KANGAROO COURTS: THE CASE FOR REFORMING TITLE IX PROCEEDINGS ON CAMPUS

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Abstract

This study analyzes whether Title IX itself is to blame for the systemic mishandling of sexual assault proceedings on college campuses. The study attempts to discern whether sexual assault goes unreported on college campuses and, if so, whether the lack of reporting hinders law enforcement's ability to curtail assault. Additionally, this study assesses the lack of uniform procedures in the status quo and explores the problems caused by this lack of standards. In examining the impact of current policy, this study explores how victims, the accused, universities, and members of law enforcement are affected by the current application of Title IX. This study also scrutinizes current reform efforts to determine whether they successfully allay the concerns presented. Ultimately, this study finds that it is necessary to adopt stringent and uniform federal procedures for how colleges should handle allegations of sexual assault. This study concludes by exploring possible areas for reform and proposes one key change that would lead to a fairer system.

Introduction

Bethany is an undergraduate student at a large state university. She is studious, ambitious, and popular. One night, Bethany's life changes forever when she is sexually assaulted by a fellow student on her campus. Bethany finds it difficult to talk about the incident or reach out for help. When she does reach out, she is urged by school administrators to keep quiet and discouraged from reporting the incident to local law enforcement.

Eventually, Bethany's accusation is addressed by the university in a formal manner. However, instead of involving local authorities or conducting a thorough investigation of the incident, the case goes to a school administrator. This administrator serves as both judge and jury and has nearly complete control over the way the case is handled. The administrator will decide whether to inform the accused about the allegations prior to making a decision. The administrator will decide whether to allow the victim and the accused to have legal representation during the process if there is a hearing.

Throughout the entire process, the campus official, who likely lacks any legal training in how to adjudicate sexual assault, is given wide latitude. The evidence presented to the adjudicator may be withheld from either party. Witnesses are only called if the administrator allows it, and the administrator can choose to prohibit the cross-examination of any witnesses that do end up on the stand. Ultimately, this representative of the university is responsible for making the final decision—a decision that will impact Bethany's life and the life of her attacker.

In making this decision, the campus administrator will use the lowest standard of proof. Neither Bethany nor her attacker are allowed to appeal the decision. Neither of the parties are allowed to talk about what happened during the process. Yet the ramifications of the administrator's decision will follow Bethany and the accused student for the rest of their lives.

Bethany's story may seem far-fetched, but it occurs countless times on university campuses across the nation every year. With such high stakes and such an unstandardized process, it is not surprising that these proceedings are often described as "kangaroo courts."

This study examines the way that colleges and universities nationwide enforce Title IX on both an individual and systemic level. Those who argue against reform maintain that the status quo is fixing itself and that current enforcement is adequate to protect students and universities. Proponents of reform argue that the system is fundamentally and pervasively flawed and that victims of sexual violence, those accused of assault, and colleges themselves are all greatly harmed by the lack of uniform federal procedures. This study considers both sides of the issue in determining whether there is a need for Title IX reform.

There is currently no uniform federal protocol for universities to reference when an alleged case of sexual violence is brought to them. Instead, universities must create their own policies to try to comply with "Dear Colleague Letters" issued by the Department of Education and "best practices and guidelines" issued by its Office for Civil Rights (OCR). This study seeks to determine whether this process is effective or whether the lack of uniform federal procedures endangers students and universities.

Opponents of the current application of Title IX have claimed that the existing process essentially decriminalizes rape and other forms of sexual violence. Because universities are not required to report potential cases of sexual violence to the police, such cases are said to go uninvestigated by law enforcement and unpunished by legal authorities. Opponents further claim that in many cases, those found guilty of sexual violence essentially "get off the hook" by merely being suspended. Worse still, opponents of the status quo claim that universities essentially hush up the victims of sexual assault when their accused attacker is part of a student group that the university has a special interest in, such as student athletes. This study examines the veracity of these claims and hypothesizes that a series of uniform procedures would better ensure an effective and just process.

Literature Review

Title IX was passed in 1972 with little controversy. Smith (2015) noted that the driving force behind the legislation was the issue of sex discrimination in the realm of higher education. Unfortunately, the law has been largely unable to curb sexual assault and discrimination on university campuses.

