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COMMENT

PAVED WITH GOOD INTENTIONS: TITLE IX CAMPUS SEXUAL ASSAULT PROCEEDINGS AND THE CREATION OF ADMISSIBLE VICTIM STATEMENTS

SARA F. DUDLEY*

INTRODUCTION

[D]etective[s] will tell you and the prosecutors will tell you that in a lot of cases the difference between holding someone accountable sometimes has more to do with how the victim is interviewed than the underlying facts of the case.¹

Victim statements are crucial pieces of evidence in a criminal sexual assault investigation and subsequent prosecution.² When the survivor³ is

* Associate Editor, Golden Gate University Law Review, Volume 46; J.D. Candidate, May 2016, Golden Gate University School of Law. I am astounded and appreciative beyond words to the professionals who permitted me to interview them at length and provided me with introductions to their colleagues. I appreciate the hard work of the members of the Golden Gate University Law Review in reviewing and editing this Comment. Finally, thank you to my faculty mentors, Professors Wes Porter and Helen Kang, for their insight, guidance, and assistance. Any errors or omissions contained within are entirely the fault of the Author.

¹ *Majority Roundtable on Campus Sexual Assault: The Admin. Process & the Criminal Justice System Before the Subcomm. on Fin. & Contracting Oversight, Comm. on Homeland Sec. & Governmental Affairs*, 113th Cong. 14 (2014), <http://www.hsgac.senate.gov/download/?id=835D1CA9-5D55-4A86-BEEA-EC2D57289D42> [hereinafter *Roundtable*] (statement of Sen. Claire McCaskill, Chairman, Subcomm. on Fin. & Contracting Oversight).

² See *infra* Part III(A).

³ Historically, those who survived a sexual assault were termed “victims.” Recently, sexual assault advocates have begun using the term “survivor” instead, to emphasize the person’s resilience in surviving the assault. See, e.g., Jon Bird, *People Who’ve Been Raped Are Survivors Not Just Victims*, *John Humphrys*, THE GUARDIAN: OPINION (Dec. 22, 2014), <http://www.theguardian.com/commentisfree/2014/dec/22/people-raped-survivors-not-just-victims>. However, the term “victim” has legal significance in a criminal proceeding, and on campus, anyone who files a Title IX com-

assaulted on a college campus, victim interviews may occur there, as campuses are required to comply with Title IX of the Educational Amendments Act of 1972 (“Title IX”).⁴ Title IX requires that schools promptly respond to allegations of sexual assault by investigating allegations and holding disciplinary hearings.⁵ Title IX’s role in maintaining a safe learning environment is critically important for many female students, as studies have found that nearly one in five undergraduate women (twenty percent) survive an attempted or completed sexual assault on campus.⁶

However, investigators and adjudicators in campus Title IX proceedings are not required to have specific training with regard to interviewing survivors of sexual trauma.⁷ Furthermore, due to the unique context in which a sexual assault occurs, survivors may omit or falsify information when interviewed. This is significant because without understanding the trauma issues inherent in a campus sexual assault, Title IX investigations can produce inaccurate or inconsistent victim statements. These statements can be used to impeach the victim during the course of a future criminal prosecution and result in a retraumatized victim who is unwilling to cooperate with law enforcement.

Failing to account for trauma in the interview process is contributing to the lack of criminal convictions for rape in the United States. Research published in 2012 concluded that of 100 rapes committed, only five to twenty percent are reported to police, 0.4 to 5.4 percent of those reports are prosecuted, 0.2 to 5.2 percent of perpetrators are convicted, and of those convicted, only .02 to 2.28 percent are incarcerated.⁸ Put simply,

plaint is termed a “complainant.” For the purposes of this Comment, the term “survivor” will be used whenever practical, and “victim” and “complainant” used where appropriate in those respective contexts.

⁴ 20 U.S.C.A § 1681 *et seq.* (West, Westlaw through Pub. L. No. 114-61 (excluding Pub. L. No. 114-52, 114-54, 114-59, and 114-60)).

⁵ See generally RUSSELYN ALI, U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter 2011 DEAR COLLEAGUE LETTER].

⁶ CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 5-3 (BiblioGov Project 2015 ed.) (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (finding that 19% of respondents survived an attempted or completed sexual assault); see also WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 6 (2014), http://www.whitehouse.gov/sites/default/files/docs/report_0.pdf [hereinafter WHITE HOUSE FIRST REPORT] (citing the Krebs study); BONNIE S. FISHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10 (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

⁷ See WHITE HOUSE FIRST REPORT, *supra* note 6, at 3 (discussing the need for sexual assault trauma-informed training on college campuses).

⁸ Kimberly A. Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 157 (2012); see also Statement from Nancy Chi Cantalupo, *Majority Roundtable on Campus Sexual*

“[w]hen an individual is raped in this country, more than 90 percent of the time the rapist gets away with the crime.”⁹

Evidence also suggests that assaults originating on campus are no more likely to result in criminal convictions than sexual assaults reported in the general public. A “2011 study conducted by the *Chicago Tribune* found that of 171 sex crimes investigated by police involving student victims at six Midwestern universities over a five year period, only 12 arrests (7%) were made and only four convictions (2.3%) resulted.”¹⁰ Failing to detect and incarcerate campus offenders early in their criminal careers places the public at risk. Researchers now recognize that perpetrators of sexual violence are recidivist offenders, whose behaviors become increasingly obsessive and entrenched.¹¹

This Comment argues that campuses should, in the course of their Title IX proceedings, ensure that anyone who takes a potentially admissible statement from a survivor has received trauma-informed interview training. Trauma-informed interviewing acknowledges the physiological effect of trauma on survivors, the impact that it can have on their ability to recall facts and details, and the limits and possibilities of obtaining information from such witnesses. In addition, campuses should limit the number of individuals who take statements from survivors and record the victim’s statements. These improvements will create statements of higher evidentiary quality. It will also mitigate the emotional harm to survivors, helping to ensure their continued cooperation with prosecutors and law enforcement. To understand the process of investigating Title IX complaints and how the procedures that started on campus can impact a future criminal investigation, experts on both sides of the “ivory tower”

Assault: The Admin. Process & the Criminal Justice System Before the Subcomm. on Fin. & Contracting Oversight, Comm. on Homeland Sec. & Governmental Affairs 6-7 (2014), <http://www.hsgac.senate.gov/subcommittees/fco/hearings/roundtable-campus-sexual-assault-the-administrative-process-and-the-criminal-justice-system> (follow hyperlink to “Statement from Nancy Chi Cantalupo”) (citing the Lonsway & Archambault study for the proposition that the failure to incarcerate offenders demotivates campus victims from reporting to police).

⁹ JON KRAKAUER, *MISSOULA* 110 (2015) (discussing the Lonsway & Archambault study).

¹⁰ Cantalupo, *supra* note 8, at 7 (emphasis omitted).

¹¹ A ground-breaking study of 1,882 undergraduate men, who had never been criminally charged with a sex crime, revealed that 120 of them admitted to behaviors consistent with rape/attempted rape. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 *VIOLENCE & VICTIMS* 73, 78 (2002). The majority of these perpetrators (63.3% or 76 individuals) were repeat offenders, averaging nearly six rapes/attempted rapes each. *Id.* Therefore, Lisak & Miller conclude, these 76 individuals alone were responsible for 439 acts of sexual violence on campus. *Id.* at 80; *see also* KRAKAUER, *supra* note 9, at 116-19 (discussing and analyzing the Lisak & Miller study). In Jon Krakauer’s interview of David Lisak for his book, *MISSOULA*, Mr. Lisak reiterated the threat that “undetected” campus rapists pose to the public, because their violent behaviors become obsessive and entrenched. Having escaped detention on campus, Mr. Lisak asserts, they will continue to offend and even hone their skills in targeting individuals and committing the assaults. KRAKAUER, *supra* note 9, at 122.

were interviewed, including law enforcement officers, prosecutors, and an expert in Title IX jurisprudence.

Part I describes the research methodology utilized, the process of finding and interviewing the research subjects selected, and the research subjects' credentials. Part II reviews Title IX disciplinary proceedings and applicable laws. Part III explains a typical interview process, and how it does not account for the trauma inherent in sexual assault or the unique context in which a campus sexual assault occurs. This creates admissible statements of dubious value and quality, which can be used to impeach a victim in a future criminal case. Part IV outlines a new way forward, which allows survivors to participate in the campus disciplinary process while mitigating the harm to both to themselves and to a future criminal prosecution. Here, advances in trauma-informed interviewing, the need to mandate such training for all personnel who conduct a Title IX proceeding on campus, and the necessity of accurately documenting the survivor's statement, are explored. In addition, recent federal actions that support trauma-informed interview practices as a necessary component of Title IX compliance are described.

I. METHODOLOGY

The interviewees cited in this Comment are three members of law enforcement, three state prosecutors, and a law professor whose research focuses on victim's rights and Title IX proceedings. Although this is a limited pool of subjects, all of the interviewees are highly qualified experts with deep knowledge of the field. All three original interviewees were public participants in Senator Claire McCaskill's roundtable on campus sexual assault.¹² These interviewees referred me to three colleagues, who I subsequently interviewed. One interviewee was referred to me by an acquaintance. All of the initial interviews were conducted over the phone from November 2014 to February 2015. When necessary, follow-up questioning was conducted by phone and email. All interviewees were given the option to remain anonymous, which Deputy District Attorney (DDA #1) choose to do. A list of questions were prepared prior to each interview. Many questions were asked of all the interviewees so that their answers could be compared. Beyond the prepared questions, interviewees were allowed to share any information that they felt relevant and responsive. The interviews were not audio recorded. Statements in quotations are direct quotes as transcribed by the Author at the time of the interview. All interview notes are in the Author's files.

¹² Roundtable, *supra* note 1.

David Martin is the Senior Deputy Prosecutor at the King's County Domestic Violence Unit in Seattle, Washington.¹³ Mr. Martin is a member of the American Bar Association's Commission on Domestic Violence and is a recipient of the Prosecuting Attorney's Outstanding Trial Advocacy award.¹⁴ Katharina Booth is the Chief Trial Deputy in the Sex Assault/Domestic Violence Unit in Boulder, Colorado.¹⁵ She was also a participant in Senator Claire McCaskill's third roundtable on campus sexual assault.¹⁶ DDA #1 is a 16-year veteran of a prosecutor's office in the San Francisco Bay Area, including four years in the sex crimes division. Nancy Chi Cantalupo is a law professor at the Georgetown University Law Center. Her numerous scholarly publications focus on Title IX and institutional responses to campus sexual assault.¹⁷ Ms. Cantalupo was also a participant in Senator Claire McCaskill's third roundtable on campus sexual assault.¹⁸ Carrie Hull is a detective with the Ashland, Oregon Police Department and participated in Senator Claire McCaskill's third roundtable on campus sexual assault.¹⁹ Detective Hull is a founder of the "You Have Options" campus sexual assault reporting program.²⁰ Randall Carroll is the retired Chief of Police for Bellingham, Washington. As a member of the Policy Center at the International Association of Chiefs of Police ("IACP"), he and his colleagues drafted several "best practice" guidelines for sex crime investigations. Mr. Carroll provides consulting services to communities and law enforcement organizations on police culture and practices.²¹ Steve Bellshaw is the Deputy Chief of Police for Salem, Oregon. Deputy Chief Bellshaw serves on the Oregon Attorney General's Sexual Assault Task Force.²² Deputy Chief Bellshaw is an instructor for the Sexual Assault Training Institute and the IACP,

¹³ *Domestic Violence Commission - Biographies*, AMERICAN BAR ASS'N, http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/biographies/David%20Martin.authcheckdam.pdf (last visited Feb. 25, 2016).

