AN EXAMINATION OF U.S. AND U.K. PROCEDURES GOVERNING SEXUAL MISCONDUCT INVESTIGATIONS IN UNIVERSITIES

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I. INTRODUCTION

One night in March of 2020 at the University of Oxford, a PhD student named Harriet walked into a large seminar room where a small group of classmates awaited her.[1] Harriet told the group how a fellow

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student sexually assaulted her on multiple occasions over the course of several months.[2] Harriet did not wish to file a criminal complaint; she knew that, statistically, the odds of her alleged attacker being convicted were not promising.[3] Instead, she filed a formal complaint with Oxford.[4] A staff member told Harriet that they initiated an investigation.[5] After six months, Harriet was informed that Oxford would not fully investigate the allegations because of Harriet's "refusal to go to the police."[6] When Harriet complained to another Oxford administrator, they advised Harriet to go to the police because "the college's non-academic disciplinary procedure wasn't meant for serious sexual misconduct."[7] Bewildered by Oxford's response, Harriet listened in astonishment as the other students in the seminar room explained how their allegations of sexual misconduct were similarly dismissed offhand.[8]

"Sexual assault" is defined as, "penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."[9] "Sexual harassment" encompasses a broader range of acts, including, but not limited to, repeated and/or unreciprocated sexual advances, unwanted sexually explicit photos, emails, or text messages, and verbal harassment of a sexual nature, including jokes referring to sexual acts or sexual orientation.[10] For the purpose of this Note, "sexual misconduct" will be used as an umbrella term to encompass either sexual assault or sexual harassment.

In the United Kingdom ("U.K."), sexual misconduct is akin to a pandemic. A recent survey indicates that 62% of all students are victims of sexual misconduct at British universities, while only 6% report

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[1] Alex Howlett, *'What We Fear as Women': Sexual Abuse in UK Universities*, AL JAZEERA (Nov. 2, 2021), https://www.aljazeera.com/features/2021/11/2/what-we-fear-as-women [https://perma.cc/RUU5-GUCK].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Howlett, *supra* note 1.

[8] *Id.*

[9] FEDERAL BUREAU OF INVESTIGATION: UNIFORM CRIME REPORT CRIME IN THE UNITED STATES, 2013 (2013).

[10] *Sexual Harassment*, RAINN, https://www.rainn.org/articles/sexual-harassment?gclid=Cj0KCQjw5JSLBhCxARIsAHgO2ScG1NlCLf35UdeqCs-ttfzM4YJo7K1PatZ2nJhu6tJMoE5lw0nczK0aAokjEALw_wcB [https://perma.cc/UHY7-9SC2] (last visited Oct. 10, 2021).

the misconduct to their university.[11] Even more concerning is the fact that many prominent U.K. universities have, in recent years, denied having received any reports of sexual misconduct. However, U.K. students have taken to the internet to publicly name their attackers and the universities have failed to proceed with formal grievance procedures.[12] By contrast, in the United States, 13% of all undergraduate and graduate students are the victim of attempted or completed sexual violence (i.e., sexual assault) during their time at U.S. universities, though this figure is also likely inaccurate when accounting for students who do not report.[13] These figures have remained largely unchanged since the first in-depth survey of sexual misconduct on university campuses in 1987,[14] and while not ideal, they are certainly preferable to comparable statistics in the U.K.

In the United States, while students are free to file both criminal or civil complaints of sexual misconduct, many students prefer to instead file a complaint through their universities' Title IX department.[15] Ever since Title IX was first passed in 1972, universities have been rapidly adapting to the legislative, judicial, and executive demands that they develop investigatory and adjudicatory procedures concerning sexual misconduct.[16] Today, Title IX requires that all federally-funded educational institutions abide by a uniform set of procedures in handling an allegation of sexual misconduct.[17] Despite its

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[11] *Research*, REVOLT SEXUAL ASSAULT, https://revoltsexualassault.com/research/ [https://perma.cc/7LTH-CQPA] (last visited Sept. 1, 2021).

[12] Isabelle Stanley, *6 Universities Say They Have 'Zero' Reports of Sexual Violence, But the Numbers Don't Add Up*, VICE (May 24, 2021, 4:00 AM), https://www.vice.com/en/article/5db3p3/uk-universities-zero-sexual-violence-reports-investigation [https://perma.cc/5SVC-N6Q4].

[13] *Campus Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/campus-sexual-violence [https://perma.cc/95GM-GSD8] (last visited Sept. 1, 2021) [hereinafter *RAINN*].

[14] M.P. Koss, C.A. Gidycz & N. Wisniewski, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING & CLINICAL PSYCH. 162-70 (1987) (discussing sexual assault statistics amongst university students).

[15] For clarity, there is no federal or state law - and certainly no university rule - that can constitutionally preclude a student from simultaneously filing Criminal, Civil, and Title IX complaints against the alleged offender, subject to the statute of limitations and Title IX equivalent provisions.

[16] *See infra* Part II.

[17] DEP'T OF EDUC. OFF. FOR C.R., NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE (2020) [hereinafter *Nondiscrimination on the Basis of Sex*].

uniformity, Title IX remains a controversial and poorly understood set of regulations.[18]

In August 2021 as my friend Zach prepared to fly off to the U.K. for a year at the London School of Economics, I asked him if he was familiar with the school's sexual misconduct reporting and adjudicatory procedures. To my disappointment, but unsurprisingly, he responded, "no." Upon review, it is apparent that the U.K. does not have an overarching regulatory regime like Title IX to govern investigatory and adjudicatory procedures for university sexual misconduct cases.[19] Instead, U.K. universities are able to handle – or not handle – sexual misconduct allegations as they see fit.[20]

This absence of a formal and enforceable adjudicatory regime has been both an empirical and unconscionable failure. This Note will begin by laying out the historical context in which Title IX was passed, how its use developed over the course of several decades, and the current black letter law governing Title IX sexual misconduct investigations. This Note will then proceed to examine the socio-political circumstances that failed to produce an overarching Title IX equivalent in the U.K., identify the policies most frequently used by individual U.K. universities, and highlight how these policies both lead to unjust outcomes and stifles reforms. As both nations have universities that attract students from across the globe,[21] their students are best served by being familiar with the overlapping and conflicting procedures that govern sexual misconduct investigations and adjudications. However, in order to effectively preserve both the physical safety and civil liberties of its students, the U.K. must develop an overarching regime

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[18] Greta Anderson, *Campus Sexual Assault Policy Changes Not Widely Known*, INSIDE HIGHER ED (June 29, 2020), https://www.insidehighered.com/news/2020/06/29/survey-public-shows-lack-knowledge-about-title-ix-changes [https://perma.cc/2KSS-H64T].

[19] *See infra* Part III.

[20] WOMEN AND EQUALITIES COMMITTEE, SEXUAL HARASSMENT OF WOMEN AND GIRLS IN PUBLIC PLACES, 2017-19, HC 701, at 48 (UK) [hereinafter *The Committee*].

[21] *See* Sally Peck, *Why are so Many British Students Going to American Universities?*, THE TELEGRAPH (Oct. 11, 2019, 11:53 AM), https://www.telegraph.co.uk/education-and-careers/2019/10/11/many-british-students-going-american-universities/ [https://perma.cc/FF22-Y3YH] (discussing statistics and reasons behind U.K. students desire to attend American universities). *See also International Student Recruitment Data*, UNIV. UK (July 12, 2022), https://www.universitiesuk.ac.uk/universities-uk-international/explore-uuki/international-student-recruitment/international-student-recruitment-data [https://perma.cc/LMB2-BP9U] (discussing statistics regarding U.S. students studying in the U.K).

governing universities' investigation and adjudication of sexual misconduct claims.[22]

II. THE UNITED STATES TITLE IX SYSTEM

A. *Legislative History*

In 1916, the National Woman's Party ("NWP") was formed to create a lobbying group specifically for the Women's Suffrage movement.[23] From 1917 to 1919, the NWP organized the Silent Sentinels protest, led by Sarah Paul, in front of the White House.[24] Nearly 2,000 women took part in the protest – at that point, the largest women's protest in history – and hundreds were harassed, arrested, and tortured for their involvement.[25] The NWP received unprecedented support in the wake of the United States' involvement in World War I:[26] how could the United States lay claim to moral authority on the world stage when, at home, half of its constituents lacked the right to vote?

In 1920, following the passage of the Nineteenth Amendment,[27] the NWP shifted their efforts to lobby for the passage of the Equal Rights Amendment ("ERA"), which would end legal distinctions between men and women in divorce proceedings, property acquisitions, employment matters, and other areas affecting a woman's independence and liberty. Unlike the Nineteenth Amendment, the ERA failed for decades to generate the social and political momentum necessary for passage.[28] In 1979, the ERA was passed by Congress and put forth

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[22] This Note makes frequent use of the terms "complainant" and "respondent," legally prescribed terms under Title IX that do not denote guilt or innocence. *Infra*, notes 79 and 80, respectively. This note places great emphasis on the importance of procedural due process – rather than evaluating the merits of specific allegations – so terms such as "survivor" or "perpetrator," are generally avoided. That being said, for more information on the infrequency of false sexual misconduct allegations, see *Myths about Sexual Assault Reports*, BROWN UNIV., https://www.brown.edu/campus-life/health/services/promotion/sexual-assault-dating-violence/myths-about-sexual-assault-reports [https://perma.cc/KT7J-TZBX].

