

# Sexual Misconduct Adjudication under the DCL

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# Logics in Conflict? Contradictions in Campus Sexual Misconduct Adjudication

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## 'Willing to Do Everything,' Mothers Defend Sons Accused of Sexual Assault



Sherry Warner Seefeld, right, meeting last month in a restaurant in Eagan, Minn., with other mothers of students who had been accused of campus sexual assault. Tim Gruber for The New York Times

By **Anemona Hartocollis** and **Christina Capecchi**

Colleges lose series of rulings in suits brought by male students, judges fault lack of due process.

By **Jake New** // April 14, 2016

can derail a person's entire

**EMILY YOFFE** SEP 6, 2017

[SEE COMMENTS](#)

The Volokh Conspiracy • Opinion

## New U.S. Sexual Misconduct Rules Bolster Rights of Accused and Protect Colleges



Michigan State University students demonstrate in support of sexual assault survivors in East Lansing, Mich., in January. Jake May/The Flint Journal-MLive.com, via Associated Press

What was the state of the adjudication of student sexual misconduct at US postsecondary institutions as of 2016?

# Argument

Despite recent revisions to policies, campus sexual assault adjudication processes continue to be deeply problematic, failing survivors more than those accused.

# Argument

The failure of these policies is in part a result of:

- Legalization
- Poorly executed (e.g., vague, contradictory)
- Conflicting logics

# Outline

- Methods
- Context
- Analysis of Policies
- Student Experiences of Adjudication
- Toward Better Models

# Methods

# The Larger Project

- With Sandra Levitsky
- We seek to identify the constellation of pressures that account for university responses to sexual misconduct in a changing legal environment.
- We hypothesize that status processes and external pressures interact with processes of legal endogeneity to create variation in organizational responses.

# Research Design

- Construction and analysis of data set capturing responses to sexual misconduct of 381 American universities at two points in time (2016-17 and 2021?)
- Six in-depth university case studies
- Today's talk focuses on preliminary analysis of one part of Time 1 data collection

# Data Sources

381 Colleges and Universities

**Certainty Sample (114):**  
State Flagships, Women's Colleges, Ivy League, HBCUs

**Random Sample (267):**  
Four Year, Residential Schools, Enrollment >900

Sample drawn from IPEDS

## Sexual Misconduct Policies

- Prohibited Behaviors & Consent
- Jurisdiction & Who is Protected
- Adjudication Procedures

