

NOTE

GENDER PARITY: THE INCREASING SUCCESS AND SUBSEQUENT EFFECT OF ‘ANTI-MALE BIAS’ CLAIMS IN CAMPUS SEXUAL ASSAULT PROCEEDINGS

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INTRODUCTION	467
I. TITLE IX.....	469
A. The Context of Campus Sexual Assault	469
B. Title IX and Sexual Assault	471
C. Legislative Direction	471
II. TITLE IX AND THE ACCUSED: AN OVERVIEW OF ANTI- MALE BIAS SUITS	474
A. Pre- <i>Twombly/Iqbal</i> : <i>Yusuf v. Vassar College</i> ...	474
B. Second Circuit: Presumption-Shifting Framework	477
C. Sixth Circuit: <i>Twombly/Iqbal</i> Standard	480
III. A PRO-PLAINTIFF PROPOSAL	481
A. Reconciling Second Circuit and Sixth Circuit Approaches	482
B. Why <i>Twombly/Iqbal</i> Pleading Alone is Insufficient.....	486
C. Plaintiff Presumption and Summary Judgment	488
IV. CRITICISMS AND LONG-TERM CONSEQUENCES.....	491
A. Social Stakes.....	491
B. Economic Costs	494
CONCLUSION	494

INTRODUCTION

The conventional narrative of sexual assault on college campuses typically focuses on the struggles of a victim seeking

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justice against a perpetrator¹—from Emma Sulkowicz carrying a mattress in protest of sexual assault at Columbia University² to the flawed police investigations against Florida State star athlete Jameis Winston.³ In recent years, however, a surge of Title IX claims have been promulgated by accused students—the alleged perpetrators of sexual assault—against their respective universities in federal courts. Indeed, more federal courts are allowing accused students to move forward with Title IX lawsuits against their respective schools on legal grounds such as violation of due process, breach of contract, and—for the sake of this Note—gender bias.⁴ Despite the increase in “anti-male bias” claims, the various circuit courts remain divided as to the standard under which to examine them: whereas the Second Circuit grants the plaintiff a burden-shifting “temporary presumption” with respect to pleading discriminatory intent,⁵ the Sixth Circuit adheres to the ordinary “plausibility” standard as required by the *Twombly* and *Iqbal* line of cases.⁶ This split with respect to the appropriate legal standard and, relatedly, the sufficiency of pleadings, raise practical concerns for accused students.

Part I of this Note briefly discusses sexual assault and the legislative and legal history of Title IX. Part II of this Note provides an overview of “male bias” gender-discrimination suits and focuses in particular on the recent decisions by the Second Circuit and Sixth Circuit. In Part III, this Note explains the discrepancy behind the circuit split and illustrates the ramifi-

¹ Throughout this Note, the term “victim” is used to refer to an individual who alleges that he or she has been sexually assaulted without passing judgment on the individual for his or her experience or endorsing the validity of his or her claims. The term “perpetrator” or “accused student” is used to refer to an individual who allegedly committed the crime without, again, assuming the truth of the allegations.

² See Roberta Smith, *In a Mattress, a Lever for Art and Political Protest*, N.Y. TIMES (Sept. 21, 2014), <https://www.nytimes.com/2014/09/22/arts/design/in-a-mattress-a-fulcrum-of-art-and-political-protest.html> [http://perma.cc/P5DM-2WWJ] (describing Sulkowicz’s project as “an artwork of last resort” after Columbia University found her alleged perpetrator of sexual assault not guilty).

³ See Walt Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), <https://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html> [http://perma.cc/AVT2-HA7Q] (reporting that neither the police nor Florida State University investigated the victim’s rape claims against Winston).

⁴ Samantha Harris, *Due Process Legal Update: More Students’ Lawsuits Move Forward*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Apr. 11, 2016), <https://www.thefire.org/due-process-legal-update-more-students-lawsuits-move-forward/> [http://perma.cc/4V47-S5QP].

⁵ *Doe v. Columbia Univ.*, 831 F.3d 46, 53–56 (2d Cir. 2016).

⁶ *Doe v. Miami Univ.*, 882 F.3d 579, 589 (6th Cir. 2018).

cations of applying one standard over another by pointing to similar arguments made within the Title VII employment context. This Note contends, further, that for the sake of maintaining consistency across jurisprudence and vindicating the goals of discrimination laws at large, courts should adopt the plaintiff-presumption approach as advocated by the Second Circuit and consider dismissal of non-substantiated claims at the later summary judgment phase. Lastly, in Part IV, this Note will address policy and legal implications of allowing gender-bias discrimination claims for the accused student, ultimately cautioning that “anti-male” bias claims should be treated similarly to other gender-discrimination claims.

I

TITLE IX

A. The Context of Campus Sexual Assault

For the purposes of this Note, the broad definition of sexual assault encompasses situations where a person is unlawfully coerced or physically compelled by another person to commit a sexual act. It goes without saying that the legal system should encourage sexual assault victims to report their experiences and achieve the justice that they deserve.⁷ Because sexual assaults are still largely unreported, statistics regarding sexual assault on and off college campuses may not fully reflect the nature of the issue. Only about 10% of all rapes in America are ever reported to the police and of these only 14 to 18% are ultimately prosecuted.⁸ Though law enforcement agencies throughout the United States are required to collect information on campus crimes, many experts believe these official crime statistics underestimate—possibly significantly—the prevalence of sexual violence.⁹ Some ascribe the low rates to

⁷ Cf. HEATHER B. GONZALEZ & JODY FEDER, CONG. RESEARCH SERV., *SEXUAL VIOLENCE AT INSTITUTIONS OF HIGHER EDUCATION*, (2016), <https://www.fas.org/sgp/crs/misc/R43764.pdf> [<http://perma.cc/ARW2-87CE>] (listing consequences for victims, including physical injuries, unintended pregnancies, sexually transmitted diseases, post-traumatic stress disorder, depression, suicidality, and substance abuse).

⁸ Emily Matchar, *New Campus Sexual Assault Legislation Is Not Enough to Prevent Another Florida State Scandal*, NEW REPUBLIC (Apr. 18, 2014), <https://newrepublic.com/article/117414/new-sexual-assault-legislation-wont-prevent-another-florida-state> [<http://perma.cc/9NA8-B7BA>].

⁹ Christopher Krebs & Christine Lindquist, *Setting the Record Straight on ‘1 in 5.’* TIME (Dec. 15, 2014), <http://time.com/3633903/campus-rape-1-in-5-sexual-assault-setting-record-straight/> [<http://perma.cc/CA2B-N8PM>].

“[p]rosecutors often only tak[ing] cases they can win.”¹⁰ Moreover, studies show that women between the ages of sixteen and twenty-four are raped four times as often as the national average for all women.¹¹ One reason for these statistics is that women in this age group tend to experience more rapes that fall into the category of “alcohol-related” rape or “acquaintance” rape. These types of rapes tend to be reported less by victims and are less likely to be prosecuted than “stranger rape.”¹² These “he said, she said” cases are often dismissed by the police and prosecutors.¹³

Women are typically thought of as the victims in these sexual assault cases, but men can also be at risk for sexual assault. Because so few men report sexual assault, information is limited about the prevalence and nature of the problem.¹⁴ Survey data suggest that up to 10% of acquaintance rape victims on campus are men, and college men are more likely to report experiencing unwanted kissing or fondling than sexual intercourse.¹⁵

Though all statistics should be regarded cautiously, a report by the independent risk management and insurance firm, United Educators, provides a baseline understanding of the scope and extent of current Title IX sexual-assault lawsuits.¹⁶ Its findings, based on 305 claims from 104 colleges between January 1, 2011 and December 31, 2013, note that almost

¹⁰ UNIV. OF KY. CTR. FOR RESEARCH ON VIOLENCE AGAINST WOMEN, TOP TEN THINGS ADVOCATES NEED TO KNOW QUESTION 7, WHAT PERCENTAGE OF RAPE CASES GETS PROSECUTED? WHAT ARE THE RATES OF CONVICTION? 1, (Dec. 2011), https://opsvaw.as.uky.edu/sites/default/files/07_Rape_Prosecution.pdf [http://perma.cc/P6C9-KGDP].

¹¹ Matchar, *supra* note 8. *But see* Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 11:53 PM), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html [http://perma.cc/7J73-X4NU] (questioning the methodology of government statistics regarding sexual assault, including the lack of comparison of victimization rates of students to non-students of the same age).

¹² Matchar, *supra* note 8.

