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The Threat of Expulsion as Unacceptable Coercion: Title IX, Due Process, and Coerced Confessions

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THE THREAT OF EXPULSION AS UNACCEPTABLE COERCION: TITLE IX, DUE PROCESS, AND COERCED CONFESSIONS

ABSTRACT

The nation's recent focus on the prevalence of sexual assault has rightfully prompted colleges and universities to take a second look at their sexual assault policies. Bringing justice to those who have committed sexual assault, and violated schools' codes of conduct, is worthy. However, one concern is that the pendulum has swung too far to the left. Schools have instituted stricter policies without considering the due process rights of the accused. Problematically, the statements made by the accused, under limited due process safeguards, can be used in criminal proceedings. This Comment argues that it is unconstitutional to admit in a state criminal proceeding statements that were made by students accused of sexual assault in a college disciplinary hearing. Specifically, it posits that such statements can be considered coerced confessions in violation of due process.

This Comment pays particular attention to the lack of safeguards present in the college disciplinary process for adjudicating sexual misconduct. Pressure from the Obama Administration for colleges and universities to transform their sexual assault response procedures ushered in sweeping changes that paid little attention to the accused student's due process rights. This approach to college sexual misconduct policies, while valuable for victim protection purposes, is troublesome when the accused student is facing, or will later face, criminal charges. This Comment argues that the threat of expulsion used by college officials to elicit statements from an accused student is coercion that becomes unconstitutional when a prosecutor seeks to admit the statements into evidence in a criminal case.

INTRODUCTION

Designing a sufficiently fair and appropriate structure for college and university[1] sexual misconduct proceedings has long been a unique challenge for legal scholars and college officials seeking to ensure that both the complainant and the accused are treated fairly and impartially.[2] The prevalence of sexual assault on college campuses has only heightened the need for colleges to ensure that their procedures are adequate and efficient.[3]

Recently, Title IX has emerged as a salient tool for addressing sexual violence on campus.[4] Title IX is a federal law that provides, "[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."[5] Although Title IX

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[1] For purposes of this Comment, the terms "college" and "university" are treated identically and may be used interchangeably. Where "school" is used, it refers to both a "college" and a "university."

[2] *See, e.g.*, Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 79–80 (2013).

[3] The rampancy of sexual assault on campuses is startling. While statistics on its frequency vary, depending on study surveys' targeted audiences, targeted behaviors, and definitions, for all entities involved, the policy discussions report shockingly high numbers of sexual assault and misconduct behaviors. Tyler Kingkade, *Campus Rape May Be "Worse than We Thought," Study Shows*, HUFFINGTON POST (May 20, 2015, 3:00 AM), http://www.huffingtonpost.com/2015/05/20/1-in-5-college-study-raped_n_7293068.html. For example, in one study, 23.1% of female college students reported they experienced some form of unwanted sexual contact carried out by force or incapacitation due to alcohol and drugs. DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 14 (2015), https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf. Additionally, women ages eighteen to twenty-four (the age range of most college students) have the highest rate of sexual violence victimization among women generally and are "3 times more likely than women in general to experience sexual violence." *Victims of Sexual Violence: Statistics*, RAINN, https://rainn.org/get-information/statistics/sexual-assault-victims#College (last visited Feb. 21, 2016); SOFI SINOZICH & LYNN LANGTON, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013, at 1 (Jill Thomas & Lynne McConnell eds., 2014), https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf. This problem does not only concern women. *See Victims of Sexual Violence: Statistics*, *supra*. Male college students ages eighteen to twenty-four are five times more likely than male nonstudents of the same age to be victims of rape or sexual assault. *Id.* Not surprisingly, combatting sexual violence on college campuses became a significant focus of the Obama Administration and garnered significant media and political attention in the last five years. *See* Elizabeth Hartfield, *Obama Launches New Effort Combating Sexual Assault on College Campuses*, CNN (Sept. 19, 2014, 2:40 PM), http://www.cnn.com/2014/09/19/politics/obama-combating-campus-sexual-assault/; Jennifer Steinhauer, *White House to Press Colleges to Do More to Combat Rape*, N.Y. TIMES (Apr. 28, 2014), http://www.nytimes.com/2014/04/29/us/tougher-battle-on-sex-assault-on-campus-urged.html?_r=0.

[4] *See* Barclay Sutton Hendrix, Note, *A Feather on One Side, a Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in College Disciplinary Proceedings*, 47 GA. L. REV. 591, 603–04 (2013) (discussing the U.S. Department of Education's interpretations of Title IX and how it will be enforced).

[5] 20 U.S.C. § 1681(a) (2012).

had not previously applied to campus policies on sexual violence, three new documents ushered in sweeping changes: the U.S. Department of Education's Dear Colleague Letter (Dear Colleague Letter), the Department of Education's Office for Civil Rights' *Questions and Answers on Title IX and Sexual Violence* (*Questions and Answers*), and the White House Task Force to Protect Students from Sexual Assault's *Not Alone* report.[6] Many colleges and universities did not comply with these requirements, causing the Department of Education (DOE) to investigate over a hundred of them.[7] Schools rushed to transform their policies and procedures on sexual violence out of fear of losing federal funding.[8]

This Comment focuses on the collateral consequences of college disciplinary proceedings, specifically the effect of these proceedings on the accused student's due process rights in a concurrent or subsequent criminal proceeding. In the aftermath of the Title IX policy changes and the resulting transformation in colleges' sexual violence procedures—all of which sought to provide more services and protections for identified victims of sexual violence[9]—little attention has been paid to the effects of these policy changes on the constitutional rights of accused students. Individual colleges and universities have offered only minimal safeguards to accused students as their policies have reformed.[10] Only a few state legislatures are pushing for more protection of the rights of the accused.[11] This Comment argues that the lack of safeguards present in the college disciplinary process taints the evidence that results from that

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[6] *See* 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 (2014) [hereinafter NOT ALONE], https://www.justice.gov/ovw/page/file/905942/download; U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014) [hereinafter QUESTIONS AND ANSWERS ON TITLE IX], http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf; Russlynn Ali, U.S. Dep't of Educ., Office of Civil Rights, Dear Colleague Letter: Sexual Violence (Apr. 4, 2011) [hereinafter Ali, Dear Colleague Letter], http://www.whitehouse.gov/sites/default/dear_colleague_sexual_violence.pdf.

[7] Tyler Kingkade, *106 Colleges Are Under Federal Investigation for Sexual Assault Cases*, HUFFINGTON POST (Apr. 6, 2015, 3:03 PM), http://www.huffingtonpost.com/2015/04/06/colleges-federal-investigation-title-ix-106_n_7011422.html.

[8] *See* Meredith Clark, *Official to Colleges: Fix Sexual Assault or Lose Funding*, MSNBC (July 15, 2014, 11:23 AM), http://www.msnbc.com/msnbc/campus-sexual-assault-conference-dartmouth-college#51832 (stating that then-DOE Assistant Secretary for Civil Rights, Catherine Lhamon, threatened to cut funding for schools that violate Title IX).

[9] *See* QUESTIONS AND ANSWERS ON TITLE IX, *supra* note 6; NOT ALONE, *supra* note 6; Ali, Dear Colleague Letter, *supra* note 6.

[10] *See* Ashe Schow, *Hardly Any Mention of Due Process at Senate Hearing on Campus Sexual Assault*, WASH. EXAMINER (July 29, 2015, 3:35 PM), http://www.washingtonexaminer.com/hardly-any-mention-of-due-process-at-senate-hearing-on-campus-sexual-assault/article/2569207.

[11] Valerie Richardson, *After UVA Fiasco, Some Colleges Consider Providing Lawyers to Students Accused of Sex Assault*, WASH. TIMES (Apr. 16, 2015), http://washingtontimes.com/news/2015/apr/16/college-sexual-assault-crackdown-sparks-effort-to-/?page=all.

process. For that reason, it violates due process to allow statements of the accused student to be used against him or her in a criminal proceeding.

This Comment proceeds in four Parts. Part I explains the general college disciplinary process for sexual assault complaints. First, this Part discusses Title IX requirements that are applicable to all colleges and universities that receive federal funding. Next, it details the three basic investigatory models that are most commonly used by colleges and universities in responding to sexual assault.

Part II identifies the various safeguards that are lacking in college and university disciplinary procedures and explains how those deficiencies taint statements made by the accused student. Next, this Part examines state legislatures' reactions to due process concerns, particularly the unwillingness of states to mandate that colleges and universities provide certain due process safeguards to accused students.