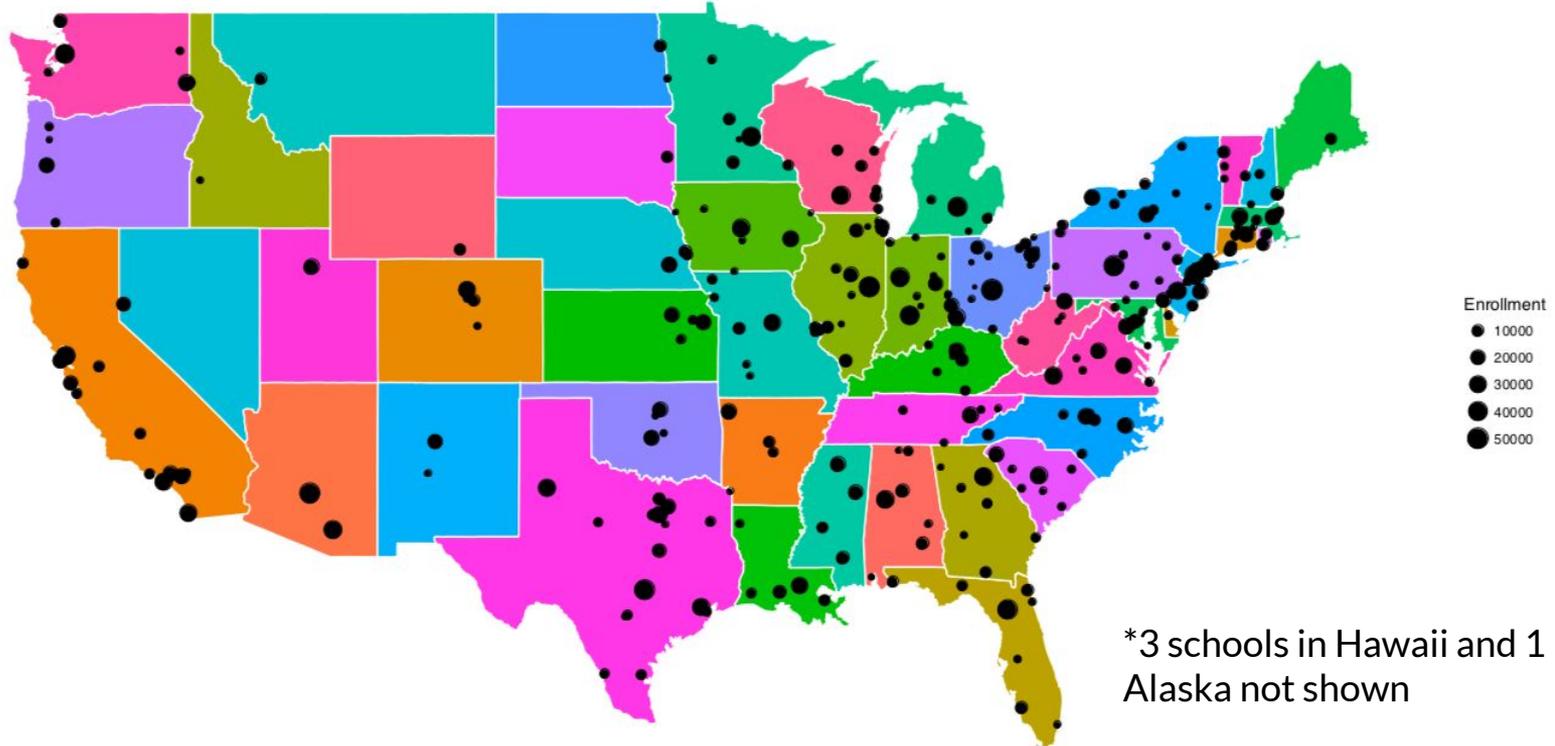
## Annual Security Reports

- Crime Reports
- Education & Prevention
- Adjudication Procedures

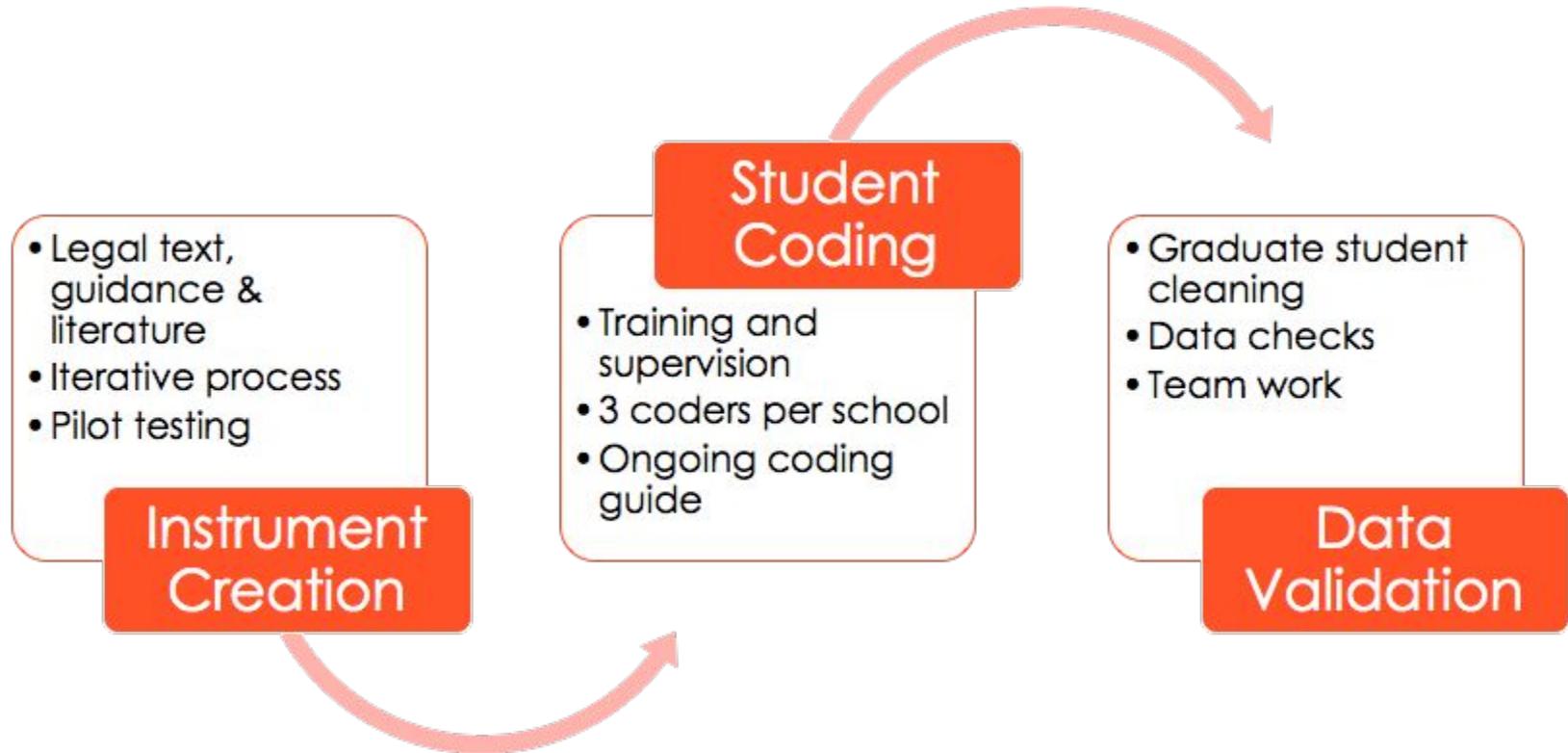
## Website Material

- Resources & Reporting
- Messaging to Students

# Title IX Project Sample, n = 381



# Data Collection Process



# Integration of Rapidly Growing Literature

- Law review articles
- Articles in criminology, sociology, psychology, student services, college health, social work, interdisciplinary social science journals on violence
- Edited collections
- Guidance to practitioners from consultants
- Media coverage

Almost all published after 2014

# Limitations

## OUR STUDY

Coding and analysis of adjudication processes is still underway.

## IN GENERAL

Research on student experiences of adjudications is scarce.

**Context**

# The Legalization of Organizations

“The legalization of organizations is the process through which elements of law and legal principles become relevant to organizations and motivate the infusion of law-like ideas and the creation of law-like structures into organization governance.”

Edelman 2016, p. 25

# Law and Guidance

1972	Title IX
1980	Alexander v. Yale
1990	Clery Act
1992	Campus Sexual Assault Victims' Bill of Rights
2001	Revised Sexual Harassment Guidance from the OCR
2011	Dear Colleague Letter
2013	Violence Against Women Reauthorization Act
2014	President Obama's Presidential Memorandum
2014	Significant Guidance Document (52 Q&A Items)
2017	Rescinding of DCL and Q&A, Interim Guidance

Source: Koss et al.

# DCL Guidance on Grievance Procedures

(from Koss, Wilgus, Williamsen 2014)

- Adopt and publish grievance procedures
- Procedures must apply to complaints filed against employees, students, or third parties
- If disciplinary procedures are used, Title IX coordinator should review them to ensure consistency
- **Clarify that mediation will not be used to resolve sexual assault complaints**
- Complaints must not be addressed solely by Athletics if complaint involves an athlete
- Provide for adequate, reliable, and impartial investigation
- Designate reasonably prompt time frames for major stages of complaint process
- Notify parties of outcome of complaint and any appeal consistent with FERPA and Clery
- Provide parties with notice of outcome concurrently
- Use language understood by the audience
- Notify complainant of right to file criminal complaint and do not dissuade from doing so
- Do not wait for criminal investigation or proceeding to conclude before beginning investigation
- Ensure that any agreement or MOU with local law enforcement is consistent with DCL
- **Use “preponderance of the evidence” standard or equivalent**

The table text is based on the DCL (Ari, 2011).

