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ARTICLE: THE LEGACY OF THE PROMPT COMPLAINT REQUIREMENT, CORROBORATION  
REQUIREMENT, AND CAUTIONARY INSTRUCTIONS ON CAMPUS SEXUAL ASSAULT

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**TEXT:**

[\*945]

Introduction

Potiphar, an officer of the Egyptian Pharaoh, bought Joseph of the hands of the Ishmeelites. And it came to pass that his master's wife cast her eyes upon Joseph and said, "Lie with me." But Joseph refused, saying, [\*946] "because thou art his wife: how then can I do this great wickedness, and sin against God?" And it came to pass, as she spake to Joseph day by day, he hearkened not unto her, to lie by her, or to be with her. One day she caught him by his garment, saying, "Lie with me," and he left his garment in her hand and fled. And she called unto the men of her house, and spake unto them, saying, "See, he hath brought a Hebrew unto us to mock us; he came in unto me to lie with me, and I cried with a loud voice. And when he heard that I lifted up my voice and cried, he left his garment with me, and fled." When Potiphar came home and heard the words of his wife, his wrath was kindled. And Potiphar took Joseph and put him into prison.  
n1

The Biblical tale of Potiphar's wife stands as a warning to the criminal justice system. It is one nightmare about rape: a spurned woman seeks revenge by falsely accusing an innocent man. n2 This nightmare terrifies because of the helplessness of the weak male - in this case, a Jewish servant - and the fear of a justice system governed by the emotions of an irrational woman.

There is another nightmare about rape, of course, one that recurs in waking life: a man rapes a woman or girl he knows, taking advantage of her proximity and vulnerability to satisfy a cruel desire for sexual dominance. Rape, the fear of which terrifies most women at some point in their lives, is dreadful enough. But then the legal bad dream begins. In great pain, the rape victim tells of her assault to police, prosecutors, judges, and jurors, but no one believes her. They suspect either that she fabricated a rape from a consensual encounter or that she caused it by her own bad behavior. n3 This nightmare should also stand as a [\*947] warning to the criminal justice system, but we have no notorious ancient parables to sear it into our collective unconscious. As a result, the criminal justice system has not reacted to the cynical disbelief many feel toward rape victims who muster the courage to come forward with the truth. n4

By contrast, the criminal justice system has overreacted to infamous anecdotes of men falsely accused. Three particular rules, designed to prevent irrational women from succeeding in levying false rape charges, arose in English common law. First is the prompt complaint requirement, which required a woman to complain swiftly of rape to officials or risk losing legal redress for the crime. Henry de Bracton, an influential 13[su'th] century English legal scholar, explained:

When therefore a virgin has been so deflowered and overpowered ... forthwith and whilst the act is fresh, she ought repair with hue and cry to the neighbouring vills, and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress, and so she ought to go to the provost of the hundred and to the serjeant of the lord the King, and to the coroners and to the viscount and make her appeal at the first county court ... . n5

Despite the humiliation a victim might feel about revealing a degrading, personal attack, if a victim failed to promptly report a rape, the victim was not allowed to bring a claim of rape in court. n6 In 1962, the Model Penal Code in the United States turned this rule into a strict statute of limitations, which it still contains:

Prompt Complaint. No prosecution may be instituted or maintained under this Article [for sexual offenses] unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence ... . n7

[\*948] No other crime in the Model Penal Code requires a similar prompt complaint. n8

Second, the corroboration requirement in rape law meant that a man could not be convicted of rape unless the complainant had corroborative evidence of the assault, such as bruises or ripped clothing indicating a struggle. The assumption that a rape victim should be able to "display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress" n9 has been codified under the Model Penal Code. n10 Although the credible but uncorroborated testimony of one person can support a prosecution for burglary or homicide under the Model Penal Code, a rape victim does not have a case without corroborating evidence. n11

Third, cautionary instructions warned jurors to weigh the testimony of a rape complainant with particular circumspection. n12 The seventeenth century English jurist Sir Matthew Hale believed that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." n13 The risk of false accusations led Hale to admonish:

We may be the more cautious upon trials of offenses of this nature, wherein the court and the jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the person accused thereof by the confident testimony sometimes of malicious and false witnesses. n14

[\*949] Many jurisdictions responded to Hale's admonition by requiring courts to issue instructions cautioning juries to regard the complainant's testimony in rape cases with particular suspicion. The Model Penal Code continues to mandate such a warning:

In any prosecution before a jury [for sexual offenses], the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private. n15

Legal scholars and others have criticized the prompt complaint requirement, corroboration requirement, and cautionary instructions in the criminal law of rape for about three decades. n16 As a result, most jurisdictions have removed these doctrines from formal law. Only three states - California, Illinois, and South Carolina - continue to mandate prompt complaint, and then only for spousal sexual offenses. n17 Furthermore, only three states require corroboration: Texas requires corroboration unless the complainant makes a prompt outcry to authorities, New York requires corroboration when a [\*950] complainant's mental incapacity forms the basis of her non-consent, and Ohio requires corroboration for the crime of sexual imposition. n18 Eight states continue to require cautionary instructions when there is no corroboration of an alleged rape, twenty-five other states and the District of Columbia prohibit judges from issuing this type of cautionary instruction. n19

After scrubbing down the foul Model Penal Code and tidying up a dozen or so state codes on the bookshelf, one might toss these relics - prompt complaint, corroboration, and cautionary instructions - into the dustbin of historical misogyny, declare a victory for the second wave of feminism, and go home. But the cultural dirt from the criminal law has drifted into an adjacent room previously assumed to be uncontaminated. Despite most states' removal of the prompt complaint requirement, corroboration requirement, and cautionary instructions from formal law, some colleges and universities are imposing new versions of these ancient doctrines on students who complain to campus authorities of having been sexually victimized by other students. Harvard College offers a recent example. n20

In May of 2002, Harvard College adopted new procedures for complaints of sexual assault and other student infractions. n21 The procedures stated, "Complaints must ordinarily be brought to the College in a timely manner." n22 If the information provided at the time of a complaint indicated that there was "little evidence beyond the conflicting statements of the principals," Harvard would likely decline to resolve the "peer dispute." n23 The 2002 procedures pointed out that Harvard "ordinarily will not consider a case unless allegations presented by the complaining party are supported by independent corroborating evidence." n24 Thus, the effect of Harvard's policy is to impose a prompt ("timely") complaint requirement and an "independent corroborating evidence" requirement on those students who suffer sexual assault. It also cautioned officials against pursuing reports in which the complainant's only evidence is her "credible account" of sexual abuse. These new rules will not only reduce the number of successful disciplinary proceedings against sexual assailants; they will deter the original complaints themselves.

[\*951] The recent scandal at the Air Force Academy goes further by both discouraging victims from filing complaints and actively punishing victims for speaking out. Since February 2003, dozens of current and recent cadets have gone public with their stories of mistreatment upon reporting to the Air Force Academy brass that they had been raped by male cadets. n25 Rather than punishing the reported attackers, the Academy chose instead to discipline the female cadets for the minor infractions they committed around the time of the incidents in question. These offenses included drinking, fraternizing with upper class cadets, or even having sex in the dorms (referring to the alleged rape itself). n26 Many of these female cadets were forced to leave the Academy because of these infractions, which ended their military careers, while their alleged attackers marched unscathed toward graduation. n27 These reactions - the belief that an alleged rape occurred because of the complainant's own behavior and the action of charging a complainant with a separate, less compelling offense - are not unique to the Air Force Academy and have also deterred the filing of sexual assault complaints on civilian campuses. n28

These college and university practices may correlate with powerful institutional incentives to deter student complaints of sexual assault. First, campus sexual assault cases generate negative press, because federal law requires colleges and universities to report annually to the Secretary of Education and the general public the number of sexual assaults on campus. n29 Second, these cases also expose the institution to potential backlash. Colleges and universities may fear that a student disciplined for sexual misconduct will lodge a civil suit against the institution for procedural unfairness. n30 Third, [\*952] these cases are tough. Reported complaints of rape on campus almost always involve acquaintances and alcohol. n31 Irrefutable evidence - in the form of guns, knives, or broken bones - is rare. n32 Additionally, these cases are complicated and cumbersome to pursue, particularly for officials untrained in criminal procedure. From the perspective of a college administrator, one case of campus rape can collapse into a small black hole, extinguishing resources, time, and money like light across the event horizon. n33

These factors may motivate college and university administrators to deter or facilitate early disposal of difficult cases. Regardless of their personal beliefs, then, administrators may be motivated to capitalize on an underlying societal bias against women who complain of rape by importing discredited doctrines from the criminal law. If scholars continue to ignore university disciplinary proceedings as a site for this kind of gender bias, campus administrators may increasingly follow Harvard's lead. n34 It is time therefore to re-examine the prompt complaint requirement, corroboration requirement, and cautionary instructions in the criminal law of rape so that administrators may similarly expel them fully from campus disciplinary policies and practices.

Part I of this Article discusses the prompt complaint requirement, corroboration requirement, and cautionary instructions in the criminal law of rape. It traces a brief history of the three doctrines, discusses their intransigence in the Model Penal Code, and catalogs their weakened status in the formal criminal law of the fifty states and the District of Columbia.

Part II analyzes the faulty assumptions behind the prompt complaint requirement, corroboration requirement, and use of cautionary instructions that led criminal law to reject them. Studies reviewed therein reveal that, contrary [\*953] to the assumptions of legal scholars formulating these doctrines, most victims of rape do not promptly complain to the police or other authorities, most rapes do not produce corroborating evidence, and most jurors are already cautioned by an underlying societal bias against those who claim rape. Part II also examines the empirical data on the incidence of false rape reports to police. It finds that although no solid data supports the belief that false complaints of rape are more common than false complaints of any other crime, ample data exists proving that actual incidents of rape are greatly underreported to the police.

Part III discusses the emergence of prompt complaint, corroboration, and cautious consideration in campus sexual assault policies and practices. It begins by analyzing the current policy at Harvard College and surveys other colleges'

and universities' formal policies and informal practices to conclude that Harvard is not alone in its use of disreputable legal doctrines against rape victims. It then analyzes why schools would adopt abandoned rules from the criminal law in their own disciplinary procedures, looking to the legal and institutional difficulties that campuses face when policing sexual assault. Colleges and universities have reasons to want to avoid difficult cases; these doctrines from the criminal law of rape afford them the opportunity to do so.

Part IV proposes a method to free disciplinary proceedings from the legacy of these discredited doctrines. It argues that, in rejecting a prompt complaint requirement, sexual assault policies should allow a complainant to pursue campus disciplinary proceedings against a student as long as that student remains enrolled at the institution. In rejecting the corroboration requirement, policies should clarify that the standard of proof for finding a violation of the disciplinary code is a "preponderance of the evidence" and that a complainant's testimony alone can be sufficient for such proof. In rejecting the use of the cautionary instruction, policies should not subject rape complainants to extra scrutiny or procedural hurdles in bringing their claims to the campus disciplinary boards. Additionally, rape complainants should ordinarily be afforded amnesty for disciplinary infractions that occurred on the instance in question. Part IV then offers model campus sexual assault provisions to effectuate these goals.

#### I. The Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions in the Criminal Law of Rape

The prompt complaint requirement, corroboration requirement, and use of cautionary instructions were adjacent bands in a spectrum of unique legal rules that made the crime of rape harder to prove than other felonies. The utmost resistance requirement,<sup>n35</sup> the chastity requirement,<sup>n36</sup> and the marital rape [\*954] exemption<sup>n37</sup> filled out the spectrum and contributed to the difficulty rape victims had with persuading legal actors that they had suffered a criminal wrong. These latter doctrines were fairly independent of one another, whereas prompt complaint, corroboration, and cautionary instructions were interdependent.<sup>n38</sup> For example, in many jurisdictions, if a woman failed to complain promptly, she would be forgiven if she had evidence corroborating the rape.<sup>n39</sup> If a woman suffered a rape that produced no corroborative evidence, a prompt complaint itself might serve as the necessary legal corroboration.<sup>n40</sup> A judge was frequently required to issue cautionary instructions in a rape case unless the complainant proffered corroborative evidence of the offense.<sup>n41</sup> Thus, in many jurisdictions, prompt complaint and corroboration substituted for one another with cautionary instructions only triggered by a complainant's failure to either promptly complain or offer corroborative evidence of the crime. The English common law history of these requirements demonstrates the extent to which suspicion and criticism of women who complain of rape underlies the doctrines' invention and continued vitality.

##### A. History of the Three Doctrines

English common law required all victims of violent crime, including rape [\*955] victims, to "hue and cry" if they wished to bring a claim.<sup>n42</sup> "Hue and cry" referred to the "outcry calling for the pursuit of a felon, raised by the party aggrieved" or "the pursuit of a felon with such outcry."<sup>n43</sup> Victims were thereby notifying their neighbors to pursue the evildoers.<sup>n44</sup> Though courts rejected a "hue and cry" requirement for victims of other serious offenses in the 1700s, "courts continued to require hue and cry in rape cases, and held it against the State if the woman had not confided in anyone after the attack."<sup>n45</sup> By the early 1800s, courts in the United States allowed rape prosecutions to proceed despite the complainant's failure to promptly hue and cry; however, they admitted evidence of her failure to hue and cry to discredit her testimony.<sup>n46</sup> Although the prompt complaint requirement waned in 1800s, courts still accepted the underlying reasoning in the common law that a complainant who was making a truthful allegation of rape would promptly cry out.<sup>n47</sup> For example, in 1900, the Utah Supreme Court stated:

The natural instinct of a female thus outraged and injured prompts her to disclose the occurrence, at the earliest opportunity, to a relative or friend who naturally has the deepest interest in her welfare; and the absence of such a disclosure tends to discredit her as a witness, and may raise an inference against the truth of the charge.<sup>n48</sup>

This sentiment remained prevalent until the early 1980s.<sup>n49</sup>

In contrast to the early prompt complaint requirement, English common law did not require corroboration for a rape prosecution to proceed.<sup>n50</sup> Sir Matthew Hale explained the lack of such a requirement: "The party ravished may give evidence upon oath and is in law a competent witness but the credibility of her [\*956] testimony, and how far she is to be believed, must be left to the jury."<sup>n51</sup> In his leading treatise on evidence, Professor John Wigmore concurred,

explaining that "at common law, the testimony of the prosecutrix or injured person, in the trial of all offences against the chastity of women, was alone sufficient evidence to support a conviction; neither a second witness nor corroborating circumstances were necessary." n52

The first mention of the value of corroborative evidence appeared in the United States in the published appeal of an 1875 rape case, *Boddie v. State*. n53 In that case, the Supreme Court of Alabama indicated its preference for corroborative evidence in rape cases, but did not make corroboration a prerequisite. n54 The court stated: "No principal of law forbids a conviction on her uncorroborated testimony, though she is wanting in chastity, if the jury are satisfied of its truth." n55 If the complainant could not present corroborative evidence, her testimony should be more closely scrutinized, but if the jury found the testimony still credible, the jury could convict. n56 Several jurisdictions followed the Boddie analysis when developing rules through statute and case law that corroboration was not required; however, these jurisdictions tempered the elimination of a corroboration requirement by insisting that in the absence of corroboration, the judge should issue cautionary instructions warning the jury to closely scrutinize the complainant's testimony. n57

In 1886, the New York legislature became the first to enact a corroboration [\*957] requirement for the prosecution of rape, n58 a provision purportedly designed to protect the defendant from an "untruthful, dishonest, or vicious complainant." n59 The statute read: "No conviction can be had for abduction, compulsory marriage, rape, or defilement upon the testimony of the female abducted, compelled or defiled, unsupported by other evidence." n60 A number of other jurisdictions followed New York's lead. n61

In 1904, the Supreme Court of Georgia became one of the first to impose the requirement. The court asserted, contrary to the historical record:

The law is well established, since the time of Lord Hale, that a man shall not be convicted of rape on the testimony of the woman alone, unless there are some concurrent circumstances which tend to corroborate her evidence. n62

Underlying the Georgia court's decision to impose a corroboration requirement was its concern for false accusers. The court stated that "without [a corroboration requirement], every man is in danger of being prosecuted and convicted on the testimony of a base woman in whose testimony there is no truth ... the man is powerless." n63 The court gave examples of evidence that would satisfy the corroboration requirement including "some outcry [or evidence] that she told of the injury promptly, or her clothing was torn or disarranged, or her person showed signs of violence, or there were other circumstances which tend to corroborate her story." n64 A prompt complaint thus could function as corroborative evidence.

By the early 1970s, seven jurisdictions maintained a corroboration requirement, either through statute or case law. n65 By contrast, twenty-five [\*958] states had rejected such a requirement, some explicitly. n66 In 1973, for [\*959] example, the Pennsylvania rape code was amended to state: "The testimony of a complainant need not be corroborated in prosecutions under this chapter." n67

The use of cautionary instructions in the English common law of rape arose out of statements made by Lord Hale in the seventeenth century. n68 In reaction to the conviction and execution of one rape defendant, Hale wrote, "some malicious people seeing how easy it was to make out such an accusation, and how difficult it was for the party accused to clear himself" brought forth "many indictments of rapes, wherein the parties accused with some difficulty escaped." n69 Hale concluded with a warning:

I only mention these instances that we may be the more cautious upon trials of offenses this nature, wherein the court and the jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation, that they are over-hastily carried to the conviction of the accused thereof by the confident testimony, sometimes of malicious and false witnesses. n70

Hale's alarm perhaps befits a time when criminal defendants lacked the presumption of innocence, the standard of proof of guilt beyond a reasonable doubt, and other fundamental trial rights that the modern criminal justice [\*960] system guarantees. n71

Hale's cautionary warning about rape complainants entered both the culture and common law of England and carried over to the American legal system. n72 Exactly when cautionary jury instructions in rape trials entered American law is unclear, but, by 1856 the California Supreme Court stated that "from the days of Lord Hale to the

present time, no case has ever gone to the jury upon the sole testimony of the prosecutrix, unsustained by facts and circumstances corroborating it, without the Court warning them of the danger of a conviction on such testimony." n73

Throughout the nineteenth and twentieth centuries, U.S. courts cited Hale's warnings of "the confident testimony sometimes of malicious and false witnesses" to justify requiring instructions cautioning juries to weigh rape complainants' testimony with particular suspicion. n74 Hale's underlying concern with false accusers thus resonated with both legislatures and judges.

#### B. Model Penal Code on the Three Doctrines

When the Model Penal Code was initially drafted in 1962, no jurisdiction barred a rape prosecution for a lack of prompt complaint. n75 Nevertheless, the drafters of the Model Penal Code formulated the prompt complaint rule as a [\*961] strict statute of limitations for sexual offense complaints. n76 Therefore, no prosecutor may initiate a case against a defendant for rape, gross sexual imposition, deviate sexual intercourse by force or imposition, corruption of minors and seduction, sexual assault, or indecent exposure unless the victim made a complaint to authorities within three months of the offense. n77

The imposition of a short three-month statute of limitation is unique to sexual offenses. For example, under the Model Penal Code, a murder prosecution may be commenced at any time; other first degree felonies within six years; all other felonies within three years; misdemeanors within two years; and petty misdemeanors within six months. n78 The three-month prompt complaint rule in the Model Penal Code places forcible rape and other sexual offenses at about half the level of shoplifting. n79

The Commentary to the 1962 Model Penal Code justified the prompt complaint requirement, stating:

The possibility that pregnancy might change a willing participant in the sex act into a vindictive complainant, as well as the sound reasoning that one who has, in fact, been subjected to an act of violence will not delay in bringing the offense to the attention of the authorities, are sufficient grounds for setting some time limit upon the right to complain. Likewise, the dangers of blackmail or psychopathy of the complainant make objective standards imperative. n80

However, by 1980, the Model Penal Code's Commentary had modified its defense:

The requirement of prompt complaint springs in part from a fear that unwanted pregnancy or bitterness at a relationship gone sour might convert a willing participant in sexual relations into a vindictive complainant. Barring prosecution if no report is made within a reasonable time is one way of guarding against such fabrication. Perhaps more importantly, the provision limits the opportunity for blackmailing another by threatening to bring a criminal charge of sexual aggression. n81

Both the 1962 and 1980 commentaries thus relied on the fear of a false accuser [\*962] to justify the prompt complaint rule. n82

In addition to a prompt complaint, the Model Penal Code also includes a corroboration requirement for all sexual felonies. n83 It states: "No person shall be convicted of any felony under this Article [for sexual offenses] upon the uncorroborated testimony of the alleged victim." n84 Therefore, no person may be convicted of the felonies of rape, gross sexual imposition, deviate sexual intercourse by force or imposition, corruption of minors less than 16 years old, or seduction unless the complainant can corroborate her testimony with other evidence. n85 A man may be convicted of robbery or assault upon the credible but uncorroborated testimony of one person, but not rape. n86

The Commentary to the Model Penal Code finds the corroboration requirement justified by the "the difficulty of defending against false accusation of a sexual offense." n87 The Commentary continues: "In no other context is felony liability premised on conduct that under other circumstances may be welcomed by the "victim."" n88 When proof comes down to conflicting accounts between the complainant and the defendant, "the corroboration requirement is an attempt to skew resolution of such disputes in favor of the defendant." n89 The Commentary insists that "in short, the corroboration requirement should not be understood as an effort to discount female testimony or as an unsympathetic understanding of the female experience with sexual aggression. It is, rather, only a particular implementation of the general policy that uncertainty should be resolved in favor of the accused." n90

The only other time that the Model Penal Code implements "the general policy that uncertainty should be resolved in favor of the accused" with this peculiar requirement of corroboration, however, is for the crime of perjury. n91 As the

only other offense requiring corroboration perjury the crime of making [\*963] a false statement n92 is particularly revealing of the Model Penal Code's concern that women falsely claim rape. For all other crimes, the rule of lenity and the standard of proof of guilt beyond a reasonable doubt satisfies the "general policy that uncertainty should be resolved in favor of the accused." n93

The Model Penal Code also includes special cautionary jury instructions that judges must administer in prosecutions for any sexual offense. n94 The Commentary to the 1962 Code analyzed the cautionary instruction in this way:

A general caution to the authorities against convicting on the bare testimony of the prosecutrix may be desirable in view of the probable special psychological involvement, conscious or unconscious, of judges and jurors in sex offenses charged against others. The only rational alternative would be to require corroboration as to every element of the crime, since there is no reason to believe that the complainant is more likely to lie or deceive herself on one point rather than another. A requirement as broad as that would impose an impracticable burden on the prosecutor. n95

The Commentary thereby contrasted two possible legal rules in sexual offense cases in light of the conscious or unconscious "special psychological involvement" of both judges and jurors in offenses of a sexual nature. First, courts could require corroboration of every element of the crime because "there is no reason to believe that the complainant is more likely to lie or deceive herself on one point rather than another." n96 This rule was rejected, however, as posing insurmountable obstacles for the state. Second, courts could issue cautionary instructions to warn jurors against the "bare testimony" of a potentially lying or self-delusional woman complaining of rape. n97 This rule was accepted as superior to its alternative. n98 The two alternatives reveal the interplay between the corroboration requirement and cautionary instructions in rape law. Both are attempts to address the extraordinary problem in sexual offenses that the complainant might "lie or deceive herself." n99

Interestingly, it is unclear who is more at risk of suffering from feeling an irrational "involvement" in the crime: victims or judges and jurors. The Model Penal Code's cautionary instruction itself warns against the "emotional involvement" of the "complaining witness," n100 while the 1962 Commentary [\*964] warns against the "special psychological involvement" of judges and jurors. n101 In any case, by 1980, the Code's drafters retained the cautionary instruction but deleted their involved commentary defense of the instruction.

### C. Current Law on the Three Doctrines

Despite the vigor with which the Model Penal Code embraces the prompt complaint requirement, corroboration requirement, and cautionary instructions for sexual offenses, most American jurisdictions have formally spurned these three doctrines. A prompt complaint requirement, for example, remains today in only three states - California, Illinois and South Carolina - and in those jurisdictions, it applies only to spousal sexual offenses. n102 The California code states:

No prosecution shall be commenced [for spousal rape] unless the violation was reported to medical personnel, a member of the clergy, an attorney, a shelter representative, a counselor, a judicial officer, a rape crisis agency, a prosecuting agency, a law enforcement officer, or a firefighter within one year after the date of the violation. This reporting requirement shall not apply if the victim's allegation of the offense is corroborated by independent evidence that would otherwise be admissible during trial. n103

In California, therefore, failure to complain within one year of spousal rape may be offset by corroborating evidence of the offense. There is no prompt complaint requirement for non-spousal sexual offenses in California. n104

Illinois has applied a modified version of the Model Penal Code prompt complaint requirement to spousal offenses as well:

Prosecution of a spouse of a victim under this subsection for any violation by the victim's spouse of [criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse or aggravated criminal sexual abuse] is barred unless the victim reported such offense to a law enforcement agency or the State's Attorney's office within 30 days after the offense [\*965] was committed, except when the court finds good cause for the delay. n105

The thirty-day complaint provision is substantially more restrictive than California's time frame of one year, although it contains a "good cause" exception. n106 Illinois also lacks a prompt complaint requirement for non-spousal sexual offenses. n107

Finally, the South Carolina code for sexual battery provides that "the offending spouse's conduct must be reported to appropriate law enforcement authorities within thirty days in order for that spouse to be prosecuted for this offense." n108 South Carolina is even stricter than Illinois because it requires a complaint within thirty days without a "good cause" exception. n109 Like California and Illinois, South Carolina's code does not require a prompt complaint for non-spousal sexual offenses. n110

Modern courts rarely require a prompt complaint; rather, under a modern "fresh complaint" doctrine, courts will allow a complainant to admit evidence that a complaint was promptly reported to bolster the complainant's credibility. n111 In *State v. Hill*, n112 the Supreme Court of New Jersey rejected the common law requirement of a prompt complaint, but concluded that a court could still admit evidence of a prompt complaint where it existed:

If we were to eliminate the fresh-complaint rule, rape victims would suffer whenever members of the jury held prejudices that women who do not complain have not really been raped ... . Hence, until there is a [\*966] clearer understanding of the perception of rape and its women victims, we think that the better solution is to allow fresh-complaint testimony to be admitted. n113

As a result of similar analysis, states now usually allow for the admission of the fact of a rape victim's prompt complaint to corroborate the victim's testimony. n114 For example, the Virginia code states that "in any prosecution [\*967] for criminal sexual assault ... the fact that the person injured made complaint of the offense recently after commission of the offense is admissible, not as independent evidence of the offense, but for the purpose of corroborating the testimony of the complaining witness." n115 Additionally, Pennsylvania's criminal code states:

Prompt reporting to public authority is not required in a prosecution under this chapter: Provided, however, that nothing in this section shall be construed to prohibit a defendant from introducing evidence of the complainant's failure to promptly report the crime if such evidence would be admissible pursuant to the rules of evidence. n116

[\*968] The rule in most jurisdictions, then, is that evidence of prompt complaint may be admitted to bolster the victim's testimony and the defendant may attack its absence to discredit her testimony. n117

Like the traditional prompt complaint requirement, the corroboration requirement has also been almost eradicated from formal rape law. Only three states - New York, Ohio, and Texas - continue to impose a corroboration requirement in their criminal codes for certain sexual offenses. New York requires corroboration of the complainant's testimony only when her lack of consent is due to her mental defect or incapacity. n118 Ohio requires corroboration of the complainant's testimony for the crime of "sexual [\*969] imposition," n119 but not for other sexual offenses. n120 The Texas code states:

A conviction [for sexual assault or aggravated sexual assault] is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred. n121

[\*970] Texas thus allows corroboration and prompt complaint to offset one another in sexual assault cases. n122

Fourteen other state codes indicate that corroboration of a sexual offense complainant's testimony is not required. n123 The remaining thirty-three states' [\*971] codes are silent on the issue of corroboration. n124 However, case law from each of these states indicates that corroboration of the complainant's testimony is not ordinarily required. Twenty-two states - Alabama, n125 Arkansas, n126 California, n127 Colorado, n128 Delaware, n129 Georgia, n130 Hawaii, n131 Idaho, n132 Illinois, n133 Indiana, n134 Iowa, n135 Louisiana, n136 Maine, n137 Maryland, n138 Nevada, n139 [\*972] New Jersey, n140 North Carolina, n141 North Dakota, n142 Oregon, n143 Tennessee, n144 Utah, n145 and Virginia n146 - allow a defendant to be convicted of rape based on the uncorroborated testimony of the complainant. Twelve states and the District of Columbia appear to qualify a general rule that no corroboration is required. For example, in Alaska, when a complainant of sexual abuse later recants her allegation, the state must produce corroborating evidence to support the original allegation. n147 In Arizona, corroboration may be needed when the witness' story is physically impossible or incredible. n148 Oklahoma and West Virginia require corroboration only

when the complainant's testimony is inherently improbable. n149 In Kansas and Kentucky, the complainant's [\*973] testimony need not be corroborated if it is clear and convincing and not unbelievable. n150 In Mississippi, n151 Missouri, n152 Montana, n153 and the District of Columbia, n154 corroboration is not required except to explain inconsistencies within the complainant's testimony. Wisconsin requires corroboration when the complainant's testimony is unreliable. n155

Cautionary instructions, like the prompt complaint requirement and the corroboration requirement, have also greatly waned in formal rape law. n156 [\*974] Cautionary instructions for rape are prohibited in more than half of the states. Codes in seven states prohibit the judge from issuing jury instructions that the complainant's testimony should be reviewed with special caution given the nature of sexual crimes. n157 In addition, a Florida statute generally prohibiting judges from commenting to the jury on the credibility of witnesses has been applied in rape cases to reject cautionary instructions. n158 Cautionary [\*975] instructions in rape cases have also been prohibited by case law in the District of Columbia<sup>159</sup> and twenty other states: Alaska, n160 Arizona, n161 California, n162 Florida, n163 Georgia, n164 Idaho, n165 Indiana, n166 Iowa, n167 Louisiana, n168 Missouri, n169 Montana, n170 Nevada, n171 North Dakota, n172 Ohio, n173 Oregon, n174 Rhode Island, n175 Utah, n176 Virginia, n177 Washington, n178 and Wyoming. n179

[\*976] In the remaining thirteen states, cautionary instructions, though not always required, have not been explicitly prohibited. n180 For example, in Nebraska, a judge may refuse to issue the traditional cautionary instruction when an instruction emphasizing "the grave importance of [the jury's] fact-finding function in the administration of justice" is given. n181 Texas has not prohibited cautionary instructions, but there is no rule requiring them either. n182 The courts of Arkansas, n183 Connecticut<sup>n184</sup> and Mississippi n185 retain the discretion to use cautionary instructions in rape cases. n186 In eight other states - Delaware, n187 [\*977] Hawaii, n188 Kansas, n189 Maine, n190 New Hampshire, n191 New Mexico, n192 West Virginia, n193 and Wisconsin n194 - corroboration is not required, although some courts have issued cautionary jury instructions in rape cases.