¹⁴ *Id.*

¹⁵ *Staff Contact List*, BOULDER COUNTY, <http://www.bouldercounty.org/doc/da/dacontacts.pdf> (last visited Feb. 25, 2016).

¹⁶ *Roundtable*, *supra* note 1.

¹⁷ *Our Faculty: Nancy Chi Cantalupo*, GEORGETOWN LAW, <http://www.law.georgetown.edu/faculty/cantalupo-nancy-chi.cfm> (last visited Feb. 25, 2016).

¹⁸ *Roundtable*, *supra* note 1.

¹⁹ *Id.*

²⁰ Katie Van Syckle, *The Tiny Police Department in Southern Oregon That Plans to End Campus Rape*, NY MAGAZINE: THE CUT (Nov. 9, 2014), <http://nymag.com/thecut/2014/11/can-this-police-department-help-end-campus-rape.html> (discussing Detective Hull's role in You Have Options); *You Have Options Sexual Assault Reporting Program*, CITY OF ASHLAND, <http://www.ashland.or.us/Page.asp?NavID=15331> (last visited Feb. 19, 2016).

²¹ PROFECTUS CONSULTING SERVICES, <http://www.profectusconsulting.com/> (last visited Feb. 19, 2016).

²² *Author Biography: Steve Bellshaw*, THOMSON REUTERS, <http://legalsolutions.thomsonreuters.com/law-products/productAuthorsBio/100008343> (last visited Feb. 25, 2016).

providing training to law enforcement officials on sex crime investigations.²³

II. THE FEDERAL REGULATION OF CAMPUS SEXUAL VIOLENCE: TITLE IX

Title IX states that “[n]o 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.”²⁴ Title IX recognizes that gender-based discrimination can adversely impact a student’s performance at school and in extracurricular activities, and therefore can prevent victims from receiving the benefits of their publicly funded education.²⁵ Schools are required to prevent sexual harassment, stop its recurrence, and remedy its effects on the complainant, particularly the effect on his or her education.²⁶ Investigating allegations of sexual violence and holding disciplinary hearings to assign responsibility are critical steps in this process.

The Office of Civil Rights (“OCR”), a division of the Department of Education (“DOE”),²⁷ and the Civil Rights Division of the Department of Justice (“DOJ”), are responsible for Title IX enforcement.²⁸ Title IX regulations²⁹ and guidance documents from the OCR³⁰ are the primary sources of administrative law regulating campus sexual assault.

²³ Int’l Ass’n of Chiefs of Police, *Speaker List*, IACP 2015, <http://72.32.1.225/iacp2015/Public/SpeakerDetails.aspx?FromPage=speakers.aspx&ContactID=18207> (last visited Feb. 25, 2016).

²⁴ 20 U.S.C.A § 1681(a) (West, Westlaw through Pub. L. No. 114-61 (excluding Pub. L. No. 114-52, 114-54, 114-59, and 114-60)).

²⁵ See generally Cantalupo, *supra* note 8, at 2-5 (discussing school’s responsibility to remedy the negative impacts to complainant’s education). Negative educational consequences for the survivor can include “declines in educational performance, the need to take time off, declines in grades, dropping out of school, and transferring schools.” *Id.* at 3.

²⁶ 2011 DEAR COLLEAGUE LETTER, *supra* note 5, at 15-17 (discussing the school’s obligation to remedy the effects of sexual violence). With its emphasis on remedying the effects of victimization on the survivor’s education, Title IX’s purpose varies sharply with the criminal justice system whose focus is on punishing offenders. See generally Cantalupo, *supra* note 8. Therefore, Ms. Cantalupo urges, legislators and the public should not “conflat[e] and confus[e]” the role and purpose of Title IX and that of the criminal justice system. *Id.* at 2.

²⁷ *About OCR*, DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last visited Feb. 25, 2016).

²⁸ WHITE HOUSE FIRST REPORT, *supra* note 6, at 5 (Department of Justice shares authority with the Department of Education for enforcing Title IX).

²⁹ 34 C.F.R. § 106 *et seq.* (2015).

³⁰ Periodically, the OCR releases “significant guidance documents” on the topic of campus sexual assault. Three of the most cited, definitive, and relevant are CATHERINE E. LHAMON, U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [hereinafter 2014 TITLE IX Q&A]; 2011 DEAR COLLEAGUE LETTER, *supra* note 5; and U.S. DEP’T OF

Title IX applies to every educational institution that receives federal funding, from elementary to graduate schools.³¹ The focus of this Comment is on post-secondary institutions of higher education (“campus,” “college,” or “school”) and conduct between adult students.

A. CONDUCT COVERED BY TITLE IX INCLUDES SEX CRIMES

The OCR defines sexual violence as “rape, sexual assault, sexual battery, and sexual coercion.”³² The OCR further states that “[a]ll such acts of sexual violence are forms of sexual harassment covered under Title IX.”³³ There is considerable overlap between Title IX sexual violence and sex crimes that are prosecuted in criminal court. The OCR and the DOJ jointly define sex crimes as “sexual acts that are considered criminal by a specific local, state, federal, or tribal jurisdiction” including “rape, sexual assault, and sexual battery.”³⁴ Conduct that is actionable as both sexual violence under Title IX and as a sex crime in a local jurisdiction is the focus of this Comment.³⁵

B. TITLE IX’S PROMPTNESS REQUIREMENT INCREASES THE LIKELIHOOD THAT VICTIM STATEMENTS WILL BE TAKEN ON CAMPUS PRIOR TO, OR CONCURRENTLY WITH, A LAW ENFORCEMENT INVESTIGATION

Title IX guidance mandates that school officials’ responses be “prompt and equitable” when they have notice that sexual harassment has occurred.³⁶ Notice can come from any source, including the survivor, a witness, a Title IX responsible employee,³⁷ or a Clery Act campus se-

EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), <http://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf> [hereinafter 2001 SEXUAL HARASSMENT GUIDANCE].

³¹ 20 U.S.C.A § 1681(c) (West, Westlaw through Pub. L. No. 114-61 (excluding Pub. L. No. 114-52, 114-54, 114-59, and 114-60)).

³² 2011 DEAR COLLEAGUE LETTER, *supra* note 5, at 1-2.

³³ *Id.* at 2.

³⁴ OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUSTICE ET AL., NCJ 240177, PROMOTING EFFECTIVE CRIMINAL INVESTIGATIONS OF CAMPUS SEX CRIMES 4 (2012), <http://www.ovc.gov/pdf/CampusSexCrimesReport.pdf>. [hereinafter DOJ ET AL., PROMOTING EFFECTIVE CRIMINAL INVESTIGATIONS].

³⁵ Unless otherwise specified, the terms “campus sexual assault,” “sexual harassment,” and “sexual violence” are used interchangeably and refer to this category of conduct.

³⁶ 2011 DEAR COLLEAGUE LETTER, *supra* note 5, at 9.

³⁷ 2014 TITLE IX Q&A, *supra* note 30, at 15 (discussing the role of a Title IX responsible employee).

curity authority (“CSA”).³⁸ Responsible employees include any school employee “who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence . . . to the Title IX coordinator . . . or whom a student could reasonably believe has this authority or duty.”³⁹ Regulations under the Clery Act⁴⁰ contain a similar provision for mandated reporters, termed CSAs.⁴¹ CSAs include campus security personnel, individuals who have “significant responsibility for student and campus activities,” or anyone that the school specifically designates as a CSA.⁴²

The OCR believes that a Title IX investigation typically takes sixty days.⁴³ Failure to resolve a complaint within that timeframe, without justification, suggests that a school is not responding promptly as required. A school must conduct a Title IX investigation even when police are engaged in a parallel investigation.⁴⁴ The school is permitted only to temporarily delay its Title IX proceedings during the course of a police investigation, but then must promptly resume and complete its own factfinding investigation.⁴⁵ This emphasis on a prompt response without delay is consistent with Title IX’s focus on providing closure with minimal disruption to the students’ education. In contrast, the criminal justice system does not proffer a timeframe in which a case must be concluded, although once formal charges are brought, the accused has a right to a speedy trial.⁴⁶ Therefore, it is likely that a Title IX campus proceeding, which includes gathering and presenting the survivor’s testimony, will occur prior to a concluded criminal prosecution.⁴⁷

³⁸ 34 CFR § 668.46(a)(i)-(iv) (defining campus security authority); The Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act, 20 U.S.C.A. § 1092(f) (West, Westlaw through Pub. L. No. 114-61 (excluding Pub. L. No. 114-52, 114-54, 114-59, and 114-60)).

³⁹ 2014 TITLE IX Q&A, *supra* note 30, at 15; *see also* WHITE HOUSE TASK FORCE ON WOMEN & GIRLS, INTERSECTION BETWEEN TITLE IX AND THE CLERY ACT 3-4, <https://www.notalone.gov/assets/ferpa-clerychart.pdf> (last visited Nov. 6, 2015) (describing the role of a Title IX responsible employee and the comparable duties of a Clery Act campus security authority).

⁴⁰ 34 CFR 668.46(a)(i)-(iv).

⁴¹ *Id.*; *see also* U.S. DEP’T OF EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 74-77 (2001), <https://www2.ed.gov/admins/lead/safety/handbook.pdf> (discussing the role of campus security authorities).

⁴² U.S. DEP’T OF EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, *supra* note 41, at 75.

⁴³ 2011 DEAR COLLEAGUE LETTER, *supra* note 5, at 12.

⁴⁴ *Id.* at 10.

⁴⁵ *Id.*

⁴⁶ U.S. CONST. amend. VI.

⁴⁷ *See* CAROL BOHMER & ANDREA PARROT, SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION 236 (1993) (noting that it could take a year for a case to conclude, should the survivor choose to report the crime and cooperate in a criminal investigation.).

C. EQUITABLE TITLE IX DISCIPLINARY PROCEEDINGS

In addition to being prompt, Title IX proceedings must also be equitable;⁴⁸ however, the OCR vests schools with wide discretion regarding the format of their specific proceedings. “Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience.”⁴⁹ Required of all institutions is the “preponderance of the evidence” standard of proof⁵⁰ and that hearings provide each party (the complainant and respondent) with an “equal opportunity to present relevant witnesses and other evidence.”⁵¹

Because of the tremendous variation in how Title IX is implemented on campuses, understanding how survivors are interviewed requires a multi-faceted approach. Below is a review of the applicable administrative law, published Title IX policies from colleges, the Author’s interviews, and an unprecedented survey of campus Title IX proceedings published in 2014.⁵² The 2014 survey was conducted at the request of Senator Claire McCaskill in her role as the Chairman of the U.S. Senate Subcommittee on Financial and Contracting Oversight (“McCaskill Survey”).⁵³ The committee asked 440 public and private four-year institutions detailed questions about their Title IX compliance programs.⁵⁴ The McCaskill Survey was divided into three samples: (1) a national sample (subdivided by institution size, status as public or private, and athletic division); (2) the forty largest private schools; and (3) the fifty largest public schools. Collectively, the institutions surveyed 5.3 million stu-

⁴⁸ 2011 DEAR COLLEAGUE LETTER, *supra* note 5, at 9-14 (discussing requirements for equitable proceedings).

⁴⁹ 2001 SEXUAL HARASSMENT GUIDANCE, *supra* note 30, at 20.

⁵⁰ 2011 DEAR COLLEAGUE LETTER, *supra* note 5, at 11.

⁵¹ *Id.* While this requirement appears both commonsense and obvious, there is evidence that schools have not consistently afforded the complainants and respondents equitable proceedings. *See, e.g.,* BOHMER & PARROT, *supra* note 47, at 42-53 (describing Title IX proceedings and highlighting instances where the respondent was afforded rights and privileges not extended to the complainant, such as access to an advocate).

