

“Due” the Process: The Sufficiency of  
Due Process Protections Afforded by  
University Procedures in Handling  
Sexual Assault Allegations

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#### INTRODUCTION

Whether it be in a song<sup>1</sup> nominated for a Grammy and an Academy Award or as the topic of an ESPN documentary series,<sup>2</sup> sexual assault is a topic of conversation and it’s not going anywhere.

This Comment will first explore the goals, interest, and laws that govern sexual assault in two institutions: higher education and the criminal justice system. Then, this Comment will discuss the rights of the victim and the perpetrator in the context of each of those institutions. Finally, this Comment will discuss potential legislation and policy changes made at the University of Oregon, which will illustrate why the institution of higher education and the criminal justice system must each maintain their autonomy. In order to understand the dynamic between those institutions, this Comment will

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<sup>1</sup> LADY GAGA, *TILL IT HAPPENS TO YOU* (Interscope Records 2015) was used in the 2015 documentary *The Hunting Ground* and was nominated for a Grammy for Best Song Written for Visual Media and for an Academy Award for Best Original Song. AWARDS, <http://thehuntinggroundfilm.com/awards/> (last visited Mar. 14, 2017).

<sup>2</sup> *Fantastic Lies* (ESPN 30 for 30 Mar. 13, 2016) is a documentary about a sexual assault scandal that rocked the Duke Lacrosse team a decade ago.

continually discuss two recent, high-profile incidents involving sexual assault allegations made against college athletes.

In April 2015, Jon Krakauer released an investigative novel that explored the handling of sexual assault investigations in Missoula, Montana.<sup>3</sup> Krakauer’s much-anticipated book brought the prevalence and mishandling of sexual assaults on college campuses into the national spotlight. Although Krakauer’s book chronicled various victims’ sexual assaults, the most infamous account involved allegations against the University of Montana’s then-starting quarterback, Jordan Johnson.<sup>4</sup>

In February 2012, a University of Montana student reported being raped by Johnson, which led to an investigation by the University of Montana.<sup>5</sup> The university ultimately found Johnson to have committed sexual misconduct and subsequently expelled him.<sup>6</sup> Clayton Christian, the Commissioner of Higher Education in Montana, overturned the University of Montana’s decision to expel Johnson and required the University of Montana to further investigate the allegations.<sup>7</sup> The University of Montana hired an independent investigator, who ultimately determined that Johnson had committed sexual misconduct.<sup>8</sup> Dean of Students Rhondie Voorhees disagreed with the investigator’s conclusion, Johnson was reinstated at the University of Montana, rejoined the football team, and was allowed to continue his studies.<sup>9</sup>

In the interim, Johnson’s accuser had reported the sexual assault to the local police department.<sup>10</sup> Johnson was charged with sexual intercourse without consent.<sup>11</sup> Johnson was represented by Kirsten Pabst, who had resigned from her position as Deputy County Attorney for Missoula County, and David Paoli, a prominent

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<sup>3</sup> JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN* (2015).

<sup>4</sup> *Id.* at 225.

<sup>5</sup> *Id.* at 142.

<sup>6</sup> *Id.* at 184–85.

<sup>7</sup> *Id.* at 186–87.

<sup>8</sup> *Id.* at 187.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 144.

<sup>11</sup> *Id.* at 225.

Missoula lawyer known for his “bulldog tactics.”<sup>12</sup> Following a trial, Johnson was acquitted of the charge.<sup>13</sup>

Just a few years later, in March of 2014, another high-profile sexual assault case made headlines: a female student at the University of Oregon reported being sexually assaulted by three other students.<sup>14</sup> All three were members of the University of Oregon men’s basketball team.<sup>15</sup> The University of Oregon Police Department, assisted by the Eugene Police Department, investigated the sexual assault.<sup>16</sup> The three alleged perpetrators remained on the team during March Madness,<sup>17</sup> but were ultimately removed from the team and expelled from the University of Oregon.<sup>18</sup> The Lane County District Attorney’s Office declined to pursue charges against the three perpetrators.<sup>19</sup> Unlike the University of Montana, which immediately reinstated Johnson,<sup>20</sup> the University of Oregon did not reinstate the three alleged perpetrators and all three subsequently enrolled at different universities.<sup>21</sup> The difference in the appeals processes used

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<sup>12</sup> *Id.* at 226.

<sup>13</sup> *Id.* at 299.

<sup>14</sup> OFFICER JOHN LOOS, EUGENE POLICE DEP’T, INCIDENT INVESTIGATION REPORT 14-04131 (2014), [http://media.oregonlive.com/ducks\\_impact/other/14-04131.pdf](http://media.oregonlive.com/ducks_impact/other/14-04131.pdf).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 4.

<sup>17</sup> See Jay Cohen, *Oregon Beats BYU 87-68 in NCAA Tournament*, NCAA, <http://www.ncaa.com/game/basketball-men/d1/2014/03/20/byu-oregon> (last visited Mar. 11, 2017).

<sup>18</sup> Sean Newell, *Oregon Basketball Players Suspended After Rape Investigation*, DEADSPIN (May 6, 2014, 1:34 AM), <http://deadspin.com/oregon-basketball-players-suspended-after-rape-investig-1572259820>.

<sup>19</sup> Andrew Greif, *Lane County District Attorney Details Why Oregon Basketball Players Were Not Charged in Rape Accusations*, THE OREGONIAN (May 6, 2014), [http://www.oregonlive.com/ducks/index.ssf/2014/05/lane\\_county\\_district\\_attorney.html](http://www.oregonlive.com/ducks/index.ssf/2014/05/lane_county_district_attorney.html).

<sup>20</sup> Keila Szpaller, Higher Education Commissioner, *Dean of Students Reinstated Expelled UM Quarterback*, THE MISSOULIAN (Apr. 25, 2015), [http://missoulian.com/news/local/higher-education-commissioner-dean-of-students-reinstated-expelled-um-quarterback/article\\_27e4dc45-4228-5a86-99b0-95e624471ab6.html](http://missoulian.com/news/local/higher-education-commissioner-dean-of-students-reinstated-expelled-um-quarterback/article_27e4dc45-4228-5a86-99b0-95e624471ab6.html) (explaining how Johnson was ultimately reinstated by the University of Montana Dean of Students, Rhondie Voorhees).

<sup>21</sup> See NORTHWEST FLORIDA STATE COLLEGE MEN’S BASKETBALL ROSTER 2014–2015, <http://nwfraiders.com/sports/mkbk/2014-15/roster> (last visited Mar. 11, 2017) (illustrating that Brandon Austin was enrolled at the Northwest Florida State College during the 2014–2015 season); UTEP MEN’S BASKETBALL ROSTER 2015–2016, <http://www.utepathletics.com/sports/m-baskbl/mtt/utep-m-baskbl-mtt.html> (last visited Mar. 11, 2017) (illustrating that Dominic Artis is currently enrolled at the University of Texas at El Paso); UNIVERSITY OF HOUSTON MEN’S BASKETBALL ROSTER 2015–2016, <http://www.uhcougars.com/sports/m-baskbl/mtt/hou-m-baskbl-mtt.html> (last visited Mar. 11, 2017) (illustrating that Danyean Dotson is currently enrolled at the University of Houston).

by the University of Oregon and University of Montana could explain the difference in outcomes;<sup>22</sup> however, it is unknown whether the three perpetrators at the University of Oregon ever exercised their rights to appeal.<sup>23</sup>

These cases illustrate that the handling of sexual assaults on campuses is anything but simple. Educational institutions receiving federal funds must comply with federal law, which may include mandatory reporting to local law enforcement.<sup>24</sup> Guided by those federal laws, universities aim to protect the educational environment of their students.<sup>25</sup> This goal is inherently different than ones underlying the criminal justice system, whose laws are meant to deter, punish, and rehabilitate the offender, all while providing retribution for the public and the victim.<sup>26</sup>

Ultimately, a sexual assault incident that implicates both the university and the criminal justice system creates a serious conundrum for a university, especially given the prevalence of such incidents in the campus environment.<sup>27</sup> Universities are increasingly

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<sup>22</sup> See UNIV. OF MONTANA, UNIVERSITY OF MONTANA STUDENT CONDUCT CODE (Revised Aug. 27, 2013), <http://www.umt.edu/vpsa/documents/Student%20Conduct%20Code%20FULL%20-%20UPDATED%20AUG%2028%202012.pdf>) [hereinafter UM STUDENT CONDUCT CODE] (providing for several layers of appeal, including to the Commissioner of Higher Education; UNIV. OF OR., UNIVERSITY OF OREGON STUDENT CONDUCT CODE (Revised June 29, 2015), <http://policies.uoregon.edu/vol-3-administration-student-affairs/ch-1-conduct/student-conduct-code>) [hereinafter UO STUDENT CONDUCT CODE] (last visited Mar. 11, 2017) (allowing for one layer of appeal)).