¹³ *Id.*

¹⁴ RANA SAMPSON, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, PROBLEM-SPECIFIC GUIDE NO. 17, ACQUAINTANCE RAPE OF COLLEGE STUDENTS (Aug. 7, 2003), https://cops.usdoj.gov/html/cd_rom/inaction1/pubs/AcquaintanceRapeCollegeStudents.pdf [http://perma.cc/B6N9-9CVX] (stating that even current national data collection systems fail to capture information about rape of men, as the FBI's Uniform Crime Report (UCR) does not provide data on male rape victims).

¹⁵ *Id.*

¹⁶ *See* EDURISK, UNITED EDUCATORS, CONFRONTING CAMPUS SEXUAL ASSAULT: AN EXAMINATION OF HIGHER EDUCATION CLAIMS (2015), http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf [http://perma.cc/R3PF-53MA].

99% of the perpetrators were men while 94% of victims were women.¹⁷ Victims filed suit against their institutions in 68% of the litigated cases and accounted for 84% (or \$14.3 million) of the total payouts by the institutions.¹⁸ Perpetrators filed the remaining 32% of lawsuits against institutions, mostly in reaction to sanctions taken by the institutions against them.¹⁹ After negligence and breach of contract, Title IX claims—specifically focusing on “inherently discriminatory [policies and process] toward men” or alleging that the institution reached an unfair outcome against them to stave off adverse findings by the Department of Education Office of Civil Rights (OCR)—constituted the third-most frequent allegation made by perpetrators against institutions.²⁰

B. Title IX and Sexual Assault

In its final form, Title IX states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”²¹ The Supreme Court held that an individual has an implied private right of action to sue civilly to enforce his or her rights under Title IX, even though the statute does not explicitly provide for such action.²² In the sexual-harassment context, the Supreme Court ruled that schools could be held responsible for “student-on-student” harassment.²³ Schools are held responsible if the harassment, even if occurring only once, was “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”²⁴

C. Legislative Direction

In 2011, the OCR under President Obama released detailed guidelines in a now-notorious “Dear Colleague Letter,” explain-

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* (noting that 72% of perpetrators who sued the institution also sued the victim for defamation or slander, suggesting that, “for some perpetrators, litigation is a means to repair their reputation”).

²¹ 20 U.S.C. § 1681(a) (2012).

²² *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709–10 (1979).

²³ *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

²⁴ *Id.*

ing the requirements of Title IX as it pertains to sexual harassment and sexual violence.²⁵ While the letter clarified that it did not add requirements to applicable law, it provided “information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations.”²⁶ The letter and its subsequent Question and Answer companion document explained, among other topics, the proper notice and the appropriate evidentiary standard for investigations; moreover, the letter warned that non-compliance could result in a Title IX investigation and loss of federal funding.²⁷ Almost immediately, the Department of Education became inundated with Title IX investigations at college campuses.²⁸ Data show that the number of sexual-violence complaints increased from just 9 complaints in 2009 to 102 by 2014.²⁹ As of December 7, 2016, the OCR estimated there were 292 sexual-violence cases under investigation at 219 post-secondary institutions.³⁰

In 2017, the Department of Education under President Trump formally rescinded the “Dear Colleague Letter” and its companion text, asserting that the documents “created a system that lacked basic elements of due process and failed to ensure fundamental fairness.”³¹ The department’s rescission corresponded to growing public backlash against the 2011 let-

²⁵ See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER 1 n.1 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> [<http://perma.cc/87F6-ZXTW>].

²⁶ *Id.*

²⁷ *Id.*; OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<http://perma.cc/QM63-38AA>].

²⁸ Allie Bidwell, *College Sexual Violence Complaints Up 1,000 Percent in 5 Years*, U.S. NEWS & WORLD REP. (May 5, 2015, 5:03 PM), <http://www.usnews.com/news/blogs/data-mine/2015/05/05/college-title-ix-sexual-violence-complaints-increase-more-than-1-000-percent-in-5-years> [<http://perma.cc/E3C7-RSRP>].

²⁹ *Id.*

³⁰ E-mail from Tamara Merges, Customer Service, Office for Civil Rights, U.S. Dep’t of Educ., to author (Dec. 12, 2016) (on file with author).

³¹ Press Office, *Department of Education Issues New Interim Guidance on Campus Sexual Misconduct*, U.S. DEP’T OF EDUC. (Sept. 22, 2017), <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct> [<http://perma.cc/8GR8-9FZ6>]. The rescission of the 2011 “Dear Colleague Letter” and criticism by the Trump Administration have not, to date, impacted how courts analyze an accused student’s Title IX claim. Though some plaintiffs have relied on the rescission to argue that universities violated Title IX by conforming to the letter’s guidelines, courts have declined to give any weight to such arguments and have simply stated that interpretations of Title IX can change. See *Doe v. Colgate Univ.*, No. 5:15-CV-1069, 2017 U.S. Dist. LEXIS 180267, at *40 (N.D.N.Y. Oct. 31, 2017).

ter, as commentators noted students on both sides caught in a web of bureaucracy and overzealousness on the part of the administration to protect federal funding.³² Most notably, the new letter revoked the mandate that schools use the “preponderance of the evidence standard”—what critics described as too low of an evidentiary burden—and allowed schools to decide whether to use the higher “clear and convincing evidence” standard.³³ What remains, nevertheless, are the school’s affirmative duties to understand the allegations of sexual misconduct, respond “appropriately,” and take interim measures for the involved parties.³⁴

For some, Title IX’s ability to pursue perpetrators is “an opportunity to achieve the punishment and accountability denied to many under the current criminal law regime.”³⁵ Critics of the “Dear Colleague Letter” interpretation of Title IX, however, contend that these punitive measures blame the individual student rather than seek structural changes on a societal level.³⁶

³² For discussions about the impact of Title IX proceedings, see Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, ATLANTIC (Sept. 6, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/> [http://perma.cc/62LY-MLCT] (“[The alleged perpetrator’s] lawsuit describes the period that followed as one of extreme stress, during which he lost weight, contracted pneumonia, and was forced to drop two courses because the restrictions placed on him precluded him from attending class during his midterm exams . . . His lawyer asked for the hearing to be rescheduled [because of emotional collapse], but the school refused, so it went on without him. He was found not responsible for sexual misconduct.”).

³³ OFFICE FOR CIVIL RIGHTS, U.S. DEPT OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [http://perma.cc/VML7-FNFQ].

³⁴ *Id.*

³⁵ Erin Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365, 367 (2016) (discussing how some feminist legal theorists see Title IX’s punitive aspect as a victory).

³⁶ *Id.* (“[T]he prevailing interpretations of Title IX sacrifice structural critiques of the origins of gendered violence in favor of a myopic focus on individual responsibility as the key to remedying the problem of campus sexual assault. It is a largely reactive approach that, while not carceral in the technical sense because it does not lead to incarceration or expand the prison state, embraces criminal law’s fundamental dedication to punitive, rather than redistributive, solutions to social issues.”).

II

TITLE IX AND THE ACCUSED: AN OVERVIEW OF ANTI-MALE
BIAS SUITSA. *Pre-Twombly/Iqbal: Yusuf v. Vassar College*

Though the bulk of lawsuits initiated by perpetrators grew exponentially only within the last few years, the initial legal framework for these cases stems from the 1994 case *Yusuf v. Vassar College*.³⁷ In *Yusuf*, the Second Circuit held that Title IX bars the “imposition of university discipline where *gender is a motivating factor in the decision to discipline*.”³⁸ The court established that accused students who attack a university disciplinary proceeding for gender bias generally fall within two categories.³⁹ In the first type of cases, a plaintiff alleges “selective enforcement”: regardless of his or her guilt, the plaintiff argues that the severity of the penalty imposed and/or the decision to initiate the proceeding was attributed, in some part, to the student’s gender.⁴⁰ These claims are difficult to litigate because, if the plaintiff is male, these claims require the plaintiff to allege that a female accused of similar sexual misconduct was treated preferentially by the university; practically speaking, such cases almost never exist.⁴¹ The second category of cases—“erroneous outcome” cases—encompass situations where a plaintiff alleges that he or she was innocent and was wrongly found by the school to have committed sexual misconduct.⁴² With the latter category of cases, the *Yusuf* court created the now widely used, two-prong “erroneous outcome” test: “In order to survive a motion to dismiss, the plaintiff must specifically allege the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference of [gender] discriminatory intent.”⁴³ In other words, the plaintiff must allege “particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of

³⁷ 35 F.3d 709, 714–15 (2d Cir. 1994). Though the Second Circuit’s decision is of course not binding for all courts, it is highly persuasive and has been utilized by other courts. See, e.g., *Doe v. Univ. of Mass.—Amherst*, No. 14-30143-MGM, 2015 U.S. Dist. LEXIS 91995, at *24 (D. Mass. July 14, 2015) (“Lacking guidance from the First Circuit, this court turns to the analytic framework set forth by the Second Circuit in *Yusuf v. Vassar College*.”).