[23] *National Woman's Party*, ALICE PAUL INST., https://www.alicepaul.org/nwp/ [https://perma.cc/N44R-GTHT] (last visited Oct. 4, 2022).

[24] *Id.*

[25] Belinda A. Stillion Southard, *Militancy, Power, and Identity: The Silent Sentinels as Women Fighting for Political Voice*, 10 RHETORIC & PUB. AFFS. PRESS 399-401 (2007).

[26] *Id.*

[27] U.S. CONST. amend. XIX.

[28] *Historical Overview of the National Womans Party*, LIBR. OF CONG., https://www.loc.gov/collections/women-of-protest/articles-and-essays/historical-

to the states for ratification; however, a massive conservative women's movement led by Phyllis Schlafly successfully convinced enough state legislatures that the ERA would eradicate existing and necessary protections for women, such as those protecting women from the military draft and giving women favorable alimony and child custody judgments.[29] As too few states ratified the ERA before Congress' deadline, the ERA failed to take effect.[30] As the NWP dedicated most of its political capital towards the ERA, other women's issues fell to the wayside from 1920 until the 1960s.[31]

In the early 1960s, Dr. Martin Luther King, Jr. and the National Association for the Advancement of Colored People ("NAACP") led nationwide protests to bring attention to then-existing laws discriminating against people of color.[32] Unlike the NWP and the Nineteenth Amendment, the NAACP and Dr. King were the beneficiaries of then-modern technologies (radio, television, etc.), bringing their message to a national audience.[33] In the wake of overwhelming support, the Civil Rights Act of 1964 was passed, ending discrimination in places of public accommodation or employment on the basis of race, gender, sex, or national origin.[34] Title VI – enacted the same year – prohibited discrimination in federally-funded education programs on the basis of race, gender, and national origin, but not sex explicitly.[35]

Even with the passage of these two laws, the United States had little awareness of both the frequency and severity of sex discrimination throughout the country in the 1960s. "Sex discrimination" was

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overview-of-the-national-womans-party/ [https://perma.cc/UXL7-XYNQ] (last visited Oct. 4, 2022).

[29] Lesley Kennedy, *How Phyllis Schlafly Derailed the Equal Rights Amendment*, HISTORY (Mar. 19, 2020), https://www.history.com/news/equal-rights-amendment-failure-phyllis-schlafly [https://perma.cc/PBY7-SW96]. *See also* Jennifer Granat, *The Failure of the Equal Rights Amendment*, GEO. L. LIBR. (1997), https://repository.library.georgetown.edu/handle/10822/1051268 [https://perma.cc/JPE8-4FTT].

[30] *Id.*

[31] *See generally* Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755, 762-63 (2004).

[32] *See generally* Amanda Philley, *The Civil Rights Movement: The Power of Television*, 2012 3690 J. FIRST-YEAR STUDENT RSCH. WRITING 6 (2012).

[33] *Id.*

[34] *See* 42 U.S.C. § 2000(a); 42 U.S.C. § 2000e-2.

[35] *See* Kristen M. Galles, *Filling the Gaps: Women, Civil Rights, and Title IX*, A.B.A (July 1, 2004), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol31_2004/summer2004/irr_hr_summer04_gaps/ [https://perma.cc/3RPZ-QTUK].

just introduced into the lexicon,[36] and the first major study concerning sex discrimination would not be completed until 1987.[37]

In the early 1970s, the Women's Equity Action League ("WEAL"), a small organization based in Ohio, began filing administrative class action complaints against nearly 250 universities that received federal contracts.[38] WEAL pointed to an executive order that prohibited federal contractors from discriminating in employment on the basis of race, color, religion, and national origin.[39] The order was later amended to include sex discrimination.[40] The aforementioned universities all used federal contractors, and were, therefore, subject to the sex-discrimination provisions of the order.[41] WEAL also instructed everyone who contacted the organization to write to their congressperson or senator detailing their experiences.[42] The wealth of lawsuits and constituent outreach brought sex-based discrimination to national attention.

Congresswoman Edith Green, Chair of the Special Sub-Committee on Education of the Committee on Education and Labor and a member of WEAL's Executive Board, drafted what eventually became Title IX.[43] Congressional hearings on Title IX were mostly limited to sex discrimination concerning professional employment.[44] Despite this limitation, Congress was presented with a binder of over 1,200 pages of data and anecdotes of sex discrimination in higher education.[45] Despite the allegations levied against them in these 1,200 pages, and the broad implications Title IX would have on their day-to-day operations, most higher education institutions did not know that Title IX was being presented to Congress.[46] Those few who did know about the bill did not believe it would have any meaningful impact.[47]

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[36] Bernice Resnick Sandler, *Title IX: How We Got It and What a Difference it Made*, 55 CLEV. STATE L. REV. 473 (2007).

[37] *See* Koss, Gidycz & Wisniewski, *supra* note 14.

[38] Sandler, *supra* note 36, at 475-76.

[39] *Id.* at 475.

[40] Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965). *See also* Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 17, 1967).

[41] Sandler, *supra* note 36, at 475.

[42] *Id.* at 476.

[43] *Id.* at 477.

[44] *Id.*

[45] *Id.* at 477-78.

[46] *Id.* at 478.

[47] Sandler, *supra* note 36, at 478.

In 1972, Congress passed, and President Richard Nixon signed, Title IX of the Education Amendments.[48] Title IX reads as follows: "[n]o 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 . . . ."[49]

The Office for Civil Rights ("OCR") – which operates under the Department of Education – became the administrative agency responsible for determining how Title IX applied to educational institutions.[50] The most immediate consequence of Title IX was university funding of women's athletics. It became abundantly clear that most universities failed to provide equivalent funding for women's sports as they provided for men's sports.[51] In fact, many universities offered no funding for women's athletics.[52] Following the passage of Title IX, universities were required to take several steps to ensure women in college had equal opportunities to participate in collegiate sports, such as through athletic scholarships, and that those sports programs would be as well funded as men's programs.[53] In the years following the passage of Title IX, women's participation in athletics skyrocketed more than tenfold.[54] For the next few decades, Title IX would be predominantly recognized for this success.[55]

B. *Judicial and Executive Developments*

Nowhere in the text of Title IX do the terms "sexual harassment," "sexual assault," or "sexual misconduct" appear.[56] As with countless other laws, it initially fell to the courts to determine what Title IX

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[48] *50th Anniversary of Title IX*, RICHARD NIXON FOUND. (June 16, 2022), https://www.nixonfoundation.org/2022/06/50th-anniversary-title-ix/ [https://perma.cc/C2Z6-KLW6].

[49] 20 U.S.C. § 1681(a).

[50] Sandler, *supra* note 36, at 480.

[51] *Id.* at 480-82.

[52] *Id.*

[53] *Id.* at 482-84.

[54] *Fast Facts: Title IX*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=93 [https://perma.cc/Y4BE-9GVK] (last visited Oct. 4, 2022).

[55] *See generally* Sarah Pruitt, *How Title IX Transformed Women's Sports*, HISTORY (June 11, 2021), https://www.history.com/news/title-nine-womens-sports [https://perma.cc/4T54-N8YR]. *See generally* Sandler, *supra* note 36, at 482.

[56] *See* 20 U.S.C. § 1681(a).

meant and what responsibilities it created for students, universities, and other interested parties.