Part III provides the constitutional backdrop for the coerced confession analysis. The Supreme Court has not yet addressed the constitutionality of allowing the statements made by an accused student during a college disciplinary proceeding into a state criminal proceeding. In *Colorado v. Connelly*,[12] the Court insisted that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."[13] This Part argues that the *Connelly* holding should be extended to recognize threats of expulsion by school officials as a form of coercion.

Part IV discusses state court decisions about whether to interpret their own constitutional due process provisions in a manner that is consistent with *Connelly*, paying particular attention to those states that have rejected the U.S. Supreme Court's stingy approach in favor of a more generous due process standard. This Part explores cases in which state courts have held, as a matter of state law, that egregious police conduct is not a necessary predicate for finding a due process violation because private parties can be sources of coercion. This Part particularly considers workplace confession cases in which courts have held that statements were coerced, despite the absence of egregious police activity, based on a threat of firing by the employer. It argues that statements made by accused students in campus disciplinary proceedings are similarly coerced if

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[12] 479 U.S. 157 (1986).
[13] *Id.* at 167.

they are made under threats of expulsion. Lastly, this Part explains the implications of holding that the use of such statements in a criminal proceeding is unconstitutional.

I. THE COLLEGE DISCIPLINARY PROCEEDING

All public and private colleges and universities receiving federal financial assistance are required to follow Title IX and its interpretations.[14] Because almost all colleges and universities receive federal financial assistance and thus must comply with Title IX,[15] certain aspects of sexual assault disciplinary proceedings are common across institutions. Additionally, schools' methods for investigating and resolving sexual assault complaints share some features. This Part first introduces Title IX and provides an overview of three of Title IX's interpreting documents: the Dear Colleague Letter, the *Questions and Answers*, and the *Not Alone* report. Next, this Part discusses in detail Title IX's requirements for college sexual assault proceedings. Last, this Part describes the three models that are generally used at colleges and universities to respond to complaints of sexual violence.

A. Title IX and Recent Guidance Documents

Title IX provides a mechanism for the DOE to perform compliance reviews, investigate individual complaints, and provide technical assistance.[16] This

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[14] 20 U.S.C. § 1681(a) (2012).

[15] *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., TITLE IX LEGAL MANUAL (2015) [hereinafter TITLE IX LEGAL MANUAL], http://www.justice.gov/crt/title-ix#III.%C2%A0%20Scope%20of%20Coverage.

[16] *See id.* (noting that the federal agency that provides the financial assistance is the agency responsible for enforcing Title IX); Susan Hanley Duncan, *The Devil Is in the Details: Will the Campus SaVE Act Provide More or Less Protection to Victims of Campus Assaults?*, 40 J.C. & U.L. 443, 448 (2014); Hendrix, *supra* note 4. The enforcement mechanism for Title IX requirements is administrative in that federal agencies that distribute education funding are responsible for establishing requirements and may enforce those requirements through any lawful means, including the termination of funding. *See* 20 U.S.C. § 1682 (2012) ("Compliance with any requirement adopted pursuant to this section may be effected . . . by the termination of . . . assistance of such program or activity . . . ."). Additionally, the Supreme Court has held that Title IX is enforceable through a private right of action, meaning that a student can bring suit against a school alleging that it did not comply with Title IX. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) (holding that a student could maintain her private right of action against two universities for sex discrimination). Further, a school can be held liable for a Title IX violation when it manifests "deliberate[] indifferen[ce] to known acts of sexual harassment by a teacher" or "known acts of peer sexual harassment." Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 641, 648 (1999). The Court noted that the appropriateness of a response may be different in a primary- or secondary-education setting than in a college setting. *Id.* at 649. Based upon interpretation of DOE's policy guidance, the:

> [T]hree part test for evaluating the adequacy of a school's response to peer sexual harassment [is]: (1) whether the harassment impaired access to educational opportunities, (2) whether the school

mechanism allows the DOE to review the policies and procedures of colleges and universities to determine whether they are in compliance.[17] Title IX requires that agencies promulgate regulations to provide guidance to recipients of federal financial assistance, including colleges and universities.[18] In 2000, the DOJ and twenty other agencies published a common rule to provide guidance for Title IX compliance.[19] Although the common rule touches on Title IX sexual harassment law, the most recent, helpful guidance on Title IX compliance is found in the Dear Colleague Letter, the *Questions and Answers*, and the *Not Alone* report.[20] These three documents provide guidance to colleges and universities about and suggestions for Title IX compliance.[21]

1. Dear Colleague Letter

In 2011, the DOE released the Dear Colleague Letter, an advisory letter to college and university officials, as a guide to the DOE's views of Title IX compliance.[22] In the Dear Colleague Letter, the DOE stated three notable grievance procedure provisions. First, and for the first time, it mandated that

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> had actual or constructive notice of the harassment, and (3) whether the school took prompt and effective action to remedy the harassment and prevent its recurrence.

Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 102 (2010).

[17] Susan Hanley Duncan, *supra* note 16, at 443, 448.

[18] TITLE IX LEGAL MANUAL, *supra* note 15; *see* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858, 52,859 (Aug. 30, 2000) ("The goal of Title IX is to ensure that Federal funds are not utilized for and do not support sex-based discrimination, and that individuals have equal opportunities, without regard to sex, to pursue, engage or participate in, and benefit from academic, extracurricular, research, occupational training, employment, or other educational programs or activities.").

[19] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. at 52,858.

[20] *See* QUESTIONS AND ANSWERS ON TITLE IX, *supra* note 6; NOT ALONE, *supra* note 6; Ali, Dear Colleague Letter, *supra* note 6.

[21] *See supra* note 20.

[22] Ali, Dear Colleague Letter, *supra* note 6. The Dear Colleague Letter defined sexual violence to include "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol" or is otherwise "unable to give consent to due to an intellectual or other disability." *Id.* at 1. This made it clear that acts such as "rape, sexual assault, sexual battery, and sexual coercion . . . are forms of sexual harassment covered under Title IX." *Id.* at 1–2. The DOE reasoned that these acts, regardless if they only occur once, are severe enough to create a hostile environment that limits a student's ability to participate or benefit from a school program and thus brings it within Title IX's coverage of prohibition against sexual harassment in educational programs. *See id.* at 3. The Dear Colleague Letter emphasized that a single incident of sexual assault or rape was enough to implicate Title IX coverage by citing a number of cases in which courts have held that the question of whether a hostile environment exists can be proven by a single incident of sexual violence. *Id.* at 3 n.10.

schools use the preponderance of the evidence standard for determining sexual misconduct.[23] Second, it required that anyone investigating or adjudicating college sexual misconduct matters have specific training or experience responding to sexual harassment and sexual violence reports.[24] Third, it stated that colleges should resolve complaints "timely," noting that "a typical investigation takes approximately 60 calendar days."[25]

2. Questions and Answers on Title IX and Sexual Violence

In April 2014, the DOE's Office for Civil Rights issued a guidance document titled *Questions and Answers on Title IX and Sexual Violence*.[26] The *Questions and Answers* reiterated that schools are required to use the preponderance of the evidence standard.[27] Additionally, the *Questions and Answers* required universities to do the following: take interim measures to ensure student safety[28] and the complainant's safety if law enforcement is pursuing a simultaneous criminal investigation,[29] if requested, make arrangements so that the complainant and the accused are not present in the same room at the same time,[30] and prohibit the questioning of a complainant about sexual interactions with anyone other than the respondent.[31]

3. The Not Alone *Report*

A third document also guides colleges and universities in complying with Title IX. In 2014, the White House Task Force to Protect Students from Sexual Assault issued a report entitled, *Not Alone*.[32] The *Not Alone* report suggested ways to reform policies to "give survivors more control"[33] and to "[b]etter [h]old[] [o]ffenders [a]ccountable."[34]

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[23] *See id.* at 11.
[24] *Id.* at 12.
[25] *Id.*; *see* Djuna Perkins, *Behind the Headlines: An Insider's Guide to Title IX and the Student Discipline Process for Campus Sexual Assaults*, 59 BOS. B.J., at liv, lv (2015).
[26] QUESTIONS AND ANSWERS ON TITLE IX, *supra* note 6.
[27] *Id.* at 26.
[28] *See id.* at 21.
[29] *See id.* at 28.
[30] *Id.* at 30.
[31] *Id.* at 31.
[32] NOT ALONE, *supra* note 6.
[33] *Id.* at 3.
[34] *Id.* at 14.

