Michigan Journal of Gender & Law

Volume 28 | Issue 2

2022

Title IX and the Alleged Victimization of Men: Applying *Twombly* to Federal Title IX Lawsuits Brought by Men Accused of Sexual Assault

Zoë Seaman-Grant
Edelson PC, Chicago, IL

https://doi.org/10.36641/mjgl.28.2.title

TITLE IX AND THE ALLEGED VICTIMIZATION OF MEN: APPLYING *TWOMBLY* TO FEDERAL TITLE IX LAWSUITS BROUGHT BY MEN ACCUSED OF SEXUAL ASSAULT

Zoë Seaman-Grant[*]

Table of Contents

* Associate at Edelson PC, Chicago, IL. J.D. May 2021, University of Michigan Law School. Thank you to Professor Ellen Katz for her support developing this topic and asking the tough questions. Thank you also to the editors at *Michigan Journal of Gender & Law* for their help revising and refining this Note.

INTRODUCTION

Over the past decade, increasing numbers of male[1] students have filed federal lawsuits against colleges and universities alleging that Title IX sexual misconduct proceedings are infected with gender bias against men.[2] The number of suits filed has risen from about one per year prior to 2011 to one per week in 2018-19.[3] Male students typically allege that the federal government has pressured post-secondary institutions to unfairly favor complainants, who are often women or gender nonconforming people, over respondents, who are almost invariably male.[4] Male students have advanced an array of legal theories—including breach of contract and due process—in federal court to challenge universities' Title IX proceedings.[5] However, this Note will focus exclusive-

1. Throughout this Note, "male" and "female" are used interchangeably with "men" and "women." "Male" and "female" are not used in this Note to refer to "biological" sex, nor are they intended to exclude trans individuals. These terms are intentionally used interchangeably to call attention to the false dichotomy between supposedly "biological" sex and "culturally-constructed" gender. "Biological" sex is itself culturally constructed: "'sex' is not a static, distinct, or even strictly biological characteristic that exists prior to the relations and practices that produce it." Katrina Karkazis, *The Misuses of "Biological Sex"*, 394 LANCET 1898, 1899 (2019).
2. *See, e.g.,* Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 11:53 PM), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.single.html [https://perma.cc/K72M-PXV5]; *see also* Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER ED (Oct. 3, 2019), https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings [https://perma.cc/252W-KB59] (noting that "legal challenges in federal court exploded" following the Obama administration's Title IX guidance).
3. Catherine Rentz, *Ex-UMBC Baseball Players, Part of National Trend, Turning Tables on Sexual Assault Accuser in Court*, BALT. SUN (July 8, 2019), https://www.baltimoresun.com/maryland/baltimore-county/bs-md-baltimore-county-counter-claims-20190401-story.html [https://perma.cc/6YD5-6FAR].
4. DAVID CANTOR, BONNIE FISHER, SUSAN CHIBNALL, REANNE TOWNSEND, HYUNSHIK LEE, CAROL BRUCE & GAIL THOMAS, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT 20 (Westat ed., 2020) [hereinafter CANTOR ET AL.].
5. *See infra* Part II (discussing the most common legal theories advanced by plaintiffs in Title IX anti-male bias lawsuits).

ly on claims brought under Title IX alleging gender discrimination against men.

In 2016, with the United States Court of Appeals for the Second Circuit (Second Circuit)'s *Doe v. Columbia University* decision, a circuit split emerged among federal courts about the proper pleading standard to apply in gender discrimination claims brought by men under Title IX.[6] The Second Circuit employs a "temporary presumption" in favor of the plaintiff for pleading discriminatory intent,[7] while all other federal circuits that have considered the question employ the "plausibility standard" required by *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.[8] The "temporary presumption" permits plaintiffs to plead fewer facts to survive a motion to dismiss; a plaintiff must merely plead facts sufficient to establish "a minimal plausible inference of discriminatory intent."[9]

Contrast the Second Circuit's "temporary presumption" with the pleading standard developed in *Twombly* and *Iqbal*: The Supreme Court of the United States in *Twombly* and *Iqbal* established a "plausibility standard" for pleading that requires "not only…the pleading of facts that state the claim, but the pleading of facts that demonstrate the plausibility of a claim."[10] The Second Circuit first applied the "temporary presumption" to Title IX cases in *Doe v. Columbia University*, and explicitly stated that the "temporary presumption" reduces the plaintiff's pleading burden in Title IX cases below the pleading burden established in *Twombly*.[11] Despite the consensus among the vast majority of federal courts that *Twombly*'s plausibility standard applies to Title IX anti-male bias claims, commentators have frequently favored applying the Second Circuit's approach to Title IX anti-male bias claims and have urged oth-

6. *Compare* Doe v. Columbia Univ., 831 F.3d 46 (2d Cir. 2016), *with* Doe v. Miami Univ., 882 F.3d 579 (6th Cir. 2018). There are thirteen federal circuit courts of appeals in the United States. These courts hear cases appealed from federal district courts, which are trial level courts that have jurisdiction over claims arising under federal law and claims with parties from different states where the potential award meets a certain monetary threshold. The United States Court of Appeals for the Second Circuit hears cases appealed from federal district courts in Connecticut, New York, and Vermont.
7. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).
8. This includes discrimination cases arising under Title VII and Title IX. Littlejohn v. City of New York., 795 F.3d 297, 311 (2d Cir. 2015) (applying the "temporary presumption" to a Title VII employment discrimination case).
9. Doe v. Columbia Univ., 831 F.3d 46, 55 (2d Cir. 2016).
10. A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 444 (2008).
11. *Columbia Univ.*, 831 F.3d at 54.

er circuits to adopt it.[12] However, the apparent consensus among a majority of federal courts—that the *Twombly*/*Iqbal* "plausibility standard" should apply—obscures the vastly different ways in which individual circuits apply the "plausibility standard" to evidence of alleged gender bias presented by male plaintiffs.

This Note provides a survey of the current state of Title IX law as applied to anti-male bias lawsuits and suggests how courts should apply *Twombly*'s plausibility standard to anti-male bias claims going forward. Part I of this Note provides an overview of sexual violence on college campuses and the history of Title IX regulations and jurisprudence. Part II offers a brief history of Title IX anti-male bias lawsuits, examines the structure of anti-male bias lawsuits, and analyzes the various pleading standards applied by courts. Part III lays out the types of facts pled by Title IX anti-male bias plaintiffs and discusses what facts should be viewed as sufficient to meet *Twombly*'s plausibility standard. In Part IV, this Note looks at the future of Title IX anti-male bias lawsuits in light of new federal regulations and discusses the implications of these lawsuits for claimants and respondents in campus Title IX proceedings.

I. SEXUAL VIOLENCE ON CAMPUS AND THE ROLE OF TITLE IX

Sexual violence on college campuses is a pervasive problem. According to a 2019 survey of college students, 25.9% of undergraduate women, 26.4% of trans or genderqueer undergraduates, and 6.9% of undergraduate men experience rape through physical force, violence, or incapacitation.[13] The percentage of undergraduate women who report having experienced rape has actually increased in the past thirty years,[14] as demonstrated by a 1985 survey of undergraduate women, in which only "15 percent of college women reported experiencing legal rape."[15]

12. *See* Weiru Fang, Note, *Gender Parity: The Increasing Success and Subsequent Effect of Anti-Male Bias Claims in Campus Sexual Assault Proceedings*, 104 CORNELL L. REV. 467 (2019) (arguing that federal courts should adopt the Second Circuit's temporary presumption in Title IX anti-male discrimination cases); *see also* Bethany A. Corbin, *Riding the Wave or Drowning?: An Analysis of Gender Bias and* Twombly/Iqbal *in Title IX Accused Student Lawsuits*, 85 FORDHAM L. REV. 2665 (2017).

13. CANTOR ET AL., *supra* note 4, at 6.

14. Mary Koss, Christine Gidycz & Nadine 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, 162 (1987) [hereinafter Koss et al.] (finding that 15% of undergraduate women reported "experiencing legal rape" and 4.4% of men reported perpetrating "legal rape").

15. *Id.*

One explanation for the increase in women reporting rape is that the definition of rape has expanded significantly between 1985 and 2019. The 1985 study defined rape as "oral, anal, vaginal penetration, or penetration by objects through threat, force, or *intentional* incapacitation of the victim via *drugs*."[16] In contrast, the 2019 survey included "inability to consent" in its definition of rape.[17] The survey defined "inability to consent" as "when the student was unable to consent or stop what was happening because they were passed out, asleep, or incapacitated due to alcohol or drugs."[18] Unlike the 1985 study's definition of rape, the 2019 survey included unconsciousness that was not induced by the perpetrator. Additionally, the 2019 survey asked students about nonconsensual sexual contact that occurred due to coercion or without voluntary agreement.[19] The 2019 survey's question about nonconsensual sexual contact that occurred without voluntary agreement asked students to report "incidents that occurred without [their] active ongoing voluntary agreement."[20] This definition adopts a version of "affirmative consent," which assesses whether parties affirmatively agreed to participate in the entire sexual encounter and in each of the acts involved.[21] Affirmative consent is a relatively recent reworking of the traditional definition of consent, and as of 2016 over 1,400 colleges and universities employ some definition of affirmative consent.[22] The definition of rape employed by the 2019 survey is considerably broader than the 1985 study's definition.

Because earlier definitions of rape set a high bar for what conduct qualified as rape, conduct that today would be classified as rape was not reported or documented.[23] Further, the narrow definition of rape meant many victims were unsure whether sexual violence they experienced was

16. *Id.* at 180 (emphasis added).
17. CANTOR ET AL., *supra* note 4, at 5.
18. *Id.*
19. *Id.* at 123.
20. *Id.* at A5-26
21. *What Consent Looks Like*, RAINN (AUG. 8, 2021), https://www.rainn.org/articles/what-is-consent [https://perma.cc/4M23-256D].
22. Sandy Keenan, *Affirmative Consent: Are Students Really Asking*, N.Y.TIMES (July 28, 2015), https://www.nytimes.com/2015/08/02/education/edlife/affirmative-consent-are-students-really-asking.html [https://perma.cc/6JSW-2UE5]. (noting that traditionally, colleges and the law have followed a "no means no" approach to consent; consent exists unless a party verbally objects to sexual contact).
23. *See With Expanded Definition, Rape is Reported More Often*, NPR (Feb. 23, 2014, 4:00 PM), https://www.npr.org/2014/02/23/281731761/with-expanded-definition-rape-is-reported-more-often [https://perma.cc/72BL-P8X3] (noting that after the FBI adopted a broader definition of rape, more rapes were reported).

"bad enough" to qualify as rape.[24] Today, colleges and universities are working to increase awareness among students and employees about sexual violence. [25] In particular, universities are striving to inform students of each university's own definition of sexual violence.[26] Therefore, the supposedly higher rates of sexual violence on campus may actually reflect students' increasing willingness to report instances of sexual violence that historically would not have been defined as rape.

Students who have experienced sexual violence report negative academic and professional consequences, including decreased class attendance, difficulty concentrating on assignments, and missing work.[27] Additionally, only 45% of students believed school administrators would take their allegations seriously. [28] Cis women, cis men, and trans or genderqueer undergraduates are all at risk of being victims of sexual violence on campus. The gender make-up of perpetrators of sexual violence in the 2019 study was similarly diverse. However, the gender make-up of perpetrators varied depending on the gender of the victim. Among women, "virtually all . . . (99%) reported a man was the offender."[29] For men, about two-thirds of perpetrators were women, while one-third were men.[30] For trans or genderqueer students, around 85% of perpetrators were men.[31] Overall, "roughly 98% of perpetrators are male."[32] The vast majority of reported perpetrators are men because, while men are victims of sexual violence, the overwhelming majority of victims are women, trans, or genderqueer students who disproportionately report men as perpetrators.

24. *See* Lindsay Orchowski, Douglas Meyer & Christine Gidycz, *College Women's Likelihood to Report Unwanted Sexual Experiences to Campus Agencies: Trends and Correlates*, 18 J. AGGRESSION, MALTREATMENT & TRAUMA 839, 841 (2009) [hereinafter Orchowski et al.] (noting that victims may not classify sexual assault they have experienced as a crime, particularly if the perpetrator is an acquaintance).
25. CHRIS LINDER, SEXUAL VIOLENCE ON CAMPUS: POWER-CONSCIOUS APPROACHES TO AWARENESS, PREVENTION, AND RESPONSE 42 (2018).
26. *Where Colleges Stand on Sexual Misconduct and Title IX*, CHRON. OF HIGHER ED. (Oct. 15, 2020), https://www.chronicle.com/article/where-colleges-stand-on-sexual-misconduct-and-title-ix [https://perma.cc/8UND-2UDZ] (providing an overview of new policies implemented by colleges to address campus sexual misconduct, including mandatory trainings and outreach to students).
27. CANTOR ET AL., *supra* note 4, at 26-27.
28. *Id.* at 15.
29. *Id.* at 20.
30. *Id.*
31. *Id.*
32. Maddie Brockbank, *The Myth of the "Gray Area" of Rape: Fabricating Ambiguity and Deniability*, 4 DIGNITY: J. ON SEXUAL EXPLOITATION & VIOLENCE 1, 3 (2019).