In *Cannon v. University of Chicago*, the Supreme Court ruled that Title IX contains an implied, private cause of action against universities that fail to uphold their Title IX commitments.[57] In *Franklin v. Gwinett County Schools*, the Court ruled that Title IX provides students protection against sexual misconduct and that complainants in civil suits relating to a university's Title IX failures were entitled to seek monetary damages as relief.[58]

One of the most consequential Title IX cases was *Davis v. Monroe County Schools* in 1999, in which a fifth-grade girl was repeatedly harassed by a boy in her class.[59] The boy would force Davis up against the wall and feel her breast, chase her in the schoolyard, and make graphic sexual comments about her.[60] Davis's mother reported the misconduct to her teachers, principals, and the superintendent.[61] Even still, it took three months to get the boy's seat moved further away from Davis's.[62] Realizing the school would not protect Davis, her mother reported the boy to the local police, who removed the boy from the school.[63] Davis' mother then sued the school under Title IX.[64] For the first time, the Supreme Court ruled that student-on-student misconduct was prohibited under Title IX.[65]However, the Court in *Davis* ruled that in order for a school to be liable under Title IX for failure to prevent student-on-student misconduct, the plaintiff must prove that the school had "actual knowledge" of the misconduct, that the school was "deliberately indifferent" to the misconduct, and that the misconduct was "so severe, persistent, and objectively offensive that it effectively bars the victim's access to educational opportunity."[66]

Many found the "severe, persistent, and objectively offensive" standard to be a prohibitively high threshold for liability.[67] On the very

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[57] Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979).
[58] Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75-76 (1992).
[59] Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 632 (1999).
[60] *Id.* at 633.
[61] *Id.* at 633-34.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 635.
[65] Sandler, *supra* note 36, at 485.
[66] *Davis*, 526 U.S. at 650.
[67] *See generally* R. Shep Melnick, *Analyzing the Department of Education Final Title IX Rules on Sexual Misconduct*, BROOKINGS INST. (June 11, 2020), https://www.brookings.com.edu/research/analyzing-the-department-of-educations-

last day of the Clinton Administration, OCR explicitly rejected the Supreme Court's framework.[68] OCR argued that the Court's framework applied to civil lawsuits for monetary damages under Title IX but did not apply to administrative regulations establishing what schools must do to qualify for federal funding.[69] However, there has not been a Supreme Court case that has addressed OCR's rejection of the standard promulgated in *Davis*. This conflict has not been resolved by either the courts or by statute, and today, universities follow OCR standards for Title IX liability instead of the standards laid out by the Court in *Davis*.[70]

In 2011, President Barack Obama's Department of Education released an open letter to U.S. universities, emphasizing their duty to provide students with an education devoid of discrimination: "[t]he sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime."[71] The Dear Colleague Letter ("DCL") made it clear that federally funded educational institutions were responsible for protecting students.[72]

To simplify, the DCL outlined three general guidelines for federally funded universities: (1) disseminate a notice of nondiscrimination; (2) designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX; and (3) adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.[73] The DCL also went to great lengths to clarify the recommended – but not required – procedural steps in a Title IX inquiry, the jurisdictional reach of universities, the burdens of proof required to find a respondent liable, and certain procedural safeguards designed to ensure a less adversarial investigation.[74]

In 2020, President Donald Trump's Department of Education enacted a series of amendments ("2020 Amendments") that largely

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final-title-ix-rules-on-sexual-misconduct/ [https://perma.cc/L965-B5YC]. *See also* Melnick, *infra* note 63.

[68] R. Shep Melnick, *The Strange Evolution of Title IX*, NAT'L AFFS. (2018), https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix [https://perma.cc/UDS9-2FQP].

[69] *Id.*

[70] *Id.*

[71] DEP'T OF EDUC., OFF. FOR C.R., DEAR COLLEAGUE LETTER (Apr. 4, 2011).

[72] *Id.*

[73] *Id.*

[74] *Id.*

repealed many, if not most, of the Obama-era Title IX recommendations.[75] Additionally, the 2020 Amendments instituted a wide range of mandatory regulations – as opposed to recommended guidelines – that federally-subsidized universities are required to follow as part of their duties under Title IX to investigate sexual misconduct.[76] Legal scholars and political commentators tend to agree that the 2020 Amendments create a wealth of clarity concerning what universities are legally entitled or required to do with respect to Title IX investigations, much more so than under previous presidential administrations.[77] Critics of the 2020 Amendments, however, argue that there has been too great a shift in the pendulum of procedures away from those tending to favor "complainants"[78] of sexual misconduct and towards "respondents"[79] of sexual misconduct allegations.[80] Current President Joe Biden has vowed to repeal the 2020 Amendments, and the Department of Education proposed changes earlier this year.[81] However, these are proposals, and the 2020 Amendments are still in effect.[82] It is through the lens of the 2020 Amendments that the key procedures governing the life cycle of a Title IX inquiry shall be identified and evaluated.

C. *A Complete Title IX Investigation*

For the purpose of this analysis, assume the following hypothetical: two students, John and Jane, meet one night at a fraternity party

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[75] *Nondiscrimination on the Basis of Sex*, *supra* note 17.

[76] *Id.*

[77] Jeannine Suk Gersen, *How Concerning Are the Trump Administration's New Title IX Regulations?*, THE NEW YORKER (May 16, 2020), https://www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations [https://perma.cc/BKK3-F9XZ].

[78] DEP'T OF EDUC., OFF. OF C.R., QUESTIONS AND ANSWERS ON THE TITLE IX REGULATIONS ON SEXUAL HARASSMENT 2 (2021) (The complainant is "[t]he person who has experienced the alleged sexual harassment. This person is considered a complainant regardless of whether they choose to file a formal complaint of sexual harassment under Title IX.") [hereinafter *Q&A*].

[79] *Id.* at 3 (The respondent is "[t]he person accused of the alleged sexual harassment.").

[80] Gersen, *supra* note 77.

[81] *See* Suzanne Eckes, R. Shep Melnick & Kimberly J. Robinson, *Reactions to the Biden Administration's Proposed Title IX Changes from Education Law Scholars*, BROOKINGS INST. (June 30, 2020), https://www.brookings.edu/blog/brown-center-chalkboard/2022/06/30/reactions-to-the-biden-administrations-proposed-title-ix-changes-from-education-law-scholars/ [https://perma.cc/8SJV-DWLP].

[82] *See id.*

hosted in an on-campus residential suite at Mobius University.[83] John and Jane are seen conversing and drinking for some time, and some other students take part in their conversation. John and Jane depart the party together and return together to John's private dorm room. The next morning, Jane files a Title IX complaint against John, in which she claims that John sexually assaulted her. While John admits that he had a sexual encounter with Jane, he maintains the encounter was consensual. Jane has not filed any concurrent criminal or civil charges against John related to the alleged assault. Mobius complies with the 2020 Amendment Title IX policies, although the exact titles of Title IX officers and procedures are not necessarily the same as their equivalents at other universities.[84]

Mobius must first assess whether it has proper jurisdiction to inquire into the alleged offense. Broadly, under the 2020 Amendments, universities have the authority to inquire into the allegation if it took place (1) on campus; (2) in an off-campus setting "if the school exercised substantial control over the respondent and the context in which the alleged sexual [misconduct] occurred"; or (3) in an off-campus setting if the buildings are owned or controlled by a student organization officially recognized by a postsecondary school.[85] Since the sexual encounter took place in John's private dorm room – on campus – Mobius has jurisdiction.

If the Title IX Case Manager who reviews the initial complaint believes that the allegations contained in the notice could be a violation of university policies, the Case Manager will personally meet with John and Jane in separate meetings.[86] Jane will be informed of her choice to pursue either an "Informal Resolution Process" or an "Investigative Procedure."[87] Jane does not believe a restorative (informal)

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[83] "Mobius University" is a fictitious university. The policies, procedures, and titles of individuals used in this section are based on those of Brandeis University. Brandeis University is a Title-IX compliant institution. The hypothetical on which this section is based is not based on any specific event that took place at Brandeis University.

[84] In other words, whereas Brandeis may designate an employee as their "Title IX Case Manager," an individual working at another university with similar duties/functions may be titled the "Title IX Case Officer." The 2020 Amendments do not mandate uniformity of titles, only that employees are hired for these duties/functions. *See Q&A*, *supra* note 78.

[85] *Q&A*, *supra* note 78, at 8.

[86] BRANDEIS UNIV., FORMAL COMPLAINT PROCESS: POLICY AGAINST DISCRIMINATION, HARASSMENT & SEXUAL VIOLENCE 11 (2021) [hereinafter *Brandeis*].

[87] *Id.* at 2. Both the Complainant and Respondent must agree to an Informal Resolution Process. Instead of there being an Investigative Procedure, the parties agree

process is appropriate, given the severity of her allegations, and demands an Investigative Procedure. Had Jane desired an Informal Resolution Process, John would have ten business days after Jane's compilation of the initial complaint (not the Formal Complaint) to declare if he accepts responsibility for the alleged assault.[88] John insists that the sexual encounter was consensual, so he too would have demanded an Investigative Procedure. A formal investigation will then commence.

Jane must complete a "Formal Complaint," which includes the basic facts of the allegation (identifying John, listing the date and location of the alleged assault, description of the alleged assault in narrative format, etc.). [89] John will complete a similar document. John and Jane must provide the names of potential witnesses and other sources of evidence such as texts, emails, social media posts, etc.[90]

John and Jane will each be assigned or allowed to choose an Advisor, someone to attend and represent them in their Title IX meetings. [91] Advisors can be anybody, including friends, family, a Mobius-approved support person, or private legal counsel.[92] John and Jane must review Mobius' privacy and non-retaliation policies: "[w]hile [they are] not restricted from discussing the allegations in order to be able to gather information relevant to the Formal Complaint, . . . [They are] advised about the importance [of maintaining] discretion and privacy regarding the complaint to protect the integrity of the Process."[93]

Mobius has two on-staff Title IX Investigators, both of whom–at the very least – participate in annual training on Title IX related matters, as well as anti-discrimination, harassment, and sexual violence policies.[94] The Investigators will review all documents, texts, emails, social media posts, or other volunteered evidence, including potential witnesses put forth by John and Jane. The Investigators will prepare an Investigative Report (the "Report"). This Report will,

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to mediation or other restorative justice methods. Moreover, the Informal Resolution Process necessitates that the respondent accepts responsibility for the alleged misconduct. However, while certain allegations are more appropriate for an Informal Resolution Process (ex. a student making repeated sexually suggestive comments towards another student), other allegations are of such a nature that an informal process would be inappropriate (ex. sexual assault.).