Describing itself as offering its "first set of action steps and recommendations,"[35] the report outlined the White House Task Force's four major purposes: (1) "[i]dentify the scope of the problem on college campuses;" (2) "[h]elp prevent campus sexual assault;" (3) "[h]elp schools respond effectively when a student is assaulted; and" (4) "[i]mprove, and make more transparent, the federal government's enforcement efforts."[36] First, to identify the scope of the problem, the report announced that the Task Force would "provid[e] schools with a new toolkit for developing and conducting a climate survey."[37] Second, to aid in prevention efforts, the report encouraged sexual assault prevention strategies, including bystander intervention, particularly those programs that engage men.[38] Third, in regard to ensuring that schools' responses to sexual assaults are effective, the report emphasized instituting "confidential advice and support" for victims, included a "checklist for schools to use in drafting (or reevaluating) their own sexual misconduct policies," and announced that the DOJ would begin "assessing different models for investigating and adjudicating sexual assault cases with an eye toward identifying best practices."[39] Finally, in efforts to increase transparency and enforcement, the White House Task Force promised to post enforcement data on its website and provide information about how students can file a complaint if they think their schools are not sufficiently responding to sexual assault.[40] In addition, the report stated the DOE would strengthen its enforcement procedures by "instituting time limits on negotiating voluntary resolution agreements" with schools, among other measures.[41]

B. Title IX Requirements for College and University Sexual Violence Proceedings

Title IX requirements for college and university sexual violence proceedings are collected from Title IX and administrative documents, including the guidance documents discussed above. All colleges and universities are required to "take immediate action to eliminate the harassment, prevent its recurrence, and address its effects."[42] To that end, every college and university must have a

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35 *Id.* at 2.
36 *Id.* at 6.
37 *Id.* at 8.
38 *Id.* at 9–10.
39 *Id.* at 2–4.
40 *Id.* at 4.
41 *Id.* at 5.
42 Ali, Dear Colleague Letter, *supra* note 6, at 4.

set of procedures in place to respond to sexual assault complaints, although colleges and universities are not required to adopt grievance procedures specific to sexual violence.[43] If a school relies on its ordinary student disciplinary procedures to resolve a sexual violence complaint, the school's Title IX coordinator must review the procedures to ensure compliance with Title IX.[44]

A school's grievance procedures must provide for "prompt and equitable resolution of . . . complaints."[45] Colleges and universities are allowed under federal law to use voluntary informal mechanisms, such as mediation, to resolve some types of sexual harassment complaints, but they are not allowed to use mediation to resolve sexual assault complaints.[46] As part of their grievance procedures, all colleges and universities must: provide notice to students and employees of the procedures, including where complaints may be filed; apply the procedures to complaints alleging harassment, including sexual assault, "carried out by employees, students, or third parties"; provide "[a]dequate, reliable, and impartial investigation of complaints"; provide the opportunity for both the complainant and the accused to "present witnesses and other evidence"; "[d]esignate reasonably prompt time frames for the major stages of the complaint process"; and "assure[] [they will] take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate."[47]

The "prompt and equitable resolution" of complaints includes the requirement that colleges and universities must resolve complaints even if a criminal investigation is simultaneously taking place.[48] Once law enforcement has completed the gathering of evidence in response to a criminal complaint, schools must "promptly" resume their Title IX investigations.[49] In addition, all schools should notify complainants of their right to file criminal complaints, and should not dissuade complainants from filing a police report.[50]

To make grievance procedures "equitable," many colleges and universities conduct investigations and hearings to determine whether sexual violence has

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43 *Id.* at 8.
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.* at 9.
48 *Id.* at 10.
49 *Id.*
50 *Id.* Specifically, the Dear Colleague Letter emphasizes that schools should not tell the complainant that it is "working toward a solution and instruct, or ask, the complainant to wait to file the report." *Id.*

occurred.[51] To determine guilt, colleges and universities must use a preponderance of the evidence standard.[52] Additionally, all schools must provide the complainant and the accused with access to any information that will be used at the hearing.[53] A school that provides an accused student with a pre-hearing meeting, allows him to present character witnesses, or allows him to review the complainant's statement must make the same provisions for the complainant.[54]

Although sexual violence response procedures vary by college, they generally include the following process. Once the school receives notice of sexual violence,[55] "it must take immediate and appropriate steps to investigate."[56] The DOE requires each institution to designate a Title IX Coordinator to oversee complaints, meet with students, and oversee problems that arise during the review of complaints.[57] A person affiliated with the school then investigates the complaint and provides written notice to the complainant and the accused of its outcome.[58] The persons who conduct the investigation and make factual findings and conclusions vary among schools, but there are three dominant models, each explained in the following section.[59]

C. Three Common Investigatory Models

Most colleges and universities use one of three models for Title IX investigations and proceedings: the traditional model, the single investigator model, or the hybrid model.[60]

1. The Traditional Model

The traditional model involves a college hearing, where a "judicial board hears a case . . . , makes a finding, and decides the sanction."[61] An investigation

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51 *Id.*

52 *Id.* at 11.

53 *Id.*

54 *Id.* at 11–12.

55 QUESTIONS AND ANSWERS ON TITLE IX, *supra* note 6, at 2 (explaining that a school can receive notice of an act of sexual violence in various ways: a student filing a grievance with or informing the school's Title IX coordinator; an individual reporting an incident to an employee or staff member; a teacher or dean witnessing the sexual violence; or indirectly through sources such as a "member of the local community, social networking sites, or the media").

56 *Id.*

57 34 C.F.R. § 106.8(a) (2017); *see* Ali, Dear Colleague Letter, *supra* note 6, at 7.

58 *See* QUESTIONS AND ANSWERS ON TITLE IX, *supra* note 6, at 12.

59 *See* Perkins, *supra* note 25, at lvi.

60 *See id.*

61 NOT ALONE, *supra* note 6, at 14.

typically occurs prior to the hearing.[62] Generally, there is either an administrative hearing or a panel hearing; an administrative hearing most often involves one adjudicator, while a panel hearing has at least three members.[63] Both the complainant and the accused appear before the board.[64] Some schools have rightly put protections into place to prevent the complainant from being re-traumatized.[65]

2. The Single Investigator Model

In contrast, the single investigator model, approved by the *Not Alone* report,[66] vests investigative authority in a single investigator rather than in a board.[67] This model removes the need for an in-person hearing.[68] The investigator conducts the entire disciplinary process by gathering all of the evidence, interviewing witnesses, and issuing findings.[69] Usually the investigator notifies the accused student of basic details of the investigation in writing.[70] He then interviews the complainant, the accused student, and witnesses using non-adversarial questioning intended to seek information pertaining to both potential defenses for the accused student and support for the complainant's allegations.[71] The investigator writes a report at the conclusion of the investigation, outlining his findings and conclusions as applied to the college's sexual assault policy.[72]

3. The Hybrid Model

Finally, a hybrid model combines aspects from both the traditional model and the single investigator model.[73] Schools that adopt a hybrid model usually divide responsibilities among different individuals.[74] It is common in the hybrid

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62 ASS'N FOR STUDENT CONDUCT ADMIN., STUDENT CONDUCT ADMINISTRATION & TITLE IX: GOLD STANDARD PRACTICES FOR RESOLUTION OF ALLEGATIONS OF SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 15 (2014), http://www.theasca.org/files/Publications/ASCA%202014%20Gold%20Standard.pdf.

63 *Id.*

64 *See* Perkins, *supra* note 25, at lvi.

65 *Id.*

66 NOT ALONE, *supra* note 6, at 3, 14; Perkins *supra* note 26, at lv.

67 Perkins, *supra* note 25, at lv–lvi.

68 ASS'N FOR STUDENT CONDUCT ADMIN., *supra* note 62, at 16.

69 Perkins, *supra* note 25, at lv.

70 *Id.*

71 *Id.* at lv–lvi.

72 *Id.* at lvi.

73 ASS'N FOR STUDENT CONDUCT ADMIN., *supra* note 62, at 16.

74 *See id.*

model for a "single investigator [to] make[] a recommendation to a panel of administrators . . . who make a final decision, sometimes meeting with the investigator and the students separately."[75]

Title IX's requirements apply in full force regardless of which model a college chooses to employ to investigate sexual assault. In other words, the school's compliance with Title IX is determined not by which investigatory model it chooses but by whether the school has taken steps to meet the requirements of Title IX and its guidance documents.