³⁸ *Yusuf*, 35 F.3d at 715 (emphasis added).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 713.

the disciplinary proceeding” as well as causally link the flawed outcome with gender bias.⁴⁴

At the time of the decision, the *Yusuf* court operated under the *Conley* pleading standard of the Rule 12(b)(6) pleading requirements—which is more lenient than the later *Twombly/Iqbal* heightened pleading standard.⁴⁵ Under the *Conley* standard, a complaint must be allowed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁴⁶ This standard reflected an intent to grant plaintiffs their day in court and to ensure that defendants simply had “notice” of the claims.⁴⁷ Under Rule 8 of the Federal Rules of Civil Procedure, a complaint merely needs to contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁴⁸ The plaintiff’s alleged facts are assumed and, if proven, must support an inference of discrimination—a burden that the *Yusuf* court described as “not heavy.”⁴⁹

To allege “particularized facts” of the erroneous outcome, a plaintiff may include particular evidentiary weaknesses behind the finding of an offense, such as a complainant’s or witnesses’ motives to lie, particularized strengths of the defense, or other reasons to doubt the veracity of the charge.⁵⁰ A complaint may also allege particular procedural flaws affecting the proof of evidence. The causal element of the “erroneous decision” analysis—what the *Yusuf* court described as the “fatal gap”—deals with whether the plaintiff can state with some “specificity” a causal connection between the flawed outcome and gender bias. A plaintiff must allege “particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding.”⁵¹ In particular, the *Yusuf* court noted that a plaintiff may use statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision making to plead causation. Such examples of

⁴⁴ *Id.* at 715.

⁴⁵ Charles B. Campbell, A “Plausible” Showing After *Bell Atlantic Corp. v. Twombly*, 9 NEV. L.J. 1, 21 (2008) (“*Conley*’s ‘no set of facts’ language, at least if read literally, represented an endorsement of ‘notice’ pleading in its least demanding form.”)

⁴⁶ *Yusuf*, 35 F.3d at 713 (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

⁴⁷ See Tanvir Vahora, Note, *Working Through a Muddled Standard: Pleading Discrimination Cases After Iqbal*, 44 COLUM. J.L. & SOC. PROBS. 235, 241–42 (2010).

⁴⁸ FED. R. CIV. P. 8(b).

⁴⁹ *Yusuf*, 35 F.3d at 715.

⁵⁰ *Id.*

⁵¹ *Id.*

gender bias, the court went on to say, can be found in the “familiar setting of Title VII cases.”⁵²

In allowing the plaintiff’s case to move forward, the *Yusuf* court held both that the plaintiff’s complaint alleged particularized facts and also identified a causal connection. The *Yusuf* court noted that the plaintiff had identified retaliatory motives by the alleged victim as well as various actions by the presiding disciplinary tribunal official that prevented him from fully defending himself.⁵³ Additionally, the Second Circuit noted that the plaintiff had sufficiently stated a pattern of biased decision-making through his allegation that accused-male perpetrators at Vassar were “historically and systematically” and “invariably found guilty, regardless of the evidence, or lack thereof.”⁵⁴ The court stated that the allegations that males invariably lose when charged with sexual harassment at Vassar “provides a verifiable causal connection similar to the use of statistical evidence in an employment case.”⁵⁵ Indeed, the court added that “similar allegations, if based on race . . . would more than suffice in a Title VII case.”⁵⁶ The court, however, noted, “We need not pause at the pleading stage of the proceedings to consider issues regarding what statistical sample would be significant or what degree of consistency in outcome would constitute a relevant pattern.”⁵⁷

⁵² *Id.* The court cited various Title VII cases as examples illustrating the contours of the causation prong: *Silver v. City Univ. of N.Y.*, 947 F.2d 1021, 1022–23 (2d Cir. 1991) (holding that a university’s internal memorandum stating that candidates should include a significant representation of minorities and females was not sufficient evidence of discriminatory intent or purpose); *Lopez v. Metro. Life Ins. Co.*, 930 F.2d 157, 159–60 (2d Cir. 1991) (holding that an African-American employee failed to establish a prima facie disparate impact case by “merely” showing a void of black employees in his regional office and noting that the causal requirement of Title VII recognizes underrepresentation of African-Americans might result from any number of factors); *Krieger v. Gold Bond Bldg. Prods.*, 863 F.2d 1091, 1094–95 (2d Cir. 1988) (holding that an employer’s decision to fire a woman employee despite good job performance amounted to gender discrimination and violated Title VII).

⁵³ *Yusuf*, 35 F.3d at 716 (“Fairly read, Yusuf’s complaint alleges that a false and somewhat stale charge of sexual harassment was made against him only after he pursued criminal charges for a brutal assault by the complainant’s boyfriend.”).

⁵⁴ *Id.*

⁵⁵ *Id.* (citing *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 84 (2d Cir. 1990)). In *Hollander*, the Second Circuit stated that “[e]vidence relating to company-wide practices may reveal patterns of discrimination against a group of employees.” *Hollander*, 895 F.2d at 84.

⁵⁶ *Yusuf*, 35 F.3d at 716.

⁵⁷ *Id.*

B. Second Circuit: Presumption-Shifting Framework

Since the *Yusuf* case in 1994, male students accused by their respective schools of sexual assault have continued to sue on gender-discrimination grounds under Title IX—though largely to no avail.⁵⁸ For years, many commentators felt that an accused student would have a difficult time alleging and proving gender-bias claims under Title IX.⁵⁹ Curiously, these gender claims persisted, perhaps in part on symbolic grounds,⁶⁰ but also perhaps with an eye towards settlement amounts.⁶¹ As one commentator speculated, “These [gender-bias] Title IX suits are not faring well so far, but all it takes is one good win with the right set of facts and the right attorney, and a whole new venue of litigation will open up.”⁶²

In 2016, the “right” case indeed came along. In *John Doe v. Columbia University*, the Second Circuit—the same court that decided *Yusuf*—held that an accused student’s claim under Title IX alleging “anti-male” bias met the minimal “plausible inference” to survive dismissal.⁶³ This decision was particularly surprising given the heightened pleading requirements post-*Yusuf*: after the *Twombly*⁶⁴ decision and the subsequent

⁵⁸ Jake New, *Suits from the Accused*, INSIDE HIGHER ED (May 1, 2015), <https://www.insidehighered.com/news/2015/05/01/students-accused-sexual-assault-struggle-win-gender-bias-lawsuits> [http://perma.cc/WH9L-LD5V].

⁵⁹ See, e.g., Allie Grasgreen, *Going on Offense with Title IX*, INSIDE HIGHER ED (Aug. 9, 2013), <https://www.insidehighered.com/news/2013/08/09/accused-rape-men-allege-discrimination-under-title-ix> [http://perma.cc/PBB3-PMUV] (“Assuming that the policies themselves do not single out a differential treatment for men and women—and I would be shocked if they did—and assuming they don’t have smoking-gun evidence of bias against men, I think that it would be a very difficult road for the plaintiff here[.]”).

⁶⁰ See Nora Caplan-Bricker, *Testing Title IX*, SLATE (Mar. 15, 2016, 12:55 PM), http://www.slate.com/articles/double_x/doublex/2016/03/paul_nunges-sers_columbia_title_ix_case_is_part_of_a_larger_legal_theory.html [http://perma.cc/3HNS-H6Z4] (“It may be that plaintiffs continue to advance the Title IX theory because if they could establish that universities are routinely liable under Title IX for disciplining students for sexual assault, it would create the impression that Title IX is inherently contradictory, unworkable and its application to sexual assault should be repealed.”).

⁶¹ See, e.g., Kevin Connell, *Tennessee Settles Title IX Lawsuit for \$2.48 Million*, GRIDIRON NOW (Jul. 5, 2016), <http://gridironnow.com/tennessee-settles-title-ix-lawsuit-2-48-million/> [http://perma.cc/N6H7-X83X] (detailing a university’s \$2.48 million settlement with eight female plaintiffs).

⁶² New, *supra* note 58.