<sup>23</sup> See Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (2012) (protecting student records, including records of misconduct, related to a student’s enrollment at an educational institution).

<sup>24</sup> See The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2012); see also UNIV. OF MONTANA, OFFICE OF PUBLIC SAFETY/POLICE SEXUAL ASSAULT INVESTIGATION POLICY § III(IV)(B)(1)(i) (2014), <http://www.umt.edu/policies/documents/Sexual%20AssaultPolicyProcedure.pdf> (requiring a responding officer to “turn over” a crime scene to the local law enforcement if the responding officer suspects “Sexual Intercourse Without Consent” has been committed); UNIV. OF OR., UNIVERSITY OF OREGON POLICE DEPARTMENT POLICY MANUAL (July 16, 2015), [http://police.uoregon.edu/sites/police.uoregon.edu/files/UOPD\\_Operations\\_Manual\\_PUBLIC\\_2015-07-20.pdf](http://police.uoregon.edu/sites/police.uoregon.edu/files/UOPD_Operations_Manual_PUBLIC_2015-07-20.pdf) (lacking a requirement to hand over a crime scene to local law enforcement).

<sup>25</sup> See, e.g., UNIV. OF OR., DIVISION OF STUDENT LIFE, STATEMENT OF NON-DISCRIMINATION, <http://studentlife.uoregon.edu/nondiscrimination> (last visited Mar. 14, 2017).

<sup>26</sup> See, e.g., OR. REV. STAT. § 163.375 (2013).

<sup>27</sup> In 2014, a psychology professor at the University of Oregon administered a survey to examine sexual assault at the University. Preliminary results of that survey revealed that at least thirty-five percent of female participants and fourteen percent of male participants

concerned about students' safety and the effectiveness of current protocols regarding sexual assault, but they are also concerned with the potential liability and exposure caused by sexual assaults involving current students.<sup>28</sup> In fact, universities may face litigation from both the victim and the perpetrator.<sup>29</sup>

## I

### GOALS, INTERESTS, AND GOVERNING LAW IN THE CRIMINAL JUSTICE SYSTEM AND HIGHER EDUCATION INSTITUTIONS

A great temptation exists for universities to allow outside law enforcement and the criminal justice system to handle sexual assault allegations because, theoretically, universities could be able to effectively shield themselves from liability related to the mishandling of sexual assault allegations. However, due to the differing goals and interests of higher education institutions and the criminal justice system, universities must address sexual assault allegations concurrently with the criminal justice system. Moreover, different law applies in each context. Thus, now more than ever, higher education institutions must maintain their autonomy from the criminal justice system.

#### *A. The Criminal Justice System*

Various statutory authorities guide the criminal justice system, including state and federal law and state and federal constitutions. As it pertains to sexual assault, prosecutors, using evidence gathered by law enforcement, must determine whether, under the applicable statute, probable cause exists to charge an accuser with sexual assault.

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had experienced at least one instance of sexual contact without consent. Of those participants, ninety percent did not report the nonconsensual sexual contact to the university. Jennifer Freyd, *The UO Sexual Violence and Institutional Behavior Campus Survey* (2014), <http://dynamic.uoregon.edu/jjf/campus/VO2014campussurveycontent.pdf> [hereinafter *UO Sexual Violence Survey*]; Jennifer J. Freyd, *The UO Sexual Violence and Institutional Betrayal Surveys: 2014 and 2015, Assessing Sexual Assault, Sexual Harassment, Perpetration, Institutional Betrayal, Student Attitudes, Student Health, Educational Engagement, and Participant Experience with the Survey*, <http://dynamic.uoregon.edu/jjf/campus/> (2014) [hereinafter *UO Survey Assessment*] (finding that ninety percent of students who reported having a nonconsensual sexual experience did not tell any university source).

<sup>28</sup> See, e.g., Complaint, *Austin v. Univ. of Or.* et al., No. 15CV29383 (Lane Cty. Cir. Ct. 2015) [hereinafter *Austin Complaint*]; Complaint, *Doe v. Univ. of Or. and Dana Altman*, No. 6:15CV-00012-MC (D. Or. 2015) [hereinafter *Jane Doe Complaint*].

<sup>29</sup> *Id.*

### 1. Protecting the Community

The criminal justice system consists of law enforcement, prosecutors, pretrial and probation services, courts, and corrections services.<sup>30</sup> In Eugene, Oregon, law enforcement includes the University of Oregon Police Department, Eugene Police Department, and the Lane County Sheriff’s Department.<sup>31</sup> According to the Eugene Police department, its general goals are to “[r]educe crime, disorder and the fear of crime in Eugene; [f]oster a culture of service excellence; [e]nhance data led and community policing services; [r]ecruit, retain and develop a highly capable and professional workforce; [i]mprove communication and public engagement; and [l]everage technology to deliver effective and efficient policing services.”<sup>32</sup> Its mission is to “promote safety and security, enforce laws, prevent crimes, and safeguard the constitutional rights of all people.”<sup>33</sup>

The Lane County District Attorney’s Office handles the prosecution of sexual assaults and rape in Eugene.<sup>34</sup> According to the office’s website, its general mission and goals are to “[s]trive to improve public safety and quality of life by prosecuting the guilty, protecting the innocent, securing appropriate support for children and families and determining cause and manner of death in all cases of traumatic [sic] or unattended death.”<sup>35</sup> If charges are brought by the Lane County District Attorney’s Office, the Lane County Circuit Court has jurisdiction to hear the case. That court, as well as all Oregon state courts, seek “[e]qual [j]ustice in the 21st [c]entury” and “lead the nation in providing fair, accessible, and timely justice to promote the rule of law, protect individual rights, and resolve conflicts.”<sup>36</sup>

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<sup>30</sup> Office of Justice Systems, *Criminal Justice Data Improvement Program*, <http://www.bjs.gov/index.cfm?ty=tp&tid=4> (last visited Mar. 11, 2017).

<sup>31</sup> Lane County Law Enforcement Agencies, <https://www.lanecounty.org/cms/one.aspx?portalId=3585881&pageId=4027787> (last visited Mar. 14, 2017).

<sup>32</sup> Mission Vision Values, EUGENE POLICE DEP’T, <http://eugene-or.gov/658/mission-vision-values> (last visited Apr. 5, 2017).

<sup>33</sup> *Id.*

<sup>34</sup> Sexual Assault, LANE CTY. DIST. ATTORNEY’S OFFICE, <http://lanecounty.hosted.civiclive.com/cms/One.aspx?portalId=3585881&pageId=5187369> (last visited Mar. 14, 2017).

<sup>35</sup> *Id.*

<sup>36</sup> Lane Cty. Circuit Court, *Vision and Statement of Values*, <http://courts.oregon.gov/Lane/AboutUs/pages/vision.aspx> (last visited Mar. 11, 2017).

The court system encompasses both criminal and civil litigation that could stem from sexual assaults. The “Oregon [c]ourts provide justice and uphold the rule of law,” and the Lane County Circuit Court’s values include: “[f]airness, equality and integrity[,] [o]penness and timeliness; [i]ndependence, impartiality and consistency; [e]xcellence, innovation and accountability; [and] [r]espect, dignity, public service, and community well-being.”<sup>37</sup> Thus, the overall theme among all of the players in the Eugene criminal justice system is that the guilty shall be punished, the innocent shall be protected, and the public at large will be protected. Most significant is the recognition that individuals’ constitutional rights must be respected.

## 2. Oregon Law Precluding Rape

In Oregon, rape in the first degree is precluded by Oregon Revised Statute 163.375.<sup>38</sup> Rape in the first degree occurs when “[t]he victim is subjected to forcible compulsion by the person . . . or [t]he victim is incapable of consent by reason of . . . mental incapacitation or physical helplessness.”<sup>39</sup> The term “[f]orcible compulsion” is defined as “compel[ling] by [p]hysical force or . . . threat, express or implied, that places a person in fear of immediate or future death or physical injury to self or another person, or in fear that the person or another person will immediately or in the future be kidnapped.”<sup>40</sup> The term “[m]entally incapacitated” is defined as “render[ing] [a person] incapable of appraising or controlling the conduct of the person at the time of the alleged offense.”<sup>41</sup> Further, “[p]hysically helpless” is defined as “unconscious[ness] or . . . physically unable to communicate unwillingness to an act.” Finally, “[s]exual intercourse” is defined in its “ordinary meaning and occurs upon any penetration, however slight; emission is not required.”<sup>42</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> OR. REV. STAT. § 163.375 (2013).

<sup>39</sup> *Id.*

<sup>40</sup> OR. REV. STAT. § 163.305(2)(a)–(b) (2015).

<sup>41</sup> *Id.* § 163.305(4).

<sup>42</sup> *Id.* § 163.305(5).