# DCL Guidance on Grievance Procedures

(from Koss, Wilgus, Williamsen 2014)

- Provide parties with equal opportunity to present relevant witnesses and evidence
- Provide parties with similar and timely access to information that will be used at the hearing
- If lawyers are permitted to participate, provide equal participation rights to each party
- **Forbid parties to personally question or cross-examine each other**
- Provide an appeals process
- If appeals proceed, provide access equally to both parties
- Maintain documentation of all proceedings
- Train all individuals responsible for implementing procedures or ensure relevant experience
- Disclose any real or perceived conflict of interest that fact finder or decision maker may have
- **Provide due process to alleged perpetrator without unnecessarily delaying Title IX protections of complainant**
- Provide periodic status updates to parties
- Do not require complainant's to accept or sign nondisclosure agreements concerning the outcome of a disciplinary proceeding

The table text is based on the DCL (Ari, 2011).

# Enforcement and Compliance

- Office for Civil Rights (OCR) in the Department of Education enforces Title IX
- OCR could withdraw Federal funding (although it has never happened)
- OCR took a more active role in enforcement under Obama,
- It appears that many schools may have taken “a maximally risk-averse strategy that went way beyond what the federal government was calling for” (Bagenstos 2015).

# Did the DCL push toward criminalization?

## NO

The OCL “decriminalizes” Title IX “with the explicit rejection of the criminal ‘beyond a reasonable doubt’ standard of proof and an elevation of the student survivor’s rights in hearings and other procedures above the status of victims in the criminal justice system” (Cantalupo 2012, p.506).

Comparison:

Civil vs. criminal law, incarceration not at stake

Cantalupo 2012, Baker 2015

## YES

“... current Title IX practices are coming to resemble an extension of, rather than a diversion from, the criminal justice framework” (Collins 2016, p 367).

Refer to DCL’s advocacy of formal, professionalized, adversarial processes oriented toward punishment as “quasi-criminal justice model”

Comparison:

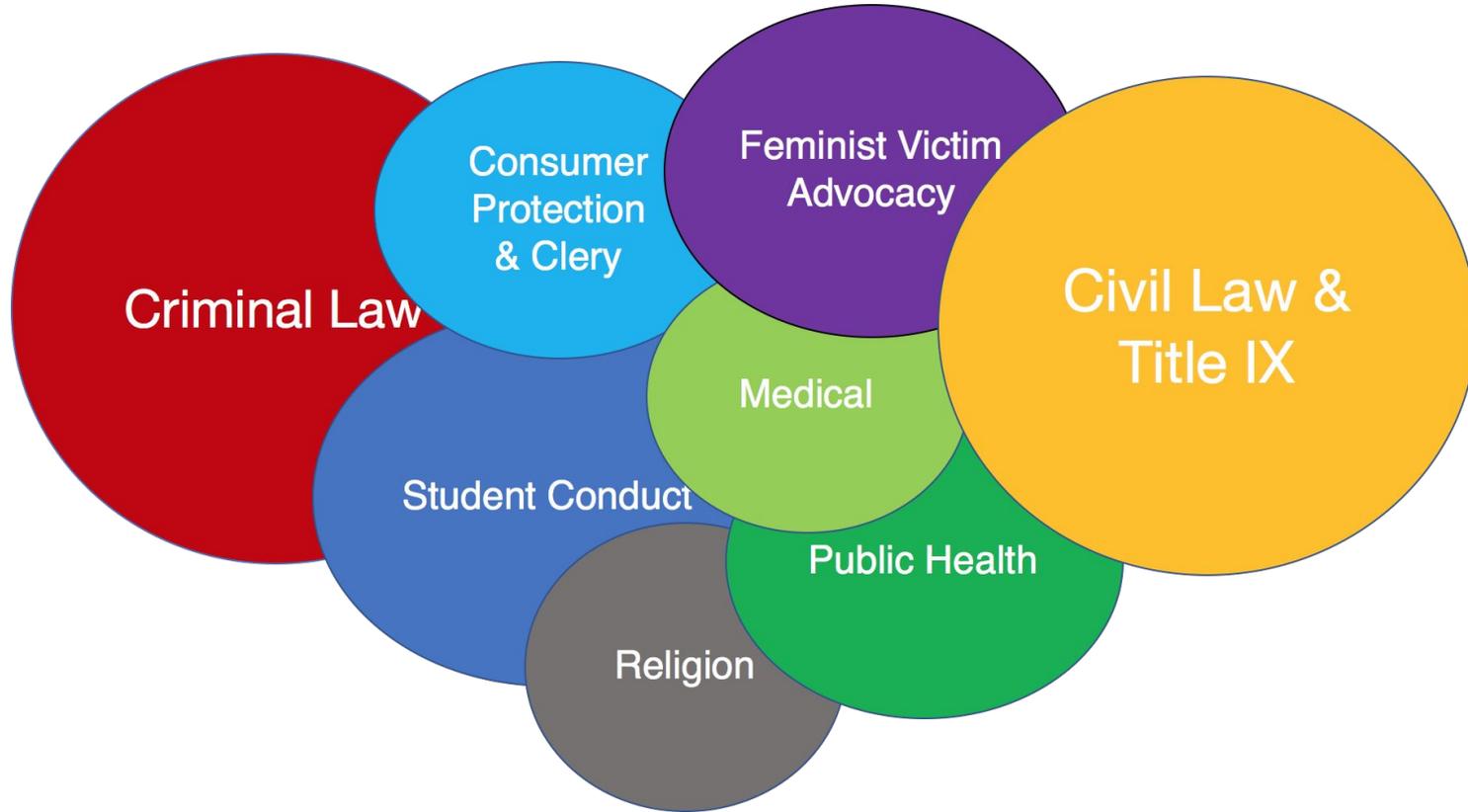
Punitive vs. restorative models of resolution

Collins 2016, Koss et al. 2014, Brubaker 2018, Holland & Cortina 2017

# The DCL and Other Legal Requirements:

- Pushed toward **legalization** of adjudication, and
- Required substantial resources and expertise to implement,
- In a context where failure to comply was perceived to be high stakes,
- And where other methods for managing the problem, influenced by competing forms of expertise, already existed.

