THE OLD COLLEGE TRIAL: EVALUATING THE INVESTIGATIVE MODEL FOR ADJUDICATING CLAIMS OF SEXUAL MISCONDUCT

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Colleges and universities are facing mounting pressure to tackle the pervasive problem of student-perpetrated sexual misconduct. Whether these institutions lack the expertise or, less optimistically, the willpower, colleges and universities have struggled to sift through a morass of Department of Education regulations, conflicting case law, and institutional incentives in order to design disciplinary procedures that protect the rights of both complainant and respondent students. Schools' resulting procedures are split among roughly three models: the disciplinary-hearing model, the investigative model, and a hybrid of the two. This Note seeks to corral the authorities that schools must consider in creating their procedures to evaluate the vitality of the investigative model, in which a trained investigator conducts the primary fact-finding in a case and renders their own finding on responsibility. It uses case law developed in response to disciplinary hearings to draw out the strengths and weaknesses of the investigative model. The Note ultimately concludes that schools can protect the rights of complainants and respondents by utilizing a trained investigator to conduct an initial fact-finding followed by a disciplinary hearing to test the strength of that fact-finding and assess the credibility of witnesses.

INTRODUCTION

As the Class of 2021 settles into college campuses across America, it will count almost seventy-three percent of America's female high school graduates in its ranks.[1] They will go on to earn fifty-nine percent of master's degrees and fifty-two percent of doctoral degrees conferred by American universities.[2] Despite the accomplishments these women will achieve, a recent survey of twenty-seven colleges and universities across America reported thirty-three percent of undergraduate women will be

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1. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, College Enrollment and Work Activity of 2015 High School Graduates (Apr. 28, 2016), http://www.bls.gov/news.release/pdf/hsgec.pdf [http://perma.cc/C93A-VYRR].

2. Leila M. Gonzales et al., Council of Graduate Sch. & Graduate Record Examinations Bd., Graduate Enrollment and Degrees: 2002 to 2012, at 48 tbl.2.24, 49 tbl.2.25 (Sept. 2013), http://cgsnet.org/ckfinder/userfiles/files/GEDReport_2012.pdf [http://perma.cc/233W-EUXW].

victims of nonconsensual sexual contact at least once while enrolled in college.[3]

College and university presidents have called this trend "deeply disturbing,"[4] "unacceptable,"[5] and "profoundly troubling."[6] Given the prevalence of sexual assault, the degree to which these numbers actually shock universities is up for debate,[7] but Title IX and the Department of Education's (DOE's) implementing regulations firmly place the responsibility to adjudicate claims of student sexual misconduct on colleges and universities.[8] As this Note explains, schools' adjudicatory models have generally assumed three forms: (1) the disciplinary-hearing model, in which a panel tries a student's case; (2) the investigative model, in which a trained investigator handles the case; and (3) the hybrid model, in which a panel and a trained investigator work together to manage the case.

While there is substantial scholarship dedicated to how universities adjudicate sexual misconduct, legal scholarship to date has focused on the rights of the accused,[9] the propriety of the preponderance of the evi-

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3. David Cantor et al., Westat, Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct 23 (Sept. 21, 2015), http://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/AAU_Campus_Climate_Survey_12_14_15.pdf [http://perma.cc/XT87-9MGK].

4. Letter from Drew Faust, President, Harvard Univ., to Members of the Harvard Community (Sept. 21, 2015), http://www.harvard.edu/president/news/2015/statement-on-results-sexual-conduct-survey [http://perma.cc/4CFC-766G].

5. Posting of Lee C. Bollinger, President, Columbia Univ., officeofthepresident@columbia.edu, to president@lists.columbia.edu (Sept. 21, 2015) (on file with the *Columbia Law Review*).

6. Letter from Peter Salovey, President, Yale Univ., to the Yale Community (Sept. 21, 2015), http://president.yale.edu/speeches-writings/statements/results-aau-survey-sexual-assault-and-misconduct [http://perma.cc/6CXN-RDCX].

7. Cf., e.g., Christopher P. Krebs et al., Nat'l Inst. of Justice, The Campus Sexual Assault (CSA) Study 5-3 (Dec. 2007), http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf [http://perma.cc/8NNF-CPYT] (finding that 26.3% of seniors had experienced sexual assault while in college); MIT, Survey Results: 2014 Community Attitudes on Sexual Assault 5 (2014), http://web.mit.edu/surveys/health/MIT-CASA-Survey-Summary.pdf [http://perma.cc/37LG-XTRF] (finding seventeen percent of female undergraduate MIT students experienced unwanted sexual behaviors involving use of force, physical threat, or incapacitation and thirty-five percent of female undergraduates experienced sexual misconduct).

8. See 20 U.S.C. § 1681(a) (2012) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."); 34 C.F.R. § 106.8 (2016) (requiring educational institutions receiving federal funds to establish "prompt and equitable" grievance procedures); Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Sexual Violence 3 (Apr. 4, 2011) [hereinafter Dear Colleague Letter], http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [http://perma.cc/GA6V-KR8P] (explaining a school has an obligation to prevent sexual harassment because sexual harassment creates a hostile environment).

9. See, e.g., Stephen Henrick, A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses, 40 N. Ky. L. Rev. 49 (2013) (claiming to

dence standard,[10] and the boundaries of institutions' broad duties to respond to complaints of sexual misconduct.[11] But notably, scholarship thus far has assumed that colleges are adjudicating sexual-misconduct claims using the historically predominant mode of adjudication: disciplinary hearings.[12] Recently, however, the investigative model and the hybrid model that builds off it have become increasingly popular.[13]

"shift the reader's focus to the rights of accused students in campus disciplinary processes for sexual misconduct"); Holly Hogan, The Real Choice in a Perceived "Catch-22": Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings, 38 J.L. & Educ. 277 (2009) (using the lens of due process for the accused to determine whether universities can effectively comply with both Title IX and due process requirements); Matthew R. Triplett, Note, Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection, 62 Duke L.J. 487 (2012) (considering how college sexual-misconduct procedures might violate the rights of respondent students); 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 (2012) (investigating whether the preponderance of the evidence standard comports with due process for respondent students).

10. See, e.g., Amy Chmielewski, Comment, Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault, 2013 BYU Educ. & L.J. 143 (arguing the preponderance of the evidence standard is appropriate for campus adjudications); Weizel, supra note 9 (same).

11. See, e.g., Deborah L. Brake, School Liability for Peer Sexual Harassment After *Davis*: Shifting from Intent to Causation in Discrimination Law, 12 Hastings Women's L.J. 5 (2001) (considering which university actions trigger institutional liability in sexual-assault claims); Nancy Chi Cantalupo, Campus Violence: Understanding the Extraordinary Through the Ordinary, 35 J.C. & U.L. 613 (2009) [hereinafter Cantalupo, Campus Violence] (arguing the frequency of sexual assault on college campuses requires a cultural shift and survivor-based responses from universities); Nancy Chi Cantalupo, "Decriminalizing" Campus Institutional Responses to Peer Sexual Violence, 38 J.C. & U.L. 481 (2012) [hereinafter Cantalupo, Decriminalizing] (recommending that campus procedures broadly reject the influence of criminal rape proceedings); Nancy Chi Cantalupo, How Should Colleges and Universities Respond to Peer Sexual Violence on Campus? What the Current Legal Environment Tells Us, 3 NASPA J. About Women Higher Educ. 49 (2010) [hereinafter Cantalupo, How Should Colleges Respond?] (advocating for universities to adopt sexual-assault prevention efforts and looking to federal laws that govern education to guide how universities respond to claims of sexual assault); Kathryn M. Reardon, Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights, 38 Suffolk U. L. Rev. 395 (2005) (seeking to outline appropriate university responses to support survivors).

12. See, e.g., Cantalupo, How Should Colleges Respond?, supra note 11, at 73–74 (providing recommendations for school procedures in response to problems with current disciplinary hearings); Triplett, supra note 9, at 492–93 (describing "typical sexual-assault adjudication"); Weizel, supra note 9, at 1627 (considering procedural safeguards specifically for hearings).

13. See Michael Stratford, Aggressive Push on Sex Assault, Inside Higher Ed (Apr. 30, 2014), http://www.insidehighered.com/news/2014/04/30/white-house-calls-colleges-do-more-combat-sexual-assault [http://perma.cc/5KHR-X47X]; see also Djuna Perkins, Behind the Headlines: An Insider's Guide to Title IX and the Student Discipline Process for Campus Sexual Assaults, Bos. B.J. (July 8, 2015), http://bostonbarjournal.com/2015/07/08/behind-the-headlines-an-insiders-guide-to-title-ix-and-the-student-discipline-process-for-campus-sexual-assaults/ [http://perma.cc/NS92-4T5A].

In the investigative model, "a trained investigator or investigators interview the complainant and alleged perpetrator, gather physical evidence, interview available witnesses—and then either render a finding, present a recommendation, or even work out an acceptance-of-responsibility agreement with the offender."[14] The investigator replaces the disciplinary panel as the primary fact-finder and ultimate decisionmaker, sitting as "judge, jury and executioner" on the respondent student's case.[15] The hybrid model builds off the investigative model: An investigator interviews the relevant parties and witnesses, but a disciplinary panel reviews the investigation, examines the parties and witnesses, and makes a final determination.[16] A university's choice of how to investigate and adjudicate sexual misconduct has a dramatic effect on how investigations proceed,[17] but the literature has thus far provided little guidance on the efficacy of the investigative model and its fairness to both parties.[18]

Furthermore, the investigative model is largely untested in the courts.[19] To date, courts have primarily dealt with disciplinary proceedings

14. White House Task Force to Protect Students from Sexual Assault, Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault 14 (Apr. 2014) [hereinafter White House Task Force Report], http://www.justice.gov/ovw/page/file/905942/download [http://perma.cc/XGT3-PUXW]; see also, e.g., University Implements New Model for Investigating Sexual Assault Cases, Penn St. News (Apr. 29, 2015), http://news.psu.edu/story/355163/2015/04/29/administration/university-implements-new-model-investigating-sexual-assault [http://perma.cc/V5J2-E8S8].

15. Prasad v. Cornell Univ., No. 5:15-cv-322, 2016 WL 3212079, at *11 (N.D.N.Y. Feb. 24, 2016) (internal quotation marks omitted) (quoting Amended Complaint at 17, *Prasad*, 2016 WL 3212079 (No. 5:15-cv-322)).

16. See, e.g., Yale Univ., UWC Procedures, http://provost.yale.edu/sites/default/files/files/UWC%20Procedures_5-8-2015.pdf [http://perma.cc/A3NV-XEQP] [hereinafter Yale Misconduct Procedures] (last updated May 8, 2015) (serving as an example of the hybrid model).

17. See Stanford Univ., Report of the Provost's Task Force on Sexual Assault Policies and Practices 9–12 (Apr. 2015), http://notalone.stanford.edu/sites/default/files/provost_task_force_report.pdf [http://perma.cc/JZ6Z-RBAS] (providing an example of how the choice of investigatory model transforms the adjudicatory process).

18. White House Task Force Report, supra note 14, at 3–4 (indicating more research on the investigative model is necessary before making a recommendation).

19. The lack of case law on the subject is likely due to the investigative model's novelty as a means of adjudicating claims of sexual misconduct. For example, Harvard began using this model only three years ago, announcing its policy in July 2014. A New Sexual Assault Policy, Harv. Gazette (July 2, 2014), http://news.harvard.edu/gazette/story/2014/07/a-new-sexual-assault-policy/ [http://perma.cc/4M8V-JHDJ]. The University of Michigan switched from "a complaint-driven to an investigative-driven model" in August 2011 as an interim measure that the university ultimately adopted in February 2014. Austen Hufford, Investigation Powers Strengthened Under New Sexual Misconduct Policy, Mich. Daily (Feb. 24, 2014), http://www.michigandaily.com/article/4-years-3-policies-2-standards-1-respondent [http://perma.cc/EC4K-WMFX]. Dartmouth College implemented an investigative model in the summer term of 2014. Bill Platt, New Sexual Assault Disciplinary Policy Goes into Effect, Dartmouth Now (June 18, 2014), http://now.dartmouth.edu/2014/06/new-sexual-assault-disciplinary-policy-goes-effect [http://perma.cc/YUX2-QRNM].

that involve hearings;[20] only one court has passed judgment on the validity of the investigative model.[21] In that case, which settled in December 2016,[22] a student found responsible for sexual misconduct challenged the investigative model in a suit against Cornell University.[23] The plaintiff claimed that Cornell's use of the investigative model deprived him of sufficient process to satisfy Title IX's requirements.[24] On a motion to dismiss, the Northern District of New York found that when the Cornell disciplinary committee merely received the report of the two investigators on the case and investigated no further, a reasonable fact-finder could conclude that the plaintiff had "little meaningful opportunity to challenge the investigators' conclusions or their rendition of what witnesses purportedly stated."[25]

Cornell's legal battle strongly signals that schools must consider the legal implications and potential vulnerabilities of the investigative model before transitioning away from the disciplinary-hearing model. A single district court case, however, does not provide sufficient guidance for universities seeking to navigate this territory. This Note therefore draws on case law and DOE requirements that have developed in response to the disciplinary-hearing model in order to test the strengths and weaknesses of the investigative model and, correspondingly, elements of the hybrid model. Part I maps DOE's mandates and regulations to provide an overview of the only uniform guidance schools have received. It then outlines four examples of universities' current sexual-misconduct policies to add texture to how these models operate in practice. In Part II, the Note lays out how schools might select one model or another based on considerations that are unique to the higher-education context, such as the role of faculty in the disciplinary process and perceptions of campus safety and

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20. See, e.g., Flaim v. Med. Coll. of Ohio, 418 F.3d 629 (6th Cir. 2005) (considering a disciplinary panel); Nash v. Auburn Univ., 812 F.2d 655 (11th Cir. 1987) (same); Winnick v. Manning, 460 F.2d 545 (2d Cir. 1972) (same); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961) (same).