The Dear Colleague Letter, the *Questions and Answers*, and the *Not Alone* report required more specific and perhaps stricter methods of compliance and transformed the ways in which colleges and universities across the country respond to sexual misconduct. These newly changed policies bring serious questions concerning the lack of due process safeguards for accused students.

II. LACK OF SAFEGUARDS IN COLLEGE DISCIPLINARY PROCEEDINGS AND EFFORTS TO PROTECT DUE PROCESS

In light of the recent focus on the mounting evidence of sexual assaults on college campuses, due process safeguards for the accused student were rarely considered, if considered at all, when colleges and universities reformed their policies to meet the newly announced requirements of Title IX compliance.[76] First, this Part explains, from a due process standpoint, several pivotal safeguards that are missing from many colleges' disciplinary proceedings. Next, this Part discusses the minimal attention given by state legislatures to protect the due process rights of accused students.

A. Lack of Safeguards

When faced with claims that a college or university failed to provide an accused student due process during the disciplinary proceeding, courts have repeatedly asserted that school disciplinary proceedings are not meant to mirror criminal proceedings.[77] For that reason, accused students do not have the same

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[75] Perkins, *supra* note 25, at lvi.

[76] *See* Schow, *supra* note 10.

[77] *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 583 (1975) (noting the complications with requiring school proceedings to be more like court proceedings); Gorman v. Univ. of R.I., 837 F.2d 7, 14–16 (1st Cir. 1988) (noting that the same procedures are not required in school disciplinary proceedings as in criminal proceedings); Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 16 (D. Me. 2005) ("A university is not a court of law . . . ."). In addition, private universities are not state actors and thus need not afford students constitutional protection.

due process rights in a college disciplinary proceeding as defendants do in a criminal proceeding.[78] Even if this is true with respect to the legality of the disciplinary proceeding, the lack of due process protection must be considered when the prosecution wants to admit statements made by the accused student into evidence in a state criminal proceeding.

At the outset, many colleges refuse to allow the accused student to seek representation by an attorney.[79] The Dear Colleague Letter mandates that "if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties."[80] At most schools that allow legal counsel to be present, the schools do not allow them to speak on behalf of the student.[81] The denial of counsel has serious consequences for the due process rights of the accused student when he or she faces a concurrent or subsequent criminal proceeding.[82] Advice of counsel is especially important when a student risks not just the loss of a college degree, but also the loss of liberty as a result of criminal punishment through sentencing.

In addition to lack of counsel, accused students face self-incrimination concerns.[83] At least in public colleges and universities, an accused student can invoke the privilege against self-incrimination and choose to remain silent during the disciplinary proceeding, but doing so can be used to prove one's guilt.[84] For private colleges, there is no self-incrimination right.[85] Students have to cooperate. Accused students therefore face a troubling dilemma: they can either actively defend themselves and risk making incriminating statements and exposing their cases to the criminal prosecutor, or they can remain silent in the

However, private actors who act at the behest of the government or who perform traditional government functions are subject to constitutional restraints. *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974).

78 *See Gomes*, 365 F. Supp. 2d at 15–16.

79 *See* Judith Shulevitz, *Accused College Rapists Have Rights, Too*, NEW REPUBLIC (Oct. 11, 2014), http://newrepublic.com/article/119778/college-sexual-assault-rules-trample-rights-accused-campus-rapists.

80 Ali, Dear Colleague Letter, *supra* note 6, at 12.

81 Shulevitz, *supra* note 79.

82 *See* Holly Hogan, *The Real Choice in a Perceived "Catch-22": Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings*, 38 J.L. & EDUC. 277, 290 (2009).

83 Paul E. Rosenthal, Note, *Speak Now: The Accused Student's Right to Remain Silent in Public University Disciplinary Proceedings*, 97 COLUM. L. REV. 1241, 1243 (1997).

84 *See generally id.* (discussing the limitations of the privilege against self-incrimination for accused students in disciplinary hearings).

85 See *id.* at 1253 n.65 (explaining that the Due Process Clause applies to public, not private, colleges and universities).

school disciplinary hearings, most likely resulting in expulsion.[86] The cooperative communication and relationship between schools and law enforcement only exacerbates this dilemma for students who might be criminally charged if the university finds them guilty at the university proceeding.[87] Moreover, even if schools and law enforcement do not cooperate with each other, Title IX proceedings can be subpoenaed and the accused student's statements turned over to the prosecution in a criminal proceeding.[88]

In addition to the problems associated with a lack of opportunity to be represented by counsel and to remain silent, three guidelines set out in the Dear Colleague Letter are of particular concern in light of the possibility that an accused student could later face charges in a criminal proceeding: (1) the requirement that colleges use the preponderance of the evidence standard;[89] (2) the DOE's position that colleges should not allow an accused student to cross-examine the complainant;[90] and (3) the requirement that if the school offers an appeals process that it does so for both parties.[91]

1. The Preponderance of the Evidence Standard

First, the requirement that colleges use the preponderance of the evidence standard[92] to decide the guilt or innocence of the accused student makes it more likely that the accused student will offer statements that could be self-incriminating than if a higher standard were used.[93] The claimant is only

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[86] *See* Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 691 (2001).

[87] James M. Picozzi, Note, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132, 2153–54 (1987).

[88] 34 C.F.R. § 99.31(a)(9)(i) (2017).

[89] Ali, Dear Colleague Letter, *supra* note 6, at 11.

[90] *Id.* at 12 ("Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.").

[91] *Id.*

[92] Before 2011 and the release of the Dear Colleague Letter, many schools used higher standards of proof, such as clear and convincing or beyond a reasonable doubt. These standards were criticized for being too favorable to the accused and perpetuating the presumption that all sex is consensual. Perkins, *supra* note 25, at liv–lv.

[93] *See* Rosenthal, *supra* note 85, at 1251–52 (explaining that colleges are free to use evidence standards that are looser than the beyond a reasonable doubt standard and that accused students may be compelled to testify or risk expulsion); *see also* Hendrix, *supra* note 4, at 613. Hendrix argues that the preponderance of the evidence standard is the most troubling requirement present in the Dear Colleague Letter. *Id.* at 610. He finds fault in the DOE's reasoning to mandate the preponderance of the evidence standard so that grievance procedures will be consistent with Title IX standards in other contexts. *Id.* Hendrix rightly points out that the issues being decided when the DOE evaluates a school's compliance are extremely distinct from issues decided in college disciplinary

required to prove that it is more likely than not that the act of sexual violence happened, so accused students who remain silent during an investigation are more likely to be found guilty.[94] More specifically, because students face sanctions for not talking during the proceeding,[95] the preponderance of the evidence standard gives accused students the incentive to talk in an effort to defend themselves, which can lead to self-incriminating statements that can be used by a prosecutor in a criminal proceeding.[96] The incentive to talk is only exacerbated by the heavy threat of expulsion that looms as punishment for students found guilty.[97]

2. Cross-Examination

Second, the DOE's Office for Civil Rights' (OCR) strong position about whether colleges should allow the accused student the opportunity to cross-examine his or her accuser[98] prevents the accused student from revealing inconsistencies or motives to lie in the complainant's testimony.[99] Some law review articles have argued, and courts have agreed, that the right to confront one's accuser is a procedural due process requirement in sexual assault disciplinary hearings.[100] Because the question of whether sexual violence occurred often turns on heavy disputes of fact, the repercussions of not allowing a student accused of sexual violence to cross-examine his or her accuser include the inability to uncover biased, untruthful, incomplete, and inaccurate allegations.[101]

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proceedings. *Id.* Further, he argues, requiring the same standard of proof for both situations is "illogical given the different implications and ramifications of each type of situation." *Id.*

94 Rosenthal, *supra* note 85, at 1252.

95 *Id.* at 1277.

96 Rosenthal, *supra* note 85, at 1252; *see also* Hendrix, *supra* note 4, at 610–15. Hendrix argues that accused students should be afforded at least the protection of a clear and convincing burden of proof. *Id.* at 612. Any lesser standard, he argues, does not comply with due process. *Id.* at 611–15. Hendrix notes the obvious and severe reputational harm to the accused student and the stigmatization from the charge alone are appropriate reasons for requiring a higher burden of proof. *Id.* at 612.

97 *See id.* at 613 ("Because the penalty for those found guilty is usually expulsion, the private interests at stake are significant.").

98 Ali, Dear Colleague Letter, *supra* note 6, at 12.

99 *See* Hendrix, *supra* note 4, at 615–18.

