
THE IRONY OF TITLE IX: EXPLORING HOW COLLEGES IMPLEMENT CREDIBILITY DISCOUNTS AGAINST STUDENT VICTIMS OF GENDER-BASED VIOLENCE IN CAMPUS MISCONDUCT CASES

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INTRODUCTION

On May 6, 2020, the U.S. Department of Education released new Title IX regulations requiring colleges to provide expanded due process rights for student respondents in campus misconduct cases involving sexual assault, dating violence, and stalking.¹ A little over a year earlier, a California appellate court also expanded rights to student respondents in sexual misconduct cases, indicating that the trend is not limited to one particular presidential administration.² To those unfamiliar with typical campus adjudication procedures, many of the new rights federal and state law afford respondents in campus misconduct cases involving gender-based violence might seem intuitive. The right to retained counsel, the right to a live hearing following an investigation, the right to cross-examine all witnesses, and the right to appeal are all common in U.S. criminal and civil law systems. But when placed within the context of campus misconduct procedures, the normalization of these protections for only one class of student respondents requires interrogation. The expanded due process rights do not apply to all students responding to campus misconduct violations; they do not even apply to all students responding to violations that could also constitute crimes or result in expulsion or suspension from college. The new rights only protect students responding to campus misconduct violations that involve gender-based violence, and the resulting

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¹ Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*, INSIDE HIGHER ED (May 7, 2020), <https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations/> [https://perma.cc/9FM6-6PQM]; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (codified at various places in 34 C.F.R. pt. 106). In 2022, the Biden administration released new proposed Title IX regulations, some of which contain the same or similar respondent protections. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

² *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 130 (Cal. Ct. App. 2019) (“[F]undamental fairness requires that the university must at least permit cross-examination of adverse witnesses at a hearing . . .”).

harms of the additional procedures only burden student victims of gender-based violence.

This article provides specific examples of campus misconduct procedures demonstrating how colleges may provide heightened procedural protections to student respondents and heightened burdens to student complainants in gender-based violence cases that diverge from their adjudication procedures for other forms of misconduct on the same campus. Part I provides a brief overview of the current legal landscape for campus adjudications involving gender-based violence. Part II employs two hypothetical fact patterns to identify specific differences between the procedural protections campuses provide students responding to a complaint of physical assault against another student generally and the protections provided to students responding to a complaint of physical assault against a current or former dating partner. Part III addresses how heightened procedural protections for student respondents cause additional harms for student complainants in campus cases involving gender-based violence. Part IV explores the role that credibility discounting of victims of gender-based violence plays in the creation of heightened procedural protections for respondents in campus misconduct cases involving gender-based violence. It further suggests that any future changes to Title IX policy involving campus misconduct procedures should include an analysis comparing the rights and protections colleges afford respondents in gender-based violence adjudications to all other respondents in campus misconduct adjudications.

I. BACKGROUND: THE COMPLICATED LEGAL LANDSCAPE

The legal landscape forming the current backdrop for campus misconduct involving gender-based violence is complicated and fluid. Unlike most other forms of campus misconduct, misconduct involving sexual assault, dating violence, and stalking falls under federal civil rights law.³ Both complainants and respondents in campus misconduct cases involving gender-based violence have litigated in federal court or filed complaints with the Department of Education Office on Civil Rights (OCR). Similarly, different state legislation and case law prescribe additional requirements for campuses adjudicating gender-based misconduct.⁴

Dueling narratives about the nature and scope of campus sexual assault fueled national debate about the role colleges should play in addressing gender-based

³ Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 (2018).

⁴ See, e.g., CAL. EDUC. CODE § 66281.8 (West 2021); *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018) (“[I]f a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.”); *Allee*, 242 Cal. Rptr. 3d at 130 (holding that when universities adjudicate cases involving sexual misconduct with potential serious sanctions in which credibility is at issue, they must allow respondents to cross-examine witnesses); *Boormeester v. Carry*, 263 Cal. Rptr. 3d 261, 280-81 (Cal. App. Ct. 2020) (expanding the right of cross-examination to respondents in campus adjudications involving dating violence).

violence on their campuses and the processes and procedures they should use to respond. While respondents gained certain procedural rights through the reciprocal implementation of protections granted to victims under Title IX itself, the Trump administration's Title IX regulations and case law established many novel protections.⁵ The result on many campuses is the creation of two distinct misconduct policies and procedures: one for adjudicating student code violations including reports of qualifying gender-based violence and one for all other forms of serious student misconduct.