# Student Sexual Misconduct is a Problem for:



# The Field of Student Conduct

“Student Conduct Programs must identify relevant and desirable student learning and development outcomes” (p. 3 from Council for the Advancement of Standards in Higher Education 2006, quoted in Koss et al. p. 248).

Student conduct professionals “have worked for years to decrease the legalism of student conduct processes and separate the terminology of student misconduct management from criminal procedures” (Koss et al. 25).

# Analysis of Policies

# Basic Findings

- 99% of schools had some kind of sexual misconduct policy
  - 71% of schools had a document specifically geared towards sexual misconduct, rather than being embedded in a student handbook or annual security report
- 94% of schools published an annual security report
- 93% of schools used the preponderance of evidence standard

# Adjudication Process



# Adjudication Models

## Hearing Model



- **Trial-like:** Traditional hearing, **adversarial**
- Concurrent student participation
- Advisors, advocates, and lawyers present
- Hearing panel decides finding
- Volunteer-dependent (faculty and staff)
- Domain of student affairs/Dean of Students
- Potential for student involvement in panel

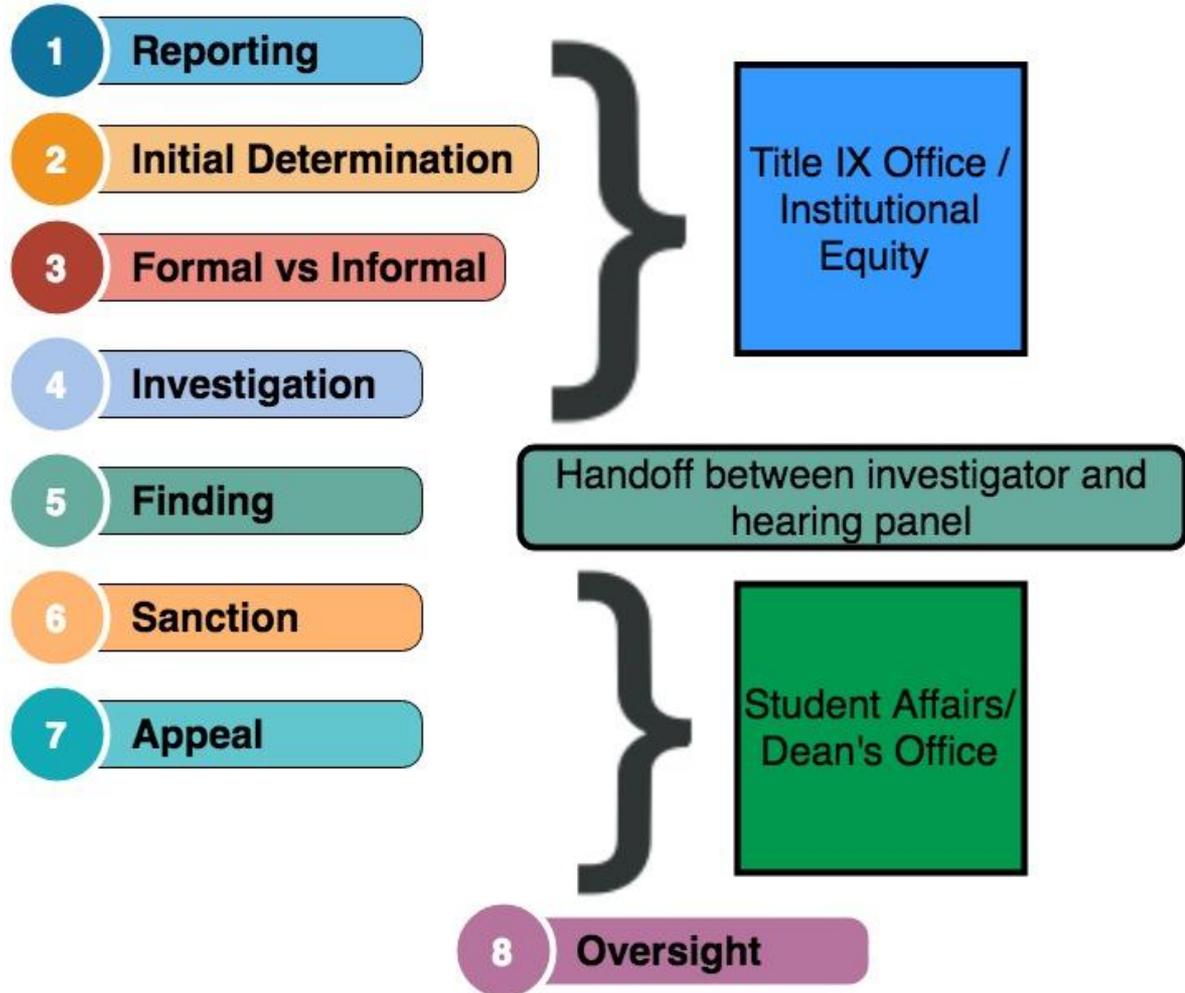
## Single Investigator Model



- **Inquisitorial:** Single fact-finding mission
- Students completely separate
- Advisors, advocates, and lawyers in the background
- Single person decides finding with potential oversight
- Professional staff dependent
- Domain of Title IX office/Institutional Equity Office

