

# CAMPUS VIOLENCE: UNDERSTANDING THE EXTRAORDINARY THROUGH THE ORDINARY

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## INTRODUCTION

The tragic events at Virginia Tech and Northern Illinois University, the two most recent mass shootings on college campuses, have focused many on the responsibilities of colleges and universities to prevent and respond to such violence. Thankfully, in statistical terms, this type of campus violence can be considered relatively extraordinary. In contrast, the only type of campus violence that is unfortunately common enough to be characterized as “ordinary” is peer sexual assault and similar forms of campus gender-based violence.

Despite their differences in frequency, there are links and commonalities between the ordinary and the extraordinary when it comes to campus violence. Most obviously, gender-based violence has played a role in some of the shootings, most starkly in the motivations of Marc Lépine, who targeted and killed fourteen women for being “feminists” in the École Polytechnique massacre<sup>1</sup> and less clearly in the case of Sueng Hui Cho, the

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1. See Barry Came et al., *Montreal Massacre: Railing Against Feminists, A Gunman Kills 14 Women on a Montreal Campus, Then Shoots Himself*, MACLEAN’S MAG., Dec. 18, 1989, at 14, available at <http://www.rapereliefshelter.bc.ca/dec6/macleans.html>.

Virginia Tech gunman reported for stalking women students multiple times before going on his shooting rampage.<sup>2</sup> Less obviously, similar laws and liability issues can apply to these ordinary and extraordinary forms of campus violence, and colleges and universities often react and respond to these different types of campus violence in similar ways. Both forms of violence present the question of what colleges and universities should do to protect students and other members of the campus community who are or who could become victims of violence by student peers or others to whom the institution is similarly obligated. How should the law inform campus structures and systems, and how far beyond the basic legal requirements can and should these structures go?

While it is fortunate that mass shootings are so rare, their infrequency can make them harder to analyze and understand so as to prevent future violence and respond effectively should it occur. Because sexual violence has emerged as the most common form of campus peer violence, understanding it and applying that understanding to less common forms of violence may help us to prevent and understand what the proper responses should be to both forms of violence. In addition, because peer sexual violence on college campuses happens so frequently and therefore harms so many more people, it is an important subject worthy of examination on its own and should not be forgotten in the sensationalism that often surrounds campus shootings.

For these reasons, this article explores the typical college and university responses to ordinary campus violence, what the law requires of institutions in these cases, and what best institutional practices should be both in response to the law and beyond the bottom-line legal requirements. It focuses in particular on how college and university student disciplinary systems deal with cases of peer sexual assault, compares and contrasts the typical approach with how the current law and best practices treat campus sexual violence, and considers the goals and policy objectives that animate or should animate college and university disciplinary proceedings. It argues that drawing student disciplinary procedures in peer sexual violence cases primarily from the criminal system is inappropriate for several reasons, including that the goals underlying procedures in criminal cases are largely non-applicable in the campus context. While criminal procedures are designed to protect the accused's rights, the laws that apply to campus violence are concerned mainly with victims' civil rights. Therefore, criminal procedures are actually more likely to increase liability risks for institutions as well as increase, rather than decrease, the incidence of such violence. This article concludes that student disciplinary treatments of peer violence need to be reconceived to respond to the legal and

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2. VIRGINIA TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH: REPORT OF THE REVIEW PANEL 45–47 (2007), available at <http://www.governor.virginia.gov/TempContent/techpanelreport.cfm>.

practical realities of campus sexual violence. This reconception, moreover, is both an example and a part of a larger attitude shift that needs to take place at colleges and universities regarding campus violence, including violence such as mass shootings, even though such extraordinary violence often will never be dealt with through student disciplinary systems.

Accordingly, this article first explores the scope and dynamics of both “ordinary” and “extraordinary” campus violence, with a view towards elucidating the common interests of students, the campus community, and institutions of higher education themselves in addressing both. Part II discusses recent legislation dealing with peer sexual violence, such as portions of the Clery Act and Title IX, and the enforcement of such legislation, as well as more longstanding legal precedents dealing with the due process rights of students accused of misconduct. Part III compares the responses that are legally required with “best practices” for dealing with peer sexual violence, both at the comprehensive, institution-wide level and in the specific case of student disciplinary systems. Part IV critiques the typical disciplinary responses of many schools to cases of peer sexual violence and contrasts those responses with both the methods required by the applicable law and those advocated by the best practices discussed in the previous sections. Finally, Part V concludes with recommendations for what systemic changes and resources institutions should institute to respond to both forms of violence.

## I. ORDINARY AND EXTRAORDINARY VIOLENCE ON CAMPUS

Campus violence in both its ordinary and extraordinary forms is alternately surrounded by silence or sensationalism. One needs to look no further than the intense media attention paid to the Virginia Tech massacre to see the sensationalism that can occur. Yet the silence surrounding ordinary violence is much more pervasive. Neither silence nor sensationalism is likely to promote accurate and productive understandings of the problem. What is needed is an examination of the incidence and dynamics of both forms of campus violence.

### A. Peer Sexual Violence

Only a few comprehensive studies on campus-based, peer sexual violence have been completed over the last couple of decades since such phenomena as “date rape” began to be discussed widely and prominently. Nevertheless, their findings and conclusions are relatively consistent,<sup>3</sup> and

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3. Although some of the studies that are cited here are somewhat old, they are included for two reasons. First, they are the most recent studies that have been completed on this topic. This is particularly true for the 2000 report, *The Sexual Victimization of College Women*, which is the last nation-wide, comprehensive study to be completed on the topic of sexual assault on college campuses. See BONNIE S.

they indicate that “[r]ape is the most common violent crime on American college campuses today.”<sup>4</sup> Studies estimate that 20–25% of college women are victims<sup>5</sup> of forced sex during their time in college.<sup>6</sup> As many as 15% of college men may also have been forced to have sex.<sup>7</sup> “College men who are raped are usually raped by other men. However, since so few men report, information is limited about the extent of the problem.”<sup>8</sup> Studies on college men indicate that 6–14.9% of them “report acts that meet legal definitions for rape or attempted rape.”<sup>9</sup>

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FISHER ET AL., *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* (2000), *infra* note 6. Second, the findings of the older studies are quite consistent with the most recent ones, including one from 2007, 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. RANA SAMPSON, U.S. DEP’T OF JUSTICE, *ACQUAINTANCE RAPE OF COLLEGE STUDENTS 1* (2003), *available at* [http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/1a/8e/e1.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1a/8e/e1.pdf).

