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Title IX Legal Developments for Title IX Personnel

Big Picture

1. *Cummings* was a game changer on litigation front
   - But….
2. ED's embrace of informal resolution has served everyone well
   - But practices need to be tightened up
3. It's not 2011 (and Department of Education has reverted to its historical role)
4. Courts: Deference is Dead ☹
5. Picking nits is passe, focus on Death Star events

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Overdam v. Texas A&M, 43 F.4th 522 (5th Cir. August 2022)

- *** Incident was in 2016
- 5th Circuit: "**First**, what is the proper pleading standard for a Title IX claim challenging a university's disciplinary proceeding? **Second**, does constitutional due process require that students accused of sexual assault be permitted the opportunity for attorney-led direct cross-examination of their accusers during university disciplinary proceedings?"

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- “We see no meaningful tension between Yusuf and *Purdue* , as Texas A&M itself acknowledged during oral argument . . . *Purdue* is surely correct that we are governed by the standard set forth in the text of Title IX—prohibiting discrimination on the basis of sex. *Yusuf* is likewise correct that there are different fact patterns that could very well state a claim of sex discrimination under Title IX.”
- “Accordingly, we apply here the following standard. . . Do the alleged facts, if true, raise a plausible inference that Texas A&M or its administrators discriminated against Van Overdam on the basis of sex? We find they do not.”

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“we conclude that Texas A&M did not violate Van Overdam's due process rights. Van Overdam received **advanced notice** of Shaw's allegations against him. He was **permitted to call witnesses and submit relevant, non-harassing evidence of his innocence** to a **neutral panel** of administrators. He was **represented by counsel** throughout the entirety of his disciplinary proceeding. He had the **benefit of listening** to Shaw's description of the allegations directly. And he and his attorney had the **opportunity to submit an unlimited number of questions** to the disciplinary panel.”

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Questions

1. If regulations don’t require direct cross examination from advisor, will you nevertheless continue to allow?
2. How will you communicate decision to campus community?

Hypothetical

- Student reports that fellow student gave her herpes during a consensual sexual encounter
- Q1: prohibited by policy?
- Q2: what are material disputed facts?

Doe v. Rice Univ. (5th Cir. 2023)

- Erroneous Outcome: “First, and most significantly, we note that contrary to Roe's allegations and the University's position at the time of Doe's interim suspension, the record supports Doe's contention that he did inform Roe about his history with herpes before the two had sex and that she may have had herpes already. Indeed, by her own admission, Roe knew that Doe had herpes in his sexual history, but she declined to inquire further about the disease or its transmissibility before having unprotected sex with him. Moreover, as Doe urged in the SJP proceedings, Roe could have contracted herpes from one of her other sexual partners prior to beginning her relationship with him, a theory which could have been corroborated by another male student had the University contacted him to confirm Doe's allegations. In other words, the record supports Doe's argument that Roe knew about Doe's herpes, had unprotected sex with him anyway, and may have already had herpes herself at that time.”

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“Furthermore, Rice ultimately sanctioned Doe with what amounted to expulsion for failing to inform Roe of all of the risks of having sex with a herpes carrier, **even though Rice's student code does not contain such a requirement** and, again, **even though the University would ultimately immunize Roe for doing the same thing**. This is further evidenced by Dean Ostdiek's deposition testimony that the University would not require Roe to disclose to her sexual partners that she had herpes as the University was holding Doe liable for failing to do. Likewise, Garza's deposition testimony provided, and the record confirms, that Doe never made any misrepresentations or changed his story while Roe consistently misrepresented the facts and changed her story. For example, Roe told the RUPD that Doe never told her he had herpes prior to their sexual encounters but later admitted that Doe did in fact disclose his herpes diagnosis to her prior to the two having sex. A rational juror could also find the variance between Roe's allegations and the conduct for which Doe was ultimately sanctioned to be explainable by the fact that Roe's allegations fell apart under scrutiny. A factfinder would not be unreasonable to conclude, as the Ninth Circuit speculated in Doe v. Regents of University of California, that ‘when confronted by a claim that lacked merit, the University rushed to judgment’ by suspending Doe, ‘and then sought out a way to find the accused responsible for something in order to justify its earlier actions.’”