21. Prasad v. Cornell Univ., No. 5:15-cv-322, 2016 WL 3212079 (N.D.N.Y. Feb. 24, 2016); see also Jessica Li, In Lawsuit, Former Cornell Student Alleges Rights Violated in Sexual Misconduct Investigation, Daily Princetonian (Mar. 21, 2015), http://dailyprincetonian.com/news/2015/03/in-lawsuit-male-cornell-student-alleges-rights-violated-in-sexual-misconduct-investigation/ [http://perma.cc/TTM3-Q7CN].

22. Order of Dismissal by Reason of Settlement, *Prasad*, 2016 WL 3212079 (No. 5:15-cv-322).

23. *Prasad*, 2016 WL 3212079, at *14–15; Amended Complaint at 17, *Prasad*, 2016 WL 3212079 (No. 5:15-cv-322) (calling the single investigator the "judge, jury and executioner" on the case (internal quotation marks omitted)). As of August 1, 2016, Cornell's sexual misconduct procedures provide for an initial review by an investigator and allow a student-party to request a hearing. Cornell Univ., Procedures for Resolution of Reports Against Students Under Cornell University Policy 6.4, at 20–28 (Aug. 1, 2016), http://blogs.cornell.edu/titleix/files/2016/07/Policy-6.4-Adjudication-Procedures-for-Student-Respondents-Effective-8.1.16-q5lign.pdf [http://perma.cc/6AVP-YFGL].

24. *Prasad*, 2016 WL 3212079, at *17.

25. Id. at *16.

the fairness of adjudications. The Part proceeds to analyze case law across jurisdictions to signal what aspects of current policies courts previously have held vulnerable to challenge and thus give guidance to schools in shaping their policies. Finally, Part III accomplishes this Note's main purpose: evaluating the investigative model in the context of regulations, cases, and institutional considerations that have previously played out in the disciplinary-hearing context.

I. FEDERAL MANDATES AND CURRENT UNIVERSITY PRACTICES

This Part sets the stage for the complex decisions that universities make in adopting sexual-misconduct procedures. It begins in section I.A by explaining DOE's regulatory scheme to explore the broadest and most general mandates for schools' disciplinary procedures. Section I.B builds on this general foundation to describe how schools' current disciplinary procedures, including the disciplinary-hearing, investigative, and hybrid models, have developed in the context of DOE regulations.

A. *DOE's Broad Guidance*

The Obama Administration oversaw a substantial expansion of DOE and its role in helping schools comply with Title IX.[26] Nonetheless, DOE requirements continue to be flexible, nonspecific guidelines that schools must follow in developing their sexual-misconduct policies. And despite uniform DOE guidance, schools' resulting policies vary immensely.[27] To provide context for these differences, this section reviews the foundational requirements for schools' misconduct policies, first setting out DOE's regulatory enforcement scheme and then mapping DOE's broad mandates for sexual-misconduct policies.

1. *DOE and Title IX Enforcement.* — The procedures that schools adopt for adjudicating claims of sexual misconduct must conform with Title IX,[28] the civil rights statute that prohibits discrimination on the basis of sex in educational programs,[29] and DOE's implementing regulations.[30] When a student believes that their school has mishandled a claim

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26. See Lyndsey Layton, Civil Rights Complaints to U.S. Department of Education Reach a Record High, Wash. Post (Mar. 18, 2015), http://www.washingtonpost.com/news/local/wp/2015/03/18/civil-rights-complaints-to-u-s-department-of-education-reach-a-record-high/ [http://perma.cc/66WC-PY9L].

27. See, e.g., infra section I.B (detailing four schools' different procedures that have developed against the backdrop of the same DOE regulations).

28. See, e.g., Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) (setting the standard for institutional liability for noncompliance with Title IX).

29. 20 U.S.C. § 1681(a) (2012). Sex discrimination under Title IX contemplates sexual assault as a form of sex-based discrimination. See, e.g., Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999) (concluding a Title IX claim could arise from peer-on-peer sexual harassment).

30. See 62 Fed. Reg. 12,034, 12,038 (Mar. 13, 1997) (requiring schools to have grievance procedures for sexually harassing conduct that creates a "hostile or abusive educa-

of sexual assault, they have two options: judicial or administrative review of their complaint. To seek judicial review, a student can sue their university for its response under a claim of sex-based discrimination in violation of Title IX.[31] To succeed in court, however, the student must prove the school was deliberately indifferent to sex-based discrimination.[32] This standard is highly deferential to schools and creates a substantial barrier to most claims.[33]

Consequently, when students seek to challenge schools' responses to sexual misconduct, they frequently file complaints with the DOE Office for Civil Rights (OCR).[34] When a student files a complaint with OCR, the agency conducts a detailed investigation of the school's practices to determine whether the school complied with Title IX and DOE regulations in handling the complaint.[35] If OCR finds a school did not comply, the agency and school negotiate a resolution agreement in which the school agrees to change its policies; if negotiations fail, the agency can ultimately withdraw the school's federal funding.[36]

2. *DOE's Requirements for Sexual-Misconduct Proceedings.* — The primary requirement that DOE and OCR have established is that students

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tional environment"); see also Office for Civil Rights, U.S. Dep't of Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, at v–vi (Jan. 2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [http://perma.cc/X7K3-AHMT].

31. While Title IX does not contain an explicit private right of action, the Supreme Court has held Title IX includes an implied private right of action. See Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) ("Title IX presents the atypical situation in which *all* of the circumstances that the Court has previously identified as supportive of an implied remedy are present.").

32. See *Davis*, 526 U.S. at 644–45 ("If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment." (alteration in original) (quoting 20 U.S.C. § 1681(a))).

33. See Brake, supra note 11, at 16–17 (arguing courts intended the deliberate indifference standard to insulate universities from suit until after they were given the opportunity to correct their policies).

34. See Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations [http://perma.cc/HL38-FKVR]; see also Tyler Kingkade, 124 Colleges, 40 School Districts Under Investigation for Handling of Sexual Assault, Huffington Post (July 24, 2015), http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault_55b19b43e4b0074ba5a40b77 [http://perma.cc/SV2J-YA6V] (revealing the growing number of active Title IX investigations). Importantly, an OCR investigation results in only institutional relief. See Cantalupo, How Should Colleges Respond?, supra note 11, at 63. A favorable court decision, however, provides individual relief. See id. at 56–57.

35. See Office for Civil Rights, U.S. Dep't of Educ., OCR Complaint Processing Procedures, http://www2.ed.gov/about/offices/list/ocr/docs/complaints-how.pdf [http://perma.cc/RY8E-CVRB] (last updated Feb. 2015).

36. See id.

experiencing sex discrimination[37] are entitled to a "prompt and equitable" university response.[38] In 2011, amid confusion about what constituted a "prompt and equitable" response[39] and in the wake of numerous court decisions on Title IX claims,[40] DOE released a Dear Colleague Letter that updated OCR's Revised Sexual Harassment Guidance from 2001.[41] As the first real guidance DOE had issued in ten years, the letter signaled the Obama Administration's intention to escalate its efforts to bring schools into compliance with Title IX.[42] Despite this initiative, the letter (and its companion OCR Questions and Answers on Title IX and Sexual Violence[43]) deliberately avoided defining procedures that universities and colleges should follow in disciplinary actions.[44]

The Dear Colleague Letter did, however, provide some general guidance on what universities' disciplinary procedures should ultimately look like.[45] OCR established three broad requirements for schools' procedures: (1) "disseminate a notice of nondiscrimination," (2) "designate at least one employee to coordinate [the school's] efforts to comply with and carry out its responsibilities under Title IX," and (3) "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints."[46] Universities are free to adopt the disciplinary-hearing model, the investigative model, or a hybrid of the two, but all procedures must promptly and equitably resolve complaints.

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37. See 62 Fed. Reg. 12,034, 12,038 (Mar. 13, 1997) (requiring schools to have grievance procedures whenever sexually harassing conduct creates a "hostile or abusive educational environment").

38. 34 C.F.R. § 106.8(b) (2016).

39. See generally Cantalupo, How Should Colleges Respond?, supra note 11, at 67–70 (surveying comprehensively how federal laws and regulations and due process rights sometimes conflict, complicating schools' misconduct procedures).

40. See, e.g., Furey v. Temple Univ., 730 F. Supp. 2d 380, 397–98 (E.D. Pa. 2010) (considering whether the respondent had a right to counsel in a sexual-misconduct proceeding that could result in expulsion); Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6 (D. Me. 2005) (evaluating a university sexual-misconduct proceeding for fundamental fairness); Schaer v. Brandeis Univ., 735 N.E.2d 373 (Mass. 2000) (adjudicating a claim alleging the university's sexual-misconduct procedures breached the university's educational contract with students).

41. Dear Colleague Letter, supra note 8, at 2 ("This letter . . . explains schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence.").

42. See Chmielewski, supra note 10, at 144.

43. Office for Civil Rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014) [hereinafter 2014 Q&A], http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [http://perma.cc/HW6B-8CTJ].

44. See Dear Colleague Letter, supra note 8, at 8–9 (noting "procedures adopted by schools will vary in detail, specificity, and components, reflecting differences in the age of students, school sizes and administrative structures, State or local legal requirements, and past experiences").

45. Id. at 8.

46. Id. at 6.

The Dear Colleague Letter also set up a few concrete requirements for the procedures that schools must adopt. First, it explicitly required that schools use a preponderance of the evidence standard—a standard adopted from Title VII, which forbids discrimination in employment[47]—in resolving complaints between student-parties.[48] The letter also focused on providing the same treatment to both parties:[49] Each party must have "equal opportunity to present relevant witnesses and other evidence" and "similar and timely access to any information that will be used at the hearing."[50] OCR then counseled that parties should not personally cross-examine one another because the practice may be traumatic for the complainant student or perpetuate a hostile environment.[51] These broad considerations constitute the bulk of DOE's procedural requirements, and DOE itself noted that "[t]he specific steps in a school's investigation will vary."[52]

Accordingly, DOE regulations provide schools with only the broad outlines of what sexual-misconduct procedures should look like, leaving schools with the formidable task of determining the best practices to employ to properly and fairly adjudicate claims of sexual misconduct. Without clear guidance on appropriate procedures, schools frequently face two costly situations: litigating disputes with students[53] and submitting to OCR investigations that risk revocation of the school's federal funding.[54]

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47. Id. at 11 & n.26.

48. Id. at 11 ("OCR's Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination . . . .").

49. See id. at 11–12 (outlining areas of proceedings in which equality between parties is particularly important).

50. Id. at 11.

51. Id. at 12.

52. Id. at 4–5.

53. United Educators (UE), a group insuring 1,300 universities and colleges, reported that "[o]ver the three-year period [between 2011 and 2013], UE and its members spent approximately $17 million defending and resolving sexual assault claims." United Educators, Confronting Campus Sexual Assault: An Examination of Higher Education Claims 14 (2015), http://www.ue.org/uploadedFiles/Confronting%20Campus%20Sexual%20Assault.pdf [http://perma.cc/R5QE-KHEG]. The study found that the majority of suits—and thus the majority of the costs to schools—was brought by survivors of sexual assault, nearly one-fourth of whom believed that the penalties imposed on perpetrators were not harsh enough. Id. at 14–16. Of survivor allegations, seventy-two percent alleged noncompliance with Title IX. Id. at 17. Litigation by the respondent student accounted for thirty-two percent of sexual-misconduct litigation brought against universities. Id.