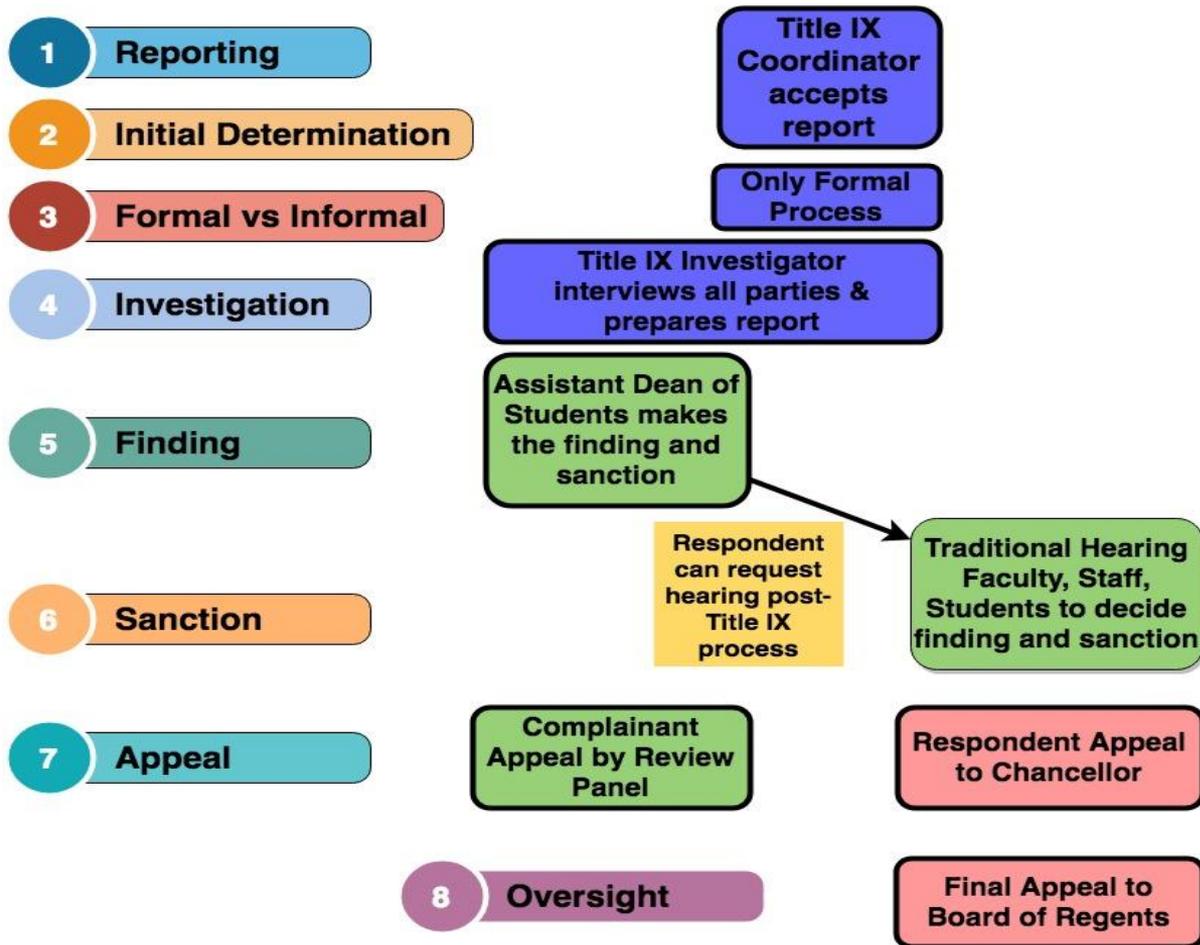
# Hybrid Model

- Increase in single investigator and hybrid processes
- Who determines the finding varies
- Typically Title IX/Equity offices handle fact finding
- Student Affairs officials handle sanctions and appeals from students



# Hybrid Example: Large, Mid-Western, Public

- Title IX office handles investigation
- Dean of Students decides finding
- Respondent can request hearing post-Dean decision
- Two appeal processes
- Possible for Board to change finding



# Restorative Practice

- We found 16 schools that posted restorative practices in policies
- No apparent institutional pattern
- Schools integrate RJ in different ways:
  - Informal Resolution
  - Sanctions
  - Remedies

# Poor Execution

- **Contradictory**

*“Specifically, the [Sexual Misconduct Policy] states that the College President **decides** whether or not a respondent violated the [policy], while the [Annual Security Report] states that a **hearing committee will conduct a hearing to decide** if the [policy] was violated.” (coder comment)*

- **No Information Provided**

*“[This school] has literally **no information about procedures for the hearing/sanctions process...** None. There's a lengthy description of the election process for members of the pool of people who can be on the hearing board, which appears to be larger than the hearing board itself, **but on the actual procedure, there is none.**” (coder comment)*