5. A note about language: I will use “victim” and “survivor” interchangeably to refer to people who claim they have been victims of sexual violence. Therefore, “victim” is not a term of art used to indicate a finding of responsibility for sexual violence. I may use “accuser” when discussing the role of the victim/survivor in a disciplinary proceeding. I will 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 will use “accused” or “alleged” to indicate when I am referring to those who have been charged but not found responsible for committing sexual violence. Finally, I will use female pronouns to refer to victims because the majority of victims are women, and male pronouns to refer to perpetrators and accused students because the majority of perpetrators and accused students are men.

I use “sexual violence” instead of terms such as “sexual assault” or “rape” because in my view “sexual violence” is a broader, descriptive term that is, once again, not a term of art, and that I regard to include a wider range of actions that may not fit certain legal or readers’ definitions of “sexual assault” or “rape.” The term therefore includes “sexual assault” or “rape,” as well as other actions involving physical contact of a sexual nature that may not always fit everyone’s definition of “sexual assault” or “rape.” While I acknowledge that non-physical actions can constitute violence, including those forms of violence is outside the scope of this paper.

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

6. CAROL BOHMER & ANDREA PARROT, *SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION* 6 (1993); BONNIE S. FISHER ET AL., *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* 10 (2000), *available at* <http://www.ncjrs.gov/pdffiles1/nij/182369.pdf>. *But cf.* Brenda J. Benson et al., *College Women and Sexual Assault: The Role of Sex-Related Alcohol Expectancies*, 22 *JOURNAL OF FAMILY VIOLENCE* 341, 348 (2007) (indicating that 21% of students in a sample of 350 were victims of attempted rape, and 13% of students in the sample were victims of a completed rape).

7. BOHMER & PARROT, *supra* note 6, at 6.

8. SAMPSON, *supra* note 4, at 3 (footnote omitted).

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

Studies indicate that college and university women are particularly vulnerable to sexual violence and that they often become victims of such violence shockingly early in their time at a college or university. Most victims are between the ages of fifteen and twenty-four.<sup>10</sup>

“Women ages 16 to 24 experience rape at rates four times higher than the assault rate of all women,” making the college (and high school) years the most vulnerable for women. College women are more at risk for rape and other forms of sexual assault than women the same age but not in college.<sup>11</sup>

Often the victim has been drinking or been given alcohol.<sup>12</sup>

Sexual assaults most often happen during a victim’s first year in college, often during the first week they are on campus.<sup>13</sup> In one study, 12.8% of completed rapes, 35% of attempted rapes, and 22.9% of threatened rapes took place on a date.<sup>14</sup> Most perpetrators are known to the victim,<sup>15</sup> including classmates and friends of the victim (70% of completed or attempted rapes) and boyfriends or ex-boyfriends (23.7% of completed rapes and 14.5% of attempted rapes).<sup>16</sup>

Studies have also looked at the characteristics of perpetrators of campus sexual violence. Almost all men,<sup>17</sup> perpetrators share characteristics such as “macho” attitudes, high levels of anger towards women, the need to dominate women, hyper-masculinity, anti-social behavior and traits, lack of empathy, and abuse of alcohol.<sup>18</sup> A study in 1993 found that 5–8% of college men commit rape knowing it is wrong;<sup>19</sup> 10–15% of college men commit rape without knowing that it is wrong;<sup>20</sup> and 35% of college men indicated some likelihood that they would commit rape if they could be

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10. BOHMER & PARROT, *supra* note 6, at 18.

11. SAMPSON, *supra* note 4, at 2 (quoting S. Humphrey & A. Kahn, *Fraternities, Athletic Teams and Rape: Importance of Identification with a Risky Group*, 15 J. OF INTERPERSONAL VIOLENCE 1313 (2000)).

12. *Id.* at 13.

13. BOHMER & PARROT, *supra* note 6, at 26.

14. FISHER ET AL., *supra* note 6, at 17.

15. BOHMER & PARROT, *supra* note 6, at 26. FISHER ET AL., *supra* note 6, at 17.

16. FISHER ET AL., *supra* note 6, at 19.

17. BEYOND THE CRIMINAL JUSTICE SYSTEM: USING THE LAW TO HELP RESTORE THE LIVES OF SEXUAL ASSAULT VICTIMS, A PRACTICAL GUIDE FOR ATTORNEYS AND ADVOCATES i (Jessica E. Mindlin et al. eds., 2008) available at <http://www.victimrights.org/pdf-manual/beyondthecriminaljusticesystem.pdf> [hereinafter BEYOND THE CRIMINAL JUSTICE SYSTEM].

18. BOHMER & PARROT, *supra* note 6, at 23; Lisak & Miller, *supra* note 9, at 73; see also Martin D. Schwartz et al., *Male Peer Support and a Feminist Routine Activities Theory: Understanding Sexual Assault on the College Campus*, 18 JUSTICE Q. 623, 628 (2001).