With the release of new proposed Title IX regulations in June 2022 and ongoing litigation,⁶ there is little doubt that schools will continue to revise their policies and procedures. But as we focus on the broad theory of civil rights for women to be free from sexual harassment and violence in education and on due process rights of respondents in Title IX cases, I suggest taking a step back to look at both the practical and symbolic implications of these revisions on students attending college today. Abstract debates too often remove the focus from the college campus setting, making it difficult to directly compare how colleges adjudicate different kinds of student code violations on the same campus. Regardless of the intentions that brought us here, it's important to examine how and why so many campuses now have procedures that provide respondents in gender-based violence misconduct cases with extraordinary protections and rights they do not provide to students responding to any other forms of campus misconduct.

II. THE CURRENT REALITY: COMPARING RIGHTS IN CAMPUS MISCONDUCT PROCEEDINGS

Rape exceptionalism is so embedded in our laws and culture that differences in procedural protections afforded respondents in sexual misconduct cases when compared to other types of campus misconduct is often justified or minimized.⁷ Although dating violence is rarely limited to an isolated incident of physical assault, a direct comparison of hypotheticals involving a physical assault of victims with a different relationship to the perpetrating student highlights the disparate protections campuses provide students responding to complaints of gender-based violence than they do to other students.

Hypothetical 1: Student John Smith physically assaulted his roommate, Jason Doe, in campus housing. One week later, Doe submitted a complaint to the college. Hypothetical 2: Student John Smith physically assaulted his girlfriend,

⁵ See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (codified at various places in 34 C.F.R. pt. 106); *Allee*, 242 Cal. Rptr. 3d at 130.

⁶ See e.g., *Boormeester v. Carry*, 472 P.3d 1062, 1062 (Cal. 2020) (petition for review granted).

⁷ See generally Kelly A. Behre, *Rape Exceptionalism Returns to California: Institutionalizing a Credibility Discount for College Students Reporting Sexual Misconduct*, 73 OKLA. L. REV. 101 (2020).

Jane Doe,⁸ in campus housing.⁹ One week later, Doe submitted a complaint to the college.

In both hypotheticals, the following is true: Smith engaged in behavior that violated student conduct codes at colleges across the country; Smith engaged in behavior that would also constitute a crime; Smith's misconduct carries the potential of serious sanctions, including suspension or expulsion; and Smith's college will probably apply a preponderance of the evidence standard. Yet, depending on Smith's college, his procedural rights and protections in his campus adjudication process may look very different depending on who he physically assaulted.¹⁰

III. INVESTIGATION PROCESS: OPPORTUNITIES TO PARTICIPATE IN INVESTIGATION, REVIEW EVIDENCE, SUBMIT QUESTIONS FOR WITNESSES, AND SUBMIT RESPONSES TO PRELIMINARY REPORTS

After receiving Doe's report of an assault, Smith's college will notify him about an investigation and provide him with an opportunity to be heard in line with the minimum due process rights afforded all college students facing serious discipline. But the nature of that investigation and Smith's opportunities to participate in it may vary greatly depending on the nature of his relationship with the student he assaulted. For example, if Smith attends the University of Southern California (USC) and he assaults a roommate who he's never dated,¹¹ the Office of Student Judicial Affairs and Community Standards will invite him to meet with a staff member to conduct an administrative review and to submit

⁸ The selection of gendered names and pronouns in the second hypothetical involving intimate partner violence is intentional. Although anyone can be subjected to intimate partner violence and sexual assault, the majority of students who report gender-based violence identify as women. And although anyone can perpetrate intimate partner violence and sexual assault, the overwhelming majority of students reported for campus misconduct involving gender-based violence identify as men. It is important to be mindful that LGBTQ and male students are even more reluctant to report forms of gender-based violence to their campuses than cisgender, heterosexual women because of the stigma attached with these forms of misconduct. However, for the purposes of this Article, it is also important to address the gendered reality of these types of misconduct cases on campuses and the gendered nature of who benefits and who is burdened when campuses provide students responding to gender-based misconduct with special rights and protections not afforded students in other types of misconduct cases.