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“Furthermore, Doe was punished for alleged violations of the University code of conduct's ‘expectations of civility and respect’ but it is unclear on these facts exactly how Doe's failure to describe to Roe how a certain strain of herpes is transmitted violated these ‘expectations of civility and respect.’ Roe's behavior, meanwhile, hardly appeared to exemplify ‘civility and respect,’ as indicated by her text messages to Doe: ‘Question: are you aware of how much you f***** up. I don't think you do. But you will, do not worry. You don't f*** w me like that and get away with it.’ **Despite Roe's expletive-laden threats against Doe, there is no indication that she was ever charged with any such violation or that the University took any action against her whatsoever**.”

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Selective Enforcement

- “With respect to his arguments under the selective enforcement theory, Doe emphasizes that he ‘informed [ ] Garza that Roe had done exactly what she was accusing Doe of, except worse[,]’ and yet Garza did not investigate further. He explains that ‘[n]one of the email recipients at Rice discussed whether Roe posed a danger to other students, yet when assessing Doe's punishment, they considered ‘every other student that attends Rice University’ (and who had not filed complaints).” According to Doe, ‘[t]hese are all instances of the [U]niversity's selective enforcement of its policies against Doe but not Roe.’”

- “Construing the evidence in a light most favorable to Doe, the nonmovant, we agree that a material fact question exists as to whether the University selectively enforced its policies against him by refusing to treat Roe and Doe equally when Doe alleged—in response to Roe's allegations—that she was guilty of the same conduct of which he was charged: failure to disclose the risk of STD transmission . . . If, as Doe alleges, Roe likely had herpes before having sex with him, on the University's reasoning, she should have warned him before they had sex—and she did not. But Garza refused to investigate this possibility despite Doe's telling her about this because she claims they ‘did not have a report about [Roe].’”

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Archaic Assumptions

- "Doe contends that '[c]ertainly, assuming that an adult female college junior is incapable of understanding the risks of sexual intercourse without the male educating her is part of' the archaic thinking our case law prohibits. According to Doe, '[r]efusing to acknowledge that Roe had an accountability for her own actions, her own choices[,] and her own conduct is 'remarkably outdated' " and "[s]ubsequently refusing to hold her accountable for the same conduct is outdated, archaic, and outmoded."

- "We agree with Doe that, to the extent a rational jury could find that the University's policy arose from the view that a more-knowledgeable male (Doe) had a duty to educate an unwitting female (Roe) about the precise risks of herpes transmission, its position rests on an archaic assumption. Roe, as Garza acknowledged, was a "consenting adult female" who, as the record confirms, was rather sexually knowledgeable. In fact, it appears that Roe was perhaps even more educated about herpes and its transmissibility than Doe as evidenced by their text message exchanges wherein Roe informed Doe that herpes was an incurable disease and his case was likely dormant, to which Doe replied "what does dormant mean[?]" Garza's decision appeared to depend on the view that it was Doe's responsibility to inform Roe of publicly available information that Roe, a capable adult woman, could have ascertained for herself: to wit, "the details of the disease, the long-term effects, [and] how it is spread." A rational juror could conclude that to absolve Roe of responsibility for her own risk-assessments—and to place that burden on her male partner—is to act on archaic assumptions in violation of Title IX. For these reasons, we agree that a material fact issue remains as to whether the University acted on archaic assumptions in its investigation against Doe."

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Doe v. Univ. of Southern Indiana, 43 F.4th 784 (7th Cir. 2022)

- Respondent litigation: Evidence of public pressure on a university can be relevant in assessing sex discrimination claims under Title IX.
- "Here, the university took significant steps to insulate the grievance process from any public pressure. It used **independent contractors at each stage of the proceedings**. The outside lawyer who did the original investigation, the committee members who heard the case, and the outside lawyer who acted as appeal officer were not affiliated with the university. No school officials were involved even in deciding John's sanction."
- "John's assertion that public pressure on the university supports his claim of sex discrimination is less convincing when no university officials—who were the focus of the reported pressure—were responsible for compiling the evidence or assessing the merits of Jane's complaint."

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Questions

1. Does policy contemplate outside contractors?
2. When do you use outside contractors?
3. What have you done to vet ever-expanding group of consultants in this space?