The formal prompt complaint requirement, corroboration requirement, and cautionary instructions in the criminal law of rape have been rejected in most jurisdictions. There are good reasons that states have repudiated these doctrines: each doctrine is based on faulty assumptions.

## II. The Faulty Assumptions Behind the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions

One obvious problem with the prompt complaint requirement, corroboration requirement, and cautionary instructions in rape law is that they are ineffective. These legal precautions will not thwart a shrewd manipulator. Take the story [\*978] of Potiphar's wife, for example. She made a point of promptly complaining. After Joseph rejected her sexual advances, she immediately called the men of her house together and claimed: "See ... he came in unto me to lie with me, and I cried with a loud voice." n195 Potiphar's wife also gathered corroborative evidence for her false claim. She produced the garment Joseph shed while fleeing her clutches and capitalized on that evidence, claiming to the assembled crowd, "And ... when he heard that I lifted up my voice and cried ... , he left his garment with me, and fled." n196 Finally, even if someone had cautioned Potiphar of the risk of a wrongful conviction, he would probably have thrown Joseph in prison anyway.

Independent of their ineffectiveness at stopping false rape complaints, the prompt complaint requirement, corroboration requirement, and cautionary instructions are based on a series of false assumptions. The prompt complaint rule assumes that, if a woman were really raped, she would promptly complain to authorities and that the failure to promptly complain to authorities means that she was not really raped. n197 Wigmore surmised that "it was entirely natural, after becoming a victim of assault against her will, that she should have spoken out. That she did not, that she went about as if nothing had happened, was in effect an assertion that nothing violent had been done." n198

The reality of victims' experiences, however, is quite different. Most rape victims do not promptly report the crimes they suffer to police or other authorities. In fact, most never report. According to the 1992-2000 Bureau of Justice Statistics' National Crime Victimization Survey, 63 percent of rapes, 65 percent of attempted rapes, and 74 percent of sexual assaults were not reported to the police. n199 A 1997 Bureau of Justice Statistics random sample survey of 4,446 college-aged women found that, although about one in ten had been raped and another one in ten had experienced an attempted rape, fewer than five percent of those victims reported their rapes or attempted rapes to police or other campus authorities. n200 Of those rape victims who do tell police [\*979] or other authorities of having been sexually attacked, a substantial percentage delays reporting for a period of time. n201 Most women who are raped, therefore, do not promptly complain.

The corroboration requirement assumes that, if a woman were really raped, she would have corroborative evidence of the assault therefore, her failure to produce corroboration means that she was not really raped. Again, the reality of rape victims' experiences is quite different. Corroboration in a rape case usually refers to physical injuries from the assault, torn clothing, or other evidence of a physical struggle. n202

Contrary to popular belief, however, non-genital, physical injury from rape is uncommon. n203 The Department of Justice studied victims admitted to hospital emergency rooms for rape, a population that one would assume suffers from more serious and numerous physical injuries than victims not admitted to emergency rooms post-rape. Sixty-eight percent of these admitted emergency [\*980] room rape victims suffered no non-genital physical injuries, 26 percent suffered mild non-genital physical injuries, only 5 percent suffered moderate non-genital physical injuries, and just 0.02 percent suffered severe non-genital physical injuries. n204 Even genital physical injuries are rare as most rape victims do not suffer the kind of genital trauma that hospital staffs can detect. n205

The other type of corroborative evidence courts will accept is torn clothing or other evidence of a serious physical battle between the assailant and the victim. Most rapes, however, do not involve a fight that would produce this kind of evidence. n206 Most rapists, particularly acquaintance rapists, are able to subdue their victims with verbal coercion and pinning and need not resort to overt physical violence. n207 Some women also become frozen with fear once an attack begins, preventing physical resistance of their assailants. n208

The assumption behind cautionary instructions for juries in rape cases is that jurors are ordinarily biased in favor of an alleged rape victim and so should be cautioned against this natural inclination. As Hale explained, in rape cases, "the heinousness of the offense many times" transports the judge and jury to hastily convict. n209 Although Hale's admonition might be relevant to black on white stranger rapes where a judge and jury may be transported to hastily convict, in most rape cases - which are intra-racial and committed by acquaintances - social science indicates that jurors go out of their way to scrutinize the victim's behavior to excuse the defendant's behavior. n210 The [\*981] cautionary instructions both derive from and exacerbate this expansive societal prejudice against rape victims.

Although the saying that the legal proceedings in a rape case (and the media circus that occasionally accompanies them) put the victim on trial has become cliché, the notion is more real than rhetorical. n211 Juries are hyper-critical of a victim's behavior and tend to blame her for the rape itself. n212 Studies indicate that the outcome of an average rape trial has more to do with the jury's assessment of the complainant's guilt than its assessment of the defendant's guilt. n213

A complainant's perceived promiscuity, n214 less-than-chaste clothing style, n215 [\*982] and failure to conform to gender norms n216 negatively affect jurors' assessment of whether a rape has occurred. n217 Any victim behavior that increases the risk for sexual assault (from hitchhiking to dating to just talking to a man at a party) leads to leniency with the defendant. n218 As one study concluded:

Any evidence of [the victim's] drinking, drug use, or sexual activity outside marriage led jurors to doubt defendants' guilt, as did any prior acquaintance between victim and defendant. In fact ... measures of victims' gender-role behavior were more important than measures of physical evidence and seriousness of offense in predicting jurors' case evaluations. n219

Jurors thus often blur the distinction between a complainant's behavior that may increase her risk of being raped with a justification for the rape itself. n220 In rape cases, juries frequently make a victim's negligence tantamount to her consent to sex. n221 Jurors thus improperly import "the tort concepts of contributory negligence or assumption of risk into the criminal case, acquitting the defendant when they believe that the victim behaved carelessly" thereby nullifying rape law and excusing the defendant's conduct. n222

[\*983] Cautionary instructions warning juries to evaluate the victim's testimony carefully in light of her "emotional involvement" in the crime do not mitigate societal bias in favor of rape complainants. Instead, such cautionary instructions reflect and aggravate substantial societal bias against rape complainants. n223

The erroneous notion that women and girls are prone to lie about sexual assault derives at least in part from the misogyny Sigmund Freud brought to the burgeoning field of psychoanalysis he founded in the late nineteenth and early twentieth centuries. Freud asserted that women unconsciously desire sexual assault because they are inherently masochistic. n224 Courts and legal scholars used the assertions of Freud and his contemporaries to support their view that women are apt to fabricate accusations of rape. n225 Wigmore argued:

Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex-incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale. n226

[\*984] The fields of psychology and psychiatry have since rejected Wigmore and Freud's argument that the female psyche is inherently defective. n227

To be sure, there are personality disorders that might lead a man or woman to lie in any number of outrageous ways, including lodging a false report of a crime. n228 There is, however, no specific empirical research connecting any of these personality disorders with false complaints of rape to the police. In fact, there is no good empirical data on false rape complaints either historically or currently. A debate over the number of false complaints nevertheless continues.

One side of the debate maintains that only two percent of rape complaints made to the police are false. n229 In her popular 1975 book on rape, *Against Our Will*, Susan Brownmiller wrote, "when New York City instituted a special sex crimes analysis squad and put police-women (instead of men) in charge of interviewing complainants, the number of false charges in New York dropped dramatically to 2 percent, a figure that corresponded exactly to the rate of false [\*985] reports for other violent crimes." n230 Over time and perhaps through repetition, n231 this two percent false rate has come to constitute the "conventional scholarly wisdom" on the matter. n232 The United States Justice Department appears to agree, stating that "false accusations of sexual assault are estimated to occur at the low rate of two percent - similar to the rate of false accusations for other violent crimes." n233

The other side of the debate claims that eight percent or more of rape complaints made to the police are false, a percentage disproportionate to other crimes. n234 The F.B.I. Uniform Crime Reports have in the past indicated that, overall, about eight percent of forcible rape complaints reported to police are "unfounded." n235 The term "unfounded" is misleading, however, because it does not mean "false." n236 Rather, police may code a case "unfounded" when they conclude that it is unverifiable, not serious, or not prosecutable. n237 Various factors can increase a city's percentage of "unfounded" rape complaints, such as police incompetence, bias, or insensitivity to rape victims. n238 As the Department of Justice found, police may think a rape claim is false or unfounded if the victim had a prior relationship with the attacker, used drugs or alcohol at the time of the attack, lacked visible signs of injury, delayed [\*986] notifying police, did not have a rape exam, blames herself for the rape, or did not immediately conceive of the assault as a rape. n239

Thus, neither side's numbers in the debate over the rate of false complaints of rape lodged with the police appear to be supported by the kind of empirical evidence upon which one might feel confident. n240 As a scientific matter, the frequency of false rape complaints to police or other legal authorities remains unknown.

While there is very little empirical evidence on false rape complaints to the police, there are ample data indicating that real rapes remain vastly underreported to the police. n241 Rape is, in fact, one of the most underreported serious crimes. n242 Although decades of studies document the great reluctance of true rape victims to report their attacks to the police, many people fixate on the risk of false rape complainants, a risk that does not enjoy empirical support.

Most rape victims not only do not promptly complain, they do not ever complain to police or other legal authorities of having been sexually victimized. Corroborative evidence of sexual assault - such as torn clothes or injuries - is not only uncommon, it is downright rare. Instead of exhibiting a bias in favor of rape victims that jurors need to be cautioned against, jurors tend to be biased against rape victims and traditional cautionary instructions in rape cases only exacerbate that bias. Instead of warding off false claims, then, these three legal doctrines greatly hinder the prosecution of truthful claims. Because they are based on faulty assumptions, the criminal rape law in most jurisdictions has formally rejected the prompt complaint requirement, corroboration requirement, and cautionary instructions. n243

[\*987]

### III. Campus Sexual Assault Policies and Practices

In the early nineteenth century, the newly created American institutions of higher education were rampant with student disorder. n244 In general, colleges and universities policed crime on campus internally rather than referring students to the outside criminal justice system. n245 After a student riot at Harvard in 1818, for example, John Adams suggested flogging to discipline the unruly undergraduates. n246 Disavowing corporal punishment, Thomas Jefferson established a student government at the University of Virginia in the hopes that its undergraduates would thereby control themselves. n247 Less than a year later, however, campus disorder had only escalated and the faculty threatened to resign. n248 After a violent altercation involving fourteen students and two professors at the University of Virginia, Jefferson dissolved the student government and constructed a new disciplinary code. n249

Student discipline in the early republic involved only male students because women were forbidden from attending college. n250 Despite Oberlin College's first foray into coeducation at its founding in 1833, women remained but a small minority of the collegiate student body through most of the century. n251 [\*988] By the beginning of the twentieth century, despite the notable resistance of many prestigious institutions located in the Northeast and South, coeducation became the predominant form of higher education in America. n252 The issue of sexual assault on campus did not arise, however, until much later in 20[<sup>th</sup>] century.

During the past few decades, many factors led colleges and universities to change their disciplinary codes to address student sexual assault. n253 In the 1960s, attitudes toward college students changed when states lowered the age of majority and the twenty-sixth Amendment reduced the voting age to eighteen. n254 The sexual revolution of the 1960s and 1970s meant that young adults were more likely to engage in sexual interactions. n255 Student curfews were repealed and mixed-sex dorms opened. n256 In the 1970s, reform of the criminal law of rape became a central item on the feminist agenda. n257 In the 1980s, Dr. Mary Koss published a nationwide survey of 6,100 college students on rape, and her research sparked widespread interest in the problem of campus sexual assault. n258 In the 1990s, media then became interested in colleges' disciplinary responses to sexual assault on campus. n259 As a result of these changes, colleges and universities have implemented a variety of sexual assault codes. Penalties for violations of these codes can include fines, reprimands, negative notations on one's record, probation, suspension, or expulsion. n260

There are a number of reasons a woman raped on campus might choose to avail herself of these codes and pursue a campus disciplinary proceeding instead of a criminal proceeding against her attacker. Victims often harbor substantial fear of the publicity and emotional trauma attendant to a trial process. n261 If a rape victim can obtain some recourse at a more local level, she [\*989] often feels more comfortable pursuing it. n262 A victim may also simply want to have her attacker suspended or expelled so she does not have to face him in calculus class. Finally and most importantly, the criminal justice system, with its standard of proof of guilt beyond a reasonable doubt, rarely provides relief to acquaintance rape victims, so a campus disciplinary proceeding may appear to be a more advantageous avenue of potential relief. n263 The legacy of the prompt complaint requirement, corroboration requirement, and cautionary instructions as they now affect campus sexual assault policies and practices are making disciplinary proceedings less advantageous, however.

#### A. Emergence of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions in Campus Sexual Assault Policies and Practices

In response to the growing concern over campus sexual assault and rape, some institutions of higher learning are imposing versions of the ancient corroboration and prompt complaint requirements on victims through informal practice and even through formal policies laid out in campus disciplinary procedures. These antiquated tactics, long rejected by the vast majority of criminal law jurisdictions in the United States, tend to deter sexual assault victims from coming forward and, in those cases that do come to light, to resolve them hastily in favor of the accused.

In 1993, the Faculty of Arts and Sciences at Harvard College, the undergraduate division of Harvard University, adopted a strong statement against sexual misconduct. n264 The 1993 statement granted students "the right to bodily safety and integrity" and affirmed that the institution was "committed to creating and maintaining an environment" in which all individuals "are treated with dignity and feel safe and secure in their persons." n265 It said:

[\*990]

In accordance with these principles, the Faculty of Arts and Sciences will not tolerate sexual misconduct including rape and sexual assault, whether affecting a man or a woman, perpetrated by an acquaintance or a stranger, by someone of the same sex or someone of the opposite sex. Such behavior is unacceptable in our community. A student who commits rape, sexual assault, or other sexual misconduct is subject to severe penalties under the rules of the Faculty of Arts and

Sciences. Rape and sexual assault are serious crimes under the laws of the Commonwealth of Massachusetts and the individuals responsible for such acts are subject to prosecution and legal penalties. n266

The statement indicated that a victim could "initiate disciplinary or remedial action for sexual misconduct, including rape and sexual assault, through Harvard College in accordance with the procedures for adjudicating peer disputes ... ." n267 A victim could pursue such a disciplinary action at the campus level whether or not she chose to report to the local police and pursue the case criminally. n268 The 1993 statement was a strong policy in favor of victims' rights.

Nine years later, the Faculty of Arts and Sciences at Harvard College adopted a new set of procedures for complaints of sexual assault. n269 Newspaper reports indicated that a "spike in accusations" of student rape motivated the changes. n270 Harvard officials indicated that the school disciplinary system failed to reach satisfactory results in these recent cases. n271 When he recommended the new procedures, Harry Lewis, the Dean of Harvard College, said that the Administrative Board at Harvard, the body responsible for resolving peer disputes, was not equipped to deal with what he characterized as "he said/she said" rape complaints. n272

The previous academic year was representative of Harvard's inadequacy in disciplining campus rape. During the 2000-01 academic term the [\*991] Administrative Board handled seven student complaints of sexual assault. n273 In six of the seven cases, the Board chose to take no disciplinary action against the accused. In the one case in which the Board did take disciplinary action, the Board found the complainant and the accused equally responsible for the assault and required them both to withdraw from the college. n274

In one of the six cases in which the Board chose to take no disciplinary action, a sophomore complained of having been raped in the fall of her first year at Harvard by a male student. n275 According to the complainant, the male student sexually assaulted her twice as she lapsed in and out of consciousness due to heavy intoxication. The complainant submitted a list of fifteen witnesses to the Administrative Board. The Board concluded there was not enough evidence to resolve the case in the complainant's favor and so took no disciplinary action against the accused. n276

Harvard administrators believed that, despite the complainant's fifteen witnesses, this case was emblematic of the so-called "he said/she said" rape complaints that the Board did not have the capacity to resolve. n277 Harvard administrators did not indicate a problem with the disciplinary board itself. They asserted, instead, that the problem was with female students who, they alleged, had "unrealistic expectations" in bringing their complaints of having been sexual assaulted to the Administration Board. n278

The 2002 Procedures were a way to eliminate those complaints from the Board's docket. The Procedures said:

Complaints must ordinarily be brought to the College in a timely manner. The Board typically cannot resolve peer dispute cases in which there is little evidence except the conflicting statements of the principals. Therefore, the Board ordinarily will not consider a case unless the allegations presented by the complaining party are supported by independent corroborating evidence. Based on the information provided [\*992] at the time of the complaint, the Board will decide whether or not there appears to be sufficient corroborating evidence to pursue the complaint. n279

These new procedures not only implemented an explicit prompt complaint requirement and a corroboration requirement under ordinary circumstances, they also implied a cautionary rule. Complaints needed to be "timely," allegations needed to be supported by "sufficient corroborating evidence," and Harvard cautioned the Board against pursuing cases in which the victim had "little evidence" but her own testimony. n280

A preliminary investigation would "assess whether the complaint has the potential to be resolved through the College's judicial process." n281 If the Board was "unlikely to obtain information beyond students' conflicting and credible accounts," the Board might "decline to pursue a complaint further." n282 Harvard thereby cautioned officials against pursuing grievances in which the complainant's "credible account" of her sexual abuse was the only evidence she had.

A student grievance would proceed as follows. First, the complainant would give "the College a detailed written statement summarizing his or her complaint along with a descriptive list of all sources of information (persons, correspondence, records, actions taken, etc.) that may help to corroborate the allegations." n283 The sources of information could include "virtually anything that helps to corroborate a student's account, including, for example, diary entries or conversations with roommates or friends; it is not limited to eyewitnesses, confessions, or forensic evidence."

n284 The accused was then asked to "prepare a detailed written statement along with a descriptive list of sources of supporting information." n285

The Secretary of the Administrative Board would review "the statements and lists of supporting information and collect any other statements or documents that help to corroborate the students' accounts." n286 The Secretary would then present the information to the Chair of the Board. The Chair took [\*993] one of two actions. If "responsibility for the alleged misconduct can likely be established or corroborated," the Chair might refer the matter to a subcommittee of the Board for a full investigation. n287 If, however, "the essential facts of an allegation are contested" or if "responsibility for the alleged conduct cannot be clearly established from the statements or other preliminary documents, the Chair will refer the matter to the full Administrative Board." n288 The Board would then choose to "refer the matter to a subcommittee for further investigation, bracket or postpone a decision on the matter pending receipt of additional specific information, or decline to pursue the complaint further and instead refer to students to other avenues of possible resolution." n289 A complainant's ability to meet the ancient corroboration and prompt complaint requirements would determine which outcome she obtained.

Ironically, the Commonwealth of Massachusetts has never imposed a prompt complaint requirement, corroboration requirement, or cautionary instructions in its rules for the criminal prosecution of sexual offenses. n290 As a result, in theory at least, it is harder to be disciplined at Harvard College for raping a student under the 2002 Procedures than it is to be convicted in the Commonwealth and incarcerated in a Massachusetts prison for the same act.

In June 2002, an anonymous Harvard student filed a complaint with the Office of Civil Rights ("OCR") at the Department of Justice. The student claimed that Harvard's 2002 Procedures violated Title IX of the Education Amendments of 1972 because they did not provide students "access to a prompt and equitable resolution of complaints." n291 The complaint alleged that, because the 2002 Procedures required sexual assault victims to provide "sufficient independent corroboration" before a formal investigation into the complaint would be launched, the policy discriminated against the (mostly female) victims of sexual assault on campus. n292

The OCR investigated the complaint and concluded that there was no Title IX violation. n293 It determined that Harvard's 2002 Procedures, including the "sufficient independent corroboration" requirement and the preliminary investigation stage, did not deny sexual assault victims a "prompt and [\*994] equitable process" for resolving their complaints. n294 OCR concluded, "Title IX does not prohibit a process that limits the proceedings if it appears from a reasonable preliminary inquiry that further investigation would not produce evidence that could resolve the complaint." n295

In 2003, the Harvard faculty revised some of the language in the 2002 Procedures. The relevant passage now states:

Complaints must ordinarily be brought to the College in a timely manner. The Board typically cannot resolve peer dispute cases in which there is little evidence except the conflicting statements of the principals. Therefore, students are asked to provide as much information as possible to support their allegations. Based on that information and any other information obtained through investigation, the Board will decide whether to issue a charge. n296

This revision failed to alter the prompt complaint requirement. Harvard's insistence that the Board "cannot resolve peer disputes in which there is little evidence except the conflicting statements of the principals" remains the same. Instead of being told that the Board will "not consider a case unless the allegations ... are supported by independent corroborating evidence," complainants are "asked to provide as much information as possible to support their allegations." Based on the information provided, the Board will decide whether to issue a charge and continue with investigation. Although the troubling word "corroborating" has been erased from the policy, the revision is one of form and not substance. Robert Mitchell, director of communications for the Faculty of Arts and Sciences at Harvard, stated that nothing in the revision changed the way Harvard handles sexual assaults and the revision of the policy is "purely for clarification." n297 The Dean of Harvard College agreed, indicating that the revision to the 2002 Procedures is "not substantial." n298

[\*995] Robert Iuliano, Harvard's deputy general counsel, now suggests that victims of acquaintance rape turn to the Massachusetts criminal justice system for relief because the Harvard Administrative Board can no longer help them. He asserts, "the courts, or at least the police, are in a better position to conduct the investigation. They have access to investigative tools that we don't have." n299 Dean Harry Lewis concurs, "I want to encourage women to take cases to the criminal justice system where something can be done. We don't have forensic laboratories, we don't have subpoenas." n300 There is no evidence, however, that the trouble with rape cases at Harvard was that the Board lacked

subpoena power or a place to conduct DNA analysis. In campus acquaintance rape cases in which the defense is almost always consent neither investigative tool is generally used. n301 Iuliano and Lewis are no doubt aware that the criminal justice system, with its standard of proof of guilt beyond a reasonable doubt, rarely provides relief to acquaintance rape victims. n302

Sheldon Steinbach, general counsel for the American Council on Education, an umbrella organization of 1,800 colleges, nevertheless lauded Harvard College's new sexual assault procedures as "creative, innovative, and an attempt to try and insert a degree of fairness in a process that is, because of the nature of the allegations of sexual assault, unduly complicated." n303 Harvey Silverglate, an attorney who has represented a number of students accused of rape, agrees: "The new policy is one of the best things to happen to the campus judicial system in years." n304 Because the OCR at the Department of Justice has now given Harvard College the green light in its sexual assault policy, other schools may imitate the institution. Mr. Steinbach predicts: "When a prominent institution tries something innovative, other institutions are likely to follow." n305

To analyze the sexual assault policies at the other top colleges and universities in the country, I attempted to contact what U.S. News & World Report listed in its 2003 survey as the top 50 national universities<sup>n306</sup> and the [\*996] top 50 liberal arts colleges. n307 I received hard copies of sexual assault policies from 31 institutions<sup>n308</sup> and obtained sexual assault policies from 33 other institutions' websites.<sup>n309</sup> In total, I reviewed 64 campus sexual assault policies. n310

Like Harvard's 1993 policy, the majority of these institutions have sexual assault policies that are victim-friendly in some respects.<sup>n311</sup> A number of policies list the complainant's rights, <sup>n312</sup> emphasize the institution's commitment to confidentiality, <sup>n313</sup> instruct students about what to do if they are [\*997] sexually assaulted, <sup>n314</sup> state that pursuing disciplinary procedures is up to the complainant,<sup>n315</sup> give examples of what is and is not considered sexual assault, <sup>n316</sup> and/or provide other consoling and helpful suggestions. n317

In terms of prompt complaint, campus policies routinely urge victims to report incidents of sexual assault as soon as possible. Some offer reasons why complaining promptly is beneficial. For example, Amherst College's policy states:

You are encouraged to report immediately any incidents of this nature ... even if you do not wish to pursue the matter further. Keep in mind that an assailant who is allowed to go unpursued is a potential future danger, not only to you but also to other members of the community. n318

The Georgia Institute of Technology states simply, "Time is of the essence [\*998] when a sexual assault has occurred. The sooner an assault is reported, the easier it is to collect valuable evidence." n319 Washington and Lee University states similarly that "because it is often difficult to determine the facts of an incident long after it occurred, complaints should be filed as soon as possible." n320

In a number of campus policies, no explanation accompanies the suggestion of prompt complaints. In these situations, it appears that the failure to promptly complain may be held against the alleged victim. For example, one policy declares, "any student of Occidental College who feels that he or she has been the subject of sexual assault or any person witnessing sexual assault should promptly report the incident." n321 Pepperdine University's policy urges, "Victims understandably find rape and sexual assault upsetting and painful to discuss. However, it is important to report the incident as soon as possible." n322

By contrast, several schools make explicit that, although students are urged to promptly report, there is no prompt complaint requirement. For example, the California Institute of Technology's policy states: "Students, faculty, or staff who wish to file a campus complaint against a member of the Caltech community should do so as soon as possible after the assault, although complaints may be filed at any time." n323 Many institutions make clear that [\*999] there is no time limit for complaints of sexual assault when both the complainant and the accused are students. Wake Forest, for example, notes, "while students are encouraged to report any sexual assault as soon as possible, they may initiate University judicial proceedings at any time while the individuals involved are students at the University." n324

A minority of campus policies limit the time period within which a victim must report sexual assault. Columbia University, for example, requires an incident to be reported within five years.<sup>n325</sup> Duke University requires a report within two years. n326 Northwestern University requires a report within one year. n327 Stanford University grants accused students the right "to have charges filed no more than six months after the alleged misconduct occurred or should reasonably have been discovered." n328 Wesleyan University states, "Reports should be submitted as soon as possible, but preferably within five (5) days of the incident." n329 In terms of a prompt complaint requirement, then, [\*1000] college and university sexual assault policies are widely diverse. Many strongly encourage rape victims to

promptly complain, a few suggest that the failure to do so will be held against the complainant, and a few maintain prompt complaint rules as statutes of limitations. n330

By contrast, none of the reviewed campus sexual assault policies besides Harvard's contains language about a corroboration requirement or cautionary instructions. This silence is not surprising given that very few policies even articulate what the standard of proof is for the finding of a disciplinary infraction. A recent National Institute of Justice survey of the sexual assault policies of 2,438 institutions of higher learning found that just one in five articulated a standard of proof. n331 The standard of proof is explicit in only 22 out of the 64 policies I reviewed.