[88] *Id.*

[89] *Id.* at 5.

[90] *Id.*

[91] *Id.* at 4.

[92] *Brandeis*, *supra* note 86.

[93] *Id.* at 5.

[94] *Id.* at 8.

"summariz[e] the relevant facts obtained through the Investigative Procedure. The Investigators may draw conclusions regarding the credibility of statements by [John and Jane's] witnesses and the reliability of documentation. The Investigator will also identify any undisputed facts from the Investigation."[95] John and Jane will have the opportunity to review and comment on the Report, and the Investigators have the discretion to investigate further or amend the Report.[96]

The Title IX Case Manager will determine whether the Report alleges sufficient facts to warrant a Title IX adjudication and, if not, whether the Report alleges sufficient facts to warrant a non-Title IX based offense.[97] For the purpose of this hypothetical, the Case Manager will determine that the Report sufficiently alleges a Title IX offense. The case therefore would continue with the Mobius Title IX Grievance Process (the "Process").[98]

The adjudicatory hearing (the "Hearing") will commence. At this point, both John and Jane must have an advisor.[99] If either party does not have an advisor, Mobius will provide the party with an advisor of Mobius' choosing, at no expense to the party.[100] While Mobius has not explicitly referred to the COVID-19 pandemic in their Title IX policies, Mobius has incorporated the requisite technology to facilitate the Hearing over video conference. Only upon the mutual consent of John and Jane will the Hearing take place in person.[101]

There are no opening (or closing) statements made by either party's advisor.[102] The Investigators appear as the first witnesses, answering questions from the Hearing Panel (the "Panel") – individuals who have received similar training as the Investigators – regarding the information the Investigators learned during their investigation.[103] The Investigators will not be permitted to recommend or discourage a finding of responsibility.[104] The Panel will likewise question all witnesses, including John and Jane.[105] Following the Panel's questions, John and

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[95] *Id.* at 12.
[96] *Id.* at 13.
[97] *Id.* at 14.
[98] *Brandeis*, *supra* note 86, at 4.
[99] *Id.*
[100] BRANDEIS UNIV., TITLE IX GRIEVANCE PROCESS 6 (2021) [hereinafter *Process*].
[101] *Id.* at 9.
[102] *Id.* at 11.
[103] *Id.*
[104] *Id.* at 10.
[105] *Id.*

Jane's respective advisors have the right to ask pre-approved questions to the witnesses, similar to a courtroom cross-examination.[106]

Following the conclusion of the Hearing, in order to find John liable of the alleged sexual misconduct, a majority of the Panel must find him responsible by the preponderance of the evidence (meaning more likely than not).[107]

John and Jane will be informed of the Panel's decisions immediately and in writing.[108] Both John and Jane may file an appeal to the University Appeal Board ("UAB")[109] only if there was a procedural error somewhere in the Process, if there is new or previously unavailable information relevant to the Process, or if one of the Panel members was biased against the appealing party.[110] If there are proper grounds for appeal, UAB will determine whether to uphold, modify, or remand the decision.[111] The decision of the UAB will be submitted in writing to both John and Jane.[112]

Assuming that John is found to be responsible and that there are no applicable grounds for appeal, the Dean of Students will issue a sanction against John. Potential sanctions can range from a no-contact order to expulsion from Mobius.[113] However, it is worth noting that neither Mobius nor the 2020 Amendments "dictate that [an authority] provide any particular remedies for the complainant or disciplinary sanctions for the respondent after a finding of responsibility."[114] In fact, many prominent universities have declined to expel students they have found to be responsible for "penetration without consent," "non-consensual sex," or "intercourse without consent."[115]

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[106] *Process*, *supra* note 100, at 11.

[107] *Id.* at 12. It is worth noting that, under the 2020 Amendments, universities have the right to employ either a "preponderance of the evidence" or "clear and convincing evidence" standard in evaluating a Title IX allegation. *See Q&A*, *supra* note 78, at 30. "Clear and convincing evidence" is defined herein as mean[ing] the decision-maker must determine whether it is "highly probable" that the alleged facts are true. *See Q&A*, *supra* note 78, at 28.

[108] *Process*, *supra* note 100, at 12.

[109] *See id.* at 5-6 (noting that the UAB members are trained in the same vein as Panel members, but the UAB members cannot be the same individuals as the Panel members).

[110] *Id.* at 14.

[111] *Id.* at 15.

[112] *Id.*

[113] BRANDEIS UNIV., RIGHTS AND RESPONSIBILITIES: SECTION 20.1, RANGE OF CONDUCT ACTIONS AND SANCTIONS 46-47 (2019-2020 ed.).

[114] *Q&A*, *supra* note 78, at 14.

[115] *See* Abby Jackson, *At Yale, Students Found To Be Sexual Assailants Return To Campus*, BUS. INSIDER (Jan. 19, 2018, 12:54 PM),

Under the DCL, universities were previously advised to conclude their Title IX adjudication procedures (excluding the appeals process) within a sixty-day time frame.[116] Under the 2020 Amendments, this position was reversed: "[e]ach school 'is in the best position to balance promptness with fairness and accuracy based on [its] own unique attributes and [its] experience with its own student disciplinary proceedings,' and thus, each school has the discretion to determine its own reasonably prompt time frames."[117]

The Q&A for the 2020 Amendments notes, however, that no part of the Title IX process is, "subject to an open ended time frame."[118] Many universities today, including Mobius, endeavor to resolve or conclude the Title IX process within the previously advised sixty days, in line with previous DCR guidelines.[119] For comparison, most states have enacted a Speedy Trial Statute that requires the progression of a criminal complaint by certain dates and deadlines.[120] However, these laws often allow for extensive delays due to pre-trial motion hearings, requests for continuances, and other procedural issues that can result in a sexual assault case lasting well beyond a year.[121]

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https://www.businessinsider.com/yale-sexual-misconduct-story-2018-1 [https://perma.cc/J234-4HAQ].

[116] DEAR COLLEAGUE LETTER, *supra* note 71, at 12.

[117] *Q&A*, *supra* note 78, at 20.

[118] *Id.*

[119] For examples, see *Sexual Misconduct Policy, Resource Offices and Complaint Procedures*, UNIV. OF PA. (July 1, 2022), https://catalog.upenn.edu/pennbook/sexual-misconduct-resource-offices-complaint-procedures/ [https://perma.cc/KFD3-ZVDQ]; *Title IX Sexual Harassment and Related Conduct Policy*, GEO. WASH. UNIV. OFF. OF ETHICS, COMPLIANCE, & RISK, (Aug. 14, 2020), https://compliance.gwu.edu/title-ix-sexual-harassment-and-related-conduct-policy [https://perma.cc/76YT-5HS2]; *Title IX Sexual Harassment and Grievance Process*, MICH. CAREER & TECH. INST. (Apr. 9, 2021), https://www.michigan.gov/leo/-/media/Project/Websites/leo/Folder23/Title_IX_Sexual_Harassment__Grievance_Process.pdf [https://perma.cc/4NAB-M48P].

[120] *See Speedy Trial Rights*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 24, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/speedy-trial-rights.aspx [https://perma.cc/26GT-Q4J6].

[121] For an example of how Speedy Trial Statutes are undermined, see Phyllis Goldfarb & Arthur Leavens, *Speedy Trial and Related Issues*, *in* MASSACHUSETTS CRIMINAL PRACTICE (Eric D. Blumenson ed., 4th ed. 2012).