19. BOHMER & PARROT, *supra* note 6, at 21.

20. *Id.* at 6.

assured of getting away with it.<sup>21</sup> A 1986 study indicated that 30% of men in general say they would commit rape and 50% would “force a woman into having sex” if they would not be caught.<sup>22</sup> “[O]ne [1997] study found that 96 college men accounted for 187 rapes, suggesting that further research may establish that serial rapists are a common component of the acquaintance rape problem.”<sup>23</sup> Finally, a study published in 2002 surveyed 1882 male students at a university and found that 6.4% of self-reported acts qualified as rape or attempted rape.<sup>24</sup> Of this group, 63.3% reported committing repeat rapes<sup>25</sup> averaging about 6 rapes a piece.<sup>26</sup> In addition, these “undetected” (i.e. not arrested or prosecuted) rapists each committed an average of 14 additional acts of interpersonal violence (battery, physical and/or sexual abuse of children, and sexual assault short of rape or attempted rape),<sup>27</sup> meaning that 4% of the students in the study accounted for 28% of the violence, nearly 10 times that of non-rapists (1.41 acts of violence each)<sup>28</sup> and 3.5 times that of single-act rapists (3.98 acts of violence each).<sup>29</sup>

Ninety percent or more of victims of sexual assault on college campuses do not report the assault.<sup>30</sup> Fear of hostile treatment or disbelief by legal and medical authorities prevents 24.7% of college rape victims from reporting,<sup>31</sup> and studies on attitudes of law enforcement, judges, juries, and prosecutors indicate that this fear is well-founded.<sup>32</sup> Other factors include not seeing the incidents as harmful;<sup>33</sup> not thinking a crime had been committed;<sup>34</sup> not thinking what had happened was serious enough to involve law enforcement;<sup>35</sup> not wanting family or others to know;<sup>36</sup> lack of proof;<sup>37</sup> embarrassment from publicity;<sup>38</sup> not wanting to get men whom

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21. *Id.* at 8.

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

23. SAMPSON, *supra* note 4, at 11.

24. Lisak & Miller, *supra* note 9, at 76.

25. *Id.* at 78.

26. *Id.* at 80.

27. *Id.* at 78.

28. *Id.*

29. *Id.* 78–80.

30. FISHER ET AL., *supra* note 6, at 24.

31. BOHMER & PARROT, *supra* note 6, at 13, 63; FISHER ET AL., *supra* note 6, at 23; WARSHAW, *supra* note 22, at 50.

32. *See* BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 8; *see also* Lisak & Miller, *supra* note 9, at 74.

33. FISHER ET AL., *supra* note 6, at 23.

34. *Id.*

35. *Id.*

36. *Id.* at 24.

37. *Id.*

38. BOHMER & PARROT, *supra* note 6, at 13.

victims know in trouble;<sup>39</sup> lack of faith in, or fear of, court proceedings; lack of faith in police ability to apprehend the perpetrator;<sup>40</sup> fear of retribution from the perpetrator;<sup>41</sup> and belief that no one will believe them and nothing will happen to the perpetrator.<sup>42</sup> Not being believed and official mishandling can increase survivor trauma.<sup>43</sup> Not reporting or telling anyone about the assault can also hurt the survivor further.<sup>44</sup> In contrast, both speaking with someone about the assault and reporting it can be therapeutic<sup>45</sup> and a necessary step to recovery.<sup>46</sup>

The picture that these statistics paint is one of epidemic gender-based campus violence that overwhelmingly does not reach the light of day, with both the violence and the silence surrounding it having serious consequences. In addition, they suggest how the problem of sexual violence may be perpetuated, at least in part, on college and university campuses. First, one can see from the statistics a vicious cycle between the campus sexual violence and the prevention of it—or rather, the failure to prevent it. Perpetrators often commit rape because they think they won't get caught or because they actually haven't been caught. Then, because survivors often do not report the violence, perpetrators are not caught, continuing to believe they will not get caught, and continuing to rape. Second, the ages of survivors and the timing of most campus sexual violence suggest that perpetrators may select victims who are particularly vulnerable and unlikely to have the resources at their disposal to report the violence. Third, clearly institutions and their responses to the violence play a part in the cycle of non-reporting and continued violence. On the survivor's side, research indicates that the main reason campus sexual violence survivors do not report is that they do not think anyone will believe them and that various authorities, especially legal and medical authorities, will be hostile. On the perpetrator's side, some studies suggest that lack of "proper guardianship" in terms of the failure of colleges and universities to address the campus peer sexual violence problem is a key and necessary element to creating the problem in the first place.<sup>47</sup>

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39. WARSHAW, *supra* note 22, at 50.

40. BOHMER & PARROT, *supra* note 6, at 13, 63.

41. *Id.*

42. WARSHAW, *supra* note 22, at 50; *see also* BOHMER & PARROT, *supra* note 6, at 13, 63.

43. BOHMER & PARROT, *supra* note 6, at 5, 198.

44. WARSHAW, *supra* note 22, at 66.

45. BOHMER & PARROT, *supra* note 6, at 235.

46. WARSHAW, *supra* note 22, at 66.

47. Schwartz et al., *supra* note 18, at 625 (citations omitted).

### B. Links Between Peer Sexual Violence and Campus Rampage Shootings

Despite the marked differences in frequency between mass shootings and peer sexual violence, there are similarities as well between these two forms of campus violence. Both ordinary and extraordinary campus violence often arise from similar circumstances, exist on the same continuum of violence, share contributing and complicating factors, and receive similar responses from institutions.

From a number of analyses of both college and university and secondary school shootings, including the examination of John Marshall Law School Professor Helen de Haven in this volume of the *Journal of College and University Law*,<sup>48</sup> several links between peer sexual violence and school shooting cases can be seen. First, evidence suggests that school shooting cases can themselves be cases of gender-based violence.<sup>49</sup> Gender-based violence is generally thought of as violence that is either directed at a particular victim because of the victim's gender or perceived gender or disproportionately impacts a particular group of people because of their gender or perceived gender.<sup>50</sup> The shootings that have been noted as gender-based violence are ones where the shooter has clearly targeted women or girls. These include the École Polytechnique massacre, where

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48. Helen Hickey de Haven, *The Elephant in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability*, 35 J.C. & U.L. 503 (2009).