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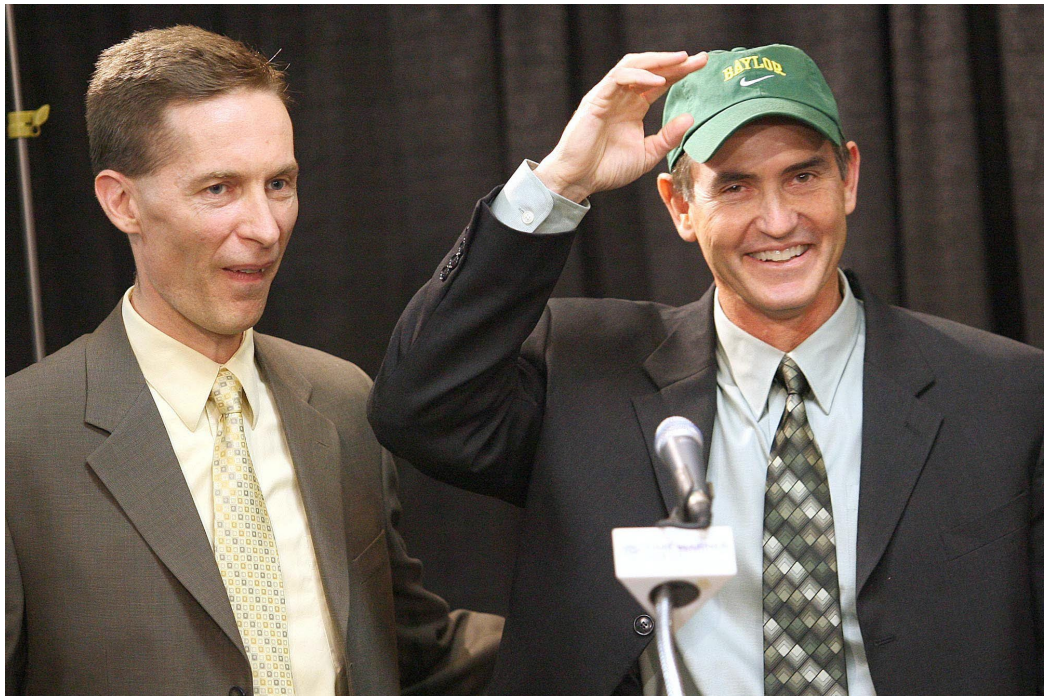
Lozano v. Ian McCaw (Sep. 2022)



- Former student brought a negligence claim against a former athletic director based on allegations that the athletic director did nothing to help her after she reported that a football player had sexually assaulted her.
- The court held that the athletic director owed plaintiff an independent duty of care because (1) the athletic director knew about the first sexual assault, (2) it was foreseeable that the football player might continue to assault plaintiff, and (3) the athletic director had the authority to implement corrective measures,
- Finally, although criminal conduct can be a superseding event that breaks the chain of causation, in this case, it was not because the criminal conduct was foreseeable due to defendant's negligence.

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Kashdan v. George Mason Univ. (4th Cir. 6/13/2023)

- Kashdan was a psychology professor at GMU for over fifteen years and primarily studies sex, human sexuality, and cultural norms.
- In December 2018, four current and former female graduate students accused Kashdan of sexually harassing them.
- In essence, the complainants alleged that during two graduate courses and in interpersonal interactions in his laboratory, at professional conferences, and at student events hosted in his home, Kashdan told them explicit stories about his personal sexual experiences, as well as made explicit remarks and asked intimate questions about their sex lives. One complainant also recounted that Kashdan went to a strip club with her and other graduate students, and another complainant alleged Kashdan hugged her in a manner she believed was inappropriate. From the complainants' perspectives, Kashdan provided educational, research, and other opportunities to graduate students based on favoritism, and having sexually explicit conversations with Kashdan was a prerequisite to getting on his good side. They claimed that Kashdan's conduct made it more difficult to pursue their educations.
- **Question: Sex harassment or no?**

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Kashdan v. George Mason Univ. (4th Cir. 6/13/2023)

- Title IX Coordinator: Kashdan's repeated sexual conversations and physical interactions with his students were unprofessional and created a hostile environment for students.
- Appeal: Denied → Kashdan's "apparent lack of professional boundaries" with his graduate students, demonstrated by "numerous instances of non-pedagogical discussions of sex" and "sexual encounters" as well as by Kashdan's creation of "a sexually-charged environment."
- Punishment: sanctions precluded Kashdan from teaching graduate-level courses, mentoring new graduate students, or hiring new graduate students as research assistants, all for a period of roughly two years.

