

2011

## Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence

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### Recommended Citation

Nancy Chi Cantalupo, Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence, 43 LOY. U. CHI. L.J. 205 (2011)

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# Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence

Nancy Chi Cantalupo\*

*This Article discusses why two laws that seek to prevent and end sexual violence between students on college campuses, Title IX of the Educational Amendments of 1972 ("Title IX") and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"), are failing to fulfill this goal and how these legal regimes can be improved to reach their objectives. It explicates how Title IX and the Clery Act ignore or exacerbate a series of "information problems" that create incentives for schools to "bury their heads in the sand" with regard to campus peer sexual violence. These information problems include: (1) the damage to a school's public image that can come from increased reporting of the violence; (2) the persistent myth that such violence is committed mainly by strangers; (3) the lack of awareness by most school officials about the violence and a school's legal obligations with regard to preventing the violence; and (4) the prohibitively expensive broad-based education and training that correcting such information problems would require. Several legal deficiencies emerge from this examination, including: (1) problems arising from the "actual notice" prong of the test created by the Supreme Court in Gebser v. Lago Vista Independent School District and Davis v. Monroe County Board of Education; (2) problems related to the Department of Education's ("DOE's") administrative enforcement of Title IX; and (3) problems with the campus crime reporting provisions of the Clery Act. This Article discusses each*

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*deficiency in turn, how each serves to enable schools' lack of knowledge and avoidance of knowledge about peer sexual violence and how each either fails to solve or exacerbates the information problems faced by schools, students, and parents. Finally, this Article concludes with a series of recommendations for changes that should be made to Title IX, the Clery Act, and their enforcement regimes to address these information problems and ultimately to prevent and end the persistent problem of campus peer sexual violence.*

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## I. INTRODUCTION

When one of a school's students sexually assaults or is otherwise sexually violent toward another of the school's students, that school faces much greater liability from inadequately protecting student victims<sup>1</sup> of such peer sexual violence than schools do from expelling and otherwise disciplining students found responsible for perpetrating the violence. This was a central conclusion of an article I authored in 2009,<sup>2</sup> in which I comprehensively reviewed the law governing school liability, both in terms of the school's obligations to the victim and the accused perpetrator. My review of not only the law but also the social science research regarding peer sexual violence on college and university campuses indicated, moreover, that this liability scheme reflects quite accurately how the problem of campus peer sexual violence is perpetuated by the college or university itself. Because of these dynamics, I decided that school processes imitating and drawing from procedures used in the criminal justice system do not help a school address campus peer sexual violence and actually create greater risks of liability for the school. Therefore, I concluded that the law creates an

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1. A note about language: I use "victim" and "survivor" interchangeably to refer to people who claim they have been victims of sexual violence. Therefore, "victim" is not a term of art used to indicate a finding of responsibility for sexual violence. I may use "accuser" when discussing the role of the victim/survivor in a disciplinary proceeding. I use "perpetrator" or "assailant" when someone accused of sexual violence has been found responsible or in discussions where it can be assumed the person perpetrated the sexual violence, such as statistical analyses. I use "accused" or "alleged" to refer to those who have been charged but not found responsible for committing sexual violence. Finally, I use female pronouns to refer to victims because the majority of victims are women, and male pronouns to refer to perpetrators and accused students because the majority of perpetrators and accused students are men.

Other than when I am discussing studies or other sources that use terms such as "sexual assault" or "rape," I use "sexual violence" instead of terms such as "sexual assault" or "rape" because in my view, "sexual violence" is a broader, more descriptive term that is not a term of art and that I regard to include a wider range of actions that may not fit certain legal or readers' definitions of "sexual assault" or "rape." The term therefore includes "sexual assault" or "rape," as well as other actions involving physical contact of a sexual nature that may not always fit everyone's definition of "sexual assault" or "rape." While I acknowledge that non-physical actions can constitute violence, including those forms of violence is outside the scope of this paper. When I discuss studies or other sources that use terms such as "sexual assault" or "rape," I retain use of those terms as the original researchers and authors used them.

I use "school" and "institution" to identify either K-12 schools or higher education institutions, although I use "college," "university," "campus," or "higher education" to refer to the latter category of schools.

Finally, my definition of "report" and "reporting" is not a technical one. I regard a report as any time a victim tells any professional with any role or authority to help her about the violence, including but not limited to medical, counseling, security or conduct-related, residential life or other student affairs personnel, as well as faculty and community or campus advocates.

2. Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1457343](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457343).

incentive for schools to disassociate their internal processes and procedures related to student misconduct from a criminal model and to create a *sui generis* administrative model that responds to the goals and powers of schools, not those of a coercive state.

Nevertheless, a wide variety of sources indicate that many colleges and universities appear to act exactly opposite to their legal incentives when it comes to responding to the widespread problem of campus peer sexual violence. A growing number of private lawsuits, complaints filed with the Department of Education (“DOE” or “Department”), and news reports indicate that schools often respond in ways that are both violative of the law and unhelpful in ending the violence. These sources include an in-depth, nine-month investigation of campus peer sexual violence, conducted by the Center for Public Integrity (“CPI”) in late 2009 and early 2010, with companion pieces by National Public Radio, four regional news networks, and *Nightline*.<sup>3</sup> The CPI study simply confirms what many lawyers, faculty, and administrators involved in cases of campus peer sexual violence, both within and outside of schools, say: that school adjudications of campus peer sexual violence cases are “kangaroo courts” with the deck stacked in favor of the alleged perpetrator, and that a survivor of campus peer sexual violence needs independent representation because she cannot rely on her school to protect her rights.<sup>4</sup> These impressions are further confirmed by the facts of various cases litigated under Title IX of the Educational Amendments of 1972 (“Title IX”), cases decided under the test for school liability set out in *Gebser v. Lago Vista Independent School District*<sup>5</sup> and *Davis v. Monroe County Board of Education*.<sup>6</sup>

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3. Cynthia McFadden, *Many Campus Assault Victims Stay Quiet, or Fail to Get Help*, ABC NEWS NIGHTLINE (Sept. 6, 2010), <http://abcnews.go.com/Nightline/college-campus-assaults-constant-threat/story?id=11410988>; *Sexual Assault on Campus: A Frustrating Search for Justice*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010), [http://www.publicintegrity.org/investigations/campus\\_assault/](http://www.publicintegrity.org/investigations/campus_assault/).

4. See, e.g., Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010), [http://www.publicintegrity.org/investigations/campus\\_assault/articles/entry/1945/](http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1945/) (quoting a victim characterizing her university’s handling of her case as a “kangaroo trial with a kangaroo sanction”); Kristen Lombardi, *Sexual Assault on Campus Shrouded in Secrecy*, CTR. FOR PUB. INTEGRITY (Dec. 1, 2009), [http://www.publicintegrity.org/investigations/campus\\_assault/articles/entry/1838/](http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1838/) (quoting a campus administrator likening campus judicial proceedings to “star chambers”). The comments listed here are just the tip of the iceberg of comments that have been shared with me during my fifteen-plus years of experience working on these issues. However, to the extent that many of these comments were made by various university employees in settings not involving a journalistic investigation or other settings where the speaker might expect them to be made public, they cannot be cited with specificity.

5. 524 U.S. 274 (1998).

6. 526 U.S. 629 (1999).

Accordingly, this Article explores why many schools have a tendency to act against their own liability interests in the area of campus peer sexual violence and asks how the law does or does not encourage schools to act in this fashion. Part II reviews what is known about both campus peer sexual violence and how many colleges and universities handle reports of such violence. This review reveals that colleges and universities face serious information problems when it comes to campus peer sexual violence that create incentives opposite to those created by the existing liability structure. At best, these information problems cause schools to be generally unaware of the laws and the underlying campus peer sexual violence problem and, at worst, create countervailing incentives for schools to actively avoid knowledge of both.

Part III then examines what, if anything, the law does to alleviate or exacerbate these information problems and the incentives that can arise from them. Several legal deficiencies emerge from this examination, including problems arising from the *Gebser/Davis* test, problems related to the DOE's administrative enforcement of Title IX, and problems with the campus crime reporting provisions of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"). Part III discusses each of these deficiencies as well as how they serve to enable the lack of knowledge and avoidance of knowledge by schools about peer sexual violence happening on their campuses. Part III concludes with a description of how each deficiency fails to solve the information problems faced by schools, students, and parents.

Finally, Part IV discusses various changes that need to be made to existing laws and enforcement regimes for the incentive structures surrounding campus peer sexual violence to be influenced in a meaningful way. Although school liabilities under Title IX, the Clery Act, and constitutional law related to accused students' due process rights clearly encourage schools to address the campus peer sexual violence problem in a meaningful and responsible way, the information problems discussed in this Article create quite opposite incentives—incentives that account in part for the collective failure over the last three decades to end or significantly prevent the epidemic of peer sexual violence that afflicts the nation's campuses.

## II. CAMPUS PEER SEXUAL VIOLENCE: THE PROBLEM AND THE INFORMATION PROBLEMS

Is it fair to characterize campus peer sexual violence as an epidemic? The statistics suggest that it is. Comprehensive studies on campus-based, peer sexual violence that have been completed over the last

several decades have consistently found that 20–25% of college women are victims of attempted or completed nonconsensual sex during their time in college.<sup>7</sup> Because so few male victims report instances of abuse, there is a limited amount of information about the extent of campus peer sexual violence against men. Despite the low rate of male victim reporting, statistics do show that when men are raped, it is usually done by other men.<sup>8</sup>

These statistics also suggest that college and university women are particularly vulnerable to sexual violence:

Women ages 16 to 24 experience rape at rates four times higher than the assault rate of all women, making the college (and high school) years the most vulnerable for women. [Furthermore,] college women are more at risk for rape and other forms of sexual assault than women the same age but not in college.<sup>9</sup>

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7. CHRISTOPHER P. KREBS ET AL., U.S. DEP'T OF JUSTICE, THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT 5-3 (Oct. 2007), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (finding that 19% of students in the sample had experienced attempted or completed sexual assault since entering college, but noting that over 50% of the sample had completed less than two years of college and therefore discussing the incidence reported by college seniors, where 26% had experienced attempted or completed sexual assault since entering college, to predict a woman's risk during her overall college career); Brenda J. Benson et al., *College Women and Sexual Assault: The Role of Sex-Related Alcohol Expectancies*, 22 J. FAM. VIOLENCE 341, 348 (2007); *see also* CAROL BOHMER & ANDREA PARROT, SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION 6 (Lexington Books 1993) (noting that data from studies from the mid-1980s reveal that between 20–25% of college women have experienced forced sex); BONNIE S. FISHER ET AL., U.S. DEP'T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10 (2000), *available at* <http://www.ncjrs.gov/pdffiles1/nij/182369.pdf> (explaining how the study measured victimization for only half a year and thus projected results for an entire school year may be significantly higher). Although some of the studies that are cited here are somewhat old, they are included because the findings of the older studies are quite consistent with the most recent ones, even when the studies have been conducted in different decades. This indicates that the findings of older studies are still valid in terms of what we see today.

8. RANA SAMPSON, ACQUAINTANCE RAPE OF COLLEGE STUDENTS 3 (2003), *available at* <http://www.cops.usdoj.gov/pdf/e03021472.pdf>; *see* BOHMER & PARROT, *supra* note 7, at 6 (noting that between ten and fifteen percent of males report being forced to have sex).

9. SAMPSON, *supra* note 8, at 2. *But see* KATRINA BAUM & PATSY KLAUS, BUREAU OF JUSTICE STATISTICS, VIOLENT VICTIMIZATION OF COLLEGE STUDENTS, 1995–2002, at 3 (2005), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/vvcs02.pdf> (finding that college students were less likely to be the victim of sexual assault than non-students). The discrepancy in these two findings is due to the wording of questions asked during data collection. The conclusions of Baum and Klaus are based on the National Crime Victimization Survey, which gathers information on sexual assault by asking category-centered questions, such as “Has anyone attacked or threatened you in [this way]: rape, attempted rape or other type of sexual attack?” *Id.* The conclusions that Sampson cites are based on studies such as the National College Women Sexual Victimization study, which use behavior-oriented questions such as “Has anyone made you have sexual intercourse by using force or threatening to harm you or someone close to you?” *See* FISHER ET AL., *supra* note 7, at 6, 13 (explicitly comparing the difference between the National Crime Victimization Survey methodology and results and the National College Women Sexual Victimization study methodology and results). Other than the wording of the questions,

Moreover, sexual assaults most often happen at times when college women are most vulnerable: during a victim's first two years in college,<sup>10</sup> often during the first week they are on campus.<sup>11</sup>

The vast majority of sexual violence that student victims experience is not at the hands of a stranger, but of someone they know.<sup>12</sup> In one study, 12.8% of completed rapes, 35% of attempted rapes, and 22.9% of threatened rapes took place on a date.<sup>13</sup> Typical perpetrators include classmates, friends of the survivor, and boyfriends or ex-boyfriends.<sup>14</sup>

Studies on college men indicate that 6–14.9% of them “report acts that meet legal definitions for rape or attempted rape”<sup>15</sup> and that a small number of repeat perpetrators commit most of the sexual violence and likely contribute to other violence problems as well. For example, a 2002 study surveyed 1882 male students at a university and found that 6.4% self-reported acts qualified as rape or attempted rape.<sup>16</sup> Of this group, 63.3% reported committing repeat rapes, averaging about six rapes per perpetrator.<sup>17</sup> In addition, these “undetected” (i.e., not arrested or prosecuted) rapists each committed an average of fourteen additional acts of interpersonal violence (which includes battery, physical and/or sexual abuse of children, and sexual assault short of rape or attempted rape), meaning that 4% of the students in the study accounted for 28% of the violence, nearly ten times that of non-rapists (1.41 acts of violence per person) and 3.5 times that of single-act rapists (3.98 acts of violence per person).<sup>18</sup> A more limited study in 1987 revealed that ninety-six college men accounted for 187 rapes.<sup>19</sup>

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the basic methodology of the two studies was identical, yet behavior-oriented questions have been found to produce eleven times the number of reported rapes. *Id.* at 11.

10. See KREBS ET AL., *supra* note 7, at xiv (noting that the risk for forced sexual assault was greater for freshmen and sophomores than for juniors and seniors).

11. BOHMER & PARROT, *supra* note 7, at 26.

12. *Id.* at 26; see FISHER ET AL., *supra* note 7, at 17 (reporting that about nine in ten offenders were known to the victim); KREBS ET AL., *supra* note 7, at 5–18 (stating that only a small portion of victims reported being assaulted by a stranger).

13. FISHER ET AL., *supra* note 7, at 17.

14. See *id.* at 19 (noting that for completed rapes, 35.5% of offenders were classmates, 34.2% were friends, 23.7% were boyfriends or ex-boyfriends, and 2.6% were acquaintances, and that for attempted rapes, 43.5% of offenders were classmates, 24.2% were friends, 14.5% were boyfriends or ex-boyfriends, and 9.7% were acquaintances); see also KREBS ET AL., *supra* note 7, at 5–15 (finding that 21.7% of offenders were classmates/fellow students, 24.3% were friends, 17.8% were boyfriends, 20.0% were ex-boyfriends, and 27.9% were acquaintances).

15. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 73 (2002).

16. *Id.* at 78.

17. *Id.*

18. *Id.*

19. MARTIN D. SCHWARTZ & WALTER S. DEKESEREDY, SEXUAL ASSAULT ON THE COLLEGE



Other studies, as well as news items from various campuses, indicate that there are many rape-supportive attitudes among college men. For instance, in October 2010, a Yale fraternity had its pledges chant outside the university's Women's Center, "No means yes! Yes means anal!"<sup>20</sup> This incident was not an isolated one, but was merely a repeat of an incident involving fraternity men, the campus Women's Center, and the same chant in 2006.<sup>21</sup> A student member of the Women's Center said that such incidents "tend to repeat themselves every year or two" at Yale<sup>22</sup> and that the October 2010 incident spurred a group of Yale students to file a Title IX complaint against the university.<sup>23</sup> Moreover, sociological studies have confirmed wide subscription to such attitudes among college men beyond those at Yale. A 2001 study found significant peer support for sexual violence among college men.<sup>24</sup> A 1993 study found that 5–8% of college men commit rape knowing it is wrong,<sup>25</sup> 10–15% of college men commit rape without knowing that it is wrong,<sup>26</sup> and (citing a similar study in 1981) 35% of college men indicated some likelihood that they would rape if they could be assured of getting away with it.<sup>27</sup> Finally, a 1987 study indicated that 30% of men in general say they would commit rape and 50% would "force a woman into having sex" if they would not get caught.<sup>28</sup>

As indicated, these studies suggest linkages between such cultural attitudes and the actual occurrence of campus peer sexual violence. Multiple studies have shown that perpetrators share characteristics such as macho attitudes, high levels of anger towards women, the need to dominate women, hyper-masculinity, antisocial behavior and traits, lack of empathy, and abuse of alcohol.<sup>29</sup> The 2001 study mentioned above

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CAMPUS: THE ROLE OF MALE PEER SUPPORT 12 (1997).

20. Michael Kimmel, *The Men, And Women, of Yale*, MS. MAG. BLOG (Oct. 17, 2010), <http://msmagazine.com/blog/blog/2010/10/17/the-men-and-women-of-yale/>.

21. *Id.*

22. Jordi Gasso & Sam Greenberg, *DKE Apologizes for Pledge Chants*, YALE DAILY NEWS (Oct. 15, 2010), <http://www.yaledailynews.com/news/2010/oct/15/dke-apologizes-for-pledge-chants/>.

23. *Yale is Subject of a Title IX Inquiry*, N.Y. TIMES, Mar. 31, 2011, at A17.

24. Martin D. Schwartz et al., *Male Peer Support and a Feminist Routine Activities Theory: Understanding Sexual Assault on the College Campus*, 18 JUST. Q. 623, 641 (2001).

25. BOHMER & PARROT, *supra* note 7, at 21.

26. *Id.* at 6.

27. *Id.* at 8.

28. ROBIN WARSHAW, *I NEVER CALLED IT RAPE* 97 (1988).

29. See, e.g., BOHMER & PARROT, *supra* note 7, at 23 (noting that athletes and fraternity members are more likely to be offenders because of their use of alcohol); Lisak & Miller, *supra* note 15, at 73 (stating that common characteristics shared by offenders include high levels of anger at women, the need to dominate women, hyper-masculinity, lack of empathy, and psychopathy and antisocial traits); Schwartz et al., *supra* note 24, at 628 (noting that the sexist

indicates that, especially in light of the lack of strong anti-violence messages from campus authority figures, male peer support for sexual violence likely encourages some men to perpetrate such violence who might not otherwise do so.<sup>30</sup>

With this rate of peer sexual violence, why does the general public appear to know so little about it, or at least about its full scope? The surface reason is because 90% or more of sexual assault survivors on college campuses do not report the assault.<sup>31</sup> However, this reason begs the further question: Why do survivors not report? The vast majority of the reasons that victims provide involve victims' fears that they will not be believed or will face hostile treatment, especially from authority figures. Fear of hostile treatment or disbelief by legal and medical authorities prevents 24.7% of college rape survivors from reporting.<sup>32</sup> Other factors include not seeing the incidents as harmful, not thinking a crime had been committed, not thinking what happened was serious enough to involve law enforcement, not wanting family or others to know, lack of proof, and the belief that no one will believe them and nothing will happen to the perpetrator.<sup>33</sup> Moreover, the stakes of a victim's report not being credited are quite high for the victim. Not being believed and official mishandling can increase survivor trauma.<sup>34</sup> Not reporting or telling anyone about the assault, however, can hurt the survivor further.<sup>35</sup> In contrast, both speaking with someone about the assault and reporting it can be therapeutic<sup>36</sup> and a necessary step to recovery.<sup>37</sup>

Given that studies on attitudes of law enforcement, judges, juries, and prosecutors indicate that survivors' fears are often well-founded,<sup>38</sup> it is

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nature of many police organizations leads to patterns of victimization).

