THE DEVIL IS IN THE DETAILS: WILL THE CAMPUS SAVE ACT PROVIDE MORE OR LESS PROTECTION TO VICTIMS OF CAMPUS ASSAULTS?

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INTRODUCTION

Campus violence, especially sexual harassment which includes sexual violence, remains a major issue facing colleges and universities today. Colleges and universities must not abrogate their legal obligations to law enforcement; they have a shared responsibility under federal civil rights laws to proactively provide safe environments for students to live and learn. Despite several laws addressing the problem, guidance from federal agencies, and greater education efforts, the statistics still reflect a sad reality— young people in colleges and universities, especially young women, are not safe. The White House Council on Women and Girls released a report in January 2014, *Rape and Sexual Assault: A Renewed Call to Action*, which portrayed a frightening landscape of sexual violence on college campuses, in the military, and among certain defined populations including LGBT individuals and Native American women.

More needs to be done now. To that end, President Obama and Congress recently revised legislation hoping these modifications would make college and university campuses safer. In addition, the President formed a White House Task Force to Protect Students from Sexual Assault, a task force of senior administration officials to provide him with recommendations within ninety days on the topic of best practices for preventing and responding to sexual assault and rape. In addition, he requested that the task force explore how well universities and colleges are complying with the law, and provide him with ideas on how to increase transparency with enforcement and encourage better collaboration between governmental agencies enforcing the law.

This renewed focus on campus sexual assaults comes at the same time the new Campus Sexual Violence Elimination Act (Campus SaVE Act) goes into effect on March 7, 2014. This new law seeks to increase transparency, accountability, and education surrounding the issue of campus violence, including sexual assaults, domestic violence, dating violence and stalking. The law remains hotly debated within victim advocate circles and college and university administrators as to whether it will help victims or reduce their protections under Title IX. All the interested parties agree, however, that the law leaves many questions unanswered and are anxiously watching the negotiated rulemaking process in hopes for more clarity.

This paper will first briefly give a context for the sexual assault problem

by exploring the statistics and the impact of campus violence on its victims. Part Three will review the existing law and the recent amendments to those laws. Part Four will consider the reactions to these changes. Part Five will outline the questions and concerns that still remain. The last section will highlight important strategies schools should adopt.

I. THE SCOPE OF CAMPUS SEXUAL ASSAULT PROBLEM

The statistics are sobering. The American Association of University Women (AAUW) collects statistics from a variety of sources that reflect a widespread problem of campus sexual assaults and rapes which remains largely unreported:[1]

- In a nationally representative survey of adults, 37.4% of female rape survivors were attacked between ages eighteen and twenty-four.
- In a study of undergraduate women, nineteen percent had experienced attempted or completed sexual assault since entering college.
- Ninety-five percent of attacks are unreported, making sexual assault the "silent epidemic." Sexual assault remains the most drastically underreported crime.
- Thirteen percent of women are stalked during the academic year, and each stalking episode lasts an average of sixty days.
- Ninety percent of women know the person who sexually assaulted or raped them.
- Forty-two percent of college women who are raped tell no one about the assault.
- Five percent of rape incidents are reported to the police. Ten times more rapes are reported to crisis lines than are reported to the police.
- Forty-two percent of raped women expect to be raped again.
- Although the majority of sexual violence acts involve women, men also are victims of this violence.[2]

Studies specific to campus sexual assaults produce findings that show:

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1. *Your Talking-Points Memo on Campus Sexual Assault*, AAUW, http://www.aauw.org/resource/campus-sexual-assault-talking-points/ (last visited Sept. 12, 2014).

2. *See generally* MICHAEL SCARCE, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME (1997).

- many assaults involve alcohol and/or drugs;[3]
- many assaults take place at a party;
- assailants are not strangers but known to their victims; and
- women are most at risk during the first weeks of freshman and sophomore year.[4]

Acquaintance rape victims suffer many of the same effects as stranger rape victims including: "shock, humiliation, anxiety, depression, substance abuse, suicidal thoughts, loss of self-esteem, social isolation, anger, distrust of others, fear of AIDS, guilt, and sexual dysfunction."[5] These various conditions contribute to a drop off in academic performance and an inability to attend classes regularly.[6] Some students even drop out of school altogether because they must risk encountering their perpetrator on campus.[7]

Despite these statistics, colleges and universities rarely expel the perpetrators, often doling out little or no punishments greater than a slap on the

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3. WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION (2014), *available at* http://www.whitehouse.gov/sites/default /files/docs/sexual_assault_report_1-21-14.pdf.

> The dynamics of college life appear to fuel the problem, as many survivors are victims of what's called 'incapacitated assault': they are sexually abused while drunk, under the influence of drugs, passed out, or otherwise incapacitated. Perpetrators often prey on incapacitated women, and sometimes surreptitiously provide their victims with drugs or alcohol. Perpetrators who drink prior to an assault are more likely to believe that alcohol increases their sex drive – and are also more likely to think that a women's drinking itself signals that she's interested in sex.

Id. at 14.

4. RANA SAMPSON, U.S. DEP'T OF JUSTICE PROBLEM ORIENTED GUIDES FOR POLICE PROBLEM-SPECIFIC GUIDE SERIES NO. 17, ACQUAINTANCE RAPE OF COLLEGE STUDENTS 7 (2003), *available at* http://www.cops.usdoj.gov/files/RIC/Publications/e07063411.pdf.

5. *Id.* at 8.

6. AAUW, *supra* note 1. The AAUW website offers the following observations about Academics and Achievement:

> - In addition to physical and emotional damage, college students who have been victims of sexual assault suffer from a host of problems that impede their academic achievement.
> - In nearly every case, victims cannot perform at the same academic levels that they did prior to the attack.
> - Sexual assault sometimes causes students to be unable to carry a normal class load, and they miss classes more frequently. (This is often a result of social withdrawal or a way to avoid seeing the perpetrator.)
> - Student victims regularly withdraw from courses altogether.
> - In more traumatic incidents, victims leave the school until they recover, sometimes transferring to another college.

Id.

