

# DECONSTRUCTING THE DISCIPLINED STUDENT NARRATIVE AND ITS IMPACT ON CAMPUS SEXUAL ASSAULT POLICY

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*The national discourse about campus sexual assault is currently dominated by two powerful narratives: the student survivor narrative and the disciplined student narrative. These narratives continue to shape and inform the public's understanding of campus sexual assault and the role of colleges and universities in preventing and responding to sexual assault. Unlike the student survivor narrative developed and shared directly by students, the disciplined student narrative is more layered and less explicit. This Article follows the development of the disciplined student narrative from lawsuits to editorials and scholarship to its successful impact on public policy as demonstrated by the 2018 proposed Title IX regulation.*

*The Narrative Policy Framework provides us with specific narrative elements that influence public policy. Through character development, the disciplined student narrative employs third-party narrators to introduce students disciplined for sexual assault as sympathetic protagonists cast in the role of victims in a story about campus sexual assault. The setting for the disciplined student narrative takes the form of a legal history constructed to support the proposed policy change. The main plot point is not the sexual misconduct, but rather the campus disciplinary process. The disciplined student narrative uses several rhetorical techniques by capitalizing on the confusion between the campus disciplinary system and the criminal justice system, claiming moral equivalency with student survivors, and employing disaster analogies through well-known false allegations stories. It exploits male privilege by using a cultural and legal history of discounting credibility of women reporting sexual assault, calling for extraordinary protections for male students, and erasing women of color from discussions about racism. The incorporation of references to meta-narratives about the Obama Administration's overreach and concerns about campus culture wars further strengthen the disciplined student narrative's salience with a broad audience. The 2018 proposed Title IX regulation demonstrates the*

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*disciplined student narrative's success in transforming a civil rights law enacted to protect women from sex discrimination into a civil rights law directing schools to protect and privilege the rights of men accused of sexual misconduct.*

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### INTRODUCTION

Campus sexual assault is not a new phenomenon, but recent shifts in the dominant narrative have better informed the public's understanding of the problem and influenced public policy. From the 1970s through the first decade of the 2000s, campus sexual assault was most often viewed through the lens of public education and risk reduction for women. Although research consistently revealed significant prevalence of sexual assault on campus, victims rarely reported to law enforcement or schools.<sup>1</sup> Colleges largely limited their role to improving lighting and offering

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1. A 2000 study found that 15.5% of college women were sexually victimized during that current academic year. BONNIE FISHER ET AL., U.S. DEP'T OF JUSTICE NAT'L INST. OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 15 (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>. A 2006 survey of undergraduate students at two large public universities found that 19% of female students reported experiencing completed or attempted sexual assault since starting college, and that the figure rises to 26.3%

self-defense classes, signaling their belief that most campus rapes were committed by strangers lurking in the bushes. In advising incoming female students on “how to avoid rape” through risk reduction, colleges implied that rapists were an inevitable part of campus life and that female students who failed to heed warnings by drinking alcohol or venturing out without a “buddy system” assumed a risk that made them at least somewhat responsible for their rapists’ actions.<sup>2</sup>

This dominant narrative featured anonymous female victims as the only real characters, excluding male and transgender victims altogether. Even as awareness about acquaintance rape or “date rape” grew in the 1990s, student rapists faded into the background of the campus sexual assault narrative, characterized alternately as natural fixtures on college campuses willing to “take advantage” of incautious young women or as well-meaning men confused by “mixed signals.” Student victims largely filled the role of preventing and responding to sexual violence by providing crisis counseling and support groups for each other, increasing awareness through public events, such as “Take Back the Night” and the “Clothesline Project,” and providing anonymous warnings through bathroom graffiti on individual campuses.<sup>3</sup>

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when the data were limited to responses from women in their final year of college. CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT 5.1.1 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>. More recent national surveys by journalists and individual campus climate surveys reveal similar rates of sexual assault. See, e.g., Nick Anderson & Scott Clement, *1 in 5 College Women Say They Were Violated*, WASH. POST (June 12, 2015), <http://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated> (reporting on a poll of more than 1,000 people who attended college in the past four years that found 25% of young women and 7% of young men say they suffered unwanted sexual incidents in college).

Low reporting rates persist today. Less than 5% of sexual assault rape victims attending college choose to report the assault to law enforcement. MAJORITY STAFF OF S. SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT MAJORITY STAFF, 113TH CONG., SEXUAL VIOLENCE ON CAMPUS 4 (2014), <http://web.archive.org/web/20181206183632/http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf>. Student victims only report 2.7% of sexual battery incidents and 7% of rape incidents to any college official. CHRISTOPHER KREBS ET. AL., U.S. DEP’T OF JUSTICE, BUREAU OF STATISTICS, CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT 107 (2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf>; see also Kathryn J. Holland & Lilia M. Cortina, “*It Happens to Girls All the Time*”: Examining Sexual Assault Survivors’ Reasons for Not Using Campus Supports, 59 AM. J. COMMUNITY PSYCHOL. 50, 50 (2017) (finding that even with increased campus resources, most students do not report sexual assaults to colleges).

2. Nicole Bedera & Kristjane Nordmeyer, “*Never Go Out Alone*”: An Analysis of College Rape Prevention Tips, Sexuality & Culture, 19 SEXUALITY & CULTURE 553 (2015) (finding that most colleges in the sample continue to direct rape prevention tips to a female audience, including avoiding alcohol and drug use, remaining vigilant, and refraining from being alone); Dana Bolger, *We Deserve to Live Full Lives: Another View*, USA TODAY (Aug. 4, 2014, 2:56 PM), <https://www.usatoday.com/story/opinion/2014/08/04/campus-rape-victims-know-your-ix-editorials-debates/13602035/>.

3. Lora Bex Lempert, *The Clothesline Project as Student Production: Creativity, Voice, and Action*, 31 TEACHING SOC. 478 (2003); Sara Lipka, *An Arc of Outrage: Despite the Clamor, the Real Conversation About Campus Sexual Assault Has Hardly Begun*, CHRON. HIGHER EDUC. (Apr. 13, 2015), [https://www.chronicle.com/interactives/assault\\_main](https://www.chronicle.com/interactives/assault_main).

In the early 2010s, student survivors and activists created a new narrative for campus sexual assault. They utilized school newspapers, the national media, and the internet to share their personal experiences, elevating stories previously only shared with other survivors on individual campuses to a national audience.<sup>4</sup> As one of the precursors to the #MeToo movement, their individual accounts personalized campus sexual assault by providing details otherwise obscured through statistics.<sup>5</sup> The accumulation of their many stories made the issue of campus sexual assault more difficult to dismiss as a rarity. Their descriptions of sexual assault illustrated how perpetrators did not fit the outdated stereotypes of rapists, but rather were college students, often men they trusted, who were otherwise unremarkable on a college campus.<sup>6</sup> Student survivors also pushed back against the excuse that the students who raped them were simply confused or accidentally made a poor decision.<sup>7</sup> They described the effect of sexual assault on their mental and physical health, as well as the direct impact on their education through declining grades, decreased access to school activities and scholarships, and withdrawals from college or transfers to other schools.<sup>8</sup> Their vivid descriptions of how sexual assault impacted their lives made the issue more difficult for an audience to dismiss or minimize. These student survivors became the narrators, protagonists, and advocates in their narratives. Those who chose to forgo anonymity provided names, faces, and voices to the collective narrative, thereby strengthening its impact.<sup>9</sup>

The survivor narrative changed the standard timeline and plot, extending the conclusion from the assault to include their college's inadequate or hostile

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4. E.g., Annie E. Clarke, *Rape is Like a Football Game: Why Survivors of Sexual Assault Do Not Report*, HUFFPOST (Feb. 28, 2013, 2:44 PM), [https://www.huffingtonpost.com/annie-e-clark/rape-is-like-a-football-g\\_b\\_2769576.html](https://www.huffingtonpost.com/annie-e-clark/rape-is-like-a-football-g_b_2769576.html); Angie Epifano, *An Account of Sexual Assault at Amherst College*, AMHERST STUDENT (Oct. 17, 2012, 12:07 AM), <http://amherststudent.amherst.edu/?q=article/2012/10/17/account-sexual-assault-amherst-college>; Andrea Pino, *The Second Rape: Battling PTSD and Betrayal*, HUFFPOST (Sept. 5, 2013, 1:10 PM), [http://www.huffingtonpost.com/andrea-pino/the-second-rape\\_b\\_3655062.html](http://www.huffingtonpost.com/andrea-pino/the-second-rape_b_3655062.html); see also Lipka, *supra* note 3.

5. Clarke, *supra* note 4; Epifano, *supra* note 4; Lipka, *supra* note 3; Pino, *supra* note 4.

6. E.g., Nick Anderson, *Changing the Discussion on Sexual Assault: UCLA Grad Went from Survivor to Activist*, WASH. POST (June 15, 2015), [https://www.washingtonpost.com/local/education/changing-the-discussion-on-sexual-assault-ucla-grad-went-from-survivor-to-activist/2015/06/15/a9203b74-0964-11e5-a7ad-b430fc1d3f5c\\_story.html](https://www.washingtonpost.com/local/education/changing-the-discussion-on-sexual-assault-ucla-grad-went-from-survivor-to-activist/2015/06/15/a9203b74-0964-11e5-a7ad-b430fc1d3f5c_story.html); Taylor Harvey, *From Victim to Advocate: One Sexual Assault Survivor Shares Her Story*, MADISON.COM (Apr. 4, 2013), [https://madison.com/daily-cardinal/news/campus/from-victim-to-advocate-one-sexual-assault-survivor-shares-her/article\\_bd6f8ac2-9cff-11e2-afd3-001a4bcf887a.html](https://madison.com/daily-cardinal/news/campus/from-victim-to-advocate-one-sexual-assault-survivor-shares-her/article_bd6f8ac2-9cff-11e2-afd3-001a4bcf887a.html).

7. See, e.g., Katie J.M. Baker, *Here's the Powerful Letter the Stanford Victim Read to Her Attacker*, BUZZFEED NEWS (June 3, 2018, 4:17 PM), <https://www.buzzfeednews.com/article/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra>.

8. E.g., Epifano, *supra* note 4; Tyler Kingkade, *The Woman Behind #SurvivorPrivilege Was Kicked Out of School After Being Raped*, HUFFPOST (June 12, 2014, 5:39 PM), [https://www.huffpost.com/entry/survivor-privilege-wagatwe-wanjuki\\_n\\_5489170](https://www.huffpost.com/entry/survivor-privilege-wagatwe-wanjuki_n_5489170).

9. E.g., Clarke, *supra* note 4; Epifano, *supra* note 4.

response to reports of campus sexual assault. Student survivors described how college administrators asked them victim-blaming questions, made excuses for the students who sexually assaulted them, and failed to open investigations.<sup>10</sup> They spoke about how their schools failed to provide them with requested mental-health resources or academic accommodations.<sup>11</sup> They described lengthy delays in school investigations, traumatizing hearings, questionable investigation and hearing findings, inadequate sanctions, and retaliation.<sup>12</sup> The collective narrative demonstrated how higher education's response to reports of campus sexual assault exacerbate the harm caused by sexual assault and introduced the concept of "institutional betrayal."<sup>13</sup> Unlike the previous dominant narrative about campus sexual assault, the survivor narrative clearly identified colleges as separate characters whose failure to mitigate the harm caused by the sexual assault exacerbated trauma and negatively impacted student survivors' access to education.

The survivor narrative served as the vehicle for a social movement. On individual campuses, student survivors used their narratives to demand better responses to campus sexual assault by writing letters to campus newspapers, drafting petitions, forming new student groups, creating campaigns and art projects, organizing protests, and participating in task forces.<sup>14</sup> They leveraged social media to coordinate, strategize, and provide support to each other across campuses, quickly

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10. E.g., Kayla Webley Adler, *Big Shame on Campus*, MARIE CLAIRE (Oct. 16, 2013), <https://www.marieclaire.com/politics/news/a8217/big-shame-on-campus/> (reports of colleges engaging in victim-blaming behavior, such as using a football analogy to insinuate that a survivor should have avoided rape, telling a survivor she needed to "forgive and forget," asking a survivor what she did to cause the sexual harassment, and telling a survivor that rape will continue to occur until women stop "spreading their legs like peanut butter.").

11. E.g., 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>.

12. E.g., Jason Song & Richard Winton, *U.S. Investigates Handling of Alleged Sex Assaults at USC*, L.A. TIMES (July 22, 2013, 12:00 AM), <http://articles.latimes.com/2013/jul/22/local/la-me-usc-sexual-harassment-20130723>; Dave Bangert, *Lawsuit: Purdue Accused of 'Chilling' Retaliation on Women Who Reported Sexual Assaults*, J. & COURIER (Nov. 14, 2018, 10:09 PM), <https://www.jconline.com/story/news/2018/11/14/purdue-accused-chilling-retaliation-sexual-assault-reports/2003101002/>.

13. E.g., Pino, *supra* note 4; see also Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 122 (2013) (describing research showing how a school's response to reports of sexual assault exacerbate a victim's trauma symptoms).

14. E.g., Dana Bolger, *Surviving at Amherst College*, IT HAPPENS HERE AT AMHERST (Oct. 23, 2012), <https://ithappenshereamherst.wordpress.com/2012/10/23/survivingatamherstcollege/>; Sarah Frost, Becca Guthrie & Megan Cunnane, *Emma Sulkowicz, CC '15, to Mix Performance Art, Sexual Assault Protest*, COLUMBIA SPECTATOR (Sept. 2, 2014, 6:14 PM), <https://www.columbiaspectator.com/multimedia/2014/09/02/emma-sulkowicz-cc-15-mix-performance-art-protest/>; Jake New, *Howard Students Protest Handling of Sex Assault Cases*, INSIDE HIGHER ED (Mar. 24, 2016), <https://www.insidehighered.com/quicktakes/2016/03/24/howard-students-protest-handling-sex-assault-cases>; Ishani Premaratne, *Sexual Assault Protest Cancels Dartmouth Classes*, USA TODAY (Apr. 27, 2013, 7:54 AM), <https://www.usatoday.com/story/news/nation/2013/04/27/dartmouth-sexual-assault-protest-cancels-classes/2117159/>.

spreading the movement from elite universities to campuses across the country.<sup>15</sup> Students from marginalized communities shared how racism, homophobia, and transphobia placed them at a higher risk of sexual assault and decreased their access to resources and adequate responses by colleges.<sup>16</sup> Survivors expanded their audience by engaging national media and by creating and contributing to books and documentaries about campus sexual assault.<sup>17</sup> They organized national campaigns and formed nonprofits to educate students about their rights and advocate for systematic change.<sup>18</sup> Their goal was not limited to risk reduction; it included widespread prevention and improved responses by colleges.<sup>19</sup>

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15. See, e.g., Tyler Kingkade, *Students Claim Bad Note-Taking Sabotaged Sexual Assault Investigations*, HUFFPOST (Feb. 12, 2014, 2:52 PM), [https://www.huffingtonpost.com/2014/02/12/note-taking-sexual-assault-college-investigations\\_n\\_4732604.html](https://www.huffingtonpost.com/2014/02/12/note-taking-sexual-assault-college-investigations_n_4732604.html) (reporting about the Office on Civil Rights, Department of Education complaints filed by students at the University of Texas-Pan American, the University of Indianapolis, the University of Southern California, and the University of Akron); *About Last Night: How HBCU Students are Addressing Sexual Assault on Campus*, RADIO PROJECT (Sept. 4, 2018), <https://www.radioproject.org/2018/09/last-night-hbcu-students-addressing-sexual-assault-campus/>.

16. E.g., Emily Kassie, *Male Victims of Campus Sexual Assault Speak Out 'We're Up Against a System That's Not Designed to Help Us'*, HUFFPOST (Jan. 27, 2015), [https://www.huffingtonpost.com/2015/01/27/male-victims-sexual-assault\\_n\\_6535730.html](https://www.huffingtonpost.com/2015/01/27/male-victims-sexual-assault_n_6535730.html); Katie Rose Guest Pryal, *Held Accountable: An Interview with Andrea Pino*, WOMEN IN HIGHER EDUC. (Aug. 1, 2018), <https://www.wihe.com/article-details/78/held-accountable-an-interview-with-andrea-pino/>; Wagatwe Wanjuki, *College Rape: Does the Media Focus Only on White Survivors?*, MIC (Apr. 29, 2013), <https://mic.com/articles/38363/college-rape-does-the-media-focus-only-on-white-survivors#.BQKuQpmqH>. Student activists in the movement against campus sexual assault also critique the movement for not centering survivors from marginalized communities. See, e.g., Candace King, *We Need to Include Black Women's Experience in the Movement Against Campus Sexual Assault*, THE NATION (June 15, 2018), <https://www.thenation.com/article/need-include-black-womens-experience-movement-campus-sexual-assault/>; Taliah Mancini, *Bringing the Intersections to the Forefront in the Fight to End Campus Sexual Assault*, MS. MAGAZINE (Oct. 12, 2017), <http://msmagazine.com/blog/2017/10/12/bringing-intersections-forefront-fight-end-campus-sexual-assault/>.

17. E.g., ANNIE E. CLARK & ANDREA L. PINO, *WE BELIEVE YOU: SURVIVORS OF CAMPUS SEXUAL ASSAULT SPEAK OUT 33* (2016); JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN 4* (2015); Laura Dunn, *It's Time For the Law to Protect Victims of Gender Violence*, TED TALK (Apr. 2018), [https://www.ted.com/talks/laura\\_1\\_dunn\\_it\\_s\\_time\\_for\\_the\\_law\\_to\\_protect\\_victims\\_of\\_gender\\_violence/transcript?language=en](https://www.ted.com/talks/laura_1_dunn_it_s_time_for_the_law_to_protect_victims_of_gender_violence/transcript?language=en); THE HUNTING GROUND (Chain Camera Pictures 2015); IT HAPPENED HERE (Neponsit Pictures 2014); Laura L. Rahman, *Broken Social Contracts*, YOUTUBE (June 30, 2010), <https://www.youtube.com/watch?v=gPQ1XV8erh4&t=>.

18. E.g., Dana Bolger & Alexandra Brodsky, *Sexual Assault Survivor Activists Launch 'Know Your IX' Campaign*, HUFFPOST (Apr. 18, 2013, 5:10 PM), [https://www.huffingtonpost.com/dana-bolger/sexual-assault-survivor-a\\_b\\_3104714.html](https://www.huffingtonpost.com/dana-bolger/sexual-assault-survivor-a_b_3104714.html). "End Rape on Campus" is a non-profit founded by student survivors in 2013. *Frequently Asked Questions*, END RAPE ON CAMPUS, <http://endrapeoncampus.org/faq/> (last visited Sept. 12, 2019); Jake New, *Asking for an Apology*, INSIDE HIGHER ED (Aug. 10, 2016), <https://www.insidehighered.com/news/2016/08/10/sexual-assault-victims-urge-colleges-apologize-mishandling-cases>.

19. E.g., Bolger & Brodsky, *supra* note 18.

Survivors used their narratives to suggest that campus sexual assault was not an individual issue, but rather a systemic, institutional issue that requires an institutional response.<sup>20</sup> They connected their experiences on campus to a legal civil rights framework and claimed that existing federal law already prohibited the kind of sex discrimination they experienced.<sup>21</sup> Specifically, they pointed to Title IX of the Educational Amendments of 1972 to argue that schools have a duty to respond to sexual harassment, including sexual violence.<sup>22</sup> Students coordinated with survivors on different campuses to file complaints under Title IX with the Office on Civil Rights, Department of Education (“OCR”).<sup>23</sup> When they found the federal response inadequate, they successfully lobbied OCR to increase enforcement, leading to OCR’s issuance of new policy documents providing colleges with guidance about Title IX enforcement: the 2011 Dear Colleague Letter (“2011 OCR guidance”) and the 2014 OCR Questions and Answers (“2014 Q&A”).<sup>24</sup> The White House created a new task force and national campaign.<sup>25</sup>

OCR complaints under Title IX rose from 11 in 2009 to more than 200 in 2016.<sup>26</sup> Although OCR never sanctioned a college for violating Title IX, the public identification of colleges with active complaints helped survivors access more media coverage and better advocate for changes on individual campuses.<sup>27</sup> Survivors successfully persuaded the Obama Administration to take a more active role responding to campus sexual assault.<sup>28</sup> The federal government became a new character in the student survivor narrative, shifting from an early role of passivity into the role of an active ally. Survivors used their narratives to file federal lawsuits against their colleges using Title IX, creating a financial incentive for schools to

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20. See *supra* notes 2–12 and accompanying text.

21. See Bolger & Brodsky, *supra* note 18; see also Lipka, *supra* note 3.

22. Bolger & Brodsky, *supra* note 18.

23. See *id.*

24. Russlynn Ali, Dear Colleague Letter, U.S. Dep’t of Educ. Office for Civil Rights 1 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter 2011 OCR guidance]; Catherine E. Lhamon, Questions and Answers on Title IX and Sexual Violence, U.S. Dep’t of Educ. Office for Civil Rights 31 (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [hereinafter 2014 Q&A on Title IX and Sexual Violence].

25. The Obama Administration established the White House Task Force to Protect Students from Sexual Assault and launched the *Not Alone* campaign in 2014. *Not Alone Together Against Sexual Assault*, THE WHITE HOUSE (Jan. 22, 2014), <https://obamawhitehouse.archives.gov/1is2many/notalone>.

26. Nick Anderson, *At First, 55 Schools Faced Sexual Violence Investigations. Now the List Has Quadrupled*, WASH. POST (Jan. 18, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/at-first-55-schools-faced-sexual-violence-investigations-now-the-list-has-quadrupled/>.

27. Emily Suran, *Title IX and Social Media: Going Beyond the Law*, 21 MICH. J. GENDER & L. 273, 303–04 (2014).

28. E.g., Allie Grasgreen, *Enforcement for the Enforcers*, INSIDE HIGHER ED (July 16, 2013), <https://www.insidehighered.com/news/2013/07/16/sexual-assault-activists-protest-level-federal-title-ix-enforcement> (describing a protest where student activists presented a petition with nearly 123,000 signatures calling on the Department of Education to better enforce Title IX).

prevent and respond to campus sexual assault.<sup>29</sup> They also used their narratives to help enact law reform at the federal and state level.<sup>30</sup> Some survivor activists wrote law review articles, attended law school, and represent student survivors today.<sup>31</sup>

In just a few years, student survivors used their narratives as a tool to increase awareness about campus sexual assault, change how we think about both perpetrator accountability and school responsibility, and engage the federal government to increase enforcement of their civil rights. But the student survivor narrative may be fading just as quickly as it formed, as a new narrative gains traction in the collective consciousness. Shortly after the survivors' narrative was highlighted in the national media, the power of narrative was also successfully employed by lawyers and advocacy groups on behalf of students disciplined for student conduct violations involving sexual misconduct. These groups sought to create empathy for disciplined students and convince policymakers to rescind OCR guidance. Offering itself as the counterpoint to the survivor narrative, the disciplined student narrative<sup>32</sup> was increasingly covered by the media and included in policy discourse. It resonated with some working in higher education.<sup>33</sup>

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29. See Nancy Chi Cantalupo, *Violating Student Victims' Rights Is Expensive*, TIME (May 15, 2014), <https://time.com/99697/campus-sexual-assault-nancy-chi-cantalupo/>.

30. See, e.g., Nanette Asimov, *Audit on How Universities Deal with Sex Assault*, SF GATE (Aug. 21, 2013, 10:01 PM), <https://www.sfgate.com/news/article/Audit-on-how-universities-deal-with-sex-assaults-4751565.php> (reporting on UC Berkeley student survivors' testimony at the California State Capitol advocating for state oversight of state universities' response to campus sexual assault).

31. E.g., Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 822 (2017); Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L. J. 2106, 2106 (2016); see also *From Remote to Nationally Reknown*, SURVJUSTICE, <https://survjustice.org/about/our-story/> (last visited Sept. 12, 2019) (a public interest law firm founded by student survivor Laura Dunn, with student survivor Carly Mee acting as interim director).

32. I use the term "disciplined student narrative" in recognition that this narrative generally focuses on students a school adjudicated responsible and sanctioned for violating a student conduct code through sexual misconduct. People sharing the disciplined student narrative more often refer to the students as "accused," "falsely accused," "plaintiffs," or "victims," while the student survivor narrative more commonly refers to these same students as "rapists," "perpetrators," or "respondents." I chose the term "disciplined student" to respect the disciplined students' point that the vast majority of them were never found guilty of sexual assault in a criminal court, while still acknowledging their status as students who were adjudicated and found responsible for sexual misconduct through a college administrative process. 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, 71 (2017) (discussing "disciplined-student litigation").

