CAMPUSES OR COURTROOMS? GOVERNMENT INVOLVEMENT IN U.S. AND U.K. UNIVERSITY SEXUAL MISCONDUCT RESPONSE

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I. INTRODUCTION

The handling of sexual misconduct allegations on college and university campuses has received widespread public attention in recent years.[1] This attention is reflective of a problem that affects a significant number of students annually. A 2019 study showed that 13% of U.S. college students surveyed had experienced nonconsensual sexual contact by physical force or inability to consent in the time since the student enrolled at the institution.[2] With 15.9 million students enrolled in U.S. institutions of higher education,[3] campus sexual assault is an area of significant concern. This concern, however, is not limited to the U.S. The U.K. also experienced a recent reckoning with the prevalence and handling of sexual misconduct on university campuses.[4] With almost 2.7 million students enrolled in U.K. institutions of higher education, the concern is salient across the pond, as well.[5]

Given that higher education and government have a history of entanglement,[6] it is unsurprising that government has intervened in many countries to address the crisis of campus sexual misconduct. However, the U.S. and U.K. methods of intervention reflect two vastly different approaches.[7]

This Note will discuss the legislative approaches taken in the U.S. and the U.K. to address sexual assault on university campuses by comparing Title IX[8] with the Equality Act 2010.[9] This Note will focus on the distinct statutory and

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[1] Recent major changes to Title IX of the Education Amendments of 1972 (Title IX), the federal legislation which codifies the procedures that universities must follow when investigating and resolving these allegations, received over 124,000 public comments prior to the Final Rule's publishing in 2020. U.S. DEP'T OF EDUC., TITLE IX: FACT SHEET: FINAL TITLE IX REGULATIONS (2020).

[2] WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT 78 (2020), https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019. While this 13% statistic is significant, it does not reflect the much higher percentage of students who experience other types of sexual misconduct not reflected by the two categories referenced.

[3] Institute of Education Sciences, Report on the Condition of Education 25 (2022) (statistic refers to fall 2020 enrollment).

[4] Megan Specia, *Women Are Calling Out 'Rape Culture' in U.K. Schools*, N.Y. TIMES (Apr. 1, 2021), https://www.nytimes.com/2021/04/01/world/europe/schools-uk-rape-culture.html.

[5] HOUSE OF COMMONS LIBRARY, RESEARCH BRIEFING: HIGHER EDUCATION STUDENT NUMBERS, 2022, HC 7857, at 8 (UK) (referring to academic year 2020/2021 enrollment).

[6] *See* ARTHUR M. COHEN & CARRIE B. KISKER, THE SHAPING OF AMERICAN HIGHER EDUCATION 21 (2d ed. 2010) (describing the post-Enlightenment concept of "the university as an agent of the state").

[7] *Compare* Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681, *with* Equality Act 2010, c. 15 (UK), https://www.legislation.gov.uk/ukpga/2010/15/contents.

[8] 20 U.S.C. § 1681.

[9] Equality Act 2010, c. 15 (UK), https://www.legislation.gov.uk/ukpga/2010/15/contents.

regulatory differences between the U.S. and U.K. approaches to managing campus sexual misconduct. This Note will conclude with a discussion of a proposed "middle-ground" approach, which strives to employ the benefits of each country's approach while mitigating the challenges that each country currently faces.

II. BACKGROUND

A. Origins of U.S. and U.K. Higher Education Systems

The founding principles and features of U.S. and U.K. higher education provide helpful context for comparing each country's modern-day approaches to sexual misconduct. The two countries share many common origins in the establishment of their early institutions and generally relied on similar concepts of higher education when creating new universities.[10]

English higher education is widely thought to have its origins at Oxford, which is estimated to have been established around the late eleventh century.[11] Early English higher education, however, looked very different from our understanding of the university today.[12] Both Scottish and English universities experienced a transformation following the eighteenth-century Enlightenment, which pushed higher education in a direction more familiar today.[13] This transformation was influential as the U.S. higher education system began to emerge. In the early American colonies, "settlers began organizing colleges within a decade of their arrival,"[14] and these fledgling universities were seen as an extension of the English colonial strategy.[15]

While U.S. and U.K. universities share common roots, some key differences arose in the nineteenth and twentieth centuries. University governance is one area where English and American universities diverged early on. While English universities had "evolved from self-governing groups of teachers and students or from within a court or church hierarchy" and were largely governed from within, American institutions were governed by outsiders,

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[10] *See* COHEN & KISKER, *supra* note 6, at 21 (describing the modeling of U.S. higher education practices on Scottish and English universities).

[11] *History*, UNIV. OF OXFORD, https://www.ox.ac.uk/about/organisation/history (last visited Sept. 22, 2022).

[12] JOHN LAWSON & HAROLD SILVER, A SOCIAL HISTORY OF EDUCATION IN ENGLAND 31 (1973) (describing Oxford and Cambridge through the 13th century as "centres of professional training . . . . [They did not] exist to pursue knowledge for its own sake or to prosecute research in any modern sense. Society generally and students individually could not afford these intellectual luxuries.").

[13] COHEN & KISKER, *supra* note 6, at 20–21, 39.

[14] CRAIG STEVEN WILDER, EBONY & IVY 34 (2013).

[15] *Id.* at 21 ("Universities facilitated England's colonial campaigns . . . . Raising a college was part of a layered English strategy to maintain religious orthodoxy among the colonists and to check the power of the confederacy under chief Powhatan . . . .").

primarily members of colonial government.[16] As will be discussed, this difference in governance structures continues to influence the ways higher education and government interact today.