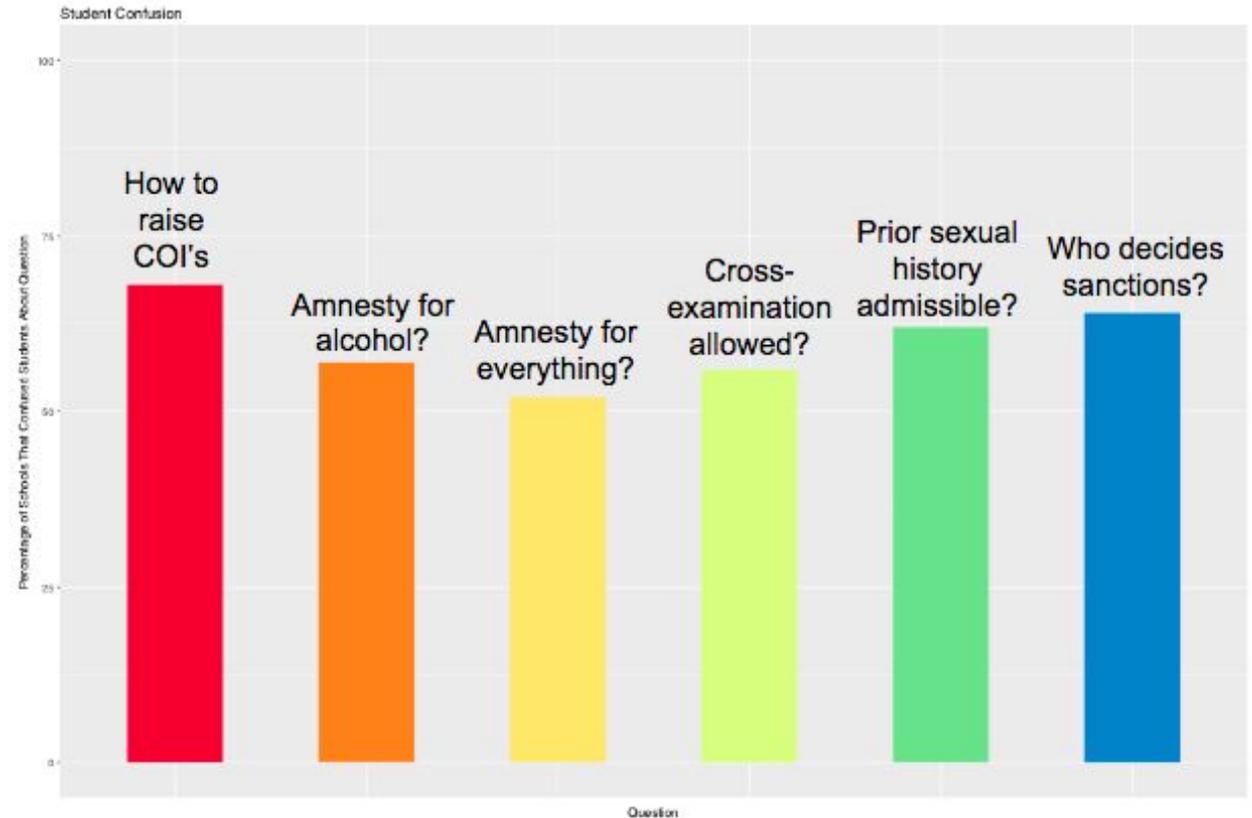
# Poor Execution

- **Lack of Transparency, Lack of Student Agency**

*“It is up to the **Dean of Students to determine** if there is enough evidence to investigate. Furthermore, there are **no details on the investigative process** ... The initial adjudication and investigation is **solely run by the Dean of Students**, and there is **no way to challenge any bias** with [the Dean]” (coder comment)*

# Trained Student Coders Confused By Policies

For 57% of schools, coders could not agree on whether or not the school granted amnesty for alcohol offenses.





# Conflicting Logics

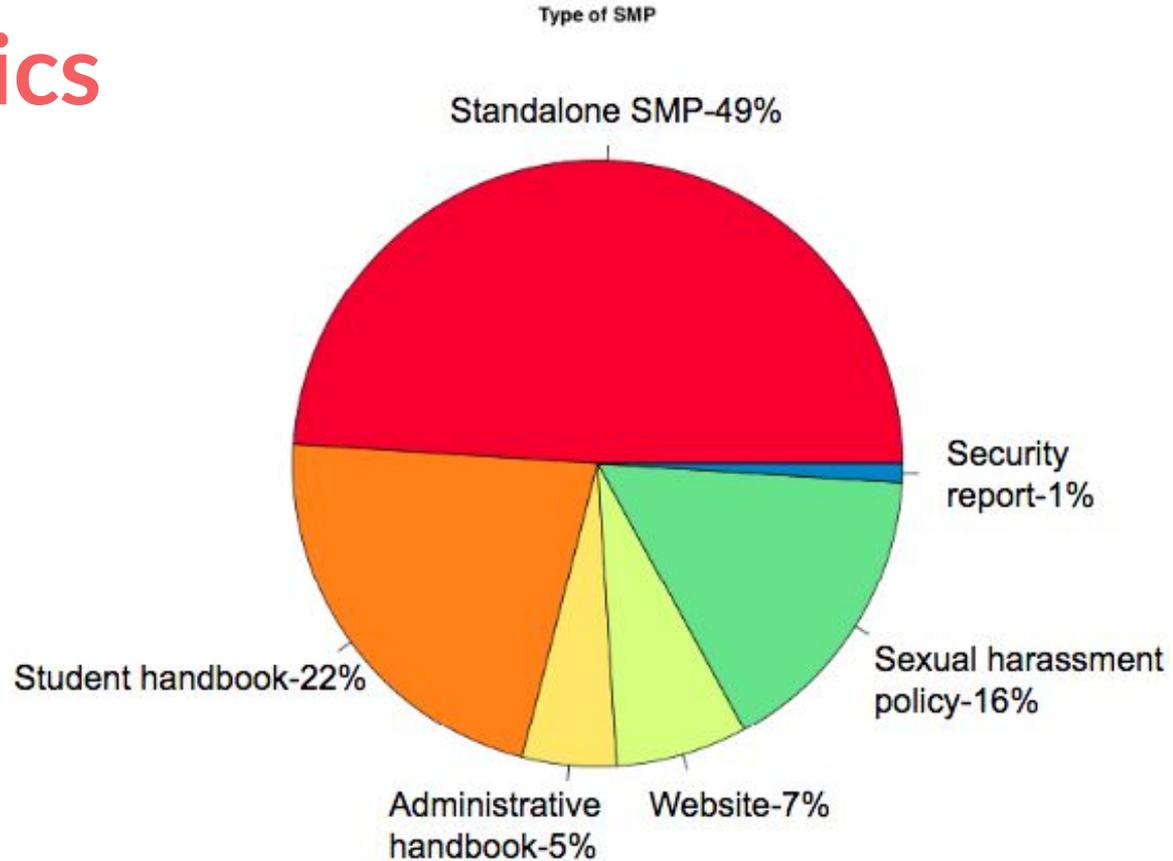
"Justice calls us to hold those accountable who violate community standards and the law of the land. Justice also calls us to protect the innocent. Mercy calls us to see ourselves as fellow sinners in need of God's grace who encourage the community to remember Christ's example of offering hope rather than condemnation."