33. See, e.g., Press Release, Elizabeth Bartholet, et al., Harvard Law School Faculty, Re: The Hunting Ground (Nov. 11, 2015), <https://web.archive.org/web/20190501132920/http://hlrecord.org/2015/11/19-harvard-law-professors-defend-law-student-brandon-winston-denouncing-his-portrayal-in-the-hunting-ground/>; Open Letter from David Rudovsky, et al., Penn Law School Faculty, Sexual Assault Complaints: Protecting Complainants and The Accused Students at Universities (Feb. 18, 2015), [http://online.wsj.com/public/resources/documents/2015\\_0218\\_upenn.pdf](http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf).



In 2017, U.S. Department of Education Secretary Betsy DeVos provided equal meeting time to disciplined student advocates and campus sexual assault survivors, signaling that the disciplined student narrative had achieved equal standing in policy debates.<sup>34</sup> Following these meetings, she referenced both narratives in a speech about campus sexual assault, referring to both “survivors” [of sexual assault] and “victims of a lack of due process,” implying parity between the issues of campus sexual assault and inadequate procedural protections in campus disciplinary processes.<sup>35</sup> Secretary DeVos credited the disciplined student narrative as the reason for her decision to rescind the 2011 OCR guidance and 2014 OCR Q&A.<sup>36</sup> In November 2018, the Department of Education’s proposed regulation for Title IX included several elements of the disciplined student narrative, demonstrating the success of the disciplined student narrative in changing policy.<sup>37</sup> The success was not limited to a conservative administration. When the California legislature provided democratic Governor Jerry Brown with a bill that would have codified many of the equitable protections contained in the 2011 OCR guidance into state law, he vetoed it on October 15, 2017.<sup>38</sup>

The disciplined student narrative is employed both by advocacy groups with a good-faith concern about procedural protections for students and groups engaged in “campaign[s] of misogyny and misinformation about sexual assault.”<sup>39</sup> The unexpected alliance of people who otherwise self-identify with conflicting political beliefs seemingly coming together to use the disciplined student narrative to advocate for changes to Title IX makes the narrative particularly interesting to explore. This Article deconstructs the disciplined student narrative into the different elements that led to its success. Part I introduces narrative in legal practice and Narrative Policy Framework (“NPF”). Part II locates the disciplined student narrative in lawsuits, the media, and academia. Part III addresses the specific elements of the disciplined student narrative: characters, setting, events and plot, rhetoric, and moral of the story.

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34. Andrew Kreighbaum, *DeVos Hints at Changes in Title IX Enforcement*, INSIDE HIGHER ED (July 14, 2017), <https://www.insidehighered.com/news/2017/07/14/after-full-day-meetings-title-ix-devos-says-improvements-needed>.

35. Susan Svrluga, *Transcript: Betsy DeVos’s Remarks on Campus Sexual Assault*, WASH. POST (Sept. 7, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devos-remarks-on-campus-sexual-assault/?noredirect=on&utm\\_term=.fac15a187c6d](https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devos-remarks-on-campus-sexual-assault/?noredirect=on&utm_term=.fac15a187c6d).

36. *Id.*

37. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) [hereinafter 2018 Proposed Title IX Regulation].

38. Letter from Edward G. Brown, Jr., Office of the Governor, to Members of the California Senate, (Oct. 15, 2017), [https://web.archive.org/web/20171127104209/https://www.gov.ca.gov/docs/SB\\_169\\_Veto\\_Message\\_2017.pdf](https://web.archive.org/web/20171127104209/https://www.gov.ca.gov/docs/SB_169_Veto_Message_2017.pdf).

39. Brodsky, *supra* note 31, at 826.

## I. THE POWER OF NARRATIVES IN LAWYERING AND ADVOCACY

Individuals and societies are defined through the stories we share. Narrative (or narrative discourse) is the way a story is transmitted to others.<sup>40</sup> Narratives announce meaning and shape behavior, looking backward and forward, explaining and constraining.<sup>41</sup> They are not bound by a story's order or duration, but rather provide the organization for our "understanding of time."<sup>42</sup> Lawyers often serve as storytellers by constructing narratives to argue cases or influence public policy.<sup>43</sup> Narratives provide a human-centered story to make lawyers' arguments more convincing by inviting an audience to create an emotional connection to the legal problem and empathize with the client.<sup>44</sup>

### A. *The Role of Narrative in the Law*

Narratives are a topic of study in many academic disciplines. Legal narrative theory teaches lawyers how to use narratives in presenting legal cases. Legal narrative theory identifies three main components of compelling narratives: (1) characters, (2) events, and (3) rhetoric.<sup>45</sup> In constructing narratives, storytellers choose which characters to include and which characters to center the story around.<sup>46</sup> They define characters by providing traits, motivations, intentions, emotions, and beliefs, and by describing characters' agency over their own lives.<sup>47</sup> The main characters are usually described in terms that make them likable, with some forgivable flaws, in order to encourage an audience to root for their success.<sup>48</sup> Narrators choose which events to include and which to exclude from the story. They are not bound to the timeline of the story's facts, but rather develop their plot and create new meaning through choices about how they present a sequence of events.<sup>49</sup> They are also not bound by temporal accuracy. They transmit the importance of an event in the narrative to the audience by dedicating a disproportionate amount of time to detailing it while glossing over other longer events.<sup>50</sup>

Rhetoric is the way meaning is transmitted through a narrative. It's how a narrator uses the story to persuade the audience.<sup>51</sup> Legal scholars identify four pieces of the rhetorical power of narrative as: (1) causation, (2) normalization, (3) masterplot, and (4) closure.<sup>52</sup> Causation is the way in which authors sequence events

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40. CAROLYN GROSE & MARGARET E. JOHNSON, *LAWYERS, CLIENTS, AND NARRATIVES* 4 (2017).

41. See David M. Engel, *Origin Myths: Narratives of Authority, Resistance, Disability, and Law*, 27 L. & SOC'Y REV. 785, 790 (1993).

42. GROSE & JOHNSON, *supra* note 40.

43. Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 487 (1995).

44. GROSE & JOHNSON, *supra* note 40, at 6.

45. *Id.* at 8–14.

46. *Id.* at 10.

47. *Id.*

48. *Id.*

49. *Id.* at 13.

50. *Id.*

51. *Id.* at 14–20.

52. *Id.* at 14.

into order to explain cause and effect.<sup>53</sup> Normalization describes how a compelling narrative is both internally and externally consistent, in that it aligns with our understanding of how the world works.<sup>54</sup> Masterplots are stories we repeat that connect with our cultural values and fears.<sup>55</sup> These “stock scripts” can lend credibility to narratives through “enormous emotional capital that can be drawn on in constructing a narrative.”<sup>56</sup> Masterplots include recurring characters or “types” that provide archetypes we expect to see and know how to categorize. Last, narratives need an ending or closure. Closure occurs when conflict is resolved or when expectations are filled or violated.<sup>57</sup> In legal narratives, closure is obtained by persuading the audience who should be responsible for the conflict.<sup>58</sup>

### ***B. Narrative Policy Framework***

Narratives and counternarratives play an essential role in policy debates.<sup>59</sup> The Narrative Policy Framework (“NPF”), developed by political scientists as a tool for understanding and predicting policy outcomes, recognizes how stakeholders strategically deploy narratives to influence policy.<sup>60</sup> The framework identifies four core elements in policy narratives: (1) characters, (2) setting, (3) plots, and (4) morals of the story (policy solutions).<sup>61</sup> The characters are generally categorized as victims harmed by the described problem, villains who intentionally or unintentionally cause the harm, and the heroes that provide or promise relief from the harm.<sup>62</sup> “The setting consists of policy-consequential facts,” which may include the legal background of the policy debate, “geography, economic conditions, and other factors deemed relevant by policy actors involved or associated with the public policy” at issue.<sup>63</sup> The moral of the story is the policy solution promoted by the policy narrative.<sup>64</sup> “The plot links the narrative elements by establishing relationships between characters, the policy setting, and the moral of the story.”<sup>65</sup>

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53. *Id.* at 15.

54. *Id.*

55. *Id.* at 17.

56. *Id.*

57. *Id.* at 20.

58. *Id.*

59. Backlash narratives also play an important role in policy debates. *See* Reva B. Siegel, *Community in Conflict: Same-sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1747 n.89 (2017) (“As I have observed: Backlash arcs across the decades because there are natural incentives in democratic politics to appeal to those aggrieved by change, whether change transpires by judicial decision, the great civil rights statutes of the 1960s, or the efforts of local government to ensure a modicum of integration in basic social institutions. Backlash is best understood, not as the repression of democratic politics, but its expression: backlash escalates as movements, parties, and officials embrace the cause of those who resent change, in the hopes of winning their support.”).

60. *See* Garry Gray & Michael D. Jones, *A Qualitative Narrative Policy Framework? Examining the Policy Narratives of US Campaign Finance Regulatory Reform*, 31 PUB. POL’Y & ADMIN. 193, 194 (2016).

61. *Id.* at 196.

62. *Id.*

63. *Id.*

64. *Id.* at 197.

65. *Id.* at 196.

In identifying and deconstructing the disciplined student narrative into its components, I borrow from both legal practice and NPF. The disciplined student narrative is both a narrative created by lawyers suing colleges on behalf of individual clients and a narrative developed by advocacy organizations promoting policy change. Its success is due, at least in part, to its use of normative values that render its components difficult to identify and critique.<sup>66</sup> Therefore, the deconstruction of the disciplined student narrative is a necessary first step to engaging in meaningful policy debate about campus sexual assault.

## II. LOCATING THE DISCIPLINED STUDENT NARRATIVE

Public policy research focuses on narratives shared by advocacy groups and the media.<sup>67</sup> The disciplined student narrative is somewhat unusual in that it gained traction through lawsuit pleadings. Federal and state lawsuits provide an ideal forum for the development and dissemination of the disciplined student narrative. One of an attorney's goals in drafting a complaint in a civil lawsuit is to create a compelling narrative on behalf of a client. Courts generally allow disciplined students to file anonymously through the use of a pseudonym, providing students and their attorneys with an opportunity to develop the narrative while limiting public scrutiny of individual disciplined students.<sup>68</sup> Facts pled in disciplined student lawsuits referencing the school's investigation and disciplinary process, as well as the assault itself, are often the only public record of those events, because the Federal Educational Rights and Privacy Act ("FERPA") prevents colleges and victims from releasing investigation details.<sup>69</sup> Further, disciplined student lawsuits rarely go to trial, leaving the disciplined student's written description or denial of the sexual misconduct as the only one available to the public.<sup>70</sup>

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66. *Infra* Section III.D.

67. See Elizabeth Shanahan et al., *Narrative Policy Framework: The Influence of Media Policy Narratives on Public Opinion*, 39 POL. & POL'Y 373, 377 (2011).

68. Both federal and state courts routinely permit students disciplined for sexual misconduct to file lawsuits under the pseudonym "John Doe" against colleges, administrators, and the original complainants. See, e.g., *Doe v. Brown Univ.*, No. 1:15-CV-00144 (D.R.I. Apr. 13, 2015); *Doe v. Occidental College*, No. BS 156253 (Cal. Super. Ct. June 29, 2015). There are rare exceptions that limit a disciplined student's ability to maintain anonymity, such as popular college athlete's notable absence from a team event. See, e.g., John Walters, *Yale Basketball Star Expelled for Sexual Misconduct; Vows to Sue*, NEWSWEEK (Mar. 14, 2016), <https://www.newsweek.com/yale-basketball-star-expelled-vows-sue-436560>. There are also a few disciplined students whose names were disclosed by columnists (presumably with the students' permission). See, e.g., Robin Wilson, *Presumed Guilty: College Men Accused of Rape Say the Scales Are Tipped Against Them*, CHRON. OF HIGHER EDUC. (Sept. 1, 2014), <https://www.chronicle.com/article/Presumed-Guilty/148529>.

69. 20 U.S.C. § 1232g (a), (d) (2012).

70. E.g., Amended Complaint at 212–14, 219–21, *Doe v. Cornell Univ.*, No. 1:16-CV-03531-WHP (S.D.N.Y. July 7, 2016) (student disciplined by Cornell for sexually assaulting another student describes the assault in his lawsuit against Cornell as one in which he was actually the victim and complainant was the aggressor).

Although common in any type of litigation, it is still important to note that the vast majority of disciplined student lawsuits never make it to trial. Judges dismiss most of the suits for the failure to state a claim, and other cases end in undisclosed settlements, leaving the facts in the disciplined student complaints unchecked. Consequently, in the relatively

Lawsuit complaints filed by disciplined students provide an easy source of information for the media and disciplined student advocacy groups. Local newspapers cover the cases by repeating the disciplined student's version of the assault and allegations against the school.<sup>71</sup> National media outlets share the disciplined student narrative by reporting on lawsuits alleging particularly egregious facts and reporting about trends of disciplined students claiming their schools treated them unfairly.<sup>72</sup> Just as the media helped individual student survivors of sexual assault and anti-rape advocacy groups bring the problem of both campus sexual assault and colleges' inadequate responses to campus sexual assault to the public's attention, the media provided a national forum for disciplined students' attorneys and advocates to further amplify their narrative.<sup>73</sup> Attorneys representing disciplined students, particularly those who represent multiple clients against different colleges, leverage media coverage to share the disciplined student narrative and influence public opinion about campus sexual assault.<sup>74</sup> And just as student survivors could

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small number of campus cases in which colleges find students responsible for sexual misconduct, the only publicly available description of the assault is one in which the disciplined student denies the assault ever occurred or blames the complainant. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 3 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) (noting that most civil state and federal cases do not make it to trial).

71. E.g., Edmund DeMarche, *Texas College Student Sues Over Possible Expulsion for Alleged Sex Assault*, FOX NEWS (Mar. 1, 2016), <http://www.foxnews.com/us/2016/03/01/texas-college-student-sues-over-possible-expulsion-for-alleged-sex-assault.html> ("A physics major one semester away from graduation is suing to stop University of Texas-Austin from expelling him based on the unproven accusation he sexually assaulted a woman in a drunken, off-campus encounter."); Teresa Watanabe, *Ruling in Favor of UC Student Accused of Sex Assault Could Ripple Across U.S.*, L.A. TIMES (July 15, 2015), <http://www.latimes.com/local/education/la-me-ucsd-male-student-20150715-story.html> (reporting about a ruling in a lawsuit filed by a man found responsible for sexual misconduct by stating, "It began as a typical college hookup: two students at UC San Diego met at a party last year, began drinking and ended up in bed. The encounter snowballed into a sexual assault complaint, university investigation and a finding that the male student should be suspended.").

72. E.g., Tovia Smith, *Some Accused of Sexual Assault on Campus Say System Works Against Them*, NPR (Sept. 3, 2014), <http://www.npr.org/2014/09/03/345312997/some-accused-of-campus-assault-say-the-system-works-against-them>; Wilson, *supra* note 68; Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, THE ATLANTIC (Sept. 6, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/> [hereinafter Yoffe, *The Uncomfortable Truth*].

73. E.g., Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014), [http://www.slate.com/articles/double\\_x/doublex/2014/12/college\\_rape\\_campus\\_sexual\\_assault\\_is\\_a\\_serious\\_problem\\_but\\_the\\_efforts.html](http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html) [hereinafter Yoffe, *The College Rape Overcorrection*] (beginning an editorial by introducing a story of campus sexual assault as described by a disciplined student in his lawsuit against a college).

74. See, e.g., Andrew T. Miltenberg, NESENOFF & MILTENBERG LLP, <http://nmllplaw.com/law/andrew-t-miltenberg/> (last visited Sept. 11, 2019) (Andrew Miltenberg, a Boston attorney who represented more than 150 students in campus disciplinary cases in 30 states, was described by Newsweek as the "go-to attorney for student accused of sexual assault," was quoted by several major newspapers, and serves on the board of Families Advocating for Campus Equality ("FACE")); Eric Rosenberg, ROSENBERG BALL CO., LPA, <http://www.rosenbergball.com/our-attorneys/eric-rosenberg/> (last visited Sept. 11, 2019)

look to a handful of journalists for access to a larger audience and a nuanced treatment of their stories, a handful of journalists and columnists reliably write about campus sexual assault through the lens of the disciplined student narrative.<sup>75</sup>

Advocacy organizations promoting the disciplined student narrative tend to fall within one of three categories: organizations formed by parents of students disciplined or accused of campus sexual misconduct;<sup>76</sup> conservative organizations focused more broadly on promoting individual rights in higher education or critiquing the Obama Administration more generally;<sup>77</sup> and men's rights groups.<sup>78</sup>

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(Eric Rosenberg, who states that he represented falsely accused students in 18 lawsuits and dozens of university-level disciplinary proceedings across the country, was quoted by several media outlets and serves on the Board of FACE, as well as men's rights group, Stop Abusive and Violent Environments ("SAVE")). California attorney Mark Hathaway represented at least 60 students and faculty accused of sexual misconduct and was quoted by several news outlets. See Teresa Watanabe & Rosanna Xia, *California Colleges Vow to Press on Against Sexual Assault Despite Any Federal Rollback in Protections*, L.A. TIMES (Sept. 7, 2017, 8:40 PM), <http://www.latimes.com/local/lanow/la-me-california-sexual-assault-20170907-story.html>.

75. For example, Emily Yoffe, a journalist and contributing editor to *The Atlantic*, wrote several popular articles about campus sexual assault highlighting the disciplined student narrative. *Emily Yoffe*, THE ATLANTIC, <https://www.theatlantic.com/author/emily-yoffe/> (last visited Sept. 11, 2019). Cathy Young, a contributing editor at *Reason* magazine and columnist for *Newsday*, drafted editorials for different national media outlets highlighting the disciplined student narrative. *Cathy Young*, NEWSDAY, <https://www.newsday.com/opinion/columnists/cathy-young> (last visited Sept. 11, 2019). George F. Will, a conservative columnist for the *Washington Post* wrote popular columns from a disciplined student perspective. *George Will*, WASH. POST, [https://www.washingtonpost.com/people/george-f-will/?utm\\_term=.b60142da9ff6](https://www.washingtonpost.com/people/george-f-will/?utm_term=.b60142da9ff6) (last visited Sept. 11, 2019).

76. E.g., *About Us*, FAMILIES ADVOCATING FOR CAMPUS EQUALITY, <https://www.facecampusequality.org/about-us> (last visited Sept. 11, 2019) (FACE, founded in 2013 by three mothers of sons accused of campus sexual misconduct); see also SAVE OUR SONS, <https://helpsaveoursons.com/> (last visited Sept. 11, 2019).

77. E.g., *Mission*, THE FOUND. FOR INDIVIDUAL RTS. EDUC., <https://www.thefire.org/about-us/mission/> (last visited Sept. 11, 2019) (the Foundation for Individual Rights in Education ("FIRE"), founded in 1999, has a mission to defend the "freedom of speech, legal equality, due process, religious liberty, and sanctity of conscious."). FIRE's executive director, Robert Shibley, frequently comments about the rights of accused and disciplined students to major media outlets and wrote a book criticizing OCR's interpretation of Title IX. See *Our People*, THE FOUND. FOR INDIVIDUAL RTS. EDUC., <https://www.thefire.org/about-us/staff/> (last visited Sept. 11, 2019). FIRE's funders include conservative foundations, such as the Koch Brothers. 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>. The Heritage Foundation, a politically conservative think tank, created commentary on campus sexual assault using the disciplined student narrative. Hans A. von Spakovsky & Elizabeth Slattery, *Campus Sexual Assault: Understanding the Problem and How to Fix It*, HERITAGE FOUND. (July 25, 2017), <https://www.heritage.org/education/commentary/betsy-devos-stands-due-process-rights-campus-sexual-assault-cases>.

78. E.g., *About SAVE*, STOP ABUSIVE & VIOLENT ENV'TS, <http://www.saveservices.org/info/about/> (last visited Sept. 11, 2019). SAVE, a men's rights organization that advocates to prevent false allegations of domestic violence and sexual assault, created articles about campus sexual assault using the disciplined student narrative and met with Secretary DeVos. SAVE was identified by the Southern Poverty Law Center as

Although the specific policy goals of these different types of advocacy groups vary based on the nature and purpose of each group, the disciplined student narrative they employ to work toward those goals is relatively consistent, aided by overlapping narrators. Attorneys drafting the narratives in disciplined student lawsuit pleadings also serve on the boards of different advocacy organizations and provide interviews to the media about campus sexual assault through the lens of the disciplined student narrative.<sup>79</sup> The disciplined student narrative is also featured and developed through letters, editorials, and scholarship produced by professors working in higher education, particularly law school faculty.<sup>80</sup> Like journalists and advocacy groups, faculty in higher education often highlight narratives from disciplined student lawsuit pleadings or reference personal experience with individual disciplined students.<sup>81</sup> Disciplined student lawsuits, in turn, often cite interest group publications, media articles and editorials, letters, and research from faculty in higher education to support their pleadings.<sup>82</sup> Consequently, the disciplined student narrative is at times self-referencing and refined through this cycle.

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a misogynistic organization and part of the “manosphere.” *Misogyny: The Sites*, SOUTHERN POVERTY L. CTR. (Mar. 1, 2012), <https://www.splcenter.org/fighting-hate/intelligence-report/2012/misogyny-sites>. The National Coalition for Men Carolinas (“NCFMC”) is another men’s rights group that uses the disciplined student narrative to advocate for changes to Title IX interpretation. *About Us*, NAT’L COALITION FOR MEN CAROLINAS, <https://www.ncfmc Carolinas.com/> (last visited Sept. 11, 2019).

79. *Rosenberg*, *supra* note 74. There is some overlap between members of the different types of advocacy organizations. For example, one of FACE’s co-founders, Cynthia Garrett, also sits on the board of SAVE.

80. For example, Professor KC Johnson, a history professor at Brooklyn College and CUNY Graduate Center, wrote several books and dozens of editorials and blogs about campus sexual assault. *KC Johnson, CV*, KC JOHNSON, <https://kc-johnson.com/cv/> (last visited Sept. 11, 2019). Stuart Taylor, an attorney, author, and contributing editor to the *National Review*, wrote books and editorials about campus sexual assault, as well as affirmative action and political correctness. *Stuart S. Taylor, Jr.*, FEDERALIST SOC’Y, <https://fedsoc.org/contributors/stuart-taylor> (last visited Sept. 11, 2019); *see also* Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement: Backing Off the Hype in Title IX Enforcement*, 128 HARV. L. REV. F. 103 (2015); Letter from Mike Adams, et al., Open Letter Regarding Inequitable Victim-Centered Practices (Feb. 7, 2018), <http://www.saveservices.org/wp-content/uploads/Victim-Centered-Practices-Open-Letter-FINAL.docx.pdf> (providing an example of a letter by a men’s rights group featuring signatures of legal faculty critiquing college sexual misconduct investigation techniques); Barthetalet, et al., *supra* note 33; Jeannie Suk Gersen, *Shutting Down the Conversations about Rape at Harvard Law*, THE NEW YORKER (Dec. 11, 2015), <https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school>; Glenn Harlan Reynolds, *Glenn Reynolds: The Unilateral War on College Men*, USA TODAY (Sept. 30, 2015, 11:01 AM), <https://www.usatoday.com/story/opinion/2015/09/30/glenn-reynolds-catherine-lhamons-rape-title-ix-column/73019678/> (editorial by a law professor at the University of Tennessee); Letter from David Rudovsky, et al., *supra* note 33.

81. *E.g.*, Halley, *supra* note 80; 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> [hereinafter Bazelon, *I’m a Democrat*].

82. *E.g.*, Complaint at 10, 13–14, 17–18, *Doe v. Univ. of Dayton*, No. 3:17-CV-00134 (S.D. Ohio Apr. 20, 2017) [hereinafter *Complaint Against Dayton*] (including citations

### III. THE CONSTRUCTION OF THE DISCIPLINED STUDENT NARRATIVE

#### A. *Characters*

Characters are the heart of the policy narrative. Advocacy groups use characters to connect with the audience and exploit cognition. By deciding which actor to make the protagonist, storytellers tell the audience who is the most important character in the story. By placing characters in familiar roles, such as the hero or villain, advocacy groups tell audiences how to process the story and who to root for. By carefully selecting narrators, advocacy groups assure the audience of the story's validity.

