Critical analysis of university conduct codes as a mechanism for remedying student sexual misbehavior

Kimberly Hollingshead-Aitken
University of Nevada, Las Vegas

Follow this and additional works at: https://digitalscholarship.unlv.edu/rtds

Repository Citation
Hollingshead-Aitken, Kimberly, "Critical analysis of university conduct codes as a mechanism for remedying student sexual misbehavior" (2004). UNLV Retrospective Theses & Dissertations. 2604.
https://digitalscholarship.unlv.edu/rtds/2604

This Dissertation is brought to you for free and open access by Digital Scholarship@UNLV. It has been accepted for inclusion in UNLV Retrospective Theses & Dissertations by an authorized administrator of Digital Scholarship@UNLV. For more information, please contact digitalscholarship@unlv.edu.
CRITICAL ANALYSIS OF UNIVERSITY CONDUCT CODES AS A MECHANISM FOR REMEDYING STUDENT SEXUAL MISBEHAVIOR

by

Kimberly Hollingshead-Aitken

Bachelor of Science
University of Nevada, Las Vegas
1994

Master of Education
University of Nevada, Las Vegas
2000

A dissertation submitted in partial fulfillment of the requirements for the

Doctor of Education Degree in Higher Educational Leadership
Department of Higher Educational Leadership
College of Education

Graduate College
University of Nevada, Las Vegas
December 2004
The Dissertation prepared by

Kimberly Michele Hollingshead

Entitled

Critical Analysis of University Conduct Codes as a Mechanism for Remediying Student Sexual Misbehavior

is approved in partial fulfillment of the requirements for the degree of

Doctor of Education in Educational Leadership

Examination Committee Chair

Dean of the Graduate College

Examination Committee Member

Examination Committee Member

Graduate College Faculty Representative
ABSTRACT

Critical Analysis of University Conduct Codes as a Mechanism for Remedying Student Sexual Misbehavior

By
Kimberly Hollingshead
Dr. Gerald Kops, Examination Committee Chair
Professor in Higher Educational Leadership
University of Nevada, Las Vegas

The purpose of this study was to examine university/college student conduct codes in order to determine current practices at colleges and universities with regard to disciplinary procedures for sexual misconduct on or near campuses. The purpose of this study was also to ascertain the perceptions of university judicial officers regarding the implementation and effectiveness of the student conduct code when addressing sexual misconduct issues.

As an analytical, qualitative research design, this study reviewed relevant case law, law reviews, journal articles, newspaper articles, books, and law digests.

Student conduct codes of certain colleges and universities were critically analyzed and compared to model student conduct codes to determine the similarities, differences and patterns found in them. An in-depth interview of the university judicial officers at the same colleges and universities was also conducted to determine their perceptions of the university judicial process regarding the implementation and application of student conduct codes to claims of sexual misconduct. Twenty-seven of thirty-two judicial officers responded to the interview.

This study examined the following six questions:

What procedure is utilized for adjudicating violations of student conduct code? Are
there special procedures for dealing with sexual misconduct in the student conduct code? What are the strengths of the student conduct code with regard to addressing sexual misconduct at the university? What are the weaknesses of the student conduct code with regard to addressing sexual misconduct at the university? What recommendations do university judicial officers have to strengthen the university discipline procedure with regard to addressing sexual misconduct at the university? Is the university judicial system an effective mechanism for addressing sexual misconduct allegations?

This study provides data to pinpoint the strengths and weaknesses of the university judicial process regarding sex crimes. This study also provides higher education judicial officers and administrators with a resource guide for reviewing their student conduct codes as a mechanism for dealing with sexual misconduct on campus.

The student conduct codes and interviews of judicial officers indicated both similarities and differences between universities nationwide with regards to the adjudication of sexual misconduct. These similarities and differences were explored as were recommendations for improvement of the codes by judicial officers and recommendations for further research.
TABLE OF CONTENTS

ABSTRACT ........................................................................................................................... iii

ACKNOWLEDGEMENTS ................................................................................................... viii

CHAPTER I INTRODUCTION ......................................................................................... 1
  Statement of the Problem ............................................................................................... 6
  Purpose ........................................................................................................................... 7
  Research Questions ....................................................................................................... 7
  Research Design ............................................................................................................ 8
  Significance of Study ..................................................................................................... 8
  Limitations of Study ...................................................................................................... 8
  Definition of Terms ....................................................................................................... 10
  Summary ....................................................................................................................... 13

CHAPTER II REVIEW OF RELATED LITERATURE ................................................. 14
  History ........................................................................................................................... 14
  Due Process .................................................................................................................... 15
  Student/Institution Relationship .................................................................................... 17
  Cases Dealing with Student/University Relationships ................................................... 18
    Relyea v. State ............................................................................................................. 18
    Mullins v. Pine Manor College ..................................................................................... 18
  Damage Claims ............................................................................................................. 22
  Clery Act ....................................................................................................................... 26
  Campus Sexual Assault:
  How America’s Institutions of Higher Education Respond ............................................ 33
  Student Code of Conduct ............................................................................................. 36
    Purpose of Code .......................................................................................................... 36
    Writing the Code ......................................................................................................... 37
  Model University Judicial Process .................................................................................. 38
  Harvard’s Conduct Code ............................................................................................... 41
  Judicial Process Regarding Sexual Misconduct ............................................................. 44
  Criminal Court Cases Involving Student Conduct Codes ............................................ 46
    United States v. Morrison ............................................................................................ 47
  Recent Allegations of Student Sexual Misconduct ......................................................... 49
    Air Force Academy .................................................................................................... 49
    Colorado University .................................................................................................... 52
    St. John’s University ................................................................................................. 59
# Summary

## Chapter III: Methodology

- Research Methodology
- Educational Research
- Exploratory Study
- Legal Research Methodology
- Doctrine of Precedent
- Shepard's Citations
- Court System Configuration
- Qualitative Research Design
- Student Conduct Code Analysis
- Interview Research
- Pilot Interview
- Telephone Interview
- Demographic Questions
- Campus Sexual Assault Procedures
- Summary

## Chapter IV: Findings of the Study

- Methodology
- Student Conduct Code Analysis
  - Definitions of Sexual Misconduct
  - Sexual Misconduct Policies
  - Grievance Filing Procedures
  - Judicial Hearing Process
  - Sanctions
  - Appeals Process
  - Student Rights
  - Sexual Assault Assistance
  - Education/Prevention
  - Contact Information
- Conclusion
- Interview Analysis
- Summary of Demographic Questions from Interviews of Judicial Officers
  - Questions One and Two
  - Questions Three and Four
  - Question Five
  - Question Six
  - Question Seven
  - Question Eight
  - Question Nine
  - Question Nine Part B

---

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
ACKNOWLEDGEMENTS

I would like to extend my deepest gratitude to my doctoral committee chair, Dr. Gerald Kops. His knowledge, advice, encouragement and concern transformed this dissertation from a dream to a reality.

I would also like to extend my appreciation to the other committee members; Dr. Gerald Landwer, Dr. Paul Meacham, and Dr. Porter Troutman, for their time, advice and encouragement.

To my husband, Eric Aitken, your love and support saw me through it all. I couldn’t have done this without you.

To our daughter, Kameron, you are my inspiration. Your life and your smile have made me want to be the best I can possibly be.

To our “baby on the way”, your impending arrival has given me a renewed spark for this project and for life. I can’t wait to meet you.

To my parents, brothers and sister, as always, your love and support were invaluable.

To my friends, Joe and Julie Russo, and Kris Marshall, your advice and support were also invaluable.
CHAPTER I

INTRODUCTION

Crime on college campuses is an issue of concern for campus administrators, faculty, staff, parents, students, government officials and the general public as well. According to the Chronicle of Higher Education, there was an increase in the number of most crimes committed at the universities studied between the years of 1997 and 1998. The Chronicle examined crime statistics reported by 481 4-year colleges with 5,000 or more students and found increases in all crime areas except manslaughter, robbery, burglary and motor vehicle theft. The highest increases in crime were nonforcible sex offenses (27.2%), liquor-law violations (24.3%), arson (16.9%), hate crimes (15.5%) and forcible sex offenses (11.3%). The other areas examined that showed increases were murder, aggravated assault, drug-law violations and weapons-law violations (Chronicle, June 9, 2000).

In 1998, twenty-seven universities with 5,000 or more students reported having ten or more “forcible sex offenses” (Chronicle, June 2000). In the 2002 crime statistics reports made to the Department of Education, thirty-two colleges/universities with 5,000 or more students reported ten or more “forcible sex offenses” (OPE, 2003). These reports indicate yet another increase in the number of “forcible sex offences” being reported at colleges and universities nationwide.

The increase in crime can be alarming, but it can perhaps be attributed in part to the laws mandating the accurate reporting, by college officials, of all crimes committed on or near college campuses. Crime reporting by colleges and universities has become a major concern and issue for Congress.
Under pressure from Congress to disclose campus crimes more fully, American colleges are rushing to release new crime statistics by a federal deadline of Tuesday. Government officials are posting all university crime records on the Internet and can fine colleges $25,000 for each unreported crime (Schemo, 2000).

Making crime reports available on the Internet is designed to help parents, students and employees determine the safety of colleges and universities. This move comes ten years after The Student Right-to-Know and Campus Security act was passed by Congress requiring colleges to report annual reports of campus crimes (Schemo, 2000).

Schemo (2000) asserts that there has been little compliance with this law, and that the Education Department has failed to enforce it adequately. Congress has now toughened the laws and increased the fines. It has also required that the statistics go to the Department of Education and be posted on the Internet so accountability could be assessed quickly and so all interested parties could receive the information they desired relative to campus crime (Schemo, 2000).

This may make some colleges nervous they will lose potential students, but based on their decision to pass this law, it appears that Congress feels everyone has the right to know these safety statistics. In order to comply fully with this law, all colleges and universities, public and private, that participate in federal student financial aid programs must,

Publish and distribute an annual campus security report by October 1 of each year. This report should provide on- and off-campus crime statistics for the prior three years, policy statements, campus crime prevention program descriptions, and procedures to be followed in the investigation and prosecution of alleged sex offenses (Epstein, 2001).

The Student Right-To-Know and Campus Security Act of 1990 was renamed the Jeanne Clery Act in 1998 in remembrance of the Lehigh University freshman who was raped
and murdered in her dorm room in April 1986. Clery’s parents lobbied lawmakers to require that colleges and universities report crime statistics in an effort to make campuses safer for students. Of main concern to the Clery family after the rape and murder of their daughter, and to many other people, was the reporting of sex crimes or sexual assault.

Statistics vary, from study to study, as to the occurrence of date rape on college campuses (Belknap, 1996; Finley & Corty, 1993; Olsen, 2001). These differences are due to the multiple definitions of rape and date rape and to the questions investigators use to determine whether or not a sexual assault has occurred. There have been studies reporting campus date rape and attempted date rape statistics as high as 25-30% of female students (Belknap, 1996; Finley & Corty, 1993). In another study it was reported that 3% of female college students are victims of rape or attempted rape each year, which accounts for thousands of women nation-wide (Olsen, 2001). It is likely that this number is conservative and is substantially lower than most studies on the subject (Belknap, 1996; Finley & Corty, 1993). Olsen states, however, that “When projected over the nation’s female student population of several million, these figures suggest that rape victimization is a potential problem of large proportion and of public policy” (Olsen, 2001).

“All rape is an exercise in power” (Regan, 1996). Historically, rape was defined as the male penetrating the female in her vagina with his penis. It was often further stated that it was rape if ejaculation took place and if the woman was not the man’s wife and he forced her or threatened to force her (Belknap, 1996). These definitions missed many rape victims. Anyone can be a victim of rape. One’s gender, race, age or even physical stature will not assure one that s/he will not be a victim of rape.

Current definitions now found in dictionaries are more inclusive. Rape was defined as: “1. The unlawful compelling of a woman through physical force or duress to have sexual intercourse. 2. Any act of sexual intercourse that is forced upon a person”
(Random House Webster's Unabridged Dictionary, 2001). Black's Law Dictionary also had these definitions and further defined rape as

the common-law crime of rape required at least a slight penetration of the penis into the vagina. Also at common law, a husband could not be convicted of raping his wife. 2. Unlawful sexual activity (esp. intercourse) with a person (usu. a female) without consent and usu. by force or threat of injury—most modern state statutes have broadened to the definition along these lines. Marital status is now usu. irrelevant, and sometimes so is the victim's gender—also termed (in some statutes) unlawful sexual intercourse; sexual assault; sexual battery; sexual abuse (Black's Law Dictionary, 1999).

The terms rape and sexual assault are often used interchangeably, and now both definitions encompass more possible victims and situations. Sexual assault was defined as “sexual intercourse with another person without that person's consent. Several state statutes have abolished the “crime of rape” and replaced it with the offense of sexual assault” (Black's Law Dictionary, 1999).

Date rape is essentially the same as rape, only it is committed by someone the victim knows or who is his/her peer. Date rape is defined as, “sexual intercourse forced by a man upon a woman with whom he has a date” (Random House Webster's Unabridged Dictionary, 2001). Or, “rape committed by someone known to the victim, esp. by the victim’s social companion.—also termed “acquaintance rape” (Black’s Law Dictionary, 1999). In most cases, the victim has known the attacker for a year or longer, but it could also be someone he/she has been talking to for only a few minutes. Date rape ranges from a surprise attack by a trusted friend to a new acquaintance who expects sex as payment for a night out. While a rape by a stranger can happen anywhere at any time of the day, date rape primarily occurs in late-night hours and 80% happen in the man’s home (Finley & Corty, 1993). According to authors Finley & Corty, when investigating date rape, researchers attempt to “determine the prevalence of sexual assault involving
force, alcohol, and psychological pressure” (Finley & Corty, 1993). Psychological pressure is defined as “threatening to end the relationship otherwise, pressuring with continual arguments, or saying things that were not meant” (Finley & Corty, 1993).

When dealing with sexual misconduct on college campuses, there are essentially four remedies available for the victims: a victim, after filing a report with the police, can seek prosecution of the accused in state criminal court; the victim can file a civil suit against the accused for battery, assault in an attempt to secure money damages to compensate for his/her suffering; the victim can file a complaint alleging a violation of the university student code of conduct and seek the remedies provided under the code; the student can file a lawsuit against the university for damages.

University student conduct code complaints involving victims of sexual misconduct on college campuses are becoming more frequent. Colleges and universities are disciplining perpetrators who are found responsible of committing sexual misconduct. However, some appeals to civil court have resulted in the reversal of the university imposed sanction due to flawed sexual assault policies or procedures at the universities. Further complicating the remedy issues, federal laws crafted to cover gender related criminal acts committed at the universities and colleges have been judged unconstitutional.

The cases of United States v. Morrison, and Schaer v. Brandeis dealt with alleged deficiencies in the student conduct codes of Virginia Polytechnic and State University and Brandeis University when handling sexual misconduct adjudication. The cases of Relyea v. State (1980), Mullins v. Pine Manor College (1983), Duarte v. State of California (1979) and Peterson v. San Francisco (1984) address the student/institution relationship with reference to sexual misconduct. The university judicial process was never employed in the case of John Doe v. Gonzaga University. The accused student sued his university after the dean of the colleges of education refused to sign his affidavit of character to become a teacher based on hearsay that he had committed
sexual assault. These cases, along with others, will be discussed further in Chapter II. Currently there is an ongoing investigation of the Air Force Academy relative to allegations that the Academy treated alleged sexual assault victims with “indifference, inaction or retaliation by academy officials” (Janofsky, 2003) when the incident was reported. Allegations also exist regarding sexual misconduct committed by basketball players at St. John’s University and by football players and the recruits at recruiting weekends at the University of Colorado.

The handling of sexual misconduct cases at the university level has come under scrutiny in recent years but few studies of the effectiveness of campus judicial systems for addressing this issue exist.

Statement of the Problem

Sex crimes, whether they are rape/sexual assault, or date rape, are serious crimes punishable in criminal courts with lengthy prison terms. Civil liability may be imposed in an attempt to compensate the victim to some degree for his/her suffering. Sex crimes are punishable in universities as violations of student conduct code through a variety of sanctions including suspension from school or expulsion. However, limited data exist analyzing student conduct code provisions concerning sexual misconduct. Furthermore, research exploring issues regarding implementation and application of the university’s/college’s student conduct code and the university judicial system for handling complaints of sexual misconduct is lacking.

There are inherent problems associated with handling a matter as serious as sexual assault in the university judicial forum. According to Harvey Silverglate, a Boston civil liberties lawyer, “The [university] system has been perverted to accomplish preordained political goals” (Gose, 2000). Decisions can easily be prejudiced by the judicial committee based on the identity of the victim or the accused. Mistakes can be made easily and judgments assessed incorrectly simply due to the fact that the judicial
committee is made up of students, faculty and staff and not by persons with knowledge of the law and law proceedings. Is the university judicial forum an appropriate place to hear sexual misconduct disputes? Is the university judicial system capable of handling such a case in an appropriate and effective manner?

Purpose of the Study

The purpose of this study is two fold. First, student codes will be examined in order to determine current practices at colleges and universities with regards to disciplinary procedures for sexual misconduct on or near campuses. Second, this dissertation also will ascertain the perceptions of university judicial officers regarding the implementation and effectiveness of the student conduct code when addressing sexual misconduct issues.

Research Questions

1. What procedures are utilized for adjudicating violations of student conduct code?
2. Are there special procedures for dealing with sexual misconduct in the student conduct code?
3. What are the strengths of the student conduct code with regard to addressing sexual misconduct at the university?
4. What are the weaknesses of the student conduct code with regard to addressing sexual misconduct at the university?
5. What recommendations do university judicial officers have to strengthen the university discipline procedure with regard to addressing sexual misconduct at the university?
6. Is the university judicial system an effective mechanism for addressing sexual misconduct allegations?
Research Design

The research design for this legal/historical analysis will include search, selection and critical analysis of sources, presentation of facts and generalizations, and inductive case law analysis (McMillan & Schumacher, 1997; Pettit, 1999). Student conduct codes will be critically analyzed to determine the similarities, differences and patterns found in them. As an analytical, qualitative research design, this study will review relevant case law. In addition, secondary sources examined include case law, law reviews, journal articles, newspaper articles, books, and law digests.

In depth interviews of university judicial officers were conducted to determine their perceptions of the university judicial process regarding the implementation and application of student conduct codes to claims of sexual misconduct.

Significance of Study

Student sex crimes have become a major concern for many students, parents and university administrators. There have been many studies done to indicate the extent of the problem on campuses but there is little information regarding the effectiveness of the university judicial process in handling this type of misconduct. Through the analysis of student judicial codes and the survey results of the university judicial officers, this study will provide data to pinpoint the strengths and weaknesses of the university judicial process regarding sex crimes. This study should also provide higher education judicial officers and administrators with a resource guide for reviewing their student conduct codes as a mechanism for dealing with sexual misconduct on campus.

Limitations of Study

This study will be limited to examining the judicial codes and practices of thirty-two four-year institutions based on their 2002 reporting of “Forcible Sex Offenses.” Those institutions with ten or more reported offenses were selected to be surveyed and have
their student judicial codes analyzed. No Junior or Community colleges were included in this study.

The information provided in this study regarding the effectiveness of the student conduct codes was through the lens of the judicial officer. No students were interviewed to assess their perceptions of the effectiveness of the student conduct codes or the university judicial process.

The results from the survey presented in this dissertation are based on the knowledge of the judicial officers who were surveyed. The knowledge of these judicial officers regarding the effectiveness of the university judicial process when handling sexual misconduct allegations could vary based on their direct experience handling sexual misconduct cases.

The interview process itself, a telephone interview, was chosen to better facilitate the accumulation of a large amount of information (from the relatively high number of open-ended questions), in the smallest amount of time and in a fashion that would produce both higher rates of response and an easier mechanism through which the judicial officers could relay their knowledge and experience.

Because of the sensitive nature of this topic, an independent professional researcher from the Canon Research Center at the University of Nevada-Las Vegas was trained on the interview schedule and conducted the interview in order to increase confidentiality. The confidentiality factor was an important consideration.

A tape-recorder was utilized to record the responses as well as hand-written notes taken by the interviewer. Although the tape recorder was used to obtain an exact transcription of the information provided by the judicial officers, it proved to be problematic during some interviews. Some of the interviews had to be re-done due to the total inability to hear the responses of the judicial officers. Most of the interviews were completely understandable, but where problems were found, either the judicial
officer was contacted to re-do the question, or, in cases where only small problems were detected, an indication was made in the transcriptions.

Campus crime statistics can vary greatly regarding sexual misconduct depending on how the researcher defines sexual misconduct and the type of questions they use to gather data. There is also no requirement for the university to report violations of student code. Colleges/universities must report when certain crimes are committed, however, if a student reports a violation of a student code, the university does not have to report it if the complaint is dropped or if no actual crime is proven.

Another limitation is that this is an exploratory study. The results of this study are not generalizable, but they provide information that can be useful to those involved with the university judicial process. The researcher of this study may also be a limitation in this study due to researcher bias.

Borg & Gall state, "a threat to external validity in a qualitative study is the experimenter effect. This is the degree to which the biases or the expectations of the observer have led to distortions of the data" (Borg & Gall, 1989; Pettit, 1999). These biases and expectations will be controlled through the acknowledgement and discussion of their existence and a review of other possible viewpoints.

Definition of Terms

Appellate Court: A court having jurisdiction of appeal and review of decisions of lower courts; a court to which causes are removable by appeal, certiorari, error or report (Black's Law Dictionary, 1991).

Acquaintance Rape: Forced intercourse with a person known to the victim (Random House Webster’s Unabridged Dictionary, 2001).

Campus is: “any building or property owned or controlled by the institution of higher education within the same reasonably contiguous geographic area and used by the institution in direct support of, or related to its educational purposes; or any building
or property owned or controlled by student organizations recognized by the institution” (Kaplin and Lee, 1997; Fisher and Sloan, 1995)

Date Rape: “rape committed by someone known to the victim, esp. by the victim’s social companion.—also termed “acquaintance rape” (Black’s Law Dictionary, 1999).

Forcible Rape: “the carnal knowledge of a person, forcibly and/or against that person’s will or not forcibly or against the person’s will where the victim is incapable of giving consent because of her or his temporary or permanent mental or physical incapacity (or because of his or her youth)” (Karjane, Fisher, and Cullen, 2002; USOJ, 1992).

Forcible Sodomy: “oral or anal sexual intercourse with another person, forcibly and/or against that person’s will or where the victim is incapable of giving consent because of her or his temporary or permanent mental or physical incapacity (or because of his or her youth)” (Karjane, Fisher, and Cullen, 2002; USOJ, 1992).

Misconduct: “unlawful or improper behavior” (Black’s Law Dictionary, 1999).

Sexual assault with an object: “to use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person’s will or not forcibly or against the person’s will where the victim is incapable of giving consent because of her or his temporary or permanent mental or physical incapacity (or because of his or her youth). (An “object” or “instrument” is anything used by the offender other than the offender’s genitalia)” (Karjane, Fisher, and Cullen, 2002; USOJ, 1992).

Forcible Fondling: “the touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person’s will or not forcibly or against the person’s will where the victim is incapable of giving consent because of her or his temporary or permanent mental or physical incapacity (or because of his or her youth)” (Karjane, Fisher, and Cullen, 2002; USOJ, 1992).

Incest: “sexual relations with a person who is related either by blood or marriage.
(Incest may occur within a marriage if the persons are related to one another within the degrees wherein marriage is prohibited by law. For example, first cousins generally cannot marry one another) (Karjane, Fisher, and Cullen, 2002; USOJ, 1992). Statutory rape: “non-forcible sexual intercourse with a person who is under the statutory age of consent” (Karjane, Fisher, and Cullen, 2002; & USOJ, 1992).

Defendant: “The person defending or denying; the party against whom relief or recovery is sought in an action or suit” (Black’s Law Dictionary, 1991).

Implied: “This word is used in law in contrast to “express”; i.e. where the intention in regard to the subject matter s not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties” (Black’s Law Dictionary, 1991).

Plaintiff: “A person who brings an action; the party who complains or sues in a court action and is so named on the record; a person who seeks remedial relief” (Black’s Law Dictionary, 1991).

Rape: “1. The unlawful compelling of a woman through physical force or duress to have sexual intercourse. 2. Any act of sexual intercourse that is forced upon a person” (Random House Webster’s Unabridged Dictionary, 2001). Black’s Law Dictionary also had these definitions and further defined rape as “the common-law crime of rape required at least a slight penetration of the penis into the vagina. Also at common law, a husband could not be convicted of raping his wife. 2. Unlawful sexual activity (esp. intercourse) with a person (usu. A female) without consent and usu. by force or threat of injury—most modern state statutes have broadened to the definition along these lines. Marital status is now usu. Irrelevant, and sometimes so is the victim’s gender.—also termed (in some statutes) unlawful sexual intercourse; sexual assault; sexual battery; sexual abuse” (Black’s Law Dictionary, 1999).

Remand: “The act of an appellate court when it sends a case back to the trial court and orders the trial court to conduct limited new hearings or an entirely new trial, or to
take some other further action" (Black's Law Dictionary, 1991)

Sexual Assault: “sexual intercourse with another person without that person's consent. Several state statutes have abolished the “crime of rape” and replaced it with the offense of sexual assault” (Black's Law Dictionary, 1999).

Summary

Chapter I discussed the occurrence of campus crime, crime reporting, and of date rape on college campuses. It introduced the relevant court cases and discussed recent developments. The chapter also discussed the statement of the problem, the purpose of the study, the research questions that will be answered, as well as defined pertinent terms used in the paper. Finally, the chapter discussed the research design, significance of the study and limitations of the study.

Chapter II will provide a review of literature used in the dissertation including law cases involved, literature on campus crime, student discipline, student codes and university judicial processes. It will also discuss the research and data available on the occurrence of date rape on college/university campuses.

Chapter III will describe the process used to analyze the student conduct codes and the components of the survey of university judicial officers. The method of assessment of the survey will be described. As a qualitative study, search and analysis of sources as well as a presentation of the facts are also components of this dissertation.

Chapter IV will discuss current college/university policies and procedures with regards to student sexual misconduct and the changes to those policies that some institutions are enacting at this time. Chapter four will also discuss the results of the survey of university judicial officers.