3. “In [A]ll [C]riminal [P]rosecutions, the [A]ccused [S]hall [E]njoy . . .”<sup>43</sup>

Once the accused is officially charged, the accused is afforded the protections and safeguards of the state and federal constitutions.<sup>44</sup> These protections include the right against self-incrimination,<sup>45</sup> the right to due process,<sup>46</sup> and the right to counsel,<sup>47</sup> to name a few.

*a. Beyond a Reasonable Doubt*

Arguably one of the greatest protections afforded to a criminal defendant is the requirement that the prosecution prove its case against the defendant “beyond a reasonable doubt.”<sup>48</sup> Perhaps even more fundamental is that a defendant is presumed innocent until proven guilty.<sup>49</sup> These protections are considered necessary because the conviction of a criminal offense has such serious consequences.

*b. Criminal Adjudication*

Once an accused party is formally charged, the accused party must be informed of the charges against that party.<sup>50</sup> Moreover, the accused is now considered a defendant, and will be afforded the rights of a defendant.<sup>51</sup> The defendant also must enter a plea to the charges.<sup>52</sup> If the defendant pleads not guilty, and no plea agreement is agreed upon, a trial date is set.<sup>53</sup> Following a trial, where the defendant and the government present evidence and witnesses, a verdict is reached.<sup>54</sup> If the verdict is not guilty, the prosecution may

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<sup>43</sup> U.S. CONST. amend. VI.

<sup>44</sup> See *id.*; see also OR. CONST. art. I, § 11.

<sup>45</sup> See U.S. CONST. amend. V; see also OR. CONST. art. I, § 11.

<sup>46</sup> See U.S. CONST. amend. V; see also U.S. CONST. amend. XI.

<sup>47</sup> See U.S. CONST. amend. VI.

<sup>48</sup> *In re Winship*, 397 U.S. 357, 362 (1970).

<sup>49</sup> *Coffin v. United States*, 156 U.S. 432, 453 (1895).

<sup>50</sup> Office of Justice Systems, *The Justice System: What is the Sequence of Events in the Criminal Justice System?*, <https://www.bjs.gov/content/justsys.cfm> (last visited Mar. 11, 2017).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

not appeal.<sup>55</sup> If the verdict is guilty, the defendant may have a limited right to appeal, as well as the potential to seek other civil remedies.<sup>56</sup>

*c. Rights to Appeal*

In Oregon, a criminal defendant who has pleaded guilty or has been found guilty by conviction has a statutory right to appeal;<sup>57</sup> however, that right to appeal is limited.<sup>58</sup>

*B. Higher Education*

Universities are governed by their own conduct codes, several different federal laws, and by and through Department of Education guidance. As such, universities must take into account the concerns of the victim, more so than criminal prosecutions, because universities must provide a safe learning environment for all students, including an environment free of sexual violence.<sup>59</sup>

*1. Preserving the Educational Environment*

The primary goal of the University of Oregon Student Conduct Code is to “maintain and protect an environment conducive to learning and keeping with the educational objectives of the University of Oregon.”<sup>60</sup> As such, the university seeks to educate students on how to be responsible for their actions and respectful of others.<sup>61</sup> Most significantly, the Code acknowledges that students are a part of the campus community, as well as the larger community of Eugene, but that the Code is meant to preserve the standards set forth in the Code.<sup>62</sup> Thus, if a student’s actions are interfering with the educational objectives of the university, or any other objectives in the Code, the university may discipline that student.

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<sup>55</sup> *See id.* (stating that defendants can request appellate review of convictions or sentences).

<sup>56</sup> *Id.*

<sup>57</sup> OR. REV. STAT. § 137.020(5) (2015).

<sup>58</sup> OR. REV. STAT. § 138.050 (2015).

<sup>59</sup> *See, e.g., supra* note 25.

<sup>60</sup> UO STUDENT CONDUCT CODE, *supra* note 22, at § I(1).

<sup>61</sup> *Id.* § I(2).

<sup>62</sup> *Id.* § I(3).

## 2. *Sexual Misconduct*

Under Oregon’s Student Conduct Code, sexual misconduct is categorized as a violation of the “Standards Relative to the Rights of Individuals and to the Welfare of the University Community.”<sup>63</sup> Sexual misconduct includes “[u]nwanted [p]enetration . . . [n]onconsensual personal contact . . . [and] [s]exual advances.”<sup>64</sup> The Code also states that a lack of consent is necessary to facilitate a violation of sexual misconduct, whether the victim has either not explicitly consented to the action or lacks the capacity to consent.<sup>65</sup>

## 3. *Rights of the Accused and the Accuser*

The Code provides substantial protections to the accused student, as well as the accuser. Accused students must be provided with notice of the complaint and notice of their rights under the Code.<sup>66</sup> Extensive procedural protections are provided to the accused students, including the right to be informed of the contents and basis of the complaint. The accused also has the right to schedule an administrative conference with the Director of Community Standards, where the accused may present a “relevant response” to the allegations contained in the complaint.<sup>67</sup> Both the accused and accuser shall be allowed a reasonable amount of time to prepare for the administrative conference, which allows for the proposal of relevant witnesses.<sup>68</sup> Each party is also allowed to have an advisor present at the administrative conference.<sup>69</sup> The advisor can include an attorney, member of the faculty, or another student.<sup>70</sup> These procedural protections seek to maintain parity between the accused and the accuser. The Family Educational Rights and Privacy Act, as well as Oregon law protect the confidentiality of parties involved in complaints, administrative conferences, disciplinary actions, and any other process governed by the Code.<sup>71</sup>

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<sup>63</sup> *Id.* § V(3)(h).

<sup>64</sup> *Id.* § II(29).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* § 2(5).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* § 2(5)–(6).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* § 3(II)(2).

<sup>71</sup> *See id.* § 2(4)(f). For more information on FERPA, see FERPA Frequently Asked Questions, <http://familypolicy.ed.gov/faq-page?src=ferpa> (last visited Mar. 14, 2017).

*a. Preponderance of the Evidence*

Unlike the high standard of beyond a reasonable doubt in the criminal setting, in a university setting, the finding of a violation of the student conduct code may be supported by a lesser burden of proof, such as a “preponderance of the evidence.”<sup>72</sup> Preponderance of the evidence means that the claim is “more probably true than not true.”<sup>73</sup> This is a lesser evidentiary standard than clear and convincing, which ascertains that the truth of the claim is “highly probable.”<sup>74</sup> The University of Montana, for example, used the “clear and convincing” standard prior to the publication of the “Dear Colleague” letter by the Office of Civil Rights, which suggested that the lower evidentiary standard of “preponderance of the evidence” be used in sexual assault cases.<sup>75</sup> The Office of Civil Rights supported its position for the lower evidentiary standard by noting that cases involving Title VII violations also used the “preponderance of the evidence” standard.<sup>76</sup> Moreover, the Office of Civil rights uses that standard when it reviews allegations of discrimination, including Title IX violations.<sup>77</sup>

*b. Student Conduct and Community Standards Process*

At the University of Oregon, the student conduct violation process initiates when a written complaint alleging a violation of the Code is provided to the Office of Community Standards.<sup>78</sup> The Director of Student Conduct and Community Standards must provide written notice to the accused student within sixty days of receiving the complaint.<sup>79</sup> The written notice provided to the accused student will include information about the alleged Code violation and the student’s rights under the Code.<sup>80</sup> One of those rights includes the right to schedule an administrative conference with the Director of

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<sup>72</sup> See Letter from Russlyn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to colleague (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter Dear Colleague Letter 2011]; see also UO STUDENT CONDUCT CODE, *supra* note 22 at § 2(5)(h).

<sup>73</sup> MODEL JURY INSTRUCTIONS CIVIL r. 1.3 (9th Cir. 2007).

<sup>74</sup> *Id.*

<sup>75</sup> Dear Colleague Letter 2011, *supra* note 72; see U.S. CONST. amend. V; see also OR. CONST. art. I, § 11.

<sup>76</sup> *Id.* at 10.

<sup>77</sup> *Id.* at 11.

<sup>78</sup> UO STUDENT CONDUCT CODE, *supra* note 60, at § 3(II)(1).

<sup>79</sup> *Id.* § 3(II)(1)–(2).

<sup>80</sup> *Id.* § 3(II)(2).