Cultural commentary has focused on the supposedly high risk of men being falsely accused of sexual assault.[33] This commentary positions men not as perpetrators, but as the true victims.[34] After the #MeToo movement gained ground in the popular consciousness, men began tweeting using the hashtag #HimToo to raise concerns about men being falsely accused of sexual assault.[35] Lawyers representing men accused of rape have embraced this narrative and blamed female accusers for ruining their clients' lives.[36] College campuses in particular have become a flashpoint for discussions about false rape accusations. *The Other McCain*, a self-described men's rights website, described a climate of false accusations on college campuses as a "'rape culture' hysteria ginned up by the Obama administration and its feminist allies" resulting "in male students being falsely accused of rape and denied their due-process rights in campus kangaroo-court disciplinary proceedings."[37] However, scholars estimate that only about 0.005% of all rape allegations are false.[38] Critics have pointed out that this statistic focuses on false reports to *law enforcement*, not Title IX accusations.[39] However, studies have not demonstrated that false accusations of sexual assault are significantly higher on college campuses.[40]

33. *See* Bret Stephens, Opinion, *For Once, I'm Grateful for Trump*, N.Y. TIMES (Oct. 4, 2018), https://www.nytimes.com/2018/10/04/opinion/trump-kavanaugh-ford-allegations.html [https://perma.cc/G7HM-TAN6] (noting that false accusations of rape are more common than false accusations of other crimes, and that "falsely accusing a person of rape is nearly as despicable as sexual assault itself").
34. Sarah Banet-Weiser, *'Ruined' Lives: Mediated White Male Victimhood*, 24 EUR. J. CULTURAL STUD. 60, 69 (2021).
35. Emma Gray Ellis, *How #HimToo Became the Anti #MeToo of the Kavanaugh Hearings*, WIRED (Sept. 27, 2018), https://www.wired.com/story/brett-kavanaugh-hearings-himtoo-metoo-christine-blasey-ford/ [https://perma.cc/83HP-GD8L] (identifying one tweet that read, "Mothers of sons should be scared. It is terrifying that at any time, any girl can make up any story about any boy that can neither be proved or disproved, and ruin any boy's life.").
36. *Id.*
37. *Feminism's Excuse Factory: Nikki Yovino, Title IX and False Rape Accusations*, OTHER MCCAIN (July 17, 2017), http://theothermccain.com/2017/07/17/nikki-yovino-false-rape-accusation-campus-title-ix/ [https://perma.cc/N4QG-QNF4].
38. Joanne Belknap, *Rape: Too Hard to Report and Too Easy to Discredit*, 16 VIOLENCE AGAINST WOMEN 1335, 1335 (2010).
39. Jeremy Bauer-Wolf, *Education Dept. Clarifies DeVos Comments on Sexual Assault*, INSIDE HIGHER ED (Mar. 14, 2018), https://www.insidehighered.com/news/2018/03/14/education-department-devos-says-false-reports-sexual-assault-are-rare [https://perma.cc/FCX2-F63G].
40. *See* David Lisak, Lori Gardinier, Sarah C. Nicksa & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318 (2010) [hereinafter Lisak et al.] (estimating that, during a 10-year pe-

Compared to the relatively insignificant number of false allegations, a large number of male college students admit to having engaged in sexually coercive behavior.[41] In one study of a large, Division I southeastern university, 46% of male survey respondents admitted to engaging in sexually coercive behavior.[42] Despite the self-admittedly high rates of sexual assault perpetrated by male college students, people are often hesitant to attribute fault to individual men.[43] One explanation for the public's unwillingness to believe that specific men are guilty of rape is that while they "are willing to believe in the abstract concept of rape, they were not willing to believe that a man they knew. . . could commit rape himself."[44] This is especially exacerbated in the college context when alleged perpetrators do not match myths about what a perpetrator "should" look like. Poor men of color are stereotyped as the "typical" perpetrator.[45] When the public sees a "good guy"—a white, middle-class college student accused of rape by a fellow college student—they "are less inclined to label him as a rapist.[46] Because so many male college students fit the "good guy" profile, victims and universities can struggle to persuade the public that individual men accused of sexual violence are actually guilty.

Discussions of male victimhood in the Title IX context have primarily focused on the risk of false accusations. However, the attention given to false accusations distracts from the reality that men are more likely to be victims of sexual violence themselves than falsely accused of

riod at a major northeastern university, between 2 and 10 percent of allegations of sexual assault were false).

41. *See* Belinda-Rose Young, Sarah L. Desmarais, Julie A. Baldwin & Rasheeta Chandler, *Sexual Coercion Practices Among Undergraduate Male Recreational Athletes, Intercollegiate Athletes, and Non-Athletes*, 23 VIOLENCE AGAINST WOMEN 795, 796 (2017) [hereinafter Young et al.]. The study defines sexually coercive behavior "any unwanted oral, vaginal or anal penetration as a result of verbal or physical pressure, including rape."
42. *Id.* at 803.
43. *See, e.g.* KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY 198 (2018) (discussing the trial of Brock Turner and testimony from one of Turner's female friends describing him as a good person who could not be a monster who committed sexual assault).
44. Katie Heaney, *Almost No One is Falsely Accused of Rape*, THE CUT (Oct. 5, 2018), https://www.thecut.com/article/false-rape-accusations.html [https://perma.cc/PYF5-SQL9].
45. Taylor Martinez, Jacquelyn D. Wiersma-Mosley, Kristen N. Jozkowski & Jennifer Becnel, *"Good Guys Don't Rape": Greek and Non-Greek College Student Perpetrator Rape Myths*, 8 BEHAV. SCI. 1, 2 (2018) [hereinafter Martinez et al.].
46. *Id.*

rape.[47] Male college students are 78% more likely than men of the same age who are not students to be victims of rape or sexual assault.[48] Men's rights organizations have characterized campus sexual assault proceedings as a power struggle between women, who supposedly fabricate allegations of sexual assault, and men, who are the exclusive victims of false accusations.[49] These organizations largely ignore the existence of male victims of sexual violence. Reducing sexual violence on campus would benefit many male college students, who are too often victims of sexual violence themselves.

A. *How Title IX Came to Be Applied to Sexual Misconduct*

Congress enacted Title IX to address educational inequalities faced by women.[50] Title IX prohibits sex-based discrimination in any educational program or activity that receives federal funds[51] and is commonly known for expanding athletic opportunities for women at all levels of education, though the text of Title IX is not limited to addressing inequality in athletics.[52] Notably, the text of Title IX does not mention sexual harassment or sexual violence. Title IX states that "no person 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."[53] While the text of Title IX does not explicitly mention sexual harassment and sexual violence, the United States Supreme Court has read Title IX's prohibition on sex discrimination "broadly to encompass diverse forms of in-

47. *See* Cindy Dampier, *Your Son is More Likely to be Sexually Assaulted than to Face False Allegations. Explaining the Fear of #HimToo*, CHI. TRIB. (Oct. 12, 2018), https://www.chicagotribune.com/lifestyles/ct-life-false-rape-allegations-20181011-story.html [https://perma.cc/53KT-SX2M].

48. *Campus Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/campus-sexual-violence [https://perma.cc/2SMM-JZDA] (last visited Mar. 3, 2021).

49. *See* Emily Matchar, *'Men's Rights' Activists are Trying to Redefine the Meaning of Rape*, NEW REPUBLIC (Feb. 26, 2014), https://newrepublic.com/article/116768/latest-target-mens-rights-movement-definition-rape [https://perma.cc/46Y5-XDBD] (describing how various men's rights groups have latched onto supposedly false allegations of sexual assault, including a group that created posters saying 'just because you regret a one-night stand, doesn't mean it wasn't consensual').

50. U.S. DEP'T OF JUST., EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 2 (2012).

51. 20 U.S.C. § 1681.

52. Lavinia M. Weizel, Note, *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, 1615 (2012).

53. 20 U.S.C. § 1681(a).

tentional sex discrimination."[54] This broad interpretation of intentional sex discrimination has come to include student-on-student sexual harassment and sexual violence.

In 1997, during the Clinton administration, the Office of Civil Rights (OCR) published guidance that interpreted Title IX to prohibit sexual harassment.[55] The 1997 Guidance stated that schools will be liable for student-on-student sexual harassment if "(i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known about the harassment, and (iii) the school fails to take immediate and appropriate corrective action."[56] Two Supreme Court decisions in the 1990s, *Davis v. Monroe County Board of Education* and *Gebser v. Lago Vista Independent School District*, also interpreted Title IX's prohibition on sex discrimination to extend to sexual harassment.[57] These decisions built on the Court's Title VII precedent holding sexual harassment to be a form of sex discrimination. In *Meritor Savings Bank v. Vinson*, a case involving a Title VII sex discrimination claim, the Court concluded that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[58] Relying on *Vinson*, the Court in *Gebser* concluded that sexual harassment of a student by a teacher was a form of sex discrimination prohibited by Title IX.[59] In *Davis*, the Court permitted a student to sue a school board under Title IX for failure to stop student-on-student sexual harassment.[60] The *Davis* Court concluded that in certain circumstances, "deliberate indifference to known acts of harassment . . . amounts to an intentional violation of Title IX."[61]

Notably, the *Davis* Court's deliberate indifference standard of liability was a more favorable standard for institutions than the one promulgated in OCR's 1997 Guidance.[62] However, in 2001, on the final day of the Clinton administration, OCR announced that it would continue

54. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 183 (2005).
55. OFF. OF C.R., DEP'T. OF EDUC., SEXUAL HARASSMENT GUIDANCE (1997).
56. *Id.*
57. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).
58. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).
59. *Gebser*, 524 U.S. at 282.
60. *Davis*, 526 U.S. at 643.
61. *Davis*, 526 U.S. at 643.
62. R. Shep Melnick, *The Strange Evolution of Title IX*, NAT'L AFF. Summer 2018, at 19, 28.

to enforce the 1997 Guidance.[63] OCR interpreted *Davis* as "limited to private actions for monetary damages"[64] and therefore, *Davis* did not apply to administrative regulations establishing what schools must do to qualify for federal funding.[65] The Bush administration neither repealed nor enforced the 1997 Guidance and, until 2011, there was little enforcement of institutions' Title IX obligations to address sexual misconduct.[66]

B. *Federal Guidance and Enforcement of Title IX During the Obama and Trump Administrations*

The Department of Education's Title IX guidance and regulations have varied significantly over the past decade depending on the presidential administration. In 2011, the Obama administration "launched a concerted attack on the problem of sexual assault on college campuses."[67] In April of that year, OCR published a Dear Colleague Letter (2011 DCL) supplementing the 2001 Guidance.[68] The 2011 DCL "provid[es] additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence."[69] This was the first time OCR introduced the term "sexual violence" in the context of schools' Title IX obligations.[70] Some commentators, like Jacob Gersen and Jeannie Suk Gersen, have characterized the 2011 DCL's extension of Title IX to sexual violence as "a very significant, even fundamental, shift in OCR's position."[71] While a person generally cannot be subject to criminal charges for sexual harassment, sexual violence "usually refers

63. OFF. OF C.R., DEP'T. OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001).
64. *Id.*
65. Melnick, *supra* note 62.
66. *Id.*
67. R. Shep Melnick, *Analyzing the Department of Education's Final Title IX Rules on Sexual Misconduct*, BROOKINGS (June 11, 2020), https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/ [https://perma.cc/P932-5348].
68. Letter from Russlynn Ali, Assistant Sec'y, Off. of C.R., U.S. Dep't of Educ., to Colleague 1–2 (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/3GCE-NZH4]
69. *Id.*
70. Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881, 900 (2016).
71. *Id.* at 901.

to acts that are criminal."[72] To some commentators, requiring institutions to adjudicate potentially criminal acts is a significant departure from earlier OCR guidance on sexual harassment.[73]

Despite criticism, extending Title IX coverage to sexual violence is a reasonable interpretation of Title IX's prohibition on sex discrimination. Before the 2011 DCL, courts had already read Title IX to prohibit student-on-student sexual harassment.[74] Critics point to the criminal nature of sexual violence to distinguish between sexual harassment and sexual violence. However, courts in the Title VII context have found employers liable for failing to respond appropriately to an employee's experience of sexual violence. The Ninth Circuit has held, in the context of Title VII, that "being raped is, at a minimum, an act of discrimination based on sex. Thus, the employer's reaction to a single, serious episode may form the basis for a hostile work environment claim."[75] The rape at issue in that case was criminal, yet the act's criminal nature did not preclude Title VII liability. Similarly, universities should be liable for failing to respond appropriately to sexual violence, even if the sexual violence in question may also be criminal. Additionally, Title IX proceedings do not preclude students from also filing criminal charges against an accused student.