54. In practice, no school has ever lost federal funding due to a Title IX violation. Tyler Kingkade, 55 Colleges Face Sexual Assault Investigations, Huffington Post (May 1, 2014, 11:22 AM), http://www.huffingtonpost.com/2014/05/01/college-sexual-assault_n_5247267.html [http://perma.cc/2Q9E-T7DX] (last updated July 1, 2014); Taylor Maycan, Putting University of Virginia's Sexual Assault Scandal into Perspective, USA Today College (Nov. 26, 2014, 8:50 PM), http://college.usatoday.com/2014/11/26/putting-the-

B. *Schools' Misconduct Policies in Response to DOE Guidance*

Schools' attempts to comply with DOE guidance have generated a variety of disciplinary approaches.[55] Broadly, though, schools' procedures tend to fall into three main categories: an investigative model, a disciplinary-hearing model, and a combined investigative and disciplinary-hearing model.[56] This section briefly outlines the disciplinary procedures at four schools. It will first consider two schools that employ the investigative model:[57] Harvard University and the University of Michigan. Harvard and the University of Michigan both transitioned to the investigative model under intense scrutiny[58] and provide useful examples of the model in practice.[59] This section then considers the more familiar disciplinary-hearing model at Rutgers University, which is particularly relevant because the school served as the pilot campus for the Obama White House's survey on campus climate around sexual assault.[60] Finally, this section considers the hybrid blend of the investigative and disciplinary-hearing models that Yale University uses. Yale's procedures were recently

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u-va-scandal-into-perspective/ [http://perma.cc/7W2J-BTQM]. Rather than lose funding, schools that violate Title IX have the opportunity to voluntarily settle with OCR and modify their procedures. See, e.g., Tufts Univ., Voluntary Resolution Agreement, Complaint No. 01-10-2089 (Apr. 17, 2014), http://www2.ed.gov/documents/press-releases/tufts-university-agreement.pdf [http://perma.cc/99M8-EGES] (detailing changes Tufts University agreed to make following OCR's finding the school had violated Title IX).

55. Triplett, supra note 9, at 492.

56. See, e.g., Justice Gaines, Adam Kemerer & Yvonne Yu, Brown Univ., Potential Campus Sexual Assault Investigating Models for Brown University, http://www.brown.edu/web/documents/president/SATF-Final-Report-B.pdf [http://perma.cc/2BMW-LENK] [hereinafter Brown Task Force] (last visited Nov. 11, 2016) (proposing different models that Brown University might adopt to adjudicate sexual misconduct and dividing policies broadly into these categories).

57. For simplicity, this Note refers to investigative procedures that involve one or two investigators as the "investigative model."

58. See David Jesse, University of Michigan Revamps Sexual Misconduct Policy, Det. Free Press (Apr. 6, 2016), http://www.freep.com/story/news/local/michigan/2016/04/06/university-michigan-revamps-sexual-misconduct-policy/82712486/ [http://perma.cc/9DVB-E2MX]; Tovia Smith, Harvard Law Professors Say New Sexual Assault Policy Is One-Sided, NPR (Oct. 15, 2014), http://www.npr.org/2014/10/15/356424999/harvard-law-professors-say-new-sexual-assault-policy-is-one-sided [http://perma.cc/5K6M-64U3].

59. Harvard Univ., Procedures for Handling Complaints Involving Students Pursuant to the Sexual and Gender-Based Harassment Policy 4–5 (2014) [hereinafter Harvard University-Wide Procedures], http://titleix.harvard.edu/files/title-ix/files/harvard_student_sexual_harassment_procedures.pdf?m=1441919500 [http://perma.cc/4ABJ-T6RC]; Univ. of Mich., The University of Michigan Policy and Procedures on Student Sexual and Gender-Based Misconduct and Other Forms of Interpersonal Violence 28 (2016) [hereinafter Michigan Sexual-Misconduct Policy], http://studentsexualmisconductpolicy.umich.edu/files/smp/SSMP-FINAL-062916.pdf [http://perma.cc/HM9Y-QV8Z]. Since Harvard is a private school and the University of Michigan is a public school, these two examples provide a look at the investigative model across both types of schools.

60. See Pilot Campus Survey, Rutgers Univ., http://pilot-campus-survey.rutgers.edu/ [http://perma.cc/N46L-4YWJ] (last visited Nov. 12, 2016).

the subject of an OCR investigation,[61] and the school's new policy reflects the results of that investigation and OCR's recommendations.

The primary practical difference between the models is how much of the burden to investigate falls on one person as opposed to a panel of faculty, administrators, and students. A secondary difference is how the schools use the information the investigator or panel solicits. In some instances, the investigator's decision stands as the final word on misconduct allegations;[62] alternatively, the investigator might present their report and a recommendation to a panel that subsequently engages in further fact-finding.[63] And in other procedures, schools use an investigator to conduct a preliminary fact-finding and then assemble a panel to collectively make a determination on responsibility, unless either party desires a hearing.[64] The following accounts of schools' procedures elucidate these differences.

1. *The Investigative Model.* — At the University of Michigan and Harvard, an investigator conducts the initial fact-finding in the complaint. The University of Michigan typically employs one investigator,[65] while Harvard arranges for two investigators to look into the case.[66] The investigative team first meets with the complainant party to listen to their accusations and determine if they merit investigation.[67] The investigative team has full power to determine whether the complaint will proceed to further fact-finding.[68] If the complaint passes the initial screening, then the investigative team meets with both parties individually—either to

61. Press Release, U.S. Dep't of Educ., U.S. Department of Education Announces Resolution of Yale University Civil Rights Investigation (June 15, 2012), http://www.ed.gov/news/press-releases/us-department-education-announces-resolution-yale-university-civil-rights-investigation [http://perma.cc/G9RY-PJJ8].

62. See, e.g., Harvard University-Wide Procedures, supra note 59, at 6 (explaining the sanction that the investigators recommend is ultimately subject to review by the faculty); Michigan Sexual-Misconduct Policy, supra note 59, at 28.

63. See, e.g., Yale Misconduct Procedures, supra note 16, § 7.3.

64. See, e.g., Harvard Law Sch., HLS Sexual Harassment Resources and Procedures for Students (2014), http://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf [http://perma.cc/GAR9-WYM5]; Rutgers Univ., Reporting Sexual Harassment and Physical Sexual Misconduct: Title IX Grievance Procedures 1, http://compliance.rutgers.edu/wp-content/uploads/sites/42/2014/11/Title_IX_Grievance_Procedures.pdf [http://perma.cc/G9TT-V6J9] [hereinafter Rutgers Sexual-Misconduct Grievance Procedures] (last visited Nov. 12, 2016).

65. Michigan Sexual-Misconduct Policy, supra note 59, at 23.

66. Harvard University-Wide Procedures, supra note 59, at 4. This Note refers to the single investigator at the University of Michigan and the two investigators at Harvard as the "investigative team."

67. Id. at 3; Michigan Sexual-Misconduct Policy, supra note 59, at 18. At the University of Michigan, a Title IX officer conducts this initial evaluation. Id.

68. See Harvard University-Wide Procedures, supra note 59, at 4; Michigan Sexual-Misconduct Policy, supra note 59, at 19.

interview them or collect written statements.[69] This is an effort to reduce the trial-like atmosphere of the proceedings and avoid a confrontation between the parties.[70] The parties to the complaint then have the opportunity to read and comment on one another's statements, providing a form of written cross-examination.[71] Subject to review by the school's Title IX office, the investigative team makes the final finding of responsibility.[72]

2. *The Disciplinary-Hearing Model.* — In contrast, the disciplinary-hearing model appears much more like a traditional trial.[73] At Rutgers, a two-person investigative team from the Office of Student Conduct undertakes an initial review of the complaint to determine if the complaint merits a charge of a conduct violation.[74] If the respondent party elects to have their case heard in a disciplinary hearing, then the preliminary-review investigators will present their report at the hearing;[75] following this report, the complainant and respondent present their cases, constituting the primary fact-finding in the case.[76] Notably, at the request of either party, the university will provide alternative means of questioning, such as answering questions while separated from the other party—meaning neither party will be subject to direct questioning without their consent.[77] The hearing takes place in front of the university hearing board and a hearing officer, and the board is charged with making a final determination in the case.[78]

3. *The Hybrid Model.* — The structure of hearings at Yale differs slightly from that at Rutgers, working as a hybrid model that blends aspects

69. Harvard University-Wide Procedures, supra note 59, at 4 (providing an alternative to live testimony and cross-examination by allowing the investigative team to meet with student parties individually); Michigan Sexual-Misconduct Policy, supra note 59, at 23 (same).

70. Harvard University-Wide Procedures, supra note 59, at 4; Michigan Sexual-Misconduct Policy, supra note 59, at 23.

71. Harvard University-Wide Procedures, supra note 59, at 6; Michigan Sexual-Misconduct Policy, supra note 59, at 27–28.

72. Harvard University-Wide Procedures, supra note 59, at 6; Michigan Sexual-Misconduct Policy, supra note 59, at 28.

73. For an analysis on the difference between criminal rape trials and campus sexual-misconduct proceedings, see Nancy Chi Cantalupo, For the Title IX Civil Rights Movement: Congratulations and Cautions, 125 Yale L.J. Forum 281 (2016) [hereinafter Cantalupo, Congratulations and Cautions], http://www.yalelawjournal.org/pdf/Cantalupo_PDF_7ee3t5ic.pdf [http://perma.cc/37GF-RNHD].

74. Rutgers Sexual-Misconduct Grievance Procedures, supra note 64, at 3. A conduct officer from the Office of Student Conduct receives the investigative report and determines whether the complaint is sufficiently substantiated to proceed. Id.

75. Id. at 4.

76. University Hearings, Rutgers Univ., Student Conduct, http://studentconduct.rutgers.edu/disciplinary-processes/university-hearing-procedures/ [http://perma.cc/Q9KE-V6ST] (last visited Dec. 27, 2016).

77. Rutgers Sexual-Misconduct Grievance Procedures, supra note 64, at 4.

78. Id.

of the investigative model with aspects of the disciplinary-hearing model. At Yale, a thirty-person University-Wide Committee (UWC) receives allegations of sexual misconduct.[79] If a formal disciplinary hearing is necessary, the chair of the UWC appoints an outside investigator to undertake the primary investigation of the complaint.[80] The investigator conducts the fact-finding and generates a report, which the five-person adjudicatory panel receives.[81] The final report is also sent to both parties prior to the hearing, but the panel does not accept written responses to the report.[82] The parties typically do not simultaneously appear before the panel: While one party testifies, the other party is provided an audio recording of the testimony but is not present in the room.[83] Both parties can submit questions to the panel, which has sole discretion over whether to ask the submitted questions.[84] The UWC panel ultimately makes findings of responsibility.[85]

These procedures set up the major points of contention that Part II will analyze. The models differently implicate university faculty, the ability of fact-finders to avoid bias and adjudicate fairly, the opportunity to expose incredibility of witnesses via cross-examination, and the separation of the complainant and respondent.

II. DEVELOPING SEXUAL-MISCONDUCT POLICIES

Having laid out the federal regulatory regime and examples of school disciplinary procedures, this Note now turns to the at times competing considerations that universities must weigh when developing sexual-misconduct policies. Schools must consider not only the interests and well-being of their students in intensely sensitive situations, but also how to effectively use the school's resources and personnel and maintain the fundamental fairness of the proceedings. The proper balance of these interests is not always clear. Accordingly, this Part plumbs how universities might gauge institutional considerations in section II.A and then considers how universities respond to the demands that courts have placed on sexual-misconduct proceedings in section II.B.

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79. Yale Misconduct Procedures, supra note 16, § 2.1. The chair, secretary, and one other member of the UWC determine if a formal disciplinary hearing is necessary based on whether interviews with both parties reveal that the allegations are substantiated credibly. Id. § 7.1.

80. Id. § 7.3.

81. Id.

82. Id.

83. Id. § 7.4.

84. Id.

85. Id. § 7.5.

A. *Institutional Resources*

Schools must balance their primary roles as institutions of education[86] with their obligations to maintain an environment free from discrimination,[87] but it is not clear that any one disciplinary model is superior at striking this balance. Accordingly, section II.A.1 evaluates how universities allocate scarce resources to adjudicating claims of sexual assault: It considers the fitness of faculty and administrators to fill the roles each model envisions for them. Section II.A.2 then looks to the fact-finding capacities of panels and investigators, considering the inherent ability of each to draw out and weigh the relevant facts in a case. Finally, section II.A.3 investigates the costs and benefits of using an adversarial method to resolve complaints of sexual misconduct; it queries how the adversarial method generates concerns about discouraging survivors of assault from reporting but historically also produces robust fact-finding. On the whole, this section articulates the unique concerns schools face because they are both institutions of education and significant actors in the lives of students and faculty.