Student Conduct and Community Standards; however, the accused must request that conference within seven days of receiving notice of the complaint.<sup>81</sup> If the accused student fails to request an administrative conference or does not attend a scheduled administrative conference, the Director of Student Conduct and Community Standards may proceed through the process without the accused.<sup>82</sup>

The accused student has a right to a fair hearing; thus, the student can request that the case be referred to an outside office upon showing that a “reasonable basis” exists to believe that the Office of Community Standards may be biased towards that student.<sup>83</sup> During the administrative conference, the accused will have “[r]easonable access to the case file prior to and during the conference, except . . . [as] prohibited by law.”<sup>84</sup> While the accused may not present witnesses and evidence, the accused will be allowed to respond to the information provided, as well as request the Director of Student Conduct and Community Standards to contact “relevant and necessary witnesses.”<sup>85</sup> Administrative conferences concerning sexual misconduct should typically be complete within sixty days of receiving the complaint.<sup>86</sup>

### *c. Right to Appeal*

Both the accused and accuser may appeal the decision of the Director of Student Conduct and Community Standards within fourteen days of the decision.<sup>87</sup> The appeal will be heard by the University Appeals Board, which is comprised of three faculty members and three student members.<sup>88</sup> Instead of rehearing the case, the Appeals Board merely reviews the administrative conference “record” and other documents.<sup>89</sup> The University Appeals Board decision may overrule its own decision with the “affirmative vote of a majority of the University Appeals Board members present.”<sup>90</sup> At the

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<sup>81</sup> *Id.* § 3(II)(2).

<sup>82</sup> *Id.* § 3(II)(3).

<sup>83</sup> *Id.* § 3(III)(2)(c); *see also id.* § 2(5)(g).

<sup>84</sup> *Id.* § 3(III)(2)(a).

<sup>85</sup> *Id.* § 3(III)(2)(b).

<sup>86</sup> *Id.* § 3(III)(5).

<sup>87</sup> *Id.* § 3(IV)(1).

<sup>88</sup> *Id.* § 3(V)(2).

<sup>89</sup> *Id.* § 3(IV)(2).

<sup>90</sup> *Id.* § 3(IV)(3).

University of Oregon, the University Appeals Board is considered the “final appeals body within the Student Conduct Program.”<sup>91</sup>

At the University of Montana, several layers of appeal exist for parties involved in sexual misconduct allegations.<sup>92</sup> In the case of Jordan Johnson, who was found in violation of the Student Conduct Code, the decision that rendered him expelled was reviewed numerous times at various levels.<sup>93</sup> Initially, Johnson appealed the decision of the Conduct Board to the Dean of Students.<sup>94</sup> After the Dean of Students upheld the decision, Johnson then appealed to the Board of Regents and the Commissioner of Higher Education, who remanded the case back to the University of Montana.<sup>95</sup> The University of Montana then hired an independent consultant who found Johnson had violated the Student Conduct Code.<sup>96</sup> Despite the finding of a violation, the Dean of Students then unilaterally rejected the consultant’s decision, reinstating Johnson.<sup>97</sup>

It may be true that, despite the existence of such an appeal, the appeal does not comport with due process. While there may be some validity to that argument, the real focus must be on the fact that the goals and governing laws, including the evidentiary standards, are not necessarily the same between the criminal justice system and the higher education system. Thus, due process, while still relevant, may not have the same significance or meaning in the context of higher education disciplinary proceedings.

## II

### LIABILITY CAUSED BY THE COEXISTENCE OF THE CRIMINAL JUSTICE SYSTEM AND HIGHER EDUCATION

A university investigating allegations of sexual misconduct asserted against one of its students must be conscious of the rights of both the victim and the accused. Both parties’ rights are vulnerable to infringement. The investigation, and any subsequent disciplinary actions, are part of a student’s educational record, which is

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<sup>91</sup> *Id.* § 3(IV).

<sup>92</sup> *See* UNIV. OF MONT., DISCRIMINATION GRIEVANCE PROCEDURES (Sept. 23, 2013), <http://www.umt.edu/eo/documents/discriminationprocedures.docx>.

<sup>93</sup> *See* KRAKAUER, *supra* note 3, at 186–87.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 186.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 187.

confidential under the Family Educational Rights and Privacy Act.<sup>98</sup> Concurrent investigations by outside law enforcement may not necessarily be subject to the same restrictions.<sup>99</sup>

#### A. Potential Infringement on the Rights of the Victim

Lawsuits involving victims of campus-related sexual assaults may assert several claims against a university stemming from state and federal law.<sup>100</sup> For example, the victim of the alleged sexual assault involving three University of Oregon basketball players filed a civil suit against the University of Oregon for its mishandling of the case—namely its improper handling of the victim’s counseling files—which were obtained by the University’s counsel prior to being released in discovery by the victim’s attorneys.<sup>101</sup> According to the complaint, counsel for the University of Oregon had obtained the victim’s confidential counseling records without her permission.<sup>102</sup> That lawsuit, filed in January 2015, lasted nearly eight months, with the victim settling the lawsuit out of court in August 2015.<sup>103</sup>

#### B. Potential Infringement on the Rights of the Accused

Universities are also vulnerable to potential lawsuits filed by the accused.<sup>104</sup> For example, in October 2015, one of the alleged perpetrators in the aforementioned University of Oregon sexual assault case, Brandon Austin, filed a civil suit in state court against

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<sup>98</sup> The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g(b) (2012). *But see*, 34 C.F.R. § 99.31 (2016) (listing limited circumstances in which an educational institution may release a student’s educational record without that student’s prior consent).

<sup>99</sup> *See generally* UO STUDENT CONDUCT CODE, *supra* note 22, at § 1(IV)(7) (indicating that “[s]tudents may be accountable both to civil and criminal authorities and to the University for behavior that constitutes violations of the law and the Student Conduct Code”).

<sup>100</sup> *See, e.g.*, Complaint at 4–5, 20–24, *Kollaritsch v. Mich. State Univ. Bd. of Tr.* (W.D. Mich. Nov. 18, 2015) (No. 1:15-cv-01191) (involving sexual assault allegations that allegedly occurred on campus, including one such instance at a Michigan State University football game).

<sup>101</sup> Jane Doe Complaint, *supra* note 28, at 9–10.

<sup>102</sup> *Id.* at 10.

<sup>103</sup> Gosia Wozniacka, *University of Oregon Settles Lawsuit with Alleged Gang Rape Victim*, ASSOCIATED PRESS (Aug. 4, 2015), [http://www.huffingtonpost.com/entry/university-of-oregon-settles-lawsuit-with-alleged-gang-rape-victim\\_55c1349ee4b0f7f0bebadc97](http://www.huffingtonpost.com/entry/university-of-oregon-settles-lawsuit-with-alleged-gang-rape-victim_55c1349ee4b0f7f0bebadc97).

<sup>104</sup> *See* Austin Complaint, *supra* note 28.

the University of Oregon.<sup>105</sup> Among other things, Austin alleged that the University caused him to lose future income that he would have made had he remained a player for a Division I school, such as the University of Oregon.<sup>106</sup> The basis of this lawsuit was that Austin's due process rights were violated by the University.<sup>107</sup> Austin alleged that the severity of the punishment from the University "required the defendants to provide Mr. Austin with the right to representation by counsel, testimony of witnesses under oath, depositions, issuance of subpoenas, and cross-examination of witnesses, and other due process protections."<sup>108</sup>

The sentiment that accused students are denied due process when found responsible in university proceedings is becoming more common.<sup>109</sup> A law firm in Eugene, Oregon, claims to "have pioneered" defense strategies for students who have been accused "false[ly] [of] university sexual assault accusations in Oregon."<sup>110</sup> The firm goes on to claim that "[t]he process is now broken and is discriminatory against men in violation of Title IX. Due Process is denied and students without the means to appeal unjust expulsions are forced to leave the University."<sup>111</sup> Further, a former Eugene city council member filed a Title IX complaint against the University of Oregon in regards to the three basketball players who were expelled after being accused of sexual assault.<sup>112</sup> The Title IX complaint alleged that the University of Oregon, including the Athletic Department, engaged in behavior that was discriminatory against males.<sup>113</sup> Most significantly, the complaint included an assertion that

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<sup>105</sup> *Id.*

<sup>106</sup> *See id.* at 12–18.

<sup>107</sup> *Id.* at 7–14.

<sup>108</sup> Austin Complaint, *supra* note 28, at 8–9.

<sup>109</sup> *See, e.g., Eugene, Oregon Sex Crimes Attorneys, Sexual Abuse Lawyers*, ARNOLD LAW, <http://arnoldlawfirm.com/eugene-oregon-sex-crimes-attorneys/> (last visited Mar. 11, 2017). Michael Arnold, a self-proclaimed sex-crime defense attorney, believes that "[t]he pendulum has swung from ignoring sex crime victims to believing everything they say (i.e., University of Oregon Student Conduct 'Hearings')." *Id.*

<sup>110</sup> *Student Conduct Code Attorney—University of Oregon and Oregon State*, ARNOLD LAW, <http://arnoldlawfirm.com/student-conduct-hearing-lawyer/> (last visited Mar. 11, 2017).

<sup>111</sup> *Id.*

<sup>112</sup> Diane Dietz, *Rights Complaint Filed on Behalf of Ducks Players*, THE REGISTER-GUARD, (May 14, 2014), <http://www.statesmanjournal.com/story/sports/college/univ-oregon/2014/05/14/uo-basketball-players-complaint-filed/9077533/>.