⁵² Diana Reese, *Sen. McCaskill Sends Out ‘Unprecedented’ Survey About Campus Rape to Colleges*, WASH. POST: SHE THE PEOPLE (Apr. 15, 2014), <https://www.washingtonpost.com/blogs/she-the-people/wp/2014/04/15/sen-mccaskill-sends-out-unprecedented-survey-on-campus-rape-to-college-presidents>.

⁵³ U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, SENATE COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, SEXUAL VIOLENCE ON CAMPUS: HOW TOO MANY INSTITUTIONS OF HIGHER EDUCATION ARE FAILING TO PROTECT STUDENTS (2014), <http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf> [hereinafter MCCASKILL SURVEY].

⁵⁴ *Id.* at 1.

dents.⁵⁵ Unless otherwise indicated, statistics cited are to the larger national sample.

1. *Title IX Investigations: Gathering Evidence and Interviewing Witnesses*

The OCR mandates that a school conduct a Title IX investigation, even when police are engaged in a parallel investigation.⁵⁶ If the incident was reported to police, the school can use the information gathered by law enforcement. OCR guidance states that “criminal investigations conducted by local or campus law enforcement may be useful for fact gathering.”⁵⁷ However, this assumes that police will share their investigation files while their own investigation is ongoing, which may or may not be the case. To resolve this issue, the OCR recommends that schools create Memorandums of Understanding (“MOUs”) with local law enforcement to establish protocols for “referring allegations of sexual violence, sharing information, and conducting contemporaneous investigations.”⁵⁸ On campus, the Title IX coordinator can conduct the school’s investigation.⁵⁹

The ability of campus authorities to conduct investigations is limited. Campus security, unless they are sworn police, do not have the training or resources to gather and preserve forensic evidence (e.g., clothing, bedding, or DNA).⁶⁰ They also lack the legal authority to obtain search warrants and subpoena witnesses and documents.⁶¹ Given these limitations, interviewing the complainant, respondent, and any willing witnesses is a crucial part of the investigation.

⁵⁵ *Id.* at 2-4.

⁵⁶ 2011 DEAR COLLEAGUE LETTER, *supra* note 5, at 10.

⁵⁷ 2014 TITLE IX Q&A, *supra* note 30, at 27.

⁵⁸ *Id.* at 28.

⁵⁹ *Id.* at 11.

⁶⁰ Telephone Interview with Randall Carroll, President, Profectus Consulting Servs. (Dec. 16, 2014).

⁶¹ In comparison, a police investigation can include collecting DNA, accessing FBI profile databases, and subpoenaing telephone call logs, motor vehicle records, and surveillance videos. *See* James Curtis Shepard, *Moving Toward Victim-Centered Sexual Assault Investigations*, in *INSIDE THE MINDS: INVESTIGATING SEX CRIMES: LAW ENFORCEMENT OFFICIALS ON EXAMINING THE LATEST SEX CRIME TRENDS, CONDUCTING A THOROUGH INVESTIGATION, AND PREPARING FOR TRIAL* 103 (Jo Alice Darden, ed. 2011) (describing the use of those investigative techniques by police in a sex crime investigation).

2. *Title IX Hearings: Examining Witnesses and Assigning Responsibility*

The Title IX hearing must be presided over by an “impartial” adjudicator.⁶² The adjudicator is the factfinder and assigns responsibility (the equivalent of a verdict in a criminal proceeding). The adjudicator could be a single individual or a panel.⁶³ The Title IX coordinator can also act as the adjudicator.⁶⁴ The OCR requires that all persons involved in Title IX proceedings receive training in both the school’s grievance proceedings and “in handling complaints of sexual harassment and sexual violence.”⁶⁵

A school may have a disciplinary committee that reviews evidence and questions witnesses. The school determines the composition of the disciplinary committee. Eighty-one percent of schools overall allow students to participate in the proceedings, and for the largest private and public institutions, the figures are even higher (ninety-three percent and eighty-three percent respectively).⁶⁶ In addition to students, other participants may include faculty (seventy-eight percent),⁶⁷ non-faculty employee staff (eighty-two percent),⁶⁸ and the college’s administrators (ninety-three percent).⁶⁹ The primary sources of OCR guidance do not directly reference a disciplinary committee’s role in Title IX proceedings.⁷⁰ Therefore, there is no specific guidance as to the function that this collection of students, employee staff, faculty, and administrators play; the training that they must receive; whether or not they may interview witnesses; or the form, content, and scope of their questioning.

The school may also allow the parties to bring a lawyer to the hearing.⁷¹ Other schools permit students to bring advocates, who may or may not be legal counsel. The role of advocates at Title IX proceedings varies, from providing emotional support to actively participating in the pro-

⁶² 2011 DEAR COLLEAGUE LETTER, *supra* note 5, at 12.

⁶³ MCCASKILL SURVEY, *supra* note 53, at F2.3, F2.4.

⁶⁴ 2014 TITLE IX Q&A, *supra* note 30, at 11 (Title IX coordinator can determine the appropriate sanctions against a perpetrator found responsible for committing a campus sexual assault).

⁶⁵ 2011 DEAR COLLEAGUE LETTER, *supra* note 5, at 12.

⁶⁶ MCCASKILL SURVEY, *supra* note 53, at F1.2.

⁶⁷ *Id.* at F1.3.

⁶⁸ *Id.* at F1.4.

⁶⁹ *Id.* at F1.5.

⁷⁰ While the 2011 Dear Colleague Letter states that all persons involved in Title IX grievance proceedings must have training or experience in handling complaints of sexual violence, (including coordinators, investigators, and adjudicators), it does not directly reference disciplinary committees that are composed of students, faculty, administrators, and staff. *See* 2011 DEAR COLLEAGUE LETTER, *supra* note 5, at 12.

⁷¹ *Id.*

ceedings.⁷² If an advocate is allowed to question witnesses, then invariably, the complainant will be questioned by the respondent's advocate.

Campus adjudications are not required to follow the federal or state rules of evidence regarding how witnesses are questioned, examined, or cross-examined. This is notable because in federal criminal or civil proceedings, an important protection for testifying assault survivors is Federal Rule of Evidence 412, termed the "Rape Shield Rule."⁷³ Many states have adopted an equivalent rule. With some exceptions, the Rape Shield Rule prevents the defense from inquiring into the witness' sexual behavior and predispositions.⁷⁴ Added to the Federal Rules of Evidence in 1978, the purpose of Rule 412 is to "safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process."⁷⁵ Recognizing how traumatic and prejudicial such questioning can be, the OCR has made recommendations consistent with rape shield rules. OCR guidance from 2014 states that the complainant's general sexual history should not be the subject of inquiry and that factfinders should not draw an inference of consent even if the parties had a pre-existing relationship.⁷⁶ Many schools are not following OCR recommendations. Forty-two percent of schools overall do not use their state's rape shield rules or an equivalent, and of large institutions with over 10,000 students, only one percent followed rape shield rules on campus.⁷⁷ Furthermore, in a small number of schools, this intimate and embarrassing questioning could be conducted in front of anyone on campus. In the national example, six percent of schools allow sexual violence proceedings to be "open," and with the fifty largest public institutions, that number rises to twelve percent.⁷⁸ Therefore, at many schools, when complainants are questioned during Title IX disciplinary proceedings, their sexual preferences, orientation, behaviors, and history (with the respondent or with others) can be freely inquired into before a considerable and varied audience.

⁷² *Compare Victim Advocacy*, MARQUETTE UNIVERSITY, <http://www.marquette.edu/sexual-misconduct/victim-advocacy.shtml> (last visited Mar. 2, 2016) (employing advocates on staff who are available to provide "[a]ssistance and support throughout the student conduct process"), with *Title IX Hearing Board Formal Process*, BRESCIA UNIVERSITY, <https://www.brescia.edu/title-ix-hearing-board-formal-process> (last visited Mar. 2, 2016) (allowing students to have an "advisor," who may be an attorney, but the advisor is not permitted to speak at the disciplinary hearing).

⁷³ FED. R. EVID. 412.

⁷⁴ *Id.*

⁷⁵ FED. R. EVID. 412 (advisory committee's note to 1994 amendment).

⁷⁶ TITLE IX Q&A, *supra* note 30, at 31.

⁷⁷ MCCASKILL SURVEY, *supra* note 53, at F5.2.

⁷⁸ *Id.* at F2.1.

3. *Documentation of Title IX Proceedings*

The OCR mandates that schools “maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio proceedings.”⁷⁹ The phrase “all proceedings” would include testimony by the complainant and other witnesses. Eighty-one percent of schools keep written records⁸⁰ and forty-one percent keep audio records.⁸¹ Therefore, in the majority of cases, it is likely that the complainant’s statement is preserved, either as a written transcript or audio recording.

III. PAVED WITH GOOD INTENTIONS: TITLE IX CAMPUS SEXUAL ASSAULT INVESTIGATIONS AND THE CREATION OF ADMISSIBLE VICTIM STATEMENTS

A victim’s statement is a vital piece of evidence in a sexual assault prosecution.⁸² But the effect of trauma on the survivor’s ability to give a thorough and accurate statement, and the context in which campus sexual assaults occur, is not well understood.⁸³ Because of this, traditional methods of interviewing do not account for these factors. This can produce factually inaccurate statements that can be used to discredit the survivor on the witness stand during trial testimony.⁸⁴ There are numerous opportunities for factually inaccurate or inconsistent statements to be generated on campus. During a Title IX proceeding, the campus survivor could be interviewed by campus security, the Title IX coordinator, disciplinary committee members, advocates, or police officers located on campus.⁸⁵ Therefore, it is important to understand how errors are made during the campus interview process, and how these mistakes can be mitigated or avoided.⁸⁶

The examples discussed below are drawn from the police experience and process of interviewing sexual assault survivors. However, campus authorities in a Title IX process can make these same mistakes if they are not aware of the effect of trauma on a survivor, and do not consider the unique context of campus assaults that may motivate some survivors to omit or falsify information.

⁷⁹ 2011 DEAR COLLEAGUE LETTER, *supra* note 5, at 12.

⁸⁰ MCCASKILL SURVEY, *supra* note 53, at F2.5.

⁸¹ *Id.* at F2.6.

⁸² *See infra* Part III(A).

⁸³ *See infra* Part III(B)-(E).

⁸⁴ *See infra* Part III(F)-(G).

⁸⁵ *See supra* Part II(C).

⁸⁶ *See infra* Part IV.

A. THE CRITICAL IMPORTANCE OF A VICTIM'S STATEMENT IN A
CRIMINAL SEXUAL ASSAULT INVESTIGATION AND
PROSECUTION

The importance of the victim's statement in a sexual assault investigation cannot be underestimated.⁸⁷ "Because there are often no witnesses to corroborate the rape victim's testimony, many rape trials consist primarily of the victim's word against that of the defendant, leading the defense attorney to attempt to destroy the victim's credibility by showing that she actually consented to having sex with the defendant."⁸⁸ This is particularly true when both: 1) the identity of the assailant; and 2) the fact that sexual intercourse occurred is not in dispute, which is typical for the majority of campus sexual assaults.⁸⁹ In these situations, the most viable defense is to allege that the contact was consensual.⁹⁰ The survivor's statement is critical evidence in disproving the element of consent.⁹¹

⁸⁷ Police officers interviewed for this Comment cautioned that the traditional importance assigned to a victim's statement may be overemphasized in sexual assault investigations, at the expense of overlooking other valuable forms of corroborating evidence. As Randall Carroll stated, "I've never had a homicide case where I've been able to interview the victim," going on to note the importance of doing evidence-based, and not just victim-interview based, investigations. Telephone Interview with Randall Carroll, President, Profectus Consulting Servs. (Dec. 15, 2014). Guidance from the International Association of the Chiefs of Police supports an evidence-based approach to sexual assault investigations as well. "Strong sexual assault investigations are supported by physical evidence and do not rely solely on the victim or the perceived credibility of the victim." *Sexual Assault Incident Reports: Investigative Strategies*, INT'L ASS'N OF CHIEFS OF POLICE 7, <http://www.theiacp.org/portals/0/pdfs/SexualAssaultGuidelines.pdf> (last visited Mar. 2, 2016).