B. The Role of Student Conduct Proceedings in Higher Education

The shared origins of U.S. and U.K. higher education systems also influenced their early approaches to student misconduct. The doctrine of *in loco parentis*, literally meaning "in the place of a parent,"[17] dominated early English and American thinking about university discipline of students. The doctrine had evolved from English common law, and established that the university, standing in for parents of their students, was the arbiter of student discipline and courts would largely defer to the university's judgment on matters of discipline.[18] By the early 20th century, the U.S. judicial system even legally recognized the concept of *in loco parentis* in *Gott v. Berea College*.[19] The *in loco parentis* concept continues to permeate modern thinking about student conduct. As U.S. Supreme Court Justice Hugo Black noted in 1969, "[s]chool discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens."[20] As recently as 2018, Sam Gyimah, the U.K. Minister for Universities, Science, Research and Innovation, said in a speech, "the universities need to act *in loco parentis*;"[21] while this statement was not made in the context of student conduct, it demonstrates the breadth and depth with which the concept was instilled in higher education.

In the United States, the concept of *in loco parentis* diminished as a legal doctrine following a series of cases in the 1960s which rejected the idea "that no process was due because the students consented to an *in loco parentis*

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[16] COHEN & KISKER, *supra* note 6, at 44.

[17] *In loco parentis*, BLACK'S LAW DICTIONARY (8th ed. 2004).

[18] Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J. COLL. & UNIV. L. 1, 8 (2004). For examples of administrative behavior in the *in loco parentis* era which illustrates that "paternalism was so pervasive that it occasionally bordered on the ludicrous," see Brian Jackson, *The Lingering Legacy of "In Loco Parentis": An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, n.30 (1999).

[19] Gott v. Berea Coll., 156 Ky. 376, 379 (1913) ("College authorities stand *in loco parentis* concerning the physical and moral welfare, and mental training of the pupils, and we are unable to see why to that end they may not make any rule or regulation for the government, or betterment of their pupils that a parent could for the same purpose.").

[20] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 524 (1969) (Black, J., dissenting).

[21] Sam Gyimah, Minister for Univs., Sci., Rsch. and Innovation, U.K. Dep't for Educ., A Revolution in Accountability (Feb. 28, 2018), *in News and Communications*, GOV.UK, https://www.gov.uk/search/news-and-communications (last visited Oct. 18, 2022).

relationship with a college by their very enrollment therein."[22] The initial case that rejected the *in loco parentis* doctrine was *Dixon v. Alabama*,[23] which established minimum due process rights for students facing disciplinary processes at institutions of higher education. Like in *Dixon*, judicial action in the U.K. established students' rights to some level of due process in university disciplinary procedures in *The King v. Chancellor of the University of Cambridge*.[24] *Cambridge* differed from *Dixon* in that the English court applied principles of corporate law to erode at the protections of *in loco parentis*, while *Dixon* utilized an individual rights approach to do the same. While the doctrine has waned from a legal perspective, the *in loco parentis* concept continues to shape the expected purposes of student conduct proceedings in higher education.

While student conduct regulations, like criminal regulations, reflect a community's norms, expectations, and accountability processes for its members, the purpose of student conduct is distinctly different from that of the criminal justice system in society.[25] This distinctly separate system, however, comes with its own challenges. Thomas Jefferson once remarked while lamenting the difficulties of establishing a university, "[t]he article of discipline is the most difficult in American education."[26] As a foundational document for student affairs in U.S. higher education later stated, "the college should make optimum provision for the development of the individual and his place in society through . . . [t]he treatment of discipline as an educational function designed to modify personal behavior patterns and to substitute socially acceptable attitudes for those which have precipitated unacceptable behavior."[27] U.S. courts have also endorsed the idea that the student disciplinary process serves a distinct function, separate from the criminal process:

> The discipline of students in the educational community is . . . a part of the teaching process . . . . [T]he disciplinary process is not equivalent to the criminal law processes of federal or state criminal law. For, while the expelled student may suffer damaging effects, sometimes irreparable, to his educational, social, and economic future, he or she may not be

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[22] Philip Lee, *The Curious Life of* In Loco Parentis *at American Universities*, 8 HIGHER EDUC. REV. 65, 72 (2011).

[23] Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

[24] The King v. Chancellor of the Univ. of Cambridge (1723) 92 Eng. Rep. 370 (KB).

[25] *See* Daniel B. Smith, *Student Discipline in American College & Universities: A Historical Overview*, 72 EDUC. HORIZONS 78, 84 (1994) ("[T]he historical development of disciplinary systems demonstrates . . . that the monitoring and molding of student behavior are crucial components of American higher education.").

[26] Letter from Thomas Jefferson to Dr. Thomas Cooper (Nov. 2, 1822), *in* XV THE WRITINGS OF THOMAS JEFFERSON 403, 406 (Albert Ellery Burgh ed., 1907).

[27] AM. COUNCIL ON EDUC. STUD., THE STUDENT PERSONNEL POINT OF VIEW 7–8 (1949).