⁶³ *Doe v. Columbia Univ.*, 831 F.3d 46, 56 (2d Cir. 2016).

⁶⁴ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (holding plaintiff’s allegations of defendants conspiring to create barriers to entry by others and not to compete in each other’s marketplaces, which would have violated section one of the Sherman Act if true, were mere legal conclusions and thus were not plausible enough to survive dismissal).

*Iqbal*⁶⁵ decision, a plaintiff's allegations must rise to a level of "plausibility" so that the court can draw "a plausible inference that the defendant is liable for the misconduct alleged."⁶⁶ Plausibility, though not like a probability requirement, requires "more than a sheer possibility that a defendant has acted unlawfully."⁶⁷

In allowing the plaintiff's motion to survive dismissal, the Second Circuit stated that the applicable framework was a burden-shifting temporary presumption for the plaintiff, as established by the *McDonnell Douglas*⁶⁸ line of employment-discrimination cases, and this framework adopted from Title VII was appropriate in the Title IX setting.⁶⁹ The court justified its decision to look to Title VII jurisprudence by noting the similarity between claims from Title VII and Title IX, particularly on their facts. Moreover, the court cited the frequency with which other courts, including the Supreme Court, look to Title VII case law to interpret Title IX.⁷⁰ Ultimately, the court wrote:

We therefore hold that the temporary presumption afforded to plaintiffs in employment discrimination cases under Title VII applies to sex discrimination plaintiffs under Title IX as well.

Thus, a complaint under Title IX, alleging that the plaintiff was subjected to discrimination on account of sex in the imposition of university discipline, is sufficient with respect to the element of discriminatory intent, like a complaint under Title VII, if it pleads specific facts that support a mini-

⁶⁵ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (dismissing plaintiff's *Bivens* claim because it was not plausible that defendants had "improper" motives of discrimination on the basis of race, religion or national origins where defendants, as top-level officials, had apparent motives such as a desire to protect national security). Although the *Iqbal* decision and *Twombly* decision are different cases with different factual underpinnings, this Note refers to them as a single entity for convenience's sake.

⁶⁶ *Columbia Univ.*, 831 F.3d at 54 (quoting *Iqbal*, 556 U.S. at 678).

⁶⁷ *Id.*

⁶⁸ See *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802 (1973); see also *Littlejohn v. City of New York*, 795 F.3d 297, 307 (2d Cir. 2015) ("[I]n the initial phase of the case, the plaintiff can establish a prima facie case without evidence sufficient to show discriminatory motivation . . . If the plaintiff can show (1) that she is a member of a protected class; (2) that she was qualified for employment in the position; (3) that she suffered an adverse employment action; and, in addition, has (4) some minimal evidence suggesting an inference that the employer acted with discriminatory motivation, such a showing will raise a temporary 'presumption' of discriminatory motivation, shifting the burden of production to the employer and requiring the employer to come forward with its justification for the adverse employment action against the plaintiff." (citations omitted)).

⁶⁹ *Columbia Univ.*, 831 F.3d at 53–56.

⁷⁰ *Id.* at 56.

mal plausible inference of such discrimination . . . *McDonnell-Douglas's temporary presumption in a plaintiff's favor reduces the plaintiff's pleading burden*, so that the alleged facts need support only a minimal inference of bias.⁷¹

With respect to the sufficiency of federal complaints generally, the court turned to Second Circuit precedents:

In *Littlejohn*, we clarified that *Iqbal* applies to employment-discrimination complaints brought under Title VII. "To the same extent that the *McDonnell Douglas* temporary presumption reduces the facts a plaintiff would need to *show* to defeat a motion for summary judgment prior to the defendant's furnishing of a non-discriminatory motivation, that presumption also reduces the facts needed to be *pleaded* under *Iqbal*." Because "[t]he discrimination complaint, by definition, occurs in the first stage of the litigation . . . the complaint also benefits from the temporary presumption and must be viewed in light of the plaintiff's minimum burden to show discriminatory intent."

In other words, at the 12(b)(6) stage of a Title VII suit, allegations of facts supporting a minimal plausible inference of discriminatory intent suffices as to this element of the claim because this entitles the plaintiff to the temporary presumption of *McDonnell Douglas* until the defendant furnishes its asserted reasons for its action against the plaintiff.⁷²

In this case, the Second Circuit ruled that the plaintiff's complaint identified sufficiently specific facts to survive dismissal because of "pro-female, anti-male bias" on the part of Columbia's hearing panel, which the university adopted at least in part to refute criticisms lodged by the student body and press against the university for its treatment of sexual-assault victims.⁷³ The court noted that "[w]hen the evidence substantially favors one party's version of a disputed matter, but an evaluator forms a conclusion in favor of the other side (without an apparent reason based in the evidence), it is plausible to infer . . . that the evaluator has been influenced by bias."⁷⁴ Here, the plaintiff alleged Jane Doe was an altogether willing participant, no evidence was presented to the contrary, and still the hearing panel decided against him. On these facts alone, however, the court seemed reluctant to acknowledge a plausible inference of bias on account of sex. But because the university faced substantial criticism in the period preceding

⁷¹ *Id.* (emphasis added).

⁷² *Id.* at 54–55 (citations omitted).

⁷³ *Id.* at 56.

⁷⁴ *Id.* at 57.

the disciplinary hearing, the court found it was “entirely plausible” that the university’s decision-makers and its investigators were motivated to favor the accused female over the accused male.⁷⁵

C. Sixth Circuit: *Twombly/Iqbal* Standard

To date, the Sixth Circuit uses the general *Twombly/Iqbal* pleading standard without modification with respect to Title IX cases.⁷⁶ To justify its decision, the Sixth Circuit stated merely that its precedent, unlike the Second Circuit’s, does not support a reduced pleading standard.⁷⁷ The court held that “a plaintiff asserting a Title VII claim must plead sufficient factual allegations to satisfy *Twombly* and *Iqbal* in alleging the required element of discriminatory intent.”⁷⁸

Although it did not adopt the presumption-shifting framework, the Sixth Circuit continued to cite to the Second Circuit’s analysis with respect to “selective enforcement” and “erroneous decision” claims.⁷⁹ In *Doe v. Cummins*, the Sixth Circuit cited to *Yusuf’s* “erroneous outcome” analysis and held that the students’ claims failed to allege a causal connection between the adverse outcomes in their hearings and gender bias.⁸⁰ The *Cummins* court said that, unlike in the *Columbia* case, the *Cummins* plaintiffs did not allege “additional facts” such as “substantial” and “public” criticism.⁸¹ Similarly, the accused students failed to show the procedural deficiencies in their adjudicatory proceedings were connected to bias.⁸² The court explained,

[T]hese deficiencies at most show a disciplinary system that is biased in favor of alleged victims and against those accused of misconduct. But this does not equate to gender bias because sexual-assault victims can be both male and female.⁸³

The court additionally dismissed the students’ argument that the university evinced a “pattern” of discrimination when, in each of the nine sexual-assault cases adjudicated since 2011, the accused student was male and was found “responsi-

⁷⁵ *Id.*

⁷⁶ *See Doe v. Miami Univ.*, 882 F.3d 579, 588 (6th Cir. 2018).

⁷⁷ *Id.* at 589.

⁷⁸ *Id.* (citing *Keys v. Humana, Inc.*, 684 F.3d 605, 609–10 (6th Cir. 2012)).

⁷⁹ *Doe v. Cummins*, 662 Fed. Appx. 437, 451 (6th Cir. 2016).

⁸⁰ *Id.* at 452.

⁸¹ *Id.* at 452–53.

⁸² *Id.* at 453.

⁸³ *Id.*

ble.”⁸⁴ The court explained that the students failed to eliminate “the most obvious reasons,” which were that the university only received complaints of male-on-female sexual assault and males were less likely than females to report sexual assault.⁸⁵ Furthermore, the court explained that nine cases was an insufficient sample size to draw any reasonable inferences of gender bias.⁸⁶

In *Doe v. Miami University*, the Sixth Circuit allowed a plaintiff to survive a motion to dismiss with respect to the plaintiff’s “erroneous outcome” claim.⁸⁷ The court stated that the plaintiff’s allegations indicated a potential pattern of gender-based decision-making that met the *Twombly/Iqbal* standard⁸⁸ because every male student accused of sexual misconduct in the Fall 2013 and Spring 2014 semesters was found responsible for the alleged violation, and nearly 90% of students found responsible for sexual misconduct between 2011 and 2014 had male first names.⁸⁹ Moreover, the plaintiff incorporated an attorney’s affidavit, which described a pattern of the university pursuing investigations concerning male students but not female students. The court also stated that the plaintiff alleged a sufficient causal connection because Miami University faced external pressures from the federal government and private lawsuits, including one from a complainant who stated that she would not have been assaulted if the university had expelled her attacker for prior offenses. Consequently, “the statistical evidence that ostensibly shows a pattern of gender-based decision-making and the external pressure on Miami University supports at the motion-to-dismiss stage a reasonable inference of gender discrimination.”⁹⁰

III

A PRO-PLAINTIFF PROPOSAL

Arguably, the Second Circuit and Sixth Circuit interpretations of the 12(b)(6) pleading standards in Title IX are not mu-

⁸⁴ *Id.*

⁸⁵ *Id.* at 453–54.