30. Schwartz et al., *supra* note 24, at 630, 641.

31. FISHER ET AL., *supra* note 7, at 24.

32. *Id.* at 23; *see also* BOHMER & PARROT, *supra* note 7, at 13, 63 (noting that many victims do not report the offense because they know the college does not take complaints seriously); WARSHAW, *supra* note 28, at 50 (noting disbelief that reporting the offense is effective).

33. BOHMER & PARROT, *supra* note 7, at 13, 63; FISHER ET AL., *supra* note 7, at 23–24; WARSHAW, *supra* note 28, at 50.

34. *See* BOHMER & PARROT, *supra* note 7, at 5, 198 (noting that when the offender is acquitted, the victim may suffer more severely because lack of belief by others can increase the trauma).

35. WARSHAW, *supra* note 28, at 66.

36. BOHMER & PARROT, *supra* note 7, at 235.

37. WARSHAW, *supra* note 28, at 66.

38. *See* BEYOND THE CRIMINAL JUSTICE SYSTEM: USING THE LAW TO HELP RESTORE THE LIVES OF SEXUAL ASSAULT VICTIMS, A PRACTICAL GUIDE FOR ATTORNEYS AND ADVOCATES 8 (Jessica E. Mindlin et al. eds., 2008) (showing how studies indicate authorities are confused about what constitutes consensual sex and what the boundary is between sex and sexual assault); *see also* Lisak & Miller, *supra* note 15, at 74 (noting the continuing perception within the criminal

quite understandable that survivors would avoid reporting. Stories culled from news reports and cases indicate that survivors who report at many colleges and universities fare no better—possibly worse—than those who engage the criminal justice system. The treatment that victims can often expect from their schools when they make a report includes the following:

- (1) The school does nothing at all;<sup>39</sup>
- (2) The school talks to the alleged perpetrator, who denies the allegations, makes no determination as to which story is more credible,<sup>40</sup> and then does nothing, including nothing to protect the victim from any retaliation from the alleged perpetrator or his friends as a result of her report;<sup>41</sup>

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justice system that rapes committed by undetected rapists are somehow less serious than rapes by strangers).

39. See, e.g., Kristin Jones, *Barriers Curb Reporting on Campus Sexual Assault: Lack of Response Discourages Victims of Rape, Other Crimes*, CTR. FOR PUB. INTEGRITY (Dec. 2, 2009), [http://www.publicintegrity.org/investigations/campus\\_assault/articles/entry/1822/](http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1822/) (describing the lack of response by school administrators after one victim's report of sexual assault). For cases demonstrating instances of school officials ignoring or brushing aside victim's complaints, see *S.G. v. Rockford Bd. of Educ.*, 2008 U.S. Dist. LEXIS 95522, at \*15–16 (N.D. Ill. Nov. 24, 2008); *James v. Indep. Sch. Dist. No. 1-007*, 2008 U.S. Dist. LEXIS 82199, at \*6 (W.D. Okla. Oct. 16, 2008); *Bruning v. Carroll Cmty. Sch. Dist.*, 486 F. Supp. 2d 892, 915–16 (N.D. Iowa 2007); *Bashus v. Plattsmouth Cmty. Sch. Dist.*, 2006 U.S. Dist. LEXIS 56565, at \*10 (D. Neb. Aug. 3, 2006); *Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 447–48 (D. Conn. 2006); *Doe v. E. Haven Bd. of Educ.*, 430 F. Supp. 2d 54, 63–65 (D. Conn. 2006), *aff'd*, 200 F. App'x 46, 49 (2d Cir. 2006); *Martin v. Swartz Creek Cmty. Schools*, 419 F. Supp. 2d 967, 974 (E.D. Mich. 2006); *Jones v. Ind. Area Sch. Dist.*, 397 F. Supp. 2d 628, 645–46 (W.D. Pa. 2005); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1301 (D. Kan. 2005); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000).

40. See, e.g., *S.S. v. Alexander*, 177 P.3d 724, 740 (Wash. Ct. App. 2008) (finding that the school acted with “deliberate indifference” when it failed to address the student's complaint); Letter from John E. Palomino, Reg'l Civil Rights Dir., S.F., Office for Civil Rights, U.S. Dep't of Educ., to Robin Wilson, President, Cal. State Univ., Chico (Oct. 23, 1991) (noting that the university failed to make a credibility determination between the alleged victim and the harasser).

41. For examples of instances where the victim reported the rape to a school official or some other authority figure, but the school did nothing to prevent the offender or his friends from continually coming in contact with the victim, see *Patterson v. Hudson Area Sch.*, 2009 U.S. App. LEXIS 25, at \*33 (6th Cir. 2009); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008); *Doe v. Hamden Bd. of Educ.*, 2008 U.S. Dist. LEXIS 40269, at \*17 (D. Conn. May 19, 2008); *M. v. Stamford Bd. of Educ.*, 2008 U.S. Dist. LEXIS 51933, at \*28 (D.Conn. 2008); *James*, 2008 U.S. Dist. LEXIS 82199, at \*6; *S.G.*, 2008 U.S. Dist. LEXIS 95522 at \*10, \*14–15; *Bashus*, 2006 U.S. Dist. LEXIS 56565, at \*10–11; *Derby Bd. of Educ.*, 451 F. Supp. 2d at 444–45; *Doe v. Erskine Coll.*, 2006 U.S. Dist. LEXIS 35780, at \*39 (D.S.C. May 25, 2006); *E. Haven Bd. of Educ.*, 430 F. Supp. 2d at 59–60; *Martin*, 419 F. Supp. 2d at 974; *Jones*, 397 F. Supp. 2d at 645–46; *Theno*, 394 F. Supp. 2d at 1310–11; Letter from Charlene F. Furr, Operations Officer, Dall., Office for Civil Rights, U.S. Dep't of Educ., to Jimmy D. Hattabaugh, Superintendent, Mansfield Sch. Dist. (Apr. 16, 2007) (on file with author); Letter from Cathy H. Lewis, Acting Dir., Policy & Enforcement Serv., Office for Civil Rights, U.S. Dep't of Educ., to Thomas Crawford, Superintendent, Acad. Sch. Dist. (Apr. 16, 1993) (on file with author).

- (3) The school waits or investigates so slowly that it takes months or years for the survivor to get any redress;<sup>42</sup>
- (4) School officials investigate in a biased way, such as through their treatment of the survivor or characterization of her case,<sup>43</sup> or by setting up fact-finding procedures and hearings with significantly more procedural rights for the accused than the survivor;<sup>44</sup>
- (5) School officials investigate and determine that the sexual violence did occur, but do not discipline or minimally discipline the assailant and do not protect the survivor from any retaliation;<sup>45</sup>

42. See, e.g., *Williams v. Bd. of Regents*, 477 F.3d 1282, 1297 (11th Cir. 2007) (finding the school took eight months to respond to reports of a gang rape); Letter from Frankie Furr, Team Leader, Office for Civil Rights, U.S. Dep't of Educ., to James E. Nelson, Superintendent, Richardson Indep. Sch. Dist. (Aug. 5, 2005) (on file with author) [hereinafter Richardson Indep. Sch. Dist. Letter] (explaining that the victim reported an incident of sexual harassment on January 22, 2003, and the school failed to acknowledge the report until March); Letter from Thomas J. Hibino, Reg'l Civil Rights Dir., Office for Civil Rights, U.S. Dep't of Educ., to Daniel Kehoe, Superintendent, Mills Pub. Sch. (May 19, 1994) (on file with author) [hereinafter Millis Pub. Sch. Letter] (explaining the OCR's finding of sex discrimination by the school after the it failed to take "sufficient prompt and effective action"); Letter from Charles R. Love, Program Manager, Office for Civil Rights, U.S. Dep't of Educ., to Glenn Roquemore, President, Irvine Valley College (Jan. 28, 2003) (on file with author) (noting that the victim's charge of sex discrimination took nearly one year for the school to investigate due to inadequate processes for evaluating complaints).

43. For more details on cases in which the school conducted a biased investigation, see *Patterson*, 2009 U.S. App. LEXIS 25, at \*4; *Brimfield Grade Sch.*, 552 F. Supp. 2d at 823; *S.S.*, 177 P.3d at 740; *Siewert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007); *Erskine*, 2006 U.S. Dist. LEXIS 35780, at \*33–34; *Theno*, 394 F. Supp. 2d at 1310–11; *Kelly v. Yale Univ.*, 2003 U.S. Dist. LEXIS 4543, at \*3 (D. Conn. Mar. 26, 2003); Richardson Indep. Sch. Dist. Letter, *supra* note 42; Letter from John E. Palomino, Reg'l Civil Rights Dir., S.F., Office for Civil Rights, U.S. Dep't of Educ., to Ruben Armiñana, President, Sonoma State Univ. (Apr. 29, 1994) (on file with author) [hereinafter Sonoma State Univ. Letter].

44. See Letter from Gary D. Jackson, Reg'l Civil Rights Dir., Office for Civil Rights, U.S. Dep't of Educ., to Jane Jervis, President, The Evergreen State Coll. (Apr. 4, 1995) (on file with author) [hereinafter Evergreen State Coll. Letter] (noting that the school had inequitable procedural rights for discrimination complaints and failed to comply with Title IX, which requires that complaints be resolved promptly and equitably).

45. For cases demonstrating this proposition, see *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 262 (6th Cir. 2000); *S.S.*, 177 P.3d at 739 2008; *Hamden*, 2008 U.S. Dist. LEXIS 40269, at \*5; *Stamford*, 2008 U.S. Dist. LEXIS 51933, at \*28; *Siewert*, 497 F. Supp. 2d at 954; *Derby Bd. of Educ.*, 451 F. Supp. 2d at 447; *Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. 467, 481 (D.N.H. 1997); see also Millis Pub. Sch. Letter, *supra* note 42 (noting that after the victims informed the school, the principal simply spoke to the perpetrators about the sexual violence but did nothing further); Sonoma State Univ. Letter, *supra* note 43 (stating that after the victim reported the sexual violence she experienced, the university declared it was only a "miscommunication" and failed to take any further action); Letter from Patricia Shelton, Branch Chief, and C. Mack Hall, Div. Dir., Office for Civil Rights, U.S. Dep't of Educ., to James C. Enochs, Superintendent, Modesto City Schools (Dec. 10, 1993) (on file with author) (finding that once the victims told the principal, school officials did nothing more than lecture the assailants about their actions); Kristen Lombardi, *A Lack of Consequences for Sexual Assault: Students Found "Responsible" Face Modest Penalties, While Victims are Traumatized*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010), [http://www.publicintegrity.org/investigations/campus\\_assault/articles/entry/1945/](http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1945/) (explaining that at many campuses, abusive students are rarely disciplined, and when they are, it is rarely more than a slap on the wrist).

- (6) School officials investigate and determine that the sexual violence did occur and proceed to remove the victim from classes, housing, or transportation services where she would encounter her assailant, resulting in significant disruption to the victim's education but none to the assailant's;<sup>46</sup>
- (7) School officials tell the victim not to tell anyone else, including parents and the police;<sup>47</sup>
- (8) School officials hold a hearing to determine whether the allegations are true, find the perpetrator responsible, and *then* tell the victim she cannot tell anyone about the findings or she will be brought up on disciplinary charges;<sup>48</sup>
- (9) School officials require or pressure the survivor to confront her assailant or go through mediation with him before allowing her to file a complaint for investigation;<sup>49</sup>
- (10) School officials distribute a press packet to local media about a survivor after she reports an assault, stating that she was charged by the school with alcohol consumption and "disorderly conduct" in connection with the events at issue in her report;<sup>50</sup>

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46. See, e.g., *Siewert*, 497 F. Supp. 2d at 954 (noting that after the victim was repeatedly harassed and assaulted, the school moved the victim to a different classroom "rather than deal with the other student's threats and actions"); *James v. Indep. Sch. Dist. No. 1-007*, 2008 U.S. Dist. LEXIS 82199, at \*6 (W.D. Okla. 2008) (finding that although the school was aware of ongoing, sexual harassment of the victim, the only action the school took was to remove the victim from the class in which some of the alleged harassment occurred).

47. See, e.g., *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1248 (10th Cir. 1999) (noting that after a male student repeatedly raped a student with spastic cerebral palsy, the school did not inform, and told the victim not to inform, her mother); *Oyster River Coop. Sch. Dist.*, 992 F. Supp. at 479 (finding that a school's guidance counselor told two sexual harassment victims not to tell their parents because it could subject the school to lawsuits).

48. Press Release, Sec. on Campus, Inc., Georgetown Univ. Violated Rights Of Rape Victims According To Fed. Review (July 27, 2004), available at [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=196:press-release-georgetown-university-violated-rights-of-rape-victims-according-to-federal-review-&catid=1:soc-news&Itemid=79](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=196:press-release-georgetown-university-violated-rights-of-rape-victims-according-to-federal-review-&catid=1:soc-news&Itemid=79) [hereinafter Sec. on Campus, Georgetown Univ. Violation]; Letter from Nancy Paula Gifford, Area Case Dir., U.S. Dep't of Educ., to S. Daniel Carter, Senior Vice President, Sec. on Campus, Inc. (Nov. 3, 2008), available at [http://www.uvavictimsofrape.com/images/Clery\\_Act\\_Ruling.pdf](http://www.uvavictimsofrape.com/images/Clery_Act_Ruling.pdf).

49. See, e.g., *S.S.*, 177 P.3d at 740 (highlighting how the school's continuing suggestion that the victim leave her job and allowing the perpetrator to remain, contributed to the school acting with deliberate indifference); Letter from Alan D. Hughes, Attorney-Advisor, Office for Civil Rights, U.S. Dep't of Educ., to Susan Whittle, Superintendent, Golden City R-III (Sept. 14, 2008) (on file with author) (noting that Level I of the District's written procedure policy may require an individual to confront her harasser before initiating a grievance, which violates OCR policy); Jones, *supra* note 39 (stating how mediation is discouraged by the Justice and Education Departments and should never be used because it presumes an equality of power that is not present in sexual assault cases); Lombardi, *supra* note 4 (highlighting a University of Virginia student who was encouraged by university deans to use mediation instead of a hearing and how the student refused because she did not want to talk to her assailant).

50. Kristin Jones, *Lax Enforcement of Title IX in Campus Sexual Assault Cases: Feeble Watchdog Leaves Students at Risk*, *Critics Say*, CTR. FOR PUB. INTEGRITY (Feb. 25, 2010), [http://www.publicintegrity.org/investigations/campus\\_assault/articles/entry/1946/](http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1946/) [hereinafter

(11) School officials set up a football recruitment program where players and recruits are “shown a good time” by female college students and keep the program going even in the face of multiple reports that the female students are being raped by players and recruits;<sup>51</sup> and/or

(12) School officials admit or readmit student athletes even with knowledge that they have past criminal or disciplinary violations, including sexual violence.<sup>52</sup>

These behaviors run counter to what the law requires, and, indeed, many of the examples listed above come from court cases where schools were found to have violated Title IX (or at least a court allowed the case to proceed to a jury to determine whether Title IX was violated). Others come from news stories, particularly Kristen Lombardi’s excellent series for CPI,<sup>53</sup> and from DOE investigations. It is clear from these various sources that schools are regularly acting contrary to the law.

Furthermore, when schools are sued for such mishandling, the settlements can often be quite large. For instance, in *Simpson v. University of Colorado Boulder*,<sup>54</sup> when two college women were gang-raped as a part of an unsupervised football recruiting program, and the university had evidence the program was leading to sexual violence, the university ultimately paid a total of \$2.85 million to the plaintiffs, hired a special Title IX analyst, and fired some thirteen university officials, including the President and football coach.<sup>55</sup> In a case where a student

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*Lax Enforcement of Title IX*] (citing Letter from Carolyn F. Lazaris, Program/Admin. Manager, U.S. Dep’t. of Educ., Office for Civil Rights, to John Silber, President, Boston University (Apr. 25, 2003), available at [http://www.publicintegrity.org/investigations/campus\\_assault/assets/pdf/Bufinding.pdf](http://www.publicintegrity.org/investigations/campus_assault/assets/pdf/Bufinding.pdf)).

51. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1184 (10th Cir. 2007) (finding that the football coach “maintained an unsupervised player-host program to show high school recruits ‘a good time’” despite knowing generally “of the serious risk of sexual harassment and assault during college-football recruiting efforts; . . . that such assaults had indeed occurred during CU recruiting visits; . . . [and] that there had been no change in atmosphere since” the last assault).

52. *Williams v. Bd. of Regents*, 477 F.3d 1282, 1289 (11th Cir. 2007) (denying the school’s motion to dismiss after finding it recruited and admitted the alleged rapist to the school even though the coach, athletics director, and president knew that he had criminal and disciplinary problems, including sexually violent behavior); *J.K. v. Ariz. Bd. of Regents*, 2008 U.S. Dist. LEXIS 83855, at \*13 (D. Ariz. Sept. 29, 2008) (denying summary judgment when a student athlete was expelled, in part because of sexual harassment, from a “Summer Bridge Program” but then re-admitted to Arizona State University as a freshman, only to be found responsible for sexually assaulting another student during his first year on campus).

53. *Sexual Assault on Campus*, THE CTR. FOR PUB. INTEGRITY (Feb. 24, 2010), [http://www.publicintegrity.org/investigations/campus\\_assault/](http://www.publicintegrity.org/investigations/campus_assault/).

54. *Simpson*, 500 F.3d at 1170.

55. See Diane L. Rosenfeld, *Changing Social Norms? Title IX and Legal Activism: Concluding Remarks*, 31 HARV. J.L. & GENDER 407, 418 (2008) (explaining that the University of Colorado Boulder “settled the case paying \$2.5 million to Simpson and another \$350,000 to

was raped and murdered at Eastern Michigan University and the university suspected a fellow student but failed to inform the school and victim's family of its suspicion for several months, the school eventually agreed to pay \$350,000 in fines for thirteen separate violations of the Clery Act and settled with the victim's family for \$2.5 million.<sup>56</sup> The case further led to the termination of the President, Vice President for Student Affairs, and Director of Public Safety,<sup>57</sup> and an estimated \$3.8 million in total costs.<sup>58</sup> Other large settlements include an \$850,000 settlement by Arizona State University in a case where a football player, who had been expelled for misconduct including sexual harassment, was readmitted after an intervention by the coach and subsequently raped a student.<sup>59</sup> In addition, the University of Georgia paid a six-figure settlement to a plaintiff who was raped by several athletes, including a student-athlete the university knew had a criminal record before admitting him to the university.<sup>60</sup> In light of such large

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the other plaintiff. . . . agreed to hire a special Title IX analyst . . . to oversee the implementation of new policies and procedures regarding sex equality on campus. . . . [and fired] thirteen university officials and administrators, including the President of the University and Coach Gary Barnett.”).

56. See Geoff S. Larcom, *Eastern Michigan University to Pay \$350,000 in Federal Fines Over Laura Dickinson Case*, MLIVE.COM (June 6, 2008, 9:25 AM), [http://blog.mlive.com/annarbornews/2008/06/eastern\\_michigan\\_university\\_to.html](http://blog.mlive.com/annarbornews/2008/06/eastern_michigan_university_to.html) (explaining that the fine imposed on the university was the highest fine ever imposed for Clery Act violations by the U.S. Department of Education when it was cited for “an egregious violation” by failing to warn the public about the murder and that in total, the university was cited for thirteen violations, “including failing to issue a timely warning in the death of Dickinson, various policy shortcomings and failing to properly disclose certain crime statistics”).

