

Oklahoma Law Review

Volume 73 | Number 1

Symposium: Drawing the Line: Modern Sexual Conflicts and the Law

2020

Discriminatory Dualism in Process: Title IX, Reverse Title IX, and Campus Sexual Assault

Sarah L. Swan

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

Sarah L. Swan, *Discriminatory Dualism in Process: Title IX, Reverse Title IX, and Campus Sexual Assault*, 73 OKLA. L. REV. 69 (2020), <https://digitalcommons.law.ou.edu/olr/vol73/iss1/5>

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.

DISCRIMINATORY DUALISM IN PROCESS: TITLE IX, REVERSE TITLE IX, AND CAMPUS SEXUAL ASSAULT

SARAH L. SWAN*

For decades, the Title IX process of adjudicating campus sexual assault has been heavily weighted against complainants (usually women). However, at some universities, this weighting has recently flipped, such that Title IX procedures at these institutions now seem weighted not against complainants, but against respondents (usually men). This “reverse Title IX” trend is typically described as an overcorrection, stemming from schools’ over-zealous attempts to comply with the Title IX requirements the Obama Administration imposed in 2011.

This Article offers a different account of Title IX’s procedural flip. It argues that Title IX’s procedural switch can be productively viewed through the lens of discriminatory dualism. Discriminatory dualism posits that structural discrimination frequently divides into two seemingly opposite—but in fact mutually supportive—strands. Applying the theory of discriminatory dualism here suggests that reverse Title IX is not a mere overcorrection. Instead, it is part of a patterned, recurring, and common way that structural discrimination upholds existing social hierarchies.

Echoing other examples of discriminatory dualism, Title IX’s twinned procedural problems work to sustain existing gendered and social hierarchies in three main ways. First, procedural unfairness to respondents functions to “confirm” the stereotype underlying the initial procedural problems with Title IX: that women are not credible witnesses and are committed, at all costs, to punishing men for perceived slights and imagined harms. Second, the emergence of the reverse Title IX strand undermines the complaints about unfairness to complainants, suggesting that they are misplaced and that the “real” problem is discrimination against men. The confusion created by these dueling complaints undermines the legitimacy of the Title IX system of adjudication as a whole, rendering all findings potentially suspect. Finally, Title IX’s discriminatory dualism creates a double bind, under which universities are portrayed as

* Assistant Professor, Florida State University College of Law. This Article was written as part of the *Oklahoma Law Review* 2019 Symposium: Modern Sexual Conflicts and the Law. Many thanks to Anita Bernstein, Claudia Haupt, and the participants of the Symposium for their helpful comments and conversations.

only capable of adjudicating in ways that are either unfair to complainants or unfair to respondents. These consequences all work to the detriment of those seeking gender equality.

Table of Contents

I. Introduction	70
II. Title IX’s Procedural Problems	77
III. Reverse Title IX and Discriminatory Dualism	81
IV. Discriminatory Dualism and the Future of Title IX	93
V. Conclusion	99

I. Introduction

Title IX of the Education Amendments of 1972 declares that “[n]o 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.”¹ With a wide ambit that includes harassment and sexual violence within its parameters,² Title IX is an important legal vehicle for preventing and remedying gender discrimination at educational institutions.³ Title IX does not require universities to “guarantee[] the good behavior” of students or completely “purge . . . campus of sexual misconduct,” but it does require schools to avoid “deliberate indifference” to these problems.⁴ If school officials know about sexual misconduct problems but decline to address them, the school can be liable for damages

1. 20 U.S.C. § 1681(a) (2018).

2. *Title IX, KNOW YOUR IX*, <https://www.knowyourix.org/college-resources/title-ix/> (last visited Aug. 10, 2020). The scope of Title IX was explicit in the 2011 Dear Colleague Letter, which declared that “[s]exual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX.” See Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter Dear Colleague Letter].

3. Other legal vehicles include negligence claims and breach-of-contract claims. See *Liability for Student Sexual Assault: UE’s Claims Say OCR and Title IX Are Not the Biggest Dangers*, UNITED EDUCATORS (Mar. 20, 2017), <https://webcache.googleusercontent.com/search?q=cache:RND2NEXRPDgJ:https://www.ue.org/risk-management/insights-blog/%3Fid%3D3287+%&cd=1&hl=en&ct=clnk&gl=us&client=safari>.

4. *Karasek v. Regents of the Univ. of Cal.*, 956 F.3d 1093, 1114 (9th Cir. 2020). See also *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999). This Article uses the term “university” broadly to include colleges and other post-secondary institutions as well.

in court.⁵ Schools can also be liable for not taking “adequate preventative steps” to discourage sexual misconduct.⁶ And the Office of Civil Rights can bring administrative enforcement proceedings if institutions do not comply with Title IX.⁷

However, despite these mandates and enforcement mechanisms, prior to 2011 Title IX provided virtually no meaningful redress for those who experienced campus sexual violence.⁸ “Institutional barriers . . . encourage[d] students to stay quiet,” and the students who did come forward to file complaints found themselves embroiled in antiquated and hostile procedural rules that “[le]ft them feeling victimized again.”⁹ These

5. *The High Cost of Student Victim Sexual Assault Claims and What Institutions Can Do*, CANOPY PROGRAMS (Mar. 2017), <https://static1.squarespace.com/static/53e530a1e4b021a99e4dc012/t/590501f74402431ac4900596/1493500411575/FN+-RE-+2017.04-High+Cost+of+Student-Victim+SA+Claims.pdf> [hereinafter CANOPY PROGRAMS].

6. See Susan D. Friedfel & Jason A. Ross, *University's Handling of Students' Pre-Assault Complaints of Sexual Misconduct Open to Title IX Claim*, JACKSONLEWIS (Feb. 14, 2020), <https://www.jacksonlewis.com/publication/university-s-handling-students-pre-assault-complaints-sexual-misconduct-open-title-ix-claim> (citing *Karasek*, 956 F.3d at 1111–12) (describing the “‘pre-assault’ theory of deliberate indifference toward sexual assault on campus,” where “the plaintiff alleges the university . . . did not take adequate preemptive steps to avoid or lessen the likelihood of sexual misconduct on campus”). Under this theory of liability, “the university is liable if a plaintiff is victimized by the sexual misconduct the university should have helped avoid” or misconduct that comes about through the school “maintaining ‘a policy of deliberate indifference that heighten[s] the risk of sexual harassment on campus’ prior to a sexual assault.” *Id.* See generally Erin E. 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 (2020).

7. CANOPY PROGRAMS, *supra* note 5. Importantly, “[w]hat funding recipients’ responsibilities are under Title IX and what they can be held liable for in a private cause of action for damages . . . are not one and the same.” *Doe v. Bibb Cty. Sch. Dist.*, 126 F. Supp. 3d 1366, 1377 (M.D. Ga. 2015), *aff’d*, 688 F. App’x 791 (11th Cir. 2017).

8. Most victims of sexual assault are women. MICHELE C. BLACK ET AL., NAT’L CTR. FOR INJURY PREVENTION & CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 18 (Nov. 2011), https://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf; see also Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010), <http://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault> [https://perma.cc/D379-ALQY]. Yet men can also be victims of sexual assault. For some of the challenges men face when attempting to receive redress for sexual assault they experience on campus and off, see Alexandra Flanagan & Phoenix Tso, *Inside the Student Activist Movement: Tufts and Sexual Violence*, JEZEBEL (Feb. 19, 2014, 5:00 PM), <https://jezebel.com/inside-the-student-activist-movement-tufts-university-1526094401>, and see generally Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259 (2011).

9. JD Solomon, *Sexual Assaults on Campus: Journalist Talks About “Frustrating*

rules included requirements that complainants produce independent corroborating evidence, meet a higher burden of proof than is typical in a civil case, and file their complaints within a short window.¹⁰ Given that sexual assault typically occurs in private with no additional direct witnesses other than the parties, and that it often takes a complainant some time to decide whether they want to pursue justice within formal remedial channels, these hurdles proved insurmountable to many.¹¹ Under these procedural standards, “campus adjudications were often confusing, ‘shrouded in secrecy,’ and marked by lengthy delays,”¹² and sexual assault victims only rarely received redress.¹³

Following intense media scrutiny of these widespread institutional failures to address campus sexual assault,¹⁴ the Obama administration in 2011 sought to change this status quo. It issued a non-binding Dear Colleague Letter instructing universities to implement more equitable

Search for Justice,” UNIV. BUS. (Mar. 19, 2014), <https://universitybusiness.com/sexual-assaults-on-campus-journalist-talks-about-frustrating-search-for-justice/>; see also Rachael A. Goldman, Note, *When Is Due Process Due? The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students*, 47 PEPPERDINE L. REV. 185, 207 (2020).

10. See, e.g., Wendy J. Murphy, *Using Title IX’s “Prompt and Equitable” Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to Redress Sexual Assault on Campus*, 40 NEW ENG. L. REV. 1007, 1007 (2006); Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1943 (2016).