> imprisoned, fined, disenfranchised, or subjected to probationary supervision. The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound.[28]

The idea that university student conduct processes are distinct in purpose and process from criminal justice also permeates the higher education landscape in the U.K. In 1994, the Council of Vice-Chancellors and Principals, now known as Universities UK, published the *Final Report of the Task Force on Student Disciplinary Procedures*, more commonly referred to as the Zellick Report.[29] The Zellick Report provided guidelines for universities to follow in their student disciplinary procedures; while they were not mandatory, many universities used the Zellick Report as a baseline in the absence of any formal requirements.[30] Notably, the Zellick Report advised that sexual assault should never be investigated via university student disciplinary procedures.[31] Rather, the university was advised to wait until a police investigation and subsequent legal proceedings have concluded before fully executing their disciplinary process.[32] Further, the university process under Zellick guidance should take into account any verdict or outcome from a judicial process when determining findings of responsibility and sanctions.[33] As the years went on, the Zellick Report was widely criticized,[34] and Universities UK instituted a new taskforce in 2016 to review the Zellick Report and to specifically address "concerns that the guidelines did not adequately reflect the various duties and obligations that universities have in relation to their students or assist universities in handling the most complex and sensitive incidents, particularly those involving sexual violence."[35] While this task force published new guidance in

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[28] Esteban v. Cent. Mo. State Coll., 290 F. Supp. 622, 628 (W.D. Mo. 1968).

[29] NICOLA BRADFIELD, PINSENT MASONS LLP, GUIDANCE FOR HIGHER EDUCATION INSTITUTIONS: HOW TO HANDLE ALLEGED STUDENT MISCONDUCT WHICH MAY ALSO CONSTITUTE A CRIMINAL OFFENCE 1 (Universities UK, 2016). The Zellick Report was named for Graham Zellick, the then-president of Queen Mary and Westfield College, who headed the taskforce that produced the 1994 report. NAT'L UNION OF STUDENTS, HOW TO RESPOND TO COMPLAINTS OF SEXUAL VIOLENCE: THE ZELLICK REPORT 1 (2015).

[30] BRADFIELD, *supra* note 29.

[31] NAT'L UNION OF STUDENTS, *supra* note 29, at 1.

[32] *Id.* at 3.

[33] *Id.*

[34] *See, e.g.*, *id.*; Paul Greatrix, *From Zellick to Here: Guiding the Way on Student Misconduct*, WONKHE (Oct. 24, 2016), https://wonkhe.com/blogs/registrarism-from-zellick-to-here-guiding-the-way-on-student-misconduct.

[35] BRADFIELD, *supra* note 29, at 1. Another major criticism of the Zellick Report was that it was inconsistent with newer legislation that had been enacted since 1994, notably the Equality Act 2010. *See* NAT'L UNION OF STUDENTS, *supra* note 29; Greatrix, *supra* note 34.

2016 that departed from the Zellick Report,[36] the fact that the Zellick Report dominated the approach taken by universities for over two decades illustrates that a separation between university and criminal processes is well established in the U.K.

C. U.S. Law: Title IX

The U.S. codified its approach to the issue of sex discrimination in education in Title IX of the Education Amendments of 1972 (Title IX).[37] Title IX and its associated administrative regulations provide specific procedures that universities must follow when investigating and resolving sexual assault allegations.[38]

i. Legislative Intent and History

Title IX was passed in the aftermath of the American civil rights movement of the 1960s.[39] Many of the laws passed during the civil rights movement, including portions of the Equal Rights Act, explicitly excluded educational institutions from the non-discrimination mandates.[40] As a result, sex discrimination was commonplace in education, with both men and women experiencing limitations on their educational opportunities.[41] Title IX was proposed with language modeled after Title VI of the 1964 Civil Rights Act, "except that Title IX replaces Title VI's prohibition against discrimination 'on the basis of race, color, or national origin' with discrimination 'on the basis of sex;'" additionally, while Title VI exempted educational institutions, Title IX specifically applies to educational institutions receiving federal funding.[42]

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[36] BRADFIELD, *supra* note 29, at 1. Notably, the 2016 report does still advise that university disciplinary processes should remain secondary to any criminal processes by stating, "if the matter is being dealt with under the criminal process . . . the internal disciplinary process should be suspended until the criminal process is at an end." *Id.* at 4.

[37] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

[38] *Id.*; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106 (2020).

[39] Kristen M. Galles, *Filling the Gaps: Women, Civil Rights, and Title IX*, 31 HUM. RTS. 16–17 (2004).

[40] ELIZABETH KAUFER BUSCH & WILLIAM E. THRO, TITLE IX: THE TRANSFORMATION OF SEX DISCRIMINATION IN EDUCATION 5 (2018).

[41] *Id.* ("The 1960s classroom routinely segregated the sexes based upon subject—young women were excluded from industrial arts and auto mechanics classes, while young men were denied access to home economics, secretarial training, and nursing.").

[42] *Id.* at 9–10.

ii. Governmental Oversight of University Discipline Under Title IX

While Title IX itself contains just thirty-seven words,[43] thousands of pages of guidance and regulations have been promulgated to accompany the statute.[44] The Office for Civil Rights (OCR) within the U.S. Department of Education enforces Title IX and produces the regulatory guidance documents that universities must follow.[45] While the specificity of the guidance that OCR has provided has varied over the years, the current controlling guidance, enacted in 2020, provides detailed, technical requirements for sexual misconduct proceedings.[46] In effect, the OCR has dictated exactly how sexual misconduct proceedings should operate on college and university campuses, leaving little room for institutions to produce their own procedures.