1. *The Role of University Actors.* — One of the primary differences between the investigative model and the disciplinary-hearing model concerns which university actors are responsible for engaging in fact-finding. Disciplinary panels are largely composed of faculty, administrators, and students, who are usually trained to participate in disciplinary hearings.[88] In contrast, an investigator is typically a member of a university's Title IX office[89] or is hired from outside the university community.[90] In a hybrid model, an outside investigator and faculty, administrators, and students can be involved in the process.[91] When a university selects a disciplinary model, it is therefore making a calculated decision about how to use its faculty and administrators.

From a personnel perspective, the investigative model is appealing because an investigator, whose sole job is to investigate misconduct, can gain proficiency and expertise in adjudicating claims of sexual assault.[92] By contrast, university faculty members are typically hired for their skill as

86. See Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (Warren, C.J.) (plurality opinion) (noting the almost self-evident "essentiality of freedom in the community of American universities").

87. See 20 U.S.C. § 1681(a) (2012).

88. E.g., Yale Misconduct Procedures, supra note 16, § 2.2.

89. E.g., Harvard University-Wide Procedures, supra note 59, at 3; Michigan Sexual-Misconduct Policy, supra note 59, at 23.

90. E.g., Dartmouth Coll., Unified Disciplinary Procedures for Sexual Assault by Students and Student Organizations 10 (2016), http://www.dartmouth.edu/sexualrespect/pdfs/unified_disciplinary_procedures_for_sexualassault_final_2014_2015a.pdf [http://perma.cc/7SKG-BF4B].

91. E.g., Yale Misconduct Procedures, supra note 16, §§ 2.2, 7.3.

92. See University Implements New Model for Investigating Sexual Assault Cases, supra note 14.

educators and administrators, not for their investigative expertise.[93] The investigator is therefore helpful for compartmentalizing the roles of university personnel: It allows faculty and students to focus on their primary roles while the investigator develops expertise in sexual-misconduct cases, theoretically better enabling the investigator to ensure just results.[94]

The investigative model also keeps faculty above the fray in these situations. Whether the faculty members who sit on disciplinary panels are professors or school administrators, they have other roles to play on college campuses.[95] Accordingly, the parties to sexual-misconduct proceedings might have future unanticipated dealings with the faculty members who serve on panels. Blurring the roles of faculty member and adjudicator could lead faculty members who know of a student's implication in a sexual-misconduct case to treat the student differently, imposing a social cost and potentially deterring students from bringing sexual-misconduct complaints in the first place.[96] Using investigators for sexual-misconduct allegations therefore might encourage reporting by reducing the social cost to involved students.[97]

The choice between models is further a choice about faculty and investigators as institutional resources. When faculty members serve on

93. Cf. Vivian Nunez, What Role Do College Faculty Members Play in the Discussion Around Campus Sexual Assault?, Generation Progress (Feb. 25, 2015, 12:53 PM), http://genprogress.org/voices/2015/02/25/35022/what-role-do-college-faculty-members-play-in-the-discussion-around-campus-sexual-assault/ [http://perma.cc/77JT-58U6] (discussing the challenges faculty face in helping their students cope with sexual assault and recovery).

94. See White House Task Force Report, supra note 14, at 3 (describing positive results from having a "single, trained investigator" and avoiding "harsh and hurtful questioning" from students and faculty in a disciplinary panel).

95. Joseph Cohn, Commentary, Campus Is a Poor Court for Students Facing Sexual-Misconduct Charges, Chron. Higher Educ. (Oct. 1, 2012), http://chronicle.com/article/campus-is-a-poor-court-for/134770/ [http://perma.cc/3VVN-Y7JC] (noting potentially perverse incentives for faculty, students, and administrators to align themselves with the institution due to their other roles in the institution).

96. Cf. Walt Bogdanich, Reporting Rape, and Wishing She Hadn't, N.Y. Times (July 12, 2014), http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html (on file with the *Columbia Law Review*) (documenting how one student found reporting her rape soured her relationships with faculty, administrators, and the school). This is particularly true given the role that alcohol often takes in sexual assault on college campuses. OCR recommends amnesty provisions for students who violated other school policies in connection with sexual misconduct. 2014 Q&A, supra note 43, at 42; see also Rutgers Univ., Interim Student Policy Prohibiting Sexual Harassment, Sexual Violence, Relationship Violence, Stalking, and Related Misconduct 11 (2015), http://slwordpress.rutgers.edu/esv/wp-content/uploads/sites/89/2015/09/Interim-Student-Sexual-Misconduct-Policy_8-14-15_00209464.pdf [http://perma.cc/WX3B-C8QP] (noting Rutgers's amnesty for drug and alcohol use related to sexual misconduct); Michigan Sexual-Misconduct Policy, supra note 59, at 9–10. This amnesty cannot extend, however, to the student-parties' reputations with faculty.

97. Cf. White House Task Force Report, supra note 14, at 14 ("Preliminary reports from the field suggest . . . [investigative] models . . . encourage reporting and bolster trust in the process . . . .").

sexual-misconduct committees, they must devote their time to training for such proceedings[98]—in addition to spending time conducting lengthy adjudications.[99] Universities that have faculty serve on disciplinary panels require faculty to step beyond their roles as professors or university staff.[100] From a resource-allocation perspective, it might be most efficient for schools to separate sexual-misconduct proceedings from faculty's other duties.

However, having faculty serve on disciplinary panels accurately reflects faculty members' current integration into campus communities.[101] Faculty and administrators are now heavily involved in daily life at colleges. Their inclusion in misconduct proceedings at some schools demonstrates a "tradition of involving all levels of the community in issues that affect" the community[102] and may be motivated by the same impetus that leads schools to include students on disciplinary panels.[103] Indeed, many faculty members participate in trainings to support survivors[104]—a recognition of the integration of faculty members into matters that concern campus culture.[105] Accordingly, a school's choice between models reflects a decision either to minimize the role of faculty (the

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98. See, e.g., The Conduct Disciplinary Process, Rutgers Univ., Student Conduct, http://studentconduct.rutgers.edu/disciplinary-processes/the-conduct-disciplinary-process/ [http://perma.cc/SG3Q-WB58] (last visited Dec. 27, 2016); Yale Misconduct Procedures, supra note 16, § 2.4.

99. See, e.g., Austin Heyroth, Opinion, Transparency on Sexual Assault, Colum. Spectator (Oct. 15, 2013, 7:21 PM), http://columbiaspectator.com/2013/10/15/transparency-sexual-assault [http://perma.cc/7EHW-VBAK].

100. See, e.g., FAQ: Education and Training, Univ. of Cal. Sexual Violence Prevention & Response, http://sexualviolence.universityofcalifornia.edu/faq/education-training.html [http://perma.cc/3CBR-JTS5] (last visited Nov. 10, 2016) (requiring faculty and supervisors to complete two hours of training every two years, receive training on legal obligations to report sexual violence, and attend violence-prevention training on an annual basis).

101. See Am. Ass'n of Univ. Professors, Campus Sexual Assault: Suggested Policies and Procedures 370–71 (2012), http://www.aaup.org/file/Sexual_Assault_Policies.pdf [http://perma.cc/Z7TR-6E4E] (discussing various roles that faculty members play in supporting survivors of sexual misconduct, shaping campus policy around sexual misconduct, and adjudicating sexual misconduct).

102. Brown Task Force, supra note 56.

103. See Adam Liptak, Should Students Sit on Sexual Assault Panels?, N.Y. Times: Educ. Life (Apr. 10, 2015), http://www.nytimes.com/2015/04/12/education/edlife/12edl-12forum.html [http://perma.cc/6P9R-YDW6] (discussing the community-based motivation for including students on panels adjudicating sexual misconduct).

104. See, e.g., Storer Rowley, Protecting Students, Faculty, Staff from Sexual Misconduct: New Northwestern Policy, Training on Title IX, Clery Act, Violence Against Women Act, Nw. Now (Sept. 28, 2015), http://news.northwestern.edu/stories/2015/09/protecting-students-faculty-staff-from-sexual-misconduct [http://perma.cc/6WPP-MRQZ].

105. See, e.g., Melissa C. Rodman & Luca F. Schroeder, In Campus Sexual Assault Conversation, Faculty Grapple with Role, Harv. Crimson (Mar. 29, 2016), http://www.thecrimson.com/article/2016/3/29/sexual-assault-conversation-faculty-role/ [http://perma.cc/AUZ3-ETP8] (reporting Harvard faculty's view of its role as educators and trusted resources for students).

investigative model),[106] rely primarily on faculty (the disciplinary-hearing model),[107] or remove faculty from the initial fact-finding process and bring them into the proceedings later (the hybrid model).[108]

2. *The Competence and Integrity of Disciplinary Panels and Investigators.* — Schools must further consider public perception of the fairness of their proceedings. For example, universities and DOE have routinely faced criticism alleging that universities are not equipped to make findings of responsibility for sexual assault.[109] Critics question whether schools can remain sufficiently neutral when the outcomes of sexual-misconduct proceedings impact universities' abilities to recruit students and retain donors.[110] They argue that universities have incentives to find students responsible for sexual assault because universities must cultivate a sense of safety on their campuses[111] and often receive negative publicity if they find a respondent student *not* responsible for committing sexual misconduct.[112]

Putting aside the disputed validity of these concerns,[113] the investigative model has the potential to eschew aspersions about university incentives by entrusting the case to an individual who does not have loyalties generated by their other roles in the institution. If a school chooses to appoint an investigator who is not associated with the school in any other

106. E.g., Harvard University-Wide Procedures, supra note 59, at 3–4 (utilizing a Title IX officer rather than faculty); Michigan Sexual-Misconduct Policy, supra note 59, at 23 (same).

107. E.g., The Conduct Disciplinary Process, supra note 98 (noting the role of the conduct officer from the Office of Student Conduct and the role of faculty and students on a disciplinary panel).

108. E.g., Yale Misconduct Procedures, supra note 16, §§ 2.1–.2, 7.2.

109. See, e.g., Nina Bernstein, College Campuses Hold Court in Shadows of Mixed Loyalties, N.Y. Times (May 5, 1996), http://www.nytimes.com/1996/05/05/us/college-campuses-hold-court-in-shadows-of-mixed-loyalties.html [http://perma.cc/PC9Z-EVDW] (last updated May 12, 1996).

110. E.g., Henrick, supra note 9, at 80–86 (arguing there are at least four reasons universities are ill-suited to adjudicate sexual misconduct claims: (1) the institution's financial interests, (2) individual faculty members' career prospects, (3) preserving the university's reputation, and (4) a desire to change societal attitudes regarding sexual assault).

111. E.g., Triplett, supra note 9, at 514–16 (contemplating how universities weigh the financial cost of proceedings and the effect that findings of nonresponsibility can have on students' perceptions of safety on campus).

112. E.g., Henrick, supra note 9, at 81–83 (positing administrators have incentives to avoid potentially controversial actions and negative media attention from finding a student not responsible for sexual misconduct).

113. Numerous commentators argue that lawsuits accusing schools of falsely holding students responsible are equally damaging to schools' interests. E.g., Justin Dillon & Matt Kaiser, Opinion, Why It's Unfair for Colleges to Use Outside Investigators in Rape Cases, L.A. Times (Sept. 16, 2015), http://www.latimes.com/opinion/op-ed/la-oe-0916-dillon-kaiser-campus-sex-assault-javert-20150916-story.html [http://perma.cc/JH6P-VQ4T]. And still more commentators and professional insiders have noted the incredible expense that defending misconduct policies in litigation can pose. E.g., United Educators, supra note 53, at 14.

capacity, then the investigator will not have the same conflicts of interest as faculty members or students would.[114] An outside investigator would not be concerned about public criticism of the university for not finding a student guilty of misconduct or be responsible for cultivating a sense of security on campus. Even if a school chooses to use an internal investigator (Title IX employees at many schools serve as the internal investigators[115]), the investigator will likely not face precisely the same incentives as professors or high-level college administrators who are heavily involved in student life.[116]

However, neither internal nor external investigators are immune to conflicts of interest. Internal investigators may face pressure to align with universities in order to pursue favorable work relations.[117] Similarly, external investigators may face pressure to align themselves with universities because their careers depend on universities rehiring them for their services. Drawing an analogy to the arbitration context, when one party (in this case, the university) is a repeat player in adjudications and the other party (in this case, the complainant or respondent student) is not, scholars have noted concerns that the arbitrator faces incentives to rule in favor of the repeat player, who will likely be in a position to hire the arbitrator again.[118] This has the potential to compromise the independence of outside investigators.