7. SAMPSON, *supra* note 4, at 8.

wrist. The Center for Public Integrity and National Public Radio (NPR) joined together to produce an award winning series exploring the problem of sexual assaults on American college and university campuses.[8] The reports uncover that victims find little support on campus, and that often school administrators fail to appreciate research showing many of the perpetrators to be serial rapists.[9]

II. THE LAW

Several laws affirmatively require colleges and universities to protect students from sexual harassment including sexual violence. These laws focus on prevention by raising awareness of the problem of sexual harassment, including sexual violence, and also provide for investigations and penalties for those schools that do not comply with their obligations under the law.

A. Title IX

Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities which receive federal financial assistance. Title IX states that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[10]

Under Title IX, discrimination based on sex includes sexual harassment, sexual violence, and sexual assault.[11] Title IX also prohibits retaliation against individuals who complain about or participate in an investigation regarding an alleged Title IX violation.[12] Title IX requires institutions to

8. Center for Public Integrity & NPR, *Seeking Justice for Campus Rapes*, NPR, http://www.npr.org/series/124073905/seeking-justice-for-campus-rapes (last visited Sep. 12, 2014).

9. Joseph Shapiro, *Rape Victims Find Little Help On College Campuses*, NPR, Feb. 27, 2010, *available at* http://www.npr.org/templates /story/story.php?storyId=124148857; Joseph Shapiro, *Myths That Make It Hard To Stop Campus Rapes*, NPR, Mar. 4, 2010, http://www.npr.org/templates/story /story.php?storyId=124272157.

10. Title IX § 901(a), 20 U.S.C.A. § 1681(a) (2012).

11. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999). *See also* U.S. Dep't of Educ., Off. For Civ. Rts., Dear Colleague Letter (2011), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter *Dear Colleague*, April 2011]. Letter includes sexual violence within the definition of sexual harassment. Sexual violence "refers to physical sexual acts perpetrated against a person's will or where a person may be unable to give consent due to an intellectual or other disability." *Id*. at 1. Such sexual acts include "rape, sexual assault, sexual battery, and sexual coercion," and these acts are forms of sexual harassment under Title IX. *Id*. at 1–2.

12. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005).

stop the harassment, prevent future occurrence, and remedy its effects.[13]

Title IX permits a student to bring a private cause of action for monetary damages against an institution for sexual harassment.[14] The legal standard requires a plaintiff to prove the school to be deliberately indifferent in the face of actual knowledge of harassment that is severe, pervasive, and objectively offensive.[15] In addition to private causes of action, Title IX also contemplates an administrative enforcement which permits the Department of Education's Office for Civil Rights (OCR) to perform compliance reviews, investigate individual complaints which seek injunctive relief, and provide technical assistance.[16] Unlike the legal standard for private causes of action for monetary relief, the legal standard for these administrative proceedings only requires that an institution knew or should have known of the sexual harassment.[17] These investigations allow OCR to review policies and procedures of colleges and universities and their implementation of those policies and procedures. If OCR determines the institution is not in compliance, the institution is given the opportunity to voluntarily comply.[18] The Department of Education rarely suspends funds from the college or university, but instead resolves issues by reaching an agreement with a letter of finding and a voluntary resolution agreement.[19]

Although in principle Title IX gives the Department of Education an excellent enforcement mechanism, in reality this has not been the case. Relatively few students know about the complaint procedure, compliance reviews remain rare absent a complaint, inconsistent investigations occur

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13. 34 C.F.R. § 106.3 (2013); *Dear Colleague Letter*, April 2011, *supra* note 11, at 4 (stating that "[i]f a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects").

14. Franklin v. Gwinnett Pub. Sch., 503 U.S. 60 (1992).

15. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998); *Davis*, 526 U.S. at 651.

16. 34 C.F.R. § 100.7 (2013).

17. Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* at ii–v, 12–13, U.S. DEP'T OF EDUC. (Jan. 19, 2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html (noting that "if the school knows or reasonably should know about the harassment" is a proper standard in administrative proceedings because of the concern for "possibility of a money damages award against a school for harassment about which it had not known" and noting in footnote 2 that the standard applies "to private actions for injunctive and other equitable relief"). *See also* U.S. DEPT. OF JUSTICE, TITLE IX LEGAL MANUAL, *available at* http://www.justice.gov/crt/about/cor/coord/ixlegal.php.

18. 34 C.F.R. § 100.7(d) (2013).

19. Nancy Chi Cantalupo, *Burying Our Head in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L. J. 205, 234 (2011).

between schools, and the agency rarely rules against schools.[20] The difficulty in obtaining records of the investigations also makes it challenging to collect and compile a comprehensive list of the Department of Education's findings and sanctions.[21] Perhaps in response to these criticisms, the Department of Education recently published two high profile resolution agreements with the University of Montana and the University of Notre Dame.[22] These agreements provide a template for other institutions regarding their obligations and responsibilities under Title IX. The agreements reinforce important components of the law which require institutions to make sure their student bodies are well informed about sexual harassment policies and procedures and that investigations will be taken seriously and conducted in a timely manner.

B. Clery Act[23]

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), enforced by the United States Department of Education, requires all colleges and universities that receive federal aid to report annual crime statistics and campus security information. This law is named in honor of Jeanne Clery, who was raped and killed while a freshman at Lehigh University.[24] Congress amended the statute to institute a sex offender notification requirement and campus emergency response protocols.[25] In addition, later amendments made it illegal to retaliate against the victim or whistleblowers.[26]

The Clery Act is quite extensive and requires colleges and universities to:

- Publish an Annual Security Report (ASR).
- Have a public crime log.
- Disclose crime statistics for incidents that occur on cam-

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20. Joseph Shapiro, *Campus Rape Victims: A Struggle for Justice*, NPR, Feb. 10, 2010, http://www.npr.org/templates/story/story.php?story Id=124001493.

21. Cantalupo, *supra* note 19, at 236–42.

22. U.S. DEP'T OF JUSTICE & DEP'T OF EDUC., RESOLUTION AGREEMENT: AMONG THE UNIVERSITY OF MONTANA–MISSOULA, THE U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, EDUCATIONAL OPPORTUNITIES SECTION AND THE U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS (2013), *available at* http://www.justice.gov/crt/about/edu/documents/montanaagree.pdf; U.S. DEP'T OF JUSTICE & DEP'T OF EDUC., RESOLUTION AGREEMENT: UNIVERSITY OF NOTRE DAME (2011), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/investigations/05072011-b.pdf.