Kashdan v. George Mason Univ. (4th Cir. 6/13/2023)

- "GMU disciplined Kashdan for speech that concerned topics of purely personal interest. Specifically, Kashdan's comments were about his personal sex life and the sex lives of his students. Besides two personal stories Kashdan used as examples in class, GMU sanctioned him for speech outside of his curricula, formal scholarship, other published work, or public discourse. Indeed, his sanctioned speech primarily involved casual, interpersonal interactions with students about personal sexual matters that Kashdan does not plausibly connect to a larger public discourse or matter of public concern. Kashdan's employment at GMU and his role as his students' teacher, mentor, and supervisor enabled and facilitated these interactions."
- "While Kashdan's research, publishing, and teaching about sex may qualify as matters of public concern, his contested speech veered well outside his teaching and scholarship into areas of private, personal interest. It is simply implausible that the public is 'truly concerned with or interested in" Kashdan's personal sexual exploits or the intimate and private details of his students' sex lives.'"

Doe v. Stonehill College (1st Cir. 2022)

- Respondent's allegation that Stonehill failed to follow its own procedures related to reviewing evidence and notifying him of witness interviews, as well as Stonehill's failure to conduct a complete, thorough and impartial investigation, gave rise to a plausible claim for **breach of contract**.
- The court agreed with the respondent that investigators failed adequately to probe the complainant's account, or to assess the plausibility of respondent's account. The court took issue with what it characterized as the investigators' failure to "weigh[] competing evidence" or to explain sufficiently their rationale for credibility determinations and findings.
- The court also noted that administrators who were tasked with conducting an "independent review" of the investigators' findings provided only brief, conclusory communications related to that review, and permitted the inference that the administrators did not make an independent judgment, but instead blindly adopted the investigators' findings.

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Texas & Disclaimers ("This is not a contract!")

- "Several courts, including this Court, have addressed the issue of whether a university's student bulletin or handbook constitute a contract between the university and the student." *See Southwell v. Univ. of Incarnate Word*, 974 S.W.2d 351 (Tex. App.—San Antonio, 1998, pet. denied) (collecting cases); *Anyadike, v. Coll.*, 2016 WL 7839183, at *6 (N.D. Tex. 2016) (O' Connor, J.).
- In Anyadike, this Court assessed a breach of contract claim involving two of the college's student handbooks. This Court ultimately held that neither handbook constituted an enforceable contract **because there was no intent to be strictly bound**. In one handbook, the college included statements indicating that the policies were "**subject to continuous review and evaluation**" and the college "reserves the right to make changes at any time without notice." Anyadike, 2016 WL 7839183, at *6.
- Likewise, the other handbook included statements such as "[t]his handbook is provided to assist you in satisfactory adjustment to your newly chosen career. From time to time, there will be changes in the policies and regulations." Id. The Court reasoned that these statements clearly demonstrated the college's lack of intent to be bound by the terms of the handbooks. Id. Rather than acting as contracts, the documents "served as informational guides to assist students." Id. Therefore, the plaintiff failed to establish the existence of a contract, and the breach of contract claim was dismissed. Id. at *7.

Brown v. Arizona (9th Cir. 2022)

- The panel affirmed the district court's summary judgment in favor of the University of Arizona in a Title IX action brought by student who suffered physical abuse at the hands of her former boyfriend and fellow University student at his off-campus residence.
- The panel held that, under *Davis ex. rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999), Title IX liability exists for student-on-student harassment when an educational institution **exercises substantial control over both the harasser and the context in which the known harassment occurs**.
- Majority rejected the dissent's context theory that the boyfriend, a university football player, had to have university approval to live off campus and his housing was paid for with scholarship funds that he received from the university.

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Brown v. Arizona (9th Cir. 2022)

Dissenting judge wrote that, while the physical location of the harassment can be an important indicator of a school's control over the "context" of alleged harassment, **the key consideration is whether the school had disciplinary authority over the harasser in the setting in which the harassment took place**. Dissent wrote that an off-campus residence paid with scholarship funds that former boyfriend received from the university, and where students reside with permission of the school, is such a setting. Accordingly, the university had control over the "context" in which Brown was assaulted.