⁸⁸ Lisa Hamilton Thielmeyer, Note, *Beyond Maryland v. Craig: Can and Should Adult Rape Victims Be Permitted to Testify by Closed-Circuit Television?*, 67 IND. L.J. 797, 811 (1992); see also David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1026-35 (1990) (arguing that defense lawyers generally should not brutally cross-examine rape victims as a defense tactic).

⁸⁹ KREBS ET AL., *supra* note 6, at 2-3 (2007) (In 90% of campus assaults, the victim can identify the assailant because he is "a classmate, friend, boyfriend or ex-boyfriend, or acquaintance.").

⁹⁰ See, e.g., Luban, *supra* note 88, at 1026 ("The woman calls it rape; the defendant claims she consented, and it all comes down to his word against hers.").

⁹¹ The law "puts a special burden on the rape victim to prove through her actions her nonconsent . . . while imposing no similar burden on the victim of trespass, battery, or robbery." Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1126 (1986). To illustrate, the definition of common law rape is "sexual intercourse against a victim's will by force, threat, or intimidation." 65 Am. Jur. 2d *Rape* § 1 (Westlaw, database updated Nov. 2015). Common law robbery "is the felonious, non-consensual taking of money or personal property from the person . . . by means of violence or fear." E.g., *North Carolina v. Smith*, 292 S.E.2d 264, 270 (1982), *cert. denied*, 459 U.S. 1056 (1982). While lack of consent does need to be established with both crimes, this element is rarely at issue with regard to theft, given the societal presumption that one does not willingly and permanently surrender one's possessions, even to acquaintances. And this presumption is strengthened when the crime victim is a member of a vulnerable population. E.g., CAL. PENAL CODE § 368 (West 2010) (creating the specific crime of physically harming or stealing from the elderly). The existence of a personal relationship

B. THE PHYSIOLOGICAL AND PSYCHOLOGICAL EFFECTS OF TRAUMA
ON A SURVIVOR OF SEXUAL ASSAULT

The current *Diagnostic and Statistical Manual of Mental Disorders* specifically identifies actual or threatened sexual violence as a traumatic event.⁹² More so than stress, trauma has long-term and significant physiological and psychological effects.⁹³ Post-traumatic stress disorder (“PTSD”) can result after serious trauma.⁹⁴ Forty-five percent of female rape survivors exhibit PTSD,⁹⁵ and college survivors in particular “suffer high rates of PTSD.”⁹⁶

The physiological effect of trauma is significant with regard to survivor interviewing, because trauma affects the part of the brain that controls cognition.⁹⁷ During a traumatic event the prefrontal cortex, which controls rational thought, shuts down. In its place, the limbic system, the “primitive” part of the brain that controls fight or flight, takes over.⁹⁸

between the perpetrator and the victim does not often raise the specter of consent. For example, a theft committed by an elderly victim’s neighbor does not typically raise the presumption of consent, despite their status as acquaintances. Yet, consent is all but presumed when sexual violence between acquaintances occurs. *See generally* Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 *NEW CRIM. L. REV.* 644 (2010) (overcoming the presumption of consent among acquaintances, particularly in the absence of extrinsic evidence of violence during the attack). A rape survivor’s vulnerability will undercut her credibility rather than bolster it. *See* Brett Erin Applegate, Comment, *Prior (False?) Accusations: Reforming Rape Shields to Reflect the Dynamics of Sexual Assault*, 17 *LEWIS & CLARK L. REV.* 899, 906 (2013) (vulnerability of survivor negatively impacts credibility); Steve Bellshaw, *Sexual Assault Investigations: An Offender-Focused, Victim-Centered Approach*, in *INSIDE THE MINDS: INVESTIGATING SEX CRIMES: LAW ENFORCEMENT OFFICIALS ON EXAMINING THE LATEST SEX CRIME TRENDS, CONDUCTING A THOROUGH INVESTIGATION, AND PREPARING FOR TRIAL 9* (Jo Alice Darden, ed. 2011) (assailants target victims who are vulnerable and can be “made to lack credibility.”).

⁹² AMERICAN PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5*, at 274 (5th ed. 2013) (“[D]irectly experienced traumatic events . . . include . . . threatened or actual sexual violence (e.g., forced sexual penetration, alcohol/drug facilitated sexual penetration, abusive sexual contact, noncontact sexual abuse, sexual trafficking).”).

⁹³ Russell W. Strand with Stephanie Avalon (ed.), *Shifting the Paradigm for Investigating Trauma Victimization*, BATTERED WOMEN’S JUSTICE PROJECT (Mar. 2014), <http://www.bwjp.org/resource-center/resource-results/shifting-the-paradigm-for-investigating-trauma-victimization.html>.

⁹⁴ *See generally* Sarah L. Halligan et al., *Posttraumatic Stress Disorder Following Assault: The Role of Cognitive Processing, Trauma Memory, and Appraisals*, 71 *J. CONSULTING & CLINICAL PSYCHOL.* 419 (2003) (examining effect of PTSD on cognitive processing and memory).

⁹⁵ Bellshaw, *supra* note 91, at 10.

⁹⁶ WHITE HOUSE TASK FORCE ON WOMEN & GIRLS, RAPE & SEXUAL ASSAULT: A RENEWED CALL TO ACTION 14 (2014), https://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf.

⁹⁷ Strand with Avalon (ed.), *supra* note 93 (The “trauma itself impacts the brain, effectively shutting down cognition and leaving the more primitive mid-brain and brainstem to experience and record the event.”).

⁹⁸ Russell W. Strand, *The Forensic Experiential Trauma Interview (FETI)*, THE MINN. COALITION AGAINST SEXUAL ASSAULT 1, <http://www.mncasa.org/assets/PDFs/FETI%20-%20Public%20Description.pdf>.

Unfortunately, it is the prefrontal cortex that records the facts that law enforcement officers want to obtain during an interview (the “who, what, where, when, why, and how”).⁹⁹ In this way, the trauma itself “dam- age[s] the parts of the brain that control memory.”¹⁰⁰ Because trauma’s effects are long-term, during the course of the interview process and be- yond, a sexual assault survivor continues to struggle with “impaired ver- bal skills, short term memory loss, memory fragmentation, and delayed recall.”¹⁰¹ Adding to the difficulty of gauging trauma’s effect is the abil- ity of the survivor to recall “some aspects of the trauma with exceptional clarity,” while at the same time “important aspects of the trauma . . . cannot be recalled at all.”¹⁰²

C. FORM OVER SUBSTANCE: THE EMPHASIS ON CHRONOLOGY AND DETAILS IN TRADITIONAL VICTIM INTERVIEWING

Traditional methods of interviewing sexual assault survivors follow a standard police intake form, which emphasizes details and chronolo- gies. It is not structured to account for the effect of trauma on the survi- vor being interviewed¹⁰³ or the context in which a campus sexual assault occurs. Strict adherence to the form can result in victim statements that contain factual errors or appear incoherent.¹⁰⁴ An inaccurate or incoher- ent statement can be used to label the account “unfounded” and conclude the investigation.¹⁰⁵ It can also become a justification for arresting the victim for filing a “false police report,” even when the incident actually

⁹⁹ Strand with Avalon (ed.), *supra* note 93.

¹⁰⁰ WHITE HOUSE TASK FORCE ON WOMEN & GIRLS, RAPE AND SEXUAL ASSAULT: A RE- NEWED CALL TO ACTION, *supra* note 96, at 16.

¹⁰¹ *Id.*

¹⁰² Halligan et al., *supra* note 94, at 419.

¹⁰³ Telephone Interview with Randall Carroll, President, Profectus Consulting Servs. (Dec. 15, 2014).

¹⁰⁴ *Id.*

¹⁰⁵ “Unfounded” is a technical term and “does not indicate whether the rape report is false; rather, it means that for one reason or another, the police decided not to pursue the complaint.” 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, 1029 (1991). Therefore, “an unfounded complaint is one in which, although a rape may have occurred, the police have determined that barriers exist to obtaining a conviction in court.” *Id.* Police have labeled victim reports as “unfounded” because victim was intoxicated; the victim delayed in filing a report; the existence of any previous relation- ship between the victim and the offender; or the victim was uncooperative. *Id.* The use of “unfound- ing” for these reasons contributes to the myth that victims frequently falsely allege rape. “[T]he reality is severe underreporting of rape.” *Id.* at 1030-31. *See also* INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 87, at 2 (cautioning police not to label reports “unfounded” based solely on the initial interview of the survivor).

occurred.¹⁰⁶ Additionally, if the investigation continues to a prosecution, it can be used as a basis to impeach the survivor on the stand.¹⁰⁷

A standard police incident report will first elicit details about the victim (name, age, and address); specifics about the crime (date, time, and location); and details about the perpetrator (name or description).¹⁰⁸ Law enforcement officers are instructed to conduct an interview in the same order as written on the form, and to fill out all the information that the form requires.¹⁰⁹ It is permissible to interrupt the victim in order to

¹⁰⁶ Two recent incidents of survivors with legitimate and meritorious claims being arrested for filing “false” police reports highlight the serious consequences for survivors when police do not understand the nature of trauma and how it can impact a victim’s statement, making it appear inconsistent or incoherent. These examples also demonstrate how overemphasis on the victim’s statement, to the exclusion of physical evidence, can lead to flawed investigations.

In 2011, “Marie” reported to Lynwood, Washington, police that a stranger had broken into her apartment, tied her up, gagged her, and raped her. T. Christian Miller & Ken Armstrong, *An Unbelievable Story of Rape*, PROPUBLICA: THE MARSHALL PROJECT, (Dec. 16, 2015), <https://www.propublica.org/article/false-rape-accusations-an-unbelievable-story>. Unfamiliar with the effects of trauma, police found Marie to exhibit puzzling behaviors (such as an unwillingness to meet an officer’s gaze). There was physical and forensic evidence consistent with both burglary and rape on Marie and at the scene. *Id.* Confused by her behavior and responses, police interrogated Marie and confronted her regarding “inconsistencies in her story.” *Id.* Traumatized by the rape and re-traumatized by police, Marie reluctantly “conceded it might have been a dream. Then she admitted making the story up.” *Id.* She was charged with filing a false police report and pled guilty to a misdemeanor. *Id.* In fact, Marie was the victim of a serial rapist, Marc Patrick O’Leary, who had been committing rapes in Washington and Colorado. Mr. O’Leary was finally apprehended in a separate investigation. Police then discovered numerous images on his camera of him raping a bound and gagged Marie, as she had described. *Id.*

Survivor Danielle Hicks-Best was only 11 years old in 2008 when she reported being abducted and raped by several adult males, in Washington, D.C. Johanna Walters, *An 11-year-old Reported Being Raped Twice, Wound Up with a Conviction*, WASH POST: MAGAZINE (Mar. 12, 2015), https://www.washingtonpost.com/lifestyle/magazine/a-seven-year-search-for-justice/2015/03/12/b1cccb30-abe9-11e4-abe8-e1ef60ca26de_story.html. A rape kit was collected, DNA was retrieved, and doctors established that she had injuries consistent with assault. Ms. Hicks-Best was able to identify one assailant. *Id.* Yet, police failed to continue an investigation. Within a month, Ms. Hicks-Best was raped again by one of her original assailants. Again, she and her parents reported it to the police. Police focused their investigation primarily on Ms. Hicks-Bests’ statement, labeled it “inconsistent,” and stated in intradepartmental emails that she was “promiscuous.” Police interviewed one of her abductors and accepted his assertion that the sexual contact he witnessed between her and the adult males was “consensual.” *Id.* On this basis, they arrested the 11-year-old child for filing a false police report. *Id.* Depressed and suicidal, Ms. Hicks-Best pled guilty. *Id.* Ms. Hicks-Best was removed from her home and declared a ward of the state. *Id.* She spent the next seven years in a series of juvenile detention facilities and foster homes. After being confronted by Washington Post reporters who reviewed the file, police now admit to mishandling her allegations. *Id.*

¹⁰⁷ See *infra* Part III(F).

