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RAPE EXCEPTIONALISM RETURNS TO CALIFORNIA: INSTITUTIONALIZING A CREDIBILITY DISCOUNT FOR COLLEGE STUDENTS REPORTING SEXUAL MISCONDUCT

KELLY ALISON BEHRE*

I. Introduction

Recent litigation filed by students disciplined for student conduct code violations involving sexual misconduct persuaded some federal and state courts to reconsider student rights in college disciplinary adjudications. Although most of the litigation was unsuccessful, the few, but significant, victories have been hailed as evidence that Title IX forced colleges to overcorrect their responses to campus sexual assault by abandoning procedural fairness for respondents.¹ This framing of the issue is misleading and contributes to problematic outcomes. Rather than apply settled law to address procedural errors in individual cases, a few courts created new, unprecedented procedural rights for college students accused of sexual misconduct.

Embedded within the discussion of why students facing college discipline for sexual misconduct need procedural protections not afforded to students facing other kinds of student misconduct is “rape exceptionalism”—the insidious myth that students reporting sexual assault are more likely to lie than students reporting other kinds of misconduct. By creating new procedural rights for student respondents in sexual misconduct cases to cross-examine complainants and witnesses in a live hearing setting in order to test credibility, courts are effectively ordering colleges to institutionalize processes that discount the credibility of students reporting sexual assault. They are forcing colleges to signal to their students that victims of sexual assault are less trustworthy and therefore must submit themselves to credibility testing in an adversarial setting that may not exist for students reporting other types of misconduct.

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1. 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, 102–03 (2017); see also Sarah L. Swan, *Procedural Discriminatory Dualism: Title IX and Campus Sexual Assault*, 73 OKLA. L. REV. 69 (2020).

This Article focuses on a 2019 California appellate opinion that required most public and private colleges in the state to rewrite their procedures for campus sexual misconduct adjudications.² It shifts the focus from the discussion about the individual rights of student respondents to the implications of this abrupt change in state law for California student victims of sexual assault. This Article further considers the potential impact of this case on a college's ability to respond to campus sexual assault.

II. Doe v. Allee³

A. Facts

The University of Southern California (USC) is a private college⁴ that utilizes an investigatory model with a preponderance of the evidence standard for nonacademic campus discipline cases and a written appeal process with enumerated, qualifying grounds.⁵ In 2014, a USC student reported that John Doe violated the USC Student Code of Conduct (SCC) when he sexually assaulted her.⁶ The USC Title IX investigator twice interviewed both the complainant and the respondent (Doe) in person and asked the complainant additional questions by phone.⁷ The investigator also interviewed witnesses proposed by both parties, reviewed text messages

2. This Article does not address the new Title IX regulations released by the Department of Education on May 6, 2020. It is important to note, however, that these new regulations mandate procedural protections for respondents in campus disciplinary cases involving gender-based violence that may lead to many of the same concerns identified in this Article. *See Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students*, U.S. DEP'T EDUC. (May 6, 2020), <https://www.ed.gov/news/pressreleases/secretary-devos-takes-historic-actionstrengthen-title-ix-protections-all-students>.

3. 242 Cal. Rptr. 3d 109 (Ct. App. 2019).

4. As used herein, the term "college" refers to both colleges and universities.

5. *SCampus Part B: Student Conduct Code*, USC: UNIV. OF S. CAL. (July 9, 2018), <https://policy.usc.edu/scampus-part-b/> (listing the permissible grounds for appeals as new, relevant, and previously unavailable evidence; claims that the sanction was excessive or inappropriate; claims that the coordinator or panel failed to follow university rules or regulations).

6. *Doe*, 242 Cal. Rptr. 3d at 115–16, 118. Although Doe initially filed his lawsuit against USC under his own name, he proceeded under the pseudonym "John Doe" in his appeal. Therefore, I will refer to him as "Doe" in this Article as well. For a discussion about disciplined students' use of the Doe pseudonym to strengthen their claims, see Kelly Alison Behre, *Deconstructing the Disciplined Student Narrative and Its Impact on Campus Sexual Assault Policy*, 61 ARIZ. L. REV. 885, 903–04 (2019) [hereinafter Behre, *Deconstructing*].

7. *Doe*, 242 Cal. Rptr. 3d at 121–23.

submitted by the parties, and reviewed photographs of injuries submitted by the complainant.⁸ The investigator found Doe responsible for violating six sections of the USC SCC, including sexual misconduct, and sanctioned him with expulsion from USC.⁹ Doe submitted an internal written appeal to the USC Appeals Panel, which, in turn, recommended upholding five of the six violations.¹⁰ The Vice Provost of Student Affairs approved the Appeals Panel's recommendation and affirmed the sanction of expulsion.¹¹

In 2015, Doe filed a Writ of Administrative Mandate and an Ex Parte Application for Stay in the Superior Court of California, County of Los Angeles seeking to overturn his expulsion based on due process violations and investigator bias.¹² The trial court initially granted a stay of Doe's expulsion from USC and found that a justiciable controversy existed in spite of Doe's subsequent expulsion from USC in 2016 for separate

8. *Id.* at 120–21.