23. 20 USC § 1092(f)(1)–(15) (2012).

24. *Summary of the Jeanne Clery Act*, CLERY CTR., http://clerycenter.org/summary-jeanne-clery-act (last visited Sep. 12, 2014). By its 1998 amendments Congress renamed the Campus Security Act in honor of Jeanne Clery.

25. *Id.* These changes resulted from the 2000 and 2008 amendments.

26. *Id.* The 2008 amendment made this addition.

pus, in unobstructed public areas immediately adjacent to or running through the campus and at certain non-campus facilities.

- Issue timely warnings about Clery Act crimes which pose a serious or ongoing threat to students and employees.
- Devise an emergency response, notification, and testing policy.
- Compile and report fire data to the federal government and publish an annual fire safety report.
- Enact policies and procedures to handle reports of missing students. [27]

As with Title IX, the Department of Education rarely fines colleges and universities for Clery Act violations. NPR reported that the Department of Education has only fined six colleges and universities.[28]

C. Guidance on Sexual Harassment from the Department of Education

In an effort to assist colleges and universities in complying with the law, the Department of Education Office for Civil Rights periodically issues guidance documents which contain information that educational institutions can use when investigating and resolving allegations of sexual harassment. Very comprehensive guidance documents were issued in 1997,[29] and another document was issued in 2001 that incorporated two Supreme Court cases on the topic.[30] At the time of Title IX's passage, there was uncertainty whether it included sexual harassment. In the 1990s, the Supreme Court decided this in the affirmative with two cases. The first involved alleged sexual harassment between a student and a teacher, and the second case involved peer-on-peer sexual harassment.[31] The Supreme Court adopted a standard for when an educational institution would be liable for a private action under Title IX for monetary damages.[32] For liability, the Court re-

27. *Id.*

28. Shapiro, *supra* note 20.

29. Office for Civil Rights, *Sexual Harassment Guidance 1997*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html (last visited Sept. 12, 2014).

30. Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP'T OF EDUC., Jan. 19, 2001, http://www2.ed.gov/about /offices/list/ocr/docs/shguide.html.

31. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

32. *Davis*, 526 U.S. at 651; *Gebser*, 524 U.S. at 277.

quired actual knowledge of a school official who had authority to address the harassment, deliberate indifference by that official, and harassment that was "severe, pervasive, and objectively offensive."[33]

As discussed above, the Revised Guidance made clear that the Supreme Court opinions with their legal standards applied to private actions, not administrative proceedings.[34] Other highlights included:

- Emphasizing that separate policies and grievance procedures help the community understand the nature of sexual harassment and that it will not be tolerated.
- Giving guidance on actions schools could take when a victim wanted to remain anonymous.
- Identifying which employees needed to be trained and the content of the trainings. In particular, the Department emphasized what the Title IX coordinator needed to know including basic definitions and familiarity with how grievance procedures operate.
- Supplying examples of how to eliminate hostile environments when many students were involved.[35]

The Department of Education issued a Dear Colleague letter in 2011 that supplemented its previous guidance.[36] Highlights of that letter included:

- Schools are not relieved of their investigatory obligations just because law enforcement is also investigating the behavior. In addition, schools need to address the effects of the harassment before the investigation is concluded.
- The correct standard for grievance procedures is preponderance of evidence, not clear and convincing.
- Both parties must have equal access to evidence, the same opportunities to present witnesses, have an attorney present, or appeal a decision.
- Grievance procedures must be posted and include timeframes for all major stages of the procedure. Victims must be advised of their right to file a grievance.
- All institutions must identify and publish the name of a Title IX coordinator and ensure that person is properly trained in both sexual harassment and the grievance procedures.
- Schools may have an obligation to investigate off campus activities if the effects create a hostile environment on campus.
- FERPA does not prohibit, and Title IX requires, the outcome of a disciplinary proceeding against a perpetrator be communicated to the

33. *Davis*, 526 U.S. at 633.
34. *See supra* note 17 and accompanying text.
35. *See id.*
36. *Dear Colleague Letter,* April 2011, *supra* note 11.

witness.

- Institutions are encouraged to develop proactive measures to prevent sexual harassment including preventive education programs and victim resources.

D. The Campus Sexual Violence Elimination Act

As part of the Violence Against Women Reauthorization Act (VAWRA), President Obama signed into law in March 2013 a new provision known as the Campus Sexual Violence Elimination Act (Campus SaVE Act) which imposes new obligations on colleges and universities.[37] The Campus SaVE Act codifies some, but not all, of the provisions in the April 2011 Dear Colleague Letter. Institutions now have new reporting requirements, new student disciplinary requirements and new requirements to educate students and employees about sexual violence. Specifically, institutions as part of their annual reporting requirements under the Clery Act must report by October 1, 2014, incidents of domestic violence, dating violence, and stalking that are reported to campus security authorities or local police agencies.[38] In addition, institutions must report on programs they use for prevention of these offenses as well as the procedures they utilize, including the standard of evidence used for disciplinary procedures.[39]

The new changes address necessary components of prevention and awareness programs, including bystander intervention education for all incoming students and new employees; however, the statute does not make clear whether these programs must be mandatory or just available.[40] The prevention and awareness programs must be ongoing and should include risk reduction tips and warning signs of abusive behavior.[41] Investigations and disciplinary proceedings should be conducted by school personnel who receive specific training on domestic violence, sexual assault, and stalking.[42]

In addition, several directives relate to what procedures must be used in investigating and conducting student disciplinary hearings. Some of the additions center upon providing certain information and services to the victim. Information must be given to the victim about the disciplinary policy and potential sanctions as well as contact information for counseling services, legal assistance, and medical care.[43] Victims can request a change in

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37. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89–92 (2013).
38. *Id.* at § 304(a)(1)(B)(iii).
39. *Id.* at § 304(a)(5).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*

academic, living, transportation, and working situations to avoid a hostile environment.[44] Colleges and universities must also assist them if they want to obtain or enforce a no contact directive or restraining order.[45] Finally, campus authorities must assist victims if they choose to report the incident to law enforcement.[46]

Other rights apply to both the victim and the accused, including that proceedings be prompt, fair, and impartial.[47] Both parties may have others present at the proceeding, and both shall be simultaneously informed of the outcome in writing.[48] Although the policy describing the disciplinary policy must include the standard of evidence to be used, no specific standard is articulated in the statute itself.[49] The 2011 Dear Colleague letter specifies the standard as "preponderance of the evidence", but Congress did not incorporate this standard into the statute, which is causing confusion about what standard institutions are required or permitted to use. Finally, institutions must address in their policies how victims' confidentiality will be protected.

