

## ARTICLES

### **RIDING THE WAVE OR DROWNING?: AN ANALYSIS OF GENDER BIAS AND TWOMBLY/IQBAL IN TITLE IX ACCUSED STUDENT LAWSUITS**

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*In April 2011, the Department of Education’s Office for Civil Rights shook the foundation of campus sexual assault policies by publishing a “Dear Colleague” letter (“the 2011 DCL”). The 2011 DCL emphasized that a university’s failure to address sexual assault constituted gender discrimination in violation of Title IX and further clarified a university’s role in preventing, responding to, and correcting sexual abuse. This letter symbolized the Obama administration’s commitment to—and aggressive enforcement of—Title IX. Universities reacted by rebuilding and strengthening their administrative responses to sexual assault in a decidedly provictim manner. Unfortunately, these alterations to the campus disciplinary structure sacrificed accused sexual assault perpetrators’ rights to fairness and due process. To remedy perceived errors in disciplinary proceedings, accused assailants are increasingly suing their universities for reverse gender discrimination under Title IX. Alleged perpetrators argue that men are invariably found responsible for sexual misconduct due to a politicized sexual assault climate.*

*This Article offers the first empirical analysis of dismissal trends in reverse Title IX cases and highlights that most courts erroneously dismiss these lawsuits at the 12(b)(6) stage. Through a misinterpretation of plausibility pleading, these courts hold that accused perpetrators have not shown causal evidence of discrimination at the outset of the lawsuit. This prodissmissal approach, however, violates Swierkiewicz v. Sorema N.A.’s proclamation*

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*that a plaintiff need not plead a prima facie case of discrimination in the complaint. This Article proposes a more flexible causal pleading scheme that satisfies Twombly, Iqbal, and Swierkiewicz and ensures accused perpetrators receive their day in court. Alternatively, this Article argues for limited pre-dismissal discovery in reverse Title IX suits where the court contends the causational element has been insufficiently pled.*

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## INTRODUCTION

The evening of October 11, 2014, started with a party. When John, a Brown University sophomore, encountered Jane at the lively event, the two left for what John termed “a consensual hook up.”<sup>1</sup> Jane called it sexual assault.<sup>2</sup> Approximately one week later, Jane made a “serious allegation of sexual misconduct” to university officials, and the university issued a no-contact order against John.<sup>3</sup> John received written notice on November 5, 2014, that the university had formally charged him with four student code violations.<sup>4</sup> Although John provided Brown with a list of witnesses, Brown did not contact any of these individuals prior to initiating the charges.<sup>5</sup>

Four days before the student conduct hearing, Brown gave John access to an eighty-page packet of “critical evidence and procedural information.”<sup>6</sup> The packet did not include favorable character statements of John. Brown further appointed Richard Bova, senior associate dean of residential and dining services, as a substitute member of the panel the day before the hearing.<sup>7</sup> This last-minute substitution deprived John of an opportunity to screen the new panelist for conflicts of interest.<sup>8</sup> Such screening would have revealed that Bova was previously accused in a federal lawsuit of violating a Brown student’s rights in a sexual misconduct investigation.<sup>9</sup>

During the disciplinary hearing, the panelists refused to cross-examine Jane about the multiple inconsistencies in her interviews, complaint, and subsequent retellings of the events.<sup>10</sup> Additionally, the disciplinary panel stopped John’s testimony only a few seconds into his midpoint statement.<sup>11</sup>

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1. See Complaint paras. 11–12, *Doe v. Brown Univ.*, No. 1:15-cv-00144 (D.R.I. Apr. 13, 2015), ECF No. 1. In the complaint and subsequent court documents, the male perpetrator is known only as John Doe, and the female victim is known as Jane Doe. See *id.* For purposes of this Article and to enhance readability, the male student is referred to as “John,” and the female student is referred to as “Jane.”

2. See *id.* paras. 20, 23, 30. The events in the introduction are relayed from John’s perspective for two reasons: First, records from campus sexual assault proceedings are not publicly available. Consequently, the retelling of events is limited to John’s federal complaint. Second, this Article focuses on the denial of due process to alleged campus sexual assault perpetrators. Thus, understanding the disciplinary process from the accused’s perspective is critical to this piece. This Article in no way attempts to victim blame or minimize the harm sexual violence victims suffer. The author herself is a former victim of domestic violence and understands the emotional sensitivity that accompanies this topic.

3. See *id.* paras. 15, 20–21, 23.

4. See *id.* para. 41. Brown charged John with the following offenses: (1) “[a]ctions that result in or can be reasonably expected to result in physical harm to a person or persons”; (2) “[s]exual Misconduct that involves non-consensual physical contact of a sexual nature”; (3) “[s]exual Misconduct that includes one or more of the following: penetration, violent physical force, or injury”; and (4) “[i]llegal possession or use of alcohol.” *Id.* para. 30.

5. See *id.* paras. 39, 44.

6. *Id.* para. 49. Brown’s “Code of Conduct” requires that respondents have seven business days to access and review all materials that will be presented and considered at the disciplinary hearing. See *id.*

7. See *id.* para. 62.

8. See *id.*

9. See *id.*

10. See *id.* paras. 69–73.

11. See *id.* para. 74.

In contrast to the panel's twenty minutes of calmly cross-examining Jane, John endured ninety minutes of cross-examination in a "caustic tone."<sup>12</sup> The panel further failed to investigate the motives and biases of Jane's witnesses.<sup>13</sup> Unsurprisingly, the panel found John "responsible" for all four charges and suspended him for two and a half years.<sup>14</sup>

In the aftermath of his suspension, John filed a federal lawsuit with the District of Rhode Island on April 13, 2015.<sup>15</sup> The gravamen of John's complaint was a reverse Title IX claim for erroneous outcome and deliberate indifference.<sup>16</sup> Specifically, John argued that his suspension was "symptomatic of a broader culture of inherent, systematic and intentional gender bias against male students accused of sexual misconduct."<sup>17</sup> In particular, John alleged that Brown's policies exhibited gender bias because male perpetrators accused of sexual assault are "invariably found guilty."<sup>18</sup> As a result of this bias, John argued that male students are denied fair and impartial procedures during the disciplinary process.<sup>19</sup>

For many suspected perpetrators of campus sexual assault, John's experience is exceedingly common. In 2011, the Department of Education's Office for Civil Rights (OCR) issued a "Dear Colleague" letter ("the 2011 DCL") to universities explaining that Title IX of the Education Amendments of 1972 prohibits sexual assault as a form of sexual harassment.<sup>20</sup> The 2011 DCL clarified the Department of Education's interpretation of Title IX, addressing such topics as proper notice and appeal procedures, use of a preponderance of the evidence standard, and development of interim protection for sexual assault victims.<sup>21</sup> The 2011 DCL reiterated that a university's failure to comply with these procedures could result in a Title IX investigation and loss of federal funding.<sup>22</sup> OCR's "guidance" and its corresponding ramifications have pressured universities to crack down on sexual assault and prosecute those crimes zealously through the disciplinary system.<sup>23</sup> While this outcome received widespread praise for destigmatizing

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12. *See id.* paras. 68, 76.

13. *See id.* paras. 77–79.

14. *Id.* para. 82.

15. *See id.* paras. 1, 47.

16. *See id.* paras. 94–101, 106–146.

17. *Id.* para. 120.

18. *Id.* para. 127.

19. *See id.* para. 94.

20. *See* Letter OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER 1, 3 (2011) [hereinafter 2011 DCL], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/DNR9-R5G6>]; *see also* Max Kutner, *The Other Side of the College Sexual Assault Crisis*, NEWSWEEK (Dec. 10, 2015, 5:33 PM), <http://www.newsweek.com/2015/12/18/other-side-sexual-assault-crisis-403285.html> [<https://perma.cc/J3RE-SPRC>].

21. *See* 2011 DCL, *supra* note 20, at 4–16.

22. *See id.* at 16.

23. *See* Valerie Bauerlein, *In Campus Rape Tribunals, Some Men See Injustice*, WALL ST. J. (Apr. 10, 2015, 12:43 PM), <http://www.wsj.com/articles/in-campus-rape-tribunals-some-men-see-injustice-1428684187> (stating that the 2011 DCL is a federal directive that instructs campuses to "crack down on sexual assault") [<https://perma.cc/2SLW-WW8D>]; Scott Jaschik, *Swarthmore Backs Down*, INSIDE HIGHER ED (Dec. 1, 2014), <https://www.insidehighered.com/>

sexual violence, hundreds of accused perpetrators are arguing that higher education sexual assault procedures “trample” on their federal rights.<sup>24</sup> These students cite myriad ways in which universities favor victims of sexual assault throughout the disciplinary process, to the point of impeding justice.<sup>25</sup> By perceiving male rights as subordinate to OCR’s policy agenda, universities may inadvertently deny sexual assault perpetrators due process and fairness.

The perceived lack of justice in university disciplinary proceedings has prompted many accused assailants to seek vindication of their rights in the judicial system.<sup>26</sup> Hundreds of males accused of sexual violence are suing their universities for gender discrimination.<sup>27</sup> These students are unwilling to accept the perceived denial of their civil rights and destruction of their academic future based on an allegedly biased system.<sup>28</sup> Filing suit under Title IX is a political declaration that male rights matter and a final chance to reverse disciplinary sanctions.

Regrettably, when universities shut the doors of justice, the judiciary seems to bolt the lock. Through a misinterpretation of plausibility pleading, a majority of district courts improperly dismiss reverse Title IX cases and block the final avenue of relief for accused students.<sup>29</sup> These courts read *Bell Atlantic Corp. v. Twombly*<sup>30</sup> and *Ashcroft v. Iqbal*<sup>31</sup> as requiring particularized factual evidence that the flawed disciplinary proceeding was a direct result of the student’s gender.<sup>32</sup> Rather than evaluating the complaint as a whole, these courts mandate specific factual data on the causal element

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news/2014/12/01/swarthmore-drops-findings-against-male-student-who-sued-under-title-ix (explaining that universities face “intense pressure from female students and the U.S. Education Department to crack down on sexual assault”) [<https://perma.cc/E935-25DY>].

24. Kutner, *supra* note 20; *see also* Lavinia M. Weizel, *The Process That Is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1618 (2012) (“In response to the Dear Colleague Letter, critics have argued that the use of the preponderance of the evidence standard in school disciplinary proceedings may jeopardize or even violate the due process rights of accused students.”).

25. *See infra* Part II.

26. *See infra* Part II.

27. *See Colleges Slammed with Lawsuits from Men Accused of Sex Crimes*, CBS NEWS (Mar. 23, 2016, 2:51 PM) [hereinafter *Colleges Slammed*], <http://www.cbsnews.com/news/colleges-slammed-with-lawsuits-from-men-accused-of-sex-crimes/> (noting that prominent attorney Andrew Miltenberg represents almost one hundred accused perpetrators of sexual assault) [<https://perma.cc/7GSL-7WW5>]; Teresa Watanabe, *More College Men Are Fighting Back Against Sexual Misconduct Cases*, L.A. TIMES (June 7, 2014, 6:15 PM), <http://www.latimes.com/local/la-me-sexual-assault-legal-20140608-story.html> (claiming that Andrew Miltenberg receives approximately three to four new sexual assault cases each week) [<https://perma.cc/M8DZ-D56K>].

28. *See* Max Kutner, *Suspended College Athlete Suing U.S. over Sexual Assault ‘Guidance,’* NEWSWEEK (Apr. 20, 2016, 1:52 PM), <http://www.newsweek.com/grant-neal-lawsuit-sexual-assault-pueblo-450334> [[perma.cc/C37H-SNLQ](https://perma.cc/C37H-SNLQ)].

29. *See infra* Part III.

30. 550 U.S. 544 (2007).

31. 556 U.S. 662 (2009).

32. *See infra* note 239 and accompanying text.

at the outset of the lawsuit.<sup>33</sup> This framework creates an insurmountable pleading hurdle that plaintiffs cannot overcome.<sup>34</sup>

While the majority's approach to dismissal may be appropriate if *Twombly* and *Iqbal* existed in isolation, courts improperly ignore the third leg of the stool: *Swierkiewicz v. Sorema N.A.*<sup>35</sup> *Swierkiewicz*, which was cited favorably in *Twombly*,<sup>36</sup> expressly holds that the elements of a prima facie case are evidentiary in nature and "should not be transposed into a rigid pleading" structure.<sup>37</sup> Rather, discrimination claims should be judged only based on the plausibility of the complaint in its entirety. Because the causal link between discriminatory conduct and gender bias is part of the prima facie framework, the complaint does not need evidentiary backing or extensive factual allegations at the pleading stage.<sup>38</sup>

This Article analyzes the inability of accused students to access justice through both educational disciplinary proceedings and courts of law.<sup>39</sup> In particular, this Article proposes a more flexible reverse Title IX pleading scheme in line with *Twombly*, *Iqbal*, and *Swierkiewicz* and advocates for limited discovery where a court determines that a plaintiff's complaint lacks factual specificity for the causation element.

To explore these issues, this Article is divided into four parts. Part I offers an overview of campus sexual assault, Title IX, and OCR's interpretive guidance, focusing particularly on the 2011 DCL. Part I then highlights a university's investigatory and adjudicatory roles in sexual assault disciplinary proceedings, details the most common due process violations, and offers an explanation for why these breaches of due process occur. Part II describes accused students' use of reverse Title IX lawsuits to protest this deprivation of rights. Then, Part III builds on this foundation and delves into an analysis of the current pleading standards by examining the parameters of *Twombly*, *Iqbal*, and *Swierkiewicz*. Part III also explores how plausibility pleading has altered the motion to dismiss landscape for reverse sex discrimination claims and investigates the majority and minority approaches to reverse Title IX complaints. Additionally, Part III provides the first empirical analysis of dismissal trends in reverse Title IX cases. Finally, Part

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33. See *infra* Part III.C.2.

34. See *infra* Part III.C.2.

35. 534 U.S. 506 (2002).

36. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007); see also *Serrano v. Cintas Corp.*, 699 F.3d 884, 897 (6th Cir. 2012); *Keys v. Humana, Inc.*, 684 F.3d 605, 609 (6th Cir. 2012).

37. *Swierkiewicz*, 534 U.S. at 510–12.

38. See *Witte v. Rippe & Kingston Sys., Inc.*, 358 F. Supp. 2d 658, 666 (S.D. Ohio 2005) (holding that a plaintiff is not required to plead evidence of direct or indirect causation); see also *Carlson v. CSX Transp., Inc.*, 758 F.3d 819, 827 (7th Cir. 2014) ("[E]vidence is not required at the pleading stage."); *Hodczak v. Latrobe Specialty Steel Co.*, No. 08-649, 2009 WL 911311, at \*6 n.7 (W.D. Pa. Mar. 31, 2009) (affirming the validity of *Witte* post-*Twombly*).

39. The author does not express an opinion on whether discrimination is the proper lens through which to view sexual assault and reverse Title IX claims. In fact, the author believes that such claims may be better suited to a vulnerability analysis. However, given the present classification of sexual assault as discrimination, this Article uses this current lens to examine reverse Title IX claims.

IV argues that the majority's dismissal of reverse Title IX lawsuits contravenes *Swierkiewicz* and proposes a more flexible pleading approach for the causation element. This relaxed pleading framework not only satisfies the plausibility requirement but also prevents accused perpetrators from having to establish the evidentiary value of their claims at the outset of the lawsuit.

#### I. TITLE IX AND THE VIOLATION OF STUDENT RIGHTS

Public attention, controversy, and criticism regarding campus sexual assault has reached an unprecedented level.<sup>40</sup> Many universities, perceived as fostering a culture of rape, endure repeated attacks by politicians, federal regulatory agencies, and the press regarding their insufficient responses to sexual violence.<sup>41</sup> This part explains the role of Title IX in bolstering educational institutions' reactions to sexual violence and highlights the manner in which the disciplinary process can violate the rights of accused perpetrators.

##### A. Understanding Campus Sexual Assault

Sexual assault is a complicated and pervasive problem facing higher education institutions today. Harrowingly common, sexual violence disproportionately affects college women, particularly freshman and sophomore students.<sup>42</sup> Recent studies estimate that at least one in five women is sexually assaulted in college,<sup>43</sup> with a vast majority of incidents

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40. See, e.g., Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 HARV. L. REV. F. 359, 359 (2015) ("Th[e] longstanding epidemic of campus sexual assault has finally reached a flashpoint, igniting a national dialogue.").

41. See, e.g., Nicole Auerbach, *Summary of Outside Report: Baylor Failed Sexual Assault Victims*, USA TODAY (May 27, 2016), <http://www.usatoday.com/story/sports/ncaaf/big12/2016/05/26/baylor-investigation-pepper-hamilton-report-sexual-assault/84979090/> [<https://perma.cc/LU6U-ZELG>]; Elena Kadvany, *Stanford University Processes Fail Victims of Sexual Assault, Students Say*, PALO ALTO ONLINE (Jan. 22, 2016), <http://www.paloaltoonline.com/news/2016/01/22/stanford-university-processes-fail-victims-of-sexual-assault-students-say> [<https://perma.cc/2LFR-CQXJ>]; THE HUNTING GROUND (Radius-TWC 2015) (exposing the failure of universities to expel or suspend perpetrators responsible for sexual misconduct).

42. See WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE 2, 6 (2014) [hereinafter WHITE HOUSE TASK FORCE REPORT], <https://www.justice.gov/ovw/page/file/905942/download> [<https://perma.cc/7UBY-F9D2>]; see also Susan Hanley Duncan, *The Devil Is in the Details: Will the Campus SAVE Act Provide More or Less Protection to Victims of Campus Assaults?*, 40 J.C. & U.L. 443, 445 (2014); Karen Oehme et al., *A Deficiency in Addressing Campus Sexual Assault: The Lack of Women Law Enforcement Officers*, 38 HARV. J.L. & GENDER 337, 352 (2015); Weizel, *supra* note 24, at 1614.

43. See WHITE HOUSE COUNCIL ON WOMEN & GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 10 (2014) [hereinafter COUNCIL ON WOMEN & GIRLS REPORT], [http://www.sapr.mil/public/docs/research/201401\\_WhiteHouse\\_CouncilonWomenandGirls\\_RapeandSexualAssault.pdf](http://www.sapr.mil/public/docs/research/201401_WhiteHouse_CouncilonWomenandGirls_RapeandSexualAssault.pdf) [<https://perma.cc/W8LK-4P29>]; Rosenfeld, *supra* note 40, at 359. Although the one-in-five statistic has been verified by numerous scholars, disagreement nonetheless exists regarding the prevalence of campus sexual assault. For instance, columnist Edward Morrissey insists that the pressure colleges face to address campus sexual assault "comes in part from a moral panic based on bad data." Edward Morrissey, Opinion, *Guilt by*

occurring before the victim turns twenty-four.<sup>44</sup> Contrary to public perception, the majority of sexual assault victims (between 75 percent and 80 percent) know their attacker, either as a current or former romantic partner or acquaintance.<sup>45</sup> This bond between victim and perpetrator forces victims to confront not only the painful aftermath of a sexual attack but also intense feelings of betrayal and mistrust.<sup>46</sup>

The commonness of sexual violence at universities nationwide suggests the existence of particularized environmental and cultural triggers on campuses that perpetuate sexual misconduct. According to former Homeland Security Secretary and current university administrator Janet Napolitano, the fact that “vast numbers of young adults live independently and in close proximity to one another for the first time” is a key factor in the prevalence of sexual violence at universities.<sup>47</sup> Additionally, easy and constant access to alcohol combined with a “party” and casual “hook-up”<sup>48</sup> environment exacerbate the frequency of sexual assault.<sup>49</sup> Research reveals that most campus sexual assaults involve intoxication, occur late at night, and do not result in outward physical injuries.<sup>50</sup> In one study, 80 percent of assailants

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*Accusation—How Colleges Deal with Campus Sex*, FISCAL TIMES (Aug. 14, 2014), <http://www.thefiscaltimes.com/Columns/2014/08/14/Guilt-Accusation-How-Colleges-Deal-Campus-Sex> [https://perma.cc/A4BP-U2HK]. Morrissey expresses concern that the one-in-five statistic comes solely from a study consisting of an online questionnaire conducted at two universities, not a formal, widespread study conducted pursuant to academic standards. *Id.*

44. See COUNCIL ON WOMEN & GIRLS REPORT, *supra* note 43, at 10; Duncan, *supra* note 42, at 445.

45. See WHITE HOUSE TASK FORCE REPORT, *supra* note 42, at 6; Duncan, *supra* note 42, at 445 (placing the percentage of women who knew their sexual assault attackers at 90 percent).