Chapter V will present conclusions and recommendations that emerge from the survey and literature analysis. These will include changes that can be made to policies and procedures of colleges and universities to make them compatible with the law and to remove any vague areas and loopholes that may exist in current policies and procedures.
CHAPTER II

REVIEW OF LITERATURE

History

The university judicial system is a mechanism by which disciplinary issues involving students can be adjudicated with educational ramifications rather than criminal. Since the university judicial system has educational ramifications, it is generally accepted that the university govern its students under a student conduct code and student disciplinary system that best suits the institution and is thus not required to uphold the strict guidelines followed in criminal proceedings (Friedl, 2001).

Since medieval times, universities have been thought of as self-sustaining institutions capable of handling their own discipline problems so the courts left them alone, "the history of the relationship between the courts and the universities is best described by nonintervention or judicial abstinence (Travelstead, 1987; Edwards and Nordin, 1979). Despite the nonintervention view that the court system has taken, there have, of course, been many cases that have come to the U.S. courts involving students and universities. These cases were relatively infrequent until the mid twentieth century and the courts still preferred not to interfere, “Although case law reflects a significant increase in judicial activity in the affairs of colleges and universities, since 1950, the courts have, for the most part, been wary about interfering with academic decisions” (Travelstead, 1987). So, despite the increase of court cases over the years, the courts have remained hesitant to get involved in the student disciplinary proceedings of higher education.
Due Process

One area in which the U.S. courts have been more involved regarding students and universities is "due process." Webster's Dictionary (2001) defines due process as "the course of legal proceedings established by the legal system of a nation or state to protect individual rights and liberties." In addition to this definition, Will Travelstead (1987) stated that,

any law dictionary will explain that due process has no fixed meaning and varies with the circumstances surrounding the case in question. What this literally means is that more due process is required for disciplinary cases that result in the termination of a student from an institution of higher education (Travelstead, 1987).

Because of this interpretation of due process, many universities have found it necessary to revise their student conduct codes and disciplinary systems to meet due process requirements while, at the same time, have had to be careful not to make their processes so legally complex that they open themselves to additional litigation.

The Due Process Clause of the federal Constitution's Fourteenth Amendment "prohibits the government from depriving an individual of life, liberty, or property without certain procedural protections" (Kaplin & Lee, 1995). Private colleges and universities are only required to provide due process to their students in so much as it is indicated in each institution's code of student conduct (Schaer v. Brandeis University, 2000). Public colleges and universities, however, are required by law to provide due process rights in accordance with the Fourteenth Amendment and further with the ruling of Dixon v. Alabama State Board of Education (1961). "The decision in Dixon v. Alabama State Board of Education (1961) rests on the assumption that a student at a public institution of higher education has a property interest in education. Thus, the student cannot suffer this loss without due process" (Travelstead, 1987).

In the Dixon v. Alabama State Board of Education (1961) case, several black
students were expelled from Alabama State College, and, supported by the NAACP, proceeded to sue the state board. "The court faced the question, 'whether [the] due process [clause of the Fourteenth Amendment] requires notice and some opportunity for hearing before students at a tax-supported college are expelled for misconduct'" (Kaplin & Lee, 1995). Upon appeal, the answer to this question was "yes". The court further established standards that public colleges and universities should follow when creating and implementing their discipline procedures for expulsion [and now including suspension and other serious disciplinary action] (Kaplin & Lee, 1995). The standards that the 5th circuit court provided include notice to the accused, including specific charges and grounds for possible expulsion; names of witnesses and a report of the facts provided by each witness should be given to the accused; a hearing that varies according to each case and that allows for an opportunity to hear both sides in detail; and the results and findings of the hearing should be provided to the accused (Dixon v. Alabama State Board of Education, 1961; Kaplin & Lee, 1995). The case of Esteban v. Central Missouri (1967) expands on the Dixon v. Alabama State Board of Education (1961) decision, providing more detail to include notice to both parties, inspection of any pertinent information prior to the hearing, right to have counsel (to advise only), and a right to make a record of the hearing (Esteban v. Central Missouri, 1967; Kaplin & Lee, 1995). Although Esteban v. Central Missouri is more specific and thus provides more protection to colleges, according to Kaplin & Lee, "the constitutional focus remains on the notice-and-opportunity-for-hearing concept of Dixon (Kaplin & Lee, 1995).

A model code was developed by Gary Pavela in 1979-80 and updated in 2000 to assist institutions in writing their student conduct codes. Other model codes (Stoner II, & Cerminara, 1990; Kaplin & Lee, 1995 & 1997; Stoner II, 2000) have also been written due to increasing lawsuits forcing institutions of higher education to review, re-think and revise their student disciplinary procedures.
Since the inception of the university in the United States, when a student was sent to study away from home, the institution of higher education became the student's "home away from home." The university assumed the role of in loco parentis, or in place of the parent, and watched over its students educationally, physically and morally. "But with the cultural revolution of the late 1960's, this relationship changed. In the wake of student protests against the Vietnam war and racial inequality, a new student independence emerged" (Gibbs and Szablewicz, 1994). Students were now perceived as adults and allowed the rights, privileges and responsibilities afforded to adults. Laws in many states were even changed to lower the legal age to eighteen so the majority of students could now vote and have other rights afforded adults. Along with changing the legal age, "Congress gave students at both public and private schools new rights under various civil rights acts and, in the Buckley Amendment, gave postsecondary students certain rights that were expressly independent of and in lieu of parental rights" (Kaplin and Lee, 1997).

The Dixon v. Alabama State Board of Education case of 1961 essentially did away with the in loco parentis philosophy practiced at colleges and universities when the court ruled that public higher education is not just a

'privilege' to be dispensed on whatever conditions the state in its sole discretion deems advisable; it also implicitly rejected the in loco parentis concept, under which the law had bestowed on schools all the powers over students that parents had over minor children (Kaplin and Lee, 1997; Dixon v. Alabama State Board of Education, 1961).

The U. S. was changing in the 1960's and early 1970's, moving away from in loco parentis, to give students the freedom and rights that they sought, but along with that came more student responsibility and accountability for their actions.

The 1980's brought even more change to the student/institution relationship.
Students wanted freedom, and yet they wanted the university to find them jobs, protect
them from any harm, and give them tuition assistance. “Courts and commentators have
struggled to define this new student-college relationship, using theories of contract,
landowner liability, guest and host, and consumerism. To date, no single doctrine or
label has been developed that explains this new relationship” (Gibbs and Szablewicz,
1994). However, having this new relationship has also given students new avenues
through which to hold universities liable for crimes committed against them.

Cases Dealing With Student-University Relationships

*Relyea v. State*

In the case of *Relyea v. State* (1980), a female student filed a lawsuit against the
institution after being sexually assaulted on campus. She claimed that the university had
an obligation to provide reasonable security for those on campus. The courts ruled that
the university was not responsible in this case, citing that the attack was not foreseeable
and thus not the responsibility of the university as the landowner (Gibbs and

*Mullins v. Pine Manor College*

Three years later, in the case of *Mullins v. Pine Manor College*, the court ruled in
favor of the female student who was sexually assaulted on campus by a non-student
assailant. Although the circumstances in both cases were very similar, the Mullins ruling
was different because the court, although viewing the university as a landowner, also
believed they had a higher responsibility to protect their invitees since they were
students. The courts did not re-instate in *loco parentis*, but they did state that due to the
institution/student relationship, the university had an obligation to ensure the students’

*Mullins v. Pine Manor College* was an important case for both higher education
institutions and their students. For the institutions, it raised their level of responsibility
with regards to student safety, making it necessary for many institutions to take a new look at some of their safety procedures, safety education programs and overall student awareness.

Mullins was a freshman at Pine Manor College when she was sexually assaulted by an unknown assailant on December 11, 1977. Mullins had arrived at her dormitory at approximately 3am, spoke to a friend for a few minutes in the friend’s room and went to bed. Mullins was awakened by the intruder some time later and was forced from her room with a pillow case over her head. The assailant led Mullins through the courtyard of her campus and out of the courtyard through an inadequately secured gate. He led her down a bicycle path towards the refectory (the college’s dining hall), stayed in front of the refectory for several minutes, went inside the refectory, went back outside for several more minutes and then back inside the refectory where the assailant then raped Mullins. Mullins and her assailant were outside, in various areas of the campus for at least twenty minutes and the entire incident lasted for 60 to 90 minutes (Mullins v. Pine Manor, 1983).

There were many factors that led to a ruling of the Superior Court of Norfolk County in favor of Mullins. Upon appeal by Pine Manor College, the Supreme Judicial Court affirmed the ruling for similar reasons.

The supreme Judicial Court, Liacos, J., held that: (1) the college had a duty to provide security for its students; (2) the evidence was sufficient to sustain the conclusions that the college was negligent in performing that duty and that the negligence was the proximate cause of the student’s injuries; and (3) the vice-president was not entitled to avoid liability on the grounds that he was an officer of a charitable corporation (Mullins v. Pine Manor, 1983).

The jury awarded Mullins $175,000.00 when the case was heard in the Superior Court of Norfolk County, but the justices reduced that amount to $20,000.00 before
judging in favor of Mullins. The Supreme Court upheld the $20,000.00 judgment

According to the second restatement of Torts 323 (1965):

One who undertakes, gratuitously or for consideration, to render services to
another which he should recognize as necessary for the protection of the other’s
person or things, is subject to liability to the other for physical harm resulting
from his failure to exercise reasonable care to perform his undertaking, if (a) his
failure to exercise such care increases the risk of such harm, or (b) the harm is
suffered because of the other’s reliance upon the undertaking (Mullins v. Pine
Manor, 1983).

It was found that Pine Manor College had assumed the responsibility for protecting
their students, as most colleges have, and that the protections they employed were
inadequate in protecting Mullins which demonstrated that the criminal activities of third
parties were foreseeable. It was also clear, as stated in part (b) of the Torts 323, that
Mullins and her parents were reliant on the university for protection.

These two principles of law provide a sufficient basis for the imposition of a
duty on colleges to protect their resident students against the criminal acts of
third parties. Colleges must, therefore, act ‘to use reasonable care to prevent
injury’ to their students ‘by third persons whether their acts were accidental,
negligent, or intentional’ (Mullins v. Pine Manor College, 1983; Carey v. New

With regards to the negligence claim presented by Mullins, the jury had sufficient
evidence to find Pine Manor College responsible. There were several deficiencies found
in the design of the security system and there was evidence to show that the guards did
not perform their duties on and before the night of the attack. There were only two
guards on duty at night before and on the day of the attack. Two more guards were hired
after the attack to patrol from 11:30 pm to 7:30 am. Not only were the locks on the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
dormitory doors found to be insufficient, as they did not have chains or deadbolts, the
locks on some perimeter doors and gates were found to be unlocked on the night of the
attack.

There was also sufficient evidence to show “Causation” as “a plaintiff need only
show that there was greater likelihood or probability that the harm complained of was
due to causes for which the defendant was responsible than from any other cause”
evidence presented, it was reasonable for the jury to conclude that the assailant was
most likely a trespasser, and had the college had an adequate locking system, then more
than likely, the attack would not have successfully occurred. Also, had the refectory
been locked as it was supposed to be and had there been three guards instead of two, the
attack would, more than likely, have been unsuccessful (*Mullins v. Pine Manor College*,
1983).

The college and Ms. Person (vice-president of Pine Manor College) were also found
responsible for proximate causation.

The college and Person next argue that the judge should have ruled, as matter of
law, that the intervening criminal act of an unknown third person was a
superseding cause which severed the chain of proximate causation. Our holding
that the defendants had foreseen the risk of criminal attack largely disposes of
the issue. The act of a third party does not excuse the first wrongdoer if such act
was, or should have been, foreseen (*Mullins v. Pine Manor College*, 1983).

Justice O’Connor dissented with opinion in the case of *Mullins v. Pine Manor
College* but the votes of the remaining judges ruled in favor of Mullins. As stated above,
the ruling dealt with various protection issues with regards to student safety and the
level of responsibility that a college or university has in protecting its students. These
rulings have since impacted many cases, especially sexual assault cases.

In the case of *Duarte v. State of California*, the parents sued for the wrongful death
of their daughter who was raped and murdered in the residence hall operated by a state university. They stated that due to the “special” relationship between the student and university, the university had an obligation to warn their daughter of the recent increase of violent attacks and to teach her how to protect herself. The courts ruled in favor of the parents (Nolte, 1985; Duarte v. State of California, 1979). In the case of Peterson v. San Francisco Community College, the courts also ruled in favor the female student sexually assaulted in the school parking lot, stating that the college was “responsible for overseeing its campus” (Gibbs and Szablewicz, 1994; Peterson v. San Francisco Community College, 1984).

It appears that filing a lawsuit on the basis of in loco parentis alone will not yield a ruling in favor the plaintiff (assault victim), but combining breach of contract (between the student and university), lack of ordinary care and using the landlord/landlord and tenant relationship will yield a stronger case for the plaintiff. This appears to be the direction most cases are taking (Nolte, 1985). Due to the current trend in the relationship between student and institution that appears to be returning somewhat towards in loco parentis, and the incidence of court cases and the rulings of the courts, the universities are once again facing the challenge of modifying their student codes and judicial processes to ensure students safety, increase student responsibility for their actions and protect the institution from lawsuits.

Damage Claims

If a student feels that he/she has a reasonable complaint against a university, one of the options that the student has to adjudicate his/her claim is to sue the university for damages. The two cases that follow illustrate recent instances in which students sued their universities for damages by claiming negligence, breach of contract, lack of ordinary care and/or landlord/tenant relationship violations (Ostrander v. Duggan, 2003; Freeman v. Busch, 2003).
The following cases do not involve the university judicial process or student conduct codes, but are pertinent to this dissertation as they further confirm regulations regarding premises liability, Title IX liability regarding sexual assault, summary judgment, and negligence.

A case recently decided in the United States Court of Appeals for the Eighth Circuit from the United States District Court for the Western District of Missouri was entitled Ostrander, plaintiff, v. Duggan and Delta Tau Delta fraternity (DTD), and University of Missouri (MU), defendants-Appellees.

Ostrander was sexually assaulted by Duggan inside the house Duggan was leasing with ten other fraternity members. Ostrander and Duggan had attended a sorority formal together after which they had consensual sex. One week later, Duggan invited Ostrander to his house to stuff envelopes which they did for thirty minutes and then proceeded to drink alcohol. Ostrander had two shots of vodka and began to feel very intoxicated. She stated that she “saw the room turn a golden haze, lost control of her limbs, and then lost consciousness” (Ostrander v. Duggan, 2003). Ostrander randomly regained consciousness various times, during which she realized Duggan was sexually assaulting her and other males in the house were viewing her naked. Ostrander left in the morning and did not report the incident right away.

Approximately five months later, Ostrander reported the incident to the Office of Greek Life, along with two other females reporting sexual assaults committed by fraternity members. Following the complaints, the coordinator, Pam Sampson spoke personally with her supervisor, Laura Osteen, who in turn, spoke personally with the local chapter advisor to inform him of complaints of sexual assault. Sampson and Osteen also sent a letter to the fraternity’s national president informing him of the allegations and that they believed the local chapter would investigate and handle the matter. Ostrander was never informed of any action taken or sanctions imposed on the fraternity.
Ostrander filed suit against Duggan for sexual assault, against DTD on a claim of premises liability and against MU for a Title IX infraction. Summary judgments were made in favor of DTD and MU prior to turning the case over to a jury. Following that, a jury from the District Court for the Western District of Missouri found in favor of Ostrander in the individual claim against Duggan and awarded her $100,000 in compensatory and $200,000 in punitive damages. Ostrander appealed the summary judgment decisions, but the Court of Appeals affirmed the district court’s decision.

Ostrander claimed that DTD owned the property leased to Duggan. Upon investigation, it was determined that the property did not belong to DTD. In addition, Ostrander could not prove DTD had failed to protect her or that the crime was foreseeable had they owned the house, the Court of Appeals affirmed the district court’s grant of summary judgment in favor of DTD.

Ostrander also appealed the district court’s grant of summary judgment as a matter of law in favor of MU on her Title IX claim.

Title IX provides that ‘[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance’ 20 U.S.C 1681 (a)...however, a recipient of federal funds may only be liable for damages arising from its own misconduct (Ostrander v. Duggan, 2003).

For a public university to be held liable under Title IX, it must show that it is deliberately indifferent to known acts of discrimination and “the public university’s ‘deliberate indifference must either directly cause the abuse to occur or make students vulnerable to such abuse, and that abuse must take place in a context subject to the [university’s] control’” (Ostrander v. Duggan, 2003). The record clearly shows that because MU did not own or control the house leased by Duggan, therefore, they cannot be held liable under Title IX.
In the case entitled *Freeman v. Busch and Simpson College*, the United States Court of Appeals for the Eighth Circuit decided an appeal from the United States District Court for the Southern District of Iowa. Freeman attended a party in Busch's dorm room, became intoxicated, passed out, was allegedly sexually assaulted by Busch and had her breasts fondled by Hildreth and Hatfield. Freeman filed tort against Busch, Hildreth, Hatfield, and Simpson College. Busch and Simpson filed motions for summary judgment, which was granted in full to Simpson, and in part to Busch prior to a trial by jury. On the remaining issues, the jury found in favor of Freeman. Freeman appealed the court's decision for summary judgments, and a dismissal of a claim for punitive damages. Busch cross-appealed the court's ruling denying a mistrial and his claim that the jury was erroneously instructed. The Court of Appeals affirmed the district courts decision.

The case went to court on claims of negligence for supplying alcohol to a minor and for sexual battery. The jury found in favor of Freeman, awarding her "$81,396.27 in damages ($66,947.64 against Busch, $14,447.63 against Hildreth, and $1.00 against Hatfield.) Both Freeman and Busch appealed" (*Freeman v. Busch, 2003*).

Freeman appealed both the court's grant of summary judgment and the dismissal of her claim for punitive damages. "'Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law'" (*Freeman v. Busch, 2003; Thomas v. Union Pac. R.R Co., 308F. 3d 891, 893 (8th cir. 2002)*). Freeman alleged she had a legitimate claim against Simpson College since Busch was a security guard employed by the institution. However, since Busch was not working when the incident took place, Simpson cannot be held responsible. Freeman's claim for punitive damages was denied because "the district court found that Freeman provided 'no reason why punitive damages could not have earlier been alleged'" (*Freeman v. Busch, 2003*). The same was true on appeal so Freeman's appeal was denied.
Busch cross-appealed on the district court’s denial of a mistrial and because he claims the jury was not instructed correctly. Busch claimed that there was a mistrial due to Freeman’s alleged violation of a pretrial order, but he did not file for a mistrial in a timely fashion, (he filed over six weeks past the due date) so the Court of Appeals did not need to address the issue. With regard to the instruction of the jury, they were given the “egg-shell plaintiff” instruction.

The ‘egg-shell plaintiff’ instruction provided that if the jury found that Freeman ‘had a pre-existing condition [which made] her more susceptible to injury than a person in normal health, then [Busch would be] responsible for all injuries and damages’ that Freeman suffered (*Freeman v. Busch*, 2003).

There was evidence that Freeman had undergone psychological counseling as a child due to sexual molestation. Therefore, the ruling was appropriate that Busch would still be held “responsible for damages, despite Freeman’s prior psychological condition” (*Freeman v. Busch*, 2003). Based on all the information presented, the Court of Appeals affirmed all of the decisions made by the district court.

These cases offer information on state and federal laws that can assist universities in assuring they are taking all precautions necessary to educate students with regards to sexual misconduct and consent, they are doing all they can to prevent any form of negligence on their part and their judicial process is in compliance with Title IX regulations.

**Clery Act**

The Student Right-To-Know and Campus Security Act of 1990 was renamed the Jeanne Clery Act in 1998 in remembrance of the Lehigh University freshman who was raped and murdered in her dorm room in April 1986. Clery’s parents lobbied lawmakers to require that colleges and universities report crime statistics in an effort to make campuses safer for students. Of main concern to the Clery family after the rape and
murder of their daughter, and to many other people, was the reporting of sex crimes. Through the efforts of the Clery family and their supporters, government officials and, subsequently, university personnel are working to inform everyone of campus crime through the reporting mandates issued through the Clery Act.

The extent of the institution’s obligation to protect students from crime on campus—particularly, violent crimes committed by outsiders from the surrounding community—has become a sensitive issue for higher education. The number of such crimes reported, especially sexual attacks on women, has increased steadily over the years. As a result, postsecondary institutions now face substantial tactical and legal problems concerning the planning and operation of their campus security systems, as well as a federal law requiring them to report campus crime statistics (Kaplin and Lee, 1997).

As stated, the number of lawsuits of students against universities is rising. In order for a college or university to be found responsible by the courts for criminal acts against students, the student must prove negligence on the part of the university. Negligence can only be proven if the “crime” (or harm) is foreseeable, which is best indicated through the use of prior crimes evidence (Ferguson and Monroe, 2002 and Fritz and Harstein, 2000). The Clery Act is a federal mandate that requires all universities that participate in federal financial aid programs to report the incidence of certain crimes. The Clery Act is found in Title II of the Student Right-To-Know and Campus Security Act and the U.S. Department of Education is responsible for overseeing compliance of colleges and universities with the Clery Act (Fisher and Sloan, 1995). The reports must be published yearly and must include the schools’ security policies and three years of crime statistics of certain crimes.

In the reports, schools must provide statistics on the crimes of murder, manslaughter, sex offenses, robbery, aggravated assault, burglary, motor vehicle theft, and arson. The reports also must include numbers of liquor law violations,
drug-related violations, and incidents of weapons possession if such acts resulted in an arrest (Ferguson and Monroe, 2002).

Hard copies must be made available to current students and staff and the information should be made available via the Internet as well. The reports must also state if the crime occurred on campus, in a campus building or off campus.

Neither the victim nor the perpetrator can be named in the reports and, “the report must describe a school’s policies regarding campus sexual assault programs, and it must detail the procedures to be followed once a sexual assault occurs” (Ferguson and Monroe, 2002). These procedures include informing the alleged victim that she/he has the right to file a report to the local police in addition to or instead of filing a report with the university and “the right of both the complainant and the accused in a campus sexual assault hearing to have the same opportunity to have others present in support or advisory capacities” (Karjane, Fisher, and Cullen, 2002).

According to the 1995 amendment to the Family Education Rights and Privacy Act of 1974, FERPA, the complainant also has the right to know the outcome of a hearing in which sexual assault is involved. In 1995, one of many amendments to FERPA (Kaplin & Lee, 2000) stated that “‘disciplinary records’” would be included with “‘education records,’” thus shielding them from disclosure” (Kaplin & Lee, 2000). This amendment also made a specific exception regarding the Clery Act that “permits postsecondary institutions to disclose to a victim of a violent crime the results of any disciplinary proceeding against the alleged perpetrator” (Kaplin & Lee, 2000).

FERPA was created to protect students’ rights to privacy, but individual students cannot sue an institution based on infringement of those rights; according to the decision of the U.S. Supreme Court in John Doe v. Gonzaga University.

John Doe was an elementary education student at Gonzaga University when he had an intimate sexual relationship with Jane Doe, a student in the special education program, at Gonzaga University. Jane Doe did not report that she had been sexually
assaulted by John Doe, but her classmate Julia Lynch reported the alleged incident (John Doe v. Gonzaga University, 2001).

Roberta League, Gonzaga’s teacher certification specialist, overheard Julia Lynch talking to another student about how dissatisfied she was with the way Gonzaga handled complaints of sexual misconduct. Lynch had seen Jane Doe in obvious physical pain and when she inquired as to the cause of the pain, “Jane” stated that it was from having sex with “John”. Lynch was upset no one had inquired about the events. League recognized the name of John Doe and reported it to the director of field experience for student teachers, Dr. Susan Kyle. The two decided that they should investigate, as League was concerned that the allegations might affect the dean’s ability to submit an affidavit affirming John Doe’s application for teacher certification (John Doe v. Gonzaga University, 2001). John Doe was never notified of the investigation, a complaint was never filed by Jane Doe, and John Doe was never confronted with any allegations.

League and Kyle met with Lynch on October 14th, 1993, during which, Lynch told them that “Jane” reported being sexually assaulted by “John” three times in November or December, 1992. Lynch stated that she had accompanied Jane Doe to the student health center shortly after the last assault and that the nurse had affirmed that Jane Doe had been date raped. At the trial, the nurse stated that she did not perform a physical examination of “Jane,” but that she had recorded her subjective symptoms and scheduled an appointment for her to see Dr. Nancy Crotty. She also stated that Jane Doe declined when asked if she wanted to report a rape. Dr. Crotty stated upon examination the next day, her findings were consistent with intercourse, and Jane Doe did not accuse John Doe of date rape or sexual assault. John Doe testified that “Jane Doe told him the nurse or doctor had said the intercourse appeared forced. When John Doe asked Jane Doe, ‘Well, was it?’ she responded, ‘I don’t know. Was it?’” (John Doe v. Gonzaga University, 2001).

At the trial, Lynch testified that “the conduct Jane Doe had described to her was
normal, nonaberrant sexual activity. Lynch, League, and Kyle could not say at the time of trial what they discussed that led to references in the Kyle and League declarations to seamy and deviant activities and sexual penetration with foreign objects" (John Doe v. Gonzaga University, 2001). Kyle also admitted that she may have misunderstood when she had been told that John Doe was trying to force a ménage trois on Jane Doe; perhaps he had only stated that he wanted to date two women simultaneously.

Jane Doe refused on several occasions to give a statement, and refused to say that any sexual misconduct had occurred. She became angry when asked to give a statement and repeatedly asked for these women not to pursue the allegations.

League continued her investigation and also informed Adelle Nore, an investigator for the Office of the Superintendent of Public Instruction (OSPI), the state agency that certifies teachers, of John Doe's sexual misconduct and identified him by name. Nore testified that she thought Gonzaga needed to talk to Jane Doe and John Doe regarding the allegations, which Gonzaga failed to do. Nore was under the impression that Jane Doe was a credible witness and was prepared to give a statement (John Doe v. Gonzaga University, 2001).

According to Professor William Sweeney and Professor Cheryl Lepper, Jane Doe had told them both, on separate occasions, that John Doe had sexually assaulted her. Jane Doe, in her statement in court, claimed that there were falsehoods in the statements provided by the professors. In January 1994, Jane Doe also asked Janet Burcalow not to pursue the matter. According to Burcalow, Jane Doe could not affirm that the assaults had not occurred and admitted that John Doe would be angry if he knew she was talking about their relationship.