⁸⁶ *Id.*; see also *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 943 (6th Cir. 1987) (finding sample size of seventeen cases insufficient to support an inference of discrimination in the employment context).

⁸⁷ *Doe v. Miami Univ.*, 882 F.3d 579, 584 (6th Cir. 2018).

⁸⁸ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (“[The facts must] raise a reasonable expectation that discovery will reveal evidence of [gender discrimination].”).

⁸⁹ *Miami Univ.*, 882 F.3d at 594.

⁹⁰ *Id.* at 593.

tually exclusive. This section seeks to reconcile the two approaches and proposes that the plaintiff should be allowed to plead a prima facie case with a reduced pleading burden, or, if failing to do so, plead under the general *Twombly/Iqbal* standard. In the first part of this section, this Note illustrates the different presumptions guiding the Second Circuit and Sixth Circuit with respect to their understanding of *Swierkiewicz*⁹¹ and reconciles the presumptions with each other. Next, this Note illustrates why the *Twombly/Iqbal* standard by itself may be insufficient for discrimination cases in the Title VII or Title IX context. Lastly, this Note advocates that, under the general *Twombly/Iqbal* standard, courts should at the outset utilize the *McDonnell Douglas* temporary plaintiff-presumption pleading to avoid conflating the requirements at the 12(b)(6) stage with the requirements reserved for summary judgment. Moreover, the *McDonnell Douglas* framework allows for flexibility in pleading so that if a plaintiff cannot plead a prima facie case, they can still plead generally under *Twombly/Iqbal*.

A. Reconciling Second Circuit and Sixth Circuit Approaches

To evaluate the appropriate pleading standard for Title IX “anti-male” bias claims, three relevant questions emerge. First, does the *Twombly/Iqbal* standard apply in the Title IX context? Second, if it does, does the *Twombly/Iqbal* standard supplant the *McDonnell Douglas* framework or can the two coexist? Third, what drives this reasoning?

Both the Sixth Circuit and the Second Circuit agree that *Twombly/Iqbal* applies in the Title VII context and thus, by extension, also in the Title IX context. In *Littlejohn*, the Second Circuit “conclude[d] that *Iqbal*’s requirement applies to Title VII complaints of employment discrimination, but does not affect the benefit to plaintiffs pronounced in the *McDonnell Douglas* quartet.”⁹² The Second Circuit, in *Columbia*, not only referenced its precedent in *Littlejohn* but also reiterated *Iqbal* at the outset of discussions.⁹³ Similarly, the Sixth Circuit stated in *Keys* that “the Supreme Court established a ‘plausibility’ standard in *Twombly* and *Iqbal* for assessing whether a complaint’s factual allegations support its legal conclusions, and that standard applies to causation in discrimination claims.”⁹⁴

⁹¹ See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

⁹² *Littlejohn v. City of New York*, 795 F.3d 297, 310 (2d Cir. 2015).

⁹³ *Doe v. Columbia Univ.*, 831 F.3d 46, 54 (2d Cir. 2016).

⁹⁴ *Keys v. Humana, Inc.*, 684 F.3d 605, 610 (6th Cir. 2012).

The Sixth Circuit reiterated this standard in *Doe v. Miami University*.⁹⁵

The thornier question is whether and how the *McDonnell Douglas* framework interacts with the *Twombly/Iqbal* standard at the pleading stage. Recall, the *McDonnell Douglas* prima facie framework in Title VII is a three-step process.⁹⁶ First, a plaintiff must sufficiently plead and prove a prima facie case of discrimination. A Title IX plaintiff has to allege and ultimately prove four factors: (1) the plaintiff is a member of a protected class,⁹⁷ (2) was innocent, (3) suffered an adverse disciplinary action, and (4) has at least minimal support for the proposition that the disciplinary hearing committee and/or investigator were motivated by discriminatory intent. In essence, a court presumes the adverse decision against the plaintiff was a result of discriminatory motive.⁹⁸ A court typically evaluates the sufficiency of the prima facie case at the summary judgment stage of the proceedings.⁹⁹ If a plaintiff is successful in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the Title IX hearing committee's and/or investigator's decision.¹⁰⁰ The defendant's burden is one of production, whereas the plaintiff still has the burden of persuasion.¹⁰¹ At this stage, if the defendant meets its burden, the plaintiff's presumption "simply drops out of the picture."¹⁰² At the final stage, the plaintiff has the opportunity to present evidence showing that the committee's stated reasons for the discipline were not the true reasons for the

⁹⁵ 882 F.3d 579, 584 (6th Cir. 2018).

⁹⁶ See *supra* note 68 and accompanying text.

⁹⁷ Recall that "protected class" merely means that the plaintiff was discriminated against on some impermissible basis such as race or gender. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278–79 (1976).

⁹⁸ See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) ("Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.")

⁹⁹ See Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2298 (1995) ("In the conventional application of summary judgment principles to *McDonnell Douglas-Burdine* cases, the prima facie case is treated as a required 'element' of the case, and the plaintiff's failure to create a genuine issue of material fact as to the existence of a prima facie case entitles the defendant to summary judgment.")

¹⁰⁰ *Burdine*, 450 U.S. at 254–55.

¹⁰¹ *Id.*

¹⁰² See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

intentional discrimination.¹⁰³ To avoid summary judgment, then, a plaintiff must refute the committee's stated reasons since the ultimate burden of persuasion remains with the plaintiff.¹⁰⁴

In light of *Twombly/Iqbal*, the Second Circuit clearly expressed that the *McDonnell Douglas* plaintiff presumption and *Twombly/Iqbal* standard coexist. It stated:

As for the argument that the Supreme Court was unlikely to have intended in *Iqbal* to add new wrinkles to the special field of Title VII suits, which the Supreme Court had so extensively covered in the *McDonnell Douglas* quartet of cases, arguably there is no incompatibility, or even tension, between the burden-shifting framework of *McDonnell Douglas* and a requirement that the complaint include reference to sufficient facts to make its claim plausible—at least so long as the requirement to plead facts is assessed in light of the presumption that arises in the plaintiff's favor under *McDonnell Douglas* in the first stage of the litigation.¹⁰⁵

In contrast, the Sixth Circuit declined to read the *McDonnell Douglas* framework as having a role under the *Twombly/Iqbal* standard.¹⁰⁶ In so doing, the Sixth Circuit demonstrated a narrow reading of *Swierkiewicz*—a 2002 Supreme Court case whose status as good law after *Twombly/Iqbal* remains highly contested.¹⁰⁷

In *Swierkiewicz*, the plaintiff alleged a violation of Title VII because of his national origin as well as a violation of the Age Discrimination in Employment Act (ADEA).¹⁰⁸ The complaint alleged facts regarding the events leading up to the plaintiff's termination, relevant dates, nationalities, and ages of those involved in his termination. Ultimately, the court held that the complaint contained sufficient facts to survive a motion to dismiss.

Both the Second Circuit and Sixth Circuit understand *Swierkiewicz* to be good law, though they differ in their understandings of what the case stands for. For the Sixth Circuit, *Swierkiewicz* stands for the proposition that a plaintiff must not be required to plead a prima facie case under the *McDonnell Douglas* standard. The Sixth Circuit emphasized that the Su-

¹⁰³ *Burdine*, 450 U.S. at 256.

¹⁰⁴ *Id.*

¹⁰⁵ *Littlejohn v. City of New York*, 795 F.3d 297, 310 (2d Cir. 2015).

¹⁰⁶ *Keys v. Humana, Inc.*, 684 F.3d 605, 609–610 (6th Cir. 2012).

¹⁰⁷ *See, e.g., Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir. 2009) (stating that *Twombly* and *Iqbal* were the “demise of *Swierkiewicz*”).