¹⁰⁸ Modernly, police reports are generated using software forms, which follow the model described, but can be customized. An example of a software generated police form is available at *Incident Module*, CRIME STAR, <http://www.crimestar.com/incident.html> (last visited Mar. 2, 2016).

¹⁰⁹ Telephone Interview with Randall Carroll, President, Profectus Consulting Servs. (Dec. 15, 2014).

complete the form and to ensure that all the data fields are completed.¹¹⁰ The result can be an interview that proceeds as described below.

After listening to an initial outburst of crime-related facts, often no more than just a few seconds, the interviewer interrupted the witness's narrative response and asked a series of direct, short-answer questions, on the order of: "How tall was he? How much did he weigh? Did he have a weapon?" These questions, which reflect generically salient crime facts, often were asked in the same order to all witnesses using a standardized checklist.¹¹¹

Rather than admit that they do not know a fact, cannot recall it, or do not wish to discuss it at this time, sexual assault survivors may simply provide an answer to move the process along, or to bolster their perceived lack of credibility with the officers.

[W]hat happens so often is the victim will try to bootstrap their credibility by making up things they do not really remember because they are so worried [about] whether or not they are going to be believed. And that is the exact opposite of what you really want the victim to do.¹¹²

Survivors are then caught in a paradox when the police interviewers suspect that the survivor is falsifying or withholding facts, because "[o]ne of the mantras within the criminal justice system is that 'inconsistent statements equal a lie.'"¹¹³ Police will even consider a statement "inconsistent" when details are merely related out of chronological order or if a detail is omitted. Having sensed or discovered an "inconsistency," an officer may switch modes from "fact gathering" to "discovering what else you are hiding."¹¹⁴ This mentality is consistent with police officer training, which is "geared and steered" toward *interrogating perpetrators* and not *interviewing survivors*.¹¹⁵ Pressuring survivors to supply answers, combined with questioning conducted in a "negative tone ('You don't recall his name, do you?') . . . may reinforce the victim's sense of inadequacy."¹¹⁶ Sensing that the officer doubts their account, survivors may lose confidence and stop cooperating.¹¹⁷ Unfortunately, the "narra-

¹¹⁰ R. Edward Geiselman & Ronald P. Fisher, *Interviewing Witnesses and Victims 1* (2014) (unpublished manuscript), https://www.psych.ucla.edu/sites/default/files/documents/other/Current_CI_Research.docx.

¹¹¹ *Id.*

¹¹² *Roundtable*, *supra* note 1, at 54 (statement of Sen. Claire McCaskill, Chairman, Subcomm. on Fin. & Contracting Oversight).

¹¹³ Strand, *supra* note 98, at 1-2.

¹¹⁴ Telephone Interview with Randall Carroll, President, Profectus Consulting Servs. (Dec. 15, 2014).

¹¹⁵ *Id.*

¹¹⁶ Geiselman & Fisher, *supra* note 110, at 6-7.

¹¹⁷ See Torrey, *supra* note 105, at 1029 (failing to fully cooperate can itself be cause to label a survivor's complaint "unfounded" by police).

tive” portion of the intake form, where survivors can describe the incident without suggestive questions or interruptions, is last on the form. By then, as one police investigator warns, “[i]t is easy to become skeptical of that victim, at which point the investigation starts to break down because the investigator no longer has trust in the victim’s account of the facts.”¹¹⁸

D. DAMNED IF YOU DO, DAMNED IF YOU DON’T: THE UNIQUE CONTEXT OF CAMPUS SEXUAL ASSAULT AND INTENTIONAL OMISSIONS BY STUDENT SURVIVORS

“Shame should be reserved for the things we choose to do, not the circumstances that life puts on us.”¹¹⁹ Unfortunately for a campus survivor, life has created circumstances where it may be easier to intentionally omit or falsify a shameful detail than be entirely candid with authorities. This erodes a survivor’s credibility with authorities and contributes to the creation of incomplete or inaccurate victim statements. Only by understanding the typical college survivor and exploring the context in which these assaults occur, can an interviewer anticipate and account for these behaviors during victim interviews.

1. *The Typology of a Campus Sexual Assault Survivor*

The majority of campus survivors are women and unfortunately, many women will be victimized. As previously stated, nearly one in five undergraduate women (twenty percent) survives a sexual assault at college.¹²⁰ Comparatively, the figure for men is 2.5 percent.¹²¹ Ninety percent of those assaults, or attempted assaults, are committed by someone the victim can identify. The assailant is “most commonly a classmate, friend, boyfriend or ex-boyfriend, or acquaintance.”¹²² The majority of sexual assaults occur when the victim has voluntarily or involuntarily consumed drugs or alcohol.¹²³ Acquaintance rape has been referred to as the United States’ most underreported crime. This is even more accurate with campus sexual assaults.¹²⁴ Between eighty-seven and ninety-five percent of attempted or completed campus sexual assaults are not re-

¹¹⁸ Shepard, *supra* note 61, at 100.

¹¹⁹ ANN PATCHETT, TRUTH & BEAUTY: A FRIENDSHIP 146-47 (2004).

¹²⁰ *Supra* note 6.

¹²¹ KREBS ET AL., *supra* note 6, at 5-27.

¹²² *Id.* at 2-3.

¹²³ *Id.* at 5-16; 5-19.

¹²⁴ See generally Estrich, *supra* note 91, at 1161-79 (discussing the underreporting of acquaintance rape and factors that contribute to underreporting).

ported to law enforcement.¹²⁵ And, if the campus victim has consumed drugs or alcohol, the level of reporting can slip to a staggeringly low two percent.¹²⁶ Freshman and sophomore women are at greater risk for assault than juniors and seniors.¹²⁷ Even throughout the year, there is “substantial variability” as to when assaults occur, with the fall “clearly being the most prevalent season,” particularly in October.¹²⁸ The majority of incapacitated assaults occur on Friday and Saturday, between midnight and six a.m.¹²⁹

In short, the typical campus survivor is a woman, between 18-20 years old, below the legal age to consume alcohol, but who has nevertheless consumed drugs or alcohol prior to her assault. She is an underclassman and was assaulted within two months of arriving on campus. If she was a freshman, this is within weeks of her first time leaving her home, family, and traditional support network in order to attend college. Considering the day and the timing, she was likely at a party or otherwise socializing. Her assailant will not be a stranger, but rather someone from school with whom she is academically and socially enmeshed.

2. *Details That a Campus Sexual Assault Survivor May Intentionally Falsify or Omit Due to the Unique Context in Which Campus Assaults Occur*

There are many reasons that students may forego reporting sexual assaults. These reasons include fear of school or police sanctions if they were using drugs or alcohol; the social ramifications of disclosing a sexual assault to peers; and fear of disappointing parents.¹³⁰ These same

¹²⁵ Statistics on the number of sexual assaults committed on campus that are reported to law enforcement vary, perhaps because sexual assault is an underreported crime overall, so determining how underreported it is can be challenging. Compare FISHER ET AL., *supra* note 6, at 23 (less than 5% of completed and attempted rapes are reported to law enforcement) with, KREBS ET AL., *supra* note 6, at 5-25 (13% of attempted or completed sexual assaults on campus that do not involve an incapacitated victim are not reported to law enforcement).

¹²⁶ KREBS ET AL., *supra* note 6, at 5-25 (stating that only 2% of survivors who were incapacitated by drugs or alcohol report to law enforcement).

¹²⁷ *Id.* at 2-7, 6-3.

¹²⁸ *Id.* at 5-19.

¹²⁹ *Id.* at 5-19, 5-20.

¹³⁰ BOHMER & PARROT, *supra* note 47, at 56-57 (discussing fear of disappointing parents); KREBS ET AL., *supra* note 6, at 2-9 (reporting barriers include not wanting family or others to know; fear of reprisals for violating school alcohol policies); BONNIE S. FISHER, ET AL., *supra* note 6, at 23 (reporting barriers include not wanting others to know); DOJ ET AL., PROMOTING EFFECTIVE CRIMINAL INVESTIGATIONS, *supra* note 34, at 13 (reporting barriers include a fear of disappointing parents; fear of reprisals if they were using drugs or consuming alcohol; fear that peers will blame them for the incident and side with the assailant); *Understanding the Survivor*, EMORY UNIVERSITY: OFFICE OF HEALTH PROMOTION, http://studenthealth.emory.edu/hp/respect_program/understanding_the_survivor.html (last visited Mar. 2, 2016) (social consequences of disclosing sexual assault to peers).

factors may result in student survivors omitting or falsifying information when they do report. This ultimately can create inconsistencies in their account.

When survivors fear school or police sanctions for using drugs or consuming alcohol, they may respond by outright denying that drugs or alcohol were involved or by simply omitting this information.

“The survivor may fear compromising or complicating relationships with mutual friends” by reporting.¹³¹ Social complications can include the intertwined fears of becoming a target for campus gossip¹³² and a desire to protect friends from scrutiny by authorities. These fears are justified, considering the rapid adoption by young adults of new technology that increases the speed and ease of transmitting salacious information.¹³³ For these reasons, survivors may lie during interviews about where the assault occurred to avoid having that property searched, if their peers reside there.¹³⁴ Student survivors may not disclose the names of corroborating witnesses who could bolster their account in order to protect their peers from being questioned by authorities. This is especially likely if those witnesses were violating school rules or the law by consuming drugs or alcohol.

When students fear disappointing their parents,¹³⁵ they may falsify or omit information that will bring them into disrepute with their families. What information they omit may depend on that student’s particular cultural background, religion, and relationship with his or her parents. Information they could omit may include that they were consuming alcohol or socializing with friends rather than studying. They may also deny the existence of a prior consensual sexual relationship with the perpetrator to avoid disclosing to their family that they are sexually active.

¹³¹ *Understanding the Survivor*, EMORY UNIVERSITY: OFFICE OF HEALTH PROMOTION, *supra* note 131.

¹³² *Id.*

¹³³ See DANAH BOYD, *IT’S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS* (2014) (use of social media by young adults); Jamie P. Hopkins et al., *Being Social: Why the NCAA Has Forced Universities to Monitor Student-Athletes’ Social Media*, 13 U. PITT. J. TECH. L. POL’Y 1, 6-9 (2013) (use of social media by college students and descriptions of prevalent websites and applications).

¹³⁴ In the noncampus context, Detective Hull related a case that she handled where the survivor falsified where the assault had occurred, because the incident happened inside the survivor’s home, and the survivor had illegal drugs there. Detective Hull sensed that the survivor was not being entirely truthful in her account regarding the location, but rather than pressure the survivor, or use that potential inconsistency as a basis for labeling the entire account false, Detective Hull continued to interview the victim and established trust. Later, the victim disclosed where the incident had actually occurred. Telephone Interview with Carrie Hull, Detective, Ashland, Or. Police Dep’t (Nov. 19, 2014).