--from student code of conduct of a small religious college framing the handling of disciplinary issues

# Conflicting Logics

Logics are suggested by the different kinds of documents schools use to address sexual misconduct.

A student handbook suggests a student affairs logic, while a sexual harassment policy suggests a human resources logic.



# Student Experiences of Adjudication

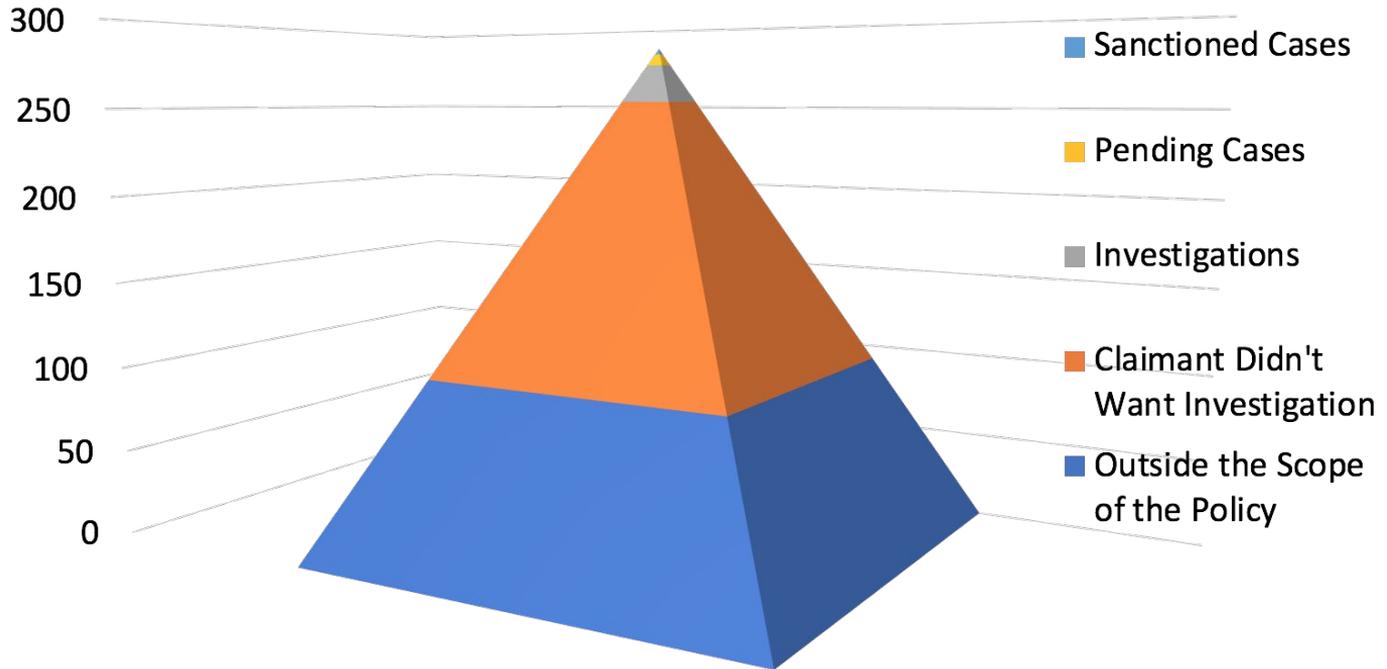
# Victim Protections in Policies are Uneven

**Analysis of policies of all 25 four-year residential colleges in Maryland, 2013-2014**

Separation of accused and accuser	28%
Indirect questioning	24%
Rape shield	20%
Victim impact statement	16%
Immunity	28%
Training of investigator	16%
Training of hearing board members	24%

**At 47% of schools in our sample, students can be sanctioned for false reporting.**

## University of Michigan Report on Actions taken by the University to Address Reports of Prohibited Conduct: July 1, 2017 – June 30, 2018



University of Michigan Office for Institutional Equity, Sept. 5, 2018.

<https://hr.umich.edu/sites/default/files/student-sex-misconduct-report-fy-18.pdf>

# Why Don't Students Report?

Khan et al. (2018) interviewed 150 undergraduate students at Columbia and Barnard on why college students do not report.

66 of the 150 described at least one incident of assault.

89 incidents of assault were described overall in the study.

# Why Students Don't Report

“One, it’s ridiculous that, like, it’s an investigative process because that means that someone can literally get a lawyer and argue against my experiences. Two, it’s traumatic.”

- To avoid conflict with peers
- Out of concern for labeling someone as a “perpetrator” or for one’s own reputation
- To avoid damage to one’s own academic goals, career goals, roles in organizations
- To avoid traumatic adjudication processes

# Experiences of Adjudication

“Even in a context in which the university has invested heavily in improving adjudication ... the process remains relentlessly difficult for students.”

Khan et al. 2018

Survivors recounted:

- Unhelpful and coercive police
- Accidental formal reporting
- “...my agency was totally stripped out of my hands.”

# Due Process

The controversy over “due process” is evidence of the legalization, even criminalization, of this process.

The language of ... *cross-examination, complainant, violation, disciplinary charges, hearing, witnesses, testimony, probation, etc.*  
... is the language of the law.

# Toward Better Models

# Revisit the Goals of Campus Student Sexual Misconduct Resolution

- Student development
- Victim reparation
- Offender accountability
- Community justice

Koss, Wilgus, and Williamsen 2014

# Recenter Survivors

Sexual assault victims need to:

- Tell their own stories
- Obtain answers to questions
- Experience validation as a legitimate victim
- Observe offender remorse
- Receive support
- Have choice and input into the resolution

# Rethink Policies and Approaches (AGAIN)

- Push back against legalization
- Develop restorative/transformational justice options, alongside formal processes
- Commit resources to the evaluation of processes
- Innovate!