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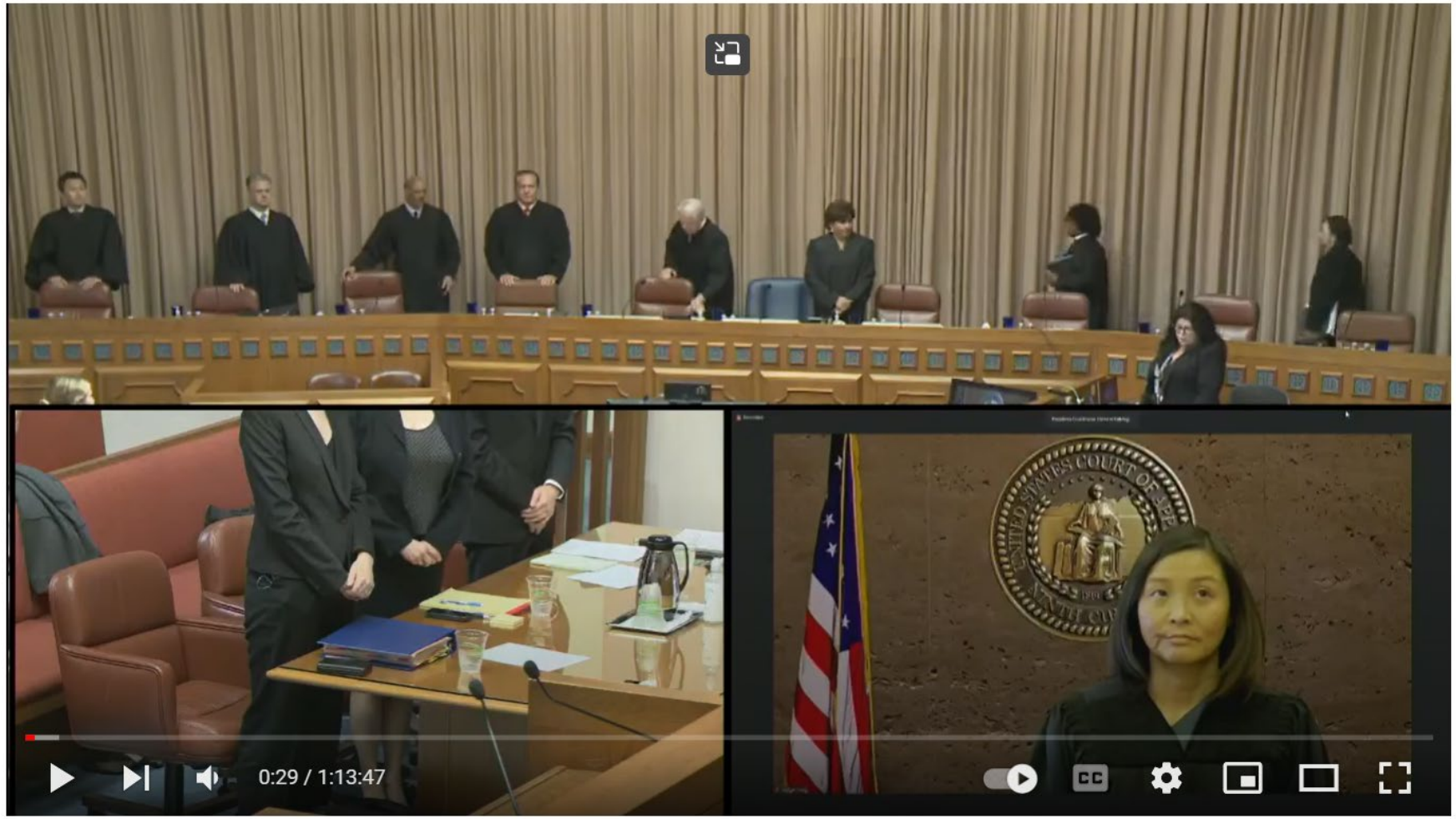

20-15568 Mackenzie Brown v. State of Arizona

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Mackenzie Brown appeals the district court's summary judgment in her Title IX action against the State of Arizona et al. [2:17-cv-03536-GMS]