Scholars like Kasic and Schuld (2008) maintained that the problem with the status quo is not an issue with Title IX itself but rather the way it has been applied in higher education. Similarly, Henrick (2013) concluded that Title IX has been expanded by OCR and the Supreme Court in a manner totally at odds with the original intent of the law. Henrick argued that including cases of inter-student conduct under Title IX's harassment prohibitions creates a "hostile environment" for student defendants. Reich (2017) agreed, noting that the OCR misstepped in aggressively expanding Title IX sexual discrimination to include both sexual harassment and sexual violence.

The current application of Title IX in higher education has led to many cases of sexual assault on university campuses going unreported. The fundamental reasons for this have been revealed to some degree by scholars. Smith (2015) pointed out that a lack of recourse makes victims hesitant to come forward with reports of sexual assault. Smith further noted that the OCR's current policy places universities under no obligation to forward reports of sexual violence to the police or local law

enforcement. The logical result of this policy, as noted by DeBold (2014), is that many serious allegations never reach law enforcement agencies but are instead handled "in house" by college administrators.

Writing for Time Magazine, Shibley (2014) likened the current process by which schools handle sexual assault to "campus kangaroo courts" (para. 4). Shibley traced the problem back to the current interpretation of Title IX, which actively encourages schools to handle cases of suspected sexual violence themselves. Smith (2015) came to the same conclusion, noting that a lack of uniformity in OCR regulations leads to a lack of uniformity among institutions of higher education. Under this system, individual universities can interpret OCR guidelines and form their own policies as they please. Absent any true standards for how a Title IX investigation ought to proceed, the door is open for universities to decide for themselves which investigative procedures they wish to use—or whether they launch an investigation at all.

Some scholars argue that while Title IX has expanded in scope, it has not actually achieved its goals. Villasenor (2016) examined Title IX proceedings in comparison to conviction in criminal trials in common law courts. He concluded that the former adjudicate very serious matters under a substantially lower standard of proof. Villasenor found that without curbing the very real problem of sexual violence on university campuses, there exists a massively inflated likelihood that the innocent will be found guilty in Title IX proceedings. Fay and Starr (2017) similarly cited findings of federal district courts that the system is deeply flawed, depriving all involved of a fair, thorough, and impartial process.

Data and Methods

This study is primarily qualitative, relying on work completed by respected experts in related fields such as government and law. The pervasive problem of the mishandling of cases of sexual violence on university campuses is complex and comes from many sources. This study does not attempt to address all possible sources. Instead, it focuses the discussion on the evolving scope and application of Title IX and the primary issues that this evolution has spawned. In exploring the way universities handle allegations of sexual violence, this study discusses the process used by colleges, the lack of uniformity in that process, and possible solutions to better serve victims, the accused, and universities.

Research

The Current Policy

Title IX of the Education Amendments of 1972 protects individuals from sex-based discrimination in federally funded education programs. The law states: "No

person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" (United States Department of Education, 2015, para. 2).

Title IX applies to any institution that receives financial assistance from the federal government. This includes educational agencies at the state and local levels. The basic meaning of the law is that institutions that receive financial assistance from the federal government are required to operate in a completely nondiscriminatory manner in order to keep receiving federal support. The law also protects individuals who present a claim that a university's policy is at odds with Title IX protections. Such individuals are protected by Title IX from any retaliation resulting from their charges or testimony. There are a number of areas under Title IX in which recipients of federal funding have affirmative obligations. These areas include recruitment, admissions, financial assistance, athletics, treatment of pregnant and parenting students, and employment (United States Department of Education, 2015).

In the years following the initial implementation of Title IX, the government quickly realized that the law was toothless without an agency to enforce it. Thus, the government created the Office for Civil Rights within the Department of Education to enforce the Title IX and other civil rights policies. The official mission statement of the OCR is "to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights" (United States Department of Education, 2018, para. 1).

Murphy (2017) explained that the OCR possesses two primary enforcement tools: withholding federal funds and referring complaints to the Department of Justice for prosecution. The OCR is given these tools in order to fulfill their primary responsibility of ensuring complicance with laws that prohibit discrimination on the basis of race, color, national origin, sex, disability, or age. When it comes to Title IX, the OCR is responsible for making sure that cases of sexual violence on university campuses are properly handled under the law.