The 2011 DCL established guidelines for schools to follow when addressing sexual harassment and violence. Under the 2011 DCL, schools were required to use a preponderance of the evidence standard when evaluating allegations of sexual misconduct.[76] While the majority of schools had used a preponderance of the evidence standard prior to the 2011 DCL, some schools used a higher evidentiary standard to adjudicate sexual misconduct – clear and convincing evidence.[77] If a school using the clear and convincing evidence standard had refused to

72. *Sexual Harassment*, RAINN, https://www.rainn.org/articles/sexual-harassment [https://perma.cc/X37E-37PY] (last visited Feb. 14, 2021).

73. *See* Gersen & Suk, *supra* note 70 at 906-07 (noting that internal Title IX investigations and tribunals "have the flavor of criminal tribunals because they discipline conduct that is called criminal in the federal statute and regulations at issue.").

74. *See, e.g.*, Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999) (holding that a school district can be liable for peer-on-peer sexual harassment).

75. Little v. Windermere Relocation, Inc., 301 F.3d 958, 968 (9th Cir. 2002).

76. Letter from Russlynn Ali, Assistant Sec'y, Off. for Civ. Rts., U.S. Dep't of Educ., to Colleague 1–2 (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/E6C7-TERJ].

77. Jake New, *Burden of Proof in the Balance*, INSIDE HIGHER ED (Dec. 16, 2016), https://www.insidehighered.com/news/2016/12/16/will-colleges-still-use-preponderance-evidence-standard-if-2011-guidance-reversed [https://perma.cc/4L7L-PTV8] (noting that 70 percent of U.S. colleges were using the preponderance of the evidence standard prior to the 2011 DCL).

switch to preponderance of the evidence, the school would be in violation of Title IX. OCR justified requiring a preponderance of the evidence standard because preponderance of the evidence is used in other civil rights litigation, like Title VII.[78] Furthermore, OCR itself uses a preponderance of the evidence standard "when it resolves complaints against recipients."[79] In addition to the new evidentiary requirement, schools were required to allow accusers to appeal decisions.[80] Also, the 2011 DCL recommended that schools prohibit parties from cross-examining each other.[81] Finally, the 2011 DCL urged schools to complete investigations within sixty days.[82]

After OCR published the 2011 DCL, critics raised concerns about requiring schools to use the preponderance of the evidence standard. Critics alleged that using the lower evidentiary standard of preponderance of the evidence violated accused students' due process rights,[83] arguing that accused students in school disciplinary proceedings "face the deprivation of a property interest in their continued education as well as the reputational harm" of having a disciplinary mark on their record.[84] Critics also argued that these harms meant schools should use a clear and convincing evidence standard. [85] Additionally, commentators alleged that prohibiting accused students from cross-examining their accuser violated accused students' due process rights.[86]

Contemporaneous to the 2011 DCL's publication, OCR began publishing a list of institutions under investigation for Title IX violations.[87] OCR publicly threatened institutions on the list with revocation of federal funding if OCR found an institution to be in violation of Ti-

78. Letter from Russlynn Ali to Colleague, *supra* note 76, at 1–2.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. Conor Friedersdorf, *The ACLU Moves to Embrace Due Process on Title IX*, ATLANTIC (Feb. 8, 2019), https://www.theatlantic.com/ideas/archive/2019/02/aclu-title-ix/582118/ [https://perma.cc/3N2D-DA9A].
84. Weizel, *supra* note 52, at 1621.
85. Friedersdorf, *supra* note 83.
86. K.C. Johnson & Stuart Taylor, Opinion: *The Path to Obama's 'Dear Colleague' Letter*, WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/ [https://perma.cc/CK6T-TUXA].
87. *See* OFF. OF C.R., DEP'T OF EDUC., PENDING CASES CURRENTLY UNDER INVESTIGATION AT ELEMENTARY-SECONDARY AND POST-SECONDARY SCHOOLS, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tix.html?queries%5Bstate%5D=MI&queries%5Btod%5D=Title+IX+-+Sexual+Violence [https://perma.cc/H8AF-92BB] (last visited Mar. 3, 2021).

tle IX.[88] "OCR does not publish similar lists for other types of investigations that are still in progress."[89] Universities and critics have argued that publishing ongoing investigations places universities under "a cloud of suspicion."[90] Candice Jackson, acting director of OCR in 2017, described OCR's database of schools as a "list of shame."[91] OCR also expressed support for a "single investigator model," in which one person would serve as the investigator, judge of the evidence, and decider of the appropriate punishment.

In September of 2017, OCR issued a new Dear Colleague Letter (2017 DCL) under the Trump administration that withdrew the 2011 DCL.[92] The 2017 DCL echoed many of the criticisms levied against the 2011 DCL.[93] OCR concluded that the 2011 DCL caused "the deprivation of rights for many students," particularly accused students.[94] OCR issued a press release announcing the withdrawal of the 2011 DCL, in which OCR described the 2011 DCL as "creating a system that lacked basic elements of due process and failed to ensure fundamental fairness."[95] In 2018, OCR issued a notice of proposed rulemaking to amend regulations implementing Title IX.[96] The final rules were issued in May of 2020, and became effective in August of that year.[97]

OCR's new rules require post-secondary institutions to "hold live disciplinary hearings in sexual misconduct cases and allow cross-examination of witnesses."[98] The Department of Education "has insisted that cross-examination is indispensable for determining the credibility of

88. Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, ATLANTIC (Sept. 6, 2017), https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/ [https://perma.cc/HPY6-BU56].

89. *Id.*

90. *Id.*

91. Benjamin Wermund, *Title IX List Going Out of Print?*, POLITICO (June 29, 2017), https://www.politico.com/tipsheets/morning-education/2017/06/29/title-ix-list-going-out-of-print-221112 [https://perma.cc/NE6V-PVHU].

92. Letter from Candice Jackson, Assistant Sec'y, Off. for Civ. Rts., U.S. Dep't of Educ., to Colleague (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf [https://perma.cc/Z5GD-Q8NR].

93. *Id.* (citing to open letter from professors arguing that prior 2011 DCL denied due process rights to students).

94. *Id.*

95. *Id.*

96. Nondiscrimination on he Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

97. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

98. Melnick, *supra* note 67.

witnesses," particularly "when other forms of evidence are unavailable."[99] This marks a sharp departure from OCR's approach during the Obama era, when schools were urged to adopt a "single investigator" model and avoid live hearings and cross-examination.[100] The new rules also require institutions to presume that students and employees accused of sexual misconduct are innocent until proven guilty.[101] Decision-makers must not "be employees of the Title IX coordinator," which is markedly different from the single investigator model pushed by the Obama administration.[102] Finally, the new rules require institutions to choose either the "preponderance of the evidence" or "clear and convincing" standard and apply that standard to *all* sexual misconduct cases, including those against faculty and staff.[103] Tenure rules, academic freedom codes, or collective bargaining agreements often require that proceedings against employees use the "clear and convincing" standard of evidence.[104] Because schools will often be required to use the "clear and convincing" standard in cases against employees, schools will therefore also employ the "clear and convincing" standard in cases against students.

C. *Potential Changes to Title IX Under the Biden Administration*

The Biden administration may decide to promulgate new regulations. President Biden "has . . . promised to strengthen Title IX."[105] During his time as vice president, Biden focused extensively on "violence against women and the prevalence of sexual violence."[106] President Biden's campaign website promises to "restore the Title IX guidance for colleges, including the 2011 Dear Colleague Letter."[107] Biden's campaign website also promises that Biden will "stand on the side of survivors, who deserve to have their voices heard, their claims taken seriously

99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. Greta Anderson, *A Long and Complicated Road Ahead*, INSIDE HIGHER ED (Jan. 22, 2021), https://www.insidehighered.com/news/2021/01/22/biden-faces-title-ix-battle-complicated-politics-and-his-own-history [https://perma.cc/3XHM-6N5N].
106. *Id.*
107. *The Biden Plan to End Violence Against Women*, BIDEN HARRIS, https://joebiden.com/vawa/ [https://perma.cc/W39F-X3LZ] (last visited Feb. 13, 2021).

and investigated, and their rights upheld."[108] However, to repeal the Trump administration's rules, Biden's administration "would need to go through the same time-consuming process the department just completed."[109] During that process, "virtually all colleges and universities" will be required to continue to follow the Trump administration's rules.[110]

D. *Title IX's Implied Private Right of Action*

The federal government and private citizens have an array of options for enforcing Title IX. Though Title IX does not explicitly authorize a private right of action, the Supreme Court in *Cannon v. University of Chicago* (1979) held that Title IX contained an implied private right of action.[111] Courts are willing to imply private rights of action in cases "where a private victim of a legal wrong is likely to be in the best position to know of the violation and to sue the violator."[112] Post-*Cannon*, the federal government is able to delegate some of its enforcement responsibility to private citizens. The government can also track lawsuits and recognize patterns, allowing the government to bring its own enforcement actions as necessary.

E. *Disparate Impact Availability Under Title IX*

The Supreme Court has not yet decided whether Title IX allows for liability based on a disparate impact theory.[113] Title IX was modeled after Title VI of the Civil Rights Act of 1964, and the Court held in *Cannon* that courts should look to Title VI jurisprudence when interpreting Title IX.[114] In *Guardians Association v. Civil Service Commission of the City of New York*, the Court held that "discriminatory intent is not an essential element of a Title VI violation, but . . . a private plaintiff

108. *The Biden Agenda for Women*, BIDEN HARRIS, https://joebiden.com/womens-agenda/ [https://perma.cc/E4EM-EY5F] (last visited Feb. 13, 2021).
109. Melnick, *supra* note 67.
110. *Id.*
111. Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979). A private right of action authorizes individual plaintiffs to bring claims to enforce their rights under a statute. Some statutes expressly permit private parties to bring lawsuits, while others, like Title IX, are silent about whether plaintiffs can bring individual claims. In the Title IX context, the Supreme Court has interpreted Title IX to impliedly permit private parties to bring lawsuits.
112. Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 16 (2014).
113. 1 RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS § 8:27 (3d ed. 2021).
114. *Cannon*, 441 U.S. at 703-04.

should recover only injunctive, noncompensatory relief for a defendant's unintentional violations of Title VI."[115] If courts continue to interpret Title IX in lockstep with Title VI, then courts will likely limit disparate impact claims under Title IX to injunctive, noncompensatory relief as well.

Some lower courts have interpreted Title IX to prevent recovery of money damages in disparate impact claims. In *Horner v. Kentucky High School Athletic Association*, the Sixth Circuit held that proving "intentional discrimination is a prerequisite for money damages under Title IX when a facially neutral policy is challenged under a disparate impact theory."[116] Therefore, a plaintiff suing under Title IX would need to prove discriminatory intent in order to receive monetary damages, despite the fact that courts read Title IX broadly to prohibit a wide range of intentional discrimination.[117] Schools can, for example, be found to have intentionally discriminated by failing to take an affirmative action to prevent student-on-student sexual harassment.

Though the Supreme Court has restricted the availability of disparate impact to claims asking for injunctive relief, plaintiffs discussed in this Note are almost all requesting injunctive relief in addition to monetary damages. Because they are asking for injunctive relief, plaintiffs could plead disparate impact as well as intentional discrimination.[118] Despite having disparate impact as an available theory of liability, plaintiffs pleading disparate impact do not get access to money damages, and therefore have little incentive to plead disparate impact causes of action. Additionally, because of courts' broad interpretation of intentional discrimination, there is no clear delineation between disparate treatment and disparate impact suits under Title IX as there would be under Title VII. Therefore, the Title IX plaintiffs discussed in this Note could argue disparate impact if they wanted, but do not need to as the intentional discrimination prohibition covers a wide range of conduct.

II. STRUCTURE OF TITLE IX ANTI-MALE BIAS LAWSUITS

Title IX anti-male bias lawsuits take various forms. However, plaintiffs tend to plead similar theories of liability and rely on similar evi-

115. Guardians Ass'n v. Civ. Serv. Comm'n, 463 U.S. 582, 607 (1983).

116. Horner v. Ky. High Sch. Athletic Ass'n, 206 F.3d 685, 692 (6th Cir. 2000).

117. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 183 (2005).

118. *See* Doe v. Univ. of Cincinnati, 173 F. Supp. 3d 586, 608 (S.D. Ohio 2016) (rejecting plaintiff's disparate impact theory, Court held that a disparate impact theory is not available for recovery under Title IX).

dence to prove intentional discrimination. As courts have heard increasing numbers of anti-male bias claims, they have developed varying frameworks for evaluating these claims. Courts have borrowed from each other to develop categories for anti-male bias suits. At least one circuit has adopted a lower pleading standard for anti-male bias lawsuits than other civil actions.