9. *See Doe*, 242 Cal. Rptr. 3d at 123–24. The Title IX investigator found Doe responsible for violating the following sections of the USC SCC: section 11.53A (unwelcome sexual advances); section 11.53B (non-consensual sexual touching); section 11.53C (attempted non-consensual intercourse); section 11.53D (non-consensual intercourse); section 11.41 (use of illegal drugs); and section 11.36B (“causing reasonable apprehension of harm”). The investigator did not find Doe responsible for other alleged violations. *Id.* at 118 n.16, 124.

Specifically, USC found the complainant's report credible that Doe committed forcible sexual acts, including nonconsensual vaginal penetration with his penis. The complaint said that Doe grabbed her breast (resulting in some bruising) and ripped off her shorts. *Id.* at 116. When “[s]he tried to pull herself away by holding onto the headboard, . . . Doe pulled [her] hands down,” and when she tried to push against his chest, she “could not push him away.” *Id.* She explained that, because he was a football player, he was very strong. *Id.* The complainant described how Doe pulled her hands over her head and used one of his hands to hold them down. *Id.* She said that when she told him “‘I can’t’ because I know I’m not allowed to for job purposes,” he put “his hand ‘aggressively’ over her mouth, ‘shush[ing]’ her, and said, ‘[n]o one has to know.’” *Id.* She explained how frightened this made her not because she was worried about people knowing, but because she did not want to engage in this conduct. *Id.* She described how Doe then “flipped [her] over onto her stomach and continued to have sex with her from behind.” *Id.* She reported that “[h]e pulled her head back by the hair, which ‘really hurt[.]’ and caused her to say ‘Ow.’ He stuck several fingers in her mouth,” which made her gag. *Id.* at 116–17. USC further found that Roe disclosed to several friends the next morning and that her friends described seeing bruising on the inside of Jane Roe's arms and legs that had not been there before the incident, which a friend documented with photographs and submitted to USC. *Id.* at 117–18.

10. *Id.* at 127.

11. *Id.* at 128.

12. *See id.* at 113, 128.

violations of the SCC related to several felonies.¹³ Despite this preliminary approval, it ultimately denied Doe's writ.¹⁴ Doe appealed the trial court's denial of his writ.

B. Holding

The California Court of Appeal, Second Appellate District, reversed the denial of the Writ of Administrative Mandate on the ground that USC's process for adjudicating sexual misconduct cases was fundamentally flawed.¹⁵ The appellate court noted that colleges were historically only required to provide a student facing discipline with some kind of notice and some kind of hearing that does not necessarily include the same safeguards and formalities of a criminal trial.¹⁶ However, the court further noted that "[i]n the case of competing narratives, 'cross-examination has always been considered a most effective way to ascertain truth'" and that as "the greatest legal engine ever invented for the discovery of truth," it permits the fact finder to observe a witness's demeanor in assessing credibility.¹⁷ After acknowledging that not every administrative process must afford a respondent an opportunity to confront and cross-examine witnesses, the court concluded that specific procedural requirements vary based on the situation and the interests involved.¹⁸

In light of these concerns, we hold that when a student accused of sexual misconduct faces severe disciplinary sanctions and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university

13. After the trial court issued its stay reinstating Doe, USC again expelled Doe for violating independent SCC provisions related to a carjacking and robberies he committed with a knife near the USC campus. Doe was also criminally prosecuted for several felonies and sentenced to six years in state prison for the same underlying incidents. Nathan Fenno, *Former USC Tight End Bryce Dixon Sentenced to Six Years in State Prison*, L.A. TIMES (Apr. 21, 2016, 7:14 PM), <https://www.latimes.com/sports/usc/la-sp-bryce-dixon-sentence-20160422-story.html>.

14. *Id.*; *Doe*, 242 Cal. Rptr. 3d at 112. Of note, the record does not indicate that Dixon amended his pleadings to argue that he should have also been given the opportunity to cross-examine the victims and witnesses to his robberies or carjackings in a live hearing on campus, even though these complaints also led to his expulsion from USC.

15. *See Doe*, 242 Cal. Rptr. 3d at 138.

16. *Id.* at 130–33.

17. *Id.* at 133–34.

18. *Id.* at 135.

provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (e.g., videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments.¹⁹

The *Allee* holding applies to all public and private colleges in California, impacting almost three million students.²⁰ In response, colleges across the state changed their procedures for investigating and adjudicating sexual misconduct complaints.²¹ There are pending class action lawsuits attempting to retroactively apply *Allee* to closed cases, potentially extending its holding even further.²²

III. How Did We Get Here?

A. Campus Misconduct and Due Process

Both private and public colleges enjoy wide discretion in how they investigate and adjudicate student code violations on their campuses. Public colleges, however, must provide students facing campus discipline with notice of the case against them and an opportunity to be heard.²³ There is a recent federal circuit split on whether or not public colleges must provide students accused of misconduct with a live hearing and an opportunity to cross-examine the complainant and adverse witnesses, but it is important to note that these new decisions all arose from litigation filed by students disciplined for sexual misconduct.²⁴

19. *Id.* at 136–37.

20. See Teresa Watanabe & Suhauna Hussain, *Ruling Affirming the Rights of Students Accused of Sexual Misconduct Roils California Colleges*, L.A. TIMES (Feb. 14, 2019, 5:05 PM), <https://www.latimes.com/local/education/la-me-california-universities-title-ix-20190215-story.html>; PUB. POLICY INST. OF CAL., CALIFORNIA'S HIGHER EDUCATION SYSTEM (Oct. 2019), <https://www.ppic.org/wp-content/uploads/higher-education-in-california-californias-higher-education-system-october-2019.pdf>.