III. AN ABSENCE OF AN OVERARCHING REGULATORY SCHEME IN THE U.K.

A. *A Lack of Both Social Development . . .*

In 1992, Austen Donnellan was a student at King's College of the University of London.[122] Donnellan had been accused of sexually assaulting a classmate after a night of drinking and partying.[123] The classmate did not go to the police but instead to the university; she did not want the alleged assault to be made public, preferring that Donnellan be discreetly expelled.[124] Donnellan, believing his degree, career, and reputation would be ruined, went to the police and insisted that he be formally charged with sexual assault so he could face a jury of his peers. The jury found Donnellan not guilty; he subsequently filed and won a civil suit against King's College for their decision to suspend him, earning Donnellan a substantial payout.[125]

In the immediate aftermath of *Donnellan*, affirmative action taken by universities in cases of sexual misconduct was seen as a potential liability rather than an opportunity to challenge society's tolerance for such behavior.[126] In 1994, the Committee of Vice Chancellors and Principals, a non-governmental advocacy organization for U.K. universities, known today as "Universities UK" ("UUK"), published the Zellick Report, which offered guidance for how universities handle allegations of sexual misconduct.[127] Owing to the results of *Donnellan*, the Zellick Report advised universities that sexual misconduct should never be investigated via internal disciplinary procedures. "Internal action for rape and sexual assault is out of the question, regardless of whether or not the victim has any intention of reporting to the police or the preference for either party of an internal investigation."[128] The Zellick Report further advised universities that only after a formal

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[122] *How to Respond to Complaints of Sexual Violence: The Zellick Report*, NAT'L UNION OF STUDENTS, https://universityappg.co.uk/sites/default/files/field/attachment/NUS%20Zellick%20report%20briefing.pdf [https://perma.cc/EB5V-QAUH] (last visited Apr. 6, 2023).

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] GRAHAM ZELLICK, COMMITTEE OF VICE-CHANCELLORS AND PRINCIPALS OF THE UNIVERSITIES OF THE UNITED KINGDOM, FINAL REPORT OF THE TASK FORCE ON STUDENT DISCIPLINARY PROCEDURES (1994).

[128] *Id.* at 12.

criminal trial relating to the matter has concluded should universities take any disciplinary actions of their own.[129]

In the wake of *Donnellan*, there was no Parliament-imposed duty on universities to address student allegations of sexual misconduct in any particular way. The Zellick Report was the only well-known guidance being offered to U.K. universities at the time.[130] Prior to 2010, U.K. anti-discrimination laws – in other fields/industries – were governed by a series of overlapping and conflicting statutes dating back decades, none of which addressed sexual misconduct in universities.[131]

It would stand to reason then, that at the time *Donnellan* was decided, the U.K.'s understanding of sexual misconduct in universities was underdeveloped relative to the United States'. For instance, the judge in *Donnellan* said, "[a] person who is drunk, and because she is drunk consents to an act, which she would not when sober, still consents. . . . If she can't be sure she didn't consent, how can the jury?"[132]

There are a few factors that help explain how the U.K. trails behind the United States on this issue. First, by sheer volume, there are vastly more U.S. students in college: in 2020, there were approximately nineteen million Americans attending American universities,[133] whereas there were only about two and a half million U.K. students in U.K. universities.[134] Additionally, a greater percentage of

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[129] *Id.*

[130] *See generally* Universities UK & Pinsent Mason, *Guidance for Higher Education Institutions: How to Handle Alleged Student Misconduct Which May Also Constitute a Criminal Offence* (2016), https://www.universitiesuk.ac.uk/sites/default/files/field/downloads/2021-07/guidance-for-higher-education-institutions.pdf [https://perma.cc/YHF8-SJJF] [hereinafter *UUK&PM*].

[131] *See generally* The Equality Act 2010, c.15 §§ 26-27, 90-94 (UK) (listing the anti-discrimination laws established by the UK in 2010, including the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Employment Equality (Sexual Orientation) Regulations 2003), https://www.legislation.gov.uk/ukpga/2010/15/contents [https://perma.cc/4R5Z-RUAQ].

[132] William Tuohy, *London Student's Date Rape Trial Stirs Wider Debate*, LA. TIMES (Oct. 22, 1993, 12:00 AM), https://www.latimes.com/archives/la-xpm-1993-10-22-mn-48487-story.html [https://perma.cc/RKV8-JRPF].

[133] Erin Duffy, *College Enrollment in the United States from 1965 to 2020 and Projections up to 2030 for Public and Private Colleges*, STATISTA (May 31, 2022), https://www.statista.com/statistics/183995/us-college-enrollment-and-projections-in-public-and-private-institutions/ [https://perma.cc/M2HJ-ZZZJ]. Note that these numbers reflect pre-pandemic figures.

[134] D. Clark, *Higher Education in the UK - Statistics & Facts*, STATISTA (Sept. 6, 2022), https://www.statista.com/topics/6938/higher-education-in-the-uk/#dossierKeyfigures [https://perma.cc/AKQ4-QC9K]. Note that these numbers reflect pre-pandemic figures.

U.S. students than U.K. students live in on-campus housing.[135] This means that not only are incidents of sexual misconduct more visible in the U.S. because the students are more concentrated together, but more students see this injustice altogether, creating quantifiably more student outrage than what would be seen in the U.K. With more outrage comes more protest, and with more protests comes more awareness of the issue at the levels of government where change can be actualized.

A second explanation arises from the fact that the United States has vastly more educational programs geared toward women's issues. By 1977, there were 276 women's studies programs in the United States, and today, there are more than 700.[136] In the U.K., however, by 2012, there were no undergraduate degrees in women's studies.[137] If sexual misconduct is one of the most prevalent women's issues, but there is no program through which students can be educated about sexual misconduct, there can be little expectation that those students would raise the issue at a national level.

Another explanation arises from the fact that the United States had vastly more organized networks of women's rights activist groups, at least relative to the U.K. While in the United States, NWP had chapters across the nation (at least by the time they were pursuing the ERA), and WEAL was almost singularly focused on enacting Title IX, the women's rights groups in the U.K. were relatively decentralized and non-hierarchical.[138] This meant that these groups in the U.K. often lacked a unified voice in policy and that any victories resulting directly from the work of these groups arrived at a snail's pace.[139]

B. . . . *and Significant Parliamentary Action.*

Those victories are little to write home about. In 2010, the Brown Ministry in Parliament passed the Equality Act.[140] The Equality Act supplants several other statutes including, but not limited to, the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Employment Equality (Sexual Orientation) Regulations 2003.[141] Despite this amalgamation of anti-discrimination

[135] Alison Phipps & Geraldine Smith, *Violence Against Women Students in the UK: Time to Take Action*, 24 GENDER & EDUC. 357, 366 (2012).
[136] *Id.* at 364-65.
[137] *Id.*
[138] *Id.* at 369.
[139] *See id.*
[140] The Equality Act 2010, c.15 § 137 (UK).
[141] *Id.* § 137(2).

statutes into what should have been a landmark piece of civil rights legislation, in 2018, the Women and Equalities Committee [of Parliament] (the "Committee") expressed their dissatisfaction with the Equality Act by stating, "[w]hilst universities are public bodies with clear legal duties under the Equality Act 2010 . . . to ensure that women are free from sexual harassment, the central government has not placed specific legal obligations on them to deal with sexual harassment."[142] The Committee's interpretation of the Equality Act runs in direct contradiction to that of the Government.[143] In its response to the Committee, the Government wrote: "Higher education providers already have legal duties in relation to discrimination and harassment, which are set out in the Equality Act 2010. Sections 91–92 comprise specific duties relating to higher education which apply to those [higher education] providers which receive public funding . . . ."[144]

Part 6, Chapter 2 of the Equality Act pertains to "Further and Higher Education," or how post-secondary education would normally be perceived. Section 91(2)(b) provides that "[t]he responsible body of such an institution must not discriminate against a student . . . in the way it affords the student access to a benefit, facility or service."[145] Section 91(7)(d) and (f) provide that "[t]he responsible body of such an institution must not [victimize] a student . . . by not affording the student access to a benefit, facility or service . . . [or] by subjecting the student to any other detriment."[146] While one may, as the Government must have, broadly interpret that language to read implied duties of care (as they relate to sexual misconduct cases), nowhere in Part 6, however, are the terms "sexual assault," "sexual misconduct," or "sexual harassment" explicitly mentioned.[147] There are no required or recommended procedures for a U.K. university to follow in order to adjudicate an allegation of sexual misconduct: no threshold standards of

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[142] *The Committee*, *supra* note 20.

[143] "Government" in the context of the U.K. refers to the administration of the Prime Minister. For example, in 2010, this would have been the government under Prime Minister Gordon Brown.

[144] *Sexual Harassment of Women and Girls in Public Places: Government Response to the Committee's Sixth Report of Session 2017–19*, UK PARLIAMENT (May 8, 2019), https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/2148/214802.htm [https://perma.cc/8YZL-BJQ3] (UK) [hereinafter *The Government*].

[145] The Equality Act 2010, c.15 § 91(2)(b) (UK).

[146] *Id.* § 91(7).