E. Reactions to the Campus SaVE Act

One can feel sympathy for campus administrators faced with complying with so many laws. The Campus SaVE Act adds yet another layer of directives and guidance that campus administrators must integrate with the previous body of guidance which is not always consistent. Despite this, many sexual assault advocates hailed the new legislation as a major advance for women.[50] Lawmakers also celebrated its passage with its sponsors promising it would give colleges and universities more guidance and provide the public with more information.[51]

Although many advocacy groups pushed for its passage, some warn that the Campus SaVE Act does not codify the Dear Colleague letter, but instead waters down the protections afforded under Title IX. An especially vocal critic is Wendy Murphy, a New England attorney specializing in

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44. *Id.*
45. *Id. See* amended ¶ 8(B)(iii)(IV).
46. *Id. See* amended ¶ 8(B)(iii)(III)(bb).
47. *Id. See* amended ¶ 8(B)(iv)(I)(aa).
48. *Id. See* amended ¶ 8(B)(iv)(II-III).
49. *Id. See* amended ¶ 8(A)(ii).
50. Tyler Kingkade, *College Sexual Assault Victim Advocates Hail VAWA Passage*, HUFFINGTON POST, Mar. 1, 2013, http://www.huffingtonpost.com/2013/03/01/college-sexual-assault-vawa_n_2786838.html.
51. Kristin Lombardi, *Campus Sexual Violence Elimination Act Headed For President's Signature*, CTR FOR PUBLIC INTEGRITY, Mar. 1, 2013, http://www. publicintegrity.org/2013/03/01/12259/campus-sexual-violence-elimination-act-headed-presidents-signature.

crime victims, women, and children.[52] She attacks the law on several fronts and questions whether it is a result of the lobbying of elite schools which the OCR has been investigating for years.[53] In particular, she takes issue with the standard of evidence provision, arguing that institutions could now choose a more stringent standard than the "preponderance of evidence" that the Dear Colleague letter previously instructed institutions to use with sexual harassment investigations.[54] She also raises concerns over the mandate to apply state criminal law standards to a determination of whether a federal civil rights violation occurred.[55] For example, she points to criminal law standards pertaining to sexual assault that require proving non-consent, penetration, and force as compared to federal civil rights laws that merely require that the sexual assault be "unwelcome," offensive and based on sex.[56]

On February 24, 2014, a University of Virginia rape victim filed a lawsuit to halt the implementation of the Campus SaVE Act scheduled to go into effect on March 7.[57] She filed the lawsuit to prevent provisions of the new Campus SaVE Act from being applied to her previously filed Title IX lawsuit.[58] The underlying Title IX lawsuit centers upon an allegation that the University of Virginia mishandled her rape investigation by falsifying medical records and destroying photographs of her injuries.[59] The Department of Education and the Department of Health and Human Services investigation of UVA is now over 18 months old.[60] The lawsuit requests that Campus SaVE not be applied by the agencies to the ongoing investigation because the changes in the law would be detrimental to her case.[61] She argues that the new law allows a change to the standard of evidence which provides her with less protection and thereby negatively impacts her claim.[62] She asks the court to not only halt the implementation of the

52. Wendy Murphy, *The Harsh Truth About Campus Sexual Assault*, WENDY MURPHY LAW, http://wendymurphylaw.com/the-harsh-truth-about-campus-sexual-assault/ (last visited Sep. 12, 2014).

53. *Id.*

54. *Id.*

55. Wendy Murphy, *Campus 'SaVE' Law Does Exact Opposite*, WOMEN'S ENEWS, Jan. 22, 2014, http://womensenews.org/story/education/140121/campus-save-law-does-exact-opposite#.Uz8FeagwdcY.

56. *Id.*

57. James R. Marsh, Press Release*: Landmark Civil Rights Action Filed By Campus Rape Victim to Halt New Federal Law*, PR NEWSWIRE, March 2, 2014, http://www.prnewswire.com/news-releases/landmark-civil-rights-action-filed-by-campus-rape-victim-to-halt-new-federal-law-248124061.html.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

Campus SaVE Act in her case, but for all women, alleging it is unconstitutional on several grounds because it treats victims of sexual violence differently than other protected class categories.[63] Multi-year Title IX investigations against Harvard and Princeton continue which could also be impacted by the change in law.[64]

The press release quotes Dr. Bernice Sandler:

> SaVE places a greater burden of proof on the victim, while also subjecting women to disparate legal protections depending on where their college is located because SaVE incorporates state criminal law standards into assessments of federal civil rights violations. Title IX, as a federal law, was intended to protect the rights of all women equally, no matter where they go to college. I hope the federal court takes steps to protect women's right to equality and safety in education.[65]

The outrage over the proper standard of evidence originates not only from the victims but also the accused. Several men who were disciplined for a Title IX offense recently filed lawsuits against their universities.[66] Like their female accusers, these men also use Title IX to allege that their rights were violated.[67] Specifically the men complain about a lack of training of officials, subpar investigations, and a bias against them.[68] Lawsuits were filed against Xavier University, Vassar College, Williams College, Bucknell University, St. Joseph's University, and College of the Holy Cross.[69] In one of the cases, a former basketball player sued Xavier over his expulsion for a sexual assault after the County Prosecutor did not bring rape charges, finding the sex to be consensual.[70]

III. ISSUES THAT REMAIN: THE NEGOTIATED RULEMAKING PROCESS

The Department of Education is currently engaged in negotiated rulemaking which will culminate in new regulations to implement the changes that the Violence Against Women Act (VAWA) made to the Clery Act.[71] Proposed regulations will probably not be available until late 2014 and un-