49. See Jackson Katz, *Conversation with Philosopher on School Shootings*, THE HUFFINGTON POST, April 7, 2008, [http://www.huffingtonpost.com/jackson-katz/conversation-with-philoso\\_b\\_95530.html](http://www.huffingtonpost.com/jackson-katz/conversation-with-philoso_b_95530.html) [hereinafter Katz, *Conversation*]; Jackson Katz, *Coverage of "School Shootings" Avoids the Central Issue*, COMMONDREAMS.ORG, Oct. 11, 2006, <http://www.commondreams.org/views06/1011-36.htm> [hereinafter Katz, *Coverage*]; Michael Kimmel, Ph.D., *Manhood and Violence: The Deadliest Equation*, <http://www.nomas.org/node/106> (last visited Apr. 21, 2009).

As Professor de Haven points out, the category of "school shootings" actually has a number of subcategories, depending on types of school (secondary or post-secondary), types of shooters (students, faculty/staff, or outsiders), level of rampage-like characteristics (whether victims are targeted or random), and the country where the shooting took place. See de Haven, *supra* note 48, at nn.17–19 and accompanying text, for an account of how Professor de Haven selected the cases for her study and the cases that were excluded. Professor de Haven discusses only cases in U.S. higher educational institutions, and therefore excludes cases such as the École Polytechnique Massacre in Montreal, Canada, as well as all secondary school shootings. Because this article does not attempt any comprehensive review of school shootings of a particular subcategory and mainly draws from other analyses and commentaries on school shootings in making its comparisons to peer sexual violence, it does not eliminate commentary and analyses based on any of these subcategories.

50. See, e.g., Interactive Population Center, *Violence Against Women and Girls: Introduction*, <http://www.unfpa.org/intercenter/violence/intro.htm> (last visited Apr. 20, 2009) ("Gender-based violence is violence involving men and women, in which the female is usually the victim; and which is derived from unequal power relationships between men and women. Violence is directed specifically against a woman because she is a woman, or affects women disproportionately" (internal quotation omitted)).

Marc Lépine shot and killed fourteen women engineering students for being “feminists,”<sup>51</sup> the Amish schoolhouse shooting, where 32-year-old Charles Carl Roberts IV killed five Amish girls and wounded six others after allowing all the boys to leave,<sup>52</sup> and the Platte Canyon High School Shooting, where the 53-year-old gunman took six girls hostage, molested all, sexually assaulted at least two, and killed one before killing himself.<sup>53</sup> In addition, commentators such as Temple Law School Professor Marina Angel have suggested that many of the secondary school shootings of the 1990s, including those at Pearl, West Paducah, Jonesboro, and Columbine constitute gender-based violence. In support, Professor Angel cites evidence that the shooters in each of these cases killed mainly girls, often ones by whom they had been rejected or whom they claimed to “love.”<sup>54</sup> Finally, at least two of the campus shootings discussed by Professor de Haven could be seen as gender-based violence. At the University of Arizona College of Nursing, the shooter was one of a few male students at an overwhelmingly female dominated nursing college. Therefore, his targets were likely to be women, he in fact killed only women, and evidence suggested that his feelings of marginalization as a man in the woman-dominated climate of the College factored into his shooting.<sup>55</sup> At Northern Illinois University, the perpetrator shot mainly at women.<sup>56</sup>

Second, even if the shootings themselves are not instances of gender-based violence, several commentators have noted that gender and gender-based violence are often contributing or complicating factors of institution shootings. Most obviously, although often not acknowledged by the media or the FBI,<sup>57</sup> thus far, nearly every school shooter has been a man or a boy.<sup>58</sup> More importantly, scholars who study gender, such as Professor

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51. Came et al., *supra* note 1; *see also* Katz, *Coverage*, *supra* note 49.

52. *See Fifth Girl Dies After Amish School Shooting*, CNN, Oct. 3, 2006, <http://www.cnn.com/2006/US/10/02/amish.shooting/index.html>; *see also* Katz, *Coverage*, *supra* note 49.

53. *See* Tom Kenworthy, *Investigation of Colorado School Shooting Turns Up Letter from Gunman*, USA TODAY, Sept. 29, 2006, [http://www.usatoday.com/news/nation/2006-09-29-colorado\\_x.htm](http://www.usatoday.com/news/nation/2006-09-29-colorado_x.htm).

54. *See* Marina Angel, *The School Shooters: Surprise! Boys Are Far More Violent than Girls and Gender Stereotypes Underlie School Violence*, 27 OHIO N.U. L. REV. 485, 493–94 (2001).

55. *See* de Haven, *supra* note 48, at n.184 and accompanying text.

56. *Id.* at nn.449–51 and accompanying text.

57. *See* Angel, *supra* note 54, at 492; *see also* Katz, *Conversation*, *supra* note 49; Katz, *Coverage*, *supra* note 49; Kimmel, *supra* note 49.