57. See Marisa Schultz, *EMU Murder Trial Begins Today*, DETROIT NEWS, Oct. 15, 2007, at B1 (explaining that as a result of numerous complaints regarding the university's approach to handling the murder, the university's board of regents fired the Vice President of Student Affairs, the Public Safety Director, and the university's President).

58. Marisa Schultz, *Controversy to Cost EMU \$1 Million—University to Pay Severance to Ousted Officials, Legal Fees, Fines Over Handling of Slaying*, DETROIT NEWS, July 19, 2007, at 1B. In addition to the Clery-related DOE investigation, OCR also investigated EMU's violations of Title IX and published its Letter of Finding in December 2010. See Letter from Catherine D. Criswell, Dir., U.S. Dep't. of Educ. Office for Civil Rights, to Gloria A. Hage, Gen. Counsel, E. Mich. Univ. (Nov. 22, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096002-a.pdf>.

59. Tessa Muggridge, *ASU Settlement Ends in \$850,000 Payoff*, STATE PRESS (Feb. 3, 2009), <http://www.statepress.com/archive/node/4020>. In another case, when another ASU student claimed she was raped, the University knew that there was a pattern of sexual violence, and the suspected mishandling of the investigation by campus police made criminal charges impossible. Kyle Patton & Joseph Schmidt, *Former Student Sues ABOR over Sexual Assault Case*, STATE PRESS (July 18, 2010, 3:46 PM), <http://www.statepress.com/2010/07/18/former-student-sues-abor-over-sexual-assault-case/>.

60. See Rosenfeld, *supra* note 55, at 420–21 (“[T]he school knowingly recruited an athlete with a history of sexual misconduct who later sexually assault another student. . . . [T]he coaches went out of their way to gain admission of the student athlete; pulling strings to get others higher up in the administration to approve of the admission[] and even grant scholarships to [the student]

finances and settlements, it is baffling to see schools regularly acting against their clear interests in avoiding quite expensive liability. It appears as though something else is going on, and indeed, it is.

The rate of campus peer sexual violence and the high non-reporting rate perpetuate a cycle whereby perpetrators commit sexual violence because they think they will not get caught or because they actually have not been caught. As a result of survivors not reporting the violence, perpetrators are not caught, continue to believe they will not get caught, and continue to perpetrate. Because survivors largely do not report due to the documented disbelief and/or hostile reactions of others, particularly those in authority, the first step of campus communities and society as a whole should be to change these attitudes and the procedures in order to encourage victims to come forward. If the cycle is to be broken and the violence is to be ended, survivors need to report. Yet survivors cannot be expected to report unless they are treated better when they do. Despite universities' behavior, the structure of school liability that the law sets up appears to recognize and support this approach.

When schools create better responses to victim reporting, however, and survivors begin to report the violence as a result, a strange thing happens: the campus suddenly looks like it has a serious crime problem. In fact, both national and local statistics<sup>61</sup> indicate that every campus currently has this serious crime problem at a similar rate—a rate that tracks the national incidence. The non-reporting phenomenon and how it is created, however, means that the schools that ignore the problem have fewer reports and look more safe, whereas the schools that encourage victim reporting have more reports and look less safe. Appearances in this case are completely the opposite of reality, and the correct conclusion to draw from the number of reports of peer sexual violence on a campus is entirely counterintuitive.

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despite [his] criminal record[] and propensity to commit sexual misconduct against females who would be exposed to [his] presence. . . . That the school[] . . . did nothing to ameliorate the risk that a privileged male athlete with a history of sexual predation would present to female students was a key factor in the appellate court's opinion . . .").

61. Some schools conduct surveys on the incidence of sexual violence on their particular campus. For example, the American College Health Association offers the American College Health Assessment, which includes questions related to sexual violence. *About ACHA-NCHA*, AM. COLL. HEALTH ASS'N—NAT'L COLL. HEALTH ASSESSMENT, <http://www.acha-ncha.org/overview.html> (last visited Aug. 26, 2011). However, the school-specific information collected by the surveys is generally not made publicly available. Nevertheless, aggregate data made available to the public and school-specific survey results shared confidentially by officials at some schools confirm a consistent incidence rate at individual campuses, subsets of campuses, and nation-wide. *Publications and Reports*, AM. COLL. HEALTH ASS'N—NAT'L COLL. HEALTH ASSESSMENT II, [http://www.acha-ncha.org/reports\\_ACHA-NCHAI.html](http://www.acha-ncha.org/reports_ACHA-NCHAI.html) (last visited Aug. 26, 2011).



This disconnect between appearance and reality puts any given college or university on the horns of a dilemma: does an institution seek to end the violence by encouraging victim reporting and otherwise drawing attention to the problem (through, for instance, mandatory prevention-oriented programming at first-year student orientation) and risk gaining a reputation as a dangerous campus, or does the institution ignore the problem and discourage victim reporting either passively (through hard-to-navigate, confusing, or simply nonexistent policies and procedures) or actively (by treating victims who report hostilely) and appear to be a less dangerous institution? Add into the mix that the campus next door or across town or one step below or above in the rankings may choose to ignore the problem, leaving a school to explain to potential and current students and their parents why it has so much more crime than a competitor institution. It is this information problem that creates incentives counter to those created by the liability structure of laws such as Title IX and the Clery Act. Instead of acknowledging the problem, helping victims, and punishing perpetrators, schools have incentives not only to remain unaware of the general problem and specific instances of campus peer sexual violence, but also to actively avoid knowledge about both.

Closely related to this information problem is one that underlies it. Society continues to hold onto many persistent myths about sexual violence. One such myth is that of the stranger rapist. In the public imagination, a rapist is still someone who jumps a woman in a dark alley late at night—someone she has never seen before and may never see again, depending on whether he is caught.<sup>62</sup> Yet in reality, the vast majority of sexual violence perpetrators are those who are known to the victims: acquaintances, dates, friends, husbands, family members, religious officials, employers, supervisors, and others,<sup>63</sup> none of whom need to jump a woman in a dark alley. Instead, they have access to her home, her room, or her workplace. They are around her when she is most vulnerable and when the least amount of force, if any at all, is needed to overcome her will and lack of consent. After the violence, she is left with all of the complicated decisions about whether to bring charges and seek justice against someone whom she trusted and perhaps even loved, and who may still be trusted and loved by others very close to her.

This reality is a much more complicated picture than the stranger-rape myth, and it is just as true on college and university campuses as in

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62. SAMPSON, *supra* note 8, at 9.

63. *The Offenders, RAPE, ABUSE & INCEST NAT'L NETWORK* <http://www.rainn.org/get-information/statistics/sexual-assault-offenders> (last visited Aug. 26, 2011).

any other place. In fact, the situation may be even more complicated on campuses. Sociologists and criminologists studying campus peer sexual violence have used a theory called the Routine Activities Theory to posit that sexual violence occurs so frequently on college campuses because there is a surfeit of “motivated offender[s] [and] . . . suitable target[s] and an absence of capable guardians all converg[ing] in one time and space.”<sup>64</sup> They suggest that all three elements must be present for there to be a significant crime problem and that the failure of schools to act as “capable guardians”<sup>65</sup> elevates the influence of peer support to commit assaults by “motivated offenders.”<sup>66</sup> In other words, cultures supportive of sexual violence can lead to higher incidences of sexual violence. Additionally, if the institution itself ignores the problem and fails to act as a “capable guardian,” it too helps to create the problem. Therefore, colleges and universities that want to be “capable guardians” and address the campus peer sexual violence problem are left with having not only to explain why increased reports of sexual violence are a good thing, but also why the vast majority of campus sexual violence cannot be addressed through better lighting, blue light phones, and police escort services. Complicated pictures and persistent myths are particularly hard to explain in our sound bite society.

There are still other less central, but also important, information problems exacerbating schools’ tendencies toward passive lack of, and active avoidance of, knowledge. First, the vast majority of professionals working on the front lines in residence life, student

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64. Amy I. Cass, *Routine Activities and Sexual Assault: An Analysis of Individual- and School-Level Factors*, 22 VIOLENCE & VICTIMS 350, 351 (2007).

65. See Schwartz et al., *supra* note 24, at 630 (explaining that the occurrences of sexual assault may be determined by the presence or absence of capable guardians and that college campuses are frequently “effective-guardian-absent,” such that the campuses lack administrators who will seriously punish offenders); see also Elizabeth Ehrhardt Mustaine & Richard Tewksbury, *Sexual Assault of College Women: A Feminist Interpretation of a Routine Activities Analysis*, 27 CRIM. JUST. REV. 89, 101 (2002) (“[G]iven the lower penalties that men experience for sexually assaulting women, any guardianship or deterrence that the criminal justice system would provide is diminished.”). Schwartz and his colleagues provide an explanation for the history and use of the routine activities theory in explanations of criminal violence generally and sexual violence on college campuses specifically. The original theory apparently focused almost entirely on the victims “suitable targets” and has been criticized for seeking to “deflect[] attention away from offenders’ motivation.” Schwartz et al., *supra* note 24, at 625. Schwartz and various colleagues have therefore deliberately focused on the “motivated offender” part of the equation, proposing a feminist version of the routine activities theory. *Id.* at 628. In addition, while they note that the “absence of capable guardians” aspect of the theory’s equation is the least studied, they highlight the effect that a rape-supportive culture has on all three parts of the equation, in that it “gives men some of the social support they need . . . to victimize women” while women’s “internalization of [the same] social structure can contribute both to the availability of ‘suitable targets’ and to the lack of deterrence structures to act as effective guardianship.” *Id.* at 630.

66. Schwartz et al., *supra* note 24, at 646.

conduct, public safety, and other departments where survivors are likely to report are not hired for, or trained in, knowledge about campus peer sexual violence—nor are they lawyers. Many are honestly unaware of the basic facts of campus peer sexual violence, never mind what the law requires of schools and school officials,<sup>67</sup> yet they are the ones creating and applying the policies and procedures, as well as responding to any reports that victims do make on campus. Moreover, many are likely to realize that they are untrained when they are confronted with the problem and, especially if there is no time or resources with which to educate themselves, may be tempted to ignore the problem or make it go away.

Second, education and efforts to combat violence against women are both notoriously underfunded areas. Thus, schools often find that comprehensive training is too expensive for the wide swath of personnel who could have contact with a campus peer sexual violence survivor. This is particularly true when there are so many other important matters vying for limited resources. Responding at all, never mind adequately, to even a single report of peer sexual violence can also require a tremendous amount of resources and is, by its nature, going to result in

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67. Note that this characterization is made based on a variety of factors. First, from my years of experience working in various parts of university administration, as well as my interactions with higher education professionals when I attend and present at various national higher education conferences, I have a sense of the typical background and training of most college personnel. This rarely includes education as a lawyer or a background in the dynamics of sexual violence. Second, an essay by the American College Personnel Association, a major student affairs professional association, makes fairly clear that most student affairs personnel are not lawyers. Patrick Love, *Considering a Career in Student Affairs*, AM. COLL. PERSONNEL ASS'N (Sept. 2003), <http://www2.myacpa.org/comm/profprep/directory/career.php>. Third, a 2002 study on college and university responses to campus peer sexual violence found that, although most school administrators viewed campus law enforcement as the likeliest staff to take sexual violence reports, less than 38% required those staff to be trained in responding to sexual violence. HEATHER M. KARJANE ET AL., *CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND REPORT 67* (2002), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf>. Nearly 50% of schools provided no training on sexual violence to faculty and staff generally. *Id.* at 66. Finally, a recent Dear Colleague Letter from OCR, as well as the most recent announcement of its campus grants program by the U.S. Department of Justice's Office on Violence against Women, emphasizes training for school officials, indicating that there is a need for training on sexual violence issues. *Dear Colleague Letter*, U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter *Dear Colleague Letter*]; U.S. DEP'T OF JUST. OFFICE ON VIOLENCE AGAINST WOMEN, *OVW FISCAL YEAR 2011 GRANTS TO REDUCE SEXUAL ASSAULT, DOMESTIC VIOLENCE, DATING VIOLENCE, AND STALKING ON CAMPUS PROGRAM 9, 11, 12, 15, 16* (2011), available at <http://www.ovw.usdoj.gov/docs/fy2011-campus-solicitation.pdf> [hereinafter *OVW FISCAL YEAR 2011 GRANTS*] (explaining that the funds issued under the Campus Program may be used to create and improve training programs for "campus administrators, security personnel, and personnel serving on campus disciplinary boards" on state and federal policies, protocols, and services regarding sexual assault, domestic violence, dating violence, and stalking).

at least one very unhappy student. That student may be unhappy enough to sue or complain to the DOE, an even greater resource drain. Under these circumstances, not knowing about the violence to begin with, or making a report go away as soon as possible, once again looks like a very attractive option.

In sum, over thirty years of research demonstrates that campus peer sexual violence is a shockingly common phenomenon that is surrounded by a general lack of knowledge of the problem as a whole, of specific instances of violence, and of the law that applies to both. In addition, this research has made clear that the high incidence of violence is largely due to repeat perpetration by assailants who believe they will not be caught or are actually not caught. Because catching assailants requires victims to report, ending the violence requires facilitating and increasing victim reporting.

Furthermore, the seeming conflict between a high incidence of violence and a general lack of awareness of the violence is caused by three levels of “information problems” relating to the violence and schools’ institutional responses to it. At the first and most surface level is the massive underreporting of the violence by victims, which leads to general silence and lack of awareness surrounding the violence itself. At a second and deeper level, survivors’ fears regarding the hostile treatment they will face if they report the violence cause many survivors not to come forward, and these fears appear to be justified by many schools’ actual institutional responses when survivors do report. Finally, at the third and deepest level, schools’ poor institutional responses are themselves caused by four additional information-related difficulties: (1) the counter-intuitive effects of increased reporting on a school’s public image; (2) the persistence of the stranger-rape myth among students, parents, and school officials; (3) the lack of education and training about campus peer sexual violence or the law that applies to it among the front-line school officials who respond to individual cases; and (4) the prohibitively expensive broad-based education and training that correcting such information problems would require.

All in all, these three levels of information problems cause a lack of awareness on the part of school officials, students, and their parents about campus peer sexual violence and the legal requirements that schools must meet in addressing it. Furthermore, these problems provide incentives to schools to actively avoid such knowledge. When greater victim reporting presents a public image and resource problem, deliberately or passively discouraging knowledge of the violence makes it easier to maintain an illusion, both internally and externally, that the violence is not occurring or is less common than it actually is.

### III. THE ROLE OF THE LAW AND LEGAL ENFORCEMENT IN PERPETUATING AND EXACERBATING CAMPUS PEER SEXUAL VIOLENCE INFORMATION PROBLEMS

At first glance, these information problems seem somewhat intractable. This is particularly the case for the central dilemma discussed above: ending the violence and creating a safer campus requires more victims to come forward, but encouraging reporting makes a campus look less safe. Higher education in the United States is a competitive business, and those institutions competing for students are overwhelmingly private entities. Even publicly-funded state schools still compete for the best students, tuition dollars, and future alumni donations. A school's reputation is critically important in such a competitive system. Although factors such as academic reputation, curriculum, and cost likely count as the most important criteria for most students and parents,<sup>68</sup> a reputation as a dangerous place—especially as a place where a large number of daughters and young women are victims of rape—must be damaging to a school.

Indeed, the idea that potential students and parents should know about the level of crime—especially violent crime—on a campus was a key motivator behind the Clery Act.<sup>69</sup> A primary aim of the Clery Act involves campus crime reporting, establishing requirements for schools to report and publish certain categories of crime that occur on campus. The DOE may fine schools that violate the Clery Act, with the largest fine to date being the aforementioned \$350,000 against Eastern Michigan University.<sup>70</sup> This case and other cases involving large fines against schools for Clery Act violations demonstrate that, as sexual violence is the most common form of violent crime on college campuses today,<sup>71</sup> the Clery Act and the issue of campus peer sexual violence have become quite interrelated.

However, of the federal statutes that apply to campus peer sexual violence, the Clery Act is arguably not the most important, especially

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68. The studies that have sought to measure the Clery Act's achievement of the Clerys' original goals, including students' selection of schools based on safety issues, have found overall that students and parents overwhelmingly do not consult Clery Act statistics and/or do not use those statistics in choosing schools. Dennis E. Gregory & Steven M. Janosik, *Research on the Clery Act and Its Impact on Higher Education Administrative Practice*, in *CAMPUS CRIME: LEGAL, SOCIAL AND POLICY PERSPECTIVES* 30, 60 (Bonnie S. Fisher & John J. Sloan, III eds., 2d ed. 2007).

69. H.R. REP. NO. H11499-01, at 1 (1990) (Conf. Rep.) (statement of Rep. Gooding).

70. See Larcom, *supra* note 56 ("Eastern Michigan University will have to pay \$350,000 in fines for violating a federal campus crime reporting law—the largest ever imposed by the U.S. Department of Education for Clery Act violations.").

71. SAMPSON, *supra* note 8, at 1.

with regard to protecting victims of campus peer sexual violence. That honor instead belongs to Title IX, which prohibits sexual harassment in schools as a form of sex discrimination.<sup>72</sup> Peer sexual violence is generally considered a case of hostile environment sexual harassment that is “so severe, pervasive and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”<sup>73</sup> Because of the severity of sexual violence generally, even a single instance of violence will be considered hostile environment sexual harassment.<sup>74</sup>

Title IX is enforced in two ways when peer sexual violence is at issue: first, through survivors’ private right of action against their schools,<sup>75</sup> and second, through administrative enforcement by the DOE’s Office for Civil Rights (“OCR”).<sup>76</sup> Both enforcement jurisdictions derive from the fact that schools agree to comply with Title IX in order to receive federal funds.<sup>77</sup>

In general, the private right of action requires a plaintiff/survivor to reach the quite high standard set out by two Supreme Court cases, *Gebser v. Lago Vista Independent School District* and *Davis v. Monroe County Board of Education*, which will be discussed in more detail below. If a plaintiff can meet that standard, as suggested above, the required damages that the school might have to pay are quite

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72. See U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENT BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2 (2001) [hereinafter REVISED GUIDANCE], available at <http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf> (“[S]exual harassment of students can constitute discrimination prohibited by Title IX.”).

73. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 632–33 (1999) (holding that “a private damages action may lie against the school board in cases of student-on-student harassment . . . only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. . . . [S]uch an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”).

74. See REVISED GUIDANCE, *supra* note 72, at 6 (“The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. For instance, if the conduct is more severe, e.g., attempts to grab a female student’s breasts or attempts to grab any student’s genital area or buttocks, it need not be as persistent to create a hostile environment. Indeed, a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.”).

75. THE EDUCATOR’S GUIDE TO CONTROLLING SEXUAL HARASSMENT ¶ 102 (Travis Hicks ed., 2008) [hereinafter EDUCATOR’S GUIDE].

76. *Id.* ¶ 321.

77. See REVISED GUIDANCE, *supra* note 72, at 2–3 (“Title IX applies to all public and private educational institutions that receive Federal funds, i.e., recipients, including, but not limited to elementary and secondary schools, school districts, proprietary schools, colleges, and universities. . . . As a condition of receiving funds from the Department, a school is required to comply with Title IX and the Department’s Title IX regulations, which spell out prohibitions against sex discrimination.”).

significant.<sup>78</sup> While most cases settle, the settlements give a sense of both sides' anticipated damages awarded by a jury.

The OCR process is more injunctive than compensatory, so student victims complaining to OCR will not get monetary damages. However, OCR's approach is both more comprehensive and more exacting than is possible in a private lawsuit, especially under the *Gebser/Davis* standard. Schools can be, and often are, required to change their entire response system to peer sexual violence and harassment, including, but not limited to, policies, procedures, and resource allocations.