# Develop Restorative Justice Options

“Harm has been done and someone is responsible for repairing it.”

“The fundamental difference between mediation and RJ is the requirement that the responsible person accepts responsibility as a precondition of participation as opposed to neutrality toward the parties.”

“The focus on RJ is present and future oriented. Looking back to weigh evidence and deliberate fault is the function of adversarial justice, which we believe the DCL guidance encourages...”

Koss, Wilgus, and Williamsen 2014, p. 246

# Develop RJ Options- WITH CARE

- Readiness
- Leadership and vision
- Input from campus victim advocates, Title IX coordinator(s), student affairs staff and administrators, students, and the larger campus community

Koss, Wilgus, and Williamsen 2014

# Develop RJ Options- WITH CARE

“To implement options, an institution needs highly skilled practitioners, experience supporting sexual assault victims, clarity and transparency, flexibility of options, and wide inclusion of partners (McGlynn, 2012).”

Koss, Wilgus, and Williamsen 2014

# Improving Formal Resolution Processes

## GOALS:

- Transparency (balancing confidentiality)
- Reduction of complexity and burden on students
- Fairness (balancing due process and victim protections)
- Survivor control (balancing the safety of the community)

# Improving Formal Resolution Processes

## GOALS:

- Proportionality (sanctions commensurate with the harm)
- Healing of survivor/community and education of perpetrator
- Prevention of further harm (including to survivor friendships)
- Efficient use of staff & administrative resources

# Improving Formal Resolution Processes

## CHALLENGES:

- Lack of evidence of successful formal resolution models
- Legal uncertainty
- Legal pressure may be pushing in ways that will make adjudication processes worse

# Improving Formal Resolution Processes

But even so, schools could improve their written policies, as a clear policy is a necessary first step to a good process.

“Campus judicial systems must also appear fair and legitimate to members of the campus community, such that students and faculty are willing to play a role in the administration of justice.”

Konradi 2017, p. 375

# Conclusion

Adjudication of campus sexual misconduct is likely to be contested for some time to come, as current policies and practices are not meeting the needs of students. They are likely to be subject to ongoing legal, cultural, and political challenges from all sides.

# Acknowledgments

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Faculty Co-PI: Sandra Levitsky

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Karina Lopez

Angela Perone

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Undergraduate Researchers: MANY!

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Questions



# Implications

- Reforms should recenter survivors, resist adversarial processes, and consider restorative/transformational approaches.

# Why Must Universities Adjudicate Sexual Misconduct

“The government has made clear that schools must adopt procedures to address sexual misconduct on campus, rather than leaving the issue to the criminal justice system. But this is not objectionable. Universities routinely employ their disciplinary procedures to address student-on-student misconduct that also might violate criminal laws. That is because the schools recognize that they have an obligation to protect students against threats to their safety and well-being on campus, and that this obligation arises independently of whether the state believes it appropriate to deploy the apparatus of criminal punishment in a particular case.”

Bagenstos, Sam

<https://washingtonmonthly.com/magazine/septoct-2015/what-went-wrong-with-title-ix/>

# Resolution Models

## Hearing Model

- Students present evidence and testimony to a panel of faculty and staff. Student membership on panels becoming rarer.
- Accused and accuser can ask questions of each other and witnesses usually through the hearing panel.
- Finding of responsibility decided by the hearing panel.
- The original hearing panel or a similar body may decide sanctions and/or hear appeals.
- Resembles a trial

## Single Investigator

- One person collects evidence, interviews parties and maintains communication with accuser and accused.
- The investigator produces a report outlining the case and a rationale for a finding. This may be done under the oversight of a higher level administrator.

# Few Findings

Michigan grievance pyramid

OIE for reports, investigations, responsibility findings, sanctions?

Climate data 2015 - or keep this separate, and on the side say the numbers for michigan 2015. (Basically a contrast, but do not make the percentage of climate data the bottom of the pyramid)

Number of harms out there

Truth

# BUT Most Schools Need Better Written Policies

“Campus policies that do not address or are unclear about the way in which hearings are conducted and the grounds for appeal are likely to [suppress reports].”

Konradi 2017, p. 375

# Due Process Concerns

Processes haven't been working for respondents

RJ - take responsibility, learn, and to not do it again

DATA?

--- due process protections - concerns

-- pissed off respondents/moms

--law suits are being decided

Is the process leading to a safer campus with less SV

Insufficient knowledge

Issue is that the basic way that DCL campus adj becomes none CJ is that it shifts the scale of justice from the crim heavy emphasis on rights of the accused (due to the stakes) to equal it out 50/50 -- the issue is in adver system, someone has got to lose

# Experiences of Adjudication

Students “described the actual adjudication process as exacerbating mental health challenges and providing little relief” (p. 448).

“The act of investigating--asking both the reporter and the reported what happened, asking others who were present before (typically friends), reinterviewing parties multiple times given competing accounts or confusing information (particularly when incapacitation is involved, as it frequently is)--although procedurally responsible is almost necessarily traumatic” (p. 448).

Khan et al. 2018, based on research at Columbia University

# Experiences of Adjudication

“...my agency was totally stripped out of my hands. Like, I had no choice. There was going to be an investigation launched whether I liked it or not” (p. 449).

“Even in a context in which the university has invested heavily in improving adjudication--Columbia has hired sexual sex crimes investigators and/or lawyers to help investigate and manage cases and guaranteed free representation for both the reporting and responding student--the process remains relentlessly difficult for students” (p. 449).

“If she had known how long and difficult the reporting process would actually be, she likely wouldn't have participated” (p. 450).

“Universities, perhaps stung by being called out on their prior inaction, overreached by allowing a class of professional campus administrators, insulated from the classroom, to pursue a maximally risk-averse strategy that went way beyond what the federal government was calling for and that put important values of academic freedom and fair process at risk on their campuses.”