First, this section provides a background on the increasing number of anti-male bias lawsuits brought under Title IX. Next, this section provides a survey of pleading standards employed by courts in anti-male bias lawsuits. Finally, this section looks at theories of liability for finding intentional discrimination in anti-male bias claims.

A. *Recent Trends in Anti-Male Bias Lawsuits Under Title IX*

Male students are suing universities under Title IX in increasing numbers. The number of suits filed in federal court by male students accused of sexual misconduct has risen from about one a year prior to 2011 to one a week in 2018-19.[119] Plaintiffs typically do not allege just one cause of action and instead allege a combination of causes of action based in breach of contract, due process, and Title IX, among others. Plaintiffs frequently allege 42 U.S.C. § 1983 and Fourteenth Amendment procedural due process challenges against public universities.[120] Since the Due Process Clause has a state action requirement, only plaintiffs who attend state universities can allege due process violations.[121] Students at public universities have had some success alleging due pro-

119. Catherine Rentz, *Ex-UMBC Baseball Players, Part of National Trend, Turning Tables on Sexual Assault Accuser in Court*, BALT. SUN, July 8, 2019.

120. *See, e.g.,* Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018).

121. Note that a student attending private university might still have a cognizable due process claim depending on the relationship between the government and the private university. In *S.P. v. City of Takoma Park*, 134 F.3d 260, 269 (4th Cir. 1998), the court held that private action can be considered state action if "the state has, through extensive regulation, exercised coercive power over, or provided significant encouragement to, the private actor." A student could claim that the 2011 DCL and OCR investigations provided significant encouragement to private actors, thereby making "private" conduct qualify as state action for due process purposes. *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (holding that state action is required for due process challenge); *See also* Doe v. Washington & Lee Univ., No. 6:14-CV-00052, 2015 WL 4647996, at *8 (W.D. Va. Aug. 5, 2015) (explaining that: "Had Plaintiff been enrolled at a public university, he would have been entitled to due process and the proceedings against him might have unfolded quite differently. Unfortunately for Plaintiff, W & L is a private university, and as such, is generally not subject to the constitutional protections of the Fifth Amendment.").

cess violations, but students at private universities have not.[122] Unlike due process claims, breach of contract claims are available to students at either private or public universities, and some students have gotten past motions to dismiss on breach of contract claims.[123] Similarly, Title IX claims are available to students at both public and private universities. The increasing popularity of Title IX anti-male bias claims can be at least partly explained by Title IX's breadth of applicability as compared to procedural due process. Title IX, unlike due process, applies to all universities whether private or public; the only requirement is that a university receive federal funds.[124] Given Title IX's reach, plaintiffs who may be blocked from bringing a due process challenge are able to claim a Title IX violation.

However, Title IX claims overcome motions to dismiss less frequently than procedural due process claims. A due process challenge requires a plaintiff to show that the school failed to provide adequate procedures to ensure a fair outcome.[125] In contrast, a Title IX plaintiff must show *both* an unfair outcome *and* that gender bias was a motivating factor in the unfair outcome.[126] A plaintiff must allege that (1) the educational institution receives federal funding, (2) the plaintiff was excluded from participation in or denied the benefits of an educational program, and (3) that the educational institution in question discriminated against the plaintiff based on gender in order to bring a Title IX claim.[127] Plaintiffs alleging suspension or expulsion due to anti-male bias easily meet the first two requirements, but have often struggled to prove that the disciplinary action was caused by anti-male bias.[128]

Historically, courts have tended to dismiss Title IX anti-male bias claims for failure to show a causal link between the unfair element and gender bias.[129] Courts often agreed that plaintiffs had called the reliability of the disciplinary proceeding into question but also generally found

122. *Compare* Doe v. Baum, 903 F.3d 575 (6th Cir. 2018) (holding that plaintiff could proceed on due process claim against public university for failing to provide opportunity to confront accuser in Title IX proceeding), *with* Doe v. Marymount Univ., 297 F. Supp. 3d 573 (E.D. Va. 2018) (holding that private university was not subject to requirements of 5th Amendment due process and therefore plaintiff could not proceed on procedural due process claims).

123. *See* Corbin, *supra* note 12 at 2665.

124. 20 U.S.C. § 1681.

125. *See, e.g.,* Doe v. Baum, 903 F.3d 575 (6th Cir. 2018) (plaintiff alleged that university's internal Title IX investigation and proceedings violated his due process rights).

126. Yusuf v. Vassar Coll., 35 F.3d 709, 715 (2d Cir. 1994).

127. Doe v. Columbia Coll. Chicago, 933 F.3d 849 (7th Cir. 2019).

128. *Columbia Coll. Chicago,* 933 F.3d at 849.

129. Corbin, *supra* note 12, at 2688.

that plaintiffs were unable to show that gender bias caused the unreliable outcome.[130] Of twenty-eight Title IX anti-male bias cases brought between 2009 and 2016, twenty cases were dismissed "for failure to adequately allege causation."[131] However, beginning in 2017, courts began to permit more Title IX anti-male bias claims to proceed past the motion to dismiss stage.

B. *The First Anti-Male Bias Case:* Yusuf v. Vassar College

Though decided in 1994, the Second Circuit's treatment of an anti-male bias lawsuit in *Yusuf v. Vassar College* has continued to influence courts' approaches to anti-male bias claims.[132] Yusuf, a male student at Vassar College, was suspended for one semester after a panel assembled by the college determined that he had sexually harassed a female student.[133] He sued under Title IX, alleging that Vassar College had discriminated against him as a man by finding him responsible for sexual harassment.[134] In support of his Title IX claim, Yusuf alleged that Vassar "'historically and systematically rendered verdicts against males in sexual harassment cases, solely on the basis of sex' and that 'males are invariably found guilty, regardless of evidence, or lack thereof.'"[135] The district court dismissed Yusuf's Title IX claim, holding that "the bald assertion that the plaintiff was found guilty . . . because he was a male confronting a female accuser is too conclusory to withstand a motion to dismiss."[136] The Second Circuit reversed, finding that the evidence the district court dismissed as conclusory was sufficient to support a claim of gender discrimination under Title IX.[137] The Court noted that "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."[138]

130. *See, e.g.,* Mallory v. Ohio Univ., 76 F.App'x 634, 640 (6th Cir. 2003) (finding that plaintiff cast doubt on disciplinary proceedings but did not link that doubt to gender bias).
131. Corbin, *supra* note 12, at 2697.
132. *See, e.g.*, Doe v. Virginia Polytechnic Inst. and State Univ., No. 19-CV-249, 2021 WL 719898 (W.D. Va. Feb. 24, 2021) (citing to and applying *Yusuf* while also noting some courts' hesitancy to use *Yusuf*'s categories for Title IX claims).
133. Yusuf v. Vassar Coll., 35 F.3d 709, 712 (2d Cir. 1994).
134. *Yusuf*, 35 F.3d at 714.
135. Yusuf v. Vassar Coll., 827 F. Supp. 952, 957 (S.D.N.Y. 1993), *rev'd* 35 F.3d 709 (2d Cir. 1994).
136. *Yusuf*, 827 F. Supp. at 957.
137. *Yusuf*, 35 F.3d at 715-16.
138. *Yusuf*, 35 F.3d at 716.

In *Yusuf*, the Court established that "Title IX bars the imposition of university discipline where gender is *a motivating factor* in the decision to discipline."[139] The Court cited to Title VII, which prohibits employment decisions where gender "was a motivating factor… even though other factors also motivated the practice."[140] At the pleading stage, a Title VII plaintiff need not show that gender was the but-for cause of the adverse employment decision.[141] At trial, however, the defendant can demonstrate that they would have made the same employment decision absent gender.[142] If a court finds that an employer would have made the same decision without considering gender, then the court has effectively concluded that gender was not a but-for cause of the employment decision.[143] The employer may avoid liability by rebutting the inference that gender changed the outcome of the employment decision. Although the plaintiff must show gender was a motivating factor, the plaintiff is not required to prove that gender discrimination was the defendant's sole motive. [144]

Yusuf held that a Title IX plaintiff must "allege particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding."[145] However, the plaintiff does not meet their pleading burden merely by challenging the accuracy of the outcome. The plaintiff must also plead sufficient facts to demonstrate a causal link between gender bias and the erroneous outcome.[146] Merely "conclusory allegation[s] of gender discrimination" are insufficient to overcome a motion to dismiss.[147] The court stated that evidence of a causal connection could "be of the kind . . . found in the familiar setting of Title VII cases."[148] In Title VII cases, plaintiffs pleading that sex was a motivating factor in the employment decision may present either di-

139. *Yusuf*, 35 F.3d at 715 (emphasis added).
140. 42 U.S.C. § 2000e-2(m) (2012).
141. Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989).
142. *Price Waterhouse*, 490 U.S. at 244.
143. *Price Waterhouse*, 490 U.S. at 249.
144. *Price Waterhouse*, 490 U.S. at 240.
145. Yusuf v. Vassar Coll., 35 F.3d 709, 715 (2d Cir. 1994).
146. *Yusuf*, 35 F.3d at 715 (A plaintiff must plead "a particularized allegation relating to a causal connection between the flawed outcome and gender bias. A plaintiff must thus also allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding. Allegations of a causal connection in the case of university disciplinary cases can be of the kind that are found in the familiar setting of Title VII cases . . . .").
147. *Yusuf*, 35 F.3d at 715.
148. *Yusuf*, 35 F.3d at 715.

rect or circumstantial evidence of discrimination.[149] The court in *Yusuf* suggested that Title IX plaintiffs could similarly rely on either direct or circumstantial evidence to show that gender was a motivating factor in the decision to discipline.[150]

C. *Theories of Liability for Anti-Male Bias Claims: Erroneous Outcome, Selective Enforcement, and Archaic Assumptions*

Yusuf v. Vassar College remains highly influential for courts evaluating anti-male bias claims under Title IX.[151] In *Yusuf*, the Second Circuit established two categories that most anti-male bias claims will fall into: erroneous outcome and selective enforcement.[152] An erroneous outcome claim alleges that "the plaintiff was innocent and wrongly found to have committed the offense."[153] Gender bias must be "a motivating factor behind the erroneous finding."[154] A selective enforcement claim asserts that, irrespective of the plaintiff's guilt or innocence, "the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender."[155] The court stressed that under either theory the plaintiff must demonstrate a causal connection between gender bias and the outcome in the plaintiff's particular disciplinary proceeding.[156] Examples of allegations that could sustain a particularized causal connection include "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender."[157] Most circuits have adopted both the erroneous outcome and selective enforcement theories of liability.[158]

The Sixth Circuit in *Doe v. Miami University* added a third theory of liability for plaintiffs attacking the outcome of a university disciplinary proceeding: archaic assumptions.[159] Prior to *Miami University*, the

149. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (holding that plaintiffs do not need to present direct evidence to obtain mixed-motive instructions).
150. *See Yusuf*, 35 F.3d at 715 (plaintiff could show "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender.").
151. Fang, *supra* note 12, at 474.
152. Yusuf v. Vassar College, 35 F.3d 709, 715 (2d Cir. 1994).
153. *Yusuf*, 35 F.3d at 715.
154. *Yusuf*, 35 F.3d at 715.
155. *Yusuf*, 35 F.3d at 715.
156. *Yusuf*, 35 F.3d at 715.
157. *Yusuf*, 35 F.3d at 715.
158. Corbin, *supra* note 12, at 2686.
159. Doe v. Miami Univ., 882 F.3d 579, 589 (6th Cir. 2018).

Sixth Circuit had only recognized an archaic assumptions theory of liability in the athletic context.[160] The archaic assumptions theory "finds discriminatory intent in actions resulting from classifications based upon archaic assumptions."[161] The plaintiff in *Mallory v. Ohio*, another Sixth Circuit anti-male bias case, involved a university Title IX investigation where both the plaintiff, a man, and the woman made cross-claims of sexual assault against each other.[162] Plaintiff alleged that the university's decision to initiate disciplinary proceedings against him and not the woman was a product of archaic assumptions held by university administrators about who assaulted whom.[163] The court held that the plaintiff and the woman were not similarly situated and therefore did not "establish that the University's disciplinary proceeding against Mallory was motivated by his sex."[164] Only the Sixth Circuit has adopted an archaic assumptions theory of liability.

A plaintiff may plead more than one of these theories of liability.[165] Plaintiffs often plead all of them, with courts selecting which theory, if any, actually fits the plaintiff's case. However, some circuits have completely rejected certain theories used by anti-male bias plaintiffs. The Seventh Circuit in *Doe v. Purdue University* rejected these theories because they merely restate the central question a court should answer: "do the alleged facts, if true, raise a plausible inference that the university discriminated against John 'on the basis of sex'?"[166] The Seventh Circuit in *Purdue University* refocused the inquiry of Title IX anti-male bias claims on whether gender bias was a motivating factor in the disciplinary action.