In February 1994, Dr. Corrine McGuigan, dean of the school of education, met with League, Kyle, Sweeney and Burcalow and concluded that there was sufficient evidence for her not to sign John Doe's moral character affidavit supporting his application for teacher certification.
John Doe first learned about Gonzaga’s investigation on March 4, 1994, nearly one and a half years after the investigation had begun and the same day he made his final payment of fees to Gonzaga University.

John Doe received a call asking him to come to McGuigan’s office. He was escorted to a private room and left to read a letter from McGuigan. The letter explained that in light of allegations of sexual assault, McGuigan would not give John Doe the moral character affidavit required to support his application for certification to teach. McGuigan refused to tell John Doe who had made the allegations against him… when John Doe and his parents asked about their appeal rights, they were told there were none (John Doe v. Gonzaga University, 2001).

Jane Doe had married and was living in another state by the time of the trial. Jane presented her testimony through a taped deposition during which she stated that John Doe had not sexually assaulted her and that Lynch had “really blown things out of proportion” (John Doe v. Gonzaga University, 2001). She said there were falsehoods in the statements by Kyle, Burcalow, and Sweeney and denied ever speaking to Lepper. And she testified that she tried to dissuade Kyle and Burcalow from pursuing the allegations.

John Doe testified that he never had any indication that Jane Doe was unwilling to participate in intercourse and that he had stopped any time he sensed discomfort on her part.

John brought an action suit against Jane Doe and Gonzaga University in June 1994, but later dropped the suit against Jane Doe. Jane Doe cross-claimed against Gonzaga and counterclaimed against John Doe for sexually assaulting her, but later dropped both suits (John Doe v. Gonzaga University, 2001).

Following a trial in the Spokane Washington Superior Court, the jury returned a verdict in favor of John Doe, awarding him damages in the amount of $1,155,000.00.
Gonzaga appealed to the Court of Appeals. "The Court of Appeals reversed the negligence, invasion of privacy, and breach of contract awards and remanded for a new trial on the defamation of character claim... The court was ordered to 'impose an appropriate sanction upon remand'" (John Doe v. Gonzaga University, 2001).

The Washington Supreme court granted John Doe's petition for review of the Court of Appeal's decision. According to the standard of review, in order for the Court of Appeals to overturn a jury decision, it must have sufficient evidence of the truth of the premise in question and it cannot overturn the jury if there is evidence that supports the verdict rendered (John Doe v. Gonzaga University, 2001). Based on this information, the Court of Appeals decision is reversed and the judgment is reinstated on the jury verdict as to John Doe's claims for defamation, invasion of privacy, violation of his rights under FERPA, and breach of contract...The trial court's supplemental judgment for attorney fees and costs is reinstated, and John Doe is awarded reasonable attorney fees and expenses on appeal pursuant to RAP 18.1 (John Doe v. Gonzaga University, 2001).

During this case, when determining breach of contract, Gonzaga's student handbook was introduced.

Under the heading, "Mutual Responsibility," the Gonzaga handbook it states that upon acceptance of admission to Gonzaga, the student accepts an agreement of mutual responsibility and must then abide by the policies of the university. The university, in turn, has the responsibility of providing an educational environment and providing the student "with an opportunity to be heard in matters affecting their welfare" (John Doe v. Gonzaga University, 2001).

Through review of the student conduct code and testimony provided, it was evidenced that John Doe had not been allowed to "be heard in matters affecting [his] welfare" (John Doe v. Gonzaga University, 2001).

Gonzaga appealed the decision once again, this time to the U.S. Supreme Court.
They challenged the use of the Family Educational Rights and Privacy Act (FERPA) as a mechanism for private lawsuits. "FERPA is about conditioning the receipt of federal money on having certain programs and practices with respect to students' educational records," said Martin Michaelson, a lawyer representing Gonzaga. "It is not intended to be and should not be an engine for private litigation" (Gose, January 2002).

The U.S. Supreme court agreed with Gonzaga and ruled "that individuals cannot sue colleges for violating a federal law that protects the privacy of student records" (Schmidt, June 2002). Chief Justice William H. Rehnquist, speaking for the majority further added,

members of Congress, in adopting the law, intended that its privacy provisions would be enforced by the U.S. secretary of education, mainly through the withholding of federal funds to educational institutions that failed to change their policies to comply. The law's privacy provisions 'contain no rights-creating language' giving students or parents the ability to sue institutions that release confidential information without permission (Schmidt, June 2002).

This ruling set precedents that will probably save the university system time and money, but the case itself indicated that simply having a student conduct code that addresses students’ rights to privacy does not sufficiently protect an institution from lawsuits; the code must be implemented as well.

"Campus Sexual Assault: How America’s Institutions of Higher Education Respond"

If there are crimes that produce an on-going threat to members of the university community, they must be reported in a timely fashion and in a way as to prevent the future occurrence of the crime. A daily log must be maintained of all crimes reported to university security and this log is to be made public within two days. All of these requirements were enacted to improve student and faculty awareness of current crime.
and potential danger in the university community in an effort to reduce the incidence of
dangerous crimes; and to give notice of these statistics to those applying for admission
to college.

"Fewer than 40 percent of colleges are in full compliance with a federal law that
requires the reporting of crime statistics on rapes and sexual assaults..." (Chronicle,
Nov. 1, 2002). An extensive report was published in October 2002, which examined the
level of compliance of colleges and universities with the Clery Act. The report entitled,
"Campus Sexual Assault: How America’s Institutions of Higher Education Respond,"
written by Heather Karjane, Bonnie Fisher, and Francis Cullen, "included information
collected from 2,438 colleges and universities in the United States and Puerto Rico"
(Goetz, 2002). The report took a statistical look at how well universities are complying
with each aspect of the Clery Act and a summary of the results are quoted as follows:

- Most campuses that reported back did articulate some definition of rape or
  sexual assault, but those definitions varied widely between institutions.

- Only 36.5% of schools reported crime statistics in a manner that was fully
  consistent with the Clery Act. Of the 77.9% of schools that sent their annual
  security reports as requested, 80% had three years of crime statistics but only
  approximately 50% of those separated their sexual assault statistics into
  "forcible" and "non-forcible".

- Only 13.7% of schools collect statistical information on the use of drugs in the
  commission of rapes.

- Four-year public and private non-profit institutions have made substantial
  strides in developing sexual assault policies (approximately 75% with policies),
  but smaller, for profit, non-residential schools are lagging behind
  (approximately 10% with accessible policies).

- Nearly 75% of institutions of higher education (IHE’s) mentioned contact
  procedures in their sexual assault policies for victims of sexual assault and
almost all of them included a telephone number. Campus police or local police were most frequently the contact person.

- Few campuses provide sexual assault and/or sensitivity training to those most likely to first hear of sexual assaults on their campus and on the whole, 60% of schools provide no training to students. Only 37.6% of all schools require sexual assault training for campus law enforcement/security officers and about half of all schools provide no training to faculty and staff about "how to respond to disclosures of sexual assault."

- 84.3% of the nation's IHE's offer confidential reporting to campus sexual assault victims. But only 44.7% have policies that include statements on the legal and disciplinary system options available to students. Only approximately half of the school's sexual assault policies include procedures on how to report sexual assaults to on-campus and/or off-campus police.

- Approximately 33% of sexual assault policies contain a statement on the importance of victims obtaining a forensic (medical) examination and 40% discuss the importance of preserving evidence if a sexual assault has occurred.

- Less than half of the IHE’s report providing new students with sexual assault awareness education, and less than half provide date rape prevention programs.

- Only 3.2% of schools report providing victims with legal support services.

- Over 7 in 10 institutions report that they have “disciplinary procedures,” a “judicial system,” “grievance procedures,” or some similarly named adjudication process.

- 60% of schools provide students with information on how to file a written complaint in the event of a sexual assault.

- Almost half of 4-year institutions utilize an "investigation stage" to gather evidence in a sexual assault complaint but only 25% of them report using written protocols to coordinate the investigation efforts.
• Student judicial committees use a variety of hearing processes. Hearing boards may contain as few as a single board member or as many as 24. The burden of proof ranges from ‘preponderance of the evidence’ to ‘beyond a reasonable doubt’.

• 52.6% of schools’ policy materials mention that the complainant will be notified of the procedures that will be used in, and the outcome of, the complaint, whereas 61.9% notify the accused of the existence and nature of a complaint filed against them.

• Due process procedures for the accused are utilized at only 37.3% of IHE’s.

• In 2000-2001, the bulk of cases of acquaintance rape involving college students were resolved out of court and never formally reported to criminal justice personnel.

• Of the schools with a disciplinary process, the most common sanctions employed for those found responsible of committing sexual misconduct are expulsion (84.3%), suspension (77.3%), probation (63.1%), censure (56.3%), restitution (47.8%), and loss of privileges (35.7%) (Karjane, Fisher, and Cullen, 2002).

This report essentially indicated that many institutions, especially four-year public and private non-profit, are making an attempt to comply with the Clery Act, but when the report was released, twelve years after the mandate was enacted, it showed full compliance was far from being reached.

Student Code of Conduct

Purpose of the Code

The article of discipline is the most difficult in American education. Premature ideas of independence, too little repressed by parents, beget a spirit of insubordination, which is the great obstacle to science with us and a principle
cause of its decay since the revolution. I look to it with dismay in our institution, as a breaker ahead, which I am far from being confident we shall be able to weather (Jefferson, 1884; Stoner and Cerminara, 1990).

Student discipline is a necessary element for an educational environment to be conducive to learning. The purpose of the student conduct code is to provide to students, faculty and staff, in written form, the institution’s mission and goals, student rights and responsibilities, rules and regulations of the institution, school policies, judicial procedures, counseling services and safety procedures.

For a public college or university, such a written code provides constitutionally-required notice to students, faculty and administrators concerning the institution’s policies and procedures. It may also ensure against charges of unconstitutional arbitrary action...by clearly setting forth the terms of the ‘contract’ between the student and the school with respect to disciplinary matters (Stoner and Cerminara, 1990).

The “contract” aspect of the student code of conduct is especially important within private institutions, for both the students and the universities, since constitutional mandates do not apply to private institutions.

Writing the Code

In crafting the code of conduct, it is important to think about the audiences...in it [the code], the standard of behavior is set for all, because the code both proscribes certain student behavior, and prescribes behavior of members of the university community during the disciplinary process (Footer, 1996).

The code of conduct should be clear, specific, informative and understandable to all audiences. According to The Journal of College and University Law, there are a few principles the institution should keep in mind.

First, the institution...should try to follow the general dictates of due process...Second...student disciplinary codes need not be drafted with the
specificity of criminal statutes. In fact...a college or university should avoid language implying that criminal standards apply. Finally...the college or university should try to emphasize, in addition to its prohibitions, rights it recognizes (Stoner and Cerminara, 1990).

Although student codes of conduct will vary by institution due to differences in the institutional mission and goals, there are some general areas that should be addressed in the conduct codes of most institutions. The code should include a definition of various terms used throughout the document, indication of the judicial authority, proscribed student conduct—jurisdiction of the college, rules and regulations, and violations of the law and university discipline. The code should also contain the judicial policies of the institution, including, charges and hearings, sanctions, interim suspension, and the appeals process (Stoner and Cerminara, 1990, Pavela, 2000).

Many codes are now including intervention programs and safety tips and procedures.

Institutions take a giant step in the right direction if they: have easily understood rules of student rights and responsibilities that reflect institutional values; follow those rules; and educate their constituencies about the rules, and the rights, responsibilities and values that the rules reflect (Stoner, 2000).

Model University Judicial Process

“Universities are not required to provide the full panoply of constitutional safeguards in student misconduct hearings that are available to defendants in criminal proceedings” (Friedl, 2001)

The university is a learning environment which never intended to use criminal law standards to govern student behavior. When deciding whether a student violated campus rules, the “more likely than not” standard of proof used in civil hearings is more appropriate than the “beyond a reasonable doubt” standard of proof used in criminal trials (Stoner, 2000). Gary Pavela, (2000) also recommends a burden of proof less than
that of the criminal courts through the use of a “clear and convincing” burden of proof, which is a higher standard of proof than “more likely than not” but lower than “beyond a reasonable doubt”.

However, the university does need to provide at least a basic level of due process to the accused (according to Dixon v. Alabama State Board of Education), care and understanding to the accuser, an adequate level of competence in the judicial process and fairness to all involved.

The Council for the Advancement of Standards in Higher Education (CAS) has developed standards for colleges and universities to follow when forming and instituting a judicial program at their institution. Essentially, the goals of the judicial program at colleges and university are to:

- develop, disseminate, interpret and enforce campus regulations; protect relevant rights of students; deal with student behavioral problems in a fair and responsible manner; facilitate and encourage respect for campus governance;
- provide learning experiences for students who are found to be responsible of conduct code violations; and initiate and encourage educational activities that serve to prevent violations of campus regulations (CAS, 1997).

The judicial process is a method for protecting the rights of the entire college community and to increase the overall safety of its community members. In order to maintain a well-functioning and successful university judicial system, the judicial program must be clearly defined, written and easily accessible to the entire university community. The written document should include:

- a) campus policies, such as those concerning legal representation, the maintenance of confidentiality, and the expunging of disciplinary records; b) campus procedures, such as filing a disciplinary action, gathering information, conducting a hearing, and notifying a student of the hearing/appeal board’s decision; c) the composition, authority, and jurisdiction of all judicial bodies; d)
the types of advice that the complainant and others can receive about the process; e) the types of disciplinary sanctions, including interim suspension procedures; and f) a general explanation of how and when non-campus law officials are used (CAS, 1997).

The publication should also contain information on the jurisdiction of the university judicial system, hearing officer and board, pre-hearing procedures, investigation procedures, hearing procedures, appeals procedures, confidentiality standards, records/policy procedures and the rights of the accused, accusers, and victims, when appropriate (CAS, 1997, Pavela, 2000).

Students should be informed that the judicial process will be completed in a timely fashion, but that time must be allowed for a proper investigation. It is recommended that a single recorded copy of any judicial proceedings be made and kept at the institution in the event of appeal or any further legal action that may occur, but that court reporters and/or additional recordings not be allowed. Additionally, criminal law terminology should not be utilized in the judicial code or proceedings as they could open the institution to additional law suits (Stoner, 2000, Pavela, 2000).

The university judicial process, being educational in nature, and not criminal, generally seeks to impose sanctions that are educational as well. The sanctions can be, but are not limited to, verbal reprimand, or warning, loss of privileges, restitution, community service, counseling programs, “no contact orders,” parent/guardian notification of drug or alcohol violations, disciplinary probation, suspension, or expulsion. The severity of the sanction correlates with the severity of the code violation for which the student has been found responsible, with expulsion being the most severe (Pavela, 2000).
Harvard’s Conduct Code

In response to the increasing number of sexual assault cases being reported at Harvard University, its university judicial process has been changed, raising the standard proof for sexual misconduct/assault allegations. Harvard will no longer, through a unanimous faculty vote, conduct a full investigation of sexual misconduct allegations without ‘sufficient corroborating evidence’—more than one student’s word against another’s—including eyewitnesses and physical evidence. If no such corroboration is available, officials may dismiss the complaint and refer students to a lawyer or to a new ‘confidential mediation’ process to resolve the matter (Hoover, 2002).

Harvard is attempting to avoid the “he said/she said” cases that are difficult to adjudicate and tend to be irresolvable. Harvard denies allegations that they are abandoning their students, but rather that they are trying to protect them from the pain of a case that they believe will likely go unresolved.

There are supporters and opponents of Harvard’s new policy regarding sexual misconduct investigations. An article by Harvey A. Silverglate, an attorney and a director of the Foundation for Individual Rights in Education (FIRE), and Josh Gewolb, program director for FIRE and a recent Harvard graduate, indicates that they are supporters of Harvard’s new policy and identifies some reasons why. They believe the university judicial process, especially regarding sexual misconduct, should more closely reflect the proceedings of a criminal court, as date rape is a criminal offense and since finding a person responsible can lead to a sanction as serious as expulsion from the institution. Essentially, Silverglate and Gewolb believe that the university’s procedures should mirror criminal court investigations. Evidence should be presented and the burden of proof should rest on the prosecution. The terminology they utilize should
directly reflect that of criminal proceedings as well, such as judge, jury prosecution, burden of proof and exculpatory evidence.

Apparently, the university's review of its procedures has given its administrators an inkling of what outside observers have known for some time: Harvard for many years has convicted students on the basis of evidence that would not persuade real-world prosecutors to bring charges, much less persuade judges and juries to convict. Now that accused students have begun to fight back, and some internal faculty criticism has emerged, the wholly inadequate nature of the administrative board will finally be exposed. We are confident that the growing recognition of that inadequacy will lead to changes in the more fundamental process of how the board conducts its investigations and reaches its decisions. That not only would bring long-overdue rationality and justice to Harvard's system, but also set an example for judicial bodies at colleges throughout the country (Silverglate & Gewolb, 2002).

Angry opponents of Harvard's new policy have spoken out as well, causing an investigative committee to be formed. This committee has recommended that Harvard "adopt new preventative education programs and create an office to prevent and investigate sexual assaults. The proposals mandate a night of sexual assault education during freshman orientation and immediate access to counseling for victims" (New York Times, 2003).

Although sexual assault hearings can be lengthy and can, due to lack of evidence, fail to place responsibility on the accused, some believe that the process itself can be beneficial for both the accuser and the accused.

Pamela L. Caughie, Professor of English and Director of the Women's Studies Program at Loyola University, in response to Harvard's new policy and the article written by Silverglate and Gewolb, stated:

I would not argue with Silverglate and Gewolb's conclusion that colleges need
better procedural protections for students accused of rape. But what about the essential injustice of a crime that goes unpunished because it was unwitnessed? At least a hearing, even without a verdict, allows the plaintiff her or his day in court, allows more stories to be told, and thus allows for the possibility that a different notion of credibility and a different understanding of truth might emerge. The messy, inconclusive hearings that Harvard wants to avoid in the name of justice are precisely the arena in which lessons in accountability and responsibility can be learned (Caughie, 2002).

In defense of adopting this new policy, Harvard has stated that they have heard many sexual assault allegations and have run full investigations on them all, only to have the majority of them end without resolution. They started, as “He said/She said” cases and they ended that way as well. Harvard also stated that they have not changed the burden of proof in sexual misconduct cases, they always required evidence before the board could discipline the accused, but now they are requiring evidence in the initial stages of the allegation rather than after weeks or months of hearings. They believe the change is designed to make these judgments earlier and at a stage where it is less intrusive to our students, so people don’t get traumatized by a process that we can predict, based on our experience, isn’t going to be successful (New York Times, 2002).

They also believe the changes will make their judicial system more like that of the criminal court system.

Students will still have the option of taking their case to the criminal courts. According to Harvard, “the courts, or at least the police, are in a better positions to conduct the investigation,” Mr. Juliano said. “They have access to investigative tools that we don’t have” (New York Times, 2002).

By amending its system of campus justice, Harvard officials say they are acknowledging that the university is not equipped to always act as private
investigator, prosecutor, and judge for its students. Colleges need to make limits of disciplinary power clearer to students (Healy, 2002).

Harvard has taken a big stand. Many will continue to agree and disagree with the new policy. Only time will tell if the new policy will work or if Harvard will have to again re-evaluate and re-construct their sexual misconduct policies. As Steinbach noted in the Brandeis case, however, “[private] colleges have no obligation to provide due process to students who file complaints, citing state and federal court ruling that say colleges are only obligated to follow their own, written disciplinary procedures to the letter” (Schaer v. Brandeis University, 2000). Recommendations have been made that universities provide at least some level of due process, but private institutions are not required to do so unless it is stated in their student conduct code.

Judicial Process Regarding Sexual Misconduct

Along with varying sanctions, the judicial process itself can vary depending on the code violation being adjudicated. Although every student accused of a conduct code violation has the right to a formal hearing of the judicial board, minor violations can, and often are, at the request of the accused, handled informally through the judicial affairs office. Information is gathered, responsibility decided, and, if appropriate, a sanction imposed. The student still has the right to appeal the decision and to choose a formal hearing to decide the matter.

In the case of an accusation of a serious infraction, such as sexual misconduct, where the consequences are as high as suspension or expulsion, in accordance with the recommendations of Dixon v. Alabama State Board of Education (1961), many institutions automatically require a formal hearing with the judicial board. When an accusation is made, the statement of the accuser is taken, the accused is notified and the investigative process begins. The judicial office is interested in gathering any information that will assist in resolution of the case.
Once the information is gathered, a hearing date is scheduled, all interested parties notified and the judicial board assembled to hear the case. Both parties are entitled to representation, although the role such representation is allowed to take in each institution varies, and they can provide any evidence and/or witnesses available (Footer, 1996). According to Phil Burns (2004), the accused in most university judicial proceedings has the right to face his/her accuser. In the case of sexual assault at the university and due to the sensitivity of the accusation, accommodations are occasionally made so that the accuser can state his/her claim, the accused respond, and all cross-examinations occur without actually having to speak face to face. A decision is reached after the evidence is presented for both parties and sanctions imposed if appropriate.

Sanctions for all conduct code violations are intended to assist in educating the person found responsible in hopes that the violation does not occur again. In the event a person is found responsible for sexual misconduct, not only does the university want the sanction to be educational, but it also has a responsibility to protect the accuser and the student body at large. It is for this reason that the sanctions include suspension or expulsion from the institution if deemed necessary (Burns, 2004).

Due to the Clery Act, as well as an apparent increase in the number of reports of sexual misconduct at the colleges and universities, and the number of subsequent cases going to the state and federal courts, IHE’s are finding it necessary to review and revise their student conduct codes with regards to sexual misconduct. The definition of sexual misconduct is becoming more specific as are the reporting procedures and judicial process. More often, now, sexual harassment has its own definition and consequences as does sexual misconduct. In drafting the student code of conduct, the state and/or federal definitions for sexual misconduct are recommended. It is also recommended that the student conduct code,

provide provisions for confidential and anonymous reporting or sexual misconduct, written law enforcement protocols for responding to reports,
coordinated crisis response across campus and community, forensic medical evidence collection by trained and certified forensic nurses, such as sexual assault nurse examiners, on-campus victim assistance services office, sexual assault peer educators, and first year and new student orientation programs (Karjane, Fisher & Cullen, 2002).

Criminal Court Cases Involving Student Conduct Codes

The handling of sexual misconduct cases at the university level has come under scrutiny in recent years. In the case of Schaer v. Brandeis University, Schaer sought a reversal of his sanctions and filed charges against Brandeis University through the criminal justice system.

Schaer was dissatisfied with the university judicial process, its handling of his case and the sanctions that were imposed. Schaer filed a complaint against the university seeking injunctive relief and compensatory damages after being, what he considered, unfairly disciplined by the university. Mr. Schaer was a student at Brandeis University when he had a sexual encounter with another student. A complaint was filed accusing Schaer of date rape, Schaer responded that the encounter was consensual. Mr. Schaer was brought before the judicial committee of the university and was suspended from Brandeis University for one summer after being found guilty by the university judicial committee of “unwanted sexual activity” (Gose, 2000). There was no concrete evidence presented to prosecute Schaer, just his version of the events of the evening versus his accuser’s version. Margaret Wood Hassan, a Boston lawyer, says that

Brandeis’s ‘unwanted sexual activity’ charge allows [Brandeis] to punish for behavior that falls well short of rape. That Mr. Schaer was suspended for only a summer is prima-facie evidence that the judicial panel did not think a rape had occurred...Yet such punishments make clear that Brandeis and other colleges want men and women to treat ambiguity in sexual situations as a no (Gose, 2000).
So, in effect, Schaer was punished for acting inappropriately as opposed to criminally. This verdict, despite the reason, did affect his academic career as well as potentially harming his professional one; thus he filed suit against Brandeis for their handling of his case (Gose, 2000).

Denied a new hearing at the university, Schaer sued Brandeis for damages, but his suit was dismissed in the lower court. He appealed the decision to the Massachusetts Appeals Court and they ruled unanimously that Brandeis may have violated its own student-judicial code by failing to make an adequate record of the hearing; failing to advise students on the judicial panel about the requirements of due process; and allowing ‘irrelevant and inflammatory evidence’ to be introduced. The judges, who reversed the trial judge’s decision, also said that the serious charge against Mr. Schaer should have been handled with great care. Brandeis appealed that ruling to Massachusetts’ highest court, the Supreme Judicial Court (Gose, 2000).

The Massachusetts’ Supreme Court reversed the decision of the Appellate Court and in a 3-to-2 decision ruled that Brandeis does not need to provide students the same protections that a criminal court does. Hassan said the decision “reaffirms the notion that courts will not unduly interfere with private-university disciplinary proceedings and that colleges do not have to create processes that are dominated by lawyers” (Chronicle, Sept., 2000). Regardless of the ruling, there are still serious concerns with the manner in which the university judicial committee handled the case and whether or not the student code, found in the student handbook, was followed by the judicial committee and university administrators in this case.

_U.S. v. Morrison_

The case of _U.S. v. Morrison_ involved a student, the accuser, who was not satisfied with the process and ruling of the university judicial system. A female college student,
Christy Brzonkala, alleged that two male students raped her. She filed a complaint against both of the male students under the university's sexual assault policy. One of the men, Antonio Morrison, admitted having sex with her even though she had refused to consent to the act twice. This student was found responsible by the university judicial committee and suspended for two semesters. It was ruled by the committee that there was insufficient evidence against the other male student.

Morrison later fought this ruling stating that the sexual assault policy was not in effect at the time of the incident. Another university hearing was conducted and Morrison was found responsible again, this time under the abusive conduct policy, and was given the same punishment. He again appealed this sanction to the university and his punishment was reduced. Brzonkala proceeded to file suit in the federal district court against the two male students and the university. “She alleged that the male students had violated section 13981 of the Violence Against Women Act and that the university had violated her rights under Title IX” (U.S. Sup. Ct., 2000).

The following is a summary of the findings of the courts:

The District Court dismissed Brzonkala’s Title IX claims against Virginia Tech for failure to state a claim upon which relief can be granted...It then held that Brzonkala’s complaint stated a claim against Morrison and Crawford under section 13981, but dismissed the compliant because it concluded that Congress lacked authority to enact the section under either the Commerce Clause or section 5 of the of the Fourteenth Amendment (Brzonkala v. Virginia Polytechnic and State Univ., 1996).