Further, and perhaps most importantly, the use of investigators raises concerns about their institutional competencies. The investigative model envisions no check on the investigator's implicit biases.[119] As an illustrative example, consider documented race and sex biases in sexual-

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114. Shanlon Wu, Improving Campus Sexual Assault Investigations: Will Independent Investigators Help or Hurt?, Huffington Post (June 21, 2014, 3:03 PM), http://www.huffingtonpost.com/shanlon-wu/improving-campus-sexual-assault_b_5516402.html [http://perma.cc/LY2V-5FAX] (last updated Aug. 21, 2014).

115. E.g., Harvard University-Wide Procedures, supra note 59, at 3; Michigan Sexual-Misconduct Policy, supra note 59, at 23.

116. See Brown Task Force, supra note 56 (weighing the potential neutrality of external investigators with the potential bias of internal investigators).

117. See id.

118. See, e.g., Lisa B. Bingham, Employment Arbitration: The Repeat Player Effect, 1 Emp. Rts. & Emp. Pol'y J. 189, 192–93 (1997) (considering the "repeat player problem" in arbitration and noting the "'employer gains some advantage in having superior knowledge with respect to selection of an arbitrator'" (quoting Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1476 (D.C. Cir. 1997))).

119. See Nancy Gertner, Complicated Process, 125 Yale L.J. Forum 442, 444, 448 (2016), http://www.yalelawjournal.org/pdf/Gertner_PDF_tkc98w9s.pdf [http://perma.cc/DX75-TSTF] (noting the concern that a single investigator was responsible for appointing and training a team of investigators and that a single investigator could lead to "a one-sided administrative proceeding"). For more on the role of implicit bias, see generally Nilanjana Dasgupta, Color Lines in the Mind, *in* Twenty-First Century Color Lines 97, 97–117 (Andrew Grant-Thomas & Gary Orfield eds., 2009).

assault proceedings.[120] A number of studies have suggested that race and gender biases, particularly those that are hidden and fostered by cultural stereotypes, likely infect the outcomes of sexual-assault adjudications.[121] A 2002 study that presented sexual-harassment case files to white and black university students and individually surveyed the participants found that male students returned guilty verdicts in a significantly racially biased manner.[122] White males were more likely to return a guilty verdict when the female plaintiff was white, when the male defendant was black, or when both circumstances were present.[123] Regarding black participants, researchers found that "[w]hen the defendant was White rather than Black, both female and male jurors were more likely to find in favor of the plaintiff, more certain of the defendant's guilt, and more generous in their awards to the plaintiff."[124] Researchers attributed the racially biased results to cultural stereotypes and participants' personal identification with the plaintiffs and defendants.[125]

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120. While evidence of racial bias in sexual-misconduct proceedings has been well documented in social sciences literature, at least one study has also documented the role that the attractiveness of parties plays in findings of guilt. Karl L. Wuensch & Charles H. Moore, Effects of Physical Attractiveness on Evaluations of a Male Employee's Allegation of Sexual Harassment by His Female Employer, 144 J. Soc. Psychol. 207, 214–15 (2004). The study revealed that individual jurors are nearly twice as likely to find in favor of a plaintiff alleging sexual harassment when jurors rated the plaintiff as attractive. Id. at 214. In a case study involving a female boss sexually harassing her male employee, the authors determined the trend in juror verdicts was evidence that "jurors find it difficult to believe that an employer would sexually harass a physically unattractive opposite-sex employee." Id. The study further revealed a sex disparity in juror decisions: Female jurors favored the attractive male plaintiff only when the female defendant was unattractive, but male jurors favored the attractive male plaintiff only when the defendant was also physically attractive. Id. at 214–15.

121. See, e.g., id.; Karl L. Wuensch et al., Racial Bias in Decisions Made by Mock Jurors Evaluating a Case of Sexual Harassment, 142 J. Soc. Psychol. 587, 593, 597–98 (2002).

122. Wuensch et al., supra note 121, at 590–91, 596. Participants, who were surveyed alone and not as a jury, were presented with mock case files in a civil claim of sexual harassment and asked to determine whether the defendant was guilty. Id. at 590.

123. Id. at 593.

124. Id. at 597.

125. See id. at 593–94. Similarly, a 2011 study into racial bias in uses of character evidence found that jurors' uses of character evidence were based in part on racial stereotypes. See Evelyn M. Maeder & Jennifer S. Hunt, Talking About a Black Man: The Influence of Defendant and Character Witness Race on Jurors' Use of Character Evidence, 29 Behav. Sci. & L. 608, 617–18 (2011) (considering stereotypes' effect on determinations of guilt). The study determined that "[p]ositive CE [character evidence] had a stronger effect on mock jurors when the defendant was Black, whereas negative CE was more harmful when the defendant was White." Id. at 617. It continued:

> [J]urors may form more negative initial impressions of Black defendants than White defendants, who are likely to begin trials with more of a "blank slate." If jurors are more influenced by stereotype-inconsistent information . . . positive CE may have a stronger impact on Black defendants, whereas negative CE may have a stronger influence on White defendants.

The implication of these studies is that bias can be pervasive even when there are no objective indications that a fact-finder is biased.[126] If physical and cultural traits such as sex and race can invade the average fact-finder's judgment, then using a single investigator—whose biases cannot be challenged by other fact-finders—could lead to biased outcomes.

A disciplinary panel, by contrast, provides opportunities for panel members to challenge the assumptions and hidden biases of other fact-finders.[127] As Professor David Sklansky's research indicates, the American anti-inquisitorial model of investigation and adjudication relies heavily on the ability of juries to make accurate decisions.[128] According to Professor Sklansky, the virtue of the jury is that it is a tool for obtaining a representative cross-section of society and promoting group deliberation.[129] These functions protect against the risk that a single person's bias will influence a decision and instead invite people holding different perspectives to challenge one another.

3. *Protection of Complainant Students and the Use of the Adversarial Method.* — Finally, universities must consider the uniquely sensitive nature of adjudicating claims of student-perpetrated sexual violence. The adversarial method can be harmful to vulnerable complainant students who have survived the traumatic experience of sexual assault.[130] Subjecting survivors of sexual assault to an adversarial process in which they must retell traumatic events, identify witnesses, or collect witness statements can be particularly damaging to their emotional health.[131] Indeed, DOE has noted as much in its Dear Colleague Letter.[132] In a

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Id. at 610.

126. Indeed, students accused of sexual assault have levied accusations of investigator bias as a means of challenging misconduct decisions. See, e.g., Chris Sadeghi, Lawsuits Against UT Allege Bias Against Males in Sex Assault Cases, KXAN (Feb. 5, 2016, 2:55 PM), http://kxan.com/2016/02/05/lawsuits-against-ut-allege-bias-against-males-in-sex-assault-cases/ [http://perma.cc/BE5E-KY8H].

127. Cf. David Alan Sklansky, Anti-Inquisitorialism, 122 Harv. L. Rev. 1634, 1654–55 (2009) (noting the purposes of the jury include promoting group deliberation and this group deliberation is to a certain extent dependent upon jury size).

128. See id. at 1654 ("[T]he Supreme Court held this right [to a jury trial] to be 'fundamental to the American scheme of Justice . . . .'" (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968))).

129. Id. (quoting Williams v. Florida, 399 U.S. 78, 100 (1970)).

130. See Cantalupo, Campus Violence, supra note 11, at 669–71 (discussing the recent movement to protect survivors in sensitive disciplinary proceedings); see also Cantalupo, Congratulations and Cautions, supra note 73, at 283–84.

131. Reardon, supra note 11, at 407–08; see also Gertner, supra note 119, at 448 ("It is surely traumatic for the accuser to repeat her story over again.").

132. See Dear Colleague Letter, supra note 8, at 12 ("Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment."). Additionally, DOE regulations limit situations in which schools may suggest that student-parties engage in informal mediation. Id. at 8.

similar vein, critics have highlighted how the disciplinary-hearing model's resemblance to a criminal trial exacerbates concerns about further traumatizing survivors.[133] Scholars have also noted that using procedures that are similar to full-dress criminal procedures might deter survivors from pursuing complaints in the first place.[134]

Investigators avoid these concerns by conducting individual meetings with complainant and respondent students rather than requiring students to engage in an adversarial process.[135] The investigation minimizes contact between the complainant and respondent and "remove[s] the burdens of the hearing model, and its associated emotional effects."[136] The investigative model, then, may be an appropriate method for protecting survivors' emotional well-being and encouraging survivors to report.[137] The hybrid model fits uneasily in this context: An initial interview with an investigator may ease concerns about a trial-like atmosphere, but serious complaints will eventually reach a full-dress disciplinary hearing.[138] Ultimately, as this Note will demonstrate, a myopic concern for avoiding trial-like procedures may create trade-offs that compromise the integrity of the fact-finding process.

B. *Recent Court Rulings on Sexual-Misconduct Disciplinary Hearings*

While different disciplinary models envision varying levels of investigative expertise, protections against investigator bias, and means of minimizing contact between student-parties, all university procedures must facilitate fair fact-finding. This section will consider how courts have considered these differences. It lays out how current case law should overlay the institutional considerations mentioned in section II.A and inform schools' decisions of which model to adopt. Section II.B.1 details how courts have contemplated students' rights against educational institutions, setting a point of reference for consideration of the particular issues that sexual-misconduct proceedings implicate. Section II.B.2 outlines the only decision thus far rendered on the investigative model, *Prasad v. Cornell University*.[139] Sections II.B.3 and II.B.4 consider how case law responding to challenges to the disciplinary-hearing model might

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133. Cantalupo, Campus Violence, supra note 11, at 682–85.

134. Cantalupo, Decriminalizing, supra note 11, at 491. Indeed, survivors frequently underreport sexual misconduct, meaning schools should actively encourage reporting rather than discourage it. See, e.g., Chmielewski, supra note 10, at 159 (noting the reasons that sexual misconduct is underreported).

135. Harvard University-Wide Procedures, supra note 59, at 4; Michigan Sexual-Misconduct Policy, supra note 59, at 23.

136. Brown Task Force, supra note 56.

137. Cantalupo, Congratulations and Cautions, supra note 73, at 289 & n.39 (noting criminal standards and the trial-like atmosphere of disciplinary proceedings discourage survivors from reporting sexual assaults).

138. E.g., Yale Misconduct Procedures, supra note 16, § 7.3.

139. No. 5:15-cv-322, 2016 WL 3212079 (N.D.N.Y. Feb. 24, 2016).

predict the legality of the investigative model, looking specifically to cross-examination and the fact-finder's ability to make credibility determinations.

Prior to delving into these considerations, it is important to bracket this Note's primary purpose in investigating case law. The Supreme Court has heard relatively few cases directly bearing on students' due process rights in disciplinary hearings.[140] The fact-specific nature of such inquiries has led to a piecemeal and at times confusing jurisprudence regarding sexual-misconduct proceedings.[141] This is in part because many challenges to disciplinary-hearing procedures emanate from claims that universities' processes were fundamentally unfair due to the university's departures from the policies in its student-conduct handbook.[142] The case law examined here is intended to provide the broad strokes of the law across jurisdictions. Accordingly, while a certain practice might not violate students' rights per se, disfavor for the practice in the courts may lead a university to develop a conservative policy that avoids courts' prior concerns.

1. *Common Law Rules for Disciplinary Proceedings.* — In shaping their misconduct policies, universities are attuned to the potential for students to bring claims in court challenging their procedures.[143] Sexual-misconduct procedures at public universities automatically trigger due process concerns for respondent students: Public universities are state actors, and students have property and liberty interests in continued enrollment at public universities.[144] The Supreme Court's first major and lasting

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140. The Court's jurisprudence involving school disciplinary hearings includes: Davis ex rel. Lashonda D. v. Monroe County Board of Education, 526 U.S. 629 (1999), Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998), and Goss v. Lopez, 419 U.S. 565 (1975).

141. Cantalupo, Campus Violence, supra note 11, at 641 ("Lower courts have articulated the test that *Davis* established in a variety of ways.").

142. See, e.g., Corso v. Creighton Univ., 731 F.2d 529, 533 (8th Cir. 1984) ("Corso's misconduct, albeit academic or academic-related, resulted in expulsion, which the Student Handbook specifically regards as a serious penalty. It is clear that Corso was not accorded the privilege which the contract gives him, to wit, the right to a hearing before the University Committee on Student Discipline." (citation omitted)); Felheimer v. Middlebury Coll., 869 F. Supp. 238, 244 (D. Vt. 1994) ("The College has agreed to provide students with proceedings that conform to a standard of 'fundamental fairness' and to protect students from arbitrary or capricious disciplinary action to the extent possible within the system it has chosen to use."); Triplett, supra note 9, at 498 ("Otherwise, due-process rights exist only in the institution's student handbook provisions, which are enforceable through breach-of-contract claims.").