<sup>113</sup> *See* Kevin Hornbuckle, *Complaint of Civil Rights Violation*, FACEBOOK (May 13, 2014), <https://www.facebook.com/kevin.hornbuckle/posts/10202199207561959> (featuring an alleged copy of the complaint).



males accused of sexual assault at the University of Oregon were presumed to be guilty, rather than innocent.<sup>114</sup> While the outcome of this complaint is unknown, the concerns raised in the complaint appear to be a growing sentiment.

At many schools, student conduct hearings only require the presence of the accused.<sup>115</sup> Some of those hearings allow counsel to be present.<sup>116</sup> However, the question remains as to whether accused have the right to counsel. If the proceedings are considered administrative in nature, not criminal,<sup>117</sup> then the right to an attorney likely does not apply. Even if an accused can afford to hire counsel, the counsel may be precluded from participating in the hearing or have a limited role in the hearing.<sup>118</sup> For example, at the University of Oregon, a student is allowed to have one “advisor” present at the hearing.<sup>119</sup> Advisors may include other students who are not involved in the case, a parent or other family member, or a member of the faculty or administration.<sup>120</sup> That advisor may also be an attorney, including an attorney from the Office of Student Advocacy; however, despite the advisor’s ability to participate in the hearing, the advisor is in no way meant to be a representative of the accused student.<sup>121</sup> Moreover, the advisor may not cross-examine witnesses or fulfill any other role traditionally held by an attorney.<sup>122</sup>

With the prevalence of sexual assault and sexual assault allegations on college campuses, the line between college administrative hearings and criminal prosecution is becoming less apparent; however, now more than ever, it is important for the line to remain solid. The protections given to criminal defendants, including due process protections, do not necessarily extend to the accused in a student conduct hearing. Moreover, the extent to which those protections

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<sup>114</sup> *Id.*

<sup>115</sup> See e.g., UO STUDENT CONDUCT CODE, *supra* note 22, at § 3(III)(2).

<sup>116</sup> See *id.*, at § 2(II)(2)(C).

<sup>117</sup> See U.S. CONST. amend. VI (indicating that an accused has a right to counsel in a criminal proceeding).

<sup>118</sup> UNIV. OF OR., STUDENT CONDUCT STANDARD OPERATING PROCEDURES REGARDING SEXUAL MISCONDUCT, SEXUAL HARASSMENT, AND UNWANTED SEXUAL CONTACT § 10 (last updated Oct. 13, 2016), <https://dos.uoregon.edu/sexual-misconduct> [hereinafter UO STUDENT CONDUCT PROCEDURES].

<sup>119</sup> *Id.* at § 15.

<sup>120</sup> See UNIV. OF OR., OFFICE OF STUDENT CONDUCT AND CMTY. STANDARDS, *Do I Need an Advisor?*, <https://dos.uoregon.edu/files/Advisors.pdf> (last visited Mar. 11, 2017).

<sup>121</sup> UO STUDENT CONDUCT PROCEDURES, *supra* note 118, at § 15.

<sup>122</sup> *Id.*

extend to the accused is still largely up for debate. Further, universities must balance the rights of the accused with the rights of the accuser.

### *C. Constitutional Claims in Practice*

In 1975, the U.S. Supreme Court held that “when a school charges a student with a disciplinary violation, it must provide ‘notice and an opportunity for hearing appropriate to the nature of the case.’”<sup>123</sup> However, the Court limited its holding to student suspensions of less than ten days.<sup>124</sup> More recently, a federal trial court in the Eastern District of Pennsylvania held that a student’s expulsion deprived that student of his due process rights.<sup>125</sup> In *Furey*, a student at Temple University was accused of assaulting an off-duty police officer,<sup>126</sup> which led to the student being charged with a violation of the student conduct code.<sup>127</sup> After participating in the processes dictated by the student conduct code, the student was expelled from Temple University.<sup>128</sup>

That student filed a complaint in federal court against Temple University in which the student alleged various due process violations.<sup>129</sup> The court ultimately held that the student was provided adequate notice of the alleged violations against him; however, the court held that the school violated the student’s due process rights by not providing an unbiased conduct hearing.<sup>130</sup> The court further noted that the student’s due process rights did not necessarily guarantee the student be provided with counsel.<sup>131</sup> Most importantly, however, the court noted that, as in prior cases, the accused student’s due process rights were premised on the notion that the student had a property interest in his education at the university.<sup>132</sup> Thus, permanent deprivation of the student’s education by expulsion without proper procedure would violate due process.<sup>133</sup>

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<sup>123</sup> *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

<sup>124</sup> *Id.* at 584.

<sup>125</sup> *Furey v. Temple*, 884 F. Supp. 2d 223, 261 (E.D. Pa. 2012).

<sup>126</sup> *Id.* at 230–31.

<sup>127</sup> *Id.* at 240.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 226.

<sup>130</sup> *Id.* at 259.

<sup>131</sup> *Id.* at 253.

<sup>132</sup> *Id.* at 246.

<sup>133</sup> *Id.*

A few federal circuit courts have indicated that students may be entitled to legal counsel at disciplinary hearings; however, those circuit courts confronted cases involving students who were also facing criminal charges stemming from the behavior that had violated the student conduct code.<sup>134</sup> Some courts limit the right to counsel only to a right to consult or obtain advice from counsel.<sup>135</sup> Other courts have noted that if counsel actively participates in the disciplinary hearing, then perhaps other parties involved in the hearing would be required to have the training and expertise of an attorney.<sup>136</sup>

Ultimately, case law supports the notion that some sort of procedural due process must be given to students who are participating in student conduct hearings for student conduct code violations. The extent of the due process rights is directly related to the potential severity of the punishment. Further, if a university follows its own process as laid out in its conduct code, the university could likely comport with due process requirements.

### III RECENT DEVELOPMENTS IN HIGHER EDUCATION AND AT THE UNIVERSITY OF OREGON

Although Title IX and other federal laws have mandated that universities provide safe educational environments free from discrimination caused by sexual assault, these universities often find difficulty in abiding by such standards. As of March 9, 2016, 173 postsecondary institutions are being investigated by the United States Department of Education, Office of Civil Rights (OCR) for Title IX violations.<sup>137</sup> The OCR initiates those investigations either due to complaints that it has received or in order to review an institution's

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<sup>134</sup> See, e.g., *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993); *Gabrilowitz v. Newman*, 582 F.2d 100, 103 (1st Cir. 1978).

<sup>135</sup> See, e.g., *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 925–26 (6th Cir. 1988); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988).

<sup>136</sup> See *Furey v. Temple Univ.*, 884 F. Supp. 2d 223, 253 (E.D. Pa. 2012) (finding that an accused student may be afforded the right to counsel in a disciplinary proceeding but not the right for counsel to actively participate in the hearing).

<sup>137</sup> Press Release, Office of Civil Rights, List of Sexual Violence Investigations Open at the Postsecondary Level Including the Dates the Specific Investigations Were Initiated (Mar. 9, 2016) (on file with author).

compliance with Title IX.<sup>138</sup> Upon conclusion of an investigation, OCR will either enter into a resolution agreement with the investigated institution to resolve compliance concerns or determine that insufficient evidence existed to establish a Title IX violation occurred.<sup>139</sup>

OCR periodically releases publications meant to provide further guidance for universities that are struggling to maintain compliance with the various federal regulations.<sup>140</sup> Some of those publications include the “Dear Colleague” letters. Two significant “Dear Colleague” letters have been disseminated over the past five years. Each of these letters provided specific guidance for universities to remain in compliance with Title IX.

#### A. “Dear Colleague” Letters

On April 4, 2011, OCR issued a “Dear Colleague” letter (2011 letter) addressing sexual harassment in school districts, colleges, and universities (recipients) that receive Title IX funding.<sup>141</sup> Recipients were issued the 2011 letter as a reminder of the recipients’ responsibilities under Title IX to provide a safe educational environment, free from harassment, for all students.<sup>142</sup> Citing to a 2001 OCR publication, OCR explained that harassment in the educational context may create “a hostile environment . . . sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program.”<sup>143</sup> While a pattern of harassment likely creates a hostile environment, isolated incidences do not necessarily constitute “sufficiently serious” interference; however, “a single instance of rape is sufficiently severe to create a hostile environment.”<sup>144</sup> The 2011 Dear Colleague letter outlined the recipients’ obligations under Title IX, including an obligation to respond to conduct involving students, both on and off school

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<sup>138</sup> Press Release, United States Dep’t of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i>.

<sup>139</sup> Press Release, Office of Civil Rights, *supra* note 137.

<sup>140</sup> Reading Room Frequently Asked Questions, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html> (last visited Mar. 15, 2017).

<sup>141</sup> *See* Dear Colleague Letter 2011, *supra* note 72.

<sup>142</sup> *Id.* at 1.

<sup>143</sup> *Id.* at 3.