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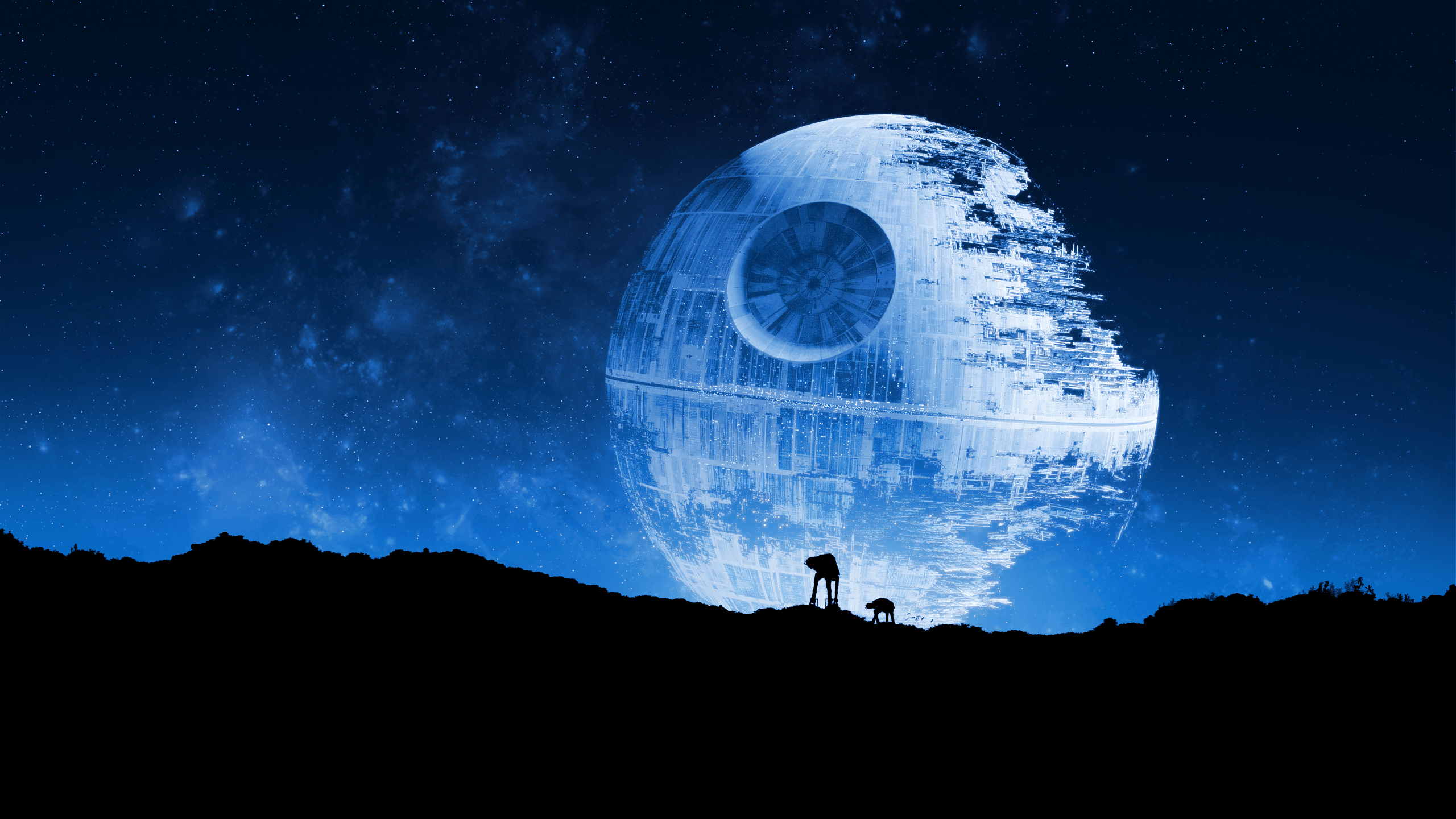
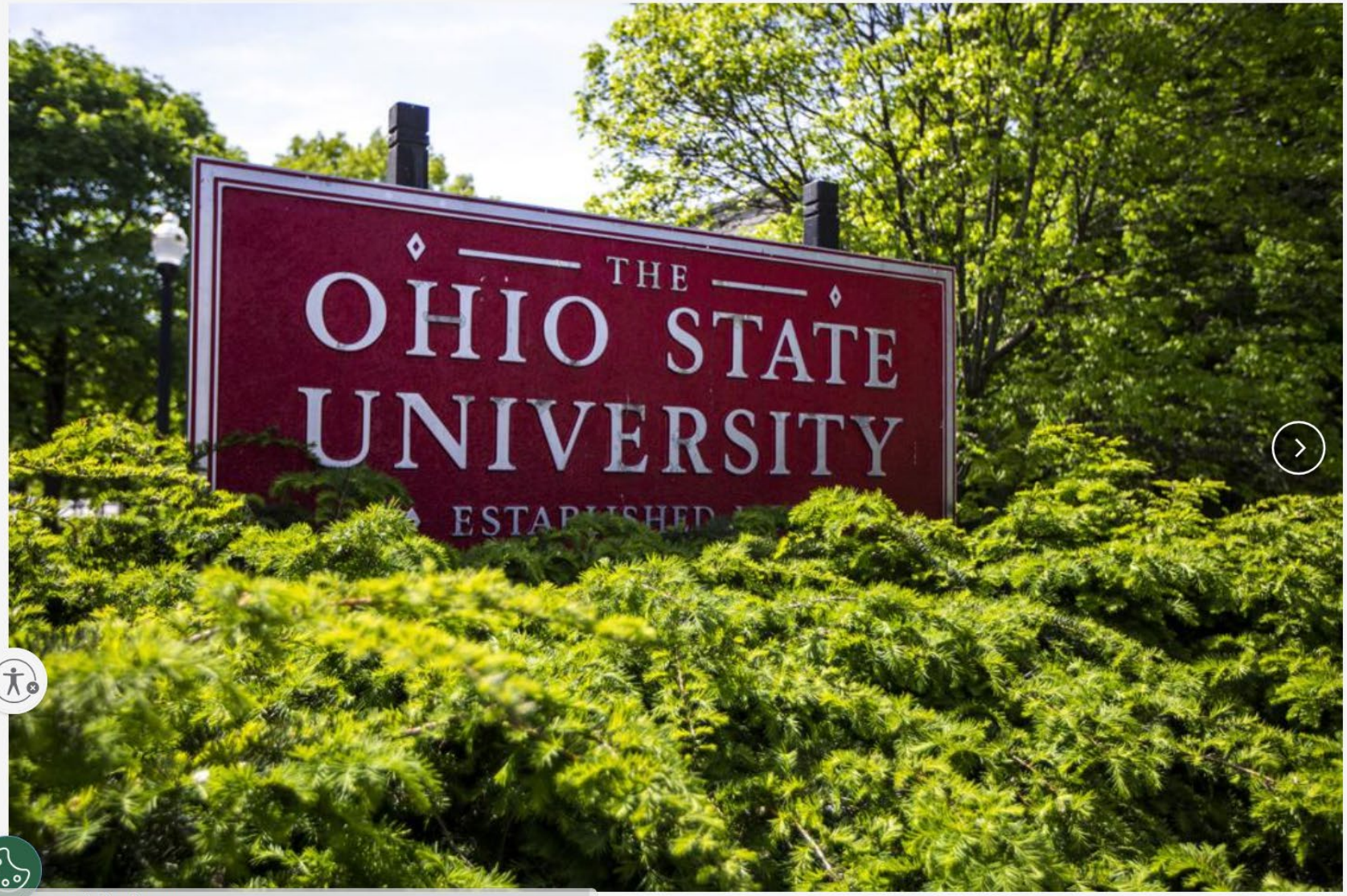