143. See United Educators, supra note 53, at 19 ("Although addressing student sexual assaults is a formidable task, the information [on litigation brought against schools] from this study can help institutions understand this complex environment and develop an integrated and comprehensive plan for responding to and preventing sexual assaults on campus.").

144. See, e.g., *Goss*, 419 U.S. at 573 ("[O]n the basis of state law, appellees plainly had legitimate claims of entitlement to a public education."); Nash v. Auburn Univ., 812 F.2d 655, 660 (11th Cir. 1987) ("[I]t is assumed by the parties and by the district court that

decision regarding due process in disciplinary proceedings was *Goss v. Lopez*, in which the Court emphasized that the nature of a punishment plays a critical role in determining what process is due.[145] Just one year later, the Court clarified the standards for due process in *Mathews v. Eldridge*, a case concerning disability benefits.[146] The Court held that the definition of due process in a particular context depends on "the private interest that will be affected by the official action; . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest."[147] The circuits have read *Goss* and *Mathews* as compatible by using the specific factual circumstances of a school disciplinary hearing to sketch the boundaries of due process.[148] For example, the Sixth Circuit has held that in a university-misconduct proceeding "the Due Process Clause requires us to look at the specific facts of the case . . . ."[149]

However, the campus-disciplinary-proceeding landscape is slightly more complicated because private-university students enjoy no such due process protections. They must develop their claims either under the premise that the university has created and breached a contract with them[150] or by asserting that the university's sexual-misconduct proceedings introduced sex bias.[151] In addition, courts check private universities'

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appellants have property and liberty interests in their continued enrollment at Auburn University and that their interests enjoy the protections of due process."); cf. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 570–71 (1972) (defining liberty and property as "broad and majestic terms" that are not rigidly fixed).

145. *Goss*, 419 U.S. at 576 (comparing the severity of a ten-day suspension to the severity of expulsion and finding due process was more strongly implicated by more severe punishments).

146. 424 U.S. 319 (1976).

147. Id. at 335.

148. See, e.g., Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 643 (6th Cir. 2005) ("[T]he Due Process Clause requires us to look at the specific facts of the case . . . ."); *Nash*, 812 F.2d at 660 ("What process is due is measured by a flexible standard that depends on the practical requirements of the circumstances."). This is also consistent with how the circuits interpreted *Goss* prior to *Mathews*. See, e.g., Winnick v. Manning, 460 F.2d 545, 549–50 (2d Cir. 1972) (engaging in a fact-specific analysis to determine whether due process was violated when a school did not allow the respondent student to cross-examine witnesses).

149. *Flaim*, 418 F.3d at 643.

150. In advancing a contract claim, students must demonstrate that the university disciplinary proceeding deviated from the published procedures, which form a piece of an educational contract. See, e.g., Bleiler v. Coll. of Holy Cross, No. 11-11541-DJC, 2013 WL 4714340, at *14–15 (D. Mass. Aug. 26, 2013) (measuring whether the college proceeding against Bleiler conflicted with the school's obligations prescribed in the student handbook).

151. See, e.g., Yusuf v. Vassar Coll., 35 F.3d 709, 715 (2d Cir. 1994) (reviewing plaintiff's claim of discrimination in violation of Title IX that was based on allegations that his conviction was erroneous and sex motivated); Doe v. Univ. of the S., 687 F. Supp. 2d 744, 758 (E.D. Tenn. 2009) (requiring a plaintiff bringing a Title IX claim to allege facts supporting a finding that the plaintiff's sex motivated the university's decision).

disciplinary proceedings for basic fairness,[152] reviewing "the procedures followed [by private schools] to ensure that they fall within the range of reasonable expectations of one reading the relevant rules."[153] This focus on basic fairness functionally blends the due process considerations at public universities with fairness considerations at private universities: The circuits have broadly agreed that "[w]here basic fairness is preserved, [courts] have not required the cross-examination of witnesses and a full adversary proceeding."[154] Accordingly, courts frequently look to the same aspects of public- and private-university procedures to determine whether they are adequate.[155]

As a consequence of this jurisprudence, the floor for proceedings at both public and private universities tends to be whether the university afforded the respondent student three things: (1) notice of the specific claim pending against them, (2) an explanation of the case against them, and (3) an opportunity to present their own side of the story.[156]

The first two elements—notice and an explanation of the case against the student—are relatively straightforward.[157] However, the third—"an opportunity to present their own side of the story"[158]—has produced more complicated case law. As the following sections will consider, this concern implicates two contentious components of sexual-misconduct proceedings: methods of cross-examination and accommodations for complainant students that minimize interaction between the respondent and complainant.

2. *The Investigative Model and* Prasad v. Cornell University. — This section lays out how these components played out in *Prasad v. Cornell*

152. See, e.g., Cloud v. Trs. of Bos. Univ., 720 F.2d 721, 725 (1st Cir. 1983). The fairness concern is also evaluated based on whether a university has violated its contract with the parties. See, e.g., Schaer v. Brandeis Univ., 735 N.E.2d 373, 378–80 (Mass. 2000); Coveney v. President & Trs. of Coll. of Holy Cross, 445 N.E.2d 136, 139 (Mass. 1983).

153. *Cloud*, 720 F.2d at 724–25; see also Lyons v. Salve Regina Coll., 565 F.2d 200, 202–03 (1st Cir. 1977) (looking to what students would "reasonably" think procedures outlined in the conduct handbook meant).

154. Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987); see also Boykins v. Fairfield Bd. of Educ., 492 F.2d 697, 701 (5th Cir. 1974); Winnick v. Manning, 460 F.2d 545, 549 (2d Cir. 1972); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961).

155. See, e.g., Xiaolu Peter Yu v. Vassar Coll., 97 F. Supp. 3d 448, 465 (S.D.N.Y. 2015) (citing cases evaluating public-university procedures to resolve a claim of inadequate cross-examination at a private school).

156. Cf. Goss v. Lopez, 419 U.S. 565, 581 (1975) (requiring the "student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story"); Gorman v. Univ. of R.I., 837 F.2d 7, 14 (1st Cir. 1988) (identifying these three elements as the process due to respondents).

157. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 348 (1976) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" (alteration in original) (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring))).

158. *Goss*, 419 U.S. at 581.

University,[159] a recent adjudication on the legality of the investigative model that questions the model's early promise.[160] Vito Prasad was found responsible for sexually assaulting a female student at Cornell University.[161] Cornell engaged two investigators to conduct interviews with the parties and witnesses, develop the facts of the case, and make a recommendation to a three-person review panel regarding the outcome of the case.[162] After being found responsible for sexual misconduct, Prasad claimed that the investigator's report was biased against him and in favor of the complainant student's version of events;[163] he also claimed that the procedure denied him the opportunity to confront the witnesses against him and challenge their credibility.[164]

The court denied Cornell's motion to dismiss Prasad's claim.[165] Due to the procedural posture of the case, the court credited Prasad's claims of deficiencies in the investigation, including the investigators' failure to ask witnesses certain pertinent questions and Prasad's inability to question witnesses beyond making written comments on the investigators' reports, among many others.[166] The court noted that "[t]he fact finders' determinations . . . are based almost exclusively upon the content of the Investigative Report" and that this deprived Prasad of the opportunity to engage in "fact finding hearings with the possibility of questions presented to the complainant and witnesses."[167] While the case remains instructive for this Note, Prasad and Cornell settled in December 2016.[168]

The court's concerns in *Prasad* reflect the weaknesses of the investigative model. The model (1) is vulnerable to allegations of investigator bias,[169] (2) offers weak cross-examination procedures,[170] and (3) is susceptible

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159. No. 5:15-cv-322, 2016 WL 3212079, at *1 n.3 (N.D.N.Y. Feb. 24, 2016).

160. The White House Task Force to Protect Students from Sexual Assault concluded that "[p]reliminary reports from the field suggest that these innovative models, in which college judicial boards play a much more limited role, encourage reporting and bolster trust in the process, while at the same time safeguarding an alleged perpetrator's right to notice and to be heard." White House Task Force Report, supra note 14, at 14. Despite these "very positive results," the Task Force concluded that more research was necessary to determine whether the investigative model constituted a best practice in sexual-misconduct proceedings. Id. at 3–4.

161. *Prasad*, 2016 WL 3212079, at *1 & n.3.

162. Id. at *2, *11 n.22.

163. Id. at *9.

164. Id. at *11.

165. Id. at *17.

166. Id. at *15–16.

167. Id. at *15.

168. Order of Dismissal by Reason of Settlement, *Prasad*, 2016 WL 3212079 (No. 5:15-cv-322).

169. See id. at *12; see also supra notes 113–126 and accompanying text (discussing concerns about investigator bias in the investigative model generally).

170. See *Prasad*, 2016 WL 3212079, at *11; see also infra section II.B.3 (looking to disciplinary-hearing cases to predict how courts might rule on the opportunities to cross-examine witnesses in the investigative model).

to the challenge that it inhibits a fact-finder's ability to make witness-credibility determinations.[171] Since the court in *Prasad* never reached the merits, sections II.B.3 and II.B.4 will demonstrate how case law from the disciplinary-hearing context can help resolve the live challenges to the investigative model that *Prasad* teed up.

3. *Courts' Requirements for Cross-Examination in University Disciplinary Hearings.* — As a general matter, courts are concerned with whether respondent students have the opportunity to meaningfully confront witnesses.[172] In *Goss*, the Supreme Court "stop[ped] short of construing the Due Process Clause to require, countrywide, . . . that hearings . . . must afford the student the opportunity to . . . confront and cross-examine witnesses."[173] The circuits have generally interpreted this to mean that the right to cross-examine witnesses is not "an essential requirement of due process in school disciplinary proceedings."[174] In keeping with due process's fact-specific mandate, courts typically weigh the impact that the credibility of witnesses would likely have on the outcome of the case to determine whether cross-examination is necessary.[175] Courts have strongly indicated that when, as in sexual-misconduct proceedings, a case comes down to a "choice between believing an accuser and an accused, . . . cross-examination is not only beneficial, but essential to due process."[176]

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171. See *Prasad*, 2016 WL 3212079, at *9–11; see also infra section II.B.4 (considering disciplinary-hearing cases to predict how courts might rule on the opportunities to make determinations about witnesses' credibility in the investigative model).

172. See, e.g., Donohue v. Baker, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) ("[I]n light of the disputed nature of the facts and the importance of witness credibility in this case, due process required that the panel permit the plaintiff . . . to direct questions to his accuser through the panel."); cf. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961) (refusing to extend the right to cross-examine witnesses to students but specifically mentioning cross-examination as an element of disciplinary hearings); Jessica Watanabe, Ruling in Favor of UC Student Accused of Sex Assault Could Ripple Across U.S., L.A. Times (July 15, 2015, 4:00 AM), http://www.latimes.com/local/education/la-me-ucsd-male-student-20150715-story.html [http://perma.cc/2QHZ-ES3S] (discussing possible changes in case law after a recent ruling that turned, in part, on concerns about cross-examination).

173. Goss v. Lopez, 419 U.S. 565, 583 (1975).

174. Winnick v. Manning, 460 F.2d 545, 549 (2d Cir. 1972); see also *Dixon*, 294 F.2d at 159 ("This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required.").

175. Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 641 (6th Cir. 2005); *Winnick*, 460 F.2d at 550.

176. *Flaim*, 418 F.3d at 641; see also *Dixon*, 294 F.2d at 158–59 ("[A] charge of misconduct . . . depends upon a collection of the facts[,] . . . easily colored by the point of view of the witnesses. . . . [A] hearing which gives . . . the administrative authorities . . . an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved."); Johnson v. Collins, 233 F. Supp. 2d 241, 250 (D.N.H. 2002) (overturning a school board's decision in part due to the plaintiff's inability to challenge witnesses' credibility via cross-examination and reveal that a testifying witness had not actually observed the incident).

Jurisprudence on sexual-misconduct proceedings has built on these principles. The case law suggests that the importance of credibility in sexual-misconduct cases indicates parties should be allowed to cross-examine witnesses. The court in *Donohue v. Baker* neatly summarized the role of cross-examination in sexual-misconduct proceedings: "[I]n light of the disputed nature of the facts and the importance of witness credibility in this case, due process required that the panel permit the plaintiff . . . to direct questions to his accuser through the panel."[177]

A line of recent decisions has built on this trend and called schools' cross-examination procedures into question, renewing the dispute over whether respondent students have a right to cross-examination.[178] In *Gomes v. University of Maine System*, the Maine district court weighed in on the evidentiary value of cross-examination.[179] The primary question was whether the school's failure to disclose a list of the complainant student's witnesses to the respondent students violated their due process rights.[180] The court ultimately concluded that the respondent students' ability to confront and cross-examine witnesses in the disciplinary hearing sufficiently mitigated the harm of not receiving a list of witnesses and dismissed their due process claim.[181] *Gomes* suggests that due process is not violated when the respondent has some opportunity to confront and question the witnesses against them. It would be a broad reading of this case, however, to infer that courts *require* schools to provide the respondent with the opportunity to cross-examine witnesses.