11. See Murphy, *supra* note 10, at 1018.

12. Goldman, *supra* note 9, at 187.

13. After examining a survey of 152 college-crisis-services programs, ten years of Title IX complaints, and interviews with fifty experts, one study concluded that students found responsible for perpetrating campus sexual assaults often faced “little or no consequence[s].” Lombardi, *supra* note 8; see also Goldman, *supra* note 9, at 187–88 (citing Nick Anderson, *Colleges Often Reluctant to Expel for Sexual Violence*, WASH. POST (Dec. 15, 2014), https://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for-sexual-violence--with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e_story.html) (“Nationally, in 2014, only 12% of the 478 sanctions for sexual assault on university campuses were expulsions, meaning that the other 88% of guilty perpetrators received some other form of discipline (or none at all).”). Some schools, like the University of Virginia, used the sanction so rarely that between 2004 and 2014, the University of Virginia did not expel a single student for sexual misconduct, even though “many students” had been expelled for other misconduct. *Id.*

14. Hannah Walsh, Note, *Further Harm and Harassment: The Cost of Excess Process to Victims of Sexual Violence on College Campuses*, 95 NOTRE DAME L. REV. 1785, 1785 (2020).

procedures.¹⁵ In its wake, however, some universities blew past the letter's recommendations and adopted their own procedural rules that drastically departed from those suggested.¹⁶ Though the letter encouraged universities to implement fair procedures that would grant both parties similar access to information and similar opportunities to be heard, some schools instead implemented procedures that actively disadvantaged respondents.¹⁷ For instance, some schools set up procedures that denied respondents access to basic materials, including the investigative report, the "notice of the factual basis of the charges, the evidence gathered," and "the identities of witnesses."¹⁸ At these schools, Title IX adjudication essentially flipped from being weighted against complainants to being weighted against respondents. Evidentiary hurdles that complainants could not possibly overcome and cursory hearings designed to favor respondents transformed into presumptions and procedures that were instead unfair to respondents.

This flip is most commonly described as an "over-correction" brought about by schools simply trying too hard to meet the Obama-era guidelines.¹⁹ This Article offers a different account for this phenomenon. It

15. See Dear Colleague Letter, *supra* note 2.

16. See Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 82–84 (2017) (observing that complaints regarding colleges' response to sexual violence have increased since the Dear Colleague Letter and that there have been findings of colleges utilizing procedures that do not adhere to the letter's recommendations).

17. Elizabeth Bartholet et al., *Fairness for All Students Under Title IX 2* (Aug. 21, 2017), <https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf?sequence=1&isAllowed=y>.

18. *Id.*

19. *Id.*; see Buzuvis, *supra* note 16, at 72 n.5 (first citing Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 11:53 PM), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html; then Gregg Bernstein, *An Overcorrection on Campus Sexual Assault Policies?*, BALTIMORE SUN (Feb. 15, 2015, 6:00 AM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-bernstein-0215-20150214-story.html>; and then Max Kutner, *The Other Side of the Sexual Assault Crisis*, NEWSWEEK (Dec. 18, 2015, 5:33 AM), <https://www.newsweek.com/2015/12/18/other-side-sexual-assault-crisis-403285.html>); see also Walsh, *supra* note 14, at 1787 nn. 11–15 (citing Open Letter from Members of the Penn Law Sch. Faculty on Sexual Assault Complaints: Protecting Complainants and Accused Students at Universities (Feb. 18, 2015), http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf); Editorial Board, *New Guidance on Campus Sexual Assault Is Ill-Timed and Partially Ill-Advised. But It's Not a Return to the Bad Old Days*, WASH. POST (May 19, 2020, 4:37 PM), <https://www.washingtonpost.com/opinions/new-guidance-on-campus-sexual-assault-is-ill-timed-and->

argues that a situation in which some schools use procedures that are stacked against complainants, while others use procedures that are stacked against respondents,²⁰ is productively viewed as an example of discriminatory dualism.²¹ Discriminatory dualism describes structural discrimination's frequent tendency to divide into two seemingly opposite, but in fact mutually supportive strands.²² Often in response to agitations for social change or to legal interventions which make one path less tenable, structural discrimination sometimes separates into two strands that seem distinct and contradictory, but are actually two sides of the same coin.²³ These two opposing discriminatory practices work together to reinforce social hierarchies and maintain systems of subordination.²⁴

Discriminatory dualism appears in multiple contexts, with notable examples occurring in employment, housing, and policing.²⁵ For instance, discriminatory dualism appears in employment when female employees receive both unwanted sexual attention in the form of sexual harassment and shunning in the form of coworkers refusing to engage with them entirely.²⁶ A similar paradox exists in housing, where minority homeownership is suppressed by both redlining—the denial of credit based on race—and reverse redlining—the over-offering of credit on exploitative terms.²⁷ And in policing, communities of color paradoxically experience both overpolicing in the form of the aggressive overenforcement of minor, petty crime, and underpolicing in the form of the persistent failure to address violent crime.²⁸ Along with these examples, the phenomenon of

partially-ill-advised-but-its-not-a-return-to-the-bad-old-days/2020/05/19/f6aaedc2-9941-11ea-ac72-3841fcc9b35f_story.html.

20. See Buzuvis, *supra* note 16, at 83–84 (observing practices schools have adopted that disadvantage complainants); Bartholet et al., *supra* note 17, at 1 (noting that Harvard University's procedures are “overwhelmingly stacked against the accused”).

21. The discussion of discriminatory dualism in notes 22–30, 79–84, 100–06 and accompanying text largely initially appeared in Sarah L. Swan, *Discriminatory Dualism*, 54 GA. L. REV. 869 (2020).

22. *Id.* at 872.

23. *Id.* at 873. Discriminatory dualism is a form of adaptive discrimination. See Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235 (2016).

24. Swan, *supra* note 21, at 872.

25. *Id.* at 873.

26. *Id.* at 872–73.

27. *Id.* at 872.

28. *Id.*

discriminatory dualism also occurs in many other countries and in many additional contexts.²⁹

The lens of discriminatory dualism helps to show that flips into a reverse discriminatory form are not mere overcorrections: they are a patterned, recurring, and common way that structural discrimination upholds existing hierarchies and perpetuates preservation-through-transformation.³⁰ By developing into two contradictory forms, structural discrimination ironically manages to maintain and perpetuate the same inequalities that fueled its original form. With the emergence of “reverse Title IX”—Title IX adjudications that procedurally disadvantage defendants³¹—Title IX adjudication has also become an example of discriminatory dualism.

Title IX’s discriminatory dualism, though, has an interesting twist: at first it appears as though the group receiving the discrimination has changed.³² Title IX processes once clearly disadvantaged women, and now at some schools it seems like they may disadvantage *men*.³³ But applying the theory of discriminatory dualism suggests that this second strand of procedural unfairness ultimately functions to reinforce existing gender and social hierarchies. On a collective and structural level, women remain the group that will lose most by Title IX’s discriminatory dualism.³⁴

29. *Id.* at 872 n.1 (noting that under and overpolicing has been observed in Canada and Australia, a phenomenon similar to redlining and reverse redlining has been observed in South Africa and New Zealand, and sexual harassment and shunning has been observed in Canada, Australia, the United Kingdom, and South Korea). Discriminatory dualism also occurs in higher education, through the pattern of denial and then exploitative over-access for racial minorities. *Id.* at 922. Additionally, discriminatory dualism has occurred in the context of marriage, through coverture and reverse coverture, denying and then over-prescribing marriage as a cure for poverty, and denying and then obligating marriage in the LGBTQ context. See Sarah L. Swan, *Marrying Discriminatory Dualism* (May 2020) (unpublished manuscript) (on file with author).

30. Preservation-through-transformation is a term coined by Professor Reva Siegel, describing the phenomena that occur when “[e]fforts to reform a status regime bring about changes in its rule structure and justificatory rhetoric,” yet the discrimination itself persists. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

31. See Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER ED. (October 3, 2019) (crediting attorney Laura Dunn for introducing the term “reverse Title IX”), <https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings>.

32. See *infra* Part III.

33. See *infra* Part III.

34. See *infra* Part III.

This is so for three reasons. Discriminatory dualism often involves seemingly confirmed stereotypes, confusion surrounding identifying the “real” problem, and the creation of a double-bind in which the only available options are discriminatory.³⁵ Those three characteristics are present in this iteration of discriminatory dualism as well. First, procedural unfairness to respondents functions to “confirm” the stereotype underlying the initial procedural problems with Title IX: that women are not credible witnesses and are committed, at all costs, to punishing men for perceived slights and imagined harms. Second, reverse Title IX undermines the arguments about the continuing problem of unfairness to complainants at many institutions and sows confusion over the nature of Title IX’s “real” or most significant problem. This confusion destabilizes and discredits the entire system of Title IX adjudication, rendering all findings of responsibility in the Title IX context seemingly suspect. Finally, Title IX’s discriminatory dualism establishes a double bind, under which universities are portrayed as only able to adjudicate in ways that are either procedurally unfair to complainants or procedurally unfair to respondents, but simply incapable of adjudicating fairly.