One example of the specificity by which the government controls university sexual misconduct proceedings via Title IX is in its provisions which require particular procedures in the hearing setting. Recent major guidance from OCR, issued in 2020, has provoked strong reactions on all sides for its endorsement of the use of legal mechanisms throughout the sexual misconduct resolution process. The most controversial of these mechanisms is the use of live cross-examination in sexual misconduct hearings.[47] The requirement that post-secondary institutions employ live cross-examination in these proceedings reflects a major shift from prior OCR guidance, which frowned upon the use of cross-examination in such proceedings.[48] One primary critique of the

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[43] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .").

[44] *See, e.g.*, 34 C.F.R. § 106.

[45] *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last visited Oct. 18, 2022).

[46] 34 C.F.R. § 106.45. While the 2020 guidance controls at the time of publication of this Note, revised guidance is coming. The Biden administration released proposed new rules and opened the notice and comment process on June 23, 2022, the 50th anniversary of Title XI. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106); Press Release, U.S. Dept. of Educ., The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment (June 23, 2022), https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment.

[47] R. SHEP MELNICK, *Analyzing the Department of Education's Final Title IX Rules on Sexual Misconduct*, BROOKINGS INST. (June 11, 2020), https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct (noting that "almost all the commentary has focused on the live hearing/cross-examination question" and highlighting both praise and criticism that the live cross-examination requirement has elicited).

[48] *Id.* ("Obama-era guidelines did not prohibit live hearings and cross-examination; they 'discouraged' but did not prohibit the accused from personally cross-examining their

requirement for live cross-examination is that it is "overly judicial and adversarial in nature,"[49] a view which embraces the educational goal of student conduct proceedings and argues that "colleges and universities are not courts, nor should they be."[50] On the other hand, some praise the inclusion of live cross-examination, arguing that it "guarantee[s] due process for students caught up in campus kangaroo courts."[51]

D. U.K. Law: Equality Act 2010

In contrast with Title IX, the U.K. applies the Equality Act 2010 to university sexual assault incidents.[52] The Equality Act is a more broadly applicable anti-discrimination law which tends to provide universities with greater flexibility in their responses to allegations of sexual assault.[53]

i. Legislative Intent and History

In 2010, the U.K. engaged in a consolidation of prior anti-discrimination legislation, codifying and combining them into the Equality Act.[54] "One of the objectives of the Equality Act 2010 [wa]s to bring together in one place all of those characteristics on which it is unlawful to discriminate and to

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accuser."). The proposed 2022 rules promulgated by the Biden administration reflect a return to the Obama-era guidelines; while the proposed rules do not entirely eliminate live cross-examination, they no longer require it. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41502–03 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106) ("Proposed § 106.46(g) would eliminate the requirement in [the current rule] that a postsecondary institution must provide for a live hearing with cross-examination in its grievance procedures for complaints of sex-based harassment. Instead, proposed § 106.46(g) would permit, but not require, a postsecondary institution to hold live hearings.").

[49] *NASPA Statement on the Release of the Final Title IX Rule*, NASPA (May 6, 2020), https://www.naspa.org/news/naspa-statement-on-the-release-of-the-final-title-ix-rule.

[50] TED MITCHELL, *Written Comment: Title IX Public Hearing*, AM. COUNCIL ON EDUC. (ACE) (June 10, 2021), https://www.acenet.edu/Documents/Comments-ED-OCR-Title-IX-Hearing-061021.pdf.

[51] Robert Shibley, Opinion, *A Victory for Campus Justice*, WALL ST. J. (May 6, 2020, 7:12 PM), https://www.wsj.com/articles/a-victory-for-campus-justice-11588806738.

[52] Equality Act 2010, c. 15 (UK), https://www.legislation.gov.uk /ukpga/2010/15/contents.

[53] *Id*. *See also* Roger Halson, *The Recovery of Damages for Non-Pecuniary Loss in the United Kingdom: A Critique and Proposal for a New Structure Integrating Recovery in Contract and Tort*, 3 CHINESE J. COMPAR. L. 245, 262 (2015) (describing the Equality Act 2010 as "[bringing] together the 'statutory torts' based on discrimination which previously derived from separate regimes dealing with sex, race and age discrimination").

[54] Gov't Equals. Off., *Equality Act 2010: Guidance*, GOV.UK, https://www.gov.uk/guidance/equality-act-2010-guidance (last visited Oct. 18, 2022).

establish a single approach to discrimination, with some exceptions."[55] The Equality Act 2010 applies not only to sex discrimination but also to nine total protected classes.[56] The Equality Act 2010 applies to educational institutions, but was not specifically enacted to address discriminatory environments in schools; rather, it purports to "legally protect[] people from discrimination in the workplace and in wider society."[57] The Equality Act 2010 applies to institutions of higher education through its "further and higher education" provisions.[58]

ii. Governmental Oversight of University Discipline Under Title IX

The Equality Act 2010 instructs institutions to resolve complaints through their internal procedures when possible but does not provide specific guidance or requirements on how those procedures must operate.[59] Students may, if they choose to bypass or have exhausted the internal complaint procedure at their university, report discrimination to the government's Office of the Independent Adjudicator ("OIA") (for universities located in England or Wales) or the Public Services Ombudsman (for universities located in Scotland).[60] However, prior to a report being made, the government is mostly uninvolved in a university's internal complaint procedure. Notably, while courts regularly hear cases about university failures under Title IX in the U.S.,[61] "there hasn't yet been a reported case in which a British higher educational provider has been found by a court to have breached the Equality Act for handling sexual misconduct poorly."[62] In sum, governmental oversight over U.K. campus sexual misconduct proceedings is limited.