The National Institute of Justice found that, in those policies in which the standard of proof was explicit, eight of ten used "preponderance of the evidence." Among the universities and colleges I reviewed with explicit standards of proof, a majority also used a "preponderance of the evidence" or "more likely than not" standard. n332 Five required "clear and convincing [\*1001] evidence." n333 A few developed their own standards: Northwestern University required "sufficient evidence," n334 Whitman College required "highly probable" evidence, n335 and Washington and Lee University indicated that the finding of a disciplinary infraction "must be supported by reasonable evidence." n336 The broad range of standards of proof for disciplinary infractions indicates that there is no uniformly accepted method for evaluating these claims. The problem with silence on the standard of proof is that the age-old theories of rape regarding corroboration and caution that have largely been discredited in criminal law may unduly influence disciplinary tribunals' perceptions of what is required for a finding of sexual assault.

Independent of the formal sexual assault policies that colleges and universities maintain, informal practices by these institutions in response to campus sexual assault suggest a matching concern with false accusations and a belief that women provoke or cause rape with their bad behavior. The recent scandal at the Air Force Academy ("AFA") provides one example. n337 In the past year, more than 50 current and former AFA cadets have publicly recounted their stories of mistreatment when they reported having been raped to campus officials. n338 The AFA often ignored the male perpetrators but [\*1002] disciplined the female complainants for the minor infractions they committed in connection with the incidents of sexual assault, such as drinking, fraternizing with upper class cadets, or having sex in the dorms (referring to the alleged rape itself). n339

When Sharon Fullilove enrolled in the AFA, older female cadets told her, "you should expect [sexual assault] to happen ... if you make it through four years without it, you'll be one of the very few." n340 She still did not believe she was in danger. One night in 1999, a male cadet gave Sharon a ride home from a movie she'd seen with friends. n341 Sharon alleges that the male cadet pulled the car over and raped her. n342 When Sharon reported the rape to her military superiors, two AFA officers grilled her for four hours in a windowless basement room and told her she was a liar. n343 Thereafter they closed the case against her attacker. n344

In 2001, a male AFA cadet reportedly raped Lisa Ballas in a bathroom after a party involving drinking and strip poker. n345 Lisa reported the rape to her commanding officer, and supported her claim with testimony from witnesses who saw her crying and saw blood on the bathroom floor, as well as a medical exam that noted several abrasions, contusions, and tears inside and outside her vagina. n346 When she went to the Commandant of Students to ask that her [\*1003] attacker be court-martialed, General Silvanus "Taco" Gilbert III told her, "I want the cadet wing to know that your behavior that night was wrong and won't be tolerated" and that, if he had his way, he would see Lisa marching alongside her attacker as punishment. n347 Lisa reported that General Gilbert told her she ""didn't have to go to that party, didn't have to drink that night, didn't have to play the card game and didn't have to follow [her alleged attacker] back into that bathroom." n348 Lisa responded to him by saying, "You know what, Sir? He didn't have to rape me." n349 General Gilbert analyzed the case in writing:

[Lisa] did engage in some very high-risk behavior that night. Again, the behavior in no way justifies what happened to her, but when you put yourself in situations with increased risk, you have to take increased precautions to mitigate those risks. "For example, if I walk down a dark alley with hundred-dollar bills hanging out of my pockets, it doesn't justify my being attacked or robbed, but I certainly increased the risks by doing what I did. The behavior she engaged in is not behavior we condone for our cadets or our officers in the Air Force. This standard isn't just for the Air Force Academy; it's an Air Force standard." n350

The AFA chose not to court-martial Lisa's attacker. n351 Like Harvard officials who blamed their own inability to discipline campus rape on the victims' "unrealistic expectations" about the process, the Air Force working group charged with investigating the AFA asserted that the sexual abuse scandal may have been caused by "unrealistic expectations for prosecutions in the minds of victims." n352

[\*1004] As a result of the sexual abuse scandal exemplified by Sharon and Lisa's stories, the Air Force ushered in new policies at the AFA. While offering complainants "amnesty from Academy discipline arising in connection with the alleged offense," the new sexual assault policy also mandated prompt disclosure by requiring that "all allegations of sexual assault will be reported to the officer chain of command immediately." n353 When a rape victim confers with a campus counselor, her name and narrative of the sexual assault must immediately be reported to the Vice Commandant of the AFA. n354 The AFA thus publishes a victim's complaint at an early stage, requiring her to make an involuntary prompt complaint to her commanders before she may be emotionally and psychologically ready. This rule will deter victims from coming forward with complaints. n355

About one in three civilian institutions of higher learning maintains a policy similar to the AFA's mandatory reporting rule. n356 That is, they maintain "designated mandatory reporters," school officials who are required to report (sometimes confidentially) all instances of rape or sexual assault to the police. n357 Furthermore, one in three institutions similarly mandates that students who report rape or sexual assault must participate in the adjudication process. n358 These policies also deter complaints because rape victims often do not want their families or friends to find out and distrust even confidential procedures for mandatory reporting. n359

Anecdotal evidence suggests that civilian institutions may also believe that a [\*1005] rape victim shares culpability when the victim engages in disciplinary infractions contemporaneous with the sexual assault. Kristin Roslonski, a former Boston University student, was allegedly raped on campus one night after she drank heavily. n360 Reports detail that she and her attacker engaged in consensual petting but Kristin told him she did not want to engage in intercourse because she was a virgin. n361 Reports further detail that, despite her protests, the attacker painfully penetrated her. n362 Kristin reported the rape to Boston University officials who, instead of punishing her alleged attacker, suspended Kristin and fined her \$ 250 for violating the school's alcohol policy and another \$ 250 for sexually assaulting her assailant. n363 Robert B. Smith, Boston University's general counsel, sent a letter to Kristin's attorney, stating that the institution "cannot guarantee the safety of students from their own irresponsibility or voluntary conduct. We cannot prevent them from making poor choices. Your client made poor choices, drank and behaved badly earlier in the evening." n364 Although the Boston University Board of Student Conduct eventually exonerated Kristin of the sexual assault charge, it upheld her fine for underage drinking. n365

Another Boston University student, Meghann Horner, was reportedly raped after smoking marijuana with her attacker. n366 When she reported the rape, she was charged with drug possession, placed on probation, and fined \$ 250. n367 Although Kristin's fine for alcohol use was upheld, the Boston University Board of Student Conduct eventually overturned Meghann's drug charges. n368 Boston University informed both Meghann and Kristin that there was [\*1006] insufficient evidence to discipline the male students they accused of rape. n369

In a 2000 study on campus sexual assault adjudication, the Association for Student Judicial Affairs found that the majority of colleges and universities did not provide rape victims protection from charges of alcohol or drug use when they reported their victimization. n370 Victims at these institutions may be deterred from proceeding with complaints of a sexual assault if they were drinking at the time of the incident. n371 Officials at some colleges and universities even tell the victim that, because she was drinking during the incident, no crime occurred. n372 Despite the lack of a legal basis for this assertion, officials can convince many victims that their intoxication is a seriously mitigating circumstance in the crime. n373 Catherine Bath, program director at the nonprofit group Security on Campus, finds that some colleges and universities now employ an array of informal but aggressive tactics to decrease rape reports, stating that "we've seen victims outright discouraged [\*1007] from reporting rape because they've been told they could be found guilty of drinking or having sex in the dorm." n374 As a result, she says many campus victims "are afraid of even going through the campus judicial system for fear of being sanctioned." n375

#### B. Motivation to Deter Complaints of Campus Sexual Assault

Campus officials may be motivated to deter complaints of campus sexual assault for three reasons: (1) officials may not want to be bothered with most campus rapes because they do not conform to the stereotype of violent stranger rape; (2) officials may fear substantial negative press because federal law obligates campus administrators to disseminate reports of campus rape widely; and, (3) officials may fear civil suits from students disciplined for campus rape. Tools derived from the discredited prompt complaint requirement, corroboration requirement, and cautionary instructions from the criminal law of rape can allow campus administrators to swiftly dispose of reported incidents of sexual assault and deter the reporting of future incidents.

When people think about rape, many imagine a stereotypical scenario involving a black stranger jumping out of the bushes, dragging an innocent white woman into a dark alley, beating her viciously, and raping her.<sup>n376</sup> They [\*1008] also imagine rape to be a rare occurrence. <sup>n377</sup> These racist and sexist stereotypes are misleading and inaccurate, particularly in terms of campus rape. <sup>n378</sup> Rape is not a rare occurrence. One in four women of college age have suffered from an attempted or completed rape. <sup>n379</sup> One in five female college students suffer a rape or attempted rape during their college years. <sup>n380</sup> Typically, rapes are committed not by black men on white women but by men on women of the same race. <sup>n381</sup> Campus rapes rarely involve strangers; rather, they are committed by acquaintances such as classmates, friends, boyfriends, and fraternity brothers. <sup>n382</sup> Campus rapes tend to happen in dorm rooms or during parties, not dark alleys of city streets. <sup>n383</sup> They happen to women who are not "innocent," but who have prior sexual experiences as varied as any other college student. <sup>n384</sup> Rapes on campus rarely involve weapons, vicious beatings, or other indisputable evidence of force. <sup>n385</sup> Acquaintance rapists do not need to employ those tools; they ply with alcohol, pin with their body [\*1009] weight, and verbally and physically coerce. <sup>n386</sup> As a result, campus acquaintance rapes usually lack corroborative evidence of a violent physical struggle. <sup>n387</sup> Often there are no witnesses to corroborate the victim's testimony. <sup>n388</sup> Moreover, because many believe that students will and perhaps should engage in a certain amount of sexual experimentation at college, people may be predisposed to assume that a questionable sexual encounter on campus was not a transgression. <sup>n389</sup>

Alcohol use by college students has a sizable impact on sexual assaults on campus. <sup>n390</sup> Increased drinking frequency and intensity are both associated with sexually aggressive behavior by male college students. <sup>n391</sup> In one study, 16 percent of male college students admitted providing or encouraging the use of drugs or alcohol to obtain sex. <sup>n392</sup> Some men believe in the stereotype that "women who drink are more sexually available than those who do not." <sup>n393</sup> Others may use their own inebriation to justify or excuse their sexually aggressive behavior. <sup>n394</sup> As many as 75 percent of perpetrators and 50 percent of victims of acquaintance rapes on campus were consuming alcohol at the time of the attacks. <sup>n395</sup> Importantly, the intoxication of both parties makes [\*1010] people more willing to shift blame from the perpetrator to the victim of sexual assault. <sup>n396</sup>

In the typical campus rape, therefore, male and female classmates consume alcohol at a party and then go to a dorm room alone. There, he pins and penetrates her despite her cries or alcohol-induced incapacitation. There are no strangers, no bushes, no knives, and no innocence. Because campus rape does not conform to stereotypical rape, campus officials often dismiss the serious psychological, emotional, and social harm it causes. <sup>n397</sup> One motivation to deter complaints of campus rape, then, is that administrators are in the dark about the extent of the problem and fail to grasp the real harm of this kind of rape. <sup>n398</sup>

Another motivation to deter complaints of campus rape is that administrators may be trying to protect their institutional reputations, massaging campus-wide numbers to make them look good.<sup>n399</sup> The Clery Act <sup>n400</sup> requires colleges and universities to provide annual reports to the Secretary of Education on the number of sexual crimes that occur on campus. <sup>n401</sup> The college or university must make these reports available to "all [\*1011] current students and employees" as well as to prospective students. <sup>n402</sup> The Clery Act requires colleges and universities to "maintain a daily log" of "all crimes reported to such police or security department." <sup>n403</sup> The log must contain the time, location, and nature of the crime, as well as "the disposition of the complaint, if known." <sup>n404</sup> The log must "be open to public inspection within two business days of the initial report being made to the department or a campus security authority." <sup>n405</sup> Only 36.5 percent of colleges and universities report their crime statistics in a manner fully consistent with the Clery Act. <sup>n406</sup>

Because federal law requires colleges and universities to widely distribute information about reported rapes on campus, campus officials may be more driven by a concern for the image of their institutions than by protecting sexual [\*1012] assault victims on campus. <sup>n407</sup> The Department of Justice has noted, "campus police may be influenced by college administrators who fear that too strong an emphasis on the problem [of acquaintance rape] may lead potential students and their parents to believe that rape occurs more often at their college than at others." <sup>n408</sup> As a result, campus officials may be motivated to deter such reports.

Another reason colleges and universities may try to deter complaints of campus rape is that they fear civil lawsuits from students disciplined as a result of these complaints. <sup>n409</sup> In assessing students' rights vis-a-vis campus disciplinary proceedings, courts have held that students have the due process right to notice and the opportunity to be heard before they can be expelled from public universities. <sup>n410</sup> However, they have few due process rights against private universities. <sup>n411</sup> In private college and university settings, courts have mostly applied contract theories to review student disciplinary proceedings, sometimes incorporating a quasi-requirement of "fundamental" or "basic" fairness.

n412 In general, courts have concluded that private universities must "comply with their own published procedures and act reasonably." n413

[\*1013] There are about thirty-five written decisions in state and federal courts involving students who have sued their colleges or universities as a result of being disciplined for sexual assault. Ordinarily, disciplined students are only successful when colleges or universities are found to have deviated from the procedures outlined in their own disciplinary policies. When a student wins such a lawsuit, a court then orders that the college or university grant the student a new disciplinary hearing untainted by the procedural anomaly. Two examples are representative.

Travis Marshall sued the State University of New York College at Old Westbury ("SUNY") after he was expelled for rape. n414 The SUNY disciplinary code provided for a hearing by a Judicial Review Committee and appeal to the Judicial Council. n415 The disciplinary code indicated that no person "shall serve simultaneously on the Judicial Council and the Judicial Review Committee[;]" n416 however, one associate dean at SUNY served on both Marshall's Judicial Review Committee and his Judicial Council. n417

Marshall sued on the basis of this procedural irregularity and the courts found that the dean's dual service violated Marshall's due process rights. n418 The New York Supreme Court explained that "the violation by an agency of its own regulations even where they are more generous than the Constitution requires may, in and of itself, constitute a violation of a student's due process rights ... ." n419 The court then annulled Marshall's expulsion and remanded the matter for a hearing before a new judicial council that was properly constituted according to SUNY's code of judicial conduct. n420

The situation of Ethan Fellheimer is also instructive. A Middlebury College student accused Ethan Fellheimer of rape. n421 Middlebury told Fellheimer that the college disciplinary committee would investigate him on the charge of rape, but after finding him not guilty of rape, the committee adjudicated him "guilty of disrespect for persons" and suspended him for a year for "engaging [\*1014] in inappropriate sexual activity." n422 The Middlebury College Handbook for Students indicated that the committee would "state the nature of the charges with sufficient particularity to permit the accused party to prepare to meet the charges." n423 Fellheimer sued Middlebury College in federal court for breach of contract and violation of due process. The District Court determined that Middlebury had created a contractual obligation that required it to "conduct its hearings in a manner consistent with the terms of the Handbook." n424 The court concluded that Middlebury breached its contract with Fellheimer because it provided him notice only of the rape charge and did not warn him of the "Disrespect for Persons" charge. n425 Middlebury's deviation from the procedures outlined in its Handbook rendered the hearing fundamentally unfair so the court granted Fellheimer's motion for summary judgment on the breach of contract claim. n426

If colleges and universities scrupulously follow their own procedures, they have little to worry about in terms of suits from disciplined students. They should perhaps be more concerned with federal civil suits when they receive and ignore complaints from women who were sexually assaulted. Title IX requires: "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." n427

Title IX may provide sexually victimized students with a cause of action against colleges and universities that know about and fail to redress sexually hostile environments caused by peers. Federal courts are only beginning to articulate the contours of the application of Title IX to colleges and universities; n428 however, the claim that colleges may be liable to sexually [\*1015] victimized students has enjoyed some success. n429

#### IV. Freedom from the Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions

As we have seen, new versions of the prompt complaint rule, the corroboration requirement, and cautionary instructions are now infecting disciplinary proceedings in the academic world. The prompt complaint requirement unduly influences the timing and mandatory reporting rules that various colleges and universities have enacted for claims of sexual misconduct. Harvard's new policy indicates that a "timely" complaint is ordinarily required. Some top schools suggest that a prompt complaint of sexual assault is necessary; others mandate it. Those that are silent on the issue may still discourage complaints on the basis that they are not reported immediately.

Additionally, the Air Force Academy's new sexual assault policy mandates prompt disclosure of any allegation to superior officers: "All allegations of sexual assault will be reported to the officer chain of command immediately." n430 One in three civilian institutions of higher learning employs "designated mandatory reporters," school officials who are required to confidentially report instances of rape or sexual assault to the police. n431

The corroboration requirement from the criminal law of rape now influences the amount of evidence of sexual misconduct colleges and universities require for a violation of their disciplinary codes. Harvard adopted a strong corroboration requirement in its formal sexual misconduct policy that it recently converted to a quieter demand: "Students are asked to provide as much information as possible to support their allegations." Harvard has indicated that it will not take disciplinary action against those students accused of rape unless the complainant provides such support. Other schools may soon follow Harvard's lead.

Four out of five campus disciplinary codes do not contain a standard of proof for the finding of sexual assault. n432 This deficiency does not prevent an institution from informally holding sexual assault complaints to a higher [\*1016] standard of proof than other disciplinary complaints. Because of the traditional bias against those who lodge claims of sexual assault generally, as well as the bias against those who bring claims of campus acquaintance rape specifically, there is reason to suspect that a double standard might infect the way some campus officials treat complaints of sexual assault.

The cautionary instruction from the criminal law has paved the way for campuses to react with extra suspicion to reports of sexual assault. Sexual assault is widespread on college campuses yet it is vastly under-reported. Victims who come forward have been subjected to intense counter-scrutiny and even scorn from both their peers and campus officials to whom they reported having been violated. One manifestation of this counter-scrutiny is the counter charges filed against victims who come forward with allegations of rape. Both the Air Force Academy and Boston University have struggled with substantial negative publicity regarding the practice of disciplining students who come forward with allegations of rape on the basis of other (often alcohol or drug-related) disciplinary infractions. A majority of colleges and universities do not provide rape victims who come forward to report their victimization amnesty from charges of alcohol or drug use. n433

As a result, I propose the following provisions for campus sexual assault policies. My proposal is not a comprehensive policy on sexual assault; it is simply a set of three model provisions in areas of particular concern, given the influence of the prompt complaint requirement, corroboration requirement, and cautionary instructions from the criminal law of rape.

**Complaint Timing:** Victims are encouraged to report instances of sexual assault to campus authorities anonymously, confidentially, or publicly at any time. Students may initiate disciplinary proceedings on the basis of sexual assault against any student currently enrolled at [applicable institution's name].

**Standard of Proof:** The standard of proof for a violation of the disciplinary code for sexual assault shall be a preponderance of the evidence. This standard requires that the complainant prove that an allegation is more probable than not. A student who complains of sexual assault need not present additional evidence to corroborate the complaint. The complainant's testimony alone may be sufficient to prove that an allegation is more probable than not.

**Amnesty for Disciplinary Infractions:** Ordinarily, a student who reports an instance of sexual assault to campus authorities shall be granted amnesty for other disciplinary infractions committed by that student on the instance in question.

The first model provision on complaint timing would abolish the influence of the criminal law's prompt complaint requirement by encouraging reports of sexual assault at any time. It emphasizes that the complainant can make a report anonymously, confidentially, or publicly, which would abolish non- [\*1017] confidential mandatory reporting rules in place at some institutions of higher learning. The provision would grant the rape victim, who has often had her sense of control destroyed, control over the amount of information she will reveal to authorities in terms of her identity and experience. The first provision would also allow school disciplinary boards to curtail their jurisdiction in sexual assault cases to those circumstances that most affect campus life by authorizing disciplinary proceedings only against those who are currently enrolled.

The second model provision would abolish the influence that the corroboration requirement has on campus sexual assault policies and procedures by stating that a complainant need not present additional evidence to corroborate her complaint. No external corroboration of the complainant's testimony should be required at any stage of the process. As we have seen, acquaintance rape victims often have few eyewitnesses, bruises, or other evidence to corroborate their assaults. n434 None should be required. A credible narrative that convinces the fact finder should be enough for a disciplinary adjudication in favor of the complainant.

The second model provision also prevents institutions from holding sexual assault complaints to a higher standard of proof than other disciplinary complaints. The burden of proof for a disciplinary violation on campus should not

mimic the criminal law's standard of proof of guilt beyond a reasonable doubt. The privilege of an education from an institution of higher learning should be denied to students on evidence less serious than would subject them to criminal sanctions. Being thrown out of the Air Force Academy is not the same as being thrown into the brig. It should be easier to be expelled from Harvard than to be placed in a prison in the state of Massachusetts.

Since eight of ten sexual assault policies on university campuses that include a standard of proof employ a "preponderance of the evidence" standard, I have included that level of proof as the appropriate one here. Preponderance of the evidence, the burden of proof in civil cases, requires "[evidence] that, though not sufficient to free the mind wholly from ... doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." n435 A small minority of campuses maintains a "clear and convincing" standard of proof for disciplinary proceedings. Clear and convincing evidence requires proof that is reasonably certain or highly probable - something more than preponderance of the evidence, but less than beyond a reasonable doubt. n436 Should an institution of higher learning maintain a clear and convincing standard of proof for other disciplinary infractions, it would be appropriate to include the same standard of proof in this provision.

Assuming that an institution adopts "preponderance of the evidence," such a standard would allocate burdens to each side in a disciplinary action for sexual [\*1018] assault the same way that the burdens are allocated in a regular civil suit. As in a civil suit, it is up to the decision-makers to assess the credibility of the witnesses. If the only evidence submitted is the testimonies of the complainant and the accused (the so-called "he said/she said" circumstance), and the complainant's story is more credible than the accused student's story, the complainant should prevail. If the narratives are equally credible, the accused student should prevail because the complainant would not have proven that the sexual assault was more probable than not.

The second model provision would also abolish the influence that the cautionary instruction has on campus sexual assault policies and procedures. The testimony of a student who brings a claim of sexual assault against another student should not, merely because of the nature of that charge, be treated in any different manner than the testimony of a complaining witness in any other case. The testimony should not be subject to extra scrutiny or additional burdens beyond that which regularly attend the evaluation of student charges. This analysis is consonant with state criminal codes that have abolished the traditional cautionary instruction in rape cases. South Dakota's criminal law states: "The testimony of the complaining witness in a trial for a charge of a sex offense ... may not, merely because of the nature of that charge, be treated in any different manner than the testimony of a complaining witness in any other criminal case." n437 Pennsylvania's criminal code is similar: "The credibility of a complainant of [a sexual assault] shall be determined by the same standard as is the credibility of a complainant of any other crime ... No instruction shall be given cautioning the jury to view the complainant's testimony in any other way than that in which all complainants' testimony is viewed." n438

[\*1019] The third and final model provision curtails the ability of campus sexual officials to counter-scrutinize students who come forward with allegations of rape. As we have seen, most colleges and universities do not provide raped students with immunity from disciplinary charges related to the incident in question. This provision grants those who complain to campus authorities of sexual assault routine amnesty for the disciplinary infractions they engaged in on the instance in question. The term "ordinarily" simply allows the campus some discretion to pursue disciplinary infractions related to the complainant's actions on the instance in question if those actions were particularly egregious or otherwise extraordinary. In the normal course of events, however, campus authorities should not pursue alcohol infractions against college students who are raped.

Some might worry that such an amnesty provision would create an incentive for false rape complaints. To assuage such a concern, one might look to the practice of police departments that receive complaints of crimes from the general public. Police departments tend to ignore the relatively minor criminal infractions that a woman who reports a rape engaged in on the instance in question. If a woman comes forward to report that she was raped by a man with whom she smoked marijuana on the instance in question, police do not respond by charging her with possession of a controlled substance. They pursue the rape report. Police understand that women are very unlikely to report rape if police prosecuted those women for any criminal offenses engaged in on the instance in question. As a result, the third model provision removes a powerful tool campus administrators can use to deter and dismiss complaints of sexual assault.

#### Conclusion

Danielle Bauer won five academic scholarships to attend Erskine College, a small, private, Presbyterian institution in Due West, South Carolina. n439 In the fall of 2002, she enrolled in her first semester of classes. One afternoon in

November, according to Danielle, her chemistry tutor, Mark, asked her to come to his dorm room and, after she arrived, they began kissing. He asked Danielle for sex but she refused. He then maneuvered his way on top of her and leaned his shoulder deeply into her neck. Danielle lost consciousness and he raped her. n440

[\*1020] Danielle went to the hospital emergency room that night. She asked for a rape kit examination, but the attending nurse told her that the hospital would only perform such an exam if Danielle knew for sure that she was going to press charges against her assailant. n441 Danielle, confused and traumatized, was not sure what to do. Although the attending nurse gave Danielle the phone number of the Rape Crisis hotline, she refused to give her an exam. n442

According to the psychologist she had to see as a result of the attack, Danielle suffered "significant psychological distress and a loss of daily functioning." n443 Although Danielle had "no previous history of depression or anxiety," she suffered from "a drastic decline in her academic, emotional, and social functioning immediately following the rape attack." n444 She "experienced suicidal thoughts, repetitive intrusive thoughts about the assault, self-mutilating behavior, feeling dirty and worthless, severe sleep disturbance, anxiety attacks, shaking, crying spells, weight loss, impaired concentration, mood swings, intense anger, loss of self-confidence, and social withdrawal." n445

When Danielle mustered the courage to report her rape to Erskine College officials, they ignored the situation for months, insisting that they could not be expected to handle a sexual assault case. n446 It was not until Danielle reported the rape to the local police department in April of 2003 and her assailant was indicted for first-degree sexual assault that Erskine officials relented to Danielle's repeated requests for a school hearing. n447

At the hearing on the matter, Erskine officials found her assailant not guilty of sexual assault. They then put Danielle on trial, introducing witnesses who said she was a sorority girl who wore provocative clothing and drank. n448 A dean then argued that Danielle had perhaps made up the whole story because she was doing poorly in a biology class and wanted a medical leave from school to maintain her scholarships. n449 Officials then found both Danielle and her assailant guilty of "sexual misconduct." n450

Danielle appealed. Her first appeal affirmed the decisions made the hearing. n451 Danielle appealed again. At this final appeal, the president of [\*1021] Erskine College, John Carson, affirmed the determination that her assailant was not guilty of sexual assault. n452 Carson noted, "neither I nor any other human being can look within the heart of another human being let alone two human beings and determine what motives are there, we can only look at the limited evidence which can be produced." n453

Carson then hesitantly affirmed the decision of the Presidential Appeals Committee that the sexual misconduct findings against both parties be dropped. He was, however, "especially grieved" to have to do so. n454 Referring to the kissing that preceded the rape, he noted, "I can in no way condone the sexual involvement which was consensual up to the point of debate between the two parties." n455 Carson wrote to Danielle of the decision not to punish her for sexual misconduct:

I grieve that this decision is contrary to my personal beliefs with respect to upholding a standard of conduct which is appropriate between a man and a woman and contrary to the standard of conduct of the Erskine community. Your actions not only affect you but also every member of the Erskine community - whether student, faculty, or staff.