63. *Id.*
64. Wendy Murphy, *supra* note 52.
65. Marsh, *supra* note 57.
66. John Lauerman, *College Men Accused of Sexual Assault Say Their Rights Violated*, BLOOMBERG, Dec. 16, 2013, http://www.bloomberg.com/news/2013-12-16/college-men-accused-of-sexual-assault-say-their-rights-violated.html.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Negotiated Rulemaking 2013-2014 Violence Against Women Act (VAWA)*, U.S. DEP'T OF EDUC., *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa.html.

til then institutions are to "make a good faith effort to comply with the statutory requirements."[72] Prior to the three negotiation sessions, the Department held three conference calls with institutional administrators, campus public safety officials, and advocacy groups to help get feedback and set the agenda.[73] Questions that arose during these calls centered upon:

- how new crimes would be reported;
- how new terms would be defined;
- how VAWA would impact institutional disciplinary proceedings and crime investigations;
- how the Clery Act will interact with institutional responsibilities under Title IX;
- how institutions would implement the new education and training requirements; and
- possible content guidelines for the new education and training requirements.[74]

Three negotiation sessions occurred during spring of 2014. In addition, the Department of Education published issue papers to help direct the discussions. Nine primary negotiators and nine alternative negotiators from different constituencies took part in the negotiated rulemaking with three Department of Education representatives and two facilitators.[75] The Department of Education representatives introduced each section of the regulations by walking the participants through the text and the rationale behind the choices made. The facilitators then allowed the negotiators to comment on the provisions. At the end of the meetings, the public participants could offer their commentary. AAUW blogged the proceedings and interested

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72. Lynn Mahaffie, *Implementation of Changes Made to the Clery Act by the Violence Against Women Reauthorization Act of 2013*, INFORMATION FOR FINANCIAL AID PROFESSIONALS, May 29, 2013, http://www.ifap.ed.gov/eannouncements/052913ImplementofChangesMade2CleryActViolenceAgainstWomenReauthorizationAct2013.html.

73. Summary of the Conference Calls with Campus Safety Advocates (Dec. 17, 2013), http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawacall-safetyadvocs.html; Summary of the Conference Calls with Institutional Administrators (Dec. 11, 2013), http://www2.ed.gov/policy/highered/hearulemaking/2012/vawacall-institadmin.html; Summary of the Conference Calls with Public Safety Officials (Dec. 12, 2013), http://www2.ed.gov/policy/highered/hearulemaking/2012/vawacall-publicsafety.html.

74. *See supra* note 73.

75. Negotiators represent many different stakeholders including various institutions' representatives (two-year public, four-year public, private non-profit, private for-profit), LGBT representatives, campus safety officials, campus safety advocates, legal assistance organizations, student affairs representatives, students, etc. For a full list of negotiators, see U.S. DEP'T OF EDUC., VAWA NEGOTIATED RULEMAKING COMMITTEE 2013, *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-negotiators2014.pdf (last visited Sep. 12, 2014).

parties can read the postings at their website.[76]

A. What definitions should we establish for new terms in the statute?[77]

Several new terms were added to the Clery Act that remain undefined in the regulations. One sticking point with using the same definitions that the Violence Against Women Act uses is that certain definitions are dependent upon the definition given in a particular jurisdiction. For example, the VAWA domestic violence definition specifically refers to the domestic or family violence laws of the jurisdiction. This becomes problematic for colleges and universities with campuses in multiple jurisdictions and will make it difficult to compare data between colleges and universities located in various jurisdictions. Further complicating the matter is that the definitions used in the Clery Act for reporting criminal offenses may be different than those required to be used for training students and employees. Training programs must use statutory definitions found in their respective jurisdictions.[78] What this could mean is that institutions will be forced to report incidents that occur on campus based on definitions in the regulations implementing the Clery Act, but these incidents may not actually be a crime in the jurisdiction.[79]

The definitions for dating violence and stalking also leave ambiguities. For example, what duty do colleges and universities have to investigate the nature of a dating relationship to ascertain whether it meets the definition of either stalking or dating violence? Some may argue that asking the victim about the nature of the relationship should be sufficient.[80] Several issues surround the stalking term, including how it differs from intimidation. Another major uncertainty is how to report cyberstalking since it does not neatly fit into any of the existing geographical categories currently used for reporting. The initial recommendations from the subcommittee would re-

76. *Live Blog Covers New Campus Sexual Assault Rules*, AAUW, Jan. 13, 2014, http://www.aauw.org/2014/01/13/live-blog-campus-sexual-assault-rules/; *Live Blog: Campus SaVE Rulemaking Day Four*, http://live.24liveblog.com/1259191 (Feb. 25, 2014).

77. VIOLENCE AGAINST WOMEN ACT NEGOTIATED RULEMAKING COMMITTEE, ISSUE PAPER #1, *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-issue1definitions.pdf [hereinafter *Issue Paper #1*].

78. Hillary L. Pettegrew, *The Campus SaVE Act: A Compliance Guide*, UNITED EDUCATORS RISK RESEARCH BULLETIN, *available at* https://www.ue.org/Libraries/Corporate/The_Campus_SaVE_Act_A_Compliance_Guide.sflb.ashx.

79. *Live Blog*, *supra* note 76. The posting at 16:00 on Day One discusses this very point. More discussion on this can be found on Day Two at 14:50–15:08.

80. *See Issue Paper #1*, *supra* note 77, at 2. An incident may be labeled dating violence if the perpetrator is one "who is or has been in a social relationship of a romantic or intimate nature with the victim." *Id.*

quire reporting of cyberstalking when the activity is sent or received on campus, but negotiations still continue on this point.[81] Other definitional issues arise when attempting to harmonize the FBI's definitions of sex offenses with VAWA's definitions.

Finally, the education programs required by the statute leave many questions unresolved. Institutions want more direction about the distinction between primary and ongoing prevention and awareness programs. Also, confusion exists about the meaning of "ongoing," "campaign," "awareness programming," "primary prevention," and "bystander intervention." Early negotiations define primary prevention as education that is designed to prevent sexual violent behavior from occurring by promoting positive and healthy behaviors based on a public health model.[82] In contrast, awareness programming focuses more on intervention and making sure participants know how to support and respond to sexual violence once it occurs.[83] More guidance needs to be given on how institutions are expected to track participation in these trainings.[84] Finally, the statute requires ongoing training for faculty and students but does not specifically mention staff, a major population on campus who interact with students on a regular basis (e.g. Resident Advisors, Advisors, Teaching Assistants, etc.) and often receive reports of sexual harassment.