Title IX's application to higher education has drastically evolved since its original codification. Title IX was not originally intended to be used to adjudicate allegations of sexual misconduct on university campuses (Henrick, 2013). After the OCR was established, however, Title IX began to be interpreted more broadly. Reich (2017) identified two steps the OCR took that changed the application and scope of Title IX:

> First, it interpreted Title IX sexual discrimination to encompass sexual harassment. Second, it then interpreted Title IX sexual harassment to encompass sexual violence. Perhaps the OCR felt it had

> to be so aggressive because it knew that nothing in Title IX's text applied the law to sexual violence on campuses. (p. 4)

Theoretically, the OCR's aggressive expansion of Title IX better equips the agency to enforce the law. In practice, however, the OCR has given universities practically no meaningful guidance for handling allegations of sexual violence. In the absence of such guidance, universities have resorted to developing their own improvised guidelines.

The Process

When students bring allegations of sexual violence to the attention of campus personnel, university policies for handling them vary from state to state and even school to school. Many do not notify the police, preferring to investigate matters in-house using ad-hoc Title IX tribunals. These tribunals essentially amount to in-house rape trials and have earned the unenviable moniker "campus kangaroo courts" from critics (Shibley, 2014, para. 4). These kangaroo courts were created due to the lack of a standardized process for universities to deal with allegations of sexual misconduct.

The OCR offers universities little in the way of meaningful instruction for handling serious allegations. Smith (2015) explained:

> The Office of [*sic*] Civil Rights does not set out specific guidelines for how a Title IX investigation should proceed or who should conduct the investigation, and states that it will depend on the case at hand. The only real criteria in regards to how these claims should be investigated is that the investigation must be adequate, reliable, impartial, prompt, and include the opportunity for both parties to present evidence and witnesses. Once again, this broad requirement regarding the obligation of universities to investigate sexual violence claims has opened the door for universities to decide what investigative procedures they want to use and not follow any type of uniform procedure. (pp. 170-171)

Absent clear standards or guidelines, it is left to universities to determine how they wish to handle allegations of serious sexual misconduct. Current policy merely identifies a vague obligation of universities to combat the hostile environment created by sexual assault on college campuses. Yet, the very same policy grants immense latitude to universities to combat that hostile environment in whatever way they see fit (DeBold, 2014). As a result, only 25% of universities have a uniform process to investigate claims of sexual violence (Smith, 2015).

The most concerning aspect of the current system is the lack of directions for how colleges should interact with law enforcement agencies when serious allegations are presented to them. The Department of Education has specifically stated that university personnel should not act as agents of law enforcement (DeBold, 2014). Nevertheless, the Department of Education does not require universities to contact law enforcement when a sexual assault is reported, thus opening the door to the very reality they intend to avoid. Of the 25% of universities that even have uniform processes to investigate claims of sexual violence, only 25% of that number have protocols for working with local law enforcement (Smith, 2015).

Critiques of the Current Policy

The first problem identified by critics of current policy is that the status quo allows sexual assault to go unreported. The current policy of the OCR is that universities are not required to forward allegations of sexual violence on to the police, nor are they required to investigate the incidents in conjunction with law enforcement (Smith, 2015). Instead, universities are allowed, and even encouraged, to handle allegations on their own without oversight from outside agencies.

It is certainly true that victims have the ability to contact local law enforcement regardless of whether the university contacts law enforcement pursuant to a legal obligation. However, most victims report to campus personnel, not law enforcement agencies (DeBold, 2014). At that point, the allegations go to college administrators to be dealt with in-house (DeBold, 2014). This unfortunately means that many very serious allegations never get to law enforcement agencies because college administrators prefer to deal with them internally. DeBold (2014) explained:

> Although federal policy mandates that colleges are generally required to cooperate with a victim's decision to pursue criminal charges, there have been various instances where campus personnel have discouraged victims from pursuing remedies through the criminal justice system by presenting the university disciplinary process as a less intrusive mechanism. A victim's decision to contact outside law enforcement often will be affected by her institution's initial treatment of her assault. If the institution does not treat the assault seriously or does not investigate and gather evidence that could help the victim corroborate her claim, she may be deterred from pursuing criminal charges. Finally, while victims retain the right to reach out to the criminal justice system, this right often is not substantiated by any form of coordinated process. The lack of information sharing and joint investigations between the university

> and local police can frustrate the ability for law enforcement agencies to take meaningful action on behalf of the victim. (p. 14)

Of course, it is preposterous to suggest that victims of sexual assault should be required to report what has happened to them to anyone, let alone law enforcement. Yet, the current system seems to be designed in such a way that actively encourages silence and avoidance of law enforcement (Shibley, 2014). Accusers are told that the criminal justice system is inefficient, incompetent, and cruel, whereas the campus tribunal system is painted as fair, professional, and superior (von Spakovsky, 2017). Such a system does not serve victims and makes it far more difficult for law enforcement agencies to do their job. Some agencies have gone so far as to say that the lack of information sharing between colleges and police has actively intensified the problem of sexual assault on university campuses (DeBold, 2014).