100 Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987); Donohue v. Baker, 976 F. Supp. 136, 147 (N.D.N.Y. 1997); Hendrix, *supra* note 4, at 615–16; Tenerowicz, *supra* note 86, at 690.

101 *See* Hendrix, *supra* note 4, at 617.

3. Appeal

Third, the requirement that the complainant be given the chance to appeal a finding that the accused student is innocent will require the accused student to defend himself or herself a second time.[102] Not only could any statement made in the accused's defense potentially be self-incriminating if used against him or her in a subsequent criminal proceeding, it could also encourage the accused student to remain silent and almost ensure a guilty finding.[103] The opportunity for the complainant to appeal the accused student's innocence subjects the accused to coercion a second time.

B. Policymakers' Response to Tougher Sexual Violence Policies

Like colleges, many state legislatures have pushed for harsher proceedings for the accused. Their response stems, at least in part, from national attention garnered from high-profile incidents and the Obama Administration's illumination of the sexual assault prevalence on college campuses.[104] Their endeavors focus on varying facets of the disciplinary process, including proof of consent, mandatory sentencing, and mandatory transcript reporting.[105]

1. Affirmative Consent

Several states, including Hawaii, Iowa, Minnesota, Missouri, New Jersey, and North Carolina, are pushing affirmative consent laws to require accused students at public colleges and universities to prove that the complainant consented to the sexual activity (rather than requiring the school to prove non-consent).[106] The National Center for Higher Risk Management estimates that about 800 schools have adopted variations of affirmative consent policies.[107]

Affirmative consent policies are a concern for accused students who may later face criminal charges for the same act. Similar to the problems that accompany the denial of counsel to an accused student during the disciplinary

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[102] *See id.* at 619–20 (noting that one adjudication results in less of a chance of the accused being found guilty erroneously).

[103] Rosenthal, *supra* note 83, at 1252; *see* Tenerowicz, *supra* note 86, at 691.

[104] Joseph O'Sullivan, *State Lawmakers Address Sexual Violence on Campuses*, SEATTLE TIMES (Apr. 26, 2015, 8:43 PM), http://www.seattletimes.com/seattle-news/education/state-lawmakers-address-sexual-violence-on-campuses/; *see also* Richardson, *supra* note 11 (noting that universities are "under pressure from the Obama administration to prove they're clamping down on sexual assault").

[105] *See* A.B. 967, 2015 Cal. Assemb., Reg. Sess. at 3–4 (Cal. 2015); Richardson, *supra* note 11.

[106] Richardson, *supra* note 11.

[107] *See id.*

proceeding, requiring the accused student to affirmatively prove that the complainant consented to the activity shifts the burden of proof onto the accused student.[108] The student is again faced with the dilemma of either defending himself or herself in the school disciplinary proceeding and potentially handing over details and incriminating statements to the criminal prosecutor, or remaining silent during the disciplinary proceeding, which often leads to a finding of liability because the student cannot meet the burden of proof.[109] Common punishments for liability are mandatory long-term suspension and expulsion.[110]

2. Mandatory Sentencing

Some states are considering mandatory sentencing as an appropriate response to the sexual assault problem on college campuses.[111] For example, California has proposed a bill that would require at least a two-year suspension for students found guilty of forcible sexual violence.[112]

3. Mandatory Transcript Reporting

Other state legislatures are pushing for mandatory reporting of the accused student's guilt on academic transcripts.[113] Virginia and New York require colleges to note on transcripts whether a student was suspended or expelled because of sexual misconduct, turning school transcripts into a "sex-offender registry."[114]

4. National Response

On a national level, congressional action also seems to be following the Obama Administration's lead toward tougher sexual assault policies, further eroding due process rights for the accused.[115] The Campus Accountability and Safety Act, for example, introduced by the U.S. Senate in February 2015, sought to require colleges and universities that receive federal funding to share

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108 Schow, *supra* note 10.

109 *See* Tenerowicz, *supra* note 86, at 691.

110 *See id.* at 691–92.

111 *See* Richardson, *supra* note 11.

112 A.B. 967, 2015 Cal. Assemb., Reg. Sess. at 4 (Cal. 2015).

113 *See* Jake New, *Requiring a Red Flag*, INSIDE HIGHER ED (July 10, 2015), https://www.insidehighered.com/news/2015/07/10/states-requiring-colleges-note-sexual-assault-responsibility-student-transcripts.

114 *Id.*

115 *See* Schow, *supra* note 10.

information about sexual violence with local law enforcement agencies.[116] On July 29, 2015, in a Senate committee hearing, senators' discussions mostly focused on providing easier reporting access for complainants with minimal proposed reforms to ensure adequate procedure for accused students.[117]

With little protection offered in school disciplinary proceedings by individual colleges and universities and minimal protection required by federal and state laws, the due process rights of accused students are extremely vulnerable in a concurrent or subsequent criminal proceeding. Because school disciplinary proceedings offer so few safeguards to accused students and tilt the balance in favor of the complainant, allowing the accused student's statements into a criminal proceeding is a due process violation.

III. COERCED CONFESSION DOCTRINE

The Supreme Court has not yet addressed the constitutionality of allowing into a state criminal proceeding the statements made by an accused student during a college disciplinary proceeding. While in *Colorado v. Connelly*,[118] the Court insisted that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment,"[119] this Part argues that the *Connelly* holding should be extended to allow threats of expulsion by school officials to be recognized as a form of coercion. This Part begins with a discussion of a line of cases leading up to *Colorado v. Connelly*. Next, this Part details the *Connelly* Court's facts, holding, and reasoning. Last, this Part argues that the *Connelly* holding should be extended to allow threats of expulsion by school officials to be recognized as a form of coercion that may violate an accused student's due process.

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116 S. 590, 114th Cong. (2015).

117 *See* Schow, *supra* note 10; *see also Reauthorizing the Higher Education Act: Combating Campus Sexual Assault Before the U.S. Senate Comm. on Health, Education, Labor and Pensions*, 114th Cong. (2015) (testimony of Senator Claire McCaskill) ("Not only would the Confidential Advisor coordinate support services for survivors, they would also provide critical information about options for reporting these crimes to campus authorities and/or local law enforcement."); *id.* (testimony of Senator Dean Heller) ("I believe the Campus Accountability and Safety Act is a step in the right direction towards combating this heinous crime and guaranteeing survivors have access to the resources they need and deserve.").

118 479 U.S. 157 (1986).

119 *Id.* at 167.

A. History

The Fourteenth Amendment prohibits any state practice that "deprive[s] any person of life, liberty, or property, without due process of law."[120] In 1936, the Supreme Court applied the due process involuntariness doctrine for confessions for the first time in *Brown v. Mississippi*.[121] Ellington, a black man accused of murder, was twice hung to a tree and repeatedly whipped by law enforcement officers.[122] Brown and Shields, two other black defendants, were stripped, laid over chairs, and repeatedly struck with buckles on a leather strap.[123] The beatings continued until each defendant agreed to confess in a manner dictated by the police.[124] These confessions were each introduced at trial, and each defendant was convicted and sentenced to die.[125] On appeal, the Mississippi Supreme Court upheld the convictions.[126] But the U.S. Supreme Court reversed, holding that the due process clause prohibits state criminal trials from using confessions that were made involuntarily.[127]

By the 1960s, the Court was interested in balancing an individual's right to make rational choices motivated by a free will with society's interest in "prompt and efficient law enforcement."[128] However, this balancing and the totality of the circumstances test utilized by the Court made relief under the due process voluntariness doctrine uncertain.[129] The Court continued to recognize due process violations when state officers physically abused suspects to garner confessions. Additionally, the doctrine was extended to cover some forms of psychological pressure.[130] Yet the Court also began relying on the Sixth Amendment right to counsel[131] and the Fifth Amendment privilege against self-

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120 U.S. CONST. amend. XIV, § 1.

121 297 U.S. 278 (1936); Scott A. McCreight, Comment, Colorado v. Connelly*: Due Process Challenges to Confessions and Evidentiary Reliability Interests*, 73 IOWA L. REV. 207, 210 (1987).

122 *Brown*, 297 U.S. at 281.

123 *Id.* at 282.

124 *Id.* at 282.

125 *Id.* at 284.

126 *Id.* at 279–80.

127 *Id.* at 286.