[147] *Id.*

evidence listed, no investigatory methods outlined, no circumstances for appeal examined, and so on.[148]

Adding fuel to the fire is the lack of data available to Parliament. The Office for Students ("OfS"), a non-departmental public body of the Department of Education,[149] revealed in 2018 that it was not "collecting data on sanctions that universities may have put in place in relation to sexual [misconduct], nor is it monitoring outcomes related to sexual [misconduct]."[150] In fact, the position of OfS was that they did not have legal duties with respect to women's safety at universities, and instead, those duties lay with the Equality and Human Rights Commission.[151] Meanwhile, the Minister for Universities informed the Committee of his belief that responsibility for collecting data lies with the individual universities, not any overarching governmental entity or parliamentary committee.[152]

While OfS did publish survey results in July 2021, the scope of the survey was focused primarily on the role of alcohol and drugs in sexual misconduct cases, with little discussion on the procedures that follow a formal allegation of sexual misconduct, and no discussion of what procedures might be implemented to best adjudicate and record allegations of sexual misconduct.[153]

There have been several attempts over the past decade by third-party nongovernmental organizations, Parliament-subsidized surveys, and U.K. law firms to create a more standardized system of investigating and data collecting complaints.[154] In 2016, UUK published a set of guidelines that explicitly rejected the Zellick Report.[155] However, these recommendations as intricate, well-thought-out, and well-intentioned as they may be – at least relative to the non-existent procedures of Parliament – do not carry the weight of the law and do not impose

[148] The Equality Act 2010, c.15 (UK).

[149] A "body which has a role in the processes of national government, but is not a government department or part of one, and which accordingly operates to a greater or lesser extent at arm's length from ministers." *Guidance: Public Bodies*, GOV.UK (Feb. 19, 2013), https://www.gov.uk/guidance/public-bodies-reform#ndpbs-executive-agencies-and-non-ministerial-departments [https://perma.cc/JN4A-XS7].

[150] *The Committee*, *supra* note 20, at 153.

[151] *Id.* at 154.

[152] *Id.* at 157.

[153] OFF. FOR STUDENTS & UNIVS. U.K., THE INTERSECTION OF SEXUAL VIOLENCE, ALCOHOL AND DRUGS AT UNIVERSITIES AND COLLEGES 4 (2021).

[154] *See* ANTONIA BEVAN, ANNA BULL, EMMA CHAPMAN & TIFFANY PAGE, SECTOR GUIDANCE TO ADDRESS STAFF SEXUAL MISCONDUCT IN UK HIGHER EDUCATION 24-25 (2020).

[155] *See UUK&PM*, *supra* note 130, at 1.

any obligations on U.K. universities, much in the sense that the DCL was guiding but not controlling.[156] The UUK itself does not believe in imposing any mandatory procedures on its member universities:

> As a representative of the sector rather than a regulator, UUK supports our institutions by providing recommendations and frameworks to help the development of effective responses, kept flexible enough to recognise that every case is different. A single approach or response that applies in any circumstance is unlikely to be appropriate.[157]

U.K. universities effectively have free reign to enforce whatever procedures they wish in sexual misconduct cases, insofar as those procedures do not frustrate the minimal standards set by the Equality Act. The Committee summarizes its frustration:

> There are promising initiatives in the universities sectors . . . which could be embedded elsewhere. However, even here, the prevention work is piecemeal and there is no overarching coordinating body or monitoring system. Between the Government, regulators and institutions, we have been left with a strong impression of passing the buck on who is responsible for women's safety at university. A voluntary approach has not proven to ensure that women's safety is prioritised consistently across the higher education sector and it is now time for the Government to consider legislation.[158]

The Committee goes on to recommend that Parliament impose "legal obligations [on universities] that mirror provisions in the US to link state funding with a requirement to prohibit sex discrimination and sexual harassment, and to collect and publish data on the effectiveness of institutional policies."[159] The Government's response – "[w]e will continue to monitor the progress of the sector and will keep under review whether the current non-legislative approach to tackling sexual harassment in [higher education] remains an effective means of driving change in the sector" – leaves much to be desired.[160] With generations of under-educated students, a nascent women's rights

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[156] *Id.*

[157] Vicky Spratt, T*oxic Environments, Nonexistent Support & Factories of Trauma: It's Business as Usual at UK Unis*, REFINERY29 (Oct. 18, 2021, 2:00 PM), https://www.refinery29.com/en-gb/2021/10/10709360/sexual-assault-at-universities-uk [https://perma.cc/UV54-9CCP].

[158] *The Committee*, *supra* note 20, at 160.

[159] *Id.* at 161.

[160] *The Government*, *supra* note 144, at 20.

network, and an absence of tangible government intervention, the U.K. is vastly behind the United States on truly tackling the matter.

C. *Notable University Procedural Trends*

To understand just how far behind the United States the U.K. is, this section will continue the "John and Jane" scenario. All of the facts in that scenario remain the same, except that the alleged assault took place at a U.K. university. Because U.K. universities are not required to follow any one set of procedures, a hypothetical incident at a particular university cannot be examined.[161] Instead, this section will examine what John and Jane would have to do under the most prevalent policies existing in U.K. universities today.

1. *Informal Barriers to Filing a Complaint*

From the outset, there are many informal barriers that would dissuade or prevent Jane from filing a formal complaint with her university. To start, all complainants of sexual misconduct globally face similar emotional barriers to reporting sexual misconduct. To relive a traumatic experience in front of strangers, without assurances that justice will be served, is an extremely potent disincentive to filing a formal complaint with a university.[162] In many U.K. universities, on top of these emotional and human barriers, exist institutional formalities that serve as similar, if not more upsetting, barriers to entry. As discussed earlier, Harriet was completely denied any recourse from her university by their circular policies on reporting the alleged misconduct to the police.[163] Jane could be similarly stonewalled.

At some universities, Jane would have to file her official complaint within three months of the alleged incident, in order to avoid the complaint being dismissed outright.[164] Some universities, as a prerequisite to filing a formal complaint, would require Jane to informally approach John personally and request an apology.[165] Jane may not feel

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[161] *See generally The Committee*, *supra* note 20, at 143 (noting how the Government has issued guidance, but no regulations related to mandatory procedures).

[162] For a more in-depth analysis of re-traumatization as a barrier to effective justice in criminal prosecutions, see Negar Kitarai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81 (2020).

[163] Howlett, *supra* note 1.

[164] ANNA BULL & RACHEL RYE, SILENCING STUDENTS: INSTITUTIONAL RESPONSE TO STAFF SEXUAL MISCONDUCT IN UK HIGHER EDUCATION 15 (2018) [hereinafter *Silencing Students*].

[165] *Id.*

comfortable being alone with the respondent, in any context, making this prerequisite a stonewall. Additionally, Jane may be responsible for amassing a wealth of evidence and information and attending a plethora of meetings to initiate a formal grievance process. In one instance, a complainant supplied 200 pages of documented evidence in support of their twelve-page narrative which constituted their formal complaint.[166] It is hard to imagine that a student, whilst managing both the demands of their academic career and the trauma incurred by the allegation, would have the time, resources, or wherewithal to compile such an abundance of documentation. Complainants often are required to meet with university department heads, student unions, private attorneys, and other parties in order to generate enough momentum to compel the university to initiate a formal grievance procedure.[167]

It is worth noting that these barriers to a formal complaint are not exhaustive or mutually exclusive. A university may employ numerous other informal policies that dissuade Jane from initiating a formal complaint process or may employ some combination of the aforementioned policies.

Additionally, Jane may end up dealing with a university staff member, whom themselves does not know how to properly handle the grievance process:

> Andrea, a [m]aster's student, described [what occurred] when she reported to her course leader [an alleged sexual assault she experienced]: "[The course leader] was very much like, 'Oh, gosh, no one has ever come to me about anything like this before. Honestly, I've got no idea what you do in this situation.'"[168]

Institutional confusion at the outset of a formal grievance process would certainly beget Jane's, as well as John's, confusion as neither party is likely to be fully informed of what they should anticipate or expect later down the line.

Any of these informal barriers to reporting could dissuade Jane from filing a formal complaint. At a micro level, this means that Jane is arbitrarily denied anything resembling due process at the school. At a macro level, this benefits U.K. universities greatly. To the extent that they collect data on sexual misconduct cases, the universities can declare to the public and to potential regulators that they have few incidents of sexual misconduct and that their "system" is working. This

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166 *Id.* at 20.
167 *Id.* at 14.
168 *Id.* at 19.

makes a university more appealing to donors[169] and to students deciding which university to attend. In reality, there are just fewer "formal complaints."[170]

This all presumes that universities are collecting this data to begin with. Universities are under no obligation to collect this data or maintain records concerning sexual misconduct.[171] Therefore, U.K. students have taken to the internet to anonymously describe the misconduct they experienced and how they feel the university failed to take a course of action.[172] Similarly, however, there is no data regarding how many students are reporting online, or how frequently a given university is referenced.[173] Two problems result from this: (1) a respondent – like John – is publicly accused of a crime he may not have committed; and (2) the public is never getting an accurate understanding of just how much sexual misconduct is affecting students. No problem can truly be fixed if no one knows of the problem in the first place.