##### 1. *Centering Disciplined Students as the Protagonists*

The disciplined student narrative was developed as a response to survivor narratives.<sup>83</sup> It presents a different narrative about campus sexual assault, told from the perspective of the student found responsible for sexually assaulting another student. The disciplined student becomes the protagonist, and the survivor of the sexual assault either disappears or fades into the background to fill a minor antagonist role. The disciplined student narrative humanizes a disciplined student by introducing him<sup>84</sup> as an accomplished and caring young man through the facts section in his lawsuit against the college, the media coverage of his lawsuit, or information provided by advocacy groups often led by disciplined students' mothers or attorneys. In high school, he "earned a cumulative GPA of 4.06 and took 10 Advanced Placement courses . . . was nominated Class President . . . and was a member of the basketball, volleyball, swimming and football teams"<sup>85</sup> or he "obtained perfect scores on the SAT II in math and chemistry . . . and was also a varsity athlete in cross country, a member of the track and tennis teams, [who] started an NGO group on campus . . ." <sup>86</sup> His mom describes him as "super-smart, kind, conscientious, honest, and humble . . . [and an] Eagle Scout . . . and a National Merit Finalist [with] his pick of many wonderful colleges and universities with

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to a SAVE Special Report, a Heritage Foundation report, articles by Emily Yoffe and Heather MacDonald, a book by Stuart Taylor and KC Johnson, a law review article by Professor Janet Halley, and the *Open Letter from Sixteen Members of Penn Law School Faculty*); Complaint at 7, 12, *Rossley v. Drake Univ.*, No. 4:16-CV-00623 (S.D. Iowa Dec. 1, 2016) (including citations to law review articles by Professors Janet Halley and Emily Safko and a FIRE update in a Heritage Foundation report).

83. See Lipka, *supra* note 3.

84. The overwhelming majority of disciplined student lawsuits are filed by (cis-gender) men. *But see* Kevin Grasha, *Lawsuit: Female UC Student Accused of Sexual Misconduct Is Victim of 'Slut Shaming,'* CINCINNATI.COM | ENQUIRER (May 10, 2018), <https://www.cincinnati.com/story/news/2018/05/10/female-uc-student-accused-sexual-misconduct-victim-slut-shaming/598268002/>.

85. Complaint at 4, *Doe v. Regents of the Univ. of Cal.*, No. 2:15-CV-02478 (C.D. Cal. Apr. 3, 2015).

86. Complaint at 19, *Prasad v. Cornell Univ.*, No. 5:15-CV-00322-TJM-DEP (N.D.N.Y. Mar. 19, 2015).



scholarships . . . .”<sup>87</sup> In college, he “is a double major . . . in Accounting and Finance . . . a NCAA Division 1 athlete . . . [who] volunteered with the Senior Olympics . . . .”<sup>88</sup> The narrator recounts how excited the disciplined student was to attend the college of his dreams and how involved he was in his campus community. The young men featured in the disciplined student narratives are not simply the “boys next door,” but rather those with especially bright futures with plans to attend medical or law school or obtain other high-paying jobs.<sup>89</sup> Media coverage of disciplined student lawsuits amplifies this carefully crafted character introduction, shifting the focus of campus sexual assault to disciplined students.<sup>90</sup> The personal details bolster the credibility of the disciplined student and help the public create an emotional connection to him, thereby achieving one of the primary goals of a strong narrative. Beginning a campus sexual assault story with the introduction to this new protagonist helps the public suspend the skepticism normally employed by listeners when processing the version of a story told by someone an investigator or hearing panel already found responsible for sexual misconduct. The presentation of the disciplined student as a plaintiff suing his school for justice also aids in the perception that he is innocent. It makes it easier for an audience to view the anonymous young man as a bright student with a promising future derailed by false allegations or an inconsequential miscommunication, rather than as a man who sexually assaulted another student. The successful use of narrative to sympathetically introduce the character of disciplined student provides the audience with permission to root for him.<sup>91</sup>

The disciplined student narrative shared through lawsuits and media accounts further encourages empathy for disciplined students by providing only the disciplined student’s account and not forcing the audience to reconcile this with a sexual assault victim’s account or confront the victim’s pain.<sup>92</sup> The narrative creates

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87. E.g., *The Mother of an Accused Student, Who Reached a Settlement Agreement With the School After Two Years*, FAMILIES ADVOCATING FOR CAMPUS EQUALITY, <https://www.facecampusequality.org/new-page> (last visited Sept. 20, 2019).

88. Plaintiff’s First Amended Complaint at 3, *Henry v. Del. State Univ.*, No. 1:13-CV-02005-SLR (D. Del. Dec. 27, 2013).

89. E.g., Complaint at 8, *Doe v. Colgate Univ.*, No. 5:15-CV-01069-LEK-DEP (N.D.N.Y. Aug. 31, 2015) (noting John Doe “planned to attend medical school”); Complaint at 15, *Doe v. Yale Univ.*, No. BC579833 (Cal. Sup. Ct. Apr. 24, 2015) (noting John Doe’s “goal to attend law school or graduate school at a top-flight university”).

90. E.g., Yoffe, *The Uncomfortable Truth*, *supra* note 72 (opening her article criticizing campus rape policy by introducing a student disciplined in connection with a campus sexual misconduct case: “Kwadwo ‘Kojo’ Bonsu, 23, was on track to graduate in the spring of 2016 with a degree in chemical engineering from the University of Massachusetts at Amherst. Bonsu, who was born in Maryland, is the son of Ghanaian immigrants. He chose UMass because it gave him the opportunity to pursue his two passions, science and music. He told me he hoped to get a doctorate in polymer science or chemical engineering. At UMass he was a member of the National Society of Black Engineers. He also joined a fraternity (he was the only black member), played guitar in a campus jazz band, and tutored jazz guitarists at a local high school.”).

91. GROSE & JOHNSON, *supra* note 40, at 6 (commenting that “audiences root for (or against) characters in the narrative”).

92. While the practice of humanizing your client is good lawyering, it is still important to note its impact on victims. *See, e.g., Baker, supra* note 7 (quoting a victim impact

an alternative story about campus sexual misconduct without any sexual misconduct. It encourages the audience to set aside any questions of culpability to instead prioritize concern for disciplined students. The successful shift in character roles is evidenced in the 2018 proposed Title IX regulation, which centers a key analysis of a sex discrimination civil rights law through a disciplined student lens by comparing male respondents to one another while omitting an equitable comparison of student complainants.<sup>93</sup>

## 2. *Reassigning the Roles of Victims, Villains, and Heroes*

Policy narratives categorize characters into specific roles. In the campus sexual assault survivor narrative, those roles are clear. The victims of campus sexual assault are the identifiable victims. Both the students who sexually assaulted them and the school administrators who failed to appropriately respond to the sexual assault are the villains, each causing the victim harm. The heroes change with the timing of the story, but may include the other survivors who supported them; the advocates or attorneys who assisted them in navigating various legal systems; or OCR after it explicitly outlined its expectations for school responses to sexual violence and stated its intention to investigate complaints against colleges out of compliance with those guidelines.

In order to effectively argue that campus sexual assault policy should be reversed, disciplined students reassigned the character roles in the campus sexual assault narrative. The disciplined student narrative accomplished this transition by casting disciplined students as the victims through several steps. First, the disciplined student narrative adopts terminology to remove some of the taint of identity as perpetrators of sexual misconduct.<sup>94</sup> Through narrators, disciplined

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statement written by a survivor of campus rape for a related criminal case: “‘When I read about me like this, I said, this can’t be me . . . . In the next paragraph, I read something that I will never forgive; I read that according to him, I liked it. I liked it. Again, I do not have words for these feelings. . . . [A]t the bottom of the article, after I learned about the graphic details of my own sexual assault, the article listed his swimming times. She was found breathing, unresponsive with her underwear six inches away from her bare stomach curled in fetal position. By the way, he’s really good at swimming. Throw in my mile time if that’s what we’re doing. I’m good at cooking, put that in there, I think the end is where you list your extracurriculars to cancel out all of the sickening things that’ve happened . . . . You made me a victim. In newspapers my name was “unconscious intoxicated woman,” ten syllables, and nothing more than that. For a while, I believed that that was all I was. I had to force myself to relearn my real name, my identity. To relearn that this is not all that I am.’”).

93. For example, in determining the appropriate standard of evidence for schools to use in campus investigations and adjudications involving sexual harassment (including sexual assault), the proposed regulation advised schools to use students responding to complaints as the center of the analysis by instructing schools to compare them to other students responding to serious nonsexual harassment violations, as well as to employees responding to complaints of sexual harassment. The proposed regulation explicitly allows schools to use a higher standard of evidence in assessing a student’s complaint of sexual harassment than they use in assessing other types of complaints of student misconduct. 2018 Proposed Title IX Regulations, *supra* note 37, at 61477.

94. See Fred Barbash, *‘Toxic Environment’ for Sons Accused of Campus Sex Offenses Turns Mothers Into Militants*, WASH. POST (Aug. 29, 2016, 1:59 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2016/08/29/toxic-environment->

students shed labels like “rapists,” “students suspended for sexual misconduct,” or “disciplined students” and instead use terms such as “the accused,” “the falsely accused,” “other victims,” or “real victims.”<sup>95</sup> Understanding that an audience is less sympathetic to men suspended or expelled from school for committing sexual misconduct, the disciplined student narrative uses terminology to shift back in time before an investigation or adjudication of responsibility occurred—back to when there were merely allegations. Media accounts of disciplined student lawsuits and advocacy efforts assist the narrative in this transition by employing the “accused” label to identify disciplined students and using the term “alleged” to describe the sexual misconduct.<sup>96</sup> Academic scholarship often mirrors this purposeful shift in terminology as well. It is instrumental in shifting empathy onto disciplined students and casting doubt not only on the validity of school findings against them, but also on the veracity of the students who reported the sexual assaults. By describing disciplined students as “the accused,” narrators remove them from their automatic role as villains and grant audiences permission instead to view disciplined students as victims.

The disciplined student narrative also suggests that the disciplined students are the victims in the narrative—rather than the villains—through its explicit description of experienced harms. Lawsuits and media coverage of lawsuits describe the harm experienced by disciplined students by listing the same symptoms of trauma identified by survivors of sexual assault; including anxiety, depression, and PTSD.<sup>97</sup> They further parallel language utilized by survivors in describing the harm to them in terms of the impact on their educational trajectory and career future. They share their fear that they will be branded sex offenders and overwhelmingly file under the pseudonym “John Doe,” asking the court to protect their privacy and

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for-sons-accused-of-campus-sex-offenses-turns-mothers-to-militants/?utm\_term=.6021b1221a08; Anemona Hartocollis et al., *‘Willing to Do Everything,’ Mothers Defend Sons Accused of Sexual Assault*, N.Y. TIMES (Oct. 22, 2017), <https://www.nytimes.com/2017/10/22/us/campus-sex-assault-mothers.html>; e.g., Wilson, *supra* note 68 (quoting FACE founder, Judith Grossman: “in their rush to judgment, colleges are now substituting one class of victims for another . . . [f]undamental fairness has become a pawn in the gender wars.”); see also Svrluga, *supra* note 35 (noting Education Secretary DeVos referencing both “survivors” and “victims of a lack of due process” in a speech about campus sexual assault).

95. Svrluga, *supra* note 35.

96. E.g., Molly Jackson, *Campus Assault Claims: 75 Men Sue for Putting Accusers’ Rights Before Theirs*, CHRISTIAN SCI. MONITOR (Mar. 24, 2016), <http://www.csmonitor.com/USA/Education/2016/0324/Campus-assault-claims-75-men-sue-for-putting-accusers-rights-before-theirs> (“Many schools punish alleged rapists, even if the case isn’t reported to the police.”); Ray Stern, *Expelled ASU Grad Student Accused of Rape Suing State for \$4.1 Million*, PHX. NEW TIMES (Jan. 7, 2019, 7:00 AM), <https://www.phoenixnewtimes.com/news/expelled-asu-grad-student-accused-of-rape-sues-arizona-11092115>.

97. E.g., Complaint Against Dayton, *supra* note 82, at 57 (student suspended for two years describing the impact of the student conduct process, including a diagnoses of PTSD, with symptoms including “flashbacks related to [the University’s] conduct, depression, and difficulty sleeping and interacting socially.”); Complaint at 33, *Oirya v. Brigham Young Univ.*, No. 2:16-CV-01121-BSJ (D. Utah Nov. 1, 2016) [hereinafter *Complaint Against Brigham Young*].

safety—just as the courts generally protect the privacy of victims of sexual assault.<sup>98</sup> This again promotes the idea that they are also victims in need of court protection and that they are similarly situated to sexual assault victims.<sup>99</sup> Advocates disseminating the disciplined student narrative ask the audience to suspend feelings about what appropriate sanctions might be for a student who sexually assaulted another student and to instead imagine what it would feel like if your son or partner experienced the kinds of harm that flow from school sanctions if he were a victim of a false accusation.<sup>100</sup>

By casting the school and federal government as the primary “villains,” the disciplined student narrative further persuades the audience to see the disciplined student in the role of victim. Rather than view the disciplined student as the aggressor against another student, the disciplined student becomes the David to the federal government’s Goliath. The disciplined student as the protagonist has limited agency. He was simply “in the wrong place at the wrong time” or the helpless victim of a vindictive lie.<sup>101</sup> The disciplined student narrative further finds purchase of its claim to victimhood through its argument that colleges do not provide disciplined students with adequate procedural protections. The narrative suggests that disciplined students are “victims of due process,” a term reiterated by Secretary DeVos.<sup>102</sup>

Disciplined student narratives also recast the student survivors in the narrative from “victims” of sexual assaults (as determined by a school administrative process) into “accusers.”<sup>103</sup> The victims of sexual assault are either erased from the

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98. *E.g.*, Plaintiff’s Memorandum of Law in Support of Motion to Proceed under Pseudonym and for Protective Order, *Doe v. Allegheny Coll.*, No. 1:17-CV-00031-BR (W.D. Pa. Feb. 3, 2017).

99. *See, e.g.*, Memorandum Opinion, *Doe v. Alger, et al.*, No. 5:15-CV-00035 (W.D. Va. Mar. 31, 2016).

100. *E.g.*, Lara Bazelon, *The Landmark Sexual Assault Case You’ve Probably Never Heard Of*, POLITICO (Apr. 18, 2017), <https://www.politico.com/magazine/story/2017/04/sexual-assault-title-ix-trump-california-san-diego-215037> (quoting Professor Janet Halley: “I would ask people to think, what would it be like if your brother or son was expelled. It’s not nothing. It’s the end of a life plan.”).

101. *E.g.*, Smith, *supra* note 72 (Attorney Andrew Miltenberg explaining: “I think “witch hunt” is a dramatic phrase, but I would tell a group of young men right now, “woe is to you if someone makes an allegation”. . . . This young man was in the wrong place at the wrong time, in the sense that there was an attempt by the university officials to say, “Oh, yeah? Well, watch how we do this one!””).

102. *E.g.*, Wilson, *supra* note 68 (quoting FACE founder, Judith Grossman: “Fundamental fairness has become a pawn in the gender wars . . . in their rush to judgment, colleges are now substituting one class of victims for another.”); *see also* Svrluga, *supra* note 35 (Secretary DeVos referencing both “survivors” and “victims of due process” in a speech about campus sexual assault).

103. *E.g.*, Michael Gordon, *More Men Named in College Sex Assault Cases Are Taking Their Accusers to Court*, THE CHARLOTTE OBSERVER (June 9, 2017), [http://www.greensboro.com/ap/north\\_carolina/more-men-named-in-college-sex-assault-cases-aretaking/article\\_3c4dc11f-92e4-54aa-8c80-8af3c311cf22.html](http://www.greensboro.com/ap/north_carolina/more-men-named-in-college-sex-assault-cases-aretaking/article_3c4dc11f-92e4-54aa-8c80-8af3c311cf22.html); KC Johnson, *Campus Sexual Assault Policies Are Unfair to the Accused. This Case Shows How*, WASH. POST (Aug. 16, 2017), <https://www.washingtonpost.com/opinions/campus-sexual-assault-policies-are->

narrative or reduced to sexist tropes commonly employed against women reporting sexual assault. Sexist tropes found in disciplined student narratives include the vindictive woman who files a false rape complaint against an innocent man after he indicates a lack of interest in a romantic relationship, ends a romantic relationship, or indicates a romantic interest in someone else (i.e. “hell hath no fury like a woman scorned”);<sup>104</sup> the embarrassed women who regrets a sexual encounter and files a false report of sexual misconduct in order to save her reputation;<sup>105</sup> and the melodramatic woman seeking attention or “coveted status” through identification as a victim.<sup>106</sup> The narrator also points to a survivor’s history of mental health issues or substance abuse to persuade the audience to further discount her credibility.<sup>107</sup>

Using tropes common in public discourse helps the audience quickly identify the victim as a character they should approach with skepticism and distrust.<sup>108</sup> It is strengthened by historic cultural and legal norms which discount the credibility of women and sexual minorities reporting sexual assaults.<sup>109</sup> Use of sexist tropes in character development allows the audience to view all complainants together as one “type,” ignoring the details that make them individuals. This

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unfair-to-the-accused-this-case-shows-how/2017/08/16/2ab6781e-7de0-11e7-a669-b400c5c7e1cc\_story.html?utm\_term=.a11ff3d42d6e.

104. E.g., Amended Complaint at 3, *Doe v. Univ. of Colo.*, No. 1:14-CV-03027 (D. Colo. Nov. 21, 2014) (claiming that Jane Doe filed a police report and school complaint for sexual misconduct because she was angry that John Doe had rebuffed her); Halley, *supra* note 80, at 114–15 (suggesting that spite from recent break-ups is a motivation for sexual misconduct complaints); George Leef, *Another University Will Have to Pay for Its Title IX Zealotry*, FORBES (Feb. 25, 2018), <https://www.forbes.com/sites/georgeleef/2018/02/25/another-university-will-have-to-pay-for-its-title-ix-zealotry/#262165f3b033> (describing a case as one “[l]ike many others – a ‘hookup’ between college students that ended in anger, with the woman using Obama-era sexual assault rules for revenge”).

105. E.g., Halley, *supra* note 80, at 107 (suggesting that “morning-after remorse can make sex that seemed like a good idea at the time look really alarming in retrospect [particularly with black men or LGBT students]”).

106. E.g., George F. Will, *George Will: Colleges Become the Victims of Progressivism*, WASH. POST (June 6, 2014), [https://www.washingtonpost.com/opinions/george-will-collegebecome-the-victims-of-progressivism/2014/06/06/e90e73b4-eb50-11e3-9f5c-9075d5508f0a\\_story.html](https://www.washingtonpost.com/opinions/george-will-collegebecome-the-victims-of-progressivism/2014/06/06/e90e73b4-eb50-11e3-9f5c-9075d5508f0a_story.html) [hereinafter, Will, *Colleges Become the Victims*] (suggesting that students claim to be victims of sexual misconduct because the Obama Administration made “victimhood a coveted status that confers privileges”).

107. E.g., *Parent of an Accused Student Who Was Exonerated Following a Long, Unbalanced Process*, FAMILIES ADVOCATING FOR CAMPUS EQUALITY (FACE), <https://www.facecampusequality.org/stories-2> (last visited Sept. 20, 2019) (“The accuser was a deeply troubled young woman (drug overdoses, psychiatric hospitalizations, fantasy rape claims, etc.) who - 5 months after the fact and 3 months after their relationship ended - accused John Doe of attempting to go slightly farther than they’d gone before (though stopping when she asked him to), an act that she apparently did not find too horrifying as she remained in his bed for the remainder of the night and continued to sleep with him for the ensuing month; her claim was filed only after mutual friends reported that he’d found a new girlfriend.”).

108. E.g., Complaint at 43–44, *Doe v. Univ. of Chi.*, No. 1:16-CV-08298 (N.D. Ill. Aug. 24, 2016) (suggesting that it is well-documented that anger can lead to false claims of sexual misconduct and that half of sexual assault allegations are false).

109. See generally Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 (2017).

character reassignment through tropes proved successful when the head of the agency tasked with investigating Title IX complaints indicated her skepticism of the vast majority of complainants reporting sexual assaults.<sup>110</sup>

The disciplined student narrative encourages us to forget or ignore sexual assault victims in order to instead identify students disciplined for sexual misconduct as the real victims.<sup>111</sup> In some cases, disciplined students further encourage this shift by taking an offensive stance, suing their sexual assault victims for defamation or including their sexual assault victim's name in the pleadings and using the legal system to harass or embarrass victims.<sup>112</sup> Some completely flip the script by claiming that the student who reported the sexual assault was the real aggressor.<sup>113</sup> Advocates and journalists writing from the disciplined student narrative lens assist with the role reversals in their use of terminology.<sup>114</sup>

### 3. Adding New Narrators

The reassignment of character roles in the campus sexual assault story is further strengthened by the addition of new narrators. Unlike the stories shared by

110. Candice Jackson, the Deputy Assistant Secretary of OCR stated that 90% of the accusations of sexual misconduct “fall into the category of ‘we were both drunk,’ ‘we broke up, and six months later I found myself under a Title IX Investigation because she just decided that our last sleeping together was not quite right.’” Erica L. Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos’s Ear*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html>.

111. Ariel Kaminer, *New Factor in Campus Sexual Assault Cases: Counsel for the Accused*, N.Y. TIMES (Nov. 19, 2014), [https://www.nytimes.com/2014/11/20/nyregion/new-factor-in-campus-sexual-assault-cases-counsel-for-the-accused.html?\\_r=0](https://www.nytimes.com/2014/11/20/nyregion/new-factor-in-campus-sexual-assault-cases-counsel-for-the-accused.html?_r=0) (describing how a student Columbia suspended for one year claims the sexual “encounter was harmless fun: A female freshman invited him into her suite bathroom, got a condom, took off her clothes and had sex with him. . . . [Attorneys] are speaking out on behalf of the students they describe as most vulnerable: not those who might be subjected to sexual assault, but those who have been accused of it.”).

112. E.g., Marcos Bretón, *Yuba County Judge Tosses Out \$4 Million Defamation Suit Against Sexual Assault Victim*, SACRAMENTO BEE (Oct. 3, 2016, 3:17 PM), <https://www.sacbee.com/news/local/news-columns-blogs/marcos-breton/article105794141.html>; see also Gordon, *supra* note 103.

113. E.g., Amended Complaint & Jury Demand at 22, 26, *Doe v. Yale U.*, No. 3:16-CV-01380-AWT (D. Conn. Feb. 2, 2017) [hereinafter Amended Complaint & Jury Demand Against Yale]; Amended Complaint, *supra* note 70, at 33 (disciplined student accusing the student who filed the complaint of sexual misconduct of sexually assaulting him); Complaint at 1, *Doe v. Roe*, No. 1:16-CV-00174 (D.R.I. Apr. 12, 2016); *Doe v. U. of S. Fla. Bd. of Tr.*, No. 8:15-CV-682-T-30EAJ, 2015 WL 3453753, at \*2 (M.D. Fla. May 29, 2015) (mentioning that after an assailant was investigated for sexual misconduct, he filed a complaint of sexual misconduct against his accuser). Research also suggests that a common strategy for perpetrators of interpersonal violence is to attack victims and to try to reverse the victim and offender role. See Sarah J. Harsey et al., *Perpetuator Responses to Victim Confrontation: DARVO and Victim Self-Blame*, 26 J. OF AGGRESSION, MALTREATMENT & TRAUMA 644, 645 (2017), <https://www.tandfonline.com/doi/full/10.1080/10926771.2017.1320777>.

114. E.g., John Lauerman, *College Men Accused of Sexual Assault Say Their Rights Violated*, BLOOMBERG (Dec. 16, 2013, 3:00 AM), <https://www.bloomberg.com/news/articles/2013-12-16/college-men-accused-of-sexual-assault-say-their-rights-violated>.

student survivors of campus sexual assault, which are told primarily in their own words or through the words of the journalist interviewing them, the disciplined student narrative is shaped and shared by third parties: parents (most often mothers), attorneys, and professors.<sup>115</sup> The addition of the third party as narrator provides a buffer separating the disciplined student from the audience, reducing audience scrutiny of the protagonist.