128 Spano v. New York, 360 U.S. 315, 315 (1959); McCreight, *supra* note 121, at 211.

129 McCreight, *supra* note 121, at 211–12.

130 *See* Payne v. Arkansas, 356 U.S. 560, 564–65, 568 (1958) (holding that a confession was coerced when police threatened defendant with a fifth grade education that he would be lynched unless he confessed).

131 *See* Gideon v. Wainwright, 372 U.S. 335, 343–44 (1963) (holding that Sixth Amendment right to counsel is applicable to states through fundamental fairness of due process).

incrimination[132] to aid in the confession analysis. Between the mid-1960s and 1986, few cases addressed—and little scholarly writing appeared on—the voluntariness doctrine.[133] In 1986, however, the Court granted review of a case involving a voluntariness question which, for the first time, provided what seemed to be a threshold requirement for a confession due process violation.[134]

B. Colorado v. Connelly*: The Predicate Finding of Law Enforcement Coercion*

In *Colorado v. Connelly*, the Supreme Court announced that police misconduct is necessary for a finding that the use of a coerced confession violates the due process rights of the speaker.[135] In that case, Connelly approached a police officer and, without any prompting, told him that he had murdered someone and wanted to talk about it.[136] The police officer advised Connelly of his *Miranda* rights.[137] Connelly said that he understood the rights but still wanted to talk about the murder, assuring the police officer after questioning that he had not been drinking or taking any drugs.[138] Connelly then told the officer that he had been a patient in several mental hospitals in the past.[139] The officer told Connelly that he was under no obligation to say anything, and Connelly replied that it was "all right" and he would talk to the officer because his conscience had been bothering him.[140] The officer testified that Connelly appeared to understand fully the nature of his acts.[141]

Later, a homicide detective arrived, advised Connelly of his *Miranda* rights, and asked him "what he had on his mind."[142] Connelly stated that he had traveled all the way from Boston to Denver to confess to the murder of a young girl whom he had killed in Denver.[143] He gave details of his story to the officers and agreed

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132 *See* Miranda v. Arizona, 384 U.S. 436, 448 (1966) (noting inherent coercion when an individual is interrogated while in custody); Malloy v. Hogan, 378 U.S. 1, 3 (1964) (holding that Fourteenth Amendment includes Fifth Amendment right against self-incrimination).

133 McCreight, *supra* note 121, at 213.

134 *Id.*

135 479 U.S. 157, 167 (1986).

136 *Id.* at 160.

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

143 *Id.*

to take the officers to the scene of the killing.[144] Under Connelly's direction, the officers took Connelly in a police vehicle to the location of the crime, where Connelly pointed out the exact location of the murder.[145] The homicide detective perceived no indication that Connelly was suffering from a mental illness.[146] After being held overnight, Connelly became visibly disoriented during an interview with the public defender the next morning.[147] He gave confused answers to questions.[148] For the first time, he stated that "voices" had told him to travel from Boston to Denver and that he had followed the directions of the voices in confessing.[149] Connelly was sent to a state hospital for evaluation.[150] He was initially found incompetent to assist in his own defense by a state hospital, but doctors subsequently determined that he was competent to proceed to trial.[151]

At a hearing on the admissibility of Connelly's statements, a psychiatrist employed by the state hospital testified that Connelly was suffering from chronic schizophrenia and was in a psychotic state at least as of the day before he confessed.[152] The psychiatrist's interviews with Connelly revealed that Connelly was following the "voice of God."[153] This voice instructed Connelly to withdraw money from the bank, to buy an airplane ticket, and to fly from Boston to Denver.[154] After arriving in Denver, Connelly perceived the "voice" becoming stronger; it told him to confess the killing to police officers or to kill himself.[155] The defense expert witness testified that these "command hallucinations" interfered with Connelly's "ability to make free and rational choices."[156]

Both the Colorado state trial court and the Colorado Supreme Court held that the suppression of the statements was appropriate under the Due Process Clause.[157] Although the trial court found there was no police misconduct, it ruled that Connelly's mental illness deprived him of the "free will" required to make

144 *Id.*
145 *Id.* at 160–61.
146 *Id.* at 161.
147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.*
151 *Id.*
152 *Id.*
153 *Id.*
154 *Id.*
155 *Id.*
156 *Id.*
157 *Id.* at 162.

a confession.[158] The Colorado Supreme Court upheld the suppression order on two lines of reasoning.[159] First, the court held that the statements made to the officer before the arrest were involuntary and therefore inadmissible under the Due Process Clause of the Fourteenth Amendment.[160] Second, the court ruled that the statements made following the arrest were also inadmissible because the state failed to show that Connelly had validly waived his privilege against self-incrimination.[161]

In reversing the Colorado Supreme Court, the U.S. Supreme Court announced that coercive governmental conduct was a prerequisite to a finding of involuntariness, and that no such conduct had occurred during Connelly's first confession to the police officer.[162] The Court rejected the trial court's view that the statements should be suppressed because Connelly's illness destroyed his volition and compelled him to confess, therefore rendering the statements involuntary.[163] The Court also rejected the Colorado Supreme Court's finding that the admission of the confession into evidence in state court was sufficient state action, faulting such reasoning as failing to live up to the line of "voluntariness" cases that demonstrated an "essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other."[164]

The Court supported its new requirement for police coercion by first noting that police misconduct had been present in every voluntariness case before the Court in the last fifty years.[165] The Court recognized that other factors in each of the cases had aggravated the extent of coerciveness but emphasized that, absent coercive behavior by the police, no sufficient state action exists to support a Fourteenth Amendment Due Process claim.[166] The Court justified its requirement of governmental misconduct by underscoring that police overreaching was not only present in precedent cases, but that it was the necessary element that rendered confessions coerced in violation of due process.[167] The Court went further, in dicta, stating that even "[t]he most

158 *Id.*
159 *Id.* at 162–63.
160 *Id.* at 162.
161 *Id.* at 162–63.
162 *Id.* at 167.
163 *Id.* at 162.
164 *Id.* at 165.
165 *Id.* at 163.
166 *Id.* at 163–64.
167 *Id.* at 164–65.

outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause."[168]

C. A Critique of Connelly

By announcing the threshold requirement of police misconduct, the Court in *Connelly* did not overturn prior precedent. As the Court noted, each earlier case contained some amount of police overreaching. However, the *Connelly* decision did significantly narrow the broad language of early 1960s opinions, which focused on "rational choice" and "free will" of the individual.[169]

A strong dissent argued that admitting the involuntary confession of a mentally ill person is "antithetical to the notion of fundamental fairness embodied in the Due Process Clause."[170] The dissent rejected the requirement of police coercion, agreeing with the Colorado Supreme Court that the state action requirement for a due process claim was fulfilled by the action of the state trial court in admitting the confession evidence.[171]

Scholarly writing that followed *Connelly* critiqued the decision for being unnecessarily broad and for deviating from precedent and the values of the due process voluntariness doctrine.[172] An article by the Harvard Law Review Association, written shortly after *Connelly*, contended that the state's use of confessions coerced by even private parties is fundamentally unfair.[173] It argued that the decision was wrong to declare that police coercion can be the only source for a coerced confession because any person who coerces a confession overrides an individual's free will, and the state "participates in that violation" by admitting those coerced statements into state court as evidence.[174]

A Texas Law Review article, in addition to condemning the *Connelly* majority for being too quick to dismiss the reliability of confessions as a due process concern,[175] argued that *Connelly* departed from a major premise of

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168 *Id.* at 166.

169 McCreight, *supra* note 121, at 216–17.

170 *Connelly*, 479 U.S. at 174 (Brennan, J., dissenting).

171 *Id.* at 180.

172 *See, e.g.*, George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 289 (1988); Harvard Law Review Ass'n, *Right Against Self-Incrimination—Involuntary Confessions*, 101 HARV. L. REV. 179 (1987).

173 Harvard Law Review Ass'n, *supra* note 172, at 186–87.

174 *Id.*

175 Dix, *supra* note 172, at 274–76.

federal constitutional law.[176] The article noted that the *Connelly* Court deviated from the Court's previously held interpretation that the admissibility of a confession depends, under the totality of the circumstances, on the defendant's free will and rational choice; instead, the Court embraced a test in which the totality of the circumstances is not relevant at all unless the court first finds coercive police activity.[177] The article correctly points out that if the only purpose of federal constitutional law is to control *official* activity that threatens due process interests, private coercion may be irrelevant to the admissibility of an accused person's statements.[178] However, as the article notes, if due process protects a defendant's interest in trial accuracy, as it should, it should not matter whether the source of coercion was governmental or private.[179]

Certainly some form of state action is required for the Due Process Clause of the Fourteenth Amendment to apply,[180] but the Court wrongfully concluded police conduct was the only state action that would have been sufficient to support Connelly's claim. As the dissent's approach acknowledged,[181] the state itself supplies the needed state action when it, acting in an adversarial role, introduces evidence into trial that is not the product of the rational choice and free will of the individual.[182]

If courts are unwilling to limit the holding of *Connelly* to cases involving confessions of mentally ill persons, this Comment urges state courts to reject the broad implications and limits on due process of the *Connelly* holding.[183] Instead, they should read into their state constitutions and statutory provisions a more generous due process voluntariness standard to protect the accused from egregious coercion, even if it is not caused by police misconduct.