I pray that all of us will consider the serious nature of our decisions and seek God's forgiveness. n456

One might be tempted to conclude that Danielle's story is exceptional. But other colleges and universities have responded to women's reports of having been raped by charging them with a variety of disciplinary infractions, making Danielle's story far from unique. Set aside their sanctimony and Erskine College officials echo General Gilbert at the Air Force Academy, who insisted:

If I walk down a dark alley with hundred-dollar bills hanging out of my pockets, it doesn't justify my being attacked or robbed, but I certainly increased the risks by doing what I did. The behavior [Lisa] engaged in is not behavior we condone for our cadets or our officers in the Air Force. n457

Boston University's general counsel Robert Smith echoed similar sentiments when he noted that Boston University "cannot guarantee the safety of students from their own irresponsibility or voluntary conduct. We cannot prevent them from making poor choices. [Kristin] made poor choices, drank and behaved badly earlier in the evening." n458

[\*1022] Each of these officials, deeply suspicious of women who allege sexual assault, acts as if chastising Potiphar's wife. He seeks to place the blame for the incident squarely on the woman's shoulders. She failed to personify a model of sexual virtue and so she should be held responsible for the attack. She failed to report the rape to the police promptly enough. She failed to present hard, corroborating evidence. School officials cannot be expected to plumb the depths of the human heart. They "can only look at the limited evidence which can be produced." n459

The prompt complaint requirement, corroboration requirement, and cautionary instructions in the criminal law of rape evinced the belief that, because women lie about rape, men accused of it need special legal protection beyond that which the law affords defendants accused of other crimes. Officials at some colleges and universities have now adopted similar beliefs about female students who come forward with allegations of campus rape. Importing new versions of these ancient policies from the criminal law institutionalizes their grave skepticism of women. It is important to connect these retrograde policies with their discredited past and reject them both in the remaining state laws in which they withstand old age and in campus disciplinary procedures in which they are just being born.

#### FOOTNOTES:

n1. Genesis 39:1-20 (King James) (edited from the original).

n2. Susan Estrich refers to this type of story as a "male rape fantasy." See Susan Estrich, Rape, 95 Yale L.J. 1087, 1139-40 (1986) (disparaging the Model Penal Code's fixation on the spurned woman as a justification for the "fresh complaint" rule).

n3. Professor Wigmore of Northwestern utilized Freudian psychology to conclude that the psychic complexes of females are "multifarious, distorted partly by inherent defects, partly by bad social environment, partly by temporary physiological or emotional conditions." 3 John Wigmore, *A Treatise on the Anglo-American System of Evidence in Trial at Common Law* 924a (3d ed., 1940) (entreat[ing] judges to withhold the complainant's testimony from the jury in a rape case unless verified by a physician, owing to the risk that an unchaste woman, while excessively emotional, will fabricate imaginary sex acts). Wigmore quoted a doctor who alleged that sexual assaults are frequently "charged or claimed with nothing more substantial supporting this belief than an unrealized wish or unconscious, deeply suppressed sex-longing or thwarting." *Id.* (quoting Dr. W. F. Lorenz). In their widely cited study, Harry Kalven and Hans Zeisel found that any so-called "contributory" behavior of the alleged rape victim (ranging from hitchhiking, to dating, to talking to men at parties) led jurors to believe that she assumed some risk and acquit the defendant or find him guilty of a lesser offense. Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 249-54 (1966). This work has been confirmed in more recent studies. See Gary LaFree, *Rape & Criminal Justice: The Social Construction of Sexual Assault* 200, 203 (1989) (supporting Kalven and Zeisel's conclusions).

n4. Rape is a crime unique for its gender correlation. Ninety-nine out of 100 convicted rapists are male and rape victims are overwhelmingly female. Lawrence A. Greenfeld, Bureau of Justice Statistics, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* iii, v (1997). Ninety-four percent of all completed rape victims are female. Callie Marie Rennison, Bureau of Justice Statistics Selected Findings, *Rape and Sexual Assault: Reporting to Police and Medical Attention 1992-2000* 1 tbl. 1 (2002) (breaking down the total number of reported rape victims from 1992 to 2000 by gender).

n5. Henrici De Bracton, 2 *De Legibus et Consuetudinibus Angilae* 483 (Sir Travers Twiss trans., 1879). Bracton served as a justice for King Henry III and as a justice on the *Coram Rege* (which evolved into the

Queen's Bench). He incorporated Roman and canon law principles into English common law. 2 Encyclopedia Britannica 452 (1998).

n6. Cf. *State v. Hill*, 578 A.2d 370, 374 (N.J. 1990) (reviewing the history of the "hue and cry" requirement, ultimately concluding that evidence of non-prompt reporting is admissible for consideration, but is not dispositive of claim of rape).

n7. Model Penal Code 213.6(4) (1980) (establishing a statute of limitations for sexual assault claims).

n8. See *Estrich*, supra note 2, at 1139 ("The rule is unique to rape, and its justification is unique to women victims of sexual assault."). Conversely, murder has no statute of limitations and other first degree felonies must be prosecuted within six years. Model Penal Code 1.06 (1980) (establishing time limits for claims).

n9. *Bracton*, supra note 5, at 483 (describing the evidence a rape victim should be able to present).

n10. Model Penal Code 213.6(4) (1980) (stating that "no person shall be convicted of any felony [for sexual offenses] upon the uncorroborated testimony of the alleged victim").

n11. Perjury is the only other crime in the Model Penal Code that requires corroboration. Model Penal Code 241.1(6) (1980).

n12. Although most people believe that they can effectively assess a witness' credibility by observing the witness' demeanor, there is little scientific support for this belief. Rather, untrained individuals cannot do much better than chance in discerning lies under experimental conditions. See Olin Guy Wellborn III, *Demeanor*, 76 Cornell L. Rev. 1075, 1075 (1990-91); see also Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 Neb. L. Rev. 1157, 1162-63 (1993) (observing the inability of jurors to distinguish between actual deception and the appearance of deception through nervous actions).

n13. 1 Hale, *History of the Pleas of the Crown* 635 (1971). Hale's legal judgment may have been clouded by misogynistic beliefs. See Peggy Reeves Sanday, *A Woman Scorned: Acquaintance Rape on Trial* 62 (1997) (ascribing Hale's actions in rape and witchcraft trials to his general "anti-female attitudes").

n14. Hale, supra note 13, at 636 (restating the reasons for the corroboration requirement and the use of cautionary instructions)

n15. Model Penal Code 213.6(5).

n16. See, e.g., Susan Brownmiller, *Against Our Will* 369 (1975) (arguing against Hale's provision for caution in rape cases); *Estrich*, supra note 2, at 1138-40 (arguing against prompt complaint requirement, corroboration requirement, and cautionary instructions); Rosemary Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 Harv. Women's L.J. 127, 157 (1996) (reporting that juries in fact have a tendency to seek corroborating evidence and proposing instructions reminding juries that they may convict solely on the basis of alleged victim's uncorroborated testimony); Sanday, supra note 13, at 23 (stating that

cautionary instruction creates pro-defense bias); Kathryn M. Stanchi, *The Paradox of the Fresh Complaint Rule*, 37 B.C. L. Rev. 441, 474-76 (1996) (supporting a modified fresh complaint rule that protects victim and restores victim's credibility but does not reinforce timing myth); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. Davis L. Rev. 1013, 1064-66 (1991) (advocating abrogation of prompt complaint doctrine and arguing for jury instruction that states "absence of a prompt complaint does not suggest that a rape did not occur"); Georgia Wralstad Ulmschneider, *Rape and Battered Women's Self-Defense Trials as "Political Trials": New Perspectives on Feminists' Legal Reform Efforts and Traditional "Political Trials" Concepts*, 29 Suffolk L. Rev. 85, 102 (1995) (arguing that the corroboration requirement and use of cautionary jury instruction are hallmarks of a rape law "'safeguarding' men from rape accusations"); see also Dawn M. DuBois, Note, *A Matter of Time: Evidence of a Victim's Prompt Complaint in New York*, 53 Brooklyn L. Rev. 1087, 1109-13 (1988) (presenting alternative methods of admitting prompt complaint evidence); Donald J. Friedman, Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 Yale L.J. 1365 (1972) (arguing against justifications for corroboration requirement); Christine Kenmore, Note, *The Admissibility of Extrajudicial Rape Complaints*, 64 B.U. L. Rev. 199, 237 (1984) (rejecting "hue and cry" and corroboration theories behind prompt complaint doctrine).

n17. See infra notes 102-110 and accompanying text.

n18. See infra notes 118-122 and accompanying text.

n19. See infra notes 156-194 and accompanying text (discussing cautionary instructions in the rape law of various states).

n20. Harvard College refers specifically to the undergraduate program while Harvard University refers to the overall institution including the undergraduate college, graduate schools, other academic bodies, research centers, and affiliated institutions. See Harvard University website, *What is Harvard's mission statement?* (Feb. 23, 1997) (displaying the mission statement of Harvard College), at <http://www.harvard.edu/siteguide/faqs/faq110.html>.

n21. See infra notes 279-289 and accompanying text.

n22. See infra note 279 and accompanying text.

n23. See infra note 279 and accompanying text.

n24. See infra note 279 and accompanying text.

n25. See Dick Foster, *Ex-Cadets Keep Close Eye on Hearing*, Rocky Mtn. News, July 12, 2003, at 1A (cataloging the reactions of the complainants and the Air Force leadership after a congressional panel's investigation of the scandal); T. R. Reid, *Academy Probes Assaults; Female Air Force Cadets Allegedly Punished for Reporting Rapes*, Wash. Post, Feb. 21, 2003, at A04 (reporting the reactions of the superiors and the fellow cadets of those female Air Force cadets who chose to report incidents of sexual assault at the Air Force Academy).

n26. See Tillie Fong, *Legal Group Arrives at AFA; Probe to See Whether Women were Chided for Reporting Rape*, *Rocky Mtn. News*, Feb. 20, 2003, at 17A (recording the arrival of four Air Force officials at the Air Force Academy to investigate the allegations of sexual assault and subsequent administrative mishandling); Lee Hockstader & T.R. Reid, *Academy Culture Blamed in Handling of Rapes; Air Force School is Male-Dominated 'Family'*, *Wash. Post*, Mar. 10, 2003, at A3 (recounting the story of former cadet Jones, who personally experienced the defensive and anti-victim attitudes of the Air Force Academy).

n27. See Hockstader & Reid, *supra* note 26, at A3 (observing the disparity in treatment between complainants and their alleged male attackers).

n28. See *infra* notes 330-368 and accompanying text.

n29. See *infra* notes 399-404 and accompanying text (discussing the Clery Act).

n30. Carol Bohmer & Andrea Parrot, *Sexual Assault on Campus* 140 (1993) (asserting that schools create sexual assault policies both to protect students and to protect the institution from litigation); Fernand Dutille, *Students and Due Process in Higher Education: Of Interests and Procedures*, 2 *Fla. Coastal L.J.* 243, 243 (2001) ("In the process of enforcing their academic and disciplinary standards, colleges and Universities increasingly find themselves confronting the possibility and even the reality of litigation."); see also Lisa Swem, *Due Process Rights in Student Disciplinary Matters*, 14 *J.C. & U.L.* 359 (1987) ("Students disciplinary proceedings frequently intimidate college and university officials."); Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 *B.C. L. Rev.* 653, 660 (2001) ("College administrators are faced with mounting pressure from both sides.").

n31. See *infra* notes 382-383 and accompanying text.

n32. See *infra* notes 384-386 and accompanying text.

n33. See Committee To Address Sexual Assault at Harvard, *Public Report* 43 (April 2003) (stating the opinion of Harvard's disciplinary board members that "a case exacts a heavy price in terms of their own personal time and can lead to frustration on their part") available at [http://www.fas.harvard.edu/casah/files/CASAH\\_FinalReport.pdf](http://www.fas.harvard.edu/casah/files/CASAH_FinalReport.pdf).

n34. Theo Emery, *Harvard Faculty to Revisit Sexual Misconduct Policy on Campus*, AP story partially reprinted at *Harvard Handbook Becomes Hot Topic: New Sex Misconduct Policy Starts Uproar*, *The Record* (Bergen County, NJ), June 13, 2002, at A30 (quoting Sheldon Steinbach, general counsel for American Council on Education, saying, "when a prominent institution tries something innovative, other institutions are likely to follow.").

n35. See Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 *U. Ill. L. Rev.* 953, 962 [hereinafter Anderson, *Reviving Resistance*] (discussing history of the common law resistance requirement).

n36. See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 *Geo. Wash. L. Rev.* 51, 60-69 (2002) [hereinafter Anderson, *From Chastity*].

Requirement to Sexuality License] (reviewing the history of the chastity requirement as evidence in criminal rape trials).

n37. See Michelle J. Anderson, Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates, 54 *Hastings L.J.* 1465, 1477-85 (providing a history of the marital rape exemption).

n38. See Hunter, *supra* note 13, at 156 (discussing the overlap between the three doctrines as applied by states). Hale discussed the complainant's credibility this way:

For instance, if the witness be of good fame, if she presently discovered the offense and made pursuit after the offender, shew [sic] circumstances and signs of injury, ... if the place, wherein the fact was done, was remote from people, inhabitants or passengers, if the offender fled for it; these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself.

But on the other side, if she conceald [sic] the injury for any considerable time after she had the opportunity to complain, if the place, where the fact was supposed to be committed, were near to inhabitants, or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption, that her testimony is false or feigned.

Hale, *supra* note 13, at 633 (emphasis added). Note the centrality and interplay of prompt complaint and corroboration. A complainant was not credible if "she made no outcry," but she was credible if she "shew [sic] circumstances and signs of injury." *Id.*

n39. See *infra* notes 114-116 and accompanying text.

n40. See *infra* note 64 and accompanying text.

n41. See *infra* notes 68-74 and accompanying text.

n42. *State v. Hill*, 578 A.2d 370, 374 (N.J. Sup. Ct. 1990) (reviewing the history of the "hue and cry" requirement in the common law).

n43. 7 *Oxford English Dictionary* 464 (1989) (defining "hue and cry").

n44. *Hill*, 578 A.2d at 374 (stating that the original purpose of the "hue and cry" requirement was to allow the victim and his neighbors to catch the perpetrator).

n45. *Id.* (mentioning that courts continued to require "hue and cry" for rape long after it disappeared in other contexts).

n46. Id. at 374-75 (criticizing earlier courts for admitting evidence of the non-occurrence of a "hue and cry" to support the negative inference that no rape occurred).

n47. Id. at 375 (observing that juries were still allowed to consider a negative inference from the failure to "hue and cry" despite the progressive development of hearsay exclusions).

n48. *State v. Neel*, 60 P. 510, 511 (Utah 1900) (allowing evidence of a prompt "hue and cry" to preempt possible defense impeachment).

n49. See *Hill*, 578 A.2d at 375-76 (analyzing resistance to eliminating the "hue and cry" requirement and its admission for a negative inference).

n50. Under English common law, the only crime that required corroboration was perjury, not rape. See 7 *Wigmore*, supra note 3, 2040. It was a concern that women would lie regarding their unchaste experiences that prompted the doctrine to later appear in rape cases. See *Estrich*, supra note 2, at 1137.

n51. *Hale*, supra note 133, at 63 (allowing the jury to assess the credibility of the complainant's claim without need for corroborating evidence).

n52. 7 *Wigmore*, supra note 3, at 2061 (emphasis in original).

n53. 52 Ala. 395, 398 (1875) (refusing to require corroborating evidence to sustain an action for rape).

n54. Id. at 398-99 (finding no corroboration requirement in an action for rape).

n55. Id. at 398.

n56. Id. (stating that "her testimony should be cautiously scrutinized, and court and jury should diligently guard themselves from the undue influence of [sympathy]").

n57. See *Curby v. Territory of Arizona*, 42 P. 953, 955-56 (Ariz. 1895); *People v. Keith*, 75 P. 304, 305 (Cal. 1904); *State v. Anderson*, 59 P. 180, 181 (Idaho 1899); *People v. Polak*, 196 N.E. 513, 515 (Ill. 1935); *Ashbire v. State*, 158 N.E. 227, 288 (Ind. 1927); *Ex parte Ledington*, 192 P. 595, 596 (Okla. 1920); *Commonwealth v. Oyler*, 197 A. 508, 508 (Pa. 1938); *Addington v. Commonwealth*, 170 S.E. 565, 566 (Va. 1933); *Strand v. State*, 252 P. 1030, 1033 (Wyo. 1927); see also *Doyle v. State*, 22 So. 272, 274 (Fla. 1897) (holding that there is no law requiring corroboration in order for jury to convict defendant of rape, although court may instruct jury to view victim's testimony with extreme scrutiny); *Monroe v. State*, 13 So. 884, 884 (Miss. 1893) (holding that while corroboration is not required, uncorroborated testimony of victim should be closely scrutinized for credibility and truthfulness). But see *O'Boyle v. State*, 75 N.W. 989, 991 (Wis. 1898) (reversing a rape conviction and holding that corroborative evidence was required where the complainant's testimony was not credible).

n58. See Friedman, *supra* note 16, at 1365 (discussing New York's passing of a statute requiring corroborating evidence in a rape trial).

n59. *People v. Yannucci*, 15 N.Y.S.2d 865, 866 (N.Y. App. Div. 1939) (stating that the corroboration requirement saves potential defendants from facing fraudulent claims without adequate defense) (*dictum*), *rev'd* on other grounds, 29 N.E.2d 185 (1940).

n60. Act of June 15, 1886, ch. 663, 283, 1886 N.Y. Laws 953 (amending the penal code to prevent conviction for rape based on uncorroborated victim testimony). New York courts actually made the statutory requirement more stringent in the 1960s. See *People v. Perez*, 269 N.Y.S.2d 768, 769 (N.Y. App. Div. 1966) (holding that corroboration requirement could not be satisfied by generalized admission from the defendant); *Lore v. Smith*, 256 N.Y.S.2d 422, 425 (N.Y. City Ct. 1965); *People v. Tashman*, 233 N.Y.S.2d 744, 745 (N.Y. Sup. Ct. 1962) (holding that victim's pregnancy was not sufficient corroboration).

n61. See Friedman, *supra* note 16, at 1367 (cataloging the seven states that followed New York's lead in requiring corroborative evidence in rape trials); see also 7 Wigmore, *supra* note 3, at 2061 n.2.

n62. *Davis v. States* 48 S.E. 180, 181-82 (Ga. 1904) (requiring corroborative evidence in a rape prosecution and citing Lord Hale).

n63. *Id.* at 181

n64. *Id.* (paraphrasing De Bracton's explanation of the "hue and cry" requirement).

n65. See Friedman, *supra* note 16, at 1367. Five jurisdictions - Georgia, Idaho, Iowa, New York, and the Virgin Islands - imposed the corroboration requirement by enacting legislation, and the District of Columbia and Nebraska imposed the requirement in the prosecution of rape cases despite the absence of legislation. *Id.* at 1367 nn.13-14.

n66. See *id.* at 1367 n.16 (citing *Boddie v. State*, 52 Ala. 395, 398 (1875); *Bakken v. State*, 489 P.2d 120, 127 (Alaska 1971); *Hodges v. State*, 197 S.W.2d 52, 53 (Ark. 1946); *People v. Stevenson*, 80 Cal. Rptr. 392, 395 (Cal. Ct. App. 1969), cert. denied 397 U.S. 1014 (1970); *McQueary v. People*, 110 P. 210, 212-13 (Colo. 1910); *State v. Chuchelow*, 37 A.2d 689, 689 (Conn. 1944) (*dictum*); *Wilson v. State*, 109 A.2d 381, 393 (Del. 1954) (*dictum*); *State v. Smith*, 249 So. 2d 16, 17 (Fla. 1971); *Yeary v. State*, 273 N.E.2d 96, 97-98 (Ind. 1971); *State v. Brown*, 116 P. 508, 509 (Kan. 1911); *Green v. State*, 220 A.2d 131, 135 (Md. 1966); *Commonwealth v. Bemis*, 136 N.E. 597, 598 (Mass. 1922); *People v. Inman*, 24 N.W.2d 176, 182 (Mich. 1946) (*dictum*); *Blade v. State*, 126 So. 2d 278, 280 (Miss. 1961) (*dictum*); *State v. Bouldin*, 456 P.2d 830, 834 (Mont. 1969); *State v. Diamond*, 264 P. 697, 698 (Nev. 1928); *State v. Garcia*, 199 A.2d 860, 862 (N.J. Super. Ct. App. Div. 1964); *State v. Johnson*, 227 N.W. 560, 564 (N.D. 1929); *State v. Fitzmaurice*, 475 P.2d 426, 428 (Ore. 1970); *State v. Wiggan*, 256 A.2d 219, 221-22 (R.I. 1969); *State v. Gatlin*, 38 S.E.2d 238, 240 (S.C. 1946) (*dictum*); *King v. State*, 357 S.W.2d 42, 45-46 (Tenn. 1962); *State v. Hodges*, 381 P.2d 81, 82 (Utah 1963); *State v. Thomas*, 324 P.2d 821, 822 (Wash. 1958) (*dictum*); *Tway v. State*, 50 P. 188, 189 (Wyo. 1897) (*dictum*)).

Eight states developed doctrines, either by statute or judicial decision, in which corroboration was preferred, but not always mandated. See Friedman, *supra* note 16, at 1368 nn. 17-18. In some states, corroboration of a complainant's testimony was not necessary, but was helpful in establishing the credibility of her testimony. In other jurisdictions, corroboration was only required for certain charges, such as statutory rape, or cases in which

the alleged victim failed to promptly complain. See *id.* Hawaii and New Mexico required corroboration that would help to establish the truth of the victim's complaints. *Id.* at n.17. Six other states, Massachusetts, Minnesota, Mississippi, Missouri, Tennessee, and Texas, required corroboration only in specific factual circumstances, such as cases of statutory rape, a delayed complaint, or the minor status of the victim. *Id.* at n.18. Additionally, ten other states required corroborating evidence when the evidence in the case was not reasonably sufficient to sustain a rape conviction. See *Reidhead v. State*, 250 P. 366 (Ariz. 1926) (waiving the corroboration requirement if witness's testimony is "reasonable, consistent and not inherently impossible or improbable to a degree that would make it incredible to the ordinary man"); *People v. White*, 186 N.E.2d 351, 352 (Ill. 1962) (waiving the corroboration requirement if witness's testimony is "clear and convincing"); *Robinson v. Commonwealth*, 459 S.W.2d 147, 150 (Ky. 1970) (waiving the corroboration requirement if victim's testimony is "not contradictory or incredible or inherently improbable"); *State v. Field*, 170 A.2d 167, 169 (Me. 1971) (waiving the corroboration requirement but finding that without corroboration, victim's testimony "must be scrutinized and analyzed with great care"); *Bryant v. State*, 478 P.2d 907, 909 (Okla. Crim. App. 1970) (finding corroboration is not necessary if testimony is "not inherently improbable or unworthy of credence"); *Commonwealth v. Kretzitis*, 169 A. 417, 418 (Pa. 1933) (waiving corroboration unless testimony "is so indefinite, contradictory or unreliable that it would be unsafe to rest a conviction thereon"); *State v. Dachtler*, 179 N.W. 653, 653-54 (S.D. 1920) (requiring corroboration unless testimony is "unreliable, improbable," or if victim has been "fairly impeached"); *Fogg v. Commonwealth*, 159 S.E.2d 616, 620 (Va. 1968) (reiterating that corroboration is not required if testimony "is credible and the guilt of the accused is believed by the jury beyond a reasonable doubt"); *State v. Beacraft*, 30 S.E.2d 541, 544 (W. Va. 1944) (stating that corroboration is not required "unless her testimony is inherently incredible"); *Gauthier v. State*, 137 N.W.2d 101, 105 (Wis. 1965) (corroboration is not required if testimony is "convincing and not inherently incredible"). Those jurisdictions that retained a corroboration requirement in the 1970s began to reject it over the next decade or so. By 1990, the majority of U.S. jurisdictions had abolished the corroboration requirement. 1 Burr W. Jones, *Jones on Evidence*, 2:42 (Clifford S. Fishman ed., 7th ed. 1992).

n67. See 18 Pa. Con. Stat. Ann. 3106 (West 2003) (prohibiting a corroboration requirement or any heightened measure of credibility for a complainant in a rape case).

n68. See *People v. Rincon-Pineda*, 538 P.2d 247, 254 (Cal. 1975) (holding the use of cautionary instruction to be inappropriate).

n69. *Hale*, *supra* note 13, at 636. One example involved a 63-year-old man and a fourteen-year-old girl who accused him of rape. The man's defense was that he was "afflicted with a rupture so hideous and great" making it impossible for him to "carnally know any woman." *Hale* instructed the man and the jury into a private room to view this "unusual evidence." The jury confirmed "that it was impossible he should have to do with any woman in that kind, much less to commit a rape, for all his bowels seemed to be fallen down in those parts, that they could scarce discern his privities, the rupture being full as big as the crown of a hat." Thus, *Hale* concluded, the man had been falsely accused and was rightly acquitted. *Hale* also briefly described another example. The case involved a man who was accused of raping two young girls. Prior to the judgment, however, *Hale* noted, "it was most apparently discovered, that [the rape] was but a malicious contrivance, and the party innocent; he was therefore reprieved before judgment." *Id.* at 635-36.

n70. *Id.* at 636 (concluding that cautionary instructions and corroborating evidence are necessary in light of the risk of fraudulent accusations).

n71. *Rincon-Pineda*, 538 P.2d at 256 (reviewing the many rights afforded modern defendants not available in *Hale*'s time to show that *Hale*'s reasoning is outmoded). Additionally, some historians maintain that rape was sometimes a "prelude to a marriage" because an unwed victim could save her assailant from serious punishment, including death, by agreeing to marry him. One reason for widespread suspicion toward rape complainants was

the concern that lower class women could use charges of rape to force wealthier men to marry them. See 2 Sir Frederick Pollock & Frederic William Maitland, *The History of English Law* 491 (2nd ed. 1898); De Bracton, *supra* note 5, at 491. The concern for fabricated rape stories should be understood in the context of the traditional English preoccupation with the use of criminal charges as blackmail. See Rincon-Pineda, 538 P.2d at 257; see also Antony E. Simpson, *The "Blackmail Myth" and the Prosecution of Rape and Its Attempt in 18[su'th']-Century London: The Creation of a Legal Tradition*, 77 *J. Crim. L. & Criminology* 101, 109 (1986) (finding that defense lawyers of 18[su'th'] century England used the blackmail myth quite effectively despite the fact that an examination of legal records between 1740 and 1830 revealed few actual attempts of extortion).

n72. Thomas Morris, Note, *The Empirical, Historical and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform*, 1988 *Duke L.J.* 154, 155 (1988) (tracing the origins of the American cautionary instruction rules to English common law as influenced by Hale).

n73. *People v. Benson*, 6 Cal. 221, 223 (1856) (reversing a rape conviction for lack of corroborating evidence and lack of credibility of the victim).

n74. Armand Arabian, *The Cautionary Instruction in Sex Cases: A Lingering Insult*, 10 *Sw. U. L. Rev.* 585-86 (1978) (suggesting that courts have used Hale's comments in formulating cautionary jury instructions).