Mothers serving as narrators and advocates add a new character to the narrative when they describe the experience of watching their sons investigated and disciplined for sexual misconduct as their personal nightmares.<sup>116</sup> For example, in discussing campus sexual assault guidance, OCR Chief Candice Johnson described being moved by a mother's description of finding her son, who she said had planned to be a doctor before being disciplined for sexual misconduct, trying to kill himself.<sup>117</sup> Two months later, in issuing new guidance, Secretary DeVos referenced a similar story and commented that: "[n]o mother, no parent, no student should be living that reality. We are here today for those families."<sup>118</sup> In this new iteration of the narrative, the mother's pain becomes central to the story, providing even more distance from the sexual assault. Mothers add a female voice and a perspective that encourages the audience to see college-aged men more like children in need of protection and empathy.<sup>119</sup> The centrality of a mother's genuine pain also makes it feel more callous to question the relevancy of her pain to campus sexual assault policy in order to ask whether or not the school was correct in its assessment that her son sexually assaulted someone.

Attorneys and professors both change the tenor of the narrative through their participation. Attorneys provide the appearance of neutrality and authority, even though they are essentially storytellers and advocates. Professors sharing the disciplined student narrative through their scholarship and advocacy add the weight of expertise. Whether they are discussing a legal analysis of Title IX or sharing an anecdote about a student disciplined for student code violations involving sexual misconduct, their voices are persuasive both to the public and those enacting policy change. Their scholarship and editorials are cited in the 2018 proposed Title IX regulation.<sup>120</sup>

Although the debate about how colleges should best address campus sexual assault is often presented as a debate between men and women, the most noticeable difference between the narrators of the student survivor narrative and the disciplined

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115. E.g., Barbash, *supra* note 94; Hartocollis et al., *supra* note 94.

116. Barbash, *supra* note 94; Hartocollis et al., *supra* note 94.

117. E.g., Green & Stolberg, *supra* note 110 (reporting how the Department of Education's Acting Assistant Secretary for Civil Rights, Candice Jackson, described meeting with a woman whose son was accused of sexual misconduct: "Listening to her talk about walking in and finding him in the middle of trying to kill himself because his life and his future were gone, and he was forever branded a rapist – that's haunting.").

118. Svrluga, *supra* note 35.

119. E.g., *The Mother of an Accused Student, Who Reached a Settlement Agreement With the School After Two Years*, *supra* note 87 ("First of all, I would like to tell you a little about my son so you can picture him in your mind. He's super-smart, kind, conscientious, honest, and humble. In high school, he achieved the rank of Eagle Scout.").

120. 2018 Proposed Title IX Regulation, *supra* note 37, at 61465.

student narrative is not gender, but rather age. On one side is a story told by college students and recent graduates and on the other is the story told by parents, attorneys, and professors. The debate is perhaps more accurately framed as generational.

***B. Setting: Constructing a Legal History of Campus Discipline and Title IX***

NPF identifies setting as one of the main narrative components developed to influence public policy. In the disciplined student narrative, the setting is a specific legal background created to both define the policy problem and support a policy goal. It provides a framework that serves as a powerful tool to help the audience process the disciplined student narrative. The constructed legal setting, similar to an origin story, remains consistent throughout many individual tellings and retellings and seems impervious to fact-checking.<sup>121</sup> It appears not only in disciplined student lawsuits, but in media and academic accounts as well.

The setting bolsters the disciplined student narrative by introducing several misleading claims that the federal government (or, more specifically, President Obama) abruptly created a new legal obligation for colleges to respond to sexual misconduct on April 4, 2011.<sup>122</sup> In beginning the legal timeline with the date OCR issued a “Dear Colleague Letter” policy guidance (“2011 OCR guidance”) clarifying how colleges should address sexual misconduct,<sup>123</sup> the disciplined student narrative presents a setting that omits all federal legislation, OCR enforcement, and campus discipline that occurred prior to April 4, 2011. The narrative further suggests that the 2011 OCR guidance drastically altered college procedures for responding to complaints of student code violations involving sexual misconduct. The legal setting described in the disciplined student narrative generally contains the following elements:

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121. See David M. Engel, *Origin Myths: Narratives of Authority, Resistance, Disability, and Law*, 27 L. & SOC’Y REV. 785, 785–87 (1993) (describing how parents of children with special needs, despite the enormous differences among families and children, share remarkably similar “origin” stories about how they first learned of their child’s disability).

122. E.g., ROBERT L. SHIBLEY, *TWISTING TITLE IX 4* (Encounter Books eds., 1st ed. 2016) (introducing the story of federal laws about campus sexual assault with the 2011 OCR guidance); Jed Rubinfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, 96 TEX. L. REV. 15, 16 (2017) (“Beginning in 2011, the federal government has induced private colleges and universities all over the country to investigate, prosecute, adjudicate, and punish alleged law violations under Title IX of the Educational Amendments of 1972, conducting secretive trials according to specified procedures, including a government-dictated standard of proof.”); George F. Will, *Betsy DeVos Is Trying To Stop an Assault on Civil Rights on College Campuses*, WASH. POST (Sept. 7, 2018), [https://www.washingtonpost.com/opinions/betsy-devos-is-trying-to-stop-an-assault-on-civil-rights-on-college-campuses/2018/09/07/eb4b9a52-b208-11e8-9a6a-565d92a3585d\\_story.html](https://www.washingtonpost.com/opinions/betsy-devos-is-trying-to-stop-an-assault-on-civil-rights-on-college-campuses/2018/09/07/eb4b9a52-b208-11e8-9a6a-565d92a3585d_story.html) [hereinafter Will, *Betsy DeVos*] (“Current Education Secretary Betsy DeVos is moving to halt the life-shattering procedures that began in 2011, when the department sent to colleges and universities a ‘Dear Colleague’ letter.”).

123. The 2011 OCR guidance detailed colleges’ obligations under Title IX to respond to sex discrimination in the form of sexual harassment (including sexual violence), clarified OCR’s expectations of colleges for their policies and procedures to respond to allegations of sexual misconduct, and put colleges on notice that the agency would apply this guidance in its Title IX investigations of colleges. 2011 OCR guidance, *supra* note 24.



- (1) *An implicit or explicit claim that colleges never prohibited sexual misconduct or adjudicated behavior involving sexual misconduct prior to the 2011 OCR guidance.*<sup>124</sup>

Behavior subjecting college students to school discipline has always included both criminal (i.e. sexual assault, battery, theft) and noncriminal conduct (i.e. plagiarism, cheating, lying). Colleges investigated, adjudicated, and disciplined students for sexual misconduct prior to 2011.<sup>125</sup> This aspect of the legal setting conflates increased campus enforcement of sexual misconduct violations with a brand new prohibition of sexual misconduct.

- (2) *An implicit or explicit claim that 2011 was the first time the federal government created relevant law, guidance, or oversight on campus sexual misconduct cases.*<sup>126</sup>

Although generally omitted from the disciplined student setting, the federal civil rights of students to be free from sex discrimination in the form of sexual harassment (including sexual violence) and colleges' legal obligations to respond to sexual harassment were developed through legislation (signed by presidents of both

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124. This component of the legal setting is often implied by the introduction of the 2011 OCR guidance as a policy document newly requiring schools to respond to campus sexual misconduct. But there are also examples in which proponents of the narrative explicitly claim that sexual misconduct was not even regulated by colleges until 2011, erroneously arguing that prior to 2011, sexual misconduct was in the exclusive jurisdiction of the state. *See, e.g.*, Amended Complaint & Jury Demand Against Yale, *supra* note 113, at 2, 62 (pleading that “[p]rior to April 4, 2011, the investigation and prosecution of people who physically forced people to have sexual intercourse without consent was the traditional and exclusive prerogative of the state”).

125. Examples of campus sexual assault investigations and adjudications can be located in pre-2011 lawsuits filed by students disciplined for violations of student codes involving sexual misconduct. *See, e.g.*, *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744, 751 (E.D. Tenn. 2009) (opinion in lawsuit filed by a disciplined student and his parents who opted to withdraw for two semesters rather than be suspended for one semester with the sexual assault noted on his transcript); *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 10, 38–39, 46 (D. Me. 2005) (decision in lawsuit filed by two former student athletes suspended for one year for sexual assault holding that the university’s disciplinary hearing was fundamentally fair, that the proceedings complied with student code provisions, and the publication of the results was not defamatory); *Donohue v. Baker*, 976 F. Supp. 136, 148–49 (N.D.N.Y. 1997) (decision in lawsuit filed by student disciplined for sexual assault); *Boyle v. Newman*, No. 79-335, 1980 WL 335999, at \*2 (R.I. Super. Ct. June 19, 1980) (holding men sanctioned for sexual harassment were not entitled to the right to counsel cross-examination of witnesses); *Nzuve v. Castleton St. College*, 335 A.2d 321, 322–24 (Vt. 1975) (holding a college student adjudicated for conduct violations involving burglary and attempted rape does not have a right to counsel, cross-examination, a unanimous finding, or a delay in the adjudication process based on related criminal proceedings). However, it is important to note that although colleges have historically forbidden sexual misconduct on campuses, student victims filing lawsuits and OCR complaints indicate that many, if not most, colleges did not regularly enforce their own rules.

126. *Supra* note 122 and accompanying text.

political parties), case law, and administrative decisions over the past 47 years.<sup>127</sup> Similarly, OCR's enforcement of colleges' responses to campus sexual assault did not begin in 2011, but was instead developed through various guidance and administrative decisions dating back at least 20 years.<sup>128</sup> The 2011 OCR guidance

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127. President Nixon signed Title IX of the Educational Amendments in 1972, prohibiting colleges from discriminating on the basis of sex in federally assisted education programs and activities. 20 U.S.C. § 1681 (1986). In 1999, the U.S. Supreme Court recognized a private cause of action under Title IX for peer-to-peer sexual harassment, affirming a principle already recognized by many lower courts. *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 634, 644 (1999). This decision made it clear that colleges must promptly and equitably respond to complaints of sexual harassment—including sexual assault—through internal procedures, and further stated that federal agencies, such as the Department of Education, had the power to “promulgate and enforce requirements that effectuate [Title IX’s] nondiscrimination mandate,” even in circumstances that would not give rise to a claim for money damages.” OFFICE FOR CIV. RTS., U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, at ii–iii (2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1989)). Other federal legislation addressed campus sexual assault as well. The Student Right-to-Know and Campus Security Act of 1990, better known as the Clery Act, required colleges to disclose information about campus crimes, including sexual assault, and provide primary prevention and awareness programming, as well as a statement that the school provide victims with assistance in changing housing. 20 U.S.C. § 1092(f) (2013). In 1992, President Bush signed an amendment to the Clery Act, the Campus Sexual Assault Bill of Rights, into law, creating specific rights for victims of campus sexual assault to have the same right as the accused student, to have others present during disciplinary proceedings, and to receive notification of the outcome of the proceeding. Colleges were further required to inform victims of their right to contact law enforcement, counseling options, and options to change academic and living situations. 20 U.S.C. § 1092(f)(8) (2013).

128. In 1997, OCR’s first published guidance on sexual harassment included an explanation of how colleges could be liable for peer-to-peer sexual harassment, if upon notice, they do not take immediate and appropriate steps to remedy the hostile environment. It further explained that sexual harassment under the meaning of Title IX could include a single or isolated incident, if sufficiently severe, such as a sexual assault. Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12037, 12041 (Mar. 13, 1997). In response to *Gebser*, the U.S. Department of Education issued an updated guidance on sexual harassment, articulating principles for addressing campus sexual misconduct. OFFICE FOR CIV. RTS., U.S. DEP’T OF EDUC., *supra* note 127, at ii. Both the 1997 and 2001 OCR guidance went through the notice and comment process. Although the 2011 OCR guidance did not go through a notice and comment process, some aspects of it were codified in the 2013 Campus Sexual Violence Elimination Act (“Campus SaVE Act”), entered into law through the Violence Against Women Act (“VAWA”) Reauthorization Act. It required colleges to provide victims of sexual assault, domestic violence, and stalking with written notification of their rights to change academic or living situations to avoid a hostile environment, obtain and enforce a campus no-contact directive or restraining order, obtain clear information about the campus disciplinary process and the range of possible sanctions, and receive information about campus and community resources for counseling, health, mental health, victim advocacy, and legal assistance both on campus and in the local community. It further codified several of the OCR directives for campus disciplinary procedures, including requiring a prompt, fair, and equitable process and the right for both the complainant and the respondent to have an advisor present, and it expanded the types of included cases from sexual assault to domestic violence

was not the first OCR guidance addressing campus sexual misconduct nor did it establish a new legal obligation for colleges to respond to sexual misconduct, but instead clarified a preexisting obligation.<sup>129</sup> Yet, the 2011 OCR guidance became shorthand in the disciplined student narrative for the proposition that OCR's involvement in campus sexual assault is a recent and unexpected development in campus sexual assault policy.

(3) *The related claims that no or few colleges used a preponderance of the evidence standard in their campus disciplinary adjudications prior to the 2011 OCR guidance and that 2011 was the first time OCR established the appropriate standard of proof as the preponderance of evidence for campus adjudications.*<sup>130</sup>

The appropriate standard of evidence colleges should use when determining whether a student violated the student conduct code by committing sexual misconduct remains a heated debate, and the disciplined student narrative's

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and stalking. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–14, § 304, 127 Stat. 54 (2013) (codified in part at 42 U.S.C. §§ 13701–14040). By 2015, there were more than 100 OCR complaints and many private lawsuits filed by student victims of sexual assault alleging that their colleges committed sex discrimination in their response (or lack of response) to their reports of campus sexual assault. Jake New, *Justice Delayed*, INSIDE HIGHER ED (May 6, 2015), <https://www.insidehighered.com/news/2015/05/06/ocr-letter-says-completed-title-ix-investigations-2014- lasted-more-4-years>.

129. OCR's 1997 and 2001 guidance to colleges emphasized the importance of establishing equitable procedures to investigate and respond to sexual harassment. Several of the directives discussed in the 2011 OCR guidance are also present in the 2001 guidance, such as requiring colleges to adopt and publish prompt and equitable procedures for responding to complaints of sexual harassment, the importance of considering interim measures to protect students who report sexual assaults, and the explicit statement that mediation, even if voluntary, is not appropriate in sexual assault cases. Compare OFFICE FOR CIV. RTS., U.S. DEP'T OF EDUC., *supra* note 127, at 16, 19 with Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12037, 12041 (Mar. 13, 1997).

130. E.g., Robert Carle, *Assault By the DOE*, 28 ACAD. QUESTIONS 11, 12–13 (Feb. 6, 2015), <https://link.springer.com/article/10.1007/s12129-015-9472-5> (“Perhaps most significantly, the [2011 OCR guidance] letter mandated that colleges use a ‘preponderance of evidence’ standard (50.01% probability of guilt) to adjudicate cases of sexual misconduct. Traditionally, colleges and universities have used a ‘clear and compelling’ evidentiary standard (80% probability of guilt) in disciplinary hearings.”); FIRE Staff, *Standard of Evidence Survey: Colleges and Universities Respond to OCR's New Mandate*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Oct. 28, 2011), <https://www.thefire.org/standard-of-evidence-survey-colleges-and-universities-respond-to-ocrs-new-mandate/> (describing OCR's New Requirements as the establishment of the preponderance of the evidence standard and stating that “[t]he April 4, 2011, letter is a clear deviation from prior OCR practice.”); Cathy Young, *The Politics of Campus Sexual Assault*, REASON (Nov. 17, 2011, 7:00 PM), <http://reason.com/archives/2011/11/17/the-politics-of-campus-sexual-assault> [hereinafter Young, *The Politics of Campus Sexual Assault*] (claiming “[t]raditionally, most colleges have adjudicated charges of misconduct against students under the higher standard of ‘clear and convincing evidence’—less stringent than ‘beyond a reasonable doubt,’ but nonetheless requiring an extremely strong probability of guilt. A few months ago [April 4, 2011], the Office for Civil Rights . . . undertook to change that.”).

claim that President Obama abruptly required colleges to use a preponderance of the evidence standard adds fuel to this debate.<sup>131</sup> OCR decisions dating back to at least 1995 suggest colleges using any higher evidentiary standard, such as clear and convincing, do not meet the “fair and equitable” requirement under Title IX.<sup>132</sup> The further contention in the origin story that all or most colleges were using a higher standard of proof prior to the 2011 OCR guidance is inaccurate.<sup>133</sup>

(4) *The claim that the 2011 OCR guidance eroded preexisting due process protections for students accused of sexual misconduct, such as the right to an attorney, the right to cross-examination, the right against self-incrimination, and evidentiary safeguards, such as hearsay prohibitions.*<sup>134</sup>

The claim that the 2011 OCR guidance ordered schools to decrease due process protections for students accused of campus sexual misconduct is misleading when describing rights such as cross-examination and false when describing respondents’ rights to legal representation, to remain silent without a negative inference, and other evidentiary protections.<sup>135</sup> This setting element takes root through the deliberate confusion between constitutional rights for defendants in criminal trials and respondents in campus misconduct proceedings. Courts have

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131. Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 109 (2017) [hereinafter Brake, *Fighting the Rape Culture Wars*].

132. A 2004 OCR disposition letter regarding a complaint against Georgetown University found that the appropriate standard for resolving complaints of sexual discrimination, including sexual harassment, under Title IX is the preponderance of the evidence standard, rather than the clear and convincing standard Georgetown had incorrectly applied. Letter from Sheralyn Goldbecker, Team Leader, Office for Civil Rights, U.S. Dep’t of Educ., to Dr. John J. DeGioia, President, Georgetown Univ. 3 (May 5, 2004), <https://cdn.tngconsulting.com/website-media/nchem.org/unoffloaded/2017/08/199-GeorgetownUniversity--11032017.pdf>; see also Brake, *Fighting the Rape Culture Wars*, *supra* note 131, at 129–30; Letter from Gary D. Jackson, Reg’l Civil Rights Dir., Office for Civil Rights, U.S. Dep’t of Educ. to Dr. Jane Jervis, President, the Evergreen State College 8 (Apr. 4, 1995), <https://www.documentcloud.org/documents/3253526-Evergreen-Preponderance.html> (noting that the preponderance of evidence standard should be used in Title IX cases).

133. With some notable exceptions, such as Harvard, Yale, and Princeton, the majority of colleges actually adopted the general civil preponderance of the evidence standard for all of their campus disciplinary cases long before 2011. See Brake, *Fighting the Rape Culture Wars*, *supra* note 131, at 128, 147–48.

134. See KC Johnson & Stuart Taylor, *Betsy DeVos Is Right: In College Sexual Assault Cases, Due Process Matters*, USA TODAY (Aug. 2, 2017, 9:47 AM), <https://www.usatoday.com/story/opinion/2017/07/28/betsy-devos-right-sexual-assault-cases-due-process-kc-johnson-stuart-taylor-column/493320001/>; Leef, *supra* note 104; Young, *The Politics of Campus Sexual Assault*, *supra* note 130.

135. Although OCR strongly discouraged colleges from allowing respondents to directly cross-examine victims (and established best practices as allowing both parties to submit questions in writing to a neutral party to ask instead), it was silent on whether or not respondents’ attorneys or advisors could directly cross-examine victims. The guidance is silent on other issues. 2011 OCR guidance, *supra* note 24, at 12; see also 2014 Q&A on Title IX and Sexual Violence, *supra* note 24.

defined the rights of students adjudicated for any kind of campus misconduct (including, but not limited to, sexual misconduct) for the past several decades as a basic entitlement to notice and an opportunity to be heard.<sup>136</sup> The rights granted to students accused of any student code conduct violations continue to vary greatly by state and by college, and most colleges provide the same safeguards to students accused of sexual misconduct as they do to students accused of other serious offenses, such as theft and assault.<sup>137</sup>

Although OCR explicitly recognized reciprocal rights for students reporting sexual misconduct, there was no mandate for colleges to decrease rights for students accused of sexual misconduct. To the contrary, OCR clarified, enforced, and likely increased due process protections for students accused of student code violations involving sexual misconduct at schools where those protections were not previously required.<sup>138</sup> Yet the legal setting created by the disciplined student narrative is so powerful and consistent that the media often repeats it without critique. Many scholars also incorporate parts of this origin story into their publications, which are then cited in disciplined student lawsuits, creating not just an echo chamber, but a self-perpetuating cycle.<sup>139</sup> The 2018 proposed Title IX regulation includes a reference to this legal setting claim as well.<sup>140</sup>

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136. Students at both public and private colleges are entitled to notice about student disciplinary proceedings, although the length and content of the required notice is not well-defined. *Mathews v. Eldridge*, 424 U.S. 319, 333-34 (1976); *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

137. See Brake, *Fighting the Rape Culture Wars*, *supra* note 131, at 127 n.96.

138. OCR required notice to both complainants and respondents in student adjudications involving sexual misconduct beyond the minimal constitutional requirements. See Letter from Beth Gellman-Beer, Supervisory Attorney, Office for Civil Rights, U.S. Dep't of Educ., to Robert E. Clark II, President of Wesley Coll. (Oct. 12, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf> (OCR finding that Wesley College violated Title IX when it failed to provide a male student accused of sexual misconduct with equitable procedural protections, including an opportunity to share his version of events during the investigation, to challenge the evidence used by the college to impose an interim suspension, to review written statements and reports, and to have adequate time to prepare a defense for a hearing). In addition, the 2011 OCR guidance increased and clarified due process protections for students accused of campus sexual misconduct that are not required for students accused of any other student conduct code violations, including other crimes, by requiring colleges to allow students to have an advisor with them (who may be an attorney) and a strong recommendation that colleges create an appellate process. OCR also specified that both student complainants and respondents should have the same right to present witnesses and evidence. See Brodsky, *supra* note 31, at 832, 834, 837. A few disciplined student lawsuits acknowledge this increase in protections as they cite the 2011 OCR guidance as law requiring colleges to provide their client with greater due process protections. See, e.g., Verified Complaint & Jury Demand at 12, *Doe v. W. New Eng. Univ.*, No. 3:15-CV-30192 (D. Mass. Nov. 2, 2015) (claiming that the school violated the 2011 OCR guidance when it violated the respondent's due process rights in a sexual misconduct investigation and adjudication).

139. E.g., Rubinfeld, *supra* note 122, at 16.

140. 2018 Proposed Title IX Regulation, *supra* note 37, at 61464 ("Other criticisms of the previous guidance included that those guidance documents pressured schools and colleges to forgo robust due process protections . . .").

(5) *The claim that the 2011 OCR guidance forced colleges to expel innocent male students for sexual misconduct based on their fear that the federal government would sanction them by removing access to federal financial resources.*<sup>141</sup>

Last, the discipline student narrative legal setting concludes by suggesting that the 2011 OCR guidance placed colleges under enormous pressure to find and expel male students for sexual misconduct by threatening their federal financial aid. The disciplined student narrative also points to a fear of public shaming as an incentive to expel students, particularly at colleges with negative media attention following a past mishandling of a campus sexual assault case or a history of student protest against campus sexual assault.<sup>142</sup> In colleges where a survivor of sexual assault previously filed a complaint opening a current or past OCR investigation, the narrative suggests that the school is under particularly strong pressure to discipline students accused of sexual misconduct, increasing the chances of unfair findings against male students.<sup>143</sup> 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. The constructed legal setting establishes a background that places the disciplined student as the hapless victim caught between a powerful federal government and fearful college.

Just as the disciplined student narrative shifts the face of campus sexual assault from victims of sexual assault to disciplined students, the setting reframes the description of the legal problem from the need for increased enforcement of civil rights to be free from sexual violence in education to the need for increased individual rights to protect men from campus investigations and discipline. The construction of a legal backstory creates a setting that strengthens disciplined

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141. *E.g.*, James Taranto, *An Education in College Justice*, WALL STREET J. (Dec. 6, 2013, 6:25 PM), <https://www.wsj.com/articles/behind-the-auburn-curtainbehind-the-auburn-curtain-1385756706> (“The prospect of losing federal funds has left university administrators ‘crippled by panic,’ Robert Shibley of the Foundation for Individual Rights in Education told me. ‘The incentives are pointing toward findings of guilt, not accurate findings.’”); Lara Bazelon, *California’s Sexual Assault Law Will Hurt Black Kids*, N.Y. TIMES (Sept. 22, 2017), <https://www.nytimes.com/2017/09/22/opinion/california-sexual-assault-law-blacks.html> [hereinafter Bazelon, *California’s Sexual Assault Bill*] (“Obama-era sexual assault . . . rules told colleges to toughen up on sexual assault allegations or risk losing federal dollars . . . . In case after case, young men were expelled on the basis of allegations that they were not allowed to challenge by seeing the evidence against them or cross-examining witnesses.”).