Similarly, in *Doe v. Salisbury University*, the Maryland district court held a respondent student had sufficiently alleged the first portion of a Title IX claim—erroneous outcome—in large part because the university afforded him insufficient opportunity to ask "critical" questions of the investigator, complainant, and witnesses.[182] The respondent student also contended that Salisbury University prevented him from reviewing witness statements and a list of witnesses prior to the hearing.[183] His objections to the procedure centered on his inability to elicit and prepare for important testimony on cross-examination, and the court concluded on

177. 976 F. Supp. at 147.

178. See Watanabe, supra note 172 (reporting uncertainty for college procedures after a court overturned a finding of responsibility at the University of California San Diego in part based on cross-examination limitations); see also Triplett, supra note 9, at 501–02 (describing how *Donohue* has caused administrators to "fear that they may be held liable" for not permitting cross-examination).

179. 365 F. Supp. 2d 6 (D. Me. 2005).

180. Id. at 23–24.

181. Id. at 24.

182. 123 F. Supp. 3d 748, 766 (D. Md. 2015). The court ultimately determined that the respondent student's Title IX claim could survive a motion to dismiss because he also pled on information and belief that sex was a motivating factor in the disciplinary board's decision to find him responsible. Id. at 768–69.

183. Id. at 766.

those grounds that the school had denied him the ability to effectively challenge the complainant student's story.[184]

Finally, the recent case *Doe v. Regents of the University of California San Diego* raised concerns about a popular questioning model in which both parties submit their questions to a panel and the panel then selects which questions to ask witnesses from these submissions.[185] The court concluded the panel had exercised too much discretion over which questions it asked: In the university's disciplinary hearing, the chair of the panel asked only nine of the respondent student's thirty-two questions.[186] The court's primary concern was that the respondent did not have a meaningful opportunity to cross-examine witnesses, which the court determined is critical in this context because the outcomes of sexual-misconduct adjudications turn on the credibility of witnesses.[187]

Taken collectively, these decisions reveal a concern that students must have the opportunity to ask enough questions to substantiate their side of the story and challenge an alternative version of events. Courts are primarily concerned with whether students have the ability to respond to relevant facts that arise in the course of fact-finding and testimony. In other words, courts are less concerned with whether procedures preserve cross-examination as a formal matter; they focus instead on whether procedures preserve the primary purpose of cross-examination—revealing testimonial inconsistencies and lack of witness credibility.[188]

The investigative and disciplinary-hearing models differ vastly in how they envision cross-examination.[189] In the investigative model, cross-examination occurs when student-parties comment on one another's statements.[190] In the disciplinary-hearing and hybrid models, cross-examination occurs when a live panel questions witnesses.[191] The investigative model, therefore, operates without the complainant student confronting the respondent student[192] and without the trial-like setting of

184. Id.

185. No. 37-2015-00010549-CU-WM-CTL, 2015 WL 4394597, at *2 (Cal. Super. Ct. July 10, 2015).

186. Id.

187. Id.

188. E.g., id. at *2–3 (applying a purposive analysis to the university's cross-examination procedures).

189. While the decisions analyzed here concern what process schools must give to respondent students, complainant students' ability to receive fair judgments is equally at issue in sexual-misconduct proceedings. DOE requires that both students receive equal treatment. Dear Colleague Letter, supra note 8, at 11–12. Through the lens of the process given to respondent students, one can also understand the minimum process complainant students should receive.

190. See supra notes 65–72 and accompanying text (recounting the investigative model used at the University of Michigan and Harvard).

191. See supra notes 77, 82–84 and accompanying text.

192. See supra notes 67–70 and accompanying text.

live questioning and cross-examination.[193] As Part III discusses, the student-parties lack the ability to control cross-examination, leaving the investigative model vulnerable to challenge.[194]

4. *The Complainant's Visibility to the Respondent.* — In the disciplinary-hearing context, a number of schools have used screens to block the respondent from the complainant's view;[195] others have provided separate facilities to entirely avoid confrontation between the complainant and the respondent.[196] These separations are an effort to prevent the complainant student from suffering emotional trauma at the sight of the alleged perpetrator during a disciplinary proceeding.[197] The concern with these accommodations is that if the questioning party cannot view the witness, they have less opportunity to assess the witness's credibility and therefore less opportunity to meaningfully cross-examine the witness.[198]

Outside the university-proceeding context, the Supreme Court has held in *Douglas v. Alabama* that "an adequate opportunity for cross-examination" can enable an adequate examination of credibility "even in the absence of physical confrontation."[199] In line with this decision, courts have held that in university proceedings, so long as a screen does

193. See supra notes 75–78 and accompanying text (describing how disciplinary hearings have trial-like procedures).

194. Infra section III.A.1.

195. See, e.g., Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 27 (D. Me. 2005) (holding a partition did not deprive the plaintiff-respondent of a meaningful right to determine the credibility of the witness because the panel could see the witness and determine her credibility); Doe v. Regents of the Univ. of Cal. San Diego, No. 37-2015-00010549-CU-WM-CTL, 2015 WL 4394597, at *3 (Cal. Super. Ct. July 10, 2015) (considering the school's use of a screen to separate the complainant and respondent).

196. E.g., Rutgers Sexual-Misconduct Grievance Procedures, supra note 64, at 4 ("[T]he hearing officer or board may accommodate any student(s) with concerns for the personal safety, well-being, and/or fears of confrontation during the hearing by providing separate facilities and/or by permitting participation by other means . . . ."); Yale Misconduct Procedures, supra note 16, § 7.4 ("Unless both parties ask to appear jointly, the complainant and the respondent will not appear jointly before the panel at any stage of the hearing. The party who is not before the committee will be in a private room with audio access to the proceedings.").

197. See Triplett, supra note 9, at 521 ("Institutions have found many creative ways of permitting cross-examination . . . while also protecting the victim from suffering psychological harm.").

198. See, e.g., *Gomes*, 365 F. Supp. 2d at 26 (framing an objection to the use of a partition as a concern about the ability to confront and view the witness).

199. 380 U.S. 415, 418 (1965). Notably, *Douglas* is a Confrontation Clause case, which presents a different inquiry from a due process inquiry, but courts have drawn on Confrontation Clause jurisprudence to inform whether each party has an opportunity to question a witness and make a meaningful credibility determination regarding the witness. See, e.g., Cloud v. Trs. of Bos. Univ., 720 F.2d 721, 725 (1st Cir. 1983) (citing *Douglas*, 380 U.S. at 418).

not obscure the witness's face from the panel, the panel can adequately assess the witness's credibility.[200]

In perhaps the leading case on the use of protective screens, the First Circuit determined that the misconduct policy's provision for cross-examination was not violated when the complainant testified with a screen blocking the respondent's view.[201] Notably, the respondent student in *Cloud* had the opportunity to cross-examine the complainant student, and the *panel* was able to view her despite the screen.[202] The First Circuit therefore determined that placing the complainant behind a screen was a permissible "protective ruling" within the discretion of the adjudicator.[203]

The *Gomes* court also considered the due process implications raised by a complainant testifying behind a screen.[204] At the proceeding, the disciplinary panel erected a partition that partially obscured the complainant from the respondents' view but permitted their attorney to view the complainant's face unobstructed.[205] The court did not find a due process violation with the arrangement.[206] The respondents' objection in this case, however, is illuminating. They lodged their challenge because *they* could not view the complainant, even though their attorney and the panel could. The court's emphasis that the complainant remained in sight of the panel and in sight of the respondents' attorney suggests that if erecting a partition—or otherwise separating the fact-finder and the person giving testimony—inhibits credibility determinations or the ability to cross-examine a witness, a due process violation might lie.

These cases demonstrate that so long as the respondent has adequate opportunity to question the witness and so long as the fact-finder's view of the witness remains unobstructed, the respondent's ability to cross-examine remains intact. Separate accommodations to protect witnesses do not per se violate respondents' due process rights or create an inequitable trial.

The investigative model envisions investigators interviewing parties separately, meaning that neither party would have the opportunity to

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200. See *Cloud*, 720 F.2d at 725 (determining the plaintiff's ability to ask questions and the visibility of the witness to the panel precluded a claim that the school violated its guarantee of cross-examination); *Gomes*, 365 F. Supp. 2d at 27 (determining because "all witnesses . . . [were] visible to the Plaintiffs while testifying" no due process violation existed); *Regents of the Univ. of Cal. San Diego*, 2015 WL 4394597, at *2 ("The Court also notes the importance [sic] demeanor and non-verbal communication in order to properly evaluate credibility. This is especially true given that the panel made findings in this case from Ms. Roe's testimony and her credibility.").

201. *Cloud*, 720 F.2d at 725 (citing *Douglas*, 380 U.S. at 418).

202. Id.

203. Id.

204. *Gomes*, 365 F. Supp. 2d at 26–27.

205. Id. at 27.

206. Id.

view the other making statements to the investigator and to gauge their credibility.[207] The next Part therefore considers whether the investigative model is vulnerable to allegations that it undermines credibility determinations.[208] Physically separating the parties from the investigator or permitting written statements that do not require the investigator to observe the parties could compromise the fact-finder's ability to make credibility determinations, which courts hold at a premium in sexual-misconduct cases.[209]

III. EVALUATING THE INVESTIGATIVE MODEL

Court opinions on cross-examination and credibility determinations certainly inform schools' decisions of which policies to adopt,[210] but as Part II demonstrated, they are not schools' sole considerations. Universities face DOE's absolute requirement that they use the preponderance of the evidence standard and treat both parties the same.[211] They face institutional concerns about (1) how to utilize their personnel and match their personnel's roles in sexual-misconduct procedures to their respective skill sets, (2) how to weigh the capacity of panels and investigators to make such sensitive determinations, and (3) how to contemplate the appropriateness of the adversarial method given the vulnerability of the parties and the central role of witness credibility.[212] This Part first considers how the investigative model fares in light of these factors[213] and next draws on the preceding sections to prescribe potential best practices for universities.

A. *The Vulnerabilities of the Investigative Model*

1. *Cross-Examination.* — The current case law on disciplinary hearings demonstrates that the investigative model runs into two problems with cross-examination: (1) the investigator can limit the parties' abilities to ask and formulate questions and (2) the investigator's bias may influence questioning.

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207. E.g., Harvard University-Wide Procedures, supra note 59, at 4; Michigan Sexual-Misconduct Policy, supra note 59, at 23.

208. See infra section III.A.2.

209. See supra notes 199–206 and accompanying text.

210. See, e.g., Triplett, supra note 9, at 501–02 (noting how schools tailor their policies to even outlier court decisions to avoid liability).

211. See supra section I.A.2.

212. See supra section II.A (analyzing institutional resources).

213. Since the hybrid model essentially incorporates elements of the investigative model and the disciplinary-hearing model, this Part will primarily address the investigative model rather than belaboring how the case law affects the hybrid model. Notably, the hybrid model uses an investigator to conduct initial interviews with the parties and witnesses, preparing the initial fact-finding in the case.

a. *The Investigator Can Limit the Parties' Abilities to Ask Questions.* — The investigative model leaves it entirely up to the investigator to determine what questions will be asked of either party and whether questions will be asked at all.[214] The parties must rely on the investigator to formulate appropriate follow-up questions and solicit responses (if the investigator is even compelled to do that).[215] At best, each party is permitted to comment on the other party's written statements, and their comments may or may not entice the investigator to ask follow-up questions.[216] This raises substantial concerns about whether students will retain the ability to ask adequate questions of witnesses and investigators, as considered in *Doe v. Salisbury University*.[217] It also conflicts with the holding in *Donohue v. Baker* that the respondent should be allowed to confront witnesses and direct questions to them—albeit through a panel—due to the importance of determining credibility in sexual-misconduct cases.[218] If the investigator has full power to determine whether questions are asked and what questions are asked, students do not have the ability to ask questions that may be crucial to establishing the truth unless the investigator is similarly inclined to ask those questions. The result is that both the respondent and the complainant, the two parties most intimately connected with the incident, have less control over developing necessary or disputed facts than they would in an oral hearing.

Moreover, at least one court has held that reformulating and screening a party's questions infringes on the party's ability to ask critical questions.[219] Recall that the court in *Doe v. Regents of the University of California San Diego* held that a disciplinary panel severely curtailed the party's ability to influence questioning when it selected which questions

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214. Harvard University-Wide Procedures, supra note 59, at 4–5 (describing the investigative team's control over witness interviews); Michigan Sexual-Misconduct Policy, supra note 59, at 23, 25–28 (same).