The case was then appealed to the Court of Appeals. A Fourth Circuit divided panel, reversed the District Court thus reinstating Brzonkala's section 13981 claim and her Title IX hostile environment claim. The Court of Appeals reheard the case en banc.

The en banc court then issued an opinion affirming the District Court’s conclusion that Brzonkala stated a claim under section 13981 because her
complaint alleged a crime of violence and the allegations of Morrison’s crude
and derogatory statements regarding his treatment of women sufficiently
indicated that his crime was motivated by gender animus. Nevertheless, the court
by a divided vote affirmed the District Court’s conclusion that Congress lacked
the constitutional authority to enact section 13981’s civil remedy (Brzonkala v.
Virginia Polytechnic and State Univ., 169 F.3d 820 (CA4 1999)).

The Supreme Court granted Brzonkala’s petition for appeal, but in a five to four
split, affirmed the Fourth Circuit’s en banc decision (U.S. Supreme Court, 2000).

This case is relevant with regards to the sanctioning phase of the university judicial
process. Brzonkala’s case against Morrison had enough merit that it was adjudicated all
the way through the U.S. Supreme Court, but could not be adjudicated successfully in
the university judicial system under any code stronger than the “abusive language”
policy. Morrison admitted to having non-consensual sex with Brzonkala, but the
university student code of conduct was such that, at the time of the offense, there was no
code that included sexual misconduct. This case illustrates the legal implications
possible for institutions that do not indicate sexual misconduct in their student codes of
conduct.

Recent Allegations of Student Sexual Misconduct

Air Force Academy

Currently, there are investigations into allegations that the Air Force Academy has
 mishandled complaints of sexual misconduct. Female cadets have recently come
forward, not only with complaints of being sexually assaulted, but also with complaints
that when they reported the misconduct to the Academy, they were reprimanded and
treated as though they were at fault in the assaults. A special review panel has been
created to investigate sexual misconduct of all branches in the military, but with special
emphasis on the Air Force Academy.
Brig. General S. Taco Gilbert III has defended the school's conduct in a written response to questions about one alleged assault in October 2001, in which a cadet said she was raped after a night of drinking and a strip poker game... He [Gilbert] said there was 'no justification' for the alleged assault, but added 'when you put yourself in situations with increased risk, you have to take increased precautions to mitigate those risks' (Associated Press, 2003).

However, Senator Wayne Allard, Republican of Colorado, is unsure of Gilbert's adequate investigations into the alleged sexual assaults; he stated, "I don't trust him, I don't think he gets it" (Janofsky, 2003).

The women who have come forward have said that the Academy actually put effort into undermining their cases and they were told to keep quiet about the assaults. They have stated the culture of the Academy "in which 84 percent of the cadets are men and where few were punished for sexual misconduct was so powerful it effectively discouraged women from reporting offenses" (Janofsky, 2003). The women contend that they are warned by female cadets at the academy that if you report a sexual assault, your life at the Academy is probably over.

In a preliminary report of a survey conducted at the Air Force Academy, "nearly 69 percent of female cadets said that at the academy they had experienced sexual harassment, which was defined in the survey as 'unwanted and uninvited sexual attention.' Among graduating seniors, 24 percent said they had been sexually assaulted" (Chronicle notebook, 2003). This suggests a much higher incidence of sexual misconduct than has been reported by the Air Force Academy. The female cadets contend there is a fear of reporting due to the responses they have received thus far when complaints have been filed.

Senator Allard has reported receiving dozens of complaints from the families of
female cadets, stating that someone in their family has been sexually assaulted by a fellow cadet.

About 60 current and former female cadets had reported sexual assaults to his office, but many were reluctant to file charges at the academy for fear that their careers would suffer. ‘No person should have to endure what these women have endured,’ he said (Chronicle, July 11, 2003).

Senator Allard has also asked the Air Force Academy to improve its sexual assault policies for reporting sexual misconduct.

A civilian panel, led by Tillie K. Fowler, a Florida Republican and former member of the U.S. House of Representatives, was formed to investigate the reports against the academy.

In the sharply critical report, the commission faulted the Air Force for ‘a chasm of leadership’ that ‘helped create an environment in which sexual assault became a part of life at the Academy…’ Air Force leaders have known about ‘serious sexual misconduct problems’ at the academy since at least 1993, the report says, but they have failed to conduct investigations or make long-range plans to deal with the issue (Gomstyn, 2003).

The panel felt that the academy did not accurately report findings of sexual assault when they reported that there was no evidence of “systematic acceptance of sexual assault at the academy” or “institutional avoidance of responsibility” (Gomstyn, 2003). The members of the panel felt that “Mary L. Walker, the Air Force general counsel who prepared the internal report, failed to hold the Air Force accountable for sexual misconduct at the academy an attempt ‘to shield the Air Force Headquarters from public criticism” (Gomstyn, 2003). The panel did praise the efforts being made to improve the situation at the academy but feels there should be more effort to improve the institutions gender climate.
Colorado University

Like its neighboring institution, the Air Force Academy, the University of Colorado, Boulder is under investigation for alleged sexual assaults that have continually occurred without the proper attention, investigation or adjudication of the institution. There are allegations that “The University of Colorado football team is using sex parties to entice recruits, and the athletic department has resisted demands the practice stop, Boulder District Attorney Mary Keenan said in a deposition” (Hughes, January 29, 2004).

Three women have come forward with allegations that they were raped at a party attended by football players and their recruits. “There is testimony that the women may not have been fully conscious. There are statements that others stood around watching” (Carman, 2004). “The law also recognizes that there’s such a thing as being too drunk to consent to sex” (Spencer, 2004). The players and CU officials claim there was nothing but consensual sex at the party; however, the women allege otherwise, and are filing suit against the school for violating Title IX.

Mary Keenan, prosecutor and possible witness for Lisa Simpson, one of the accusers, has chosen not to file criminal charges due to lack of evidence. According to Karen Steinhauser, former sexual assault prosecutor, “…Keenan’s decision not to file charges didn’t mean she doubted the alleged victim. ‘We can only file a criminal charge ethically if we believe we can prove beyond a reasonable doubt every element of the charge,’ she said” (Pankratz, 2004).

According to one recruit, there was “‘some kind of sex party for the recruits,’” (Hughes, January 29, 2004) held the night before the three alleged assaults at the Omni Interlocken Hotel, during which the “recruits were shown a porn video and told that easy sex was a fringe benefit of being a Buffalo. ‘They told us, you know, ‘This is what you get when you come to Colorado’” (Hughes, January 29, 2004).

This controversy comes after the 1997 report of sexual assault of a Niwot woman during a recruit weekend. Keenan stated in a deposition that after the 1997 incident, she
informed the athletic department of the allegations and put them “on notice” that things must change in their recruiting practices. CU denies this occurred. However, Keenan stated that since the meeting with them in 1997, “They decided, after discussing the history, that they would not change anything because they could not afford to lose the competitive edge against universities such as Oklahoma (and) Nebraska” (Hughes, January 29, 2004).

CU’s football coach, Gary Barnett and athletic director, Dick Tharp deny these allegations even though statements made by Barnett indicate some acknowledgment of wrongdoing on behalf of his students. Campus Police Chief James Fadenrecht believes that there were some questionable actions, when, after the current three allegations of sexual assault, Barnett became angry at the suggestion to prevent one recruit, suspected of being involved, from attending CU. “By this time, I think we had identified some really inappropriate behaviors,” Fadenrecht said. “There wasn’t any question about that.’ But Barnett ‘was taking the position that (the unknown recruit) shouldn’t suffer the consequences of being…put in a (bad) position by some of the more senior players’” (Hughes, January 31, 2004).

John Buechner, former University of Colorado President, claims he was never informed of the football recruiting concern in 1998. Had he been aware of the problem, he would have informed Barnett prior to hiring him as head coach. “Court records show that CU chancellor Richard Byyny was deeply involved in the discussions CU officials had with prosecutors, and he would have been the one to brief Buechner” (Migoya, 2004). Byyny claims did in fact inform Buechner; “just enough to let him know the problem was being handled” (Migoya, 2004). Buechner, however, does not recall these conversations and alludes to the fact that it is too important an issue for him to have forgotten. Buechner contends that had he known, not only would he have informed

Barnett prior to hiring him of the climate of the team and school with regards to the recruiting practices, but he would have monitored and expected progress on the issue.
There are some who believe that Barnett would not have interfered, even had he known what was happening at the recruiting parties. He has set, what some consider, a very strict curfew of 1 am for the players on these recruiting weekends; but claims that there is no way for him to know what is going on at night with his recruits and their hosts. According to Barnett, it is

‘...almost impossible to get your arms around,’ admitting the twin behemoths of sex and drugs are far too large for any one football coach to tackle. ‘You’re taking on a national culture, not just the climate of recruiting. You’re taking on campuses, you’re taking on Abercrombie & Fitch, you’re taking on something I don’t know that there’s any way to get your arms around (Kizla, February 1, 2004).

Former associate athletic director, Robert Chichester, stated under oath in his deposition, that he and Barnett had discussed the importance of recruits attending parties where girls might “offer themselves to recruits” (Spencer, February 8, 2004).

According to Chichester, Barnett felt CU football would be at a disadvantage compared to other universities if they did not offer the same enticements. Chichester also believed that Barnett did not want to know exactly what was happening at the recruit parties and according to CU depositions that becomes clear. Chichester stated:

If you want to know what the CU depositions reveal, think of Barnett with his hands over his eyes, athletic director Dick Tharp with his hands over his ears and Hoffman with her hands over her mouth. See no sex or alcohol, hear of no sex or alcohol, speak of no sex or alcohol (Spencer, February 8, 2004).

Chichester also stated that a head coach should know what is going on during recruiting weekends and should set an appropriate tone climate for those weekends. Chichester does not believe Barnett agrees with that (Migoya, February 8, 2004).

In addition to allegations of rape, there are also allegations that the Boulder Police Department informs CU football directors of any proceedings or allegations against
them so they can “get their story together” (Hughes, January 29, 2004). Boulder Police Chief, Mark Beckner says the officer in question, Don Spicely, did nothing wrong, he is simply the liaison between the football team and the police department. Keenan does not feel it is appropriate “that a group has a special liaison to warn them that something’s coming up…” (Hughes, January 29, 2004).

There were also allegations that the football team solicited the services of an escort service the night of the party at the Omni Interlocken hotel. The former owner of the escort service, Pasha Cowan, notified police that she had received a request by a CU staffer to provide prostitutes. All CU officials denied this, but through a recent internal audit, the telephone records of the athletic department employees were examined and it was quickly discovered that Cowan had in fact been contacted by former athletic administrative assistant, Nathan Maxcey. Maxcey later admitted to requesting the services of the escort service, but that it was only for personal use and not for the players or recruits. Cowan “told police that she provided prostitutes for Maxcey and sometimes he paid for the women to have sex with other men, some of them ‘awfully young,’ according to people familiar with the conversations” (Migoya & Caldwell, 2004). Maxcey stated that any allegations of involvement of the players or recruits were a “blatant lie” (Migoya & Caldwell, 2004). CU officials say they were surprised to discover that Maxcey had utilized the escort service, due to his very “by the book” demeanor, but state that at this time there is no evidence to indicate that anyone other than Maxcey was involved with the use of the escort service. They will continue investigating the situation.

Colorado Governor Bill Owens is clearly upset by the allegations at CU. He has demanded that the university take action to investigate the situation or he will. “Women are not recruiting tools…I call upon you to reassure young women now attending the university- and those considering enrollment – that the university will not tolerate a climate of sexual misconduct” (Hughes, January 30, 2004).
CU president Elizabeth Hoffman has answered the governor’s request. Hoffman ordered the formation of a commission consisting of people inside and outside of the institution to investigate the allegations pertaining to the football recruiting activities. The commission, headed by Joyce Lawrence and Peggy Lamm will have the authority to examine the football recruiting practices and how all involved parties handled the investigation into the 2001 rape allegations. They will not have subpoena powers, however. The committee, aside from Lawrence and Lamm (both former state legislators) will likely “‘include an attorney, a victim’s advocate, possible a parent and experts in sexual assault and recruiting,’” Lawrence said (Curtin, 2004). The committee will have until April 30th to complete its investigation. Some believe this to be too short of a timeline, but it would leave time to pass new laws in the legislature if necessary.

Hoffman’s choice of committee chairpersons has already come under scrutiny. Not only do opponents say that Lawrence and Lamm are not qualified for an undertaking this important and large, but they say Lawrence has made a statement viewed by some as rendering her opinion of sexual assault prejudicial. “‘The question that I have for the ladies in this is why are they going to parties like this and drinking or taking drugs and putting themselves in very threatening or serious position like this?’ Lawrence told News 4 on Friday night” (Curtin and Anas, 2004). In response to this comment, CU Regent Jim Martin stated “she is biased and has made statements that embarrass women” (Curtin and Anas, 2004). The executive director of a Colorado Springs group, TESSA, who helped women who claimed they were assaulted at the Air Force Academy, had this to say regarding Lawrence’s statement, “‘I would question her ability to be objective,’ [Cari] Davis said. ‘I would ask why we continue to expect women to circumscribe their lives in order to be safe from violence versus addressing offenders and their continued violence toward women’” (Weller, 2004). Lawrence says she is not biased against the women and that she will not step down as co-chair of this committee (Weller, 2004).
Hoffman’s decision to form this committee came after two state senators, Peter Groff and Dan Grossman drafted a plan to form a panel of state lawmakers to investigate the allegations against the football program. Grossman said, "I think (the allegations are) extremely serious. The excuse that this goes on elsewhere isn’t going to fly’” (Kelly, 2004). This plan would be the first of its kind, and provide subpoena powers to the panel members to force testimony from anyone involved. Hoffman did not agree with their plan and said she hoped they would reconsider. She states that “A legislative inquiry would represent ‘a loss of faith in the university’s ability to manage its own affairs, and I would certainly hope that the legislature has not lost that faith’” (Hughes, February 1, 2004). The senators, after speaking personally with Hoffman, have postponed proposing the new legislature while Hoffman’s committee does their investigation, but they gave the April 30th deadline.

Hoffman states that if the women simply want to change some of the recruiting policies, are not seeking money, and are willing to drop their lawsuit, she will try to settle this out of court. Lisa Simon, a spokeswoman for one of the alleged victims, Lisa Simpson has stated that they have tried repeatedly to meet with Hoffman and settle this out of court but she will not respond (Hughes & Pankratz, 2004). With all of the attorney fees involved, time and emotional strain on both sides, a settlement with no money would seem impossible. There does appear to be some change going on in the football program, however, since four football players have come forward on their own admitting to violating team rules regarding recruiting activities. One player admitted to taking a recruit to an 18-and-over strip club while the other three violators have not made public their acts of wrongdoing. All four players have been suspended from the opening game in 2004, which is said to be a standard disciplinary action for a first-time offense. “We are pleased that the three players came forth with this new information and that the coach took swift action," CU president Betsy Hoffman and chancellor Richard Byyny said in a statement issued Saturday afternoon” (Mocine-McQueen, 2004).
Apparently the incidents of illicit recruiting practices being investigated at CU are not isolated only to that institution.

Minnesota recruits reported last month being taken to Twin Cities strip clubs...Brigham Young officials are investigating a January party at a player’s home where recruits witnessed heavy consumption of alcohol and football players reportedly made sexual advances to female guests...Lynell Hamilton...was offered marijuana, alcohol and sex during his recruiting trip to the University of Oregon...A member of the Sun Devil Recruiters, one of many female hosting clubs in college football, said to Arizona State’s student newspaper last year that club members often slept with recruits during trip (Henderson, 2004).

This indicates a widespread problem with sex, drugs and recruiting. “‘It’s a don’t ask, don’t-tell arrangement,’ said Kathy Redmond, founder of the National Coalition Against Violent Athletes in Littleton. Coaches keep the system running, all the while maintaining plausible deniability, she said. ‘Its wink, wink, nudge, nudge, show them a good time, and we don’t know what you’re doing,’ she said. ‘This is why it’s so tricky to stop’” (Carman, February 1, 2004). In response, the NCAA president Myles Brand has announced the formation of a task force to establish tougher standards (Dempsey, 2004). The task force is being created to investigate the recruiting practices across the nation of primarily football and basketball teams, the sports under the most pressure to win. “‘This is not an initiative that is directed at one institution in particular as much as one to ensure the recruiting practices and policies that are in place meet the values that the association is based on’” stated NCAA spokesman Jeff Howard (Dempsey, 2004). President Brand’s task force was met with widespread approval around the nation, including Colorado (Dempsey, 2004).

Currently, the NCAA has three general rules against sexual misconduct on recruiting visits, the rules are subjective, based on institutional involvement, vary case-by-case,
and may ultimately need to be strengthened based on the investigation findings (Henderson, 2004). The three rules are:

1. institutions may entertain prospects only at a scale comparable to normal student life 2. institutions cannot arrange or permit excessive entertainment of a prospect and 3. a school may provide student hosts with no more than $30 to cover all cost of entertaining recruits with outside meals and souvenirs (Henderson, 2004).

*St. John's University*

Despite the attention universities and their students have been receiving the past several years due to sexual misconduct, the allegations keep coming. St. John’s University recently expelled one basketball player, suspended two players from school (one later withdrew to avoid the judicial process and the other was suspended for a year), suspended two from the team and one for one game. These actions were taken based on the sexually inappropriate behaviors of the players.

Initially, these players were accused of sexually assaulting Sherri Ann Urbanek-Bach, a woman they had met at a local strip club. The woman later admitted to lying about the rape, but contended that she had had sexual intercourse with an undisclosed number of the players with the understanding that they would pay her $1000.00. When they refused to pay, she said she would have them arrested. One of the players had recorded part of the incident on his cell phone, providing evidence that the encounter was, in fact, consensual.

The starting forward, Grady Reynolds, was on disciplinary probation already at the institution for a charge of sexual assault that was settled last season. He was placed on probation and agreed to take anger management classes in order to stay in school and on the team. Reynolds was expelled immediately for this second offense. Elijah Ingram was the player who withdrew, and Abe Keita was suspended for a year. All of these players were starters for the basketball team.
Reverend Donald J. Harrington holds the current interim basketball coach, Kevin Clark, blameless for the current situation. Clark took over the team in December after Mike Jarvis, the team’s coach of five years, was fired. Harrington has seemed to place some blame on Jarvis, but places most of the blame on the players involved. "These young men made decisions and they’re responsible for those decisions. I know that Mike Jarvis would never want this to happen and I’m sure Mike would’ve tried to avoid that (Hermoso, February 8, 2004). St. John’s Athletic Director, David C. Wegrzyn concurred that the incident was the responsibility of the players.

‘This is not a situation relating to university staffing.’ Wegrzyn said.

‘Decisions were made by student-athletes not to adhere to policy, not to adhere to the university rules and regulations to be in an appropriate location and engage in activity that was not in concert with the code of conduct’ (Hermoso, February 7, 2004).

Again, the current allegations that abound are making it evident that sexual misconduct is an issue that is not going to go away quickly or quietly. Education, information, rules and regulations are necessary to prevent sexual misconduct in the future and provide adequate punishment for the offenders.

Summary

Increases in the number of university sexual assault cases going to state courts could be indicative of weaknesses in the university student conduct codes and judicial processes with regards to sexual assault. At the very least, the literature in Chapter II shows that colleges and universities need to be thorough throughout the entire judicial process and keep adequate record of the proceedings. The manner in which a sexual assault on campus is handled affects both the individuals involved and potentially the institution and entire university community.
An institution’s response to sexual assault allegations is important in terms of helping victims attain justice and recover from their assault, but it also sends an explicit message that reflects the institution’s attitude about what constitutes unacceptable behavior on campus (Bohmer & Parrot, 1993). Mishandled cases not only cause further trauma for the individual victim seeking justice through campus adjudication proceedings, but also create a wide-ranging ripple effect. Word of mouth and publicity surrounding mishandled cases functions to discourage other victims from reporting similar incidents, thus fostering a cultural norm within the institution that rape, never mind less invasive forms of sexual misconduct, is not an issue for which the school has ‘zero tolerance.’ Such institutional environments invite institutional negligence and due process lawsuits against the school (Karjane, Fisher, and Cullen, 2002).
CHAPTER III

METHODOLOGY

Research Methodology

This dissertation examined current university/college student conduct codes in order to identify and assess the nature of disciplinary procedures for sexual misconduct on or near campuses in relation to model code recommendations. In addition, a telephone interview of university judicial officers at subject schools was performed to obtain their perceptions of the effectiveness of their institution’s student conduct code. The assessment of the effectiveness included the perceived strengths, weaknesses, and recommendations for improvement of the code. Additionally, the implementation of the student conduct codes was examined as were the application issues of them.

Educational Research

Educational research is performed to increase knowledge in every possible area of education in hopes of improving the educational process itself. “Researchers are convinced that the closely related processes of educational research and educational development offer the best chance there is at this time for bringing about real improvements in education” (Borg & Gall, 1979). There are many areas in which educational research can be useful, from students, teachers and administrators, to the institution itself and the rules and regulations under which the institution exists and is successful or not successful. This dissertation examined the institution itself by examining the student conduct codes and judicial process.
Educational research can be performed in many ways as well. It can be done utilizing Quantitative research methods, which “require the use of standardized measures so that the varying perspectives and experiences of people can be fit into a limited number of predetermined response categories to which numbers are assigned” (Patton, 1990). Quantitative research methods allow a large number of people to be questioned in a short time with generalizable results. Qualitative research methods can also be utilized and “typically produce a wealth of detailed information about a much smaller number of people and cases” (Patton, 1990). A qualitative research design was used in this dissertation.

Exploratory Study

As the term suggests, Exploratory Research is often conducted because a problem has not been clearly defined as yet, or its real scope is as yet unclear. It allows the researcher to familiarize him/herself with the problem or concept to be studied…it is the initial research (Ryerson, 2004).

Exploratory research can employ many different approaches to gathering information. Additional research, such as reviewing literature on the subject or qualitative research, such as in-depth interviews, focus groups or pilot studies can be utilized. This dissertation employs both literature reviews and qualitative research methods.

Legal research methods were utilized to assist in the acquisition of necessary court cases and legal documents, as well as, to better understand the legal system. Qualitative research methods were also employed and include a pilot of the interview schedule and open-ended telephone interviews.

Legal Research Methodology

Legal research is used to assist individuals determine the legal status of issues they
are investigating. Legal research is important as it is, "the process of finding the laws that govern most of our like activities and the materials which explain or analyze these laws...[it is] a central part of our history" (Cohen & Olson, 1996; Pettit, 1999).

Wren & Wren (1983) recognized that legal research did not 'occur in a factual vacuum.' They asserted that the purpose of researching law is to ascertain the legal consequences of a specific set of actual or potential facts. Wren & Wren (1983) also contended that 'it is always the facts of any given situations that suggest-indeed-dictate the issues of law that need to be researched' (Pettit, 1999; Wren & Wren, 1983).

Legal research was used in this dissertation to ascertain the legal consequences of court decisions pertaining to higher education, more specifically, those pertaining to sexual misconduct in higher education. This dissertation examined relevant legal precedents regarding college/university student discipline and campus sexual misconduct disciplinary procedures.

According to Cohen & Olson (1996) and Pettit (1999), the legal researcher needs to be familiar with three categories of legal literature, including primary sources, finding tools and secondary materials. One major category of primary sources is judicial decisions (Cohen & Olson; Pettit, 1999). Judicial law, made by the judiciary, is also known as common law. Common law changes and evolves, but is used to establish rules and laws (Cohen & Olson; Pettit, 1999).

**Doctrine of Precedent**

When a court is deciding the facts of a case and determining law, it utilizes the Doctrine of Precedent. This precedent, stated that people in "like circumstances are treated alike," (Cohen & Olson; Pettit, 1999). "This Court-created document says, essentially, that when a court has applied a rule of law to a set of facts, that legal rule
will apply whenever the same set of facts is again presented to the court” (Wren & Wren, 1983; Pettit, 1999).

The doctrine of precedent is utilized to ensure that similar cases are treated similarly. The more similarities in a case, the higher the likelihood that the cases will yield the same result. This is to increase fairness in the court system through the utilization of precedents.

Shepard’s Citations

In order for the doctrine of precedent to work effectively, a researcher must have the most up-to-date information. According to Wren & Wren (1983), and Pettit, (1990),

The final step in doing legal research is updating the law (Wren & Wren; Pettit). This is to make sure that the legal rules being used have not changed and are still valid law. (Wren & Wren , 1983; Pettit,1999). Shepardizing is the most widely used method of updating the law. It involves tracing the subsequent treatment of cases, statutes, and some other legal authorities by using reference works called Shepard’s Citations’ (Wren & Wren ,1983; Pettit, 1990).

There are many volumes of Shepard’s Citations available with which to track the rulings of a court case that pertains to the case you are reviewing, but now the Shepard’s Citations are available on-line through WESTLAW and LEXIS-NEXIS. Through these resources, one can find the information he/she needs without having to search through multiple volumes of books.

Researchers may now use the Shepard’s Citation service to verify citations; check the validity of a case using Shepard’s editorial analysis; trace the history and treatment of a pertinent case which has cited the case; find parallel citations; find citations by courts in other jurisdictions; and find citing references by administrative agencies, law reviews, articles and texts (Pettit, 1999).
Court System Configuration

A final body of knowledge necessary to complete legal research is an understanding of the way the court system is configured.

The United States Judicial system consists of hierarchies of courts, which include trial courts, appellate courts and a court of last resort, usually the Supreme Court of the Jurisdiction. This judicial system incorporates the processes of appellate review, where higher courts review the decisions of lower courts and of judicial review, where the courts determine the validity of legislative and executive actions (Pettit, 1999; Cohen & Olson, 1996).

According to Wren & Wren (1983), and Pettit (1999), the Federal court system in broken up into three levels,

a trial level, an intermediate appellate level, and a final appellate level...At the federal level, these trial courts are called United States District Courts and each state has within its boundaries at least one federal judicial district, with some states having several...The intermediate appellate courts at the federal level are known as the United States Courts of Appeals. Each federal Court of Appeals covers a geographic part of the United States called a ‘circuit’, with thirteen federal Courts of Appeals in existence. To appeal a district court decision, a party to a lawsuit will normally appeal to the U.S. Court of Appeals covering that district. The very final appellate court in the federal court system is the Supreme Court of the United States (Pettit, 1999; Wren & Wren, 1983).