¹⁰⁸ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

preme Court “unanimously held that the prima facie case under *McDonnell Douglas* is an evidentiary standard, not a pleading requirement.”¹⁰⁹ The court went on to quote: “[I]t is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case.”¹¹⁰ Because the precise requirements of a prima facie case can vary depending on the context and occur prior to discovery, articulating an appropriate formulation of the correct version of *McDonnell Douglas* framework may be difficult.¹¹¹ Thus, only the *Twombly/Iqbal* standard remains.¹¹² The distinction in the Second Circuit’s approach comes from its reading of *Swierkiewicz* as stating merely that a prima facie pleading is a higher standard than that of *Twombly/Iqbal*; as such, the prima facie complaint would be sufficient but not necessary to meeting the *Iqbal* standard.¹¹³ The Second Circuit characterized the subsequent *Twombly* court’s treatment of *Swierkiewicz* as “meaning nothing more than that the plaintiff’s pleadings contained sufficient factual allegations to satisfy the ‘liberal pleading requirements’ of the Federal Rules and that [the Second] Circuit had improperly invoked a ‘heightened pleading standard for Title VII cases.’”¹¹⁴ As such, the Second Circuit reconciled *Iqbal*—which it characterized as a “broad”¹¹⁵ ruling—as also applying to cases falling under the *McDonnell Douglas* framework. Instead of requiring plaintiffs to meet the heightened pleading requirements of alleging a prima facie case under the *McDonnell Douglas* test, the Second Circuit allowed the plaintiff’s complaint to benefit from the *McDonnell Douglas* plaintiff presumption by “reduc[ing] the facts needed to be pleaded under *Iqbal*” at the first pleading stage.¹¹⁶

¹⁰⁹ *Keys*, 684 F.3d at 609.

¹¹⁰ *Id.* (quoting *Swierkiewicz*, 534 U.S. at 510). The *Swierkiewicz* Court reasoned that the prima facie analysis does not apply in every discrimination case, such as cases involving direct evidence of discrimination. *Swierkiewicz*, 534 U.S. at 511. Moreover, the Court stated that it would be “incongruous” to require a plaintiff to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is later discovered. *Id.* at 511–12.

¹¹¹ *Id.*

¹¹² See *Keys*, 684 F.3d at 609 (“[T]he ordinary rules of notice pleading apply . . .”).

¹¹³ *Littlejohn v. City of New York*, 795 F.3d 297, 310 (2d Cir. 2015).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 309.

¹¹⁶ *Id.* at 310.

B. Why *Twombly/Iqbal* Pleading Alone is Insufficient

Procedural decisions such as early dismissal may have impacts that go beyond the court's evaluation of the complaint. In some cases, early rulings on procedural issues lead to an effective revision of substantive law "through the back door."¹¹⁷ The impacts of *Twombly/Iqbal* have been significant, especially in the employment-discrimination context. In general, the *Twombly/Iqbal* standard may invite judicial subjectivity and impermissible probabilistic determinations.

Courts may turn "a relatively cursory evaluation appropriate for a preliminary stage of the litigation, namely, whether any set of facts could support the allegations in a complaint, into a more searching inquiry about whether those allegations were 'plausible.'"¹¹⁸ Under the *Twombly/Iqbal* standard, courts are invited to "draw on [their] judicial experience and common sense" to evaluate the plausibility of complaints.¹¹⁹ Whereas the evaluation at the 12(b)(6) stage should determine only whether pleadings are "consistent with" liability—an approach that requires nothing more than a rational examination of the complaint by measuring the factual allegations against the legal claims to see "if they fit"—courts have instead asked whether alternative explanations for the events are "more likely" than the allegations made by the plaintiff.¹²⁰ At least one court, however, has dismissed a case for failing to eliminate alternative reasons in the pleading—that the university had only received complaints of male-on-female sexual assault and that males were less likely than females to report sexual assault—rather than evaluating the actual plausibility of the pleading.¹²¹ This is, effectively, an impermissible probabilistic determination and invites judicial subjectivity.¹²²

Another example of the dangers of probabilistic determination under the *Twombly/Iqbal* standard is a court's belief that the sufficiency of the pleading hinges on the plaintiff's ability to allege that an investigation or treatment throughout investigation would have been different if the plaintiff was female.¹²³ It is not hard to imagine the scarcity of cases, particularly at a

¹¹⁷ Elizabeth M. Schneider & Nancy Gertner, "Only Procedural": Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases, 57 N.Y.L. SCH. L. REV. 767, 768 (2012).

¹¹⁸ *Id.* at 769.

¹¹⁹ *Id.* at 773.

¹²⁰ *Id.*

¹²¹ See *Doe v. Cummins*, 662 Fed. Appx. 437, 453 (6th Cir. 2016).

¹²² *Id.*

¹²³ *Doe v. Coll. of Wooster*, 243 F. Supp. 3d 875, 887 (N.D. Ohio 2017).

single university, in which these cases are reported and documented; moreover, a plaintiff would likely only obtain such evidence during the discovery phase, after 12(b)(6) dismissal. Similarly, judicial subjectivity has led to unpredictable rulings and confusing usage of “statistics” to evince a pattern of biased decision-making. The Sixth Circuit alone has muddled the plaintiff’s ability to use “statistics” in proving causation at the pleading stage.¹²⁴ Moreover, courts should not require the use of statistics to demonstrate causation at this early stage of the proceeding.¹²⁵

Male gender-discrimination cases invite the danger of judges relying too much on their “general schemas” in decision-making: courts are understandably reluctant, based on “common sense,” to allow men to plead gender bias, particularly in the painful context of sexual assault.¹²⁶ The danger both at the Title IX disciplinary level and at the judicial pleading level is to conflate a plaintiff’s alleged actions with the merits of his discrimination case. As one court stated in an early anti-male bias case, *Nungesser v. Columbia University*:

[Nungesser] assumes that because the allegations against him concerned a sexual act that everything that follows from it is “sex-based” within the meaning of Title IX. He is wrong. Taken to its logical extreme, Nungesser’s position would lead to the conclusion that those who commit, or are accused of committing, sexual assault are a protected class under Title IX.¹²⁷

The court’s skepticism here is evident and certainly warranted in some cases. Still, the potential harm to plaintiffs in Title IX discrimination cases can be significant. As discussed in greater detail later on, the best approach to these “anti-male” bias claims should be to view them not as “reverse discrimination” cases but rather as discrimination cases, plain and sim-

¹²⁴ Compare *Cummins*, 662 Fed. Appx. at 454 (holding that plaintiffs did not evince a “pattern” of discrimination by alleging that nine male accused students were “responsible” in the cases since 2011), with *Doe v. Miami Univ.*, 882 F.3d 579, 593 (6th Cir. 2018) (holding that plaintiff sufficiently alleged a pattern of gender bias by stating that every male student accused of sexual misconduct in the Fall 2013 and Spring 2014 semesters was found responsible for the alleged violation).

¹²⁵ See *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 189 (D.R.I. 2016) (“Requiring that a male student conclusively demonstrate, at the pleading stage, with statistical evidence and/or data analysis that female students accused of sexual assault were treated differently, is both practically impossible and inconsistent with the standard used in other discrimination contexts.”).

¹²⁶ Schneider & Gertner, *supra* note 117, at 775–76.

¹²⁷ 169 F. Supp. 3d 353, 364 (S.D.N.Y. 2016).

ple. Not only does equal enforcement of the law ensure justice for all individuals seeking legitimate redress, but also, equal enforcement reinforces the legal system's institutional value by being gender neutral.¹²⁸

Like in many other types of discrimination cases, Title IX plaintiffs often face the problem of information asymmetry. The facts in *Marshall v. Indiana University*,¹²⁹ for example, illustrate a common situation in which the defendants have sole possession of all the information relating to the allegations, which they then refuse to share with the plaintiff. At the same time, the defendants can successfully argue that a court should dismiss the plaintiff's pleading for failure to identify more particularized facts. At the Rule 12(b)(6) stage of the pleading, the parties have not yet proceeded to discovery and thus lack a factual record, unlike the summary judgment phase. In essence, as one commentator put it, the pleading standard under *Twombly/Iqbal* "perpetuates a catch-22 scenario: a plaintiff cannot access discriminatory evidence without the use of discovery, but the complaint is dismissed before the discovery stage."¹³⁰

C. Plaintiff Presumption and Summary Judgment

A court should grant a plaintiff alleging gender bias the *McDonnell Douglas* plaintiff presumption at the Federal Rule 12(b)(6) pleading stage if the plaintiff chooses to plead a prima facie case. This framework, introduced by the Second Circuit in *Columbia*, allows a plaintiff to plead sufficiently—but minimally—under *Iqbal* while still inviting the plaintiff to benefit from discovery. Whereas potentially meritorious claims may survive Rule 12(b)(6)'s gatekeeper function in greater numbers, non-meritorious claims will not survive summary judgment.¹³¹ Assuming, as the Second and Sixth Circuit do, that *Swierkiewicz* remains good law, it stands merely for the proposition that the *McDonnell Douglas* framework was too demanding of a standard under the *Conley* Rule 12(b)(6) pleading standards.¹³² The *McDonnell Douglas* framework, however, is

¹²⁸ See discussion *infra* subpart IV.A.