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81. U.S. DEP'T OF EDUC., STALKING SUBCOMMITTEE RECOMMENDATIONS, *available at* https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-stalkingrecomm.pdf.

82. U.S. DEP'T OF EDUC., PREVENTION-TRAINING SUBCOMM, PREVENTION RECOMMENDATIONS, *available at* https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-preventiontrng.pdf

83. *Id.*

84. Some confusion currently exists as to whether these trainings must be mandatory. The Department of Education appears to be taking the position that these programs are not mandatory. *See Live Blog: Campus SaVE Rulemaking Day Four*, AAUW (Feb. 25, 2014, 11:14 AM), http://live.24liveblog.com/1259191. "Department indicating they see no reason that these programs should have mandatory attendance by all students." *Id.* Thinking the trainings would be mandatory spurred some universities to start designing programs to reach all students. For example, the University of Louisville initially planned for new students to complete the alcohol.edu/Haven (Helping Advocated for Ending Violence Now) computer module, which can track completion. AlcoholEdu/Haven, UNIV. OF LOUIVILLE, http://louisville.edu/campushealth/alcoholedu-haven (last visited Sep. 12, 2014). Students not completing the module would be unable to register for spring classes until they complete it. *Id.*

B. How should institutions count and disclose statistics for reported offenses in the new crime categories?[85]

Several issues surround how institutions will tally and disclose information. Currently, institutions count multiple offenses that take place within a single incident differently depending on how they are categorized. For example, the protocol for some incidents counts only the most serious offense (e.g. a murder and not a rape) while at other times, offenses are counted individually if they involve a specific offense such as a hate crime. The Department of Education must decide whether these new offenses will be included in a Hierarchy Rule of reporting or reported individually in a different place of the report.[86] In addition, problems may arise when using the FBI's Uniform Crime Reporting system to count incidents of domestic violence, dating violence, and stalking incidents. The Clery Act does not require the reporting of simple assaults. Under the FBI reporting system, stalking is reported as a simple assault as well as domestic violence and dating violence that does not involve serious injuries or use of a weapon. One can imagine this simple assault classification will result in many incidents not being reported because much of the violence on campuses involves threatening behavior which does not rise to the more dangerous terrorism type behaviors that are associated with long-term relationship domestic violence.[87] Moreover, the institutional safety officers expressed specific concerns about making sure the definitions are clear enough for officers to make judgments and avoid engaging in fine distinctions in the field which would be burdensome and lead to inconsistent application.[88] Although officers are well accustomed to what qualifies as domestic violence, they are not as familiar with how to identify dating violence.[89]

Additional issues arise with stalking since it involves a pattern of behav-

85. VIOLENCE AGAINST WOMEN ACT NEGOTIATED RULEMAKING COMM., ISSUE PAPER #2: COUNTING REPORTED OFFENSES IN NEW VAWA CATEGORIES, *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-issue2counting.pdf.

86. At the time this article was written, the negotiators had not reached consensus about this issue and a subcommittee was going to be formed to discuss it further. Additional work is necessary to resolve this point as some negotiators think counting this would lead to a skewed perception of over-counting while others think not counting would fail to provide a clear picture of what is occurring on campuses. Telephone Interview by Susan Duncan with Holly Rider-Milkovich, Four Year Public Institutions Non-Federal Alternate Negotiator & Director, Sexual Assault Prevention and Awareness Center and Co-Chair, Abuse Hurts Initiative, Univ. of Michigan (Feb. 27, 2014) [hereinafter Interview with Holly Rider-Milkovich].

87. Telephone Interview by Susan Duncan with Sharon LaRue, Director, University of Louisville PEACC Program (Feb. 26, 2014) [hereinafter Interview with Sharon LaRue].

88. Interview with Holly Rider-Milkovich, *supra* note 86.

89. *Id.*

ior and institutions will need guidance whether they must report the first incident or wait until a certain number of incidents have occurred. Again, this presents problems because one could argue one incident of stalking may be serious enough if the individual is in fear of his or her life or safety.[90] Initial subcommittee recommendations advise that the passage of time between stalking incidents supports counting each as a separate incident.[91]

C. What process should institutions use for cases involving sex offenses and related incidents?[92]

Many questions revolve around the Campus SaVE Act's modification of the procedures institutions will now be required to follow as well as information they will be required to share with students about those procedures. The statute requires institutions to identify the standard of evidence that will be used in disciplinary procedures. Previous guidance from the Department of Education required institutions to use a preponderance of the evidence standard for sexual harassment matters, but, by failing to incorporate this standard into the law, Congress arguably allowed colleges and universities to make individualized decisions on the appropriate standard of evidence. During the rulemaking sessions, the Department of Education articulated that it would be statutory overreach to require a preponderance of evidence standard on matters that did not involve elements of sexual harassment, but that standard was still required for all sexual harassment matters.[93] Nevertheless, institutions may still choose to use that standard even for non-sexual harassment matters. Regardless, since most incidents of domestic or dating violence do involve elements of sexual harassment, the preponderance of evidence standard will be mandated much of the time.[94]

A similar question arises as to whether appeals must be granted or if that is left with the institution's discretion.[95] A persistent complaint of previous Title IX procedures was the often-lengthy time it took for an investigation to be completed. The new law requires that the proceedings provide a "prompt, fair and impartial investigation and resolution", but debate still

90. Interview with Sharon LaRue, *supra* note 87.

91. U.S. DEP'T OF EDUC., VAWA STALKING SUBCOMM., STALKING RECOMMENDATIONS, *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-stalkingrecomm.pdf.

92. VIOLENCE AGAINST WOMEN ACT NEGOTIATED RULEMAKING COMM., ISSUE PAPER #3: LEGAL PROCESSES IN CASES INVOLVING SEX OFFENSES AND RELATED INCIDENTS, *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-issue3disciplinary.pdf.