The cases relevant to this study generally involved decisions by the district court of the area and the appellate court of the area. There were instances where the dispute went all the way to the U.S. Supreme Court so it is necessary to have a general understanding of the hierarchy of the court system.

The primary sources for research in this dissertation were the student conduct codes of various four-year colleges and universities and a telephone survey of college judicial
officers or deans of students. Secondary sources included various books regarding student conduct codes, research methodology and sexual misconduct. Other secondary sources included research studies, journal articles, court cases and a legal dictionary.

The finding tools utilized were computer searches on the internet to locate the student conduct codes and research studies, and the computer catalog system at UNLV to locate books and articles related to this dissertation. LEXIS-NEXIS, which is a computer database of legal information was used to locate the court cases pertaining to this dissertation.

Qualitative Research Design

Qualitative research is "a research mode that emphasizes description, induction, grounded theory, and the study of people’s understanding" (Bogdan & Biklen, 1992). Qualitative research is a method of acquiring more in-depth and specific information; a way for the researcher to know, feel and understand what the subject knows, feels and understands. Although in qualitative research, the perceptions of the researcher play an active role, there are still accepted methods to be used for data collection and a certain competency level of the researcher that is necessary to ensure that the data are both accurate and usable.

“Qualitative methods consist of three kinds of data collection: 1) in-depth, open-ended interviews; 2) direct observation; and 3) written documents” (Patton, 1990). Both written documents and open-ended interviews were used in this dissertation.

The data from interviews consist of direct quotations from people about their experiences, opinions, feelings, and knowledge. Document analysis in qualitative inquiry yields excerpts, quotations, or entire passages from organizational, clinical, or program records; memoranda and correspondence; official publications and reports; personal diaries; and open-ended written responses to questionnaires and surveys...the validity and reliability of qualitative data
depend to a great extent on the methodological skill, sensitivity, and integrity of the researcher. Systematic and rigorous observation involves far more than just being present and looking around. Skillful interviewing involves much more than just asking questions. Content analysis requires considerably more than just reading to see what’s there. Generating useful and credible qualitative findings through observation, interviewing, and content analysis requires discipline, knowledge, training, practice, creativity, and hard work (Patton, 1990).

Student Conduct Code Analysis

The student conduct codes and judicial processes for handling sexual misconduct at the same universities with ten or more reported sexual assaults were collected and critically analyzed to compare and contrast the contents and report the strengths and weaknesses of each code. The contents of model student conduct codes were used to create a “checklist” of important information and guidelines regarding student misconduct that should be included in every student conduct code. The “checklist” will be reported as important “Themes” found within the codes. The universities codes will be compared to the model codes to determine whether or not the thirty-two codes of conduct reflect each of these themes. The thirty-two schools were chosen based on the number of reported “forcible sexual assaults.” This was done based on the assumption that the institutions included would have experience in dealing with allegations of sexual misconduct and would have the most experience with their code and judicial process. It is assumed the institutions that have experience utilizing their code have the greatest potential for utilizing their codes in sexual misconduct disputes.

The analysis of the student conduct codes is a form of Summative Evaluation.

Summative evaluations serve the purpose of rendering an overall judgment about the effectiveness of a program, policy, or product for the purpose of saying that the idea itself is or is not effective...summative evaluation research tests the
effectiveness of some human intervention or action for the purpose of deciding if
that program or policy is effective within its limited context... (Patton, 1990).

This dissertation analyzes the student conduct codes of certain colleges and universities
in order to compare them to model student conduct codes.

The themes that have been discovered within the model student codes and those
used to determine the strengths and weaknesses of the student conduct codes are as
follows: 1) Definition or description of sexual assault or misconduct, 2) Grievance
procedures, 3) Judicial process/Hearing, 4) Appeals process, 5) Student Rights, 6)
Sanctions, 7) Sexual assault policies/procedures that differ from other misconduct
policies/procedures, 8) Sexual assault assistance/counseling referrals, 9) Education/
prevention 10) Contact information to Judicial office available via internet. The
strengths and weaknesses will be determined by the presence of and/or the extent to
which each of these themes is addressed in the student conduct codes.

Interview Research

Interviews fall under the qualitative research umbrella of survey research. Survey
research is used to “determine the opinions, attitudes, and perceptions of the persons of
interest to the researcher” (Borg & Gall, 1979; Borg, 1987). Questionnaires are
frequently used to gather this type of information as well, but according to Borg & Gall,
“survey studies that deal with sensitive topics, such as premarital sex relations, or that
attempt to elicit deeper responses than can be easily measured with questionnaires,
frequently employ interviews” (Borg & Gall, 1979). Sexual misconduct on college
campuses is not only a sensitive topic, but the responses desired in this dissertation are
deeper than could probably be acquired through a questionnaire, and it is believed that
the response rate will be greater with an interview than a questionnaire.

The open-ended interview in this dissertation was conducted by telephone. The
telephone interview was chosen for its cost efficiency and time efficiency. Thirty-two judicial
officers from the subject schools were chosen for this study. These judicial officers reside throughout the United States; for this reason, face-to-face interviews were not feasible.

There have been concerns about the quality of telephone interviews, but according to Lavrakas et al., that is decreasing over time.

In the early stages of the shift from personal to telephone interviewing...many were concerned that the data gathered by telephone would be of lower quality (more bias and/or more variance) than data gathered via personal interviews. However, research in the past decade suggests that there are few consistent differences in data quality between the two modes and whatever differences may have existed appear to be getting smaller over time (Lavrakas, 1993; de Leeuw & van der Zouwen, 1988, & Groves, 1989).

Pilot Interview

In order to identify strengths, weaknesses and areas of improvement in the interview schedule, a pilot of the interview schedule was conducted. The pilot was also conducted to give the interviewer the opportunity to conduct the interview and familiarize herself with the interview schedule. The pilot of the interview schedule consisted of a mock interview of Judicial Officer, Phil Burns, at the University of Nevada—Las Vegas.

Mr. Burns has been the Student Judicial Affairs Officer at UNLV since 1999. He has been at UNLV in the Division of Student Life since 1995. Mr. Burns earned his Master’s Degree in Higher Education and Student Affairs from Bowling Green State University in 1995 and is currently active in the Association for Student Judicial Affairs (ASJA) and on the National Conference Planning Team.

Mr. Burns was given a copy of the letter sent to the judicial officers introducing the study. After reading the letter, the researcher did a sample telephone contact to schedule the interview appointment and answer any questions. The interviewer then proceeded to introduce herself according to the written introduction she was provided. Following the
introduction, she proceeded to conduct the interview. The interviewer asked each question and Mr. Burns considered each question and then answered it. Mr. Burns made a few recommendations regarding the use of particular words and helped to clarify responses. When Mr. Burns felt the question was clear and well-stated, he indicated this as well. The pilot study lasted approximately 45 minutes, with feedback, which indicated that the actual study would fall within the time limit desired.

An interviewer from the Canon Research Center at the University of Nevada-Las Vegas conducted the interviews. The use of a professional/ experienced interviewer is another mechanism for maintaining data integrity, eliminating interviewer bias and increasing confidentiality.

The interviewer who conducted the pilot of the interview schedule was unable to conduct the interview. Canon Research Center was contacted to appoint another interviewer, which was successfully completed the same day. This interviewer gained her substantial knowledge of the interview process through a business she owned which required that she conduct countless interviews. The interviewer has been employed by UNLV and the Canon Research Center as a professional interviewer since 2000.

The researcher shared the information from the pilot study to train the new interviewer.

Telephone Interview

Although telephone interviews are time and cost-effective, there is a greater limitation on the length of the interview with telephone as opposed to face-to-face interviews. Lavrakas recommends limiting the telephone interview to no more than 20-30 minutes to maintain the interest of the subject. The length of the telephone interview for this dissertation fit into this time frame. The interview focused on the opinions and perceptions of the judicial officers regarding the effectiveness of the student conduct code and judicial process for handling sexual misconduct at their institution.
The interview schedule (questions) consisted of four demographic questions and seven open-ended questions pertaining to the strengths, weaknesses and recommendations offered by the university judicial officer (Appendix A). The interview schedule was formulated around the research questions in this dissertation. The main crux of the interview was to find out, based on the actual experience of the subject, the effectiveness of his/her current student conduct code in handling allegations of sexual misconduct. Each institution has a student code of conduct in some form or another. The purpose of this interview was to ascertain the effectiveness of those codes in place and ask those with experience in the subject to make recommendations for improvement. The interview schedule is as follows:

Demographic Questions

1. How long have you been a judicial officer at your current 4-year college/university?

2. Have you served as a judicial officer at any other 4-year colleges/universities
   If so, for how long?

3. In the time that you have served as judicial officer, approximately how many times have you had to deal with allegations or complaints of
   a) sexual misconduct (all forms of complaints, excluding sexual harassment)
   b) date rape (more specific than sexual misconduct, date rape only)
   c) attempted date rape?

4. What is the approximate number of students attending your institution?
Campus Sexual Assault Procedures

5. What procedures do you follow when a student seeks to file a sexual misconduct complaint?
   a) unprompted answer
   b) What, if any, policies do you have regarding referrals to other government agencies?
   c) prompts such as—explain their options, such as filing a police report, going to hospital if not too late, filing a written complaint, identifying any witnesses, preserving artifacts (or evidence)
   d) additional prompts—explain the university judicial process for this offense

6. Do you have separate procedures in your student conduct code for handling sexual misconduct cases?
   a) unprompted answer
   b) prompt—if yes, how does the procedure differ with regard to handling such complaints?

7. Based on your experience, why do students choose the university judicial process as a remedy for sexual misconduct?
   a) unprompted answer
   b) prompts—remove accused from university, lower burden of proof, improve healing process (better to tell someone, than no one), fear of large, public trial but want some justice, don’t feel the crime was serious enough?

8. Based on your experience, what are the strengths of your student conduct code with regards to sexual misconduct?
   a) unprompted answer
b) prompts—its written clearly, defines sexual misconduct, how to file a complaint, explains the judicial process, hearing process and sanctions, discusses preserving evidence, provides counseling information, discusses the option of filing police report, offers timely response/resolution

9. Based on your experience, what, if any, weaknesses exist in your student conduct code regarding sexual misconduct?
   a) unprompted answer
   b) prompts—needs to be updated, code is too restrictive to allow for certain hearings to take place, improve student awareness techniques, better define policies and conduct expectations, the format or location of topic in code.
   c) what problems/concerns, if any, do you see nationally with the university judicial process as a mechanism for remedying sexual misconduct?

10. What recommendations would you make to improve your university judicial procedures regarding sexual misconduct?
   a) What do you feel are the key components of a model student conduct code regarding sexual misconduct?
   b) prompts such as—simplify it or make it more structured, clarify procedures, improve investigation process, hearing process or hearing panel, resolution process, penalty phase or sanctions
   c) additional prompts—hearing, opened or closed; role that legal council plays in hearings, prevention tactics, reporting policies, types of resolutions, judicial process, types of sanctions.

11. Based on your experience, is the university judicial system an effective mechanism for addressing sexual misconduct allegations?
    Why or Why Not?
On November 22, 2003, prior to beginning the interview process, the researcher completed the Human Participant Protections Education for Research Teams online course sponsored by the National Institutes of Health. The UNLV Institutional Review Board (IRB) reviewed and approved the research project in January, 2004.

The judicial officers were contacted by the researcher prior to the interview to introduce the topic and to schedule a time that would be convenient with them to conduct the interview. A return call was made at the scheduled time to conduct the interview itself. The interview was tape-recorded with the permission of the judicial officer being interviewed to reduce researcher error only. Although the selection of the judicial officers was pre-determined rather than randomly selected, the specific information from each will remain confidential.

Twenty-seven of the thirty-two schools completed the interview. Ten appointments were scheduled on the first day of telephone contacts and all schools were contacted at least one time. On the second day of scheduling thirteen more interviews were scheduled and again, all remaining schools contacted. The remaining four institutions able to participate were scheduled early the following week and emails were sent to the remaining un-scheduled institutions. Two of the remaining schools contacted the researcher and were unable to participate due to time constraints, one institution declined to participate and two failed to respond. The total response rate was 84.375%.

**Summary**

Legal research was conducted to review court rulings pertaining to sexual misconduct at the universities. Qualitative research methods were also used in this dissertation, including the summative evaluation of written documents and open-ended interviews. Student conduct codes were examined regarding sexual misconduct at the university level. These codes were limited to those schools reporting ten or more "forcible sexual assaults" in their 2002 crime statistics report. A telephone interview was
conducted of the judicial officers at the subject schools to gather their perceptions of the effectiveness of their institution’s student conduct code for handling sexual misconduct.

This chapter explained the qualitative research methods involved in this dissertation and the theoretical reasoning for the research methods. The research methodology that will be utilized in Chapter Four has been outlined and explained.
CHAPTER IV

FINDINGS OF THE STUDY

In chapter four, university student conduct codes were reviewed and analyzed with regards to sexual misconduct policies and procedures. These codes will be assessed against model student conduct codes to identify content themes concerning sexual misconduct.

In-depth telephone interviews of judicial officers were also conducted and analyzed to ascertain their perceptions regarding the implementation of their student conduct codes regarding sexual misconduct. The judicial officers were also asked to identify strengths and weaknesses of their codes and offer recommendations for improvement.

Thirty-two student conduct codes were analyzed and the judicial officers of the same institutions contacted for an interview. Twenty-seven interviews were completed. Five interviews were not completed due to the time constraints of the judicial officers, or an inability to contact them; one judicial officer refused to respond to this interview.

The parameters of the research were limited to those institutions reporting ten or more “forcible sexual assaults” in 2002; based on the assumption that the judicial officers at these institutions would have experience handling reports of sexual misconduct.

Through the examination of student conduct codes nationwide and the perceptions of experienced judicial officers, higher education administrators may understand current codes being utilized at various institutions and the perceived strengths and weaknesses of those codes. This knowledge can be used to assist judicial officers and administrators
Methodology

The student conduct codes analyzed in chapter four were based on the institution’s reported number of "forcible sexual assaults" in 2002. It is fully acknowledged that there are many factors contributing to the number of sexual assaults or misconduct allegations that occur at an institution and that the crime is highly underreported. The selection of these institutions based on these criteria was driven by the presumption that these institutions and the judicial officers at them, were most likely to have experience handling sexual misconduct issues.

Of the thirty-two student conduct codes analyzed, twenty-four were those of public institutions and eight were those of private. All of the institutions were 4-year colleges/universities, with at least 5,000 students. They were spread out over the United States, with a slightly higher concentration on the east coast.

The analysis of the student conduct codes focused on ten major content themes. The first seven content theme coincided with major content recommendations found in model student conduct codes. The last three content themes were not specifically stated in the model conduct codes. However, "Decisions with regard to certain topics will depend upon the preference of each individual college or university" (Stoner & Cerminara, 1990) creates leeway for these pertinent topics to be discussed. The content themes utilized were 1) Definition of sexual assault or sexual misconduct (subdivided into a) a broad definition or statement about sexual assault or sexual misconduct and; b) a specific definition of sexual assault or sexual misconduct). 2) Sexual misconduct policies and/or procedures that differ from other misconduct policies at the institution; 3) Grievance procedures (procedures for filing a sexual misconduct complaint); 4) Judicial/Hearing process; 5) Sanctions available for students found responsible; 6)
Appeals process; 7) Student rights (may include confidentiality/FERPA); 8) Sexual assault assistance (i.e.: referrals to police, hospital and counseling); 9) Education, prevention and evidence preservation; and 10) Contact information (for Judicial Affairs office, rape crisis centers, women’s centers, university police, etc.).

All of the student conduct codes were further subdivided into public and private institutions to determine if the codes of private institutions differed from public institutions regarding the handling of sexual misconduct cases.

Due to the fact that various names are used across the nation for the office or entity who handles allegations of sexual misconduct, this dissertation will utilize Judicial Affairs Office to refer to any office or entity handling these cases. Similarly, this dissertation will utilize Judicial Officer to refer to the person in charge of handling these cases and the person with whom the interview was conducted, although their exact title may have been different. It is also acknowledged that the term sexual misconduct is not utilized by all institutions when referring to sexual assault, rape, date rape, forcible sex offences and non-forcible sex offenses, but it is utilized in this dissertation to encompass all of these forms of sexual misconduct. When deemed appropriate, an alternate, or perhaps, more specific term will be used.

The responses of the twenty-seven judicial officers interviewed were compiled according to question and analyzed to identify common patterns or themes found within each response category. The research questions were used as an organizational tool, and themes were extracted from the responses to each question. The first four questions were demographic in nature and have been reported in a “table” format. Questions five through eleven each identify the content themes discovered.

All possible measures were taken to maintain the confidentiality of the respondents. The interviews were conducted by a professional interviewer from the Canon Research Center, who removed all identifying information prior to giving the responses to the researcher, and any identifying features that may have been present in the interview.
itself have been omitted. The transcription of the interviews will be maintained by the researcher and only made available upon consideration of a written request in order to fulfill the confidentiality covenant.

Student Conduct Code Analysis

Definitions of Sexual Misconduct

The definitions of sexual misconduct were generally either very broad or very specific at both public and private institutions. The definition relating to sexual misconduct offered by Stoner & Cerminara (1990) prohibits "physical abuse...and/or conduct which threatens or endangers the health or safety of any person." Gary Pavela (2000) offers a more specific example definition prohibiting sexual misconduct "Sexual assault or sexual harassment, as defined in University policies of sexual assault and sexual harassment." This definition would indicate that it is acceptable to have a separate policy on sexual assault/misconduct in the university code of conduct. Mr. Pavela further indicates that an institution may consider staying close to definitions provided in their state penal code due to rape shield laws and that care should be taken when defining consent. One of his recommendations is "affirmative consent [to sexual relations] is required, either verbally or by acts unmistakable in their meaning" (Pavela, 2000; Pavela 1992).

Of the eight private institutions, three had broad definitions or statements about sexual assault, and of the twenty-four public institutions, ten had broad definitions or statements about sexual assault.

These student conduct codes included statements such as: any physical assault or threatening the physical safety of others is not permitted; respecting the health and safety of others against assault (including sexual assault); the institution does not tolerate sexual assault; committing sexual assault is not permitted; or sexual assault is a felony and students who believe they are victims of sexual assault should seek legal or university remedies.
Some institutions discussed sexual harassment, including forced sexual intercourse, but did not specifically state sexual assault or sexual misconduct.

Of those institutions that had specific sexual assault definitions, five out of eight private and twelve out of twenty-four public actually described what sexual assault consisted of at that institution. Some codes defined sexual assault as forced penetration or intercourse of any orifice with any object (through intimidation, threat of force, taking advantage of the physical or mental incapacitation of a person, including mental incapacitation due to drugs or alcohol); non-consensual sexual activity including unwanted touching of genitals, breasts or buttocks; and public sexual indecency or indecent exposure. Some discussed the definition of consent.

When consent is defined it generally involves a person freely agreeing to the sexual act, that the person is conscious and able to communicate, that the person is of legal age to consent and not suffering from mental illness. Intoxication and use of drugs can make a person incapable of consenting, so some codes indicate specifically that ignorance due to the intoxication of the alleged offender, or the complainant is not a defense; intoxication of the alleged victim does not diminish the responsibility of the alleged offender for committing the sexual assault.

Analysis found, in some of the codes, separate definitions for forcible sex offenses (forcible rape, forcible sodomy and sexual assault with an object) and non-forcible (incest and statutory rape), which is how they have to be reported according to the Clery Act. In other codes, relationship violence is defined in their sexual assault policy to include physical abuse, threats of abuse and emotional abuse; stalking is included as well.

As previously stated, the sexual assault or misconduct definitions range from very broad to very specific, and, as indicated in the interview transcriptions, the institutions either strongly prefer their level of specificity of definition (broad or specific), or they are currently planning to re-structure it.
Sexual Misconduct Policies

In the private universities/colleges, seven out of eight schools had a sexual misconduct/assault policy that differs in some way from other misconduct; in the public arena, eleven out of twenty-four have separate policies. The major differences in these policies are as follows: an explanation of sexual assault, when it is likely to happen, with whom (on college campuses, it is generally someone known to the victim), precautions to take and where they can go for help.

Some institutions afford additional rights to those involved in sexual misconduct cases. Generally, during the hearing process, a complainant will give a statement as a witness and then leave the hearing. However, in sexual misconduct cases, some institutions allow the complainant to be present throughout the entire hearing if she/he wishes, rather that just giving a statement as a witness and then leaving. Due to the sensitive nature of sexual misconduct cases, various institutions with sexual misconduct codes allow for the alleged victim to either be in the room if he/she is comfortable facing the alleged perpetrator, or to conduct the hearing in separate rooms or with a partition in the room to separate the two if he/she is uncomfortable facing his/her alleged perpetrator.

Students have the right to a hearing free of scrutinization of past sexual experiences, report their allegations to the police, or not, receive medical attention and counseling services, and have the alleged perpetrator tested for STD’s if state law permits.

Various institutions indicate that they will take the allegations seriously, that the alleged victim will be treated with respect and that both the alleged victim and the alleged perpetrator will be treated fairly and in accordance with all aspects of due process. Those institutions that do not have a separate process for sexual misconduct also discuss student rights and due process. They simply do not differentiate those rights specifically with regards to sexual misconduct or assault.

The rights and assistance offered to both parties involved in cases of sexual
misconduct is discussed in most student conduct codes that have a sexual assault policy. A few, however, also discuss the collection and preservation of evidence immediately following the assault. Going to the hospital and/or filing a report with the police does not require that the victim seek to prosecute the alleged perpetrator, but does help to determine responsibility or guilt if he/she seeks to file charges through the university and/or the criminal court system.

The victim often has the right to request a change of living arrangement if living on campus; a change of class schedule or other necessary changes to remove him/her from the immediate vicinity of the alleged perpetrator. The university can also initiate changes as well as issue a no-contact order and/or initiate an interim suspension if it is viewed necessary and appropriate. Most institutions in this study, both those with separate sexual assault policies and without, allow for an attorney, advocate or support person to attend the hearing with both the alleged victim and the alleged perpetrator; very few, however, allow that person to speak on behalf of the student, they may only serve in an advisory or support capacity.

**Grievance Filing Procedures**

Three-fourths of the private and two-thirds of the public institutions researched provide written procedures in their student conduct code for filing a complaint against another student for any reason. In order to file a complaint, a person with knowledge of the complaint, and it does not generally have to be the alleged victim, can contact the Judicial Affairs office, the Dean of Students office, Conflict Resolution office, or an office with a different name that serves in a similar capacity. Most institutions require that the complaint be written, but some will take the complaint via the telephone; and some have a time-frame, within which the complaint must be filed, such as thirty days, ninety days or a year. These procedures are in accordance with the recommendations made by Stoner & Cerminara, and by Pavela in their model student conduct codes.

A complaint may also be filed by another entity within the institution, such as, the
university police, the center for women and men, housing, or a professor. These agencies can also refer a student to the Judicial Affairs office to file a complaint and vice versa.

The written complaints should contain as much information as possible, including the names of the alleged victim and alleged perpetrator, events that transpired to the best of their knowledge, any possible witnesses, steps taken to preserve evidence and other agencies that have been contacted or involved. The majority of institutions say they will do their best to investigate any allegations of misconduct.

**Judicial Hearing Process**

Most institutions state that they will try to resolve as many conflicts as possible informally, including sexual misconduct, but there are some institutions that require allegations of sexual misconduct to be handled through a formal hearing process. Once a complaint has been filed, an investigation will generally ensue and the alleged perpetrator, in accordance with due process regulations (*Dixon v. Alabama*, 1961), will be contacted via a letter informing him/her of the complaint and will be given the opportunity to respond. If the complaint cannot be resolved informally, then the case will go to a formal hearing. Informal resolutions include mediation, or a discussion of the situation with both parties. A formal hearing will transpire if the alleged perpetrator denies responsibility and/or the sanctions suggested by the judicial officer/Dean of Students. The same private institutions that discussed grievance procedures in their code, also discussed the judicial/hearing process. Eighty-eight percent of private institutions discussed it as opposed to the sixty-six percent of public institutions.

In accordance with the recommendations made by Stoner & Cerminara (1990) and Pavela (2000), the hearing process is an area where more specific information was published by the universities in their student conduct codes. Both public and private institutions that published their hearing procedures were very similar with regards to the process itself. As recommended, each institution discussed the investigation process, and
the notification of the accused upon finding sufficient evidence for disciplinary action to take place. When a formal hearing is decided upon, the accused is to be notified, generally between seven and fifteen days, depending on the institution. Both parties may present evidence and witnesses, which most institutions will discuss with the students in a pre-hearing meeting. The strong majority of institutions use hearing panels consisting of both faculty and students, although some use solely faculty in sexual misconduct cases and a small number of institutions use hearing panels consisting solely of students for all forms of misconduct, including sexual misconduct.

Many institutions discuss the hearing process itself, who can be present, and the procedures for documenting the proceedings (usually via a tape-recording). Nearly all of the institutions have hearings that are closed to the public. This is the recommendation made in both model conduct codes used in this study. Pavela (2000) states “Hearings will be closed to the public, except for the immediate members of the respondent’s family. An open hearing may be held, in the discretion of the hearing officer, if requested by the respondent.” As recommended in both model codes, many institutions do make the exception in many sexual misconduct cases (or all cases involving possible suspension or expulsion) of allowing an attorney or advocate for both the complainant and the accused. There were a couple of institutions that will allow the hearings to be open if either the accused requests it, or if both parties agree to an open hearing. Otherwise, it is made clear in each code that the hearing and information provided in the entire process are to remain confidential.

The accused is given a time-frame within which he/she will receive notification of the findings of the judicial committee, which is usually ten to fifteen days, but some institutions indicated that they would be notified as quickly as possible. Some institutions, primarily those with separate sexual misconduct/assault policies, also indicate that they will notify the alleged victim of the findings of the panel while others...
do not indicate this in their student conduct code. Gary Pavela (2000) indicates written notification to the accused student only in his model code.

As recommended in the model conduct codes, some institutions clarify that the university judicial process is not like that of the criminal courts; that they need not conform to the guidelines and restrictions of criminal courts. The universities that explain this contend that the university judicial process is meant to be educational in nature and to supply the students with an additional avenue through which they can adjudicate their complaint. The university judicial process is almost exclusively (according to those student conduct codes that discuss the process), an open forum for the parties and the hearing panels to hear testimony, evaluate evidence, question the complainant, accused and witnesses and make a decision of responsible or not.