The second problem identified by critics of the current policy is that it is highly susceptible to abuse. Colleges are not bound by any system of checks and balances in their responses to allegations of sexual assault, nor are they subject to any oversight from a non-institutional actor (DeBold, 2014). This presents a serious problem of conflict of interest where campus personnel may hesitate to take meaningful action when doing so would be at odds with the interests of the institution as a whole. One of the major conflicting interests has historically been when a student accused of sexual violence is a high-profile student athlete. Due to the revenue that can come in from student athletes, university officials have a significant incentive to look the other way when a major athlete at the university is accused of sexual misconduct (Smith, 2015). DeBold (2014) wrote:

> As a practical matter, when a victim files a sexual assault complaint with her university, the investigation of her assault will be in the hands of a powerful institution that has its own priorities. Because preventing and remedying the assault of young women is not a major priority for these institutions, universities will often fail to protect victims and provide them with a fair process when doing so would conflict with other institutional interests. Countless reports of universities "mishandling" sexual assault cases suggest that this conflict of interest is not the extreme, but is the norm. (p. 17-18)

In this respect, federal education policy has allowed crimes of sexual violence on university campuses to be transformed into a solely institutional problem—an issue to be handled by colleges rather than the criminal justice system. That transformation opens the door for the mishandling of critical cases and active abuse in the system.

Title IX tribunals offer a very different process than would be found in a police investigation or a courtroom proceeding. Amateur college panels do not have access to forensic evidence, nor do they have the ability to subpoena witnesses or get testimony under oath (Cohn, 2015). Title IX proceedings adjudicate allegations according to a 'preponderance of the evidence' standard—a far lower burden of proof than in criminal proceedings for the same allegations (Villasenor, 2016). While this lower burden of proof theoretically makes it easier to ensure that the guilty will not go unpunished, it also increases the probability that the innocent will suffer. Critics of the current policies argue that Title IX tribunals deny basic rights to both the victims and the accused. Accused students do not possess some of the basic elements of due process in a Title IX proceeding, including the right to see the evidence against them (Harris, 2014).

The lower burden of proof and lack of due process in Title IX proceedings are all the more concerning when one considers the number of procedural flaws throughout the system. Fay and Starr (2017) identified some of these flaws:

> Other federal district courts have found that a college's failure to conduct a thorough, impartial, and fair investigation and fact-finding process created a flawed system. Some of the procedural flaws have included an investigator's failure to seek out contemporaneous text messages; a College's failure to provide the accused with the initial statement of the accuser which was made to the College; improper instructions to the Hearing Board as to the College's Policy and Procedures; interference by administrators with the Hearing Board's deliberations; and the denial of an appeal despite the new information provided that revealed that the accused was innocent and that the conduct attributed to him was fabricated. In yet another court case, the student was allowed to pursue his claim because a university employee said male students were "guilty, until proven innocent" and that the university had "loaded the dice against the boys. (para. 6)

Indeed, Judge Gertner described this process as "the worst of both worlds, the lowest standard of proof, coupled with the least protective procedures" (American College of Trial Lawyers, 2017, p. 17).

Current policies have created a system where a single untrained college administrator can serve as investigator, prosecutor, judge, and jury. DeBold (2014) argued that colleges may be better than the criminal justice system at providing counseling and educational programs, but they lack the capability, resources, or incentives to properly fulfill the investigatory role that law enforcement serves. With

few resources to accomplish the job correctly and with significant incentive to avoid negative press from mishandling sexual assault cases, colleges often impose a de facto standard that treats students as if they are guilty until proven innocent.

The current system does not inspire confidence in those it is meant to serve. Law enforcement agencies, academics, lawmakers, and some university officials are not the only ones who are opposed to letting universities have so much control over cases of alleged sexual violence. Seven out of every ten college students go so far as to say that they have no faith in their college's process for handling claims of sexual misconduct or in the administrators responsible for overseeing that process (Smith, 2015). The American College of Trial Lawyers (2017) summed up the reality in this way: "Under the current system everyone loses: accused students are deprived of fundamental fairness, complainants' experiences are unintentionally eroded and undermined, and colleges and universities are trapped between the two, while facing a potential loss of federal funding" (p. 18).