58. *See* Katz, *Conversation*, *supra* note 49; Katz, *Coverage*, *supra* note 49; Kimmel, *supra* note 49. Many commentators on the secondary school shootings have also noted that all of the boys were white. As Professor de Haven’s review of the higher education rampage shootings notes, there is more racial and ethnic diversity among the college and university shooters. In addition, Professor de Haven notes that a recent school shooting involved a woman shooter in Louisiana, but she excludes the shooting from her study due to its lack of “rampage” characteristics. *See* de Haven,

Angel and masculinity scholars, Jackson Katz, Michael Kimmel, and Douglas Kellner, all note that many of the secondary school shooters, in particular, appear to have been undergoing identity crises related to their masculinity.<sup>59</sup> Many were bullied, harassed, and gay-baited,<sup>60</sup> and reacted to being victims of this gender-based violence in hyper-masculine ways that “define[] violence as a legitimate response to a perceived humiliation”<sup>61</sup> and use violence, especially gun violence, to establish the shooters as “real men.”<sup>62</sup> Professor de Haven notes that the higher education shooters were often also harassed.<sup>63</sup> In the case of the University of Arizona, the shooter’s suicide letter indicated that he felt marginalized as a man in the woman-dominated culture and that his male “assertive[ness]” was devalued.<sup>64</sup>

Third, gender-based violence may be a prelude or warning sign of a subsequent mass shooting. Professor Angel mentions that one of the shooters at Jonesboro shot a girl who had broken off a dating relationship because “boys don’t hit girls.”<sup>65</sup> Professor de Haven notes that in four of the seven rampage shootings that she analyzed the shooters were involved with some form of gender-based violence prior to the shooting. In the shooting at Bard College at Simon’s Rock, one of the shooter’s two friends was dismissed for threatening a woman student, and the shooter later claimed that he had been accused of stalking.<sup>66</sup> At Appalachian School of Law, the shooter was reported for engaging in verbally abusive and threatening behavior towards women students, staff, and faculty and was charged with domestic violence by his wife.<sup>67</sup> The shooter at University of Arizona was hostile and belligerent to his largely women faculty and classmates, as well as the woman-dominated culture of the program.<sup>68</sup> The Virginia Tech shooter was accused of stalking women students.<sup>69</sup>

Finally, several commentators have noted that many of the institutions where shootings have taken place had institutional cultures that were

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*supra* note 48, at n.19.

59. Katz, *Conversation*, *supra* note 49.

60. Angel, *supra* note 54, at 493–95; Michael Kimmel, *Profiling School Shooters and Shooters’ Schools: The Cultural Contexts of Aggrieved Entitlement and Restorative Masculinity*, in *THERE IS A GUNMAN ON CAMPUS: TRAGEDY AND TERROR AT VIRGINIA TECH* 65, 68 (Ben Agger & Timothy W. Luke eds., 2008).

61. Kimmel, *supra* note 60, at 68–69.

62. Katz, *Conversation*, *supra* note 49.

63. See de Haven, *supra* note 48, at n.633 and accompanying text.

64. *Id.* at n.162.

65. Marina Angel, *The Abusive Boys Kill Girls Just Like Abusive Men Kill Women: Explaining the Obvious*, 8 TEMP. POL. & CIV. RTS. L. REV. 283, 287 (1999).

66. De Haven, *supra* note 48, at n.71 and accompanying text.

67. *Id.* at nn.121, 130 and accompanying text.

68. *Id.* at nn.184–207 and accompanying text.

69. *Id.* at nn.307–313 and accompanying text.

tolerant of gender-based violence, harassment, and discrimination. Professor Angel discusses the rampant gender harassment that existed at Columbine High School, and notes that one girl got a restraining order against a football player but was obliged to get home-schooling while he continued to take classes at the school.<sup>70</sup> Professor de Haven indicates that a student's research on lesbians in Appalachia was maliciously erased from a school computer and a student who was killed at Appalachian School of Law received an email that addressed her as a "fucking cocksucker" and threatened to "cut your nipples off, and stick jumper cables in you and connect them to my truck" about a year prior to the shooting.<sup>71</sup> And Virginia Tech's hostile gender climate was publicized by what is likely the most prominent U.S. college rape case ever, where Christy Brzonkala was gang-raped by two football players and took her case all the way to the U.S. Supreme Court on one claim<sup>72</sup> and to the Fourth Circuit on the other claim.<sup>73</sup>

Discussing both Columbine and Virginia Tech, Michael Kimmel notes that the bullying and harassment went beyond simply (in the sense of "uncomplicatedly") gender. Dr. Kimmel explicitly draws a connection between Columbine's and Virginia Tech's institutional cultures, including the obviously gendered and the either not-so-obviously gendered or not gendered aspects of these cultures. He not only links the Brzonkala case with the overall climate of Virginia Tech as "a place where difference was not valued . . . where, in fact, it was punished,"<sup>74</sup> he also characterizes that overall climate as similar in both schools. He relates very similar stories from both institutions. The first story is from a boy at Columbine who said

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70. Angel, *supra* note 54, at 494.

71. De Haven, *supra* note 48, at n.152.

72. *United States v. Morrison*, 529 U.S. 598 (2000).

73. *Brzonkala v. Va. Polytechnic Inst. and State Univ.*, 132 F.3d 949 (4th Cir. 1997). Brzonkala prevailed in the Fourth Circuit on both claims but after a rehearing *en banc* solely on the claim based on the 1994 Violence Against Women Act, that claim was rejected. *Brzonkala v. Va. Polytechnic Inst. and State Univ.*, 169 F.3d 820 (4th Cir. 1999). That decision was appealed to the United States Supreme Court, which affirmed. *Morrison*, 529 U.S. 598. The other claim was based on Title IX of the Educational Amendments of 1972 ("Title IX"). Because Brzonkala's Title IX claim was decided before *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), now the leading case on peer sexual harassment in education, it is not discussed in Part II below. However, a brief review of the case is appropriate here. Brzonkala was raped three times by two football players, Antonio Morrison and James Landale Crawford, all three times without a condom. *Brzonkala*, 132 F.3d at 953. After Morrison raped her the second time, he told her "'You better not have any fucking diseases.' In the months following the rape, Morrison announced publicly in the dormitory's dining room that he 'liked to get girls drunk and fuck the shit out of them.'" *Id.* After Brzonkala filed a claim against the two men under Virginia Tech's Sexual Assault Policy, "another male student athlete was overheard advising Crawford that he should have 'killed the bitch.'" *Id.* at 954.