As one can see, particularly from cases like those at Eastern Michigan University and University of Colorado, Title IX and the Clery Act, never mind the state laws that may apply in any given case, set up a formidable liability scheme where noncompliance can be quite expensive for schools. Yet damage to a school's reputation could be even more expensive, although in a less quantifiable way. Nevertheless, the legislative and administrative schemes under Title IX and the Clery Act fail to address the countervailing pressures created by the concern about public image and reputation, although for different reasons. Title IX and its attendant enforcement regimes appear not to recognize the issue of reputation at all. Moreover, while the Clery Act is very concerned with increasing information flow and transparency about campus crime,<sup>79</sup> as will be discussed in greater detail below, its approach is not one that is well-suited to the counterintuitive effects of reporting in the campus peer sexual violence context or to debunking the stranger-rape myth.<sup>80</sup> Therefore, neither Title IX nor the Clery Act addresses the counterincentives created by the information problems discussed above.<sup>81</sup> In fact, there are several ways in which they exacerbate those problems.

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78. See *supra* notes 56–59 and accompanying text (explaining that Eastern Michigan University was fined \$350,000 for violations of the Clery Act after a female student was raped and murdered by a fellow student and that Arizona State University settled for \$850,000 paid to the victim and the creation of a program for women's safety after a lawsuit was filed by a former student, where the student alleged that the university placed her in a "dangerous situation" that resulted in her rape).

79. See *infra* note 69 and accompanying text (discussing the purpose and intent of the Clery Act).

80. See *supra* notes 50–52 and accompanying text (explaining that the schools are provided with the incentive to stay unaware of, and to actively avoid knowledge of, the general problem of sexual violence and the specific occurrences of campus peer sexual violence, as schools face the threat of gaining a negative reputation if they draw attention to campus sexual violence).

81. See *supra* notes 50–58 and accompanying text (explaining that Title IX and the Clery Act's focus on information flow and transparency does not effectively combat schools' incentives to stay unaware of, and avoid knowledge of, the problem and occurrences of sexual violence on campuses, as schools fear that they will gain a negative reputation from the publication of this information).

*A. Court Enforcement of Title IX and the Actual Knowledge Test*

The first way in which Title IX exacerbates the information problems and encourages both passive unawareness and active avoidance of knowledge is through the test for school liability for peer sexual harassment, including sexual violence. Title IX's private right of action, as well as the standard that a survivor must reach in order to prove that her Title IX rights were violated, is derived from the *Gebser* and *Davis* cases. The test has been developed in peer sexual violence cases since *Davis* by lower courts applying the *Davis* precedent and can be summarized generally as:

- (1) the school is a recipient of federal funding;<sup>82</sup>
- (2) the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school;<sup>83</sup>
- (3) the school had actual knowledge/notice of the harassment;<sup>84</sup> and
- (4) the school was deliberately indifferent to the harassment.<sup>85</sup>

A look at the full corpus of cases shows that many cases never make it to the fourth prong of the test.<sup>86</sup> This is because many are thrown out as a result of the third prong, which requires a plaintiff to show that the school had actual knowledge or notice of the harassment.

Others have written on this problem, including several dissenting Supreme Court Justices in *Gebser* and *Davis*. This subsection will briefly summarize their analyses and update them based on what has actually occurred since the late 1990s. Two main difficulties have emerged from the case law, and a third difficulty occurs as a result of pure logic as well as actual experience.

First, the actual knowledge prong requires that *the school* have actual knowledge of the harassment, begging the question of who represents the school. There is significant variation on this question. In some cases, especially ones where the harasser is a teacher or school official,

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82. *S.S. v. Alexander*, 177 P.3d 724, 736 (Wash. Ct. App. 2008) (citing *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 258–59 (6th Cir. 2000)).

83. *Id.*; see also *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 258–59 (6th Cir. 2000) (“In *Davis*, the Supreme Court established that Title IX may support a claim for student-on-student sexual harassment when the plaintiff can demonstrate . . . [that] the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school . . .” (citing *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999))).

84. *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999) (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 631–32 (1999)).

85. *Id.*

86. The precedent that has developed under the fourth “deliberate indifference” prong was the focus of my 2009 article, where my overall conclusion was that it was as robust as a deliberate indifference standard can be. See generally Cantalupo, *supra* note 2.



if only another teacher or school official of equal rank has knowledge of the harassment, courts have found this knowledge to be insufficient to qualify as knowledge by the school.<sup>87</sup> Courts are more open to allowing teachers to count as the school in peer sexual harassment cases,<sup>88</sup> but this is not guaranteed.<sup>89</sup> Others who would seem to be in similar positions of authority as teachers, such as bus drivers,<sup>90</sup> coaches,<sup>91</sup> and school “paraprofessionals,”<sup>92</sup> have been judged to be “inappropriate persons.” This leads to confusing variation,<sup>93</sup> requiring survivors to know and parse through school hierarchies in specific and diverse contexts based on the identities of the perpetrators and the relationships between the person with knowledge and the harasser.

Second, variation has emerged as to what kind of knowledge constitutes actual knowledge. If a school is aware of a student harassing other students aside from the victim who is reporting in a given case, must the school have actual knowledge of the harassment experienced by that particular victim? Courts have resolved this issue in different ways.<sup>94</sup> In a review of peer harassment cases that pose this question,

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87. Megan Ryan ed., Commentary, *Comments from the Spring 2007 Harvard Journal of Law & Gender Conference Held at Harvard Law School*, 31 HARV. J.L. & GENDER 378, 387 (2008) (quoting Linda Wharton).

88. *Montgomery v. Indep. Sch. Dist.* No. 709, 109 F. Supp. 2d 1081, 1099 (D. Minn. 2000); *Morlock v. W. Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 908 (D. Minn. 1999); *Soriano ex rel. Garcia v. Bd. of Educ. of N.Y.C.*, No. 01 CV 491(JG), 2004 WL 2397610, at \*4 (E.D.N.Y. Oct. 27, 2004); *Jones v. Ind. Area Sch. Dist.*, 397 F. Supp. 2d 628, 644 (W.D. Pa. 2005).

89. *See M. v. Stamford Bd. of Educ.*, No. 3:05-vc-0177, 2008 U.S. Dist. LEXIS 51933, at \*25–26 (D. Conn. July 7, 2008) (holding that actual knowledge did not exist until assistant principal was informed, even though other school officials were previously aware of the incident), *vacated in part* by *M. v. Stamford Bd. of Educ.*, No. 3:05-cv-0177, 2008 U.S. Dist. LEXIS 51933 (D. Conn. Sept. 9, 2008); *Peer ex rel. Jane Doe v. Porterfield*, No. 1:05-cv-769, 2007 U.S. Dist. LEXIS 1380, at \*28–30 (W.D. Mich. Jan. 8, 2007) (stating notice must be to an “official . . . capable of terminating or suspending the individual” as held to apply to a principal but not necessarily teachers (quoting *Nelson v. Indep. Sch. Dist.* No. 356, No. 00-2079, 2002 U.S. Dist. LEXIS 3093, at \*15 (D. Minn. Feb. 15, 2002))).

90. *Staehling v. Metro. Gov’t*, No. 3:07-0797, 2008 U.S. Dist. LEXIS 91519, at \*30–31 (M.D. Tenn. Sept. 12, 2008).

91. *See Halvorson v. Indep. Sch. Dist.* No. I-007, No. CIV-07-1363-M, 2008 U.S. Dist. LEXIS 96445, at \*6 (W.D. Okla. Nov. 26, 2008) (explaining that the coaches “did not have authority to institute measures on the District’s behalf”). *But see Roe ex rel. Callahan v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1033–34 (E.D. Cal. 2009) (finding that “case law does not expressly limit the employee who may trigger a school district’s liability under Title IX; it is an ‘open question.’ . . . [D]eciding who exercises substantial control for the purposes of Title IX liability is necessarily a fact-based inquiry. . . . On the present record and without evidence from the District, it cannot be established as a matter of law that [the coach] was not an ‘appropriate person’ for purposes of Title IX.”).

92. *Noble v. Branch Intermediate Sch. Dist.*, No. 4:01cv 58, 2002 U.S. Dist. LEXIS 19600, at \*44–48 (W.D. Mich. Oct. 9, 2002).

93. Ryan, *supra* note 87, at 388.

94. *Id.* at 388–89.

the decisions are fairly evenly split between courts that find that the school must have actual knowledge of the harassment experienced by the particular survivor bringing the case, courts that find that the school's knowledge of the peer harasser's previous harassment of other victims is sufficient to meet the actual knowledge standard, and ambiguous decisions.<sup>95</sup> While the circuit court cases are all in the

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95. Of seventeen cases where this question was dealt with directly or indirectly, six resulted in the court not requiring actual knowledge of harassment involving a specific victim. See *Williams v. Bd. of Regents*, 477 F.3d 1282, 1289 (11th Cir. 2007) (implying that knowledge of the perpetrator's previous harassment was enough to put the school on notice); *Roe ex rel. Callahan*, 678 F. Supp. 2d at 1029–34 (noting that the harassing behavior does not have to be plaintiff specific); *Lopez v. Metro. Gov't*, 646 F. Supp. 2d 891, 915–16 (M.D. Tenn. 2009) (concluding that knowledge of the perpetrator's sexual proclivities and previous misbehavior put the school on notice even though no prior incidents occurred between the perpetrator and victim); *Staehling v. Metro. Gov't*, 2008 U.S. Dist. LEXIS 91519, at \*28–31 (“The institution must have possessed enough knowledge of the harassment that it could reasonably have responded with remedial measures to address the kind of harassment upon which plaintiff's legal claim is based.”); *J.K. v. Ariz. Bd. of Regents*, No. CV 06-916-PHX-MHM, 2008 U.S. Dist. LEXIS 83855, at \*45–46 (D. Ariz. Sept. 29, 2008) (“Title IX claims can be based on recipients knowledge of, and deliberate indifference to, a particular harasser's conduct in general.”); *Michelle M. v. Dunsmuir Joint Union Sch. Dist.*, No. 2:04-cv-2411-MCE-PAN, 2006 U.S. Dist. LEXIS 77328, at \*16, \*20 (E.D. Cal. Oct. 12, 2006) (finding that although the defendants may not have had actual knowledge of specific incidents of peer sexual harassment, the defendant's knowledge of the perpetrator's prior disturbing behavior, coupled with the defendant's failure to disseminate its policies on sexual harassment, could give rise to Title IX liability). Five cases resulted in the court finding that the actual knowledge prong had not been met because the school did not have knowledge of harassment directed at the victim bringing the case. See *Peer ex rel. Jane Doe v. Porterfield*, 2007 U.S. Dist. LEXIS 1380, at \*28–30 (noting that knowledge of student's disciplinary problems did not amount to knowledge that he posed a sexual threat to other students); *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1348 (M.D. Ga. 2007) (“While the precise boundaries of what kind of ‘actual knowledge’ a school must have to subject itself to Title IX liability remain undefined, it is generally accepted that the knowledge must encompass either actual notice of the precise instance of abuse that gave rise to the case at hand or actual knowledge of at least a significant risk of sexual abuse.”); *Soriano ex rel. Garcia v. Bd. of Educ. of N.Y.C.*, 2004 WL 2397610, at \*4 (finding that while a general lack of discipline in the school and a student's reputation for inappropriate sexual conduct were not enough to put the school on actual notice, the plaintiff's complaint to a teacher did put the school on actual notice); *Noble*, 2002 U.S. Dist. LEXIS 19600, at \*39–47 (holding that knowledge of the perpetrator's past disciplinary problems was not enough to put the school on actual notice); *K.F. v. River Bend Cmty. Unit Sch. Dist. No. 2*, No. 01 C 50005, 2002 U.S. Dist. LEXIS 12468, at \*3–6 (N.D. Ill. July 8, 2002) (noting that perpetrator's history of general disciplinary problems was not enough to put the school on actual notice). Another six cases were ambiguous on this point. See *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1177 (10th Cir. 2007) (“*Gebser* rejected a negligence standard for liability—namely, a standard that would have imposed liability on a school district for ‘failure to react to teacher-student harassment of which it . . . should have known’—but instead had ‘concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge.’”); *Winzer v. Sch. Dist. for City of Pontiac*, 105 F. App'x. 679, 681 (6th Cir. 2004) (“The Supreme Court did not decide in *Davis* whether the ‘known acts of student-on-student sexual harassment’ must have been directed against the plaintiff herself. Neither did it decide whether such acts must have been committed by the plaintiff's harasser, as opposed to some other student.”); *Murrell v. Denver Pub. Sch.*, 186 F.3d 1238, 1247 (10th Cir.

second and third categories (no knowledge of specific victim required or ambiguous), few cases are appealed beyond the district court level. This review shows that the district courts' decisions demonstrate considerable variation on this issue.

The number of district courts that insist upon actual knowledge of harassment of a specific victim is doubly surprising because it suggests a certain acceptance of victim-blaming attitudes by some courts. A belief that the identity of the victim of harassing behavior is relevant to whether the school is obligated to respond to the harassment focuses the school or the court on the victim's, and not the perpetrator's, behavior, suggesting that some victims must do something that invites the harassment, whereas other victims are "blameless." Indeed, if a perpetrator is known to have harassed or assaulted multiple victims, this should suggest that the victim's identity and behavior are *not* relevant because the perpetrator himself does not find the identity of the victim relevant.

The *Simpson* case involving the University of Colorado provides a more specific example of the range of court reasoning on this issue. In that case, the Tenth Circuit denied the university's summary judgment motion on the basis that the university "sanctioned, supported, even funded"<sup>96</sup> a football recruiting program where the risk of peer sexual violence occurring was so obvious that the school's failure to address it constituted deliberate indifference.<sup>97</sup> In denying the university's motion for summary judgment, the court found that the football coach "maintained an unsupervised player-host program to show high-school recruits 'a good time'" despite knowing generally "of the serious risk of

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1999) ("[T]he first two prongs of the *Davis* analysis require that a school official who possessed the requisite control over the situation had actual knowledge of, and was deliberately indifferent to, the alleged harassment."); *Doe v. N. Allegheny Sch. Dist.*, No. 2:08cv1383, 2009 U.S. Dist. LEXIS 89397, at \*15–18 (W.D. Pa. Sept. 28, 2009) ("An educational institution has 'actual knowledge' [or 'actual notice'] if it knows the underlying facts, indicating sufficiently substantial danger to students, and was therefore aware of the danger. . . . The Court of Appeals for the Third Circuit has clarified that actual notice cannot be based upon a mere possibility. . . . The Seventh Circuit has found actual knowledge where there are risks of harassment 'so greatly that they are almost certain to materialize if nothing is done . . .'); *Doe v. Ohio State Univ. Bd. of Regents*, No. 2:04-CV-0307, 2006 U.S. Dist. LEXIS 70444, at \*31–34 (S.D. Ohio Sept. 28, 2006) ("The Supreme Court has declined to apply a constructive-knowledge standard, demanding actual knowledge of sexual harassment in Title IX cases of teacher-on-student harassment . . . . The Supreme Court has unequivocally imported the actual-knowledge standard into cases of student-on-student harassment. . . . The Sixth Circuit has followed the Supreme Court's lead in requiring actual knowledge of student-on-student sexual harassment in Title IX cases."); *Vaird v. Sch. Dist. of Phila.*, No. 99-2727, 2000 U.S. Dist. LEXIS 6492, at \*11–12 (E.D. Pa. May 12, 2000) ("[A]ctual notice requires more than a simple report of inappropriate conduct by a teacher.").

96. *Simpson*, 500 F.3d at 1177.

97. *Id.* at 1185.

sexual harassment and assault during college-football recruiting efforts; . . . that such assaults had indeed occurred during CU recruiting visits; . . . [and] that there had been no change in atmosphere since [the last assault].”<sup>98</sup>

The district court that decided the case, however, found that the actual knowledge standard had not been met. In doing so, the court indicated that three to seven prior incidents of sexual harassment and assault proved that “some players, and some recruits, had engaged in sexual harassment and sexual assault” but not that they put the university “on notice of a risk that CU football players and recruits would sexually assault female University students as part of the recruiting program, including the risk that those assaults would be aided or exacerbated by excessive alcohol use by players, recruits, and female students.”<sup>99</sup> Thus, the district court in *Simpson* seemed to imply that the actual knowledge requirement was not met until the school was able to predict with clairvoyant accuracy that exactly what did happen in the case would happen.

The Tenth Circuit’s decision in *Simpson* and the decisions in *J.K. v. Arizona Board of Regents* involving Arizona State University<sup>100</sup> and *Williams v. Board of Regents* involving the University of Georgia<sup>101</sup> provide some hope for the future that actual knowledge will be defined by courts in a broader sense. There is still significant variation among courts, however, and the idea that even facts as egregious as those in *Simpson* could be seen as being insufficient to establish actual knowledge by the district court means that there is still a good chance that schools with knowledge of a serious sexual violence problem among their students will not be held liable. Given what is known about the factors that contribute to the incidence of campus peer sexual violence, especially the role that male peer support can play in encouraging some male students who may not otherwise have become offenders to perpetrate sexual violence,<sup>102</sup> the concept of “actual knowledge” used by the Tenth Circuit in *Simpson* is much closer to reality than that used by the *Simpson* district court. That is, research shows that campus cultures that are supportive of sexual violence contribute to individual cases of peer sexual violence,<sup>103</sup> and the law

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98. *Id.* at 1184.

99. *Simpson v. Univ. of Colo. Boulder*, 372 F. Supp. 2d 1229, 1237 (D. Colo. 2005), *rev’d and remanded sub. nom.*, 500 F.3d 1170 (10th Cir. 2007).

100. *J.K. v. Ariz. Bd. of Regents*, 2008 U.S. Dist. LEXIS 83855 (D. Ariz. 2008).

101. *Williams v. Bd. of Regents*, 477 F.3d 1282 (11th Cir. 2007).

102. Schwartz et al., *supra* note 24, at 641.

103. See *supra* notes 30–31 and accompanying text (stating that college campuses often lack “effective-guardians,” as men who inflict sexual abuse on women are not seriously punished for

should therefore create incentives for schools to both understand this insight and act upon it. At best, the current confusion over what constitutes actual knowledge does not send this clear message, and at worst, it creates incentives in exactly the opposite direction.

This brings the discussion to the final problem with the actual knowledge standard. The standard that the *Gebser* court created, but did not define, was not the only possible standard. In fact, the plaintiff, many amici, and the DOE either advocated, or actually used, a constructive knowledge standard, which asks whether the defendant knew, or reasonably should have known, that a risk of harassment existed.<sup>104</sup> Such a standard creates incentives for schools to set up mechanisms likely to flush out and address harassment, since there is a substantial risk that a court will decide that the school “should have known” about the harassment anyway. In addition, the rule adopted by the Supreme Court in the sexual harassment in employment cases, *Faragher v. City of Boca Raton*<sup>105</sup> and *Burlington Industries, Inc. v. Ellerth*,<sup>106</sup> caused many employers to adopt sexual harassment policies and procedures.<sup>107</sup> Employers did so because under the *Faragher/ Ellerth* standard, if they have such policies and procedures in place, but a plaintiff fails to use them, the employer has a defense against liability for the harassment.<sup>108</sup>

These are not the incentives created by the actual knowledge standard. Rather, the actual knowledge standard, as Justice Stevens noted in his dissent in *Gebser*, encourages schools to avoid knowledge rather than set up procedures by which survivors can easily report.<sup>109</sup> After all, if schools can avoid knowledge then they need not respond, and a court will not evaluate whether they acted with deliberate indifference. Justice Stevens’s dissent was in part a response to the

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their acts, and noting that data regarding male peer support for the victimization of women demonstrates that male undergraduate students are encouraged by their sexually abusive male peers to assault their girlfriends or dating partners).

104. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 296 (1998) (Stevens, J., dissenting); REVISED GUIDANCE, *supra* note 72, at 13.

105. *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998).

106. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765–66 (1998).

107. See Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3, 4 (2003) (“The centerpiece of the [*Faragher/ Ellerth*] liability scheme is a rule of automatic liability for hostile environment harassment by supervisors, softened by an affirmative defense that excuses employers from liability or damages if they take adequate preventative and corrective measures. . . . Employers have taken their [lawyers’] advice, by and large, adopting or updating procedures and training programs and implementing internal grievance procedures.”).

108. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 764.

109. *Gebser*, 524 U.S. at 296 (Stevens, J., dissenting).

Court's suggestion that the actual knowledge standard is designed to "avoid diverting education funding from beneficial uses where a [school] was unaware of discrimination in its programs and is willing to institute prompt corrective measures."<sup>110</sup> A decade plus of experience with the actual knowledge standard demonstrates that Justice Stevens was correct and that schools are not "willing to institute prompt corrective measures." In fact, as already noted, doing nothing at all is both the school's response of choice and the response that is most likely to qualify as a violation of a different prong of the same review standard. Unlike with the *Faragher/Ellerth* approach, there has not been a rush to develop policies, procedures, and training on sexual harassment among schools as there has been among employers. Experience now proves what common sense and Justice Stevens suggested twelve years ago: the peer sexual violence problem will persist until schools make sure that they have knowledge about what is actually occurring among their students, and schools will not acquire that knowledge until the law requires them to do so, or at least until the law does not encourage them to do the opposite.

#### *B. Problems with Administrative Enforcement of Title IX*

The good news is that OCR uses a constructive knowledge standard when it investigates schools for violations of Title IX in peer sexual harassment cases. The bad news is that very few people know how to initiate an OCR investigation, and almost no one knows about the results of those investigations. In addition, OCR's proactive guidance, while more easily available to the general public, is relatively vague, if improving. This particular information problem compromises the effectiveness of OCR's school regulation quite broadly and contributes to both passive unawareness and active avoidance of awareness on the part of schools. Although the current administration is making admirable efforts to change this situation by issuing a recent Dear Colleague Letter ("DCL")<sup>111</sup> and posting the results of recent

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110. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 289 (1998).

111. *Dear Colleague Letter*, *supra* note 67, at n. 1 ("The Department has determined that this Dear Colleague Letter is a 'significant guidance document' under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/012507\\_good\\_guidance.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/012507_good_guidance.pdf). OCR issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations.").

investigations in OCR's electronic reading room,<sup>112</sup> these efforts are limited in comparison to the scope of the problem.

OCR enforcement generally takes place when a complaint is filed regarding a school's response to a sexual harassment case, which causes OCR to undertake a fairly comprehensive investigation of that school's response system.<sup>113</sup> This investigation often includes a close review of institutional policies and procedures, as well as the steps the school took to resolve a complaint<sup>114</sup> and files relating to past sexual harassment cases that required a school to respond in some way.<sup>115</sup> OCR also interviews those involved in the case, including particularly relevant school personnel.<sup>116</sup> OCR investigations are generally resolved through a "letter of finding" ("LOF") addressed to the school and written by OCR, which is sometimes accompanied by a "commitment to resolve" ("CTR") signed by the school.<sup>117</sup> Even when OCR does not find a school in violation of Title IX or its regulations, OCR may find "technical violations" in a school's policies or procedures and require a school to make changes to those policies as directed by OCR.<sup>118</sup> Once a case is resolved, OCR takes no further action besides monitoring any agreement it may have made with the school.<sup>119</sup>

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112. *Reading Room (eFOIA Index)*, U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS (May 26, 2011), <http://www2.ed.gov/about/offices/list/ocr/publications.html>.

113. See REVISED GUIDANCE, *supra* note 72, at 14 (explaining that OCR may be asked to "investigate or otherwise resolve incidents of sexual harassment of students, including incidents caused by employees, other students, or third parties").

114. See *id.* (explaining that in OCR's investigation of incidents or sexual harassment, OCR will consider whether "(1) the school has a disseminated policy prohibiting sex discrimination under Title IX and the effect grievance procedures; (2) the school appropriately investigated or otherwise responded to allegations of sexual harassment; and (3) the school has taken immediate and effective corrective action responsive to the harassment, including effective actions to end the harassment, prevent its recurrence, and as appropriate, remedy its effects.").

115. See *OCR Complaint Processing Procedures*, U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS (Jan. 8, 2010), <http://www.ed.gov/about/offices/list/ocr/complaints-how.html> ("OCR may use a variety of fact-finding techniques in its investigation of the complaint. These techniques may include reviewing documentary evidence submitted by both parties, conducting interviews with the complainant, recipient's personnel, and other witnesses and/or site visits.").

116. See *id.* (explaining that OCR's fact-finding techniques in its investigation of a complaint include interviews with the personnel of the complaint recipient).

117. See EDUCATOR'S GUIDE, *supra* note 75, ¶ 322 (explaining the complaint process in campus sexual violence cases).

118. See, e.g., Letter from Linda Howard-Kurent, Supervisory Team Leader, Office for Civil Rights, U.S. Dep't of Educ., to Norman Cohen, President, Utah Coll. of Massage Therapy (Aug. 17, 2001) (on file with author) (stating that the College would adopt and publish new procedures under OCR authority without any admission of wrongdoing).

119. See REVISED GUIDANCE, *supra* note 72, at 14 (stating that once a case is considered resolved, the OCR "will take no further action, other than monitoring compliance with an agreement, if any, between the school and OCR").

Relative to the *Gebser/Davis* standard, the comprehensiveness and strictness of OCR's approach makes it potentially a very useful tool to get schools to respond properly to peer sexual violence. In addition to the use of the constructive knowledge standard, OCR's approach is injunctive, forward-looking, and directly changes school behavior for the future. On the other hand, a private suit for damages at best will only make such changes indirectly, perhaps through a settlement where the plaintiff insists on changes, or because the school learns its lesson and makes changes to avoid a repeat violation. In addition, because of their comprehensiveness, OCR's investigations look at a school's system at a very detailed level and require changes at a similar level of detail. In part because the deliberate indifference standard only reaches the worst school behaviors but also because this is not the typical role of courts, private lawsuits under Title IX are unlikely to reach the level of detail that are regular parts of the OCR process.

This level of detailed review and guidance is much needed on the ground at most schools. For the front-line educational administrators and professionals actually dealing with cases of peer sexual violence, the devil is often in the details. When one student sexually assaults another student in the same dorm, which student should the school move out of the dorm while the school is investigating the case? What standard of proof should the student code of conduct adopt in adjudications of such cases and can or should it be different from the standard used for other conduct code violations (e.g., plagiarism)? What is the scope of the school's obligations to protect the students' confidentiality, especially when there is ambiguity and/or a potential conflict in the regulations? Can a school issue a "stay-away order" between students where an official charge under the student code of conduct has not been filed? Can a school require, encourage, or allow mediation of sexual harassment or violence cases? Should a survivor be allowed to appeal a hearing board decision in a student conduct case? If so, what access to evidence, the transcript of the hearing, and any written basis of the judgment should she have? These are just some of the questions that come up regularly for the "first responders" and policymakers at schools.

These are also questions that do not show up in most Title IX lawsuits or in OCR's 2001 *Revised Guidance*<sup>120</sup> on how to respond to peer sexual harassment and violence. Moreover, while the DCL has made a good start at answering a number of these questions, it does not answer them all, and the nature of individual cases is that new questions

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120. See generally *id.* (explaining how certain issues may arise, such as the need for separate housing arrangements, but lacking the specific questions typically dealt with by first responders).



are sure to arise. Many of these issues, however, have been investigated and resolved by OCR in its investigations. Therefore, having access to OCR's LOFs could resolve many of these questions for the people who really need such answers.

### 1. Lack of a Well-Publicized Complaint Procedure

Because they are a source of additional and often more specific guidance to schools, OCR investigations in response to complaints that a school mishandled a sexual violence case have the potential to be very helpful to both survivors and campus policymakers and administrators. Unfortunately, neither the information about the OCR complaint procedure nor the results of OCR investigations are particularly well-publicized or accessible to the general public. In the case of OCR complaints, while information is posted on the OCR website,<sup>121</sup> this is the only place that it seems to appear. Even OCR's own guidance and the recent DCL, while referring to OCR investigations,<sup>122</sup> never explain how one would go about initiating an investigation or where one might file a complaint.<sup>123</sup> While it is clear that the main audience for the guidance is schools, the guidance is likely to be read by a wider swath of the general public than just the regulated entities. In addition, at no place on the OCR websites dealing with the complaint process is sexual harassment mentioned, so these pages are not terribly easy to find through simple Internet searching. The CPI's series on campus sexual violence confirms that "few students know they have the right to complain" and "the number of investigations into sexual assault-related cases is 'shockingly low.'"<sup>124</sup>

### 2. Violations of the Freedom of Information Act

Still, the two websites devoted to the OCR complaint process look like a no-holds-barred publicity campaign compared to the publicly

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121. See *OCR Complaint Processing Procedures*, *supra* note 115 (describing the criteria used by OCR to evaluate a complaint and the procedures for challenging determinations of non-compliance); U.S. Dep't of Educ., *How to File a Discrimination Complaint with the Office for Civil Rights*, ED.GOV, <http://www2.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt> (last modified Oct. 20, 2010) (describing the process to file a discrimination complaint with OCR).

122. See REVISED GUIDANCE, *supra* note 72, at i, iii, 5–6, 8, 10, 11, 14–15, 20–22 (explaining the OCR complaint process); *Dear Colleague Letter*, *supra* note 111, at 9–12, 16 (stating how criminal investigations should have no or limited effect upon the initiation and progress of a school's internal Title IX investigation).

123. The OCR website containing the recent DCL includes a "Know Your Rights" flyer that includes information about the OCR complaint process. U.S. Dep't of Educ., Office for Civil Rights, *Know Your Rights*, ED.GOV, <http://www2.ed.gov/about/offices/list/ocr/know.html> (last modified Mar. 17, 2009). It is unclear, however, what schools are supposed to do with this flyer, if anything. The DCL does not require that schools post the flyer.

124. *Lax Enforcement of Title IX*, *supra* note 50.

available information devoted to OCR's resolutions of the complaints that are filed. In fact, the only way that anyone other than a complainant or the school being investigated can see the resolution of most cases is through filing a Freedom of Information Act ("FOIA") request. If a school or individual wishes to see various OCR LOFs but does not know which ones in particular, one must file a blanket FOIA request for all of the LOFs in a particular timeframe, against a particular school, or similar category. With the exception of a couple of recent cases,<sup>125</sup> the letters are not available in the DOE public FOIA reading room.

The DOE's own regulations implementing FOIA state that the agency will keep in its public reading room, "final opinions and orders in adjudications . . . and copies of all agency records regardless of form or format released to the public pursuant to a FOIA request that the Department determines are likely to be the subject of future FOIA requests."<sup>126</sup> "Adjudications" is undefined by the regulations, but even if OCR's "final opinions and orders" in its complaint investigations are not strictly adjudications, they almost certainly fit into the category of "agency records . . . released to the public pursuant to a FOIA request . . . likely to be the subject of future FOIA requests." While it is true that the DOE must determine that a particular already-released record is likely to be requested again, in the case of OCR investigations involving peer sexual violence, several bits of evidence indicate that at least some LOFs have been requested multiple times. Yet, there is a continuing categorical exclusion of these LOFs from the DOE public reading room. This evidence includes the CPI's blanket FOIA request for OCR sexual harassment investigations from 1998 to 2008.<sup>127</sup> In addition, I have filed FOIA requests for a series of LOFs in OCR cases about which I was aware through a publication called *The Educator's Guide to Controlling Sexual Harassment*.<sup>128</sup> This publication files blanket FOIA requests and then synthesizes the cases involving new or unique legal points, facts, and/or conclusions. Therefore, there is a group of LOFs that not only are "likely to be the subject of future FOIA requests," but

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125. See U.S. Dep't of Educ., *Recent Resolutions*, ED.GOV, <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/index.html> (last modified July 13, 2001). These recent cases are a positive step demonstrating this administration's recognition of and willingness to address the problem, but these efforts are still quite inadequate when compared to the sheer scope of the problem and number of past investigations not available in the reading room.

126. 34 C.F.R. § 5.10(b) (2011).

127. *Lax Enforcement of Title IX*, *supra* note 50.

128. See generally EDUCATOR'S GUIDE, *supra* note 75 (highlighting OCR cases in which LOFs were written).

actually have been requested multiple times.<sup>129</sup> Combined with the fact that *The Educator's Guide's* summaries of OCR cases increases the likelihood that they will be requested, it seems clear that the DOE would see this as proof that the LOFs are "likely to be the subject of future FOIA requests."

Moreover, not only is a FOIA request the only way a member of the public can read the LOFs, but the request process is particularly lengthy for these documents. According to its own regulations, the DOE has twenty working days after the request is received by the appropriate office to "determine whether to comply with the request."<sup>130</sup> In "unusual circumstances," however, this time period may be extended to a time "arrange[d] with the Department . . . within which the FOIA request will be processed."<sup>131</sup> "Unusual circumstances" include "[t]he need to search for and collect the requested agency records from field facilities or other establishments that are separate from the office processing the request."<sup>132</sup> Since OCR investigations are conducted by local enforcement offices,<sup>133</sup> "unusual circumstances" are in fact *usual* circumstances, and all FOIA requests related to OCR's investigations are put in a category where there is no definite deadline for the DOE's response—requests must be "arrange[d] with the Department."<sup>134</sup> It is therefore impossible to know how quickly or how slowly a FOIA request might be fulfilled, and there is potential for it to be quite slow indeed.

Based on this evidence, it appears that the DOE is engaging in a systemic FOIA violation, one that virtually eliminates a method that could alleviate one of the information problems discussed above: the lack of awareness of the non-lawyer first responders and policymakers at many schools. Such front-line staff might find the time to search files in a public FOIA reading room to see if the DOE has ever investigated a complaint that might shed light on the school's own particular policy or

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129. A final set of requests about which I am aware was filed by the Georgetown Law Library. Upon my mentioning the general inaccessibility of the LOFs to Georgetown law librarians Kumar Jayasuriya, Sarah Rhodes, and Sara Burriesci, they decided to experiment with developing Georgetown's own database of LOFs to provide a service to the public. They filed some blanket FOIA requests to obtain a certain number of LOFs directly from the DOE to assess whether they could be placed into a database. The files they received from DOE were generally so illegible (from a technical perspective) that the project has been stalled while a technical solution is sought.

130. 34 C.F.R. § 5.21(c) (2011).

131. *Id.* § 5.21(e).

132. *Id.* § 5.21(e)(1).

133. U.S. Dep't of Educ., *Questions and Answers on OCR's Complaint Process*, ED.GOV, <http://www2.ed.gov/about/offices/list/ocr/qa-complaints.html> (last modified May 5, 2009).

134. 34 C.F.R. § 5.21(e).

implementation question. The front-line staff, however, is not going to take the months and the amount of labor needed to file and receive results from a blanket FOIA request that might not even contain a case that is on point.

### 3. (Suspensions of) Inadequate and Inconsistent Investigations and Piecemeal Enforcement in Student Complaint Cases

Several other information problems occur as a result of the systemic FOIA violation in which the DOE is engaging, including a general lack of accountability for OCR and piecemeal enforcement of Title IX's requirements. First, the lack of transparency regarding OCR's investigations makes it extremely difficult to check those investigations for consistency or adequacy. In at least a few cases, significant variation appears to exist between regions in terms of OCR's findings in peer sexual violence cases, which might have to do (in part) with the quality of the investigations conducted. For instance, when the University of California at Santa Cruz was investigated in 1994, the investigation clearly involved a wide swath of people on campus, not only those officials who had dealt with the case.<sup>135</sup> Yet in other investigations, there is evidence that OCR never attempted to speak with anyone but the complainant and the school officials being investigated.<sup>136</sup> Such investigations unsurprisingly often result in "complainant said, defending school said" situations where ultimately OCR finds that there was "insufficient evidence" to support the complainant's allegations.<sup>137</sup> Third party evidence might have broken such a stalemate had OCR spoken to third parties.

As mentioned above, CPI undertook the kind of review that would be next to impossible for most schools or advocates to accomplish: it did a blanket FOIA request for eleven years worth of OCR Title IX investigations (1998–2008) and found twenty-four investigations (out of 210 campus sex discrimination investigations) into "allegations that colleges and universities botched sexual assault cases."<sup>138</sup> Only five of these found the schools responsible for violating Title IX, and in some cases, OCR did not find violations for some pretty serious school behavior. For instance, although OCR's own guidance makes clear that

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135. Mary Spicuzza, *The Missing 47 Survivor Advocates Worry UCSC's Revamped Sex Offense Policy Promotes Silence Round Sexual Assault*, METROACTIVE, <http://www.metroactive.com/papers/cruz/11.12.98/rape1-9845.html> (last visited Aug. 15, 2010).

136. E-mail from Carolyn Hurwitz to author (Aug. 15, 2010, 4:42 PM) (on file with author).

137. Letter from Sherilyn Goldbecker, Team Leader, Office for Civil Rights, U.S. Dep't of Educ., to John J. DeGioia, President, Georgetown Univ. (May 5, 2004) (on file with author) [hereinafter Georgetown Univ. Letter].

138. *Lax Enforcement of Title IX*, *supra* note 50.

retaliation by the school against a survivor for reporting an assault is a violation of Title IX,<sup>139</sup> when Boston University “distributed a press packet with information about an alleged rape victim, noting that she was fined for ‘disorderly conduct’ and drinking alcohol on the night she was allegedly raped,”<sup>140</sup> OCR did not find the school in violation of Title IX. In contrast, the University of California at Santa Cruz investigation found violations of Title IX due to “unclear information about sex offense policies, poor recordkeeping and inconsistent disciplinary procedures.”<sup>141</sup> In the primary investigation discussed by CPI, moreover, OCR accepted a series of the University of Wisconsin’s excuses for why it delayed addressing a student’s report of sexual assault, including that the school had put its process on hold because a criminal investigation was occurring.<sup>142</sup> This was despite the clear statement in OCR’s own guidance that “[p]olice investigations or reports . . . do not relieve the school of its duty to respond promptly and effectively.”<sup>143</sup> Such disparate findings raise real questions about how consistent OCR’s enforcement is, but OCR’s systemic FOIA violation makes it nearly impossible to check the accuracy of such suspicions.

In addition, both the FOIA violation and the underlying questions about the quality and consistency of the investigations themselves lead to a situation of piecemeal enforcement where some schools are being held to a higher standard than others. For instance, prior to the recent DCL, which clarifies that this rule applies to all schools, only schools that had been investigated had been required to adopt a preponderance of the evidence standard for school hearings of peer sexual violence cases.<sup>144</sup> Nothing about a preponderance of the evidence standard appears in the *Revised Guidance*, so this appeared to be a requirement that OCR had developed through its investigations, despite OCR’s disclaimer on its website that “Letters of findings are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such.”<sup>145</sup> Although the DCL has now alleviated this

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139. See REVISED GUIDANCE, *supra* note 72, at 20 (suggesting schools add a provision to their sexual harassment policies preventing any retaliation against an individual who files a complaint or participates in a harassment inquiry because retaliation is prohibited by Title IX).

140. *Lax Enforcement of Title IX*, *supra* note 50.

141. Spicuzza, *supra* note 135.

142. *Id.*

143. REVISED GUIDANCE, *supra* note 72, at 21.

144. See Evergreen State Coll. Letter, *supra* note 44 (applying a “preponderance of evidence” after the school was investigated); Georgetown Univ. Letter, *supra* note 137 (requiring a preponderance of evidence standard upon investigation).