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[55] Razia Karim, *Protected Characteristics, in* BLACKSTONE'S GUIDE TO THE EQUALITY ACT 2010 15, 15 (Anthony Robinson et al. eds., 2021).

[56] Equality Act 2010, c. 15 (UK), https://www.legislation.gov.uk/ukpga/2010/15/contents.

[57] Gov't Equals. Off., *supra* note 54.

[58] EQUALITY AND HUMAN RIGHTS COMMISSION, WHAT EQUALITY LAW MEANS FOR YOU AS AN EDUCATION PROVIDER – FURTHER AND HIGHER EDUCATION 6 (2014) (U.K.).

[59] *Id.*

[60] *Id.*

[61] Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER ED (Oct. 3, 2019), https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings.

[62] Ann Olivarius, *British Students' Secret Weapon Against Sexual Misconduct in Higher Education*, OFFICE FOR STUDENTS: BLOG (Jan. 9, 2020), https://www.officeforstudents.org.uk/news-blog-and-events/blog/british-students-secret-weapon-against-sexual-misconduct-in-higher-education. Claims under the Equality Act 2010 are redressable in the civil courts. UNIVS. UK, CHANGING THE CULTURE: REPORT OF THE UNIVERSITIES UK TASKFORCE EXAMINING VIOLENCE AGAINST WOMEN, HARASSMENT AND HATE CRIME AFFECTING UNIVERSITY STUDENTS 8 (Oct. 2016).

With limited guidance from the government about the structure and requirements of internal complaint procedures under the Equality Act, the process of campus sexual misconduct proceedings varies by institution. However, the guidelines published by the OIA provide some insight; the OIA's guidelines are framed as aspirational principles, are fairly broad, and do not promote the use of specific legal techniques throughout the resolution process.[63] This is also the case for the 2016 Report by Universities UK, which provides revised guidance in light of the outdated approach provided by the Zellick Report.[64] These broad guidelines provide universities with greater flexibility to establish educationally-focused misconduct processes, though this flexibility may come into conflict with due process or fairness considerations.[65]

III. ANALYSIS

A. Governmental Oversight

While the U.S. model demonstrates some of the problems that arise when governmental regulatory bodies are extensively involved in determining how universities handle sexual misconduct proceedings, the U.K. model reveals some of the problems that arise when the government takes a more "hands-off" approach. One 2015 report found that "fewer than half of Britain's most elite universities were monitoring the extent of sexual violence against students, and one in six said they did not have specific guidelines for students on how to report such allegations."[66] Despite significant monitoring and guidance required in the U.S., student perceptions of the process are not encouraging; only 65.6% of students surveyed in 2020 reported it was "very" or "extremely" likely that school officials would take a report of sexual assault seriously.[67]

The primary means by which both the U.S. and the U.K. governments exercise control over university sexual misconduct proceedings is by agency direction. As discussed previously, the OCR in the U.S. Department of Education is responsible for enforcement of Title IX and providing guidance to

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[63] *See* OFF. OF THE INDEP. ADJUDICATOR (UK), GOOD DISCIPLINARY PROCEDURES 6–11, 22–33 (Oct. 2018), https://www.oiahe.org.uk/media/2045/good-practice-framework-disciplinary-procedures-section.pdf.

[64] BRADFIELD, *supra* note 29.

[65] *See* Olivarius, *supra* note 62 (describing a common approach employed by universities where the university and the accused are the "parties" to the case, while the complainant is treated more like a witness and arguing that this approach "is both cruel and unproductive").

[66] Karen McVeigh & Elena Cresci, *Student Sexual Violence: 'Leaving Each University to Deal with it Isn't Working'*, THE GUARDIAN (July 26, 2015), https://www.theguardian.com/education/2015/jul/26/student-rape-sexual-violence-universities-guidelines-nus.

[67] WESTAT, *supra* note 2.

institutions.[68] In the U.K., the OIA or the Public Services Ombudsman oversees Equality Act 2010 concerns.[69] These agencies take vastly different approaches to their roles in enforcement and rules promulgation.

The OCR, as an office of the U.S. Department of Education, is a subdivision of the U.S. executive branch of government; as such, the sitting U.S. President has extensive authority with which to set priorities, pursue certain policy objectives, and initiate change.[70] With the U.S. Presidency changing over every four or eight years[71] (barring unforeseen turnover), the directives under Title IX can and do change frequently. It has become common for the OCR to release new Title IX guidance within a year or two of a new U.S. President taking office.[72] As a result, "[c]olleges and students have also been through bouts of 'whiplash' as they've had to make policy adjustments based on the political positions of the president in office."[73]

In contrast, the agencies with oversight in the U.K. do not frequently change their approach to the Equality Act 2010 and provide limited guidance to universities. On one hand, this is helpful; predictability and stability of rules in the U.K. helps to avoid the "whiplash" experienced in higher education institutions noted in the U.S. On the other hand, limited guidance can lead to confusion or even inaction within institutions where they are not certain of when or how they are expected to take action. Incidents of staff sexual misconduct against students provide an illustration of the lack of direction provided by the OIA. The OIA provides one paragraph on non-academic student

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[68] *See supra* note 45 and accompanying text.