21. Watanabe & Hussain, *supra* note 20.

22. See, e.g., *Doe v. Regents of the Univ. of Cal.*, No. RG19029617 (Cal. Super. Ct., Alameda Cty. Aug. 2, 2019).

23. See *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976); *Goss v. Lopez*, 419 U.S. 565, 579 (1975); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 151 (5th Cir. 1961).

24. Compare *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018) (“[I]f a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.”), with *Haidak v. Univ. of Mass.-Amherst*,

Private colleges are entitled to an even greater level of discretion because they are not subject to the same due process requirements of the Fifth and Fourteenth Amendments that govern public colleges.²⁵ Although private colleges cannot “arbitrarily and capriciously dismiss a student,” they need only provide students accused of misconduct with procedural protections that meet a standard of “basic fairness” and comply with their own contractual obligations.²⁶ A few states provide additional minimum protections for students facing campus discipline, such as the right to retained counsel acting in an advisory or participatory role.²⁷ Similarly, some colleges provide expanded rights for student respondents and complainants, while others limit them, as is within their discretion under state and federal law.²⁸ In short, students facing discipline for campus

933 F.3d 56, 69 (1st Cir. 2019) (declining to adopt the *Baum* court’s holding requiring state schools to provide respondents or their agents with a right to cross-examine complainants and other witnesses “because we have no reason to believe that questioning of a complaining witness by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation.”).

25. *See* *Bleiler v. Coll. of Holy Cross*, No. 11-11541-DJC, 2013 WL 4714340, at *4 (D. Mass. Aug. 26, 2013).

26. *Id.* at *5; *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 601 (D. Mass. 2016).

27. *See, e.g.*, *North v. W. Va. Bd. of Regents*, 233 S.E.2d 411, 417 (W. Va. 1977) (explaining that, in certain situations, student respondents have a right to representation by retained counsel at public university disciplinary hearings); *see also* N.C. GEN. STAT. ANN. § 116-40.11(a) (West 2013) (providing students responding to non-academic violations at public colleges with the right to have an attorney actively participate in all campus disciplinary procedures at their expense); ARK. CODE ANN. § 6-60-109(b)(1)(A)–(B) (West 2015) (granting the students disciplined with a suspension longer than ten days and the students who submitted complaints that resulted in that discipline the right to hire an attorney at their own expense to represent them in the appeals process).

28. *Compare* HARVARD LAW SCH., HARVARD LAW SCHOOL HANDBOOK OF ACADEMIC POLICIES 2019–2020, at XI(B) (2019), <https://hls.harvard.edu/dept/academics/handbook/rules-relating-to-law-school-studies/xii-administrative-board/b-procedures-for-disciplinary-cases-except-for-cases-covered-under-the-law-schools-interim-sexual-harassment-policies-and-procedures-see-appendix-viii/> (providing that students facing discipline may examine all witnesses and appear with legal counsel, which the school will try to provide for students who desire but cannot afford), *with* HOWARD UNIV., HOWARD UNIVERSITY STUDENT HANDBOOK 2018–2019, at 90 (2018), <https://www.howard.edu/students/hbook/H-Book.pdf> (forbidding students’ attorneys from attending, participating, or representing students in a student disciplinary hearing not involving sexual misconduct); *see also* STANFORD UNIV., THE STUDENT JUDICIAL CHARTER OF 1997 § II(A)(7) (2013), <https://communitystandards.stanford.edu/policies-and-guidance/student-judicial-charter-1997#party> (granting a responding student the right to be accompanied by a person of their choice to assist in responding to charges during judicial procedures).

misconduct do not currently enjoy a universal due process right to a live hearing, to cross-examine witnesses, or to bring retained counsel to any part of the disciplinary process.²⁹

B. Sexual Misconduct on Campus

Colleges have always maintained the ability to prohibit different kinds of student behavior, on and off campus, through their student conduct codes, including criminal behavior (e.g., theft, assault, sexual assault, vandalism, illicit drug use, underage drinking), academic behavior (e.g., cheating, plagiarism), and honor-based or community-based behavior (e.g., lying to administrators, disrupting class, curfew violations, legal alcohol consumption, premarital sex, dress code violations, and any behavior reflecting poorly on the school).³⁰ Through student conduct codes, colleges have prohibited and adjudicated sexual misconduct for generations as they have other types of student misconduct,³¹ even if their responses to reports of sexual misconduct violations were often inadequate.

Although sexual misconduct constitutes only a small percentage of student code violations potentially resulting in serious discipline, federal law creates some unique obligations for how colleges must respond to these types of cases. Title IX of the Educational Amendments of 1972 prohibits colleges from discriminating on the basis of sex in federally assisted education programs and activities.³² The Campus Sexual Assault Bill of Rights of 1992 mandates that colleges provide victims of campus sexual assault with the same rights they provide to accused students during

29. *See, e.g.,* *Jaksa v. Regents of the Univ. of Mich.*, 597 F. Supp. 1245, 1252–53 (E.D. Mich. 1984).