¹³⁵ BOHMER & PARROT, *supra* note 47, at 56-57.

Overwhelmed by the social and academic consequences of disclosing shameful details, these students may conclude that it is simply too difficult to report their assault to authorities. Or if they do report, they may “sanitize” their account by omitting or falsifying such information, but then lose credibility with authorities.¹³⁶ Moreover, if the case continues to a prosecution, these inaccuracies and inconsistencies are enshrined in the statement and subject the survivors to impeachment when they testify.¹³⁷ This situation contributes to the underreporting and underprosecution of meritorious claims of sexual violence against students.

E. THE PRACTICE OF SUMMARIZING AND WRITING THE SURVIVOR’S STATEMENT

Law enforcement may write and summarize a survivor’s statement rather than record it. This can enshrine inaccuracies if the interviewer does not understand what the survivor intends with her statements and word choices.¹³⁸

Noted author Alice Sebold encountered this situation and detailed it in her gripping memoir, *Lucky*.¹³⁹ Ms. Sebold survived a forcible rape by a stranger while attending college.¹⁴⁰ She reported the rape immediately and was interviewed by a police officer.¹⁴¹ The officer did not record her statement or allow her to write it herself.¹⁴² Ms. Sebold informed the officer that he had omitted facts to save space, made factual errors, and substituted his words for her own, changing their meaning.¹⁴³ The officer retorted, “All that doesn’t matter . . . [w]e just need the gist of it” before pressuring her to sign the statement as written.¹⁴⁴

¹³⁶ See *supra* Part III(C).

¹³⁷ See *infra* Part III(F).

¹³⁸ Detective Hull provided a hypothetical example of such a miscommunication between an officer and a survivor, where the survivor stated that the perpetrator “entered me from behind.” The survivor meant that the perpetrator attacked her vaginally, while she was prone and on her stomach. The officer, misunderstanding the phrase, wrote in his report that “the victim stated she was sodomized.” In future criminal proceedings, the defense attorney can raise the “inconsistency” of the survivor stating to officers that she was sodomized, but there is no physical evidence of sodomy, because that act did not occur. Telephone Interview with Carrie Hull, Detective, Ashland, Or. Police Dep’t (Nov. 19, 2014).

¹³⁹ ALICE SEBOLD, *LUCKY* (Bay Back Books 2002) (1999).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 30-33.

¹⁴² *Id.*

¹⁴³ *Id.* at 32.

¹⁴⁴ *Id.*

F. PRIOR INCONSISTENT STATEMENTS FOR THE PURPOSE OF
IMPEACHMENT UNDER THE FEDERAL RULES OF EVIDENCE

A victim's prior statement can be taken on campus and used to impeach him or her when testifying in a later criminal proceeding. While the rules of admissibility governing such statements will vary by jurisdiction, the Federal Rules of Evidence provides a model to demonstrate how this situation could occur.

1. *Prior Inconsistent Statements for the Purpose of Impeachment Under Federal Rule of Evidence 613*

Under Federal Rule of Evidence 613, prior inconsistent statements may be used to impeach the credibility of a witness.¹⁴⁵ Prior inconsistent statements are not admitted for the truth of the matter asserted,¹⁴⁶ but rather, are admissible to allow the opposing party to “suggest[] that a witness may have lied or erred on the very point of inconsistency” and therefore “may have lied or erred on other points” as well.¹⁴⁷

2. *Prior Statement Must Be Inconsistent*

As a threshold matter, the court must determine if the two statements are inconsistent with each other.¹⁴⁸ This can be established if the prior statement “diametrically opposes or directly contradicts trial testimony” but “[f]ar less suffices” and “there is inconsistency enough if the thrust of a statement” suggests that the witness has “made a mistake that matters.”¹⁴⁹ For example, if in a prior statement the witness stated that it was raining, but during trial testimony states that it was a sunny day, those statements are in direct opposition and an inconsistency. However, also potentially admissible as an inconsistency is a prior statement by the witness that it was drizzling, and now the witness states that it was raining. Those two statements are not in direct opposition, but are different. This

¹⁴⁵ FED. R. EVID. 613.

¹⁴⁶ 1 GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE § 34, at 207-08 (Kenneth S. Broun ed., 7th ed. 2013).

¹⁴⁷ CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 6.40, at 532 (4th ed. 2009).

¹⁴⁸ *E.g.* United States v. Hale, 422 U.S. 171, 176 (1975) (“As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent.”).

¹⁴⁹ MUELLER & KIRKPATRICK, *supra* note 147, § 6.40, at 533; *see also* 1 GEORGE E. DIX ET AL., *supra* note 146, § 34, at 207-13 (discussing degree of inconsistency necessary to cast doubt on witness credibility); *e.g.* Udemba v. Nicoli, 237 F.3d 8, 18 (1st Cir. 2001) (“Statements need not be directly contradictory in order to be deemed inconsistent within the purview of Rule 613(b).”).

may be enough to be admissible as an inconsistency if the weather is an important issue in the case.

3. *The Admissibility of Extrinsic Evidence to Establish an Inconsistency*

Under the “collateral matter doctrine,” extrinsic evidence may not be admitted to prove a collateral matter.¹⁵⁰ Conversely, if a matter is not collateral, then extrinsic evidence is admissible. Noncollateral matters relate to a “material, core issue in the case.”¹⁵¹ Extrinsic evidence is any evidence outside of the witness’ testimony, including things (e.g., documents and recordings) or another witness who can testify as to the prior statement.¹⁵² Extrinsic evidence relating to collateral issues can be excluded as irrelevant, confusing, or misleading, per Federal Rule of Evidence 403.¹⁵³ Ultimately, the court determines whether the prior statement is collateral or not.

4. *The Use of a Victim’s Prior Inconsistent Statement for the Purpose of Impeachment in Sexual Assault Prosecutions and Investigations of Campus Offenders*

Although a fact specific inquiry, a survivor’s prior statement regarding the facts and circumstances of the crime is likely to be considered pertinent and noncollateral. Defense counsel can use this statement to conduct a “brutal cross-examination of the victim.”¹⁵⁴

In sexual assault prosecutions, inconsistencies in a prior statement admitted for the purpose of impeachment frequently do not concern major details. According to Ms. Booth, courts will consider a statement inconsistent if it relates to even “minute details . . . the smallest of things.”¹⁵⁵ Examples given by Ms. Booth include whether the defendant used “the right hand or the left hand” to hold the weapon, or minor dis-

¹⁵⁰ GLEN WEISSEBERGER & JAMES J. DUANE, WEISSEBERGER’S FEDERAL EVIDENCE §§ 607.5, at 356; 613.5 at 423-24 (7th ed. 2011) (discussing the collateral matter doctrine).

¹⁵¹ *People v. Cade*, 73 N.Y.2d 904, 905 (1989); *see also* *United States v. Bordeaux*, 570 F.3d 1041, 1051 (8th Cir. 2009) (“A matter is collateral if the facts referred to in the statement could not be shown in evidence for any purpose independent of the contradiction.”) (citation omitted).

¹⁵² WEISSEBERGER & DUANE, *supra* note 150, § 613.3, at 422-23.

¹⁵³ *See* FED. R. EVID. 403; *see also* MUELLER & KIRKPATRICK, *supra* note 147, § 4.10, at 180 (“Although not listed as a ground for exclusion in FRE 403, evidence can be excluded if it is ‘collateral,’ which may encompass several grounds listed in the Rule including unfairly prejudicial, confusing, misleading, waste of time and undue delay.”).

¹⁵⁴ Thielmeyer, *supra* note 88, at 811; *see also* Luban, *supra* note 88, at 1028.

¹⁵⁵ Telephone Interview with Katharina Booth, Chief Trial Deputy, Sex Assault/Domestic Violence Unit, Dist. Attorney’s Office, Boulder, Colo. (Feb. 4, 2015).

crepancies regarding the route the survivor took home after the assault.¹⁵⁶ The consensus among prosecutors interviewed for this Comment is that *any deviation* from a previous statement as to *any detail* regarding the incident can be taken as evidence that the survivor is being untruthful. Even the perception that a campus survivor is being inconsistent regarding a minor detail can be enough to discredit her entire account. Campus survivors should be aware that as the complaining witness, the “victim is held to a higher standard than is the assailant; her testimony must be perfectly consistent and impeccable.”¹⁵⁷ And she must render these minute details “with a detachment that defies the nature of the crime.”¹⁵⁸

Jon Krakauer describes this situation in *Missoula*.¹⁵⁹ *Missoula* profiles the law enforcement and campus response to sexual assault at the University of Montana from 2010-2012.¹⁶⁰ As reported by Mr. Krakauer, Kaitlynn Kelly was a junior there on September 30, 2011 when “Calvin Smith” raped her.¹⁶¹ Mr. Smith penetrated Ms. Kelly’s vagina, anus, and mouth with his hands and penis, and forced her to perform fellatio on him during a 30-minute assault.¹⁶² Ms. Kelly submitted to a rape kit at the university health center.¹⁶³ The physician “documented severe vaginal and rectal pain, vaginal bleeding, and abrasions to her inner thighs and vaginal vault.”¹⁶⁴ Her bleeding was not attributable to menstruation.¹⁶⁵ Several days later, Ms. Kelly felt emotionally able to report the rape to campus security and local law enforcement was notified.¹⁶⁶ The Missoula police conducted an investigation.¹⁶⁷ In addition to the rape kit, investigators collected her underwear, shorts, and a two-inch-thick mattress pad from her bed, all saturated with blood; surveillance camera footage of Mr. Smith leaving Ms. Kelly’s room with a pair of her jeans; and statements by corroborating witnesses.¹⁶⁸

Prosecutor Kirsten Pabst from the Missoula County Attorney’s Office (“MCAO”) declined to prosecute, largely on the basis of Ms. Kelly’s

¹⁵⁶ *Id.*

¹⁵⁷ BOHMER & PARROT, *supra* note 47, at 38.

¹⁵⁸ *Id.* at 34.

¹⁵⁹ See generally KRAKAUER, *supra* note 9.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 63-101 (discussing the details of Ms. Kelly’s allegations, the police investigation, and the Title IX proceedings). Kaitlynn Kelly has chosen to speak publicly under her own name. “Calvin Smith” is a pseudonym.

¹⁶² *Id.* at 63-65.

¹⁶³ *Id.* at 66.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 82.

¹⁶⁶ *Id.* at 67.

¹⁶⁷ *Id.* 66-70.

¹⁶⁸ *Id.*

police statement.¹⁶⁹ Ms. Pabst felt that inconsistencies in Ms. Kelly's statement defeated the physical evidence and rendered Ms. Kelly's entire account unreliable.¹⁷⁰ The inconsistencies cited by Ms. Pabst concerned her belief that Ms. Kelly contradicted herself regarding the acts that Mr. Smith performed first - either by inserting his fingers into her vagina *or* by forcing her to perform fellatio.¹⁷¹ Ms. Pabst stated, "[w]e have to take into account those inconsistencies of the victim's allegation" when deciding whether or not to prosecute.¹⁷² In fact, further review of Ms. Kelly's statement revealed no such inconsistency regarding how the attack began.¹⁷³ In her written statement and in conversations with officers, Ms. Kelly only ever alleged that Mr. Smith began his attack by penetrating her with his fingers.¹⁷⁴ Ms. Pabst's error demonstrates how prone authorities are to find inconsistencies in a victim statement, or even the mere perception of inconsistencies, and how this can this can prejudice a rape investigation.