Systems of discriminatory dualism often last decades (sometimes even centuries),³⁶ and their histories show multiple oscillations between each strand rising and falling in dominance.³⁷ At this particular point in time, Title IX is also in a moment of profound oscillation. In response to the procedurally untenable situation created by the discriminatory dualism of unfairness to complainants and unfairness to respondents, the Trump administration released new Title IX regulations in the spring of 2020.³⁸ Among other controversial changes, these regulations allow for a higher evidentiary standard and re-import presumptions rooted in criminal law.³⁹ As these changes take effect, those seeking Title IX’s promise of gender equality fear the reforms will push Title IX back to once again weighting adjudications almost universally against complainants.⁴⁰ The historic

35. Swan, *supra* note 21, at 901.

36. *See id.* at 925.

37. *See id.* at 873.

38. These new regulations became binding on August 14, 2020. *See* Melinda Kaufmann, *The Deadline for Updating Your Title IX Policies is Fast Approaching: Will Your District Be Ready?*, JDSUPRA (July 29, 2020), <https://www.jdsupra.com/legalnews/the-deadline-for-updating-your-title-ix-77543/>.

39. *See infra* notes 155–63.

40. *See infra* notes 164–66.

patterns of discriminatory dualism suggests that these fears are well-founded,⁴¹ and that until broader social changes are achieved, the goal of gender equality through Title IX may remain elusive.

II. Title IX's Procedural Problems

Title IX adjudication for sexual misconduct currently operates in two main modes: procedurally unfair to complainants or procedurally unfair to respondents.⁴² Although the latter mode has recently received significant media attention, thus perhaps giving the impression that it is the primary problem in this area,⁴³ in actuality sexual misconduct *victims* bring more lawsuits against schools and are more successful in those lawsuits than respondents.⁴⁴ As the nation's largest post-secondary insurer noted in 2018, claims related to campus sexual assault constituted the bulk of their payouts to universities, and the majority of that bulk "went primarily to *victims* of sexual assault."⁴⁵ Statistics compiled from 2011–2015 reflect a similar reality: of nearly \$31 million in claims related to campus sexual assault, approximately \$22 million went to victims, with the remaining \$9 million going to those accused of sexual misconduct.⁴⁶

High payouts to complainants continue to occur because many schools continue to participate in the historical tradition of mishandling campus sexual assault allegations and skewing Title IX procedures against

41. Swan, *supra* note 21, at 873.

42. There are also, presumably, some schools which do fairly balance procedures. Nevertheless, the volume of litigation on both sides and the fervor over the new rules suggest that erring on either side is much more common.

43. Sarah L. Swan, *Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate*, 64 KAN. L. REV. 963, 978–79 (2016) ("Although perpetrator suits tend to attract more media attention, *victims* actually bring lawsuits more frequently, and those suits end up being more expensive than perpetrator suits.").

44. See Anderson, *supra* note 31; EDURISK, CONFRONTING CAMPUS SEXUAL ASSAULT: AN EXAMINATION OF HIGHER EDUCATION CLAIMS 14 (2015) http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf ("Victims brought the most litigation against educational institutions and accounted for 68 percent of the litigated complaints in this study."). Many of these cases allege institutional negligence. Swan, *supra* note 43, at 979.

45. Anderson, *supra* note 31 (emphasis added).

46. *Liability for Student Sexual Assault: UE's Claims Say OCR and Title IX Are Not the Biggest Dangers*, UNITED EDUCATORS: RISK MGMT. INSIGHTS BLOG (Mar. 17, 2017), <https://perma.cc/W6MA-AC4Y>.

complainants.⁴⁷ Notably, schools have often used procedural hurdles that “harken back to pre-reform rape law,”⁴⁸ including requirements that complaints be “timely” filed, skeptically viewed, and corroborated by additional evidence beyond that of the complaining party.⁴⁹

Statements from Harvard College in the early 2000s typify this approach. When considering whether to implement new procedures to govern sexual misconduct adjudication, the Dean of the college conveyed that Harvard lacked the tools to effectively adjudicate “‘he-said-she-said’ rape complaints,”⁵⁰ and enacted the following procedures:

Complaints must ordinarily be brought to the College in a timely manner. The Board typically cannot resolve peer dispute cases in which there is little evidence except the conflicting statements of the principals. Therefore, the Board ordinarily will not consider a case unless the allegations presented by the complaining party are supported by independent corroborating evidence. Based on the information provided at the time of the complaint, the Board will decide whether or not there appears to be sufficient corroborating evidence to pursue the complaint.⁵¹

Examples of colleges mishandling sexual assault allegations are legion. Schools have repeatedly asked complainants questions that “ranged from insensitive to insulting,” justified the assaults as the victim’s fault, failed to or delayed investigating, offered inadequate hearings with questionable findings, failed to provide notice of investigative updates and findings, and generally tried to discourage rape reporting.⁵² One student recounted that after she informed her school she had been raped by another student, she was assigned “an undergraduate student ‘lawyer’” and attended a hearing where she was made to “plead[] her case for seven hours before the Honor Court, seated at a table with the [student] she sa[id] raped her.”⁵³ Ultimately, the panel concluded that “because she and her rapist hadn’t

47. See Buzuvis, *supra* note 6, at 44 (noting plaintiffs’ difficulties in holding universities accountable under the deliberate-indifference standard and “lackluster responses by university officials” to the sexual-assault problem on university campuses).

48. Anderson, *supra* note 10, at 1983.

49. *Id.* at 1983–84.

50. *Id.* at 1983.

51. *Id.*

52. Kayla Webley Adler, *Big Shame on Campus*, MARIE CLAIRE (Oct. 16, 2013), <https://www.marieclaire.com/politics/news/a8217/big-shame-on-campus/>.

53. *Id.*

known each other, he couldn't have been aware of how drunk she was or that she didn't like being 'pushed around.'"⁵⁴

One high-profile example of unfairness to Title IX complainants involved well-known star college football player Jameis Winston.⁵⁵ After Erica Kinsman informed Florida State University that Jameis Winston raped her, the university waited twenty-four months to conduct a Title IX hearing.⁵⁶ Despite substantial compelling evidence, including DNA and visible bruising, the university made a finding of no responsibility.⁵⁷ Significant exposés in film and media revealed botched investigations in both the criminal and Title IX context, and Erica Kinsman eventually received \$950,000 from a civil settlement with Florida State, along with an agreement that the university would implement substantial reforms in its Title IX process.⁵⁸

Indeed, at some schools, the institutional response to sexual assault allegations has been so systemically egregious that other third parties have either imposed sanctions or made specific findings of institutional failings. In 2011, Baylor University's repeated institutional response to sexual assault allegations concerning athletes was so troubling that famed college athletic association "the Big 12 took the rare, if largely symbolic, step of withholding a quarter of Baylor's payouts—about \$6 million."⁵⁹ Similarly, in 2014, the California State Auditor's investigation of UC Berkeley

found that from 2009 to 2013, Berkeley did not notify or give regular updates to parties involved in investigations of sexual misconduct, did not complete investigations in a timely manner, and did not 'sufficiently educate' staff and students on sexual misconduct prevention, which led cases to be mishandled and compromised student safety.⁶⁰

54. *Id.*

55. See Tamara Rice Lave, *Ready, Fire, Aim: How Universities Are Failing the Constitution in Sexual Assault Cases*, 48 ARIZ. ST. L.J. 637, 638–40 (2016).

56. *Id.* at 639.

57. *Id.* at 640.

58. *Id.*

59. Marc Tracy & Dan Barry, *The Rise, Then Shame, of Baylor Nation*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/sports/baylor-football-sexual-assault.html>.

60. Greta Anderson, *Increased Legal Scrutiny for Sexual Assault Policies*, INSIDE HIGHER ED. (Jan. 31, 2020), <https://www.insidehighered.com/news/2020/01/31/appeals-court-holds-university-liable-ineffective-title-ix-policies>.

But while many schools continue to procedurally disadvantage complainants, other schools have recently moved in the opposite direction, using procedures that disadvantage respondents.⁶¹ As one metric, between 2011 and early 2019, more than 400 respondents sued universities for problems related to campus sexual misconduct adjudications.⁶² Nearly half of those suits resulted in either settlements or judicial decisions favoring the accused student.⁶³

In *John Doe v. Purdue University*, for example, Doe alleged that after a dating relationship ended, he received a letter indicating that his ex-girlfriend, Jane, had made a complaint of sexual assault against him.⁶⁴ He was suspended from his Navy program and banned from any school areas where Jane might be.⁶⁵ The school withheld the investigation report from John, letting him “review a redacted version” mere “[m]oments before” his hearing.⁶⁶ Jane did not appear or submit a written statement; instead, an advocate wrote a letter “summarizing [her] accusations.”⁶⁷ At the hearing, “[t]wo members of the panel candidly stated that they had *not read* the investigative report,”⁶⁸ but John was nevertheless found responsible. Even though Jane was not present at the hearing and never submitted her own written statement, it was determined that Jane was “a credible witness,” and John was not.⁶⁹

San Diego State University student Francisco Sousa faced similar procedural deficiencies when he was accused of campus sexual assault in 2014.⁷⁰ The university suspended him on an interim basis and sent an email

61. See Bartholet et al., *supra* note 17, at 1–2.

62. See Jeannie Suk Gersen, *Assessing Betsy DeVos’s Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), <https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault>.