2. *Length of the Process*

Recall that in the United States, universities endeavor to complete their Title IX processes within sixty days of receiving a formal complaint.[174] But in the U.K., from the time Jane first reports the alleged misconduct to someone at the university to when John is either reprimanded or absolved can vary markedly. Some undergraduate complainants have been working to see their allegations adjudicated for two years.[175] For some masters and doctoral complainants, this number can be up to seven to eight years.[176]

The longevity of U.K. university investigations not only hampers individual investigations but also contributes to declining reporting rates relative to U.K. universities. To begin with, the very process of putting oneself through a formal investigation surrounding one's own traumatic experiences puts one under a strenuous amount of pressure. "Being involved in an investigation was time-consuming, exhausting,

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[169] *Contra* Erin Gloria Ryan, *Fed Up Alumni Withholding Donations Until Colleges Address Rape Crisis*, JEZEBEL (May 19, 2014, 3:15 PM), https://jezebel.com/fed-up-alumni-withholding-donations-until-colleges-addr-1578550029 [https://perma.cc/E8NA-P5SS].

[170] *Silencing Students*, *supra* note 164, at 3-5.

[171] *The Committee*, *supra* note 20, at 46.

[172] Stanley, *supra* note 12.

[173] *Id.*

[174] DEAR COLLEAGUE LETTER, *supra* note 71, at 12.

[175] *Silencing Students*, *supra* note 164, at 20.

[176] *Id.*

and highly emotionally draining for [complainants]. It had severe effects on many [complainants'] mental and physical health and on their ability to carry out their academic work during this period if they were still in higher education."[177] There is competing research amongst psychological researchers regarding the effect of time on one's memory; some argue that the passage of time has a clear negative effect on one's memory capacity and long-term memory,[178] whereas others contend that interfering information – such as other people's recorded recollections – is more likely the cause of memory decay.[179]

In more violent cases of sexual assault psychological research is much stronger. In 2019, Dr. Christine Blaisey Ford testified before the Senate Judiciary Committee regarding her allegations of sexual assault against then-nominee for the Supreme Court, Judge Brett Kavanaugh.[180] Dr. Ford was challenged by certain committee members over her ability to recall the alleged assault in graphic detail, but no other details, such as the exact address at which the alleged assault took place.[181] Dr. Ford, a psychologist herself, explained that traumatic memories are encoded in one's brain more clearly than non-traumatic memories,[182] which is aligned with the prevailing consensus amongst psychologists today:

> Humans don't record events the way that cameras do. Most days we might commit few events to long-term memory. Traumatic memories are different. Our brains are being flooded with chemicals such as cortisol and norepinephrine that can "sear" events in the way that Ford described. We remember dangerous and traumatic events better than other events because it has survival value to remember them. However, she didn't know beforehand that an assault was going to happen, and so there's no reason to think that the earlier events of the day — or even what happened once she had

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[177] *Id.* at 19.

[178] *See* John Brown, *Some Tests of the Decay Theory of Immediate Memory*, 10 Q.J. EXPERIMENTAL PSYCH. 1, 12 (1958) (discussing how memory capacity and long-term memory erode over one's lifetime).

[179] *See* B.J. Underwood, *Interference and Forgetting*, 64 PSYCH. REV. 49 (1957) (discussing the effects of third-party sources on the information of one's recollection of details).

[180] *Kavanaugh Hearing: Transcript*, THE WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/ [https://perma.cc/BVP4-JY2N].

[181] *Id.*

[182] *Id.*

> gotten away — would be seared in her memory the way the assault itself was.[183]

Scientific and statistical evidence aside, there is a strong, contradictory social inclination to accept the proposition that one's memory and ability to recall details relevant to an allegation of sexual misconduct naturally decays over time; a misconception that is still reinforced by leaders at the highest levels of government.[184] Jane would arguably have a better case at a U.S. university as opposed to a U.K. university because in the former less time has likely passed between the alleged offense and her testimony before an adjudicator. Therefore, there is a less compelling counter-narrative that Jane is too far removed from the alleged assault to remember important details.

3. *Jane's Role in the Formal Investigation*

U.K. universities tend to follow one of two extremes in framing Jane's role in a sexual misconduct investigation. In the first extreme, Jane is not considered a party to the complaint. [185] For comparable terms, in U.S. criminal law, it's often "the State," "the People," or "the Commonwealth" versus a given defendant. In some U.K. universities, it is the university effectively making a case against John. At first, this seems rather favorable to Jane. Following the submission of the formal complaint Jane is not involved in the investigation in any substantive capacity:

> She, not being a party to the exercise, cannot cross-examine her alleged assailant or instruct her lawyer to do so. She cannot see or probe the evidence he offers to claim exoneration. She cannot attend the hearing. She might not even be told the outcome. She has no right to appeal. She has no power to resist a decision by the university to dispose of the complaint without a hearing. As [a] complainant, she fundamentally has no rights within the university's process.[186]

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[183] Melissa Healy, *Must Reads: Here's What Experts Who Study Sexual Violence Say About the Credibility of Christine Blasey Ford's Testimony*, L.A. TIMES (Sept. 28, 2018, 2:00 AM), https://www.latimes.com/science/sciencenow/la-sci-sn-ford-testimony-credibility-memory-20180928-story.html [https://perma.cc/ET7S-9FU7].

[184] THE WASH. POST, *supra* note 180.

[185] Georgina Calvert-Lee, Comment, *Fair Procedures Aren't as Easy to Run as Ofs Thinks*, WONKHE (Apr. 23, 2021), https://wonkhe.com/blogs/fair-procedures-arent-as-easy-to-run-as-ofs-thinks/ [https://perma.cc/5BRT-NF5X].

[186] *Id.*

On the other end of the spectrum, where Jane is a direct party to the action, akin to a U.S. civil suit, many complainants are perturbed by the poor practices exhibited by universities. Complainants often note how certain witnesses or evidence they put forth are not examined.[187] For example, Jane's friends, who theoretically could testify as to how Jane was too intoxicated to consent to her encounter with John, may never be allowed to testify. Complainants are often wrongfully instructed by university staff to personally approach potential witnesses to testify, which, in most universities, is grounds for a decision to be overturned on appeal, prolonging the procedure.[188]

If Jane was a master or doctoral student who is a party to the action, Jane may instead attend what is referred to as an "Internal Tribunal Hearing."[189] The disciplinary panel – responsible for adjudication, includes senior members of the university.[190] Also present would be John and his representative (akin to an Advisor in a U.S. case), the university's human resources and legal teams, and a notetaker.[191] Female complainants have noted that disciplinary panels often were comprised solely of men who lack substantive professional experience investigating matters of sexual misconduct.[192] The exact procedures of these Internal Tribunal Hearings vary across universities, though many complainants have noted how the respondents themselves, and not the respondent's representatives, were allowed to question the complainant.[193]

As such, Jane's ability to advocate for herself is either seriously minimized or eradicated. In nearly all tribunals – criminal, civil, and university – the burden of proof lies with the one who brought forth the complaint. In a sexual misconduct case, there are only two effective defenses available to John: (1) either the sexual encounter did not happen at all; or (2) the encounter happened and was consensual. In both scenarios, the credibility of John and Jane is critical for an evaluating panel in deciding the case: [194]

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[187] *Silencing Students*, *supra* note 164, at 19.
[188] *See generally id.*
[189] *Id.* at 20.
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Silencing Students*, *supra* note 164.
[194] *Good Practice in Addressing Student Harassment & Sexual Assault*, PROTECTED (Aug. 4, 2020), https://www.protect-ed.org/single-post/2020/08/04/good-practice-in-addressing-student-harassment-sexual-assault-dealing-fairly-with-sexua [https://perma.cc/WD9B-ZPHH] (at 7:30-8:30).

> [T]he first line of defense for many people accused of sexual misconduct is to discredit the [Complainant], and so [the Complainant is] essentially on trial too; but, because they're not a party to the disciplinary procedure [in certain UK universities], they don't have any opportunity to see evidence put in against them to discredit them . . . the Complainant is really the only person who really has the ability to provide . . . the sufficient evidence to ever overcome a sort of blanket denial defense . . . so more often than not, the person accused will get off because the process is very much weighted towards their protections, and no protections are given to the Complainant . . . [195]

4. *Use of Non-Disclosure Agreements and other Confidentiality Rules*

A prominent tool employed by a majority of U.K. universities when dealing with sexual misconduct cases is the non-disclosure agreement ("NDA"):

> An NDA binds a person who has signed it and prevents them from discussing any information included in the contract with any non-authorized party. . . . Sharing information in spite of an NDA qualifies as a breach of contract and can open the breaching party up to a lawsuit. . . . An NDA can continue indefinitely or can include a duration clause that stipulates an end date of the agreement.[196]

NDAs were originally used almost exclusively in commercial/private sector work environments to ensure that outgoing employees did not reveal sensitive and confidential company information ("trade secrets") to their future employers, competitors, or anyone else.[197]

NDAs, in recent years, have been used to prevent the release of information related to causes of action that were not commercial but were purely personal in nature. For example, in the case of film producer Harvey Weinstein, whose fall from grace served as the

[195] *Id.*

[196] *Nondisclosure Agreement*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/nondisclosure_agreement [https://perma.cc/HJ9F-5GDY] (last visited Nov. 19, 2021).