<sup>144</sup> *Id.* (citing *Jennings v. Univ. of N.C.*, 444 F.3d 255, 268, 274 n.12 (4th Cir. 2006)).

grounds, if one of the students involved files a complaint with the school.<sup>145</sup>

Recipients were also provided with procedural requirements involving the handling sexual harassment complaints.<sup>146</sup> These procedural requirements included the “[d]isseminat[ion] [of] a notice of nondiscrimination, [d]esignat[ion] [of] at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX, and [a]dopt[ion] and publication [of] grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.”<sup>147</sup> According to the 2011 letter, a recipient’s notice of nondiscrimination does not need to include a policy that specifically prohibits sexual harassment or sexual violence; however, a recipient’s policy must be specific enough so as to provide notice to students of conduct that could constitute sexual harassment (and sexual violence).<sup>148</sup> Each recipient’s designated employee, or coordinator, is required to supervise and facilitate compliance with Title IX, which includes incorporating the coordinator’s information into that recipient’s notice of nondiscrimination.<sup>149</sup> The coordinator must also ensure that the recipient’s grievance procedures are in compliance with Title IX.<sup>150</sup>

In order to comply with Title IX, a university must give notice of grievance procedures to students, parents, and employees.<sup>151</sup> Those grievance procedures must also provide an “[a]dequate, reliable, and impartial investigation of complaints” which will allow for parties involved to bring forth witnesses and other evidence.<sup>152</sup> The 2011 letter notes that the use of police investigations could aide in gathering information about the occurrence, but that criminal investigations and reports are “not determinative of whether sexual harassment or violence violates Title IX.”<sup>153</sup> This is, in part, because of the different standards used in criminal investigations as opposed to investigations of sexual harassment in an educational context.<sup>154</sup>

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<sup>145</sup> *Id.* at 4.

<sup>146</sup> *Id.* at 6.

<sup>147</sup> *Id.* (citing 34 C.F.R. § 106 (2016)).

<sup>148</sup> *Id.* at 7.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 8.

<sup>151</sup> *Id.* at 9.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 10.

<sup>154</sup> *Id.*

These investigations can occur simultaneously, and recipients do not need to wait until the conclusion of a criminal investigation in order to investigate the sexual harassment allegations.<sup>155</sup> The 2011 letter repeatedly notes that the parties involved have “equal opportunity” to present witnesses and evidence;<sup>156</sup> however, that right does not necessarily include the right to cross-examine each other’s witnesses.<sup>157</sup>

On April 24, 2015, OCR released another “Dear Colleague” letter (2015 letter) pertaining to Title IX compliance.<sup>158</sup> In particular, the 2015 letter outlined specific considerations that Title IX funding recipients should consider when designating a Title IX coordinator.<sup>159</sup> The most significant of these considerations is that the Title IX coordinator be independent so as to prevent conflicts of interest.<sup>160</sup> The 2015 letter provided examples of potential conflicts of interest, such as when the Title IX coordinator is also a “disciplinary board member, general counsel, dean of students . . . or athletics director.”<sup>161</sup> While not required, the 2015 letter suggested that the designating multiple Title IX coordinators could provide both students and staff with a “familiarity” with that coordinator which could “result in more effective training of the school community on their rights and obligations under Title IX . . . .”<sup>162</sup>

Aside from the recommendations pertaining to the selection of a Title IX coordinator, the 2015 letter also contained recommendations and clarifications of the Title IX coordinator’s position and responsibilities, specifically referencing the coordinator’s role in the handling of sexual harassment allegations.<sup>163</sup> The Title IX coordinator must facilitate the institution’s response to any and all complaints involving allegations of sex discrimination.<sup>164</sup> More importantly, the coordinator must actively track the outcomes of such complaints, recognize patterns in those outcomes, and determine the

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<sup>155</sup> *Id.* at 10.

<sup>156</sup> *Id.* at 9, 11–12.

<sup>157</sup> *Id.* at 12.

<sup>158</sup> Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. to colleague (Apr. 24, 2015), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 2–3.

<sup>161</sup> *Id.* at 3.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 3–4.

<sup>164</sup> *Id.*

impact of those outcomes on the greater campus community.<sup>165</sup> According to the 2015 letter, the coordinator’s monitoring and identification of potential patterns of sex discrimination “can help the recipient avoid Title IX violations . . . involving sexual harassment and violence, by preventing incidents from recurring or becoming systemic problems that affect the wider school community.”<sup>166</sup>

Although the coordinator is working behind the scenes, she should be visible and accessible to the greater campus community.<sup>167</sup> For example, at the University of Oregon, a notice of nondiscrimination and the Title IX coordinator’s contact information is posted on the bottom of every single webpage linked to the main university website.<sup>168</sup>

### B. Legislation

A number of acts have been introduced in congress relating to sexual assaults on campus.<sup>169</sup> The Campus Sexual Violence Elimination Act (Campus SaVE Act) amended the Clery Act through the Violence Against Women Reauthorization Act (VAWA).<sup>170</sup> The VAWA expanded the offenses that needed to be reported under the Clery Act to include domestic violence, dating violence, and stalking.<sup>171</sup> Moreover, VAWA extended institutions’ policies to include information about a victim’s choice to contact authorities, both on-campus and off-campus law enforcement, as well as a victim’s rights in regards to judicially administered protective or restraining orders.<sup>172</sup> Perhaps most significantly, the VAWA

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 4.

<sup>168</sup> See UNIV. OF OR., <http://uoregon.edu> (last visited Mar. 11, 2017).

<sup>169</sup> See, e.g., Violence Against Women Reauthorization Act of 2013 (VAWA), Pub. L. No. 113-4, § 304(a)(1)(B)(iii), 127 Stat. 54, 89 (codified as amended at 20 U.S.C. § 1092(f)(1)(F)(iii)); Safe Campus Act of 2015, H.R. 3403, 114th Cong. (2015); Fair Campus Act of 2015, H.R. 3408, 114th Cong. (2015); Campus Accountability and Safety Act, S.590, 114th Cong. (2015); Hold Accountable and Lend Transparency on (“HALT”) Campus Sexual Violence Act, H.R. 2680, 114th Cong. (2015).

<sup>170</sup> Pub. L. No. 113-4, § 304(a)(1)(B)(iii), 127 Stat. 54, 89 (codified as amended at 20 U.S.C. § 1092(f)(1)(F)(iii)).

<sup>171</sup> 20 U.S.C. § 1092(f)(F)(iii) (2015).

<sup>172</sup> See AM. COUNCIL ON EDUC., NEW REQUIREMENTS IMPOSED BY THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT (Apr. 1, 2014), <http://www.acenet.edu/news-room/Documents/VAWA-Summary.pdf>.

mandated training programs that were previously recommended in the 2015 letter, including programs involving the definition of consent.<sup>173</sup>

The Safe Campus Act of 2015<sup>174</sup> and the Fair Campus Act of 2015<sup>175</sup> both seek to eliminate the power of institutions of higher education to investigate and discipline students accused of sexual misconduct, instead placing the investigatory power almost solely on law enforcement. In particular, the Safe Campus Act of 2015 seeks to require institutions of higher education to “report and refer the allegation to the law enforcement agency of the unit of local government . . . not later than 48 hours after receiving written consent from the alleged victim.”<sup>176</sup> Upon initiating an investigation into the allegations, institutions of higher education would then be precluded from “initiat[ing] or otherwise carry[ing] out any institutional disciplinary proceeding with respect to the allegation, except to the extent that the institution may impose interim sanctions . . . .”<sup>177</sup> These interim sanctions include temporary suspensions<sup>178</sup> of “not more than 15 days” which could be extended up to 30 days if the institution of higher education determines that the accused student “poses an immediate threat to campus safety and student well-being.”<sup>179</sup>

The Safe Campus Act of 2015 also seeks to extend the so-called “due process requirements for institutional disciplinary proceedings” to essentially mirror rights provided by the Fifth and Fourteenth Amendments to a defendant in a criminal proceeding.<sup>180</sup> Specifically, the Safe Campus Act of 2015 seeks to allow a right to inculpatory and exculpatory evidence, which the Act deems as “material evidence.”<sup>181</sup> Even more significant, the Act seeks to provide a right to representation by an attorney who could participate in the formal hearing,<sup>182</sup> as well as a right for the involved parties to cross-examine each other’s witnesses.<sup>183</sup>

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<sup>173</sup> *Id.* at 3.

<sup>174</sup> Safe Campus Act of 2015, H.R. 3403, 114th Cong. (2015).

<sup>175</sup> Fair Campus Act of 2015, H.R. 3408, 114th Cong. (2015).

<sup>176</sup> H.R. 3403 § 163(a)(1).

<sup>177</sup> *Id.* § 163(b)(1).

<sup>178</sup> *Id.* § 163(c)(1).

<sup>179</sup> *Id.* § 163(c)(2)(a).

<sup>180</sup> *See id.* § 164.

<sup>181</sup> *Id.* § 164(a)(3).