[69] *See supra* notes 58–60 and accompanying text.

[70] U.S. DEPT. OF EDUC., *An Overview of the U.S. Department of Education*, https://www2.ed.gov/about/overview/focus/what.html (May 14, 2018) (stating that the U.S. Department of Education "assists the president in executing his education policies for the nation and in implementing laws enacted by Congress").

[71] *See* U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years . . . ."); U.S. CONST. amend. XXII, § 1 ("No person shall be elected to the office of the President more than twice . . . .").

[72] *See, e.g.*, Greta Anderson, *A Long and Complicated Road Ahead*, INSIDE HIGHER ED (Jan. 22, 2021), https://www.insidehighered.com/news/2021/01/22/biden-faces-title-ix-battle-complicated-politics-and-his-own-history (describing the 2011 guidance enacted under the Obama administration, the 2017 retraction of that guidance, the 2020 enactment of new guidance by the Trump administration, and expected changes from the Biden administration). *See also* Sarah Brown, *6 Things to Know About the New Title IX Guidance*, CHRON. OF HIGHER EDUC. (July 20, 2021), https://www.chronicle.com/blogs/higher-ed-under-biden-harris/six-things-to-know-about-the-new-title-ix-guidance (describing July 2021 guidance issued by the Biden administration as a "stopgap measure . . . while the department goes through the lengthy process of reviewing and revising the regulations"); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106) (proposing new regulations under Title IX under the Biden administration in 2022).

[73] Anderson, *supra* note 72.

complaints towards staff members, which directs the institution to funnel the complaint into their staff disciplinary process, but does not provide further direction on how to process such a complaint.[74]

The lack of specific statutory direction within the Equality Act 2010 causes uncertainty within institutions regarding when or how they are permitted to take action in response to concerns on their campuses, creating a sort of paralysis within institutions.[75] As a result, they may fail to take action entirely, though some external organizations suggest and advocate for institutions to take proactive measures when they are "on notice of a reasonably foreseeable risk."[76] This type of approach would be, in some ways, comparable to the Title IX requirement that institutions "must 'respond promptly in a manner that is not deliberately indifferent'"[77] when the Title IX coordinator receives notice from any person or source.[78] While the outcome might be the same where institutions in both countries follow this approach, the key differences are motivation and repercussions. In the U.K., institutions would self-impose this expectation of taking action where the statute does not require it, while in the U.S., institutions must follow this expectation where notice is made. As a result, in the U.K., there would be no punishment for deliberate indifference where no formal complaint was filed, while in the U.S., a university could be found in violation of Title IX for deliberate indifference if they were on notice, which can lead to significant sanctions issued by the OCR.[79]

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[74] OFF. OF THE INDEP. ADJUDICATOR, THE GOOD PRACTICE FRAMEWORK: DISCIPLINARY PROCEDURES 24 (Oct. 2018), https://www.oiahe.org.uk/media/2045/good-practice-framework-disciplinary-procedures-section.pdf ("When a student makes a complaint about a staff member that complaint should normally be referred to the provider's staff disciplinary process.").

[75] THE 1752 GROUP & MCALLISTER OLIVARIUS, BRIEFING NO. 1: IN CASES OF SUSPECTED SEXUAL MISCONDUCT CAN A UNIVERSITY PRO-ACTIVELY INVESTIGATE AND SPEAK TO POTENTIAL WITNESSES IN THE ABSENCE OF ANY FORMAL COMPLAINT OR COMPLAINANT? 1 (2020) ("[S]ituations can arise where members of a university community are aware of behaviour . . . but in the absence of any formal complaint, the department or institution does not seem to have a mandate to take any action, or any clear procedure to follow.").

[76] *Id.*

[77] U.S. DEPT. OF. EDUC. OFF. FOR C.R., QUESTIONS AND ANSWERS ON THE TITLE IX REGULATIONS ON SEXUAL HARASSMENT 13 (2021) (quoting 34 C.F.R. § 106.44(a) (2020)).

[78] *Id.* at 10–12. *See also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,115 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106) (establishing that Title IX Coordinators or other designated representatives "may receive notice through an oral report of sexual harassment by a complainant or anyone else, a written report, through personal observation, through a newspaper article, through an anonymous report, or through various other means").

[79] Though OCR has never levied this penalty, "[i]f colleges are found in violation of Title IX, they can lose their federal funding." Kate Hidalgo Bellows, *Here's How Title IX Could Change Under Biden's Proposed Rule*, CHRON. HIGHER EDUC. (June 23, 2022), https://www.chronicle.com/article/heres-how-title-ix-could-change-under-bidens-

B. Differentiating University Conduct Proceedings from the Criminal Justice System

As noted previously, the history of higher education and the development of student conduct from the early days of *in loco parentis* demonstrate that university disciplinary procedures do not, and should not, attempt to replace the formal criminal justice system where violations of university conduct codes overlap with criminal offenses. The U.S. and U.K. approaches, however, have both lost sight of this concept at either extreme. In the U.S., the most recently enacted Title IX rules have made university sexual assault proceedings look more like a courtroom than ever,[80] while in the U.K., the prominence of the Zellick guidance created the impression that universities were precluded from responding to sexual misconduct.[81]

In the U.S., prior to the implementation of the 2020 Final Rules, there had been a circuit split over whether university conduct proceedings to address sexual misconduct allegations required the opportunity for cross-examination in order to satisfy due process.[82] However, the general approach to determining what due process rights are necessary for a quasi-judicial university conduct proceeding typically does not require cross-examination. *Dixon v. Alabama State Board of Education* is a landmark decision stating the minimum requirements of due process in this setting.[83] In *Dixon*, the court held that "rudimentary elements of fair play" must be present throughout university conduct proceedings to ensure due process, but "[t]his is *not* to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required."[84] This idea that university conduct proceedings should not seek to model a courtroom environment is generally understood when considered in

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proposed-rule?utm_source=Iterable&utm_medium=email&utm_campaign=campaign_4536094_nl_Academe-Today_date_20220624&cid=at&source=&sourceid=.