In his model code of student conduct, Gary Pavela (2000) recommends that universities incorporate a “clear and convincing” standard of proof rather than “preponderance of evidence.” Stoner & Cerminara recommend the “preponderance of evidence but state that the “clear and convincing” could be used as well. The institutions researched in this study were almost evenly split on whether their standard of proof was “preponderance of evidence” or “clear and convincing.” Preponderance of evidence means the evidence must be fifty-one percent convincing that the accused did commit the offense. “Clear and convincing” is a higher level of proof than “preponderance of evidence” but not as high as the criminal courts’ standard of proof of “beyond a reasonable doubt.”

No institution researched in this study had a burden of proof as high as that of the criminal courts. Nearly all can proceed with a university judicial hearing in conjunction with any criminal proceedings that may be occurring, which is also the recommendation of Gary Pavela (2000). Mr. Pavela indicates that not only can an institution conduct a hearing simultaneously with the criminal courts, but that the students should be informed that the outcome of the criminal trial will not affect that of the university (Pavela, 2000).
According to Gary Pavela, "witnesses shall be asked to affirm that their testimony is truthful, and may be subject to charges of violating this Code by intentionally providing false information to the university" (Pavela, 2000). Although this recommendation would not necessarily place students under oath, it does indicate a level of responsibility and potential punishment if a student was not truthful in his/her testimony. Only a few student conduct codes indicated that students must affirm the truthfulness of their testimony, or that untruthful testimony would result in a code violation.

**Sanctions**

If a student is found responsible of sexual misconduct, or if he/she pleads guilty to the offense, there are a myriad of sanctions that can be imposed that are quite consistent among all institutions that report their sanctions in their student conduct codes and are consistent with both model student conduct codes. Of the private institutions, again, three-fourths of the institutions have their sanctions written in their student conduct codes, and of the public, just over two-thirds are documented in the codes.

Both public and private institutions are consistent with the types of sanctions they use. First, there is a warning (or verbal reprimand), then disciplinary probation, then suspension and finally, the most severe, expulsion from the institution. Most institutions also employ other sanctions within the sanctions just mentioned. Some of the other sanctions imposed are fines, restitution (if applicable), withdrawal of privileges (including attending activities, housing in dorms, and dining room privileges), writing a paper, community service, attending psychological counseling sessions, attending anger management classes, or being suspended immediately if the individual is deemed a threat to the alleged victim or the university community. The hearing board recommends a sanction(s) and the sanction(s) must be approved by the Vice President of Student Development (Pavela, 2000) or by the Judicial Advisor (Stoner & Cerminara, 1990). According to Phil Burns (2003), the judicial office then monitors compliance with the imposed sanctions.
Appeals Process

Both model codes indicate that the university should offer an appeals process. They indicate the request must be received from the accused within 5 business days of his/her receipt of the sanction(s). (Pavela 2000, & Stoner & Cerminara, 1990). The appeals process for those institutions that report it in their student conduct code (five of eight private institutions and eighteen of twenty-four public institutions) was also very consistent between institutions. Most of the institutions only allow the accused to appeal the decision of the hearing panel, but some allow the judicial affairs office to appeal the sanctions imposed by the panel. All of the institutions require that the appeal be in writing; some within 2, 3, 5 or 10 working days of notification of judgment. The majority require the appeal within 10 working days.

All of the institutions state that the appeals process is not a new hearing, and there must be sufficient grounds for the appeals process to take place. For an appeal to be considered, there must be either new evidence that can determine innocence; sufficient proof that the sanctions imposed were too severe for the violation of rules or policy that has been adjudicated; that there was insufficient evidence at the hearing to prove responsibility; that university hearing procedures were not followed properly; or that the alleged offender’s due process rights were violated. Approximately half of the institutions also state that a judicial decision can only be appealed if the sanction is suspension or expulsion.

During the appeals process, most institutions state that the appeals board will review all documents involved and a transcription of the hearing to make a decision. Testimony of the accused will not be heard by the appellate board until the review of information has been completed, if at all. The institutions also state that the appellate board can only reduce the severity of the sanction or remove it altogether, they cannot make it more severe. The decision of the appellate review board is then final.
Student Rights

Student rights to due process and confidentiality under FERPA are clearly an important aspect of the university judicial process. 100% of both public and private institutions examined discussed student rights in at least some form, and many discussed them extensively. “The college or university should try to emphasize, in addition to its prohibitions, rights which it recognizes.” (Stoner & Cerminara, 1990).

The Family Educational Rights and Privacy Act (FERPA) affords students certain rights with regards to their education records. Students are allowed to review their records within forty-five days of receipt of the request by the university. The university is allowed to disclose education records to the attorney general for law enforcement purposes without the consent of the student. The university may also disclose to an alleged victim, the results of disciplinary action taken against the alleged perpetrator if the crime was violent or a non-forcible sex offense. The final results may also be disclosed, at the discretion of the institution, if the person is found responsible for the crime of violence or non-forcible sex offences; however, information that can be provided is limited to the name of the alleged perpetrator, the violation committed and the sanction imposed. Under FERPA, a university may disclose information regarding drug or alcohol use to a parent or legal guardian, but may not disclose a student’s whereabouts. (Kaplin & Lee, 2000).

According to most student conduct codes reviewed, the confidentiality of the students and the proceedings is of importance to the institution and will be maintained to the best of their ability (through closed hearing proceedings, confidential personal information, and through confidentiality discussions with all those involved in the proceedings).

The students’ right to due process is also discussed in nearly all of the student conduct codes and in both model student conduct codes. At the very least, the codes
state that the student will be notified in writing of any complaints against them and of any subsequent meetings/hearings regarding the matter.

Following Gary Pavela's model code, the majority of institutions explain student rights extensively. Some of those rights consist of: notification of all charges in writing, an opportunity to review any written complaint against them and respond to that complaint. They have the right to be informed of the hearing process and ensuing hearings in writing and with time to prepare for the hearing, to request a delay of hearing in the case of extenuating circumstances, to be present during all phases of the hearing process except for the deliberations of the hearing committee (at most institutions, not all). Additionally, they can question all statements and information presented at the hearing, present information and witnesses if appropriate, and be informed of the findings and sanction(s) imposed within a reasonable time period after the hearing has concluded. Finally, the alleged perpetrator has the right to an appeal (sometimes only in the case of suspension or expulsion), to be presumed "not responsible" unless proven otherwise, to deny responsibility and to give a personal statement. Some institutions provide for the alleged perpetrator to be present for the presentation of sanctions as well, others notify him/her via written notification.

*Sexual Assault Assistance*

Relatively few of the institutions studied have specific procedures in their student conduct codes to provide sexual assault assistance or to refer students to the police, hospitals or counseling services. According to these codes, one-half of private institutions and three-eighths of public institutions provide this information. Of the institutions that provided this information, most also had separate procedures for sexual assault or misconduct. Also, of the institutions that provided this information, all provided names of assistance agencies, but not all provided phone numbers to contact the various agencies within the code. The majority of the agencies referred to in the student conduct code for alleged victims of sexual assault include the police (local and
university), local hospitals, rape crisis or sexual assault centers, centers for women and men, residential life, and Lesbian Gay Bisexual Programs offices.

**Education/Prevention**

There are also relatively few student conduct codes that discuss education and prevention programs or the importance of evidence preservation when a person believes he/she has been sexually assaulted. Thirty-seven percent of private institutions and twenty-one percent of public institutions discuss these programs or practices in their student conduct codes, and of these, about fifty percent are the same institutions that discuss sexual assault assistance and referral programs. Those who discuss these programs and procedures tend to do so extensively. Those discussing education state that the prevention of sexual assault is of primary concern and that their institution takes a proactive stance against sexual assault; educational programs are available to all students at various times throughout the year.

Those institutions discussing the preservation of evidence have explicit procedures explaining the duties of each agency at the university and their role in getting the victim the necessary help as quickly as possible. They state that time is of the essence in the preservation of evidence and that if disclosure of the assault occurs within ninety-six hours of the assault, then whoever receives the report is to refer the student for a medical/forensic examination.

During these exams, any evidence is preserved, STD tests are performed as well as pregnancy tests and tests for Rohypnol (the date rape drug) if appropriate. Some codes discuss the actual preservation of any evidence on the part of the victim as well, such as, placing underwear or other clothing in plastic bags and encouraging the alleged victim not to shower, urinate or drink liquids prior to a medical exam. If oral contact has occurred, the alleged victim should not eat, drink, smoke or brush his/her teeth. These practices are not only recommended for the evidence preservation in case the alleged victim would like to pursue legal avenues, but also for the health and welfare of the
victim. Again, those that discussed these procedures generally did so in detail, but the majority of the student conduct codes analyzed did not contain information on these topics.

Contact Information

The last content theme extracted for analysis in the student conduct codes is clear contact information for students seeking assistance in any way for sexual misconduct. This contact information could include phone numbers for the university police, Judicial Affairs office, Dean of Students office, any type of rape or sexual assault crisis center, etc. Of the codes analyzed, five of eight private institutions provided contact phone numbers and one-half of public institutions provided the information. Some institutions provided the names of possible agencies or offices to contact, but they did not provide phone numbers and were thus not counted in this portion of the analysis. This theme was extracted to determine if the institution presents the student with easy access to assistance when faced with a situation where sexual misconduct or assault is involved.

Conclusion

The two model codes used in this study were similar in every respect except for their definition of sexual assault/misconduct, reference to separate procedures for handling sexual misconduct and the burden of proof they recommend. The university conduct codes examined in this study differed in the same areas as the model codes. The grievance procedures, judicial hearing process, sanctions, appeals process and student’s rights content themes closely mirrored those found in the model conduct codes. This indicated that most institutions in this study are creating their codes in accordance with the recommendations made in the model codes.
Interview Analysis

The first four questions of the interview were demographic in nature. The questions were designed to indicate how many years of experience the judicial officers had at their current universities and any previous experience they had as a judicial officer at any other universities, as well as to give an estimate to the number of sexual misconduct cases that have been handled by each judicial officer and the approximate size of the institutions involved. A table was created to summarize the first four questions, on which, the responses for question number one were organized in 5-year increments for their experience at their current institution. Question number two, which asked for years of experience at another university, was listed as yes or no. If the respondent answered yes, their years of experience were added to their years of experience in question number one to give their overall years of experience as a judicial officer at a 4-year institution. Question numbers three and four were listed by the interview number assigned to each institution by the interviewer.
Summary of Demographic Questions From Interviews of Judicial Officers

*Question One*

How long have you been a Judicial Officer at your current 4-year college/university? (some include Judicial Officer position at previous institutions as years of experience, if applicable):

<table>
<thead>
<tr>
<th>Years of Experience</th>
<th>Number of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-5</td>
<td>10</td>
</tr>
<tr>
<td>6-10</td>
<td>8</td>
</tr>
<tr>
<td>11-15</td>
<td>4</td>
</tr>
<tr>
<td>16-20</td>
<td>2</td>
</tr>
<tr>
<td>21-25</td>
<td>0</td>
</tr>
<tr>
<td>26 or above</td>
<td>3</td>
</tr>
</tbody>
</table>

*Question Two*

Have you served as a Judicial Officer at any other 4-year college/university?

No = 14

Yes = 13 (# of years of these JO’s included as total experience in question 1)
<table>
<thead>
<tr>
<th>3. Number of complaints of sexual misconduct the Judicial Officer has handled</th>
<th>4. Number of students at institution</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. 8</td>
<td>8,500</td>
</tr>
<tr>
<td>2. 5 per yrst c 14 years = 70</td>
<td>37,000</td>
</tr>
<tr>
<td>3. 25-30 in 6 years</td>
<td>52,000</td>
</tr>
<tr>
<td>4. 24 in 4 years</td>
<td>17,000</td>
</tr>
<tr>
<td>5. 3 per year x 8 = 24</td>
<td>25,000</td>
</tr>
<tr>
<td>6. 100 in 27 years</td>
<td>27,000</td>
</tr>
<tr>
<td>7. 6 per year x 9 = 54</td>
<td>50,000</td>
</tr>
<tr>
<td>8. 24 in 8 years</td>
<td>5,600</td>
</tr>
<tr>
<td>9. 2-5 per year x 20 years = 40-100</td>
<td>30,000</td>
</tr>
<tr>
<td>10. 5-6 per year x 8 years = 40-48</td>
<td>28,400</td>
</tr>
<tr>
<td>11. 50 in 5 year</td>
<td>37,000</td>
</tr>
<tr>
<td>12. 2 per year average x 5 years = 10</td>
<td>44,000</td>
</tr>
<tr>
<td>13. 8 in 3.5 years</td>
<td>35,000</td>
</tr>
<tr>
<td>14. 12 in 33 years</td>
<td>38,000</td>
</tr>
<tr>
<td>15. 12 in 9 years</td>
<td>20,000</td>
</tr>
<tr>
<td>16. 12 in 4.5 years</td>
<td>45,000</td>
</tr>
<tr>
<td>17. 4-6 per year x 3 years = 12-18</td>
<td>12,000</td>
</tr>
<tr>
<td>18. 1-2 per year x 10 years = 10-20</td>
<td>11,000</td>
</tr>
<tr>
<td>19. 15-18 in 4 years</td>
<td>30,000</td>
</tr>
<tr>
<td>20. 4-5 per year x 19 years = 76-90</td>
<td>34,000</td>
</tr>
<tr>
<td>21. 20 in 6 years</td>
<td>26,000</td>
</tr>
<tr>
<td>22. 30-50 in 13 years</td>
<td>43,000</td>
</tr>
<tr>
<td>23. 4-5 per year x 5 years = 20-25</td>
<td>22,500</td>
</tr>
<tr>
<td>24. 4 per year x 15 years = 60</td>
<td>30,000</td>
</tr>
<tr>
<td>25. 1 in 7 months</td>
<td>13,000</td>
</tr>
<tr>
<td>26. 45-55 in 4 years</td>
<td>10,000</td>
</tr>
<tr>
<td>27. 25-30 in 8 years</td>
<td>17,000</td>
</tr>
</tbody>
</table>
Question Five

What procedures do you follow when a student seeks to file a sexual misconduct complaint?

This question was answered similarly by all judicial officers. The first content theme found was that of the Judicial Affairs Office receiving a written statement of the alleged assault or misconduct. This content theme was consistent in almost every interview. The manner in which the statement was received was separated into three major areas; via referral from an office or agency at the institution (i.e.: university police, sexual assault center, women’s center, center for women and men, counseling services, etc.), a written referral from the complainant that was given directly to the Judicial Affairs Office, or in a few instances, a report taken via telephone or meeting with the complainant in a location of the complainant’s choosing. Most institutions stated that they will take the written complaint either as a referral from another agency, on-campus or off-campus, or as a direct statement from the complainant, but others specified that they will not deal with a sexual misconduct complaint without the complainant first speaking with a referring agency. Others stated that although they will accept referrals either way, most, if not all, of their written complaints come via a referring agency, namely the university police.

The second content theme found in question five was an explanation of the university judicial process to the complainant. Again, this content theme was found in nearly all of the interviews. The respondents stated that they would walk the complainant through the process of what would be required of them and what to expect of the entire process; most were not specific as to what that would be but many said it could be found in their student conduct code. The majority then stated that they would then allow the complainant to decide if she/he wanted to proceed with the complaint or not. There were a few who stated that either the university would proceed regardless of whether the complainant wanted to or not; or if the complainant did not want to
proceed, the university would then decide whether or not they, as an institution would go forward with the process.

If the complainant or the institution decided to go forward with the complaint, the next step, and theme found, is a notification sent to the accused student or respondent. This, along with all explanations that follow and the explanations given to the complainant are in accordance with the due process that is to be afforded to all students. The notice sent to the accused student notifies him/her of the complaint, has the name of the complainant, a synopsis of the complaint and a request for them to contact the Judicial Affairs Office to discuss his/her options. Some judicial officers stated they would have the imposed sanction written in the notification as well, in case the respondent wished to take responsibility for the act without a full hearing.

When the accused responded to the notification, they would be asked to meet with the judicial officer and the entire process would then be explained to them, again, in accordance with their due process rights. In most cases, if the accused requested a full judicial hearing or if the accused student does not accept responsibility for the allegations, then the case will proceed to a full hearing and all necessary explanations and notifications will be completed. At some institutions, however, with cases of sexual misconduct, a full hearing is required regardless of whether or not a student accepts responsibility.

Part B of question five was, "What, if any, policies do you have regarding referrals to other government agencies?" The interviewer immediately prompted the respondents that it meant agencies as in police or hospitals. Some institutions stated they do not have a written policy, per say, but all of them notify students as to their options, which is the content theme found in this question. About fifty percent of the judicial officers stated that it was not part of the written code, but they did ask students if any other agency had been helping them and would refer students to all agencies that could be of assistance to the student; a sort of informal protocol. The others stated it was part of their written protocol to refer students to any agency with which they had not already been in contact.
The majority of judicial officers stated they were not the first office to be contacted when a student had been assaulted; they were generally one to a few steps down the line. Students would, according to nearly all judicial officers, speak to the police first (university or city, but generally university), or perhaps to a type of rape/assault center, center for women and men, counseling center or a residence hall assistant and that that person would in turn refer the student to the judicial affairs office or would write a written statement of the assault and send it to the judicial affairs office. Because the judicial affairs office is not generally the first step in the process, many judicial affairs officers stated that by the time they were in contact with the student, it was too late for a referral to the hospital for a rape kit. If the student wanted to go to the hospital, he/she would have already done so. If they were, by chance contacted early enough, the judicial officer would definitely recommend that a student go to the hospital, even if they did not plan to go forward with any charges, criminally or through the university. Many also stated that it was part of the protocol of the university that whatever agency was contacted first by the student was to inform him/her of the options for seeking medical and psychological assistance as well as filing a police report and charges against the accused student.

These responses of the judicial officers make it clear that there is a precise protocol followed by each institution regarding the reporting of allegations of sexual misconduct (or all forms of misconduct). In comparing these responses to those procedures found in the student conduct codes of each institution involved, it appears that most institutions do have their procedures clearly outlined in their code. All institutions clearly have a protocol they follow when a student reports an allegation of sexual misconduct (or any misconduct). Not all, however, have those protocols clearly outlined in their student conduct codes.
Question Six

Do you have separate procedures in your student conduct code for handling sexual misconduct cases?

This question was essentially a yes or no question upon which many of the respondents chose to elaborate. Approximately one-fifth of the interviewees stated a difference in code and four-fifths stated they do not have separate codes.

The main differences noted between sexual misconduct and all other misconduct cases were (and they differed by institution) that the accused did not have the option to plead guilty and accept a sanction; that sexual misconduct cases must be heard by a hearing panel; that sexual misconduct panels are smaller; that sexual misconduct panels must be gender diverse; that the complainant can be present throughout the entire hearing rather than giving a statement as a witness and then leaving; that sexual misconduct cases do not go before peer judicial boards, only administrative; that a more elaborate investigation is completed in sexual misconduct cases; and that the university can proceed with a complaint of sexual misconduct against an accused student without the approval of the complainant. These examples were not consistent at all of the universities, but were examples extracted from each university that stated having a different procedure for handling sexual misconduct cases versus other violations of the code of conduct.

Although many institutions responding “no” to this question stated that their procedures were exactly the same for all forms of misconduct, some of the institutions responding “no” did state some slight differences in procedure. Of these, one explained that a case of sexual misconduct would have to go to a hearing; two stated they are more sensitive to the feelings of the complainant due to the sensitive nature of the complaint; one stated that the complainant is allowed an additional support person, aside from legal counsel; and another said they have a smaller judicial panel for sexual misconduct cases. One institution stated that not only did they not have a separate sexual misconduct
policy, but they did not have a rule against sexual misconduct; it would be adjudicated under "conduct that causes serious danger to another student".

Many of the judicial officers who did not have separate codes or procedures for handling cases of sexual misconduct seemed to have a strong opinion that separate procedures were not appropriate and many of those who had separate procedures seemed to have the strong opinion that they were appropriate. It did not appear to be a "middle of the road" topic. A concern for both the rights and feelings of both the complainant and the accused seemed to be of concern, as did, assuring that the due process rights are adhered to for all involved. According to this data, the process for adjudicating any misconduct is appropriate for adjudicating allegations of sexual misconduct as well. But, being a type of offense that is sensitive in nature, it is appropriate to be sensitive towards those involved, be it through slight changes in the procedure for adjudicating the offense or be it through the concern shown towards those involved, namely the complainant.

**Question Seven**

Based on your experience, why do students choose the university judicial process as a remedy for sexual misconduct?

Many institutions stated similar reasons. There were ten content themes that were, in large part, consistent throughout the responses. The primary reason given as to why students choose the university judicial process was the lower standard of proof offered through this process compared to the criminal process. Many judicial officers stated that local prosecutors will not take many of these cases due to lack of evidence or because alcohol or drugs were involved. The university process is sometimes their only option. The standard of proof in the court system is "beyond a reasonable doubt". This standard of proof requires solid forensic evidence to reach a guilty verdict, far more than "he said, she said." And although the university system also requires more than "he said, 100 she said" for a guilty finding (or finding of responsibility), their standard of proof...
ranges from "preponderance of evidence" (or "more likely than not") to "clear and convincing."

The second major content theme noted was that the university is much more private, confidential in most cases, but at the very least, more private. The judicial officers stated that many students, primarily complainants, see what happens with sexual assault cases in the legal system, where the media gets involved and it becomes public record. They don’t want that for themselves. Although it could be argued that openness prevents mischief, it is recommended by Gary Pavela (2000) that judicial hearings be closed, and that was also the consensus of the judicial officers interviewed.

Another reason that was mentioned frequently was that often times the alleged victim wants his/her environment to be safe from the accused and the university system can do that quickly, where the criminal system cannot. The university system can remove the accused student from the premises through an interim suspension while the case is being investigated if there is adequate proof that the misconduct occurred, and then ultimately can suspend or expel the student if he/she is found responsible. Several judicial officers indicated the court system can put the accused in jail if found guilty, but that outcome is less likely and can take up to several years. The university system can also change class schedules or housing arrangements to help remedy the situation, where the criminal system cannot.

The fourth content theme discovered was the timeliness of the university process, especially compared to the criminal process. The university can adjudicate the matter within weeks or months where the criminal process can take months or years. This type of misconduct or crime is serious and can be very difficult for the alleged victim to endure for a long period of time, so many will seek the university process instead of or in conjunction with the legal system for the relative speed in which the situation can be resolved.

The judicial officers also stated that they believe students choose the university
system because it is less legalistic and intrusive of a process, and more educational in nature. Disciplinary sanctions generally range from a warning to expulsion from the university. Although a person found responsible of committing sexual misconduct would not have to register as a sex offender as in criminal proceedings, a record of the ruling is kept by the university and in the case of suspension or expulsion, the student's transcripts will indicate that the student has been suspended or expelled.

The hearing process itself is also less legalistic. The majority of institutions allow an exchange of testimony during the judicial hearing and the students can speak what they feel, rather than be questioned, or sometimes, interrogated by the attorneys. The judicial officers state that this forum is much less intimidating and frightening to all parties involved.

The sixth content theme determined was the feeling that many students, especially those cases that were considered date-rape or acquaintance-rape, involved two people who knew each other and were friends. The judicial officers stated that many students, due to the type of relationship they had with the assailant, did not want the accused to go to jail and undergo that severe of a life-altering punishment. They just wanted the accused to know that he/she did something wrong and needs to take responsibility for his/her actions. With an educational sanction, and being able to hear what he/she had done from the alleged victim’s standpoint, hopefully the perpetrator would not assault anyone else again. Some also believed that student’s feel this is a “community” problem and should be handled within the “community”. According to Webster’s Dictionary (2001), a community is “a society of people having common rights and privileges, or common interests, civil, political, etc. or living under the same laws and regulations.”

The seventh theme apparent from the interviews was the “empowering nature” of the university judicial process. Where the criminal courts tend to take the situation out of the hands of the alleged victim, within the university system, the victim can maintain a higher level of control over what happens to him/her. The victim can decide how far
he/she wants to go with the complaint. He/she can indicate if she wants to simply speak to the judicial officer, have the judicial officer speak to the alleged perpetrator, have them all speak together at some point, or file a formal complaint and seek a formal hearing. Some judicial officers believe this could be helpful in the healing process for the victim as well.

The eighth theme found consistently throughout the interviews was the possibility of counseling that is made available through the university system to both the victim and the alleged perpetrator. The alleged victim can receive counseling to help in the healing process, and the perpetrator can receive counseling (sometimes as part of a requirement to be re-instated to the institution) to address any psychological issues he/she may have. The ninth content theme determined was that the process can be done at no cost to the students, monetarily. The students, at most institutions, can employ an attorney if they wish, but it is not required, nor is there any other cost incurred by utilizing the university system.

In the tenth content theme, all of the judicial officers made it clear their process was AN alternative, not THE alternative, and most definitely, various avenues can be taken in conjunction with one another, not in place of each other. Each university did not state all of these themes, but each of the themes was stated in more than one interview; they were consistently mentioned by the judicial officers in response to this question and did not vary according to the size of the institution. The responses to this question made it very clear why the university judicial process would be appealing to many students in lieu of or in conjunction with the criminal court system.

Question Eight

Based on your experience, what are the strengths of your student conduct code with regards to sexual misconduct?

There were seven major content themes extracted from the interviews on this
question, and many of those themes are subdivided, or contain various points of importance.

The first theme was whether or not they had a specific code or definition relating to sexual misconduct or assault. There is an apparent schism between judicial officers (and/or their institutions) on this matter. Those who favor an explicit definition state that the student needs to know what exactly constitutes sexual assault or misconduct so there are no questions whether or not they violated (or may violate) the institution’s policy. Some even stated that a strength of their policy is that it mirrors the law in being so specific.

Those who do not advocate an explicit definition state that all violations fall under a broad term, as to not get caught up in sticky word games that could prove to be problematic in the adjudication process; and a strength noted by this group was their codes do not mirror the legal system and that their system is not adversarial for this reason.

In the second content theme, the judicial officers noted that the student conduct codes were well-written and well-outlined. Students and parents can easily find any policies and procedures they are looking for. A couple of institutions stated that they have added examples of inappropriate behaviors to help clarify these issues for the students.