74. Kimmel, *supra* note 60, at 76.

that he would have glass bottles thrown at him from moving vehicles by other students whom he didn't know every day as he walked home from school.<sup>75</sup> The other is Dr. Kimmel's own story of having students from a fraternity at Virginia Tech, to whom he had just presented regarding men's roles in supporting gender equality, throw a glass beer bottle at him from the back of a pick-up truck as he was walking back to his hotel. He notes that this is the only physical harassment he has ever experienced after giving similar lectures at hundreds of schools.<sup>76</sup>

Dr. Kimmel argues that it is not just that the student cultures at places like Columbine and Virginia Tech are climates that are hostile towards women, girls, and any men or boys who differ from the hyper-masculine elite, but that "the administration, teachers, and community colluded with" the behaviors creating those climates.<sup>77</sup> A boy at Columbine stated that the teachers and administrators invariably would turn a blind eye when receiving reports as to how "those who were 'different' were crushed" because "those kids [the alleged perpetrators] were their favorites."<sup>78</sup> Christy Brzonkala's case echoes these points. After Brzonkala prevailed in two hearings under Virginia Tech's student conduct policies, one of the football players who raped her, Morrison, was suspended for one year.<sup>79</sup> After the "kangaroo court"-like procedures of the second hearing did not exonerate Morrison, Virginia Tech Provost, Peggy Meszaros, reduced the charge and one year suspension to "using abusive language," a "deferred suspension," and a one-hour education session with the university's EO/AA Compliance Officer.<sup>80</sup> Morrison returned to campus the next year on a full athletic scholarship.<sup>81</sup> Brzonkala never returned, since she:

[F]eared for her safety because of previous threats and Virginia Tech's treatment of Morrison. She felt that Virginia Tech's actions signaled to Morrison, as well as the student body as a whole, that the school either did not believe her or did not view

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75. *Id.* at 71.

76. *Id.* at 75.

77. *Id.* at 72.

78. *Id.*

79. *Brzonkala v. Va. Polytechnic Inst. and State Univ.*, 132 F.3d 949, 954 (4th Cir. 1997). After Morrison lost both in the first hearing and in his appeal, he hired a lawyer and succeeded in convincing Virginia Tech officials into holding a second hearing, described to Brzonkala as a "technicality" to correct supposed procedural irregularities in the first hearing. *Id.* Despite this description, Brzonkala was told not only that all of the evidence she produced at the first hearing would be inadmissible for the second, but also that she would not even be allowed access to the tapes of the first hearing. *Id.* at 954-55. With insufficient notice, she was unable to produce affidavits and witnesses. *Id.* at 955. Morrison received ample and early access to evidence from the first hearing as well as more than sufficient notice in order to prepare his case. *Id.* Despite all of this, Brzonkala prevailed again at the second hearing. *Id.*

80. *Id.*

81. *Id.*

Morrison's conduct as improper . . . . Brzonkala believes and so alleges that the procedural irregularities in, as well as the ultimate outcome of, the second hearing were the result of the involvement of Head Football Coach Frank Beamer, as part of a coordinated university plan to allow Morrison to play football in 1995.<sup>82</sup>

Professor de Haven's research indicates that these kinds of institutional responses are replicated at other schools. For instance, Simon's Rock cut its security director out of the administration's communications loop prior to and even during the shooting, despite his being the only trained police officer in the administration, because he had criticized the campus's security measures prior to the shooting and suggested unpopular changes.<sup>83</sup> At Appalachian School of Law, the administration is said not to have responded to prior complaints about the shooter and to have made insufficient efforts to find those responsible for the violently misogynistic e-mail and the erasing of the Appalachian lesbianism research discussed above.<sup>84</sup> It was alleged that three complaints against the shooter were presented to the three top administrative officials, all male, by a female administrator and were dismissed as the product of "hormones" and "female intuition."<sup>85</sup> At the University of Arizona, one of the professors who was shot and killed told her husband prior to the shooting that she felt threatened by the shooter but saw no point in reporting him to school authorities.<sup>86</sup> The shooter at Case Western Reserve University went on his rampage because of a grievance against a school employee over a hacking of the shooter's website that the shooter's attorney in the dispute said the school did not seriously investigate.<sup>87</sup> And, of course, Virginia Tech's failures in responding adequately to the shooter's frightening behaviors in his English classes and to the two stalking reports are well-documented.<sup>88</sup>

Professor de Haven notes that the institutional resistance to acknowledging and responding to criticism often continues or is strengthened by a shooting. Many of the institutions she examined avoided institutional introspection after the shooting and tried to silence voices that dissented from a party-line absolving the institution of any responsibility for the violence. For instance, one of the shooter's acquaintances at Simon's Rock, who actually made an anonymous call warning the school of the potential shooting three hours before it happened, a warning that the school lost through administrative bungling, was asked to withdraw and did

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82. *Id.* at 955–56.

83. De Haven, *supra* note 48, at nn.100–01 and accompanying text.

84. *Id.* at n.152 and accompanying text.

85. *Id.* at n.160 and accompanying text.

86. *Id.* at n.198 and accompanying text.

87. *Id.* at nn.239–41 and accompanying text.