63. *Id.*

64. *Doe v. Purdue Univ.*, 928 F.3d 652, 656–57 (7th Cir. 2019).

65. *Id.* at 657. This case was a review of “the magistrate judge’s decision to dismiss John’s complaint for failing to state a claim.” *Id.* at 656. Accordingly, the court “recount[ed] the facts as he describes them, drawing every inference in his favor.” *Id.* So, “the story that follows is one-sided because the posture of the case requires it to be.” *Id.* Nevertheless, the procedural problems alleged are not unusual. See, e.g., Lave, *supra* note 55, at 646–47.

66. *Doe*, 928 F.3d at 657.

67. *Id.* at 657–58.

68. *Id.* at 658 (emphasis added).

69. *Id.* at 657–58.

70. See Lave, *supra* note 55, at 640–41. This Article borrows from Lave in juxtaposing the Winston case with the Sousa case.

to the entire student body informing them of the allegations against Sousa.⁷¹ When he “requested to review the basis of the allegations against him,” the university assured him that he would eventually receive that information but suggested that he make a statement immediately since the investigator “could reach a decision in the Title IX portion of the investigation at any point.”⁷² The university also informed Sousa that the investigator would decide issues of fact and law and potentially issue a sanction, but that Sousa was “not entitled to a hearing” on the sexual misconduct allegation, that he would have no opportunity to question the complainant, that he could not have counsel directly participate in the process, and that no appeal would be possible.⁷³

These cases exemplify the most common problems that render Title IX procedurally unfair to respondents, including no discovery rights, limited access to the allegations and to the investigation report, limited or no opportunity to present a defense, and a refusal to allow for legal representation.⁷⁴ These flaws fall below generally accepted standards of due process and, where they occur, usually render adjudications procedurally unfair to defendants.⁷⁵

III. Discriminatory Dualism

Many scholars and commentators frame the emergence of the reverse Title IX strand as an “over-correction,” triggered by schools’ eagerness to comply with the Obama-era Title IX regime and retain their federal funding.⁷⁶ But this does not fully capture the nature and consequences of the procedural switch. Just as the flips in the other examples of discriminatory dualism were not “overcorrections,” reverse Title IX is also not simply an overcorrection in response to concerns about the first discriminatory form. Rather, switching into a reverse mode of

71. *Id.* at 640; see Gary Warth, *SDSU Lifts Suspension Against Student*, SAN DIEGO UNION-TRIB. (Sept. 1, 2015, 5:31 PM), <https://www.sandiegouniontribune.com/news/education/sdut-sdsu-lifts-suspension-of-student-accused-of-2015sep01-story.html>.

72. Lave, *supra* note 55, at 641.

73. *Id.*

74. See *id.*; see also Barholet et al., *supra* note 17, at 2–3.

75. See Lave, *supra* note 55, at 645.

76. Kathryn Joyce, *The Takedown of Title IX*, N.Y. TIMES MAG. (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/magazine/the-takedown-of-title-ix.html>; see also Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 825 (2017).

discriminatory action is a common, reoccurring, and powerful means of maintaining social hierarchies and existing status quos.⁷⁷

The example of workplace sexual harassment and shunning provides the closest parallel to Title IX's current state. In the sexual harassment and shunning example of discriminatory dualism, sexual harassment, defined as unwanted sexual attention, couples with shunning, defined as no attention at all.⁷⁸ After the #MeToo movement exposed the problem and prevalence of sexual harassment in the workplace, some male workers responded by shunning and simply refusing to work closely or at all with their female colleagues.⁷⁹ Academic studies, surveys, and anecdotal data reported that over one-quarter of men confirmed that in the post-#MeToo era they would "avoid one-on-one meetings with female co-workers," twenty-one percent would "be reluctant to hire women for a job that would require close interaction," and nineteen percent would "be reluctant to hire an attractive woman."⁸⁰

Like Title IX's procedural flip, shunning in the workplace was also largely framed as an "overcorrection."⁸¹ Multiple popular media articles explained the movement as male workers trying so hard to comply with not sexually harassing someone that they separated themselves entirely from

77. Swan, *supra* note 21, at 874–75.

78. *Id.* at 886.

79. *Id.* at 886–87.

80. See Arwa Mahdawi, *Men Now Avoid Women at Work—Another Sign We Are Being Punished for #MeToo*, GUARDIAN (Aug. 29, 2019, 1:00 AM EDT), <https://www.theguardian.com/lifeandstyle/2019/aug/29/men-women-workplace-study-harassment-harvard-metoo>.

81. See, e.g., *#MeToo Backlash Has Employers Telling Staff Not to Overcorrect*, BLOOMBERG L. (Jan. 19, 2018, 11:39 AM), <https://news.bloomberglaw.com/business-and-practice/metoo-backlash-has-employers-telling-staff-not-to-overcorrect>; *Sexual Harassment in Law Firms – a Law Office Management Program*, NJ INST. CONTINUING LEGAL EDUC. (June 26, 2018), <https://tcms.njsba.com/personifyebusiness/njicle/CLEPrograms/NJICLEEventsCalendar/MeetingDetails.aspx?productId=15143049> (denoting "overcorrecting" as a "Tricky Topic"); Laura Johnston, *Can you Compliment a Woman's Outfit at Work? In Wake of #MeToo Movement, There Are No Office Guidelines*, CLEVELAND.COM (Sept. 19, 2019), <https://www.cleveland.com/news/erry-2018/09/06bef3b8632945/can-you-compliment-a-womans-ou.html>; Lili Loofbourow, *8 Big Questions We Need to Ask Ourselves in the Wake of America's Sexual Assault Reckoning*, WEEK (Nov. 27, 2017), <https://theweek.com/articles/739104/8-big-questions-need-ask-ourselves-wake-americas-sexual-assault-reckoning>; Eleanor Holmes Norton, *A Commission to Combat Sexual Harassment in the Workplace Needs to be Created*, HILL (Jan. 31, 2018), <https://norton.house.gov/media-center/press-releases/op-ed-a-commission-to-combat-sexual-harassment-in-the-workplace-needs-to>.

their female colleagues.⁸² Out of a purported fear that any behaviors might be misconstrued as harassment, male workers began to refuse to mentor, work closely with, or even hire women workers.⁸³

A similar dynamic is seen in Title IX. In both contexts, agitations for appropriate policies regarding systemic sexual discrimination are met with an opposite but still discriminatory behavior. And in both cases, the switch is attributed to a purported fear of negative consequences created by the agitators themselves. In the sexual harassment/shunning context, the purported fear is that innocent behavior will be misconstrued. In the Title IX context, the purported fear is that institutional federal funding will be lost.⁸⁴ Like the male workers who protest they are scared of being falsely accused, schools have been portrayed as frightened of the possibility of having their federal funding pulled. One open letter, for example, refers to “terrified” administrators, who, in the wake of the Dear Colleague letter, “not only complied; they over-complied.”⁸⁵

In both contexts, those seeking social justice are blamed for the current predicament. Just as those practicing shunning blamed #MeToo advocates for driving them to engage in a reverse form of discrimination, some commentators and institutions blame the Office of Civil Rights (“OCR”) and gender justice advocates for causing the reverse Title IX problem.⁸⁶ In this framing, the threat of losing federal funding was just too much for schools to bear, and they therefore *tried too hard* to comply.⁸⁷ However, it is important to note as an initial matter that no school has ever actually lost

82. See, e.g., Johnston, *supra* note 81.

83. *Id.*

84. Bartholet et al., *supra* note 17, at 1–2.

85. *Id.* at 2.

86. See, e.g., *id.* at 1 (“While the Administration’s goals were to provide better protections for women, and address the neglect that prevailed before this shift, the new policies and procedures have created problems of their own, many of them attributable to directives coming from the Department of Education’s Office for Civil Rights”); see also Lave, *supra* note 55, at 655 (quoting a university administrator as saying, “Whether truly innocent, the reality is that OCR wants you to take action against [respondents].”). For court decisions suggesting that the Dear Colleague letter helped cause reverse Title IX, see *Doe v. Purdue University*, 928 F.3d 652, 669 (7th Cir. 2019), and *Doe v. Miami University*, 882 F.3d 579, 594 (6th Cir. 2018).

