

“DECRIMINALIZING” CAMPUS INSTITUTIONAL RESPONSES TO PEER SEXUAL VIOLENCE

NANCY CHI CANTALUPO *

INTRODUCTION	481
I. LAWS APPLICABLE TO INSTITUTIONAL RESPONSIBILITIES REGARDING CAMPUS PEER SEXUAL VIOLENCE	490
A. Title IX	490
B. The Clery Act	508
C. Due Process Rights of Accused Students	512
II. RECOMMENDATIONS FOR DECRIMINALIZING REPORTING	517
III. CONCLUSION.....	522

INTRODUCTION

Peer sexual violence¹—when one student sexually harasses another in a

* Abraham L. Freedman Fellow, Temple University Beasley School of Law; B.S.F.S., Georgetown University; J.D., Georgetown University Law Center. My thanks to Drs. Bonnie S. Fisher and John J. Sloan, III, for first prompting me to write the original version of this article as a chapter of the third edition of *Campus Crime: Legal, Social and Policy Perspectives*, forthcoming from Charles C Thomas in 2012. In addition, I thank Professor Robin West for first suggesting “decriminalizing” as a unifying term for my recommendations regarding campus responses to peer sexual violence, as well as for her overall contributions—too numerous to list here—to my work in this and so many other areas. Finally, I send additional thanks to Carolyn Wylie, Professor Laurie Kohn, Professor Steve Goldblatt, and the many colleagues and students from my days directing Georgetown University’s Women’s Center for helping to set me on this research path and contributing so much to my perspectives on the issues.

This book excerpt first appeared in 38 J.C. & U.L. 483 (2012).

1. This Article updates and unifies more extensive discussions regarding specific aspects of how institutions of higher education should respond to campus peer sexual violence as both a legal and policy matter. Those more extensive discussions may be found at 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), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1829425, and 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.

manner that includes physical contact²—is an epidemic on campuses across the nation. Between twenty and twenty-five percent of college and university women are victims of attempted or completed nonconsensual sex during their time at college or university,³ overwhelmingly at the hands of

2. A note about language: 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 which 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 (while I acknowledge that non-physical actions can constitute violence, including those forms of violence is beyond the scope of this article). When I am discussing 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.

Similarly, my definition of “report” and “reporting” is not a technical one. I regard a report as any time a victim discloses the violence to any professional with any role or authority to help victims, 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.

In addition, I use “victim” and “survivor” interchangeably to refer to people who say that they have been victims of sexual violence. Therefore, “victim” is again not a term of art used to indicate a finding of responsibility for sexual violence. 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 indicate when I am referring to those who have been charged but not found responsible for committing sexual violence and “accuser” when discussing the role of the victim/survivor in a disciplinary proceeding. Because studies confirm that the majority of victims are women and the majority of perpetrators and accused students are men, I use female pronouns to refer to victims and male pronouns to refer to perpetrators and accused students.

Finally, I use “school” and “institution” to identify either K–12 schools or higher education institutions, although I also use “college,” “university,” “campus,” or “higher education” to refer to the latter category of schools.

3. Brenda J. Benson et al., *College Women and Sexual Assault: The Role of Sex-related Alcohol Expectancies*, 22 J. FAM. VIOLENCE 341, 348 (2007); CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT, 5-3 (Nat’l Criminal Justice Reference Serv., Oct. 2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (finding that nineteen percent of students in the sample had experienced attempted or completed sexual assault since entering college, but noting that over fifty percent of the sample had completed less than two years of college and therefore discussing the incidence reported by college seniors, where twenty-six percent had experienced attempted or completed sexual assault since entering college, to predict a woman’s risk during her overall college career). See also BONNIE S. FISHER ET AL., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10 (2000), available at

someone they know.⁴ Moreover, college and university women are particularly vulnerable to sexual violence, since “[w]omen ages 16 to 24 experience rape at rates four times higher than the assault rate of all women... [and] [c]ollege women are more at risk for rape and other forms of sexual assault than women the same age but not in college.”⁵ Six to approximately fifteen percent of college and university men “report acts that meet legal definitions for rape or attempted rape,”⁶ and a small number of repeat perpetrators commit most of the sexual violence and likely contribute to other violence problems as well.⁷ College and university men can also be victims of sexual violence, but 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

gov/pdffiles1/nij/182369.pdf; CAROL BOHMER & ANDREA PARROT, *SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION* 6 (Lexington Books 1993). 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.

4. See BOHMER & PARROT, *supra* note 3, at 26. See also KREBS ET AL., *supra* note 3, at 5–18; FISHER ET AL, *supra* note 3, at 17.

5. See RANA SAMPSON, OFFICE OF CMTY. ORIENTED POLICING SERV., U.S. DEP’T OF JUSTICE, *PROBLEM-ORIENTED GUIDES FOR POLICE SERIES NO. 17, ACQUAINTANCE RAPE OF COLLEGE STUDENTS 2* (2003), available at <http://www.cops.usdoj.gov/pdf/e03021472.pdf>. But see KATRINA BAUM & PATSY KLAUS, BUREAU OF JUST. STAT., U.S. DEP’T OF JUSTICE, *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 “[h]as 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 “[h]as 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 3, 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, the basic methodology of the two studies was identical, yet behavior-oriented questions have been found to produce 11 times the number of reported rapes. *Id.* at 11.

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

7. See *id.* at 76.

male victim reporting, statistics do show that when men are raped, it is usually done by other men.⁸

These statistics show not only epidemic rates of violence, but because they are drawn from studies conducted as early the mid-1980s⁹ and as late as 2007,¹⁰ they also show the persistence of this problem. Indeed, a comprehensive journalistic account of campus peer sexual violence published in 2009–10 by Kristen Lombardi of the Center for Public Integrity (CPI)¹¹ shows that we are now moving into our fourth decade of dealing with this problem.

While there are relatively few studies that give some insight into the causes of both the problem and its persistence, a series of studies have used the Routine Activities Theory to posit that sexual violence occurs so much on college and university campuses because there are a surfeit of “motivated offender[s] [and] suitable target[s] and an absence of capable guardians all converg[ing] in one time and space.”¹² One notable study, which the authors describe as using a feminist version of the Routine Activities Theory, suggests that all three of these elements must be present for there to be a significant crime problem and that the failure of schools to act as “capable guardians”¹³ elevates the influence of peer support on

8. See SAMPSON, *supra* note 5, at 3; BOHMER & PARROT, *supra* note 3, at 6.

9. See ROBIN WARSHAW, *I NEVER CALLED IT RAPE* (1988).

10. See KREBS ET AL., *supra* note 3; Benson et al., *supra* note 3.

11. See *Sexual Assault on Campus*, CENTER FOR PUBLIC INTEGRITY, (Feb. 25, 2011), http://www.publicintegrity.org/investigations/campus_assault/.

12. Amy I. Cass, *Routine Activities and Sexual Assault: An Analysis of Individual- and School-Level Factors*, 22 *VIOLENCE AND VICTIMS* 350, 351 (2007). The Routine Activities Theory originated with L. E. Cohen and M. Felson in *Social Changes and Crime Rate Trends: A Routine Activities Approach*, 44 *Am. Soc. Rev.* 588 (1979).

13. See 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, 630 (2001). 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). 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 as “suitable targets” and has been criticized for seeking to “deflect[] attention away from offenders’ motivation.” Schwartz et al., *supra* note TK, at 625. Schwartz and various colleagues have therefore deliberately focused on the “motivated offender” part of the equation, including by proposing a feminist version of 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 culture] can contribute both

“motivated offenders” (i.e. college and university men) to assault “suitable targets” (i.e. college and university women).¹⁴

In light of this theory, other studies can be viewed as elucidating different parts of the “suitable target,” “motivated offender,” and “incapable guardian” triangle. For instance, studies have focused on the “suitable targets” when studying the high rate of victim non-reporting and on “the motivated offenders” when studying the widespread presence of sexual harassment- and rape-supportive attitudes among college and university students as serious contributing factors to the campus peer sexual violence problem. Such studies estimate that ninety percent or more of survivors of sexual assault on college and university campuses do not report the assault,¹⁵ due to fear of hostile treatment or disbelief by legal and medical authorities,¹⁶ not thinking a crime had been committed or that the incidents were serious enough to involve law enforcement,¹⁷ not wanting family or others to know,¹⁸ lack of proof,¹⁹ and the belief that no one will believe them and that nothing will happen to the perpetrator.²⁰ These fears are not surprising when campuses regularly appear in the news for incidents such as the infamous Yale fraternity pledge chant of “No means yes! Yes means anal!”²¹ and sociological studies have confirmed wide subscription to such attitudes among college and university men well beyond those at Yale.²² Many studies regarding the role of alcohol in

to the availability of ‘suitable targets’ and to the lack of deterrence structures to act as effective guardianship.” *Id.* at 630.

14. *Id.* at 646.

15. See FISHER ET AL, *supra* note 3, at 24.

16. See *id.* at 23. See also BOHMER & PARROT, *supra* note 3, at 13, 63; WARSHAW, *supra* note 9, at 50.

17. See FISHER ET AL, *supra* note 3, at 23.

18. See *id.* at 24.

19. See *id.*

20. See FISHER ET AL, *supra* note 3, at 23; BOHMER & PARROT, *supra* note 3, at 13, 63; WARSHAW, *supra* note 3, at 50.

21. See Michael Kimmel, *The Men, And Women, of Yale*, MS. MAGAZINE BLOG, Oct. 17, 2010, <http://msmagazine.com/blog/blog/2010/10/17/the-men-and-women-of-yale/>. Note that 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. *Id.* A student member of the Women’s Center said that such incidents “tend to repeat themselves every year or two” at Yale. 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/>. The October 2010 incident spurred a group of Yale students to file a Title IX complaint against Yale. *Yale is Subject of a Title IX Inquiry*, N.Y. TIMES, Mar. 31, 2011, available at <http://www.nytimes.com/2011/04/01/us/01-yale.html>.

22. For instance, a 2001 study found significant peer support for sexual violence among college men. Schwartz et al., *supra* note 13, at 641. A study in

campus peer sexual violence focus on both the “suitable targets” and “motivated offenders.”²³ Yet relatively few studies have focused on the role of the “(in)capable guardians,” i.e. the colleges and universities, and how their institutional responses factor into the persistent campus peer sexual violence problem.

Despite this lack of attention, however, institutional responses are a key factor in the peer sexual violence epidemic. As the studies on this violence cumulatively show, 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. Then, because survivors do not report the violence, perpetrators are not caught, continue to believe they will not get caught, and continue to perpetrate. Moreover, because victim non-reporting is closely linked to the documented disbelieving and/or hostile reactions of others, particularly those in authority, the choice of institutional response when victims do report has the potential either to break the cycle of violence and non-reporting or to feed that cycle. Therefore, responses likely to break the cycle need to be designed, on the front end, to encourage victim reporting as well as other sources of information about violence occurring at that institution, and, on the back end, to hold perpetrators accountable, including through some kind of effective disciplinary process.

For a variety of complicated reasons, at the current time and at many colleges and universities, neither of these responses is generally occurring. Instead, as the cases, journalistic accounts, and empirical studies reviewed in this article suggest,²⁴ on the front end, many institutions do their best to avoid knowledge of the peer sexual violence, both in general and in specific cases, and on the back end, they adopt disciplinary procedures that make it more difficult to find students accused of sexual violence responsible for that violence. In between these two points exist any number of other, largely unhelpful and often harmful, institutional

1993 found that five to eight percent of college men commit rape knowing it is wrong; ten to fifteen percent of college men commit rape without knowing that it is wrong; and thirty-five percent of college men indicated some likelihood that they would rape if they could be assured of getting away with it. BOHMER & PARROT, *supra* note 3, at 6–8, 21. Finally, a 1987 study indicated that thirty percent of men in general say they would commit rape and fifty percent would “force a woman into having sex” if they would not get caught. WARSHAW, *supra* note 9, at 97.