46. See COUNCIL ON WOMEN & GIRLS REPORT, *supra* note 43, at 7.

47. Janet Napolitano, “Only Yes Means Yes”: *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL’Y REV. 387, 387 (2015).

48. The frequency of “hook-ups” on college campuses has been widely documented by the media. See Kate Dwyer, *The Surprising Reality About Hook-Up Culture in College*, TEEN VOGUE (Dec. 9, 2015, 11:34 AM), <http://www.teenvogue.com/story/hookup-culture-myth-dating-college> [https://perma.cc/QN5C-FZYV]. The definition of a “hook-up,” however, is purposefully vague, and can involve sexual activity that ranges from kissing to intercourse without the expectation of a continued romantic relationship. See *id.* Whether a “hook-up” culture actually exists on college campuses or is merely a myth is the subject of constant debate. Compare DONNA FREITAS, *THE END OF SEX: HOW HOOKUP CULTURE IS LEAVING A GENERATION UNHAPPY, SEXUALLY UNFULFILLED, AND CONFUSED ABOUT INTIMACY* (2013) (arguing that the “hook-up” culture dominates the lives of college students), with Justin J. Lehmiller, *The Myth of College “Hookup Culture,”* BOSTON.COM (July 16, 2014), <http://www.boston.com/culture/relationships/2014/07/16/the-myth-of-college-hookup-culture> (noting that college “students today [do] not report having sex more often” or having a greater number of sexual partners than college students in the 1980s and 1990s) [https://perma.cc/U6V9-5DG7].

49. See Sarah Edwards, *The Case in Favor of OCR’s Tougher Title IX Policies: Pushing Back Against the Pushback*, 23 DUKE J. GENDER L. & POL’Y 121, 124 (2015); see also LAUREN J. GERMAIN, *CAMPUS SEXUAL ASSAULT: COLLEGE WOMEN RESPOND* 7 (2016); Justin Neidig, Note, *Sex, Booze, and Clarity: Defining Sexual Assault on a College Campus*, 16 WM. & MARY J. WOMEN & L. 179, 195 (2009) (noting that studies have shown a direct causal link between alcohol and sexual aggression).

50. See Ashley Hartmann, *Reworking Sexual Assault Response on University Campuses: Creating a Rights-Based Empowerment Model to Minimize Institutional Liability*, 48 WASH. U. J.L. & POL’Y 287, 290 (2015); see also WHITE HOUSE TASK FORCE REPORT, *supra* note 42,



admitted to using alcohol or drugs to induce intoxication and overpower their victims.<sup>51</sup> The widespread use of alcohol and illegal drugs on campuses thus enables perpetrators to avoid using brute force to accomplish their crimes.<sup>52</sup> University culture fosters an environment where sexual assault thrives.

While the rate of sexual victimization is high at the university level, the reality is that most students do *not* engage in sexual violence. Universities rarely (if ever) receive complaints of sexual assault involving female perpetrators.<sup>53</sup> This finding is likely the product of underreporting,<sup>54</sup> as female-on-male and female-on-female sexual violence occurs throughout society.<sup>55</sup> Further, only 7 percent of college men perpetrate sexual assaults, with “[a]pproximately two-thirds of college acquaintance rapists . . . averaging about four to six rapes apiece.”<sup>56</sup> Athletes in particular

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at 6 (reporting that most survivors of sexual assault were abused while drugged, drunk, or incapacitated).

51. See Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims’ Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 397 (2005).

52. See *id.* at 397–98; see also COUNCIL ON WOMEN & GIRLS REPORT, *supra* note 43, at 14 (“Perpetrators often prey on incapacitated women, and sometimes surreptitiously provide their victims with drugs or alcohol.”); Barclay Sutton Hendrix, Note, *A Feather on One Side, a Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 595–96 (2013) (reporting that 75–90 percent of acquaintance rapes on campuses involve alcohol or drugs, and nearly 75 percent of rape victims are intoxicated at the time of the attack).

53. See, e.g., *Bleiler v. Coll. of the Holy Cross*, No. 11-11541, 2013 WL 4714340, at \*8 (D. Mass. Aug. 26, 2013) (explaining that the college has not received any complaints of female-on-male sexual assault).

54. See *Factsheets: Male Rape*, N.Y.C. ALLIANCE AGAINST SEXUAL ASSAULT, [http://www.svfreencyc.org/survivors\\_factsheet\\_38.html](http://www.svfreencyc.org/survivors_factsheet_38.html) (last visited Apr. 14, 2017) [<https://perma.cc/QN6L-E9U9>].

55. See COUNCIL ON WOMEN & GIRLS REPORT, *supra* note 43, at 9 (noting that “1 in 71 men—or almost 1.6 million—have been raped during their lives”); see also *Responding to Transgender Victims of Sexual Assault: Perpetrator Issues*, OFF. FOR VICTIMS CRIME (June 2014), [http://www.ovc.gov/pubs/forge/tips\\_gender.html](http://www.ovc.gov/pubs/forge/tips_gender.html) (stating that approximately “one-quarter of all sexual violence victims report a female assailant”) [<https://perma.cc/ZBN3-HM6S>]. Despite the reality of underreporting, some scholars have used the lack of data on female perpetrators to characterize sexual assault as a predominantly male crime. See *Understanding the Perpetrator*, U. MICH.: SEXUAL ASSAULT PREVENTION & AWARENESS CTR., <https://sapac.umich.edu/article/196> (last visited Apr. 14, 2017) (describing sexual assault perpetrators as white males) [<https://perma.cc/3CJF-3P83>]. The author does not endorse this perception but recognizes the limitations that underreporting places on comprehensively evaluating sexual assault perpetrators. For this Article, given that only male students have sued their universities for reverse sex discrimination under Title IX, the author uses male pronouns to describe perpetrators and female pronouns to depict victims. The use of these pronouns is purely for simplicity, and in no way discounts the reality that females also commit sexual misconduct.

56. See Reardon, *supra* note 51, at 398; see also COUNCIL ON WOMEN & GIRLS REPORT, *supra* note 43, at 14 (highlighting a study that “found that 7% of college men admitted to committing rape or attempted rape, and 63% of these men admitted to committing multiple offenses, averaging six rapes each”); Oehme et al., *supra* note 42, at 349 (“[R]epeat predators may account for as many as nine out of every ten rapes.”); THE HUNTING GROUND, *supra* note 41 (reporting that less than 8 percent of college men commit more than 90 percent of sexual assaults, with repeat offenders engaging in six or more acts of sexual violence). *But see* Halley Sutton, *Study Finds Campus Sexual Assaults Less Likely to Be Perpetrated by Serial Rapists*, CAMPUS SECURITY REP., Feb. 2016, at 9, 9 (“Four out of five men who committed rape on campus were not repeat offenders.”).

are believed to effectuate a disproportionate number of sexual assaults on campus, even though they account for only 3.3 percent of the collegiate population.<sup>57</sup> Comparably, fraternity members are thought to commit a “disproportionate number of gang rapes” on college campuses.<sup>58</sup> Therefore, while the number of sexual assaults on campuses remains high, the known perpetrator pool is probably relatively limited.

### *B. Using Title IX as a Weapon to Curb Sexual Misconduct*

The campus sexual assault epidemic has received widespread national attention.<sup>59</sup> In 2010, President Barack Obama instructed federal agencies to prioritize domestic and sexual violence, and the White House Council on Women and Girls and the Office of the Vice President held the first national roundtable on sexual assault.<sup>60</sup> As part of this initiative, Vice President Joe Biden and Department of Education Secretary Arne Duncan implemented new guidance to strengthen sexual assault prevention and response policies at universities.<sup>61</sup> This guidance, expressed in the 2011 DCL, set forth OCR’s interpretation of Title IX—specifically that Title IX holds universities responsible for sexual assault that occurs on campus.<sup>62</sup> This section summarizes the relevant provisions and interpretations of Title IX and analyzes the disciplinary procedures used by universities in sexual misconduct cases.

#### 1. Title IX Basics

Title IX is a deceptively short but incredibly powerful one-sentence statute that prohibits discrimination based on sex in educational institutions that receive federal funding.<sup>63</sup> Enacted in 1972, Title IX seeks to curb the use of federal resources to promote discriminatory practices.<sup>64</sup> In particular, Congress intended for Title IX “to supplement the Civil Rights Act of 1964’s

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57. See Nick Rammell, *Title IX and the Dear Colleague Letter: An Ounce of Prevention Is Worth a Pound of Cure*, 2014 BYU EDUC. & L.J. 135, 135; see also Amy Ellis Nutt, *A Shocking Number of College Men Surveyed Admit Coercing a Partner into Sex*, WASH. POST (June 5, 2016), <https://www.washingtonpost.com/news/to-your-health/wp/2016/06/03/more-than-half-of-college-athletes-surveyed-at-one-university-admit-coercing-a-partner-into-sex/> [<https://perma.cc/YV4S-R3YX>].

58. See Lauren P. Schroeder, *Cracks in the Ivory Tower: How the Campus Sexual Violence Elimination Act Can Protect Students from Sexual Assault*, 45 LOY. U. CHI. L.J. 1195, 1200 (2014).

59. See Napolitano, *supra* note 47, at 389.

60. See COUNCIL ON WOMEN & GIRLS REPORT, *supra* note 43, at 7, 19.

61. See *id.* at 25.

62. See 2011 DCL, *supra* note 20, at 4–16.

63. See 20 U.S.C. § 1681(a) (2012) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”); 34 C.F.R. § 106.31(a) (2016).

64. See, e.g., *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979); Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 DEL. L. REV. 83, 83 (2013); Christopher M. Parent, *Personal Fouls: How Sexual Assault by Football Players Is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 617, 625 (2003).

ban on racial discrimination in the workplace and in universities.”<sup>65</sup> Accordingly, Title IX shares the same substantive goals as Title VI of the Civil Rights Act of 1964 and has been interpreted in accordance with Title VI precedent.<sup>66</sup>

OCR has assumed primary responsibility for enforcement of Title IX.<sup>67</sup> Because OCR is a federal agency, its guidelines are entitled to deference by legislative and judicial bodies.<sup>68</sup> OCR’s primary goal is to ensure that federally funded educational institutions have adequate, fair, and effective procedures in place for addressing sex discrimination. Anyone who experiences discrimination or suspects a Title IX violation may file a complaint with OCR within 180 days of the alleged incident.<sup>69</sup> Upon receipt of a complaint, OCR may conduct an investigation of the offending university. If the investigation yields evidence of sex discrimination, OCR has express authority to terminate the university’s federal funding.<sup>70</sup> Prior to eliminating funding, however, OCR must provide the university with an opportunity to voluntarily resolve the violations.<sup>71</sup> To date, OCR has never revoked a university’s funding.<sup>72</sup> Given that almost all colleges and universities in the United States receive some form of federal financing,<sup>73</sup> OCR’s authority and Title IX’s prohibitions are expansive.

In addition to ensuring conformity with Title IX, OCR provides specific and technical guidance regarding institutional policies and responses to discrimination.<sup>74</sup> This insight occurs in the form of “Dear Colleague” letters, which remind universities of their compliance obligations and set forth

65. *Marshall v. Ohio Univ.*, No. 2:15-cv-775, 2015 WL 7254213, at \*5 (S.D. Ohio Nov. 17, 2015).

66. *See id.* The wording of Title IX and Title VI is virtually identical. *Compare* 20 U.S.C. § 1681(a), *with* 42 U.S.C. § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

67. *See* WHITE HOUSE TASK FORCE REPORT, *supra* note 42, at 17.

68. *See* *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *see also* Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 496 (2012) (explaining that “courts give *Chevron* deference to reasonable interpretations of Title IX found in dear colleague letters”).

69. *See* Julie Novkov, *Equality, Process, and Campus Sexual Assault*, 75 MD. L. REV. 590, 594 (2016); Schroeder, *supra* note 58, at 1207.

70. Jenni E. Spies, Comment, *Winning at All Costs: An Analysis of a University’s Potential Liability for Sexual Assaults Committed by Its Student Athletes*, 16 MARQ. SPORTS L. REV. 429, 432 (2006).

71. *See* WHITE HOUSE TASK FORCE REPORT, *supra* note 42, at 17; Hayley Macon et al., *Introduction to Title IX*, 1 GEO. J. GENDER & L. 417, 430 (2000).

72. *See* Justin F. Paget, Comment, *Did Gebser Cause the Metastasis of the Sexual Harassment Epidemic in Educational Institutions?: A Critical Review of Sexual Harassment Under Title IX Ten Years Later*, 42 U. RICH. L. REV. 1257, 1281 (2008); Tyler Kingkade, *Why It’s Unlikely North Carolina Schools Would Lose Federal Funding over HB 2*, HUFFINGTON POST (May 10, 2016, 4:06 PM), [http://www.huffingtonpost.com/entry/north-carolina-federal-funding\\_us\\_57320239e4b096e9f092b9c6](http://www.huffingtonpost.com/entry/north-carolina-federal-funding_us_57320239e4b096e9f092b9c6) [<https://perma.cc/R8T2-WYNU>].

73. *See* GERMAIN, *supra* note 49, at 9; Nicole Castle, *Sexual Harassment in Education*, 6 GEO. J. GENDER & L. 521, 523 (2005).

74. Hartmann, *supra* note 50, at 296.

specific procedures that colleges must satisfy.<sup>75</sup> The most controversial guidance issued by OCR came in the form of the 2011 DCL. The 2011 DCL “shifted the equality conception of Title IX in the public eye from one aimed primarily at women in sports to one aimed at rape and other sexual assault on college campuses.”<sup>76</sup> As a result, the dialogue surrounding sexual assault on campuses has grown exponentially in recent years.

Deemed a “significant development[]” in addressing campus sexual violence, the 2011 DCL strengthened the rights and protections for victims of sexual misconduct and affirmed the university’s proactive obligations to eliminate sexual violence.<sup>77</sup> Immediately upon learning of an incident of sexual assault, the school must investigate the attack, assist the victim, and remedy the discrimination through the university’s disciplinary process. In particular, the 2011 DCL established the following pertinent requirements: (1) schools must use the preponderance of the evidence standard to determine responsibility for sexual misconduct,<sup>78</sup> (2) the perpetrator and victim must not be allowed to personally question or cross-examine each other at the disciplinary hearing, (3) university sexual assault investigations must be conducted independently from any concurrent police investigations, and (4) both parties must be afforded the right to appeal an erroneous judgment.<sup>79</sup> In light of the 2011 DCL, universities nationwide have strengthened their commitment to sexual assault prevention and remediation, almost to the point of hyperaggression.<sup>80</sup> Due to the looming threat of funding revocation, these educational institutions do not question OCR’s guidelines.

The discretion universities afford to OCR’s Dear Colleague letters is concerning given that Title IX’s boundaries are “perilously undefined.”<sup>81</sup> The scant legislative history available for Title IX has effectively vested OCR with immense discretion in its interpretation and enforcement of sex discrimination policies.<sup>82</sup> OCR’s recent focus on sexual assault under Title IX is somewhat surprising given that nothing in the statute’s plain text, legislative history, or first seven years of administrative enforcement

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75. See Alexandra Fries, *Student-on-Student Sexual Assault Policy: How a Victim-Centered Approach Harms Men*, 39 J.C. & U.L. 633, 643 (2013).

76. Katharine Silbaugh, *Reactive to Proactive: Title IX’s Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1065 (2015).

77. See Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 50 (2013).

78. The term “preponderance of the evidence” means that the university disciplinary panel must be “50.01 percent” certain that the alleged perpetrator is responsible for the sexual misconduct. See Samantha Harris, *Campus Judiciaries on Trial an Update from the Courts*, HERITAGE FOUND. (Oct. 6, 2015), <http://www.heritage.org/education/report/campus-judiciaries-trial-update-the-courts> [https://perma.cc/G2QR-W9XJ].

79. See 2011 DCL, *supra* note 20, at 10–12.

80. See *Colleges Slammed*, *supra* note 27.

81. Matthew L. Daniel, *Title IX and Gender Equity in College Athletics: How Honesty Might Avert a Crisis*, 1995 ANN. SURV. AM. L. 255, 263.

82. See Paget, *supra* note 72, at 1260–61 (discussing the limited legislative history available on Title IX).

suggests a congressional intent to reach sexual misconduct claims.<sup>83</sup> Nonetheless, OCR has classified sexual assault as a form of sexual harassment<sup>84</sup> and is presently investigating more than 200 universities for Title IX violations.<sup>85</sup>

## 2. The University's Investigatory and Adjudicatory Roles in Sexual Misconduct Cases

The 2011 DCL placed undeniable pressure on universities to prevent, investigate, and adjudicate sexual violence in a nonjudicial setting.<sup>86</sup> Despite the fact that sexual assault—and rape in particular—is a heinous crime punishable by imprisonment, universities are expected to dedicate significant resources to prosecuting these crimes on campus through student disciplinary boards.<sup>87</sup> Universities must not only safeguard victims of sexual violence but must also afford accused students adequate due process protection in the form of meaningful notice and an opportunity to be heard.<sup>88</sup> Whether universities are successfully satisfying these mandates is a hotly debated issue.<sup>89</sup>

When a university knows or reasonably should know of an incident of sexual violence, it must take action to eliminate the harassing environment.<sup>90</sup> Universities typically initiate their investigatory process once they receive a report or other notification of sexual misconduct.<sup>91</sup> A routine investigation includes analyzing the victim's allegations, notifying the suspected perpetrator of the charges against him, obtaining the perpetrator's factual statement, interviewing witnesses, and gathering any necessary evidence.<sup>92</sup> In a single-investigator model, the university administrator responsible for

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83. See Henrick, *supra* note 77, at 51. In fact, “[f]rom Title IX’s passage in 1972 until 1997, OCR never claimed authority over rape or sexual assault between students.” *Id.* at 56; see also Paget, *supra* note 72, at 1260–61.

84. See Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,038 (Mar. 13, 1997); see also Napolitano, *supra* note 47, at 393.

85. See Anemona Hartocollis, *Colleges Spending Millions to Deal with Sexual Misconduct Complaints*, N.Y. TIMES (Mar. 29, 2016), <https://nyti.ms/2jPRrZD> [<https://perma.cc/7KWM-BXSD>]; Tyler Kingkade, *George Mason Student Accused in BDSM Sexual Assault Case Wins Rare Legal Victory*, HUFFINGTON POST (Mar. 30, 2016), [http://www.huffingtonpost.com/entry/george-mason-sexual-assault-due-process\\_us\\_56f9988de4b014d3fe23d789](http://www.huffingtonpost.com/entry/george-mason-sexual-assault-due-process_us_56f9988de4b014d3fe23d789) [<https://perma.cc/AS6U-L7HC>]; see also Leslie Ackerson, *167 Schools in Title IX Sexual Assault Investigations*, WBIR.COM (Feb. 25, 2016, 11:58 AM), <http://www.wbir.com/news/local/167-schools-in-title-ix-sexual-assault-investigations/56749976> (noting that there are 208 pending Title IX investigations spanning thirty-nine states and 167 different schools) [<https://perma.cc/Z3MY-Q2QP>].