93. Interview with Holly Rider-Milkovich, *supra* note 86.

94. *Id.*

95. Another issue is the dearth of information available to victims on the process used with appeals.

exists whether that requires the final determination to be completed within any specified timeframe. Other provisions suffering from vagueness include the type of training required for the decision-makers of the disciplinary proceedings as well as how to provide simultaneous written decisions to the parties. Questions still remain about the role of a representative at the proceedings and what they can and cannot do, including examining witnesses. Specifically, some state laws or institutions allow the accused to have an attorney and the question arises about whether that right should also be given to the accuser.[96] The Department of Education's position remains that students have a right to any person they choose to be their advisor and campuses can limit the advisor's roles as long as that is applied equally to both parties.[97] Finally, some gaps in the statute surfaced that need to be resolved. For example, the current statute does not prohibit an institution from requiring a victim to sign a "gag order" before releasing the final determination, despite previous guidance from the Department of Education that colleges and universities may not engage in such a practice.

As currently written, the law requires institutions to only provide final determinations and sanctions, but no rationale for these decisions. Not providing the rationale makes it very difficult for victims to determine whether they should appeal or not. For example, when a complaint is dismissed and no rationale is communicated to the victim, a person has no ability to evaluate whether the investigation and/or decision were misguided or were fair. The Department of Education did not include any regulations regarding whether rationales may or may not be included in the first version of the regulations, because they were still conferencing with the FERPA experts concerning the legality of such a requirement.[98]

D. What is the applicable jurisdiction for purposes of certain disclosures?[99]

Jurisdictions define the terms domestic violence, dating violence, stalking, and consent differently or not at all. As a result, during the negotiated

96. Interview with Sharon LaRue, *supra* note 87. Some movement is gaining traction to train attorneys to serve as advocates for the victims. Often the accused brings counsel, yet the accusers do not engage counsel because of financial barriers or not wanting to tell their family. Unlike in a criminal proceeding when the victim can discuss the case with a prosecutor, this lack of an attorney to guide the victim in student proceedings seems to make the process unjust.

97. Interview with Holly Rider-Milkovich, *supra* note 86. Some negotiators continue to object to the presence of attorneys.

98. *Id.*

99. VIOLENCE AGAINST WOMEN ACT NEGOTIATED RULEMAKING COMM., ISSUE PAPER #4: APPLICABLE JURISDICTION, *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-issue4jurisdiction.pdf.

rulemaking process, the agency will need to grapple with how to handle these discrepancies and still make the definitions meaningful to the public. In addition, schools need guidance on the appropriate jurisdiction they should select to ascertain the legal definitions and how much deference this decision will receive.

E. What technical changes are necessary to update the Clery Act regulations and reporting systems?[100]

Issue Paper #5 serves as a placeholder to remind the agency to make changes to the Clery Act regulations and reporting system to reflect recent changes in other laws. These include changes concerning the memorandum of understanding between campus security personnel and law enforcement, incorporating an anti-retaliation clause into the regulations, and updating the bias categories in hate crimes as well as the definitions of sex offenses.

IV. IMPORTANT STRATEGIES SCHOOLS SHOULD ADOPT

As important as it is to have strong laws coupled with rigorous enforcement, colleges and universities must utilize additional non-legal strategies in their efforts to decrease sexual harassment on campus. Institutions can implement some of these while they wait on further clarity from the Department of Education's regulations. Although space prevents a thorough discussion of these strategies, they deserve to at least be highlighted.

A. Involve the Student Advocates from the Beginning

When developing procedures, institutions should strongly consider allowing reports to not only be made to the Dean of Students office or Public Safety officers, but also to the student advocate's office. A referral to the advocate's office from the Dean of Students or Public Safety does not produce the same result as having a person meet with the advocate at the time of the report to process the experience.[101] One more step in the system can be discouraging for a victim in a time of crisis. Research demonstrates that immediate advocacy helps the student recover in a timely manner and

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100. VIOLENCE AGAINST WOMEN ACT NEGOTIATED RULEMAKING COMM., ISSUE PAPER #5: TECHNICAL CHANGES, *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-issue5technicals.pdf.

101. Rebecca Campbell, *Rape Survivors' Experiences with the Legal And Medical Systems: Do Rape Victim Advocates Make A Difference?* 12(1) VIOLENCE AGAINST WOMEN 30 (2006); Rebecca Campbell et al., *The Effectiveness Of Sexual Assault Nurse Examiner (SANE) Programs: A Review Of Psychological, Medical, Legal, And Community Outcomes*, 6(4) TRAUMA, VIOLENCE, AND ABUSE 313 (2005) (examining studies finding victims experience secondary trauma when reporting to police, prosecutors, or medical personnel).

move on to achieve their academic and life goals.[102] Protocols should be revised to incorporate the advocate from the first initial stages.

B. Educate and Empower the Bystanders

Both the President and Vice President continue to challenge this nation to change its attitude about sexual assault and view it as a crime and not a private matter. When drafting the initial Violence Against Women Act, then Senator Biden stated,

> Through this process, I have become convinced that violence against women reflects as much a failure of our nation's collective moral imagination as it does the failure of our nation's laws and regulations. We are helpless to change the course of this violence unless, and until, we achieve a national consensus that it deserves our profound public outrage.[103]

Myths continue to persist as well as rape and sexual assault supportive attitudes.

Current research indicates that then Senator Biden was absolutely right in his assessment that attitude and behavioral change will not occur until the broader community becomes involved.[104] Sexual assault prevention cannot be limited to professionals in the field, but rather requires the general public to take responsibility for its elimination.[105] Strategies need to move beyond policies and procedures to changing climates making sexual violence an unacceptable norm and therefore more unlikely to occur.[106] A wealth of research exists exploring what motivates and deters bystanders from getting involved, including not understanding the need, lacking the skills to intervene, and viewing costs as outweighing the benefits.[107]

The role of bystanders remains a key component then to successful violence prevention strategies.[108] Many evidence based bystander intervention trainings exist including the one designed by Dr. Dorothy Edwards.[109] The

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102. Campbell et. al., *supra* note 101; Rebecca Campbell et al., *Preventing the "Second Rape": Rape Survivors' Experiences with Community Service Providers*, 16 J. OF INTERPERS. VIOLENCE 1239 (2001).

103. WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, *supra* note 3, at 33–34.

104. Victoria L. Banyard, Elizabeth G. Plante & Mary M. Moynihan, *Bystander Education: Bringing a Broader Community Perspective to Sexual Violence Prevention*, 32(1) J. OF CMTY. PSYCHOL. 61, 64 (2004).