⁹ The campus location of the assault places the misconduct under the procedures applied to Title IX cases. Schools that continue to adjudicate gender-based violence misconduct occurring off-campus may use different procedures.

¹⁰ This analysis of the different rights that apply to student respondents in campus misconduct cases depending on their relationship with their victim is not exhaustive nor does it rely on a representative sample of colleges. I highlight differences in specific school policies to provide concrete examples of how these cases actually look on campuses.

¹¹ *SCampus: The USC Student Handbook*, UNIV. S. CAL., <https://policy.usc.edu/wp-content/uploads/2021/08/SCampus-Part-B-Student-Conduct-Code.pdf> [<https://perma.cc/69NR-3PB4>], at 11 (last visited Nov. 1, 2022) (including "causing physical harm to any person" as behavior violating University Standards).

a written account of his perspective in advance of that meeting.¹² Smith may provide relevant witness names and information, but he will not be allowed to submit character witnesses, character letters, transcripts, or resumes.¹³ Smith may inspect relevant documents and information gathered during the review, but he does not have the right to a copy.¹⁴ USC will prohibit Smith from creating a recording or transcription of the meeting.¹⁵ The staff member will determine if Smith is responsible for the violation based on the preponderance of the evidence and create a written decision including a factual basis for the conclusions drawn.¹⁶

Contrast that with the process USC will provide Smith if he was dating or ever dated his victim: USC will first engage in outreach to Smith and invite him to an informational meeting with sufficient time for him to prepare to participate.¹⁷ During this non-fact-gathering meeting, USC will provide Smith with written information about his procedural options, reasonably available supportive measures and the process for obtaining those supportive measures, information about campus and community resources, and how to report concerns of retaliation.¹⁸ USC will next provide Smith with a written notice of his investigation interview with sufficient time for him to prepare.¹⁹ Smith may suggest witnesses (with no explicit prohibition on character witnesses), and Smith is permitted to provide information about Doe's prior or subsequent conduct, when relevant.²⁰ In addition to party and witness interviews, the investigator may independently gather information, including documents, photographs, communications between the parties, social media posts, medical records, etc.²¹

If Smith assaulted someone he dated, USC will next provide Smith and his advisor with an electronic or hard copy of all of the evidence collected by the investigator, including the evidence upon which the University does not intend to rely in reaching a determination regarding responsibility.²² USC will provide Smith with 10 days to submit a written response to the Evidence Review, along with proposed questions for his victim and suggestions for additional witnesses,

¹² *Id.* at 19.

¹³ *Id.* at 22.

¹⁴ *Id.* at 7.

¹⁵ *Id.* at 8.

¹⁶ *Id.* at 3, 20.

¹⁷ *The University of Southern California Resolution Process for Sexual Misconduct*, UNIV. S. CAL., https://eeotix.usc.edu/wp-content/uploads/2022/02/Resolution-Process-for-Sexual-Misconduct_Effectivedate_1_1_2022.pdf [<https://perma.cc/6YB3-NJE4>], at 19 (last visited Nov. 1, 2022).

¹⁸ *Id.*

¹⁹ *Id.* at 20.

²⁰ *Id.* at 20-22.

²¹ *Id.* at 20.

²² *Id.* at 23.

which the Investigator will carefully consider.²³ After the Evidence Review, the investigator will create an Investigative Report that does not include a finding of responsibility or a credibility assessment, but instead determines whether or not, if true, the reported conduct would constitute a violation.²⁴ USC will again provide Smith with 10 days to review and provide a written response to the Investigative Report before holding a fact-finding hearing.²⁵

IV. HEARING: RIGHT TO A LIVE HEARING, TIME TO PREPARE, STRUCTURE OF HEARING, AND CROSS-EXAMINATION

Students who physically assault another student are currently only guaranteed the right to a live hearing if their victim is a current or former dating partner. Although many colleges offer a live hearing process for adjudicating serious misconduct, not all of them do. For example, if Smith attends the University of Southern California, he will not have an opportunity for a live hearing if he physically assaults any student other than those he has dated. This additional layer of procedural protection following an investigation into campus misconduct is only guaranteed to students who engaged in gender-based violence; it is not guaranteed in any other category of student misconduct, regardless of its severity, criminality, or the potential sanctions.²⁶