¹²⁹ 170 F. Supp. 3d 1201, 1210 (S.D. Ind. 2016).

¹³⁰ Bethany A. Corbin, *Riding the Wave or Drowning?: An Analysis of Gender Bias and Twombly/Iqbal in Title IX Accused Student Lawsuits*, 85 FORDHAM L. REV. 2665, 2688–89 (2017).

¹³¹ See FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

¹³² See discussion *supra* subpart III.A.

and should be read as permissive under *Twombly/Iqbal*'s heightened "plausibility" standard. By reducing the factual allegations required at the complaint stage of the proceeding, courts can sidestep any discrepancies between the *McDonnell Douglas* framework and the *Twombly/Iqbal* standard.¹³³ Moreover, the prima facie case "was not intended to be an inflexible rule";¹³⁴ if a plaintiff's allegations do not allow him or her to establish a prima facie case, the plaintiff may still plead generally under the *Twombly/Iqbal* standard.

One structural argument in support of the *McDonnell Douglas* framework is to ensure consistency between Title IX and other areas of law. Discrimination claims under Title IX, as it applies to men, should not be treated any differently than if it were to apply to other more societally vulnerable groups of individuals. Arguably, allegations of discriminatory intent in the heightened fervor of Title IX compliance may on their face be plausible. Though the Supreme Court warned in *Iqbal* against conclusory allegations of discriminatory intent, this reasoning in *Iqbal* may be distinguished based on the case's facts.¹³⁵ Moreover, the increasing prevalence of courts to allow "anti-male" bias claims to progress past the Rule 12(b)(6) stage, whether under *Twombly/Iqbal* or *McDonnell Douglas*, points to a general societal willingness to sustain the plausibility of discriminatory intent in the generally confusing arena of Title IX.¹³⁶ Though a plaintiff's pleading must naturally raise more

¹³³ See *supra* text accompanying note 105; see also Angela K. Herring, Note, *Untangling the Twombly-McDonnell Knot: The Substantive Impact of Procedural Rules in Title VII Cases*, 86 N.Y.U. L. REV. 1083, 1116–17 (2011) (proposing a judicial "reset" of Title VII doctrine that approaches *McDonnell Douglas* as suggestive, and flexible proof structures to be applied sensibly rather than rigidly).

¹³⁴ *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575 (1978).

¹³⁵ See Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 204–05 (2010) (detailing how the allegations in *Twombly* and *Iqbal* seem somewhat extraordinary on their face).

¹³⁶ See, e.g., *Doe v. Pa. St. Univ.*, No. 4:17-CV-01315, 2018 U.S. Dist. LEXIS 3184, at *15–16 (M.D. Pa. Jan. 8, 2018) ("Although these allegations do not, in any sense, raise to the level of blatant and obvious gender bias . . . they are sufficient to allow this Court to infer that [the university's] disciplinary process is tainted by anti-male bias."); *Neal v. Colo. St. Univ. Pueblo*, No. 16-cv-873-RM-CBS, 2017 U.S. Dist. LEXIS 22196, at *13 (D. Colo. Feb. 16, 2017) (holding that a holistic evaluation of pleading, including allegations of an investigator's quota for finding males, was sufficient under the *Twombly/Iqbal* standard); *Collick v. William Paterson Univ.*, No. 16-471 (KM) (JBC), 2016 U.S. Dist. LEXIS 160359, at *30–35 (D.N.J. Nov. 17, 2016) ("Whether under the off-the-rack *Iqbal* standard or a tailored *McDonnell Douglas* standard, I would find that gender-based discrimination in Defendants' treatment [of Plaintiffs] is adequately pled . . . True, the allegations of gender-based discrimination are rife with conclusory assertions . . . The Complaint gets a bit closer to sufficiency, however, in alleging that '[a]s a purported female victim, the Accuser's allegations against the male plaintiffs were

than simple legal conclusions, the point here is that allegations of discriminatory intent in the Title IX setting on their facts should necessitate a lower factual threshold than for the implausible scenarios in the *Twombly* and *Iqbal* cases.

Moreover, the role of summary judgment under the *McDonnell Douglas* framework—that a plaintiff must eventually rebut the given explanation of the rendered decision as mere pretext for discrimination to survive summary judgment—helps to explain the lowered factual showing at the Rule 12(b)(6) stage.¹³⁷ Whereas the *Iqbal* court required the plaintiff to plead that his assertions of discrimination were “more likely” than the government’s policies at the complaint stage, the *McDonnell Douglas* framework already incorporates this rebuttal at the summary judgment phase.¹³⁸ As commentators noted, to meet the new demands of *Twombly* and *Iqbal*, law and facts now have to be “wedged into a [Rule 12(b)(6)] document that in many instances is ill-suited for this kind of review.”¹³⁹ Rather, dismissal should occur at the summary judgment phase, where a plaintiff may present legal and factual arguments in a more inclusive way.¹⁴⁰

Unlike the vague “plausibility” standard, the *McDonnell Douglas* framework is simple in its requirements. Courts can point directly to the four prima facie factors with respect to deficient pleading. In practical terms, a plaintiff need only plead (a) the overall factual context of the claim, (b) the causal link between the adverse action and the protected characteristic (gender), and (c) an optional statement rebutting the decision-maker’s rationale for the actions and decisions taken against the plaintiff.¹⁴¹ If a plaintiff merely states disagreement with the outcome and alleges that the decision must have been

accepted as true without any investigation being performed and without the development of any facts or exculpatory evidence.”)

¹³⁷ See *supra* notes 131–34 and accompanying text.

¹³⁸ See *Collick*, 2016 U.S. Dist. LEXIS 160359, at *35 (“Whether such allegations are true (or can survive summary judgment) remains an open question. At the pleading stage, however, an allegation that the process was one-sided, irregular, and unsupported by evidence may give rise to an inference of bias.”)

¹³⁹ Schneider & Gertner, *supra* note 117, at 774.

¹⁴⁰ *Id.*; see also *Collick*, 2016 U.S. Dist. LEXIS 160359, at *35; *Doe v. Trs. of Bos. Coll.*, 892 F.3d 67, 92 (1st Cir. 2018) (“As this case comes to us on a motion for summary judgment, after the parties have engaged in substantial discovery, a complete lack of evidence—whether direct or circumstantial—will not allow a party to survive a motion for summary judgment. Conclusory allegations are not enough.”)

¹⁴¹ *But see* Malamud, *supra* note 99, at 2237 (arguing that the *McDonnell Douglas* framework does nothing that the normal Federal Rules of Civil Procedure cannot do).

due to “gender bias” simply because he is male and the complainant is female, and the decision was adverse to him, the complaint will not survive past the Rule 12(b)(6) stage.¹⁴² Nevertheless, courts will no longer have to decide at the Rule 12(b)(6) stage whether a plaintiff’s claim is more plausible than not, as tied to the plaintiff’s ability to eliminate alternative explanations for the decision.¹⁴³ Moreover, because the prima facie case is not meant to be inflexible, a plaintiff may still plead under the general *Twombly/Iqbal* standard (though perhaps to less avail).

IV

CRITICISMS AND LONG-TERM CONSEQUENCES

A. Social Stakes

At first blush, it is unsettling to allow an accused male student to potentially profit from a settlement and embroil the university in legal battle, which may take time and resources away from victims. Lower courts and social commentators have raised certain concerns about these kinds of cases because they feel that the long-term policy consequences may be severe for the national discussion of sexual assault.¹⁴⁴ While

¹⁴² See, e.g., *B.B. v. New School*, No. 17 Civ. 8347 (AT), 2018 U.S. Dist. LEXIS 80068, at *19 (S.D.N.Y. Apr. 30, 2018) (holding plaintiff’s complaint that the disciplinary panel’s finding stating “the plaintiff lacked empathy” and was “not credible” did not suggest gender bias in the form of sex stereotyping against the plaintiff but was gender neutral and thus warranted dismissal).