23. See, e.g., Benson et al., *supra* note 3.

24. These various sources also comport with the knowledge I have gained of institutional responses to campus peer sexual violence in over 16 years of experience working on these issues, first as a university administrator and then as an attorney.

responses.²⁵ As a result, many institutions truly are incapable guardians and provide the critical third leg in the “motivated offender”-“suitable target”-“lack of capable guardian” tripod.

Yet evidence suggests that these unhelpful and harmful institutional responses are motivated or encouraged not so much by direct anti-survivor animus, but by other incentives, including “false” incentives born of various myths about sexual violence. Chief among these myths is that sexual violence is not just a crime, but a particular kind of crime: one committed by strangers on victims who they do not know. In the public imagination, a rapist is still a depraved criminal who jumps a woman in a dark alley, late at night, someone who she has never seen before and may never see again, depending on whether he is caught.²⁶ Yet in reality—a reality that has been confirmed repeatedly in the college and university context—the vast majority of sexual violence perpetrators are those who are known to the victims: acquaintances, dates, friends, husbands, family members, religious advisors, employers, supervisors, and others,²⁷ none of whom need to jump a woman in a dark alley. Instead, they typically have access to her home, her room, 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.

Because of the myth of sexual violence as a stranger crime, the responses adopted by many policymakers at institutions of higher education suggest that these policymakers believe they should respond to such violence in a manner similar to the criminal justice system both on the front end and on the back end. Thus, on the front end, institutions’ reporting mechanisms generally direct students to report sexual violence to campus police,²⁸ who for the most part take a traditional law enforcement approach

25. A summary of such responses may be found in Cantalupo, *Burying*, *supra* note 1, at 214–17.

26. SAMPSON, *supra* note 5, at 9.

27. See *The Offenders*, RAPE, ABUSE & INCEST NAT’L NETWORK, <http://www.rainn.org/get-information/statistics/sexual-assault-offenders>.

28. An informal and non-exhaustive survey of schools whose sexual violence reporting procedures are accessible via the web confirms that campus police and other law enforcement authorities factor prominently in the reporting procedures that most schools have adopted. Although these schools provide varying degrees of detail regarding the procedures for reporting an assault, as well as varying degrees of consistency regarding the process on different websites and publications at the same school, many schools lead their list of reporting options with calling local or campus police and/or strongly encourage students to contact police. See, e.g., <https://students.asu.edu/wellness/SVHelp> (in advising students as to “what to do” if “you’ve experienced sexual violence,” listing contacting 911 first under the first subheading of “find a safe place,” addressing filing a police report under the third subheading of “filing a police report is optional,” and mentioning no other reporting procedures, although the medical, counseling and student affairs

to that report, often with all of the well-documented deficiencies of that traditional approach in the sexual violence context.²⁹ On the back end, institutions create disciplinary procedures that adopt standards of proof, evidentiary, and due process requirements provided to criminal defendants,³⁰ an approach that has been criticized for not keeping up with

resources available are mentioned); <http://handbook.fas.harvard.edu/icb/icb.do?keyword=k79903&pageid=icb.page418723> (stating in the Harvard College Student Handbook that the policy of the Faculty of Arts and Sciences is that “any student who believes that she or he has suffered a rape or indecent assault and battery is strongly encouraged to report the incident to the H[arvard] U[niversity] P[olice] D[eartment] immediately” and listing other offices under “Harvard Resources,” but providing slightly different information in the Harvard University Faculty of Arts and Sciences Handbook, available at http://webdocs.registrar.fas.harvard.edu/ugrad_handbook/2009_2010/chapter6/rape_indecent.html, although still listing the HUPD as the first on a larger list of reporting options); <http://www.temple.edu/studentaffairs/heart/links/sexualassault.html> (specifying that the first thing to do “if you HAVE been sexually assaulted” is to “contact Campus Safety Services [the campus police department]...”); <http://tulane.edu/studentaffairs/violence/sexualassault/sa-reporting-options.cfm> (under “Sexual Assault Reporting Options,” asking “Are you safe?” and advising victims to call the Tulane University Police Department or the New Orleans Police Department at 911, then stating “Consider calling a trusted friend, relative, a counselor, the Office of Violence Prevention & Support Services, or a trained Sexual Aggression Peer Hotline & Education (SAPHE) advocate”); http://www.registrar.ucla.edu/archive/catalog/2011-12/ucla_generalcatalog11-12.pdf, p. 639 (advising that “Those who believe that they are the victims of sexual assault should 1. Immediately call the police department.”) (emphasis in original); <http://wwwold.uchicago.edu/sexualassault/whattodo.html> (urging victims to “Report the Incident. Call the University Police or Chicago Police as soon as possible. If you are a student, contact the Sexual Assault Dean-on-Call.”); <http://www.usm.maine.edu/ocs/policy-sexual-assault> (indicating that “students, employees, or visitors are strongly encouraged to make an official report of any incident of sexual assault to the USM Police and/or Office of Community Standards whether the incident occurred on or off campus”); <http://www.utexas.edu/student/studentaffairs/sexualassault.html> (stating that “Procedures to follow if a sex offense occurs: [are to] 1. Call 911 immediately to report the offense and seek medical attention without delay. 2. Contact the University Police... and/or the Austin Police Department to report the offense”); http://www.virginia.edu/sexualviolence/documents/sexual_misconduct_policy070811.pdf (stating that students who “may be victims of sexual misconduct” are “strongly urged to seek immediate assistance” from a number of resources, “Police” being first on the list).

²⁹ See generally Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 468-69, n. 3-13 (2005).

³⁰ Examples of schools that incorporate criminal justice system requirements into their student discipline systems are most clearly seen in the recent focus on standards of proof raised by the April Dear Colleague Letter’s clarification that the proper standard of proof for sexual violence cases is a preponderance of the

rape law reforms initiated and adopted decades ago in the criminal justice system of nearly all states,³¹ as well as for its lack of fit with the purposes of student discipline and the institution’s powers.³² These responses are not only not solving the problem, as already indicated, but they are also contrary to both the spirit and letter of the applicable law—particularly three areas of federal law: Title IX of the Educational Amendments of 1972

evidence standard. *See infra* note 91 and related text. Several sources confirm that a substantial number of schools used a standard of proof higher than a “preponderance of the evidence” standard prior to that date. For instance, newspaper accounts after April 2011 discuss schools that were changing their standards as a result of the Dear Colleague Letter. *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 (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, available at <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); Jon Ostrowsky, *New Federal Guidance on Univ Sexual Assault: Brandeis Follows Biden Lead on Title XI*, THE 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); Rebecca D. Robbins, *Harvard’s Sexual Assault Policy Under Pressure*, THE HARVARD CRIMSON (May 11, 2012), <http://www.thecrimson.com/article/2012/5/11/harvard-sexual-assault-policy/> (discussing pressure being placed on Harvard to change standard of proof to preponderance of evidence). Earlier studies have indicated that the vast majority of schools do not articulate a standard of proof, but of those that do, a substantial minority required a standard of proof higher than a preponderance standard. *See Anderson*, 1000-01, Karjane, 120-21. *See also* Drake University, CODE OF STUDENT CONDUCT, available at: <http://www.drake.edu/dos/pdf/conductbrochure.pdf> (specifying that accused students have a right to “cross-examine the complainant,” and that accused students will receive any “exculpatory evidence” possessed by the University);

³¹ See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U.L. REV. 945, 949 (2004). See also Heather M. Karjane et al., CAMPUS SEXUAL ASSAULT: HOW AMERICA’S INSTITUTIONS OF HIGHER EDUCATION RESPOND 115 (2002), available at: <http://www.rainn.org/pdf-files-and-other-documents/Public-Policy/Legislative-Agenda/mso44.pdf> (noting that fewer than 1 in 10 of the schools surveyed responded that they had policies comparable to “rape shield” laws).

³² See EDWARD N. STONER II, REVIEWING YOUR STUDENT DISCIPLINE POLICY: A PROJECT WORTH THE INVESTMENT (2000), available at: <http://www.eric.ed.gov/PDFS/ED444074.pdf> and discussion *infra*, notes 149–154.

(“Title IX”),³³ the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”),³⁴ and case law regarding the due process rights of students at state institutions when they stand accused of any offense that could result in their suspension or expulsion.³⁵

The remainder of this Article will look at these three areas of law to see how these laws encourage institutions to adopt certain methods of dealing with campus peer sexual violence. It will ultimately conclude that, both to comply with their legal obligations and ultimately to end the violence, institutions need to “decriminalize” their institutional responses to the problem, both on the front end and on the back end. Finally, it will make two recommendations of specific methods that institutions can use to begin the decriminalization process.

I. LAWS APPLICABLE TO INSTITUTIONAL RESPONSIBILITIES REGARDING CAMPUS PEER SEXUAL VIOLENCE

The three legal regimes listed above constitute the three areas of national law applicable to a higher education institution’s responsibilities to respond to incidents of campus peer sexual violence. Title IX and Clery are federal statutes with accompanying administrative and court enforcement structures that focus mainly on how an institution responds to victims and reports of violence. The due process precedents are based on U.S. Supreme Court and federal courts of appeals interpretations of the U.S. Constitution and focus on the institution’s obligations to students accused of perpetrating violence. It is important to note that, in any given case, various state laws may also be applicable, but those laws are beyond the scope of this article. This section will discuss each set of federal laws in turn and demonstrate that, with regard to the back end of an institution’s responses, not only do none of these legal regimes require institutions to imitate the criminal justice system in their disciplinary procedures but they also often affirmatively require institutions to respond in a way that is significantly different from a criminal approach. In addition, this section will show that, on the front end, these laws are largely ineffective in addressing the campus peer sexual violence problem because these laws—largely through silence—inadvertently encourage institutions to take a criminal justice system-like approach to victim reporting and gathering information about campus peer sexual violence.

A. Title IX

Title IX provides a good example of mixed legal incentives that collectively show that imitating the criminal justice system on either the

33. 20 U.S.C. § 1681 (2006 & Supp. V 2011).

34. 20 U.S.C. § 1092(f) (2006 & Supp. V 2011).

35. *See infra* Part II.C.

front end or the back end of an institutions’ response will be ultimately ineffective in solving the campus peer sexual violence problem and may actually perpetuate it. As the review below will show, Title IX’s requirements for institutions’ responses to a report of sexual violence are both quite protective of student survivors’ rights and do not encourage schools to take a “criminal” approach to their investigations and hearings regarding such reports. However, because current enforcement of Title IX does not account for the victim-non-reporting problem discussed above, Title IX does not intervene in front end institutional responses related to reporting, and allows—even provides incentives—for institutions to adopt a criminal approach to reporting. This approach acts as an obstacle to institutions preventing and ending peer sexual violence because, if the studies discussed above are any judge, the criminal approach is a significant deterrent to victim reporting.

Title IX prohibits sexual harassment in schools as a form of sex discrimination.³⁶ 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.”³⁷ Because of the severity of sexual violence, even a single instance of violence will generally be considered hostile environment sexual harassment.³⁸

Title IX is enforced in two ways when peer sexual violence is at issue: first, through a survivor’s private right of action against her school³⁹ and second, through administrative enforcement by the Office of Civil Rights (“OCR”) of the Department of Education (“ED”).⁴⁰ Both enforcement jurisdictions derive from the fact that schools agree to comply with Title IX

36. See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENT BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2 (2001), available at: <http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf> [hereinafter REVISED GUIDANCE].

37. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 632 (1999).