145. *OCR Complaint Processing Procedures*, *supra* note 115.

problem, this could have presented a separate problem under FOIA, which states, in the section on public reading rooms, that

[a] final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.<sup>146</sup>

Therefore, to the extent that OCR relies in its enforcement actions on precedents developed in past investigations, but neither publishes the LOFs from those investigations nor integrates those precedents into its guidance, it could be violating FOIA once again.

This piecemeal enforcement has several consequences. First, schools that have not been investigated are treated differently than those that have been investigated. Additionally, schools that have been investigated are held to different standards than other schools that have been investigated. This is hardly fair to schools in general, and it is entirely possible that part of the reason why different schools are being held to different standards has to do with how well some schools negotiate versus how well some OCR offices or administrations negotiate. This is because of the structure of OCR enforcement, which seeks voluntary compliance because OCR has no ability to do less than withhold federal funds for a Title IX violation. OCR has no ability to fine a school, for instance, or to take other punitive measures short of the “nuclear option” represented by withholding federal funds.<sup>147</sup> Since the comfort level with using OCR’s nuclear option seems about the same as the United States’ and Soviet Union’s during the Cold War,<sup>148</sup> OCR is left to negotiate a settlement with schools with all of the damage to its negotiating position that an empty threat can do. All of these factors lead to uneven enforcement.

These factors also exacerbate the central information problem discussed in Part I of this Article: the idea that colleges and universities are in a kind of competition with each other with regard to their public images and the reporting of sexual violence on campus. Because enforcement of Title IX is not uniform, some schools are able to get away with adopting policies more likely to suppress—or at least not encourage—victim reporting. Only the schools that have been investigated are compelled to come into compliance with Title IX and

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146. 5 U.S.C.S. § 552(a)(2)(E) (2006).

147. *Lax Enforcement of Title IX*, *supra* note 50.

148. *Id.*

respond in a fashion that is likely to increase reporting, as the overall Title IX liability scheme encourages. Given (1) how few people are even aware of the complaint process; (2) the possibility that OCR will not insist on full compliance even if a school is investigated; and (3) the virtual guarantee that OCR will never take any money away from the school anyway, it seems much less costly to gamble that one might be investigated and found to have violated Title IX than to risk looking like a dangerous campus.

#### 4. Lack of Proactive Enforcement

When interviewed by CPI, C. Todd Jones, the OCR Deputy Assistant Secretary for Enforcement during the George W. Bush administration, attempted to justify many of the enforcement inadequacies listed above by saying that investigations are less effective than the behind-the-scenes “technical assistance” and other proactive methods adopted by OCR to get schools to come into compliance.<sup>149</sup> However, Jones also noted that the *Revised Guidance* published by the Clinton administration on one of its last days in office was shelved immediately and not followed by the subsequent administration, although it was not publicly rescinded nor were advocates and others aware of its “shelved” status.<sup>150</sup> In addition, as CPI notes, OCR’s budget and staff were cut over the course of the Bush administration, despite an increase in complaints to be investigated, impacting the Office’s ability to provide both proactive guidance and technical assistance.<sup>151</sup>

Thankfully, the Obama administration is taking enforcement more seriously. The recent DCL, other Dear Colleague Letters, particularly the one applying Title IX to bullying,<sup>152</sup> and the posting of recent compliance reviews and complaint resolutions in the reading room are evidence of the Obama administration’s commitment to enforcement. Nevertheless, there are still significant deficiencies in the proactive steps that OCR takes. First, it is not clear whether the “technical assistance” mentioned by Jones was allocated to schools other than those being investigated, and if this was the case, whether that has changed under the current administration. Therefore, this method cannot qualify as a purely proactive or preventive approach. If anything, it is designed to prevent recidivism.

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149. *Id.*

150. *Id.*

151. *Id.*

152. U.S. Dep’t of Educ., *Prevention Dear College Letter*, ED.GOV, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> (last modified Oct. 26, 2010).

Second, as already noted, the 2001 *Revised Guidance*, whether shelved or not, is quite general and leaves many of the detailed questions asked by educational administrators unanswered.<sup>153</sup> The DCL has made a good start and helped clarify a number of hitherto ambiguous issues, but much of both the 2001 *Revised Guidance* and the DCL's guidance is not bright-line-rule oriented. The lack of bright-line rules allows more room for schools to apply the rules in a way that is arguably not in violation of the letter but clearly in violation of the spirit of Title IX. The *Revised Guidance* calls for "prompt and equitable" processes to determine whether sexual harassment has occurred, but says nothing about the myriad questions that can arise as to what is "equitable." For instance, if a school holds hearings to determine whether sexual violence occurred and gives the accused student the right to appeal, what are the complaining student's appeal rights? The DCL does establish that any disciplinary procedure giving the accused student the right to an appeal must also give that right to the complaining student, but says nothing about the scope of that right. Does she get equal access to a full transcript of the hearing, any evidence submitted and considered, any opinion written by the hearing board explaining their decision, etc.? These questions are still unaddressed and leave open the possibility for a school not to allow such procedural rights for the complaining student, despite the inequitable slant of such a decision, just because there is no explicit directive that schools take these steps. Even a statement such as "when in doubt, a school should provide any right (in its full scope) that it gives to an accused student to a complaining student" would be extremely helpful, but neither the *Revised Guidance* nor the DCL contains such a statement.

Finally, although the Obama administration does appear to be taking a more proactive approach, OCR has made relatively few attempts to engage in any proactive enforcement such as random compliance reviews. This means that nearly the entire burden of enforcement falls on those who file complaints, most likely the survivors of the sexual violence, who may be too worn out to complain, given that they have not only been through the traumatizing violence itself, but likely a re-victimizing school process (why else would they complain?). This structure is therefore unlikely to alter the risk-benefit analysis of a school that would rather risk being investigated and found to have violated Title IX than risk looking like a dangerous campus.

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153. See *supra* note 120 and accompanying text (discussing how OCR's *Revised Guidance* fails to present and answer certain questions that first responders may be asked).



*C. Campus Crime Reporting Requirements and  
the Unrealized Solution of the Clery Act*

Potential/current students and their parents are the ultimate audience schools are concerned about when they face the dilemma of encouraging victim reporting but looking like a dangerous campus. Therefore, if the understandable lack of awareness of this audience could be alleviated, this could influence a school to address its own unawareness, as well as reduce incentives for schools to actively avoid knowledge and not adopt effective campus peer sexual violence response systems. In fact, this was at least in part the motivation behind the Clery Act.

The Clery Act was spearheaded by the parents of Jeanne Clery, a Lehigh University first-year student who was raped and murdered by a fellow student while she was sleeping in her dorm room.<sup>154</sup> The primary purpose of the Clery Act was to increase transparency around campus crime so that prospective students and their parents could make more knowledgeable decisions about which schools to attend. Rep. Gooding, who sponsored the bill in the House, stated, "The assumption behind these bills is that making this information available will help students decide which institution to attend, will encourage students to take security precautions while on campus, and will encourage higher education institutions to pay careful attention to security considerations."<sup>155</sup>

As such, the Clery Act's original vision, while not specifically designed for this purpose, could have gone a long way toward fixing the central information problem and dilemma faced by schools regarding encouraging reporting versus public image. Unfortunately, the criteria by which the Clery Act requires schools to count crime, as well as the discretion that the statute gives schools and its lack of strict, comprehensive, and proactive enforcement, have prevented it from reaching its potential.

According to the 2005 Handbook for Campus Crime Reporting,<sup>156</sup> institutions are required to report crimes based on four factors: (1) where the crime occurred; (2) the type of crime; (3) to whom the crime

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154. *Jeanne Clery and the SOC Story*, SEC. ON CAMPUS, [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=126&Itemid=71](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=126&Itemid=71) (last visited Aug. 12, 2011).

155. 136 CONG. REC. S13128 (daily ed. Sept. 13, 1990) (statement of Sen. Kennedy) (commenting on S. 580).

156. Please note that the handbook was updated in February 2011. Most of the citations in this section still refer to the 2005 version because this was the version in place when the crime reports examined in this article were created. Where the 2011 version retains the same rule as the 2005 version, a reference to the 2011 version will also be included.

was reported; and (4) when the crime was reported.<sup>157</sup> Reporting requirements split university locales into three categories: (1) on campus (including residence halls); (2) non-campus; and (3) public property.<sup>158</sup> Criminal acts must be reported in three categories: (1) type of crime (homicide, sex offenses, forcible and non-forcible, robbery, aggravated assault, burglary, motor vehicle theft, and arson);<sup>159</sup> (2) arrests or disciplinary actions related to liquor law violations, drug law violations, and illegal weapons possession;<sup>160</sup> and (3) hate crimes.<sup>161</sup> All reported crimes are defined by the Federal Bureau of Investigation's *Uniform Crime Reporting Handbook* ("UCR Handbook"), not local or state law definitions.<sup>162</sup> A crime is considered "reported"—and thus necessary for the school to disclose—if it is brought to the attention of a "campus security authority" or the local police.<sup>163</sup> Notably, "campus security authority" does not include faculty, campus physicians, or counselors (mental health, professional, and pastoral).<sup>164</sup> Finally, institutions are instructed to include an incident in its statistics under the year in which it was reported, not the year the incident took place.<sup>165</sup>

Institutions are required to disclose all reported crimes, regardless of whether these reports led to investigations or disciplinary actions,<sup>166</sup> and regardless of whether the survivor chooses to file an official police report or press charges.<sup>167</sup> In addition, it is immaterial whether or not the perpetrator or survivor is associated with the school.<sup>168</sup> A crime is

157. OFFICE OF POSTSECONDARY EDUC., U.S. DEP'T OF EDUC., THE HANDBOOK FOR CAMPUS CRIME REPORTING 23 (2005), available at <http://www.ed.gov/admins/lead/safety/handbook.pdf> [hereinafter CAMPUS CRIME REPORTING HANDBOOK]; OFFICE OF POSTSECONDARY EDUC., U.S. DEP'T OF EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 11 (2005), available at <http://www2.ed.gov/admins/lead/safety/handbook-2.pdf> [hereinafter CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK].

158. 20 U.S.C. § 1092(f)(12) (2006).

159. See *id.* § 1092(f)(1)(F)(i) (listing the criminal offenses that must be reported by schools); see also CAMPUS CRIME REPORTING HANDBOOK, *supra* note 157, at 24–46 (listing and defining the criminal offenses that must be reported).

160. 20 U.S.C. § 1092(f)(1)(F)(i).

161. *Id.*

162. *Id.* § 1092(f)(7).

163. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 157, at 23; CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK, *supra* note 157, at 73; see also 20 U.S.C. § 1092(f)(1)(F)(i).

164. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 157, at 51; CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK, *supra* note 157, at 77–78.

165. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 157, at 75; CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK, *supra* note 157, at 11.

166. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 157, at 23; CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK, *supra* note 157, at 73.

167. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 157, at 50; CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK, *supra* note 157, at 76.

168. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 157, at 24; CAMPUS SAFETY AND

considered to be “reported” if it is “brought to the attention of a campus security authority or the local police by a victim, witness, other third party, or even the offender.”<sup>169</sup> Institutions are prohibited from including personal identifying information about the victim or perpetrator of any reported crimes.<sup>170</sup>

A review of school reports demonstrates significant differences between reports. Often, schools do not report in the third category (to whom a report was made), even though it is required.<sup>171</sup> In addition, there is ample discretion given to schools in defining the boundaries of the first category. Both providing a map showing the boundaries used and updating campus boundary definitions on an annual basis are encouraged, but not required.<sup>172</sup> There is no automatic review process of these boundaries—an institution’s geographic definitions will only be reviewed if a complaint is brought.<sup>173</sup> Finally, there is variation in whether schools include statistics gathered from local police. Institutions are expected to contact local law enforcement agencies to obtain statistics and compile them with university statistics.<sup>174</sup> However, the institution is only expected to make a good faith effort in obtaining local law enforcement statistics, a vagary that may result in different outcomes for schools in the same jurisdiction.<sup>175</sup> If local law

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SECURITY REPORTING HANDBOOK, *supra* note 157, at 54.

169. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 157, at 24.

170. *Id.* at 79; CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK, *supra* note 157, at 55.

171. For statistics on types of crimes committed in various regions and institutions, see AM. UNIV., ANNUAL SECURITY REPORT 35–43 (2009), *available at* [https://www.american.edu/finance/publicsafety/upload/ASR\\_2009.pdf](https://www.american.edu/finance/publicsafety/upload/ASR_2009.pdf); NW. UNIV., ANNUAL SECURITY AND FIRE SAFETY REPORT 36–41 (2010), *available at* [http://www.northwestern.edu/up/jeanne/2010\\_Chicago\\_Evanston\\_Annual\\_Security\\_Fire\\_Safety\\_Report.pdf](http://www.northwestern.edu/up/jeanne/2010_Chicago_Evanston_Annual_Security_Fire_Safety_Report.pdf); SYRACUSE UNIV., YOUR SAFETY AND SECURITY AT SYRACUSE UNIVERSITY 2010, 32–38 (2010), *available at* <http://publicsafety.syr.edu/uploads/2010%20Clery1.pdf>; Purchase College, *Purchase College 2010 Annual Campus Crime Statistics*, PURCHASE.EDU, <https://www.purchase.edu/sharedmedia/capitalfacilitiesplanning/upd/purchase%20college%202010%20annual%20campus%20crime%20statistics.pdf> (last visited Feb. 27, 2011); University of Chicago, *Common Sense: Your Guide to Safe Urban Living*, <http://commonsense.uchicago.edu/crime-info.html> (last visited Feb. 27, 2011). For an example of a school that did include the receiver of the crime report in its crime statistics, see Ohio University, *2009 Clery Act Compliance Report*, OHIO.EDU, <http://www.ohio.edu/police/rtk/upload/2009cleryreport.pdf> (last visited Feb. 27, 2011) (breaking “reported to” categories into university police, local police, and non-police).

172. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 157, at 18; CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK, *supra* note 157, at 31.

173. *See* Student Assistance General Provisions, 64 Fed. Reg. 59065 (Nov. 1, 1999) (analyzing comments and changes for institutional security policies and crime statistics).

174. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 157, at 54; CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK, *supra* note 157, at 82.

175. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 157, at 54. Two universities in similar areas of Washington, D.C., reported different abilities to obtain local law enforcement

enforcement statistics are not broken down in a way that identifies the specific geographic area in which the crime occurred—making officials unable to determine if the crime took place within the Clery Act boundaries—the institution is not obligated to include law enforcement statistics and is advised to provide a statement indicating that police statistics did not comport with the Clery Act reporting requirements.<sup>176</sup> Similarly, if the local law enforcement agency does not comply with the institution's request (it is not required to do so under the Clery Act), the institution needs to document this, but needs to do no more.<sup>177</sup>

Even in terms of the Clery Act's central and original purpose, giving potential students and their parents ways to evaluate the safety of a given campus, the variation that comes from the ample discretion given to schools and the lack of proactive enforcement makes meaningful comparisons between schools difficult. Schools can minimize the crimes that they count by using their discretion in such areas as drawing the boundaries of the various locations in which they have to report and gathering statistics from local police. This discretion allows for both school manipulation of statistics and/or confusion as to the proper way to collect statistics. CPI's investigation of Clery Act reporting shows at least such confusion, if not deliberate manipulation, on the part of many schools.<sup>178</sup> In addition, like with OCR's enforcement of Title IX and despite the efforts of the organization created by the Clerys, Security on Campus, Inc., there is little knowledge of the complaint procedure and few complaints.<sup>179</sup> This lack of awareness, combined with the lack of proactive compliance reviews by the DOE, means that schools are rarely held accountable for violations.

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statistics. See Georgetown University Campus Security Data, 2006–2008 (on file with author) (reporting that local police statistics are not available); American University Campus Security Data, 2006–2008 (on file with author) (reporting that local statistics are included with campus statistics). Note that in 2009, Georgetown University began including local police statistics in its annual campus security data. THE CAMPUS SAFETY AND SEC. DATA ANALYSIS CUTTING TOOL, <http://ope.ed.gov/security/index.aspx> (follow “Get data for one institution/campus” hyperlink; then search “Georgetown University”).

176. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 157, at 54; CAMPUS SAFETY AND SECURITY HANDBOOK, *supra* note 157, at 87.

177. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 157, at 54; CAMPUS SAFETY AND SECURITY HANDBOOK, *supra* note 157, at 87.

178. Kristen Lombardi & Kristin Jones, *Campus Sexual Assault Statistics Don't Add Up*, CTR. FOR PUB. INTEGRITY (Dec. 3, 2009), [http://www.publicintegrity.org/investigations/campus\\_assault/articles/entry/1841/](http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1841/).

179. In fact, most complaints are filed by Security on Campus, Inc. itself. One exception was the case involving Salem International University, which was originally investigated as a result of a complaint by the local Chief of Police who suspected that the school was not meeting the reporting requirements of the Clery Act. Letter from John S. Loreng, Team Leader, Phila. Case Mgmt. Team, U.S. Dep't of Educ., to Fred Zook, President, Salem Int'l Univ. 2 (Dec. 17, 2001), available at <http://www.securityoncampus.org/pdf/SIUprdl.pdf>.

However, when it comes to sexual violence, the Clery Act suffers from a more fundamental problem: a definition of campus safety and security that draws from a tort-based concept of landlord liability and territorial control, rather than a definition that is centered on a school's responsibilities to its students. Underlying this definition is a concept of crime that does not fit what we know about campus peer sexual violence and in fact plays into the persistent myth of the stranger rapist. A statute that holds a school responsible for safety and security on the basis of territorial control assumes that a school can protect students from crime through its control of facilities, such as campus lighting (no dark alleys for those stranger rapists to hide) and number of blue light phones (to get police protection when fleeing the stranger rapist). In light of where, how, and at whose hands most campus sexual violence occurs, counting crime based on territorial and facilities control is unlikely to capture the full extent of the crime—at least of the sex crimes—happening among the student body. The territorial approach is also a lot more complicated to understand and allows a lot more room for manipulation through various territorial boundaries and definitions.

In fact, an amendment proposed to the Senate version of the Clery Act would have required universities to report all crimes against students regardless of whether they were committed on college campuses.<sup>180</sup> However, the amendment was dropped when the Senate and House versions were reconciled. The original House sponsor, Rep. Gooding, explained the rejection in a manner demonstrating that his concept of campus security and crime suffered from the stranger rapist myth:

Considering the fact that our goal is to provide students with information on crimes on their campus, the inclusion of all information on crimes against students would have skewed the data reported to students in such a manner that they would never know if their school's security system was effective in protecting students.<sup>181</sup>

He also stated, with regard to another part of the Clery Act that requires schools to send out timely campus warnings about crime, that “[i]t is unconscionable that a woman can be raped on a college campus and steps are not taken to warn female students and faculty members so they can take steps to assure they do not become the next victim.”<sup>182</sup> Obviously, these comments contemplate mainly warnings about stranger rapists (e.g., “a rape occurred in the northwestern corner of the

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180. 136 CONG. REC. S13131 (daily ed. Sept. 13, 1990) (statement of Sen. Specter) (commenting on S. 580).

181. 136 CONG. REC. H11499–500 (daily ed. Oct. 22, 1990) (statement of Rep. Goodling).

182. *Id.*

Quad at 2 a.m. this morning; the suspect was described as such and such and is still at large”), since warning about acquaintance rapists would require including the kind of information that would identify the survivor and/or suspect both exactly and unnecessarily for purposes of capture (e.g., “a rape occurred in Old North dormitory, room X, at 2 a.m. this morning”).