86. See 2011 DCL, *supra* note 20, at 2, 4, 8.

87. See *id.* at 14–15.

88. See *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

89. See, e.g., *Sexual Assault on Campus*, CTR. FOR PUB. INTEGRITY, <https://www.publicintegrity.org/accountability/education/sexual-assault-campus> (last visited Apr. 14, 2017) [<https://perma.cc/9CXP-MU5F>].

90. See 2011 DCL, *supra* note 20, at 4; Edwards, *supra* note 49, at 125; Schroeder, *supra* note 58, at 1203.

91. See generally 2011 DCL, *supra* note 20.

92. See Triplett, *supra* note 68, at 492–93.

investigating the sexual assault complaint then either renders a finding, presents an acceptance of responsibility agreement, or offers a disciplinary recommendation to the hearing panel.<sup>93</sup> This model, while endorsed by the White House Task Force to Protect Students from Sexual Assault, enables one person to simultaneously serve as detective, prosecutor, and jury.<sup>94</sup>

In a more traditional system, the investigator furnishes a comprehensive information packet to the university conduct board several days prior to the hearing.<sup>95</sup> Both the victim and the accused student are given access to the packet to prepare their cases.<sup>96</sup> The university conduct board then holds a disciplinary hearing, where evidence is presented.<sup>97</sup> Typically, members of the panel will question the victim, the alleged perpetrator, and any witnesses.<sup>98</sup> The board has discretion to exclude any witness whose testimony is deemed irrelevant.<sup>99</sup> Upon completion of the hearing, the board deliberates the case and distributes its written findings to both parties.<sup>100</sup> If an accused student is found responsible, an explanation of the sanction may be included.<sup>101</sup>

Despite these disciplinary procedures, sexual assault survivors often remain wary of their school's investigatory and adjudicatory processes, and no more than 10 percent of victims report their experiences to university officials.<sup>102</sup> The reasons for low reporting rates vary, but three are particularly common. First, given the lack of a uniform definition for sexual assault, many victims do not classify their experiences as sexual violence.<sup>103</sup> Second, victims may fear retaliation from the perpetrator or his friends. The White House Task Force to Protect Students from Sexual Assault concluded

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93. See WHITE HOUSE TASK FORCE REPORT, *supra* note 42, at 14.

94. See Harris, *supra* note 78; see also WHITE HOUSE TASK FORCE REPORT, *supra* note 42, at 14 (appearing to endorse the single investigator model).

95. See, e.g., *Student Sexual Misconduct Policy and Procedures: Duke's Commitment to Title IX*, DUKE U. STUDENT AFF., <https://studentaffairs.duke.edu/conduct/z-policies/student-sexual-misconduct-policy-dukes-commitment-title-ix> (last visited Apr. 14, 2017) [hereinafter *Duke Title IX Policies*] ("In advance of the hearing, the Office of Student Conduct finalizes a packet with information it deems relevant to the case to be shared with the hearing panel.") [<https://perma.cc/2D4J-HGJP>].

96. See 2011 DCL, *supra* note 20, at 11; *Duke Title IX Policies*, *supra* note 95 ("The Office of Student Conduct will share a copy of that packet with both the complainant and the respondent at least 120 hours in advance of the hearing.").

97. See Triplett, *supra* note 68, at 493; see also WHITE HOUSE TASK FORCE REPORT, *supra* note 42, at 14 (acknowledging that sometimes the educational disciplinary process tracks the adversarial criminal justice model); *Duke Title IX Policies*, *supra* note 95 (explaining the disciplinary hearing procedure).

98. See, e.g., *Duke Title IX Policies*, *supra* note 95 ("A complainant or respondent may not question each other or other witnesses directly, but may raise questions to be asked of that party through the hearing panel, which will determine whether to ask them.").

99. See, e.g., *id.* ("The hearing panel determines the relevancy of any information presented/submitted at the hearing and can exclude irrelevant information.").

100. See 2011 DCL, *supra* note 20, at 13; Triplett, *supra* note 68, at 493.

101. See Laura L. Dunn, *Addressing Sexual Violence in Higher Education: Ensuring Compliance with the Clery Act, Title IX and VAWA*, 15 GEO. J. GENDER & L. 563, 581 (2014).

102. See Rosenfeld, *supra* note 40, at 367; see also WHITE HOUSE TASK FORCE REPORT, *supra* note 42, at 3, 7 ("[O]nly 2% of incapacitated sexual assault survivors, and 13% of forcible rape survivors, report the crime to campus or local law enforcement.").

103. See Hendrix, *supra* note 52, at 596.

that at least 40 percent of sexual assault survivors feared reprisal or retaliation from perpetrators.<sup>104</sup> Finally, the lax punishment afforded to perpetrators by university officials discourages victims from pursuing their claims. Only 30 percent of students found responsible for sexual assault are expelled, and less than 50 percent are suspended.<sup>105</sup> From 2001 to 2013, the University of North Carolina at Chapel Hill reported 136 incidents of sexual assault but refused to expel any of the perpetrators.<sup>106</sup> Similar statistics characterize sexual violence responses at Harvard University, Dartmouth College, Stanford University, University of California Berkeley, and University of Virginia.<sup>107</sup> Victims are frequently told that disciplinary sanctions are not intended to be punitive in nature.<sup>108</sup> In place of expulsions and active suspensions, universities impose educational sanctions or probationary measures that are effectively meaningless. James Madison University, for example, banned three fraternity members from campus *after graduation* for sexually assaulting a female student.<sup>109</sup> These insufficient administrative responses leave survivors feeling revictimized and powerless.<sup>110</sup>

*C. Slamming the Door to Justice:  
The Silent Death of Due Process and Fairness*

The lax punishments for sexual misconduct appear to have ended. In response to the 2011 DCL and the widespread distrust of university sexual assault policies, campus administrators are toughening their approach to sexual violence. Several universities now recommend expulsion as the baseline punishment for sexual assault and have implemented procedures that favor victims.<sup>111</sup> The desire to comply with OCR's guidelines has resulted

104. See WHITE HOUSE TASK FORCE REPORT, *supra* note 42, at 7.

105. See Tyler Kingkade, *Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFINGTON POST (Sept. 29, 2014, 8:59 AM), [http://www.huffingtonpost.com/2014/09/29/campus-sexual-assault\\_n\\_5888742.html](http://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html) [<https://perma.cc/CEE6-LN83>].

106. See THE HUNTING GROUND, *supra* note 41.

107. See *id.* Amy Ziering's film, *The Hunting Ground*, exposed the following startling statistics: (1) Harvard University reported 135 sexual assaults and ten suspensions from 2009 to 2013, (2) Dartmouth College reported 155 sexual assaults and three expulsions from 2002 to 2013, (3) Stanford University reported 259 sexual assaults and only one expulsion from 1996 to 2013, (4) University of California Berkeley reported 78 sexual assaults and three expulsions from 2008 to 2013, and (5) University of Virginia reported 205 sexual assaults and zero expulsions from 1998 to 2013 but expelled 183 individuals for cheating and other honor code violations during that same time period. See *id.*

108. See Kingkade, *supra* note 105.

109. See Tyler Kingkade, *James Madison University Punished Sexual Assault with 'Expulsion After Graduation,'* HUFFINGTON POST (June 26, 2014), [http://www.huffingtonpost.com/2014/06/18/james-madison-university-sexual-assault\\_n\\_5509163.html](http://www.huffingtonpost.com/2014/06/18/james-madison-university-sexual-assault_n_5509163.html) [<https://perma.cc/95UE-ZKNR>].

110. See Weizel, *supra* note 24, at 1614.

111. See, e.g., *Duke Title IX Policies*, *supra* note 95; *Unified Disciplinary Procedures for Sexual Assault by Students and Student Organizations*, DARTMOUTH, <http://www.dartmouth.edu/sexualrespect/policies/unified-sexual-assault-policy.html> (last visited Apr. 14, 2017) (stating that "[t]he sanction shall be separation from the College (i.e., expulsion)" if the accused perpetrator used force, threats, or intentional incapacitation of the victim to have sex) [<https://perma.cc/4WMR-TQV3>]; see also Jake New, *Expulsion Presumed*, INSIDE HIGHER ED (June 27, 2014), <https://www.insidehighered.com/news/2014/>

in harsher treatment of male perpetrators and unfair disciplinary policies that deny assailants their right to due process and the presumption of innocence. As accused students are learning, the Title IX playing field is imbalanced and “creates disproportionate incentives to punish innocent students.”<sup>112</sup>

The below hypothetical combined with John’s experience described in the introduction illustrate the most common violations of due process and fairness that strip accused students of their ability to defend themselves. Without the opportunity to mount a defense, accused students are punished for crimes they may not have committed.<sup>113</sup> This disciplinary structure leads to an unconstitutional pattern or practice of presumed male guilt. Accordingly, this section explores due process violations experienced by students and explains how OCR pressures universities into promulgating decidedly provictim policies.

### 1. Guilty Until Proven Innocent: A Representative Hypothetical

The below hypothetical is reflective of the experiences accused students may endure during the campus disciplinary process. Names and dates have been changed, but the substance of the story originates from actual reverse Title IX complaints. The hypothetical and subsequent discussion in this Article do not distinguish between legitimate and spurious sexual assault allegations. Rather, the focus is solely on the perpetrator’s alleged deprivation of due process during the disciplinary proceeding, regardless of the validity of the campus complaint.

Andrew, a male sophomore, and Veronica, a female freshman, engaged in sexual intercourse at a party on May 20, 2013. A year later, on May 30, 2014, Veronica filed a sexual assault complaint against Andrew. The complaint alleged that Andrew coerced Veronica into having sex with him and that Veronica was incapable of consenting because she was intoxicated.

The university’s Title IX investigator, Irene Simons, contacted Andrew on June 5, 2014, and advised him of the complaint. Simons refused to provide Andrew with a copy of Veronica’s allegations and failed to advise him of his rights under the student code. The university further issued a no-contact order prohibiting communication between Andrew and Veronica.

Following the initial meeting, Andrew submitted a written statement to Simons that included a list of witnesses who interacted with the parties before and after the sexual encounter. Andrew told Simons that the eight witnesses were willing to be interviewed with respect to Veronica’s claims. A month later, Simons conducted a follow-up meeting with Andrew but had not

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06/27/should-expulsion-be-default-discipline-policy-students-accused-sexual-assault (stating that Dartmouth College and Duke University set expulsion as the baseline punishment for sexual assault but other universities still consider expulsion on a case-by-case basis) [<https://perma.cc/2LQA-2Y4C>].

112. Henrick, *supra* note 77, at 79.

113. Recent studies suggest that sexual assault has the same percentage of false reporting as any other crime—typically between 2 and 8 percent. *See* THE HUNTING GROUND, *supra* note 41.



interviewed any of his witnesses. By that same time, however, Simons had discussed the events with seven female witnesses who were friends with Veronica. Only one of the witnesses Simons interviewed had been present at the party where the alleged sexual misconduct occurred.

When Andrew inquired as to Simons's interview timeline for his witnesses, Simons responded that she planned to speak with several of Andrew's witnesses in the coming weeks but would not be interviewing all of them. In particular, Simons said that she would not interview Joe Hancock, who was the first person to see Veronica immediately after the alleged sexual assault, because Simons had already established that Veronica was drunk that night. On August 1, 2014, before Simons had interviewed any of Andrew's proposed witnesses, the university charged Andrew with nonconsensual sexual intercourse.

One week later, Andrew received a copy of Simons's preliminary investigation report, which supported the charges. The report included unsubstantiated rumors by Veronica's witnesses who were not present at the party. Simons only interviewed *one* of Andrew's witnesses before releasing the report. At no point did Simons speak with Hancock, who was the only person in Veronica's room that night immediately after the alleged assault. In the weeks following the report's release, Simons interviewed four of Andrew's witnesses but declined to interview the remainder. When Andrew requested that Simons conduct additional interviews, Simons explained that she had concluded her investigation. Simons additionally refused to consider text messages between the parties supporting Andrew's version of events.

Five days prior to the disciplinary hearing, Andrew received notice that his final case file, which would be presented at the hearing, was available for review. Andrew was not provided a copy of his file and was only allowed to examine the file during normal business hours at the student conduct office. At no point in time was Andrew allowed to review the specific allegations in Veronica's complaint.

On October 8, 2014, the university held a student conduct hearing on the charges. As the complainant, Veronica was provided a university advocate who sat next to her and communicated with her throughout the hearing. Veronica was further allowed to have an advisor and an attorney, but the attorney was not permitted to speak during the hearing. In contrast, Andrew was not offered a university advocate and had only a faculty advisor to assist him.

The panel questioned Veronica first, allowing her to speak for approximately thirty minutes with calm, nonaggressive questions interjected throughout her testimony. Veronica's use of buzzwords throughout the hearing suggested that she had been well prepared by the university advocate and her advisor. The panel did not question Veronica about the gaps or inconsistencies in her testimony. Neither Veronica nor her witnesses were required to provide any evidence to support their statements. The panel refused to ask Andrew's proposed questions that challenged Veronica's credibility and the motives of her witnesses.

Although the student code guaranteed Andrew the ability to make a brief opening statement and use a midpoint statement to respond to Veronica's testimony, the hearing panel stopped Andrew a few seconds into his midpoint testimony. The panel questioned Andrew for over ninety minutes, and ended the hearing before all of Andrew's witnesses had an opportunity to testify. Instead of treating Andrew as innocent until proven guilty, the university assigned Andrew the burden of proof. Furthermore, the university prohibited Andrew from introducing evidence outside of the hearing packet to contradict Veronica's testimony. A week later, the university found Andrew responsible for sexual assault and suspended him for three years.

## 2. Understanding Due Process Deprivation

The above hypothetical portrays the common experience of accused perpetrators in campus sexual assault proceedings. Universities routinely fail to notify accused perpetrators of their rights, deny assailants an opportunity to review the victim's complaint, refuse to interview key defense witnesses, withhold important investigatory findings and information from the defendants until days before the hearing, decline to cross-examine the victim or her witnesses on issues of credibility and inconsistent testimony, and refuse to admit key documents, such as text messages or Facebook posts, that may exonerate the accused.<sup>114</sup> In some instances, victims are coached by numerous advisors and university administrators regarding what to say during the disciplinary hearing and are often better prepared to testify than the accused perpetrators who are only provided with one faculty advisor.<sup>115</sup> These university actions can sacrifice the perpetrator's quest for truth and justice. Consequently, alleged assailants are left wondering why their rights and interests have been so easily neglected. The answer lies in OCR's unbalanced influence over university disciplinary structures.

The skewed nature of campus disciplinary proceedings is traceable to OCR's policy agenda, which has taken a decidedly provictim perspective.<sup>116</sup> Since 1997, OCR has failed to take any action of ensuring that campus sexual assault proceedings are equitable for alleged perpetrators.<sup>117</sup> The 2011 DCL, for instance, allocated only two sentences out of its nineteen pages to discuss

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114. See, e.g., Complaint paras. 58, 64–76, *Doe v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 1:15-cv-04079-SCJ (N.D. Ga. Nov. 20, 2015) [hereinafter Complaint, *Univ. Sys. of Ga.*], ECF No. 1; Amended Complaint and Jury Demand paras. 44, 56, *Doe v. Clark Univ.*, No. 4:15-CV-40113-TSH (D. Mass. Aug. 14, 2015), ECF No. 6; Complaint para. 28, *Turner v. Texas A&M Univ.*, No. 4:15-cv-01413 (S.D. Tex. May 27, 2015), ECF No. 1; Complaint paras. 39, 66–68, 74–76, 78, 97–103, *Doe v. Brown Univ.*, No. 1:15-cv-00144-S-LDA (D.R.I. Apr. 13, 2015) [hereinafter Complaint, *Brown Univ.*], ECF No. 1; Complaint paras. 57–59, 70, *Doe v. Wesleyan Univ.*, No. 3:14-cv-01735-SRU (D. Conn. Nov. 20, 2014) [hereinafter Complaint, *Wesleyan Univ.*], ECF No. 1; Complaint paras. 63, 119, *Doe v. Univ. of Mass. Amherst*, No. 3:14-cv-30143-MGM (D. Mass. Aug. 7, 2014), ECF No. 1.

115. See, e.g., Complaint, *Univ. Sys. of Ga.*, *supra* note 114, paras. 140–142.

116. See Henrick, *supra* note 77, at 52–53; see also Hendrix, *supra* note 52, at 610–19 (arguing that OCR's 2011 DCL disproportionately favors victims while denying accused students basic rights).

117. See Henrick, *supra* note 77, at 52–53.

due process protections for alleged assailants.<sup>118</sup> Rather, OCR's guidance has focused almost exclusively on heightening interim and long-term protection for victims and ensuring that universities foster an environment in which victims feel safe reporting their attacks. These objectives, while extremely laudable and undeniably necessary,<sup>119</sup> must be accomplished in a manner that does not impinge on the rights of accused perpetrators. By focusing *only* on the interests of victims to the exclusion of the rights of alleged perpetrators, the sole organization responsible for eliminating sex discrimination within educational institutions has unwittingly created a new form of gender bias. The policies espoused in the 2011 DCL formalize "a presumption of guilt in campus adjudications" and imply "that the rights of accused students at public colleges do not merit lengthy discussion."<sup>120</sup>

Unfortunately, universities are caught in the middle of OCR's policy agenda and the battle for due process. Without question, universities face unrelenting pressure from OCR to adopt the espoused policies or lose federal funding.<sup>121</sup> For some educational institutions, the sum at stake exceeds half a billion dollars.<sup>122</sup> Because OCR emphasizes complainants' rights, conviction of an accused perpetrator "carries a much lower risk of administrative enforcement than acquittal."<sup>123</sup> OCR has accepted fewer than five Title IX complaints from male sexual assault perpetrators,<sup>124</sup> but it is currently investigating more than 200 universities based on complaints from female sexual violence victims.<sup>125</sup> Universities that risk or defy OCR's recommendations in favor of leveling the playing field for accused students are all but guaranteed to be the next target of an administrative investigation.

Moreover, administrative complaints—even those that are voluntarily resolved with OCR—cost universities time and money. OCR grievances typically require universities to engage in extensive document production, which is commonly outsourced to local or large law firms at premium rates.<sup>126</sup> This document production can span months or years depending on

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118. See 2011 DCL, *supra* note 20, at 12.

119. See Katie Jo Baumgardner, Note, *Resisting Rulemaking: Challenging the Montana Settlement's Title IX Sexual Harassment Blueprint*, 89 NOTRE DAME L. REV. 1813, 1828 (2014) (acknowledging that OCR's goal to ensure victims are not discouraged from reporting harassment is "admirable").

120. Henrick, *supra* note 77, at 61.

121. See David G. Savage & Timothy M. Phelps, *How a Little-Known Education Office Has Forced Far-Reaching Changes to Campus Sex Assault Investigations*, L.A. TIMES (Aug. 17, 2015, 3:00 AM), <http://www.latimes.com/nation/la-na-campus-sexual-assault-20150817-story.html> [<https://perma.cc/2Q4Z-J6TW>]; see also *Colleges Slammed*, *supra* note 27.

122. See Henrick, *supra* note 77, at 53.

123. See *id.*

124. See Jake New, *Suits from the Accused*, INSIDE HIGHER ED (May 1, 2015), <https://www.insidehighered.com/news/2015/05/01/students-accused-sexual-assault-struggle-win-gender-bias-lawsuits> (placing the number at three accused student grievances under OCR investigation) [<https://perma.cc/5YYS-QQB6>].