D. *Applying* Twombly *to Anti-Male Bias Lawsuits*

Yusuf was decided under the *Conley v. Gibson* notice pleading standard, which allows a complaint to proceed "unless it appears beyond doubt that the plaintiff can prove no sets of facts in support of his claim which would entitle him to relief."[167] The *Conley* standard supported "a liberal view of notice pleading," where the purpose of pleading was

160. Mallory v. Ohio, 76 F. App'x 634, 638 (6th Cir. 2003).
161. *Mallory,* 76 F. App'x at 638-639.
162. *Mallory,* 76 F. App'x at 640.
163. *Mallory,* 76 F. App'x at 640.
164. *Mallory,* 76 F. App'x at 641.
165. Yusuf v. Vassar College, 35 F.3d 709, 715 (2d Cir. 1994).
166. Doe v. Purdue Univ., 928 F.3d 652, 667-68 (7th Cir. 2019).
167. *Yusuf*, 35 F.3d at 713 (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

simply to put the defendant on notice of the elements of the claim.[168] *Conley*'s notice pleading standard has been replaced by the factual pleading standard announced in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. In *Iqbal*, the Court held that a claim must "contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'"[169] A claim satisfies the facial plausibility requirement "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[170] Conclusory statements or mere recitations of the elements of the claim are insufficient for facial plausibility.[171]

While the *Yusuf* framework has remained influential for courts considering Title IX claims, courts have sometimes struggled to apply *Yusuf* in light of the heightened pleading standard established by *Twombly* and *Iqbal*.[172] Courts differ over what facts are sufficient to constitute a "plausible" claim of gender discrimination. Plaintiffs in Title IX anti-male bias cases often present evidence that has various explanations, some discriminatory and some not.[173] At the motion to dismiss stage, courts differ in the weight they give to alternative, non-discriminatory explanations for conduct that plaintiffs allege indicates gender bias. The United States Supreme Court addressed the weight courts should give to alternative, non-discriminatory explanations in a constitutional discrimination and § 1983 claim in *Iqbal*. The Court concluded that Iqbal's factual allegations "failed to create an inference of discrimination that was more plausible than alternative explanations for the defendants' conduct."[174] Therefore, at least in constitutional discrimination and § 1983 actions, the discriminatory explanation for conduct can fail to satisfy *Twombly*'s plausibility standard if alternative, non-discriminatory explanations for conduct are more plausible.

168. GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 47(A), at 197 (1994).
169. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).
170. *Iqbal*, 556 U.S. at 678.
171. Conclusory statements are those which provide no supporting evidence and merely state a conclusion. *See Iqbal*, 556 U.S. at 678.
172. Corbin, *supra* note 12, at 2691.
173. *See* Doe v. Univ. of Colo. Boulder, 255 F. Supp. 3d 1064, 1075-78 (D. Colo. 2017) (Plaintiff alleging that women were mostly accusers and men were mostly accused, which could be explained by either gender bias or that men tended to disproportionately commit assaults. Court said there are some moments when alternative explanation overwhelms inference of discrimination).
174. J. Scott Pritchard, *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 TEMPLE L. REV. 757, 766 (2011).

While *Iqbal* exclusively dealt with constitutional and § 1983 claims, courts have since applied the Court's reasoning in *Iqbal* to Title IX anti-male bias claims. In *Doe v. University of Colorado at Boulder*, the District Court applied *Iqbal*'s analysis to a Title IX anti-male bias claim. The plaintiff, a man, was expelled after the Title IX office concluded by a preponderance of the evidence that he had raped two female students.[175] He claimed that the university primarily disciplined men for sexual misconduct and that this higher rate of punishment supported an inference of gender bias.[176] However, the court concluded that the gender disparity in punishment stemmed from the fact that the majority of accusers are women and the majority of the accused are men.[177] The court found this non-discriminatory explanation to be "an 'obvious alternative explanation' . . . that overwhelm[ed] any potential inference of gender bias."[178] The court accordingly dismissed the plaintiff's Title IX anti-male bias claim for failing to meet the plausibility requirement.[179]

E. *Reconciling* Swierkiewicz *and* Twombly

The Supreme Court in *Twombly* stated that its holding was compatible with an earlier decision, *Swierkiewicz v. Sorema*.[180] In *Swierkiewicz*, the Court held that a pleading in an employment discrimination case need "not contain specific facts establishing a prima facie case of discrimination."[181] The Court in *Swierkiewicz* also held that courts could not impose a higher pleading standard in Title VII cases than in other civil cases.[182] In *Twombly*, the Supreme Court reconciled its new, heightened pleading standard with *Swierkiewicz*, writing "here, the Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim of relief that is plausible on its face."[183] The Court seemed to believe that *Twombly* did not overrule *Swierkiewicz*, and that the two cases remained compatible.

While the Court suggested that *Twombly* did not affect its holding in *Swierkiewicz*, lower courts have struggled to reconcile the cases and have developed two distinct approaches to resolving the apparent con-

175. *Univ. of Colo. Boulder*, 255 F. Supp. 3d at 1068.
176. *Univ. of Colo. Boulder*, 255 F. Supp. 3d at 1068.
177. *Univ. of Colo. Boulder,* 255 F. Supp. 3d at 1078.
178. *Univ. of Colo. Boulder*, 255 F. Supp. 3d at 1079.
179. *Univ. of Colo. Boulder*, 255 F. Supp. 3d at 1079.
180. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007).
181. Swierkiewicz v. Sorema, 534 U.S. 506 (2002).
182. *Swierkiewicz*, 534 U.S. at 511-12.
183. *Twombly*, 550 U.S. at 547.

tradiction. The first approach is to read *Twombly* as raising the pleading standard in all civil cases, including discrimination cases.[184] Under this approach, the central holding of *Swierkiewicz*, that discrimination cases may not have higher pleading standards than other civil cases, is preserved because the pleading standard of *all* civil cases is raised.[185] Courts employing this approach require Title IX plaintiffs to meet *Twombly*'s facial plausibility standard: Plaintiffs must establish a facial case of discrimination in the pleadings.[186] The second approach is to read *Twombly* as raising the pleading standard, but that *Twombly*'s plausibility standard does not force plaintiffs to plead a facial case of discrimination.[187] Commentators have favored the second approach. In particular, commentators have suggested that courts apply the plausibility requirement of *Twombly* too strictly in Title IX cases.[188] Courts have required plaintiffs to present evidence of discrimination in the pleadings. However, the evidence is often under the control of the defendant and therefore unavailable to the plaintiff absent discovery.[189] If *Swierkiewicz* is still good law and plaintiffs do not need to plead a prima facie case of discrimination, courts should ask whether the complaint, taken as a whole, "renders a plaintiff's entitlement to relief plausible."[190] Under this view, Title IX plaintiffs should be required to allege only 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."[191]

However, the Court in *Iqbal* established that courts should consider obvious alternative, non-discriminatory explanations for allegedly discriminatory conduct.[192] Even if plaintiffs are not required to plead a prima facie case of discrimination, courts will still consider whether the inference of discrimination is more plausible than non-discriminatory explanations.[193] The ability of courts to consider alternative, non-discriminatory explanations limits the advantage given to plaintiffs by reconciling *Swiekierwicz* and *Twombly*. A plaintiff who presents evidence with plausible alternative explanations is likely to have their case dismissed.

184. *See* Austin v. Univ. of Or., 925 F.3d 1133, 1138 (9th Cir. 2019).
185. *Swierkiewicz*, 534 U.S. at 508.
186. *See, e.g.,* Doe v. Vanderbilt Univ., 2019 WL 4748310 (M.D. Tenn. 2019).
187. Corbin, *supra* note 12, at 2694.
188. *Id.* at 2706.
189. *Id.* at 2707.
190. *Id.*
191. *Id.* at 2708.
192. Ashcroft v. Iqbal, 556 U.S. 662, 682 (2009).
193. *See, e.g.,* Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 75 (1st Cir. 2019).

F. *The Second Circuit Approach:* Doe v. Columbia University

In 2016, the Second Circuit adopted a new pleading standard for Title IX anti-male bias lawsuits in *Doe v. Columbia University*.[194] The Court imported the burden-shifting framework used in *McDonnell-Douglas Corp. v. Green* from Title VII cases into the Title IX context.[195] The court established a temporary presumption for plaintiffs in Title IX cases, which "reduces the plaintiff's pleading burden, so that the alleged facts need support only a minimal inference of bias."[196] The court reconciled its temporary presumption with *Iqbal*'s plausibility requirement of a discriminatory explanation, noting that *Iqbal* did not require "the inference of discriminatory intent to be . . . the *most plausible* explanation."[197] A plaintiff satisfied the *Iqbal* plausibility requirement as long as "the inference of discriminatory intent is plausible."[198] The court in *Columbia University* applied the temporary presumption and found that the plaintiff had pleaded sufficient facts to support a minimal inference of bias.[199]

Plaintiffs and commentators have urged other courts to adopt the Second Circuit's temporary presumption.[200] However, no court outside the Second Circuit has adopted it. The Sixth Circuit in *Doe v. Miami University* noted that the Sixth Circuit's prior cases had reconciled *Swierkiewicz* and *Twombly* differently than the Second Circuit.[201] The Sixth Circuit requires Title IX plaintiffs to "plead sufficient factual allegations to satisfy *Twombly* and *Iqbal* in alleging the required element of discriminatory intent."[202] In light of the Sixth Circuit's precedent, the Sixth Circuit rejected a temporary presumption in favor of the *Twombly* plausibility standard.[203] The Ninth Circuit in *Austin v. University of Oregon* also rejected the temporary presumption.[204] The Ninth Circuit read "the Second Circuit's application of the *McDonnell-Douglas* presumption at the pleading stage as contrary to Supreme Court precedent"

194. Doe v. Columbia Univ., 831 F.3d 46 (2d Cir. 2016).
195. *See* McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1973).
196. *Columbia Univ.*, 831 F.3d at 56.
197. *Columbia Univ.*, 831 F.3d at 57.
198. *Columbia Univ.*, 831 F.3d at 57.
199. *Columbia Univ.*, 831 F.3d at 59.
200. *See* Fang, *supra* note 12 (encouraging courts to adopt the Second Circuit's "temporary presumption" in order to vindicate discrimination law).
201. Doe v. Miami Univ., 882 F.3d 579, 589 (6th Cir. 2018).
202. *Miami Univ.*, 882 F.3d at 589.
203. *Miami Univ.*, 882 F.3d at 589.
204. Austin v. Univ. of Or., 925 F.3d 1133, 1137 (9th Cir. 2019).

and declined to embrace the approach.[205] The Second Circuit failed to explain why Title IX anti-male bias cases uniquely warranted a lowered pleading standard.

III. HOW COURTS SHOULD APPLY *TWOMBLY*/*IQBAL* TO TITLE IX ANTI-MALE BIAS CLAIMS

In order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'"[206] Plaintiffs in Title IX anti-male bias cases rely on an array of evidence to meet the plausibility requirement. The Second Circuit in *Yusuf* established that plaintiffs must (1) challenge the accuracy of the outcome in their particular case and (2) link gender bias to the inaccurate outcome.[207] Therefore, to survive a motion to dismiss, a Title IX anti-male bias plaintiff must plead sufficient factual allegations to render plausible the claim that the university's decision was wrong and that the wrong outcome was motivated by gender bias. Title IX plaintiffs tend to plead similar allegations, ranging from the hyper-specific—the decision-maker was biased against men—to broad claims about the federal government's guidance on Title IX law.

Plaintiffs in intentional discrimination cases, including the Title IX cases discussed in this Note, attempt to prove that a defendant university acted with discriminatory intent when making the decision to investigate and punish sexual assault allegations.[208] A defendant's state of mind and intent is "usually unstated."[209] Sometimes, however, plaintiffs present evidence of a discriminatory statement by a defendant, commonly referred to as direct evidence of discrimination.[210] Direct evidence of discriminatory intent "is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption."[211] However, this type of evidence is rare.[212] Because plaintiffs typically lack direct evidence of discriminatory intent, plaintiffs must rely on circumstantial, or indirect, evidence to show intentional discrimination by a defendant.[213] Indirect, circumstantial evidence of sex discrimination is

205. *Austin*, 925 F.3d at 1137.
206. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).
207. Yusuf v. Vassar Coll., 35 F.3d 709, 715 (2d Cir. 1994).
208. Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 86 (2d Cir. 2015).
209. *Vega*, 801 F.3d at 86.
210. *Vega*, 801 F.3d at 86.
211. Dominguez-Curry v. Nev. Transp. Dep't, 424 F.3d 1027, 1038 (9th Cir. 2005).
212. *Vega*, 801 F.3d at 86.
213. *Vega*, 801 F.3d at 86.

sufficient to satisfy *Iqbal*'s standard of facial plausibility. The types of evidence described in this section include both direct and indirect evidence.