n75. See *Estrich*, *supra* note 2, at 1139 (stating that at the time the MPC was drafted, no jurisdiction barred prosecution for lack of a fresh complaint).

n76. See *supra* note 7 and accompanying text (discussing the prompt complaint requirement).

n77. See *supra* note 7 and accompanying text (containing the prompt complaint rule applicable to MPC sexual offenses); see also Model Penal Code 213.1 (defining rape and gross sexual imposition), 213.2 (defining deviate sexual intercourse by force or imposition), 213.3. (defining corruption of minors and seduction), 213.4 (defining sexual assault), 213.5 (defining indecent exposure), 213.6(4) (defining the prompt complaint rule as it applies to victims who are minors).

n78. Model Penal Code 1.06 (1985) (stating the time limitations applicable to the prosecution of various crimes).

n79. *Id.* 223.1(2)(b) (defining theft as a misdemeanor).

n80. Model Penal Code 207.4(23) cmts. at 265 (1962).

n81. Model Penal Code 213.6 cmt. 5 at 421 (1980).

n82. The commentaries even boasted that the prompt complaint requirement is a new "innovation in Anglo-American law" because before the Code, failure to make a prompt complaint did not bar prosecution for rape in any state. *Id.*

n83. Model Penal Code 213.6(5) (1980) (stating that "no person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim").

n84. Id. 213.6(5).

n85. See Model Penal Code 213.1 (defining rape and gross sexual imposition), 213.2 (defining deviate sexual intercourse by force or imposition), 213.3 (defining corruption of minors and seduction) (1985).

n86. See id. 211.1, 222.1 (defining assault and robbery lacking a corroboration requirement for either).

n87. Model Penal Code 213.6 cmt. 6 (1980) (stating that the most persuasive justification for requiring corroboration for sexual offense prosecution is the difficulty of defending against a false sexual offense accusation).

n88. Id.

n89. Id.

n90. Id.

n91. Model Penal Code 241.1(6) (1985) (requiring corroboration as a prerequisite to a conviction for perjury).

n92. See id. 241.1 (defining perjury as making "a false statement under oath").

n93. Model Penal Code 213.6 cmt. 6 (1980)

n94. See supra note 15 and accompanying text (quoting the Model Penal Code 213.6(5) and directing the jury to be instructed on evaluating complainant testimony)..

n95. Model Penal Code 207.4(22) cmts. at 264 (1962)..

n96. Id.

n97. Id.

n98. See Model Penal Code 213.6(5) (1985) (detailing cautionary jury instruction).

n99. Model Penal Code 207.4(22) cmts. at 264 (1962).

n100. Model Penal Code 213.6(5) (1985) (detailing jury cautionary instructions).

n101. Model Penal Code 207.4(22) cmts. at 264 (1962).

n102. See Cal. Penal Code 262 (West 2004) (stating that the offense must have been reported to one of an enumerated class of persons within one year following the violation); 720 Ill. Comp. Stat. Ann. 5/12-18(c) (West 2004) (requiring that a spousal offense be reported to law enforcement within 30 days); S.C. Code Ann. 16-3-615(B) (Law. Co-op. 2003) (requiring that a spousal offense be reported to law enforcement within 30 days).

n103. Cal. Penal Code 262-(5)(b) (West 2004). Prompt complaint is also required in Texas, but only in situations where there is no corroborating evidence. Tex. Crim. Proc. Ann. 38.07(a) (Vernon 2004) (stating that "[a] conviction ... is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred").

n104. See generally Cal. Penal Code 261-62 (West 2004) (requiring prompt complaint only for spousal sexual offenses).

n105. 720 Ill. Comp. Stat. Ann. 5/12-18(c) (West 2004).

n106. See *id.* (allowing an exception when "the court finds good cause for the delay"). No case law in the state reveals exactly what constitutes "good cause".

n107. See generally 720 Ill. Comp. Stat. Ann. 5/12-18 (West 2004) (requiring that spousal complaint be reported within 30 days following the offense).

n108. S.C. Code Ann. 16-3-615(B) (Law. Co-op. 2003). Sexual battery is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." *Id.* 16-3-651(h). Spousal sexual battery is sexual battery "accomplished through use of aggravated force, defined as the use or the threat of use of a weapon or the use or threat of use of physical force or physical violence of a high and aggravated nature, by one spouse against the other spouse if they are living together ... ." *Id.* 16-3-615(A).

n109. Compare S.C. Code Ann. 16-3-615(B), 16-3-658 (Law. Co-op. 2003), with 720 Ill. Comp. Stat. Ann. 5/12-18(c) (West 2004) (revealing that Illinois has a good cause exception while South Carolina does not).

n110. See generally S.C. Code Ann. 16-3-658 (Law. Co-op. 2003) (requiring that offensive spousal conduct be reported within 30 days).

n111. See *Stanchi*, *supra* note 16, at 446 (explaining that the fresh complaint doctrine allows prosecutors to introduce evidence that the victim made a timely complaint).

n112. 578 A.2d 370, 378 (N.J. 1990) (deciding that the absence of a fresh complaint should not bar prosecution and explaining that the jury may be instructed as to interpreting the victim's silence).

n113. *Id.* at 378. The Supreme Court of California re-examined the fresh complaint doctrine in *People v. Brown*, 883 P.2d 949, 950 (Cal. 1994). The court stated that the admissibility of fresh complaint evidence should not turn on whether the complaint was made in a timely manner following the alleged incident, as mandated by the traditional rule, but rather should turn on whether general evidentiary principles would permit such evidence to be admitted. See *id.* at 959 (stating that the admissibility of fresh complaint evidence should be determined by its evidentiary relevancy, not by time restrictions). Because evidence of the fact of a complaint would not be barred by hearsay rules or any other principles, it should be admitted. See *id.* (explaining that, to avoid hearsay concerns, admissibly complaint evidence may be limited to the fact of the victim making the complaint).

n114. See *Aaron v. State*, 139 So. 2d 309, 316-17 (Ala. 1961) (stating that in sexual offense prosecutions, evidence of the bare fact of the complaint may be introduced); *Greenway v. State*, 626 P.2d 1060, 1061 (Alaska 1980); *State v. Navarro*, 367 P.2d 227, 230 (Ariz. 1961); *Gabbard v. State*, 285 S.W.2d 515, 516 (Ark. 1956); *People v. Brown*, 883 P.2d 949, 950 (Cal. 1994); *People v. Montague*, 508 P.2d 388, 389 (Colo. 1973); *Connecticut v. Troupe*, 677 A.2d 917, 928-29 (Conn. 1996); *State v. Brewer*, 114 A. 604, 605 (Del. 1921); *Battle v. United States*, 630 A.2d 211, 222-23 (D.C. App. 1993); *Lyles v. State*, 412 So. 2d 458, 459 (Fla. Dist. Ct. App. 1982); *Epps v. State*, 118 S.E.2d 574, 578 (Ga. 1961); *Territory v. Nishi*, 24 Haw. 677, 684 (1919); *State v. Hall*, 397 P.2d 261, 266-67 (Idaho 1964); *People v. Lawler*, 568 N.E.2d 895, 901 (Ill. 1991); *Woods v. State*, 119 N.E.2d 558, 562 (Ind. 1954); *State v. Ladehoff* 122 N.W.2d 829, 832 (Iowa 1963); *State v. Hoskinson*, 96 P. 138, 139-40 (Kan. 1908); *Cook v. Commonwealth*, 351 S.W.2d 187, 188-89 (Ky. 1961); *State v. Robertson*, 38 La. Ann. 618, 619 (1886); *State v. Calor*, 585 A.2d 1385, 1387 (Me. 1991); *State v. Werner*, 489 A.2d 1119, 1125-26 (Md. 1985); *Commonwealth v. Licata*, 591 N.E.2d 672, 675 (Mass. 1992); *People v. Taylor*, 239 N.W.2d 627, 629 (Mich. Ct. App. 1976); *State v. Blohm*, 281 N.W.2d 651, 652 (Minn. 1979); *Carr v. State*, 208 So. 2d 886, 888 (Miss. 1968); *State v. Van Doren*, 657 S.W.2d 708, 716 (Mo. Ct. App. 1983); *State v. Peres*, 71 P. 162, 164 (Mont. 1903); *State v. Daniels*, 388 N.W.2d 446, 449-50 (Neb. 1986); *State v. Campbell*, 17 P. 620, 621 (Nev. 1888); *State v. Lynch*, 45 A.2d 885, 885 (N.H. 1946); *State v. Hill*, 578 A.2d 370, 371 (N.J. 1990); *State v. Baca*, 242 P.2d 1002, 1004 (N.M. 1952); *People v. McDaniel*, 611 N.E.2d 265, 268 (N.Y. 1993); *State v. Freeman*, 5 S.E. 921, 923 (N.C. 1888); *State v. Gebhard*, 13 N.W.2d 290, 291 (N.D. 1944); *Johnson v. State*, 17 Ohio 593, 595 (1848); *State v. Brown*, No. 36315, 1977 Ohio App. LEXIS 9839, at 5 (Ohio Ct. App. June, 1977); *Roberts v. State*, 194 P.2d 219, 223 (Okla. Crim. App. 1948); *State v. Campbell*, 705 P.2d 694, 699 (Ore. 1985); *Commonwealth v. Green*, 409 A.2d 371, 374 (Pa. 1979); *State v. Russo*, 142 A. 543, 544 (R.I. 1928); *Simpkins v. State*, 401 S.E.2d 142, 143 (S.C. 1991); *State v. Twyford*, 186 N.W.2d 545, 548 (S.D. 1971); *State v. Kendricks*, 891 S.W.2d 597, 603 (Tenn. 1994); *Vera v. State*, 709 S.W.2d 681, 685 (Tex. Ct. App. 1986); *State v. Martinez*, 326 P.2d 102, 104 (Utah 1958); *State v. Willett*, 62 A. 48, 49 (Vt. 1905); *Pepoon v. Commonwealth*, 66 S.E.2d 854, 858 (Va. 1951); *State v. Ferguson*, 667 P.2d 68, 72 (Wash. 1983); *State v. Golden*, 336 S.E.2d 198, 203 (W. Va. 1985); *Hannon v. State*, 36 N.W. 1, 2 (Wis. 1888); *Ellriott v. State*, 600 P.2d 1044, 1050 (Wyo. 1979).

n115. Va. Code Ann. 19.2-268.2 (West 2003). Virginia courts have said that the only time constraint is, "the complaint [must] have been made without a delay which is unexplained or is inconsistent with the occurrence of the offense." *Woodard v. Commonwealth*, 448 S.E.2d 328, 330 (Va. Ct. App. 1994). The Court of Appeals of Virginia has identified possible reasonable explanations for delay, including fear of disbelief by others and fear of threat of further harm by the assailant. Whether to admit the complaint is a matter for the court, but once admitted, the timeliness of the complaint is a matter for the jury to consider when weighing evidence, including the credibility of the prosecutrix. See *id.* In 1993, the Court of Appeals for the District of Columbia examined the fresh complaint doctrine in *Battle v. U.S.*, 630 A.2d 211, 216-17 (D.C. 1993). The court reasoned that the fresh complaint doctrine was necessary for the benefit of the complainant for several reasons:

First, evidence of a complaint of rape negates jurors' assumptions that if there is no evidence of a complaint, no complaint was made ... Second, such evidence negates prejudices held by some jurors by showing that the victim behaved as society traditionally has expected sexual assault victims to act, i.e., by promptly telling someone of the crime ... Third, such evidence rebuts an implied charge of recent fabrication, which springs from some jurors' assumptions that sexual offense victims are generally lying and that the victim's failure to report the crime promptly is inconsistent with the victim's current statement that the assault occurred. (citations omitted)

*Id.* at 217. The Battle court explained that the prosecution was allowed to present fresh complaint evidence to corroborate the complainant's testimony, and to rebut any inferences that the complainant's testimony was not credible. See *id.* (concluding that the evidence can be introduced to corroborate the victim's story or to rebut an assertion of fabrication).

n116. 18 Pa. Cons. Stat. Ann. 3105 (West 2004). The Pennsylvania Supreme Court has explained that prompt complaint is "competent evidence, properly admitted when limited to establish that a complaint was made ... . Conversely, unexplained lack of evidence of hue and cry that one might expect to ensue from rape casts doubt on the existence of the rape itself." *Commonwealth v. Freeman*, 441 A.2d 1327, 1331-32 (Pa. Super Ct. 1982). *Freeman* contended that the trial court improperly admitted evidence of the victim's prior complaints of the rape to third parties. The court explained that, while the Pennsylvania Crimes Code no longer requires prompt complaint evidence, it allows the evidence in as long as it is limited to the fact that a complaint was made. See *id.* at 1331.

n117. See, e.g., *Fitzgerald v. United States*, 443 A.2d 1295, 1305 (D.C. 1982) (stating the rule of prompt complaint). The Massachusetts Supreme Judicial Court in *Commonwealth v. Licata*, 591 N.E.2d 672 (Mass. 1992), adopted a somewhat unique variation on the fresh complaint doctrine: not only is the fact of a fresh complaint admissible, the details of that complaint are also admissible. See *id.* at 675. Almost all other states consider the details of the complaint inadmissible. See *Aaron v. State*, 139 So. 2d 309, 317 (Ala. 1961); *Greenway v. State*, 626 P.2d 1060, 1061 n.4 (Alaska 1980); *Bing v. State*, 740 S.W.2d 156, 157 (Ark. 1987); *People v. Burton*, 359 P.2d 433, 444 (Cal. 1961); *People v. Montague*, 508 P.2d 388, 389 (Colo. 1973); *Connecticut v. Troupe*, 677 A.2d 917, 928-29 (Conn. 1996); *Fitzgerald v. United States*, 443 A.2d 1295, 1305 (D.C. 1982); *Custer v. State*, 34 So. 2d 100, 110 (Fla. 1947); *Epps v. State*, 118 S.E.2d 574, 578 (Ga. 1961); *State v. Hall*, 397 P.2d 261, 267 (Idaho 1964); *People v. Robinson*, 383 N.E.2d 164, 168 (Ill. 1978); *Woods v. State*, 119 N.E.2d 558, 562 (Ind. 1954); *State v. Grady*, 183 N.W.2d 707, 718 (Iowa 1971); *Cook v. Commonwealth*, 351 S.W.2d 187, 189 (Ky. 1961); *State v. Calor*, 585 A.2d 1385, 1387 (Me. 1968); *Carr v. State*, 208 So. 2d 886, 888 (Miss. 1968); *State v. Van Doren*, 657 S.W.2d 708, 716 (Mo. Ct. App. 1983); *State v. Daniels*, 388 N.W.2d 446, 450 (Neb. 1986); *State v. Baca*, 242 P.2d 1002, 1004 (N.M. 1952); *People v. Stripling*, 162 A.D.2d 1029, 1029 (N.Y. 1990); *State v. Campbell*, 705 P.2d 694, 699 (Or. 1985); *Commonwealth v. Green*, 409 A.2d 371, 374-75 (Pa. 1979); *State v. Harrison*, 113 S.E.2d 783, 784, 785 (S.C. 1960); *State v. Twyford*, 186 N.W.2d 545, 548 (S.D. 1971); *Vera v. State*, 709 S.W.2d 681, 685 (Tex. Ct. App. 1986); *Moore v. Commonwealth*, 278 S.E.2d 822, 826 (Va. 1981); *State v. Ferguson*, 667 P.2d 68, 72 (Wash. 1983); *State v. Golden*, 336 S.E.2d 198, 203 (W. Va. 1985).

n118. See N.Y. Penal Law 130.16 (McKinney 2004) (stating corroboration requirement for victims with mental defect or diminished capacity). The relevant statute provides that a person may not be convicted, solely on the testimony of the victim, for a sexual offense of which lack of consent is an element when that lack of consent "results solely from incapacity to consent because of the victim's mental defect, or mental incapacity ... ." See *id.*; see also *id.* 130.05 (stating that lack of consent is an element of every offense in Article 130, except for consensual sodomy). There are no corroboration requirements for testimony by victims in sexual offense cases in which lack of consent does not result from mental incapacity or defect. *People v. Soulia*, 695 N.Y.S.2d 179, 183 (N.Y. App. Div. 1999) (discussing corroboration requirements in cases in which lack of consent results from mental incapacity and stating that was not at issue in instant case); *People v. Miller*, 640 N.Y.S.2d 904, 907 (N.Y. App. Div. 1996) (holding that "corroboration is not required to establish the crime of sexual abuse when predicated upon allegation of forcible compulsion").

n119. See Ohio Rev. Code Ann. 2907.06(B) (West 2004) (stating that a sexual imposition conviction cannot be obtained without evidence corroborating the victim's testimony). The required corroboration does not have to be independently sufficient to convict the defendant and need not go to every element of the crime of sexual imposition. *State v. Economo*, 666 N.E.2d 225, 228 (Ohio 1996) (explaining that the corroborative evidence "need not be independently sufficient to convict the accused, and it need not go to every essential element of the crime"). Rather, only slight circumstances are required to support the victim's testimony. *Id.* One court defined the required evidence to be "minimal." See *City of Avon Lake v. Pinson*, 695 N.E.2d 1178, 1179 (Ohio Ct. App. 1997) (stating that the corroboration requirement is satisfied by minimal evidence). "Minimal evidence" was defined as "slight circumstances or evidence which tends to support the victim's testimony." *Id.* The Ohio sexual imposition statute states, in part:

No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(1) The offender knows that the sexual contact is offensive to the other person, or one of the other persons, or is reckless in that regard.

(2) The offender knows that the other person's, or one of the other person's, ability to appraise the nature of or control the offender's or touching person's conduct is substantially impaired.

(3) The offender knows that the other person, or one of the other persons, submits because of being unaware of the sexual contact.

(4) The other person, or one of the other persons, is thirteen years of age or older but less than sixteen years of age, whether or not the offender knows the age of such person, and the offender is at least eighteen years of age and four or more years older than such other person.

(5) The offender is a mental health professional, the other person or one of the other persons is a mental health client or patient of the offender, and the offender induces the other person who is the client or patient to submit by falsely representing to the other person who is the client or patient that the sexual contact is necessary for mental health treatment purposes.

Ohio Rev. Code Ann. 2907.06 (West 2004)

n120. The crimes of rape, sexual battery, and gross sexual imposition all lack a corroboration requirement. See Ohio Rev. Code Ann. 2907.02, 2907.03, 2907.05 (West 2004).

n121. *Tex. Crim. Proc. Code Ann. 38.07(a)* (Vernon 2004). The one year reporting requirement does not apply if the victim was, at the time of the offense, seventeen years of age or younger, sixty-five years of age or older, or eighteen years of age or older "who by reason of age or physical or mental disease, defect, or injury was substantially unable to satisfy the person's need for food, shelter, medical care, or protection from harm." *Id.* 38.07(b)(1)-(3) (listing the corroboration exceptions).

Sexual assault is when:

A person commits an offense if the person: (1) intentionally or knowingly: (A) causes the penetration of the anus or sexual organ of another person by any means, without that person's consent; (B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or (C) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor ... .

*Tex. Penal Code Ann. 22.011(a)* (Vernon 2004). Aggravated sexual assault is sexual assault when the person:

(i) causes serious bodily injury or attempts to cause the death of the victim or another person in the course of the same criminal episode; (ii) by acts or words places the victim in fear that death, serious bodily injury, or kidnapping will be imminently inflicted on any person; (iii) by acts or words occurring in the presence of the victim threatens to cause the death, serious bodily injury, or kidnapping of any person; (iv) uses or exhibits a deadly weapon in the course of the same criminal episode; (v) acts in concert with another who engages in conduct described by Subdivision (1) directed toward the same victim and occurring during the course of the same criminal episode; or (vi) administers or provides flunitrazepam, otherwise known as rohypnol, gamma hydroxybutyrate, or ketamine to the victim of the offense with the intent of facilitating the commission of the offense ... .

Id. 22.021(2)(A).

n122. See *McBride v. State*, No. 03-95-00596-CR, 1997 Tex. App. LEXIS 1284, at 17 (Tex. Ct. App. March 20, 1997) (holding that corroboration was not necessary for a rape conviction when the victim made a prompt complaint); see also *Friedel v. State*, 832 S.W.2d 420, 421-22 (Tex. Ct. App. 1992) (overturning a defendant's conviction where the victim neither made a prompt complaint nor presented corroborating evidence).

n123. See Fla. Stat. Ann. 794.022 (West 2004) amended by 2002 Fla. Sess. Law Serv. 211 (West) (stating that testimony of victim need not be corroborated in prosecution for sexual battery); S.C. Code Ann. 16-3-657 (Law. Co-op. 2004) (stating that testimony of victim need not be corroborated for criminal sexual conduct); Mich. Comp. Laws Ann. 750.520(h) (West 2004) (stating that testimony of victim need not be corroborated in prosecutions for non-statutory sexual offenses); Minn. Stat. Ann. 609.347 (1) (West 2002) amended by 2002 Minn. Sess. Law. Serv. 381 (West) (stating that testimony of victim need not be corroborated); Neb. Rev. Stat. 29-2028 (2004) (requiring no corroboration for testimony of sexual assault victims); N.H. Rev. Stat. Ann. 632-A:6(I) (2003) (stating that there is no requirement of corroboration for victim's testimony in prosecutions for sexual offenses under same chapter); N.M. Stat. Ann. 30-9-15 (Michie 2004) (indicating corroboration of victim's testimony not required for various sexual offenses); 18 Pa. Cons. Stat. Ann. 3106 (West 2004) (providing that testimony by complainants does not need corroboration in prosecutions of sexual offenses); R.I. Gen. Laws. 11-37-11 (2003) (stating that testimony of victim is not required to be corroborated in prosecutions for sexual assault); S.C. Code Ann. 16-3-657 (Law. Co-op. 2004) (stating that no corroboration required for prosecution of criminal sexual conduct in first, second, and third degrees, and criminal sexual conduct with a minor), S.D. Codified Laws 23A-22-15.1 (Michie 2004) (stating that testimony of complainant in sex offense case may not be treated differently than complainant's testimony in any other criminal case); Vt. Stat. Ann. tit. 13. 3255(a)(2) (2003) (explaining that corroborative evidence not required for rape); Wash. Rev. Code Ann. 9A.44.020(1) (West 2004) (providing no requirement of corroboration of victim's testimony for convictions of sex offenses); Wyo. Stat. Ann. 6-2-311 (Michie 2003) (stating that there is no requirement of corroboration for sexual assault).

n124. See, e.g., Ala. Code 13A-6-61 (2004) (defining rape without mentioning the issue of corroboration).

n125. See *Myers v. State*, 677 So. 2d 807, 809 (Ala. Crim. App. 1995) ("It is well settled that a conviction for rape may be had on the uncorroborated testimony of the victim.").

n126. See *Freeman v. State*, 959 S.W.2d 400, 402 (Ark. 1998) (allowing uncorroborated testimony of rape victim as sufficient to sustain conviction of rape).

n127. See *People v. Poggi*, 753 P.2d 1082, 1095 (Cal. 1988) (explaining that the conviction of a sex crime may be sustained on uncorroborated testimony of complainant).

n128. See *People v. Fierro*, 606 P.2d 1291, 1293 (Colo. 1980) (explaining that corroboration of victim's testimony is not essential in criminal prosecution for unlawful sexual acts and that need for corroboration should be assessed by jury).

n129. See *State v. Stewart*, No. IN78-06-0023-0027, 0835, 1987 Del. Super. LEXIS 990, at 1 (Del. Super. Ct. Jan. 16, 1987) (finding that Delaware law does not require corroborating evidence).

n130. See *Hutchison v. State*, 522 S.E.2d 56, 58 (Ga. Ct. App. 1999) (stating "corroboration is no longer necessary to establish rape").

n131. See *State v. Jones*, 617 P.2d 1214, 1221 (Haw. 1980) (stating that law does not require corroboration of complaining witness in rape prosecution).

n132. See *State v. Allen*, 929 P.2d 118, 120 (Idaho 1996) ("Idaho does not require corroboration of testimony in rape cases.")

n133. See *People v. Carlson*, 663 N.E.2d 32, 36 (Ill. App. Ct. 1996) ("It is well settled that a criminal sexual assault conviction may be sustained on the victim's testimony alone.").

n134. See *Browning v. State*, 775 N.E.2d 1222, 1226 (Ind. Ct. App. 2002) (stating that "conviction for rape can rest solely on the uncorroborated testimony of the victim").

n135. See *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995) ("The law has abandoned any notion that a rape victim's accusation must be corroborated.").

n136. See *State v. Zornes*, 774 So. 2d 1062, 1065 (La. Ct. App. 2000) ("The victim's testimony alone is sufficient to establish ... elements of offense.").

n137. In Maine, although uncorroborated testimony will be scrutinized more carefully, corroboration is not required. See *State v. Palmer*, 624 A.2d 469, 472 (Me. 1993) (explaining it has been held that to prove the crime of rape, corroboration beyond testimony of prosecutrix is not required); *State v. Field*, 170 A.2d 167, 169 (Me. 1961) (stating that in absence of corroboration testimony must be scrutinized and analyzed with great care and that if the testimony is contradictory, unreasonable or incredible, it is not sufficient).

n138. See *Moore v. State*, 329 A.2d 48, 54-55 (Md. Ct. Spec. App. 1974) (stating that a "victim's testimony, standing alone, if believed, is sufficient to sustain the conviction").

n139. See *State v. Gomes*, 930 P.2d 701, 706 (Nev. 1996) ("A sexual assault victim's uncorroborated testimony is sufficient evidence to convict.").

n140. See *State v. Garcia*, 199 A.2d 860, 862 (N.J. Super. Ct. App. Div. 1964) ("It is clear that in our jurisdiction a conviction for a morals or sex offense may be sustained on the uncorroborated testimony of the victim.") (citing *State v. Fleckenstein*, 159 A.2d 411, 414 (N.J. Super. Ct. App. Div. 1960)).

n141. See *State v. Henderson*, 574 S.E.2d 700, 705 (N.C. Ct. App. 2003) (stating that "the law does not require medical evidence to corroborate a victim's story as the victim's word alone is sufficient evidence upon which a jury can convict").

n142. See *State v. Kringstad*, 353 N.W.2d 302, 306 (N.D. 1984) ("It is well established in North Dakota that the uncorroborated testimony of a rape victim is sufficient to establish all of the elements of the crime.").

n143. See *State v. Fitzmaurice*, 475 P.2d 426, 428 (Or. Ct. App. 1970) (holding that rape conviction may be had on uncorroborated testimony of prosecutrix); *State v. Morrow*, 75 P.2d 737, 744 (Or. 1938) (stating that corroboration is not required for a rape prosecution).

n144. See *Montgomery v. State*, 556 S.W.2d 559, 560 (Tenn. Crim. App. 1977) ("The rape statute ... does not require that the testimony of the violated female be corroborated.").

n145. See *State v. Archuleta*, 747 P.2d 1019, 1021 (Utah 1987) (declining to adopt position that testimony of rape victim alone cannot support a conviction).

n146. See *Moore v. Commonwealth*, 491 S.E.2d 739, 740 (Va. 1997) (stating that "conviction of rape may be sustained solely upon the victim's testimony").

n147. See *Henry v. State*, 861 P.2d 582, 586 (Alaska Ct. App. 1993) (explaining that when victim of sexual abuse recants allegation, state must show corroborating evidence to support prior allegations); *Brower v. State*, 728 P.2d 645, 648 (Alaska Ct. App. 1986) (holding that the defendant's conviction was invalid because it was based on complaining witness' prior inconsistent and uncorroborated statements).