<sup>182</sup> *Id.* § 164(a)(4).

<sup>183</sup> *Id.* § 164(a)(5).



The Fair Campus Act of 2015 is nearly identical to the Safe Campus Act of 2015; however, a key difference is that the Fair Campus Act of 2015 does not include the requirement that institutions of higher education turn over sexual assault allegations to local law enforcement.<sup>184</sup> From the date of their introductions on July 29, 2015, the Safe Campus Act of 2015 and Fair Campus Act of 2015 garnered public support from both the National Panhellenic Conference and North-American Interfraternity Conference, which are considered umbrella groups of sororities and fraternities nationally.<sup>185</sup> However, in November 2015, both the National Panhellenic Conference and the North-American Interfraternity Conference withdrew their support of the Safe Campus Act of 2015.<sup>186</sup>

The HALT Campus Sexual Violence Act seeks to publish a list of institutions that have been investigated or are currently being investigated by the Department of Education.<sup>187</sup> More specifically, the HALT Campus Sexual Violence Act seeks to list institutions under investigation by the Department, sanctions and findings issued by the Department, and any agreements entered into by those institutions related to the sanctions or findings.<sup>188</sup> The Act also seeks to create a private right of action for "aggrieved individuals."<sup>189</sup> As additional punishment for institutions found in violation of the Clery Act, the HALT Campus Sexual Violence Act also seeks to increase the financial penalty from \$25,000 to \$100,000.<sup>190</sup> Perhaps most importantly, the Act seeks to establish a "Campus Sexual Violence Task Force" that would, among other things, provide and develop recommendations to institutions of higher education regarding the response to and prevention of sexual assaults, survivor resources, and

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<sup>184</sup> See Fair Campus Act of 2015, H.R. 3408, 114th Cong. (2015).

<sup>185</sup> Tyler Bishop, *The Laws Targeting Campus Rape Culture: A New Federal Policy Seeks to Tackle the College Sexual-Assault Problem—But Can It Change the Status Quo?*, THE ATLANTIC (Sept. 11, 2015), <http://www.theatlantic.com/education/archive/2015/09/the-laws-targeting-campus-rape-culture/404824/>.

<sup>186</sup> Tyler Bishop, *Forcing Colleges to Involve Police in Sexual-Assault Investigations? Greek Life is Backtracking on a Bill That Would Limit Schools' Ability to Adjudicate Cases*, THE ATLANTIC (Nov. 19, 2015), <http://www.theatlantic.com/education/archive/2015/11/forcing-colleges-to-involve-police-in-sexual-assault-investigations/416736/>.

<sup>187</sup> HALT Sexual Violence Act, H.R. 2680, § 2(a)(1), 114th Cong. (2015).

<sup>188</sup> *Id.* § 2(a)(1).

<sup>189</sup> *Id.* § 5.

<sup>190</sup> *Id.* § 6.

establish best practices for the response and prevention of sexual assaults.<sup>191</sup>

The current Clery Act requires that universities must provide an annual report of certain reported crimes, including sexual assault, that have occurred on campus.<sup>192</sup> Under the Clery Act, universities must also provide a timely warning of an incident, including a reported sexual assault, to the greater campus community.<sup>193</sup> Moreover, the Act also requires that universities provide information about options and support to survivors of sexual violence, including sexual assault.<sup>194</sup> Further, universities must have a structure in place to allow an expedient handling of an allegation of sexual violence if that act occurred on campus.<sup>195</sup>

#### IV

##### RECENT POLICY CHANGES AT THE UNIVERSITY OF OREGON

The University of Oregon, despite not being under investigation for Title IX violations, saw the need to update its policies on the handling of sexual assault investigations. The university was likely motivated in part by the dissolving of the Oregon University System, which forced the universities in Oregon to self-regulate.<sup>196</sup> Moreover, in autumn of 2014, a University of Oregon professor facilitated a study of sexual assault at the University of Oregon, which produced disturbing findings.<sup>197</sup>

###### *A. Twenty Students Per Week: The Final Report of the University Senate Task Force to Address Sexual Violence and Survivor Support*

In May 2014, the University of Oregon Senate commissioned a task force known as the Senate Task Force to Address Sexual Violence and Support (Senate Task Force). The Senate Task Force sought to study the “strengths and limitations of the university’s

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<sup>191</sup> *Id.* § 8(a).

<sup>192</sup> Violence Against Women Act, 34 C.F.R. § 668.46(b)(4) (2016).

<sup>193</sup> *Id.* § 668.46(e).

<sup>194</sup> 34 C.F.R. § 668.46(b)(11)(iv).

<sup>195</sup> 34 C.F.R. § 668.46(k)(1)(i).

<sup>196</sup> See Dash Paulson, *The End of the Oregon University System*, EUGENE WKLY. (July 9, 2015), <http://www.eugeneweekly.com/20150709/news-briefs/end-oregon-university-system>.

<sup>197</sup> *UO Sexual Violence Survey*, *supra* note 27; *UO Survey Assessment*, *supra* note 27 (finding that ninety percent of students who reported having a nonconsensual sexual experience did not tell any university source).

response to recent incidents of sexual violence, and based on those assessments, to initiate sustained, proactive changes aimed at ending sexual violence and supporting survivors of sexual violence."<sup>198</sup> In November 2014, the Senate Task Force released its final report, which outlined recommendations including critical policy changes, prevention and education, and administrative changes.<sup>199</sup> Also included in the final report were initial recommendations for immediate action made to then-interim university president, Scott Coltrane.<sup>200</sup>

### 1. Critical Policy Changes

One significant policy change suggested in the report included the simplification and accessibility of the disciplinary process because the process as it stood was confusing and difficult to navigate.<sup>201</sup> The Senate Task Force also recommended that the university conduct a campus climate survey to better determine the prevalence of sexual assault on the University of Oregon campus.<sup>202</sup> In addition, the Senate Task Force recommended asking the President and the Board to require cooperation and participation from the athletic department senior leadership in addressing sexual violence issues. Another recommendation included the encouragement of the President and the Board to mandate that senior leadership within the athletic department actively cooperate and participate in addressing sexual violence issues.<sup>203</sup>

Between May and November 2014, the Senate Task Force worked with fraternities and sororities at the University of Oregon to address sexual assault within the Greek system.<sup>204</sup> Ultimately, the Senate Task Force recommended that the university develop a separate task force specific to the Greek system.<sup>205</sup> Moreover, the Senate Task

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<sup>198</sup> UNIV. OF OR. SENATE TASK FORCE, TWENTY STUDENTS PER WEEK: THE REPORT OF THE UNIVERSITY SENATE TASK FORCE TO ADDRESS SEXUAL VIOLENCE AND SURVIVOR SUPPORT (Nov. 5, 2014), [http://senate.uoregon.edu/sites/senate.uoregon.edu/files/2014\\_11\\_06%20Senate%20Task%20Force%20Report%20FINAL.pdf](http://senate.uoregon.edu/sites/senate.uoregon.edu/files/2014_11_06%20Senate%20Task%20Force%20Report%20FINAL.pdf) (internal quotation omitted).

<sup>199</sup> *Id.* at 1.

<sup>200</sup> *Id.* at 26–28 app. A.

<sup>201</sup> *Id.* at 6.

<sup>202</sup> *Id.* at 10–12.

<sup>203</sup> *Id.* at 12.

<sup>204</sup> *Id.* at 13.

<sup>205</sup> *Id.* at 15–16.

Force recommended that the Greek system be precluded from expanding at the university until sexual assault within the Greek system had been “identified, studied and addressed.”<sup>206</sup>

## 2. *Prevention and Education*

In order to effectively educate students at the university, the Senate Task Force recommended that students be required to view multiple sessions of presentations by the Sexual Wellness Advocacy Team (SWAT), including sessions that would be focused toward particular audiences, such as fraternity and sorority members and college athletes.<sup>207</sup> The Senate Task Force also recommended the expansion of “empowerment-based women’s self-defense training.”<sup>208</sup> Regarding Title IX, the Senate Task Force recommended implementing consistent training for all university employees, hiring one head Title IX coordinator, and hiring three assistant coordinators to assist the head coordinator.<sup>209</sup>

## 3. *Administrative Changes*

Many of the suggested administrative changes involve mandatory reporting and the university’s grievance procedures.<sup>210</sup> In particular, the Senate Task Force sought to review the university’s policy involving its employees and their requirements to report sexual violence, which the Senate Task Force believed was mistakenly interpreted to be mandatory rather than discretionary.<sup>211</sup> Relatedly, the Senate Task Force sought to review and streamline the university’s grievance procedures, which many faculty, staff, and students identified as problematic and “difficult to understand.”<sup>212</sup> Aside from review of formal policies, the Senate Task Force focused on establishing other support and collaboration within the Eugene community with groups such as Sexual Assault Support Services, Womenspace, and the Eugene Police Department.<sup>213</sup>

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<sup>206</sup> *Id.* at 13.