Proposals for Reform

Many reform proposals center around the foundational premise that universities should be required to follow specific procedures or standards when dealing with allegations of sexual misconduct. Smith (2015) wrote:

> It is pertinent that the Office of [*sic*] Civil Rights provides better guidelines to universities to help them meet their Title IX requirements, and if the Office of Civil Rights created a best practice manual to help guide them in responding immediately and appropriately to reports of student-on-student sexual violence then there would be more uniformity in how universities nationwide are responding to sexual violence claims. (p. 171)

Smith's recommendations are not unique. Soave (2018) argued that a clear procedure and leadership is absolutely necessary to provide students and victims with care and protection that is both just and efficient. Reich (2017) agreed, writing that the OCR is best positioned to protect due process rights for the accused insofar as it has the ability to promulgate clear and responsible standards for universities.

In recent months, efforts towards improvement have been made. In November of 2018, Secretary of Education Betsy DeVos released a number of new regulations aimed at better enforcing Title IX (Soave, 2018). In a large step forward for education policy, the new regulations prohibit a single-adjudication system. This means that a single person will no longer be able to investigate allegations, prepare the report regarding the situation, and also deliver judgment on the matter. This change, though long overdue, will do much to align Title IX enforcement with basic

principles of fairness. The DeVos reforms additionally mandate cross-examination for witnesses, adopt a narrower definition for sexual misconduct, and allow colleges to set their own evidentiary standards (Soave, 2018). While this is an improvement, there remains a need for clear and stringent uniform procedures that will not only encourage a fair and impartial system—but will mandate it.

There are many possible options for future meaningful reform. Uniform procedures could require that all parties be notified of their right to counsel and could provide accused students with a copy of any written complaint made against them. Appointing impartial adjudicators and making training documents public could make the process more streamlined and effective. It would also benefit the education system to implement protections for the accused, such as the right to remain silent, the right to a meaningful appeal, and protection against double jeopardy. Revisiting the evidentiary standard could also be helpful. Perhaps most importantly, it may be time to revisit the "police optional approach" that has been adopted by so many universities absent strict uniform standards.

There is considerable research showing that preventing colleges from using the police optional approach is absolutely critical. DeBold (2014) demonstrated that studies have shown that the collaboration of universities with law enforcement increases the likelihood of a full and complete investigation of allegations. Supporters of the current system respond that many victims do not wish to bring their allegations forward and that a system involving the police would further decrease the number of victims willing to come forward. Supporters use this argument to discount reforms that would take the handling of sexual misconduct out of the hands of universities. However, such arguments are unpersuasive because they fail to account for all of the facts. Smith (2015) responded to arguments like these by explaining the actual reasons many victims do not report their allegations:

> One reason often given by victims for failing to report the assault is that they feel that there will not be punishment for the defendant, and another prevalent reason is that victims feel that there are barriers to reporting. This is largely due to the structural impediments that exist in sexual violence policies. These impediments include policies, procedures, and protocols that are not victim friendly. There are several scholars that believe that due to these structural impediments, along with the lack of judicial training by university officials, and the lack of ability to hand down severe punishment, that universities should not handle these claims at all, but that they should be handled by the criminal justice system. (p. 173)

In other words, the fundamental issue for many victims is not that they do not wish to bring their stories forward; rather, they fear that the system will not treat them properly. Taking the issue out of the hands of college administrators could help alleviate this concern. Law enforcement agencies simply have better tools and training to properly handle cases of this nature. Rapists are not merely misguided students who have broken a code of honor or ethics at their institution of learning: they are criminals, and education policy must treat them as such.

Conclusion

Existing Title IX guidelines are legally dubious, impractical, and unfair to all parties involved. The current system is open to abuse and gives far too much power to college administrators. The lack of uniform standards or procedures does a great disservice to victims of sexual violence, those accused of such misconduct, and the universities themselves. College administrators lack the resources, investigatory power, and authority to handle cases of sexual assault. Current policy effectively decriminalizes rape on many college campuses across the nation, which is unacceptable.

Reform is an absolute necessity to ensure justice, due process, and efficiency. Effective reforms will likely contain two key parts. First, the OCR must promulgate clear and authoritative standards for universities' adjudication of cases of sexual violence. Second, it must find a way to appropriately involve law enforcement and the criminal justice system in investigations of sexual violence on college campuses. These reforms are necessary to ensure that young women like Bethany do not have to place their faith in a kangaroo court in order to receive justice.

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