215. None of the policies explicitly requires an investigator to do anything other than note the existence of follow-up information that the parties provide. See, e.g., Harvard University-Wide Procedures, supra note 59, at 6 (requiring investigators only to "consider" information provided in follow-ups to initial interviews); Michigan Sexual-Misconduct Policy, supra note 59, at 23 (requiring the investigator to respond only to new information that the investigator independently finds "relevant" to resolution of the claim).

216. Harvard University-Wide Procedures, supra note 59, at 6; Michigan Sexual-Misconduct Policy, supra note 59, at 28.

217. See 123 F. Supp. 3d 748, 766 (D. Md. 2015) (determining plaintiffs sufficiently alleged a procedural defect because they were prohibited from asking many critical questions).

218. 976 F. Supp. 136, 147 (N.D.N.Y. 1997) ("At the very least, in light of the disputed nature of the facts and the importance of witness credibility in this case, due process required that the panel permit the plaintiff to hear all evidence against him and to direct questions to his accuser through the panel.").

219. Doe v. Regents of the Univ. of Cal. San Diego, No. 37-2015-00010549-CU-WM-CTL, 2015 WL 4394597, at *2 (Cal. Super. Ct. July 10, 2015) ("[I]t is unfair to Petitioner that his questions were reviewed by the Panel Chair for her alone to determine whether or not the question would be asked and then answered by the witness.").

to ask and how to ask them.[220] Similar concerns are at issue when an investigator determines what statements and responses are relevant and require follow-up.[221] Limiting parties' abilities to pose questions can threaten the integrity of the fact-finding when the parties cannot develop issues that they believe are critical to evaluating the allegations.

b. *Investigator Bias.* — Delegating substantial authority in fact-finding to the investigator also exacerbates the potential for investigator bias to influence the proceedings. While both parties benefit from an experienced investigator who is attuned to the unique considerations of sexual-misconduct cases,[222] centralizing investigatory powers in one person risks exposing the process to that person's subconscious (and conscious) biases.[223] A biased investigator may choose not to ask follow-up questions when they are prematurely convinced of a student's guilt or innocence. They may further formulate and phrase their questions in a biased manner, limiting both parties' abilities to develop the facts of their case in a neutral and straightforward manner.

2. *Credibility Determinations.* — The case law is slightly less clear on how the investigative model's practice of conducting separate interviews might make credibility determinations more difficult. From cases evaluating hearings in which schools erected partitions between the respondent and complainant students or used separate facilities, it is clear courts' main concern is that the complainant student be visible to the fact-finder.[224] When investigators conduct interviews in person, they can make credibility determinations that satisfy the courts' current jurisprudence: The fact-finder can observe the behavior and demeanor of the witness.[225] However, when investigators rely substantially on written statements and written comments to those statements, as they do at Harvard and the University of Michigan,[226] they sacrifice the ability to make such

220. Id. at *2–3.

221. Cf. Harvard University-Wide Procedures, supra note 59, at 4–5 (outlining procedures that might raise these concerns); Michigan Sexual-Misconduct Policy, supra note 59, at 23, 25–28 (same).

222. See supra text accompanying notes 92–97 (discussing the merits of investigative expertise and of separating faculty, who lack such expertise, from the investigative process).

223. See supra notes 120–125 and accompanying text (reviewing well-documented biases of fact-finders in sexual-misconduct adjudications).

224. See Cloud v. Trs. of Bos. Univ., 720 F.2d 721, 725 (1st Cir. 1983); Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 27 (D. Me. 2005); *Regents of the Univ. of Cal. San Diego*, 2015 WL 4394597, at *3.

225. See supra section II.B.3.

226. See Harvard University-Wide Procedures, supra note 59, at 6 ("The Investigative Team will provide the Complainant and the Respondent with a written draft of the findings of fact and analysis and will give both parties one week to submit a written response to the draft."); Michigan Sexual-Misconduct Policy, supra note 59, at 23 ("The Claimant or Respondent may, under limited and extenuating circumstances, make a request to the investigator to submit a written statement instead of participating in an interview.").

credibility determinations. This is functionally akin to obscuring the fact-finder's view of a witness with a partition, and the courts have heavily indicated that this would violate the rights of the student-parties.[227]

Even when the investigator can fully view the witnesses in the case, having an investigator make credibility determinations raises concerns about the implicit biases of the investigator. A single person may inadvertently evaluate a witness's credibility in a biased manner—particularly because the investigator's bias cannot always be detected on an initial screening—and their bias either will never be detected or will not be sufficiently rebutted.[228]

When a disciplinary panel deliberates on the appropriate disciplinary action, panel members can challenge one another's biases.[229] Accordingly, the disciplinary-hearing and hybrid models envision a deliberative space in which personal biases that may permeate fact-finding can be challenged. The investigative model lacks a similar protective mechanism to prevent biases from seeping into the investigator's findings.

B. *The Appropriate Role of the Investigator*

The best practices for adjudicating sexual misconduct cases do not require a wholesale rejection of the use of an investigator. Rather, this Note argues the case law calls for a trammeled use of the investigator. A single investigator can be a useful means of *beginning* the investigative process: They can conduct the initial investigation and report their findings to a disciplinary panel, which will primarily serve as a means for the student-parties to respond to and test the investigator's findings. The resulting model might look something like the misconduct procedures at Yale. Yale's process, though not perfect, has three primary virtues.[230]

First, Yale uses an outside investigator,[231] which limits the likelihood that institutional affiliations will infect the investigator's decisionmaking.[232]

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227. See supra text accompanying notes 199–206 (discussing cases in which courts specifically mention that the fact-finder's view of the complainant remained unobstructed).

228. In an analogous context, scholars have examined the danger of biases of administrative law judges going unchecked, arguing that Article III judicial review is the only way to eliminate bias from Article I judges' decisions. See Elaine Golin, Note, Solving the Problem of Gender and Racial Bias in Administrative Adjudication, 95 Colum. L. Rev. 1532, 1565 (1995) ("If claimants come to federal court with a colorable claim, federal district judges should permit discovery and trial in class actions claiming bias.").

229. Cf. Sklansky, supra note 127, at 1654–55 (noting the purposes of the jury include promoting group deliberation and that this group deliberation is to a certain extent dependent upon the size of the jury).

230. See supra sections II.B, III.A (discussing potential problems with allowing an investigator to exercise control over fact-finding and the questioning of witnesses).

231. Yale Misconduct Procedures, supra note 16, § 7.3.

232. See supra notes 113–116 and accompanying text (describing how employing outside investigators bolsters the integrity of the process).

Second, this investigator's work is reviewed: The investigator engages in the primary fact-finding, and a hearing panel conducts live cross-examination of the parties,[233] which can help overcome weaknesses in the original fact-finding and challenge any bias in the investigator's initial determination. Yale's process also prohibits students from submitting written statements that do not reflect oral testimony before the panel,[234] which alleviates concerns that paper hearings may compromise fact-finders' abilities to make credibility determinations.[235] Third, Yale attempts to protect vulnerable complainant students by separating the parties during the proceedings,[236] which may make the disciplinary proceedings less adversarial.

The Yale process is not perfect, however, and the ideal hybrid disciplinary model would also look to other procedures for inspiration. One improvement would be to question the investigator at a hearing.[237] If the panel can question the investigator, it can potentially weed out some of the investigator's biases that may have influenced the fact-finding.[238] A process in which the disciplinary panel builds off the investigator's fact-finding would be similar to one in which a jury deliberates as a group to evaluate the strength of the fact-finding in a case.[239] Another improvement might be for Yale to reduce the panel's discretion to screen and reformulate questions, which would heed the concerns of the court in *Doe v. Regents of the University of California San Diego*.[240] Yale's current process does not give explicit guidance to panels on when to refuse to

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233. Yale Misconduct Procedures, supra note 16, §§ 7.3–.4. Yale's process allows only the panel to question parties, preventing the parties from directly cross-examining one another. Id. § 7.4. This follows DOE guidance against party-on-party cross-examination, Dear Colleague Letter, supra note 8, at 12, while ensuring that the parties can meaningfully participate in cross-examination.

234. Yale Misconduct Procedures, supra note 16, §§ 7.3–.4.

235. See supra notes 224–227 and accompanying text (discussing a fact-finder's inability to draw conclusions about credibility without viewing testifying witnesses).

236. Yale Misconduct Procedures, supra note 16, § 7.4.

237. This would be an adaptation of Rutgers's current procedures. Rutgers requires a preliminary-review officer to present their report at the beginning of a disciplinary hearing. University Hearings, supra note 76. Its less formal disciplinary-conference procedures allow the parties to question the preliminary-review officer at the conference. Disciplinary Conferences, Rutgers Univ., Student Conduct, http://studentconduct.rutgers.edu/disciplinary-processes/disciplinary-conference-procedures/ [http://perma.cc/JRM3-GLK3] (last visited Dec. 28, 2016).

238. See supra note 120 (describing attractiveness bias in sexual-misconduct cases); supra notes 120–125 and accompanying text (describing racial bias in sexual-misconduct cases).

239. See supra notes 127–129 and accompanying text (discussing the importance of group deliberation in juries to facilitate reaching reliable conclusions).

240. See supra text accompanying notes 185–187 (discussing concerns related to the panel's broad discretion and control over the questioning in *Doe v. Regents of the University of California San Diego*).

ask a party's questions or screen them.[241] If Yale made it clear ex ante what types of questions a panel would be empowered to amend, it could reduce the chances of the panel not asking critical questions.

Despite these areas for improvement, the Yale process and processes like it envision an appropriately limited role for the investigator. The process permits both the respondent and complainant students to influence fact-finding and ensures both parties can present their versions of events and point to inaccuracies in the other party's version of events.

In considering the attributes of a hybrid model, however, it is important to note that while using both an investigator and a disciplinary hearing may smoothly navigate the case law, it does not perfectly align with universities' resources and goals.[242] From a personnel perspective, engaging an investigator and a disciplinary panel duplicates the expenditure of university resources. This may explain why the investigative model has become increasingly popular: It conserves valuable resources against growing numbers of complaints of sexual assault.[243]

Yet combining an investigator with a disciplinary panel does not destroy all of the value of the investigative model. Beginning an investigation with a one-on-one interview with a single person may eliminate some scholars' concerns that survivors do not come forward with their complaints because they do not want to participate in a full-dress trial.[244] An interview with a single trained investigator—particularly one who is not associated with the university—can help the survivor tell their story in a contained and controlled setting, potentially alleviating the survivor's initial concerns about coming forward. Additionally, a hybrid model preserves the investigator's expertise in adjudicating claims of sexual misconduct, which could increase trust in the integrity of the system.

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241. Universities are admittedly in uncertain territory regarding whether they can screen questions on cross-examination. The court in *Doe v. Regents of the University of California San Diego* was not clear on whether its primary objection was to the number of questions rejected or simply to the panel's ability to reject questions at all. See No. 37-2015-00010549-CU-WM-CTL, 2015 WL 4394597, at *2 (Cal. Super. Ct. July 10, 2015). A potential solution to this problem would be for DOE to offer more explicit guidance on what kinds of questions panels can reject. Alternatively, schools could explicitly state in their student-conduct handbooks what types of questions panels would broadly reject in sexual-misconduct proceedings. Panels could then substantiate their decisions to reword or reject a given question with DOE guidance or with the school's student-conduct policy.

242. See supra section II.A (outlining the unique concerns universities have in sexual-misconduct proceedings given their constituents).

243. See Joseph Shapiro, Campus Rape Reports Are Up, and Assaults Aren't the Only Reason, NPR (Apr. 30, 2014, 5:24 PM), http://www.npr.org/2014/04/30/308276181/campus-rape-reports-are-up-and-there-might-be-some-good-in-that [http://perma.cc/HJD9-VRNL] (postulating an increase in reported sexual assaults may reflect the fact that "more students are willing to come forward and report this underreported crime").

244. See supra notes 130–134 and accompanying text (describing scholars' critiques of the adversarial method as potentially intimidating survivors and leading them not to report sexual misconduct).

A hybrid model that uses an outside investigator to conduct initial interviews and subsequently uses a disciplinary panel to question the parties, witnesses, *and* the investigator would allow schools to retain some of the benefits of the investigative model while ensuring that adequate fact-finding is conducted and the parties have the opportunity to address all of the pertinent issues in their cases.

CONCLUSION

University sexual-misconduct proceedings have come under intense scrutiny. Critics argue that schools' policies both discourage reporting and fail to protect the rights of respondent students. The investigative model presents a new twist on sexual-misconduct proceedings, but it ultimately faces similar challenges as the disciplinary-hearing model does. The two models are not, however, exclusive, and a hybridization of the approaches can help universities encourage reporting and the perception of the proceedings' fairness while protecting the rights of both respondent and complainant students.