The Court in *Iqbal* stated that "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."[214] The *Twombly* Court clarified that "asking for plausible grounds . . .simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[215] A claim has facial plausibility if there is "more than a sheer possibility that the defendant acted unlawfully."[216] *Twombly*/*Iqbal* also do not require illegal conduct to be the *most* plausible or probable inference from the pleaded facts. Therefore, even if alternative, non-discriminatory inferences exist for pleaded facts, courts should not dismiss claims unless those alternative explanations are so obvious that they render the conclusion of discrimination implausible.[217]

Courts take varying and inconsistent approaches when evaluating what evidence satisfies *Iqbal*'s facial plausibility requirement, leaving universities uncertain about which conduct will result in Title IX litigation and liability. Instead of moving away from *Iqbal*'s facial plausibility requirement, courts should instead apply *Iqbal*'s facial plausibility requirement predictably and consistently. This Section explains how courts should apply *Iqbal*'s facial plausibility to each type of evidence commonly presented by male Title IX plaintiffs in sexual misconduct cases.

A. *Behavior of Individual University Decisionmakers*

In *Yusuf*, the Second Circuit expected that a Title IX anti-male bias plaintiff would present factual allegations that included "statements by members of the disciplinary tribunal [or] statements by pertinent university officials . . .that . . .tend to show the influence of gender."[218] An individual decisionmaker's statement admitting animus is especially strong evidence that the plaintiff's protected trait was a motivating fac-

214. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).
215. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007).
216. *Iqbal,* 556 U.S. at 678.
217. *See Iqbal*, 556 U.S. at 682 (dismissing plaintiff's claim of discriminatory conduct when alternative non-discriminatory explanation existed for allegedly discriminatory conduct).
218. Yusuf v. Vassar Coll., 35 F.3d 709, 715 (2d Cir. 1994).

tor in the decision.[219] Therefore, courts will sometimes find discriminatory statements alone sufficient to satisfy the plausibility requirement. For example, in *Doe v. Marymount University*, the plaintiff alleged that the hearing officer made statements indicating that he believed men could not be victims of sexual misconduct.[220] The Court held that "this allegation alone [was] sufficient to satisfy Doe's burden to plead a fact that creates an inference of gender discrimination in Marymount's disciplinary proceedings."[221] Similarly, in *Saravanan v. Drexel University*, the plaintiff presented statements from a university administrator that included a statement by the administrator that he "[had] never heard of a female raping a male."[222] These statements alone were sufficient for the plaintiff's erroneous outcome claim to survive a motion to dismiss. Courts seem particularly receptive to statements like the ones made in *Saravanan* and *Marymount* that evince assumptions by decisionmakers that only women can be victims of sexual assault.

Should plaintiffs present statements like those in *Saravanan*, courts should accept these allegations as particularized facts supporting an inference of gender bias. Because the decisionmaker has control over the outcome of the student's case, any stereotypes or beliefs exhibited by the decisionmaker are especially likely to influence the case. A Title IX anti-male bias plaintiff must link gender bias to the erroneous outcome in their individual case. This link is easy to make when a decisionmaker has stated that gender stereotypes impacted their adjudication or handling of the case. The Court in *Doe v. Brown University* described statements evincing gender bias as "smoking gun evidence," which illustrates how strong this type of evidence is for plaintiffs.[223]

Some courts also accept more ambiguous statements by administrators as evidence of gender bias. In *Doe v. Washington and Lee University*, the university's Title IX Officer gave a presentation that included an article titled "*Is it Possible That There is Something Between Consensual Sex and That it Happens to Almost Every Girl Out There?*."[224] The Title IX

219. *See, e.g.*, Harper v. Fulton Cnty., Ill., 748 F.3d 761, 765 (7th Cir. 2014) (holding that an admission by the decisionmaker of discriminatory intent is evidence that proves discriminatory intent "without reliance on inference or presumption").

220. Doe v. Marymount Univ., 297 F. Supp. 3d 573, 585-86 (E.D. Va. 2018).

221. *Marymount Univ.,* 297 F. Supp. 3d at 586.

222. Saravanan v. Drexel Univ., No. 17-3409, 2017 WL 5659821, at *2 (E.D. Pa. Nov. 24, 2017).

223. Doe v. Brown Univ., 166 F. Supp. 3d 177, 189 (D. R.I. 2016) (noting that, while that particular case lacked a "smoking gun" statement of gender bias, the plaintiff had still established allegations of gender bias sufficient to overcome a motion to dismiss).

224. Doe v. Washington & Lee Univ., No. 6:14-cv-00052, 2015 WL 4647996, at *3 (W.D. Va. Aug. 5, 2015).

Officer also stated that she believed "'regret equals rape' . . . and that this point was a new idea that everyone, herself included, is starting to agree with."[225] The Court found this statement sufficient for plaintiff's erroneous outcome claim to survive a motion to dismiss.

Some plaintiffs have been able to survive a motion to dismiss by alleging that, upon information and belief, the university possesses communications "evidencing [the university's] intent to favor female students alleging sexual assault over [accused] male students."[226] For example, in *Doe v. Brown University*, the plaintiff presented a former university employee's statement that "Brown treats male students as 'guilty until proven innocent' . . . and that the fact-finding process . . . at Brown operates under the assumption that it's always the 'boy's fault.'"[227] The *Brown University* court explained that the fact that these allegations were pleaded upon information and belief did not "make them improper under *Twombly* and *Iqbal*."[228] *Twombly*'s plausibility standard does not prevent a plaintiff from "pleading facts alleged upon 'information and belief' where the facts are peculiarly within the possession and control of the defendant."[229]

Title IX plaintiffs should often be permitted to engage in "information and belief" pleading. If cases are more likely to be dismissed unless plaintiffs have access to information that is peculiarly within the control of the university at the pleading stage, courts effectively turn the motion to dismiss into summary judgment. Summary judgment is, traditionally, when the sufficiency of a plaintiff's evidence is evaluated, not the motion to dismiss.[230] Plaintiffs do not have access to discovery before defendants file motions to dismiss, and therefore struggle in discrimination cases when they do not have access to confidential information. In the Title IX context, students typically do not have access to confidential Title IX communications between university administrators. Allowing the "information and belief" pleading standard in more Title IX anti-male bias cases would likely address the high rates of dismissal of these types of cases. This approach is preferable to the Second Circuit's "temporary presumption" because courts that have rejected the Second Circuit's "temporary presumption" could still allow claims to proceed under the *Twombly*/*Iqbal* plausibility standard.

225. *Washington & Lee Univ.*, 2015 WL 4647996, at *3.
226. Doe v. Salisbury Univ., 123 F. Supp. 3d 748, 768 (D. Md. 2015).
227. *Brown Univ.*, 166 F. Supp. 3d at 189.
228. *Brown Univ.*, 166 F. Supp. 3d at 190.
229. *Salisbury Univ.*, 123 F. Supp. 3d at 768.
230. *See, e.g.*, Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Twombly *and* Iqbal, 14 LEWIS & CLARK L. REV. 15 (2010).

However, courts must still exercise some restraint when deciding whether to permit complaints to proceed based solely on "information and belief" pleading. It is insufficient for the plaintiff to merely plead conclusory allegations of gender discrimination upon information and belief.[231] As the District of Maryland in *Doe v. Salisbury* noted, the plaintiff must plead "*specific factual allegations*."[232] Despite stating that conclusory allegations are insufficient under *Twombly*, the court in *Salisbury* permitted a claim to proceed on vague allegations that, upon information and belief, the university possessed communications evincing a preference for female accusers.[233] But the plaintiff in *Salisbury* did not provide corroborating statements like those provided by the plaintiff in *Brown*. Therefore, the court should not have permitted the gender discrimination claim in *Salisbury* to survive the motion to dismiss. Plaintiffs should not be permitted to plead "information and belief" if they do not have reason to actually suspect that the university possesses communications evincing gender bias.[234]

If plaintiffs are able to survive a motion to dismiss merely by pleading "upon information and belief" that the university possesses communications, every Title IX anti-male bias claim will proceed past motion to dismiss. The Court in *Iqbal* established that the pleadings should "permit the Court to infer more than the mere possibility of misconduct."[235] A complaint that merely alleges that the university may possess communications, with no corroboration, does not nudge a claim from possible to plausible. Courts should permit facts pleaded "upon information and belief" to support a claim's plausibility only if the plaintiff has some articulable reason for why they suspect the defendant will possess the information. Corroboration could come in the form of statements by former university officials or other avenues.

B. *Statistics Evincing a Pattern of Gender-Based Disciplinary Decisions*

Plaintiffs commonly rely on statistics to show that universities engaged in a pattern of gender-based decision-making. The statistical evi-

231. *Salisbury Univ.,* 123 F. Supp. 3d at 768 (noting that "plaintiffs' erroneous outcome allegations would be insufficient if they had simply stated something akin to: 'upon information and belief, procedural defects were motivated by gender bias.'").

232. *Salisbury Univ*., 123 F. Supp. 3d at 768.

233. *Salisbury Univ*., 123 F. Supp. 3d at 768.

234. *See* Austin v. Univ. of Or., 205 F. Supp. 3d 1214, 1225 (D. Or. 2016) (dismissing a claim pleaded "on information and belief" because it did not contain the kinds of statements by university officials contained in *Brown*).

235. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

dence varies depending on the case, but plaintiffs often point to the gender identities of accusers and accused students.[236] Women comprise the vast majority of complainants and men are the vast majority of respondents in almost every Title IX anti-male bias case.[237]

Courts differ in their approach to weighing this type of statistical evidence. The United States Court of Appeals for the Sixth Circuit has stated that "the fact that sexual assault proceedings have been brought only against male students is not in and of itself sufficient to infer gender bias."[238] The university "is not responsible for gender make-up of those who are accused *by other students* of sexual misconduct."[239] Similarly, the First Circuit has noted that the gender make-up of accused students "is the result of what is reported to the university, and not the other way around."[240] Therefore, the mere fact that men are the majority of accused students does not provide a particularized causal link between gender bias and the outcome in the individual plaintiff's case. Some plaintiffs will also allege that the university has exclusively punished men for sexual misconduct.[241] However, if a court accepts that the gender make-up of accused students results from which students report rather than gender bias on the part of the university, the fact that only men are disciplined is also the product of reporting rather than gender bias. The university can only discipline the pool of people that has been reported to them by students, and if that pool is exclusively comprised of men, then only men will be disciplined.

However, some courts are willing to accept the gender make-up of accusers and accused students as probative of gender bias when combined with other evidence. In *Doe v. University of Dayton*, the Sixth Circuit stated that statistics could be combined with other evidence, such as statements by university decisionmakers, to create a particularized claim of gender bias.[242] When combined with evidence that a decisionmaker was infected with gender bias, the statistics potentially become evidence of a pattern of gender-based disciplinary decisions.[243] Alternatively, if both men and women are accused of sexual misconduct, a plaintiff

236. *See, e.g.*, Doe v. Miami Univ., 247 F. Supp. 3d 875, 887 (S.D. Ohio 2017), *rev'd*, 882 F.3d 579 (6th Cir. 2018) (plaintiff alleging that only women were accusers and only men were accused, resulting in only men being punished for sexual misconduct).
237. *See, e.g.*, Doe v. Univ. of Dayton, 766 F. App'x 275, 282 (6th Cir. 2019).
238. *Univ. of Dayton*, 766 F. App'x at 282.
239. King v. DePauw Univ., No. 14-cv-70, 2014 WL 4197507, at *10 (S.D. Ind. Aug. 22, 2014).
240. Doe v. Trustees of Boston Coll., 892 F.3d 67, 92 (1st Cir. 2018).
241. Doe v. Cummins, 662 F. App'x 437, 453 (6th Cir. 2016).
242. *Univ. of Dayton*, 766 F. App'x at 281.
243. *See Univ. of Dayton*, 766 F. App'x at 281.

could show that the school disproportionately investigates and punishes men.[244] However, the First Circuit in *Brown University* noted that this type of comparative evidence about the university's treatment of male and female students is often difficult or impossible for plaintiffs to acquire at the pleading stage.[245]

If men disproportionately commit sexual violence, then it is unsurprising that men comprise the vast majority of students accused of and punished for sexual violence. As the Court in *Austin v. University of Oregon* stated, "it is a simple fact that the majority of accusers of sexual assault are female and the majority of the accused are male, therefore enforcement is likely to have a disparate impact on the sexes."[246] If the fact that universities disproportionately investigate and punish men is probative of gender bias, then any male student punished by a university that primarily investigates and punishes men has a plausible claim of gender bias. Courts should not consider the mere fact that primarily men are punished for sexual assault as a factor in an assessment of whether gender bias is plausible.