¹⁴³ Note that the plaintiff-presumption in the prima facie framework, as articulated by the Second Circuit in the Title IX setting may also have ramifications in the Title VII setting. Contrary to the ultimate holding of the Fourth Circuit, the plaintiff in *McCleary-Evans* would have been able to survive dismissal at the Rule 12(b)(6) stage under the prima facie framework: the Fourth Circuit reasoned the plaintiff’s allegation that non-black decision makers hired non-black applicants instead of the plaintiff is “consistent” with discrimination but it does not alone “support a reasonable inference” that the decision makers were motivated by bias. With a plaintiff presumption, however, the plaintiff would only need to plead facts that are consistent with a prima facie case with relative factual ease, without needing to convince the court of the likelihood of success at trial. See *McCleary-Evans v. Md. Dep’t of Transp.*, 780 F.3d 582, 587–88 (4th Cir. 2015).

¹⁴⁴ See, e.g., Fred Barbash, *Former Ivy League Athlete Suspended for Alleged Sexual Assault Wins Important—and Surprising—Court Victory*, WASH. POST (Aug. 1, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/08/01/former-ivy-league-athlete-suspended-for-alleged-sexual-assault-wins-important-and-surprising-court-victory/?utm_term=.63f0ed98f7dc [http://perma.cc/L3SF-AYGP] (quoting law professor Jamie Abrams: “The idea that vigilance to victims is a ‘pro woman bias’ potentially amounting to discrimination is a concerning perspective . . . It is important that universities continue to recognize their obligations to investigate and act fairly such that this decision will not temper or stagnate the critical cultural and institutional changes that were underway.”)

these are certainly valid considerations, the social stakes for all those involved—the perpetrator, the victim, the institution, and the courts—indicate that these claims tend to be more helpful than they are hurtful.

Sexual-assault perpetrators do not regularly file complaints with the OCR but rather initiate lawsuits in federal courts.¹⁴⁵ Moreover, OCR has historically accepted very few complaints by these accused perpetrators. The OCR's low acceptance rates indicate that redress through the judicial system may be the only vehicle to achieve justice for the wrongfully accused. Moreover, equal enforcement of the law also achieves justice on a societal level and reinforces the legal system's institutional value as an impartial and fair arbiter. Because the Title IX legislative guidelines still allow for the preponderance of the evidence standard, which is lower than that of the criminal justice system, it is more crucial than ever to have procedural protections in these federal claims. As legal scholars have noted, “[i]n law, as in life, getting it right is far more important than getting it done.”¹⁴⁶

Further, one should not think of these “anti-male” gender-bias claims as “reverse-discrimination” cases. In the employment context, a typical discrimination claim inherently pits one candidate against a hypothetical other: one candidate does not receive the job offer or is fired from the job because someone else of the other gender obtained the position. Such a scenario implies a zero-sum game, which does not translate to the Title IX setting. These lawsuits by perpetrators are zero-sum only with respect to the institutions, not the victims, to whom much respect and understanding should be given. Indeed, victims too can and do file lawsuits against their institutions for redress in their Title IX proceedings. Like in the employment context, however, these Title IX cases pit one individual disproportionately against an established and endowed institution; as such, these cases deserve procedural protections. Lastly, university students are more vulnerable in many respects due to their young age and lack of experience than comparable plaintiffs in the employment context.

Anecdotally, racial minorities are vastly overrepresented as the alleged perpetrators in Title IX sexual-assault cases.¹⁴⁷

¹⁴⁵ Corbin, *supra* note 130, at 2686.

¹⁴⁶ Henry L. Chambers, Jr., *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1, 3 (1996).

¹⁴⁷ Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases*, ATLANTIC (Sept. 11, 2017), <https://www.theatlantic.com/education/archive/2017/09/>

Commentators have noted that people of color may be “uniquely defenseless” when it comes to having financial resources, a support network, and an understanding of their rights.¹⁴⁸ It is not hard to imagine that only a select few perpetrators would have the resources (and indignation) to file “anti-male” bias claims in federal court. With clearer pleading standards, the legal system can encourage all plaintiffs to seek redress—not just the highly entitled.

A fair critique of these cases, however, is that the impact on victims can be devastating. Indeed, allowing a victim’s alleged assaulter to continue with his or her case may signal to the victim a symbolic defeat or, worse, force victims to relive the trauma of the sexual assault through depositions or in-court witness appearances. Still, allowing for fair and equitable proceedings for an accuser, however, may benefit victims as well. For one, evidence gathered from a Title IX proceeding in the discovery phase may help a victim’s case in a criminal proceeding if it is gathered without procedural errors. Likewise, by allowing cases to proceed past the initial fact-finding stage, the proliferation of gender-bias cases will inevitably expand Title IX jurisprudence, which still suffers more than similar legislation from unanswered questions of law.

At least one court has been reluctant to allow gender-discrimination suits for fear of putting universities in a “double bind” where they would “come under public fire for not responding to allegations of sexual assault aggressively enough or . . . open themselves to Title IX claims simply by enforcing rules against alleged perpetrators.”¹⁴⁹ It is not unreasonable, however, to ask institutions to strive to both respond to sexual-assault allegations diligently as well as to correctly disavow bias when enforcing the rules against accused students. Still, universities may be greatly impacted by the cases’ notoriety and legal costs. By utilizing the presumption-shifting model, though, institutions may be better equipped to avoid the costly discovery expenses that heightened pleading standards sought to avoid. Moreover, institutions may be more incentivized to correctly adjudicate with the understanding that these lawsuits cannot be dismissed as a matter of course.

the-question-of-race-in-campus-sexual-assault-cases/539361/ [http://perma.cc/6XLP-Q8X4].

¹⁴⁸ *Id.*

¹⁴⁹ *Austin v. Univ. of Or.*, 205 F. Supp. 3d 1214, 1226–27 (D. Or. 2016).

B. Economic Costs

One last consideration that deserves mention is the economic question: At what cost? On one hand, it is likely that these gender-discrimination suits will result in more settlement. Whereas settling would likely be off the table if an accused student failed to state a claim past the initial pleading stage, universities now are more incentivized to settle because more and more students will likely sue under these new standards of pleadings. As the *Twombly* court stated, “[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”¹⁵⁰ Discovery expenses can comprise between 50% and 90% of the total litigation costs.¹⁵¹

There are ways, however, to limit the costs involved. For one, the courts can reduce the cost of discovery by limiting discovery.¹⁵² Courts reviewing civil rights cases have increasingly permitted such restricted early stage discovery.¹⁵³ Allowing limited discovery is relatively risk-free for the court, as a judge has discretion to approve early stage discovery requests and the use of this discretion is largely unreviewable.¹⁵⁴ Moreover, concerns over discovery expenses are already accounted for in the discovery rules themselves: the Federal Rules explicitly state that discovery will not be permitted unless it is “proportional to the needs of the case.”¹⁵⁵ Procedurally, parties can request limits on the kind, quantity, and sequence of discovery. They can also object to particular discovery requests when those requests are made.¹⁵⁶

CONCLUSION

The plot thickens once again in Title IX jurisprudence. Though Title IX jurisprudence has achieved enormous progress for victims, the results should not be at the expense of fairness and equality. In recent years, the number of anti-male bias

¹⁵⁰ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 549 (2007).

¹⁵¹ John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010).

¹⁵² Corbin, *supra* note 130, at 2711.

¹⁵³ *Id.* at 2711–12.

¹⁵⁴ *Id.* at 2712.

¹⁵⁵ FED. R. CIV. P. 26(b)(1).

¹⁵⁶ FED. R. CIV. P. 16(c)(2)(F) (allowing courts to take appropriate action on controlling and scheduling discovery); FED. R. CIV. P. 26(b)(2) (allowing courts to order limitations on discovery); FED. R. CIV. P. 26(c)(1) (allowing parties to move for protective orders); FED. R. CIV. P. 37 (allowing for a process in which to resolve discovery disputes).

lawsuits have grown exponentially. Moreover, an increasing number of courts are becoming receptive to the idea of anti-male discrimination bias, but it still remains to be seen if such a platform will make much of a difference for the average accused student. This Note proposes additional ways for a plaintiff to plead sufficiently under the *Twombly/Iqbal* standard through reconciliation with the *McDonnell Douglas* framework. The hope is that all involved parties will benefit: as the old adage goes, a rising tide lifts all boats.