125. See *supra* note 85.

126. Some universities even preemptively hire law firms to check their compliance with Title IX regulations. Occidental College in Los Angeles, for instance, employed Pepper Hamilton to conduct a Title IX compliance audit. See Hartocollis, *supra* note 85. In addition to hiring law firms to handle OCR complaints and audits, colleges are expanding their internal

the volume of documents, the university's record-keeping structures, and the number of university officials involved in the investigation.<sup>127</sup> The estimated "cost of lawyers, counselors, information campaigns and training to fight sexual misconduct ranges from \$25,000 a year at a small college to \$500,000 and up at larger or wealthier institutions."<sup>128</sup> Handling a Title IX inquiry could easily reach six figures and responding to Title IX civil lawsuits "can run into the high six or even seven figures, not counting a settlement or verdict."<sup>129</sup> It is financially safer for universities to adopt OCR's policies as written rather than defend assailants' due process guarantees and risk backlash from OCR.<sup>130</sup>

Additionally, OCR investigations threaten a university's reputation. The general public can easily access an electronic list of all universities currently facing inquiry by OCR.<sup>131</sup> Placement on this list may negatively affect a university's social standing and, consequently, result in decreased applications for admission. A reduced applicant pool not only impacts the university's revenue stream but could also distort admission statistics and result in the university admitting less qualified applicants to keep enrollment numbers steady. Thus, regardless of the merit of an OCR complaint, the mere threat of an investigation can wreak havoc on a university's resources and finances. Universities have more economic and reputational incentives to comply with OCR's mandates than to create fair disciplinary structures.<sup>132</sup>

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Title IX offices at great expense. *See id.* At the University of California Berkeley, for example, "Title IX spending has risen by at least \$2 million since 2013." *Id.* Similarly, in 2013, Columbia University increased its number of Title IX advocates and educators from five to eleven and also increased its number of Title IX investigators and case workers from two to seven. *See id.* Yale has nearly thirty faculty and staff members who work full- or part-time to support Title IX efforts and pays forty-eight students to listen to possible grievances and intervene when their colleagues appear distressed. *See id.*

127. *See* Alexandra Brodsky & Elizabeth Deutsch, *The Promise of Title IX: Sexual Violence and the Law*, DISSENT (Fall 2015), <https://www.dissentmagazine.org/article/title-ix-activism-sexual-violence-law> ("Today, a Title IX complaint takes years to resolve, by which point the students who complained have often graduated.") [<https://perma.cc/YX5D-PZGH>]; Jake New, *Justice Delayed*, INSIDE HIGHER ED (May 6, 2015), <https://www.insidehighered.com/news/2015/05/06/ocr-letter-says-completed-title-ix-investigations-2014-lived-more-4-years> (noting that "[i]t took the U.S. Department of Education's Office for Civil Rights, on average, 1,469 days to complete campus sexual assault investigations in 2014") [<https://perma.cc/8BNG-YU2M>].

128. *See* Hartocollis, *supra* note 85.

129. *Id.*

130. *See* Baumgardner, *supra* note 119, at 1825 ("Given the thoroughness of OCR investigations, the potential for litigation, and the threat of losing federal funding, virtually no university is willing to risk noncompliance with [OCR's] guidelines.").

131. *See* Tyler Kingkade, *Federal Campus Rape Investigations Near 200, and Finally Get More Funding*, HUFFINGTON POST (Jan. 6, 2016), [http://www.huffingtonpost.com/entry/federal-funding-campus-rape-investigations\\_us\\_568af080e4b014efe0db5f76](http://www.huffingtonpost.com/entry/federal-funding-campus-rape-investigations_us_568af080e4b014efe0db5f76) (including a list of all 194 educational institutions under investigation by OCR as of December 30, 2015) [<https://perma.cc/GZH2-4595>]; *Open OCR Investigations for Sexual Assault*, KNOW YOUR IX, <http://knowyourix.org/investigations/> (last visited Apr. 14, 2017) [<https://perma.cc/UM7Q-KC86>].

132. *See* Fries, *supra* note 75, at 645 ("OCR puts enormous pressure on the school to maintain a victim-friendly environment, which can end up creating an environment that is less sympathetic to the accused and tilted in favor of the alleged victim."); Henrick, *supra* note 77, at 54 (claiming that "[t]he net effect of [OCR's] administrative enforcement scheme is that

Further, the denial of due process to accused perpetrators is a result of institutional structure. Universities were not designed as court units, yet OCR has forced colleges to undertake judicial functions.<sup>133</sup> Universities are tasked with investigating and adjudicating a student's responsibility for essentially criminal action, yet they lack due process guarantees, uniform civil procedure, and evidentiary rules.<sup>134</sup> There is no prohibition against ex parte communications between the complainant and disciplinary board and no requirement that universities disclose exculpatory evidence to the accused.<sup>135</sup> Moreover, no formal discovery procedures exist to aid alleged perpetrators with their defenses.<sup>136</sup> The lack of inherent procedural safeguards automatically places perpetrators at a disadvantage in the educational disciplinary process. Burdening universities with sexual assault adjudications without simultaneously implementing due process protections and standardized procedures is fundamentally unfair to both the university system and accused assailants. For this reason, academic scholarship has advocated for the removal of sexual violence claims from the educational disciplinary system to the civil and criminal judicial forums.<sup>137</sup> According to scholars, this change of venue will increase the probability that the accused perpetrator's case will be decided on the merits, not based on OCR's political agenda.

## II. ACCUSED CAMPUS SEXUAL ASSAULT PERPETRATORS FIGHT BACK

The unfairness associated with university disciplinary proceedings has not gone unnoticed. Students accused of sexual misconduct are pushing back against their sentences, arguing that university policies threaten their liberty and property interests and are evidence of sex discrimination against males. The closure of justice's doors during the university disciplinary process has forced accused students to seek vindication of their rights in courts of law. More than 100 male students accused of sexual violence have filed lawsuits against their universities challenging the sufficiency and legality of the educational investigatory and adjudicatory functions.<sup>138</sup> These lawsuits

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schools have an incentive to convict anyone who is charged with sexual assault or rape as a matter of risk aversion for the institution").

133. See Napolitano, *supra* note 47, at 398–99.

134. See Henrick, *supra* note 77, at 85.

135. See *id.*

136. See *id.*

137. See, e.g., *id.* at 51 ("Removing claims of sexual violence from college campuses to civil and criminal judicial systems is the only viable way to fix the problem and ensure that sexual assault adjudication is equitable and impartial for all affected parties."); *Colleges Slammed*, *supra* note 27 ("Some critics have said that universities should not be handling such cases at all and that sex crimes should instead be reported to police."); Morrissey, *supra* note 43; Tovia Smith, *Some Accused of Sexual Assault on Campus Say System Works Against Them*, NPR (Sept. 3, 2014, 3:31 AM), [http://www.npr.org/2014/09/03/345312997/some-accused-of-campus-assault-say-the-system-works-against-them?utm\\_medium=RSS&utm\\_campaign=news](http://www.npr.org/2014/09/03/345312997/some-accused-of-campus-assault-say-the-system-works-against-them?utm_medium=RSS&utm_campaign=news) [<https://perma.cc/9ZBV-XGE5>].

138. See Michelle R. Smith, *Men Accused of Sex Crimes Striking Back at Colleges*, COURIER (May 7, 2016), <http://thecourier.com/local-news/2016/05/07/men-accused-of-sex->

routinely include claims for reverse Title IX discrimination, due process violations, breach of contract, promissory estoppel, and negligence.<sup>139</sup> Although due process and breach of contract allegations are currently the most successful, accused perpetrators are increasing the frequency with which they assert Title IX reverse discrimination claims.<sup>140</sup>

While the typical conception of a Title IX claim conjures images of sexual assault victims, accused perpetrators are frequently alleging gender bias in university disciplinary proceedings.<sup>141</sup> Given the increasingly broad definition of campus sexual violence and use of the preponderance of the evidence standard, scholars predict a steady increase in the number of reverse Title IX lawsuits filed in the next few years.<sup>142</sup> As an initial observation, sexual assault perpetrators do not regularly file complaints with OCR; rather, they initiate lawsuits in a judicial arena where their rights can be conclusively established.<sup>143</sup> As of April 2015, OCR had only accepted two complaints for investigation filed by accused perpetrators of sexual assault.<sup>144</sup> This low acceptance rate discourages alleged perpetrators from filing OCR complaints, particularly given that OCR is responsible for the 2011 DCL. Thus, formal judicial action is the preferred, and arguably only, vehicle to redress accused student grievances.

When asserting a reverse Title IX claim, accused perpetrators most commonly proceed under either the erroneous outcome doctrine or selective enforcement theory.<sup>145</sup> Both approaches require *intentional* sex discrimination, as lawsuits premised on disparate impact cannot be maintained under Title IX.<sup>146</sup> To sufficiently state an erroneous outcome

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crimes-striking-back-at-colleges/ (stating that attorney Andrew Miltenberg alone represents at least 100 male students accused of campus sexual assault) [<https://perma.cc/HPF6-9FFB>].

139. See, e.g., Complaint paras. 12, 208–283, *Doe v. Colgate Univ.*, No. 5-16-cv-0072 (GLS/TWD) (N.D.N.Y. Jan. 19, 2016) [hereinafter *Complain, Colgate Univ.*], ECF No. 1; Complaint, *Brown Univ.*, *supra* note 114, paras. 147–93; see also *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 481–84 (S.D.N.Y. 2015); *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744, 762–63 (E.D. Tenn. 2009); Henrick, *supra* note 77, at 77–78 (describing the most common claims brought by reverse Title IX complainants); Allie Grasgreen, *Going on Offense with Title IX*, INSIDE HIGHER ED (Aug. 9, 2013), <https://www.insidehighered.com/news/2013/08/09/accused-rape-men-allege-discrimination-under-title-ix> [<https://perma.cc/B6S5-BR9F>].

140. Kutner, *supra* note 20.

141. See *infra* Part II.

142. See Baumgardner, *supra* note 119, at 1828.

143. See Henrick, *supra* note 77, at 69.

144. See Complaint para. 212, *Doe v. Brandeis Univ.*, No. 1:15-cv-11557-MLW (D. Mass. Apr. 9, 2015) [hereinafter *Complaint, Brandeis Univ.*], ECF No. 1; see also Henrick, *supra* note 77, at 69 (describing the Title IX accused student administrative complaint that OCR accepted at Bates College). *But see* New, *supra* note 124 (stating that three accused student grievances are under OCR investigation).

145. See *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994); *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 462 (S.D.N.Y. 2015). Some jurisdictions also recognize a deliberate indifference theory and an archaic assumptions standard under Title IX, but these doctrines are not cited as frequently as the erroneous outcome and selective enforcement theories described in this Article. See *Sterrett v. Cowan*, 85 F. Supp. 3d 916, 936 (E.D. Mich. 2015); *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744, 756 (E.D. Tenn. 2009).

146. See *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 608 (S.D. Ohio 2016); *Nungesser v. Columbia Univ.*, 169 F. Supp. 3d 353, 363 (S.D.N.Y. 2016); *Yu*, 97 F. Supp. 3d at 461; *Weser v. Glen*, 190 F. Supp. 2d 384, 395 (E.D.N.Y. 2002).

claim, the accused perpetrator must allege two elements: (1) facts that cast sufficient doubt on the accuracy of the outcome of the disciplinary proceeding and (2) a causal connection between the incorrect outcome and gender bias.<sup>147</sup> The gravamen of an erroneous outcome claim is that an otherwise innocent student was wrongly found responsible for committing sexual assault because of his gender.<sup>148</sup> In contrast, a selective enforcement claim argues that even if an accused sexual assault perpetrator violated a university policy, the initiation of disciplinary proceedings and the severity of the sanction imposed were motivated by gender bias.<sup>149</sup> Supporting a selective enforcement claim typically requires the alleged perpetrator to demonstrate that the university treated a female student, who faced substantially similar circumstances as the male student, more favorably during the disciplinary process.<sup>150</sup> Thus, the success of a selective enforcement claim hinges on the perpetrator's ability to contrast his disciplinary experience with that of an accused female sexual assault perpetrator.

Although the allegations for erroneous outcome and selective enforcement claims vary based on the particular case and facts, the basic structure the complaints assume is almost identical. In particular, accused perpetrators regularly argue that sexual assault complaints are disproportionately lodged against male students and that universities have a pattern of finding accused men responsible for sexual violence.<sup>151</sup> In most lawsuits, accused perpetrators highlight that there have been no reported male complaints of sexual violence against female assailants and, therefore, no accused female perpetrator has been disciplined for sexual misconduct against a male victim.<sup>152</sup> The lawsuits further allege that female victims are treated more favorably than male defendants throughout the disciplinary process and universities afford greater weight to the victim's testimony than the

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147. See *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 766 (D. Md. 2015).

148. See *Marshall v. Ohio Univ.*, No. 2:15-cv-775, 2015 WL 7254213, at \*5 (S.D. Ohio Nov. 17, 2015).

149. See *Yu*, 97 F. Supp. 3d at 480; see also *Yusuf*, 35 F.3d at 715.

150. See *Mallory v. Ohio Univ.*, 76 F. App'x 634, 641 (6th Cir. 2003); *Univ. of Cincinnati*, 173 F. Supp. 3d at 608; *Doe v. Case W. Reserve Univ.*, No. 1:14CV2044, 2015 WL 5522001, at \*6 (N.D. Ohio Sept. 16, 2015).

151. See, e.g., Complaint and Jury Demand para. 154, *Doe v. Univ. of Denver*, No. 1:16-cv-00152 (D. Colo. Jan. 20, 2016), ECF No. 1; Complaint, *Colgate Univ.*, *supra* note 139, paras. 117–118; Complaint para. 79, *Doe v. Regents of the Univ. of Cal.*, No. 2:15-cv-02478-MRW (C.D. Cal. Apr. 3, 2015) [hereinafter Complaint, *Univ. of Cal.*], ECF No. 1; see also *Disciplined Student May Continue to Litigate Title IX Claim Against Brown*, WOMEN TALK SPORTS (Feb. 25, 2016), <http://womentalksports.com/disciplined-student-may-continue-to-litigate-title-ix-claim-against-brown/> [https://perma.cc/XSQ4-FEYT].

152. See, e.g., Complaint and Jury Demand para. 168, *Neal v. Colo. State Univ.-Pueblo*, No. 1:16-cv-00873-WYD (D. Colo. Apr. 19, 2016) [hereinafter Complaint and Jury Demand, *Neal*], ECF No. 1; First Amended Complaint para. 175, *Doe v. Ohio State Univ.*, No. 2:16-cv-171 (S.D. Ohio Feb. 25, 2016) [hereinafter First Amended Complaint, *Ohio State Univ.*], ECF No. 3; Verified Complaint para. 189, *Pierre v. Univ. of Dayton*, No. 3:15-cv-362 (S.D. Ohio Oct. 7, 2015), ECF No. 1; Complaint paras. 148–150, *Doe v. Miami Univ.*, No. 1:15-cv-00605-MRB (S.D. Ohio Sept. 17, 2015) [hereinafter Complaint, *Miami Univ.*], ECF No. 1; Complaint, *Univ. of Cal.*, *supra* note 151, para. 78.

perpetrator's recitation of facts.<sup>153</sup> Accused assailants commonly describe procedural deficiencies, evidentiary weaknesses, examples of the victim's favorable treatment, and historical disciplinary data against males in support of their claims of gender discrimination.<sup>154</sup> Additionally, alleged perpetrators perceive this gender bias as a consequence of the increased pressure universities face to aggressively pursue and discipline males accused of sexual violence in light of the 2011 DCL.<sup>155</sup> Consequently, males maintain that once a sexual assault complaint is filed, the accused perpetrator will invariably be found responsible.

### III. PLEADING REVERSE TITLE IX CLAIMS AND EVALUATING JUDICIAL RESPONSES

Despite the increasing frequency with which accused sexual assault perpetrators allege reverse Title IX claims, the judicial reaction to these allegations has been overwhelmingly negative. The majority of courts dismiss reverse Title IX lawsuits pursuant to Federal Rule of Civil Procedure 12(b)(6) (i.e., a motion to dismiss for failure to state a claim) for lack of evidence of gender bias.<sup>156</sup> These courts hold that while accused students have successfully pleaded procedural deficiencies during the investigatory and adjudicatory processes, they nonetheless failed to factually support their allegations that the university's actions were taken *because of* the student's gender.<sup>157</sup> This approach, however, results from a misguided application of plausibility pleading. In particular, the majority of courts read *Twombly* and *Iqbal* as requiring specific evidentiary support for each element of a reverse Title IX claim at the outset of the lawsuit.<sup>158</sup> When perpetrators lack particularized evidence of discriminatory motive at the pleading stage, courts quickly dismiss the action based on causal insufficiency.<sup>159</sup> This outlook is fundamentally flawed because courts perceive *Twombly* and *Iqbal* as existing

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153. See, e.g., Decision & Order at 30, 33–34, Prasad v. Cornell Univ., No. 5:15-cv-322 (N.D.N.Y. Feb. 24, 2016), ECF No. 32; First Amended Complaint, *Ohio State Univ.*, *supra* note 152, para. 181; Complaint, *Miami Univ.*, *supra* note 152, paras. 149, 156.

154. See, e.g., Complaint and Jury Demand, *Neal*, *supra* note 152, paras. 172–180; Verified Complaint paras. 288–292, *Doe v. Bd. of Regents of Univ. Sys. of Ga.*, No. 1:15-cv-04354-RWS (N.D. Ga. Dec. 15, 2015), ECF No. 1; Complaint and Jury Demand paras. 99–100, *Doe v. Amherst Coll.*, No. 3:15-cv-30097-MAP (D. Mass. May 29, 2015), ECF No. 1; Complaint, *Brandeis Univ.*, *supra* note 144, para. 223.

155. See *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 187–89 (D.R.I. 2016); Complaint and Jury Demand, *Neal*, *supra* note 152, para. 170; Jake New, *Out of Balance*, INSIDE HIGHER ED (Apr. 14, 2016), <https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault> [https://perma.cc/BBF4-LHX9].

156. FED. R. CIV. P. 12(b)(6).

157. See, e.g., *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 603 (S.D. Ohio 2016); *Salau v. Denton*, 139 F. Supp. 3d 989, 999 (S.D. Mo. 2015); *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 733 (E.D. Va. 2015); *Doe v. Univ. of Mass.-Amherst*, No. 14-30143, 2015 WL 4306521, at \*9 (D. Mass. July 14, 2015); *Johnson v. W. State Colo. Univ.*, 71 F. Supp. 3d 1217, 1226 (D. Colo. 2014); *Harris v. Saint Joseph's Univ.*, No. 13-3937, 2014 WL 1910242, at \*4 (E.D. Pa. May 13, 2014).

158. See *supra* Part II.

159. See *supra* Part II.



in isolation and ignore the third leg of the stool: *Swierkiewicz v. Sorema N.A.*<sup>160</sup> By demanding data, statistics, or particularized evidence to prove causation at the 12(b)(6) stage, courts purposefully neglect the express prohibition against requiring a prima facie case of discrimination at the pleading phase.

This part explains the requirements for pleading reverse Title IX claims pre-*Iqbal* and analyzes how plausibility pleading has altered the motion to dismiss landscape for discrimination actions. Specifically, this part offers a comprehensive overview of *Twombly*, *Iqbal*, and *Swierkiewicz*, and it concludes that the majority's prodismissal stance is reflective of a broader misunderstanding of the interaction between these three cases. In conjunction with this proposition, this part provides an empirical analysis regarding dismissal trends at the federal court level. Finally, this part highlights how to plausibly plead causality in reverse Title IX claims under this misguided interpretation.