30. *E.g.,* *Church Educational System Honor Code*, BYU, <https://policy.byu.edu/view/index.php?p=26> (last visited Aug. 17, 2020) (requiring enrolled BYU students to commit to “[l]ive a chaste and virtuous life, including abstaining from any sexual relations outside a marriage between a man and a woman,” “[a]bstain from alcoholic beverages, tobacco, tea, coffee, vaping, and substance abuse,” and “[o]bserve Brigham Young University’s dress and grooming standards”).

31. Examples of campus sexual assault investigations and adjudications are found in lawsuits filed by students disciplined for violations of student codes involving sexual misconduct. *See, e.g.,* *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 10–13 (D. Me. 2005); *Donohue v. Baker*, 976 F. Supp. 136, 140–41 (N.D.N.Y. 1997); *Nzuve v. Castleton State Coll.*, 335 A.2d 321, 323 (Vt. 1975).

32. 20 U.S.C. § 1681 (2018).

disciplinary proceedings and that they provide victims with notification of proceeding outcomes.³³

In 1997, the U.S. Department of Education, Office for Civil Rights (OCR) issued guidance on Title IX clarifying that schools could be liable for peer-to-peer sexual harassment for failing to take immediate and appropriate corrective action to remedy a hostile environment, which could be created by a single incident of sexual assault.³⁴ In 1999, the U.S. Supreme Court recognized a private cause of action under Title IX for peer-to-peer sexual harassment in specific circumstances.³⁵ In response, OCR issued revised guidance in 2001 explaining that it can promulgate and enforce regulations related to Title IX's mandate even in circumstances that would not give rise to a claim for monetary damage.³⁶

OCR issued a "Dear Colleague Letter" in 2011 and a "Questions and Answers" letter in 2014 further clarifying colleges' obligations under Title IX, but rescinded both in 2017, rendering them no longer binding.³⁷ Despite this rescission, the Violence Against Women Reauthorization Act of 2013 ("VAWA 2013") codified some aspects of prior Title IX guidance through amendments to the Clery Act. The Clery Act requires colleges to provide a prompt, fair, and impartial disciplinary process for allegations of dating violence, domestic violence, sexual assault, and stalking.³⁸ Colleges must complete the process in a reasonably prompt timeframe, provide timely and equal access to information that will be used during informal and formal disciplinary meetings and hearings, and allow both the accuser and the accused to have an advisor of their choice present (including an attorney).³⁹

33. *Id.* § 1092(f)(8)(b)(iv)(II)–(III).

34. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039 (Mar. 13, 1997).

35. *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

36. U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES iii (2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

37. Letter from Candice Jackson, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>. To review 2011 and 2014 guidance, see Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; Office for Civil Rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

38. 34 C.F.R. § 668.46(k)(2)(i) (2020).

39. *Id.* § 668.46(k)(2)–(3).

Contrary to popular rhetoric, students responding to complaints of student code violations involving sexual misconduct (as well as dating violence, domestic violence, and stalking) do not have fewer due process rights than students responding to other types of student code violations.⁴⁰ They have more. They are the only students who have a federal right to timely process, to access the evidence gathered during the student misconduct investigation, and to have their attorney participate in an advisory role.⁴¹

C. Competing Narratives and Social Movements

Litigation does not exist in a vacuum. Narratives and counter-narratives play an essential role in policy debates and legal opinions. Competing narratives about campus sexual misconduct influence individual college responses, federal and state legislation, administrative guidance, and lawsuits about campus sexual misconduct. Research conducted over the past two decades consistently reveals campus sexual assault rates of approximately 20% for female students and approximately 5% for male students.⁴² In a precursor to the #MeToo movement, student survivors of campus sexual assault created a strong narrative, replacing depersonalized statistics with individual stories detailing how campus sexual assault impacted their health and access to education.⁴³ Many shed their anonymity to share their experiences through the media and describe how inadequate

40. See generally Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822 (2017).

41. See *id.* at 831–32.

42. See Tara N. Richards, *No Evidence of “Weaponized Title IX” Here: An Empirical Assessment of Sexual Misconduct Reporting, Case Processing, and Outcomes*, 43 L. & HUM. BEHAV. 180, 180 (2019) (reviewing decades of victimization surveys and noting that “[i]n light of these prevalence estimates, research must move beyond asking questions about whether gender-based violence is happening on college campuses and examine what happens when an incident occurs”); NAT’L SEXUAL VIOLENCE RES. CTR., STATISTICS ABOUT SEXUAL VIOLENCE 2 (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf (“One in 5 women and one in 16 men are sexually assaulted while in college.”).

Although definitions of rape, sexual assault, and sexual misconduct vary between studies, research conducted by the federal government, professional organizations, the media, and individual campuses show similar rates. See Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims’ Attorneys*, 65 DRAKE L. REV. 293, 316–18 n.87, 88 (2017) [hereinafter Behre, *Ensuring Choice*].