Notably, Mr. Smith's police statement was also not entirely consistent. He failed to disclose that he stole Ms. Kelly's jeans (a fact he admitted to only when confronted by the video footage).¹⁷⁵ He also denied penetrating her anus¹⁷⁶ which is contradicted by the physician's report.¹⁷⁷ Unlike Ms. Kelly's perceived inconsistencies, Mr. Smith's deceptive and self-serving omissions were dismissed as irrelevant and not indicative of a propensity for untruthfulness.¹⁷⁸

Although Ms. Pabst declined to prosecute, Mr. Smith was expelled following the University of Montana's Title IX proceedings.¹⁷⁹ The campus adjudicators found witness statements, physical evidence, and Ms. Kelly's testimony that she had repeatedly denied and withdrawn consent, to be more persuasive than minor chronological deviations.¹⁸⁰ In 2012, the MCAO became the focus of a DOJ Civil Rights Division investigation.¹⁸¹ Their 2014 report found persistent mishandling of rape allegations by MCAO prosecutors, amounting to gender discrimination in

¹⁶⁹ *Id.* at 93-94.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 93.

¹⁷² *Id.*

¹⁷³ *Id.* at 94.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 75.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 66.

¹⁷⁸ *Id.* at 93.

¹⁷⁹ *Id.* at 80-82, 100.

¹⁸⁰ *Id.*

¹⁸¹ See generally JOCELYN SAMUELS & MICHAEL W. COTTER, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., LETTER TO FRED VAN VALKENBURG (Feb. 14, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/02/19/missoula_itr_2-14-14.pdf.

violation of the Equal Protection Clause of the Fourteenth Amendment and relevant statutes.¹⁸²

Considering the disproportionate weight that inconsistencies are given in a sexual assault investigation, if extrinsic evidence is available to support even a minor contradiction, it is likely to be admitted to discredit the survivor. As the situation with Ms. Kelly demonstrates, this is no less true when a sexual assault is committed on campus.

Even if extrinsic evidence of the prior statement is inadmissible because the matter is considered collateral, the issue can still be raised on the stand.¹⁸³ In the example cited in Part III(E), Ms. Sebold's rape was criminally prosecuted. During the preliminary hearing, defense counsel meticulously cross-examined Ms. Sebold and attempted to impeach her by comparing her hearing testimony with the summarized and inaccurate statement created by the officer.¹⁸⁴ The document itself did not need to be admitted into evidence for this cross-examination to occur.

G. TITLE IX CAMPUS PROCEEDINGS GENERATE ADMISSIBLE EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENTS

Campus adjudications provide abundant sources of extrinsic evidence to support noncollateral contradictions. These would be admissible under the Federal Rules of Evidence, as demonstrated above. Particularly, extrinsic evidence could be in the form of things (e.g., written documents, audio recordings, or transcripts) that were generated during the course of the disciplinary hearing or new witnesses.

1. *Documents and Things*

Statements can be created if the campus investigators record statements or draft documents memorializing their interviews with the complainant. Also, entire Title IX hearings may be documented as recordings or in transcripts. This is likely to occur because, as noted, Title IX mandates that campuses document their proceedings.¹⁸⁵ In addition, complainants may create and submit statements to their disciplinary committees as evidence in support of their cases.¹⁸⁶

¹⁸² *Id.* at 1-2. Many of the cases cited by the DOJ were handled directly by Kirsten Pabst or under her supervision. KRAKAUER, *supra* note 9, at 330-31. Nevertheless, Ms. Pabst was elected Missoula County Attorney in 2015, heading the MCAO. *Id.* at 334.

¹⁸³ WEISSENBERGER & DUANE, *supra* note 150, § 613.5, at 423 (stating that collateral matters may not be proved by extrinsic evidence but can be inquired into on the stand).

¹⁸⁴ SEBOLD, *supra* note 139, at 120-29.

¹⁸⁵ 2011 DEAR COLLEAGUE LETTER, *supra* note 5, at 12.

¹⁸⁶ *Id.* at 9 (discussing complainant's right to present evidence).

2. *Witnesses*

Even if documents and things are not created, the proceeding itself generates witnesses, in the form of the campus investigators, mandatory reporters (Clery Act CSAs and Title IX responsible employees), the Title IX coordinator, disciplinary committee members, advocates, and campus adjudicators.¹⁸⁷ The consensus among law enforcement officers interviewed for this Comment is that if the assault was reported, these individuals would be considered witnesses and would be interviewed by law enforcement over the course of their criminal investigations. Likewise, prosecutor DDA #1 stated that he would review the police interviews and would follow up with witnesses as needed to complete the record.¹⁸⁸ Over the course of a criminal prosecution, the names of these witnesses would be made available to the defense as well. Therefore, unless shielded by a recognized privilege, these new third party witnesses (who were generated exclusively for the purpose of complying with Title IX) could become directly enmeshed in a criminal prosecution as witnesses used to impeach the survivor's testimony.

IV. CREATING A TRAUMA-INFORMED CAMPUS: A NEW WAY FORWARD FOR SEXUAL ASSAULT SURVIVORS AND SCHOOLS

Three closely linked recommendations would improve outcomes for the survivor, future criminal prosecutions, and Title IX investigations. First, participants in a Title IX proceeding should receive trauma-informed interview training. This includes Title IX responsible employees, Clery Act CSAs, campus safety and security officials, adjudicators, disciplinary committee members (regardless of whether they are students, faculty, employee staff, or administrators), and the Title IX coordinator. Second, as few people as possible should interview the survivor. Finally, interviews taken by trauma-informed trained investigators should be recorded. If adopted by campuses, these victim-centered practices will reduce the occurrence of inaccurate statements that can be used to impeach a survivor in a future criminal prosecution.

A. FORENSIC EXPERIENTIAL TRAUMA INTERVIEW (FETI) AND THE TRAUMA-INFORMED INTERVIEW

Trauma-informed interviewing encompasses a variety of practices that account for the trauma that the survivor has experienced and adjusts

¹⁸⁷ See *supra* Part III(C).

¹⁸⁸ Telephone Interview with DDA #1, Deputy Dist. Attorney (Dec. 1, 2014).

the interview procedure accordingly. As is particularly relevant here, trauma-informed interviewing includes techniques that can reduce the incidence of factual inaccuracies and inconsistencies from victim statements.

Support for trauma-informed interviewing has emerged from a surprising quarter—the U.S. Military. Russell W. Strand is a former special agent with the Army’s Criminal Investigation Division and is the Chief of the Behavioral Sciences Education and Training Division (“BSETD”) in the Army’s Military Police School.¹⁸⁹ He has been evaluating sexual assaults in the military since 2004.¹⁹⁰ In relevant part, the purpose of the BSETD is to conduct sexual assault investigations.¹⁹¹ During the course of his investigations, Mr. Strand realized that since traditional interviewing protocols did not account for the survivor’s trauma, these interviews were not yielding the most accurate information. In response, he developed the Forensic Experiential Trauma Interview (“FETI”).¹⁹² The consensus among law enforcement officers interviewed for this Comment is that FETI is a best practice.¹⁹³

FETI is based on the understanding that information from a traumatic incident is retained as sensory information in the brain’s limbic system. Sensory information is not comprised of chronologically organized facts, but is what the survivor felt, heard, and visually perceived.¹⁹⁴ As the title suggests, FETI interviewing is designed to unlock the survivor’s memory of the experience through experiential interviewing. Mr. Strand refers to this as “interview[ing] the brainstem.”¹⁹⁵

To achieve this, FETI interviewing is driven narratively, not chronologically.¹⁹⁶ Survivors are asked to tell only what they are *able* to relate about the *experience*, in their own words, and in their own order.¹⁹⁷ For

¹⁸⁹ Rebecca Ruiz, *Training Aims to Improve How Military Sexual Assaults Are Investigated*, NBC NEWS: U.S. NEWS (Mar. 21, 2013), http://usnews.nbcnews.com/_news/2013/03/21/17375404-training-aims-to-improve-how-military-sexual-assaults-are-investigated.

¹⁹⁰ *Id.*

¹⁹¹ *Behavioral Sciences Education and Training Division*, U.S. ARMY MILITARY POLICE SCHOOL, <http://www.wood.army.mil/usamps/Organizations/DOT/BSETD.html> (last visited Mar. 2, 2016).

¹⁹² See generally Strand, *supra* note 98 (describing the FETI technique and the eight principles of FETI interviewing); see also Terri Moon Cronk, *New Approach Helps Sexual Assault Victims Recall Details*, MILITARY1.COM (Apr. 10, 2013), <https://www.military1.com/defense/article/397934-new-approach-helps-sexual-assault-victims-recall-details>; Strand with Avalon (ed.), *supra* note 93; Ruiz, *supra* note 189.

¹⁹³ Telephone Interview with Randall Carroll, President, Profectus Consulting Servs. (Dec. 15, 2014); Telephone Interview with Steve Bellshaw, Deputy Chief of Police, Salem, Or. (Dec. 11, 2014); Telephone Interview with Carrie Hull, Detective, Ashland, Or. Police Dep’t (Nov. 19, 2014).

¹⁹⁴ Strand, *supra* note 98, at 4.

¹⁹⁵ Strand with Avalon (ed.), *supra* note 93.

¹⁹⁶ Strand, *supra* note 98, at 4.

¹⁹⁷ See generally *id.*

example, a FETI trained interviewer would avoid asking a traumatized survivor, “What was the weather like?”¹⁹⁸ These detailed questions can distress survivors when they can’t provide an answer. This can prompt them to wonder, “Why can’t I remember that?” and undermine their confidence in their account.¹⁹⁹ Consequently, survivors may just guess and provide potentially inaccurate information such as, “It may have been raining.”²⁰⁰ In contrast, FETI interviewers do not ask leading questions that may encourage survivors to supply information that they do not actually recall.²⁰¹ FETI interviewers believe that the survivor may be able to provide those same factual details, not in response to detailed questioning, but through active listening and focusing the questioning on the survivor’s experience.²⁰² Therefore, to ascertain what the weather was like at the time of the assault, the FETI interviewer might ask, “What did you hear?” This may trigger the survivor to remember what she experienced, “I heard rain.”²⁰³ Even if such details are not provided, the interviewer still does not interject. If necessary, the interviewer can follow up with more traditional, detail-oriented questions. This should be done at another interview, after the initial trauma has abated.²⁰⁴ The presence of a victim advocate may be helpful as well. In these ways, FETI addresses many of the issues raised in traditional police interviewing, which is driven by facts and chronologies.²⁰⁵ Since 2009, 721 military special agents and prosecutors have been trained in the FETI technique.²⁰⁶

While the U.S. Military has specifically endorsed FETI, the concept of trauma-informed interviewing has gained acceptance among law enforcement, government agencies, and on some progressive college campuses. The International Association of the Chiefs of Police accepts these findings about trauma, incorporates it into their protocols, and teaches it at their sex crime investigation seminars for law enforcement.²⁰⁷ Similarly, the IACP encourages officers to conduct an evidence-based investi-

¹⁹⁸ This specific example of a FETI-style interview was drawn from the Author’s interview with Detective Carrie Hull. Telephone Interview with Carrie Hull, Detective, Ashland, Or. Police Dep’t (Nov. 19, 2014); *see also* Strand, *supra* note 98, at 4 (examples of FETI questioning).

¹⁹⁹ This specific example of a FETI-style interview was drawn from the Author’s interview with Detective Carrie Hull. Telephone Interview with Carrie Hull, Detective, Ashland, Or. Police Dep’t (Nov. 19, 2014).

²⁰⁰ *Id.*

²⁰¹ Strand, *supra* note 98, at 3-5.

²⁰² *Id.*

²⁰³ This specific example of a FETI-style interview was drawn from the Author’s interview with Detective Carrie Hull. Telephone Interview with Carrie Hull, Detective, Ashland, Or. Police Dep’t (Nov. 19, 2014).