[80] Andrew Kreighbaum, *New Uncertainty on Title IX*, INSIDE HIGHER ED (Nov. 20, 2018), https://www.insidehighered.com/news/2018/11/20/title-ix-rules-cross-examination-would-make-colleges-act-courts-lawyers-say (noting that the rules promulgated by Betsy DeVos are likely to "turn campus hearings into courtroom proceedings").

[81] NAT'L UNION OF STUDENTS, *supra* note 29 (noting the Zellick Report indicated that "[i]nternal action for rape and sexual assault is out of the question" and arguing that this approach "demonstrates a lack of understanding as to the nature of sexual violence and assault cases within the criminal justice system").

[82] *Compare* Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56 (1st Cir. 2019) (cross-examination not required), *with* Doe v. Baum, 903 F.3d 575 (6th Cir. 2018) (cross-examination required).

[83] Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961). For support of the perception of *Dixon* as a landmark decision, see Goss v. Lopez, 419 U.S. 565, 600 n.8 (1975) (referring to "the landmark decision of the Court of Appeals for the Fifth Circuit in *Dixon*") and Nzuve v. Castleton State Coll., 335 A.2d 321, 324 (1975) ("In [*Goss*], the majority opinion makes reference to . . . [*Dixon*] as a 'landmark decision', which indeed it is.").

[84] *Dixon*, 294 F.2d at 159 (emphasis added).

light of the goals and mission of educational institutions, which seek to accomplish very different purposes as compared to the criminal justice system.[85] Specifically, "those who administer campus conduct processes seek the outcomes of demonstrated learning, changes in behavior, and protection for the campus community."[86] Given U.S. jurisprudence which generally exempts university conduct proceedings from a requirement to allow cross-examination in due process considerations, the 2020 Final Rule for Title IX proceedings may exceed the scope of what is necessary to ensure due process in sexual misconduct proceedings.

Further, there is a fundamental fairness question about the current approach in the U.S., which treats sexual misconduct as a distinct area of student discipline, requiring unique procedures and a different level of due process for these proceedings. That is, does it inhibit fairness for students facing non-Title IX charges, who have to face the university conduct system with fewer due process protections? While, of course, the handling of sexual misconduct cases requires the utmost sensitivity on the part of factfinders and others involved in the student conduct process, the fact that Title IX procedures are afforded greater due process than other types of conduct violations is arbitrary. As some commentators suggest:

> Rather than creating separate procedures for sexual assault cases, it is advisable to apply the same standard to all cases. This is the normal practice under the student affairs maxim that all students (including alleged victims and alleged rule violators alike) be treated with equal care, concern, fairness, and dignity.[87]

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[85] *See, e.g.*, D. Matthew Gregory & Laura Bennett, *Courts or Campuses? Different Questions and Different Answers*, 487 L. & POL. REP. 2, 3 (2014). ("[C]ampus conduct processes are about a student's relationship to the institution and its behavioral standards or policies. While there may be overlap with some criminal statutes (such as with theft, drugs, or rape), campus policies and processes are intentionally and appropriately different."). For a similar perspective from the U.K., see Elaine A.O. Freer & Andrew D. Johnson, *Overcrowding Under the Disciplinary Umbrella: Challenges of Investigating and Punishing Sexual Misconduct Cases in Universities*, 14 INT'L J.L. CONTEXT 1, 18 (2017) ("Whatever pitfalls might be perceived in the criminal justice process (and we do not deny that there are many), there are some matters that internal processes simply are not appropriate to resolve, and we cannot expect them to fill gaps perceived in the criminal justice system."). *See also* discussion *supra* Part II(B).

[86] Gregory & Bennett, *supra* note 85, at 3 (contrasting these goals with common goals of court proceedings, which the authors state "are to prosecute, to negotiate the best deal, or to avoid being found guilty through any available means that an experienced attorney or prosecutor might be able to pursue").

[87] Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J. COLL. & UNIV. L. 1, 68 n.216 (2004).

The Equality Act 2010 endorses a consistent approach to several types of discrimination, but fails to fully address this fairness issue by stopping short of providing clear guidance or rules for universities to apply. As a result, the inconsistency amongst and within university settings in responding to sexual misconduct ultimately results in challenges not unlike those seen in the U.S.

Some practitioners in student conduct have noted that "[c]ompliance with federal mandates as well as conflicting interpretations of their meaning often challenge the developmental and educational purposes student conduct processes normally are designed to deliver."[88] This results in administrators attempting to "balance the legalistic and bureaucratic doctrines of 'compliance' mandates that often are in conflict with the fundamental philosophical and legal traditions of their profession."[89] Governmental guidance should seek to align with the purpose and scope of student conduct as a realm of the higher education endeavor and not seek to establish an independent criminal justice system.