38. See REVISED GUIDANCE, *supra* note 32, 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.

Id.

39. See *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60 (1992).

40. See REVISED GUIDANCE, *supra* note 32, at i.

in order to receive federal funds.⁴¹

The private right of action requires a plaintiff/survivor to reach the standard set out by two Supreme Court cases, *Gebser v. Lago Vista Independent School District*⁴² and *Davis v. Monroe County Board of Education*.⁴³ In order to make out a violation of Title IX, this standard requires that a school act with “deliberate indifference” in the face of “actual knowledge” of an incident of sexual violence.⁴⁴ If a plaintiff can meet that standard, the damages that the school could be required to pay are quite significant. While most cases settle out of court, the settlements give a sense of what both sides anticipate the damages awarded by a jury would be. The largest settlement in a Title IX case to date was in *Simpson v. University of Colorado Boulder*,⁴⁵ when two college women were gang-raped as a part of an unsupervised football recruiting program that the university had evidence was leading to sexual violence. The university ultimately paid \$2.85 million to the plaintiffs, hired a special Title IX analyst and fired some thirteen university officials, including the President and football coach.⁴⁶ Other large settlements include an \$850,000 settlement by Arizona State University in a case where a student was raped by a football player who had been expelled for misconduct, including sexual harassment, but was readmitted after intervention by the coach.⁴⁷ In addition, the University of Georgia paid a six-figure settlement to a plaintiff who was raped by several athletes, including one who the university knew had a criminal record before he was admitted to the university.⁴⁸

Beyond these high-profile cases, there have been many cases where courts have allowed cases to proceed to a jury for a determination as to

41. *Id.* at 2–3.

42. 524 U.S. 274 (1998).

43. 526 U.S. 629 (1999).

44. See, e.g., *S.S. v. Alexander*, 177 P.3d 724, 726 (Wash. Ct. App. 2008); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 258–59 (6th Cir. 2000); *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999).

45. 500 F.3d 1170 (10th Cir. 2007).

46. See Diane L. Rosenfeld, *Changing Social Norms? Title IX and Legal Activism: Concluding Remarks*, 31 HARV. J.L. & GENDER 407, 418 (2008).

47. Tessa Muggeridge, *ASU Settlement Ends in \$850,000 Payoff*, STATE PRESS (Feb. 3, 2009), available at <http://www.statepress.com/archive/node/4020>. ASU has been sued again by a student who says she was raped by members of a fraternity where the university knew there was a pattern of sexual violence and where 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), available at <http://www.statepress.com/2010/07/18/former-student-sues-abor-over-sexual-assault-case/>.

48. See Rosenfeld, *supra* note 42, at 420.

whether the school violated Title IX. Schools have been found to have acted with deliberate indifference for the following general categories of institutional responses to a report of sexual violence:

- 1) The school does nothing at all;⁴⁹
- 2) The school talks to the alleged perpetrator, who denies the allegations, makes no determination as to which story is more credible,⁵⁰ and then does nothing, including nothing to protect the victim from any retaliation from the alleged perpetrator or other students as a result of her report;⁵¹

49. See, e.g., *Estate of Brown v. Ogletree*, 2012 U.S. Dist. LEXIS 21968 (S.D. Tex. Feb. 21, 2012); *Estate of Carmichael v. Galbraith*, 2012 U.S. Dist. LEXIS 857 (N.D. Tex. Jan. 4, 2012); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135 (N.D.N.Y. 2011) (for a more complete fact statement, see <http://www.lambdalegal.org/in-court/cases/pratt-v-indian-river-central-school-district>); *Walsh v. Tehachapi Unified School Dist.*, 2011 U.S. Dist. LEXIS 125175 (E.D. Cal. Oct. 28, 2011); *Rinsky v. Boston Univ.*, 2010 U.S. Dist. LEXIS 136876 (D. Mass. Dec. 23, 2010); *T.Z. v. City of New York*, 634 F. Supp. 2d 263 (E.D.N.Y. 2009); *McGrath v. Dominican College*, 672 F. Supp. 2d 477 (S.D.N.Y. Nov. 25, 2009); *Doe ex rel Doe v. Coventry Bd. of Educ.*, 630 F. Supp. 2d 22 (D. Conn. 2009); *C.T. v. Liberal Sch. Dist.*, 562 F. Supp. 2d 1324 (D. Kan. 2008); *Dawn L. v. Greater Johnstown Sch. Dist.*, 586 F. Supp. 2d 332, 365 (W.D. Pa. 2008); *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); *Doe v. Southeastern Greene Sch. Dist.*, 2006 U.S. Dist. LEXIS 12790 (W.D. Pa. Mar. 24, 2006); *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); *Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809 (S.D. Iowa 2004); *Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869 (N.D. Ohio 2003); *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001); *O. H. v. Oakland Unified Sch. Dist.*, 2000 U.S. Dist. LEXIS 21725 (N.D. Cal. Apr. 14, 2000); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000).

50. See, e.g., *Alexander*, 177 P.3d at 740.

51. See, e.g., *Patterson v. Hudson Area Sch.*, 2009 U.S. App. LEXIS 25, at *33 (6th Cir. 2009); *Doe v. Galster*, 2011 U.S. Dist. LEXIS 77706 (E.D. Wis. Jul. 14, 2011); *Terrell v. Del. State Univ.*, 2010 U.S. Dist. LEXIS 74841 (D. Del. July 23, 2010); *Coventry Bd. of Educ.*, 630 F. Supp. 2d at 226; *Liberal Sch. Dist.*, 562 F. Supp. 2d at 1324; *Jones v. Kern High Sch. Dist.*, 2008 U.S. Dist. LEXIS 74040 (E.D. Cal. Aug. 13, 2008); *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.

- 3) The school waits or investigates so slowly that it takes months or years for the survivor to get any redress;⁵²

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. In addition to these cases, in two cases where the school was granted summary judgment on the plaintiff’s deliberate indifference claim, the courts allowed the plaintiff’s claim alleging that the school itself retaliated to proceed to a jury: *Pemberton v. West Feliciana Parish Sch. Bd.*, 2012 U.S. Dist. LEXIS 17138 (M.D. La. Feb. 10, 2012) (finding that the school did not act with deliberate indifference but denying the school’s motion for summary judgment on plaintiff’s retaliation claim when the school initiated an investigation into her residency and dropped her from the school when she complained after three male students attacked and groped her after school); *Marcum ex rel. C.V. v. Board of Educ. of Bloom-Carroll Local School Dist.*, 727 F. Supp. 2d 657 (S. D. Ohio 2010) (denying deliberate indifference claim but granting retaliation claim of 12 year-old girl who was sexually assaulted on the school bus by a 17 year-old boy, suspended along with the boy for 10 days, complained about students harassing her by calling her a “slut” and “whore” for four days after her return to school, and was then suspended and expelled for the alleged theft of a wallet and iPod). Finally, one case is a further outlier on this issue: *Doe v. Univ. of the Pacific*, 2012 U.S. App. LEXIS 1844 (9th Cir. 2012) (concluding in an unpublished opinion that the district court “did not err” in its decision rejecting plaintiff’s claims that the school had not adequately investigated suspicions that one of the men who raped plaintiff was involved in the gang-rape of another woman the month prior to plaintiff’s rape, had acted with deliberate indifference to plaintiff’s rape “by requiring her to be in contact with her assailants when it refused to expel two of the men” and had retaliated against plaintiff for her Title IX complaint).

52. 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); *Evans v. Bd. of Educ. Southwestern Sch. Dist.*, 2010 U.S. Dist. LEXIS 72926 (S. D. Ohio 2010) (denying school’s motion for summary judgment on Title IX claims when school did not respond to two 12 year-old girls’ reports of sexual harassment by male students on school bus [including escalating incidents of verbal harassment, pulling down the girls’ pants, exposing their breasts and forcing one to perform oral sex] and eventually suspended both the victim and the perpetrator of the forced oral sex incident, even when the perpetrator pled guilty to attempted assault in a separate criminal proceeding); *Coventry Bd. of Educ.*, 630 F. Supp. 2d at 22 (denying summary judgment to school when a male student sexually assaulted a female student off school grounds and the school took no disciplinary action against the assailant [permitting him “to continue attending school with [plaintiff] for three years after the assault, leaving constant potential for interactions between the two”], engaged in unreasonable delay by allowing the two students to share a lunch period and class for over six months after the school was notified of the assault, and allowed the assailant’s “friends [to] verbally harass[and

- 4) School officials investigate in a biased way, such as through their treatment of the survivor or characterization of her case;⁵³
- 5) The school determines or acknowledges that the sexual violence did occur, but does not discipline the assailant or other students engaging in retaliatory harassment, minimally disciplines the assailant or other students engaging in retaliatory harassment, or also disciplines the victim of the violence;⁵⁴
- 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;⁵⁵

threaten] her in school, calling her ‘slut,’ ‘cow,’ ‘whore,’ ‘liar,’ and ‘bitch,’” and to send her a text message stating “‘You better watch your back if my boy goes to jail...’”)

53. See, e.g., *Galster*, 2011 U.S. Dist. LEXIS 77706; *Albiez v. Kaminski*, 2010 U.S. Dist. LEXIS 59373 (E.D. Wisc. June 14, 2010); *Terrell*, 2010 U.S. Dist. LEXIS 74841; *Babler v. Arizona Board of Regents*, Case 2:10-cv-01459-RRB (D. Ariz. Feb. 15, 2010); *Marcum*, 727 F. Supp. 2d at 657; *McGrath*, 672 F. Supp. 2d at 477; *Greater Johnstown Sch. District*, 586 F. Supp. 2d at 365; *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 Coll.*, 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); *Snelling v. Fall Mt. Regional Sch. Dist.*, 2001 U.S. Dist. LEXIS 3591 (D.N.H. 2001).

54. See, e.g., *Brown*, 2012 U.S. Dist. LEXIS 21968; *Galster*, 2011 U.S. Dist. LEXIS 77706; *Pratt*, 803 F. Supp. 2d at 135; *Evans*, 2010 U.S. Dist. LEXIS 72926; *Terrell*, 2010 U.S. Dist. LEXIS 74841; *Marcum*, 727 F. Supp. 2d at 657; *Coventry Bd. of Educ.*, 630 F. Supp. 2d at 226; *City of New York*, 634 F. Supp. 2d at 263; *Liberal Sch. Dist.*, 562 F. Supp. 2d at 1324; *Kern High Sch. Dist.*, 2008 U.S. Dist. LEXIS 74040; *Annamaria M v. Napa Valley Unified Sch. Dist.*, 2006 U.S. Dist. LEXIS 38641 (N.D. Cal. May 30, 2006); *Southeastern Greene Sch. Dist.*, 2006 U.S. Dist. LEXIS 12790; *Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d at 809; *Schroeder*, 296 F. Supp. 2d at 869; *Henkle*, 150 F. Supp. 2d at 1067; *Snelling*, 2001 U.S. Dist. LEXIS 3591 (D.N.H. 2001); *Oakland Unified Sch. Dist.*, 2000 U.S. Dist. LEXIS 21725 (N.D. Cal. Apr. 14, 2000); *Vance*, 231 F.3d at 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; *Theno*, 394 F. Supp. 2d at 1310-1; *Erskine Coll.*, 2006 U.S. Dist. LEXIS 35780, at *35; *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).