142. *E.g.*, Complaint & Jury Demand at 4–6, *Doe v. Amherst Coll.*, No. 3:15-CV-30097 (D. Mass. May 29, 2015).

143. *E.g.*, Complaint Against Dayton, *supra* note 82, at 19 (“Dayton’s erroneous disciplined of Doe was caused in part by Dayton’s fears that if it did not show preferential treatment to females who allege sexual misconduct by males, Dayton would become involved in a second OCR investigation.”); Civil Action Complaint at 13–14, *Doe v. Allegheny Coll.*, No. 1:17-CV-00031-BR (W.D. Pa. Feb. 3, 2017) [hereinafter Complaint Against Allegheny]; Complaint & Jury Demand, *supra* note 142, at 1.

students' identification as the victims of a recent and unfair legal change and supports their claim to be the students most in need of protection.<sup>144</sup>

*C. Events and Plot: Creating a Stock Story*

The events detailed in the individual disciplined student narratives are presented in a predictable timeline with predictable references that lead the audience towards a specific moral of the story. After sympathetically introducing the protagonist to the audience, the plot usually begins when the protagonist learns about the complaint of student code violations filed against him.<sup>145</sup> The narrator often omits the specific details which form the content of the original sexual misconduct complaint and replaces them with the narrator's assertion that the allegations are false with details of the ways in which the complaint differs from the rape script.

The rape script, a story comprised of misconceptions about sexual assault, remains entrenched in the public imagination, despite decades of research that contradicts it. By providing details of how the sexual misconduct complaint diverges from the rape script, the disciplined student narrative is able to exploit widely held myths about sexual assault by implying that the students who report campus sexual misconduct are different than "real" victims of sexual assault; that disciplined students are different than "real" rapists; and that any incident that may have occurred was less serious than a "real" sexual assault.<sup>146</sup>

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144. See Brake, *Fighting the Rape Culture Wars*, *supra* note 131, at 109 ("Critics of the federal intrusion into campus disciplinary processes have challenged the legitimacy of the federal government's actions and the fairness of campus justice systems for handling matters that the critics argue should be handled by courts, presumably in the criminal justice system.").

145. E.g., Complaint at 1, *Montague v. Yale Univ.*, No. 3:16-CV-30192-AVC (D. Conn. June 9, 2016) ("1. As of the fall of 2015, Jack Montague had a promising future... 2. That all changed on November 30, 2015, however, when Montague received a letter from Yale's University Wide Committee on Sexual Misconduct informing him that he was the subject of a formal complaint . . .").

146. The rape script generally presents a nice, modestly dressed, sober, white cis-gender woman violently raped by a creepy stranger with a criminal history. She physically fights her attacker and screams "no," alerting anyone around her. She immediately contacts the police and provides a detailed description and clear timeline, describing the attack as if her memory was a video recorder, while displaying an appropriately traumatized affect (not too calm nor anxious nor angry). She undergoes a sexual assault forensic examination documenting significant injuries proving her resistance. She cooperates fully with the prosecutor, defining justice as the incarceration of her rapist.

Contrary to the rape script, rapists assault adults and children of all races and genders, with young women of color and transgender women experiencing the highest rates. Most rapists know their victims and use only the amount of force necessary to commit the sexual assault, rarely leaving serious physical injuries. Alcohol and drugs are often involved in sexual assault, with some abusers using them to make their victims more vulnerable and others targeting victims more vulnerable from voluntary intoxication. The majority of victims of sexual assault never report to the police, and those who do report usually delay their reports. Victims frequently engage in counterintuitive behavior during and following sexual assaults, such as communicating with an abuser after the assault or remaining at a rapists' home following an assault. Victims are often unable to provide detailed accounts and timelines of the assault because trauma directly impacts memory, and victim affect following an assault

The main action in the disciplined student narrative involves the school's response to the complaint of the student conduct violation. The bulk of the stock story details the campus investigation, adjudication, and appeal. The narrator points out potential procedural errors, such as inadequate notice or the inability to fully review or enter potential evidence, and perceived personal biases of involved administrators, such as past involvement with prevention efforts.<sup>147</sup> The narrator references the constructed legal setting and points to any history at the specific school that might make it more susceptible to pressure from the federal government or public opinion.<sup>148</sup> The stock story ends by explaining the school's sanction and describing the current and anticipated future impact of the school discipline on the protagonist. The narrator's decision to move quickly past the details of the assault and zoom in on the legal setting and school process establishes causation and helps persuade an audience that the school and the federal government, rather than the protagonist, caused the harm.<sup>149</sup>

Through retellings of the individual stories, the events merge into one narrative to promote public policy changes. The differences and contradictions between the stories are muted as they are adopted by advocates. For example, the disciplined student narrative shared through advocacy groups usually suggests that attorneys are barred from attending campus sexual misconduct disciplinary proceedings, yet many of the stories shared by individual disciplined students are told by the attorneys who represented or advised their clients during the campus

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varies widely. Victims of sexual assault often find participating in the criminal justice system to be retraumatizing, and some victims do not want to see their abusers placed in prison for a variety of reasons.

For research on the "rape script," see Kathryn M. Ryan, *The Relationship Between Rape Myths and Sexual Scripts: The Social Construction of Rape*, 65 *SEX ROLES* 774 (2011).

147. *E.g.*, Complaint at 13, 33, 45–46, *Doe v. W. New Eng. Univ.*, No. 3:15-CV-30192 (D. Mass. Nov. 23, 2015) [hereinafter *Complaint Against W. Eng. Univ.*] (stating that respondent's counsel was not allowed to review all of the text messages downloaded from the complainant's phone, speak with the nurse practitioner before the hearing, or ask all of the proposed questions of witnesses); Complaint at 34–35, 45, *Doe v. Wash. & Lee Univ.*, No. 6:14-CV-00052 (W.D. Va. Mar. 25, 2015); Complaint at 2–3, *Blank v. Knox C.*, No. 14-CV-01386 (C.D. Ill. Sep. 23, 2014) (stating that at the grievance hearing, the college denied Plaintiff the opportunity to fully cross-examine the complainant).

148. *E.g.*, Amended Complaint & Jury Demand Against Yale, *supra* note 113, at 6 (noting that the federal government funds \$507.1 million and that OCR investigated and entered into a resolution letter about sexual harassment with Yale prior to Yale opening the sexual misconduct investigations against this plaintiff).

149. *E.g.*, Tamara Rice Lave, *Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter*, 64 *U. KAN. L. REV.* 915, 953 (2016) (discussing the importance of procedural justice in campus adjudicatory hearings, Professor Tamara Rice Lave focuses on a disciplined student's experience with the college process (omitting details about the complainant's experience or the misconduct) by sharing the following story: "A young man named Joseph Roberts, for example, has described the impact of an email he received two weeks before his scheduled graduation stating that he was being removed from campus due to a complaint of sexual assault. The email stated that he would be subject to expulsion and arrest if he returned. There was never a hearing in the case, and Roberts never received his diploma. Roberts was so distraught that he attempted suicide.").



proceedings.<sup>150</sup> Similarly, the disciplined student narrative suggests that when schools do make procedural or substantive errors in student misconduct proceedings, disciplined students have no recourse, even as individual narratives demonstrate how disciplined students successfully avail themselves of school appeals, OCR complaints, and civil state and federal courts.<sup>151</sup> The general narrative shared with the public almost always ends with the expulsion of the disciplined student and a notation on his transcript preventing him from attending another school,<sup>152</sup> even though both expulsions and transcript notations for sexual assault remain quite rare.<sup>153</sup> Expulsions are not even the norm in the individual narratives

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150. See, e.g., Complaint Against W. Eng. Univ., *supra* note 147, at 11 (complaining that Doe’s attorney was only able to review some of the text messages the school downloaded from complainant’s phone); *The Mother of an Accused Student, Who Reached a Settlement Agreement With The School After Two Years*, *supra* note 87 (“After my son received a notice of the complaint we knew we needed to hire a lawyer. The lawyer we hired had actually worked on a previous case at the same college.”).

151. See, e.g., Lauerman, *supra* note 114.

152. *Id.* (quoting attorney Nicole Colby Longton: “One sexual encounter that involves alcohol, and the next thing you know you’re accused and expelled and branded for life.”); see also T. Rees Shapiro, The Washington Post, *Expelled After Sex-Assault Allegations, Young Men are Filing More Lawsuits to Clear Their Names*, THE DENVER POST (Apr. 28, 2017, 3:01 PM), <https://www.denverpost.com/2017/04/28/expelled-for-sex-assault-young-men-file-suits-to-clear-names/> (incorrectly implying that men who filed the “more than 150 Title IX lawsuits . . . against colleges and universities” were expelled).

153. The actual rates of expulsions for sexual misconduct vary by schools, but the limited research studies and data released by individual schools show that students are rarely expelled for sexual misconduct. A study analyzing 42 institutions of higher education in one mid-Atlantic state found that of the 1,054 reports of sexual misconduct or dating violence/stalking internally reported to Title IX coordinators in the 2015 academic year, 258 (24.48%) were adjudicated through a formal Title IX process resulting in 119 (11.29%) students found responsible for the student code violation and sanctioned. Of those sanctioned, 34 (3.22%) received a suspension of some length and 22 (2.08%) were expelled. See Tara N. Richards, *No Evidence of “Weaponizing Title IX” Here: An Empirical Assessment of Sexual Misconduct Reporting, Case Processing, and Outcomes*, 43 L. & HUM. BEHAVIOR 180, 187 (2019).

The Washington Post reviewed information provided by 120 schools receiving grants from the U.S. Dept. of Justice and found that of 759 reported cases of campus sexual assault in 2012 and 2013, only 56 cases (7%) resulted in expulsion. The newspaper also reported that the University of Virginia had expelled no students for sexual misconduct in the past decade (although it had dismissed dozens of students for academic misconduct), Dartmouth expelled three students for sexual misconduct between 2002 to 2013, Georgetown expelled two students in the past year (after adjudicating 12 cases), the University of Maryland expelled one student in the past year (out of the four students found responsible for sexual assault involving penetration), George Mason University expelled three students out of four students found responsible for sexual misconduct in the past year, and both George Washington University and American University expelled no students out of the three formal sexual violence cases in the past two school years. Nick Anderson, *Colleges Often Reluctant to Expel for Sexual Violence – With U.-Va. A Prime Example*, WASH. POST: EDUC. (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](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).

shared through lawsuits, and the stories about the small number of students who are expelled for sexual misconduct often include a note about their successful transfer to a different school.<sup>154</sup> Nonetheless, the inconsistencies do not appear to diminish the power of the archetypical disciplined student narrative.

#### *D. Rhetoric*

Rhetoric is the power of the narrative. When processing stories, our brains search for meaningful patterns. Rhetoric guides our emotions on how we experience the story. It pulls the setting, characters, and plot together by suggesting how we should interpret the narrative and find meaning in it.<sup>155</sup> It intentionally leads us towards the moral of the story. The disciplined student narrative employs several rhetorical techniques to persuade the audience of the need for a policy change.

##### *1. Capitalizing on Confusion Between Campus Discipline and the Criminal Justice System*

The disciplined student narrative engages in rhetoric by conflating the criminal justice system and student disciplinary process in order to obscure the differences between the two systems. On the surface, student conduct codes, campus disciplinary processes, and civil rights protections against sexual harassment provided under Title IX more closely resemble employment conduct codes, employment investigation processes, and civil rights protections against sexual harassment provided under Title VII.<sup>156</sup> Yet, the disciplined student narrative rarely

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Publicly-released data by the University of California, Berkeley for January 2016 through June 2019 state that out of 2,565 student conduct cases, 66 involved a complaint of sexual misconduct, dating violence, or stalking. Of those cases, 26 students were found responsible for sexual misconduct, 32 students were found not responsible, and 3 cases were dropped. Of those students found responsible, 4 were dismissed (expelled), 17 were suspended, and 5 were issued probation or a warning. UC BERKELEY CENTER FOR STUDENT CONDUCT SEXUAL VIOLENCE AND SEXUAL HARASSMENT CASES: JANUARY 1, 2016 - JUNE 20, 2019 at 1–2, [https://sexualassault.berkeley.edu/wp-content/uploads/2019/08/Finalized-Center-for-Student-Conduct-SVSH-Data-1\\_1\\_19-6\\_30\\_19.pdf](https://sexualassault.berkeley.edu/wp-content/uploads/2019/08/Finalized-Center-for-Student-Conduct-SVSH-Data-1_1_19-6_30_19.pdf) (last visited Sept. 14, 2019).

154. See, e.g., Kyra Phillips et al., *Ex-student Says He Was Falsely Accused of Sexual Harassment and Was Denied Due Process on Campus*, ABC NEWS (Oct. 18, 2018, 11:01 PM), <https://abcnews.go.com/Politics/student-falsely-accused-sexual-harassment-denied-due-process/story?id=58592962> (noting that the disciplined student “completed his degree online and is now enrolled in a California law school”); Ashe Schow, *Student Accused of Sexual Assault: Like Being at The ‘Bottom of This Pit,’* WASH. EXAMINER (Mar. 24, 2015, 10:29 AM), <https://www.washingtonexaminer.com/student-accused-of-sexual-assault-like-being-at-the-bottom-of-this-pit> (noting that disciplined student Josh Strange transferred and graduated from another college); Yoffe, *The Uncomfortable Truth*, *supra* note 72 (critiquing campus rape policy by providing an example of a student disciplined for violating an interim directive (rather than sexual misconduct) with a 13-month suspension (rather than expulsion) who then spent a year studying at a community college before transferring into an engineering program at another university).

155. GROSE & JOHNSON, *supra* note 40, at 14.

156. Although both Title VII and Title IX provide for private causes of action, only Title VII requires plaintiffs to exhaust all administrative remedies, obtain an administrative “right to sue” letter, and cap damages, and only Title IX creates the additional remedy of revocation of federal funds. See Kendyl L. Green, *Title VII, Title IX, or Both?*, 14 SETON HALL CIR. REV. 1, 1 (2017).

discusses the employment context or any other civil law aside from lawsuits filed by disciplined students, instead referencing only the criminal justice system.<sup>157</sup> The direct and indirect references to the criminal justice system apply a successful rhetorical technique that prompts the audience to process debates about campus sexual assault adjudications through a criminal justice lens.

The disciplined student narrative promotes a criminal justice framing in several ways. First, the disciplined student narrative uses terminology more commonly employed in the criminal law system rather than the campus adjudicatory system in order to confuse the audience about the location of the narrative in a campus adjudicatory setting. Through the persistent use of the term “kangaroo courts” to describe campus adjudications, the disciplined student narrative implies that college disciplinary processes should look and sound like criminal courtrooms rather than administrative investigations and adjudications.<sup>158</sup> The disciplined student narrative often refers to the adjudications as “prosecutions,” the alleged violations as “charges” or “crimes,” the respondents as “defendants,” the findings of responsibility for student code violations as determinations of “guilt” or “convictions,” the sanctions as forever branding a disciplined student as a “sex offender,” and equitable appellate rights as a violation of “double jeopardy.”<sup>159</sup> The deliberate use of terminology associated with the criminal justice system signals to the audience that they should process the narrative as a story about the criminal justice system rather than as a story about the campus disciplinary process.

Second, individual disciplined student narratives point to a victim’s decision not to report to the police or a prosecutor’s decision not to charge the respondent with a crime or to ultimately dismiss criminal charges as strong evidence that the disciplined students did not violate a school’s conduct code.<sup>160</sup> Other

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157. *E.g.*, Christina Hoff Sommers, *In Making Campuses Safe for Women, a Travesty of Justice for Men*, THE CHRON. OF HIGHER EDUC. (June 5, 2011), <https://www.chronicle.com/article/In-Making-Campuses-Safe-for/127766> (“American courts take exacting precautions to avoid convicting an innocent person of a crime. It was therefore startling to read the April 4, 2011, directive on sexual violence . . .”).

158. David French, *Betsy DeVos Strikes a Blow for the Constitution*, NAT’L REV. (Nov. 16, 2018, 2:53 PM), <https://www.nationalreview.com/2018/11/betsy-devos-strikes-a-blow-for-the-constitution/>.

159. *See e.g., id.* (explaining how a preponderance standard will make it easier for school disciplinary committees to find a “defendant” “guilty” of “a major crime” and asking why they are expected to “determine guilt or innocence in cases of rape.”); Rubinfeld, *supra* note 122, at 17, 18, 41 (referencing “prosecutions,” “findings of guilt,” “convictions,” and “permanent sex offense notations”); FIRE Staff, *supra* note 130 (using terms “guilty” and “convicted” in reference to student misconduct proceedings); KC Johnson & Stuart Taylor, *The Path To Obama’s ‘Dear Colleague letter,’* WASH. POST: THE VOLOKH CONSPIRACY (Jan. 31, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/?utm\\_term=.ca68d147cd72](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/?utm_term=.ca68d147cd72) (referencing “double jeopardy” in campus sexual misconduct cases).

160. *E.g.*, Complaint at 3, *Doe v. Univ. Colo. Boulder*, No. 14-3027 (D. Colo. Nov. 7, 2014) (“After a diligent, in-depth investigation, the Boulder Police Department made the informed decision not to pursue Jane Doe’s report of non-consensual sexual intercourse. Notwithstanding the foregoing, CU Boulder made the decision to charge John Doe with violations of CU Boulder’s Student Conduct Code Policies & Procedures (‘Code’) for sexual

individual narratives share disciplined students' criminal pleas to lesser charges or not-guilty verdicts rendered by criminal juries based on the same sexual assault.<sup>161</sup> The narrative references the criminal justice system to insinuate that a prosecutor's inability or unwillingness to secure a conviction is definitive evidence that the disciplined student was falsely accused.

Third, the narrative conflates the campus disciplinary process with the criminal justice system to support the contention that students accused of campus sexual misconduct should be entitled to criminal-level protections and standard of proof.<sup>162</sup> Proponents argue that fairness can only be obtained when rights provided through the criminal justice system, such as the right to counsel, the right against self-incrimination, and the right to directly cross-examine complainants, are guaranteed in the campus disciplinary system. They imply criminal-level protections are constitutionally mandated for anyone accused of sexual misconduct, regardless of the legal system or possible sanctions, and ignore the goals of both student conduct codes and Title IX. Although student conduct codes prohibit other behavior that would also constitute a crime, this conflation is unique to sexual misconduct.<sup>163</sup> It serves as a strong rhetorical device intended to persuade the public that student disciplinary procedures for sexual misconduct (and only sexual misconduct) should either mirror the criminal justice system or solely be addressed by the criminal justice system.<sup>164</sup>

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misconduct with respect to Jane Doe.”); Nick Anderson, *Men Punished in Sexual Misconduct Cases on College Campuses Are Fighting Back*, WASH. POST: EDUC. (Aug. 20, 2014), [https://www.washingtonpost.com/local/education/men-punished-in-sexual-misconduct-cases-on-colleges-campuses-are-fighting-back/2014/08/20/96bb3c6a-1d72-11e4-ae54-0cfe1f974f8a\\_story.html](https://www.washingtonpost.com/local/education/men-punished-in-sexual-misconduct-cases-on-colleges-campuses-are-fighting-back/2014/08/20/96bb3c6a-1d72-11e4-ae54-0cfe1f974f8a_story.html) (“Josh Strange, 23, of Spartanburg, S.C., said he was stunned that Auburn University expelled him in 2012 for sexual misconduct even though an Alabama grand jury found insufficient evidence to prosecute him for a sex crime.”).

161. *E.g.*, Complaint at 24, *Altschuler v. Commonwealth of Virginia*, No. 3:15-CV-00695 (E.D. Va. Nov. 7, 2015) (referring to a criminal jury's acquittal on a rape charge).

162. The debate over the appropriate evidentiary standard to use in a campus disciplinary proceeding is further confused by comparisons to the criminal system. The preponderance standard has become a “flashpoint in the rape culture wars.” *See Brake, Fighting the Rape Culture Wars*, *supra* note 131, at 139.

163. In general, the disciplined student narrative does not identify a broader goal of establishing a higher evidentiary standard for all serious campus discipline, but instead limits the advocacy for sexual misconduct cases.

164. *See generally* Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 *YALE L.J.F.* 281, 284–85 (2016) (describing national and state efforts to “criminalize” the Title IX process).

It is important to note that attempts to “criminalize” Title IX or create exceptions for student code violations involving sexual misconduct are found on both sides of the political debate, particularly in regard to sanctions. Some anti-campus sexual assault advocates and politicians promote the idea of creating mandatory minimum sanctions for students found responsible for sexual misconduct violations in an effort to force colleges to respond more forcefully to campus sexual assault. Others promote laws requiring colleges to explicitly note sanctions for sexual misconduct on disciplined student transcripts. These efforts, although limited in their success, further strengthen the disciplined student narrative's assertion that students accused of campus sexual misconduct must be afforded with extraordinary protections not required for students accused of other campus conduct

The disciplined student narrative capitalizes on the audience's familiarity with the criminal justice system and general unfamiliarity with campus adjudicatory systems to obscure the differences between the systems, of which there are many. First, definitions of sexual misconduct prohibited by individual colleges are often different than definitions found within applicable state criminal codes.<sup>165</sup> Second, the goals of colleges responding to sexual misconduct under Title IX to promote equal access to education are different than the state and federal governments' goals for their criminal justice systems. As such, colleges operate under a different and tighter timeframe, offer interim relief and resources to complainants to mitigate the impact of the sexual harassment on their education, and provide equitable rights to both complainants and respondents. The criminal justice system carries no legal obligation to provide victims with mental health resources or ensure continued access to education. Third, the potential ramifications for students accused of student conduct code violations compared to individuals arrested for crimes are also very different. Students responding to complaints of campus conduct code violations face sanctions ranging from counseling to expulsion from an individual school system, while criminal defendants face the possibility of incarceration and registration as sex offenders. Fourth, expectations of privacy vary. Student respondents are generally protected under federal education privacy laws, while criminal defendants are forever named in public records, even when they are found not guilty. The conflation of the campus disciplinary system and the criminal law system seeks to hide or minimize these differences.

The disciplined student narrative often suggests that the criminal justice system is the only appropriate legal system for the investigation and adjudication of sexual assault without acknowledging critiques of that system by victims and defendants alike.<sup>166</sup> Critics of the criminal justice system point to its discrimination against low-income defendants and racism against both defendants and victims of

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violations. *See also* Nancy Chi Cantalupo, 'Decriminalizing' Campus Institutional Responses to Peer Sexual Violence, 38 J.C. & U.L. 483 (2012). *See generally* Erin Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365 (2016) (describing how some feminist activists also worked to "criminalize" Title IX in order to provide an alternative carceral-like system for addressing sexual assault).

165. For example, an estimated 1,400 colleges and universities, including all of those within the California and New York state systems, utilize an "affirmative consent" standard in sexual misconduct definitions in which neither a lack of protest or resistance nor silence means consent. Sandy Keenan, *Affirmative Consent: Are Students Really Asking?*, N.Y. TIMES (July 28, 2015), <https://www.nytimes.com/2015/08/02/education/edlife/affirmative-consent-are-students-really-asking.html>.

166. *E.g.*, FIRE Statement on California "Affirmative Consent" Bill, FOUND. FOR INDIVIDUAL RTS. EDUC. (Feb. 13, 2014), <https://www.thefire.org/fire-statement-on-california-affirmative-consent-bill/> ("[C]ampus administrators are . . . neither qualified nor equipped to respond properly to sexual assault allegations. [They] simply lack the investigative ability, impartiality, professional training, and legal knowledge required to reliably adjudicate sexual assault cases."); Robert Shibley, *Time to Call the Cops: Title IX Has Failed Campus Sexual Assault*, TIME (Dec. 1, 2014), <http://time.com/3612667/campus-sexual-assault-uva-rape-title-ix/>; Taranto, *supra* note 141 ("It would be better still if universities could get out of the discipline business altogether, except for scholarly offenses like plagiarism, cheating and falsification of data."); von Spakovsky & Slattery, *supra* note 77; Yoffe, *The College Rape Overcorrection*, *supra* note 73 ("[a] matter for prosecutors, not professors . . .").

color.<sup>167</sup> Victim advocates point to the consistently low percentage of cases involving sexual violence ever investigated or prosecuted and how interaction with the criminal justice system exacerbates trauma for victims,<sup>168</sup> while proponents of criminal justice reform point to exonerations for wrongful convictions of sexual assault as evidence that the criminal justice system is deeply flawed. The claim that the criminal justice system is the best system for all parties also completely omits an analysis of whether or not the criminal justice system even purports to be fair to victims of sexual violence, and it fails to address how the criminal justice system would enable student victims to retain any privacy, safety, or access to education.