88. VIRGINIA TECH REVIEW PANEL, *supra* note 2, at 41–49.

in fact withdraw from the school because he felt he was being blamed for the shooting.<sup>89</sup> The security director who was excluded resigned “in disgust” after the shooting, and college employees were discouraged from visiting one of the victims in the hospital.<sup>90</sup> Several staff and faculty also resigned from Appalachian Law School following the shooting.<sup>91</sup> At the University of Arizona, talk of the shooting was discouraged even though reports of threatening behavior went up following the shooting.<sup>92</sup>

Patricia Mooney Nickel’s account of the days following the Virginia Tech massacre echoes this resistance to introspection and change. According to that account, the campus community received seven e-mails in six days from upper administrators using some version of “We are Hokies; we will prevail,” a phrase that quickly appeared on everything from T-shirts to back windshields to signs at the dry cleaners and local Kroger’s market.<sup>93</sup> The connection to the various paraphernalia and behaviors associated with support of the Virginia Tech football team is clear from Dr. Mooney Nickel’s account. Indeed, it harkens back to what Dr. Kimmel calls “the coercive coherence of the community of Hokie Nation . . . and the sanctimoniously sadistic exclusion of anyone who doesn’t fit in to that narrowly circumscribed community,” some of the very cultural characteristics that he and others see as contributing factors to the shooter’s rampage.<sup>94</sup> Dr. Mooney Nickel also quotes a senior administrator’s e-mail stating, “Nothing in the events of last week will alter who we are and what we represent,” and points out that this statement was wrong in both descriptive and aspirational terms—i.e., that the massacre must have effects on the school, and, indeed, *should* have had *transformative* effects. She suggests, “We could have done something as simple as declaring that we were now a university staunchly opposed to violence.”<sup>95</sup> Given Christy Brzonkala and Michael Kimmel’s experiences at Virginia Tech, that would have been transformative indeed!

Thus, even when the institutional characteristics shared by schools where the shootings have occurred do not have a gendered aspect, they

89. De Haven, *supra* note 48, at n.104 and accompanying text.

90. *See id.* at nn.100–02 and accompanying text.

91. *See id.* at n.155 and accompanying text.

92. *Id.* at nn.215–16 and accompanying text.

93. *See* Patricia Mooney Nickel, *There Is an Unknown on Campus: From Normative to Performative Violence in Academia*, in *THERE IS A GUNMAN ON CAMPUS: TRAGEDY AND TERROR AT VIRGINIA TECH* 159, 161–62 (Ben Agger & Timothy W. Luke eds., 2008).

94. Kimmel, *supra* note 60, at 76. Dr. Kimmel names both Columbine and Virginia Tech “jockocracies” and argues that such schools are likely to create cultures ripe for shootings. *Id.* He notes that the administrations of such schools are “under relentless alumni pressure to maintain and build the sports programs at the expense of every other program—especially the campus counseling program that might identify and treat such deeply troubled, indeed maniacally insane, students, a bit sooner.” *Id.*

95. Nickel, *supra* note 93, at 166.

eerily reflect many of the problems with institutional responses in peer sexual violence cases, problems which will be explored in depth during the remainder of this article. Many of the cases discussed in Part II share elements with *Brzonkala* including failures to respond to and address lower levels of misconduct and behavior that negatively impacts other—usually non-dominant—members of the community; ignoring, minimizing, or retaliating against those who speak up; and generally appearing unwilling to acknowledge anything that would call the dominant school culture or management into question. In addition, evidence suggests that school shootings, gender-based violence such as peer sexual violence, and the institutional responses to both are substantially connected in that they all arise from institutional environments that are hostile to difference and that perpetuate masculinist values. They also often exist on a continuum of violence, where, depending on the institutional response, lower levels of violence can escalate or provide warning signs that can then be used to de-escalate and prevent more severe violence. Finally, the fact that school shooters can be both victims and perpetrators of gender-based violence means that each type of violence can be a contributing and complicating factor for the other.

### C. Consequences of Violent Campuses

The consequences of campus shootings are obvious and easily understood: multiple, random deaths and injuries resulting from public actions with many witnesses and providing little opportunity for victim-blaming. In contrast, the overwhelmingly unreported nature of peer sexual violence can make it more difficult to see the consequences. Nevertheless, they are massive. For survivors, they include sexually transmitted diseases, for which the treatment can be an additional trauma,<sup>96</sup> Post Traumatic Stress Disorder (affecting one-third of victims), depression, substance abuse, and suicidal tendencies.<sup>97</sup> The dynamics of college campuses, where survivors continue to have numerous connections to the perpetrator, can exacerbate these problems.<sup>98</sup> All of these consequences can have

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96. For instance,

Many victims are exposed to sexually transmitted diseases, including HIV. The trauma associated with short term care and follow-up testing and treatment is overwhelming. Some victims are prescribed HIV anti-retroviral prophylaxis treatment to prevent the contraction of HIV. The medication, which can last for up to six weeks, takes an enormous toll on victims. Side effects, including extreme nausea, chronic fatigue, and chronic headaches, can interfere with, and in many cases prohibit, daily function.

Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 398 (2005).

97. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 1.

98. *Id.* at 194.

negative implications for survivors' educational experiences. One study showed that women students who have experienced sexual violence have significantly lower GPAs than those who have not.<sup>99</sup> Other evidence indicates that survivors are more likely to miss class, perform poorly in coursework, or leave school.<sup>100</sup>

While the consequences for survivors are the most devastating, they are not the only group affected by the vicious cycle of sexual violence and non-reporting. Researchers and activists such as Men Can Stop Rape and The White Ribbon Campaign have begun examining the underlying causes of male-perpetrated violence. Many of these individuals and organizations are also the ones expressing concern about the gendered dynamics of mass shootings discussed above. Indeed, The White Ribbon Campaign was formed as an organized response to the École Polytechnique massacre.<sup>101</sup> These groups are creating education and support systems that seek to prevent men and boys from becoming perpetrators and to support and to encourage the overwhelming number of men who are not perpetrators to step out of bystander roles and to model and promote healthier forms of masculinity.<sup>102</sup>