All colleges currently must provide Smith with a minimum amount of time to prepare for his hearing if his victim was a dating partner but have no such requirement for other misconduct cases involving physical assault. This means that a college may create different rules and timelines for hearings, depending on not just the nature of the misconduct, but the nature of the relationship between Smith and his victim as well. For example, if Smith physically assaulted his dating partner while attending any California State University campus, the school will not set the hearing sooner than twenty working days after the date of the notice of hearing (with no actual mandated deadline),²⁷ but if Smith physically assaulted any other student, the school will schedule the hearing “promptly”: no sooner than ten working days after and no later than twenty

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See Allee*, 242 Cal. Rptr. 3d. at 138.

²⁷ *CSU Policy Prohibiting Discrimination, Harassment, Sexual Misconduct, Sexual Exploitation, Dating Violence, Domestic Violence, Stalking, and Retaliation (Nondiscrimination Policy)*, CAL. STATE UNIV., <https://calstate.policystat.com/policy/10926024/latest/> [<https://perma.cc/5LFK-YXB8>] (last updated Dec. 24, 2021). This timeframe is outlined in the federal Title IX regs. Schools are required to allow the parties at least ten days to inspect and respond to the evidence and at least ten days to review and respond to the school’s investigative report summarizing the evidence.

working days after the date of the hearing notice.²⁸ The policy effectively provides Smith with up to two weeks of additional time to prepare for a hearing responding to a report that he assaulted his current or former girlfriend than he would have if he physically assaulted any other student.

If Smith's college offers hearings for all students responding to reports of physical assault, the format of those hearings and the party opposing the respondents may differ based on the relationship between the respondents and their victims. For example, at Boston University, if Smith assaulted any student he never dated and requests a hearing after an investigation, the Dean of Students would be responsible for the presentation of charges (similar to a criminal proceeding), and Smith would have the right to call his own witnesses and present evidence.²⁹ However, if Smith assaulted someone he was dating or dated in the past, the hearing would proceed more like a civil trial in which Smith and his victim could present opening statements and their advisors could conduct direct and cross-examinations of parties and witnesses.³⁰ The different format subtly switches the burden of proving Smith's misconduct from the school to his victim.

A. *Right to Bring Retained Counsel to Hearing and Extent of Counsel's Participation*

Depending on the school Smith attends, his right to bring retained counsel to a hearing will be determined by his relationship with the person he physically assaulted. Title IX uniformly provides Smith with the right to bring retained counsel to a student misconduct case in which he is accused of physically assaulting an intimate partner.³¹ There is no such federal right in student misconduct cases in which he is accused of physically assaulting a non-intimate partner student; it is left to the discretion of his college, regardless of the severity of the assault or the potential sanction. For example, if Smith attends the University of Virginia, he will be limited to the selection of another student to serve as his advisor at a hearing if he physically assaulted any student he never

²⁸ *Student Conduct Procedures*, CAL. STATE UNIV. [hereinafter *CSU Student Conduct Procedures*], <https://calstate.policystat.com/policy/8453518/latest/> [<https://perma.cc/HZ66-SLNN>] (last visited Apr. 21, 2023).

²⁹ *Student Responsibilities*, BOS. UNIV., <https://www.bu.edu/dos/policies/student-responsibilities/#ii> [<https://perma.cc/RJF5-K3C3>] (last updated June 29, 2022).

³⁰ *Procedures for the Resolution of Title IX Sexual Misconduct Complaints Against Students, Faculty, Staff, Affiliates, and Non-Affiliates*, BOS. UNIV., <https://www.bu.edu/policies/procedures-for-the-resolution-of-title-ix-sexual-misconduct-complaints-against-students-faculty-staff-affiliates-and-non-affiliates/#sectionXII> [<https://perma.cc/SGG8-EQS8>] (last updated Aug. 1, 2021).