*A. Establishing a Baseline  
for Reverse Title IX Lawsuits Pre-Iqbal*

Before 2007, the standard for pleading a reverse Title IX sex discrimination claim was well established by the Second Circuit in *Yusuf v. Vassar College*.<sup>161</sup> In *Yusuf*, James Weisman, a student at Vassar College, physically attacked Syed Saifuddin Yusuf, a male student, on February 11, 1992.<sup>162</sup> The Poughkeepsie Police Department arrested Weisman for intoxication and battery, and the college regulations panel at Vassar College separately scheduled a disciplinary hearing for February 17, 1992.<sup>163</sup> Although the attack left Yusuf unconscious and decorated with multiple bruises, Weisman and his girlfriend, Tina Kapur, tried to dissuade Yusuf from pressing formal or disciplinary charges.<sup>164</sup> The parties initially agreed that Yusuf would drop all charges in exchange for Weisman's payment of Yusuf's medical expenses.<sup>165</sup> However, Weisman later renounced this agreement and Yusuf pressed charges.<sup>166</sup>

At the disciplinary hearing, the college regulations panel questioned Yusuf about his relationship with Kapur, not Weisman's battery.<sup>167</sup> At least two panelists were friends with Kapur and Weisman.<sup>168</sup> While the panel found Weisman responsible for the battery, it recommended a suspended sanction for the spring semester.<sup>169</sup> Additionally, one day before Weisman's criminal court date, Yusuf discovered that Kapur was contemplating filing a sexual

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160. 534 U.S. 506 (2002).

161. 35 F.3d 709 (2d Cir. 1994).

162. *See id.* at 711–12.

163. *See id.* at 712.

164. *See id.*

165. *See id.*

166. *See id.*

167. *See id.*

168. *See id.*

169. *See id.*

harassment complaint against him.<sup>170</sup> Vassar informed Yusuf of the sexual harassment complaint on April 8, 1992, and instructed him to appear for a hearing on the charges five days later.<sup>171</sup>

Prior to the sexual harassment hearing, Yusuf submitted a list of twelve witnesses, but the university reduced the witness list to seven.<sup>172</sup> The university prohibited Yusuf from photocopying Kapur's complaint and refused to allow a statement from one of Yusuf's witnesses who was out of town.<sup>173</sup> At the hearing, the college regulations panel declined to admit Yusuf's medical records showing that he was confined to the infirmary during one of the alleged assaults and allowed only five of Yusuf's witnesses to testify.<sup>174</sup> Unsurprisingly, the panel found Yusuf responsible for sexual assault and suspended him for a year.<sup>175</sup> After an unsuccessful appeal, Yusuf filed a lawsuit in the Southern District of New York alleging, among other things, a Title IX erroneous outcome claim.<sup>176</sup> The district court dismissed Yusuf's Title IX allegations for lack of evidence of gender discrimination, and Yusuf subsequently appealed.<sup>177</sup>

In reversing the district court's dismissal of the Title IX claim, the Second Circuit held that a plaintiff must "allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding."<sup>178</sup> Allegations of procedurally flawed disciplinary hearings combined with conclusory statements of sex discrimination are insufficient to survive a motion to dismiss.<sup>179</sup> Yusuf's complaint, however, satisfied this pleading standard because the allegations referred to specific events that could support an inference of discrimination:

Fairly read, Yusuf's complaint alleges that a false and somewhat stale charge of sexual harassment was made against him only after he pursued criminal charges for a brutal assault by the complainant's boyfriend. It alleges that he was on good terms with the complainant after the alleged incidents of sexual harassment and until he pursued those criminal charges. Yusuf's complaint further alleges that various actions by the presiding official of the disciplinary tribunal prevented him from fully defending himself. Finally, he asserts that males accused of sexual harassment at Vassar are "historically and systematically" and "invariably found guilty, regardless of the evidence, or lack thereof."

Similar allegations, if based on race in employment decisions, would more than suffice in a Title VII case, and we believe they easily meet the requirements of Title IX. They go well beyond the surmises of the plaintiff as to what was in the minds of others and involve provable events that in

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170. *See id.*

171. *See id.*

172. *See id.*

173. *See id.*

174. *See id.* at 712–13.

175. *See id.* at 713.

176. *See id.*

177. *See id.*

178. *Id.* at 715.

179. *See id.*

the aggregate would allow a trier of fact to find that gender affected the outcome of the disciplinary proceeding.<sup>180</sup>

Thus, Yusuf's factual statements, which evidenced a deficient disciplinary hearing, combined with an accusation that the university systematically discriminated against males, were deemed sufficient to support a sex discrimination claim. The plaintiff did not support this causal link with statistical data and did not explain the alleged historical and systemic discrimination by the university. Since 1994, this pleading framework has strongly influenced reverse Title IX rulings on motions to dismiss, even outside the Second Circuit.<sup>181</sup>

While *Yusuf* remains the primary authority for reverse Title IX claims, courts have begun to question its applicability to post-*Twombly* and *Iqbal* lawsuits. As discussed below, *Twombly* and *Iqbal* established a plausibility pleading standard in which conclusory allegations are disregarded, and factual statements must be sufficient to push a claim from speculative to plausible.<sup>182</sup> When the Second Circuit decided *Yusuf* in 1994, judicial review of complaints operated under the more relaxed and lenient *Conley v. Gibson*<sup>183</sup> standard, which prohibited dismissal of complaints unless the plaintiff could prove "no set of facts" that would entitle her to relief.<sup>184</sup> The modern day plausibility standard is more stringent and demanding than *Conley*'s notice pleading requirement.<sup>185</sup> For this reason, courts applying *Yusuf* post-2007 exhibit extreme confusion over the proper pleading framework to employ in reverse Title IX actions.

#### B. A Review of *Twombly*, *Iqbal*, and *Swierkiewicz*

For more than fifty years, the judicial system operated under a liberal pleading standard in which a complaint would not be dismissed unless the plaintiff could prove "no set of facts" that would entitle her to relief.<sup>186</sup> This framework, set forth in *Conley*, established notice pleading as the baseline for judging a complaint's allegations and created a low bar for surviving a motion to dismiss.<sup>187</sup> When evaluating dismissal motions, courts were

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180. *Id.* at 716.

181. *See Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 765 (D. Md. 2015) (noting that courts typically apply the erroneous outcome framework established in *Yusuf*); *Doe v. Wash. & Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996, at \*9 (W.D. Va. Aug. 5, 2015); *Doe v. Univ. of Mass.-Amherst*, No. 14-30143, 2015 WL 4306521, at \*5 (D. Mass. July 14, 2015) ("Lacking guidance from the First Circuit, this court turns to the analytic framework set forth by the Second Circuit in *Yusuf v. Vassar College*.").

182. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

183. 355 U.S. 41 (1957).

184. *Id.* at 45.

185. *See Tanvir Vahora, Working Through a Muddled Standard: Pleading Discrimination Cases After Iqbal*, 44 COLUM. J.L. & SOC. PROBS. 235, 255–56 (2010).

186. *Conley*, 355 U.S. at 45.

187. *See id.*; Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 184 (2010) (highlighting that notice pleading "placed a very minimal requirement on plaintiffs"); Vahora, *supra* note 185, at 238; Nathan A. Leber, Note, *Solving a Pleading Plague: Why Federal*

required to accept all allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff.<sup>188</sup> This standard mandated deference to the plaintiff's complaint and favored civil rights complainants who lacked specific factual data to support their accusations.<sup>189</sup> When combined with Federal Rule of Civil Procedure 8,<sup>190</sup> this pleading regime reflected an undeniable intent to grant plaintiffs their day in court and to ensure that defendants simply had notice of the claims.<sup>191</sup>

In 2007, however, the pillars of notice pleading crumbled, and the U.S. Supreme Court erected the foundation of plausibility pleading. In *Twombly*, the Court explained that a plaintiff must set forth the grounds demonstrating her entitlement to relief.<sup>192</sup> A complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."<sup>193</sup> While the complaint need not include detailed factual statements, its allegations must be sufficient "to raise a right to relief above the speculative level."<sup>194</sup> In altering this pleading analysis, the Court retired *Conley*'s no set of facts standard, reasoning that the prior test was incomplete and outdated.<sup>195</sup>

Expanding on this framework in its 2009 *Iqbal* decision, the Supreme Court reiterated that Federal Rule of Civil Procedure 8 demands more than unadorned conclusory allegations for all civil lawsuits.<sup>196</sup> Surviving a motion to dismiss requires adequately pled factual circumstances that state a plausible claim for relief.<sup>197</sup> According to the Court, "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."<sup>198</sup> This standard requires more than speculative statements that showcase a mere possibility of illegal conduct by the defendant.<sup>199</sup> Rather, the allegations in the complaint must demonstrate *plausible* misconduct. The question of whether a complaint satisfies this plausibility threshold is case specific and requires the reviewing judge to use her judicial experience and

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*Courts Should Strike Insufficient Affirmative Defenses Under the Twombly-Iqbal Plausibility Standard*, 61 CLEV. ST. L. REV. 231, 238 (2013).

188. See Elizabeth M. Schneider & Nancy Gertner, "Only Procedural": Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases, 57 N.Y.L. SCH. L. REV. 767, 772 (2014).

189. See Vahora, *supra* note 185, at 238–39.

190. Federal Rule of Civil Procedure 8 requires that a plaintiff plead only "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2).

191. See Vahora, *supra* note 185, at 238.

192. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *League of United Latin Am. Citizens v. Bradesen*, 500 F.3d 523, 527 (6th Cir. 2007).

193. See *Twombly*, 550 U.S. at 555.

194. See *id.*

195. See *id.* at 563 (stating that *Conley*'s "no set of facts" test "has earned its retirement" and that "[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard").

196. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 120 (2011).

197. See *Iqbal*, 556 U.S. at 678.

198. *Id.*

199. See *id.*

common sense.<sup>200</sup> In particular, the complainant must explain with facts *how* the defendant violated a specific statute or common law principle.<sup>201</sup>

When evaluating a motion to dismiss under the plausibility standard, courts must accept as true all *factual* allegations in the complaint.<sup>202</sup> Conclusory statements or threadbare recitals of a claim's elements are not entitled to a presumption of veracity.<sup>203</sup> The rationale for this distinction is basic: conclusory accusations fail to distinguish the case at issue from every other hypothetical lawsuit.<sup>204</sup> Without this distinction, the defendant lacks sufficient notice of the claims against him and cannot mount a comprehensive defense.

Accordingly, when considering a dismissal motion, a court must conduct a two-step analysis: (1) identify and distinguish the factual allegations, which are presumed true, from the conclusory statements, which are not credited and can be disregarded, and (2) decide whether the factual allegations support a plausible and reasonable inference that the defendant committed the proposed misconduct.<sup>205</sup> Courts should remember that plausibility pleading does not require facts demonstrating *probability* of relief.<sup>206</sup>

The adoption of plausibility pleading forced courts to grapple with the proper standard for alleging discrimination in civil rights cases. One controversy for civil rights suits following *Twombly* and *Iqbal* was whether plaintiffs must allege a prima facie case of discrimination at the pleading stage.<sup>207</sup> In *Swierkiewicz*, decided pre-*Iqbal*, the Supreme Court held that the prima facie elements of discrimination reflect an *evidentiary* standard, not a pleading requirement.<sup>208</sup> The elements of a prima facie case vary based on the context and factual circumstances of the lawsuit and “should not be

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200. See *id.* at 679; *Reilly v. Cox Enters., Inc.*, No. CA 13-785S, 2014 WL 4473772, at \*3 (D.R.I. Apr. 16, 2014) (noting that a complaint “should be considered holistically with a heavy dose of common sense”). Certain claims by their nature may require relatively few factual recitations to present a plausible claim for relief, while others might necessitate substantially more detailed factual support. See *EEOC v. Universal Brixius, LLC*, 264 F.R.D. 514, 517 (E.D. Wis. 2009). Courts should therefore engage in a context-specific inquiry instead of applying blanket pleading requirements under the new plausibility standard. See *id.*

201. See *Escuadra v. Geovera Specialty Ins.*, 739 F. Supp. 2d 967, 979 (E.D. Tex. 2010); Stephen R. Brown, *Reconstructing Pleading: Twombly, Iqbal, and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. 1265, 1284–85 (2010); see also *Han v. Univ. of Dayton*, 541 F. App'x 622, 625–26 (6th Cir. 2013); *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007).

202. See *Iqbal*, 556 U.S. at 678.

203. See *id.*

204. See *Escuadra*, 739 F. Supp. 2d at 979.

205. See *Iqbal*, 556 U.S. at 679.

206. See *Leber*, *supra* note 187, at 241.

207. For example, the following factors constitute a prima facie case of discrimination in the employment context: (1) the plaintiff belongs to a protected class (e.g., race, gender, or nationality); (2) the plaintiff applied and was qualified for the open position; (3) the plaintiff's application was rejected; and (4) the position remained open after the plaintiff's rejection, and the employer continued to seek applications from similarly qualified individuals. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

208. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002); *Keys v. Humana*, 684 F.3d 605, 609 (6th Cir. 2012).

transposed into a rigid pleading standard for discrimination cases.”<sup>209</sup> In support of this holding, the Court explained that discrimination claims are not subject to heightened pleading standards and must only satisfy basic notice requirements.<sup>210</sup> While *Swierkiewicz* dealt specifically with employment discrimination lawsuits, its holding is transferable to comparable civil rights contexts, including Title IX.<sup>211</sup>

The implementation of plausibility pleading, however, caused some courts to question whether a plaintiff now had to prove *prima facie* discrimination at the outset of the suit.<sup>212</sup> While the Supreme Court insisted that *Twombly* did not overrule *Swierkiewicz*,<sup>213</sup> numerous courts found this assertion incompatible with the creation of a heightened pleading standard for all cases. These courts have required plaintiffs to establish a *prima facie* case of discrimination at the pleading stage to satisfy the plausibility standard.<sup>214</sup> The better view, however, is to perceive *Twombly*, *Iqbal*, and *Swierkiewicz* as compatible in the following manner: discrimination claims are subject to the same “heightened” (i.e., plausibility) pleading standard as all routine civil actions, and a complaint must contain sufficient factual allegations to give the claim credibility, but the allegations need not mirror or rise to the level of a *prima facie* case.<sup>215</sup> By transposing the central holding of *Swierkiewicz*—

209. See *Swierkiewicz*, 534 U.S. at 512.

210. See *id.* at 512–13; Vahora, *supra* note 185, at 242.

211. See *Lindsay v. Yates*, 498 F.3d 434, 439 (6th Cir. 2007) (“Although *Swierkiewicz* was an employment-discrimination case, our sister Circuits have expressly extended its holding to housing-discrimination claims. Indeed, both the Second and Ninth Circuits have stated that *Swierkiewicz* applies to any claim covered by the *McDonnell Douglas* framework. We agree.” (citations omitted)); *Williams v. N.Y.C. Hous. Auth.*, 458 F.3d 67, 72 (2d Cir. 2006); *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1062 (9th Cir. 2004); see also *Doe v. Columbia Univ.*, 831 F.3d 46, 55–56 (2d Cir. 2016); *Ivan v. Kent State Univ.*, 92 F.3d 1185 (6th Cir. 1996); *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994) (explaining that “most courts that have addressed the question have indicated that Title VII principles should be applied to Title IX actions”); *Mabry v. State Bd. of Cmty. Colls.*, 813 F.2d 311, 316 n.6 (10th Cir. 1987) (stating that Title VII is “the most appropriate analogue when defining Title IX’s substantive standards”).

212. See, e.g., *Schwab v. Smalls*, 435 F. App’x 37, 40 (2d Cir. 2011) (describing that some courts have raised questions as to the continued viability of *Swierkiewicz* in light of *Twombly* and *Iqbal*); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (claiming that *Swierkiewicz* “has been specifically repudiated by both *Twombly* and *Iqbal*”); *Barbosa v. Continuum Health Partners, Inc.*, 716 F. Supp. 2d 210, 215 (S.D.N.Y. 2010) (“[S]ome courts and commentators have concluded that *Twombly* and *Iqbal* repudiated *Swierkiewicz*, at least to the extent that *Swierkiewicz* relied upon pre-*Twombly* pleading standards.”).

213. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Keys*, 684 F.3d at 609; see also *Serrano v. Cintas Corp.*, 699 F.3d 884, 897 (6th Cir. 2012).

214. See *Bartos v. MHM Corr. Servs., Inc.*, 454 F. App’x 74, 76–78 (3d Cir. 2011); *Jackson v. S.C. State Ports Auth.*, No. 2:12-cv-1283, 2014 WL 843270, at \*3 (D.S.C. Mar. 4, 2014) (“[I]n order to survive the Defendant’s motion to dismiss her retaliation claim, Plaintiff’s allegations must be sufficient to reasonably infer a *prima facie* case of retaliation.”); *Bailey v. Int’l Paper*, No. 2:11-3013, 2012 WL 405719, at \*4–5 (D.S.C. Jan. 13, 2012) (analyzing the plaintiff’s gender discrimination claim under the *McDonnell Douglas* *prima facie* framework); *Cole v. Hillside Family of Agencies, Inc.*, No. 10-3326, 2011 WL 2413928, at \*4 (D. Md. June 9, 2011); Vahora, *supra* note 185, at 259.

215. See *Lucchesi v. Day & Zimmerman Grp.*, No. 10-4164, 2011 WL 1540385, at \*4 n.7 (E.D. Pa. Apr. 21, 2011) (reconciling *Twombly* and *Swierkiewicz*); *Fowler v. Scores Holding Co.*, 677 F. Supp. 2d 673, 679 (S.D.N.Y. 2009) (“Accordingly, while a complaint need not

that a prima facie case is not a pleading standard—into the post-*Iqbal* plausibility framework, the cases are undeniably consistent. Thus, plaintiffs do not need to establish a prima facie case of discrimination at the pleading stage post-*Iqbal*.

C. *Judicial Responses to Reverse Title IX Claims Post-Iqbal:  
An Empirical Analysis*

Despite the compatibility between *Twombly*, *Iqbal*, and *Swierkiewicz*, district courts are fundamentally divided on their application of plausibility pleading to reverse Title IX claims. This section provides the first empirical study analyzing dismissal trends for reverse Title IX lawsuits. In short, the study finds that most post-*Iqbal* courts dismiss reverse Title IX claims brought by accused sexual assault perpetrators for failure to plead a prima facie case of discrimination. These courts isolate the factual and evidentiary support for discriminatory causation and dismiss complaints that do not evince a strong probability of discriminatory animus. By requiring accused perpetrators to plead particularized data, statistics, or discriminatory statements made by university officials without the use of discovery, the majority perpetuates a catch-22 scenario: a plaintiff cannot access discriminatory evidence without the use of discovery, but the complaint is dismissed before the discovery stage.<sup>216</sup>

The catch-22 dooms these lawsuits from the outset. A minority of courts, however, recognize the inevitability of the catch-22 dilemma and properly view factual sufficiency as applying to the complaint as a whole, not to each individualized prima facie element. These judges perceive an inequality in requiring accused students to cite discriminatory data that is in the possession of university administrators without the use of discovery.<sup>217</sup> Judges who acknowledge the difficulty of establishing a causal connection between gender and disciplinary errors at the pleading stage hold that there is no heightened pleading requirement for discrimination. Accordingly, merely alleging the causation element is sufficient.<sup>218</sup> As a result, the judicial districts are deeply divided on whether to progress a reverse Title IX claim to discovery if the accused perpetrator merely states that the university discriminated against him based on his sex or that the university has a pattern or practice of discrimination, without offering additional factual evidence.

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contain specific facts establishing a prima facie case of employment discrimination to overcome a Rule 12(b)(6) motion, the claim must be facially plausible, and must give fair notice to the defendants of the basis for the claim.”); Lucas F. Tesoriero, Note, *Pre-Twombly Precedent: Have Leatherman and Swierkiewicz Earned Retirement Too?*, 65 DUKE L.J. 1521, 1546 (2016); see also *Swierkiewicz*, 534 U.S. at 511 (holding that “the ordinary rules for assessing the sufficiency of a complaint apply”).