55. See, e.g., *Terrell*, 2010 U.S. Dist. LEXIS 74841 (D. Del. July 23, 2010) (denying the school’s motion to dismiss because, when plaintiff reported that another student assaulted and beat her, the school permitted him to continue attending classes without restriction, “informed [plaintiff] that she would be

- 7) School officials take some action to address the sexual violence, but when that action is ineffective, do not change the response to address its ineffectiveness or do anything more to address the violence;⁵⁶
- 8) School officials tell the victim not to tell anyone else, including parents and the police;⁵⁷
- 9) The school requires or pressures the survivor to confront her assailant or to go through mediation with him before allowing her to file a complaint for investigation.⁵⁸

In addition, the case law in this area increasingly gives a sense of what school responses *are* adequate under Title IX, since two clear trends emerge from cases where courts have granted schools' motions for summary judgment or to dismiss the plaintiffs' Title IX claims. First, once a school has knowledge of an incidence of sexual violence, the case law suggests that separating the students involved can help a school avoid a "deliberate indifference" finding.⁵⁹ Moreover, in the majority of these

required to adjust her schedule and transfer out of [a shared] class," and "punished [her] equally with her male assailant," by initiating disciplinary proceedings against her); *Siewert*, 497 F. Supp. 2d at 954 (finding that after victim repeatedly harassed and assaulted the only action the school took was to move the victim to a different classroom); *James*, 2008 U.S. Dist. LEXIS 82199, at *6 (W.D. Okla. 2008) (same). *But see Pemberton*, 2012 U.S. Dist. LEXIS 17138 (M.D. La. Feb. 10, 2012) (finding that the school did not act with deliberate indifference after plaintiff was sexually assaulted by three male students who attacked and groped her after school, the school suspended the boys, the plaintiff was subjected to verbal harassment by the assailants and their friends, and the school only offered to switch her out of the class if she wanted to avoid her harassers).

56. *See S.S.*, 177 P.3d at 739; *Vance*, 231 F.3d at 261; *Jones*, 397 F. Supp. 2d at 645; *Martin*, 419 F. Supp. 2d at 974; *Patterson*, 2009 U.S. App. LEXIS 25, at *32; *Napa Valley Unified Sch. Dist.*, 2006 U.S. Dist. LEXIS 38641.

57. *See, e.g., Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1248 (10th Cir. 1999) (finding 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 two girls were harassed repeatedly by a boy who exposed himself to them and touched them on their legs and breasts on the school bus and in school; when they reported the behavior, the school's guidance counselor told them not to tell their parents because it could subject the school to lawsuits).

58. *See, e.g., Alexander*, 177 P.3d at 740.

59. *See, e.g., Porto v. Town of Tewksbury*, 488 F.3d 67, 2007 U.S. App. LEXIS 12444 (1st Cir. Mass. 2007); *Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist.* 163, 315 F.3d 817 (7th Cir. Ill. 2003); *Watkins v. La Marque Indep. Sch. Dist.*, 308 Fed. Appx. 781, 2009 U.S. App. LEXIS 1500 (5th Cir. Tex. 2009); *P.K. v. Caesar Rodney High Sch.*, 2012 U.S. Dist. LEXIS 9572 (D. Del. Jan. 27, 2012); *Brooks v. City of Philadelphia*, 747 F. Supp. 2d 477 (E.D. Pa. Oct. 5, 2010); *Marshall v. Batesville Sch. Dist.*, 2008 U.S. Dist. LEXIS 99663 (E.D. Ark. Dec. 9,

cases, the separation of the students was achieved by moving the alleged perpetrator,⁶⁰ suspending the alleged perpetrator,⁶¹ or both. Second, a smaller group of schools have avoided being found deliberately indifferent because they expelled the perpetrators after determining them to be responsible for peer sexual violence.⁶²

These cases show that schools can face significant liability if they respond to a report of sexual violence in a way that is not protective of student survivors. This is a significant difference from the criminal justice

2008); *Addison v. Clarke County Bd. of Educ.*, 2007 U.S. Dist. LEXIS 56166 (M.D. Ga. July 30, 2007); *Lewis v. Booneville Sch. Dist.*, 2007 U.S. Dist. LEXIS 24976 (N.D. Miss. Apr. 2, 2007); *Theriault v. Univ. of S. Me.*, 353 F. Supp. 2d 1, 2004 U.S. Dist. LEXIS 17364 (D. Me. 2004); *Doe v. Lennox Sch. Dist. No. 41-4*, 329 F. Supp. 2d 1063 (D.S.D. 2003); *Ings-Ray v. Sch. Dist. of Phila.*, 2003 U.S. Dist. LEXIS 7683 (E.D. Pa. Apr. 30, 2003); *C.R.K. v. U.S.D. 260*, 2002 U.S. Dist. LEXIS 6326 (D. Kan. Jan. 30, 2002); *Clark v. Bibb County Bd. of Educ.*, 174 F. Supp. 2d 1369, 2001 U.S. Dist. LEXIS 20561 (M.D. Ga. 2001); *KF's Father v. Marriott*, 2001 U.S. Dist. LEXIS 2534 (S.D. Ala. Feb. 23, 2001); *Wilson v. Beaumont Indep. Sch. Dist. & Thom Amons*, 144 F. Supp. 2d 690 (E.D. Tex. 2001); *Manfredi v. Mount Vernon Bd. of Educ.*, 94 F. Supp. 2d 447 (S.D.N.Y. 2000); *Vaird v. School Dist. of Philadelphia*, 2000 U.S. Dist. LEXIS 6492 (E.D. Pa. May 12, 2000). Only three cases differ in some respects from the clear weight of this authority regarding separating students involved in sexual violence. See *Univ. of the Pacific*, 2012 U.S. App. LEXIS 1844; *Pemberton*, 2012 U.S. Dist. LEXIS 17138 (M.D. La. Feb. 10, 2012); *O'Hara v. Colonial Sch. Dist.*, 2002 U.S. Dist. LEXIS 12153 (E.D. Pa. Mar. 25, 2002) (dismissing Ps claims when she was sexually assaulted repeatedly through sexual touching of breasts and genitalia by a male classmate, only reporting the assaults when the assailant became violent, after which the school suspended the assailant for 70 days, and then allowed him to return to school, when he “could occasionally be found in the same vicinity as the plaintiff and . . . would stare at her”);

60. Of the seventeen cases listed in footnote 55, above, thirteen schools separated the students by moving the alleged perpetrator or separating the students in an unspecified or equal manner. See *Porto*, 488 F.3d at 67; *Gabrielle M.*, 315 F.3d at 817; *Watkins*, 308 Fed. Appx. at 781; *Addison*, 2007 U.S. Dist. LEXIS at 56166; *Lewis*, 2007 U.S. Dist. LEXIS at 24976; *Theriault*, 353 F. Supp. 2d at 1; *Lennox Sch. Dist.*, 329 F. Supp. 2d at 1063; *Ings-Ray*, 2003 U.S. Dist. LEXIS at 7683; *C.R.K.*, 2002 U.S. Dist. LEXIS at 6326; *Clark*, 174 F. Supp. 2d at 1369; *Wilson*, 144 F. Supp. 2d at 690; *Manfredi*, 94 F. Supp. 2d at 447; *Vaird*, 2000 U.S. Dist. LEXIS at 6492.

61. See *Caesar Rodney High Sch.*, 2012 U.S. Dist. LEXIS 9572; *Marshall*, 2008 U.S. Dist. LEXIS 99663; *Theriault*, 353 F. Supp. 2d at 1; *Lennox Sch. Dist.*, 329 F. Supp. 2d at 1063; *Clark*, 174 F. Supp. 2d at 1369; *Vaird*, 2000 U.S. Dist. LEXIS at 6492.

62. See *Doe v. North Allegheny Sch. Dist.*, 2011 U.S. Dist. LEXIS 93551 (W.D. Pa. Aug. 22, 2011); *Snethen v. Bd. of Pub. Educ. for the City of Savannah*, 2008 U.S. Dist. LEXIS 22788 (S.D. Ga. Mar. 24, 2008); *Fortune v. City of Detroit Pub. Schs.*, 2004 Mich. App. LEXIS 2660 (Mich. Ct. App. Oct. 12, 2004).

system, which is not particularly protective of victims, where victims are not considered parties on par with the state and the defendant, and whose interests are therefore not at the center of a criminal proceeding. Moreover, the focus of this case law is forward-looking, scrutinizing whether the school's institutional responses avoided or led to further risk of or actual occurrence of harassment or violence against a survivor. Such responses often require actions generally not associated with the criminal justice system, such as moving an accused student out of housing or classes prior to an investigation or determination as to the "truth" of the victim's report.

However, these cases obscure the number of cases where the victim was not able to successfully show that the school had "actual knowledge" of the violence, due to three problems with the "actual knowledge" standard and how it has been applied by the courts as a whole. First, the actual knowledge prong requires that the *school* have actual knowledge of the harassment, raising 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, 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.⁶³ Courts are more open to allowing teachers to count as the school in peer sexual harassment cases,⁶⁴ but this is not guaranteed,⁶⁵ and others who would seem to be in similar positions of authority as teachers, such as bus

63. 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).

64. *See, e.g.*, *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); *Ind. Area Sch. Dist.*, 397 F. Supp. 2d at 644.

65. *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 *Stamford*, , 2008 U.S. Dist. LEXIS 51933; *Snethen*, 2008 U.S. Dist. LEXIS 22788 (granting summary judgment when the school did not act with deliberate indifference to an attempted rape of one student by another and a teacher who did not necessarily qualify as an "appropriate person" for actual knowledge purposes had previously observed "horseplay" with sexual connotations between the assailant and another girl); *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))).

drivers,⁶⁶ coaches,⁶⁷ and other school professionals or “paraprofessionals”⁶⁸ have been judged to be “inappropriate persons.” This leads to confusing variation,⁶⁹ 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’s harassment of other students besides 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 the issue in different ways.⁷⁰ In a review of the peer harassment cases where this question was posed, 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, those that state 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.⁷¹

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

67. *See, e.g.,* 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 Coach Scudder was not an ‘appropriate person’ for purposes of Title IX.”).

68. *See, e.g.,* 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); Doe v. North Allegheny Sch. Dist., 2011 U.S. Dist. LEXIS 93551 (W.D. Pa. Aug. 22, 2011) (indicating that a Student Service Coordinator and social work intern were not “appropriate persons” for actual knowledge purposes).

69. Ryan, *supra* note 63, at 388.

70. *Id.* at 388–89.

71. Of eighteen 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); *Callahan*, 678 F. Supp. 2d at 1029-34 (noting 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 had occurred between the

perpetrator and victim); *Staebling*, 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).

Eight 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 North Allegheny Sch. Dist.*, 2011 U.S. Dist. LEXIS 93551 (granting school’s motion for summary judgment when a male student raped a female student with whom he had had previous consensual sexual encounters, when the school was aware of the alleged perpetrator’s previous sexual assaults but did not expel him from the school district, only expelled him after his rape of plaintiff); *Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356 (6th Cir. Mich. 2012) (affirming the district court’s grant of summary judgment when a school revised the Individual Educational Plan of a special education student with known disciplinary problems inside and outside of school, to allow for a period of adult supervision after he shoved his girlfriend (plaintiff) into a locker, demanded she perform oral sex on him and made obscene gestures toward her at a school basketball game, only expelling him after he raped plaintiff approximately 8 weeks later). *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.

Id. *See also* *Fortune v. City of Detroit Pub. Schs.*, 2004 Mich. App. LEXIS 2660 (Mich. Ct. App. Oct. 12, 2004) (affirming summary judgment for school when two boys raped plaintiff in an empty classroom after an after-school activity and previous complaints about sexual harassment from another girl regarding one of the boys did not count as actual knowledge prior to plaintiff’s rape because that complaint had not indicated that the boy harassed other girls); *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 twelve cases were ambiguous on this point or were decided on factual as opposed to legal considerations. 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.