87. Bartholet et al., *supra* note 17, at 1–2. The other implication of the overcorrection framing is the suggestion that the “process will eventually right itself” presumably through some kind of Hegelian dialectic process, and that the error is just part of a natural process moving toward the right balance. Johnston, *supra* note 81. The history of discriminatory dualism suggests that this is not the likely outcome. See Swan, *supra* note 21, at 925.

federal funding as a result of this kind of Title IX complaint.⁸⁸ Even schools that behaved so egregiously that other third parties sanctioned them or pulled their own funding never lost federal funding.⁸⁹

Further, neither Title IX nor the Obama-era guidelines demanded procedures unfair to respondents.⁹⁰ In fact, of the top ten procedural safeguards that the Foundation for Individual Rights in Education presents as “fundamental elements of due process,” eight are actually “required by Title IX, the Clery Act or the guidance letter.”⁹¹

Indeed, as these due process requirements suggest, in many cases the schools that engage in procedurally unfair practices for respondents are actively violating OCR recommendations. As “one longtime campus-safety expert who consults with colleges and universities about sexual misconduct” bluntly explained, schools that have been “taking shortcuts to justice” are “violating policy or breaking the law.”⁹² The OCR has specifically denounced these kinds of process errors. For example, in 2016, the OCR found that Wesley College had violated Title IX through procedural unfairness to respondents.⁹³ Specifically, a student “accused of livestreaming a fellow student having sex, without her consent . . . never received information from the school about the accusation or the available

88. Kelly Alison Behre, *Deconstructing the Disciplined Student Narrative and Its Impact on Campus Sexual Assault Policy*, 61 ARIZ. L. REV. 885, 914 (2019) (“Although OCR has the ability to sanction schools by removing federal aid, it has never done so as a result of a Title IX complaint.”). One OCR figure did warn a group of college administrators that despite the fact that a loss of funding had never happened, pulling federal funding was not “an empty threat.” Nancy Gertner, *Sex, Lies and Justice: Can We Reconcile the Belated Attention to Rape on Campus with Due Process*, AM. PROSPECT (Jan. 12, 2015), <https://prospect.org/justice/sex-lies-justice/>.

89. See *infra* notes 141–43 and accompanying text.

90. Bartholet et al., *supra* note 17, at 1 (internal quotation marks omitted); see also *Lawsuits Against Universities for Alleged Mishandling of Sexual Misconduct Cases*, STOP ABUSE & VIOLENT ENV'TS 1 (2016), <http://www.saveservices.org/wp-content/uploads/Sexual-Misconduct-Lawsuits-Report2.pdf> (“[M]any colleges implemented changes that went well beyond the requirements of the Dear Colleague Letter, such as relying on a single investigator to adjudicate the case and imposing interim sanctions before the investigation was completed.”); see also Gertner, *supra* note 88, at 22 (criticizing the procedures Harvard implemented and noting that “[n]othing in the OCR’s 2011 ‘Dear Colleague’ letter called for a proceeding remotely like this”).

91. Joyce, *supra* note 76 (emphasis added). One of these exceptions is the presumption of innocence, which arguably “violates Title IX’s requirement that adjudicators make no presumptions whatsoever.” *Id.*

92. *Id.*

93. Brodsky, *supra* note 76, at 822.

evidence. He was invited to attend an informal educational meeting only to discover the ‘chat’ was in fact a disciplinary hearing.”⁹⁴ The OCR held this proceeding was a violation of Title IX.⁹⁵

Heaping blame for reverse Title IX on gender justice advocates is similarly misplaced. Like the OCR, many of these groups have specifically affirmed the importance of fair procedures in the Title IX context and called for remedying “all unjust deprivations of the right to learn.”⁹⁶ For example, six organizations penned an open letter to universities urging them to adopt procedures fair to all parties.⁹⁷

Blaming social justice advocates for causing discriminatory practices to occur, meeting agitations for change by switching into an opposing form of discrimination, and framing that form as an “over-correction” are all features of Title IX’s procedural discriminatory dualism that map neatly onto the example of sexual harassment/shunning. However, there is one important area of apparent disjunction between these two examples: at first glance, it appears that the group receiving the Title IX discrimination has changed. Since procedures weighted against complainants discriminate against complainants, the logical extension is that procedures weighted against respondents discriminate against *respondents*. But discriminatory dualism thrives on cognitive dissonance. It rests on the intellectually jarring idea that two opposing practices can nevertheless both perpetuate the same discriminatory harm.⁹⁸ In the Title IX context, this idea is pushed to its extreme, as it would seem that the two practices actually discriminate against different groups.

Notably, though, the separate groups idea also occurred in the context of another example of discriminatory dualism. In the context of policing, “scholars struggling to make sense of the under and overpolicing paradox . . . tried to draw distinctions” between the groups each practice involved, suggesting that “underpolicing affects victims, while overpolicing affects perpetrators, [and] young people feel overpoliced while older folks

94. *Id.*

95. *Id.*

96. *Id.*

97. Know Your IX et al., *Letter to University Presidents on Fair Process*, KNOWYOURIX.ORG (Apr. 15, 2015), <https://www.knowyourix.org/letter-university-presidents-fair-process>. The six organizations are Know Your IX, Carry That Weight, No Red Tape, Our Harvard Can Do Better, CalArts Sexual Respect Task Force, 7,000 in Solidarity: A Campaign Against Sexual Assault, and Phoenix Survivors Alliance at the University of Chicago.

98. *See* Swan, *supra* note 21, at 872.

feel underprotected.”⁹⁹ In fact, though, these distinctions failed to fully account for the complexity of the phenomenon and its impact.

Such is the case with Title IX’s discriminatory dualism as well. Despite initial appearances, Title IX’s discriminatory dualism ultimately functions to sustain existing gendered and social hierarchies. On a structural and collective level, Title IX’s procedural discriminatory dualism, including reverse Title IX, ultimately inures to the detriment of women. This happens via three main mechanisms. First, consistent with the usual practices of discriminatory dualism, procedural unfairness to respondents functions to “confirm” the stereotype underlying the initial procedural problems with Title IX: that women are not credible witnesses and are committed, at all costs, to punishing men for perceived slights and imagined harms. Second, procedural unfairness to respondents enables Title IX opponents to suggest that unfairness to defendants is the “real” problem of Title IX adjudication, thereby overshadowing and undermining continuing problems of unfairness to complainants. The ensuing confusion over what is the “real” problem with Title IX processes discredits the entire process of adjudication, throwing suspicion onto all findings of responsibility in the Title IX context. Finally, discriminatory dualism in Title IX establishes a double bind, under which universities are portrayed as capable only of adjudicating in ways that are unfair to complainants or unfair to defendants. These consequences all work to the detriment of those seeking gender equality.

A. Stereotype Affirmation

One hallmark of discriminatory dualism is that it often appears to affirm stereotypes.¹⁰⁰ In the sexual harassment and shunning context, the

99. *Id.* at 899 n.188; see also Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1731 (2006). But, as Monica Bell writes, the situation is more complex: “Many young men, too, would ideally want the police to protect them and their communities.” Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2119 (2017) (describing a “conflicted desire for police protection”).

100. For example, in the context of redlining and reverse redlining, the defaults resulting from reverse redlining seemingly confirmed the stereotype that “African Americans in particular, and people of color in general, are high credit risks and their presence in neighborhoods leads to declining property values.” Swan, *supra* note 21, at 902–03. In actuality, “although minority borrowers were targeted for subprime loans at disproportionate rates,” simple population demographics mean that “they did not receive the majority of these loans, nor have they been more prone to foreclosure than white homeowners.” *Id.* at 903 (quoting Charles L. Nier III & Maureen R. St. Cyr, *A Racial Financial Crisis: Rethinking the Theory of Reverse Redlining to Combat Predatory Lending*

“affirmed” stereotype is that women’s complaints are unreliable, and women often complain about nothing. When women complain about both sexual harassment and shunning simultaneously, this stereotype looks true: women complain when male workers give them too much unwanted sexual attention, and then when they are given less attention, they complain about that, too. This conflict allows opponents of sexual equality to suggest all the complaints are unjustified nonsense.¹⁰¹

The stereotype at work in the Title IX context is similar: that women are not credible witnesses and are committed, at all costs, to punishing men for perceived slights, imagined harms, and regrets surrounding their own engagement in sexual encounters. Title IX procedures that are stacked against complainants—like requiring additional corroborating evidence before commencing an investigation, or imposing a higher standard of evidence—are rooted in this stereotype.

The stereotype that women are unreliable narrators of sexual harm has a long pedigree. One of its more infamous historical moments was Judge Matthew Hales’s warning in the seventeenth century that rape is a crime “easily to be made and hard to be proved, and harder to be defended.”¹⁰² In keeping with this stereotype, until rape reform measures began in the criminal law in the 1970s, many states required “extrinsic corroborating evidence” before they would allow a rape conviction to stand.¹⁰³ A 1970 law review article purportedly explained how and why women lie about rape: “Women often falsely accuse men of sexual attacks to extort money, to force marriage, to satisfy a childish desire for notoriety, or to attain personal revenge.”¹⁰⁴ The article also noted that sometimes women were simply deluded, and in such cases “these neurotic individuals can often deceive the most astute judges and jurors into believing that the imagined attack actually occurred.”¹⁰⁵

Under the Fair Housing Act, 83 TEMP. L. REV. 941, 948 (2011)). And in the context of under and overpolicing, the stereotype serving as an “underlying premise” is that “people of color commit more crime and therefore must be subjected to harsher police tactics.” Swan, *supra* note 21, at 901 (quoting ALEX S. VITALE, *THE END OF POLICING 2* (2017)). Overpolicing then purportedly “reveals” a high level of criminal activity while simultaneously masking the role of underpolicing in “perpetuating the problem of unsolved violent crime.” *Id.* at 902.