## 2. *Claiming Moral Equivalence*

The disciplined student narrative uses moral equivalence as a rhetorical device to increase coverage by the media, influence policy decision-makers, and persuade the audience of the need for policy change. The strategy of moral equivalence appears when the disciplined student narrative presents itself as the other side to the student survivor narrative in a national campus sexual assault debate by claiming that being accused of committing a sexual assault creates equal harms, occurs at a similar frequency on campuses, and involves the same culpability as sexual assault. It is this assertion of moral equivalency that enables the disciplined student narrative to co-opt the campus anti-rape movement and demand equal consideration.

The disciplined student narrative deliberately mirrors sexual assault survivors' language of harm. It includes references to student depression, anxiety, suicide attempts, flashbacks, and PTSD caused by the experience of a school investigation and discipline.<sup>169</sup> It also adopts language from survivor narratives to describe the impact of the discipline on educational and career trajectories. In some

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167. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS* (2010).

168. See Tuerkheimer, *supra* note 109, at 3 (describing how credibility discounts for women reporting sexual violence “are meted out at every stage of the criminal process: by police officers, prosecutors, jurors, and judges.”). For research on the impact of participation in the criminal justice system on sexual assault survivors, see Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 159 (2003).

169. E.g., Complaint Against Dayton, *supra* note 82, at 57 (student suspended for two years describing the impact of the student conduct process including a diagnoses of posttraumatic stress disorder (“PTSD”), with symptoms including “. . . flashbacks related to [the University’s] conduct, depression, and difficulty sleeping and interacting socially.”); Complaint Against Brigham Young, *supra* note 97, at 33; *Parent of an Accused Student Who Was Exonerated but Endured a Very Painful Extended Process*, FAMILIES ADVOCATING CAMPUS EQUALITY (FACE), <https://www.facecampusequality.org/stories-3> (last visited Sept. 14, 2019) (Parent explaining how the school investigation that ultimately found her student not responsible still caused harm: “As a result of this treatment, my student suffers from PTSD, Depression, and Anxiety, which affect both the opportunity to an education free from hostility, and physical and emotional health.”).

Victims of sexual assault frequently experience PTSD, depression, and anxiety, as is demonstrated by both individual accounts and research on the impact of trauma. Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims’ Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 398 (2005).

instances, it explicitly suggests that being accused of rape is a similar experience to being a victim of rape.<sup>170</sup> The disciplined student narrative also mirrors the language of institutional betrayal identified by survivor narratives and researchers studying the impact of institutional betrayal on sexual assault victims.<sup>171</sup> The disciplined student narrative uses the language of institutional betrayal not just to describe the harm experienced when their college found them responsible for sexual misconduct violations, but also to describe the harm experienced when a college opened an investigation based on a complaint of sexual misconduct, even if they were ultimately found not responsible for the violation.<sup>172</sup> In mirroring the harm language and suggesting that the impact of school discipline for sexual misconduct is the same as the impact of sexual assault, the disciplined student narrative adopts the considerable social science research documenting the harms to student survivors of sexual assault. By using this same language, the disciplined student narrative avoids the issue of accountability by presenting disciplined students as equally hurt in the same ways as victims of sexual assault without addressing differences in culpability or causation.

The disciplined student narrative insinuates that the frequency of campus sexual assaults is similar to the frequency of false allegations of campus sexual assault, despite considerable evidence to the contrary.<sup>173</sup> It deceptively uses sexual assault research and awareness campaigns to suggest that if there is an epidemic of sexual assault on campus (which it does not always concede),<sup>174</sup> then there too must be an epidemic of male students falsely accused and wrongly disciplined for sexual

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170. See, e.g., Sommers, *supra* note 157 (arguing that “being a victim of rape is uniquely horrific, but being accused of rape is not far behind.”).

171. See Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 122 (2013) (describing research showing how a school’s response to reports of sexual assault exacerbate a victim’s trauma symptoms); Pino, *supra* note 4 (a survivor’s account of the impact of institutional betrayal); Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims’ Attorneys*, 65 DRAKE L. REV. 293, 296 n.2 (2017).

172. See *Parent of an Accused Student Who Was Exonerated but Endured a Very Painful Extended Process*, *supra* note 169 (a parent describing a seven-month school investigation against a student that resulted in a finding of not responsible); see also Wilson, *supra* note 68.

173. E.g., Stuart Taylor Jr. & KC Johnson, *Until Proven Guilty: The Vanishing of Due Process in Campus Rape Tribunals*, NAT’L REV. (Dec. 7, 2015, 5:00 AM), <https://www.nationalreview.com/nrd/articles/427330/until-proven-guilty> (“[The 2011 OCR] mandates are having a devastating impact on the nation’s universities and on the lives of dozens — almost certainly soon to be hundreds or thousands — of falsely accused students.”).

174. See, e.g., Yoffe, *The College Rape Overcorrection*, *supra* note 73 (critiquing research on campus sexual assault). But see Jennifer Baker, *Campus Rape Skepticism: How Not to ‘Debunk’ Research*, PSYCHOL. TODAY (Mar. 6, 2015), <https://www.psychologytoday.com/us/blog/the-love-wisdom/201503/campus-rape-skepticism>. See also, e.g., Reynolds, *supra* note 80 (“Using debunked statistics, the president, the vice president and various other political officials have falsely claimed that there’s an epidemic of rape on college campuses . . . .”); Will, *Colleges Become the Victims*, *supra* note 106 (arguing that the Obama administration’s statistics on sexual assault suggesting a 20% assault rate are preposterous).

assault.<sup>175</sup> The conflation of the number of sexual assaults with the number of students wrongly sanctioned for sexual misconduct relies on several faulty assumptions. First, it mistakenly equates the number of sexual assault survivors on campus with the number of students who file complaints of sexual assault, in spite of research indicating low reporting rates.<sup>176</sup> Second, it mistakenly equates the number of sexual assault complaints with the number of students seriously disciplined for sexual misconduct by erroneously assuming that colleges find 100% of students reported for sexual misconduct responsible for student code violations and sanctions them all with suspension or expulsion. Third, it incorrectly equates the number of students disciplined for violations of student conduct codes related to sexual misconduct with students who were falsely accused. The disciplined student narrative also fails to acknowledge that male students are more likely to experience a sexual assault than to be accused of a sexual assault, let alone falsely accused of a sexual assault.<sup>177</sup> Nonetheless, the conflation of the prevalence of sexual assault with prevalence of students wrongly disciplined for sexual assault successfully influenced policy decision-makers, as indicated by recent statements by Secretary DeVos.<sup>178</sup>

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175. *E.g.*, Taylor Jr. & Johnson, *supra* note 173 (“[the 2011 OCR] mandates are having a devastating impact on the nation’s universities and on the lives of dozens — almost certainly soon to be hundreds or thousands — of falsely accused students.”).

176. *See* Behre, *supra* note 171, at 316 n.88, 318 n.92 (summarizing research estimating the rates of campus sexual assault at 20% for female students and 5% for male students, and summarizing research on low reporting rates for sexual assault indicating that less than 10% of student survivors report sexual assaults to their colleges, respectively).

Even three years after the Department of Education released the 2011 OCR guidance and the media increasingly covered the problem of campus sexual assault, one study found that 91% of colleges and universities reported no sexual assaults on their campuses in 2014. *See* CHRISTOPHER KREBS ET. AL., RESEARCH TRIANGLE INST. INT’L, NCJ 249545, CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT 107 (Jan. 2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf> (“About 2.7[%] of sexual battery incidents and 7.0[%] of rape incidents were reported by the victim to any school official.”); *see also* Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL. PUB. POL’Y & L. 1, 7 (2015) (concluding that ordinary practice of universities is to undercount incidents of sexual assault—even after they are fined for Clery Act violations—based on an analysis of Clery audits and a comparison to reports on other campus crimes); Amy Becker, *91 Percent of Colleges Reported Zero Incidents of Rape in 2014*, AM. ASS’N U. WOMEN (Nov. 23, 2015), <http://www.aauw.org/article/clery-act-data-analysis/>. In spite of the low official reporting rates, research surveys and campus climate surveys continue to show rates of sexual assault for female students around 20%. *Supra* text accompanying note 1.

177. *See* Anderson & Clement, *supra* note 1 (reporting that “7% of young men say they suffered unwanted sexual incidents in college.”).

178. *See* Aaron Blake, *Betsy DeVos’ Botched ‘60 Minutes’ Interview, Annotated*, WASH. POST (Mar. 12, 2018), [https://www.washingtonpost.com/news/the-fix/wp/2018/03/12/betsy-devos-botched-60-minutes-interview-annotated/?utm\\_term=.2a25d11d23fa](https://www.washingtonpost.com/news/the-fix/wp/2018/03/12/betsy-devos-botched-60-minutes-interview-annotated/?utm_term=.2a25d11d23fa) (When asked if she was suggesting that the number of false accusations of campus sexual assault are as high as the number of actual rapes or assaults, Secretary DeVos first responded “Well, one sexual assault is one too many, and one falsely accused individual is one too many.” When asked again if they were the same, she said “I don’t know. I don’t know . . .”). *But see* Jeremy Bauer-Wolf, *Education Dept. Clarifies DeVos Comments on Sexual Assault*, INSIDE HIGHER ED (Mar. 14, 2018), <https://www.insidehighered.com/news/2018/03/14/>



In introducing the disciplined student narrative as the other side of the campus sexual assault discourse, proponents suggest if policymakers listen to survivors of sexual assault, they must also provide equal time to students disciplined for sexual assault. The success of the disciplined student narrative's use of moral equivalency is evidenced through the increased media coverage of lawsuits filed by disciplined students, articles about their attorneys, and editorials sharing the narrative.<sup>179</sup> It is also demonstrated by Secretary DeVos's decision to provide equal time to both survivors of campus sexual assault and disciplined student advocates (along with men's rights groups advocating for disciplined students)<sup>180</sup> to meet with her to provide input into her decision to withdraw the 2011 OCR guidance and issue a new "Q&A on Campus Sexual Misconduct" letter on September 22, 2017, and a new set of proposed regulation on November 16, 2018.<sup>181</sup> In her statement, Secretary DeVos exemplified moral equivalence in her speech about campus sexual assault, stating:

one rape is too many . . . [and] one person denied due process is too many. . . . I thought about my two daughters. And I thought about my two sons. . . . [L]ives have been lost. Lives of the victims. And lives of the accused. . . . There are men and women, boys and girls, who are survivors, and there are men and women, boys and girls who are wrongfully accused.<sup>182</sup>

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education-department-devos-says-false-reports-sexual-assault-are-rare (explaining how a Department of Education spokesperson later walked the comments back and stated that Secretary DeVos knows that false reports of sexual assault are rare).

179. E.g., Barbash, *supra* note 94; Gordon, *supra* note 103; Tony Gutierrez, *Colleges Slammed with Lawsuits From Men Accused of Sex Crimes*, CBS NEWS (Mar. 23, 2016, 2:51 PM), <http://www.cbsnews.com/news/colleges-slammed-with-lawsuits-from-men-accused-of-sex-crimes/>; Hartocollis et al., *supra* note 94; Ashby Jones, *More Men Fight College Allegations of Sexual Assault*, WALL ST. J. (Mar. 19, 2015, 7:34 PM), <https://www.wsj.com/articles/former-cornell-student-sues-school-alleging-he-was-falsely-accused-for-sexual-assault-1426799783>; Leef, *supra* note 104; Max Kutner, *The Other Side of the College Assault Crisis*, NEWSWEEK (Dec. 10, 2015, 5:33 AM), <https://www.newsweek.com/2015/12/18/other-side-sexual-assault-crisis-403285.html>; Lauerma, *supra* note 114; Shapiro, *supra* note 152; Shannon McCaffrey & Janel Davis, *Secretive Justice: How Georgia Colleges Handle Rape on Campus*, ATLANTA J. CONST. (Apr. 18, 2015), <http://investigations.ajc.com/campusjudiciary/>; Smith, *supra* note 72; Taranto, *supra* note 141; Wilson, *supra* note 68; Yoffe, *The College Rape Overcorrection*, *supra* note 73.

180. Unlike organizations that identify primarily as disciplined student advocacy groups or civil rights organizations purporting to provide the other side of the story (such as FACE and FIRE), the men's right groups that met with DeVos (NCFM and SAVE) were identified as hate groups who actively facilitated threats against sexual assault survivors by posting their descriptions and addresses online. See *Misogyny: The Sites*, *supra* note 78.

181. SEPTEMBER 2017 Q&A ON CAMPUS SEXUAL MISCONDUCT, U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS. (2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [hereinafter 2017 OCR Q&A].

182. Secretary DeVos also stated:

This failed system has generated hundreds upon hundreds of cases in the Department's Office for Civil Rights, mostly filed by students who reported sexual misconduct and believe their colleges let them down. It

To a lesser extent, California Governor Brown did the same in his statement explaining his decision to veto a senate bill codifying some of the OCR protections: “On one side are complainants who come forward to seek justice and protection; on the other stand the accused students, who, guilty or not, must be treated fairly and with the presumption of innocence until the facts speak otherwise.”<sup>183</sup>

The disciplined student narrative not only promotes itself as the counter-narrative to the survivor narrative underpinning the campus anti-rape movement, it identifies as the foundation of a new social movement.<sup>184</sup> It suggests moral equivalence with the survivor narrative by also claiming to fight sexism and through its call for formal gender equality. It identifies students disciplined for campus sexual misconduct as the real victims of sex discrimination and those most in need of civil rights legal protections.<sup>185</sup> It points to campus sexual assault awareness events and trainings as evidence of sexism against men. Disciplined student lawsuits alleging Title IX sex discrimination against men claim mandatory sexual assault prevention programming create a hostile environment for male students because they imply that men are more likely than women to be rapists.<sup>186</sup> A response to this

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has also generated dozens upon dozens of lawsuits filed in courts across the land by students punished for sexual misconduct who also believe their colleges let them down . . . . Every survivor of sexual misconduct must be taken seriously. Every student accused of sexual misconduct must know that guilty is not predetermined. . . . Any school that refuses to take seriously a student who reports sexual misconduct is one that discriminates. And any school that uses a system biased toward finding a student responsible for sexual misconduct also commits discrimination.

Svrluga, *supra* note 35; *see also* 2017 OCR Q&A, *supra* note 181, at 4 (stating that violation of respondents’ rights will also constitute a violation of Title IX).

183. But also note that Governor Brown next stated, “Then, as we know there are victims who never come forward, and perpetrators who walk free.” Letter from Edward G. Brown, Jr., *supra* note 38, at 1.

184. Some proponents even claim disciplined students are the voice of the new civil rights movement, with one attorney recently calling his client a hero and comparing him to Rosa Parks. *See* Hailey Fuchs, *Junior Suing Yale Replaces Lawyer*, YALE NEWS (Feb. 28, 2018, 12:19 AM), <https://yaledailynews.com/blog/2018/02/28/junior-suing-yale-replaces-lawyer/>. Here, it is important to distinguish between the different types of advocacy groups using the disciplined student narrative, because men’s rights groups like SAVE and NCFM, have long argued that they are a civil rights movement advocating for men as the primary recipients of sex discrimination and victims of sexual assault and domestic violence. *See generally* Kelly Alison Behre, *Digging Beneath the Equality Language: The Influence of the Fathers’ Rights Movement on Intimate Partner Violence Public Policy Debates and Family Law Reform*, 21 WM. & MARY J. WOMEN & L. 525 (2015) (discussing the men’s rights movement adoption of civil rights language and identity).

185. *E.g.*, Complaint Against Allegheny, *supra* note 143, at 44 (“The college’s institutionalized gender bias against males accused of sexual assault results from classifications based on archaic assumptions.”); *see also* Deborah L. Brake, *Back to Basics: Excavating the Sex Discrimination Roots of Campus Sexual Assault*, 6 TENN. J. RACE, GENDER & SOC. JUST. 7, 26–27 (2017).

186. *E.g.*, Complaint Against Dayton, *supra* note 82, at 21–23 (describing a university’s involvement in The Red Flag Campaign, Take Back the Night Rallies, Green Dot programming, the Clothesline Project, Haven training, and a showing of the *Hunting Ground* as evidence of anti-male bias); Lauerman, *supra* note 114.

claim appears in the proposed 2018 Title IX regulation through the warning that schools should use training materials that “do not rely on sex stereotypes . . . .”<sup>187</sup>

The disciplined student narrative further suggests that even if complainants are not exclusively female,<sup>188</sup> students disciplined for sexual misconduct are almost exclusively male, creating a sexist, disparate impact of new school policies and procedures on men. By suggesting campus sexual misconduct is a zero-sum game, the disciplined student narrative asserts that any increase in civil rights obtained by students to be free from sexual misconduct results in a reciprocal decrease in rights for male students.

The disciplined student narrative embraces the same equality language and tools utilized by the campus anti-rape movement in an effort to roll back advances by that movement. The narrative uses the same federal laws, primarily Title IX, to claim sex discrimination.<sup>189</sup> It uses not only court successes or settlements to prove the existence of sex discrimination against men, but also points to the very existence of disciplined student lawsuits—regardless of their outcomes—as evidence that disciplined male students are victims of sexism.<sup>190</sup> By omitting any reference to the successful lawsuits filed by student survivors against their colleges on the basis of sex discrimination against women, the disciplined student narrative implies that courts today are primarily correcting colleges for their treatment of male students accused of sexual misconduct.<sup>191</sup>

The rhetorical tool of moral equivalence proved successful when the 2018 proposed Title IX regulation warned colleges that their treatment of students accused of sexual misconduct could constitute sex discrimination under Title IX, effectively using a federal law created to prevent sex discrimination against women in education to warn colleges that responding to individual complaints of sex discrimination against women could constitute sex discrimination against men.<sup>192</sup>

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187. 2018 Proposed Title IX Regulation, *supra* note 37, at 61473 § 106.45(b)(1)(iii).

188. Although most disciplined students responded to sexual misconduct complaints brought by female students, some responded to complaints brought by male students. *E.g.*, Complaint at 3, *Streno v. Shenandoah Univ.*, No. 5:16-CV-00068 (W.D. Va. Oct. 21, 2016).

189. *E.g.*, Complaint Against Allegheny, *supra* note 143, at 42; Complaint Against Dayton, *supra* note 82, at 61–62.

190. *See, e.g.*, Caroline Kitchener, *How Campus Sexual Assault Became So Politicized*, THE ATLANTIC (Sept. 22, 2017), <https://www.theatlantic.com/education/archive/2017/09/how-campus-sexual-assault-became-so-politicized/540846/>.

191. *See, e.g.*, 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 MONTANA L. REV. 71, 72 (Winter, 2017) (arguing that the increase in disciplined student litigation is “not because of problems that the [Dear Colleague] Letter caused; rather, it is because of the problems it corrected.”); 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>. For research about successful student survivor lawsuits, see Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.L. & U.L. 613 (2009).

192. 2018 Proposed Title IX Regulation, *supra* note 37, § 106.6(d).

3. *Employing Disaster Analogies Through References to False Allegation Stories: UVA and Duke*

Disaster analogies in narratives prove strong rhetorical devices to persuade audiences about the need for policy change. These symbolic stories provide an emotional hook that primes the audience to understand the story as not one about campus sexual assault, but rather as one about false allegations. In the disciplined student narrative, the disaster analogies are most often provided by a simple reference to two colleges: Duke and UVA.<sup>193</sup> The emotional code embedded in these two school names is so strong that the school names are consistently included in the disciplined student narrative, even when they are not applicable to the facts of the specific case or the advocacy effort.<sup>194</sup>

Merely referencing the two colleges in the context of campus sexual assault immediately brings to mind two specific stories: “UVA” is shorthand for the retracted Rolling Stone article about campus sexual assault at the University of Virginia published on November 19, 2014,<sup>195</sup> and “Duke” is shorthand for the Duke University lacrosse players accused of sexual assault on March 14, 2006.<sup>196</sup> This, in

193. E.g., Suk Gersen, *supra* note 80; Will, *Betsy DeVos*, *supra* note 122.

194. E.g., Sommers, *supra* note 157 (referencing the Duke lacrosse case to support the argument that the preponderance of the evidence standard outlined in the 2011 OCR guidance is dangerous.).

195. Sabrina Rubin Erdely, *A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE (Nov. 19, 2014), <http://web.archive.org/web/20141119200349/http://www.rollingstone.com/culture/features/a-rape-on-campus-20141119>.

Although the article references several survivors, the principle narrative describes a vicious gang rape of a woman called “Jackie” at a fraternity house and the school’s inadequate response to her report. In response to the article and the loud public outcry that followed, UVA suspended all Greek organizations on its campus, and the Charlottesville law enforcement opened an investigation. The fraternity house referenced in the article was vandalized. Within a week, journalists questioned the veracity of the article and pointed to inconsistencies in Jackie’s story, and two weeks later, Rolling Stone issued an apology for the article stating that the magazine’s “trust in [Jackie] was misplaced.” See Eamon McNiff et. al., *How the Retracted Rolling Stone Article ‘A Rape on Campus’ Came to Print*, ABC NEWS, <http://abcnews.go.com/2020/deepdive/how-retracted-rolling-stone-article-rape-on-campus-came-print-42701166> (last visited Sept. 17, 2019).

The fraternity named in the article sued Rolling Stone for defamation in a case it ultimately settled in 2017 for \$1.65 million, as did a UVA Associate Dean named in the article. Zach Schonfeld, *After Gang Rape Article, Rolling Stone Settles with University of Virginia Fraternity*, NEWSWEEK: CULTURE (June 13, 2017, 6:16 PM), <http://www.newsweek.com/after-gang-rape-article-rolling-stone-settles-university-virginia-fraternity-625288>.

196. Early in the morning on March 14, 2006, a young black woman hired to strip at a Duke lacrosse off-campus party went to the hospital and reported that she had been raped by three white Duke students in a bathroom during the party. A week later, a judge ordered the lacrosse players to provide DNA samples. The media soon learned about racial slurs used by players to describe the dancers at the party, as well as a disturbing email sent by one of the players to the other players inviting them to a party and describing his plan to kill the strippers, then ejaculate on his Duke uniform while cutting their skin off (the student later stated that his email referenced a quote from *American Psycho*). See Christina Cauterucci, *A New ESPN*

and of itself, is noteworthy, as these were not the only national media stories during the same timeframe about campus sexual assault. They were not even the only national stories about campus sexual assault about either of these two specific colleges. To the contrary, both UVA and Duke made the national news several times about other sexual assault cases and complaints about the colleges' inadequate responses to reports of sexual violence.<sup>197</sup> Nonetheless, references to the UVA and

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*Doc Exposes the Real Villains in the Duke Lacrosse Case*, SLATE: THE XX FACTOR (Mar. 11, 2016, 5:28 PM), [http://www.slate.com/blogs/xx\\_factor/2016/03/11/a\\_new\\_espn\\_film\\_exposes\\_the\\_real\\_villains\\_in\\_the\\_duke\\_lacrosse\\_case.html](http://www.slate.com/blogs/xx_factor/2016/03/11/a_new_espn_film_exposes_the_real_villains_in_the_duke_lacrosse_case.html). Duke issued an interim suspension for the student who wrote the email, the lacrosse coach resigned, and Duke cancelled the rest of the lacrosse season. Eighty-eight faculty members signed an advertisement published in the Duke newspaper indicating that regardless of the police investigation, they are listening to their students' concerns about racism and sexual violence. John D. Wiley, *Duke's Poisoned Campus Culture*, INSIDE HIGHER ED (May 1, 2006), <http://www.insidehighered.com/views/2006/05/01/dukes-poisoned-campus-culture>. For an image of the advertisement, see WHAT DOES A SOCIAL DISASTER SOUND LIKE?, [http://photos1.blogger.com/x/blogger/2862/372/1600/99636/Listening\\_Statement\\_b.jpg](http://photos1.blogger.com/x/blogger/2862/372/1600/99636/Listening_Statement_b.jpg). This advertisement was widely criticized by conservative commentators. *E.g.*, Wiley, *supra*. Three students were indicted on felony sexual assault and kidnapping charges. Duke issued them interim suspensions for the arrested students pending the outcome of the criminal case, as it stated was policy for any students arrested for felonies.