43. Behre, *Deconstructing*, *supra* note 6, at 888.

college responses exacerbated trauma.⁴⁴ They leveraged social media to coordinate protests across different campuses and coordinate national campaigns.⁴⁵ Student survivors lobbied the Department of Education for better enforcement of their civil rights and filed successful lawsuits and administrative complaints based on Title IX and the Clery Act.⁴⁶

The disciplined-student narrative (or counter-narrative) emerged as part of a backlash movement. It argued that colleges fearful of negative publicity and the wrath of the federal government overcorrected for earlier failures by adopting a presumption of guilt for all male students reported for sexual misconduct violations.⁴⁷ It changed the focus and empathy from student survivors of sexual misconduct to those accused and disciplined for sexual misconduct by labeling them the real victims and suggesting that there is an epidemic of male students wrongly disciplined for sexual misconduct.⁴⁸

Those sharing the disciplined-student narrative argued that colleges should not investigate or adjudicate sexual misconduct but should instead report and defer to the police.⁴⁹ They used criminal language to conflate the student disciplinary process with the criminal law system and suggest that male students responding to reports of student code violations involving sexual misconduct need protection in the form of more robust due process rights.⁵⁰ They adopted the same legal tools used by student survivors by lobbying the Department of Education for new guidance and filing federal lawsuits.⁵¹ *Allee* was the culmination of dozens of California state lawsuits filed by a single attorney advocating for disciplined students throughout the state.⁵²

44. *Id.* at 889.

45. *Id.* at 889–90.

46. *See id.* at 891–92.

47. *See id.* at 914.

48. *See id.* at 902–06.

49. *See id.* at 909–10, 918 (explaining that those who share the disciplined student narrative frame the debate about sexual assault through the lens of criminal law rather than civil rights in education).

50. *Id.* at 918; *see also* Brodsky, *supra* note 40, at 823.

51. Behre, *Deconstructing*, *supra* note 6, at 927.

52. *Cf.* Watanabe & Hussain, *supra* note 20 (noting that the disciplined-student’s attorney had “pioneered much of the litigation on behalf of accused students”).

IV. Why Does Allee Matter?

A. A Conspicuously Specific Holding

Allee explicitly created a new standard for due process rights in only some types of campus discipline proceedings. Its holding is both overbroad and underinclusive. USC uses the same single investigator model and written appeal process for all nonacademic student discipline, including: unauthorized entry; theft; “causing physical harm to any person in the [college] community”; “causing reasonable apprehension of harm to any person in the [college] community”; “destroying, damaging, or defacing the property of others”; “engaging in disruptive or disorderly conduct”; “engaging in or encouraging lewd, indecent, or obscene behavior”; unauthorized use or possession of firearms, knives, or other weapons; and “engaging in harassing behavior.”⁵³ USC provides no right to confront accusers or witnesses through cross-examination in any of their student misconduct cases.⁵⁴ Yet, *Allee*’s holding does not apply explicitly to any of USC’s student code of conduct cases outside of those involving sexual misconduct violations.⁵⁵

Student code violations carrying potential sanctions of suspension and expulsion are not unique to violations involving sexual misconduct. If the *Allee* court was concerned that college disciplinary adjudications carrying potential sanctions of suspension or expulsion are sufficiently serious to warrant increased due process protections, it could have created a balancing test to hold that all students facing “serious discipline” are entitled to more robust protections, such as the right to a live hearing or cross-examination. But, it did not choose to do so. The court instead limited the holding solely to adjudications that included complaints of sexual misconduct violations.

53. *SCampus Part B: Student Conduct Code*, *supra* note 5.

54. *See id.* It is also important to note that USC uses a preponderance of the evidence standard for all campus disciplinary cases. *Id.*

55. *See Doe v. Allee*, 242 Cal. Rptr. 3d 109, 138 (Ct. App. 2019) (limiting the announced procedural requirements to cases in which a student respondent is “accused of sexual misconduct for which he face[s] severe disciplinary sanctions”). The decisions in the U.S. Sixth Circuit Court of Appeals differ from *Allee* both in their limited applicability to public universities and in their factual analysis noting that the universities in question bear minimal burden and little cost because they already provide students facing non-sexual misconduct student code violations with an opportunity to cross-examine complainants during a live hearing (which is not the case at USC or many other California colleges). *See Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 406–07 (6th Cir. 2017).

Similarly, credibility assessments are not unique to student disciplinary cases involving sexual misconduct.⁵⁶ If the *Allee* court was concerned that students responding to complaints primarily based on the credibility of a reporting witness need additional due process protections, it could have created a definition of fundamental fairness that required colleges to provide all students facing discipline based on a reporting witness's credibility with the right to confront the complainant through cross-examination during a live hearing. But it did not do so. Instead, *Allee* carved out a special rule for only cases including complaints of sexual misconduct.

In spite of the high rates of campus sexual assault, college adjudications of student code violations involving sexual misconduct remain a small percentage of all college adjudications.⁵⁷ Yet, the *Allee* court limited its holding to this small subset of campus misconduct cases without explanation. As such, the *Allee* holding is too narrow to achieve its stated goals of protecting students facing severe sanctions or providing additional confrontation rights to students responding to reports based on a single complainant.⁵⁸

Allee is also inexplicably overbroad in its likely application by colleges. Rather than only including cases of campus sexual misconduct in which the sole evidence is the complainant's statement, *Allee* holds that the new procedural protections apply in all sexual misconduct cases based on the credibility of any witness.⁵⁹ This would include even the rare campus sexual assault cases with witnesses, such as the Brock Turner case at Stanford University, where two students witnessed and reported Turner for

56. There are many types of campus misconduct that might rely on the credibility of an individual complainant or witness. For example, a student might report another student for stealing a laptop or physically assaulting him or threatening her or hazing him or harassing her or breaking into his dorm room or plagiarizing her work or using illegal drugs.