The third content theme noted was the flexibility of the student conduct code. This flexibility allows a case by case handling of all complaints. Because the process is educational in nature, and not penal, the judicial officers believe the process allows for a more open and comfortable setting to discuss the complaint with both the complainant and the accused and that will produce the greatest possible level of success.

The fourth content theme follows the third, in that, it was mentioned various times that a strength of the student conduct code was the flexibility of sanctions imposed; because the institutions do not generally have a set sanction for each violation, they can
create a sanction, within their range of sanctions, that best supports the complainant and the violation committed by the accused. An example given that clearly represents this theme is that if a student is found responsible for committing sexual assault and is suspended, if the institution has a predetermined sanction for each violation, perhaps, two years for sexual assault, ultimately the accused student could be allowed to return to the institution before the victim has graduated. With flexibility in sanctioning, the institution can create a suspension that would run through the victim's completion of his/her degree. Other judicial officers stated that since they have flexibility in their sanctioning, they can require counseling for the person found responsible prior to their returning to the institution, which improves the students' chances for receiving.

The fifth content theme that was stated several times throughout the interviews was the university's ability to utilize many resources and programs within the institution. The primary resource referred to was the counseling services. Many judicial officers felt the ability to find help for both the complainant and respondent was very important and a definite strength of the student conduct code. Many institutions have special advocate or sexual assault programs specifically designed for caring for victims of this type of offense. Several discussed the strength in having such highly trained people working in each area involved in the process. Having such highly trained police officers, counselors and judicial affairs staff can make the experience easier for all involved.

The special nature of the hearing process itself for adjudicating allegations of sexual misconduct was the sixth content theme present in several interviews. Several hearing officers believed it was a strength of their code that the complainant could be present throughout the entire proceeding; to answer questions, clarify his/her version of events and to be able to face the accused and vice versa. Many judicial officers stated that the presence of advisors for the students was a strength of the process, because, although, most do not allow the advisors to take an active role in the proceedings, it can be beneficial to the students to have someone there for support and advice.
The last aspect of the hearing process that was discovered in many interviews as a strength, was that the hearings at most institutions are closed to the public, with exception in some cases to advisors being present, or if both parties agree to an open hearing. The levels of confidentiality and privacy are relatively high.

The seventh content theme discovered, and one that was stressed throughout the interviews, was that the student conduct code specifically acknowledges and was created in such a way as to protect the rights of all students. Protecting due process rights is mentioned frequently in the interviews as being a very important aspect of the student conduct code. The codes discussed are written to protect the safety and welfare of all students.

Question Nine

Based on your experience, what, if any, weaknesses exist in your student conduct code regarding sexual misconduct?

The two most frequent initial responses to this question were essentially, “I don’t think we really have any weaknesses in the system, per se,” and, “the weaknesses are such that they are probably not able to be rectified.” Despite this, all of the judicial officers gave some response as to a weakness even if it was not in the system itself, or was due to situations out of the control of the university or student conduct code. Due to the responses to this question, some of the themes extracted were areas the institutions could address, but not necessarily correct. This will be discussed within the explanation of those particular themes.

The number one content theme found and repeated was the inability of the institutions to adjudicate this offense to the satisfaction of the victim (and often the institution) due to lack of evidence. The most predominant theme found throughout the entire interview, not just question nine, was the difficulty of these cases due to the use of alcohol and drugs at the time the events allegedly occurred. This was a noted problem for various reasons. It was stated by nearly all of the judicial officers at least one time.
during each interview that alcohol and/or drugs are involved in the majority of sexual assault or misconduct cases reported. Many students reporting the assaults stated that had he/she been sober, he/she would not have consented to the act. Many of the accused state that had he/she been sober, he/she would have been more aware of the wishes of the complainant; but even more often, the accused states that he/she did not know that the complainant was so intoxicated.

Another major problem with the involvement of alcohol and/or drugs is that it blurs the memories, generally of both students, as to what exactly occurred at the time of the alleged assault. According to some judicial officers, with little recollection, and likely other personal reasons (such as embarrassment), few people report the crime and if they do report it, a substantial amount of time may have passed so there is little or no evidence with which to find the accused responsible. The case becomes, what many respondents mentioned, a "he said, she said" situation. According to nearly all of the judicial officers, these cases are nearly impossible to find the accused student responsible short of her/him deciding to voluntarily accept responsibility for the alleged misconduct, even with as low of a burden of proof as "preponderance of evidence."

Also, along the lines of policy and process, one institution felt that their use of "clear and convincing" evidence may be too high.

Along the same lines, it was stated that gathering evidence is more difficult in the university judicial process than in the criminal process due to the limited methods of collecting evidence. An example would be the inability to subpoena witnesses and force testimony. Again, this theme was found throughout every interview at one time or another, regardless of the size of the institution, but was stated most frequently in response to this question.

The institutions' definition of sexual assault/misconduct was the second content theme extracted in the responses to this question, but for differing reasons. One institution stated that their definition of physical assault, which encompassed sexual
assault, rape, date rape, sexual misconduct, sexual battery, etc., was patterned too closely after the state’s penal code for these offenses. The state’s code was very specific, too specific, in fact, for a university judicial system to deal with. The respondent stated that some people expect the university judicial system to mirror the criminal court system but that is not the purpose of the university judicial process, nor is the university truly capable of mirroring the criminal court system.

Another institution stated they were having difficulty defining sexual assault/misconduct. Along the same lines, one large institution stated that a weakness (which could be viewed a strength by some people) of their student conduct code was the over-defining of the term “consent” within their code. The respondent stated that this makes it difficult to determine consent in every case because the definition is so specific.

Several respondents listed the third content theme, the process employed by the institution to adjudicate sexual misconduct violations, as a weakness. Four of the respondents stated that something pertaining to their process could be improved. One stated that they have procedures they follow in a formal hearing, but these procedures are not available in writing, which the respondent considered a weakness. Two other institutions stated that they did not have any modifications to their code to handle sexual misconduct cases and they felt this to be an area within their student conduct codes that could be strengthened. Another judicial officer stated that their hearing process could be better.

It is interesting to note, where many institutions felt having a broad code, one that did not contain any separate procedures or accommodations for sexual assault cases was a strength, others felt that a specific set of procedures was a strength, and now still, as stated above, one institution believes their definition of assault too specific, and here, other institutions would like to see some implementation of procedures specific to sexual misconduct/assault added to their code. Another institution noted that their code generally does not extend off campus except for specific school-related trips, so the
majority of sexual misconduct cases are not even eligible for the university judicial process as they happen at apartments or houses off campus.

The fourth content theme noted was the need for more training of the hearing panels and employees of the judicial affairs office. Due to the sensitive nature of this offense, many judicial officers expressed a concern that those who deal with these cases be trained specifically. First, they should be more sensitive toward those involved. Second, they must be able to understand rape trauma and perpetrator behavior in order to better analyze evidence presented; and finally, to reduce biases, societal or personal, toward sexual assault victims and those who may have been under the influence of drugs or alcohol.

The fifth content theme noted was the need to provide more education to the students about sexual misconduct. Education explaining what constitutes sexual misconduct and how to avoid it (from both parties), consent, and the use of alcohol or drugs is not an excuse for sexually assaulting another person; and on the judicial process itself, to improve awareness that the process exists and how it works. One judicial officer noted that it may be beneficial to make the language easier as well, in the student conduct code; to make it more understandable, and consequently, make it more available to all students. The need for more education for students was evident in the analysis of the student conduct codes from each institution, and it was acknowledged and reaffirmed here by the judicial officers.

*Question Nine, Part B*

What problems/concerns, if any, do you see nationally with the university judicial process as a mechanism for remedying sexual misconduct?

From the responses provided by the judicial officers, all of them have concerns, but not all feel that the problem can be remedied due to the nature of many sexual assaults.

Alcohol and drugs were the number one concern expressed regarding national problems with the university judicial process as a mechanism for remedying sexual
misconduct because it is a national problem that the universities, potentially, cannot remedy. One judicial officer stated, “you know, if a student is willing to put a date rape drug into someone’s drink and then to rape that person, I don’t know how permanently removing them from the university is really remedying the problem, you know, these people need counseling...” (interview number thirteen). This respondent had stated just prior to this that he thinks universities do a great job holding students responsible for these crimes and in helping them to learn from their mistakes and hopefully make better choices, but that to “remedy” the situation may not be possible.

Another respondent felt that removing the perpetrator from the environment of the alleged victim definitely needed to be a possible remedy nationwide, however, and some institutions have stated that psychological counseling often is given as a sanction or as part of the sanction that accompanies suspension; that a student must complete a determined amount of psychological counseling before being readmitted to the institution. This would indicate that institutions should not only consider the immediacy of the sanction, with regards to removing the alleged perpetrator from the premises, but also the psychological needs of the accused, as an educational institution concerned with betterment of all of its students.

The next two content themes are related to the first. It was indicated by some judicial officers that a concern they had nationally was the lack of uniformity between student conduct codes regarding sexual misconduct. Although some institutions are different, and thus, so are their codes, it was still indicated that there should be some uniformity between the policies and procedures of institutions relating to sexual misconduct. A concern was also conveyed that codes are not readily available at some institutions.

The third content theme discovered was one discussed in question nine, part a, and that is, the need to better educate students regarding binge drinking and its effect on the decision making process regarding sexual activity; and the students should, again, also
be educated on consent. A respondent was concerned that the university judicial process, nationally, is reactive in nature and not proactive. The university generally responds after a violation has been committed, but it would be better to try to prevent the problem through education. Several respondents did note the lack of resources and/or staffing available at universities to properly handle the educational side of the process in conjunction with the adjudication component.

The fourth content theme was stated in different ways by several different judicial officers, but essentially was that the university system is too often confused with the criminal court system or is made to mirror the criminal court system. A concern was expressed that many institutions are allowing attorneys to participate in the process (actively) and that is legalizing the process too much. It was stated that there are limits to what the university judicial process can do, it is not a criminal proceeding. It did not appear that this was to say that the university judicial system should not adjudicate these violations, but that the university should not, and can not be expected to handle the situation as a criminal court would handle it.

A fifth national concern was the criticism that the university receives from the press and society in general regarding the way they handle sexual misconduct cases. It was stated that members of the press, and often society in general, want university sexual misconduct/assault cases to be open to the public and to become public record as in the criminal justice system. What these individuals fail to realize (or acknowledge) is the rights of students are of the utmost importance to universities (and required by the law through FERPA and the Dixon ruling). In addition, many students will utilize the system because their privacy is protected and if that protection is taken away, many more alleged victims will not come forward to have their complaints adjudicated. Privacy, or closed hearings, are allowed and not disputed in adjudicating violations by faculty, and the same rights to privacy should be allowed students without dispute. There is also public criticism and controversy as to whether or not universities should even adjudicate
this type of violation, being criminal in nature. It was again reiterated that the university system does not have to be in place of criminal proceedings, it can be in conjunction with them. The university adjudicates these violations with an educational purpose, not a penal one. The most severe sanction a person can receive is expulsion, which prevents the person from receiving further education, but they do not have to go to jail if found responsible in the university judicial process. If the complainant has no other option, as their case has been refused by prosecutors, chooses not to use the criminal court system, this gives them an avenue for holding the accused responsible. The complainant also has the option of taking criminal action in conjunction with filing a complaint with the university.

The sixth theme noted in the interviews was a concern regarding the adequacy of student rights. A respondent indicated that privacy can be a problem, even with closed hearings, because of use of hearing panels. Some institutions indicated that they only use faculty to adjudicate allegations of sexual misconduct to increase privacy, but some do not; some use a combination of faculty and students, and in a couple of instances, the judicial panels are comprised solely of students.

**Question Ten**

What recommendations would you make to improve your university judicial procedures regarding sexual misconduct?

Many institutions indicated that they are either currently in the process of revising their student conduct codes with regards to sexual misconduct, or that they have been revised recently. Those that have recently revised their codes did not have recommendations for improvement of their code, per se, but did note that that they recommend students be made more aware of the judicial process and what constitutes sexual misconduct.

The majority of judicial officers did have recommendations, from which seven content themes were extracted. The first content theme occurred most frequently. This
theme addressed the need for more education for the students. This theme discussed various aspects of educating the students, which included, creating more awareness of what constitutes sexual misconduct and consent. More education is needed pertaining to the existence of the code and what options are available through it; the agencies and services available to the students for support, counseling, and advocates of sexual assault; how to conduct themselves in intimate relationships; and more education on alcohol and substance abuse since it is involved in the majority of sexual misconduct cases at these institutions.

Several judicial officers discussed how alcohol and perceptions of women are societal issues that need to be addressed at the universities in hopes of helping students resolve them. This education, according to the judicial officers, should not only be targeted toward students currently enrolled, but also toward incoming freshmen. It is believed, according to some judicial officers, that educating students more regarding these issues will make the university more proactive rather than reactive towards sexual misconduct; education could assist in preventing the incidents from occurring.

The second content theme provided by many judicial officers was to re-visit and/or re-structure the institutions policy and/or definitions on sexual misconduct/assault. Some judicial officers recommended that institutions have a broad definition of assault, under which sexual assault/misconduct would fall; others recommended having a definition and/or policy that related specifically to sexual assault for the reasons mentioned previously.

Some judicial officers currently utilizing broad codes recommended their institution look at these codes and explore other options for defining and adjudicating these offences. One officer stated that his institution did not have an off-campus policy for violations of the student conduct code, therefore, many sexual misconduct cases could not be adjudicated. This judicial officer recommended that they look into creating a policy for the off-campus misconduct of students. Several judicial officers also
recommended putting examples of sexual misconduct in the code itself to help students have a clearer picture of what is not acceptable behavior. As stated previously, some institutions indicated that they are currently in the process of revising their definitions and procedures. A regular review the student conduct codes was also recommended.

The third content theme discusses recommendations to improve the hearing process itself. Nearly all judicial officers stated that the hearings at their institution are closed and that they should remain that way. Some institutions allow either the accused or both the alleged victim and accused to decide whether or not they would prefer that the hearing be open. Some added that the students rarely, if ever choose an open hearing for sexual misconduct cases. One institution indicated the accused has the right to request an open hearing but this has never happened at his institution. Again, it was also reiterated that the university not allow the hearing process to become too legalistic; that attorneys can be present but should not be permitted to actively participate in the hearing. It was the consensus of the judicial officers that if attorneys are allowed to fully represent their clients, then the process becomes more like a long court hearing than a university judicial hearing. They also indicated that requiring the students to speak for themselves helps them to better communicate what occurred and perhaps better understand what behaviors were inappropriate and why.

The language of the code should reflect the educational aspect of the university judicial process. Words such as responsible should be employed rather than guilty and sexual misconduct used instead of assault. Another respondent indicated that the term sexual misconduct was inappropriate because it trivializes the crime that was committed.

One judicial officer recommended that there be different people assigned to collect evidence and to decide the outcome. The judicial officer who recommended this was responsible for all aspects of the judicial process and felt the students would be best served if more than just the judicial officer was responsible for everything.

Another judicial officer recommended that it be clear in the student conduct code
that the police (university or city) are responsible for the investigation and that the judicial office is responsible for the adjudication process. This was not common among the institutions interviewed, however, the majority indicated that the judicial office (often in conjunction with the university police) did investigations into the cases brought to them. Another judicial officer recommended having a statute of limitations for the reporting of sexual misconduct allegations.

Standard of proof was the fourth content theme determined from the interviews. Two judicial officers recommended that their institution consider lowering their burden of proof from “clear and convincing” evidence to “preponderance of the evidence.” These judicial officers added that the issue is still undecided because the panel must feel assured the act was committed in order to find responsibility; lowering the burden of proof may increase findings of responsibility but also may make the panel feel uneasy about finding responsibility without more proof. It was also recommended that the burden of proof always remain with the complainant; the accused must be considered and treated as though he/she is innocent until proven responsible.

The fifth content theme indicated was need for increased and/or improved training for the judicial affair’s office staff and for judicial panel members. An equal amount of the judicial officers at both the smaller institutions and the larger ones indicated this was needed at their institution. The institutions indicated the types of training needed deal with increasing sensitivity, reducing biases (toward underage drinking, drug use, promiscuity, etc) and acquiring specific knowledge necessary for handling cases of sexual misconduct, such as, consent.

In the sixth content theme it was recommended by several judicial officers that their student conduct codes have an improved description of student’s rights. The judicial officers again emphasized the importance of not only having clearly defined student rights, but that these rights are put into practice and readily available for students to read. Many judicial officers did indicate it is difficult to balance protecting the rights of
both students, being sensitive to the special needs of the complainant, and provide all of the services needed by both individuals.

The seventh and final content theme extracted from the interviews was the importance of offering extensive and quality counseling to both the complainant and the accused students. Several judicial officers indicated a need for the availability of more counseling services; even more indicated the need to better inform students of all the services that exist for them. Several judicial officers indicated that counseling should be included in the sanctioning phase of cases dealing with sexual misconduct; they felt that both the accused student and the community would be better served if the students found responsible received help dealing with their issues, and not just a punishment of removal from the institution. The responses, understandably, mirrored the weaknesses discussed by each judicial officer.

*Question Ten, part B*

What do you feel are the key components of a model student conduct code regarding sexual misconduct?

The responses to this question were essentially the same as the themes present throughout the interview. What each judicial officer stated as strengths and/or recommendations of their code, they listed as components of a model student conduct code. One judicial officer succinctly summed up what essentially all of them were saying by stating that you start with what’s required, the Clery Act, then add sensitivity, fairness, protection of both of the students’ rights and empower the victim to take control over a situation in which they had little or no control when the misconduct was occurring. Many judicial officers added components such as assuring the code is simple, well-defined and structured, easily accessible, not over-legalized, and complete with examples of misconduct. The code should also contain counseling, medical, and legal services and options and a statement indicating the institution has zero tolerance for sexual misconduct or assault of any kind.
Several judicial officers also stated the most important thing was how the code was administered. Therefore, the judicial affairs staff and hearing panel members needed to be trained and very familiar with the special needs of sexual assault cases. They should also be highly committed to learning all that they can to better understand and adjudicate this kind of violation.

Question Eleven

Based on your experience, is the university judicial system an effective mechanism for addressing sexual misconduct violations? Why or why not?

The overwhelming majority of judicial officers stated that they believed the process to be effective (producing a desired result, (Webster’s Dictionary, 2001))—for the purpose it is meant to serve. Three institutions that were not placed in the “yes” category stated “yes and no” for their response, and two “no” responses stated that it can be effective but overall it is not especially effective.

At least ninety percent of all respondents, whether they answered that the process is effective or not, expressed a high amount of frustration with the lack of evidence present or an inability to effectively collect evidence. Again, nearly all respondents commented on the use of alcohol and/or drugs in the overwhelming majority of these cases and the tremendous roadblock this created when trying to adjudicate the complaint.

One judicial officer stated that in one case, a woman was at a party drinking alcohol and smoking marijuana of her own free will. When she awoke in the morning she was in bed with two men and noticed many used condoms. The woman indicated that she believed she consented to having sex with one man but not the other, but that she was not sure with whom she consented to have sex. This judicial officer expressed concern for the woman, but also expressed frustration because there was no clear evidence with which to adjudicate, not even from her memory.

Another key point addressed by many judicial officers was that the process is
effective, but seldom utilized by students and if the process is not utilized, then it is not effective.

There were other content themes determined with regards to the effectiveness of the code. The educational focus of the process and the sanctions were believed to be effective, as was the timeliness of the process (especially compared to the criminal justice system). The process as a mechanism to aide in the healing of the victim was a theme. It was stated that even if the hearing panel, or judicial affairs office was unable to reach a decision of responsibility on the part of the accused, most judicial officers believed the process of empowering the victim, letting his/her story be told to impartial people, and having the conversation with the accused of why he/she may have acted irresponsibly was healing and educational for both parties.

Another common content theme was that the process was better than nothing. It was stated that the process itself has inherent limitations, but some students have no other option, and there can be things learned from the university judicial process, so it is better than nothing at all. But, the judicial officers added, the process needs to be kept in proper perspective; it is an educational process in an educational institution, it is not a criminal process and should not be treated as such. The university's maximum “sentence” is expulsion, not prison. But the university can also offer options that the criminal justice system cannot offer, such as quickly removing a person from the community if he/she is deemed a threat, and it can offer psychological help for both parties that is not available through the criminal court. One respondent even stated that the university process is more effective than the criminal process since the lower burden of proof can make more people accountable for their actions.

Conclusion

The interview analysis was extremely informative. It was interesting to note the similarities between the responses to question seven, reasons why the students chose the
university judicial process, and question number eight, the strengths of the student conduct codes concerning sexual misconduct; the responses were very similar. It is reasonable to assume that this occurred primarily because the strengths of the code are the reasons that students would choose to use the university judicial process; and the similarities could also be, in part, because these responses were at the forefront of the minds of the respondents as they had just answered question number seven. Regardless, it is evident, upon analysis of the interviews, that the majority of judicial officers do feel their student conduct codes have several strengths that benefit students involved in situations involving sexual misconduct.

Question nine made it evident that there are frustrations amongst many judicial officers regarding the handling of sexual misconduct cases. There are areas in which many judicial officers would like to see improvements and areas where they feel the process is working. It is apparent that many are taking matters involving sexual misconduct into consideration and are actively working towards improvement of their student conduct codes and/or processes regarding sexual misconduct.

Summary

In this chapter, the student conduct codes of various 4-year colleges and universities were examined and analyzed. A telephone interview of the judicial officers at twenty seven of the thirty-two institutions was conducted and the transcriptions from which were also examined and analyzed.

Within the thirty-two student conduct codes, ten themes were extracted and analyzed, denoting the similarities, differences, strengths and weaknesses of the various codes. The twenty-seven interviews were analyzed question by question (with exception of the demographic questions that were noted in a table format), by determining the major themes present in the responses and analyzing those themes.
CHAPTER V

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

Summary

This study examined the current student conduct codes and perceptions of university judicial officers of the adjudication of sexual misconduct allegations. The purpose was to examine the current literature, court cases, model student conduct codes and university/college student conduct codes and compare them to model student conduct codes. This study also examined the perceptions, through interviews, of university judicial officers regarding the effectiveness of current disciplinary procedures employed by colleges and universities with regards to sexual misconduct/assault on or near campuses.

The issue of handling sexual misconduct allegations on college campuses is a concern that many institutions are attempting to rectify. The absence of specific guidelines or a model of policies, procedures, and services that should exist in the student conduct code regarding sexual misconduct has left many institutions on uncertain ground. They wonder what can be done to better serve the needs of their students and the university community.

This study was, in part, to determine whether or not the university student conduct codes contain the information necessary for a student to know his/her responsibility regarding appropriate conduct. Additionally, this dissertation examines whether or not the institutions clearly state the process for reporting and adjudicating any sexual misconduct, the services provided to students, and it educates them of these services.
This study was also to determine the perceptions of judicial officers; if they believed the university process was effective, and if not, what could be done to improve it.

Research Questions

The questions explored in this dissertation included current policies and procedures utilized by colleges/universities for adjudicating complaints of student sexual misconduct. The questions examined the strengths and weaknesses of the current student conduct codes. They also examined procedures utilized by the institutions, the strengths and weaknesses of these procedures, and recommendations offered by university judicial officers with regards to the student conduct codes. Also, the questions explored the appropriateness of the university student conduct code for adjudicating student sexual misconduct.

Methodology

Thirty-two university student conduct codes were examined, analyzed, and measured against model codes to determine the current policies and procedures utilized to adjudicate student sexual misconduct and to determine the strengths and weaknesses of these codes. Interviews of most of the judicial officers at the same institutions were conducted, again, to determine the strengths and weaknesses of each code and the recommendations these professionals could make to improve the student conduct codes with regards to sexual misconduct. The review of literature in chapter two discussed the information that has been produced regarding sexual misconduct at the university level, and included a review of court cases pertaining to this subject.

Chapter three analyzed the various research techniques utilized in this study. The institutions with ten or more “forcible sexual assaults” in 2002 were determined, using the Internet, and the student conduct codes from the institutions fulfilling the selection criteria were obtained. A telephone interview was used to obtain the responses from the judicial officers.
The format used for analyzing both the student conduct codes and the interviews was to extract the content themes found within the codes and interviews, and to compare these themes to each other and to the model codes. The analysis of the student conduct codes determined themes and then further divided the results into public versus private institutions for contrast and comparison. The telephone interviews were analyzed question by question.

Findings

Adjudication Procedures

The first research question is "What procedures are utilized for adjudicating violations of the student conduct code?"

The adjudication procedures employed by colleges/universities were similar at every institution examined. To initiate the process a written complaint must be filed with the Judicial Affairs office, an investigation will ensue and the accused will be notified of the complaint in writing. If the matter cannot be resolved informally then a formal hearing will ensue.

The hearing process itself varied somewhat by institution. Most universities used a mixed hearing panel of students, faculty and staff. Some institutions, however had panels comprised exclusively of students and others exclusively of faculty members. Most aspects of this process were clearly explained by the judicial officers in the interview and clearly outlined in the written student conduct codes. There were, however some practices employed by the judicial officers at many institutions that were not indicated in the codes. Most written codes gave no indication that both the complainant and accused would discuss the matter with the judicial officer and be given their options, including going to the hospital, police, or counseling services. Most judicial officers, however, indicated that this is a common practice. Some written codes did not discuss the investigation process, but the universities all have them and explain them to the students.
Sexual Misconduct

The second research question is, “Are there special procedures for dealing with sexual misconduct in the student conduct codes?”

Only five of twenty-seven judicial officers reported that they have separate procedures in their student conduct code for handling sexual misconduct cases. This number is lower than the number of “specific” sexual misconduct policies found in the student conduct codes which was seventeen out of thirty-two. This could indicate a different perception of “separate procedures” between the researcher and the respondents. Many institutions have a definition for sexual misconduct/assault, and some place sexual misconduct in the more general term of physical assault, or acts that threaten the health and safety of another person. The institutions that reported having different procedures for sexual misconduct cases generally had a specific definition for sexual misconduct/assault, a definition of consent and/or what constitutes sexual misconduct.

Through the analysis of the interview process, it seems clear that there is uncertainty amongst many judicial officers on whether or not to specifically define sexual misconduct in the code. Some are unsure whether or not to explicitly define consent, and whether or not to allow for some special procedures in the handling of sexual misconduct cases. Some judicial officers were adamant about the importance of having a broad code to encompass all physical or sexual misconduct. Those favoring a specific code felt it better explained to students what constitutes acceptable and unacceptable behavior which could help prevent or better adjudicate the offense. Many, however, seemed unsure what would work best for their institution and indicated it was something worthy of consideration.