[197] Danielle Bradford, *I Learned Firsthand How British Universities Are Silencing Abuse Survivors*, THE GUARDIAN, (Feb. 18, 2020, 5:00 PM), https://www.theguardian.com/commentisfree/2020/feb/18/universities-silencing-abuse-survivors-students?CMP=twt_a-education_b-gdnedu [https://perma.cc/65PU-XA3P].

beginning of the #MeToo movement.[198] As the movement expanded, attorneys and advocates have developed new arguments that, with varied success, have allowed courts to invalidate certain NDAs.[199]

With regards to sexual misconduct allegations in U.K. universities, many administrators are requiring complainants like Jane to sign NDAs – preventing them from openly discussing her allegation–to facilitate the initiation of an investigation relating to the complaint, to produce a no-contact order against John, or produce other outcomes related to the lodged complaint.[200] U.S. universities cannot predicate administrative action or require complainant silence by virtue of an NDA.[201] The legality of this practice in the U.K. is highly disputed:

> What the university is saying, it's not ". . . we're giving you a trade secret, but only on the condition that you don't talk about it," they're saying "well you've told us about sexual misconduct, but actually if you want us to do anything about it, you can't talk about your own experience." And that's an oddity because the university has never owned that data . . . they don't have an ownership right in the information, and so for them to impose confidentiality upon it, just seems wrong. It's wrong as a matter of contract law, I'm not sure it would be enforceable.[202]

Of course, the NDAs need not necessarily be legally enforceable to be effective. If Jane lacks the financial resources to legally challenge the enforceability of a mandatory NDA, Jane may feel compelled to accept the NDA's terms. Additionally, if Jane merely *believes* the NDAs are binding, the university will not face a legal challenge at all. Complainants go to university personnel not only because they believe they just endured a traumatic or harmful experience

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[198] Stacy Perman, *#Metoo Law Restricts Use of Nondisclosure Agreements in Sexual Misconduct Cases*, L.A. TIMES (Dec. 31, 2018, 3:00 AM), https://www.latimes.com/business/hollywood/la-fi-ct-nda-hollywood-20181231-story.html [https://perma.cc/JT99-LMN8].

[199] *See* Emma J. Roth, *Is a Nondisclosure Agreement Silencing You From Sharing Your 'Me Too' Story? 4 Reasons It Might Be Illegal*, ACLU (Jan. 24, 2018), https://www.aclu.org/blog/womens-rights/womens-rights-workplace/nondisclosure-agreement-silencing-you-sharing-your-me-too [https://perma.cc/LPY5-29QM].

[200] Rianna Croxford, *Sexual Assault Claims 'Gagged' By UK Universities*, BBC NEWS (Feb. 12, 2020), https://www.bbc.com/news/uk-51447615 [https://perma.cc/KTK5-NG3V].

[201] E-mail from James L. Moore, Senior Advisor, Clery Act Compliance and Campus Safety Operations, U.S. Dep't. of Educ., to Sara L. Trower, Associate General Counsel, Ariz. State Univ. (Apr. 12, 2021).

[202] Calvert-Lee, *supra* note 185.

and need help, but also because they believe that personnel has their best interests at heart. Someone in that position, someone who is *that* vulnerable,[203] is likely to be very amenable to whatever a university administrator recommends to them.

Some universities may not employ NDAs, but instead, rely on internal confidentiality rules to accomplish the same end. For example, a student code of conduct that Jane tacitly agreed to by virtue of enrollment. If Jane, dissatisfied with a finding of no responsibility or with the university deciding not to investigate, continues to publicly accuse John of sexual assault, that could constitute harassment within the university's student code of conduct.[204] If Jane violates these rules, she can face censure from the university including, but not limited to, expulsion.[205] Here, there is effectively an NDA, but with Jane getting zero compensation (or justice).

Without such confidentiality rules, some universities, unable (or unwilling) to protect Jane from - or punish - John, would instead offer Jane considerable cash payments for her silence. From 2017 to 2019, it was estimated that U.K. universities paid £90m (approximately $108M) to compel approximately 4,000 complainants to sign NDAs in sexual misconduct cases.[206]

In the short run, Jane gets some compensation. In the long run, what NDAs effectively do is silence complainants of sexual misconduct who might be driven to advocate for change. What would have happened to Women's Suffrage Movement if Alice Paul had to sign an NDA every time she got rejected from her voting center? What would have happened to the Civil Rights Act if Dr. King had to sign an NDA every time he was turned away from a "Whites Only" service? The people who endure atrocities are often the most effective advocates because their stories carry a narrative weight that helps persuade and rally those who otherwise would not understand the corrosive nature of those atrocities. In the U.K., the complainants who could

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[203] *See* Kitarai, *supra* note 162, at 92.

[204] For an example, *see* LONDON SCH. OF ECON. & POL'Y, THE DISCRIMINATION, HARASSMENT, AND BULLYING POLICY 4 (2020).

[205] Bradford, *supra* note 197.

[206] Simon Murphy, *UK Universities Pay Put £90m on Staff 'Gagging Orders' in Past Two Years*, THE GUARDIAN (Apr. 17, 2019), https://www.theguardian.com/education/2019/apr/17/uk-universities-pay-out-90m-on-staff-gagging-orders-in-past-two-years?CMP=share_btn_tw [https://perma.cc/QGL5-U5S3]. *See also Cover-Ups and Misuse of Non-Disclosure Agreements (NDAs) in Universities - Media Archive*, DO BETTER ACADEMIA, https://www.dobetteracademia.co.uk/index.php/university-wrongdoing/ndas-cover-ups-retaliation-in-universities [https://perma.cc/8CMH-DPHD] (last visited Nov. 19, 2021).

potentially be the ones to spearhead true reform are gagged by the looming threat of legal liability.

While students have taken to the internet with the hopes of bringing light to the issue,[207] their posts are made anonymously to avoid being caught violating NDAs. "Harriet" was not her real name.[208] And yet the most successful civil rights campaigns have had leaders and leaders have faces, voices, and identities,[209] all things that students are stripped of when they are compelled to sign an NDA. In effect, NDAs are not just silencing individual students, they are silencing a potential movement.

5. *Impact*

These practices represent only a fraction of the numerous and fully optional tools that U.K. universities are legally entitled to utilize. Insofar as U.K. universities take some steps to fulfill their broadly defined requirements under the Equality Act, they need not conform to any particular or prescribed regime of regulations. However, what is abundantly clear is that, at a micro level, complainants like Jane face an uphill and prolonged battle, not only to get their complaints formally recognized by universities but also to overcome the numerous institutional and social obstacles that prevent a fair adjudication. At a macro level, current U.K. students are not likely to see any changes in the near future because those who would best advocate on their behalf have been forced to contract away their free speech. Those advocates who remain lack the education and political network to make any substantive contributions. Because these universities have, since their inception, been free to handle sexual misconduct cases as they see fit, they handled them in a way that prevents anyone from interfering.

IV. CONCLUSION

Sexual misconduct pervades every modern-day industry, including and especially universities. While U.S. complainants and respondents may experience procedural hurdles as a result of dramatic changes from the Obama-era DCL to the Trump-era 2020 Amendments, and while Title IX itself is by no means perfect, the substantive and

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[207] Stanley, *supra* note 12.

[208] Howlett, *supra* note 1.

[209] *See generally* DONA J. HICKEY & JOE ESSID, IDENTITY AND LEADERSHIP IN VIRTUAL COMMUNITIES: ESTABLISHING CREDIBILITY AND INFLUENCE at xiii (2014).

procedural due process rights that U.S. students are currently entitled to vastly exceed those of their U.K. counterparts.

A historical lack of political advocacy, education, and regulation has created an environment in the U.K. where sexual misconduct runs rampant and is not addressed equitably or fairly in universities. This has resulted in rampant sexual misconduct in the U.K. The universities, tasked only with a broadly defined duty towards their students, have failed to employ either the personnel or policies necessary to effectively adjudicate a claim of sexual misconduct. And in lieu of any substantive or procedural reforms, the universities have gone out of their way to silence those who would advocate for reform. Such a system of inaction, injustice, and silence is not sustainable and must be changed.

These changes do not need to be identical to the U.S. Title IX System: reasonable people can disagree on whether the policies therein are fair to both complainants and respondents. These changes do not need to adopt, verbatim, the policies proposed by Universities UK, Pinsent Mason, Parliament, or other advocacy groups.

However, U.K. students need a clear set of procedures that will govern the adjudication of the most difficult circumstances they may ever experience. These procedures need to be similar, if not identical, across universities. These procedures need to be enforced by individuals trained in evaluating and investigating allegations of sexual misconduct. Complainants bringing forward allegations of sexual misconduct must not be threatened with expulsion or silenced by their universities. And these changes need to be made immediately. Without an overarching regulatory scheme that quashes the existing and varying procedures that perpetuates injustice and inaction, U.K. universities will continue to fail their students and their nation.