Defense counsel reported that the victim changed her account several times. He accused the prosecutor of withholding exculpatory evidence (a DNA sample collected through the sexual assault forensic examination that did not match their clients) and filed a bar complaint against him for making prejudicial statements about the case to the media and lying to a judge. The prosecutor was ultimately fired, disbarred, and criminally convicted. The attorney general announced that all charges against the students were dropped on April 11, 2007 (a little over a year after the assault). The three students sued and settled with Duke University for an undisclosed amount (estimated at \$20 million per student), as well as the City of Durham, the former district attorney, and police officers who investigated the case. The 88 members of the Duke lacrosse team also sued and settled. The woman who reported the rape, Crystal Mangum, maintains that she was sexually assaulted. There was never any kind of trial about the allegations of sexual assault. William D. Cohan, *Remembering (and Misremembering) the Duke Lacrosse Case*, VANITY FAIR (Mar. 10, 2016), <https://www.vanityfair.com/news/2016/03/duke-lacrosse-case-fantastic-lies-documentary>.

197. UVA: For example, the national media widely covered the 2014 disappearance of UVA student Hannah Graham who was eventually found dead. Police arrested Jesse Matthew for her murder, a man previously accused of sexual assault at two different Virginia colleges and who later pled guilty to killing another college student, Morgan D. Harrington, who disappeared near UVA in 2009. Responding to the intense coverage of the murder, Virginia Governor McAuliffe created a statewide campus sexual violence task force in September 2014. Jennifer Steinhauer, *Virginia Case Shows Vulnerability of Women on Campus*, N.Y. TIMES (Oct. 3, 2014), <https://www.nytimes.com/2014/10/04/us/attention-grows-but-virginia-cases-show-vulnerability-of-women-on-campus.html>.

UVA also received national coverage after student survivors filed both federal lawsuits and OCR complaints against UVA claiming the college did not hold student rapists accountable. See C-VILLE Writers, *Burden of Proof: UVA's Sexual Assault Policy Under Fire*, C-VILLE (Nov. 20, 2012, 7:00 AM), <http://www.c-ville.com/burden-of-proof-uvas-sexual-assault-policy-under-fire/#.Wt5wzk2ou72>.

In 2015, OCR issued investigation results finding UVA's sexual misconduct policies and procedures failed to provide a prompt and equitable response to reports of sexual

Duke stories consistently appear in the disciplined student narrative. They are cited as the real-life examples of how college campuses using new rules forced upon them by the federal government can use a female student's false allegations of sexual assault to wrongfully expel and ruin a young man's life. Not only are they used by disciplined students and their advocates, they also appear as shorthand by attorneys

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harassment in compliance with Title IX and that there was a basis for a hostile environment that UVA failed to eliminate nor take steps to prevent its recurrence. The OCR Summary of Findings also noted that UVA's informal resolution process was not equitable to complainants nor to accused students. Letter from Alice B. Wender, Regional Office Director, U.S. Dep't of Educ. Office for Civil Rights, to Teresa A. Sullivan, President, Univ. of Va. 2 (Sept. 21, 2015), <https://www2.ed.gov/documents/press-releases/university-virginia-letter.pdf>.

A 2016 Washington Post investigation discovered that the initial OCR letter of findings included more incidents of sexual violence and included harsher references to UVA fraternities, raising the possibility that OCR may have withdrawn the original letter due to political pressure. See Nick Anderson, *In Secret Letter, Feds Sternly Criticized U-Va for Handling of Sexual Violence*, WASH. POST (Mar. 5, 2016), [https://www.washingtonpost.com/local/education/in-secret-letter-feds-sternly-criticized-u-va-for-handling-of-sexual-violence/2016/03/01/297e9b3a-d728-11e5-9823-02b905009f99\\_story.html](https://www.washingtonpost.com/local/education/in-secret-letter-feds-sternly-criticized-u-va-for-handling-of-sexual-violence/2016/03/01/297e9b3a-d728-11e5-9823-02b905009f99_story.html) (reporting on the initial OCR letter of findings for the UVA investigation obtained through a FOIA request and questioning why the letter was rescinded and re-written).

Duke University: Duke University has faced several lawsuits by both complainants and respondents in sexual misconduct cases, as well as national media coverage of sexual assaults on its campus. In 2011, a former student sued Duke University for creating a hostile educational environment by disparaging the severity of her rape to the media. *Former Duke Student Sues University Over Rape Case*, HUFFINGTON POST (Aug. 8, 2011), [https://www.huffingtonpost.com/2011/08/04/former-duke-student-sues-\\_n\\_919512.html](https://www.huffingtonpost.com/2011/08/04/former-duke-student-sues-_n_919512.html).

In 2014, the first student Duke ever expelled for sexual misconduct, student athlete Lewis McLeod, sued Duke and ultimately reached a settlement with Duke in 2018. Valerie Bauerlein, *Duke Settles Student Lawsuit Over Sexual-Misconduct Case*, WALL ST. J. (Feb. 27, 2018, 5:57 PM), <https://www.wsj.com/articles/duke-settles-student-lawsuit-over-sexual-misconduct-case-1519770735>.

In 2015, Duke suspended a fraternity following a student's report that she was raped in at the Alpha Delta Phi house. Doug Staglin, *Duke Suspends Fraternity Over Rape Allegations*, USA TODAY (Jan. 21, 2015, 12:59 PM), <https://www.usatoday.com/story/news/nation/2015/01/21/duke-university-rape-fraternity-suspended/22106611/>. That same year, Duke also came under fire after a report revealed that it failed to open an investigation after two students publicly accused a basketball player of sexual misconduct. Matt Bonestell, *Duke Reportedly Had Known of Sexual Assault Allegations Against Rasheed Sulaimon Since March 2014*, WASH. POST (Mar. 2, 2015), [https://www.washingtonpost.com/news/early-lead/wp/2015/03/02/duke-reportedly-knew-of-sexual-assault-allegations-against-rasheed-sulaimon-since-march-2014/?noredirect=on&utm\\_term=.9d23bb66e92d](https://www.washingtonpost.com/news/early-lead/wp/2015/03/02/duke-reportedly-knew-of-sexual-assault-allegations-against-rasheed-sulaimon-since-march-2014/?noredirect=on&utm_term=.9d23bb66e92d).

In 2016, a former student opened an OCR complaint and filed a Title IX lawsuit for deliberate indifference after Duke found the two male students she reported drugged, raped, and videotaped her (one of whom was the stepson of a former Duke provost) to be not responsible for sexual assault following a school hearing. See Matt Lamb, *Duke Lacrosse Players' Lawyer Switches Sides, Sues School on Behalf of Alleged Rape Victim*, C. FIX (Aug. 22, 2016), <https://www.thecollegefix.com/post/28574/>.

In 2017, a graduate student filed a lawsuit against Duke claiming she faced harassment and retaliation after she reported she was raped by a Women's Center counselor's boyfriend. Ray Gronberg, *Student Sues Duke, Claims Counselor and Boyfriend Blocked Rape Investigation*, HERALD SUN (July 5, 2017, 5:39 PM), <https://www.heraldsun.com/news/local/counties/durham-county/article159787239.html>.

in legal pleadings, open letters, and editorials.<sup>198</sup> Although everyone can agree that these stories were infuriating and scary, it is worth asking why we consider two stories about false accusations of sexual assault to be more important and memorable than the hundreds of stories about campus sexual assault.

We must also question why the symbolic power of these two stories is not diminished by the contradictions between the facts of the specific stories and what they have come to symbolize. The Duke lacrosse case pre-dated the 2011 OCR guidance by five years. Neither UVA nor Duke actually involved a student filing a complaint of sexual misconduct against another student, and neither school actually conducted a school investigation or adjudication, let alone expelled a student for sexual misconduct. (In fact, Duke did not expel a student for sexual misconduct until 2014, and as of 2015, UVA had not expelled a single student for sexual misconduct.)<sup>199</sup> The stories certainly serve as warnings of how media frenzy can impact public opinion and they offer important lessons, but their designation as the quintessential examples of Title IX false allegations is less legitimate.<sup>200</sup> The UVA story is more accurately viewed as “an avoidable journalistic failure” that led to successful defamation lawsuits by the fraternity and administrator implicated in the story.<sup>201</sup> Duke is more accurately analyzed as an example of prosecutorial misconduct, which led to the termination, disbarment, and the first criminal conviction for contempt of court against the lead prosecutor in North Carolina’s history, along with successful civil lawsuits against the city and college.<sup>202</sup>

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198. See, e.g., Open Letter from David Rudovsky, et al., *supra* note 33 (“There are documented cases of a rush to judgment on charges of sexual misconduct at universities, including the Duke Lacrosse case and the recent events at the University of Virginia.”).

199. Anderson, *supra* note 153; Bauerlein, *supra* note 197.

200. Neither accuser ever recanted or was charged with filing a false report, nor did either case ever make it to any kind of legal adjudication or trial. See T. Rees Shapiro, ‘Jackie’ Stands By Account But Says She Had Concerns About Rolling Stone Article, WASH. POST (Oct. 24, 2016), [https://www.washingtonpost.com/local/education/jackie-stands-by-account-says-she-had-concerns-about-rolling-stone-article-before-it-ran/2016/10/24/22ee9afa-9a13-11e6-9980-50913d68eacb\\_story.html?utm\\_term=.7d4d4c34aa78](https://www.washingtonpost.com/local/education/jackie-stands-by-account-says-she-had-concerns-about-rolling-stone-article-before-it-ran/2016/10/24/22ee9afa-9a13-11e6-9980-50913d68eacb_story.html?utm_term=.7d4d4c34aa78); see also Sheila Coronel et. al, *Rolling Stone’s Investigation: ‘A Failure That Was Avoidable,’* COLUM. JOURNALISM REV. (Apr. 5, 2015), [https://www.cjr.org/investigation/rolling\\_stone\\_investigation.php](https://www.cjr.org/investigation/rolling_stone_investigation.php) (“Rolling Stone’s retraction of its reporting about Jackie concerned the story it printed. The retraction cannot be understood as evidence about what actually happened to Jackie on the night of Sept. 28, 2012. If Jackie was attacked and, if so, by whom, cannot be established definitively from the evidence available.”). For Duke, see Cohan, *supra* note 196 (explaining that the author’s research into the “Duke” case for a book revealed a nuanced story much more complex than the simple narrative of false allegations promoted by the students’ parents and attorneys and picked up by the media and suggesting that we may never know whether or not the students committed sexual assault).

201. Although the writer and editors of the article blamed the mistake on their attempts to respect a sexual assault victim’s autonomy, the Columbia University Graduate School of Journalism found “the explanation that *Rolling Stone* failed because it deferred to a victim cannot adequately account for what went wrong.” Coronel et. al, *supra* note 200. Rather, “[t]he editors made judgments about attribution, fact-checking and verification that greatly increased their risks of error but had little or nothing to do with protecting Jackie’s position.” *Id.*

202. Brake, *Fighting the Rape Culture Wars*, *supra* note 131, at 135.

Nonetheless, both of these nonrepresentative stories continue to serve an outsized role in campus sexual assault discourse because they invoke such a strong cognitive response from the audience.<sup>203</sup> These salient disaster stories bolster the disciplined student narrative by priming the audience to process every campus sexual assault as a story about false allegations.

#### 4. *Exploiting Male Privilege*

Embedded within the disciplined student narrative is a reassertion of male privilege through the implication that equality between men and women is inherently unfair to men. This is demonstrated through the claim that the 2011 OCR guidance requirement that schools provide equitable rights to both complainants and respondents in sexual misconduct investigations and adjudications is unfair to male students or colleges.<sup>204</sup> It is further demonstrated through the assertion that a preponderance of evidence standard is inherently unfair to male students in college disciplinary adjudications involving sexual misconduct (and only in those cases).<sup>205</sup> Skepticism 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 conduct code violation involving sexual misconduct based on 50.1% certainty—the preponderance of evidence standard—regularly invokes outrage.<sup>206</sup> The same outrage is not documented for other types of student misconduct based on student complaints or other administrative investigations and adjudications using the same standard of proof.<sup>207</sup>

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203. *Id.* at 136 (“Those stories that come first to mind shape cognitive responses to problems in irrational ways.”).

204. Equitable rights include the right to an advisor who may be hired counsel, the right to present evidence and witness, and the right to appeal. *See, e.g.*, Will, *Betsy DeVos*, *supra* note 122 (describing the equitable right to appeal as allowing “accusers [to] appeal acquittals, exposing the accused to double jeopardy”); Lave, *supra* note 149, at 937 (“In effect, OCR limits a university’s right to decide how it wants to handle counsel. Requiring that a school provide equal access and equal time may increase costs because if the school provides for counsel for the accused, it must now provide counsel for the complainant as well.”).

205. *See, e.g.*, Yoffe, *The Uncomfortable Truth*, *supra* note 72 (“The preponderance-of-evidence standard demanded by OCR requires schools to make life-altering decisions even when there is great doubt.”).

206. Bazelon, *I’m a Democrat*, *supra* note 81.

207. The debate about the appropriate standard of evidence to apply to campus student conduct cases involving reports of sexual assault is rooted in the idea that men’s credibility should be valued over women’s credibility. In cases where the primary evidence is often provided by statements by the complainant and respondent, the preponderance of the evidence standard requires decision-makers to assess credibility and corroborating evidence to decide whether it is more likely than not that the respondent committed a student conduct violation. The disciplined student narrative frames this standard as inherently unfair to respondents because they believe that a male student’s assertion that he did not commit sexual misconduct should be deemed more credible than a female student’s assertion that he sexually assaulted her. *See* Complaint, *supra* note 108, at 7; *e.g.*, Stephen Henrick, *Reform College Sexual Assault Policies to Protect Accused Students, Too*, HUFFINGTON POST (May 15, 2013), [https://www.huffingtonpost.com/stephen-henrick/reform-college-sexual-assault-policy\\_b\\_2885773.html](https://www.huffingtonpost.com/stephen-henrick/reform-college-sexual-assault-policy_b_2885773.html) (“Changing the burden [of proof to a preponderance standard] does not make



The disciplined student narrative's critiques of trauma-informed investigations as unfair to male students also suggest a nod to male privilege. Throughout history, women reporting sexual assaults had their credibility discounted at every step of our criminal legal system.<sup>208</sup> That systematic disbelief and skepticism is so entrenched in our culture that the disciplined student narrative has only to suggest that an investigator is using "trauma-informed" practices (which essentially means responding to and investigating reports of sexual misconduct with the same level of good faith and relevant training regularly applied to other types of misconduct violations) to claim that men are being treated unfairly or that they are "guilty until proven innocent."<sup>209</sup> The narrative subtly advocates for student conduct codes to adopt historic elements of criminal complaints discounting female victims' credibility by requiring additional witnesses or evidence of force, insinuating that a woman's account—by itself—should be insufficient to find a student responsible for a student code violation involving sexual misconduct.<sup>210</sup>

The disciplined student narrative also demonstrates a claim for male privilege in its assertion that male students need criminal-level due process protections against complaints of sexual misconduct while failing to make similar claims on behalf of students accused of other student code violations that also constitute crimes, such as assault, theft, or arson.<sup>211</sup> The seemingly benign suggestion that campus sexual assault would be more appropriately handled by the criminal justice system not only willfully ignores the criminal justice system's

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hearings more equitable; instead, it makes them even more unfair to accused students."). For more information about the debate involving the evidentiary standard, see Brake, *Fighting the Rape Culture Wars*, *supra* note 131. For a defense of the preponderance standard, see Katherine K. Baker et al., TITLE IX & THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER (2016), <http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf>.

208. See Tuerkheimer, *supra* note 109, at 1–2.

209. Suk Gersen, *supra* note 80 ("It is a near-religious teaching among many people today that if you are against sexual assault, then you must always believe individuals who say they have been assaulted. Questioning in a particular instance whether a sexual assault occurred violated that principle. Examining evidence and concluding that a particular accuser is not indeed a survivor, or a particular accused is not an assailant, is a sin that reveals that one is a rape denier or biased in favor of perpetrators."); Emily Yoffe, *The Bad Science Behind Campus Response to Sexual Assault*, THE ATLANTIC (Sept. 8, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211/> ("Assertions about how trauma physiologically impedes the ability to resist or coherently remember assault have greatly undermined defense against assault allegations."); Yoffe, *The Uncomfortable Truth*, *supra* note 72 ("A central tenant of advocates seeking greater accountability for sexual assault is that the complainant is virtually always the one telling the truth."); KC Johnson & Stuart Taylor, *Op-Ed: Students Accused of Campus Sexual Assault Are Now Guilty Until Proved Innocent*, LA TIMES (Mar. 3, 2017), <https://www.latimes.com/opinion/op-ed/la-oe-johnson-taylor-campus-sexual-assault-20170303-story.html>.

210. See Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L. J. 1, 1–2 (2015) (describing history of criminal rape law); Deborah Epstein & Lisa A. Goodman, *Discounting Credibility: Doubting the Testimony and Dismissing the Experiences of Domestic Violence Survivors and Other Women*, 167 U. PENN. L. REV. 399, 459 (2019).

211. See, e.g., Leef, *supra* note 104.

failure to address sexual assault, as well as student survivors' interim need to access education and privacy, it also suggests that men accused of sexual assault should always be entitled to the level of protections provided by the criminal justice system regardless of the type of possible sanctions and regardless of the potential impact on victims.<sup>212</sup> It capitalizes on the historic belief that women alleging sexual assault are not credible and that men need extraordinary procedural and substantive protections to defend against the possibility of women's false allegations. Its success is demonstrated in the inclusion of new due process rights for respondents in the 2018 proposed Title IX regulation not previously found in federal law and not extended to respondents in other student misconduct cases.<sup>213</sup>

The due process requested by the disciplined student narrative sometimes adopts a meaning that extends beyond its legal definition.<sup>214</sup> Both within the disciplined student narrative and in the broader backlash to the #MeToo movement, "due process" has become code for the right to be protected from any allegations or investigation.<sup>215</sup> The disciplined student narrative includes accounts of students who were found "not responsible" for student conduct code violations involving sexual misconduct and never disciplined by their colleges who assert that they never should

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212. Letter from Mike Adams, et al., *supra* note 80 ("The undersigned professors and legal experts write regarding the use of investigative 'victim-centered' practices that threaten to subvert the objective collection and presentation of evidence in administrative, civil, and criminal sexual assault proceedings. These guilt-presuming methods include 'victim-centered' investigations, 'trauma-informed' theories, and the admonition to always 'believe the victim.'"); *see, e.g.*, Emily Yoffe, *Reigning in the Excesses of Title IX*, THE ATLANTIC (Sept. 4, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/title-ix-reforms-are-overdue/569215/>.

213. The proposed Title IX regulation requires colleges to provide students responding to a sexual misconduct complaint with a live hearing and an opportunity for respondents' advocates or attorneys to cross-examine complainants in real time. 2018 Proposed Title IX Regulation, *supra* note 37, § 106.45(b)(3)(vi)–(vii). Although some individual schools already provide this right to their students through their student disciplinary process, federal law does not require schools to provide students with these protections for any type of student misconduct. Therefore, the proposed regulation would create an extraordinary protection for students accused of student code violations involving sexual misconduct.

214. Although courts have determined that due process for students accused of campus misconduct is satisfied through notice and a meaningful opportunity to be heard, the disciplined student narrative suggests that due process protections in campus cases should parallel the legal protections provided to criminal defendants.

215. This also became apparent in the #MeToo movement as many of the same journalists who wrote about the disciplined student narrative warned that pressuring powerful men to resign based on sexual harassment allegations might ignore their due process rights. *See, e.g.*, Emily Yoffe, *Why the #MeToo Movement Should Be Ready for a Backlash*, POLITICO (Dec. 10, 2017), <https://www.politico.com/magazine/story/2017/12/10/yoffe-sexual-harassment-college-franken-216057>; *see, e.g.*, Yoffe, *The Uncomfortable Truth*, *supra* note 72. *But see* Ijeoma Oluo, *Due Process Is Needed for Sexual Harassment Accusations-But For Whom?*, MEDIUM (Nov. 30, 2017), <https://medium.com/the-establishment/due-process-is-needed-for-sexual-harassment-accusations-but-for-whom-968e7c81e6d6>.

have been subjected to an investigation at all.<sup>216</sup> The narrative suggests that men's right to be free from campus discipline or even accusations that could result in campus discipline is more important than other students' rights to be free from sexual assault.<sup>217</sup>

The role of male privilege in the disciplined student narrative is further evidenced by its exclusive focus on male pain and the greater value it places on male students' futures. In emphasizing the potential negative consequences of errors in the campus disciplinary process on male students responding to complaints of sexual misconduct, it fails to acknowledge the well-documented negative consequences to student survivors when schools ignore their complaints or find their assailants not responsible.<sup>218</sup> In advocating for decreased enforcement of campus sexual misconduct violations by emphasizing the potential impact of sanctions on male students' access to education, the narrative omits the impact that lackluster enforcement had on student survivors' education that served as the impetus to the campus anti-rape social movement.<sup>219</sup> When advocating for a policy change with a story about a young man who tried to commit suicide after his school sanctioned him for sexual misconduct, the disciplined student narrative omits the stories of the suicides of female and male survivors after their schools responded to their reports of sexual assault with disinterest or hostility.<sup>220</sup> While emphasizing the importance of male pain caused by school investigations and sanctions, the disciplined student narrative simultaneously minimizes the pain experienced by victims of campus

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216. E.g., *Parent of An Accused Student Who Was Exonerated but Endured a Very Painful Extended Process*, *supra* note 169 (a parent describing a seven-month school investigation against a student that resulted in a finding of not responsible).

217. Although the narratives vary slightly between those who claim that campus sexual assault is a serious problem with an overblown response to those who claim that campus sexual assault is not a serious problem, the minimization of sexual assault is consistent, as is the focus on the harm of school discipline. The disciplined student narrative further suggests that the future of male students accused of sexual assault is of the utmost importance, while devaluing the futures of sexual assault victims as less important or already ruined. The implicit message is that male student's futures—particularly those attending elite colleges with impressive career plans—are simply more valuable to society than holding them accountable for sexual assault or providing justice or safety to sexual assault victims.

218. Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 398 (2005).

219. See *supra* notes 8, 13.

220. See, e.g., Carol Robinson, *Megan Rondini's Family, Alabama Reach Settlement on Second Anniversary of Her Death*, AL.COM (Feb. 27, 2018), [https://www.al.com/news/birmingham/index.ssf/2018/02/megan\\_rondini\\_alabama\\_settleme.html](https://www.al.com/news/birmingham/index.ssf/2018/02/megan_rondini_alabama_settleme.html); *Lead a Good Life, Everyone: Trey Malone's Suicide Note*, GOOD MEN PROJECT (Nov. 5, 2012), <https://goodmenproject.com/ethics-values/lead-a-good-life-everyone-trey-malones-suicide-note/>; Melinda Henneberger, *Reported Sexual Assault at Notre Dame Campus Leaves More Questions Than Answers*, THE NAT'L CATHOLIC REPORTER (Mar. 26, 2012), <https://www.ncronline.org/news/accountability/reported-sexual-assault-notre-dame-campus-leaves-more-questions-answers>; Tom Farrey & Nicole Noren, *Mizzou Did Not Pursue Alleged Assault*, ESPN (Nov. 2, 2018), [http://www.espn.com/espn/otl/story/\\_/id/10323102/university-missouri-officials-did-not-pursue-rape-case-lines-investigation-finds](http://www.espn.com/espn/otl/story/_/id/10323102/university-missouri-officials-did-not-pursue-rape-case-lines-investigation-finds).

sexual assaults by blaming perceived generational differences in sexual culture and use of alcohol on campus.<sup>221</sup>

In addition to placing a higher value on male pain than female pain, the disciplined student narrative also places a higher value on male pleasure over other students' safety and equal access to education. Embedded within the disciplined student narratives is the subtle yet persistent assertion that men should enjoy some level of entitlement to sex. This component of the disciplined student narrative is generally expressed through a concern that campuses are "policing" too much sex on campuses through vague or confusing sexual misconduct definitions.<sup>222</sup> The assertion that campus codes incorporating affirmative-consent definitions place too high of a burden on male students before they can engage in sexual activity implies that maximizing male students' opportunities to spontaneously engage in sex is more important than decreasing or preventing sexual assault.<sup>223</sup> The implication is that men's access to sex in college is more important than students' access to education free from sexual harassment and violence.