Other aspects of the Clery Act also show its deficiencies in capturing campus peer sexual violence in campus crime statistics. The exception of all faculty and counselors from the definition of “campus security authority” demonstrates a lack of understanding of the people to whom sexual violence survivors tend to talk to first and most often.<sup>183</sup> While it is possible to defend this exception on the basis that survivors might be dissuaded from talking to these people if they had to pass along the report, it should be noted that the Clery Act requires schools to collect numbers only, in very general categories, and prohibits schools from including in their reports any personal identifying information about the victim or perpetrator of any reported crimes.<sup>184</sup> Many counselors report such numbers for various purposes, without running afoul of the confidentiality requirements of their professions.<sup>185</sup>

In another somewhat baffling and disturbing counting rule under the Clery Act, homicide, sex offenses, and assault are counted as one offense per victim,<sup>186</sup> meaning if there are multiple perpetrators and/or multiple violations involved, such as in a gang rape, the incident is still only counted once. In contrast, robbery, burglary, and arson are counted as one offense per distinct incident,<sup>187</sup> motor vehicle theft is counted as one offense per stolen vehicle,<sup>188</sup> and arson and hate crimes

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183. See KREBS ET AL., *supra* note 7, at 5–22 (finding that among undergraduate women who were victims of sexual assault and who contacted a victims’ crisis or health care center, 35.4% of physically-forced sexual assault victims and 33.3% of incapacitated sexual assault victims contacted a counselor or therapist affiliated with the university).

184. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 157, at 79.

185. See, e.g., AM. COUNSELING ASS’N, ACA CODE OF ETHICS § B.7.d. (2005), available at <http://www.counseling.org/Resources/CodeOfEthics/TP/Home/CT2.aspx> (“Use of data derived from counseling relationships for purposes of training, research, or publication is confined to content that is disguised to ensure the anonymity of the individuals involved.”).

186. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 157, at 75.

187. *Id.* at 31, 34, 38. One could view this counting rule as consistent, in that a robbery perpetrated by three robbers is counted the same as a rape perpetrated by three rapists. Email from S. Daniel Carter, Dir. of Pub. Policy, Sec. on Campus, Inc., to author (June 18, 2011) (on file with author). Whereas three people can arguably collaborate to rob one house (i.e., commit one violation of the victim’s property), three people cannot collaborate to commit one violation of a victim’s body. Multiple rape perpetrators must involve multiple violations of the victim’s bodily integrity.

188. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 157, at 76.

are reported alongside the other most serious offense in the incident<sup>189</sup> (e.g., an assault that qualified as a hate crime would be counted as one assault and one hate crime). That the rules for counting crime would not require a gang rape to be counted for every separate violation, especially in a context that is distressingly well-known for the gang-rape phenomenon,<sup>190</sup> is bizarre at best and appalling at worst. It is not only a symbolic insult to the survivor of gang rape, but also provides less incentive for schools to address the gang-rape phenomenon. After all, if a school must only report one sex offense as opposed to ten or even five, what additional incentive does the crime-reporting structure really give to schools to take gang rape seriously?

It appears that this counting rule has its origin in the FBI's *UCR Handbook*.<sup>191</sup> The *UCR Handbook* also defines forcible sex offenses as "carnal knowledge of a female forcibly and against her will,"<sup>192</sup> with the further definition of carnal knowledge as "the act of a man having sexual bodily connections with a woman; sexual intercourse" and the specification that there is carnal knowledge if there is the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis).<sup>193</sup> Although the Clery Act regulations allow schools to use either the *UCR Handbook* or the National Incident-Based Reporting System ("NIBRS") version of the *UCR Handbook*,<sup>194</sup> which uses "person" instead of "woman,"<sup>195</sup> depending on which version a school uses, this definition could mean that all male victims of sexual violence are made completely invisible and that sexual violence that does not involve acts that can be characterized as "sexual bodily connections" or attempted "sexual bodily connections" need not be reported, despite how equally violating they might be. Although the Clery Act presumably stays away from state law sex offense definitions for consistency purposes, considering the amount of reform that has

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189. *Id.*

190. In fact, the term "gang rape" was first coined by Dr. Bernice Sandler in an article written about gang rape on college campuses. E-mail from Bernice Sandler, Senior Scholar, Women's Research & Educ. Inst., to author (May 11, 2011) (on file with author).

191. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTING HANDBOOK 47 (rev. 2004), available at [http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/ucr\\_handbook.pdf](http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/ucr_handbook.pdf).

192. *Id.* at 19.

193. *Id.* at 20.

194. 34 CFR § 668.46(c)(7) (2010).

195. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTING NATIONAL INCIDENT-BASED REPORTING SYSTEM, VOLUME I: DATA COLLECTION GUIDELINES 33 (2000), available at [http://www.fbi.gov/about-us/cjis/ucr/nibrs/nibrs\\_dcguide.pdf/](http://www.fbi.gov/about-us/cjis/ucr/nibrs/nibrs_dcguide.pdf/). Note that although the NIBRS edition also makes changes to the reporting of multiple offenses, the Clery regulations specify that "in determining how to report crimes committed in a multiple-offense situation an institution must use the UCR Reporting Handbook." 34 C.F.R. § 668.46(c)(7).

gone into defining sex offenses under state laws,<sup>196</sup> nearly any one of

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196. The UCR definition is based on the common law definition of rape. Beginning in the 1970s, however, states began massive reforms of rape laws, making laws gender neutral, eliminating the element of consent, and introducing additional forms of sexual assault that do not include force or threat of force, such as when the victim is incapacitated. See JOEL EPSTEIN & STACIA LANGENBAHN, *THE CRIMINAL JUSTICE AND COMMUNITY RESPONSE TO RAPE* 8 (1994) (explaining that during the past twenty years, modern statutes have broadened and redefined rape); see also *Sexual Assault in the United States*, THE ADVOCATES FOR HUMAN RIGHTS, <http://stopvaw.org/a6200a22-49cf-4680-a01b-e862d23ccfb6.html> (last visited Feb. 24, 2011) (explaining that in the 1970s, states began passing laws aimed at improving conviction rates and encouraging victims to report by redefining sexual assault, criminalizing marital rape, preventing the defense from investigating the victim's history, and more). The laws in Michigan and Illinois are considered models of rape law reform. *Id.* The Michigan statute holds in part:

(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(c) Sexual penetration occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes, but is not limited to, any of the circumstances listed in subdivision (f).

(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.

(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim . . . .

MICH. COMP. LAWS § 750.520b (2011). It should be noted that other provisions of Michigan's penal code hold that the victim need not resist. *Id.* § 750.520i. The Illinois statute holds:

(a) A person commits criminal sexual assault if that person commits an act of sexual penetration and:

(1) uses force or threat of force; or

(2) knows that the victim is unable to understand the nature of the act or is unable to give knowing consent . . . .



those definitions seems like it would be preferable to these disturbingly antiquated ones.

In light of all of these problems, it is no wonder that the Clery Act has not fulfilled its promise for improving public knowledge of what is happening at most schools, never mind solving the dilemma of whether to risk looking like a dangerous campus by encouraging victim reporting. Even if it had avoided allowing schools too much discretion to minimize reporting if they wish to do so (and it should be noted that some schools do not in fact appear to be minimizing reporting—some might even be characterized as maximizing reporting), the ways that it counts crime demonstrate fundamental misunderstandings about how campus peer sexual violence operates. Additionally, because campus peer sexual violence “is the most common violent crime on American college campuses today,”<sup>197</sup> to be at all accurate, the Clery Act must structure its rules to represent campus peer sexual violence correctly.

#### IV. RECOMMENDATIONS

In light of the series of information problems discussed in Part III, a whole list of changes is needed if the laws dealing with campus peer sexual violence are going to eliminate the counterincentives to the overall liability scheme’s support of institutional responses that encourage victim reporting. Accordingly, this Part proposes the adoption of a constructive knowledge approach in Title IX private lawsuits. Next, this Part suggests several improvements to OCR’s enforcement of Title IX. Part IV concludes with suggestions for possible amendments to the Clery Act. The adoption of these changes could go a long way in eliminating incentives for schools to remain passively unaware and actively avoid knowledge of campus peer sexual violence. It could likewise discourage schools from doing anything that might keep potential students and parents uninformed.

##### *A. Adopt a Constructive Knowledge Approach in Title IX Private Law Suits*

A dozen years of Title IX litigation under *Gebser* and *Davis* have shown that the actual knowledge standard simply does not create incentives for schools to respond adequately to peer sexual violence. *Gebser* and *Davis* have not even encouraged schools to pass policies or to establish effective procedures for addressing campus peer sexual

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720 ILL. COMP. STAT. 5/11-1.20 (2011) (amending and renumbering 720 ILL. COMP. STAT. 5/12-13).

197. SAMPSON, *supra* note 8, at 1.

violence and harassment or to encourage victim reporting—changes that the *Faragher/Ellerth* decisions have at least arguably achieved in terms of employer behavior.<sup>198</sup> The *Faragher/Ellerth* approach has not been without controversy,<sup>199</sup> and a full discussion of its merits and demerits is outside the scope of this Article. It is clear, however, that schools have not been encouraged to take even the minimal steps that *Faragher/Ellerth* have encouraged in the employment context, and unsurprisingly, very little progress has been made in preventing and ending campus peer sexual violence. As a result, we are now left with the unjust result that *children* and young people with fewer resources to deal with sexual harassment and violence are less protected at their schools—where their attendance for at least the early years is *compulsory*—than their *adult* parents are at their *non-compulsory* workplaces. In addition, little progress has been made in establishing a legislative fix, as invited by the Court in *Gebser*.<sup>200</sup> The proposed 2008 Civil Rights Act sadly died in committee and likely would have had to overcome a presidential veto even if it had made it to a floor vote.<sup>201</sup>

In light of the litigation experience over the last decade and the failure of Congress to change these unjust results, it is time for the Supreme Court to revisit its decisions in *Gebser* and *Davis* or for Congress to re-introduce and pass legislation similar to the 2008 Civil Rights Act. Either way, the standard that should be adopted is a constructive knowledge standard, which is consistent with the administrative standard used by OCR and avoids the criticism that has been leveled at *Faragher/Ellerth*. With genuine incentives based on such potentially expensive liability, schools might actually act in the responsible and concerned manner the Court attributed to schools in *Gebser*.<sup>202</sup>

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198. Grossman, *supra* note 107, at 4.

199. *Id.*

200. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 293–93 (1998) (“Until Congress speaks directly on the subject, however, we will not hold a school district liable in damages under Title IX for a teacher’s sexual harassment of a student absent actual notice and deliberate indifference.”).

201. Civil Rights Act of 2008, S.2554, 110th Cong. (2008). The 110th Congress ran until January 5, 2009, when President George W. Bush was still in the White House. *Years and Session Dates of the U.S. Congress*, GPO ACCESS, [http://www.gpoaccess.gov/help/congress\\_table.html](http://www.gpoaccess.gov/help/congress_table.html) (last visited Aug. 16, 2011). For this reason, at least one commentator did not anticipate that the bill would “go anywhere.” Jeffrey M. Hirsch, *Civil Rights Act of 2008*, WORKPLACE PROF BLOG (Jan. 28, 2008), [http://lawprofessors.typepad.com/laborprof\\_blog/2008/01/civil-rights-ac.html](http://lawprofessors.typepad.com/laborprof_blog/2008/01/civil-rights-ac.html).

202. *Gebser*, 524 U.S. at 289.

### *B. Improve Office for Civil Rights Enforcement*

Both Congress and the DOE should take steps to improve OCR's enforcement of Title IX in peer sexual harassment cases, including the appropriation of funds to increase staff and programs. The Obama administration is already making improvements to the proactive guidance and the availability of its enforcement actions to the public. These steps are only the beginning, however, and more must be done.

Specifically, OCR must continue to create proactive guidance giving more specific instructions to schools about how to handle sexual harassment and violence directed at students. The recent DCL, in particular its confirmation that the appropriate standard of proof for disciplinary hearings on sexual harassment and violence is a preponderance of the evidence,<sup>203</sup> is already having an effect on schools: nearly a dozen have announced that they have changed or are reviewing their standards in light of the guidance.<sup>204</sup> The DCL also clarifies such issues as the complaining and accused students' equal rights to counsel,<sup>205</sup> access to and advance notice of witnesses and other evidence,<sup>206</sup> and rights to appeal.<sup>207</sup> Nevertheless, certain questions

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203. The DCL itself establishes the ample legal support that it has for this rule. *Dear Colleague Letter*, *supra* note 67, at 10–11. For the myriad additional justice and policy-related reasons why this standard of proof is appropriate, see Cantalupo, *supra* note 2.

204. See, e.g., Daniel de Vise, *University of Virginia's Proposed Rules Aimed at Empowering Victims of Sexual Misconduct*, WASH. POST, May 7, 2011, at B1, available at [http://www.washingtonpost.com/local/education/univ-of-virginias-proposed-rules-would-lower-standard-for-sexual-misconduct/2011/05/05/AFwQVt1F\\_story.html](http://www.washingtonpost.com/local/education/univ-of-virginias-proposed-rules-would-lower-standard-for-sexual-misconduct/2011/05/05/AFwQVt1F_story.html) (showing how the University of Virginia is implementing new policies to conform to the new national guidelines, including a new standard of review for sexual assault cases); Editorial, *New Standard of Proof Better, But Still Needs Work*, STAN. REV. (Apr. 18, 2011), <http://stanfordreview.org/article/editorial-new-standard-of-proof-better-but-still-needs-work> (discussing Stanford University's decision to lower the standard of proof in cases involving sexual misconduct); Jordi Gassó, *New Committee Advises on "Campus Climate,"* YALE DAILY NEWS, Apr. 18, 2011, available at <http://www.yaledailynews.com/news/2011/apr/18/new-committee-advises-on-campus-climate/> (discussing the Yale University president's creation of an external advisory committee to advise him on how to handle sexual misconduct more efficiently); Karin Kapsidelis, *UVA Plans to Raise Sexual Misconduct Policy*, DAILY PROGRESS (May 5, 2011), <http://www.2.dailyprogress.com/news/2011/may/05/uva-plans-revise-sexual-misconduct-policy-ar-1020158/> (reviewing UVA's decision to lower the standard of proof necessary and to broaden the scope of offenses in sexual misconduct cases); Jon Ostrowsky, *New Federal Guidance on Univ Sexual Assault: Brandeis Follows Biden Lead on Title XI*, BRANDEIS HOOT, Apr. 8, 2011, at 1, available at <http://thebrandeishoot.com/articles/10159> (highlighting Brandeis University's decision to lower the standard of proof for internal hearings on sexual assault); Michael Tabb, *SU Senate Approves Changes to Student Judicial Code*, STUDENT LIFE, Apr. 15, 2011, at 1, 3, available at <http://www.studlife.com/news/student-union/2011/04/15/su-senate-approves-changes-to-student-judicial-code/> (discussing Washington University in St. Louis' new policies in response to the new Title IX changes).

205. *Dear Colleague Letter*, *supra* note 67, at 12.

206. *Id.* at 11.

207. *Id.* at 12.

remain unanswered. There is particularly a need to define a default “equitable” rule by clarifying that, absent an OCR statement to the contrary, when a school gives a right of any kind to the accused student, it must also give the same right, of the same scope, to the complaining student. This rule would apply regardless of whether it was in a campus disciplinary proceeding or other procedure for investigating complaints and determining responsibility and sanction in peer sexual violence cases.

In addition, better guidance is needed on what constitutes *institutional* retaliation against survivors who report. The 2001 *Revised Guidance* and DCL both discuss the school’s obligation to protect victims from retaliatory harassment from the harasser or the harasser’s friends,<sup>208</sup> but there is no discussion of what constitutes retaliation by the institution itself. Yet there is evidence that some school behavior does itself seem retaliatory. Examples include, as described above, distributing a press packet to local media about a survivor after she reports an assault, stating that she was charged by the school with alcohol consumption and “disorderly conduct” in connection with the events at issue in her report,<sup>209</sup> publicly stating that the victim’s report did not constitute a “real rape,”<sup>210</sup> or refusing to enforce a court-issued stay-away order after telling the survivor that her assailant was “very bright, very intelligent, and ‘going places.’”<sup>211</sup> Improved guidance can and should make clear that such school behavior will be considered a very serious violation of Title IX.

Finally, the guidance should include the creation and publication of a model sexual violence and harassment policy and process for handling complaints under the policy. There are certainly sources of “best practices” regarding such policies and procedures available,<sup>212</sup> and Students Active For Ending Rape (“SAFER”) provides an innovative project whereby students and others can assess their schools’ policies and by doing so, add to a national database of such policies.<sup>213</sup> Nevertheless, all of these efforts are voluntary and require schools to take the initiative and commit the necessary resources to adopt them. The SAFER project in particular is also more focused on policies, which is absolutely a necessary first step, but does not address many

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208. *Id.* at 4–5, 16.

209. *Lax Enforcement of Title IX*, *supra* note 50.

210. *Kelly v. Yale Univ.*, 2003 U.S. Dist. LEXIS 4543, at \*3 (D. Conn. Mar. 26, 2003).

211. *Doe v. Erskine Coll.*, 2006 U.S. Dist. LEXIS 35780, at \*33–34 (D.S.C. May 25, 2006).

212. For a more extensive discussion of various best practices related to student disciplinary policies and procedures related to sexual violence, see Cantalupo, *supra* note 2, at 665–80.

213. Campus Accountability Project, SAFER, <http://safercampus.org/campus-accountability-project> (last visited Aug. 15, 2011).

problems of implementation and procedure, which can make an otherwise good policy virtually worthless. The discretionary nature of choosing to follow best practices also is more likely to result in a policy that does not in fact comport with best practices. In contrast, if OCR were to issue model policies and procedures, schools would have serious incentives to adopt them. Schools' behavior in response to the DCL demonstrates that many schools will take such incentives seriously.<sup>214</sup>

To the extent that proactive guidance will never be able to address every question or circumstance that arises under the law, OCR must increase the visibility of its complaint process and the results of its investigations. LOFs that conclude OCR investigations, and any "Commitments to Resolve" or settlements reached in such cases dating back to at least the early 1990s, should be made accessible to the public through a FOIA electronic reading room. More importantly, accessibility to LOFs could keep schools from being sued and could prevent both schools and OCR from having to go through expensive investigations by allowing schools to resolve their questions up front and proactively comply. Having access to the LOFs could also enhance the abilities of survivors and their advocates to advocate for beneficial policy approaches, since the law supports greater rights for victims.

The DOE could publicize both the availability of the complaint process and the LOFs by sending information directly to the student government or student media on a campus. Congress or the DOE could also mandate that information about how to file complaints with the DOE under both the Clery Act and Title IX be published in each school's Clery Act report. Schools could also be required to give this information to students as a part of the written notification that would be required by the proposed Campus Sexual Violence Elimination Act ("SaVE Act") discussed below.<sup>215</sup> The DCL's emphasis on the role of Title IX Coordinators and its training requirements for all personnel involved in responding to sexual violence cases should also be used to disseminate information about the complaint process and complaint resolutions by requiring that Title IX Coordinators provide information about OCR's process to students (like OCR does on its "Know Your Rights" flyer<sup>216</sup>) and including OCR's guidance and complaint process in personnel trainings. All of these steps would make the complaint

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214. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 289 (1998).

215. For more details on the Campus SaVE Act, see *infra* notes 219–20.

216. *Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School*, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, <http://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.html> (last visited Sept. 18, 2011).

process more accessible to students, aid OCR's Title IX enforcement efforts (especially as they stand now, where they depend strictly on complaints), and increase school accountability and compliance with Title IX. At the very least, school officials will be reminded of their legal obligations every time this notice is published in the crime report or given to a victim, and such a reminder could prompt schools to make sure their response processes comply with the law.

As helpful as making the complaint process and the result of complaints more accessible would be, OCR should also initiate more investigations or compliance reviews of schools. A certain number of schools could be selected at random every year for a compliance review/investigation. This would not only create incentives for schools to come into compliance on their own, in anticipation of a review, but would also provide an avenue for OCR's technical assistance services to be spread more evenly throughout institutions. Moreover, this would alleviate the ineffective and unjust consequences in the current system of placing such a burden on survivors. The entire burden of tracking schools' compliance and ensuring schools' accountability would no longer be exclusively borne by victims, who have already been through a tremendous amount of trauma by the point that they file an OCR complaint.