216. See Suzette M. Malveaux, *The Jury (or More Accurately the Judge) Is Still out for Civil Rights and Employment Cases Post-Iqbal*, 57 N.Y.L. SCH. L. REV. 719, 727 (2013); David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 124 (2010); Michael O’Neil, *Twombly and Iqbal: Effects on Hostile Work Environment Claims*, 32 B.C. J.L. & SOC. JUST. 151, 175 (2012).

217. See *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 187–89 (D.R.I. 2016).

218. See *id.* at 188–89.

### 1. Empirical Study: Purpose and Methodology

The purpose of this empirical study is to document dismissal trends for reverse Title IX lawsuits and to analyze the stated rationales accompanying these dismissals. By undertaking this analysis, the goal is to contribute to the evolving dialogue on the impacts of *Twombly* and *Iqbal* in the civil rights context and to expand this discussion to the Title IX arena. Understanding judicial standards for reverse Title IX actions further enables the legal community to identify common pleading requirements for these cases—even if those pleading requirements depart from the plausibility standard framework.

To document judicial positions on reverse Title IX claims, I conducted a comprehensive Westlaw search using the following search parameters. First, because Title IX is a federal statute, I limited the analysis to federal district and circuit court cases. Second, given that only post-*Iqbal* interpretations of reverse Title IX claims are relevant, I restricted the date range from June 1, 2009, to August 31, 2016. Third, I conducted numerous keyword searches looking for variants of “Title IX,” “reverse Title IX,” “erroneous outcome,” and “selective enforcement.” In particular, the searches included: (1) “adv: ‘Title IX’ w/100 ‘erroneous outcome’” (resulting in thirty-four cases), (2) “adv: ‘Title IX’ w/100 ‘selective enforcement’” (resulting in twenty-seven cases), (3) “adv: ‘reverse Title IX’” (resulting in zero cases), (4) “adv: ‘Title IX’ w/100 ‘reverse gender discrimination’” (resulting in one case), (5) “adv: ‘erroneous outcome’ w/100 ‘*Yusuf*’” (resulting in twenty-nine cases), and (6) “adv: ‘Title IX’ and ‘discrimination’ w/5 ‘sex’ and ‘*Yusuf*’ and ‘*Twombly*’” (resulting in thirty cases). The cases returned from each search significantly overlapped.

Additionally, I restricted the searches to only those cases resolving motions to dismiss; this means cases involving preliminary injunctions were not considered. Further, I excluded cases that were vacated or reversed. Finally, after narrowing the searches in accordance with the criteria above, I read and analyzed each case focusing on the court’s position regarding dismissal for gender discrimination. In total, twenty-eight cases satisfied these criteria, spanning twenty-two district courts and one circuit court.<sup>219</sup> The following subsections detail the results of this empirical analysis along with the common arguments espoused for each position.

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219. The districts that have considered reverse Title IX claims include the Southern District of Ohio, Northern District of Ohio, Eastern District of Tennessee, Southern District of New York, Northern District of New York, Western District of New York, Eastern District of Michigan, District of Colorado, District of Massachusetts, Eastern District of Virginia, Western District of Virginia, Middle District of Pennsylvania, Eastern District of Pennsylvania, Western District of Missouri, Central District of Illinois, Northern District of Illinois, District of South Dakota, District of New Jersey, District of Rhode Island, District of Maryland, Western District of Oklahoma, and Southern District of Indiana. The only circuit court to have considered the issue is the Second Circuit.



## 2. The Majority of Courts Dismiss Reverse Title IX Lawsuits

Without question, most post-*Iqbal* courts dismiss reverse Title IX claims for causal insufficiency.<sup>220</sup> Twenty out of the twenty-eight cases (71 percent) dismissed erroneous outcome and selective enforcement claims for failure to adequately allege causation.<sup>221</sup> These courts held that inferences of discriminatory bias were insufficient to link erroneous disciplinary proceedings with the male student's gender.

In 2015, for example, the Southern District of New York dismissed Xiaolu Peter Yu's Title IX claim against Vassar College because Yu's complaint did not contain allegations of discriminatory statements or actions showing the influence of gender in the disciplinary process.<sup>222</sup> Yu simply stated that "males invariably lose" their disciplinary proceedings for sexual assault cases, but he did not point to any statistical evidence to support this conclusion.<sup>223</sup> The court found Yu's complaint insufficient on this count and dismissed both Yu's erroneous outcome claim and his selective enforcement action.<sup>224</sup> Similarly, the Southern District of Ohio dismissed without prejudice an accused student's erroneous outcome claim because the complaint

lack[ed] allegations that Miami University had a pattern of decisionmaking based on gender, that Miami University officials or disciplinary board members made comments demonstrating gender-based animus, or that the disciplinary proceedings against [the complainant] arose in the context of

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220. See Emily D. Safko, Note, *Are Campus Sexual Assault Tribunals Fair?: The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law*, 84 *FORDHAM L. REV.* 2289, 2311, 2316 (2016) (explaining that perpetrators have difficulty pleading discriminatory intent, which results in "frequent dismissals" of reverse Title IX claims).

221. See *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 606–07 (S.D. Ohio 2016); *Winter v. Pa. State Univ.*, 172 F. Supp. 3d 756, 775–76 (M.D. Pa. 2016); *Nungesser v. Columbia Univ.*, 169 F. Supp. 3d 353, 363–67 (S.D.N.Y. 2016); *Marshall v. Ohio Univ.*, No. 2:15-cv-775, 2015 WL 7254213, at \*5–6 (S.D. Ohio Nov. 17, 2015); *Salau v. Denton*, 139 F. Supp. 3d 989, 998–99 (W.D. Mo. 2015); *Tsuruta v. Augustana Univ.*, No. 4:15-CV-04150, 2015 WL 5838602, at \*4 (D.S.D. Oct. 7, 2015); *Doe v. Case W. Reserve Univ.*, No. 1:14-cv-2044, 2015 WL 5522001, at \*5–6 (N.D. Ohio Sept. 16, 2015); *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 732–33 (E.D. Va. 2015); *Ludlow v. Nw. Univ.*, 125 F. Supp. 3d 783, 791–93 (N.D. Ill. 2015); *Doe v. Univ. of Mass.-Amherst*, No. 14-30143, 2015 WL 4306521, at \*8–9 (D. Mass. July 14, 2015); *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 474–75 (S.D.N.Y. 2015); *Sterrett v. Cowan*, 85 F. Supp. 3d 916, 937 (E.D. Mich. 2015); *Blank v. Knox Coll.*, No. 14-cv-1386, 2015 WL 328602, at \*3–4 (C.D. Ill. Jan. 26, 2015); *Sahm v. Miami Univ.*, No. 1:14-cv-698, 2015 WL 93631, at \*7 (S.D. Ohio Jan. 17, 2015); *Johnson v. W. State Colo. Univ.*, 71 F. Supp. 3d 1217, 1224–26 (D. Colo. 2014); *Harris v. Saint Joseph's Univ.*, No. 13-3937, 2014 WL 1910242, at \*4 (E.D. Pa. May 13, 2014); *Routh v. Univ. of Rochester*, 981 F. Supp. 2d 184, 211–12 (W.D.N.Y. 2013); *Bleiler v. Coll. of the Holy Cross*, No. 11-11541, 2013 WL 4714340, at \*5–14 (D. Mass. Aug. 26, 2013); *Tafuto v. N.J. Inst. of Tech.*, No. 10-4521, 2011 WL 3163240, at \*2–3 (D.N.J. July 26, 2011); *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744, 756 (E.D. Tenn. 2009).

222. See *Yu*, 97 F. Supp. 3d at 474–75.

223. *Id.* at 475.

224. See *id.* at 475–81.

an OCR investigation against Miami University for its handling of sexual assault charges.<sup>225</sup>

The accused student's assertion that the university's disciplinary action occurred because of his sex was purely conclusory and, therefore, not entitled to a presumption of truth. This court reached an identical conclusion in *Marshall v. Ohio University*,<sup>226</sup> when it noted that "[a] mere pattern and practice of treating men and women differently does not reflect the reasons for differential treatment."<sup>227</sup> Unless the accused student can point to specific factual evidence that the differential treatment occurred *because of* the student's gender, the complaint fails the plausibility test.<sup>228</sup> The Northern District of Ohio enforced parallel reasoning in *Doe v. Case Western Reserve University*,<sup>229</sup> where it remarked that allegations of deficient or erroneous disciplinary hearings do not constitute evidence of discriminatory bias.<sup>230</sup> Rather, the accused student must plead *facts* supporting intentional discriminatory animus.<sup>231</sup>

Similarly, the District of Massachusetts held that where a university's code of conduct is facially neutral and the university has received no complaints by male students against female students for sexual violence, gender discrimination is implausible.<sup>232</sup> The accused student in that case failed to disclose factual evidence to support his statement that males accused of sexual misconduct are inevitably found responsible for the harassment.<sup>233</sup> The Southern District of Ohio extrapolated on the District of Massachusetts's reasoning in March 2016 when it explained that statistical evidence showing that only males are investigated and disciplined for sexual misconduct is insufficient to support a gender bias claim.<sup>234</sup> Instead, two nondiscriminatory reasons for this statistical disparity exist: (1) universities only receive complaints of male-on-female sexual violence and (2) males are less likely than females to report incidents of sexual misconduct.<sup>235</sup> These innocent explanations preclude a plausible finding of gender discrimination.

The Western District of Missouri articulated a comparable argument when an accused student failed to identify any similarly situated female perpetrator who received more favorable treatment during a disciplinary proceeding.<sup>236</sup> In particular, the court noted that even if a female student receives preferential treatment during the campus disciplinary process, that favorable interaction does not suggest sex discrimination.<sup>237</sup> Rather, the discrepancy

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225. *Sahm*, 2015 WL 93631, at \*6.

226. No. 2:15-cv-775, 2015 WL 7254213 (S.D. Ohio Nov. 17, 2015).

227. *Id.* at \*8.

228. *See id.*

229. No. 1:14CV2044, 2015 WL 5522001 (N.D. Ohio Sept. 16, 2015).

230. *See id.* at \*5.

231. *See id.*

232. *See Bleiler v. Coll. of the Holy Cross*, No. 11-11541, 2013 WL 4714340, at \*6-8 (D. Mass. Aug. 26, 2013).

233. *See id.* at \*8.

234. *See Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 602 (S.D. Ohio 2016).

235. *See id.*

236. *See Salau v. Denton*, 139 F. Supp. 3d 989, 999 (W.D. Mo. 2015).

237. *See id.*

in experiences may result from the individual nature of each case, innocent circumstances, or other nondiscriminatory explanations. According to the Southern District of Ohio and District of Massachusetts, the favorable treatment a victim receives during the disciplinary process at most evinces bias against perpetrators, not gender discrimination.<sup>238</sup> The Central District of Illinois, Northern District of Illinois, Eastern District of Michigan, District of South Dakota, Eastern District of Virginia, District of Colorado, Eastern District of Pennsylvania, Western District of New York, District of New Jersey, and Eastern District of Tennessee have similarly questioned the causal link between disciplinary errors and gender bias and opted to dismiss reverse discrimination claims as being insufficiently pled.<sup>239</sup> Thus, the majority of courts refuse to entertain reverse Title IX claims premised solely on allegations of flawed disciplinary procedures or severe sanctions when there is no corresponding evidence to suggest discriminatory animus.

### 3. A Minority of Courts Permit Reverse Title IX Claims to Proceed to Discovery

Contrary to the prodissmissal approach espoused by the judicial majority, a minority of courts allow reverse Title IX claims to proceed to discovery on the basis of plausible discrimination. Of the cases examined, only eight (29 percent) permitted reverse Title IX lawsuits to survive a 12(b)(6) motion to dismiss.<sup>240</sup> While a facial review suggests that the minority position is severely disfavored, the Second Circuit recently adopted this approach in July 2016, which could influence future judicial precedents nationwide.<sup>241</sup> Thus, the minority position may eventually outpace the prodissmissal perspective.

The minority's interpretation of reverse Title IX claims began in 2014 and became increasingly prevalent in 2015 and 2016. Courts that take the minority position have different views regarding the precise facts that support gender discrimination, but they share the view that male perpetrators are

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238. See *Univ. of Cincinnati*, 173 F. Supp. 3d at 602; *Doe v. Univ. of Mass.-Amherst*, No. 14-30143, 2015 WL 4306521, at \*9 (D. Mass. July 14, 2015).

239. See *Tsuruta v. Augustana Univ.*, No. 4:15-CV-04150, 2015 WL 5838602, at \*4 (D.S.D. Oct. 7, 2015); *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 733 (E.D. Va. 2015); *Ludlow v. Nw. Univ.*, 125 F. Supp. 3d 783, 791–92 (N.D. Ill. 2015); *Blank v. Knox Coll.*, No. 14-cv-1386, 2015 WL 328602, at \*3–4 (C.D. Ill. Jan. 26, 2015); *Sterrett v. Cowan*, 85 F. Supp. 3d 916, 937 (E.D. Mich. 2015); *Johnson v. W. State Colo. Univ.*, 71 F. Supp. 3d 1217, 1226 (D. Colo. 2014); *Harris v. Saint Joseph's Univ.*, No. 13-3937, 2014 WL 1910242, at \*4 (E.D. Pa. May 13, 2014); *Routh v. Univ. of Rochester*, 981 F. Supp. 2d 184, 211–12 (W.D.N.Y. 2013); *Tafuto v. N.J. Inst. of Tech.*, No. 10-4521, 2011 WL 3163240, at \*2–3 (D.N.J. July 26, 2011); *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744, 756 (E.D. Tenn. 2009).

240. *Doe v. Columbia Univ.*, 831 F.3d 46, 56–57 (2d Cir. 2016); *Ritter v. Okla. City Univ.*, No. 16-0438, 2016 WL 3982554, at \*2 (W.D. Okla. July 22, 2016); *Marshall v. Ind. Univ.*, 170 F. Supp. 3d 1201, 1210–11 (S.D. Ind. 2016); *Prasad v. Cornell Univ.*, No. 5:15-cv-322, 2016 WL 3212079, at \*17 (N.D.N.Y. Feb. 24, 2016); *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 187–89 (D.R.I. 2016); *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 768–69 (D. Md. 2015); *Doe v. Wash. & Lee Univ.*, No. 6:14-cv-00052, 2015 WL 4647996, at \*9–10 (W.D. Va. Aug. 5, 2015); *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 751 (S.D. Ohio 2014).

241. See *Columbia Univ.*, 831 F.3d at 56–57.

improperly denied access to discovery.<sup>242</sup> In particular, the minority cautions against imposing evidentiary standards at the motion to dismiss stage and reminds courts to examine whether the factual inferences support discrimination. For example, in *Wells v. Xavier University*,<sup>243</sup> the Southern District of Ohio took all inferences in favor of the male plaintiff and determined that the plaintiff's contentions that Xavier had a practice of discriminatory decision making was sufficient to withstand dismissal.<sup>244</sup> Comparable reasoning was adopted in *Ritter v. Oklahoma City University*,<sup>245</sup> when the district court acknowledged that the issue of gender discrimination was "a close question" but found sufficient facts to cast doubt on the accuracy of the proceeding.<sup>246</sup>

The most recent and compelling case supporting the minority's position is the Second Circuit's decision in *Doe v. Columbia University*.<sup>247</sup> Decided on July 29, 2016, this case evaluates the application of plausibility pleading to reverse Title IX claims. Specifically, the Second Circuit explained that an allegation of sex discrimination coupled with "specific facts that support a minimal plausible inference" of discrimination satisfies *Twombly* and *Iqbal*.<sup>248</sup> As applied to Title IX claims, the court held that allegations of disciplinary errors combined with assertions that the university was subject to intense criticism by the student body and media for not taking sexual assault complaints seriously gave rise to a plausible inference of gender bias.<sup>249</sup> This criticism was so pervasive that the university president even called a university-wide meeting with the dean to discuss the issue. Thus, given this factual background, "it is entirely plausible that the University's decision-makers and its investigator were motivated to favor the accusing female over the accused male, so as to protect themselves and the University from accusations that they had failed to protect female students from sexual assault."<sup>250</sup> In arriving at this holding, the Second Circuit reversed the district court's finding of insufficient causal evidence.

Similarly, in *Doe v. Brown University*,<sup>251</sup> the District of Rhode Island denied a motion to dismiss a reverse Title IX claim.<sup>252</sup> The court provided a

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242. See, e.g., *Marshall*, 170 F. Supp. 3d at 1210.

Further, although *Marshall*'s pleading may lack the contours of more particularized facts, the Defendants do not deny that they are in sole possession of all information relating to the allegations made by and against *Marshall*, notably refusing, at all times, to share such information with *Marshall* or his attorneys. In this regard, the Defendants cannot have it both ways, restricting access to the facts and then arguing that *Marshall*'s pleading must be dismissed for failure to identify more particularized facts.

*Id.*

243. 7 F. Supp. 3d 746 (S.D. Ohio 2014).

244. See *id.* at 751.

245. No. 16-0438, 2016 WL 3982554 (W.D. Okla. July 22, 2016).

246. See *id.* at \*2.

247. 831 F.3d 46 (2d Cir. 2016).

248. *Id.* at 56.

249. See *id.* at 57.

250. *Id.*

251. 166 F. Supp. 3d 177 (D.R.I. 2016).

252. See *id.* at 180. The facts of *Brown Univ.* are summarized in this Article's introduction.

detailed analysis of the judicial split in Title IX cases and concluded that mandating statistical evidence, discriminatory statements, or other data at the motion to dismiss stage was erroneous and premature. According to the court, “Requiring that a male student conclusively demonstrate, at the pleading stage, with statistical evidence and/or data analysis that female students accused of sexual assault were treated differently, is both practically impossible and inconsistent with the standard used in other discrimination contexts.”<sup>253</sup> The court cautioned its judicial counterparts against converting the standard for a motion to dismiss into one for quasi summary judgment.<sup>254</sup> Where there are allegations that a university’s actions against an accused student were unjust and motivated by a desire to “crack down” on sexual assault, the truth of those statements cannot be resolved at the motion to dismiss stage.<sup>255</sup> The fact that these allegations may be pled upon information and belief does not make them improper.<sup>256</sup>

The ability to plead discrimination upon information and belief is further supported by the District of Maryland’s analysis in *Doe v. Salisbury University*.<sup>257</sup> In *Salisbury*, the court denied a motion to dismiss where the accused student alleged, on information and belief, that the college possessed documentary evidence demonstrating an intentional bias toward female victims over male assailants.<sup>258</sup> The court determined that the plaintiff’s allegations of potential evidence, if true, could showcase gender as a motivating factor behind the flawed disciplinary proceedings.<sup>259</sup> While the court cautioned that “victim/perpetrator discrimination” does not qualify as gender discrimination,<sup>260</sup> it accepted these allegations as true in accordance with *Twombly* and *Iqbal*. The court treated the plaintiff’s information and belief allegations regarding a speculative document as factual statements entitled to a presumption of truth.

Finally, the Western District of Virginia struck a middle ground between the majority and minority positions when it denied a university’s motion to dismiss a reverse Title IX claim on the basis that the accused student pled sufficient factual allegations to establish a causal connection between the discrimination and gender. In *Doe v. Washington & Lee University*,<sup>261</sup> the accused student alleged that his disciplinary “investigation and hearing occurred in an environment that created pressure for the university to punish

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253. *Id.* at 189.

254. *See id.*

255. *Id.* at 188.

256. *See id.* at 190.