Court revives lawsuits against Ohio State over sex abuse

By KANTELE FRANKO September 14, 2022



Snyder-Hill v. OSU (6th Cir 2022)

- The primary question before the appeals court asked whether the statute of limitations barred Plaintiffs' claims.
- Although state law determines the length of the statute of limitations, federal standards govern when the statute of limitations begins to run. The general rule in federal courts holds that the statute of limitations clock begins to run when the reasonable person knows, or should have known, **both their injury and the cause of their injury**. This is known as the "discovery rule."
- "Here, a student must know that their school exposed them to a **heightened risk of harassment** before they have a viable claim. Until they knew the University's actions may have violated Title IX, the statute of limitations clock could not run. **Since a Title IX lawsuit is against the school, not the individual person who abused the plaintiff(s), knowledge of Strauss's abuse would not cause the statute of limitations clock to start running**."

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Snyder-Hill v. OSU (6th Cir 2022)

- **Therefore, a pre-assault heightened-risk claim may not accrue until well after a post-assault Title IX claim.** Though a plaintiff may know that a recipient mishandled their own report of discrimination or harassment, that same plaintiff may have no reason to know of a school's deliberate indifference that gave rise to their heightened-risk claim. Given that Plaintiffs alleged a decades-long cover-up, it's not clear whether Plaintiffs could have reasonably discovered Ohio State's conduct prior to the external investigation.
- The court held the statute of limitations clock only begins to run when the plaintiffs knew or should have known that University administrators knew of Strauss's conduct and failed to respond accordingly.

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A New Legal Strategy in Sexual Assault Cases

When the victim of a campus sexual assault faced a counterclaim by her alleged attacker, she sued him for “abuse of the Title IX process," in what experts say is a new approach.