Massachusetts also requires corroborative evidence to support a prior inconsistent statement. See *Commonwealth v. Sineiro*, 740 N.E.2d 602, 607 (Mass. 2000) (stating that corroborative evidence is required when there is "prior inconsistent grand jury testimony [that] concerns an essential element of the crime").

n148. See *State v. Williams*, 526 P.2d 714, 716-17 (Ariz. 1974) ("A conviction may be had on the basis of the uncorroborated testimony of the prosecutrix unless the story is physically impossible or so incredible that no reasonable person could believe it.").

n149. See *Remine v. State*, 759 P.2d 230, 232 (Okla. Crim. App. 1988) (stating that corroboration of the victim's testimony is "only necessary when the prosecutrix's testimony is too inherently improbable to support a conviction"); *State v. McPherson*, 371 S.E.2d 333, 337 (W. Va. 1988) (allowing sex offense convictions to rest solely on the uncorroborated testimony of the victim, unless the testimony is "inherently incredible"). West Virginia also allows the court to give a cautionary instruction when testimony is uncorroborated. See *id.*

n150. See *State v. Borthwick*, 880 P.2d 1261, 1265 (Kan. 1994) (finding that the prosecutrix's testimony alone could sustain a rape conviction without further corroboration as long as the evidence is clear and convincing); *State v. Mitchell*, 771 P.2d 73 (Kan. 1989) (when uncorroborated testimony of prosecutrix is unbelievable, testimony alone is insufficient to sustain rape conviction); *State v. Matlock*, 660 P.2d 945, 946 (Kan. 1983) (explaining that conviction of rape can be upheld without corroboration as long as there is clear and convincing evidence and as long as testimony is not so incredible and improbable as to defy belief); *Carrier v.*

Commonwealth, 356 S.W.2d 752, 754 (Ky. 1962) (stating that uncorroborated testimony of prosecutrix may be sufficient to sustain conviction if proof is clear and convincing, but insufficient if prosecutrix's story is intrinsically improbable or her actions before and after alleged offense indicate that offense did not happen).

n151. See *Williams v. State*, 757 So. 2d 953, 957 (Miss. 1999) (holding that the "unsupported word of the victim of a sex crime is sufficient to support a guilty verdict where that testimony is not discredited or contradicted by other credible evidence").

n152. See *State v. Gilyard*, 979 S.W.2d 138, 141 (Mo. 1998) (observing that "in a rape case, corroborative evidence can be highly probative of victim credibility and may even be essential, such as where the victim's testimony is unconvincing or contradictory").

n153. See *State v. Olson*, 951 P.2d 571, 576-77 (Mont. 1997) (reversing previous case law insofar as cases required victim's testimony be consistent with other evidence to support a conviction of sexual assault); *State v. Howie*, 744 P.2d 156, 159 (Mont. 1987) (observing that a sexual assault conviction may be based entirely on the uncorroborated testimony of the victim).

n154. See *Battle v. United States*, 630 A.2d 211, 216 (D.C. App. 1993) (recognizing that corroboration requirement has been abolished but that corroboration evidence is still admissible to explain inconsistencies, not to ascertain the truth of a statement).

n155. See *Thomas v. State*, 284 N.W.2d 917, 923-24 (Wis. 1979) (finding, although not specifically requiring, corroboration where the victim's testimony was unreliable because she "stated at one point that she did not remember the incident of sexual intercourse and only testified as to what she had been told to say").

n156. Cautionary instructions are regularly employed for the testimony of accomplices who testify against the defendant in return for immunity or a lesser charge against them. See Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 *Yale L.J.* 785, 791 n.40 (1990) (discussing state statutes requiring corroboration for accomplice testimony). Unlike rape victims, accomplices as a routine matter may have self-interested motives for lying or exaggerating on the witness stand. See *id.* at 786 (discussing the tendency of self-interested accomplice to minimize his own role and exaggerate the role of the defendant). In Hawaii, the cautionary instruction for accomplice testimony reads:

The testimony of an alleged accomplice should be examined and weighed by you with greater care and caution than the testimony of ordinary witnesses. You should decide whether the witness's testimony has been affected by the witness's interest in the outcome of the case, or by prejudice against the defendant, or by the benefits that the witness stands to receive because of his/her testimony, or by the witness's fear of retaliation from the government.

Haw. Pattern Jury Instructions: Criminal 6.01(A) (2003). In Oklahoma, the accomplice cautionary instruction states: "No person may be convicted on the testimony of an accomplice unless the testimony of such a witness is corroborated by other evidence." Okla. Uniform Jury Instructions: Criminal OUI-CR 9-25 (Vernon's 2d ed. 2003); see also Colo. Jury Instructions: Criminal 4:06 (1983); 10 Minn. Practice Jury Instruction Guides: Criminal CRIMJIG 3.18 (4th ed. 2003).

Cautionary instructions have sometimes been issued with child and alibi witnesses. See generally Carol J. Miller, Annotation, *Instructions to Jury as to Credibility of Child's Testimony in Criminal Case*, 32 *A.L.R.4th* 1196 (2003) (discussing cautionary instructions regarding child witnesses); Frank D. Wagner, Annotation,

Propriety and Prejudicial Effect of Instructions on Credibility of Alibi Witnesses, 72 A.L.R.3d 617 (2003) (discussing cautionary instructions for alibi witnesses).

n157. See Colo. Rev. Stat. Ann. 18-3-408 (West 2002) ("In any criminal prosecution [for a sexual offense], or for attempt or conspiracy to commit any [sexual offense crime], the jury shall not be instructed to examine with caution the testimony of the victim solely because of the nature of the charge, nor shall the jury be instructed that such a charge is easy to make but difficult to defend against, nor shall any similar instruction be given."); Iowa Code Ann. 709.6 (West 2002) (stating that no instruction is may tell the jury to use a different standard for victim's testimony than for other witnesses to that offense); Md. Code Ann., Criminal 3-320 (West 2002) (prohibiting jury instruction telling jury to examine victim's testimony with caution solely because of nature of charge); Minn. Stat. Ann. 609.347 (5)(d) (West 2002) (prohibiting instruction for jury to scrutinize victim's testimony more closely than in other prosecutions); Nev. Rev. Stat. Ann. 175.186(2) (Michie 2002) (prohibiting instruction stating that rape is difficult to prove or establish beyond a reasonable doubt); 18 Pa. Cons. Stat. Ann. 3106 (West 2003) ("The credibility of a complainant of an offense under this chapter shall be determined by the same standard as is the credibility of a complainant of any other crime. The testimony of a complainant need not be corroborated in prosecutions [for sexual offenses]. No instructions shall be given cautioning the jury to view the complainant's testimony in any other way than that in which all complainants' testimony is viewed."); S.D. Codified Laws 23A-22-15.1 (Michie 2003) ("The testimony of the complaining witness in a trial for a charge of [sexual offenses] may not, merely because of the nature of that charge, be treated in any different manner than the testimony of a complaining witness in any other criminal case.").

n158. See Fla. Stat. Ann. 90.106 (West 2000) (prohibiting commentary to jury on the credibility of witnesses); Marr v. State, 470 So. 2d 703, 712 (Fla. Dist. Ct. App. 1985), approved by 494 So. 2d 1139 (Fla. 1986) (finding a requested instruction about the credibility of rape victims to be unwarranted under the Florida statute and Florida judicial decisions).

n159. See Arnold v. United States, 358 A.2d 335, 344 (D.C. 1976) (prohibiting future use of cautionary instructions).

n160. See Burke v. State, 624 P.2d 1240, 1255 (Alaska 1980) (prohibiting future use of cautionary instructions).

n161. See State v. Settle, 531 P.2d 151, 153 (Ariz. 1975) (interpreting cautionary instructions as unconstitutional under the Arizona Constitution).

n162. See People v. Rincon-Pineda, 538 P.2d 247, 259-60 (Cal. 1975) (rejecting cautionary instruction as a "rule without a reason").

n163. See Marr v. State, 494 So. 2d 1139, 1142 (Fla. 1986) (prohibiting cautionary instruction).

n164. See Black v. State, 47 S.E. 370, 371-72 (Ga. 1904) (finding use of cautionary instruction improper).

n165. See State v. Smoot, 590 P.2d 1001, 1009 (Idaho 1978) (finding use of cautionary instruction improper and prohibiting future use).

n166. See *Taylor v. State*, 278 N.E.2d 273, 276 (Ind. 1972) (finding the use of cautionary instruction improper).

n167. See *State v. Fedderson*, 230 N.W.2d 510, 514 (Iowa 1975) (disapproving giving the jury a cautionary instruction).

n168. See *State v. Selman*, 300 So. 2d 467, 470 (La. 1974), rev'd on other grounds, 428 U.S. 906 (1976) (finding the refusal to give a cautionary instruction to be proper, as it might be understood as an improper comment on the evidence).

n169. See *State v. Dalrymple*, 270 S.W. 675, 679 (Mo. 1925) (finding the trial judge below properly refused to give cautionary instruction to the jury).

n170. See *State v. Liddell*, 685 P.2d 918, 922 (Mont. 1984) (finding that neither law nor public policy required cautionary instruction and that such an instruction was improper).

n171. See *Turner v. State*, 892 P.2d 579, 579 (Nev. 1995) (repudiating the cautionary instruction as an "anachronism" that "should never be given").

n172. See *State v. Gross*, 351 N.W.2d 428, 434 (N.D. 1984) (finding a general instruction sufficient to protect the defendant's right to a fair trial).

n173. See *State v. Tuttle*, 66 N.E. 524, 526 (Ohio 1903) (finding a cautionary instruction improper).

n174. See *State v. Bashaw*, 672 P.2d 48, 48 (Or. 1983) (finding that a cautionary instruction should not be given in rape cases).

n175. See *State v. Farlett*, 490 A.2d 52, 56-57 (R.I. 1985) (rejecting a cautionary instruction).

n176. See *State v. Studham*, 572 P.2d 700, 702 (Utah 1977) (disfavoring a cautionary instruction).

n177. See *Crump v. Commonwealth*, 23 S.E. 760, 761 (Va. 1895) (finding a cautionary instruction itself improper, but finding that the content of the instruction is permissible as an argument to the jury).

n178. See *State v. Wilder*, 486 P.2d 319, 322 (Wash. Ct. App. 1971) (finding proper the lower court's refusal to give a cautionary instruction).

n179. See *Story v. State*, 721 P.2d 1020, 1044-46 (Wyo. 1986) (rejecting a cautionary instruction and prohibiting its use).

n180. See *Morris*, supra note 72, at 156 n.19 (containing cases in each jurisdiction).

n181. In *State v. Vicars*, rather than instructing specifically for rape, the judge instructed the jury:

Consider the importance of your function as jurors. You are the sole judges of the facts. Your decision on these facts is final. Thus, your position is of grave importance in the proper functioning of the court in the administration of justice. Your primary desire must be to reach a fair and just conclusion only from facts and circumstances in evidence. A consideration of facts and circumstances in evidence excludes sympathy or prejudice in reaching a conclusion.

*State v. Vicars*, 299 N.W.2d 421,428 (Neb. 1980) (stating that the jury instruction requested was identical to the instruction given in *Fulton v. State*, 163 Neb. 759, 763 (1957)). Oklahoma courts have also been unwilling to mandate cautionary instructions, especially when testimony is corroborated, although they have not completely banned them. See *Maxwell v. State*, 148 P.2d 214, 219-20 (Okla. Crim. App. 1944). A Tennessee appellate court likewise upheld the trial court's rejection of an instruction that both explained that rape is "hard to disprove" and generally disparaged the complainant's testimony. See *State v. Holcumb*, 643 S.W.2d 336, 343 (Tenn. Crim. App. 1982) (upholding the trial court's rejection of a cautionary instruction).

n182. See *Hamilton v. State*, 58 S.W. 93, 95 (Tex. Crim. App. 1900) (stating that the court "knows of no rule that requires the judge to so instruct [the jury].").

n183. See *Beasley v. State*, 522 S.W.2d 365, 368 (Ark. 1975) (upholding the trial court's refusal to give a cautionary instruction, but finding the choice to give the instruction to be discretionary).

n184. See *State v. Brauneis*, 79 A. 70 (Conn. 1911) (describing the use of a cautionary instruction as discretionary in Connecticut), cited in *Arabian*, supra note 74, at 613.

n185. See *Watkins v. State*, 98 So. 537, 538-39 (Miss. 1923) (holding that the practice of giving cautionary instructions is in the judge's discretion).

n186. Courts in Alabama, Illinois, Kentucky, Michigan, and South Carolina have briefly mentioned the theory behind the cautionary instruction, but have not discussed its use. See *Barnett v. State*, 3 So. 612, 615 (Ala. 1887) (mentioning the cautionary instruction's foundation, but failing to discuss instruction to the jury); *People v. Appleby*, 244 N.E.2d 395, 398 (Ill. App. Ct. 1968) (mentioning the axiom that the accusation of rape is easy to make but difficult to disprove); *Holland v. Commonwealth*, 272 S.W.2d 458, 459 (Ky. Ct. App. 1954) (briefly discussing the cautionary instruction); *People v. Jordan*, 178 N.W.2d 659, 663 (Mich. App. 1970) (briefly mentioning the cautionary instruction); *State v. Floyd*, 177 S.E. 375, 385-86 (S.C. 1934) (touching on the cautionary instruction). Massachusetts, New Jersey, New York, North Carolina, and Vermont courts make no mention of the cautionary instruction; however, these states do not explicitly prohibit its use. See *Arabian*, supra note 74, at 612-14 (discussing the case law in these jurisdiction).

n187. See *Thompson v. State*, 399 A.2d 194, 197-98 (Del. 1979) (holding that because there was no conflict in evidence to cast doubt on victim's credibility, trial court was not required to give cautionary instruction).

n188. See *State v. Dizon*, 390 P.2d 759,770 (Haw. 1964) (allowing cautionary instruction to be given when complainant did not have corroborating evidence of rape).

n189. See *State v. Loomer*, 184 P. 723, 724 (Kan. 1919) (distinguishing the case from cases where Lord Hale's statement that "no case has even gone to the jury upon the sole testimony of the prosecutrix, unsustained by facts and circumstances corroborating it, without the court warning them of the danger of a conviction on such testimony" would be applicable).

n190. See *State v. McFarland*, 369 A.2d 227, 230 (Me. 1977) (approving of trial court's cautionary instruction).

n191. See *State v. Blake*, 305 A.2d 300, 305-06 (N.H. 1973) (finding that, although a cautionary instruction was not mandated, it was appropriate for jury to know weight to be given to uncorroborated testimony).

n192. See *State v. Dodson*, 353 P.2d 364, 365-66 (N.M. 1960) (finding trial judge's refusal to give a cautionary instruction improper); *State v. Clevenger*, 202 P. 687, 689-90 (N.M. 1921) (finding the failure to give a cautionary instruction improper).

n193. See *State v. McPherson*, 371 S.E.2d 333, 337 n.7 (W.Va. 1988) (approving use of a cautionary instruction that cautioned jury to scrutinize uncorroborated testimony).

n194. See *Cobb v. State*, 211 N.W. 785, 789-90 (Wis. 1927) (finding error where the judge failed to give a cautionary instruction and there was no corroborating evidence); *Abaly v. State*, 158 N.W. 308, 309-10 (Wis. 1916) (finding error where the judge failed to give a cautionary instruction and there was no corroborating evidence); *Connors v. State*, 2 N.W. 1143, 1147 (Wis. 1879) (reversing the lower court decision because of failure to give a cautionary instruction).

n195. Genesis 39:14 (King James).

n196. Genesis 39:15 (King James).

n197. See *Torrey*, supra note 16, at 1042.

n198. 4 *Wigmore*, supra note 3, 1135.

n199. *Rennison*, supra note 4, at 2 (reporting results of the study). Sexual assault likely refers to non-penetrative sexual contact. See *Bonnie S. Fischer et al., U.S. Dep't of Justice, The Sexual Victimization of College Women* 17, 23-24 (2000).

n200. *Fischer et al.*, supra note 199, at 23. The survey used detailed, graphic, behaviorally specific screen questions to eliminate the ambiguity of asking the respondent if she had been raped. *Id.* at 5 (describing the survey's methodology). A different study found that 6 percent of first-year female students experienced a sexual assault by force; 12 percent experienced a sexual assault involving alcohol; 15 percent experienced a sexual assault by either force or alcohol; 16 percent experienced sexual intercourse under psychological pressure; 20 percent experienced any nonconsensual sexual penetration; and 9 percent experienced attempted forceful sexual assault. *Colleen Finley & Eric Corty, Rape on Campus: The Prevalence of Sexual Assault While Enrolled in College*, 34 *J.C. Student Dev.* 113, 115 (1993). Other studies have obtained comparable results. For example, a

1993 survey of 3,472 undergraduate and graduate students from 12 schools indicated that approximately 8 percent of women had been raped and approximately 22 percent had been sexually assaulted. Bonnie S. Fischer et al., *Crime in the Ivory Tower: The Level and Sources of Student Victimization*, 36 *Criminology* 671, 683, 691 tbl.1 (1998).

Furthermore, as the Bureau of Justice Statistics study revealed, acquaintance rape is less likely to be reported. See Rennison, *supra* note 4, at 3 ("The closer the relationship between the female victim and the offender, the greater the likelihood that the police would not be told about the rape or sexual assault."). As the vast majority of rapes are acquaintance rapes, it follows that most rapes have a high likelihood of going unreported. Intimate partners (which include current and former spouses, cohabiting partners, boyfriends, and dates) comprise approximately 62 percent of the perpetrators against adult female rape victims. Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women 44 ex.22* (2000). Other relatives and acquaintances comprise another 28 percent of perpetrators. *Id.* Thus, only 17 percent of perpetrators are strangers to their victims. *Id.*

n201. One quarter of the rape victims who reported their attacks to the police delayed reporting for more than 24 hours. National Victim Center, *Rape in America: A Report to the Nation* 5-6 fig.7 (1992). Studies indicate that the greater the prior intimacy between the victim and the attacker, the longer the delay in reporting. Aviva Orenstein, "MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 *Cal. L. Rev.* 159, 201-02 n.158 (1997). Victims who do not report or who delay reporting choose to do so because they fear that no one will believe them, or they may harbor tremendous feelings of embarrassment or guilt about the incident. See Rennison, *supra* note 4, at 3.

n202. See *supra* notes 5, 9 and accompanying text (discussing the type of evidence expected from a rape).

n203. See Linda E. Ledray, U.S. Dept. of Justice, *Sexual Assault Nurse Examiner SANE Development and Operation Guide* 69-70 (1999) (collecting studies). See also Heather Karjane et al., U.S. Dep't of Justice, *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 72 (2002) (reporting that, in most cases, physical evidence outside of the victim's genital area is not present).

n204. Ledray, *supra* note 203, at 69-70. Another Bureau of Justice Statistics study indicated that only 38 percent of female rape victims who sought treatment from a hospital emergency room post-rape suffered from extrinsic physical injury: 33 percent suffered minor injuries, and 5 percent suffered serious injury. See Rennison, *supra* note 4, at 2. These findings are consistent with the findings of injuries among all reported and unreported female rape victims over the age of 12 from 1992 to 2000. *Id.* at 1.

n205. Ledray, *supra* note 203, at 70. One study showed that only 19 percent of the victims had vaginal injuries and that these injuries were always accompanied by the victim complaining of related pain, discomfort or bleeding. Two other studies found, respectively, that 22 out of 83 (27 percent) of rape victims had genital injuries and the second study found that only 1 percent of rape victims had genital injuries that required surgery for repair. *Id.*

n206. Anderson, *Reviving Resistance*, *supra* note 35, at 999; see also Hunter, *supra* note 16, at 127.

n207. See *infra* notes 381-383 and accompanying text (describing acquaintance rape).

n208. Anderson, *Reviving Resistance*, supra note 35, at 994 n.260 (discussing rape evidence in the context of the rape resistance requirement).

n209. Hale, supra note 13, at 636.

n210. After the Civil War, whites often used rape allegations to terrorize the black community and inspire lynchings. The period of Reconstruction after the Civil War in the United States brought with it decades of terror lodged against the black community by white southerners who sought to re-impose slavery. A central mechanism of the terror campaign was lynching. John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 216 (1988) (finding that between 1889 and 1940, at least 3,800 blacks were lynched in former Confederate and bordering states). Lynching was justified by a belief that the "honor and sanctity of white womanhood" needed to be protected from the black rapist. W. Fitzhugh Brundage, *Lynching in the New South* 58 (1993). Despite this justification, most lynchings had little to do with rape. D'Emilio & Freedman, supra, at 217. Between 1882 and 1946, just 23 percent of lynching victims were accused of rape or attempted rape. Bettina Aptheker, *Woman's Legacy* 61 (1982). See also Nat'l Ass'n for the Advancement of Colored People, *Thirty Years of Lynching in the United States 1889-1918* 10 (1919).

n211. See Julie A. Allison & Lawrence S. Wrightsman, *Rape The Misunderstood Crime* 174 (1993) ("It is not an exaggeration to say that in the minds of each of the legal system's operatives - the prosecuting attorney, the defense attorney, the judge, and the jury - the victim is on trial."); see also Lee Madigan & Nancy C. Gamble, *The Second Rape: Society's Continued Betrayal of the Victim* 102 (1989) (reporting the experience of one victim who claimed that she felt like she was the one on trial); Anderson, *From Chastity Requirement to Sexuality License*, supra note 36, at 60.

n212. One reason jurors blame the victim and immunize her assailant from punishment is to preserve the comforting but imaginary notion of a "just world." Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 *Minn. L. Rev.* 395, 409 n.65 (1985). People want to believe that the world is predictable and operates according to a set of rules and that people deserve what they get. Karen S. Calhoun & Ruth M. Townsley, *Attributions of Responsibility for Acquaintance Rape*, in *Acquaintance Rape The Hidden Crime* 61 (Andrea Parrot & Laurie Bechhofer eds., 1991) (arguing that such a belief relates to maintaining physical and emotional well-being).

n213. Anderson, *From Chastity Requirement to Sexuality License*, supra note 36, at 106.

n214. In a 1982 study in which mock jurors heard identical rape scenarios except that (1) the victim was promiscuous; or, (2) the victim was sexually inexperienced; or, (3) nothing about the victim's past sexual history was told, the jurors rated the rape as "most serious when the victim's past was not mentioned, less serious if she had limited experience, and least serious when she was promiscuous." *Id.* at 104-105 (citing study contained in K. L'Armand & A. Pepitone, *Judgements of Rape: A Study of Victim-Rapist Relationship and Victim Sexual History*, 8 *Pers. & Soc. Psychol. Bull.* 135 (1982)).

n215. In a 1999 study, college students were more likely to blame the victim, consider the rapist justified, and label the attack something less than rape when the victim in the rape scenario wore a shorter skirt. *Id.* at 141 (citing study contained in Jane E. Workman & Elizabeth Freeburg, *An Examination of Date Rape, Victim Dress, and Perceiver Variables Within the Context of Attribution Theory*, 41 *Sex Roles* 261 (1999)). A 1991 survey of 500 Americans found that 53 percent of adults over the age of 50 and 31 percent of adults between the age of 35 and 50 believe that a woman is responsible for her rape if she dresses provocatively. *Id.* at 141 n.572 (citing study contained in Helen Benedict, *Virgin or Vamp: How the Press Covers Sex Crimes* 13 (1992)).

n216. See LaFree, *supra* note 3, at 217-18 (explaining that juries were less likely to convict the defendant of rape if the victim engaged in such non-gender conforming behavior as leaving home without a male, hitchhiking, walking outside alone, engaging in sex outside of marriage, working in "disreputable occupations," or engaging in traditionally male activities like riding motorcycles or spending time at bars).

n217. See Kalven & Zeisel, *supra* note 3, at 251 (explaining that juries are more likely to acquit a defendant of rape if the victim engaged in certain behaviors, such as prior sexual relations with defendant, prostitution, or having illegitimate children).

n218. See Kalven & Zeisel, *supra* note 3, at 249 (observing that the jury tends to be lenient on the defendant when it perceives that the complainant has assumed some risk).

n219. LaFree, *supra* note 3, at 226 (internal note omitted).

n220. Calhoun & Townsley, *supra* note 212, at 58-60. As Calhoun and Townsley analogize, no one would suggest acquitting the house thief or the mugger because of the simple negligence of their victims. *Id.* at 60. A similar blaming the victim for his or her contributory negligence or assumption of the risk was discovered in homicide prosecutions involving drag racing accidents or Russian roulette. David P. Bryden & Sonja Lengnick, Rape in the Criminal Justice System, 87 *J. Crim. L. & Criminology* 1298, 1334 (1997) (citing the jury's reaction to Russian roulette and "chicken" reckless driving accidents). Perhaps jurors equate courtship to these games and the "loser" deserves what they got for playing the game and the victor deserves the spoils of not being blamed.

n221. Bryden & Lengnick, *supra* note 220, at 1337 (arguing that contributory negligence on the part of the victim does not equal consent).

n222. *Id.* at 1334. Although, a victim's potentially risky behavior may make her rape more likely, it does not follow that the defendant should not be blamed for his own behavior. Calhoun & Townsley, *supra* note 212, at 60.

n223. See *supra* note 15 and accompanying text (quoting the cautionary instruction under the Model Penal Code).

n224. Sigmund Freud, *Psychopathology of Everyday Life* 203 (A.A. Brill trans., 1901) (finding that a woman does not fight back against a sexual attack because "because a portion of the unconscious feelings of the one attacked meets it with ready acceptance"); see also 1 Helen Deutsch, *The Psychology of Women* 274 (1944) (proposing that women fantasize about attack because of female attraction to suffering).

n225. See Allison & Wrightsman, *supra* note 211, at 207; see, e.g., Note, Corroborating Charges of Rape, 67 *Colum. L. Rev.* 1137 (1967) (rationalizing that "surely the simplest, and perhaps the most important reason not to permit conviction for rape on the uncorroborated word of the prosecutrix is that that word is very often false"); Note, Forcible and Statutory Rape: An Exploration of the Operation of Objectives of the Consent Standard, 62 *Yale. L.J.* 55, 67 (1952) (finding that "a woman's need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feelings which might

arise after willing participation"). For a summary of the psychological literature asserting that women want to be violently sexually possessed, see Menachem Amir, *Pattern of Forcible Rape* 253-57 (1971).

n226. 3 Wigmore, *supra* note 3, 924a. Wigmore's suggestion to judges to protect against the threat of a false accusation was: "No judge should ever let a sex-offence charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." *Id.*

n227. See generally Milton Berger, *Women Beyond Freud: New Concepts of Feminine Psychology* (1994); Nancy Chodorow, *Freud on Women* (1992); Jeffery Moussaieff Masson, *The Assault on Truth: Freud's Suppression of the Seduction Theory* (1984); Eli Sagan, *Freud, Women and Morality: The Psychology of Good and Evil* (1988); Edward Timms & Naomi Segal, *Freud and the Question of Women* (1988).

n228. Borderline, antisocial, histrionic, narcissistic, and compulsive personalities have all been associated with lying. See Charles V. Ford et al., *Lies and Liars: Psychiatric Aspects of Prevarication*, 145 *Amer. J. Psychiatry* 554, 559-60 (1988). Borderline personality disorder, which afflicts approximately 2 percent of the population, may cause individuals to engage in pathological lying. See, e.g., Scott Snyder, *Pseudologia Fantastica in the Borderline Patient*, 143 *Am. J. Psychiatry* 1287 (1987). Antisocial Personality Disorder, which is diagnosed in approximately 3 percent of American males and 1 percent of females, is characterized by a pattern of irresponsible and antisocial behavior that includes repeated lying, using aliases, or conning others, promiscuous activity, as well as cheating, stealing or other criminal behavior. *Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders* 702 (4th ed. 2000).

Histrionic Personality Disorder is characterized by "pervasive and excessive emotionality and attention-seeking behavior," and individuals with it "they often act out a role (e.g., 'victim' or 'princess') in their relationships to others." *Id.* at 712. About two to three percent of people suffer from it, but it is unclear whether men or women suffer from it more often because the diagnosis may be influenced by sex-role stereotyping. *Id.* at 712-13.