257. 123 F. Supp. 3d 748 (D. Md. 2015); *see also* Ritter v. Okla. City Univ., No. 16-0438, 2016 WL 3982554, at \*2 (W.D. Okla. July 22, 2016) (explaining that *Twombly* does not prevent plaintiffs from pleading facts upon information and belief where the facts are primarily within the control of the defendant).

258. *See Salisbury Univ.*, 123 F. Supp. 3d at 768–69; David Russcol, *Courts Are Starting to Permit Title IX Lawsuits by Accused Students to Go Forward*, BOS. L. BLOG (Feb. 26, 2016), <http://www.bostonlawyerblog.com/2016/02/26/courts-starting-permit-title-ix-lawsuits-accused-students-go-forward/> [<https://perma.cc/8KWW-CBWG>].

259. *See Salisbury Univ.*, 123 F. Supp. 3d at 769.

260. *See id.* at 768 n.10.

261. No. 6:14-CV-00052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015).

male students for sexual misconduct.”<sup>262</sup> In support of this conclusion, the plaintiff cited a letter Washington & Lee published announcing the appointment of a Title IX officer and stating that numerous universities are under investigation for violating Title IX.<sup>263</sup> The complaint further referenced a May 1, 2014 press release from OCR, which remarked that universities could lose federal funding for failing to comply with Title IX, and a *Rolling Stone* article that described the University of Virginia as unresponsive to campus sexual assault.<sup>264</sup> These documents, according to the plaintiff, sufficiently demonstrated that Washington & Lee discriminated against male assailants to avoid backlash by OCR.<sup>265</sup> Most critically, however, the plaintiff pointed to an October 5, 2014 presentation by Lauren Kozak in which the Title IX officer endorsed the notion that a sexual assault occurs if a female later regrets the sexual encounter but did not express any outward reservations.<sup>266</sup> The court found this presentation especially relevant “because of the parallels of the situation it describes and the circumstances under which Plaintiff was found responsible for sexual misconduct.”<sup>267</sup> Additionally, given that Kozak wielded considerable influence over the disciplinary proceedings, her statements deserved scrutiny.<sup>268</sup> Thus, because the accused student cited in his complaint specific discriminatory statements, documents, and presentations, the court appropriately denied Washington & Lee’s motion to dismiss the Title IX count.

*D. The Two Ways to Establish Causality  
Under the Majority’s Pleading Framework*

Pleading reverse Title IX lawsuits is daunting at first glance given the high dismissal rate that plagues these claims. Accused students frequently cite Title IX as an avenue for relief, but recovery under this theory is rare and limited. Although these claims face routine dismissal, the dismissals occur because of purportedly insufficient allegations of causal links between the erroneous disciplinary proceedings and gender bias. According to the majority of courts, accused students have not plausibly demonstrated that flaws in the investigatory and adjudicatory processes are the result of sex discrimination rather than victim favoritism and perpetrator bias. Merely

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262. *Id.* at \*8.

263. *See id.*

264. *See id.* The *Rolling Stone* article, “A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA,” described an alleged incident of gang rape at the University of Virginia. The magazine later withdrew the article after commentators questioned the veracity of the story and journalists claimed the narrative was fabricated. After the article incited national controversy, *Rolling Stone* published a follow-up study that admitted and explained its failed journalism. *See* Sheila Coronel et al., *Rolling Stone and UVA: The Columbia University Graduate School of Journalism Report*, ROLLING STONE (Apr. 5, 2015), <http://www.rollingstone.com/culture/features/a-rape-on-campus-what-went-wrong-20150405> [<https://perma.cc/E9NY-VX8D>].

265. *See Wash. & Lee Univ.*, 2015 WL 4647996, at \*10.

266. *See id.* at \*3, \*10.

267. *Id.* at \*10.

268. *See id.*

providing general background history on OCR's actions and a conclusory statement about the impact of the 2011 DCL do not constitute *factual* support for a claim. Regardless of whether the majority's approach is proper, reverse Title IX complaints must adopt one of two pleading frameworks to survive dismissal: (1) description of particular discriminatory statements, presentations, or actions by the university or (2) identification of a similarly situated female sexual assault perpetrator who received more favorable treatment during the disciplinary process. If accused students can enhance their factual accusations on this causal element, then reverse Title IX claims will likely progress into the critical discovery phase.

It is undeniable that if a plaintiff alleges particular conduct by the defendant (e.g., presentations, publications, and dialogue) that can be interpreted as discriminatory, then the causal element is adequately pled.<sup>269</sup> As illustrated in *Washington & Lee*, the plaintiff's reverse Title IX claim survived not because of the generalized discussion regarding the 2011 DCL or the *Rolling Stone* article but because of the plaintiff's reference to an October 5, 2014 presentation by the Title IX officer.<sup>270</sup> During that presentation, the Title IX officer inaccurately defined rape as including all sexual encounters that a female student later regrets.<sup>271</sup> Because the Title IX officer was centrally involved in the accused student's investigatory and adjudicatory proceedings, her statements plausibly evidenced discriminatory bias.

In accordance with the *Washington & Lee* holding, accused students should identify with particularity any statements, presentations, publications, conversations, actions, or training materials published or used by members of the university's investigatory and adjudicatory teams that could demonstrate discrimination. Allegations of this nature support discriminatory bias at a specific university and help distinguish a plaintiff's case from general reverse Title IX actions. If possible, the statements or conduct in question should come from a university member directly involved in the plaintiff's case. Additionally, a plaintiff's argument is strengthened if the language used in the code of conduct or other disciplinary documents is not gender neutral.<sup>272</sup> Plaintiffs alleging these facts have a strong likelihood of reaching discovery on Title IX claims.

The second path to discovery is to pinpoint specific instances in which accused female sexual assault perpetrators have received favorable treatment compared to accused male sexual assault assailants.<sup>273</sup> Civil rights cases demonstrate that merely alleging different treatment of a similarly situated

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269. See *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 598 (S.D. Ohio 2016).

270. See *Wash. & Lee Univ.*, 2015 WL 4647996, at \*10.

271. See *id.* at \*3, \*10.

272. See generally *Tsuruta v. Augustana Univ.*, No. 4:15-CV-04150, 2015 WL 5838602, at \*4 (D.S.D. Oct. 7, 2015) (refusing to find discriminatory animus where the student handbook was written in gender neutral language); *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 767 (D. Md. 2015); *Bleiler v. Coll. of the Holy Cross*, No. 11-11541, 2013 WL 4714340, at \*7 (D. Mass. Aug. 26, 2013).

273. See *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 580 (E.D. Va. 1996).

counterpart is insufficient and conclusory.<sup>274</sup> Rather, the plaintiff must (1) identify the comparable person by name, title, or other definitive characteristic, (2) show that her circumstances are similar to the plaintiff's, and (3) specify the preferential treatment. Plaintiffs who are able to identify female sexual assault perpetrators and show that they received more lenient punishments could easily sustain their Title IX claims under this pleading structure.

While this framework would propel a reverse Title IX action into discovery, it faces practical limitations that restrict its usefulness. Given that men perpetrate the majority of known campus sexual violence, it is nearly impossible to locate a female who has been accused of sexual misconduct.<sup>275</sup> Without a corresponding female perpetrator, how can a male support his accusation that he received unfavorable treatment based on his gender? To date, male perpetrators have attempted to plead around this issue in one of two ways. First, males claim that the female *victim* received more favorable treatment and guidance during the disciplinary process.<sup>276</sup> Second, plaintiffs may cite instances of nonsexual disciplinary proceedings (e.g., academic cheating) in which females were not punished with suspension or expulsion.

Unfortunately, neither of these pleading strategies can support discriminatory animus under the majority's pleading scheme. The first scenario demonstrates only victim/perpetrator discrimination, not gender discrimination. Because the victim could be either male or female, the fact that the victim received more attention and assistance throughout the disciplinary process does not support sex discrimination.<sup>277</sup> Victim/perpetrator discrimination is not an actionable form of discrimination under Title IX.<sup>278</sup> Additionally, that females may have received lesser sanctions for nonsexual code of conduct violations is irrelevant. To qualify as similarly situated individuals, the female and male students must have comparable disciplinary allegations—i.e., sexual misconduct. Clearly, the

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274. See, e.g., *Johnson v. Hix Corp.*, No. 15-CV-07843, 2015 WL 7017374, at \*4 (D. Kan. Nov. 10, 2015) (holding that a plaintiff's sex discrimination claim failed because she merely stated that she experienced different treatment than similarly situated male employees); *Watson v. Shenandoah Univ.*, No. 5:14-cv-00022, 2015 WL 5674887, at \*8–9 (W.D. Va. Sept. 24, 2015) (dismissing a claim where the female plaintiff stated only that she was treated differently from two white males).

275. See *Haley*, 948 F. Supp. at 581 (acknowledging that women are rarely, if ever, accused of sexual harassment).

276. See Decision & Order, *supra* note 153, at 34.

277. See *Salau v. Denton*, 139 F. Supp. 3d 989, 999 (S.D. Mo. 2015) (“Even if the University treated the female student more favorably than the Plaintiff, during the disciplinary process, ‘the mere fact that Plaintiff is male and [the alleged victim] is female does not suggest that the disparate treatment was because of Plaintiff’s sex.’”); *Doe v. Univ. of Mass.-Amherst*, No. 14-30143, 2015 WL 4306521, at \*9 (D. Mass. July 14, 2015); *Sahm v. Miami Univ.*, 110 F. Supp. 3d 774, 778 (S.D. Ohio 2015) (rejecting the notion that victim/perpetrator discrimination is equivalent to gender discrimination); *Disciplined Student May Continue to Litigate Title IX Claim Against Brown*, *supra* note 151 (“That accused students tend to be male is not something that the university controls; students of either gender are permitted to file a complaint, and it is possible that if female students were similarly accused, the university’s alleged bias against the accused students would affect them as well.”).

278. See *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 768 n.10 (D. Md. 2015).



victim of a sexual assault is not similarly situated to the *perpetrator* of the attack. Therefore, although reverse Title IX complaints often contain pages of allegations suggesting that a female victim received favorable treatment or a female nonsexual assault perpetrator enjoyed a more lenient punishment, these declarations do little to demonstrate plausible causality.

Moreover, a plaintiff cannot use a sexual harassment claim filed against a female teacher or administrator to support his allegations. The plaintiff and the favorably treated counterpart must be equivalently positioned to warrant comparison. In *Grant v. Communications Workers of America, Local 1101*,<sup>279</sup> the Southern District of New York dismissed a racial discrimination count where the plaintiff, a black male, claimed his grievance was treated differently than that of the local vice president, a white male.<sup>280</sup> The local vice president, however, was not similarly situated to the plaintiff in all material respects. Specifically, the vice president was a manager in the company, and the claims against him were of a different nature than the claims against the plaintiff.<sup>281</sup> Just as a typical employee and vice president are not similarly situated,<sup>282</sup> a teacher and a student are not comparable counterparts. While the similarly situated assailant framework would progress a reverse gender discrimination claim to discovery, it must be appropriately pleaded and is only available to those plaintiffs who can identify female perpetrators of sexual violence on campus. Thus, plaintiffs may access the holy grail of discovery by either alleging direct evidence of discrimination (i.e., referencing discriminatory statements or conduct by university officials) or using circumstantial evidence (i.e., identifying a similarly situated female perpetrator). Given that most schools do not receive sexual assault complaints involving female assailants, reverse Title IX claims may be an exception to the widely held belief that circumstantial evidence of discrimination is easier to allege than direct discrimination.<sup>283</sup>

Title IX claims that adhere to this rigid pleading structure are almost guaranteed to survive the inevitable motion to dismiss. These claims not only factually describe the causal connection between improper conduct and discrimination but also highlight supporting evidence to back these assertions. This pleading framework, however, imposes an impossible burden on plaintiffs to identify evidence without discovery. When plaintiffs fail to meet this standard on the issue of causality—even though the complaint as a whole states an otherwise plausible claim—courts quickly grant dismissal motions without considering the insurmountable hurdle they have erected. While the denial of perpetrators' rights at the university level

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279. No. 13-CV-7917, 2014 WL 3439670 (S.D.N.Y. July 15, 2014).

280. *See id.* at \*2.

281. *See id.*; *see also* Lawrence v. Glob. Linguist Sols. LLC, No. 1:13cv1207 (JCC/TRJ), 2013 WL 6729266, at \*4 (E.D. Va. Dec. 19, 2013) (noting that a manager is not a similarly situated individual for comparison with an employee).

282. *See Grant*, 2014 WL 3439670, at \*2.

283. *See generally* Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1046 (highlighting that “[i]ntentional discrimination is most often established through circumstantial evidence”).

is egregious, it is the imposition of unwarranted procedural obstacles that is the greater miscarriage of justice.

#### IV. SOLVING THE PLAUSIBILITY AND CATCH-22 PROBLEMS FOR REVERSE TITLE IX CLAIMS

Judicial interpretation of plausibility pleading as applied to Title IX claims has created an outcome fundamentally at odds with the principles of *Swierkiewicz*.<sup>284</sup> As explained by the Supreme Court, a prima facie case of discrimination need not be established at the pleading stage.<sup>285</sup> Yet, despite this mandate, a majority of courts require evidence of discriminatory bias at the outset of the lawsuit.<sup>286</sup> Not only does this requirement contravene *Swierkiewicz*, but it also enhances the catch-22 trap. Reverse Title IX actions suffer from an inherent gender disparity: males commit the majority of known sexual assaults. This gender imbalance is inherent to sexual assault claims, yet courts still require accused male perpetrators to identify similarly situated female assailants to prove gender discrimination. Such a standard is impossible to satisfy and eliminates Title IX as an avenue for recovery. This part explains how the majority's approach to reverse Title IX claims conflicts with *Swierkiewicz*, and it proposes a flexible pleading structure that satisfies *Twombly*, *Iqbal*, and *Swierkiewicz*.

##### A. *The Majority's Pleading Scheme Contravenes Swierkiewicz*

In *Swierkiewicz*, the Supreme Court emphasized that civil rights plaintiffs need not establish a prima facie case of discrimination at the pleading stage; rather, a prima facie case is an evidentiary burden applicable at summary judgment.<sup>287</sup> The creation of a prima facie case refers directly to the plaintiff's "burden of presenting evidence that raises an inference of discrimination."<sup>288</sup> Because the prima facie case is a flexible evidentiary standard, discovery is typically necessary before the precise elements of discrimination can be adequately established.<sup>289</sup> When courts require a prima facie case of discrimination at the pleading stage, they transpose a soft evidentiary requirement into a rigid pleading framework.<sup>290</sup> The result is an insurmountable pleading hurdle for plaintiffs and the creation of a catch-22 scenario.

Courts have become hyperfocused on ensuring plausibility through evidentiary statements and, in so doing, have misconstrued the plausibility requirements. The majority's approach to reverse Title IX actions is to

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284. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002).

285. See *id.*

286. See *supra* Part III.

287. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Swierkiewicz*, 534 U.S. at 510. Although *Iqbal* does not mention *Swierkiewicz*, it "is wholly consistent with [that case]." *Rodriguez-Reyes v. Molina-Rodriguez*, 711 F.3d 49, 54 (1st Cir. 2013).

288. See *Swierkiewicz*, 534 U.S. at 510.

289. See *id.* at 512.

290. See *id.*

dismiss the claim unless a plaintiff cites specific discriminatory statements or actions by the defendant or identifies a female sexual assault perpetrator whose disciplinary experience was more favorable than that of the plaintiff. These “facts,” however, are more akin to evidence, which is not required until the summary judgment stage.<sup>291</sup> Furthermore, this evidence is likely in the possession of the defendant, not the plaintiff, and cannot realistically be acquired without discovery. Rather than viewing an assertion of sex discrimination as factual when combined with the complaint’s additional allegations, courts mandate proof of causality at the dismissal stage. This approach is improper because the causal link between the defendant’s conduct and gender discrimination is a *prima facie* element.<sup>292</sup>

While “the elements of a *prima facie* case may be used as a prism to shed light upon the plausibility of a claim,” a plaintiff need not plead specific facts to establish each element of discrimination.<sup>293</sup> Rather, the proper approach is to assess the complaint *as a whole*. The relevant question should not concern whether the plaintiff supported a causal statement with detailed evidence but instead whether the complaint renders a plaintiff’s entitlement to relief plausible.<sup>294</sup> A complaint that factually details the wrongful conduct and includes an allegation that the defendant’s acts were “because of” the plaintiff’s gender states a plausible claim for relief. Such allegations provide sufficient notice to the defendant of the claim and raise the right to recovery above the speculative level. The causation element does not need additional factual support to comply with *Swierkiewicz* and Federal Rule of Civil Procedure 8. The majority’s routine dismissal of reverse Title IX actions unaccompanied by evidentiary data or statistics is a misapplication of pleading precedent. This misapplication bars the doors to recovery for reverse Title IX claims that are adequately pleaded in compliance with *Twombly* and *Swierkiewicz*. Thus, the majority’s approach to reverse Title IX claims is misguided and unlawfully precludes plaintiffs from accessing judicial remedies.

### *B. An Appropriate Pleading Framework for Reverse Title IX Claims*

To repair the dysfunctional lens through which courts view reverse Title IX complaints, a new pleading scheme must be implemented for the causal element. This revised pleading approach does not violate the holdings of *Twombly* and *Iqbal* but rather ensures compatibility between these cases and *Swierkiewicz*. Pleading under this new framework promotes flexibility for courts to consider the sexual assault gender imbalance. It is important to note

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291. See *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 188 (D.R.I. 2016) (explaining that “the type of evidence called for by the *Columbia* court,” that is, data showing that women are rarely accused of sexual harassment, combined with evidence that women accused of other conduct violations are treated differently than men “is more akin to what would be required at summary judgment”).

292. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

293. See *Rodriguez-Reyes v. Molina-Rodriguez*, 711 F.3d 49, 54 (1st Cir. 2013).

294. See *id.* at 55.

that this proposed framework applies solely to the causal link between the flawed disciplinary proceeding and discrimination. It does not impact the pleading standard for additional Title IX elements.

Few scholars would disagree that the causal connection between inappropriate conduct and discriminatory animus is the most difficult part of pleading civil rights cases.<sup>295</sup> That said, pleading causation should not be as difficult as courts demand. To successfully establish a causal link between a flawed disciplinary proceeding and sex discrimination, a plaintiff should be required only to allege two elements: (1) the unfavorable outcome occurred because of the plaintiff's gender and (2) limited, generalized circumstances that give rise to an inference of bias. Each factor is discussed in turn below.

First, the allegation that a university engaged in erroneous disciplinary conduct *because of* an accused student's gender should be sufficient in and of itself to create an inference of discrimination.<sup>296</sup> Given that a *prima facie* case is unnecessary at the motion to dismiss stage, a plaintiff need not articulate statistical or evidentiary data supporting this assertion in his complaint so long as the defendant has notice of the basis of the claim.<sup>297</sup> The mere allegation of causation combined with the plaintiff's factual recitation of harm nudges the complaint across the plausibility threshold. Some reverse Title IX courts even admit that such a causal statement is sufficient in the context of general civil rights cases.<sup>298</sup>

Yet, despite this acknowledgement, the majority of judges inappropriately require evidentiary support for reverse Title IX complaints. The flaw in this reasoning is that simple causal allegations include both conclusory and factual underpinnings.<sup>299</sup> A statement that the university treated a male assailant unfavorably because of his gender cannot be deemed either conclusory or factual—it is an inseparable mix. Therefore, a “because of” allegation should rightfully be read as factual and assumed true during a motion to dismiss stage.

Nonetheless, given the reluctance of courts to accept a single allegation of causality as sufficient, plaintiffs should incorporate a second prong into their pleading framework. Plaintiffs should include one or two generalized factual—not detailed or specific—circumstances that could support discriminatory motive. These corroborative facts could include any of the following.