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176 *Id.* at 289.

177 *Id.*

178 *Id.* at 303.

179 *Id.*

180 *See* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."); Jackson v. Metro. Edison Co., 419 U.S. 345, 348 n.2 (1974) ("Because of our conclusion on the *threshold* question of state action, we do not reach the questions relating to the . . . Fourteenth Amendment . . . ." (emphasis added)).

181 *See* Colorado v. Connelly, 479 U.S. 157, 180 (1986) (Brennan, J., dissenting).

182 *See* Shelley v. Kraemer 334 U.S. 1, 18 (1948) (enforcing a racist real covenant constituted state action).

183 Although *Connelly* is a constitutional decision and thus binds states by way of the Supremacy Clause, the case establishes a floor, not a ceiling. Thus, states are free to provide *more* protection than the U.S. Constitution requires.

IV. STATEMENTS OF THE ACCUSED AS COERCED CONFESSIONS

Some state courts seem to implicitly criticize *Connelly*'s departure from the values of rational choice and free will underlying the due process voluntariness standard.[184] They have ignored or rejected *Connelly*'s requirement of official police coercion in favor of a more liberal due process standard.[185] This Part begins with a discussion of state court decisions that have held confessions to be involuntary as a violation of due process even where there was no evidence of police wrongdoing. Next, this Part examines the issue of coercion in workplace confessions made under the threat of termination or demotion. It argues that statements made by accused students in college sexual assault hearings are similarly coerced if made under the threat of expulsion. Last, this Part provides some implications of holding that the use of such statements in a criminal proceeding is unconstitutional.

A. The Effects of Connelly *in State Court*

States inconsistently apply *Connelly* to cases involving confessions coerced by private action.[186] Some state courts have held that statements made to police after a defendant's family member visited with him were admissible because the family member was not acting as a "police instrumentality."[187] For that reason, a confession resulting from coercion by a defendant's wife, for example, was admissible.[188] Other state courts have declined to decide issues based on *Connelly*,[189] acknowledging that statements coerced by private citizens can render such statements involuntary and inadmissible.[190] The following case is illustrative of those in which state courts have held that police misconduct was not a necessary predicate for finding a due process violation.

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184 *See* Howard v. State, 515 So. 2d 430 (Fla. Dist. Ct. App. 1987); State v. Bowe, 881 P.2d 538, 544 (Haw. 1994); State v. Martin, 645 So. 2d 752 (La. Ct. App. 1994); People v. Sorbo, 649 N.Y.S.2d 318, 319–20 (N.Y. App. Div. 1996).

185 *Howard*, 515 So. 2d at 430 ("[I]nvoluntary confessions or admissions given to private persons are inadmissible in Florida courts."); *Bowe*, 881 P.2d at 545 (rejecting "the Supreme Court's narrow focus on police coercion in *Connelly* and hold[ing] that the protections under. . . the Hawai'i Constitution are broader"); *Martin*, 645 So. 2d at 754 (interpreting that a state statute "mandate[d] the requirement that all confessions, regardless of whether a state actor is involved, must be proven to be voluntary"); *Sorbo*, 649 N.Y.S.2d at 320 ("[I]t has long been the law in New York that a Defendant's involuntary statement, whether obtained by the police or a private individual, may not be used against him or her.").

186 Bowe, 881 P.2d at 543.

187 *Id.* (citing People v. Whitehead, 508 N.E.2d 687, 691 (Ill.), *cert denied* 484 U.S. 933 (1987)).

188 *Id.* (citing Darghty v. State, 530 So. 2d 27, 31 (Miss. 1988)).

189 *Id.* (citing Illinois v. Bernasco, 541 N.E.2d 774 (Ill. App. Ct. 1989)).

190 *Id.* (citing People v. Seymour, 470 N.W.2d 428, 430 (Mich. Ct. App. 1991)).

In *State v. Bowe*,[191] the Supreme Court of Hawaii held that the coercive conduct of a private person was sufficient to render a confession inadmissible.[192] A brawl that resulted in injuries occurred on a university campus.[193] Afterwards, a police officer contacted the head coach of the university's basketball team to request his assistance in making arrangements for the police to interview members of the basketball team that were suspected of being involved in the fight.[194] The coach later told the defendant he needed to go to the police station for an interview and that he would accompany the defendant.[195] The defendant and the coach both went to the police station, where the defendant waived his constitutional rights to counsel and to remain silent.[196]

The lower court found that the defendant's statement to the police was not the product of his rational intellect and free will because he feared that if he did not follow his coach's direction, he would be suspended from the basketball team, and therefore the statement was not voluntary.[197] The court did not rule on whether the basketball coach exercised state police power when instructing the defendant to go to the police station, but rather considered him to be a private person.[198]

Whether coercive conduct of a private person is sufficient to render a confession involuntary was a case of first impression for Hawaii[199] The Hawaii Supreme Court rejected *Connelly*, accusing the U.S. Supreme Court of "limit[ing] the interests protected by federal constitutional confession law."[200] Instead, the Hawaii Supreme Court held, as a matter of Hawaii constitutional law, that coercive behavior by a private person may be sufficient to render a defendant's confession involuntary.[201]

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191 *Id.* at 538.
192 *Id.* at 547.
193 *Id.* at 540.
194 *Id.*
195 *Id.*
196 *Id.*
197 *Id.*
198 *Id.* at 540–41.
199 *Id.* at 541.
200 *Id.* at 544.
201 *Id.* The Hawaii Supreme Court also condemned the confession under the Hawaii Constitution's self-incrimination provision. *Id.* The court, quoting *State v. Kelekolio*, stated that "[t]he constitutional right against self-incrimination prevents the prosecution's use of a defendant's extrajudicial admissions of guilt where such admissions are the product of coercion." *Id.* (quoting State v. Kelekolio, 849 P.2d 58, 69 (1993)). The Hawaii Supreme Court interpreted a broader right against self-incrimination and refused to limit that right to government coercion. *Id.*

In doing so, the court found a broader due process right in the Hawaii Constitution than *Connelly* recognized in the Fourteenth Amendment,[202] noting that one of the basic considerations underlying exclusion of coerced confessions is the "inherent untrustworthiness of involuntary confessions."[203] The Hawaii Supreme Court echoed the *Connelly* dissent's argument about the importance of reliability when evaluating the totality of the circumstances surrounding a confession.[204]

In refusing to limit the Due Process Clause of the Hawaii Constitution to mirror *Connelly*'s interpretation of the Fourteenth Amendment,[205] the Hawaii Supreme Court in *Bowe* noted that the Due Process Clause serves to "protect the right of [the] accused in a criminal case to a fundamentally fair trial,"[206] which implicitly includes the "right to make a meaningful choice between confessing and remaining silent."[207] The court recognized that some state action was required to support a claim for a due process violation, but refused to narrow that focus to police coercion.[208] Instead, the court, using the *Connelly* dissent to buttress its reasoning, found that the state participates in the due process violation when it admits the coerced statements as evidence.[209]

If the U.S. Supreme Court is unwilling to constrain *Connelly*, it is imperative that states follow Hawaii's trend to interpret their respective state constitutional provisions more generously. In a state that adheres to the strict *Connelly* approach, the threat of expulsion that looms if the student does not actively defend himself or herself could be coercive enough to prevent his or her exercising rational choice and free will about whether to speak, but still considered voluntary because the statements were not coerced by the police.

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202 *Id.* at 545.

203 *Id.* at 544 (quoting *Kelekolio*, 849 P.2d at 69).

204 *Id.* at 545; *see also* Colorado v. Connelly, 479 U.S. 157, 181 (1986) (Brennan, J., dissenting). The *Connelly* majority was concerned with reliability but thought that state evidentiary law was more apt to determine reliability. *Id.* at 167.