Although the ongoing failure to make OCR's LOFs easily accessible to the public hinders true assessments of the quality of OCR's resolutions, with regard to both proactive and reactive investigations, OCR likely needs to develop methods of achieving more consistency and accountability among its enforcement office investigators. Therefore, it should make efforts to improve its guidelines and training for all investigators on the most effective investigatory techniques. In doing so, OCR's enforcement would apply more fairly by holding schools accountable to similar standards and applying Title IX's obligations more consistently. Unless requested not to do so by the complainant, investigations should, at a minimum, include talking to people suggested by the complainant and, if policies and processes are at issue, to people in the campus community through open forums or other gatherings of interested parties. Such investigative methods would not allow the defending school to control the information that OCR receives regarding the complained-of behavior and would give OCR third-party perspectives that could help OCR come to more accurate conclusions.

All of these improvements will of course require significantly more resources. Therefore, Congress should appropriate more money for

OCR to increase staffing and enforcement efforts.<sup>217</sup> While the current political climate might not be entirely conducive to immediate appropriation of funds, better funding should remain on the list of priorities. In addition, if OCR were given the power to fine schools, such an approach would help fix two enforcement problems at once: first, by providing OCR with an enforcement mechanism short of the “nuclear option” of withholding all federal funds and, second, by potentially adding a funding source for OCR’s work.<sup>218</sup>

### C. Amend the Clery Act

The Clery Act has been amended quite a bit since it was first passed, and a new set of amendments has been proposed in this (the 112th) Congress via the SaVE Act.<sup>219</sup> In its current form, the SaVE Act would add the following measures: (1) require schools to include domestic violence, dating violence, and stalking in the statistics schools must collect; (2) require schools to include in their annual security report a statement of policy and procedures related to such offenses; (3) mandate that schools provide educational programming promoting awareness about the violence; and (4) encourage cooperation between the Departments of Education and Justice in providing assistance to schools on best practices for responding to and preventing such offenses.<sup>220</sup> The SaVE Act would further require schools to notify student victims of their rights, disciplinary processes, victim services, and safety planning, including how the school will enforce any protective order and protect victim confidentiality.<sup>221</sup> Finally, the SaVE Act would require the school’s policy to include the educational programming previously mentioned, possible sanctions or protective measures imposed following disciplinary action, and procedures available to victims post-violence, including to whom the victim can report, disciplinary

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217. In fact, the Center for Public Integrity indicates that OCR’s funding has shrunk over the last decade, whereas complaints have gone up. See *Lax Enforcement of Title IX*, *supra* note 50 (“In fiscal year 2009, OCR had 582 full-time staffers—fewer than at any time since its creation. And it received 6,364 complaints, an increase of 27% since 2002.”).

218. Developing “proposals for remedial powers other than complete de-funding of recipients” has been a goal of OCR’s since its most recent strategic plan. *OCR Strategic Plan FY 2000*, U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, <http://www2.ed.gov/about/offices/list/ocr/strategic2000.html> (last modified Mar. 9, 2005). However, it is unclear what progress, if any, has been made on that goal.

219. S. 834, 112th Cong. (1st Sess. 2011); H.R. 2016, 112th Cong. (1st Sess. 2011); Lauren Siebin, *Education Dept. Issues New Guidance for Colleges’ Sexual-Assault Investigations*, CHRON., Apr. 15, 2011, at A20–21.

220. S. 834; H.R. 2016.

221. S. 834; H.R. 2016.

procedures, as well as the option and assistance available to change academic, living, transportation, and working situations.<sup>222</sup>

While all of these proposed amendments would be distinct improvements on the state of the law, they do not primarily address the information problems and the way the Clery Act exacerbates those problems. Therefore, several amendments should be added to the SaVE Act.

If the Clery Act is ever going to attain its original goal of providing prospective and current students and their parents with accurate information about the incidence of sexual violence on a particular campus, it needs to fundamentally change its approach to collecting that information. Specifically, it needs to stop depending on victim reporting. The Clery Act should therefore be amended to collect information about campus peer sexual violence (and any other violent criminal behavior with similar non-reporting problems) in a manner more likely to produce useful information that will both make it impossible for a campus to hide behind non-reporting and provide the school with the information it needs to address the problem properly.

More specifically, schools should be required to administer a standard survey developed by the DOE or a contractor every four years or a similarly appropriate interval via a method that would guarantee a high response rate (e.g., requiring a response to the survey in order to graduate or to register for classes) and would ask students questions designed to determine the incidence of sexual violence without depending on individual survivors to come forward to report. The results of the survey should be submitted to the DOE and be published in the campus crime report. The DOE could also do statistical comparisons of survey results from schools and ideally make those available to the public. As already noted, many schools already participate voluntarily in similar surveys,<sup>223</sup> which often include such compilations, and are given to schools confidentially for their own use.<sup>224</sup> Schools generally use information from these surveys to inform themselves of what students are experiencing and to develop policies and programs for responding to those experiences.<sup>225</sup> As helpful as

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222. S. 834; H.R. 2016.

223. *Cf.* SAMPSON, *supra* note 8, at 9 (noting that college studies still find that many men and women on campus have little understanding of acquaintance rape).

224. *See, e.g., National College Health Assessment II*, AM. COLL. HEALTH ASS'N—NAT'L COLL. HEALTH ASSESSMENT II, <http://www.acha-ncha.org/docs/ACHA-NCHAI sample.pdf> (last visited Sept. 19, 2011) (questioning college students about their health and safety in a confidential and voluntary survey).

225. For instance, the American College Health Association's National College Health Assessment states the survey's purpose as: "[E]nabling both ACHA and institutions of higher



such surveys can be, even with a comparatively small group of schools participating,<sup>226</sup> imagine the wealth of information about students that schools and the public could obtain from a survey in which all schools must participate.

Such a survey would essentially remove the school from its current “middle-man” position, where students report to the school and then the school reports to the public. The survey would enable students to report directly to the public what is happening among students on every campus across the country. School officials would receive campus-specific information that is easily comparable to national incidence rates. If the trend demonstrated by studies done thus far is any judge, schools would get hard data indicating that their campuses have just as much sexual violence as any other. Such data would thus make it nearly impossible for a school to claim that, despite national statistics, it is different from the national norm, unless the school actually is different. Schools would no longer be able to bury their heads in the sand about this problem and pretend like the lack of student reports indicates the lack of a problem. With such a survey in place, schools would simply have no incentives to minimize reporting either passively or actively.

This survey does not necessarily need to replace the Clery Act’s current reporting structure, although it is worth considering whether the resources that schools and other entities put toward meeting the Clery Act’s current requirements would be more efficiently and effectively utilized with either such a survey and/or the victim services office discussed below.<sup>227</sup> If the reporting system remains in place, however, the Clery Act must be amended to change its definitions and methods of “counting” reports. Crimes should be counted in a manner that accounts for crimes where both the survivor and alleged perpetrator are members of the campus community (students, faculty, and staff), regardless of where the crime occurred. Especially if combined with a territorial approach, such a method would capture almost all crimes

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education to adequately identify factors affecting academic performance, respond to questions and concerns about the health of the nation’s students, develop a means to address these concerns, and ultimately improve the health and welfare of those students.” *National College Health Assessment*, AM. COLL. HEALTH ASS’N—NAT’L COLL. HEALTH ASSESSMENT, <http://www.acha-ncha.org/> (last visited Sept. 19, 2011).

226. About 40–140 schools per semester participated in the National College Health Assessment in the two most recently surveyed full academic years (2008–2009 and 2009–2010), with a total of about 180–200 schools participating per academic year. Like proposed here, the National College Health Assessment does not appear to be administered every year by all participating schools. *Participation History*, AM. COLL. HEALTH ASS’N—NAT’L COLL. HEALTH ASSESSMENT, [http://www.acha-ncha.org/partic\\_history.html](http://www.acha-ncha.org/partic_history.html) (last visited Sept. 19, 2011).

227. See *infra* notes 229–30 and accompanying text.

where the school has both a responsibility to protect a student, faculty, or staff member and/or some control over the alleged perpetrator, the facilities where the crime took place, or both. Counting based on people involved would capture many crime reports involving student perpetrators that do not take place on campus (e.g., in houses owned by fraternities or hotel rooms rented for parties), which is where most campus peer sexual violence occurs.<sup>228</sup> At the same time, the territorial approach would capture crimes on campus committed against students or other members of the campus community by outsiders. Together, these approaches would decrease schools' discretion under the Clery Act and would make the reporting system more accurate.

Other methods can also help minimize schools' discretion in reporting and decrease schools' incentives to curtail reporting. All campus crime reports should be required to include mandatory standard language explaining how to interpret the data, including some acknowledgement of the significance of the non-reporting problem and the counterintuitive meaning of greater sexual violence reports. Like with Title IX, the complaint process should be mandated to appear on every campus report, and the DOE should engage in more proactive enforcement, such as reviewing a random selection of campus crime reports for full compliance with the Clery Act, in addition to investigating complaints. Although not as good as the nationwide survey option, such steps would create incentives for schools to provide more consistent information to prospective and current students, their parents, and the general public so that schools' safety records can be compared more meaningfully.

Any amendments should also get rid of the FBI's *UCR Handbook*, either by finding a more modern model, such as the FBI's own NIBRS edition of the UCR Handbook, or by creating new definitions just for the Clery Act. In particular, multiple perpetrators committing multiple sexually-violent acts against a single victim should be counted by violent act, not by victim or by perpetrator (to account for those sexual assault scenarios where one perpetrator commits multiple violent acts) and the definitions should allow male victims to be counted. Such counting rules would give a more accurate picture of the campus peer sexual violence problem and would acknowledge the different understanding of sexual violence that exists in modern society, including that men can be victims and that sexual violence should not

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228. See KREBS ET AL., *supra* note 7, at 5–19 (noting that among the respondents, a significantly large amount of sexual assault victims were at a party when the incident took place and that the most commonly-reported locations were the victim's or some other person's living quarters).

be treated like a property crime (which is implied by using the same counting rules for gang rapes and robberies with multiple robbers).

A final method, which ideally would be combined with the survey discussed above, would be to require schools, either under Title IX or the Clery Act, to create certain programs related to peer sexual violence and then to funnel reporting through those programs. For instance, one of the most effective ways of addressing the myriad challenges related to addressing peer sexual violence on campus is to create a visible (yet confidential) and centralized victims' services office.<sup>229</sup>

This method has received increasing recognition as a best practice for responding to campus peer sexual violence.<sup>230</sup> A victims' services office could help with reporting by acting as a central location for both services and reports. One can picture a campus student services system for sexual violence victims as a metaphorical wheel, with a victims' services office at the hub of the wheel and the various places where a student might initially report at the ends of the wheel spokes. These places could include the medical center, campus police, counseling services, residence life, individual faculty, the student conduct office, etc. This wheel-like structure allows the offices where a student initially reports to immediately refer the student to the victims' services office. That office could likewise refer students out to the different offices from which they can receive needed services, thus alleviating a victim's need to go from office to office trying to figure out the system on her own.

The victims' services office could also provide a critical role for the institution by being a source of expertise in an area where schools need a lot more information and training, especially in light of the training requirements and education recommendation contained in the DCL, which will be strengthened further by the Campus SaVE Act, should it be enacted into law.<sup>231</sup> Office staff would have the background and knowledge to implement such training and education programs and could provide deeper expertise in active cases. Faculty and staff could

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229. In my 2009 article, I focused on how such offices could play the role of confidential advocate for survivors in a variety of campus settings and procedures. Cantalupo, *supra* note 2, at 681. However, such offices can also play critical roles for the institution, especially when it comes to reporting and responding properly to such reports.

230. See, e.g., KARJANE ET AL., *supra* note 67, at 132 (noting a dedicated, on-campus victim services office as an "encouraging practice"); OVW FISCAL YEAR 2011 GRANTS, *supra* note 67 (mandating that no less than 20% of the funds granted to a school to combat sexual assault, stalking and domestic and dating violence go towards a victim services program where no on-campus or off-campus program currently exists).

231. *Dear Colleague Letter*, *supra* note 67, at 4, 7, 12, 14–15. In addition, for information regarding the SaVE Act, see *supra* notes 219–20.

be minimally trained in how to handle reports, mainly by referring them to the victims' services office as the campus expert, which usually is a relief to the majority of faculty and staff members who do not feel prepared to deal with such reports. Survivors would also be more likely to report to a confidential advocate and all-around resource, and such an office could provide raw numbers without breaching confidentiality. Centralizing reports with a victims' services office is one of the most effective ways of both getting survivors to report and making sure an institution's response is effective once a report occurs.

In light of the benefits of such offices, the most effective way for the Clery Act to both capture reports and ensure that sexual violence survivors' rights are protected (as required by a different portion of the Clery Act, commonly referred to as the Sexual Assault Victim's Bill of Rights) may very well be to mandate that every school create and professionally staff such an office. Such an approach would not only increase reporting, but would also provide an on-campus expert who would facilitate creation of the right policies and procedures, as well as preventive educational programming. A legal regime that truly wants to end the campus peer sexual violence problem could not do better than mandating such an office at every school.

## V. CONCLUSION

At nearly every one of the half dozen or so presentations that I have given on my 2009 article on this subject, a college administrator—usually from the judicial affairs or student conduct office—has challenged my characterization of one piece of law related to campus peer sexual violence as a myth. The particular legal controversy involved a supposed conflict between a provision of the Clery Act and the Family Educational Rights and Privacy Act ("FERPA"). FERPA generally does not allow educational institutions to disclose information from a student's educational record, which could include the results of student disciplinary proceedings, to anyone besides the student unless the student gives written consent.<sup>232</sup> However, as early as 2001, OCR's Revised Guidance made it clear that FERPA did not override the rights given by Title IX.<sup>233</sup> In addition, the implementing regulations for the

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232. See Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to S. Daniel Carter, Dir. of Pub. Policy, Sec. on Campus, Inc. (Mar. 10, 2003), *available at* <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/carter.html> (last visited Aug. 15, 2010) (explaining that under FERPA, a crime victim that receives the final results of an institution's disciplinary proceeding may not re-disclose that information without appropriate written consent from the student).

233. See REVISED GUIDANCE, *supra* note 72, at 22 (noting that FERPA does not override federally-protected due process rights of those accused and the Title IX rights of the

Clery Act state that “[c]ompliance with this paragraph does not constitute a violation of the Family Educational Rights and Privacy Act.”<sup>234</sup> Despite this relatively clear statement, schools were concerned about whether the accuser, once informed of a disciplinary procedure’s outcome, could then re-disclose that information. Many schools therefore required survivors to sign nondisclosure agreements before they were informed of the outcome of disciplinary proceedings.<sup>235</sup>

Understandably, victims and victims’ advocates objected to such measures because they compelled victims’ silence.<sup>236</sup> In light of how difficult many survivors find it to come forward at all, and the reasons listed above for why they do not report, such a “gag rule” could facilitate victim-blaming responses. Moreover, given the typical dynamics of campus sexual violence cases (where the perpetrator and survivor know each other and have a common group of acquaintances, but where the alleged violence took place without any witnesses), survivors often find their credibility being judged not only in formal disciplinary processes, but also informally by everyone around them.<sup>237</sup> Getting a neutral panel to find that her account of events was credible, never mind that what happened to her was wrong, can therefore be very important to a survivor. An inability to re-disclose the very finding that establishes her credibility and her assailant’s culpability significantly diminishes the value of going through the process at all. Even worse, it can allow the perpetrator to exploit the survivor’s compelled silence by lying about the outcome to others. All in all, it sets a victim up to feel re-victimized by the system.<sup>238</sup>

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complainant).

234. 20 U.S.C. § 1232(g) (2006); 34 C.F.R. § 668.46(b)(11)(vi)(B) (2010).

235. See Letter from Nancy Paula Gifford to S. Daniel Carter, *supra* note 48 (explaining that the University of Virginia contended its confidentiality policies were consistent with FERPA even as it appointed a working group to review and possibly revise those rules); Sec. on Campus, Georgetown Univ. Violation, *supra* note 48 (explaining that Georgetown was making campus rape victims sign documents agreeing not to talk about the results of their own campus court hearings).

236. See S. Daniel Carter, University of Virginia Clery Act Complaint Sent to the U.S. Department of Education, UVA Victims of Rape (Nov. 1, 2004), available at <http://www.uvavictimsofrape.com/Clery%20Act%20Violation.htm> [hereinafter UVA Victims of Rape] (explaining that accusers of sexual assault must be allowed to re-disclose the facts of their case and share their personal experiences, as well as the final outcome); Kate Dieringer, *Campus Injustice: A Story of Predatory Rape at Georgetown University*, SEC. ON CAMPUS, INC., [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=186](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=186) (last visited Aug. 15, 2010) (stating that signing a confidentiality agreement to not discuss the outcome from the adjudication was detrimental to the healing process).

237. See BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 38, at 194–95 (discussing the peer pressure that may make it difficult for the victim to report an assault, especially since the perpetrator’s friends and peers may rally around the perpetrator and attempt to harass the victim).

238. See Dieringer, *supra* note 236 (explaining that silencing a victim after they give their

In 2004, the DOE settled this question in response to a complaint filed by a student survivor and Security on Campus, Inc. In its resolution of the complaint, the DOE made clear that such compelled nondisclosure agreements were illegal under the Clery Act: “Under the University’s policy, a student who refused to execute an agreement would be barred from receiving judicial outcomes and sanctions information. As a result, a key aim of the Clery Act—providing access to key information to be used by affected persons in their recovery process—is defeated.”<sup>239</sup> The DOE confirmed this judgment again in a November 2008 letter to another university in response to a complaint regarding a similar policy. In doing so, it stated that, “by requiring survivors of alleged sexual assaults to abide by a confidentiality policy that is inconsistent with the letter and spirit of the Clery Act,” the school had violated the Clery Act.<sup>240</sup>

Despite all of these different pronouncements, in the fall of 2009 and spring and summer of 2010, I was still being told by people who should know otherwise that FERPA precluded a student survivor from being told about the outcome and sanctions of the disciplinary proceeding regarding her victimization. This might have been a lack of knowledge, as well as the preference of non-lawyer administrators like these for bright-line rules (of which FERPA has plenty). Alternatively, it may have involved active avoidance of this knowledge, either on the part of the attendees of these workshops (who I am not at all convinced left my workshops believing that I was right about this supposed conflict), or on the part of the people who are supposed to train them. Either way, this constant challenge demonstrates how difficult it may be to move school officials in a better direction.

In light of this resistance, the law absolutely must create consistent incentives to encourage schools to adopt institutional responses that will ultimately help end campus peer sexual violence. The primary liability scheme surrounding Title IX and the Clery Act creates such incentives, but information problems exacerbated by these same laws push in the opposite and wrong direction. The Clery Act must be amended, and both Title IX and Clery must be enforced differently and better to change the current incentives toward lack of knowledge and knowledge

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trust is to re-victimize the victim).

239. Letter from M. Geneva Coombs, Dir., Case Mgmt. Teams—Northeast, U.S. Dep’t of Educ., to John J. DeGioia, Ph.D, President, Georgetown Univ. (July 16, 2004), *available at* [http://www.publicintegrity.org/investigations/campus\\_assault/assets/pdf/Clery071604\\_Georgeto wn.pdf](http://www.publicintegrity.org/investigations/campus_assault/assets/pdf/Clery071604_Georgeto wn.pdf).

240. UVA Victims of Rape, *supra* note 236.

avoidance into incentives for ending the persistent problem of campus peer sexual violence.