57. For example, of the 2565 student misconduct cases the University of California, Berkeley, opened between January 1, 2016 and June 30, 2019, only sixty-six cases (2.6%) involved reports of sexual violence and sexual harassment (SVSH), and only twenty-one of those—less than one-third of SVSH cases opened—resulted in a suspension or dismissal. UC BERKELEY CTR. FOR STUDENT CONDUCT, SEXUAL VIOLENCE AND SEXUAL HARASSMENT CASES UNDER 1/1/16 UC POLICY ON SEXUAL VIOLENCE AND SEXUAL HARASSMENT JANUARY 1, 2016–JUNE 30, 2019, at 1 (2019), https://sexualassault.berkeley.edu/wp-content/uploads/2019/08/Finalized-Center-for-Student-Conduct-SVSH-Data-1_1_19-6_30_19.pdf.

58. *See Doe v. Allee*, 242 Cal. Rptr. 3d 109, 136–37 (Ct. App. 2019).

59. *Id.*

sexually assaulting an unconscious woman.⁶⁰ The *Allee* holding therefore applies to virtually all disciplinary cases including a report of sexual misconduct, a reality that some colleges responding to *Allee* note in their new procedures.⁶¹

Allee also applies to campus disciplinary cases involving other types of non-sexual misconduct violations of a student conduct code that co-occur with sexual misconduct, such as physical assault, threats, trespass, and harassment.⁶² Furthermore, in response to amendments to the Clery Act in 2013 incorporating more forms of gender-based violence, many colleges use the same process to investigate and adjudicate all reports of sexual assault, dating violence, domestic violence, and stalking.⁶³ Consequently, at least some California colleges expanded the new procedural protections detailed in *Allee* to respondents in dating violence and stalking cases, even though they are judicially beyond the scope of *Allee*.

60. See Lindsey Bever, *The Swedish Stanford Students Who Rescued an Unconscious Sexual Assault Victim Speak Out*, WASH. POST (June 8, 2016, 6:54 AM CDT), <https://www.washingtonpost.com/news/morning-mix/wp/2016/06/07/the-swedish-stanford-students-who-rescued-an-unconscious-sexual-assault-victim-speak-out/>.

61. See, e.g., *Systemwide Policy Prohibiting Discrimination, Harassment & Retaliation, Sexual Misconduct, Dating & Domestic Violence, & Stalking Against Students & Procedure for Addressing*, CSU: CAL. ST. U. (rev. Mar. 29, 2019) (footnote 31), <https://calstate.policystat.com/policy/6742744/latest/#autoid-58zq4> [hereinafter *CSU Systemwide Policy*] (“In most Sexual Misconduct cases, credibility will be central to the finding. Therefore, Parties should presume that this Addendum applies to all matters alleging Sexual Misconduct.”).

The CSU Executive Order applies to the 481,210 students attending colleges within the California State University system. *Enrollment*, CSU: CAL. ST. U., <https://www2.calstate.edu/csu-system/about-the-csu/facts-about-the-csu/enrollment> (last visited May 24, 2020).

62. See, e.g., *CSU Systemwide Policy*, *supra* note 61 (Addendum to CSU Executive Orders) (“This Addendum **supersedes** the existing investigation and resolution process . . . for cases (i) alleging Sexual Misconduct by a Student that, (ii) if substantiated, could result in a severe sanction (suspension or expulsion), **and** (iii) where credibility of any Party or witness is central to the finding. Allegations of other misconduct set forth in the same Complaint that arise out of the same facts and/or incidents will also be investigated and resolved (including sanctions) in accordance with this Addendum.”).

63. 34 C.F.R. § 668.46 (2014); see, e.g., UNIV. OF CAL., POLICY SVSH, SEXUAL VIOLENCE AND SEXUAL HARASSMENT POLICY 2, 3–4 (July 31, 2019), <https://policy.ucop.edu/doc/4000385/SVSH> (including relationship violence and stalking in categories of prohibited conduct governed by the sexual violence policy and procedures).

B. Requiring a Credibility Discount for Student Victims of Sexual Assault

Under federal law, respondents in sexual misconduct cases already had rights that students responding to other types of student conduct code violations do not enjoy. *Allee* provided additional procedural rights for this particular group of California students—and only this particular group of California students—in campus misconduct adjudications. Without providing a meaningful discussion, *Allee* simply asserted that cross-examination in an adversarial system is the best tool to ascertain the truth, conflating procedural justice for respondents with the most accurate outcome in student disciplinary cases involving sexual misconduct.⁶⁴ In deciding that students responding to sexual misconduct violations have the right to confront both the students who reported them and witnesses through cross-examination in a live hearing, the court focused on the issue of credibility.

Allee began as a Title IX campus case at a private college. Through the context of Title IX's prohibition of sex discrimination in the form of sexual harassment and sexual violence in education, *Allee's* emphasis on complainant credibility should be interpreted as a concern about the *lack of credibility* of women and transgender or non-conforming students who disproportionately experience and report sexual misconduct.⁶⁵ “Credibility” is coded language for an increased skepticism of students who report sexual misconduct that serves as justification for the court to mandate a respondent's opportunity to confront them by testing their credibility in front of a neutral factfinder who can then observe their demeanor.⁶⁶

64. The First Circuit Court of Appeals noted in its decision not to create a right of cross-examination in an adversarial hearing setting to respondents in sexual misconduct that “[w]e are aware of no data proving which form of inquiry produces the more accurate result in the school disciplinary setting.” *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 68 (1st Cir. 2019). *Allee* does not provide this data either but rather provides supporting quotes from previous cases. See *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 134–35 (Ct. App. 2019).