²⁰⁴ Strand, *supra* note 98, at 7.

²⁰⁵ *Supra* Part III(C)-(D).

²⁰⁶ Ruiz, *supra* note 189.

²⁰⁷ INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 87, at 3-5.

gation, and not to label a report unfounded based on the initial interview of the survivor.²⁰⁸

A joint coalition of the DOJ's Office for Victims of Crime, the OCR, and other stakeholders also discussed trauma-informed interviewing at their January 2012 forum, "Promoting Effective Criminal Investigations of Campus Sex Crimes."²⁰⁹ The forum's published recommendations called for increased training on the traumatic effect of sexual assault and how to interview such survivors.²¹⁰

In 2014, the White House published *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault*.²¹¹ The report stated that "[n]ew research has also found that the trauma associated with rape or sexual assault can interfere with parts of the brain that control memory."²¹² The report not only recognized the inadequacy of the current interviewing model, it announced that the DOJ would assist schools in their Title IX compliance by developing trauma-informed training for institutes of higher education.²¹³ It states that the DOJ "will develop trauma-informed training programs for school officials and campus and local law enforcement . . . This kind of training has multiple benefits: when survivors are treated with care and wisdom, they start trusting the system, and the strength of their accounts can better hold offenders accountable."²¹⁴

While the program's details are not known at this time, it is clear that the federal government intends to create a set of standards regarding the type of response that survivors can expect from schools receiving federal funding and subject to Title IX. Although the government has not yet mandated this training, it is difficult to imagine that a school could justify having standards that significantly differ from, or fall below, those articulated by the DOJ (considering their Title IX enforcement role).

Recognizing the benefits of the trauma-informed approach, some campuses are not waiting for the federal government to design their program. Schools like Southern Oregon University in Ashland, Oregon have begun proactively partnering with law enforcement and changing how their investigators interview survivors. Southern Oregon University has joined the You Have Options program founded by Detective Carrie Hull.²¹⁵ The program's successes were the focus of a N.Y. Magazine

²⁰⁸ *Id.* at 2.

²⁰⁹ DOJ ET AL., PROMOTING EFFECTIVE CRIMINAL INVESTIGATIONS, *supra* note 34, at 24.

²¹⁰ *Id.* at 23-26.

²¹¹ WHITE HOUSE FIRST REPORT, *supra* note 6.

²¹² *Id.* at 13.

²¹³ *Id.* at 3.

²¹⁴ *Id.*

²¹⁵ Van Syckle, *supra* note 20.

article, *The Tiny Police Department in Southern Oregon that Plans to End Campus Rape*.²¹⁶ A goal of You Have Options is to increase sexual assault reporting and the prosecution of offenders, and prevent survivor retraumatization during the legal process.²¹⁷ Colleges and police departments nationally can enroll in the You Have Options program. Consistent with this goal, a cornerstone of You Have Options is trauma-informed interviewing. The program lists twenty “Elements of a Victim-Centered and Offender-Focused You Have Options Law Enforcement Response.”²¹⁸ Element 13 states that “[l]aw enforcement officers will conduct victim interviews in a trauma-informed manner.”²¹⁹ You Have Options sponsors FETI interview training for law enforcement officers throughout the year.²²⁰ Detective Hull firmly believes that instituting trauma-informed interviewing, including FETI, will lead to more survivors feeling comfortable enough to cooperate with law enforcement, and this will hold more offenders accountable.²²¹ Furthermore, trauma-informed training is important for officers both on- and off-campus, “because oftentimes a victim may present to a campus public safety officer, so you still need all that same training there.”²²²

Title IX guidance already requires that Title IX participants receive training in sexual violence. It is an achievable goal to further mandate that such training include trauma-informed interviewing for anyone on campus who may take a survivor’s statement.

B. LIMIT THE NUMBER OF PEOPLE WHO ARE PERMITTED TO INTERVIEW A SURVIVOR

Schools must limit the number of people who are permitted to interview a survivor to only those who have received trauma-informed interview training. This will mitigate the trauma to the survivor and reduce the number of statements generated that can potentially later be compared for inconsistencies.

The IACP recommends that in-depth interviews only be conducted by a trained investigator. This will “decrease account repetition” which

²¹⁶ *Id.*

²¹⁷ *You Have Options Sexual Assault Reporting Program*, CITY OF ASHLAND, <http://www.ashland.or.us/Page.asp?NavID=15331> (last visited Feb. 19, 2016).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Upcoming Trainings*, THE YOU HAVE OPTIONS PROGRAM, <http://www.reportingoptions.org/#!lep-feti/c19jx> (last visited Feb. 19, 2016).

²²¹ Telephone Interview with Carrie Hull, Detective, Ashland, Or. Police Dep’t (Nov. 19, 2014).

²²² *Roundtable*, *supra* note 1, at 16 (statement of Carrie Hull, Detective, Ashland, Or. Police Dep’t).

“reduce[s] the possibility of inconsistent information that could be used against the victim’s credibility in court.”²²³ Senior Deputy Prosecutor David Martin was adamant that “survivors are entitled to the highest quality response that the system can give,” and that with the cases he prosecutes, Mr. Martin warns, “you are never going to speak to a victim” unless he is “confident” that you have both the requisite training and experience.²²⁴ To allow otherwise is a “recipe for disaster” because of the risk of creating inaccurate statements or retraumatizing the survivor.²²⁵

Senator McCaskill agrees that individuals who do not know how to conduct a forensic interview initiate “way too many interviews” on campus.²²⁶ At least in regard to the first person to interview a survivor on campus, she recommends that they be “trained in a forensic interview technique as it relates to a sexual assault crime.”²²⁷

By limiting the number of people who will have access to a survivor for interviewing purposes to just those who have received specific trauma-informed interview training, campuses will, by default, limit the number of people who will interview the survivor overall. Since such training may be time-consuming or expensive to obtain, it may necessarily limit the role that students, staff, and faculty can play in Title IX proceedings when there are allegations of criminal sexual violence. This will benefit survivors, because then only the most highly qualified and experienced campus administrators will be allowed to participate in this category of Title IX proceedings, rather than a rotating collection of students, staff, and faculty. This will also limit the number of people who can potentially become enmeshed in a future criminal proceeding as trial witnesses.²²⁸

C. RECORD INTERVIEWS

The combination of having interviews conducted by a trained investigator, and then also having those interviews be recorded, would “make

²²³ INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 87, at 4.

²²⁴ Mr. Martin notes that in his office, allegations of sexual harassment are investigated by “specialized HR” staff who are “highly trained.” He went on to explain that even volunteers at domestic violence shelters, who perform routine tasks such as handing out clothes or food, must receive 40 hours of training, because of the sensitive nature of the issues involved and emotional state of the survivors. Therefore, he “objects” to any system that would allow less with regard to potential felony sexual assault investigations. Telephone interview with David Martin, Senior Deputy Prosecutor, King’s Cty Domestic Violence Unit, Seattle, Wash. (Jan. 16, 2015).

²²⁵ *Id.*

²²⁶ *Roundtable*, *supra* note 1, at 14 (statement of Sen. Claire McCaskill, Chairman, Subcomm. on Fin. & Contracting Oversight).

²²⁷ *Id.*

²²⁸ *See supra* Part III(G)(2).

the biggest difference” in improving outcomes in sexual assault investigations.²²⁹ Recording interviews is a best practice in sexual assault investigations generally because “[i]f there is a discrepancy later concerning what was said during the interview, the documented record will aid in the resolution of the issue.”²³⁰ This is preferable to what occurred with Ms. Sebold,²³¹ because “[i]nstead of having an investigator filtering what he or she thinks is important [by typing notes], the videotape provides an accurate accounting of what happened.”²³²

For this recommendation to aid survivors, it is critically important that only an investigator trained in trauma-informed interviewing perform the recorded interview. Otherwise the recorded interview itself can become a source of impeachable statements. “But if the interview is done right, then their recollections are not going to change, because the interview will not ask them to remember things they do not remember, but will, rather, just ask them to say what they can remember as opposed to a typical [police interview].”²³³

“Emotional strain also becomes a factor in the telling and retelling” of the survivor’s story.²³⁴ Therefore, another advantage of recording is that survivors can avoid the retraumatization of providing multiple interviews over the course of a Title IX proceeding. Instead, after the initial statement, they can refer campus adjudicators and disciplinary committees back to their original recorded statement.

In order to grant the necessary permission for an interview to be recorded, the survivor must have a high level of trust with the interviewer.²³⁵ Detective Hull noted that in her experience, once the interviewer explains the importance of recording and how it is being done in order to assist the survivor, the survivor is more likely to permit it.²³⁶

²²⁹ Roundtable, *supra* note 1, at 52 (statement of Carrie Hull, Detective, Ashland, Or. Police Dep’t).

²³⁰ Elizabeth M. Donegan, *Leave Your Baggage at the Door: Understanding the Complexity of Sexual Assault Investigations*, in *INSIDE THE MINDS: INVESTIGATING SEX CRIMES: LAW ENFORCEMENT OFFICIALS ON EXAMINING THE LATEST SEX CRIME TRENDS, CONDUCTING A THOROUGH INVESTIGATION, AND PREPARING FOR TRIAL 67* (Jo Alice Darden, ed. 2011).

²³¹ SEBOLD, *supra* note 139, at 30-31.

²³² Donegan, *supra* note 230, at 54.

²³³ Roundtable, *supra* note 1, at 54 (statement of Sen. Claire McCaskill, Chairman, Subcomm. on Fin. & Contracting Oversight).

²³⁴ BOHMER & PARROT, *supra* note 47, at 35.

²³⁵ Telephone Interview with Carrie Hull, Detective, Ashland, Or. Police Dep’t (Nov. 19, 2014).

²³⁶ *Id.*

CONCLUSION

The detection and incarceration rate of sex crime offenders is appallingly low. This places the public at risk, particularly women. And we now know that many perpetrators commit multiple offenses while they are college students. Title IX is an administrative enforcement scheme that promotes safe and equitable campuses by requiring schools to investigate sex crimes that occur between students, and to hold disciplinary hearings to assign responsibility. Title IX can be a powerful tool to detect and incarcerate sex crime offenders if complainants choose to cooperate with law enforcement off-campus as well. The promise of Title IX can be undermined, however, if the campus mishandles a key piece of evidence—the survivor’s statement. A Title IX process that allows for multiple, untrained individuals to interview survivors creates victim statements that often contain inconsistencies and inaccuracies. These statements are memorialized in transcripts, recordings, or in the memories of third party witnesses during the Title IX proceedings. This jeopardizes a future criminal prosecution and demoralizes survivors. To remedy this issue, campuses should require that everyone who interviews a survivor during a Title IX proceeding receive trauma-informed training, particularly FETI. When the federal government releases its trauma-informed training program, campuses should consider adopting it. In addition, campuses should also voluntarily partner with their local law enforcement agency by joining the You Have Options program (or a similar available program). Only persons who have received trauma-informed interview training should ever take a statement from a survivor, and these interviews should be recorded. Instituting these requirements will limit account repetition, therefore decreasing the number of statements that can be compared for inconsistencies and avoiding unnecessarily retraumatizing the survivor.

The current system would allow for false reports to be investigated and prosecuted if a savvy individual recited a single detailed narrative, in precise chronological order. And it dismisses as false the statements of survivors who narrate the event how they experienced it and not as a series discrete and often irrelevant chronological facts. It particularly penalizes campus survivors who engage in Title IX proceedings, but do so at the risk of creating multiple statements, which can be used to attack their credibility. A system that obscures truth and helps most perpetrators evade justice can, and should, be reformed.