The more challenging question is whether statistics should be considered alongside other evidence as increasing a claim's plausibility, especially since this statistical evidence has an obvious alternative, non-discriminatory explanation. Courts should dismiss Title IX anti-male bias claims if an alternative, non-discriminatory explanation "overwhelms any inference" of discrimination.[247] The "obvious alternative explanation" must be more plausible than the discriminatory explanation. The court in *Doe v. University of Colorado Boulder* explained that, in most cases, either a claim is plausible or it is not—"the *degree* of plausibility only becomes relevant when an 'obvious alternative explanation' overwhelms any inference of liability that might otherwise exist."[248] Therefore, once a court has identified an alternative, non-discriminatory explanation for conduct, the court adjudicates whether the discriminatory explanation is more plausible than the alternative, non-discriminatory explanation. In this case, the court must decide whether the alternative explanation overwhelms any inference of discrimination supported by the statistical evidence. Here, the obvious alternative, non-discriminatory explanation for the gender make-up of accusers and accused students is that men commit sexual violence at high rates against primarily female victims.

244. Doe v. Johnson & Wales Univ., 425 F. Supp. 3d 108, 116 (D. R.I. 2019).
245. Doe v. Brown Univ., 166 F. Supp. 3d 177, 188 (D. R.I. 2016).
246. Austin v. Univ. of Or., 205 F. Supp. 3d 1214, 1225 (D. Or. 2016).
247. Doe v. Univ. of Colo., Boulder, 255 F. Supp. 3d 1064, 1076 (D. Colo. 2017).
248. *Univ. of Colo., Boulder*, 255 F. Supp. 3d at 1076.

However, as the *University of Colorado Boulder* court noted, "if enforcement officials are regularly presented with a scenario involving the same two potential classifications—nurse *and* female, taxi driver *and* ethnic minority, sexual assault suspect *and* male—there must come a point when one may plausibly infer that stereotypes about the protected classification (such as gender or ethnicity) have begun to infect the enforcement process generally."[249] Decisionmakers, if they are repeatedly confronted with female victims and male perpetrators, may begin to let gender influence their decisions. For example, a Title IX Officer deciding a case with a female victim and male perpetrator may credit testimony from the woman but not the man due to the Officer's experiences in past cases.[250] The concerns expressed by the court in *University of Colorado Boulder* suggest that a court can infer that a decision-maker is infected by bias merely because the decision-maker has seen many cases where victims are women and perpetrators are men. The court's presumption of bias goes too far: this analysis would suggest that *all* university decision-makers are presumed to be biased merely because the majority of perpetrators are men and the majority of victims are women in Title IX cases. Using the court's logic, any Title IX official would be presumed to be biased only because they have heard lots of cases. The court ignores that many cases end with a finding of no responsibility, evincing that decision-makers likely do not "automatically" credit women's testimony over men's.[251] The court also ignores that officials hear cases where both claimant and respondent are women, or where complainant is a man and respondent is a woman. The court does not grapple with whether a decision-maker's exposure to cases that do not fit the stereotype would rebut an inference of discrimination. Finally, the *University of Colorado Boulder* court's inference of discrimination rewards exactly the kind of conclusory statements *Twombly* forbade. A plaintiff, according to the *University of Colorado Boulder* court, could simply plead "men are typically respondents and women are typi-

249. *Univ. of Colo., Boulder,* 255 F. Supp. 3d at 1076.

250. *Univ. of Colo., Boulder*, 255 F. Supp. 3d at 1076 (noting that in the Title IX context enforcement officers are often required to make credibility determinations between men and women and gender-specific stereotypes may influence how the Officer credits testimony, e.g. "men always behave opportunistically towards drunk girls.").

251. *See* Mariano Castillo, *Universities Mishandled Sexual Assault Cases, Complaints Allege*, CNN (Mar. 8, 2016), https://www.cnn.com/2016/03/08/us/sexual-assault-title-ix-complaints/index.html [https://perma.cc/6DBR-HBR3] (describing a lawsuit filed by four women against four universities alleging Title IX violations in cases where alleged perpetrators were found not responsible or given minimal sanctions).

cally claimants, and therefore the decision-maker is biased"[252] and the court would deem that to be a plausible inference of gender bias.

Courts should require plaintiffs to present evidence that the decisionmaker in their individual case actually acted in ways that made the outcome potentially unfair. Plaintiffs should not be permitted to survive a motion to dismiss merely by pointing out that the majority of claimants are women and the majority of respondents are men, as suggested by the *University of Colorado Boulder*, if the plaintiff cannot demonstrate how those statistics manifested as bias in their individual case. The plaintiff also cannot merely allege that the administration might have felt pressure to punish male students more harshly. Instead, the plaintiff must allege with particularity why, in their individual case, the university actually treated male students worse.

C. *Comparing Treatment of Male and Female Students*

Male plaintiffs in Title IX cases often point to the university's treatment of similarly situated female students as evidence of gender bias. Using a similarly situated comparator is common in Title VII employment discrimination cases. In order to provide a meaningful comparison, "the proposed comparator must be similar enough to permit a reasonable juror to infer, in light of all the circumstances, that an impermissible animus motivated the employer's decision."[253] In the Title IX context, plaintiffs advancing selective enforcement claims especially rely on a comparator to show differential treatment.[254] A selective enforcement claim under Title IX "asserts that, regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender."[255] Plaintiffs will also employ a comparator in erroneous outcome claims. For example, the plaintiff in *Rolph v. Hobart and William Smith Colleges* alleged that the university helped the female claimant prepare her case, while doing nothing to help him prepare his own case.[256] Plaintiffs also often

252. *Univ. of Colo., Boulder,* 255 F. Supp. 3d at 1076.

253. Coleman v. Donahoe, 667 F.3d 835, 841 (7th Cir. 2012).

254. *See, e.g.*, Doe v. Haas, 427 F. Supp. 3d 336, 357 (E.D.N.Y. 2019) (dismissing plaintiff's Title IX selective enforcement claim because plaintiff did not allege that "disciplinary proceedings were not initiated against similarly situated females or that similarly situated females found guilty of the same offense received a less severe penalty.").

255. Yusuf v. Vassar C., 35 F.3d 709, 715 (2d Cir. 1994).

256. Rolph v. Hobart and William Smith Colleges, 271 F. Supp. 3d 386, 402 (W.D.N.Y. 2017).

argue that administrators exclusively and arbitrarily credited testimony from women.[257]

Selective enforcement plaintiffs often struggle to move past the motion to dismiss stage because they cannot find relevant comparators. As the court in *Rolph* noted, "'women rarely, if ever, are accused of sexual harassment'. . .which suggests that a similarly-situated comparator may not exist."[258] Further, even if a plaintiff identifies a female student who has been accused of sexual misconduct, the plaintiff must show that the female student was accused of committing a *similar offense*.[259] During the pleadings, plaintiffs typically struggle to obtain data about a university's treatment of similarly situated female students.[260] The details of Title IX investigations and hearings are not publicly available, and therefore plaintiffs are often unable to even know if a similarly situated female student exists.

Because plaintiffs often cannot uncover evidence of the university's treatment of similarly situated women prior to the motion to dismiss, courts should consider permitting limited discovery to uncover potential evidence of female comparators. Trial judges have enormous discretion over the discovery process.[261] When deciding whether and how to conduct discovery, "the principal goal of judges should be to reduce or balance the costs and burdens of unnecessary discovery against those of undue delay."[262] Plaintiffs seeking evidence of a female comparator ask for a relatively circumscribed set of data. Universities are likely to already have information about cases stored in a database, particularly given that universities must report Title IX cases to the Department of Education.[263] Because universities are unlikely to be significantly burdened by this type of discovery, courts should permit plaintiffs to conduct limited discovery in order to uncover female comparators.

257. *See, e.g.*, Doe v. Univ. of Dayton, 766 F. App'x 275, 281 (6th Cir. 2019) (arguing that hearing officer arbitrarily discredited testimony from men while crediting testimony from women).

258. *Rolph*, 271 F. Supp. 3d at 404.

259. *See* Doe v. Haas, 427 F. Supp. 3d at 357 (dismissing plaintiff's selective enforcement claim because plaintiff failed to allege that proceedings "were not initiated against similarly situated females or that similarly situated females found guilty of the same offense received a less severe penalty").

260. *See, e.g.*, Doe v. Brown Univ., 166 F. Supp. 3d 177 (D. R.I. 2016).

261. Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When a Motion to Dismiss is Pending*, 47 WAKE FOREST L. REV. 71, 73 (2012).

262. *Id.* at 72.

263. *Compliance Overview of Title IX, DFSCA, and FERPA*, CLERY CENTER, https://clerycenter.org/policy-resources/title-ix-related-acts/ [https://perma.cc/3V9P-QSDS].

Erroneous outcome claims tend to be more successful than selective enforcement claims, likely because plaintiffs often do not need discovery to allege the facts necessary for an erroneous outcome claim. Erroneous outcome plaintiffs often allege that the university exhibited gender bias by preferring the female complainant to the male respondent. Because the plaintiff was a party in the Title IX hearing, the plaintiff has access to the details of the investigation and the reasoning for the ultimate disciplinary decision. For example, the plaintiff in *Doe v. Baum* argued that the university credited all female testimony in his hearing while discrediting all male testimony.[264] The plaintiff in *Baum* did not need discovery to get access to this information because he was a party in the hearing and read the Title IX Board's report. In *Doe v. Purdue University*, the hearing officer credited testimony from the female accuser over the male accused, even though the female accuser did not testify in person or even submit a statement in her own words.[265] The court in *Purdue* concluded that it was plausible that the university "chose to believe [the accuser] because she is a woman and disbelieve [the accused] because he is a man."[266] In erroneous outcome cases, the relevant comparator, the female complainant, is readily available to the plaintiff, while in selective enforcement cases the plaintiff may be unaware of relevant comparators. Though comparators may be harder to identify before discovery in selective enforcement cases, courts should hesitate before dismissing these claims, particularly when limited discovery would likely identify relevant comparators.

D. *Pressure on Universities to Respond to Sexual Misconduct*

Plaintiffs rely on evidence of two types of pressure on universities as proof that universities were encouraged to exhibit anti-male bias. The first type of pressure comes from the student body, often after the university's mishandling of a Title IX complaint. For example, in *Doe v. Columbia*, the plaintiff alleged that Columbia faced criticism that it "did not take seriously the complaints of female students about sexual assaults by male students."[267] A student-run newspaper criticized the Title IX Officer's handling of internal investigations.[268] The plaintiff in *Columbia* alleged that Columbia's handling of his case was intended to re-

264. Doe v. Baum, 903 F.3d 575, 586 (6th Cir. 2018).
265. Doe v. Purdue Univ., 928 F.3d 652, 669 (7th Cir. 2019).
266. *Purdue*, 928 F.3d at 669.
267. Doe v. Columbia Univ., 831 F.3d 46, 50 (2d Cir. 2016).
268. *Columbia*, 831 F.3d at 51.

fute criticisms that the university had mishandled prior Title IX complaints.[269] The court agreed, finding it plausible that the university's unfair procedures were motivated by gender bias.[270] Similarly, the plaintiff in *Noakes v. Syracuse University* alleged that Syracuse adopted unfair investigative and adjudicatory procedures after public criticism of their handling of Title IX cases.[271]

Because discrimination on the part of university decisionmakers must be inferred from the background indicia of discrimination, public criticism of a university's handling of Title IX cases can often be indirect evidence of discrimination. The above cases, like *Columbia*, involved explicitly gendered criticism, with public pressure on the university to take complaints by women against men seriously. However, the plaintiffs in *Noakes* and *Columbia* both also pointed to credibility determinations made by investigators and other particularized facts that supported an inference of erroneous outcome. The plaintiffs did not rely on public criticism alone to support a facially plausible claim of gender discrimination, but public criticism did provide a link between the erroneous outcome and gender discrimination.[272] Further, the university may have found the plaintiff guilty irrespective of his actual guilt or innocence in order to silence criticism. Therefore, a plaintiff must both show that the university faced criticism of their handling of complaints against male students, and that the university actually acted.[273] A court should not accept public criticism alone as evidence of gender bias, particularly when a plaintiff cannot point to particularized facts suggesting that public criticism factored into the plaintiff's case. If courts were to accept public criticism alone as sufficient for a facially plausible claim of gender discrimination, *any* plaintiff could survive a motion to dismiss.[274] Those schools would be essentially precluded from finding any male student responsible for a Title IX violation during the relevant period of public criticism. Courts should therefore allow public criticism and particularized evidence of erroneous outcome, when taken together, to support a claim of gender discrimination.

269. *Columbia*, 831 F.3d at 56.
270. *Columbia*, 831 F.3d at 56..
271. Noakes v. Syracuse Univ., 369 F. Supp. 3d 397, 414-15 (N.D.N.Y. 2019).
272. Yusuf v. Vassar Coll., 35 F. 3d 709, 715 (2d Cir. 1994).
273. A plaintiff could show this by pointing to the university's credibility determinations (e.g. crediting testimony from women over testimony from women) or by showing some other defect with the adjudicatory process.
274. *Colleges, Universities Respond to Sexual Violence Investigation*, CNN (May 1, 2014), https://www.cnn.com/2014/05/01/us/colleges-sex-complaint-reactions/index.html [https://perma.cc/TT4A-6L97] (statements by 55 colleges and universities in the wake of federal investigations into their alleged mishandling of Title IX claims).