105. *Id."*

106. *Id.* at 66.

107. *Id.* at 67–69. *See also* Victoria L. Banyard, Mary M. Moynihan & Maria T. Crossman, *Reducing Sexual Violence on Campus: The Role of Student Leaders as Empowered Bystanders*, 50(4) J. OF C. STUDENT DEV. 446, 449 (2009).

108. Michael Winerip, *Stepping Up to Stop Sexual Assault*, N.Y. TIMES, Feb. 9, 2014, at ED14.

109. *The Green Dot etc. Strategy*, GREEN DOT ETCETERA,

Green Dot Bystander Training empowers individuals to use their voices to produce a change in a climate that until now either accepted sexual violence or at least turned the other way.[110] The concept is a simple one that asks participants to imagine a map with red dots symbolizing all the acts of violence that occur within their community. These red dots reflect a single choice to harm another.[111] The participants then imagine if they could cover the map with green dots, which symbolizes a single choice of action which makes it less likely for a red dot to happen.[112] The training addresses the challenges and barriers that exist for students trying to intervene in a situation.[113] By offering a framework that includes a multifaceted approach of either directly intervening, delegating, or distracting, acts of violence can be prevented by the bystanders.[114] The belief behind the training is that cultural changes only occur when enough individuals believe their voice matters.[115] This training will be most impactful if conducted during the first few weeks of the semester, which are considered high-risk times for sexual assault.[116]

C. Engage Men Directly

An important dynamic to changing the culture is to redefine the discussion that often characterizes sexual assault as a woman's issue. Men too experience sexual assault although not at the same levels as women.[117] Men's involvement, however, in preventing sexual assault against women is vital because of their ability to influence and change social norms among their peers.[118] Men commit the majority of sexual assaults, although only a minority of men commit assaults. [119] All men, however, will be necessary to deconstruct stereotypes and correct myths and misperceptions that con-

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http://www.livethegreendot.com/gd_strategy.html (last visited Sep. 12, 2014); *Connections with Renee Shaw (#841): Dorothy J. Edwards*, KETVIDEO (July 26, 2013) http://www.ket.org/cgi-bin/cheetah/watch_video.pl?nola=KCWRS+000841 [hereinafter KET].

110. KET, *supra* note 109.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *See* SCARCE, *supra* note 2.

118. Patricia M. Fabiano et al., *Engaging Men as Social Justice Allies in Ending Violence Against Women: Evidence for a Social Norms Approach,* 52:3 J. OF AM. COLL. HEALTH 105, 105 (2003).

119. Michael Flood, *Changing Men: Best Practice In Violence Prevention Work With Men*, HOME TRUTHS CONFERENCE: STOP SEXUAL ASSAULT AND DOMESTIC VIOLENCE: A NATIONAL CHALLENG (2004), *available at* http://www.aifs.gov.au/acssa/docs/Flood_Vioprev_HT.pdf.

tribute to the gender inequality which enables gender-based violence.[120] Barriers exist to engaging men, including resistance by them, but recent research on this topic as well as male initiatives around the country should help guide colleges and universities.[121]

D. Address Alcohol Abuse on Campus

As discussed above, sexual assaults often occur in combination with drinking.[122] Any prevention awareness program needs to also include education about how alcohol plays a key factor in facilitating sexual assault. It seems common sense that educational institutions should couple their trainings on alcohol use and sexual harassment together, however, very few do.[123] In addition, universities and colleges need to carefully evaluate incidents to monitor how often alcohol is a factor. This data will provide a baseline for the school administration to inform decisions about future programming and policies which are necessary for changing campus behavior. Administrators should be careful not to assume that alcohol is the cause of sexual assaults or use it as a scapegoat. Many experts in the field caution that too much focus on alcohol leads to victim blaming and diverts our focus from the true causes of sexual assaults, however, not addressing alcohol use as part of a multifaceted strategy seems ill advised.

E. Use Published Sanctions

The Campus SaVE Act requires institutions to publish the possible sanctions, but unless they are used victims will lose confidence in the system and not report. Data exists today that indicates schools do not subject offenders to rigorous sanctions despite their guilt which leaves victims feeling re-victimized.[124] Victims watch to see what happens. The new requirements in the Campus SaVE Act that require institutions to publish

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120. Mary Stathopoulas, *Engaging Men in Sexual Assault Prevention*, 14 ACSSAWRAP 2 (2013), *available at* http://www.aifs.gov.au/acssa/pubs/wrap/wrap14/wrap14 .pdf.

121. *Id.* at 13–17.

122. Alyssa S. Kahan, *Student Sexual Assault: Weathering the Perfect Storm*, UNITED EDUCATORS' RISK RESEARCH BULLETIN (2014), *available at* https://www.ue.org/Libraries/Corporate/Student_Sexual_Assault_Weathering_the_Perfect_Storm.sflb.ashx. "In 92 percent of claims with losses, the accuser was under the influence of alcohol, and more than 60 percent of accusers were so intoxicated that they had no clear memory of the assault." *Id.* at 3.

123. Christopher P. Krebs et al., *The Campus Sexual Assault (CSA) Study: Final Report*, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE 6-4 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf.

124. Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY, Feb. 24, 2010, *available at* http://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault. *See also* Cantalupo, *supra* note 19.

possible sanctions as part of their procedural notifications duty is a step in the right direction, however, it will be of little value if not utilized.

CONCLUSION

Everyone agrees that sexual violence on college and university campuses must be stopped. Unfortunately, for a variety of reasons current laws and regulations did not make this happen. The new Campus SaVE Act provides hope that new requirements will motivate colleges and universities to address the issue with a renewed focus. The new law contains many ambiguities, however, which will need to be addressed in the negotiated rulemaking process or, perhaps, even by the courts. Until more details are fixed, it is too early to determine if this law will be a net positive or negative for victims of sexual assaults. In the interim, institutions will need to use their best efforts to comply with the law and should stay updated on the negotiated rulemaking process and any proposed regulations. No matter what the ultimate verdict is concerning the benefit of the Campus SaVE Act, the good news is that the issue of stopping sexual violence is once more at the forefront of our national discourse.