Id. See also *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.”); *Ostrander v. Duggan*, 341 F.3d 745 (8th Cir. Mo. 2003) (no actual knowledge of the school prior to plaintiff’s rape, because “sexual abuse allegedly perpetrated by DTD fraternity members, other than Duggan, at locations other than the 507 premises, fails to satisfy the “known acts” requirement outlined in *Davis*”); *Murrell v. Denver Pub. Sch.*, 186 F.3d 1238, 1247 (10th Cir. 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.”); *Schaefer v. Las Cruces Pub. Sch. Dist.*, 716 F. Supp. 2d 1052 (D.N.M. 2010) (dismissing Title IX claim for no actual knowledge where plaintiff was hit in the testicles once sufficiently hard to cause injuries by an unknown student who plaintiff claimed was a part of a gang of boys who had “racked” other boys in incidents about which the school was aware); *Morgan v. Bend-La Pine Sch. Dist.*, 2009 U.S. Dist. LEXIS 9443 (D. Or. Feb. 6, 2009) (granting summary judgment to school when plaintiff with a disability was involved in coercive “sexually charged incidents” but the school did not have actual knowledge because of plaintiff’s and other students’ concealment); *Renguette v. Bd. of Sch. Trs. ex rel. Brownsburg Cmty. Sch. Corp.*, 540 F. Supp. 2d 1036, 2008 U.S. Dist. LEXIS 30225 (S.D. Ind. 2008) (finding lack of actual knowledge because sexual activity between two students may have been voluntary/consensual); *Richard P. v. Sch. Dist.*, 2006 U.S. Dist. LEXIS 75068 (W.D. Pa. Sept. 30, 2006) (denying motion for a new trial when jury found lack of actual knowledge in case involving the sexual assault by two female students by several male students in a Laundromat); *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

Finally, 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.⁷² This is in contrast to the constructive knowledge standard, which asks whether the defendant knew, or reasonably should have known, that a risk of harassment existed.⁷³ 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*⁷⁴ and *Burlington Industries, Inc. v. Ellerth*,⁷⁵ caused many employers to adopt sexual harassment policies and procedures.⁷⁶

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.

Id. See also *Doe v. Town of Bourne*, 2004 U.S. Dist. LEXIS 10021 (D. Mass. May 28, 2004) (no actual knowledge of the sexual and physical assault when the victim complained that boys who had sexually and physically assaulted her were pushing her into lockers and the school did not respond to her complaint); *Crandell v. New York College of Osteopathic Med.*, 87 F. Supp. 2d 304, 2000 U.S. Dist. LEXIS 2836 (S.D.N.Y. 2000) (some of plaintiff’s claims regarding one instance of sexual harassment allowed to go forward while many others barred by lack of actual knowledge due to the victim’s failure to report them); *Vaird*, 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.”).

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 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.

72. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 296 (1998) (Stevens, J., dissenting)

73. *Gebser*, 524 U.S. at 296 (Stevens, J., dissenting); REVISED GUIDANCE, *supra* note 32, at 13.

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

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

76. 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

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.⁷⁷

A decade plus of experience with the actual knowledge standard demonstrates that these are not the incentives created by the actual knowledge standard. In fact, as already noted, doing nothing at all is both most schools’ 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 behavior encouraged by *Faragher/Ellerth* in the employment context, there has not been a rush to develop policies, procedures, and training on sexual harassment among schools as there has been among employers. In addition, 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.

Thus, the actual knowledge standard does not encourage schools to address the victim-non-reporting problem and, if anything, gives schools incentives to suppress reporting, at least passively. Such passive suppression is easily done just by making no changes to the traditional criminal justice, policing approach to reports of sexual violence. As indicated by the statistics that began this article, fear of hostile treatment by police and other authority figures is the most common reason listed by student victims for not reporting.

Fortunately, OCR uses a constructive knowledge standard when it investigates schools for violations of Title IX in peer sexual harassment cases, in part because the OCR process is more injunctive than compensatory, so student victims complaining to OCR will not get monetary damages. OCR enforcement generally takes place as a result of a complaint being 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.⁷⁸ This investigation often includes a close review of institutional policies and procedures, as well as the steps the school took to resolve a complaint⁷⁹ and files relating to past sexual harassment cases that required a school to respond in some way.⁸⁰ OCR also interviews those involved in the case, particularly relevant school

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.”).

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

78. See REVISED GUIDANCE, *supra* note 32, at 14.

79. See *id.*

80. See U.S. DEP’T OF EDUC., *How the Office of Civil Rights Handles Complaints*, <http://www.ed.gov/about/offices/list/ocr/complaints-how.html>.

personnel.⁸¹ OCR cases 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” signed by the school.⁸²

As a result, 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. Thus, in addition to the list of institutional responses that have gotten schools in trouble in private lawsuits, each category of which includes investigations where schools have been found in violation of Title IX,⁸³

81. *See id.*

82. *See* EDUCATOR’S GUIDE TO CONTROLLING SEXUAL HARASSMENT, ¶322 (Travis Hicks, ed. 2008).

83. Examples where the victim reported the rape to a school official or some other authority figure, but the school did nothing or failed to prevent the offender or his friends from continually coming in contact with the victim, include: Letter from Debbie Osgood, Director, Chicago, Office for Civil Rights, U.S. Dep’t of Educ., to Dennis Carlson, Superintendent, Anoka-Hennepin Sch. Dist. (Mar. 15, 2012), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/05115901.html>; Letter from Zachary Pelchat, Supervisory Attorney, Office for Civil Rights, U.S. Dep’t of Educ., and Anurima Bhargava, Chief, Civil Rights Division, U.S. Dep’t of Just. to Richard L. Swanson, Superintendent, Tehachapi Unified School District (June 29, 2011), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/09111031.html>; Letter from Catherine D. Criswell, Director, Cleveland, Office for Civil Rights, U.S. Dep’t of Educ., to Dave L. Armstrong, Esq., Vice President for Enrollment and Legal Counsel, Notre Dame College (Sept. 24, 2010), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096001.html> [hereinafter Notre Dame C. Letter]; 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).

For examples where the school delayed responding, *see, e.g.*, 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]; Letter from Thomas J. Hibino, Reg’l Civil Rights Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Daniel Kehoe, Superintendent, Millis Pub. Sch. (May 19, 1994) (on file with author) [hereinafter Millis Pub. Sch. Letter]; 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). For more details on cases in which the school conducted a biased investigation, see Richardson Indep. Sch. Dist. Letter; 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

OCR has additionally found Title IX violations when a school’s policies and procedures did not follow OCR’s requirements, such as when schools create fact-finding procedures and hearings with significantly more procedural rights for the accused than the survivor;⁸⁴ adopt a standard of proof more exacting than “preponderance of the evidence,”⁸⁵ have policies or procedures that are contradictory, confusing and/or not coordinated,⁸⁶ do

Sonoma State Univ. Letter]; Letter from John E. Palomino to Karl Pister (June 15, 1994), in University of California, Santa Cruz, OCR Case No. 09-93-2141 (on file with author) [hereinafter University of California, Santa Cruz Letter].

For examples of cases where school officials investigate and determine that the sexual violence did occur, but did not discipline or minimally disciplined the assailant and did not protect the survivor from any retaliation, see Millis Pub. Sch. Letter; Sonoma State Univ. Letter; 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); 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) (on file with author).

84. See, e.g., Letter from Debbie Osgood, Director, Chicago, Office for Civil Rights, U.S. Dep’t of Educ., to The Reverend John I. Jenkins, C.S.C., President, University of Notre Dame (June 30, 2011), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/05072011.html> [hereinafter U. Notre Dame Letter]; Letter from Catherine D. Criswell, Director, Cleveland, Office for Civil Rights, U.S. Dep’t of Educ., to Gloria Hage, Esq., General Counsel, Eastern Michigan University (Nov. 22, 2010), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096002.html> [hereinafter E.M.U. Letter]; Notre Dame C. Letter, *supra* note TK; Letter from Myra Coleman, Team Leader, Philadelphia, Office for Civil Rights, U.S. Dep’t of Educ., to Valerie I. Harrison, Esq., University Counsel, Temple University (June 4, 2007) (on file with author) [hereinafter Temple U. Letter]; 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].

85. See, e.g., U. Notre Dame Letter, *supra* note 80 (noting that although the university stated that it used a preponderance of the evidence standard, it did not notify students of this standard, and requiring this notification); Evergreen State Coll. Letter, *supra* note 80 (stating that the evidentiary standard applied to Title IX actions was that of a “preponderance of evidence”); Letter from Sheralyn 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) (requiring a preponderance of evidence standard upon investigation); Sonoma State Univ. Letter, *supra* note 79 (noting that a “much different and lower standard [of proof] is required for proving a case of sexual harassment, including assault, under Title IX” than for “a criminal charge alleging sexual assault”).

86. See, e.g., U. Notre Dame Letter, *supra* note 80; E.M.U. Letter, *supra* note 80; Temple U. Letter, *supra* note 80; Letter from Sandra W. Stephens, Team Leader, Dall., Office for Civil Rights, U.S. Dep’t of Educ., to David Schmidly, President, Oklahoma State Univ. (June 10, 2004) (on file with author); Letter from

not provide clear time frames for prompt resolutions of complaints,⁸⁷ or violate more “technical” Title IX requirements.⁸⁸ Thus, even more so than the “deliberate indifference” cases noted above, the responses required by OCR are decriminalized, with explicit rejection of the criminal “beyond a reasonable doubt” standard of proof and an elevation of the student survivor’s rights in hearings and other procedures above the status of victims in the criminal system.

Despite this good news, OCR’s enforcement, like enforcement of Title IX in the court context, has significant problems that encourage schools to avoid, passively or actively, knowledge of campus peer sexual violence generally and of specific cases particularly. First, very few students seem to be aware of OCR’s complaint process. A single page of information is posted on the OCR website,⁸⁹ but this is the only place that it seems to appear. Even OCR’s own guidance and an April 2011 Dear Colleague Letter regarding sexual violence never explain how one would go about initiating an investigation or where one might file a complaint,⁹⁰ even while referring to OCR investigations.⁹¹ 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

Howard Kallem, Chief Attorney, Office for Civil Rights, U.S. Dep’t of Educ., to Stephen W. Vescovo, Esq., Thomason, Hendrix, Harvey, Johnson & Mitchell (March 26, 2004) (on file with author) [hereinafter Christian Brothers Univ. Letter]; Sonoma State Univ. Letter, *supra* note 79.

87. See, e.g., U. Notre Dame Letter, *supra* note 80; E.M.U. Letter, *supra* note 80; Temple U. Letter, *supra* note 80; Christian Brothers Univ. Letter, *supra* note 82; University of California, Santa Cruz Letter, *supra* note 79; Sonoma State Univ. Letter, *supra* note 79.

88. See, e.g., Letter from Linda Howard-Kurent to Norman Cohen, Utah College of Massage Therapy (Aug. 17, 2001) (on file with author).

89. See U.S. DEP’T OF EDUC., *supra* note 76 (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> (describing the process to file a discrimination complaint with OCR).

90. The OCR website containing the April 2011 *Dear Colleague Letter* includes a “Know Your Rights” flyer that includes information about the OCR complaint process. U.S. DEP’T OF EDUC., *Know Your Rights*, ED.GOV, <http://www2.ed.gov/about/offices/list/ocr/know.html>. It is unclear, however, what schools are supposed to do with this flyer, if anything. The *Dear Colleague Letter* does not require that schools post the flyer.

91. See REVISED GUIDANCE, *supra* note 32, at i, iii, 5–6, 8, 10, 11, 14–15, 20–22 (explaining the OCR complaint process); *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.html> [hereinafter *Dear Colleague Letter*], at 9–12, 16.

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.’”⁹² The lack of knowledge regarding the complaint process and the consequent low rate of complaints undercuts the effectiveness of OCR’s enforcement regime, including its constructive knowledge requirements.