³¹ See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (codified at various places in 34 C.F.R. pt. 106).

dated, and any attorney he hires will be limited to an observer role.³² But if Smith physically assaulted a current or former dating partner, his advisor may be an attorney who may conduct live cross-examination of his victim and other witnesses on his behalf during a hearing.³³ Similarly, if Smith attends Duke, he will be limited to the selection of an advisor who is a member of his campus community (student, staff, faculty) unless he dated the person he assaulted, in which case he can hire an attorney to represent him in the hearing.³⁴

The extent to which Smith's college will allow his retained counsel to participate in a hearing will often hinge on his relationship with the person he assaulted. Current federal law (and some state law) provides that Smith's counsel has the right to engage in live cross-examination of Doe if Doe is a current or former dating partner.³⁵ No such right exists in other forms of student misconduct, and schools often explicitly prohibit attorneys from engaging in cross-examination in hearings involving other forms of campus misconduct. Smith's ability to subject his victim to questioning about the abuse with the central goal of undermining her credibility only exists if he dated her prior to his assault, sexually assaulted her, or stalked her. In other words, Smith is only granted the power to use cross-examination as a tool to intimidate, humiliate, or retaliate against Doe if he dated her. He has no such right against any other students he assaults, even if their credibility is the central question in a campus adjudication.

B. *Gaining Victims' Rights*

If Smith assaults a current or former dating partner, rather than any other student on campus, he may also pick up additional rights created for victims of gender-based violence reciprocally granted to respondents through Title IX that

³² *Accused Students*, UNIV. OF VA., <https://ujc.virginia.edu/accused-students> [<https://perma.cc/2XBC-KYFF>] (last visited Nov. 8, 2022).

³³ *Grievance Process for Investigating and Resolving Reports of Title IX Prohibited Conduct under the Policy on Sexual and Gender-Based Harassment and Other Forms of Interpersonal Violence*, UNIV. OF VA. [hereinafter *UVA Grievance Process*], <https://eocr.virginia.edu/sites/eop.virginia.edu/files/Appendix%20A%20Title%20IX%20Grievance%20Process%20-%20Student%20and%20Employee.pdf> [<https://perma.cc/R4GX-RFSP>] (last visited Nov. 8, 2022), at 20, 29; *Policy on Sexual and Gender-Based Harassment and Other Forms of Interpersonal Violence*, UNIV. OF VA., <https://uvapolicy.virginia.edu/policy/HRM-041> [<https://perma.cc/GA28-ZF6B>] (last updated Oct. 26, 2022) (defining dating violence).

³⁴ *The Duke Community Standard in Practice: A Guide for Students*, DUKE UNIV., <https://registrar.duke.edu/sites/default/files/bulletins/%28Edited%29%20Full%20DCS%20Guide%202022-2023%20AOD%20Policy.pdf> [<https://perma.cc/827M-UCGX>] (listing a procedural right "to be accompanied by an advisor to the hearing" where an advisor must be a member of the university community, except in matters involving allegations of sexual misconduct, in which case a student may select any advisor of the student's choice).

³⁵ See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (codified at various places in 34 C.F.R. pt. 106).

would not otherwise apply to him. In addition to his advisor, he may have the right to bring a separate “support person” with him to any meetings with the college and to his hearing, even if he would be otherwise limited to one advisor. For example, if he attends the University of California, his school will provide him with a “support person” similar to the advocates that may serve as “support persons” for student victims.³⁶ Depending on his school, he may also pick up the right to submit an impact statement that he would not otherwise have an opportunity to present. For example, if Smith attends UVA, he may submit a written statement following the release of the Investigation Report explaining any factors that he believes should mitigate or otherwise be considered in determining the sanctions(s) imposed, along with any other information he believes relevant to the issue of remedies and sanctions.³⁷ But this right to provide a written impact or mitigation statement prior to his hearing only exists for Smith if he dated Doe. He will not have the same opportunity if Doe was any other student. This kind of equitable victim right available to only respondents in misconduct cases involving gender-based violence creates the illusion of false equivalency between experiencing gender-based violence and responding to a report of gender-based violence by offering only a select group of respondents with tools unavailable to students who engage in other forms of misconduct.