Someone with Narcissistic Personality Disorder has "a pervasive pattern of grandiosity, need for admiration, and lack of empathy." *Id.* at 714. It appears that more males than females are diagnosed with this disorder, which affects less than one percent of the general population. *Id.* at 716.

n229. Sedelle Katz & Mary Ann Mazur, *Understanding the Rape Victim* 205-214 (1979). Based on their review of the literature, Katz and Mazur concluded that the frequency of false rape reports is probably small and the myth that women frequently lie is not accurate. *Id.* at 214..

n230. See Brownmiller, *supra* note 16, at 387. Brownmiller's figure was based on remarks by a New York Appellate Division Justice, Lawrence H. Cooke. *Id.* at 444.

n231. See Edward Greer, *The Truth Behind Legal Dominance Feminism's "Two Percent False Rape Claim" Figure*, 33 *Loy. L.A. L. Rev.* 947, 949-51 (2000) (noting that an expansive list of legal scholarship has relied on this 2 percent claim and finding that "as far as can be ascertained, no study has ever been published which sets forth an evidentiary basis for the 'two percent false rape complaint' thesis").

n232. David P. Bryden, *Redefining Rape*, 3 *Buff. Crim. L. Rev.* 317, 377 (2000). He however qualifies his statement in its footnote because "it is unclear whether this is true; the subject is more complex than scholars usually acknowledge." *Id.* at 377 n.221.

n233. Office for Victims of Crime, U.S. Dept. of Justice, *First Response to Victims of Crime* 2001 10 (2001).

n234. Allison & Wrightsman, *supra* note 211, at 10-11.

n235. The FBI Uniform Crime Reports used to report statistics for the amount of unfounded claims filed. See Fed. Bureau of Investigation, *Uniform Crime Reports for the United States* 26 (1997); Fed. Bureau of Investigation, *Uniform Crime Reports for the United States* 24 (1996); Fed. Bureau of Investigation, *Uniform Crime Reports for the United States* 24 (1995). From 1998 on, however, the F.B.I. Uniform Crime Reports have omitted these unfounded rates. See, e.g., Fed. Bureau of Investigation, *Uniform Crime Reports for the United States* (2001).

n236. Rana Sampson, U.S. Dept. of Justice, *Acquaintance Rape of College Students* 9 (2002) (describing "unfounded" claims as both false and baseless claims).

n237. Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 *St. John's L. Rev.* 979, 1010 (1993) (discussing the treatment of unfounded claims).

n238. Michelle Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 *Vill. L. Rev.* 907, 928-31 (2001) (observing that the problem of underreported and ignored rape claims occurs throughout America's major cities).

n239. Sampson, *supra* note 236, at 5 (discussing Justice Department findings).

n240. David Bryden and Sonja Lengnick argue that the benefits a woman receives from a false rape complaint are seemingly "greatly outweighed by the potential adverse consequences of this type of deceit." Bryden & Lengnick, *supra* note 220, at 1298. A false rape charge, however, may provide a "convenient explanation" for an embarrassing affair, a pregnancy, or adultery. Regardless of whether a trend of false rape complaints is prevalent, more false rape reports would not necessarily mean more innocent men convicted because the false accuser could accomplish her goal by just making the claim and not going to trial. Additionally, pre-trial case attrition, police skepticism toward acquaintance rape, prosecutorial reluctance to accept weak cases, victim non-cooperation with prosecutors, and jury reluctance to convict men of acquaintance rape, will keep wrongful rape convictions low. See *id.* at 1299, 1313-14.

n241. Rennison, *supra* note 4, at 1 (finding that under 40 percent of rapes, attempted rapes and sexual assaults are actually reported).

n242. In 2001, for example, only 39 percent of rapes and sexual assaults were reported, as compared to 61 percent of robberies and 59 percent of aggravated assaults. Callie Rennison, Bureau of Justice Statistics, *Criminal Victimization 2001* 10 (2002). Most female college students who have an experience that meets the legal definition of rape might not even define that experience as rape, and so never recount it as such to the authorities. See Fischer et al., *supra* note 200, at 15.

n243. See, e.g., *State v. Hill*, 578 A.2d 370, 380 (N.J. 1990) (noting that prompt complaint requirement "is rooted in sexist notions about how the 'normal' woman responds to rape" and must be rejected in an "attempt to cure the defects underlying the rule that could infect rape proceedings with anti-female bias").

n244. Rodney Hessinger, "The Most Powerful Instrument of College Discipline": Student Disorder and the Growth of Meritocracy in the Colleges of the Early Republic, 39 *Hist. Educ. Q.* 237, 239 (1999).

n245. Michael Griffaton, Note, Forewarned Is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimitizations, 43 *Case W. Res. L. Rev.* 525, 529 (1993) (observing that by avoiding contact with the local police, colleges could create the illusion of a crime-free campus).

n246. Hessinger, *supra* note 244, at 241.

n247. *Id.*

n248. *Id.*

n249. *Id.* Jefferson called the student body before the Board of Visitors to take responsibility for their actions. Before Jefferson, James Madison, James Monroe, and the rest of the Board, Jefferson asked the fourteen students responsible for the fight to step forward and was astonished when his nephew did. *Id.* When both corporal punishment and student self-government came to be viewed as incorrect, Provost Federic Beasley at the University of Pennsylvania proposed the meritocracy as a way to prevent student disorder. *Id.* at 250-51. Competitive grades and class rankings were to convince students to work hard to gain their professors' approval. *Id.* at 251.

n250. See Rosalind Rosenberg, *The Limits of Access: The History of Coeducation in America*, in *Women and Higher Education in American History* 107 (John Mack Faragher & Florence Howe eds., 1988).

n251. *Id.* at 115. See also Carol Lasser, *Beyond Coeducation: Oberlin College and Women's History*, at <http://www.oberlin.edu/external/EOG/womenshist/women.html> (providing information about the history of female students at Oberlin).

n252. Rosenberg, *supra* note 250, at 109.

n253. Bohmer & Parrot, *supra* note 30, at 94 (discussing the advantages of both specific and general disciplinary codes to institutions and their students).

n254. *Id.* at 95 (observing that universities exert less control over students who are not minors).

n255. *Id.* at 96.

n256. *Id.* (arguing that this change resulted in lower expectations from society that universities limit sexual activity).

n257. *Id.* at 8 tbl.1-1.

n258. Committee To Address Sexual Assault at Harvard, *supra* note 33, at 21 (observing that Koss' report created a sense of "urgency" about the problem). Koss' research on sexual assault on campus remains the leading research in the field. But see, e.g. Neil Gilbert, *Advocacy Research Overstates the Incidence of Date and Acquaintance Rape*, in *Current Controversies on Family Violence* 120 (Richard Gelles & Donileen Loseke eds. 1993) (criticizing Koss' research).

n259. Tenerowicz, *supra* note 30, at 658-59 (observing the increased pressure press coverage creates for college administrators).

n260. Swem, *supra* note 30, at 365.

n261. Paul Rosenthal, Note, *Speak Now: The Accused Student's Right To Remain Silent in Public University Disciplinary Proceedings*, 97 *Colum. L. Rev.* 1241, 1247-48 (1997) (finding that the institutional process may afford the victim a "friendlier" atmosphere in which to pursue action).

n262. *Id.* at 1247.

n263. Charlene Muehlenhard & Jennifer L. Schrag, *Nonviolent Sexual Coercion*, in *Acquaintance Rape: The Hidden Crime* 125 (Andrea Parrot & Laurie Bechhofer eds., 1991) ("[A] woman's not consenting to sex is not enough [for a rape conviction] in the eyes of most jurors, especially if the rapist was acquainted with the victim and did not use a weapon."). When a complainant does decide to pursue criminal charges, often the school will put its disciplinary proceedings in abeyance pending resolution of the criminal proceedings.

n264. *Standards of Conduct in the Harvard Community, Faculty of Arts and Sciences: Student Handbook* ch. 4, available at <http://www.registrar.fas.harvard.edu/handbooks/student.2002-2003/chapter4/conduct.html> (last visited Nov. 4, 2002) (outlining the policy on sexual misconduct). It was the first time the school implemented such a policy. Committee To Address Sexual Assault at Harvard, *supra* note 33, at 12.

n265. See *Standards of Conduct in the Harvard Community*, *supra* note 264, available at <http://www.registrar.fas.harvard.edu/handbooks/student.2002-2003/chapter4/conduct.html>.

n266. *Id.*

n267. See *id.* The 1993 statement noted that being intoxicated was not an excuse or a defense to a sexual offense, in that it did "not diminish a student's responsibility in perpetrating rape, sexual assault, or other sexual misconduct." *Id.*

n268. See *id.*

n269. See Office of Civil Rights, Ruling on Title IX Investigation of Harvard's New Sexual Assault Policy 2 (2003). [hereinafter OCR Ruling].

n270. Kate Zernike, Campus Court at Harvard Alters Policy on Evidence, N.Y. Times, May 9, 2002, at A36 (discussing the changes at Harvard College as the result of an increase in baseless claims).

n271. Nancy Traver, A Harvard Policy Under Fire, Chi. Trib., Oct. 23, 2002, at 3C (observing that the seemingly anti-victim policy has produced a backlash against Harvard's administration).

n272. Jessica Vascellaro, Faculty To Revisit Assault Policy, Harvard Crimson Online, April 25, 2003, at <http://www.thecrimson.com/article.aspx?ref=347828>.

n273. Zernike, *supra* note 269, at A36 (discussing the more rigid evidence requirements for accusers in sexual misconduct cases at Harvard).

n274. Marie Szaniszlo, Colleges Caught in Sex-Assault Dilemma, Boston Herald, Oct. 13, 2002, at 1 (reporting that the accused did not appeal the decision, promptly reapplied, was readmitted to Harvard and received his degree retroactively while the complainant's degree remain "in limbo" during her appeal).

n275. Anne Kofol, Burden of Proof, Harvard Crimson Online, June 5, 2003, at <http://www.thecrimson.com/article.aspx?ref=348210> (commenting that the victim had waited almost a year to bring charges to the Board because she had heard of its ineffectiveness).

n276. *Id.* (observing that this case was one of many on which Harvard's Board was unable to make a decision because of uncorroborated evidence)

n277. *Id.* (discussing the wasted manpower spent investigating these claims which ultimately were not resolved).

n278. See *id.* (defending the stricter evidence requirements); see also Zernike, *supra* note 269, at A36 ("Officials feared that the existing procedures had raised expectations [among students]").

n279. The Administrative Board of Harvard College and the Student-Faculty Judicial Board, Faculty of Arts and Sciences: Student Handbook, ch. 4, available at <http://www.registrar.fas.harvard.edu/handbooks/student.2002-2003/chapter4/adboard.html> (last accessed Aug. 17, 2004) (introduction to the Board and the requirements for bringing a claim before the Board). [hereinafter Admin. Board]

n280. *Id.*

n281. The Administrative Board of Harvard College and the Student-Faculty Judicial Board, Faculty of Arts and Sciences: Student Handbook 2002-2003 (on file with the author).

n282. See *id.*

n283. *Id.*

n284. *Id.*

n285. The accused student would be "advised to seek legal counsel," whereas advice to the complainant to obtain legal counsel was seemingly optional. *Id.*

n286. *Id.*

n287. *Id.*

n288. *Id.*

n289. *Id.* at 73-74.

n290. See DuBois, *supra* note 16, at 1089 (discussing the evolution of the prompt complaint requirement); see also Arabian, *supra* note 74, at 585; Friedman, *supra* note 16, at 1367 n.16 (noting the states rejecting the corroboration requirement).

n291. See OCR Ruling, *supra* note 268, at 1. The revisions to sexual assault policy at issue became effective in September 2002.

n292. See *id.* at 1 (alleging that all other types of discrimination complaints among peers are handled differently, through a process that does not have the additional requirement of "sufficient independent corroboration" in order to investigate the allegation).

n293. See *id.* (finding that the students have access to a "prompt and equitable process for resolving their complaints").

n294. See *id.* at 3. "Based on the above [findings], OCR did not find sufficient evidence to establish that the changes to the grievance procedures...deprive students of access to a process providing a prompt and equitable resolution of this complaints." *Id.* Because the policy's requirement of "sufficient independent corroboration" was the same for cases of racial or sexual harassment and assault between peers, the requirement did not impose "additional burdens" on students who filed complaints of peer sexual assault. See *id.* Although different "formal complaint" procedures apply to actions against Harvard faculty and staff, the OCR investigation was concerned with procedures implicated in actions between students. *Id.*

n295. See *id.* (concluding that the new evidence requirements did not limit the students' right to due process

n296. Admin. Board, *supra* note 278.

n297. Marcella Bombardieri & Jenna Russell, School Bends Gender Rules, *Boston Globe*, May 25, 2003, at A31 (writing on various changes across Boston campuses).

n298. Vascellaro, *supra* note 272 (concluding that the latest changes do not make much difference in how sexual misconduct claims are resolved at Harvard).

n299. Zernike, *supra* note 270, at A36 (suggesting that the Harvard procedures do not adequately protect all alleged victims).

n300. Vascellaro, *supra* note 272.

n301. Karjane et al., *supra* note 203, at 72 (determining that the primary investigative tools are interviews with the parties as well as with people the parties had contact with before and after the event).

n302. Muehlenhard & Schrag, *supra* note 263, at 125 ("[A] woman's not consenting to sex is not enough [for a rape conviction] in the eyes of most jurors, especially if the rapist was acquainted with the victim and did not use a weapon.").

n303. Emery, *supra* note 34.

n304. Harvey Silverglate & Josh Gewolb, Rape Charges: It's Time To End "He Said/She Said" Justice, *Chron. Higher Ed.*, Apr. 16, 2002, at 20.

n305. *Id.*

n306. See National Universities: Top Schools, U.S. News & World Report, available at [http://www.usnews.com/usnews/edu/college/rankings/brief/natudoc/tier1/t1natudoc\\_brief.php](http://www.usnews.com/usnews/edu/college/rankings/brief/natudoc/tier1/t1natudoc_brief.php).

n307. See Liberal Arts Colleges: Top Schools, U.S. News & World Report, available at [http://www.usnews.com/usnews/edu/college/rankings/brief/libartco/tier1/t1libartco\\_brief.php](http://www.usnews.com/usnews/edu/college/rankings/brief/libartco/tier1/t1libartco_brief.php).

n308. Amherst College, Brandeis University, Bryn Mawr College, Carnegie Mellon University, Colby College, College of the Holy Cross, Connecticut College, Cornell University, Dartmouth College, Georgetown University, Georgia Institute of Technology, Macalester College, Mount Holyoke College, Pomona College, Rensselaer Polytechnic Institute, Rhodes College, Sarah Lawrence College, Stanford University, Union College, University of California-Irvine, University of California-Los Angeles, University of Chicago, University of

Notre Dame, University of Texas at Austin, Vanderbilt University, Wake Forest, Washington and Lee University, Washington University in St. Louis, Wesleyan University, Whitman College, Yale University.

n309. Boston College, Bowdoin College, Brown University, California Institute of Technology, Carleton College, Case Western Reserve University, Claremont McKenna College, Columbia University, Davidson College, DePauw University, Duke University, Franklin and Marshall College, Gettysburg College, Grinnell College, Hamilton College, Harvard College, Kenyon College, Massachusetts Institute of Technology, Middlebury College, New York University, Northwestern University, Oberlin College, Occidental College, Pennsylvania State University, Pepperdine University, Princeton University, Rice University, Smith College, University of Michigan, University of North Carolina, University of Pennsylvania, University of Virginia, Williams College.

n310. The National Institute of Justice recently surveyed the sexual assault policies of 2,438 institutions of higher learning but did not cite or quote the policies specifically. See generally Karjane et al., *supra* note 203. It found that only 7 in 10 schools mentioned having disciplinary procedures in their sexual assault policies. *Id.* at 105.

n311. See Karjane et al., *supra* note 203, at 308 (describing Harvard's 1993 policy).

n312. See, e.g., Cornell Univ., Policy 6.3, Sexual Assault (2002), <http://www.univco.cornell.edu/policy/SA.html> (last accessed May 24, 2004) (including a section entitled "rights of victims"); Univ. of California-Irvine, University of California Policies Apply to Campus Activities, Organizations, and Students 33 (2002); Univ. of Mich., University of Michigan Sexual Assault Policy (2003), at <http://www.umich.edu/~sapac/umassault.html> (last accessed May 24, 2004) (including procedural rights as well as information about "dignity" and "sense of self").

n313. Occidental College thoroughly explains their commitment to confidentiality and directs students to the right people to report a sexual assault so that the incident can remain confidential. See Occidental Coll., Handbook, Policy on Sexual Assault (2003), at <http://departments.oxy.edu/studentlife/studenthandbook/general.policies/sexual.assault.html> (last accessed May 24, 2004) (clarifying exception to the confidentiality policy, such as those individuals under disclosure obligations).

n314. See, e.g., University of Virginia, Procedures for Sexual Assault Cases, at [http://www.sexualassault.virginia.edu/uva\\_policies.htm#saoptions](http://www.sexualassault.virginia.edu/uva_policies.htm#saoptions) (last accessed May 24, 2004) (detailing the sexual assault victims' procedural options).

n315. For example, see Rhodes Coll., Fraternalization Policy and Sexual Harassment and Assault Policy 6 (2003) (stating that "You are the one who decides whether or not to report a sexual assault. Deciding whether or not to report an assault is one of the steps you will take to regain a sense of control over your life"). Also Whitman College tailors all of the options that a complainant can seek through college discipline to give the complainant the power to decide his or her option. See Whitman Coll., Sexual Misconduct Policy, at [http://www.whitman.edu/academic\\_resources/sex%20miscond.htm](http://www.whitman.edu/academic_resources/sex%20miscond.htm) (last accessed Aug. 17, 2004) (stating that "if the complainant wishes to proceed with a Formal Hearing ...") Carnegie Mellon's sexual assault policy also states that "no disciplinary or other action is taken in such cases without the clear, informed agreement of the individual bringing the charge forward." Carnegie Mellon Univ., Sexual Assault Policy, at <http://www.cmu.edu/policies/documents/Assault.html> (last accessed Aug. 17, 2004).

n316. For example, see Colby Coll., Important Information For the Colby College Community About Sexual Assault 7-9 (2002), and Duke Univ. Dean of Students, Sexual Misconduct Policy, at <http://deanofstudents.studentaffairs.duke.edu/sxmscondt.html> (last accessed Aug. 17, 2004).

n317. For example, the Pepperdine student handbook includes reassuring and informative statements such as, "Rape and assault are never the victim's fault." Seaver Coll., Pepperdine Univ., Student Handbook 42 (2003). Additionally, many institutions provide instruction on seeking medical attention. For example, Pepperdine University states:

Seeking medical help is an important step that should be taken as soon as possible. (The Santa Monica Rape Crisis Center at (310) 319-4000 will arrange a medical examination at no charge.) Victims should not shower, douche, bathe or use mouthwash before receiving a medical examination. Doing so may destroy evidence. If the victim wishes to change clothes, the removed clothes should be saved. All clothing and bed linens should not be washed. Going to the doctor or the Rape Crisis Center does not mean the victim will have to press charges... . The reporting party will not be subject to disciplinary sanction as a result of her or his involvement in the circumstances leading up to the occurrence of a sexual offense.

Id. at 43.

n318. Amherst Coll., Student Handbook 35 (2002).

n319. Ga. Inst. of Tech., Georgia Tech Student Policy on Sexual Harassment and Sexual Misconduct, at [http://www.deanofstudents.gatech.edu/integrity/policies/sexual\\_harrassment.html](http://www.deanofstudents.gatech.edu/integrity/policies/sexual_harrassment.html) (last accessed Aug. 17, 2004). Likewise, Macalester College states, "All victims are encouraged to report the incident immediately to one of the College Grievance Officers (the Assistant Dean of Students for students) or Campus Security. Reporting the incident allows College personnel to assist with providing services for psychological and medical attention, and other available support." Macalester Coll., Student Handbook 47 (2002). Bowdoin College's policy states that reporting as soon as possible benefits a victim's case against the accused because "delayed reporting makes it harder on [the victim] and more difficult to find and convict the attacker." Bowdoin Coll., Student Handbook 65 (2003), <http://www.bowdoin.edu/communications/publications/pdf/studentHandbook.pdf> (last accessed Aug. 17, 2004).

n320. Washington and Lee Univ., Student Handbook 25-26 (2003).

n321. Occidental Coll., *supra* note 312, VI.

n322. Seaver Coll., Pepperdine Univ., *supra* note 316, at 42.

n323. Cal. Inst. of Tech., Caltech Catalog 65 (2003), [http://pr.caltech.edu/catalog/pdf/03\\_04\\_catalog.pdf](http://pr.caltech.edu/catalog/pdf/03_04_catalog.pdf) (last accessed Aug. 17, 2004) (outlining how to file a complaint on campus). Likewise, Smith College's policy states, "There is no established time frame for filing a complaint; however survivors are urged to file a complaint as soon as possible." Smith Coll., Student Handbook, Policies, Procedures & Guidelines: Smith College Sexual Assault Policy, at <http://www.smith.edu/sao/handbook/policies/sexassault.php> (last accessed May 24, 2004). Similarly, Colby College's policy states, "If you have been a victim of unwanted sexual attention or activity, talk to someone immediately. Students are also urged to seek immediate medical attention, including possible counseling. Students are also encouraged to explore the ways in which the matter can be addressed, either

through the disciplinary process on campus, or the criminal process off campus, or both." Colby Coll., *supra* note 315, at 4.

n324. Wake Forest, Student Book 50 (2002). See also Georgetown Univ., Student Handbook (Section 4) 5, at <http://www.georgetown.edu/student-affairs/stconduc/> (last accessed Aug. 17, 2004) ("There is no time limit imposed as to when a formal complaint of misconduct may be initiated against any student currently registered at Georgetown University"); Kenyon Coll., Student Handbook 90 ("There is no statute of limitations for sexual misconduct at Kenyon. A student can bring charges against another student as long as both are currently enrolled in the College"); Sarah Lawrence Coll., Sexual Harassment/Assault 103 (2003) ("There is no deadline for filing complaints, but in order for a hearing to occur both parties must be currently enrolled at the College throughout the hearing process. The College, however, encourages any student who wishes to file a complaint to do so promptly"); Whitman Coll., *supra* note 314 (stating that "any Whitman student may bring charges of sexual misconduct against any other Whitman student at any time").

n325. Columbia University, Sexual Misconduct Policy and Disciplinary Procedure (2004), at <http://www.columbia.edu/cu/sexualmisconduct/univPolicy.html> (last accessed Aug. 17, 2004) (stating that reports must be "timely").

n326. Duke University, *supra* note 315 (applying this policy to all allegations of campus disciplinary code violations, not just sexual assault).

n327. Northwestern Univ., Northwestern University Community Guide: 2003-04 Student Handbook 50 (2003), at [http://www.northwestern.edu/handbook/stud\\_hdbk0304.pdf](http://www.northwestern.edu/handbook/stud_hdbk0304.pdf) (last accessed May 24, 2004) ("To file a complaint against another student ... contact the Sexual Assault Hearing and Appeals System ... as soon as possible, but not later than one year following the incident.").

n328. Stanford Univ., Student Judicial Charter of 1997 IIA, at 3 (2002), <http://www.stanford.edu/dept/vpsa/judicialaffairs/judicialprocess/sjc1997.htm#II-A> (last accessed May 24, 2004).

n329. Wesleyan Univ., The Code of Non-Academic Conduct III.C. (2003), [http://www.wesleyan.edu/acaf/policy/sc\\_non-academic\\_conduct.ctt](http://www.wesleyan.edu/acaf/policy/sc_non-academic_conduct.ctt) (last accessed Aug. 17, 2004) (describing procedure for reporting violations of the code of non-academic conduct).

n330. Note also that a few colleges and universities actually give those who report sexual assault more time to report than those who report other disciplinary infractions. At Claremont McKenna College, student complaints must be filed in 90 days, but complaints for sexual assault may be filed within 180 days. Connecticut College allows one year for sexual complaints as opposed to 45 days for all other complaints. Hamilton College allows two years to file an incident of harassment but increases this to five years for sexual assault. See Claremont McKenna Coll., Claremont McKenna College Basic Rule of Conduct and Judicial Procedures, at <http://dos.claremontmckenna.edu/pdf/BasicRule2002.pdf> (last accessed May 24, 2004); Conn. Coll., Student Handbook 20 (2003); Hamilton Coll., Hamilton College Harassment, Sexual Harassment and Assault Policy, at [http://www.hamilton.edu/college/Student\\_Handbook/2002-2003/HarassmentPolicy.html](http://www.hamilton.edu/college/Student_Handbook/2002-2003/HarassmentPolicy.html) (last accessed May 24, 2004).

n331. Karjane et al., *supra* note 203, at 120. Where it was addressed, 8 in 10 used a "preponderance of evidence" standard. *Id.* Only 3 percent used "beyond a reasonable doubt." *Id.*

n332. See Boston Coll., Student Guide ch. 4, at 66 (2003), [http://www.bc.edu/offices/odsd/meta-elements/pdf/web\\_chapter4\\_policies\\_code\\_conduct.pdf](http://www.bc.edu/offices/odsd/meta-elements/pdf/web_chapter4_policies_code_conduct.pdf) (last accessed May 24, 2004) (requiring a "preponderance of the evidence" standard); Bowdoin Coll., supra note 318, at 69 (explaining that the Sexual Misconduct Board uses a "preponderance of the evidence" or "more likely than not" standard of proof); Claremont McKenna Coll., supra note 329, at 28 app. C (requiring "preponderance of the evidence" for judicial decisions); Conn. Coll., supra note 329, at 23; Dartmouth Coll., Student Handbook 138 (2002), Franklin and Marshall College, College Life Manual 33 (2003), available at [http://www.fandm.edu/collegelife/fandmCollegeLife\\_0304.pdf](http://www.fandm.edu/collegelife/fandmCollegeLife_0304.pdf) (last accessed May 25, 2004); Georgetown Univ., supra note 323, at 27; Mass. Inst. of Tech., Student Discipline at MIT VI.3 (2003), at <http://web.mit.edu/discipline/procedures.html#VI> (last accessed May 25, 2004) (including in the details of a procedural hearing a "preponderance of the evidence" standard); Middlebury Coll., Handbook, Student Conduct, Policies, and Procedures (2003), <http://www.middlebury.edu/handbook/student/> (last accessed May 24, 2004) (stating that the school's judicial boards shall use a "preponderance of the evidence" standard); Oberlin Coll., Student Handbook 237 (2003), at <http://www.oberlin.edu/students/handbook/> (last accessed May 24, 2004) (requiring a "preponderance of the evidence" test for sexual offense hearings); Occidental Coll., supra note 312, VI (using a "preponderance of the evidence" standard); Univ. of California-Irvine, supra note 311, at 11; Univ. of California-Los Angeles, Student Conduct Code 29 (2003); Wesleyan Univ., supra note 328, III.G.9 (using the evidentiary standard of "fair preponderance").

n333. See Cornell Univ., Policy Notebook for Cornell Community tit. 4 art. II.B., at 31 (2002), <http://www.univco.cornell.edu/policy/PN03-04.pdf> (last accessed May 24, 2004) (establishing a standard of "clear and convincing evidence"); Davidson Coll., Student Handbook, Disciplinary Action: Rights and Powers, at [http://www2.davidson.edu/studentlife/handbook/honor\\_stucon.asp#disc\\_action](http://www2.davidson.edu/studentlife/handbook/honor_stucon.asp#disc_action) (last accessed May 24, 2004); Duke Univ., Resolution of Student Conflict & Alleged Violations of University Policy, at <http://deanofstudents.studentaffairs.duke.edu/judicialprocess.html> (last accessed Aug. 17, 2004); Penn. State Univ., Judicial Affairs Training and Reference Manual 6 (2002), [http://www.sa.psu.edu/ja/pdf/disc\\_procedures.pdf](http://www.sa.psu.edu/ja/pdf/disc_procedures.pdf) (last accessed May 24, 2004); Univ. of Penn., Charter of the Student Disciplinary System II.F.5.a (1996), <http://www.upenn.edu/osc/Charter.htm> (last accessed May 24, 2004).