Second and more critically, lack of publicity regarding OCR’s resolution of the complaints that it does receive diminishes the reach of those resolutions because schools that have not been investigated cannot learn from previous investigations and proactively fix any problems with their own response systems. 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.⁹³ If schools or individuals wish to see various OCR LOFs but do not know which ones in particular, they 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,⁹⁴ the letters are not available in ED’s public FOIA reading room. Moreover, even though the only way a member of the public can read the LOFs is through filing a FOIA request, the request process is particularly lengthy for these documents. This means that the vast majority of school officials will not wait the months or expend the labor involved in filing and receiving results from a blanket FOIA request that might not even contain a case that is on point. Thus, while being investigated could lead schools to decriminalize their responses to sexual violence, the unlikelihood of students’ filing complaints with OCR, coupled with the lack of public information regarding the investigation results of the few complaints actually filed, undercut OCR’s intervention powers. In particular, although OCR’s more exacting “knew or should have known” standard has the potential to fix some of the problems with the “actual knowledge” standard required in private lawsuits, general ignorance about OCR’s complaint process fails to create incentives for schools to seek out knowledge of peer sexual violence—or at the very least not to avoid that knowledge.

92. 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/ [hereinafter *Lax Enforcement of Title IX*].

93. For more information about the FOIA process for LOFs, see Cantalupo, *Burying*, *supra* note 1, at 236-9.

94. See U.S. DEP’T OF EDUC., *Recent Resolutions*, ED.GOV, <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/index.html>. These recent cases are a positive step demonstrating this administration’s recognition of and willingness to address the problem, but these efforts are only beginning to address the problem and past investigations prior to 2010 are not available in the reading room.

Therefore, both court and OCR's enforcement of Title IX provide mixed incentives to schools with regard to their institutional responses. On the back end, schools are encouraged to decriminalize their responses, but on the front end, Title IX's enforcement structure encourages schools to keep in place traditional law enforcement approaches to victim reporting.

B. The Clery Act

Like Title IX, the Clery Act deals with the rights of student survivors in campus disciplinary proceedings, primarily through a set of provisions referred to as the Campus Sexual Assault Victim's Bill of Rights ("CSAVBR").⁹⁵ Unlike Title IX, Clery also deals with the front end, reporting aspect of the campus sexual violence problem. However, because, as its full title suggests, the Clery Act conceives of campus peer sexual violence as merely one form of campus crime, its reporting procedures unsurprisingly tend to encourage "criminalization" of institutional responses. As such, it has been less effective than Title IX in encouraging schools to use decriminalized reporting procedures on the front end. It is also less effective than Title IX on the back end because there is no right to private enforcement under Clery, so victims can only get injunctive relief but no monetary compensation for Clery violations.⁹⁶

Nevertheless, the enforcement of Clery, particularly with regard CSAVBR, has been more protective of surviving students' rights than the criminal justice system is, and violating the Clery Act can be still quite expensive for schools, since ED has the power to fine schools for violating Clery, whereas OCR has no fining capability. CSAVBR requires schools to publish policies that inform both on-campus and off-campus communities of the programs designed to prevent sexual violence provided by the school, as well as the procedures in place to respond to sexual violence once it occurs.⁹⁷ It further specifies that a school's educational programs should raise awareness of campus sexual violence.⁹⁸ Also, procedures adopted to respond to such violence must include: procedures and identifiable persons to whom to report;⁹⁹ the right of victims to notify law enforcement and to get assistance from school officials in doing so;¹⁰⁰ encouragement to victims and instructions as to how to preserve evidence of sexual violence;¹⁰¹ notification to students regarding options for changing living and curricular arrangements and assistance in making those

95. 20 USC § 1092 (f)(8) (2008).

96. 20 USC § 1092 (f)(8)(C) (2008).

97. 20 USC § 1092 (f)(8)(A) (2008).

98. 20 USC § 1092 (f)(8)(B)(i) (2008).

99. 20 USC § 1092 (f)(8)(B)(iii) (2008).

100. 20 USC § 1092 (f)(8)(B)(v) (2008).

101. 20 USC § 1092 (f)(8)(B)(iii) (2008).

changes;¹⁰² and student disciplinary procedures that explicitly treat both accuser and accused equally in terms of their abilities “to have others present” at hearings and to know the outcome of any disciplinary proceeding.¹⁰³

Probably the most visible case involving the Clery Act was the 2006 rape and murder of Laura Dickinson in her dormitory room at Eastern Michigan University (“EMU”) by a fellow student. The school initially told Dickinson’s family that her death involved “no foul play,” then informed the family over 2 months later of the arrest of the student since convicted of raping and murdering her.¹⁰⁴ As a result of a complaint filed against EMU for violations of the Clery Act,¹⁰⁵ the school eventually agreed to pay \$350,000 in fines for 13 separate violations of the Clery Act, the largest fine ever paid in a sexual violence case according to publicly available information, and settled with Dickinson’s family for \$2.5 million.¹⁰⁶ The case eventually led to the President, Vice President for Student Affairs and Director of Public Safety being fired,¹⁰⁷ and an estimated \$3.8 million in costs from the fines, the settlement with the Dickinson family, and “severance packages, legal fees and penalties.”¹⁰⁸

Before EMU, the largest fine levied against a school was apparently against Salem International University for \$200,000.¹⁰⁹ In addition to not reporting five sex offenses, SIU had violated CSAVBR by not regularly providing counseling and other victim support services, “actively discourag[ing victims] from reporting crimes to law enforcement or

102. 20 USC § 1092 (f)(8)(B)(vii) (2008).

103. 20 USC § 1092 (f)(8)(B)(iv) (2008).

104. See Joe Menard, *EMU Slaying Probe Reopens Wounds*, DETROIT NEWS (May 10, 2007), available at <http://www.detnews.com/apps/pbcs.dll/article?AID=/20070510/METRO/705100402>; Candice Williams, *EMU Killer Denies Guilt, Gets Life*, DETROIT NEWS (May 8, 2008), available at <http://www.detnews.com/apps/pbcs.dll/article?AID=/20080508/SCHOOLS/805080340/1026>.

105. See Joe Menard, *EMU Faces Federal Complaint*, DETROIT NEWS (Mar. 7, 2007), available at <http://www.detnews.com/apps/pbcs.dll/article?AID=/20070307/SCHOOLS/703070426/1026>.

106. See Geoff Larcom, *Eastern Michigan University to Pay \$350,000 in Federal Fines Over Laura Dickinson Case*, ANN ARBOR NEWS (June 06, 2008), available at http://blog.mlive.com/annarbornews/2008/06/eastern_michigan_university_to.html.

107. See Marisa Schultz, *EMU Murder Trial Begins Today*, DETROIT NEWS (Oct. 15, 2007), available at <http://www.detnews.com/apps/pbcs.dll/article?AID=/20071015/SCHOOLS/710150361/1026/LOCAL>.

108. Marisa Schultz, *Controversy to Cost EMU \$1M*, DETROIT NEWS (July 19, 2007), available at <http://www.detnews.com/apps/pbcs.dll/article?AID=/20070719/SCHOOLS/707190389/1003/metro>.

109. See Letter from John S. Loreng to Fred Zook (Dec. 17, 2001) at 7, <http://www.securityoncampus.org/pdf/SIUprdl.pdf> [hereinafter SIU Letter].

seeking relief through the campus judicial system,”¹¹⁰ and responding to survivors’ reports with “threats, reprisals, or both.”¹¹¹ Furthermore, the school would not make accommodations for new living and academic arrangements for victims following an assault, and survivors were inadequately informed of their rights to pursue disciplinary action against the assailant.¹¹² Publicly available information indicates that the next highest fine was \$27,500 to Miami University of Ohio,¹¹³ again for a combination of underreporting various crimes, including sex offenses, and “fail[ing] to initiate and enforce appropriate procedures for notifying both parties of the outcome of any institutional disciplinary proceeding brought alleging a sex offense.”¹¹⁴ Lastly, in 2000, Mount St. Clare College in Clinton, Iowa, was the first school to be fined \$25,000, in part for two rapes that were reported to police but did not appear in the school’s reports since the perpetrators were never criminally charged.¹¹⁵ As both the provisions of CSAVBR and these four cases demonstrate, like Title IX but unlike the criminal justice system, Clery gives sexual violence survivors’ procedural rights on par with accused students, and requires schools to provide services to victims that are not contemplated in a criminal case.

Unfortunately, and despite Clery’s attempts to the contrary, the reporting system created by the statute does not similarly encourage institutions to decriminalize their front end reporting-related responses to sexual violence. 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.¹¹⁶ Therefore, the Clery Act’s focus is on establishing requirements for schools to report and publish certain categories of crime that occur on campus, including sex offenses. However, Clery’s reporting requirements do not adequately account for the differences between campus peer sexual violence and other kinds of criminal activity. For instance, Clery adopts definitions of criminal acts used in the Federal Bureau of Investigation’s *Uniform Crime Reporting Handbook* (“*UCR Handbook*”), which, up until very recently defined forcible sex offenses as “carnal knowledge of a

110. *Id.* at 16.

111. *Id.*

112. *See id.* at 22.

113. *See* Letter from Fran Susman & Gerald Sikora to James Garland (Sept. 11, 1997), http://www.securityoncampus.org/index.php?option=com_content&view=article&id=180.&Itemid=75

114. Letter from S. Daniel Carter to Douglas Parrott (Oct. 7, 2004), http://www.securityoncampus.org/index.php?option=com_content&view=article&id=179.&Itemid=75.

115. Donna Leinwand, *Campus Crime Underreported: Colleges Have Been Caught Misreporting Violence Statistics*, USA TODAY, Oct. 4, 2000, at 2A.

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

female forcibly and against her will.”¹¹⁷ It also considers a crime “reported”—and thus necessary for the institution to disclose—if it is brought to the attention of a “campus security authority” or the local police,¹¹⁸ but excludes faculty, campus physicians, or counselors (mental health, professional and pastoral) from the definition of “campus security authority.”¹¹⁹ Even more fundamentally, Clery’s approach draws from the stranger rape myth discussed above. 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 was reported; and (4) when the crime was reported.¹²⁰ Thus, rather than requiring an institution to count criminal acts that take place between its students at any location, the Clery Act only counts criminal acts occurring on school property. In doing so, it assumes that an institution can protect students from sexual violence through its control of facilities and traditional policing and security methods, such as campus lighting (no dark alleys for those stranger rapists to hide) and 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 actually occurs, this assumption is likely to spur institutions to adopt ineffective traditional policing and security responses to the violence.

As a result, despite its greater focus than Title IX on the front end reporting of sexual violence, Clery does no better—likely worse—than Title IX in creating incentives for schools to develop decriminalized reporting procedures. While it does encourage decriminalized back end disciplinary procedures, its criminalized conception of reporting undercuts

117. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORTING HANDBOOK 19 (rev. 2004), *available at* http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/ucr_handbook.pdf. Note that the FBI has recently changed its definition to “[t]he penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” See U.S. DEP’T OF JUSTICE, Press Release, *Attorney General Eric Holder Announces Revisions to the Uniform Crime Report’s Definition of Rape*, <http://www.fbi.gov/news/pressrel/press-releases/attorney-general-eric-holder-announces-revisions-to-the-uniform-crime-reports-definition-of-rape>.

118. OFFICE OF POSTSECONDARY EDUC., U.S. DEP’T OF EDUC., THE HANDBOOK FOR CAMPUS CRIME REPORTING 23 (2005), *available at* <http://www2.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 73 (2011), *available at* <http://www2.ed.gov/admins/lead/safety/handbook-2.pdf> [hereinafter CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK]. See also 20 U.S.C. § 1092(f)(1)(F)(i).

119. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 114, at 51; CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK, *supra* note 114, at 77–78.

120. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 114, at 23; CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK, *supra* note 114, at 11.

the message of CSAVBR and the results of the four investigations discussed above.

C. Process Rights of Accused Students

The case law regarding the due process rights of students accused of conduct warranting suspension or expulsion from a public school further supports the idea that colleges and universities are not required to imitate the criminal justice system in structuring their student disciplinary processes. This case law, of course, is not applicable to the front end reporting structure because it only comes into play once a report has been made, and the institution's disciplinary procedures are operating. However, on the back end, the case law confirms that there are no legal requirements that institutions treat accused students like criminal defendants with the full panoply of due process rights to which criminal defendants are constitutionally entitled.

All accused students have some due process rights; the variation is in "what process is due."¹²¹ Although the Supreme Court has never decided a case involving expulsion from a public institution, in *Goss v. Lopez*, the court considered a 10-day suspension, without a hearing, of a group of public high school students involved in a series of demonstrations and protests.¹²² The Court decided that the students were entitled to due process consisting of "some kind of notice and [] some kind of hearing."¹²³ The *Lopez* Court also cited approvingly to *Dixon v. Alabama State Board of Education*, where the 5th Circuit Court of Appeals defined what was required for cases involving expulsion.¹²⁴ In *Dixon*, a group of students were expelled without a hearing from the Alabama State College for Negroes for unspecified misconduct after they had all participated in a sit-in at an all-white lunch counter and possibly had engaged in other civil rights protests and demonstrations.¹²⁵ *Dixon* set forth the requirements for due process before a state school can expel a student, including notice "of the specific charges and grounds which, if proven, would justify expulsion,"¹²⁶ "the names of the witnesses... and an oral or written report on the facts to which each witness testifies,"¹²⁷ and a hearing, "[t]he nature of [which] should vary depending upon the circumstances of the particular case."¹²⁸ The hearing must provide "an opportunity to hear both sides in

121. *Morrissey v. Brewer*, 405 U.S. 951, 981 (1972).

122. *See Goss v. Lopez*, 419 U.S. 565, 570 (1975).

123. *Id.* at 579.

124. *Id.* at 576.

125. *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 152 (1961).

126. *Id.* at 158.

127. *Id.* at 159.

128. *Id.* at 158.

considerable detail”¹²⁹ and must give the accused student an opportunity to present “his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.”¹³⁰ These requirements fall short of “a full-dress judicial hearing, with the right to cross-examine witnesses,”¹³¹ nor do they “require opportunit[ies] to secure counsel, to confront and cross-examine witnesses... or to call... witnesses to verify [the accused’s] version of the incident.”¹³²

For private institutions, the requirements are even less onerous. While courts have reviewed private institutions for expelling or suspending students in an arbitrary and capricious manner,¹³³ most courts review private schools disciplinary actions under “the well settled rule that the relations between a student and a private university are a matter of contract.”¹³⁴ Therefore, private institutions are mainly bound by what they have promised students in the school’s own policies and procedures, and courts will review disciplinary actions according to the terms of the contract.¹³⁵

In a representative selection of cases where students have challenged expulsions,¹³⁶ courts have steadfastly refused to intervene in school disciplinary decisions as long as they are follow the minimal requirements laid out by *Lopez*, *Dixon* and the school’s own policies and procedures. They have upheld expulsions for a wide range of student behaviors, from smoking,¹³⁷ drinking beer in the school parking lot¹³⁸ and engaging in consensual sexual activity on school grounds,¹³⁹ to participating in but withdrawing, prior to discovery, from a conspiracy to shoot several

129. *Id.* at 159.

130. *Id.*

131. *Id.*

132. *Lopez*, 419 U.S. at 583.

133. *See* *Ahlum v. Administrators of Tulane Educ. Fund*, 617 So. 2d 96, 100 (La. Ct. App. 1993); *Coveney v. President & Trustees of Holy Cross College*, 445 N.E.2d 136, 137 (Mass. 1983); *Abbariao v. Hamline Univ. Sch. of L.*, 258 N.W.2d 108, 112 (Minn. 1977); *Rollins v. Cardinal Stritch Univ.*, 626 N.W.2d 464, 469 (Minn. Ct. App. 2001).

134. *Dixon*, 294 F.2d at 157.

135. *See* *Centre College v. Trzop*, 127 S.W.3d 562, 567 (Ky. 2004); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000); *Hernandez v. Don Bosco Prep. High*, 730 A.2d 365, 367 (N.J. 1999); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 243 (D. Vt. 1994).

136. The cases discussed here were drawn mainly from 3-9 EDUCATION LAW § 9.09, the section on student discipline law from an education law treatise. They are not intended to be a comprehensive review of cases involving expulsion, merely to give a sense of the range of student misconduct cases in which courts have upheld expulsions.

137. *See* *Flint v. St. Augustine High Sch.*, 323 So. 2d 229 (La. 1975).

138. *See* *Covington County v. G.W.*, 767 So. 2d 187 (Miss. 2000).

139. *See* *B.S. v. Bd. of Sch. Trs.*, 255 F. Supp. 2d 891 (N.D. Ind. 2003).

students and school officials,¹⁴⁰ and being found by two female students in a dormitory room with two other male students and the female students' roommate, who was inebriated, unconscious, and naked from the waist down.¹⁴¹

In the sexual violence context, research for two articles dealing with this subject has discovered only three cases where the court found a college or university to have violated an accused student's due process rights and in only one case did the court require the institution to pay any damages,¹⁴² a small fraction of the amount for which the accused student asked, basically amounting to a tuition refund.¹⁴³ However, in the rest of the cases reviewed here, none has overturned a school's decision to sanction a student for peer sexual violence. In contrast, they have rejected challenges

140. See *Remer v. Burlington Area Sch. Dist.*, 286 F.3d 1007 (7th Cir. Wis. 2002).

141. See *Coveney*, 445 N.E.2d 136. See also *A.B. v. Slippery Rock Area Sch. Dist.*, 906 A.2d 674 (Pa. Commw. Ct. 2006) (students leaving false bomb threat notes in a school bathroom); *Cloud v. Trustees of Boston University*, 720 F.2d 721 (1st Cir. Mass. 1983) ("peeping" under women's skirts at a university library); *Gaston v. Diocese of Allentown*, 712 A.2d 757 (Pa. Super. Ct. 1998) ("discipline problems" which plaintiffs alleged were a pretext for retaliation against the student's parents for objections they made to the school's curriculum); *Flaim v. Med. College of Ohio*, 418 F.3d 629 (6th Cir. Ohio 2005) (attempted possession of a controlled substance); *Hammock ex rel. Hammock v. Keys*, 93 F. Supp. 2d 1222 (S.D. Ala. 2000) (possession of marijuana); *Rogers v. Gooding Pub. Joint Sch. Dist. No. 231 (in Re Rogers)*, 135 Idaho 480 (Idaho 2001) (possession of a pellet gun); *Brown v. Plainfield Cmty. Consol. Dist. 202*, 500 F. Supp. 2d 996 (N.D. Ill. 2007) (brushing a teacher's buttocks with the back of a hand on two occasions); *Linwood v. Board of Education*, 463 F.2d 763 (7th Cir. Ill. 1972) (attacking and striking other students in the halls of the school); *Hernandez*, 730 A.2d 365 (engaging in a series of misbehavior including slashing a teacher's tires and selling illegal steroids); *S.K. v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 399 F. Supp. 2d 963 (D. Minn. 2005) (shooting a classmate in the back with a BB gun); *Trzop*, 127 S.W.3d 562 (possession of a gun in a college dormitory room).

142. See *Fellheimer*, 869 F. Supp. at 247. See also *Marshall v. Maguire*, 102 Misc. 2d 697 (N.Y. Sup. Ct. 1980); *Doe v. University of the South*, 2011 U.S. Dist. LEXIS 35166 (E.D. Tenn. 2011) (denying summary judgment to school district for possible failure to comply with own procedures in sexual assault case but refusing to offer an "opinion as to whether a sexual assault occurred, whether any such acts were consensual, or who, as between John Doe and the Complainant is credible.")

143. In September of 2011, John Doe was awarded \$26,500 of the \$5.5 million for which he had asked, essentially a refund of his tuition, when the jury found the university had not breached its contract with Doe but was fifty-three percent at fault (in comparison to Doe's forty-seven percent fault) in his negligence claim. Todd South, *Jury finds Sewanee and student at fault; awards student \$26,500*, TIMES FREE PRESS (Sept. 3, 2011), available at <http://timesfreepress.com/news/2011/sep/03/jury-finds-sewanee-and-student-fault-awards-50000/>.

to the admissibility of certain witnesses and evidence,¹⁴⁴ the right to know witnesses’ identities and to cross-examine them,¹⁴⁵ and the rights to an attorney,¹⁴⁶ discovery,¹⁴⁷ voir dire,¹⁴⁸ and appeal.¹⁴⁹ They have also allowed a victim to testify behind a screen,¹⁵⁰ and have consistently reiterated the distinction between disciplinary hearings and criminal proceedings.¹⁵¹

Moreover, these cases demonstrate that schools may even take actions prior to notice and a hearing without running afoul of due process requirements. Indeed, *Lopez* itself acknowledges that it might be necessary for a school to act quickly and prior to notice and a hearing under certain circumstances: “Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable.”¹⁵² Courts have relied on this language to allow schools to take measures protecting victims and accusers, including allowing them to submit witness statements instead of appearing at the hearing,¹⁵³ protecting them from retaliation,¹⁵⁴ and, in cases of peer sexual violence, suspending or otherwise

144. See *Schaer*, 735 N.E.2d at 380; *Cloud*, 720 F.2d at 724; *Brands v. Sheldon Community School*, 671 F. Supp. 627, 632 (N.D. Iowa 1987).

145. See *B.S.*, 255 F. Supp. 2d at 899; *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995); *Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 23 (D. Me. 2005).

146. See *Coveney*, 445 N.E.2d at 140; *Ahlun*, 617 So. 2d at 100.

147. See *Gomes*, 365 F. Supp. 2d at 19.

148. See *id.* at 32.

149. See *id.* at 33.

150. See *Cloud*, 720 F.2d at 724; *Gomes*, 365 F. Supp. 2d at 29.

151. See *Schaer*, 735 N.E.2d at 381 (“A university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts”); *Granowitz v. Redlands Unified School Dist.*, 105 Cal. App. 4th 349, 355 (Cal. App. 4th Dist. 2003) (“Courts have consistently refused to impose stricter, adversarial, “trial-like procedures and proof” on public school suspension proceedings”); *Ray v. Wilmington College*, 106 Ohio App. 3d 707, 712 (Ohio Ct. App., Clinton County 1995) (“The issue here is not whether Wilmington could have provided Ray with a better hearing, nor whether the hearing satisfied the requirements of a formal trial.”); *Brands*, 671 F. Supp. at 632 (“The Due Process Clause does not require courtroom standards of evidence to be used in administrative hearings”); *Gomes*, 365 F. Supp. 2d at 17 (“The courts ought not to extol form over substance, and impose on educational institutions all the procedural requirements of a common law criminal trial”).

152. *Lopez*, 419 U.S. at 582–3.

153. See *Coplin*, 903 F. Supp. 1383; *B.S.*, 255 F. Supp. 2d at 899; *Gomes*, 365 F. Supp. 2d at 23.

154. See *B.S.*, 255 F. Supp. 2d at 901 (“FWCS has a strong interest in protecting students who report classmate misconduct. Those students may be

separating accused students prior to notice and a hearing.¹⁵⁵

These cases clearly demonstrate that courts do not require schools to treat accused students like criminal defendants. Moreover, this makes total sense in light of the different powers and goals of student disciplinary proceedings. As these precedents implicitly acknowledge, the deprivations of property involved in a school expulsion are not comparable to sending someone to jail and potentially requiring registration as a sex offender. In fact, schools lack even much less coercive powers such as the subpoena. To the extent that high standards of proof, the treatment of the victim as a complaining witness as opposed to a party, and unequal rights to discovery and disclosures of evidence are all procedural protections provided in the criminal context because of the state's coercive powers, it is inappropriate to copy them wholesale in a context where those coercive powers are not present.