V. HARMS OF ADDITIONAL PROCESS

The constant call for more rights to protect respondents in campus misconduct cases involving gender-based violence often infers that more process leads to more reliable outcomes³⁸ and costs complainants nothing. To the contrary, many of the special rights provided to student respondents in only gender-based violence misconduct cases create reciprocal burdens and harms to their victims and prevent campuses from effectively responding to and preventing gender-based violence. Campuses are essentially asking victims of gender-based violence, many of whom are already experiencing high levels of trauma from the abuse, to jump through hoops and navigate barriers they do not require from any other student victims of misconduct.

Victims of gender-based violence are already reluctant to report assaults for a myriad of reasons, including the belief that they will not be believed. Those who report to their campuses rather than law enforcement often explain that they

³⁶ *University of California—Interim Policy PACAOS-Appendix F*, UNIV. CALIF., <https://policy.ucop.edu/doc/2700689/PACAOS-Appendix-F>.

³⁷ *UVA Grievance Process*, *supra* note 33, at 26-27.

³⁸ Richard O. Lempert, *Built on Lies: Preliminary Reflections on Evidence Law as an Autopoietic System*, 49 HASTINGS L.J. 343, 345 (1998); Hunter Davis, *Symbolism over Substance: The Role of Adversarial Cross-Examination in Campus Sexual Assault Adjudications and the Legality of the Proposed Rulemaking on Title IX*, 27 MICH. J. GENDER & L. 213, 231 (2020); Suzanne B. Goldberg, *Keep Cross-Examination Out of College Sexual-Assault Cases*, CHRON. HIGHER EDUC. (Jan. 10, 2019), <https://www.chronicle.com/article/keep-cross-examination-out-of-college-sexual-assault-cases/> [<https://perma.cc/UE6M-PH7T>].

are looking for a quicker resolution, the ability to complete their education without running into their abusers, and/or want the availability of non-carceral sanctions for abusers. During a time in which victims are seeking supportive measures to mitigate the impact of the gender-based violence on their education, the longer investigation, hearing, and appeal process may actually exacerbate the impact of the assault on their education. As campuses augment their procedures and extend internal deadlines for student misconduct involving gender-based violence, the length of time between a victim's initial complaint and a final outcome from an appeal has grown longer for victims of gender-based violence.³⁹ The prolonged process increases the number of interactions student victims may have with their abusers on campus waiting for the adjudication process to resolve.

The prolonged adjudication process also carries the risk of exacerbating victims' trauma and delaying healing. The process of telling and retelling abuse to an investigator is traumatic. The process of reviewing and responding to an evidence summary or a preliminary investigation report is traumatic. The process of preparing to prosecute a misconduct case about your own abuse is traumatic. The process of responding to arguments claiming the victim is the actual abuser is traumatic.⁴⁰ Being subjected to a cross-examination about sexual assault or intimate partner violence by a defense attorney whose sole goal is to undermine your credibility is traumatic.⁴¹ Actively participating in an adjudication process that may span the course of several academic semesters negatively impacts access to education. Procedural changes to campus cases involving gender-based violence introduce some of the burdens and trauma associated with the civil and criminal legal systems and undermine their very purpose of upholding victims' civil rights and keeping students safe on college campuses.

³⁹ For example, at CSU, school policy states that the school should complete an investigation into a physical assault of a non-intimate partner within forty working days after the complaint was filed while it provides that an investigation into a physical assault of an intimate partner should be completed within one hundred working days from the date that notice of investigation is provided to the parties. *CSU Student Conduct Procedures*, *supra* note 29. The addition of a right to appeal adds another potential forty working days to the process in cases in which Doe assaulted his intimate partner that a non-intimate partner victim would not have to wait for (Smith would have up to ten working days to file an appeal and the university would have up to thirty working days to respond to it.). *Id.*

⁴⁰ Sarah Harsey & Jennifer J. Freyd, *Deny, Attack, and Reverse Victim and Offender (DARVO): What Is the Influence on Perceived Perpetrator and Victim Credibility?*, 29 J. OF AGGRESSION, MALTREATMENT & TRAUMA 897, 897 (2019) (describing perpetrators' strategy of reversing narrative roles).