65. See DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT ix (2020), [https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_\(01-16-2020_FINAL\).pdf](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf).

66. Contrary to the *Allee* court's assertion that hearing officers need to be able to observe a witness's demeanor during cross-examination in order to assess credibility, research actually shows that people generally do not have the ability to assess credibility by observing demeanor. Maria Hartwig & Charles F. Bond, *Why Do Lie-Catchers Fail? A Lens Model Meta-Analysis of Human Lie Judgments*, 137 PSYCHOL. BULL. 643, 644 (2011). This is particularly true in sexual assault cases in which the general public often has

Embedded within the *Allee* decision is a historic sexist credibility discounting of students reporting sexual misconduct based on the insidious and pervasive myth that women lie about sexual assault.⁶⁷

Institutional skepticism and credibility discounting of women reporting sexual assault is not a new phenomenon. To the contrary, credibility discounting of women reporting sexual assaults is built into every stage of the criminal legal system.⁶⁸ One manifestation of this discounting is found in historic statutes requiring independent witnesses and evidence of force, however, biased police investigations, decisions not to test rape kits, prosecutorial discretion not to charge in rape cases to jury, and judicial biases against rape victims all persist to this day.⁶⁹

Student victims of sexual assault have experienced credibility discounting from their colleges as well—one of the many reasons students fought to enforce their civil rights on their campuses through Title IX.⁷⁰ *Allee* transforms colleges' common practice of implicit credibility discounting of student victims into a mandatory, explicit credibility discounting. In requiring California colleges to create extraordinary procedural protections for respondents in sexual misconduct cases, *Allee* essentially requires California colleges to advertise to their students that they find victims of sexual assault less credible than other students through the adoption of procedures that subject victims of sexual misconduct to additional credibility testing.

C. Discriminating Against Student Victims of Sexual Assault

Allee orders colleges to subject victims of sexual assault to longer and more traumatic processes than they generally impose on students reporting

misinformation about what “normal” post-rape responses and effects look like. See KIMBERLY A. LONSWAY & JOANNE ARCHAMBAULT, END VIOLENCE AGAINST WOMEN INTERNATIONAL, VICTIM IMPACT: HOW VICTIMS ARE AFFECTED BY SEXUAL ASSAULT AND HOW LAW ENFORCEMENT CAN RESPOND 41–42, 44–45 (2019), <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=656>.

67. Not all victims of campus sexual assault are women. Indeed, male students are actually more likely to experience sexual assault than be accused of sexual assault, and transgender students are at higher risk of sexual assault than cis-gender students. Nonetheless, the trope of lying women who falsely report sexual assaults underpins the credibility discussions. See Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 8–9 (2017).

68. *Id.* at 3.

69. *See id.*

70. *See Behre, Deconstructing, supra* note 6, at 887–88.

other types of student misconduct. Ironically, these are the very students at a heightened risk of experiencing secondary victimization (also referred to as “second rape”) from investigation and adjudication processes.⁷¹ Negative post-assault interaction with legal and community systems exacerbates trauma and leads to poorer health outcomes for sexual assault victims, particularly when it includes exposure to individuals engaging in “victim-blaming attitudes, behaviors, and practices.”⁷² Closed systems, such as colleges, can cause particular harm to victims of sexual assault.⁷³ Victims who experience institutional betrayal when colleges fail to respond effectively to their abuse suffer increased posttraumatic symptomology when compared to other victims of sexual assault.⁷⁴ How a college responds to a student’s report of sexual assault impacts not only that student’s educational trajectory, but also that student’s overall recovery from the sexual assault.⁷⁵

By requiring colleges to hold a live hearing with cross-examination in addition to the investigation already required by federal law, *Allee* obligates colleges to increase the duration of the adjudication process as well as the number of times a student-victim of sexual assault must describe (and relive) the assault, both of which will increase a student’s trauma and delay recovery.⁷⁶ Moreover, *Allee* requires colleges to subject student victims of sexual assault to cross-examination questions designed to attack their credibility—a process that inevitably (and often intentionally) increases victim trauma.⁷⁷ *Allee* only briefly acknowledges the impact of cross-examination during live hearings on victims of sexual assault by stating that

71. Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 159–60 (2003).

72. Rebecca Campbell et al., *Preventing the “Second Rape”: Rape Survivors’ Experiences With Community Service Providers*, 16 J. INTERPERSONAL VIOLENCE 1239, 1240–42 (2001).

73. See Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 122 (2013); see also Hannah Brenner Johnson, *Standing In Between Sexual Violence Victims and Access to Justice: The Limits of Title IX*, 73 OKLA. L. REV. 15 (2020).

74. *Id.*

75. Behre, *Ensuring Choice*, *supra* note 42, at 325–26; see Diane L. Rosenfeld, *Schools Must Prevent the “Second Rape”*, HARV. CRIMSON (Apr. 4, 2014), <http://www.thecrimson.com/article/2014/4/4/Harvard-sexualassault/>.

76. See Smith & Freyd, *supra* note 73, at 122–23 (“[S]exually assaulted women who also experienced institutional betrayal experienced higher levels of several posttraumatic symptoms.”).