First, a plaintiff can allege that the university more harshly punishes male sexual assault perpetrators than female perpetrators of other crimes. This statement is most effective when accompanied by a follow-up explanation of

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295. See Seiner, *supra* note 283, at 1046.

296. See Waters v. Drake, 105 F. Supp. 3d 780, 804 (S.D. Ohio 2015); Wells v. Xavier Univ., 7 F. Supp. 3d 746, 751 (S.D. Ohio 2014).

297. See Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc., 525 F.3d 8, 17 (D.C. Cir. 2008).

298. See Waters, 105 F. Supp. 3d at 804; Blank v. Knox Coll., No. 14-cv-1386, 2015 WL 328602, at \*3 (C.D. Ill. Jan. 26, 2015) (declining to require particularized facts at the pleading stage); Wells, 7 F. Supp. 3d at 751.

299. See Vahora, *supra* note 185, at 260–61.

the gender disparity for sexual assault cases. No statistics or data are necessary at the pleading stage to enhance this allegation, though a plaintiff should feel free to include such evidence if it is available.

Second, a plaintiff can allege that the disciplinary errors and imposition of an improper sanction were the result of increased OCR pressure on the university to crack down on sexual assault or lose federal funding. A plaintiff could identify statements by OCR or policies in the 2011 DCL that altered the Title IX landscape and could further discuss the vast increase in OCR investigations over the last few years.

Third, a plaintiff could identify changes in the university's sexual assault policies post-2011 and articulate that similar changes were not imposed for nonsex crimes. This allegation should be accompanied by a brief explanation of how OCR and the 2011 DCL altered the university's approach to Title IX.

Fourth, if the majority of university investigators and hearing panelists are female, the accused student could argue implicit and outgroup bias premised on his gender.<sup>300</sup> A similar argument is viable if an investigator or panelist

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300. Behavioral psychology literature reveals that each individual possesses unique biases and preferences that impact her daily decisions. *See, e.g.*, Bastian Schiller et al., *Intergroup Bias in Third-Party Punishment Stems from Both Ingroup Favoritism and Outgroup Discrimination*, 35 *EVOLUTION & HUM. BEHAV.* 169 (2014). When individuals are instructed to dispense punishment, they lack objectivity and respond differently based on whether the perpetrator is a member of the punisher's "ingroup" or "outgroup." *See id.* In the context of gender, a female judge may act more favorably toward female perpetrators than male assailants because the female perpetrator and judge share ingroup membership based on their sex. This ingroup affiliation strongly distorts objectivity and results in less severe punishment to the ingroup member than if an outgroup perpetrator committed the same transgression. *See id.* This outcome is a product of both ingroup favoritism and outgroup discrimination. *See id.* at 173.

Similarly, a person's gender strongly influences his or her assignment of blame and responsibility. Scholar B.J. Rye examined the role of gender and accompanying personality traits in the portioning of culpability based on authentic criminal hypotheticals. *See* B.J. Rye et al., *The Case of the Guilty Victim: The Effects of Gender of Victim and Gender of Perpetrator on Attributions of Blame and Responsibility*, 54 *SEX ROLES* 639, 640 (2006). The study revealed that "perpetrators are not solely evaluated on the basis of the crimes they commit," and judgment "is heavily dependent" on the gender of the victim and perpetrator. *See id.* In general, female perpetrators were treated more leniently than male assailants and found less culpable of the crime. *See id.* at 646.

In the context of sexual assault claims particularly, ingroup and gender bias can interact to influence assignments of blame and sanctions. *See* Amy S. Untied et al., *College Students' Social Reactions to the Victim in a Hypothetical Sexual Assault Scenario: The Role of Victim and Perpetrator Alcohol Use*, 27 *VIOLENCE & VICTIMS* 957, 958 (2012); *see also* James B. Worthen & Paula Varnado-Sullivan, *Gender Bias in Attributions of Responsibility for Abuse*, 20 *J. FAM. VIOLENCE* 305, 306, 308 (2005). Because sexual assault is portrayed as a male-on-female crime, women are more likely to identify with sexual assault victims, classify the incident as rape, and attribute responsibility to the male perpetrator. *See* Untied et al., *supra*, at 958–69. Conversely, males sympathize more with sexual assault perpetrators and attribute a neutral or even positive outlook to the sexual misconduct. *See id.* at 959; *see also* Ayenibiowo K.O., *The Influence of Gender on Assessment of Rape and Proposition of Sanctions for Perpetrators*, 12 *GENDER & BEHAV.* 6247, 6248, 6252–53 (2014). Thus, the gender of the adjudicator is "a significant factor in judgments of sexual assault scenarios." Untied et al., *supra*, at 967; *see also* Worthen & Varnado-Sullivan, *supra*, at 309 (suggesting that females are more prone to bias than males when attributing responsibility for sexual abuse among same-gender individuals).

previously experienced sexual violence. Inclusion of a sentence explaining the gender disparity for sexual assault cases would also benefit this category.

Fifth, if a university uses clear and convincing evidence as the standard of proof for nonsexual code violations, a plaintiff could contrast that higher evidentiary standard with the preponderance of the evidence standard used for sexual misconduct claims.

The above examples are not exclusive but offer an illustration of limited factual statements that can accompany an otherwise sufficient allegation of causality. While these factual circumstances have tenable nondiscriminatory explanations, they also support an inference of plausible discriminatory bias at the dismissal stage. Unlike the pleading standards required by a majority of courts, the facts in this framework are generalized and easily attainable without discovery. When combined with the particularized allegations of wrongdoing and harm, the causal link sufficiently establishes plausibility and gives a defendant notice of the claim.

When a court assumes these proposed facts are true, the causal connection between improper motive and erroneous conduct satisfies *Twombly* and *Iqbal*. The Southern District of Ohio recognized the appropriateness of this pleading structure in *Wells v. Xavier University*.<sup>301</sup> In *Wells*, the court held that the defendant's allegation that the university discriminated against him to prove its commitment to OCR's sexual assault policies was sufficient to withstand a motion to dismiss.<sup>302</sup> The court did not require additional evidentiary support for this statement and reserved the issue of proof for summary judgment.<sup>303</sup> Judges that require plaintiffs to further support similar accusations with discriminatory statements or statistics misinterpret plausibility pleading and the judiciary's role in resolving a motion to dismiss.<sup>304</sup> Thus, by returning the causal hurdle to its appropriate position, plaintiffs can more easily establish the elements of a reverse Title IX claim. In addition to conforming with plausibility requirements, this standard is uniquely flexible to account for the gender disparity that accompanies sexual assault crimes.

Courts that resist this pleading approach may argue that the limited circumstances described above support only disparate impact discrimination, not discriminatory motivation. While it is possible that these events constitute disparate impact, discriminatory animus is an equally likely conclusion when viewed in conjunction with the low reporting rates for female perpetrators. Explanations of the current climate of sexual assault are further helpful in informing a judge's common sense. As the *Iqbal* Court explained, judges may rely on their experiences and common sense to

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301. 7 F. Supp. 3d 746 (S.D. Ohio 2014).

302. *See id.* at 751.

303. *See id.* ("Plaintiff's Complaint puts Defendants on adequate notice that he contends they have had a pattern of decision-making that has ultimately resulted in an alleged false outcome that he was guilty of rape. Whether Plaintiff can unearth adequate evidence to support such claim against further challenge remains to be seen.")

304. *See, e.g., Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 475 (S.D.N.Y. 2015).

influence their judgments of plausibility.<sup>305</sup> A judge is not restricted to the four corners of a complaint, and the pleading stage is too early for courts to preclude discriminatory animus. Although disparate impact may be more probable, discriminatory intent is nonetheless plausible. Because the pleading standard is plausibility not probability, reverse Title IX claims that adhere to this pleading framework should proceed to discovery.

*C. Using Limited Discovery to Reduce Litigation Costs  
and Avoid a Catch-22 Scenario*

The main drawback of flexible pleading for reverse Title IX actions is the economic cost universities endure in defending against these lawsuits. Discovery expenses typically make up half of the total costs of litigation and can be financially debilitating.<sup>306</sup> The solution, however, is not to implement a pleading standard that is impossible to satisfy. Rather, courts should allow limited discovery on the causality element before ruling on a motion to dismiss. This limited discovery further avoids the possibility that plaintiffs will be caught in a catch-22 and have their claims judged on informational asymmetry rather than the merits.

The vast majority of reverse Title IX lawsuits do not suffer from informational deficiencies on the first part of an erroneous outcome claim—i.e., the flaws during the disciplinary proceeding that resulted in an inappropriate sanction. Rather, these circumstances are extremely well pleaded throughout the complaint, and cases are rarely dismissed on this ground. The greater catch-22 problem lies with the causal link to discriminatory bias. The two-part pleading standard advocated above maintains that this causal element is adequately pled by including a “because of” statement accompanied by one or two limited factual circumstances that could give rise to an inference of bias. This standard does not require the plaintiff to describe particular discriminatory statements by the university or to identify a similarly situated individual of the opposite sex who received favorable treatment. The problem, however, is that altering an established pleading regime—even one that is improperly interpreted and misapplied—does not occur overnight. Courts may be reluctant to advance reverse Title IX claims to discovery due to the associated economic costs. For courts that still harbor doubts about the sufficiency of the causal element, limited discovery should be permitted before conclusively ruling on a motion to dismiss.

The use of limited discovery to support plausibility is not novel<sup>307</sup> but has rarely been applied in the reverse Title IX context. Courts reviewing civil

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305. See *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

306. See John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) (acknowledging that “discovery costs [can] comprise between 50 percent and 90 percent of the total litigation costs” in each case).

307. See, e.g., Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 54 (2010); Malveaux, *supra* note 216, at 745 (advocating for the use of predissmissal discovery); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 30 (2009) (“[A] better approach might be to permit judges to identify those cases

rights cases are increasingly permitting parties to take targeted discovery before determining that a plaintiff's claims are implausible.<sup>308</sup> The use of restricted early stage discovery for Title IX cases should focus on the causal element to determine whether discrimination is a plausible explanation for the university's conduct. Engaging in early discovery on this element reduces the likelihood that a catch-22 will materialize, while simultaneously limiting a defendant's exposure to discovery costs if discrimination is not a viable theory.<sup>309</sup> Furthermore, authorizing limited discovery is relatively risk free for the court: a judge has discretion to approve early stage discovery requests, and use of this discretion is largely unreviewable.<sup>310</sup> An order permitting targeted discovery will not subject the court to appellate review, ensures that plaintiffs can access discriminatory data solely in the defendant's possession, and reduces long-term discovery costs if discrimination is not plausible. Where material evidence of discrimination is likely to be within the defendant's control, courts should afford plaintiffs latitude in pleading the affected elements and grant access to discovery.<sup>311</sup> For these reasons, courts should permit discovery on the causal connection between wrongdoing and discrimination prior to dismissing the action, particularly if the proposed two-prong pleading framework recommended above has been satisfied.

It is conceivable that courts will nonetheless resist the use of pre-dismissal discovery on the basis that the economic costs still unfairly burden the defendant if a claim is not viable. In many instances, the nature of the causal discovery can be accomplished with little or no burden to the university.<sup>312</sup> Nonetheless, to resolve this concern, plaintiffs could be responsible for paying the costs of any preliminary discovery that a court contends is necessary to determine plausibility.<sup>313</sup> While shifting this economic burden may be disfavored by plaintiffs, it is a small price to ensure the viability of reverse Title IX claims.

#### D. Why the New Pleading Framework Matters

Reverse Title IX actions do not provide plaintiffs with meaningful monetary recovery, especially given the unavailability of punitive damages.<sup>314</sup> Indeed, the current pleading climate suggests that due process

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where additional facts are needed to support the needed inference and reserve judgment on the motion to dismiss until after limited, focused discovery on that issue can occur.”).

308. See Brown, *supra* note 201, at 1294 (advocating for courts to delay ruling on dismissal motions so that the plaintiff has an opportunity to obtain discovery); Malveaux, *supra* note 216, at 745 (explaining that “some judges are even permitting the parties to take limited, targeted discovery before ruling on a 12(b)(6) motion to dismiss in which the defendant claims that the plaintiff's claims are implausible”); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 107–08 (2010).

309. See Noll, *supra* note 216, at 141.

310. See Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 513 (2010).

311. See Caraballo v. Puerto Rico, 990 F. Supp. 2d 165, 172 (D.P.R. 2014).

312. See Miller, *supra* note 308, at 108.

313. See Spencer, *supra* note 307, at 31.

314. See Macon et al., *supra* note 71, at 431–32.



and breach of contract actions, which are often brought alongside reverse Title XI actions, are easier to plead and thus more likely to proceed to discovery. Why, then, do plaintiffs insist on asserting reverse sex discrimination claims?

The driving force behind reverse Title IX actions is the desire to proclaim political outrage at the extent to which OCR has manipulated the educational disciplinary framework. OCR's hyperfocus on victim rights has created an environment in which universities are pressured to support OCR's sexual assault agenda instead of promoting due process. It is easier and more economically rewarding for universities to comply with OCR guidelines and convict male assailants than to fight for the rights of those that are accused. With Title IX lawsuits, accused students seek to swing the sexual assault pendulum back to a sturdy midpoint that balances the interests of both victim and perpetrator. Alleged perpetrators seek judicial declarations that their rights matter and further wish to hold OCR accountable for violating these rights. Reverse Title IX lawsuits are generally not about money. They are a public statement that the agency responsible for prohibiting sex discrimination in educational institutions has created a hostile environment for accused perpetrators based on gender. Because OCR failed to equally protect male students, alleged perpetrators have no choice but to seek judicial relief.

While the erosion of legal rights by OCR is fundamentally problematic, the narrower legal issue of causal pleading is more detrimental to plaintiffs. The majority's pleading framework denies accused perpetrators their final chance to protect their liberty and property interests and eliminates any relief from OCR's overreaching. This heightened pleading standard has triggered "intense societal controversy over the judicial system's accessibility."<sup>315</sup> The implementation of a new causal pleading scheme is thus necessary to ensure accused perpetrators receive their day in court. Without this flexible pleading standard, accused perpetrators will continue to be systematically denied access to the courthouse through a basic misunderstanding of plausibility requirements. Denying alleged assailants even the potential for judicial relief is a fundamental breach of justice.

Additionally, the proposed causal framework ensures consistency among pleading standards in civil rights cases. Title IX is not the first civil rights statute to be negatively impacted by *Twombly* and *Iqbal*. Rather, the unfavorable effects of heightened pleading are well documented in the employment discrimination context under Title VII.<sup>316</sup> Similar to the majority's pleading approach to Title IX cases, courts analyzing Title VII actions routinely require plaintiffs to plead a prima facie case of

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315. Michael Eaton, *The Key to the Courthouse Door: The Effect of Ashcroft v. Iqbal and the Heightened Pleading Standard*, 51 SANTA CLARA L. REV. 299, 314 (2011).

316. See O'Neil, *supra* note 216, at 158–75; Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1639–77 (2011); J. Scott Pritchard, Comment, *The Hidden Costs of Pleading Plausibility: Examining the Impact of Twombly and Iqbal on Employment Discrimination Complaints and the EEOC's Litigation and Mediation Efforts*, 83 TEMP. L. REV. 757, 773–83 (2011).

discrimination. Scholars have criticized this position as a misinterpretation of *Twombly* and *Iqbal* and have advocated for the adoption of new structures that either lessen the plaintiffs' pleading burdens or ensure plaintiffs have meaningful but limited access to predismissal discovery.

For example, Professor Joseph Seiner proposed a five-part pleading framework for Title VII plaintiffs alleging intentional discrimination. To successfully plead employment discrimination, a plaintiff must simply identify (1) the victim; (2) the protected characteristic; (3) the nature of the discrimination suffered, including the specific harm or adverse action; (4) the date and time of the discrimination; and (5) the causal link.<sup>317</sup> This recommended framework is in line with academic scholarship on post-*Twombly* pleading requirements for civil rights cases.<sup>318</sup> With regard to establishing the causal link, Professor Seiner notes that a plaintiff need only indicate that the adverse action was taken by the defendant against the plaintiff because of her membership in a protected class.<sup>319</sup> This basic causal allegation mirrors the first part of the recommended reverse Title IX pleading framework and establishes consistency between the pleading proposals for Title VII and Title IX claims.

Furthermore, the implementation of uniform pleading standards for civil rights cases saves resources and avoids dismissals based on the biases and temperament of individual judges. As demonstrated in Part III.C, courts have been inconsistent in their analysis of reverse Title IX complaints, leaving plaintiffs with substantial uncertainty about how to plead their claims. Plaintiffs are unable to account for the individual perceptions and worldviews of each judge and are unfairly subject to the whims of the court. A consistent pleading framework helps define the parameters of plausibility and promotes uniformity among courts. This uniformity may also reduce litigation costs because "plaintiffs would not be required to engage in extensive pleadings and defendants would not have to respond to lengthy complaints."<sup>320</sup> Presently, most reverse Title IX complaints are more than fifty pages in length.<sup>321</sup> Thus, a more flexible and predictable pleading standard could enhance efficiency at the beginning of the lawsuit and is necessary to ensure access to justice.

#### CONCLUSION

The climate of Title IX sexual assault litigation is changing. Previously viewed as a victim protection statute, Title IX is increasingly being invoked by accused perpetrators of sexual violence to demand fair and equitable disciplinary proceedings. This influx of reverse Title IX litigation comes on the heels of OCR's updated sexual assault guidelines. The 2011 DCL forced

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317. See Seiner, *supra* note 283, at 1043–47.

318. See *id.* at 1057.

319. See *id.* at 1047.

320. *Id.* at 1055.

321. See, e.g., Complaint and Jury Demand, *Neal*, *supra* note 152 (totaling ninety pages in length); Complaint, *Univ. Sys of Ga.*, *supra* note 114 (fifty-eight pages); Complaint, *Wesleyan Univ.*, *supra* note 114 (sixty pages).

universities to lower the standard of proof for sexual misconduct cases and mandated adoption of decidedly provictim policies. While this provictim stance sought to eliminate educational indifference to sexual assault, it neglected to protect the basic due process rights of accused perpetrators. By threatening to withdraw federal funding for noncompliance, OCR unwittingly created a discriminatory environment against alleged male perpetrators. Accused assailants frequently endure skewed investigatory and adjudicatory processes that lack basic truth-seeking structures. In this manner, OCR has sacrificed fairness and due process to support its policy agenda. As a result, males claim that they are invariably found guilty of sexual violence.

Unfortunately for accused students, the doors of justice have not only been shut by OCR and universities, but they have also been locked by district courts. Accused students seeking vindication of their rights are routinely turned away from the courthouse at the motion to dismiss stage. The empirical analysis illustrates that the majority of courts apply an inappropriately high pleading standard that results in dismissal of almost all reverse Title IX actions. Rather than viewing complaints as a whole and recognizing that a “because of” causal statement is both factual and legal, courts improperly require plaintiffs to showcase evidence of discrimination at the outset of the lawsuit. This hurdle is impossible to satisfy at the pleading stage and results in an unfortunate catch-22 scenario.

To remedy this flawed pleading structure, a flexible causal standard must be implemented that complies with *Twombly*, *Iqbal*, and *Swierkiewicz*. This new pleading regime encompasses two elements: (1) a simple causal allegation that the sex discrimination occurred *because of* the accused perpetrator’s gender and (2) limited factual circumstances that support a general finding of bias. The second prong does not require detailed factual or evidentiary support; rather, allegations of implicit bias, general university or public policy shifts towards provictim procedures, and disciplinary irregularities compared with nonsexual misconduct violations are sufficient. By altering the causal pleading framework in this manner, courts ensure that reverse Title IX complaints can ride the wave to discovery instead of drowning for insufficient evidence.