n334. Northwestern Univ., supra note 326 (requiring "sufficient evidence" before the hearing board can find a violation of sexual assault)..

n335. Whitman Coll., supra note 314.

n336. Washington and Lee Univ., supra note 319, at 39 (2003).

n337. See supra notes 25-27 and accompanying text (describing the scandal).

n338. See Foster, supra note 25 (finding that the number of frustrated female victims exceeds fifty); Reid, supra note 25 (describing the investigation of a "spate of new cases")..

n339. See Fong, supra note 26 (describing a television news story reporting that female cadets who reported rape were punished for minor infractions); Hockstader & Reid, supra note 26 (providing examples of female cadets being punished for infractions such as drinking and fraternizing after accusing males of sexual assault).

n340. Lisa Levitt Ryckman, Rape, Betrayal Ruin Cadet's Dream, Rocky Mtn. News, Mar. 1, 2003, at 1A.

n341. Id. (explaining that the cadet also drove Sharon's friends home but dropped Sharon off last).

n342. Id. (describing the circumstances including a poorly lit road and alcohol on the male cadet's breath).

n343. Id.

n344. Id. (reporting that the AFA closed the case almost immediately despite agreeing to investigate).

n345. Julie Jargon, The War Within: As America Prepares To Invade Iraq, Female Air Force Cadets Wage Their Own Battle, Denver Westword, Jan. 30, 2003, at A1 (relating the events leading up to the rape, including the fact that Julie trusted her attacker because he was engaged to be married).

n346. Id. (reporting in detail the evidence Lisa had collected against her attacker). Defense counsel jumped on the fact that Lisa had earlier commented that the attack was as much her fault as her assailant's and that she did not think they had sex. The defense attorneys also claimed that because Lisa was a Catholic and a virgin, she was having regrets about the night in question and made up the accusation. Id. Lastly, they also attacked the fact she could not remember every detail of the incident. Id. Even those on "her side" of the case did not fully represent her interests. Major Vladimir Shifrin, the academy's chief of military justice, stated that the prosecuting attorney represents the AFA and not the victim; therefore, "I would prosecute the case in the best interest of the government, not necessarily the best interest of the victim... ." Id. Lisa also wondered why the prosecution neither brought in experts to talk about post-traumatic stress to rebut the defense's claim about Lisa's selective memory nor focused on the fact that consent is not given when a person is alcohol-impaired under the AFA's sexual assault regulations. Id.

n347. Id. Since August 2001, when General Gilbert became Commandant of the Cadets, the AFA instituted a tough new anti-crime policy. Michael Moss, General's Crackdown Faulted in Rapes, N.Y. Times, Mar. 26, 2003, at A10 (describing a new wave of tougher punishments). The policy in effect voided a previous amnesty program and led to more problems for victims of sexual assault. Every minor infraction that rape victims had engaged in became a shield for those who had attacked them. While General Gilbert cracked down on drug and alcohol use, sexual assaults were rarely investigated or punished. Id. (explaining that rapes increased despite a decline in other crimes because victims were afraid to come forward).

n348. Jargon, supra note 344.

n349. Id.

n350. Id.

n351. Id. (explaining that after an initial hearing, the investigating officer decided against a court martial, instead an administrative hearing would decide the issue of the attacker's discharge).

n352. Dept. of the Air Force, The Report of the Working Group Concerning the Deterrence of and Response to Incidents of Sexual Assault at the U.S. Air Force Academy 22 (2003). (finding, without evidence, that sexual assault victims' expectations may be misled because although alcohol impairment is defined to mean lack of consent, impairment short of intoxication still requires the victim to make non-consent manifest and resist the attack).

n353. U.S. Air Force Acad., Agenda for Change, at <http://www.usafa.af.mil/agenda.cfm> (last accessed May 24, 2004).

n354. See Diana Jean Schemo, Academy Cadet Chief Backs Rape Report Disclosures, N.Y. Times, July 17, 2003, at A16 (describing the latest changes in sexual assault policy at the AFA, coinciding with Gen. Johnny A. Weida's appointment as Commandant of Cadets).

n355. Erin Emery, "False" Confidence Blinded Academy Leader, Denver Post, July 13, 2003, at B06 (quoting rape victim Sharon on the new policy: "There's no way anyone will say they were raped. The reporting will go down ... ." (internal quotations omitted)); see also Karjane et al., supra note 203, at xi (finding that a policy which removes from the victim the ability to make her own informed choice to report "not only reduces reporting rates but may be counter productive to the victim's healing process").

n356. Karjane et al., supra note 203, at 77 (summarizing data from surveys of campus administrators).

n357. Id. (listing school nurses and resident advisors as typical designated mandatory reporters).

n358. Id. (stating that four in five administrators believed a mandatory participation policy deterred victims from reporting).

n359. See id. at 81, 83, 85, 93 (explaining from psychological and practical perspectives why these policies might deter victims from reporting).

n360. Tom Farmer, Alleged Rape Victim: BU Hiding Sex Crimes, Boston Herald, Nov. 28, 2001, at 1 (reporting that the university blamed Kristin for her rape because she was "highly intoxicated and acting promiscuously").

n361. Id. (reporting Kristin's account of her attack).

n362. Id. (adding that the perpetrator used a sexual device from his room to rape her).

n363. Id. (reporting that the university punished Kristin for "propositioning [her attacker] and touching him in a suggestive way"). When Kristin did not appear at her disciplinary hearing, Daryl J. DeLuca, director of Boston University's Judicial Affairs, sent a letter to Kristin, her parents, and other university officials, about the incident and used descriptions and quotes from the incident that were extremely sexually graphic. Id.

n364. Id.

n365. See Tom Farmer, *Student Claims BU Blamed Her for Being Raped*, Boston Herald, May 20, 2002, at 19; Marie Szaniszlo, *Backlash Said to Keep Rapes Under Wraps*, Boston Herald, Apr. 21, 2002, at 17 (using Kristin's case as an example of a broader trend across American universities).

n366. Szaniszlo, *supra* note 364 (reporting that Meghann was punished instead of her attacker).

n367. Tom Farmer, *Alleged BU Rape Victim Cleared of Pot Charges*, Boston Herald, Oct. 16, 2002, at 3 (reporting also that the university imposed mandatory substance abuse counseling).

n368. *Id.* (explaining that the rotating three member board of faculty, administrators and students removed the fine, probation and counseling requirement from Meghann's record).

n369. *Id.* (presenting Meghann's response to Boston University's claim to have insufficient evidence); Farmer, *supra* note 359 (stating Boston University's attorneys claimed that the university had insufficient evidence against Kristin's attacker). Both women filed civil rights complaints against Boston University with the Office of Civil Rights for the U.S. Department of Education. The Office of Civil Rights found, however, that there was not enough evidence to show that BU failed to investigate the complaints fairly or that its "zero tolerance policy on alcohol and drug abuse ... had a chilling effect on the filing of sexual assault complaints." See Alice Dembner, *US Dismisses Rights Complaints Against BU Cases Centered on Rape Charges*, Boston Globe, Apr. 26, 2003, at B2 (finding that that the OCR could not conclude that BU hadn't investigated the complaints fairly but criticizing the university for releasing information about the cases to the media). The Office of Civil Rights explained that, because the university applied its anti-alcohol and drug policy uniformly, the policy was not discriminatory. Tom Mashberg, *BU Cleared in Handling of Student Rape Claims*, Boston Herald, Apr. 26, 2003, at 8.

n370. Ass'n for Student Judicial Affairs, *National Baseline Study on Campus Sexual Assault: Adjudication of Sexual Assault Cases 7* (2000), <http://asja.tamu.edu/news/ASJA%20-%20Baseline%20Study%20Report%20Published.pdf> (last accessed Aug. 17, 2004) (reporting that 15% of institutions surveyed afforded rape victims such immunity, 53% did not, and the remainder did not answer the question). The study did not address other charges against victims who come forward, such as sexual misconduct or having sex in the dorms (which typically are levied at private schools). See *id.*

n371. Bohmer & Parrot, *supra* note 30, at 133-34 (asserting that universities that punish or threaten to punish sexual assault victims for their own drinking discourage victims from reporting assaults altogether).

n372. See *id.* at 134-35 (presenting a typical dialogue between sexual assault victims and campus officials that results in victims blaming themselves or deciding to drop charges).

n373. See Muehlenhard & Schrag, *supra* note 263, at 83 ("People often assume that extenuating circumstances, such as drunkenness of a perpetrator and/or a victim, provide explanations for violent incidents."); see also Bohmer & Parrot, *supra* note 30, at 133-34 (describing how officials can make victims believe that their own drinking negates the crime).

n374. Gretchen Cook, *Campuses May Be Developing New Tactics To Hide Rapes*, *Women's eNews* (May 25, 2003), at <http://www.womensenews.org/article.cfm/dyn/aid/1342/context/archive>.

n375. *Id.* See also Karjane et al., *supra* note 203, at 81 (listing the presence of a campus drug/alcohol policy as a factor affecting victims' decisions on reporting sexual assault).

n376. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241, 1266 (1991) (referring to the "dominant conceptualization of rape as quintessentially black offender/white victim"); Muehlenhard & Schrag, *supra* note 263, at 27 (describing the typical rape myth); Sampson, *supra* note 236, at 9 (admitting that perceptions about rape are improving but asserting that traditional stereotypes still exist); see also Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581, 596 (1990) (critiquing Catharine MacKinnon's "general account" of rape, which involves a black stranger forcing himself on a woman, for forgetting that the victim's race is implicitly white).

Partly as a result of a cultural and media focus on the exceptional, violent, reported cases of black on white rape, fear of stranger rape among college women is much more widespread, although acquaintance rape is much more common. Sampson, *supra* note 236, at 8. College policies may exacerbate that misplaced fear. A recent National Institute of Justice funded study of more than 2,000 institutions of higher learning indicated, "Institutional authorities may (unintentionally) condone victim-blaming (for example, by circulating materials that focus on the victim's responsibility to avoid sexual assault rather than on the perpetrator) ... ." Karjane et al., *supra* note 203, at 83. The study continues: "Target-hardening crime prevention strategies are problematic, as they may inadvertently reinforce stranger-rape myths, overstate the risk of such victimization, and alleviate people's fear of being raped by [sic] sexually assaulted by someone they know." *Id.* at 97 (arguing that colleges and universities should focus on acquaintance rape prevention rather than just stranger rape).

n377. See Muehlenhard & Schrag, *supra* note 263, at 27-32 (presenting four common rape myths that contribute to a belief that "real" rape is not common: "nothing happened," "no harm done," "she wanted it" and "she deserved it").

n378. See Karjane et al., *supra* note 203, at 4-6 (outlining the problems associated with acquaintance rape myths on college campuses); see also Crenshaw, *supra* note 375, at 1267 (complaining of "racist and sexist themes" in "popular discourse and criminal law").

n379. Sampson, *supra* note 236, at 2 (reporting that this statistic is higher than for women of college age who are not in college). See also Muehlenhard & Schrag, *supra* note 263, at 19-20 (citing Mary P. Koss, *Hidden Rape: Incidence, Prevalence, and Descriptive Characteristics of Sexual Aggression and Victimization in a National Sample of College Students*, in 2 *Sexual Assault* 1-25 (Burgess ed., 1988)).

n380. Karjane et al., *supra* note 203, at 4 (adding that most perpetrators are fellow students).

n381. Greenfeld, *supra* note 4, at 11 (reporting results from the first three states to use a new national reporting system: "Victims of rape were about evenly divided between whites and blacks; in about 88% of forcible rapes, the victim and offender were of the same race").

n382. See Bohmer & Parrot, *supra* note 30, at 26 (stating that acquaintance rape, especially date rape, is the most common form of sexual assault on college campuses); see also Karjane et al., *supra* note 203, at 4 (reporting that between 84% and 97.8% of all sexual assaults committed by acquaintances, and campus rapes

often involved classmates, friends, boyfriends, and ex-boyfriends); Sampson, *supra* note 236, at 9 (explaining that contrary to popular belief, the most common campus rape situations involve victims who willingly entered their assailants' rooms after drinking alcohol).

n383. Sampson, *supra* note 236, at 7 ("Almost 60 percent of the completed campus rapes that take place on campus occur in the victim's residence, 31 percent occur in another residence, and 10 percent occur in a fraternity").

n384. *Id.* at 9 (refuting the myth that rape victims are virgins with good reputations who wear conservative clothing and have not previously had sex with their assailants).

n385. See Muehlenhard & Schrag, *supra* note 263, at 3, 116, 125 (explaining that acquaintance rape occurs as a result of nonviolent coercion); Sampson, *supra* note 236, at 9 (explaining that most campus rape situations do not involve a weapon or struggle).

n386. See Muehlenhard & Schrag, *supra* note 263, at 123-25 (describing how perpetrators coerce rape victims without using physical force, often using alcohol instead).

n387. See Karjane et al., *supra* note 203, at 82, 85 (explaining that most acquaintance rape cases lack physical evidence such as bruises, which discourages victims from reporting assault); Sampson, *supra* note 236, at 7, 9 (stating that typical campus rapes usually lack medical evidence and are not reported immediately, and finding further that "only 20% of college rape victims have additional injuries, most often bruises, black eyes, cuts, swelling and chipped teeth").

n388. See Sampson, *supra* note 236, at 7 (implying that most campus rapes do not have witnesses because they occur at the victim's residence or another residence).

n389. See Karjane et al., *supra* note 203, at 84-85 (describing a traditional "boys will be boys" attitude toward acquaintance rape).

n390. See Sampson, *supra* note 236, at 13 (explaining why alcohol often has a significant impact on, though does not cause, acquaintance rape).

n391. Mary P. Koss & John A. Gaines, The Prediction of Sexual Aggression by Alcohol Use, Athletic Participation, and Fraternity Affiliation, 8 *J. Interpersonal Violence* 94, 104-5 (1993) (discussing the results of a study determining the impact of drinking habits, athletic participation, and fraternity membership on a male's sexual aggressiveness).

n392. Crystal S. Mills & Barbara J. Granoff, Date and Acquaintance Rape among a Sample of College Students, 37 *Soc. Work* 504, 507 tbl.5 (1992) (studying date and acquaintance rape among college students).

n393. Sampson, *supra* note 236, at 13 (listing stereotypes about women and drinking as one reason that so many campus rapes involve alcohol).

n394. See *id.* (listing men's use of intoxication to excuse their actions as another reason for the prevalence of alcohol in campus rape cases).

n395. See Bohmer & Parrot, *supra* note 30, at 198 (reporting the statistics in terms of men and women rather than perpetrators and victims); Sampson, *supra* note 236, at 13 (reporting 75 percent of campus rapes involve alcohol use by the assailant, the victim or both).

n396. When the victim and the assailant are both moderately or highly intoxicated, individuals assign the victim significantly more blame and the perpetrator significantly less. Karla J. Stormo et al., *Attributions About Acquaintance Rape: The Role of Alcohol and Individual Differences*, 27 *J. Applied Soc. Psychol.* 279, 299 (1997). However, when the victim was more intoxicated than the perpetrator, the perpetrator was blamed more. Participants may blame the perpetrator in that case because he takes advantage of the victim's intoxication. *Id.*

n397. Sampson, *supra* note 236, at 9 (comparing societal attitudes about stranger rape with attitudes about acquaintance rape).

n398. *Id.* at 4 ("Most offenders are neither confronted nor prosecuted, and colleges are left in the dark about the extent of the problem [of campus rape].").

n399. Griffaton, *supra* note 245, at 532 (discussing administrators' concern for enrollment and alumni donations).

n400. Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), 20 U.S.C. 1092(f) (2004).

n401. Jeanne Clery, a student at Lehigh University, was raped and murdered in her dorm room in 1986. When her parents learned that the crime rate at Lehigh was high - 38 assaults and other violent crimes over a three-year period - they contended that their daughter would never have attended the university had she known of that rate. As a result, they lobbied Congress to pass federal legislation to require colleges to make their sexual crime statistics public. See Mark Fritz, *The Politics of Personal Grieving*, *L.A. Times*, June 3, 1999 at A1 (discussing the Clery's lawsuit against Lehigh).

The Crime Awareness and Campus Security Act was the first federal legislation to require institutions of higher learning that participated in government financial assistance programs to report to the Secretary of Education crimes that occurred on campus. See 20 U.S.C.A. 1092 (West 2003) (historical notes on amendments, citing Student Right-To-Know and Campus Security Act of Nov. 8, 1990, Pub. L. No. 101-542, 204(a), 104 Stat. 2381, 2385-87 (effective Sept. 1, 1991)). In 1992, Congress passed the Clery Act, which added sexual assaults to the list of crimes institutions were required to report. See 20 U.S.C.A. 1092(f) (West 2003) (citing historical notes on amendments, and also citing Higher Education Amendments of 1992, Pub. L. No. 102-325, 486(c), 106 Stat. 448, 621-23 (effective Sept. 1, 1992) (codified at 20 U.S.C. 1092(f)(1)(F))). In 1998, the statute was amended to require that colleges and universities keep a daily log, in plain language, of all crimes reported to campus police departments and to make the log available to the public. See *id.* The Act then became known as the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act").

n402. The Act also requires that institutions include in these reports "a statement of current policies concerning security and access to campus facilities," "a statement of current policies concerning campus law

enforcement," and "a description of programs designed to inform students and employees about the prevention of crimes." *Id.* The information must include "policies for making timely warning reports to members of the campus community" when one of the specific crimes does occur, "policies for preparing the annual disclosure of crime statistics[.]" and a statement of "whether the institution has any policies or procedures that allow victims or witnesses to report crimes on a voluntary, confidential basis for inclusion in the annual disclosure of crime statistics," as well as "a description of these policies and procedures" where they exist. Institutional Security Policies and Crime Statistics, 34 C.F.R. 668.46(b)(2)(i)-(iii) (2002). There is one exception to the timely warning requirement: "An institution is not required to provide a timely warning with respect to crimes reported to a pastoral or professional counselor." *Id.* 668.4(e)(2).

n403. 20 U.S.C. 1092(f)(4)(A) (2003)

n404. *Id.* 1092(f)(4)(A)(i)-(ii).

n405. *Id.* 1092(f)(4)(B)(i). The log must be "for the most recent 60-day period open to public inspection during normal business hours." 34 C.F.R. 668.46(f)(5) (2003). The Clery Act also requires participating colleges and universities to publicize their policies regarding their "campus sexual assault programs, which shall be aimed at prevention of sex offenses; and the procedures followed once a sex offense has occurred." See 20 U.S.C. 1092(f)(8)(A)(i)-(ii). Colleges and universities must also report possible sanctions for committing a sexual assault, disciplinary procedures for sexual assault, and procedures that victims of campus sexual assault should follow. *Id.* 1092(f)(8)(B)(ii). Seventeen states require state colleges and universities to engage in further information gathering and distribution. Karjane et al., *supra* note 203, at tab.3.2.

n406. Karjane et al., *supra* note 203, at viii (reviewing the statistics on campus security and crime reporting laws).

n407. *Id.* at 93 (referring to policies that put the school's image before the immediate needs of the victim as problematic). See also Fritz, *supra* note 400 (observing that "many schools have a long record of opposing anything that might poison their ivy-covered marketing image"); Debbie Goldberg, *Crime on Campus: How Safe Are Students?*, *Wash. Post*, Apr. 10, 1988, at R13 (stating that parents and students may evaluate schools using a combination of traditional criteria, such as courses, faculty, and social activities, and new criteria, like crime).

n408. Sampson, *supra* note 236, at 1.

n409. Bohmer & Parrot, *supra* note 30, at 141 (explaining the growing fear of lawsuits in academia).

n410. *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975) (holding that the State must enforce standards at public colleges consistently with due process); *Dixon v. Alabama*, 294 F.2d 150, 151 (5th Cir. 1961) (holding that students at a public college must receive a hearing before being expelled for misconduct).

n411. Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide To Fair Process for the University Student*, 99 *Colum. L. Rev.* 289, 309 (1999) (describing how efforts to extend due process to private universities have failed). The range of students' procedural rights in disciplinary hearings is beyond the scope of this article. For an interesting assessment of students' rights in university proceedings for academic discipline, see *id.* at 308-309.

n412. Tenerowicz, *supra* note 30, at 656-58 (summarizing courts' use of relaxed contracts approach to resolving these issues in private colleges and universities).

n413. *Id.* at 675 (adding that "few courts have been willing to require that private schools afford students the [due process] provided [to] public university students"). There has also been a traditional distinction between academic and disciplinary matters in terms of the process due. Academic violations require no notice and opportunity to be heard, whereas disciplinary violations require notice and an opportunity to be heard. See Swem, *supra* note 30, at 364; see also Dutile, *supra* note 30, at 243 ("Academic sanctions have occasioned greater deference from the courts").

n414. 424 N.Y.S.2d 89, 90 (N.Y. Sup. Ct. 1980) (seeking review of college's decision to expel the student).

n415. *Id.*

n416. *Id.* at 91 (quoting judicial process section of code of student conduct at SUNY).

n417. *Id.* (conceding that a dean served on both committees).

n418. See *id.* at 91 (holding that requirement of impartiality in disciplinary proceedings and appeals is necessary to make hearing fair, and that having same person on both committees violated fairness).

n419. *Id.* (citing *Hupart v. Bd. of Higher Ed. of N.Y.*, 420 F. Supp. 1087, 1107 (S.D.N.Y. 1976)).

n420. See *id.* at 92 (ordering that a new hearing take place in front of a properly constituted council).

n421. *Fellheimer v. Middlebury College*, 869 F. Supp. 238, 240 (D. Vt. 1994). Although criminal charges were also filed with the state, Vermont eventually dropped the charges. See *id.* at 240. After *Fellheimer* was suspended, he appealed his suspension to the Judicial Review Board, but the suspension was upheld. *Id.* at 241-42.

n422. *Id.* at 241. *Fellheimer* claimed to be unaware that "rape" and "disrespect of persons" were two separate charges, he thought instead that "disrespect of persons" was the provision under which "rape" was categorized. *Id.* at 246. Further, the confirmation form confirming the judicial hearing that was sent to *Fellheimer* referred to "Rape/Disrespect of Persons," but gave no indication that those were actually two separate and distinct charges. *Id.* at 245. The state of Vermont refused to prosecute and the college disciplinary board found *Fellheimer* not guilty of rape, which was the original charge. *Id.* at 241.

n423. *Id.* at 245.

n424. *Id.* at 242 (citing *Merrow v. Goldberg*, 672 F. Supp. 766, 774 (D. Vt. 1987)).

n425. *Id.* at 246.

n426. *Id.* The court stated:

Fellheimer defended, successfully, against a charge of rape or sexual assault. He was never told that he was being charged with a separate offense of disrespect of persons, or what conduct, if proven at the hearing, would constitute that offense. As such, it was impossible for him to defend against that charge.

*Id.* at 246-47.

n427. 20 U.S.C. 1681(a) (2004).

n428. Verna L. Williams & Deborah L. Brake, *When a Kiss Isn't Just a Kiss: Title IX and Student-to-Student Harassment*, 30 *Creighton L. Rev.* 423, 424 (1997) (describing the "disarray in the courts' over application of Title IX to student-to-student harassment).

n429. See *id.* at 424-25 (discussing three federal cases that have received differing treatment); see also Timothy Davis & Tonya Parker, *Student-Athlete Sexual Violence Against Women: Defining the Limits of Institutional Responsibility*, 55 *Wash. & Lee L. Rev.* 55, 106 (1998) (describing the "overwhelming judicial precedent" for a cause of action under Title IX against institutions for sexual harassment by student athletes).

n430. U.S. Air Force Acad., *supra* note 352.

n431. Karjane et al., *supra* note 203, at 77 (identifying the source of the requirements as institutional policies, prosecutorial policies, and state statutes).

n432. *Id.* at 120 (finding that 8 of 10 schools in which the burden of proof is mentioned apply a "preponderance of the evidence" standard, while less than 3 percent apply a standard of "beyond a reasonable doubt").

n433. See Ass'n for Student Judicial Affairs, *supra* note 368, <http://asja.tamu.edu/news/ASJA%20-%20Baseline%20Study%20Report%20Published.pdf>.

n434. See *supra* notes 385-387 and accompanying text.

n435. *Black's Law Dictionary* 1201 (7th ed. 1999).

n436. *Id.* at 577.

n437. S.D. Codified Laws 23A-22-15.1 (Michie 2003).

n438. 18 Pa. Const. Stat. Ann. 3106 (West 2002). Colorado's criminal code perhaps goes the furthest, stating:

In any criminal prosecution [for sexual assault, unlawful sexual contact, sexual assault on a child, or attempt of these crimes], the jury shall not be instructed to examine with caution the testimony of the victim solely because of the nature of the charge, nor shall the jury be instructed that such a charge is easy to make but difficult to defend against, nor shall any similar instruction be given. However, the jury shall be instructed not to allow gender bias or any kind of prejudice based upon gender to influence the decision of the jury.

Colo. Rev. Stat. Ann. 18-3-408 (West 2002). Colorado courts have held that this statute is constitutional and allowed the following jury instructions to be issued. In *People v. Fierro*, the Supreme Court of Colorado stated that the prohibition of the traditional cautionary instruction for rape cases does not deprive the defendant of "any right of constitutional dimensions, particularly in light of the fact that the jury in this case was correctly instructed concerning its duty to examine the credibility of each witness who testified at trial." 606 P.2d 1291, 1295 (Colo. 1980) (internal citation omitted). The applicable jury instruction on gender bias in Colorado is: "You are not to allow bias or prejudice, including gender bias, or any kind of prejudice based upon gender, to influence your decisions in this case." Colo. Jury Instructions: Criminal ch. 12(14) (1993).

n439. Summary Report of Psychological Counseling Services for Danielle Bauer from Dr. Joanne Armstrong 1 (May 16, 2003) (including Horry County SAT Scholarship, Elks "Most Valuable Student" Scholarship, National Honor Society Scholarship, Prudential Spirit of Community Honors, and the Palmetto Fellows Scholarship, which is South Carolina's most rigorous and competitive scholarship program) (on file with author) [hereinafter Summary Report]. Danielle Bauer disclosed her experiences to me and agreed to have me recount her story herein. Telephone Interview with Danielle Bauer, sophomore student at Erskine College (March 2, 2004) (notes on file with author) [hereinafter Telephone Interview].

n440. Telephone Interview, *supra* note 438.

n441. *Id.*

n442. *Id.*

n443. Summary Report, *supra* note 438, at 1.

n444. *Id.*

n445. *Id.*

n446. Telephone Interview, *supra* note 438.

n447. *Id.*

n448. *Id.*

n449. Id.

n450. Letter from John Wingard, Chairman of the Erskine College Discipline and Appeals Committee, to Danielle Bauer (Aug. 12, 2003) (on file with author). Sexual misconduct "is defined as conduct that is "detrimental to the spiritual, physical, emotional, or moral well-being of members of the Erskine College Community.'" Id.

n451. Id. Wingard informed Danielle in writing that the appeals committee affirmed the finding that she was guilty of sexual misconduct. He opined that "it is our hope and prayer that this very trying experience will result ultimately in your growth in grace." Id.

n452. Letter from John Carson, President of Erskine College, to Danielle Bauer (Oct. 14, 2003) (on file with author) [hereinafter Letter from John Carson].

n453. Id.

n454. Id.

n455. Id.

n456. Id.

n457. Jargon, *supra* note 344 (quoting Air Force Brigadier General Gilbert).

n458. Farmer, *supra* note 359, at 1.

n459. Letter from John Carson, *supra* note 451.