77. See *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 134–37 (Ct. App. 2019).

schools may allow indirect questioning through intermediaries and use videoconferencing.⁷⁸ But this concession does not undo the additional trauma caused by cross-examination.

The increased burden for student victims of sexual assault is especially troubling in the context of high rates of campus sexual assault and low reporting rates to both law enforcement and colleges.⁷⁹ Two of the many reasons for the low reporting rates are the concerns student victims have about the emotional impact of the process on their mental health and fear of retaliation.⁸⁰ Increasing the emotional toll of the college adjudicatory process may further decrease reporting rates, making it even more challenging for colleges to respond to sex discrimination in the form of sexual violence on their campuses.⁸¹ Through the additional burdens *Allee*

78. *See id.* at 137.

79. Less than 5% of sexual assault and rape victims attending college choose to report the assault to law enforcement. U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT—MAJORITY STAFF, *SEXUAL VIOLENCE ON CAMPUS 1* (2014), <http://dcrcc.org/wp-content/uploads/2014/10/Sen.-McCaskills-Sexual-Violence-on-Campus-Survey-Report1.pdf>. For general reporting rates to law enforcement, see DEAN G. KILPATRICK ET AL., MED. UNIV. OF S.C., NAT'L CRIME VICTIMS RESEARCH & TREATMENT CTR. *DRUG FACILITATED, INCAPACITATED AND FORCIBLE RAPE: A NATIONAL STUDY 2* (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf> (finding that “16% of all rapes [are] reported to law enforcement”).

Approximately “2.7% of sexual battery incidents and 7.0% of rape incidents were reported by the victim to any school official.” CHRISTOPHER KREBS ET AL., BUREAU OF JUSTICE STATISTICS RESEARCH & DEV. SERIES, *CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT 107* (2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf>; *see also* Amy Becker, *91 Percent of Colleges Reported Zero Incidents of Rape in 2014*, AM. ASS'N U. WOMEN (Nov. 23, 2015), <http://www.aaup.org/article/clery-act-data-analysis/>.

80. Student victims have many different reasons for not reporting sexual assaults to their colleges. Some are embarrassed or ashamed, and they believe participation in a campus investigation and adjudication will be too emotionally difficult. Student victims also chose not to report because of their belief that their school will not take the report seriously or conduct a fair investigation, concern that their school will not protect their safety, the belief that their college community will not support them, fear of retaliation by the assailant or his friends, and skepticism that their college will not hold the assailant accountable. CHRISTOPHER P. KREBS ET AL., U.S. DEP'T OF JUSTICE, *CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT xvii, 2–9* (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

81. Under Title IX, colleges are only liable for responding to sexual harassment in the form of sexual violence when they knew or should have known about the harassment. Consequently, lower reporting rates make it more difficult for students to hold their schools accountable. *See* Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge*,

creates for victims of sexual assault, colleges will send a strong message that they do not value student safety (particularly students at a higher risk of sexual violence—i.e., women and LGBTQ students) as much as they value students accused of sexual misconduct (predominantly men).

D. A Catch-22 for Colleges

California colleges now face conflicting requirements under federal and state law. *Allee* does not erase federal obligations under Title IX and the Clery Act. Colleges still have a legal obligation to prohibit sex discrimination in the form of sexual violence by conducting an independent investigation and responding effectively to prevent recurrence.⁸² In situations in which a college has knowledge of sexual violence, it must respond. Yet, under *Allee*, even after a college conducts an investigation finding that a student committed sexual misconduct, the college can only suspend or expel the student after providing the student with an opportunity to cross-examine his or her victim. If a student victim of sexual misconduct decides not to subject herself or himself to re-traumatization through cross-examination in a live hearing after the investigation concludes, the college will face a choice: violate Title IX by failing to respond to sexual misconduct it substantiated through an independent investigation or violate California case law by failing to provide the respondent with an opportunity to conduct live cross-examination. Student victims are rarely parties to disciplined-student litigation, as was the case in *Allee*. It is therefore the responsibility of colleges to effectively defend themselves against this litigation and appeal court decisions that place them in a catch-22 .

V. Conclusion

Although hailed by many as a progressive recognition of the due process rights of students in college misconduct proceedings, *Allee* fundamentally undermines the rights of student victims of sexual assault by forcing colleges to institutionalize a credibility discount against them. By creating new, extraordinary rights for students responding to student code violations involving sexual misconduct and not extending those rights to students responding to other student code violations resulting in similar sanctions, *Allee* singled out victims of sexual assault as less credible than other

Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence, 43 LOY. U. CHI. L.J. 205, 252–53 (2011).

82. See *supra* Section III.B.

students. The additional rights—to conduct cross-examination of the complainant and witnesses in an adversarial, live hearing—do not exist in a vacuum. They will cause additional trauma to victims of sexual assault and lengthen the duration of the investigation and adjudication of sexual misconduct cases. Additionally, these new barriers solely impact the students who choose to report, further decreasing the already abysmal reporting rates for campus sexual assault. *Allee* may also create a conflict for colleges between their federal obligations under Title IX and Clery and state law. The lasting effects of *Allee* on student sexual assault victims remain to be seen, but it seems likely that this opinion will reduce California colleges' ability to effectively respond to and prevent sexual assault on their campuses.