101. *Id.* at 904–05.

102. *The Corroboration Rule and Crimes Accompanying a Rape*, 118 U. PA. L. REV. 458, 458 (1970).

103. *Id.*

104. *Id.* at 460.

105. *Id.*

This stereotype continues to inform the perceived “dangers” of reverse Title IX scenarios. When Title IX’s procedures are unfairly stacked against respondents, the stereotype that women are desperate liars who will use every means possible to falsely accuse and punish men is purportedly affirmed by their seeming push to abandon any due process restraints that could challenge their onslaught of false accusations.¹⁰⁶ In essence, the lack of procedural fairness becomes yet another method women use to perpetuate their false accusations of sexual harm, reaffirming the initial position of Title IX: that stacking the procedural deck against complainants is necessary, justified, and correct.¹⁰⁷

B. Confusion over the “Real” Title IX Problem

Another common thread in examples of discriminatory dualism is that its bifurcation into two seemingly opposing strands confuses the true nature of the problem.¹⁰⁸ The inherent contradiction in a situation of two opposing problematic practices is befuddling.¹⁰⁹ Commentators have helpfully given voice to this confusion in the context of under and overpolicing, “How can a community be simultaneously over-policed *and* under-policed?”¹¹⁰ “Are there too many police or are there too few?”¹¹¹ The two strands seem as though they should cancel each other out, and that both should not be able to occur simultaneously.¹¹²

In the Title IX context, it is difficult to reconcile procedural unfairness to complainants co-existing with procedural unfairness to respondents, and those arguing for a diminished role for Title IX have thus been able to float reverse Title IX as the “real,” more dominant problem.¹¹³ With this telling,

106. See 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/>; see also Joyce, *supra* note 76.

107. Joyce, *supra* note 76; see also Swan, *supra* note 21, at 905 (citing Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399 (2019)).

108. Swan, *supra* note 21, at 899.

109. *Id.*

110. Natapoff, *supra* note 99, at 1718.

111. Vann R. Newkirk II, *What We Are Getting Wrong About Police Reform*, GAWKER (Nov. 9, 2015 12:50 PM), <https://gawker.com/what-we-are-getting-wrong-about-police-reform-1740865621>.

112. See Swan, *supra* note 21, at 899–900.

113. See, e.g., *Home*, SAVE OUR SONS, <https://helpsaveoursons.com/> (last visited Aug. 17, 2020) (introducing an organization “dedicated to the families whose college sons have been falsely accused of sexual misconduct”); see also Behre, *supra* note 88, at 900.

the main problem with Title IX adjudication is that it has become a way to oppress men.¹¹⁴ This position has been given extra heft by concerns over whether reverse Title IX perpetuates racial injustice and disproportionately punishes Black men and men of color.¹¹⁵ Unfortunately, obtaining specific data on race and Title IX is difficult because the OCR does not gather this information.¹¹⁶ We know that racism is part of the bedrock of the American legal system, but there is “little specific information about the scope, frequency, or impact of racism on accused and disciplined students in campus sexual misconduct adjudications.”¹¹⁷

Nevertheless, some of the information that does exist is deeply troubling.¹¹⁸ For example, one collection of data from Colgate University suggests that in 2012–2013, while Black students comprised only 4.2 percent of the student population, they comprised 50 percent of those accused of sexual misconduct and “40 percent of the students who went through the formal disciplinary process.”¹¹⁹ Sending a disproportionate number of Black men through the Title IX complaint system accords with “[t]he general social disadvantage that black men continue to carry in our culture,” which “make[s] it easier for everyone in the adjudicative process to put the blame on them,”¹²⁰ and corresponds with the tradition that white society has “long over-sexualized, over-criminalized and disproportionately punished black men.”¹²¹

At the same time, though, these conversations sometimes ignore the perspectives of Black women and women of color, and the racial impacts of procedural unfairness to complainants.¹²² As one commentator noted, two cases that have been held up as examples of potential racism against Black

114. See, e.g., Glenn Harlan Reynolds, *Higher Education Discriminates Against Men, but Title IX Complaints May Change That*, USA TODAY (Feb. 12, 2019, 6:00 AM ET) (noting that Title IX “has been turned into a club with which to beat male students”).

115. See Jacob Gersen & Jeannie Suk Gersen, *The Sex Bureaucracy*, CHRON. HIGHER EDUC. (Jan. 6, 2017), <https://www.chronicle.com/article/the-sex-bureaucracy/>.

116. Lara Bazelon, *I’m a Democrat and a Feminist. And I Support Betsy DeVos’s Title IX Reforms*, N.Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/opinion/-title-ix-devos-democrat-feminist.html>.

117. Behre, *supra* note 88, at 937.

118. Bazelon, *supra* note 116.

119. *Id.*

120. *Id.* (citing Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103 (2015)).

121. Bazelon, *supra* note 116.

122. Behre, *supra* note 88, at 938.

men are often referenced without acknowledging that they also suggest that white women and women of color receive disparate outcomes when they accuse the same person of sexual misconduct.¹²³ One student queried why commentators seem quick to agree “that Black men are disproportionately and wrongly implicated in on-campus sexual assault proceedings,” yet “ignore[] well-established research on the disproportionate rate at which *women* of color are sexually assaulted.”¹²⁴

The confusion created by dueling procedural problems allows reverse Title IX to be presented as the main problem of campus sexual assault adjudication. From there, reverse Title IX overshadows and undermines the continuing procedural problems to complainants, including Black women and women of color.¹²⁵ Further, the contestation of this positioning and the confusion created by the seemingly competing complaints of unfairness to respondents and unfairness to complainants functions to undermine all findings made within the Title IX system. Procedures that are unfair to complainants in some instances and unfair to respondents in others make it seem like the whole system is simply unworkable and produces results that cannot be trusted. Whereas due process allows a community to be confident in adjudicative outcomes, doubts about process can make all holdings seem suspect.¹²⁶ The emergence of reverse Title IX and the rhetoric surrounding it join with the paradoxical nature of Title IX’s procedural problems to cast a cloud of suspicion over all findings made under the system, no matter how valid they may be.

C. Discriminatory Dualism’s Double Bind

Another conceptual trap of discriminatory dualism is that the opposing practice is presented as an answer or solution to the first practice.¹²⁷ Reverse Title IX emerged as an apparent response to complainants’ calls for a fairer process. The binary thereby formed is a false dichotomy under which complainants appear to have “gotten what they asked for.”¹²⁸ Even though neither Title IX advocates nor the OCR requested to switch from a

123. *Id.* at 939.

124. Kamilah Willingham, *To the Harvard 19: Do Better*, MEDIUM (Mar. 14, 2016), <https://medium.com/@kamily/to-the-harvard-law-19-do-better-1353794288f2#.tgcony5uo>.

125. *See* Behre, *supra* note 88, at 939.

126. *See* Brodsky, *supra* note 76, at 830–31.

127. Swan, *supra* note 21, at 912.

128. *See* KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY 1730 (2015) (noting a similar dynamic with “You want marriage? We’ll give you marriage!”).

process that was weighted against complainants to one weighted against respondents, by positioning itself as an answer to the first procedural fairness problem, reverse Title IX creates a double bind of only two possibilities: unfairness to complainants, or unfairness to respondents.

In this binary, procedural fairness to respondents and redress for campus sexual assault are presented as mutually exclusive: you can have one, but not the other.¹²⁹ In this “zero-sum game” framing, “any increase in civil rights obtained by students to be free from sexual misconduct results in a reciprocal decrease in rights for male students.”¹³⁰ The political message of this position is that “[s]chools can either prevent and respond to gender violence or protect accused students’ rights,” but not both.¹³¹ Notions and imagery like “overcorrections” and “a pendulum swinging too far”¹³² suggest “a single axis of justice . . . on which every gain for one side is a loss of the other.”¹³³

Many scholars and commentators decry this false dichotomy, and point out that advancing procedural fairness to respondents and creating a campus safe from sexual violence are not mutually exclusive goals.¹³⁴ Rather, everyone has an interest in both goals being met, and “procedural pitfalls, like biased boards, insufficient transparency, untrained staff, and poor guidance” are harmful to both victims and accused students.¹³⁵ They elongate already “painful process[es]” as “internal appeals and subsequent litigation” delay closure and healing.¹³⁶ Advocates of Title IX are keenly aware that “[n]o one wins when processes are unfair,”¹³⁷ and that the procedural unfairness that currently plagues Title IX is profoundly “counter-productive, undermining the legitimacy of the important project of addressing sexual misconduct.”¹³⁸ The entire community is best served when Title IX is perceived as procedurally fair:

Just as fair criminal procedures encourage people to ‘buy in’ to legal systems and ‘adhere to agreements and follow rules over

129. Barholet et al., *supra* note 17, at 5.

130. Behre, *supra* note 88, at 927.

131. Brodsky, *supra* note 76, at 825.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 828–29.

136. *Id.* at 828.