Instead, as "best practices" literature in the student discipline area already acknowledges,¹⁵⁶ the goals of a school in conducting student disciplinary proceedings are quite different. As one author explains, the central goal of student disciplinary systems is helping "to create the best environment in which students can live and learn... [a]t the cornerstone [of which] is the obligation of students to treat all other members of the academic community with dignity and respect—including other students, faculty members, neighbors, and employees."¹⁵⁷ He reminds school administrators and lawyers that this goal means that "*student victims are just as important as the student who allegedly misbehaved*" (emphasis in original),¹⁵⁸ a principle that "is critical" to resolving "[c]ases of student-on-

understandably reluctant to come forward with information if they are faced with... the unsettling prospect of ostracism or even physical reprisals at the hands of their peers").

155. See *Brands*, 671 F. Supp. at 629 (suspending a student's eligibility in the state wrestling tournament prior to a hearing, after he and three other males "engaged in multiple acts of sexual intercourse with a sixteen-year-old female student"); *J.S. v. Isle of Wight County Sch. Bd.*, 362 F. Supp. 2d 675, 677–78 (E.D. Va. 2005) (student who sexually assaulted a younger, female student in the girls restroom suspended prior to notice and a hearing, transferred by the school to another school after an administrative hearing, and not allowed to return after the appeal hearing); *Jensen v. Reeves*, 45 F. Supp. 2d 1265, 1272 (D. Utah 1999) ("given the pattern of misbehavior and continual threat being posed by C.J. to other students, Principal Reeves may have been justified in immediately suspending C.J. without the requisite notice of the charges and opportunity to explain").

156. See generally EDWARD N. STONER II, REVIEWING YOUR STUDENT DISCIPLINE POLICY: A PROJECT WORTH THE INVESTMENT (2000), available at: <http://www.eric.ed.gov/PDFS/ED444074.pdf>.

157. *Id.* at 7.

158. *Id.*

student violence.”¹⁵⁹ In doing so, he points out that this principle of treating all students equally “creates a far different system than a criminal system in which the rights of a person facing jail time are superior to those of a crime victim.”¹⁶⁰ Therefore, he advises that student disciplinary systems use the “‘more likely than not’ standard [of proof] used in civil situations” and avoid describing student disciplinary matters with language drawn from the criminal system.¹⁶¹

Thus, the need to decriminalize institutional responses to student misconduct, including peer sexual violence, is widely acknowledged, even when the focus is upon the rights of the student accused of misconduct. When combined with the requirements of Title IX and the Clery Act with regard to victims’ rights in disciplinary proceedings, the mandate, both legal and policy-based, that institutions decriminalize their responses to sexual violence is clear in terms of the institutions’ back end responses once a report is filed. Moreover, the best practices literature provides specific strategies and recommendations for institutions to use in the decriminalization process.¹⁶² However, because the due process precedents and best practices literature regarding student disciplinary systems provide no additional insight into the front end victim-reporting problem, and Title IX and the Clery Act deal with that problem inadequately, we still need to generate some methods for decriminalizing the reporting process. The next and final section of this article turns to that task.

II. RECOMMENDATIONS FOR DECRIMINALIZING REPORTING

Because of the Clery Act’s focus on reporting as well as the number of amendments that have been made to it since it was first passed, we should start on the decriminalization process by amending the Clery Act to enable two new approaches to the sexual violence and victim-non-reporting problems.¹⁶³ In fact, a recent set of amendments to Clery were proposed in the 112th Congress via the SaVE Act,¹⁶⁴ so additional changes to Clery are on the table, presenting a good moment to add these methods to the list of

159. *Id.* at 7–8.

160. *Id.* at 7.

161. *Id.* at 10.

162. For more information about best practices and recommendations of additional ways to decriminalize disciplinary proceedings, see Cantalupo, *Campus Violence*, *supra* note 1, at 665–90.

163. Other recommendations regarding improving both Title IX and Clery’s address of the sexual violence and non-reporting problem can be found in Cantalupo, *Burying*, *supra* note 1, at 252–66, but the ones discussed here have the greatest potential to both decriminalize the reporting structure and deal effectively with the reporting-related disincentives discussed at length in that article.

164. 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. HIGHER EDUC. (D.C.), Apr. 15, 2011, at A20–21.

changes already being proposed. Alternatively, these approaches might be adopted through new regulations under either Clery or Title IX.

The first approach is to require schools 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 avoid (passively or actively) knowledge of peer sexual violence and provide the school with the information it needs to address the violence problem properly. More specifically, schools should be required to administer a standard survey developed by ED or a contractor working for ED 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). The survey would ask students questions designed to determine the incidence of sexual violence without depending on individual survivors to come forward to report, and schools would submit results of the survey to ED and publish it in the campus crime report. The ED could also do statistical comparisons of survey results from schools and, ideally, make those available to the public. Many schools already participate voluntarily in similar surveys, which often include such compilations, and are given to schools confidentially for their own use.¹⁶⁵ 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.¹⁶⁶ As helpful as such surveys can be, even with a comparatively small group of schools participating,¹⁶⁷ imagine the wealth of information about students that

165. 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>. 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 nationwide. *Publications and Reports*, AM. COLL. HEALTH ASS'N—NAT'L COLL. HEALTH ASSESSMENT II, http://www.acha-ncha.org/reports_ACHA-NCHAI.html.

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

167. About 40–140 schools per semester participated in the National College Health Assessment in the two most recently surveyed full academic years (2008–

schools and the public could obtain from a survey in which all schools must participate.

Because such a survey would not depend on a traditional policing model, it would solve or bypass a number of difficulties that plague the current traditional system, including both the perception and the reality of police or school officials who are hostile or otherwise lack expertise in the dynamics of sexual violence. A survey would essentially remove the institution from its current “middle-man” position, where students report to the institution and then the institution reports to the public, and 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.

In addition, because such a survey would be required of all schools, it would remove an ethical dilemma for schools that is created by the large victim non-reporting problem. That is, when a school creates better responses to victim reporting 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, what is known about the problem indicates that every campus currently has this serious crime problem at a similar rate, a rate that tracks the national incidence.¹⁶⁸ 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. Therefore, institutions must decide whether to seek to end the violence by encouraging victim reporting and by otherwise openly acknowledging the problem, thereby risking developing a reputation as a dangerous campus, or to ignore the problem, thus discouraging victim reporting either passively or actively and

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.

168. Some schools do conduct surveys like the American College Health Assessment on the incidence of sexual violence on their particular campus. Although the school-specific information collected by the surveys is generally not made publicly available from such surveys, aggregate data made available to the public, as well as school-specific survey results shared confidentially with this author 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.

appearing to be less dangerous. Moreover, if the campus next door or across town or one step below or above in the rankings chooses to ignore the problem, its choice could translate into a competitive disadvantage for the institution seeking to increase reporting. All schools conducting the same survey removes this competitive advantage and, with it, any incentives created by it to discourage victim reporting.¹⁶⁹

The second method by which to decriminalize reporting, which ideally would be combined with the survey discussed above, is to require institutions 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 campus peer sexual violence is to create a visible (yet confidential) and centralized victims' services office, a method which has received increasing recognition as a best practice for responding to campus peer sexual violence.¹⁷⁰

A victims' services office can help with reporting by acting as a central location for both services and reports. Such offices are generally more trusted by survivors than traditional law enforcement or other school officials, in part because they can provide survivors with a "one-stop shop" for the various academic, medical, counseling and advocacy needs of victims. 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 immediately to refer the student to the victims' services office. That office could likewise refer students out to the different offices from which they can get 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 can also provide 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 recommendations contained in the April 2011 Dear Colleague Letter, which will be

169. For more information on this dilemma and other "information problems" affecting schools' responses to campus peer sexual violence, see Cantalupo, *Burying*, *supra* note 1, at 219-23.

170. See, e.g., HEATHER KARJANE ET AL., *CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND* 132 (2002) (noting a dedicated, on-campus victim services office as an "encouraging practice"); OVW FISCAL YEAR 2011 GRANTS (mandating that no less than twenty percent 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).

strengthened further by the Campus SaVE Act, should it be enacted into law.¹⁷¹ 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 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.¹⁷²

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 the CSAVBR portion of the Clery Act) 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.

Neither the survey nor victim services office 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 to fund one of these methods. Alternatively, any amendments to the Clery Act could appropriate money for ED to design the survey and compile and analyze the data, giving schools the less resource intensive role of administering the survey and collecting the data, which might be made quite easy if, for instance, ED were to design a survey method that was electronic and automated. The design might also include questions, like the voluntary American College Health Association survey currently does, that deal with other important topics about which schools want to assess their students’ experiences. Moreover, with the majority of the expenses of designing and administering the survey removed from institution itself, schools could put the resources formerly used for campus crime reporting towards the victim services office.

171. *Dear Colleague Letter*, *supra* note TK, at 4, 7, 12, 14–15; S. 834, 112th Cong. (1st Sess. 2011); H.R. 2016, 112th Cong. (1st Sess. 2011);

172. For more information regarding the role that victims’ services offices can play once a survivor comes forward, see Cantalupo, *Campus Violence*, *supra* note 1, at 681–2.

Adopting both of these methods is ultimately in the interests of schools, given the potentially very expensive liability that schools face under Title IX, in particular. The Title IX liability scheme gives schools a clear incentive to get their institutional responses to campus peer sexual violence right. Although schools could keep their current “criminalized” approaches in place and continue to avoid knowledge of the problem generally and individual cases specifically, they would do so at their own—and at significant—risk. In addition, proper institutional responses present the best hope for schools to address the problem and prevent it from happening in the first place, by breaking the cycle of non-reporting and violence, gathering enough campus-specific information about the problem to create other forms of prevention, and bringing in expert victims’ services professionals to inform and implement best prevention and response practices. Aside from wanting to do the right thing and prevent the violence from an altruistic standpoint, violence prevention and effective institutional responses also save schools from many of the difficulties and resource expenditures that specific cases can involve when schools are unprepared to deal with them. Finally, schools seeking to address the violence problem would not be faced with the competitive disadvantage dilemma created by the high rate of violence but low rate of victim reporting.

III. CONCLUSION

If colleges and universities are ever going to end, or even significantly diminish, the distressingly high and persistent incidence of peer sexual violence on their campuses, they must decriminalize their institutional responses to the violence. While Title IX, the Clery Act and case law regarding the due process rights of students accused of misconduct warranting suspension or expulsion make it clear that schools should not be treating student disciplinary proceedings like criminal trials, they assume a traditional policing, criminal justice approach to victim-reporting. This assumption significantly diminishes the effectiveness of both these laws and an institution’s responses to sexual violence because they perpetuate a high victim non-reporting rate that is likely caused in large part by survivors’ documented fear and distrust of law enforcement’s and other school officials’ attitudes towards survivors. Therefore, institutions should be seeking not only to decriminalize their disciplinary procedures on the back end of a student’s progress through a school response system, but also to decriminalize their reporting mechanisms on the front end. Amending the Clery Act or passing new regulations under Title IX or Clery could provide two ways to decriminalize reporting: first by mandating that all institutions conduct a regular, national survey on sexual violence among their students and second by requiring institutions to create victims’ services offices which will centralize reporting and service provision as

well as serve as an expert for training and education purposes.