##### 5. Erasing Women of Color from the Discussion about Racism

One iteration of the disciplined student narrative shared primarily by law school professors and journalists focuses on the potential impact of racism on students responding to complaints of campus sexual misconduct.<sup>224</sup> As with the broader disciplined student narrative, this version shifts the focus from victims to

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221. See, e.g., Will, *Colleges Become the Victims*, *supra* note 106 (connecting high reporting rates of campus sexual assault with "ambiguities of the hookup culture, this cocktail of hormones, alcohol and the faux sophistication of today's prolonged adolescence of especially privileged young adults"); Yoffe, *The Uncomfortable Truth*, *supra* note 72 ("[T]hose who deal closely with campus sexual assault . . . mostly paint a picture of students, many of them freshmen, who begin a late-night consensual sexual encounter, well lubricated by alcohol, and end up with divergent views of what happened."); Suk Gersen, *supra* note 80 (referring to the sexual assault complaint filed by two Harvard law students against another student as "a confused, drunken encounter," even though the allegations in one complaint resulted in a criminal plea); Young, *The Politics of Campus Sexual Assault*, *supra* note 130 ("Unfortunately, much of the feminist 'war on rape' has conflated sexual assault with muddled, often alcohol-fueled, sexual encounters that involve miscommunication, perhaps bad behavior, but no criminal coercion. As a result, the drunken hookups all too common on today's campuses can lead to devastating charges and penalties.").

222. E.g., Emily Yoffe, *College Women: Stop Getting Drunk*, SLATE (Oct. 15, 2013), <https://slate.com/human-interest/2013/10/sexual-assault-and-drinking-teach-women-the-connection.html>; Jacob Gersen et al., *The Sex Bureaucracy*, 104 CAL. L. REV. 881, 894 (2016).

223. Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 HARV. L. REV. 359, 368 (2015) (analyzing the externalities involved in rigorous efforts to combat sexual assault by comparing the possibility that more survivors would be more likely to report sexual assaults, allowing campuses to prevent future sexual assaults, with the possibility that such efforts "might chill some spontaneous sexual activity").

224. E.g., Halley, *supra* note 80, at 107–08; Emily Yoffe, *The Question of Race in Campus Sexual Assault Cases*, THE ATLANTIC (Sept. 11, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/> [hereinafter Yoffe, *The Question of Race*].

disciplined or accused students. It generally begins with a story about a case told through a disciplined student's version of events or a claim that the writer has personal knowledge of cases involving white, female complainants and black, male respondents.<sup>225</sup>

There is no doubt that racism impacts all of our legal systems, but it is important to note that the disciplined student narrative offers little specific information about the scope, frequency, or impact of racism on accused and disciplined students in campus sexual misconduct adjudications. Rather, it relies on general research about the impact of racism on defendants in the criminal justice system and in the K–12 school-to-prison pipeline, or it references a history of black men lynched based on false accusations of sexual assault of white women.<sup>226</sup> In extrapolating data from general school discipline demographics to suggest changes to Title IX, the disciplined student narrative fails to explain why Title IX is the appropriate target for change or how such changes would meaningfully address the disproportionate impact of school discipline on students of color.<sup>227</sup> Sexual harassment cases, including those involving allegations of sexual assault, remain a very small percentage of overall student discipline cases in colleges and an even

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225. E.g., Halley, *supra* note 80, at 107–08 (“Case after Harvard case that has come to my attention, including several in which I have played some advocacy or adjudication role, has involved black male respondents . . .”); Yoffe, *The Uncomfortable Truth*, *supra* note 72; Bazelon, *I’m a Democrat*, *supra* note 81.

226. E.g., Bazelon, *California’s Sexual Assault Bill*, *supra* note 141 (citing research finding disproportionate discipline of black students in primary and secondary schools for “willful defiance” and general discipline to support author’s concern that black male students will be disproportionately disciplined for sexual misconduct under Title IX and a new California law codifying some of the OCR guidance); Suk Gersen, *supra* note 80 (“And if we have learned from the public reckoning with the racial impact of over-criminalization, mass incarceration, and law enforcement bias, we should heed our legacy of bias against black men in rape accusations. The dynamics of racially disproportionate impact affect minority men in the pattern of campus sexual-misconduct accusations, which schools, conveniently, do not track, despite all the campus-climate surveys. Administrators and faculty who routinely work on sexual-misconduct cases, including my colleague Janet Halley, tell me that most of the complaints they see are against minorities, and that is consistent with what I have seen at Harvard.”); Halley, *supra* note 80, at 106–07 (sharing concerns that Title IX enforcement has gone too far by refencing how “American racial history is laced with vendetta-like scandals in which black men are accused of sexually assaulting white women that become reverse scandals when it is revealed that the accused men were not wrongdoers at all. No reader of *To Kill a Mockingbird* should be able to forget how this American classic convinces its readers that some of these accusations will be based on racially exploitative evasions of responsibility by white women who willingly had sex with black men and then disavowed it as rape.”).

227. E.g., Ben Trachtenberg, *How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students*, 18 NEV. L. J. 107, 113 (2017) (providing general data about the racial composition of students expelled through the student honor code at the University of Virginia as support for the proposition that college student disciplinary processes target black students). *But see*, Coronel et al., *supra* note 200 (noting that the University of Virginia did not expel a single student for student conduct violations involving sexual misconduct during the same time frame).

smaller percentage in K–12.<sup>228</sup> Targeting Title IX for change, rather than Title VI, would also fail to address school discipline of female students of color, who are not likely to be accused of sexual misconduct, but who are still disproportionately disciplined by schools.<sup>229</sup> The disciplined student narrative suggests that schools must choose between enforcing students' civil rights to be free from sex discrimination and their civil rights to be free from racial discrimination.

More troubling, the disciplined student narrative offers a male-biased, anti-intersectional analysis of racism that renders victims of color invisible.<sup>230</sup> The narrative completely erases women of color, suggesting all students of color are black men, all victims of sexual assault are white women, and only men experience racism in legal systems.<sup>231</sup> Students who do not identify as black or white are also erased, as are male and transgender victims of sexual assault. The disciplined student narrative fails to respond to both individual survivor accounts and research showing that women and transgender students of color are at a disproportionately higher risk of sexual assault both on college campuses and in the general population.<sup>232</sup> Nor does it acknowledge the additional barriers to reporting and accessing campus resources for survivors of color. It further fails to address the discounted credibility, increased victim-blaming responses, and other forms of racism experienced by student survivors of color who do chose to report.<sup>233</sup> This male-biased analysis of racism occasionally employs racist stereotypes by suggesting that different cultures have different norms in regards to consent, implying that male students of color are not capable of understanding affirmative consent, and suggesting that women of

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228. For example, publicly-released data by the University of California, Berkeley for January 2016 through June 2019 state that out of 2,565 student conduct cases, only 66 involved a complaint of sexual misconduct, dating violence, or stalking. *See* UC BERKELEY CENTER FOR STUDENT CONDUCT SEXUAL VIOLENCE AND SEXUAL HARASSMENT CASES, *supra* note 153.

229. *E.g.*, Trachtenberg, *supra* note 227, at 158–59 (discussing the potential discriminatory impact of Title IX, but suggesting the U.S. Department of Education should use its authority under Title VI of the Civil Rights Act to require that colleges and universities immediately begin collecting the sort of data already reported by elementary and secondary schools and that decision-makers in campus disciplinary processes receive training for implicit racial bias).

230. Antuan M. Johnson, *Title IX Narrative, Intersectionality, and Male-Biased Conceptions of Racism*, 9 *GEO. J. L. & MOD. CRIT. RACE PERSP.* 57, 59 (2017); Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 *HARV. J. L. & G.*, 1, 1–2 (2019) [hereinafter Cantalupo, *And Even More of Us Are Brave*]; *see also* Brake, *Fighting the Rape Culture Wars*, *supra* note 131, at 138.

231. *E.g.*, Yoffe, *The Question of Race*, *supra* note 224; Trachtenberg, *supra* note 227, at 163 (“Most Title IX respondents are men, and racial bias in the adjudication of student conduct will injure black men most of all.”).

232. *See* Cantalupo, *And Even More of Us Are Brave*, *supra* note 230; *see also, e.g.*, Kamilah Willingham, *To the Harvard Law 19: Do Better*, *MEDIUM* (Mar. 24, 2016), <https://medium.com/@kamily/to-the-harvard-law-19-do-better-1353794288f2>.

233. *See, e.g.*, Nastassja Schmiedt & A. Lea Roth, *Hunting for the Perfect Victim*, *HUFFINGTON POST* (Nov. 22, 2015), [https://www.huffingtonpost.com/nastassja-schmiedt/hunting-for-the-perfect-v\\_b\\_8626034.html](https://www.huffingtonpost.com/nastassja-schmiedt/hunting-for-the-perfect-v_b_8626034.html).

color are more promiscuous and less entitled to civil rights protections against sexual harassment that impacts their access to education.<sup>234</sup>

The decision to erase women of color from the discussion about racism is not limited to abstract or hypothetical discourse. In two specific cases referenced by law professors to support the contention that Title IX encourages or enables racism against men, student survivors involved in those cases directly responded by pointing out how those cases were actually better examples of racism against women in the disparity between the outcomes for the white women and the women of color who reported the same men for sexual misconduct.<sup>235</sup> The tendency to erase women

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234. Johnson, *supra* note 230; *see also* Wagatwe Wanjuki (@wagatwe), TWITTER (Dec. 5, 2018, 8:15 AM), <https://twitter.com/wagatwe/status/1070336980603424773?lang=en> (posting a student survivor, Wagatwe Wanjuki's tweet responding to columns discussing concerns about racism against male respondents in Title IX cases: "White women like Emily Yoffe and Lara Bazelon are using the stereotypes of the black rapist to push for Title IX changes that will benefit assailants who are white and male.").

235. Several Harvard Law professors and journalist Emily Yoffe used the Brandon Winston adjudication (included without his name in *The Hunting Ground*) as an example of racism within the campus Title IX adjudicatory system against (male) black students without acknowledging that one of his victims was also black. The student survivor, Kamilah Willingham, directly addressed how their analysis ignored and hurt her and other student survivors of color. She responded to Emily Yoffe's article by calling it "an opportunistic move by a white woman who doesn't seem to care about the treatment of black Americans in the criminal justice system if they are black women." Tyler Kingkade, *Harvard Law Grad Kamilah Willingham Fights Back Against Sexual Assault Doubters*, HUFFPOST (April 4, 2016), [https://www.huffpost.com/entry/kamilah-willingham-harvard\\_n\\_57029258e4b0a06d580631c5](https://www.huffpost.com/entry/kamilah-willingham-harvard_n_57029258e4b0a06d580631c5). She also responded in a letter to the Harvard Law professors who wrote about the case:

You—my former professors—have joined together to silence and discredit my story of sexual assault and its institutional mishandling . . . . Even while claiming without evidence that Black men are disproportionately and wrongly implicated in on-campus sexual assault proceedings, you—charged with shaping some of the brightest legal minds in the country—ignore well-established research on the disproportionate rate at which women of color are sexually assaulted. It is for these women that I write—the ones who will be sexually violated at Harvard Law School without accountability if you do better by them than you did me, and for all of the sidelined victims whose pain is mocked, disparaged, or worse, ignored.

Willingham, *supra* note 232.

In response to an op-ed written by Professor Bazelon discussing a specific California student misconduct case, a student survivor penned her own op-ed pointing out the irony that in expressing concern about the impact of racism on campus disciplinary proceedings in her case, the law professor failed to mention the potential role of racism in the school's response to the second complainant, a woman of color: "If Ms. Bazelon truly cared about racial justice in the Title IX process, she would center on survivors of color and not reduce them to a parenthetical. The second accuser of my assailant to whom she refers is my friend, a woman of color; in her case, she wasn't believed." Amelia W., *Letters: Reforming How Colleges Handle Sexual Assault*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/letters/colleges-sexual-assault.html>; *see also* Brake, *Fighting the Rape Culture Wars*, *supra* note 131, at 137–38 (discussing a case from

of color and male victims from the campus sexual assault narrative does not stop with the depiction of assaults or discussions of specific cases. It extends to the discussion of the student movement to combat campus sexual violence as a movement created by priorities of white, middle-class women.<sup>236</sup> This characterization erases the student survivors of color who serve as leaders in the movement, along with those who protested in support.<sup>237</sup> It also ignores the work of student activists at historically black colleges and universities (“HBCUs”), some of which pre-dated the current activists covered by the media.<sup>238</sup>

*6. Incorporating References to Conservative Meta-Narratives About Federal Overreach and Campus Culture Wars*

The disciplined student narrative’s connection to traditional conservative meta-narratives increases its policy allies and extends its reach to a wider audience. It draws on both a broad concern about federal overreach and specific anti-Obama sentiment.<sup>239</sup> The disciplined student narrative criticizes the Obama Administration’s 2011 OCR guidance on both procedural and substantive grounds. It suggests that the lack of notice-and-comment rulemaking prior to the issuance of

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the University of Colorado in which the discussion about race focused on the assailants while ignoring the race of the victims).

236. Halley, *supra* note 80, at 109.

237. E.g., Wanjuki, *supra* note 16; Candace King, *We Need to Include Black Women’s Experience in the Movement Against Campus Sexual Assault*, THE NATION (June 15, 2018), <https://www.thenation.com/article/need-include-black-womens-experience-movement-campus-sexual-assault/>.

238. See, e.g., Laura L. Rahman, *Broken Social Contracts*, YOUTUBE (2007), <https://www.youtube.com/watch?v=FIN4nKLIOYM>, <https://www.youtube.com/watch?v=7ozXGyBywU0>, <https://www.youtube.com/watch?v=1MCzRitRLIs> (documentary about the student protests against sexual assault at Spelman College in 2006); Anita Badejo, *What Happens When Women at Historically Black Colleges Report Their Assaults*, BUZZFEED NEWS (Jan. 21, 2016), <https://www.buzzfeednews.com/article/anitabadejo/where-is-that-narrative#.prXl0mxVV> (describing student protests at Spelman and Morehouse over the schools’ responses to reports of sexual assault); New, *supra* note 14 (Howard students protested and shared their own stories after a student tweeted about how the school mishandled her sexual assault report); Michael Harriot, *The Mutiny at Hampton University*, THE ROOT (Mar. 5, 2018), <https://www.theroot.com/the-mutiny-at-hampton-university-1823431651> (reporting about Hampton University students protests against their administration’s perceived unwillingness to respond to sexual assault, among other complaints).

239. Robert L. Shibley, *Twisting Title IX*, ENCOUNTER BOOKS, <https://www.encounterbooks.com/books/twisting-title-ix/> (last visited Sept. 23, 2019) (“This is the story of how Title IX, a 1972 law intended to ban sex discrimination in education, became a monster that both the federal government and many college administrators treat as though it supersedes both the U.S. Constitution and hundreds of years of common law. It’s a story about the victims of this law—men and women both—and of the unaccountable government bureaucrats at the Departments of Education and Justice who repeatedly prioritize an extreme brand of politics over free speech, fundamental fairness, and basic human decency. But while help may come too late for many of the present victims of Title IX abuse, there are still measures that colleges and courts can take to curb these abuses until Congress acts—or we see a Presidential administration that cares more about restoring justice and the rule of law than it does about sex and gender politics.”).



the 2011 OCR guidance invalidates the letter and points to this lack of process as emblematic of the Obama Administration's overreach.<sup>240</sup> It further claims that the 2011 OCR guidance impedes colleges' autonomy and rights to self-govern.<sup>241</sup> This frame of federal overreach was evident in Secretary DeVos's statement explaining her decision to revoke the 2011 OCR guidance and 2014 Q&A when she accused OCR of "weaponizing" Title IX and referenced the "heavy hand of Washington" in unraveling justice.<sup>242</sup> The narrative also ties into the belief that men are under attack in its claim that the Obama Administration engaged in a "war on men."<sup>243</sup>

The disciplined student narrative finds further purchase through its connection to other popular conservative narratives about college campuses. Among these is the concern that progressive academics antagonistic to individual student rights, such as free speech, control colleges. Although more prevalent in the context of complaints of sexual harassment against faculty rather than other students, the narrative suggests that Title IX is destroying free speech on campus.<sup>244</sup> The critique that previous guidance "captured too wide a range of misconduct, resulting in infringement on academic freedom and free speech and government regulation of consensual, noncriminal sexual activity . . ." is explicitly cited in the 2018 proposed Title IX regulation.<sup>245</sup> The student discipline narrative suggests that college campuses over-police their students.

The disciplined student narrative accuses administrators of investigating under the influence of political correctness rather than neutral criteria.<sup>246</sup> It implies that many students reporting sexual misconduct and sexual harassment should not

240. See, e.g., Lave, *supra* note 149, at 916. The narrative theme aligns with other criticisms of federal overreach ranging from environmental regulation to consumer protection to the Affordable Care Act ("ACA") to the executive order providing Deferred Action for Childhood Arrivals ("DACA"). See, e.g., Ilya Shapiro, *Top 10 Ways Obama Violated the Constitution During His Presidency*, CATO INSTITUTE (Jan. 19, 2017), <https://www.cato.org/publications/commentary/top-10-ways-obama-violated-constitution-during-presidency>; Leef, *supra* note 104 (describing Title IX enforcement as an example of how the Obama Administration was notable for its "disregard of the rule of law").

241. See, e.g., Lave, *supra* note 149, at 916.

242. Svrluga, *supra* note 35 ("Through intimidation and coercion, the failed system has clearly pushed colleges to overreach. With the heavy hand of Washington tipping the balance of her scale, the sad reality is that Lady Justice is not blind on campuses today. This unraveling of justice is shameful, it is wholly un-American, and it is anathema to the system of self-governance to which our Founders pledged their lives over 240 years ago.").

243. E.g., Taranto, *supra* note 141 (referring to a student disciplined for dating violence as "a civilian casualty in the Obama administration's war on men."); e.g., Reynolds, *supra* note 80 ("It appears to many—including me—as if the Obama administration is engaged in a war on college men").

244. Risa L. Lieberwitz, et. al, *The History, Uses, and Abuses of Title IX*, AM. ASS'N OF U. PROFESSORS 69–70 (2016), <https://www.aaup.org/file/TitleIXreport.pdf>; see also Nancy Chi Cantalupo & William Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 3 UTAH L. REV. 670, 676 (2018) (finding that contrary to the popular belief that most sexual harassment allegations against faculty involve free speech and academic freedom, most allegations include unwanted physical contact, such as sexual assault or domestic abuse).

245. 2018 Proposed Title IX Regulation, *supra* note 37.

246. E.g., Yoffe, *The College Rape Overcorrection*, *supra* note 73.

be taken seriously because of their membership in a coddled and over-sensitive generation: snowflakes concerned with micro-aggressions who demand trigger warnings and safe spaces. It suggests that students are embracing victimhood as a coveted status on campus.<sup>247</sup> It places Title IX solidly into a broader campus culture war debate. Allusions to these meta-narratives appear in the proposed Title IX regulation as well.<sup>248</sup>

### *E. Moral of the Story*

The purpose of a public policy narrative is to persuade the audience that a policy change or new law is necessary. That closure or “ask” is the moral of the story. The constructed legal setting in the disciplined student narrative suggests that the 2011 OCR guidance created unprecedented regulations that caused the described harm to disciplined students. Consequently, the initial demand was for the rescission of the 2011 OCR guidance, a policy change accomplished on September 22, 2017. However, once that policy demand was met, a new policy goal emerged. At least partially because the legal setting inaccurately pointed to the 2011 OCR guidance as the primary cause of problems identified by the disciplined student narrative, its rescission proved to be an inadequate policy shift. As such, the moral of the story in the disciplined student narrative shifted, and a new demand for a legally-binding regulation interpreting Title IX emerged.

The 2018 proposed Title IX regulation incorporates aspects of the disciplined student narrative not found in any prior OCR guidance or enforcement letters, suggesting that it is creating new law rather than rolling back recent interpretations.<sup>249</sup> It formally recognizes the accused or disciplined student in the victim character role and embraces moral equivalence through its identification of male students responding to complaints of sexual misconduct as potential victims of sex discrimination under Title IX. The proposed regulation creates extraordinary legal protections for students responding to complaints of sexual harassment (and only sexual harassment), including a presumption of “not responsible” and a right to live hearings with cross-examination.<sup>250</sup>

The proposed regulation further directs schools that they may only use the preponderance of the evidence standard if they use that standard for both (a) all other serious student discipline matters and (b) all faculty sexual harassment cases. However, the proposed regulation permits schools to use a clear and convincing

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247. *E.g.*, Will, *Colleges Become the Victims*, *supra* note 106 (“[Colleges and universities] are learning that when they say campus victimizations are ubiquitous (‘micro-aggressions,’ often not discernible to the untutored eye, are everywhere), and that when they make victimhood a coveted status that confers privilege, victims proliferate.”).

248. 2018 Proposed Title IX Regulation, *supra* note 37, §106.6(d) (referencing a “chilling effect on free speech”).

249. *Id.*

250. *Id.* § 106.45(b)(1)(iv) (requiring “a presumption that the respondent is not responsible”); *Id.* § 106.45(b)(3)(vii) (requiring a live hearing and cross-examination). Arguably, this new directive that colleges conduct live hearings with cross-examination deprives schools of their autonomy to structure disciplinary processes around their educational goals and resources more than any guidance in the 2011 OCR guidance, although that contradiction is not addressed.

standard for sexual harassment cases (including sexual violence), even if they use a preponderance of the evidence standard for all other serious student discipline cases.<sup>251</sup> The proposed regulation requires colleges to obtain a signed complaint before they can respond to sexual harassment and to provide written notification to both complainants and respondents in sexual harassment cases warning them of any provision in the student code of conduct that prohibits knowingly making false statements or knowingly submitting false information.<sup>252</sup> Through these provisions (and their exclusive applicability to sexual harassment cases), the proposed rule incorporates the sexist tropes featured in the disciplined student narrative and enables schools to legally implement a discounted credibility standard for students reporting sexual misconduct.

The proposed regulation reduces survivors' access to their college disciplinary processes by explicitly directing colleges to dismiss all complaints of sexual harassment (including sexual violence) that occurred off campus or outside of official school activities.<sup>253</sup> It instructs colleges that they only have to respond to complaints of sexual harassment when there is a formal complaint to the administrator with the authority to institute corrective measures—even if other administrators or faculty are aware of the harassment.<sup>254</sup> It further reduces liability for schools responding to survivors of sexual harassment by requiring them to only respond in a way that is not “deliberately indifferent,” essentially decreasing student survivor rights.<sup>255</sup> Through these provisions, the proposed regulation incorporates the conservative meta-narrative, namely that colleges police too much student behavior, and the fear that increased enforcement of civil rights by survivors makes colleges more likely to find male respondents responsible for sexual misconduct. In this moral of the story, the 2018 proposed Title IX regulation demonstrates the disciplined student narrative's success in transforming a civil rights law enacted to protect women from sex discrimination into a civil rights law directing schools to protect and privilege the rights of men accused of sexual misconduct over the rights of women to access educational settings free from sexual harassment and sexual violence.

### CONCLUSION

The disciplined student narrative was successfully deployed to counter the student survivor narrative and roll back the increased enforcement of women's civil rights on college campuses. Both legal narrative theory and NPF provide useful tools in identifying different components of the disciplined student narrative. The disciplined student narrative introduced disciplined students as the protagonists and reassigned roles, identifying the disciplined students as victims, casting parents and professors as third-party narrators, and framing colleges and the federal government as villains. The disciplined student narrative created a setting that placed the narrative in a new and unexpected legal landscape. In creating a stock story, it

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251. *Id.* § 106.45(b)(4)(i) (establishing the rules about the applicable evidentiary standards of proof schools may use).

252. *Id.* § 106.45(b)(2).

253. *Id.* §§ 106.30, 106.45(b)(3).

254. *Id.* §§ 106.44(a), 106.30.

255. *Id.* § 106.44(a).

borrowed from the victim script and changed the timeline to alter causation and reduce the disciplined student's culpability. The disciplined student narrative used rhetoric to suggest how the audience should process the story by conflating the criminal justice system with the college disciplinary system, claiming moral equivalency between sexual assault and accusations of sexual assault, referencing symbolic false allegation stories, claiming male privilege, and erasing women of color from discussions about racism. It used recognizable conservative meta-narratives, such as anti-Obama federal overreach and campus culture wars, to lead the audience to support the desired policy change. Once it met its policy goal of rescinding a 2011 OCR guidance, it expanded its goal to significantly alter Title IX enforcement. The November 2018 proposed rule for Title IX incorporates several aspects of the disciplined student narrative, demonstrating the narrative's political success in explicitly moving male students accused or disciplined for sexual misconduct into the category of potential victims to be protected by a law created to protect women from sex discrimination in education.