⁴¹ H.H. Bruton, *Cross-Examination, College Sexual Assault Adjudications, and the Opportunity for Tuning up the "Greatest Legal Engine Ever Invented"*, 27 CORNELL J. L. & PUB. POL'Y 161, 176-77 (2017); Mary Fan, *Adversarial Justice's Causalities: Defending Victim-Witness Protections*, 55 B.C. L. REV. 775, 785 (2014); Brief for California Women's Law Center and Equal Rights Advocates as Amicus Curiae, *Boermeester v. Carry*, No. S263180 (Cal. 2021).

More intense and complicated campus procedures also widen the door to victim privacy violations. Campuses increasingly ask victims to turn over cell records, social media posts, and medical records that they would normally consider outside the scope of investigation in other kinds of misconduct cases. Some campuses increasingly interview witnesses without direct knowledge about the abuse, such as ex-partners and roommates, even over victims' objections and even when such interviews disclose a victim's identity and details of the assault without a victim's consent. In insular college communities, each disclosure to another student exponentially increases the risk of further disclosures to other students. Increased participation by defense counsel in longer investigations and hearing processes also creates new privacy risks, as defense counsel or their private investigators may contact a victim's family members or friends in the course of their own investigation, including people the victim intentionally chose not to disclose the assault to.

VI. INSTITUTIONALIZING DISCOUNTED CREDIBILITY

The addition of new rights and procedural protections for respondents in campus misconduct cases involving gender-based violence—and only those respondents—sends a strong message to victims that their campuses believe those respondents need extra protection because campuses are more skeptical of students reporting gender-based violence. By embracing a cultural norm dismissing gender-based violence cases as notoriously challenging to investigate and adjudicate (i.e., “he said-she-said”), campuses institutionalizing different procedural standards for different student respondents are rarely forced to explain why they believe Jane Doe is inherently less credible than Jason Doe. But colleges are not making these changes on their own. In many circumstances, their hands have been tied by the U.S. Department of Education and both federal and state judges.

California state court decisions provide some insight into the rationale (or lack of rationale) behind the special treatment of student respondents in campus misconduct cases involving gender-based violence when compared to other student respondents facing serious discipline. *Allee* sets a new requirement for both private and public colleges to provide a live hearing and an opportunity to engage in cross-examination for student respondents in sexual misconduct cases when credibility is at issue and the respondent faces serious discipline. *Boormeester* extends those protections to respondents in dating violence cases, even though the facts of the case indicate that there were other witnesses to the abuse. Neither court ever addressed why student respondents in campus adjudications involving gender-based violence—and only those respondents—need different rights and procedural protections than other student respondents. But the rationale can be inferred through the legal history of rape and domestic violence exceptionalism. Courts are more skeptical of victims of gender-based violence than victims of other crimes and expect colleges to implement policies and procedures that institutionalize that sexist skepticism.

Similarly, in mandating extraordinary rights for student respondents in campus misconduct violations involving gender-based violence, the Department of Education requires colleges to institutionalize credibility discounts for victims of gender-based violence. By creating more cumbersome and traumatic procedures for student complainants under the new Title IX regulations, colleges are required to send the message to their students that victims campus misconduct involving gender-based violations are inherently less credible than students reporting other types of campus misconduct. In an ironic chapter in a complicated legal history, Title IX, a civil rights law created to prevent sex discrimination in education, now instructs colleges to engage in sex discrimination through its disparate treatment of students reporting gender-based violence.

CONCLUSION

Rape exceptionalism is so embedded in our laws and culture that the focus on the differences in procedural protections afforded respondents in sexual misconduct cases when compared to other types of campus misconduct is often ignored or minimized.⁴² Although dating violence is rarely limited to an isolated incident of physical assault, a direct comparison of hypotheticals involving a physical assault of victims with different relationships to the perpetrating student highlights the disparate protections campuses provide to students responding to complaints of gender-based violence than they do to other students. It reveals how a civil rights law intended to protect victims of sex discrimination in the form of gender-based violence has been manipulated to protect perpetrators of gender-based violence and harm victims through longer and more traumatic campus processes.

⁴² Kelly A. Behre, *Rape Exceptionalism Returns to California: Institutionalizing a Credibility Discount for College Students Reporting Sexual Misconduct*, 73 OKLA. L. REV. 101 (2020).