C. Recommendations

Given the discussion and examples of the benefits and challenges experienced in the U.S. under Title IX and in the U.K. under the Equality Act 2010, three primary areas of recommendations will be explored. First, this Note will examine the extent to which government agencies should dictate the process and procedures of university conduct proceedings. Next, the role of stakeholders will be discussed. Finally, the Note will conclude with a brief discussion of re-aligning sexual assault response in the university setting with the goals of the student conduct process.

First, as demonstrated by the U.S. and the U.K., government agencies can either play a significant or a subtle role in determining the ways that universities respond to allegations of sexual misconduct. In the U.S., OCR rules promulgation has become increasingly politicized, which leads to major pendulum shifts with each new executive administration.[90] On the other hand, the OIA in the U.K. plays a subdued role, providing only recommendations to assist universities in complying with the Equality Act 2010, a general non-discrimination statute.

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[88] Jim Lancaster & James Lorello, *Care Over Compliance: Re-Centering the Profession on Human Experience*, ACSA: BLOG (Oct. 16, 2020, 12:38 PM), https://www.theasca.org/blog_home.asp?display=54.

[89] *Id.*

[90] *See, e.g.*, Sarah Brown, *Is a Fair Title IX System Possible?*, CHRON. HIGHER EDUC. (May 18, 2021), https://www.chronicle.com/article/is-a-fair-title-ix-system-possible ("Debates about campus rape have become fraught and politicized, with battle lines drawn and seemingly little room for middle ground."); Bellows, *supra* note 79 (noting that "the pendulum has swung back" with the 2022 proposed rules and that "campus officials are exhausted by more than a decade of political Ping-Pong over Title IX").

In order to promote fairness, responsiveness, and safety on university campuses, government agencies should continue to promulgate guidance for universities to follow that will promote compliance with the laws. However, this guidance should be mandatory; as the U.K. example demonstrates, universities may too easily fail to act when there are no carrots or sticks to enforce agency direction. Further, this guidance should be generalized and should not seek to replicate the criminal justice process. As the U.S. example illustrates, using legalistic mechanisms such as cross-examination in the conduct process reduces reporting of sexual misconduct and creates an adversarial process that detracts from the educational and developmental missions of the university setting.

Second, greater stakeholder involvement should be sought in creating external and internal rules for addressing sexual misconduct through university disciplinary proceedings. Shared governance is a concept familiar to higher education; most typically, it takes the form of faculty and other stakeholder involvement in the oversight and approval processes of the university's affairs. In the U.S., the American Association of University Professors has called for "all Title IX policies to be developed through shared governance."[91] Some scholars also advocate for shared governance in policy creation extending beyond faculty, including survivors and university administrators.[92] A robust, collaborative process of rules creation may allow for greater opportunity to establish processes that last and are not changed with each executive administration, like we see in the U.S.[93] In both the U.S. and U.K., greater stakeholder involvement in rules promulgation at the governmental level and in process creation at the university level is likely to produce a conduct process which more effectively meets the goals of the university process while balancing academic freedoms, due process, and fairness for complainants and respondents.

Lastly, both the U.S. and U.K. approaches to university sexual misconduct response illustrate that we have strayed too far from the purpose of student

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[91] Am. Ass'n of Univ. Professors, *The History, Uses, and Abuses of Title IX*, 102 BULL. AM. ASS'N UNIV. PROFESSORS 69, 70 (2016) ("For the most part, faculty members do not participate in the formulation of sexual-assault and sexual-harassment policies . . . . As a result, the process of adopting and implementing Title IX procedures has been carried out in parallel with—but independent of—the policies and procedures of academic freedom, due process, and shared governance, all of which are crucial to . . . sustaining the university's educational mission.").

[92] *See, e.g.*, Fredrik Bondestam & Maja Lundqvist, *Sexual Harassment in Higher Education – A Systematic Review*, 10 EUR. J. HIGHER EDUC. 397, 412 (2020) ("Preventive efforts in the future need to look beyond narrow legal and bureaucratic understandings of sexual harassment in order to build resilient organizations through experience-based knowledge of both practitioners in the field and victims to sexual harassment.").

[93] While little consensus exists in this area, one author notes, "[t]here's consensus about one thing, though: The political ping-pong over Title IX isn't fair to students or to colleges. No one wants to do this again in four years." Brown, *supra* note 90.

conduct as a method of achieving functioning institutions of teaching and learning. In the U.K., the limits imposed on universities to respond to conduct violations which are also criminal offenses have unnecessarily categorized student behaviors as either within the university or the justice system's purview. By contrast, in the U.S., the student conduct process for sexual misconduct has sought too closely to replicate the criminal justice system on college campuses. Moving forward, it is recommended that we revisit the goals of the student conduct process and align sexual misconduct procedures with the educational goals which serve as the foundation for the student conduct process while allowing the criminal justice system to serve its distinct purpose in society.

IV. CONCLUSION

The U.S. and U.K. legislative efforts to prevent, address, and combat sexual misconduct on college and university campuses, as codified by Title IX and the Equality Act 2010, represent two vastly different approaches to a problem which impacts vast numbers of students annually. Unfortunately, neither approach fully meets the needs of students or higher education institutions. The preferred approach which would satisfy the stated goals of these efforts and better align with the goals of the student conduct process as a whole would be a middle of the road approach between these two examples. This approach would allow for stable, consistent, and thorough agency direction that respects the boundaries between the criminal justice system and the university misconduct process.