The second type of pressure plaintiffs allege comes from the federal government's 2011 DCL and OCR investigations into schools for Title IX violations. Because the federal government's Title IX policies apply to every university receiving federal funds, almost every Title IX plaintiff argues that federal pressure encouraged the university to exhibit anti-male bias.[275] The plaintiff in *Doe v. College of Wooster* alleged that the 2011 DCL encouraged universities to treat "all those accused of sexual misconduct with a presumption of guilt."[276] Many courts have been willing to accept that pressure from the federal government supports a claim of gender discrimination as long as federal pressure is paired with other facts particular to the plaintiff's case, like statements by university officials. At least one court has been willing to accept that pressure from the federal government, alone, is sufficient to support a plausible claim of gender bias.[277] Other courts tend to treat the 2011 DCL as a "backdrop" that, when combined with other evidence, supports a claim of gender bias.[278]

Courts have incorrectly treated the 2011 DCL as evidence supporting an inference of gender bias. The 2011 DCL avoids using gendered language, instead referring to "victims" and "perpetrators." In fact, the 2011 DCL explicitly stated that both men and women can be victims of sexual violence.[279] The 2011 DCL urged schools to pursue more aggressive investigation and adjudication of student-on-student sexual violence. However, the 2011 DCL did not urge schools to punish men in particular, nor did the 2011 DCL even identify men as the primary perpetrators of sexual violence. As the Court in *Doe v. University of Cincinnati* stated, "it is not reasonable to infer that [the university] has a policy of railroading students accused of sexual misconduct simply to appease the Department of Education and maintain its federal funding."[280] Universities, simply by enforcing Title IX, are not acting with anti-male bias. In order to infer anti-male bias, a court must accept that the 2011 DCL itself fostered an environment in which universities were motivated to act against male students because they are men. No court has provided a compelling rationale for why the 2011 DCL created a climate

275. *See* Doe v. Oberlin Coll., 2019 WL 1349115 (N.D. Ohio 2019); Doe v. Marymount Univ., 297 F. Supp. 3d 573; 583 (E.D. Va. 2018); *Noakes*, 359 F. Supp. 3d at 416; Doe v. Univ. of Colo., Boulder, 255 F. Supp. 3d 1064, 1076 (D. Colo. 2017).

276. Doe v. Coll. of Wooster, 243 F. Supp. 3d 875, 882 (N.D. Ohio 2017).

277. *See Marymount*, 297 F. Supp. 3d at 573.

278. Doe v. Purdue Univ., 928 F. 3d 652, 668 (7th Cir. 2019).

279. Letter from U.S. Dep't of Educ., Office for Civil Rights to Colleague, 2 (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/V6JZ-FJR8].

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

that encouraged schools to discriminate against men. Even if one assumed that the 2011 DCL failed to protect accused students' due process rights, it does not follow that abrogating due process rights is the equivalent of discriminating against men.

IV. GOING FORWARD

More aggressive enforcement of Title IX has, unsurprisingly, prompted a strong backlash among commentators, courts, and male students accused of sexual assault. In light of these criticisms, the Trump Administration released new Title IX regulations in May 2020.[281] Secretary of Education Betsy DeVos tweeted that the new rule "balances the scales of justice on campuses across America."[282] The rule requires colleges to offer cross-examination and live hearings and permits schools to set the standard of evidence as either preponderance of the evidence or clear and convincing.[283] If the rule truly does increase protections for students accused of sexual misconduct, the number of Title IX anti-male bias lawsuits will likely decline. However, with the new Biden administration, the federal approach to Title IX may shift to resemble the Obama administration's approach. During his campaign, Biden committed to strengthening Title IX's application to sexual violence on campus.[284] If Biden does increase enforcement of Title IX, anti-male bias lawsuits will likely increase once again.

A disturbing amount of male college students commit sexual violence. Studies have reported that approximately 11% of male college students commit rape during college.[285] Despite this sobering statistic, commentators seem to perceive men who commit assault as anomalies. In particular, commentators often promulgate the myth that campus rapes are committed by a small number of serial rapists.[286] This myth

281. Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*, INSIDE HIGHER ED (May 7, 2020), https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations [https://perma.cc/39QY-FPUT].

282. Betsy DeVos (@BetsyDeVosED), TWITTER (May 6, 2020, 11:55 AM), https://twitter.com/BetsyDeVosED/status/1258062830101815303 [https://perma.cc/WC3T-HR7V].

283. Anderson, *supra* note 282.

284. Greta Anderson, *A Long and Complicated Road Ahead*, INSIDE HIGHER ED (Jan. 22, 2021), https://www.insidehighered.com/news/2021/01/22/biden-faces-title-ix-battle-complicated-politics-and-his-own-history [https://perma.cc/5R9X-3SXT].

285. Kevin M. Swartout, *Trajectory Analysis of the Campus Serial Rapist Assumption*, 169 JAMA PEDIATRICS 1148 (2015).

286. CHRIS LINDER, SEXUAL VIOLENCE ON CAMPUS: POWER-CONSCIOUS APPROACHES TO AWARENESS, PREVENTION, AND RESPONSE 90 (2018).

encourages people to believe that the vast majority of accused students are innocent, particularly if they do not fit the model of an expected perpetrator, e.g., a stranger with a history of violent sexual assaults. Male college students, in particular, are likely to believe that "a typical rapist wears a ski mask, carries a knife, and attacks strangers in dark corners."[287] These stereotypes are concerning because "the perceptions of perpetrators play a significant role in peoples' beliefs about the 'legitimacy' of sexual assault as a crime and the manner in which guilt is determined."[288] Judge Aaron Persky's approach to Brock Turner provides a valuable case study of the consequences of believing stereotypes about perpetrators. Turner, like Persky, was a white, middle-class, Stanford athlete.[289] Judges themselves, or their sons, often match the profiles of the male college students they are supposed to find guilty of sexual assault. Studies of judges' approaches to sentencing in rape cases have found that the common sentencing approach is "demonstrably arbitrary (relying heavily on assumption about who rapes) and prejudicial to the victims of the crime."[290] Judges who consider themselves "good guys" may be unwilling to conclude that alleged perpetrators who also fit the "good guy" profile committed sexual violence.

Along with perpetrator stereotypes, people often believe that there is a "gray area" of rape.[291] This narrative views campus rapists as "basically good guys who, because of a combination of too much alcohol and too little communication, end up coercing sex on their partners."[292] Because of these factors, observers may perceive these men as being unfairly punished for conduct that lacked malicious intent.[293] Judge Persky in the Turner case exhibited this view when, during sentencing, he stated that "the argument can be made that it's more morally culpable for someone with no alcohol in their system to commit an offense like that."[294] In surveys of college students, up to three-quarters of perpetra-

287. Martinez et al., *supra* note 45 at 2.
288. *Id.* at 7.
289. *Id.*
290. Rebecca Chennells, *Sentencing: The "Real Rape" Myth*, 82 GENDER & LEGAL SYS. 23, 34 (2009).
291. Maddie Brockbank, *The Myth of the "Gray Area" of Rape: Fabricating Ambiguity and Deniability*, 4 DIGNITY: J. ON SEXUAL EXPLOITATION & VIOLENCE 1 (2019).
292. David Lisak, *Predators: Uncomfortable Truths About Campus Rapists*, 19 J. OF NEW ENG. BD. OF HIGHER EDUC. 19 (2004).
293. Brockbank, *supra* note 291, at 6-7.
294. Sam Levin, *Stanford Sexual Assault: Read the Full Text of the Judge's Controversial Decision*, GUARDIAN (June 14, 2016), https://www.theguardian.com/us-news/2016/jun/14/stanford-sexual-assault-read-sentence-judge-aaron-persky [https://perma.cc/9NL6-TBVJ].

tors of sexual assault were drinking alcohol prior to the assault.[295] Antonia Abbey explains that the co-occurrence of alcohol and sexual assault does not necessarily mean alcohol causes sexual assault; instead, "men may consciously or unconsciously drink prior to committing sexual assault to have an excuse for their behavior."[296] Judges and commentators validate the idea that alcohol diminishes a perpetrator's responsibility by treating intoxicated perpetrators as less culpable than sober perpetrators.

Critics also describe Title IX procedures as punishing men of color at disproportionately high rates.[297] Some critics have used concerns about men of color to support limiting Title IX enforcement or to justify lowering the pleading standards used by courts in male Title IX lawsuits.[298] Anecdotal evidence suggests that men of color are disproportionately accused of sexual misconduct in the university setting, though currently no large-scale studies have been conducted to confirm or rebut this claim.[299] There is reason to suspect men of color may be disproportionately accused, particularly when stereotypes cast poor men of color as the most common perpetrators of sexual violence.[300] Universities should do more to ensure nondiscriminatory application of Title IX regulations. However, it is unclear that increasing due process protections or scaling back Title IX is the correct solution. First, any benefits stemming from more due process protections would likely accrue disproportionately to white men, given both of these solutions operate in a system that almost invariably advantages and rewards white men. Second, scaling back Title IX or increasing due process would likely work to disadvantage women of color, individuals who are frequently ignored by critics using men of color as a talisman in arguing against Title IX. Women of color, particularly Black women, are disproportionately victims of sexual violence.[301] Perpetrators and victims are not cleanly divid-

295. Antonia Abbey, *Alcohol-Related Sexual Assault: A Common Problem Among College Students*, 14 J. STUD. ALCOHOL SUPP. 118, 119 (2002).

296. *Id.* at 19.

297. Fang, *supra* note 12, at 492.

298. *Id.*

299. Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases*, THE ATLANTIC (Sept. 11, 2017), https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/ [https://perma.cc/R6H6-X6T9] (suggesting that while anecdotal evidence might suggest higher rates of clams against male students of color, no large-scale studies have been done to confirm or rebut that claim).

300. Martinez et al., *supra* note 45, at 2.

301. Susan Green, *Violence Against Black Women – Many Types, Far-Reaching Effects*, INST. FOR WOMEN'S POL'Y RSCH. (July 13, 2017), https://iwpr.org/iwpr-issues/race-ethnicity-gender-and-economy/violence-against-black-women-many-types-far-reaching-effects/ [https://perma.cc/9XJV-6X3L].

ed along racial lines; many men of color are accused by women of color.[302] Scaling back Title IX, or increasing barriers to winning Title IX hearings, risks abandoning these women in an attempt to protect men of color, who likely will not benefit from these efforts in the same way white men will.

An impressive amount of attention and sympathy has been given to male students accused of sexual violence, likely due to the misconceptions earlier discussed. It is important to consider how Title IX anti-male bias lawsuits have come to cast male students accused of sexual violence as victims, often at the expense of victims of sexual assault. Many people seem to believe that while sexual assault happens at unacceptably high rates, individual men whom they personally know could not possibly have committed an assault. Instead, individual men are perceived as victims of an unjust adjudicatory process designed to scapegoat them for a problem in which they had no role. However, if individual male college students have no role in the scourge of campus sexual assaults, who is to blame? Many critics blame women themselves, who have supposedly misclassified "gray rape" as *rape* rape. [303] Critics of Title IX procedures should be careful to avoid insinuating that campus rape is an overstated problem.

Critics have described the 2011 DCL as creating a process that discriminated against men as a class. Now that OCR has promulgated new regulations, lawyers bringing Title IX anti-male bias lawsuits should consider what they hope to achieve with these lawsuits. Schools are now required to implement cross-examination and live hearings, two procedural protections that almost every plaintiff requested. Hopefully, those procedural protections will increase confidence in the outcomes of campus disciplinary proceedings. If accused students feel that they have gone through a fair process, it might mitigate the need for lawsuits of the kind discussed in this Note. When attorneys continue to bring these cases, even after schools have instituted the requested due process pro-

302. AMIA SRINIVASAN discusses this more thoroughly in *The Conspiracy Against Men*, *in* THE RIGHT TO SEX (2021), where she discusses accusations by Black women against Virginia's Lieutenant Governor Justin Fairfax and Supreme Court Justice Clarence Thomas.

303. *See* Ashe Shaw, *Overly Broad Definition of Sex Assault Ensnares Innocent Students*, WASH. EXAM'R (Oct. 2, 2015), https://www.washingtonexaminer.com/overly-broad-definition-of-sex-assault-ensnares-innocent-students [https://perma.cc/4BCL-28GZ]. *See also* Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, ATLANTIC (Sept. 6, 2017), https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/ [https://perma.cc/HPY6-BU56] (describing various Title IX allegations that the reader is meant to infer are insufficiently severe to constitute actionable sexual misconduct).

tections, they risk forcing schools into a position where they are unable to implement Title IX without facing liability. Merely working to prevent sexual violence, even if men are disproportionately punished, is not sex discrimination. ♣

* * *