137. *Id.* at 828–29.

138. Barholet et al., *supra* note 17, at 7.

time,' ethical and equitable campus disciplinary procedures will likely improve student participants' trust in hearing boards and acceptance of their decisions. Over time, fair procedures should lead to greater community faith in campus discipline, allowing colleges to take the steps necessary to build safe and just campuses.¹³⁹

Title IX's discriminatory dualism, though, sets up two untenable options as the only possibilities, and does so using a frame in which fairness to complainants and fairness to respondents seem irreconcilable. Not surprisingly, then, this apparent double bind has caused many commentators to "throw up their hands and propose . . . that schools should not decide these cases at all," and that sexual misconduct allegations should instead be handled by law enforcement.¹⁴⁰

Unfortunately, law enforcement and the criminal system of adjudication are not effective mechanisms for addressing sexual assault.¹⁴¹ As Catherine MacKinnon once summarized, "In the United States most rapes are never reported. Most reported rapes are not prosecuted. Most prosecuted rapes do not result in convictions. The vast majority of rapists are never held accountable for their actions."¹⁴² From rape kit backlogs to persistent inattention from the police, criminal law enforcement activities have shown little to no ability to fairly adjudicate sexual assault claims.¹⁴³ Thus, the net result of the recommendations to transfer all adjudications to the criminal system would be to diminish any chance of remedy or redress for rape and campus sexual misconduct.

This result would thwart the entire purpose of Title IX. Relinquishing all sexual misconduct claims to the criminal system would not assist goals of educational access. It is paramount that "[a] school . . . be able to discipline students for violating its conduct codes and protect its students from harm, whether or not the violations are also crimes."¹⁴⁴ But the double bind of Title IX's discriminatory dualism suggests that schools are simply unable to

139. Brodsky, *supra* note 76, at 831.

140. Bartholet et al., *supra* note 17, at 4.

141. See Sarah Swan, *Triangulating Rape*, 37 N.Y.U. REV. L. & SOC. CHANGE 403, 421 (2013).

142. CATHERINE MACKINNON, SEX EQUALITY 751–52 (2007).

143. For further discussion of these problems, see Swan, *supra* note 141, at 421–22.

144. Bartholet et al., *supra* note 17, at 4.

fairly adjudicate claims of sexual misconduct.¹⁴⁵ This message destabilizes and undermines the entire remedial system.

IV. Discriminatory Dualism and the Future of Title IX

Title IX's double bind functions to narrow the perceived field of options to only two choices: unfairness to complainants or unfairness to respondents. In limiting the perceived possibilities of the system, the discriminatory dualism of Title IX serves to "repress aspirations for alternative . . . arrangements."¹⁴⁶ The sphere of available answers becomes limited to a bleak future where either campus sexual assault adjudication is removed from the purview of Title IX or Title IX simply oscillates between its two procedurally unfair forms in perpetuity.

A. The New Title IX Regulations

At the time of this writing, Title IX is currently poised at the precipice of another significant oscillation. In response to the untenable situation created by Title IX's discriminatory dualism, the Trump Administration created a new set of regulations, which took effect in August 2020.¹⁴⁷ These regulations were open to a lengthy notice and comment period and attracted numerous responses on both sides of the issue.¹⁴⁸ The new procedural regime created by these regulations includes some reasonable procedural requirements. For example, schools must give the accused student written notice detailing the allegations, let students review the evidence the investigation report relies on, and allow students to respond in writing before the report is filed.¹⁴⁹ But the new regulations also include more controversial requirements.¹⁵⁰ Under the new regulations, schools must

145. *Id.* at 4–5.

146. See Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1361 (1982).

147. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30045–46, 30574 (final rule published May 19, 2020, effective Aug. 14, 2020) (codified at 34 C.F.R. 106.44(a)); see also Erica L. Green, *Lawsuits Aim to Block DeVos's New Sexual Misconduct Rules*, N.Y. TIMES (July 10, 2020, 5:03 AM EST), <https://www.nytimes.com/2020/07/09/us/politics/sexual-misconduct-betsy-devos.html>.

148. See Daniel Kees, *The New Face of Title IX Due Process*, REG. REV. (Feb. 6, 2019), <https://www.theregreview.org/2019/02/06/kees-new-face-title-ix-due-process/>.

149. *Id.*

150. For example, under the new requirements, "universities are no longer obligated to investigate most sexual assaults that occur off-campus, where an estimated 80 percent of

employ a presumption of innocence, rather than the former neutral stance, hold a “live hearing that could include cross-examination” (conducted by someone other than the accused student and possibly with the students in separate rooms), and use a clear and convincing evidentiary standard if that standard is used in any other disciplinary context.¹⁵¹

Changes like a higher evidentiary standard portend a return to weighting Title IX adjudication against complainants. Concerned public and private actors thus filed numerous lawsuits challenging the new regulations.¹⁵² The Attorneys General of almost twenty states filed suit, arguing that the rules are arbitrary and capricious,¹⁵³ and gender and social justice advocacy centers, supported by a group of law professors, also challenged the rules.¹⁵⁴ These groups argued that the new regulations reinvigorate the gender stereotype that caused the initial procedural problems with Title IX and that “[t]he department’s decision to single out sex-based harassment for uniquely burdensome and inequitable procedures is evidence of their intent to discriminate based on sex.”¹⁵⁵ Challengers also note that “[s]kepticism of women reporting sexual misconduct is so ingrained in our culture and legal history that the mere suggestion that a student could be disciplined for a campus code violation involving sexual misconduct based on 50.1% certainty—the preponderance of evidence standard—regularly invokes outrage,”¹⁵⁶ and the new regulations are supporting such skepticism.

college students live, or to complete their inquiry within 60 days. Professors and administrators no longer have to report sexual violence when they’re informed of an incident” and the definition of sexual harassment has been narrowed. Hélène Barthélemy, *How Men’s Rights Groups Helped Rewrite Regulations on Campus Rape*, NATION (Aug. 14, 2020), <https://www.thenation.com/article/politics/betsy-devos-title-ix-mens-rights/> (last visited Aug. 27, 2020).

151. Kees, *supra* note 148. The proposed regulations also prohibit gag orders, mandate that the investigative and adjudicative portions be conducted by a different person, and require that evidentiary “rape shield” laws apply to the hearings. The guidelines also require that “all remedies must be designed to ‘restore or preserve access’ to the [school]’s education program or activity.” Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30045–46, 30258, 30487, 30575 (final rule published May 19, 2020, effective Aug. 14, 2020) (codified at 34 C.F.R. 106.44(a)).

152. Green, *supra* note 147.

153. *Id.*

154. *Id.*

155. *Id.*

156. Behre, *supra* note 88, at 932.

Further, although the new regulations purport to merely allow schools to adopt a higher evidentiary standard, in reality, they are structured in such a way that a higher standard will be “effectively required, in many cases.”¹⁵⁷ For cases involving potential sexual harassment, the new regulations require schools to apply the same standard to sexual misconduct allegations against students as they do for faculty. But the collective bargaining agreements and contracts that govern faculty disciplinary hearings usually require a clear and convincing standard to be used.¹⁵⁸ In other words, “the New Rule effectively imposes a heightened standard as a requirement for student complaints without saying so.”¹⁵⁹

The significance of the applicable standard of proof for sexual misconduct complaints is hard to overstate. The consequences of a higher standard are “impossible to ignore . . . [H]istory shows that this type of complacency has led to inequality, harassment and real harm to women and vulnerable members of society.”¹⁶⁰ In fact, the new regulations are consciously designed to “reduce the number of sexual harassment allegations the schools investigate and remedy,” with the Department itself estimating that the new regulations will result in postsecondary schools conducting 33% fewer investigations, K-12 schools conducting 50% fewer investigations, and a reduction in the number of “hearings, decisions, and informal resolutions” more generally.¹⁶¹ In accordance with how deterrence operates, “overwhelming evidence” suggests that a decrease in the number of investigations will lead to an increase in harassment occurrences.¹⁶²

B. Paths Forward

Discriminatory dualism creates systems with a polarity that is difficult to break. When complainants called for fairer procedures, some schools answered with procedures that blatantly worked against respondents,

157. Brief for Law Professors as Amicus Curiae in Support of Plaintiffs’ Motion for Preliminary Injunction or 5 U.S.C. Sec. 705, Victim Rights Law Ctr. et al. v. DeVos et al., No. 1:20-CV-11104 (D. Mass. 2020) [hereinafter Law Professors’ Amicus Brief].

158. *Id.*

159. *Id.*

160. Michael Spratt, *The Presumption of Innocence Is for Courtrooms, Not Politics* (Jan. 27, 2018), <http://www.michaelspratt.com/law-blog/the-presumption-of-innocence-is-for-the-court-of-law-not-for-protecting-the-reputations-of-the-powerful> (providing an edited version of spoken remarks made at the 2019 Runnymede Society’s Law and Freedom Conference).