By Johanna Alonso

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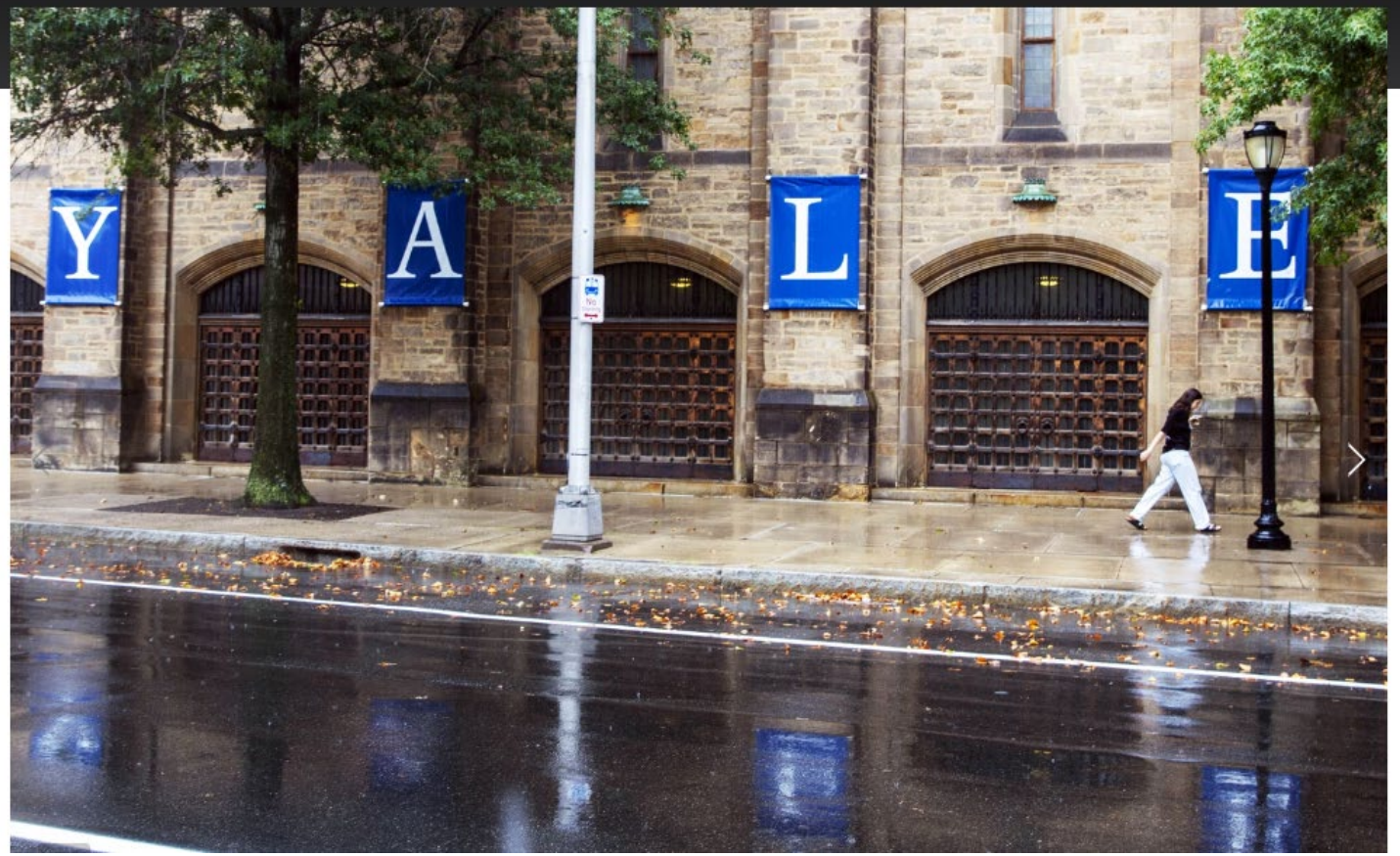
EXIT

Yale student who reported rape can be sued for defamation due to school's procedures, court says



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Big Picture Trends

1. The regulatory side is vastly different now than 10+ years ago
2. Supreme Court *Cummings* decision was a game changer on litigation front (pursuing alternative theories?)
3. Cases on the respondent side are down but getting through MTDs and MSJs
4. RM focus shift to systemic claims?

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