<sup>207</sup> *Id.* at 17.

<sup>208</sup> *Id.* at 18.

<sup>209</sup> *Id.* at 19.

<sup>210</sup> *Id.* at 20–21.

<sup>211</sup> *Id.* at 20.

<sup>212</sup> *Id.* at 21.

<sup>213</sup> *Id.* at 23.

#### 4. Initial Recommendations for Immediate Action

Prior to the publishing of the final report, the Senate Task Force made initial recommendations for immediate action to the then-interim president, Scott Coltrane, which the Senate Task Force believed needed to be implemented before the first day of undergraduate classes.<sup>214</sup> Those initial recommendations included establishing an emergency fund for survivor support and prevention of sexual assault, a Good Samaritan policy, Title IX messaging, educational messaging, and anonymous reporting.<sup>215</sup> The emergency fund, with a requested amount of \$10,000, was meant to be a "discretionary fund . . . administered by the Sexual Violence Response & Support Services Coordinator."<sup>216</sup> The Good Samaritan policy was meant to prevent the hesitation that students may feel when, for example, students had been drinking underage at the time of the incident and thus feared the punishment involved with that act.<sup>217</sup> The Title IX messaging sought to provide the university's employees with a clear explanation of the university's Title IX policies, including information on resources, officers and deputy officers, and responsibilities under Title IX.<sup>218</sup> Similarly, the educational messaging suggested that each member of the faculty include the university's Title IX policy in their syllabi, and that the university provide faculty with information and guidance about discussing sexual violence in the classroom.<sup>219</sup> Finally, the Senate Task Force was concerned with the University of Oregon Police Department's anonymous reporting website, which would track the IP address of anonymous reporters on that site, thus contradicting the anonymity of that method of reporting.<sup>220</sup>

In response to the Senate Task Force's initial recommendations, then interim president Scott Coltrane released a statement on September 23, 2014, outlining his intention to proceed regarding each recommendation. Interim President Coltrane agreed with all of the initial recommendations and took action to proceed with each, including authorizing a discretionary fund for survivor support and

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<sup>214</sup> *Id.* at 26 app. A.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 27.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

prevention of sexual assault and directing the Division of Student Life to review the draft Good Samaritan policy.<sup>221</sup> He also agreed to send an e-mail to university employees outlining the university's Title IX resources, while directing the Title IX coordinator to review all communications on the matter.<sup>222</sup> Interim President Coltrane also directed the Provost's Office to review the draft language on the university's Title IX policy to be included in each faculty member's syllabus.<sup>223</sup> Finally, Interim President Coltrane acknowledged that the University of Oregon Police Department's anonymous reporting site does attach an anonymous reporter's IP address; however, he directed the University of Oregon Police Department not to access those IP addresses.<sup>224</sup>

### *B. Transition*

For the past few years, the University of Oregon has experienced a variety of changes in leadership from the president to the general counsel, as well as the Title IX coordinator. The University of Oregon's current president, Michael Schill, began his tenure in July 2015.<sup>225</sup> Prior to President Schill's appointment, Scott Coltrane served as interim president for almost a year. Interim President Coltrane's service came after the sudden resignation of President Michael Gottfredson, who served as president of the university during the sexual assault incident involving the three University of Oregon basketball players.<sup>226</sup> The Office of General Counsel, which provides legal counsel to the university, has seen more changes than the president. Attorneys currently listed as general counsel include Doug Park, Samantha Hill, Melissa Matella, Bryan Dearing, and Craig Ashford. Park and Hill were investigated by the Oregon State Bar for potential wrongdoing after the bar received complaints that Park and Hill had illegally obtained a student's counseling records without the

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<sup>221</sup> E-mail from Scott Coltrane, Interim President of the Univ. of Or., to Robert Kyr, President of the Senate Task Force, and Carol Stabile and Randy Sullivan, Senate Task Force Co-Chairs (Sept. 23, 2014), <https://president.uoregon.edu/content/interim-president-act-upon-recommendations-university-senate-task-force>.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> NEW UO PRESIDENT SPENDS TIME ON CAMPUS MEETING AND GREETING, AROUND THE O, <https://around.uoregon.edu/content/new-uo-president-spends-time-campus-meeting-and-greeting> (last visited Mar. 11, 2017).

<sup>226</sup> Newell, *supra* note 18; Greif, *supra* note 19.

student's consent.<sup>227</sup> Park and Hill were eventually cleared of wrongdoing in the matter.<sup>228</sup> The interim Title IX coordinator at the University of Oregon was Penelope Daugherty,<sup>229</sup> however, the university recently hired a replacement for Daugherty.<sup>230</sup>

### C. President Schill: A New Direction

President Michael Schill began his tenure at the University of Oregon on July 1, 2015.<sup>231</sup> On August 4, 2015, President Schill announced his plan to prevent and respond to sexual assault at the University of Oregon.<sup>232</sup> His plan included hiring a new Title IX coordinator, two deputy Title IX coordinators, and an Affirmative Action and Equal Opportunity investigator.<sup>233</sup> President Schill also indicated his intention to continue to follow through with the plan created under Interim President Coltrane, under the recommendation of the Senate Task Force.<sup>234</sup>

Following his appointment, President Schill instituted the Sexual Assault Advisory Council consisting of faculty, staff, graduate and undergraduate students, as well as members of the community.<sup>235</sup> The goal of this council, according to President Schill, is to "help guide

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<sup>227</sup> Richard Read, *Six UO Employees, Including Vice President, Under Investigation for Alleged Misconduct Concerning Rape Case*, OREGON LIVE (May 8, 2015), [http://www.oregonlive.com/education/index.ssf/2015/05/six\\_uo\\_employees\\_including\\_a\\_v.html](http://www.oregonlive.com/education/index.ssf/2015/05/six_uo_employees_including_a_v.html).

<sup>228</sup> Letter from Troy J. Wood, Assistant Gen. Counsel, Or. State Bar, to Jennifer Morlok, University Counseling & Testing Center (June 18, 2015), [http://media.oregonlive.com/education\\_impact/other/OregonStateBarMorlok.pdf](http://media.oregonlive.com/education_impact/other/OregonStateBarMorlok.pdf).

<sup>229</sup> Heroy Named Permanent AVP and Title IX Coordinator, AROUND THE O, <https://around.uoregon.edu/content/heroy-named-permanent-avp-and-title-ix-coordinator> (last visited Mar. 11, 2017).

<sup>230</sup> Camilla Mortenson, *Dragged Through the Mud: Sexual Assault Survivors Endure*, EUGENE WKLY. (May 28, 2015), <http://www.eugeneweekly.com/20150528/lead-story/dragged-through-mud>.

<sup>231</sup> Biography: Michael Schill 18th President of the University of Oregon, UNIV. OF OR., THE OFFICE OF THE PRESIDENT, <http://president.uoregon.edu/biography> (last visited Mar. 15, 2017).

<sup>232</sup> UNIV. OF OR., THE OFFICE OF THE PRESIDENT, SEXUAL ASSAULT PREVENTION AND RESPONSE AT THE UNIVERSITY OF OREGON, <https://president.uoregon.edu/content/sexual-assault-prevention-and-response-university-oregon> (last visited Mar. 11, 2017).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> UNIV. OF OR., THE OFFICE OF THE PRESIDENT, SEXUAL ASSAULT ADVISORY COUNCIL, <http://president.uoregon.edu/content/sexual-assault-advisory-council> (last visited Mar. 11, 2017).

and evaluate [the University's] work to end sexual violence and foster a campus culture of safety, respect, and responsibility."<sup>236</sup>

#### CONCLUSION

Over the past year, the University of Oregon has taken great strides in combatting sexual assaults involving University of Oregon students, as well as updating the university's procedure for handling sexual assaults. In particular, the university has acknowledged that the entire campus community must be educated about the university's policies, procedures, and support systems in regards to sexual assault. Increased cooperation between the university and the Eugene Police Department, as well as a more straight-forward investigation process, will hopefully lessen the chance of mishandling sexual assault allegations. Further, the hiring of President Schill, who has openly supported the plan set forth by the Senate Task Force, is a step in the right direction for the university.

Publicity from high-profile sexual assault cases, cultural acknowledgment that a sexual assault problem exists, and a continual overlap between the criminal justice system and the institution of higher education has culminated in a perfect storm of liability for the public institutions. Regardless of whether a sexual assault allegation is handled strictly by outside law enforcement or the university officials, universities find themselves exposed to liability from multiple angles. While this liability may never be completely eliminated, universities can limit liability by staying in compliance with Title IX and appropriately handling sexual assault allegations. The diverging goals and interests of the criminal justice system and institutions of higher education force these two institutions to remain separate from each other. Moreover, the laws and rules governing the criminal justice system and institutions of higher education vary; therefore, allegations of sexual assault should be handled separately by each system.

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<sup>236</sup> *Id.*