161. Law Professors’ Amicus Brief, *supra* note 157 (citing New Rule at 30,551, 30,565–68).

162. *Id.*

though this is not what complainants requested. Most recently, though, when respondents called for fairer procedures, they were answered with the Trump Administration's rules, which will likely work against complainants once again and actually satisfy the requests of many men's rights groups.¹⁶³ There are templates for equitable procedures that could work within the Title IX context—like those of the civil courts¹⁶⁴ or universal student conduct codes, for example.¹⁶⁵ But in the current political environment and within Title IX's current system of procedural discriminatory dualism, it is increasingly difficult to imagine that any proposed procedure will ultimately be implemented in a way that achieves the goals of Title IX.¹⁶⁶

In circumstances where agitations for change are met with systems that reify existing hierarchies, survivors of sexual violence remain understandably reluctant to pursue remedies through formal legal structures like Title IX.¹⁶⁷ When “[t]he legal logics that produce patterns of silence in response to sexual violence are [so] deeply embedded in socio-cultural structures and norms” that even formal law reforms cannot displace them, it becomes challenging to see any path forward.¹⁶⁸ Yet the double bind of discriminatory dualism may, perhaps ironically, provide an opportunity for reconceptualization.¹⁶⁹

Other discriminatory dualism examples suggest that polarities will continue to govern unless a solution is crafted that anticipates the rise of the reverse form occurring and aims beyond the problematic institutions.¹⁷⁰ Indeed, sometimes the only discernible fix for discriminatory dualism is moving away from the institutions engaged in the discriminatory

163. The new Title IX regulations were designed in “collaboration” with many men's rights groups. Those groups have “publicly demeaned the credibility of young women, ridiculed sexual assault survivors, and pushed junk science on campus rape.” See Barthélemy, *supra* note 150.

164. See Swan, *supra* note 43, at 976.

165. See generally Corey Rayburn Yung, *Is Relying on Title IX a Mistake?*, 64 KAN. L. REV. 891, 893 (2016).

166. For a discussion of the difference in the mandatory nature of the new regulations versus the discretionary nature of the Dear Colleague guidance, see Greta Anderson, *U.S. 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>.

167. Debra L. DeLaet & Elizabeth Mills, *Discursive Silence as a Global Response to Sexual Violence: From Title IX to Truth Commissions*, 32 GLOBAL SOC'Y 496, 505 (2018).

168. *Id.*

169. See Swan, *supra* note 21, at 918.

170. *Id.*

practices.¹⁷¹ For example, one way to break away from redlining and reverse redlining is to disinvest from the financial institutions that continue to discriminate in these ways, opting instead to use banks with better track records.¹⁷² But given the hierarchical structure of post-secondary education in the United States, simply refusing to affiliate with certain institutions may not be an effective response in this context.

Nevertheless, Title IX's discriminatory dualism might provide a moment to query how the mission of Title IX could be supported by other measures not wholly dependent on ex post adjudication, including more attention to preventative measures and measures that focus on the cultural norms which allow these forms of violence to flourish in the first place.¹⁷³ Then, instead of seeking justice by focusing on formally punishing perpetrators, approaches emphasizing the healing, empowerment, and agency of survivors can be explored.¹⁷⁴ It may be that "the limits of formal law as a mechanism for promoting justice for survivors of sexual violence" urge us to move away from reliance on legal vehicles that respond only after violence has occurred, and instead drive us to "pursue initiatives that seek to transform culture and to reduce the incidence of sexual violence."¹⁷⁵ These initiatives might include "[m]ajor efforts to expand socio-cultural understandings of consent and initiatives to educate young people about consent and healthy sexual relationships,"¹⁷⁶ with the goal of "reduc[ing] the incidence of sexual violence and . . . pursu[ing] justice rooted in gender equity."¹⁷⁷

Such initiatives fit well with the educational mission of colleges and universities.¹⁷⁸ Numerous states have little to no sex education for their secondary school students, meaning many students arrive on college campuses with little or no sexual sophistication or knowledge. For example, in Texas, "sixty percent of Texas public school districts teach abstinence only sex education and 25 percent have no sex education programs at

171. *Id.*

172. *Id.* at 914.

173. *See generally* Erin R. Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365 (2016).

174. DeLaet & Mills, *supra* note 167, at 509.

175. *Id.* at 509–10.

176. *Id.* at 510.

177. *Id.*

178. Also, "[t]he Dear Colleague Letter emphasized the role of educational programming in a university's duty to prevent sexual violence and the SaVE Act elaborated upon and codified the requirement." Collins, *supra* note 173, at 382.

all.”¹⁷⁹ More focus on ensuring young adults have received education on issues of intimacy, sex, and consent could reinforce norms about appropriate sexual conduct¹⁸⁰ and assist the resolve of young people to discourage others from engaging in inappropriate conduct.¹⁸¹

In addition to this type of preventative work, a wider range of redress mechanisms could be offered.¹⁸² Traditional disciplinary hearings need not be the only method of redressing sexual harm when it has occurred on campus: restorative or transformative justice frameworks may provide mechanisms of accountability that some sexual harm survivors prefer over standard adjudication using any set of procedural rules.¹⁸³ Although these kinds of mechanisms risk being coopted into tools for replicating and reifying existing social hierarchies, mindfully guarding against these influences may allow these processes to flourish and offer victims a greater role in choosing what form of repair would be most meaningful to them.¹⁸⁴ Restorative and transformative justice may offer much to all stakeholders in redressing sexual violence:

For those harmed, restoration means repairing the actual damage caused by wrongdoing and restoring their sense of control over their lives. For wrongdoers, restoration involves accepting

179. Julia Zaksek, *Expanding University Sex Education Would Fill in Gaps, Help Students*, DAILY TEXAN (Mar. 26, 2019, 6:19 PM), <https://thedailytexan.com/2019/03/26/expanding-university-sex-education-would-fill-in-gaps-help-students>.

180. One study concluded that “[p]re-college comprehensive sexuality education, including skills-based training in refusing unwanted sex, may be an effective strategy for preventing sexual assault in college.” John S. Santelli et al., *Does Sex Education Before College Protect Students From Sexual Assault in College?* 13 PLoS ONE 11, 11 (2018).

181. Such programming would differ from the rape-prevention and bystander training required under the SaVE Act. See Collins, *supra* note 173, at 383. “Under this regime, schools must teach students how to avoid risky situations, how to intervene if they see a suspect situation unfolding, and what to do in the aftermath of an assault. They are not required, however, to adopt programs that seek to change cultural norms and behaviors so that such reaction is unnecessary.” *Id.*

182. See Collins, *supra* note 173, at 391–95.

183. *Id.* at 394.

184. *Id.* The new regulations allow for informal resolution processes. However, these processes seem unlikely to be a successful means of achieving gender justice while situated within a larger system that skews toward unfairness to complainants. For a discussion of the new provisions and their potential impact, see Adrienne Publicover, *The New Provisions in Title IX Regulations – Taking the Right Steps for a Successful Informal Resolution*, JDSUPRA.COM (July 17, 2020), <https://www.jdsupra.com/legalnews/the-new-provisions-in-title-ix-51028/>.

responsibility for their actions by repairing any harm that they caused and dealing with the issues that contributed to the wrongdoing. For the community, restoration means denouncing wrongdoers' behavior and assisting victims and offenders in their process of restoration.¹⁸⁵

Transformative justice goes one step further, encouraging “imagination beyond [the] current system” that can root out the underlying structures and supports of sexual violence, and envision new alternatives and possibilities.¹⁸⁶

V. Conclusion

Redressing sexual misconduct and violence in any context is a difficult endeavor. Complicating the task even further are “the ways in which formal laws governing sexual violence may reproduce legal logics that reinforce rather than challenge gendered social orders and patterns of violence.”¹⁸⁷ Discriminatory dualism is one means by which such reification, rather than transformation, sometimes occurs, and discriminatory dualism has impeded Title IX's ability to serve as a successful mechanism for redressing sexual assault on campus.

With the looming implementation of the regulations crafted by the Trump administration, Title IX seems all but certain to continue to fail victims of campus sexual misconduct. Yet the current fears over what Title IX will look like as these new regulations are implemented also presents a moment of opportunity for gender and social justice advocates. Recognizing Title IX's current discriminatory dualism as a symptom of intense dysfunction and discrimination prompts reimagining what a different system might look like. Recognizing that procedural rules for disciplinary hearings are unlikely to offer, at least in the near future, the kind of redress many survivors hope for may compel the development of revolutionary and transformative ideas outside of the disciplinary hearing.

185. *From Restorative Justice to Transformative Justice*, L. COMM'N CAN. 8 (1999), <https://www.yumpu.com/en/document/read/18455759/from-restorative-justice-to-transformative-justice-discussion-paper-> (last visited Aug. 17, 2020).

186. *Destabilizing Rape Culture Through Transformative Justice*, ANTI-OPPRESSION RES. & TRAINING ALLIANCE (2013), http://aorta.coop/portfolio_page/destabilizing-rape-culture-through-transformative-justice/ (last visited Aug. 17, 2020).

187. DeLaet & Mills, *supra* note 167, at 503.