205 *Bowe*, 881 P.2d at 545.

206 *Id.* at 546 (quoting State v. Matafeo, 787 P.2d 671, 672 (Haw. 1990)).

207 *Id.*

208 *Id.*

209 *Id.* at 546–47.

B. Issue of Workplace Threat of Termination as Analogous to College Officials' Threat of Expulsion

Students accused of sexual assault in college disciplinary proceedings face similar obstacles to at-will employees investigated for crimes in their workplace. The coercion of confessions by employers and employer-hired private investigators is a growing phenomenon.[210] Although few U.S. Supreme Court cases have focused on coerced confessions in the workplace, the lower courts' treatment of these confessions can shed light on the unfairness of confessions under conditions similar to the duress experienced in the college disciplinary process.

In *Commonwealth v. Miller*,[211] a Massachusetts appellate court found that the admission of an employee's confession elicited by private individuals employed as investigators by the defendant's employer might yield a constitutional violation.[212] Although the defendant was not specifically threatened with termination, the investigators informed her that she could be separated from her child if she did not cooperate.[213] The court noted that admitting a confession improperly elicited is a violation of due process, even if private individuals coerced the confession.[214]

The U.S. Supreme Court has showed an interest in condemning threats of termination to elicit self-incriminating statements in the public sector.[215] In *Garrity v. New Jersey*,[216] police officers who were being investigated were given the choice either to incriminate themselves or to forfeit their jobs.[217] The Court held that, where the officers chose to make confessions, the confessions were not voluntary but coerced, and the Fourteenth Amendment prohibited the use of the statements in subsequent criminal proceedings.[218] In short, *Garrity* prohibits the prosecution from introducing statements made by government employees

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[210] *See* Saul Elbein, *When Employees Confess, Sometimes Falsely*, N.Y. TIMES (Mar. 8, 2014), http://www.nytimes.com/2014/03/09/business/when-employees-confess-sometimes-falsely.html?_r=0 (discussing the increasing trend of employer internal investigators' use of police interrogation methods, resulting in false confessions due to the threat of termination).

[211] 865 N.E.2d 825 (Mass. App. Ct. 2007).

[212] *Id.* at 843–44.

[213] *Id.* at 840–41.

[214] *Id.* at 843.

[215] *E.g.*, Garrity v. New Jersey, 385 U.S. 493, 499–500 (1967).

[216] *Id.*

[217] *Id.* at 494–95.

[218] *Id.* at 500.

who have been threatened with adverse employment action for failure to voluntarily answer questions by the employer.[219]

Similar to *Garrity*, the U.S. Supreme Court in *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation of the City of New York*,[220] held that a discharge of city sanitation department employees violated constitutional privilege.[221] In the case, fifteen employees were investigated by the Commissioner of Investigation of New York City on allegations that the employees were not charging "proper fees for use of certain city facilities and were diverting to themselves the proceeds of fees that they did charge."[222] Each employee was summoned before the Commissioner and advised that if he refused to testify with respect to his official conduct or the official conduct of any other city employee on the grounds of self-incrimination, he would be terminated.[223] Twelve employees refused to testify, asserting the constitutional privilege against self-incrimination, and were dismissed explicitly on that ground.[224] The Court, holding that the employees' dismissal violated the Constitution,[225] reasoned that the employees were entitled to remain silent because it was clear that New York was seeking not merely to investigate "their use or abuse of their public trust" but to elicit testimony from the employees that could be used to prosecute them criminally.[226] The Court noted that employees "subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."[227]

Relying on *Uniformed Sanitation Men I*, the U.S. Court of Federal Claims in *Kalkines v. United States*[228] promulgated the *Kalkines* warning, which requires that a government employer notify an employee who is compelled to make potentially incriminating statements in an administrative investigation that his statements cannot be used against him in a criminal prosecution.[229] In *Kalkines*, plaintiff Kalkines worked for the Bureau of Customs for the Treasury

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219 *Id.* at 499–500.
220 392 U.S. 280 (1968).
221 *Id.* at 284–85.
222 *Id.* at 281.
223 *Id.* at 281–82.
224 *Id.* at 282.
225 *Id.* at 283.
226 *Id.* at 284.
227 *Id.* at 285.
228 473 F.2d 1391 (Ct. Cl. 1973).
229 *See id.* at 1398.

Department until he was suspended and subsequently discharged for his alleged failure to answer the Bureau's questions relating to the performance of his duties in four separate interviews.[230] Importantly, for all or most of the interviews, the DOJ was concurrently conducting a criminal investigation against Kalkines relating to the alleged misconduct that was of concern in the administrative investigation.[231] The court ruled that Kalkines's discharge was invalid,[232] holding that a government employee can be removed for not answering his employer's questions, but only "if he is adequately informed both that he is subject to discharge for not answering and that his replies (and their fruits) cannot be employed against him in a criminal case."[233]

The threat of termination or removal from office is akin to the threat of expulsion from a college or university as a method to coerce self-incriminating statements from an accused person. Just as the employee's "option to lose [his] means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent,"[234] so, too, is the student's option to lose access to education when choosing to remain silent rather than speak out. Without the institution of more adequate safeguards in the disciplinary process, courts should hold it a violation of due process for statements compelled under the threat of expulsion to be used against the accused student in a subsequent criminal proceeding.

C. Implications

If the Court were to expand *Connelly* to hold that confessions made under the threat of expulsion in college proceedings are involuntary under the Fourteenth Amendment Due Process Clause, or if more states were to hold it a violation of their state constitutions' due process clauses, colleges and universities would be incentivized to develop a more balanced system for adjudicating cases of sexual assault on campuses. In fact, some states have

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230 *Id.* at 1391–92.

231 *Id.* at 1392.

232 *Id.* at 1398.

233 *Id.* at 1393.

234 Garrity v. New Jersey, 385 U.S. 493, 497 (1967). Even though *Garrity* addressed a countervailing policy issue of encouraging forthright police officers, *Garrity*'s holding and reasoning has been extended to other governmental employees, demonstrating that the Court was not solely concerned with police officer conduct. *See, e.g.*, Sher v. U.S. Dep't of Veterans Affairs, 488 F.3d 489, 502 (1st Cir. 2007) (holding that the employer's notification that "[e]mployees will furnish information and testify freely and honestly in cases respecting employment and disciplinary matters" and "[r]efusal to testify . . . in connection with an investigation or hearing may be ground for disciplinary action" was a "threat of removal sufficient to constitute coercion under *Garrity*").

recognized the due process concerns posed by the lack of safeguards in schools' sexual assault disciplinary procedures and consequently have implemented various protections to compensate.[235] In Arkansas, for example, students have the right to bring an attorney when appealing a nonacademic suspension of expulsion.[236] North Carolina and North Dakota have passed laws that guarantee a student's right to counsel at his or her own expense in public colleges and universities in nonacademic suspension and expulsion hearings.[237]

Granting immunity for self-incriminating statements made by accused students in the college disciplinary procedure would aid in the effort to keep college investigations separate from criminal investigations.[238] Because accused students would not have to fear that their statements could be used against them in state court, accused students would feel encouraged to speak more freely to school officials about alleged misconduct.

CONCLUSION

Increased media reporting on the prevalence of sexual assault and the Obama Administration's pressure for colleges and universities to comply with Title IX initiated sweeping reforms for school disciplinary procedures. While the importance of combatting rape and sexual violence on college campuses cannot be overstated, the methods for accomplishing this task must not be too one-sided as to deprive students of their constitutional rights.

Although a call for the Court to overturn *Connelly* might seem unlikely, the dissent's reasoning adheres to the pre-*Connelly* values of rational choice and free will that are of particular interest when courts consider confession cases in the public employer-employee context. If the Court is unwilling to constrain

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235 *See* Richardson, *supra* note 11 (explaining different states' efforts to strike a balance between combatting rape and ensuring due process).

236 *Id.*

237 *North Dakota Guarantees College Students' Right to Attorney During Nonacademic Disciplinary Hearings*, CAMPUS SAFETY (Apr. 29, 2015), http://www.campussafetymagazine.com/article/north_dakota_guarantees_college_students_right_to_attorney_during_nonacadem.

238 Keeping college investigations and criminal proceedings separate is a legitimate concern, even in the face of increasing incidents of sexual assault, to ensure that the constitutional rights of both the accused student and the victim are adequately protected in an educational setting.

Connelly, states' efforts to strike an appropriate balance in college sexual assault disciplinary reforms are especially important.

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