Some student conduct codes contained examples of what constitutes sexual misconduct which can help students better understand and correctly identify sexual misconduct if it occurs. Some contained differences in the hearing process itself; such
as, allowing the complainant to be present throughout the entire hearing, having separate rooms for the complainant and accused or a partition separating the two, and some stated that sexual misconduct cases are required to go through a formal hearing, they cannot be adjudicated through informal means. These differences, although small, can make the process less intimidating for all involved while still clearly indicating the seriousness of the complaint.

What most institutions did concur was sexual misconduct is a very sensitive issue and needed to be handled as such; with care and concern for both parties, maintaining the due process and privacy rights of everyone involved, and by trained professionals who understand the intricacies of this type of offense.

**Strengths of Code**

The third research question was “What are the strengths of the student conduct code with regards to addressing sexual misconduct at the university?”

With regards to the student conduct codes that were analyzed, the strengths of the majority of the codes were: the acknowledgement of the students’ rights to due process and privacy, and the explanation of the judicial process for filing a complaint, the hearing process, sanctions imposed and the appeals process. These content themes were generally stated clearly in nearly all of student conduct codes.

The strengths perceived by the judicial officers were manifested through the themes consistent throughout the interviews. The first strength was the university’s definition of sexual misconduct/assault. Although opinions varied as to which was more effective, specific or broad definitions, many judicial officers felt that their definition of it, whether specific or broad was a strength. It was surprising to learn that institutions could vary so greatly and yet all feel their definition was one of their greatest strengths. Another strength expressed by several judicial officers was that their code was well written and well-outlined. Additional strengths include: handling of complaints on a case-by-case basis, the flexibility of sanctions imposed, the ability to use many
resources and programs within the institution, allowing the complainant to be present throughout the entire hearing (at some institutions), and the protection of rights that the code provides.

Weaknesses of Code

The fourth research question was “What are the weaknesses of the student conduct code with regards to addressing sexual misconduct at the university?”

A weakness of the student conduct codes was the lack of written information regarding referrals to any agencies, such as the hospital, police, counseling services, crisis centers, centers for women and men, or advocate services, in the event of a sexual assault or other misconduct.

Another weakness of the student conduct codes was a lack of educational services provided, prevention techniques or written steps to follow in the event of a sexual assault.

The last weakness found in many student conduct codes was the absence of contact information clearly written within the code, to contact the agencies stated above as well as to contact the judicial affairs office. Some universities had contact information for the Judicial Affairs office or Dean of Students office clearly stated on the front page of their code or somewhere within, but many, although they may state who to contact, did not include phone numbers. And similarly, some institutions had names and phone numbers for the agencies that can assist students who have been sexually assaulted, some have only the names of agencies, and some have no agencies stated at all.

Several institutions indicated they had recently updated their student conduct codes, and, subsequently, they did not feel weaknesses existed in the code itself. It was also indicated frequently the weaknesses that existed were due primarily to circumstances out of the control of the university. Many sexual misconduct allegations stem from incidents that occur while students are under the influence of drugs and/or alcohol, and
that inherently diminishes the students' ability make sound decisions and to recollect the incident clearly.

Another theme relating to the perceived weaknesses of the student conduct codes was, interestingly, the definitions of sexual misconduct/assault in place at the institution. This was an area that there was an indication of uncertainty as to what is the most effective way to define this subject; it is an area that should be explored.

Other weaknesses noted that were similar between the institutions were: the processes utilized to adjudicate sexual misconduct violations, the need for more training of the hearing panel members and employees in the judicial affairs office, and the need for greater education of students regarding sexual assault; what constitutes it and how to avoid it (both parties). More education is also needed to teach students about consent, the affects of alcohol on judgment in these situations and on the judicial process itself; to improve awareness of the existence of the process (and other helpful agencies).

*Recommendations of Judicial Officers for Improvement of Student Conduct Code*

The fifth research question asked, “What recommendations are there to strengthen the university discipline procedures with regards to addressing sexual misconduct at the university?”

Logically, the recommendations provided generally mirrored and were potential solutions for the weaknesses indicated by each judicial officer. Nearly all of judicial officers indicated a need to better educate students on the policies, procedures, definitions, and support services available relating to sexual misconduct/assault.

Another recommendation made was that institutions re-visit and/or re-structure the institutions policy and/or definitions of sexual assault/misconduct or assault in general; whatever the institution proscribes to with regards to handling this issue. Other recommendations included improving the hearing process, reducing the burden of proof from “clear and convincing” to “preponderance of evidence”, increasing/improving the training for the judicial affairs office staff and for judicial panel members, improve the
description of students’ rights, to offer extensive and quality counseling to both the complainant and the accused students.

**Effectiveness of Code**

Research question number six asked, “Is the university judicial system an effective mechanism for addressing sexual misconduct allegations?”

Based on the analysis of the student conduct codes and the responses of the judicial officers, the university code is effective as an option for the adjudication of sexual misconduct allegations. Twenty-two out of twenty-seven judicial officers interviewed indicated that the process is effective for the purpose it is meant to serve; an educational one. The university judicial process is not meant to replace the criminal court system, but rather as an additional means whereby to hold students responsible for misbehavior that occurred within the university community and its members. The minimum level of accountability for those students found responsible is generally a warning or reprimand, and the “maximum sentence” is expulsion, with a variety of educational sanctions in between.

The university utilizes a more conversational technique in its adjudication process, whereby it hopes that both parties can learn from the incident, and counseling services are nearly always available for both the complainant and the accused; sometimes it is used as part of a disciplinary sanction as well. The university judicial process has its limitations; it does not have the same investigative capabilities that the criminal court system has, nor the funding or staffing necessary to investigate as intensely as the criminal system. But, it was indicated that since the purpose of the university system is to educate students in the matter and not to put them in prison, it is not necessary to follow the same strict guidelines as the criminal system.

The judicial officers indicated the university process is appropriate, as well, in that it has the capability of quickly removing someone who is a foreseeable threat to the complainant and/or the community, which the criminal court system cannot do, at least
not quickly. But the main reason that the university system is an appropriate option for adjudicating sexual assault is the psychological assistance it offers to both parties; this is something that the criminal system rarely, if ever, offers, but in the situation of sexual misconduct/assault, can be of great value.

Conclusions

The themes present in both the student conduct codes and the interviews were relatively consistent. However, in many institutions, there were clearly practices followed by the judicial officers that were known and consistent, but not written in the student conduct codes, especially regarding referrals to other agencies that can be of assistance to both parties involved in cases of sexual misconduct/assault. There were few differences detected between public and private institutions in the written student conduct code analysis or between institutions in the interview analysis. It appears that in practice, most institutions treat sexual misconduct similarly, even if in writing more differences are detected.

The interview questions seemed to spark some additional reflection on a topic that is already receiving much attention. It was evident that most institutions are currently considering or have recently considered the issue of student sexual misconduct and the most effective mechanisms for addressing it.

As a researcher, coming into this study, I was unsure as to why students chose the university judicial process to adjudicate a crime as severe as sexual assault or rape. At the conclusion of this study, not only do I understand why students would choose this mechanism, but, if students are sexually assaulted, I highly recommend that they do. The university judicial system can not only be effective in meeting the immediate needs that a student may have regarding his/her safety and welfare, but it can also meet his/her needs psychologically and emotionally through the process and through the various crisis and counseling services available.
As a student, until initiating this study, I had no idea that any of these services were available, nor would I have thought to look to the university to help me had a situation occurred. In the codes that broadly state that any physical assault or acts that threaten the safety welfare of others is not permitted, and make no reference anywhere regarding sexual assault or what to do if assaulted, students cannot know that these services are available to them unless they seek help and are then referred to the university services.

As both a researcher and a student, upon reading the student conduct codes that explained sexual misconduct/assault; that explained, even broadly, the definition of consent and what role alcohol plays with regards to consent; that explained what to do if assaulted, and that explained all of the services and people available to help, there was a strong sense that the university could do something to help students and that they cared. Sexual misconduct of any kind is a sensitive and serious issue, and one that is highly under-reported (Belknap, 1996; Regan, 1996; Finley & Corty, 1993). If students are to come forward, they need to know that, not only can the university help them through the many programs and agencies that it has available, but also that the institution and people in it care.

Researcher’s Recommendations for Code Improvement

There are steps that universities can take to improve their student conduct codes regarding sexual misconduct and/or their judicial processes in order to improve the effectiveness of the each and to reduce lawsuits.

1. Colleges and universities need to be sure that students’ rights are incorporated into their student conduct code and followed in every step of the judicial process, and that they adhere to the policies and procedures contained within their student conduct codes.

2. Student conduct codes should be clearly written, separating each area with headings and putting bullets or space between each item to clearly delineate what is being stated; more user friendly.
3. Create some uniformity nationally. Information should be given as to where to locate the student conduct code on the internet. There should also be some level of uniformity of definitions and judicial processes with, of course, allowing leeway to tailor them to the specific needs of the institution.

4. Separate codes do not appear to be necessary when adjudicating sexual misconduct allegations, but some acknowledgement should be made regarding the sensitivity of the issue. The complaint should be treated with fairness and sensitivity. There should also be some explanation of what constitutes sexual misconduct and that being under the influence of alcohol and/or drugs is not an excuse or defense for committing it.

5. Educational and counseling services, as well as other sexual assault assistance agencies, should be clearly listed in the student conduct code. Telephone numbers should be included. Guidelines or procedures that an alleged victim of sexual assault should follow to preserve evidence, report a crime, and receive assistance should be clearly delineated.

6. Contact information to the Judicial Affairs office or Dean of Students should be clearly presented within the code.

7. Improve student awareness of sexual misconduct/assault. Widely distribute information regarding definitions, policies and procedures dealing with sexual misconduct; create a mandatory seminar for incoming students discussing these definitions, policies, and procedures and well as the role alcohol and drugs play in most occurrences of sexual misconduct; and create posters and pamphlets that describe these issues and how/where to find help if sexually assaulted.

Recommendations for Further Research

The scope of this dissertation was limited to thirty-two student conduct codes and twenty-seven interviews. It included only those institutions with at least 5,000 students.
Additional research could be done to include more institutions and/or institutions with under 5,000 students.

Further research is needed in comparing the occurrence of on-campus student sexual misconduct and off-campus misconduct with premises that fall under the jurisdiction of student conduct codes. Many offenses of sexual misconduct by students occur at off-campus premises. Asking if off-campus locations should be under the jurisdiction of university conduct codes would also lead to useful information for university officials.

This research determined some institutions tend to choose broad definitions of assault or sexual assault while other institutions choose more specific definitions. This dissertation was limited and only hinted at this trend. Further research to determine if and why this trend exists could yield results of value to those who are involved in the university judicial system.

This research also highlighted that private institutions have separate procedures to adjudicate sexual misconduct, compared to public institutions that utilized the same code for all student misconduct. Further research could be done to specifically examine this difference.

It was evident that some institutions advocated student conduct codes specific to sexual misconduct while others clearly proscribed to general student conduct codes. This schism could be researched further.

The lens that was chosen through which to collect and analyze these data was that of the judicial officer. It would be interesting and beneficial to determine the effectiveness of the student conduct code and university judicial process through the perspective of students who have utilized the process for the adjudication of sexual misconduct/assault.

Many judicial officers made reference to the need for better training for themselves and their staff to better adjudicate cases of sexual misconduct and to better serve the specific needs of students regarding the sensitivity of this offense. Further research could be done to examine the administrative component of the student conduct code,
with specific reference to the training of judicial officers and their staff regarding the handling of sexual misconduct cases.

Research on the best practices for training judicial officers and their staff would be beneficial as well, as would research on best practices on improving student awareness.

The judicial officers also indicated that a code was only as good as the administration of it. More research is needed regarding the implementation of the code in sexual misconduct cases.

It was indicated by various judicial officers a full hearing is required in the case of sexual misconduct, the institution does not allow the matter to be resolved through informal means. Why this requirement exists for sexual misconduct cases and not for others or all cases could be investigated.

For those institutions that do have separate policies for sexual misconduct, it would be interesting to research whether or not these differences weigh in favor of either the victim or the accused.

Lastly, many of the same weaknesses were noted throughout the analysis of the data. A research study could be conducted to further examine these weaknesses and what could be done to address them.

Conclusion

Sexual misconduct is an issue on the fore-front of concerns relating to student misbehavior in institutions of higher education. Institutions nation-wide are dealing with this issue aggressively, but problems still exist both within the student conduct codes and within the administration of these codes. The number of cases of students going to court to contest the university's adjudication of their sexual assault case is on the rise despite the efforts of some universities to improve their codes, policies and procedures. All colleges and universities should examine their codes, if they have not done so already, to assure they are in compliance with all legal guidelines, especially the laws.
relating to students rights. They should ensure the fairness of their student conduct
codes, both in writing and in practice.

The university judicial process is an effective mechanism for addressing student
sexual misconduct, as long as the process is fair, follows legal guidelines of due process
and privacy, and provides the protections and educational outcomes for which the
process was intended.
APPENDIX A
INTERVIEW INSTRUMENT

DESCRIPTION OF STUDY

NAME: Kimberly M. Hollingshead
DEPARTMENT: Higher Educational Leadership
TITLE OF STUDY: Critical Analysis of University Conduct Codes as a
Mechanism For Remedying Student Sexual Misbehavior.

1. SUBJECTS

The subjects of this research interview are the judicial officers at the four-year
universities and colleges that reported 10 or more “forcible sex offences” in their 2002
crime data report to the U. S. Department of Education pursuant the Student Right to
Know and Campus Security Act (20 U.S.C. 1092) of 1990, which was renamed the
Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act in
1998. This is not a vulnerable population, and the subjects will not be paid. As the
subjects were selected via statistical reports and their role as judicial officer, as opposed
to random selection, it was not possible to assure gender equitability.

2. PURPOSE, METHODS, PROCEDURES

The purpose of this study is to gather the opinions of the judicial officers of those
universities that have, as shown by their reported crime statistics, dealt with allegations
of sexual misconduct at their institution. The questions deal with how sexual misconduct allegations are handled at each institution and the opinion of the judicial officers as to the effectiveness of the student conduct code in resolving allegations of sexual misconduct as well as the effectiveness of the university judicial process in adjudicating sexual misconduct claims.

The research method used to gather this information will be a telephone survey. The survey will have approximately fifteen questions and should take one-half hour to forty-five minutes.

The researcher will contact the judicial officers through an introductory letter, in which the study will be explained, including all measures that will be taken to ensure confidentiality and that they are free to disclose or withhold any information they choose. The researcher will follow the introductory letter with a telephone call attempting to secure an interview with the judicial officer. If the judicial officer agrees to participate, an appointment will be scheduled for the interview. A confirmation letter will be sent to the participant, thanking him/her for his/her time, confirming the appointment time and date and reviewing study and confidentiality procedures. An interviewer from Canon Research Center will then contact the participant at the time and date scheduled and will conduct the interview. The focus of the interview will be on the perceptions of the Judicial Officer regarding the effectiveness of his/her student conduct code relating to sexual misconduct based on the experience the officer has had handling this topic. We have determined that the officer has this experience based on the number of reported sexual assaults at his/her university, but we are not interested in the statistics of the institution or any information relating specifically to the institution. When the interviews are complete, all personal identifiers will be removed by Canon Research Center and the information will be turned over to the researcher for analysis.
3. RISKS

There are minimal foreseeable risks to the subjects from participating in this study. The names and all other identifying and personal information will remain confidential. Interviewers from the Canon Research Center will be utilized for their knowledge and expertise in interviewing as well as to ensure anonymity and reduce risk factors. The interview will be fully explained to the participants verbally and in written form prior to the study and explained again during the interview. Participants can choose whether or not to respond to the questions and their responses will be analyzed and reported without linking the response to the respondent in any way. Potential risks are discomfort in discussing the issue and possibly boredom if the topic is not of interest to the participant. Another risk is loss of time on behalf of the subject for participating in the study.

4. BENEFITS

Society can benefit from students who will hopefully leave college with a better understanding of sexual misconduct and how to avoid being involved in situations of sexual misconduct. Colleges and universities can benefit from this study by reading the information presented and considering the effect that the opinions and suggestions presented could have on their institution and by possibly implementing some recommended procedures in their policies. The benefits to the participants for taking part in this study are the personal satisfaction that they will feel for adding to the general body of knowledge in this area, and that their responses could potentially lead to the refinement of university policies and procedures for dealing with sexual misconduct.

5. RISK-BENEFIT RATIO

It is estimated that the potential benefits to the society in general, institutions of higher learning and to the participant outweigh the risks of discomfort, boredom and
loss of time. Participants may disclose or withhold information as their comfort level permits, and the confidentiality of the respondents will be maintained.

6. COST TO SUBJECTS

The only costs incurred in this study will be the time required by the participant for both the initial phone call and for the interview itself. Some additional time may be lost by the participant to review his/her institutional policies regarding sexual misconduct and to gather any information the respondent feels is necessary to complete the interview.

7. INFORMED CONSENT

Since this is a telephone interview, informed consent will be explained and received via the telephone call from the interviewer. The interviewers at the Canon Research Center have standard statement to obtain informed consent and this will be utilized in this study.
Dear Judicial Officer/ Discipline Officer/ Dean of Students,

Hello. My name is Kimberly Hollingshead and I am a doctoral student at the University of Nevada—Las Vegas. I am currently writing my dissertation in which I will critically analyze university conduct codes as a mechanism for remedying student sexual misconduct. As part of my research, I would like to speak to university Judicial officers/Dean of Students who have had some experience handling allegations of sexual misconduct. Because your institution reported 10 or more “forcible sexual assaults” in 2002, I thought that you may have some experience dealing with these allegations. I have no interest in the statistics of your institution or any other information specific to your institution, but rather in your knowledge of the effectiveness of your student conduct code relating to sexual misconduct based on your experiences handling allegations of it. All responses will be analyzed and reported, but they will not be connected in any way to the respondent.

I believe that gathering the knowledge of those who deal first-hand with this issue can provide vital information and insight that could help all Higher Ed. Institutions evaluate their student codes and judicial processes and, perhaps, even find ways to improve them. I am writing in hopes that you will schedule an appointment with me to conduct a telephone interview regarding your opinions as to the effectiveness of your student conduct codes and judicial process dealing with sexual misconduct that will last approximately 30 minutes. All of the information you provide will remain confidential. A university research center will be conducting the interview and will remove all identifying information prior to giving me the tape-recorded interview. The center will store the information in locked facilities for three years and then it will be destroyed.
I will be calling you within a week or two to schedule the interview appointment if you are willing to participate. The questions are open-ended and opinion-based. You are free to include any information or choose not to respond to questions based on your discretion.

I appreciate your consideration in this matter and hope you will participate; your knowledge, insight and opinions are very important to me and my study.

Sincerely,

Kimberly Hollingshead
Ed. D. Student, UNLV
And

Dr. Gerald Kops
Dissertation Chairperson
Educational Leadership Professor
University of Nevada-Las Vegas
TELEPHONE INTERVIEW APPOINTMENT

Hello. I am Kimberly Hollingshead, a doctoral student at UNLV, and I sent you a letter requesting your participation in an interview discussing your knowledge on the student conduct code at your institution relating to sexual misconduct. Did you receive my introduction letter? Have you been the Judicial Officer/Dean of Students at this institution since at least January of 2002? If no, thank them for their time and end call.

If yes, “great, would you be willing to participate in the interview?

If yes,

Thank you so much! Is there any day next week that is good for you? What time is best?

Great. How about _________ (day) at _________ (time)?

Wonderful. The interviewer will be calling you on _________ at _________ for your interview. Again, this will be tape-recorded if that is ok, to ensure accurate reporting of your responses, and all information will be kept confidential. I will send out a confirmation letter today with the time and date and a short review of my study.

If he/she did not receive the letter or did not read it summarize the letter and request participation. If they agree, schedule the appointment. If they disagree or are unsure ask if I can send them a letter and call them back in a week.

If he/she declines to participate in the survey, thank them for their time and end call.
Confirmation of Interview Appointment

Hello again, _____________, this is just a small reminder of our scheduled interview on ____________ at __________.

The interview questions will be related to your institution’s student conduct codes and judicial process with regards to sexual misconduct, so you may want to have a copy available for reference. Some questions are regarding procedures and policies in place at your institution, but primarily they will be opinion-oriented, based on your experiences and perceptions. Your responses will remain confidential and protected by the Canon Research Center in Las Vegas, NV.

Again, thank you so much for your time, knowledge and experience!

Sincerely,

Kimberly Hollingshead
Doctoral Student
University of Nevada—Las Vegas
Department of Educational Leadership
Hello, _________________, my name is ____________. I’m calling from the University of Nevada—Las Vegas, on behalf of Kimberly Hollingshead, with whom you spoke and scheduled this appointment. Thank you for agreeing to this interview, it will take approximately 30 minutes, and your responses will remain confidential. Are you ready to continue?

If yes, begin interview

IF NO

Would you like me to hold for a moment or would you like to Schedule a callback? For _______________day_____________time.

OR

Refused to participate
SURVEY OF UNIVERSITY JUDICIAL OFFICERS

Demographic Questions

1. How long have you been a judicial officer at your current 4-year college/university?

2. Have you served as a judicial officer at any other 4-year colleges/universities
   If so, for how long?

3. In the time that you have served as judicial officer, approximately how many times
   have you had to deal with allegations or complaints of
   a) sexual misconduct (all forms of complaints, excluding sexual harassment)
   b) date rape (more specific than sexual misconduct, date rape only)
   c) attempted date rape?

4. What is the approximate number of students attending your institution?

Campus Sexual Assault Procedures

5. What procedures do you follow when a student seeks to file a sexual misconduct
   complaint?
   a) unprompted answer
   b) What, if any, policies do you have regarding referrals to other government
      agencies?
   c) prompts such as—explain their options, such as filing a police report, going to
      hospital if not too late, filing a written complaint, identifying any witnesses,
      preserving artifacts (or evidence)
   d) additional prompts—explain the university judicial process for this offense

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
6. Do you have separate procedures in your student conduct code for handling sexual misconduct cases?
   a) unprompted answer
   b) prompt—if yes, how does the procedure differ with regard to handling such complaints?

7. Based on your experience, why do students choose the university judicial process as a remedy for sexual misconduct?
   a) unprompted answer
   b) prompts—remove accused from university, lower burden of proof, improve healing process (better to tell someone, than no one), fear of large, public trial but want some justice, don’t feel the crime was serious enough?

8. Based on your experience, what are the strengths of your student conduct code with regards to sexual misconduct?
   a) unprompted answer
   b) prompts—its written clearly, defines sexual misconduct, how to file a complaint, explains the judicial process, hearing process and sanctions, discusses preserving evidence, provides counseling information, discusses the option of filing police report, offers timely response/resolution

9. Based on your experience, what, if any, weaknesses exist in your student conduct code regarding sexual misconduct?
   a) unprompted answer
   b) prompts—needs to be updated, code is too restrictive to allow for certain hearings to take place, improve student awareness techniques, better define policies and conduct expectations, the format or location of topic in code.
c) what problems/concerns, if any, do you see nationally with the university judicial process as a mechanism for remedying sexual misconduct?

10. What recommendations would you make to improve your university judicial procedures regarding sexual misconduct?
   a) What do you feel are the key components of a model student conduct code regarding sexual misconduct?
   b) prompts such as—simplify it or make it more structured, clarify procedures, improve investigation process, hearing process or hearing panel, resolution process, penalty phase or sanctions
   c) additional prompts—hearing, opened or closed; role that legal council plays in hearings, prevention tactics, reporting policies, types of resolutions, judicial process, types of sanctions.

11. Based on your experience, is the university judicial system an effective mechanism for addressing sexual misconduct allegations?
   Why or Why Not?
APPENDIX B
HUMAN SUBJECTS RESEARCH CERTIFICATION

Human Participant Protections Education for Res:
Completion Certificate

This is to certify that

Kimberly Hollingshead

has completed the Human Participants Protection Education for Research Teams online course, sponsored by the National Institutes of Health (NIH), on 11/22/2003.

This course included the following:

- key historical events and current issues that impact guidelines and legislation on human participant protection in research,
- ethical principles and guidelines that should assist in resolving the ethical issues inherent in the conduct of research with human participants,
- the use of key ethical principles and federal regulations to protect human participants at various stages in the research process,
- a description of guidelines for the protection of special populations in research,
- a definition of informed consent and components necessary for a valid consent,
- the roles, responsibilities, and interactions of federal agencies, institutions, and researchers in conducting research with human participants.

National Institutes of Health
http://www.nih.gov
REFERENCES

Legal and Research Aids


Court Cases

Brzonkala v. Virginia Polytechnic & State University, 169 F. 3d 820 (CA4 1999).


147


John Doe v. Gonzaga University, 143 Wn.2d 687; 24 P.3d 390; Wash. LEXIS 381 (2001).


Relyea v. State, 385 So. 2d 1378 (Fla. App., 4th Dist. 1980).

Thomas v. Union Pac. R.R. Co., 308 F. 3d 891, 893 (8th Cir. 2002).


Journals and Periodicals


escort, University cell phone was used; ‘no…players, recruits involved’.


Olsen, F. (2001). 3% of female students are victims of rape or attempted rape each year, report says. The Chronicle of Higher Education. Retrieved February 2, 2001, from chronicle.com/cgi2-bin/printable.cgi


Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.


Books


VITA

Graduate College
University of Nevada, Las Vegas

Kimberly M. Hollingshead-Aitken

Local Address:
9320 Canyon Shadows Lane
Las Vegas, NV 89117

Degrees:
Bachelor of Science, Biodynamic Kinesiology, 1994
University of Nevada, Las Vegas

Master of Education, Physical Education, 2000
University of Nevada, Las Vegas

Dissertation Title: Critical Analysis of University Conduct Codes as a Mechanism for Remedyng Sexual Misbehavior

Dissertation Examination Committee
Chairperson, Dr. Gerald Kops, Ph. D.
Committee Member, Dr. Gerald Landwer, Ph. D.
Committee Member, Dr. Paul Meacham, Ph. D.
Graduate Faculty Representative, Dr. Porter Troutman, Ph. D.