For example, a study by four sociologists and criminologists on sexual assault on college campuses in Canada explains that "the amount and the location of crime are affected, if not caused, by three important factors: the presence of likely offenders, who are presumed to be motivated to commit the crimes; the absence of effective guardians; and the availability of suitable targets."<sup>103</sup> The authors go on to explain that their study indicates that on college campuses "motivated male offenders view women who drink and/or consume drugs as 'suitable targets'; further, these views are largely a function of ties and social exchanges with male peers who perpetuate and legitimate sexual assault in college dating relationships, in combination with the use of alcohol by the men themselves."<sup>104</sup> In fact, "Undergraduate men who drank two or more times a week and who had friends who gave them peer support for both emotional and physical partner abuse were more than nine times as likely to report committing sexual abuse as men reporting none of these three characteristics."<sup>105</sup> To complete the third prong of the formula,

99. Benson, *supra* note 6, at 350.

100. Reardon, *supra* note 96, at 398–99.

101. The White Ribbon Campaign, <http://www.whiteribbon.ca/> (last visited May 28, 2009).

102. Men Can Stop Rape, Inc., Who We Are, [http://www.mencanstoprape.org/info-url\\_nocat2701/info-url\\_nocat.htm](http://www.mencanstoprape.org/info-url_nocat2701/info-url_nocat.htm) (last visited Apr. 21, 2009); The White Ribbon Campaign, The Campaign, [http://www.whiteribbon.ca/about\\_us/](http://www.whiteribbon.ca/about_us/) (last visited Apr. 21, 2009).

103. Schwartz et al., *supra* note 18, at 625 (citations omitted).

104. *Id.* at 647.

105. *Id.* at 645–46.

[C]ollege campuses too often are ‘effective-guardian-absent.’ Many campus administrators do not seriously punish men who abuse women sexually, even if they engage in extremely brutal behavior such as gang rape. Even criminal justice personnel often disregard acquaintance and/or date rapes, essentially telling men that their sexually aggressive behavior is acceptable.<sup>106</sup>

In this climate, the role of male peers may actually substitute for proper guardianship:

[M]ale peer support can be regarded as a component of effective guardianship. When offenders receive either encouragement or no punishment from peers, administrators, faculty, and law enforcement officials, then effective guardianship is lacking. On the other hand, insofar as a man’s friends give no support for abuse, this absence of support may well be the beginning of effective guardianship.<sup>107</sup>

The authors conclude that

[P]revention and control strategies [should target] the broader social, social psychological, and psychological forces that motivate men to sexually abuse female intimates and strangers . . . . [E]fforts based solely on self-defense and awareness campaigns for women are insufficient. The male peer support network that legitimizes rape must be attacked and dismantled before women will be truly safer on campus.<sup>108</sup>

These efforts recognize that campuses with rampant gender-based violence are harmful to men, as well as to women who are not victimized. First, college women spend an enormous amount of time and energy trying to “prevent” themselves from becoming victims of sexual violence.<sup>109</sup> To the extent that schools have begun “prevention” education, as the Canadian study above indicates, many campuses focus on making women students aware of the dangers and encouraging them to take risk-reducing measures such as going, leaving, and staying with trustworthy friends at parties, not leaving their drinks unattended, and taking self-defense classes. Second, given the statistics, both men and women are likely to know and be called on to help and support friends or family who have been victimized.

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106. *Id.* at 630 (citations omitted).

107. *Id.* at 646 (citations omitted).

108. *Id.* at 647.

109. The author has repeatedly co-presented with colleague Jennifer Schweer a program on campus sexual violence to students at the National Conference for College Women Student Leaders. See AAUW, 2008 Student Leadership Conference Workshops, <http://www.aauw.org/nccwsl/2008/workshops.cfm#2j> (last visited Apr. 21, 2009). When we ask how the students, who are all women, “prevent” sexual assault, we must always cut off discussion before participants have finished listing all the things they do every day to “prevent” such violence.

Providing such help and support can be acutely painful and involve secondary trauma. Third, as Men Can Stop Rape's Campus Strength Program indicates, men in particular may find themselves becoming bystanders to violence or encouragement towards violence and often do not know how to intervene.<sup>110</sup> Fourth, men may also feel pressured to actually perpetrate violence by the peer support dynamics talked about in the Canadian study above or by the dictates of traditional masculinity itself.<sup>111</sup> Finally, as the dynamics noted above in many school shootings indicate, some men and boys who, for whatever reason, do not feel that they are sufficiently masculine may seek to assert that masculinity through catastrophic violence.

School shooters demonstrate how even perpetrators have an interest in addressing the causes and complicating factors that are involved in campus violence. These interests are present in peer sexual violence cases as well, particularly the interest in ending the vicious cycle of non-reporting and violence perpetuation. The studies above show that there may be some perpetrators who can be educated not to perpetrate. The dynamics of peer support, the possibility of some men being pressured into committing acts of violence, and the indications that some university men are not inclined to repeat offending provide some hope that proper responses can encourage some men who are currently perpetrators to have healthier relationships and lives. Because getting caught probably has some deterrent effect, even repeat perpetrators may stop the behavior if they get caught and face serious but not debilitating consequences while in school. If so, they will not face the much more injurious consequences of being caught, tried, and convicted in the criminal context.

These interests and dynamics show that there are myriad reasons for institutions to address problems of campus violence. In the wake of the Virginia Tech and Northern Illinois University shootings, this need has been acknowledged repeatedly in the case of campus shootings. Such attention has, however, been less prominently given to campus peer sexual violence, despite its epidemic frequency and the contrasting rarity of campus shootings. Yet this frequency is precisely what creates opportunities for understanding and combating campus peer sexual violence through effective institutional responses. Moreover, the connections between peer sexual violence and violence such as rampage shootings suggest that addressing the ordinary violence may simultaneously reduce the likelihood of extraordinary violence. For these

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110. See MEN CAN STOP RAPE, INC., CAMPUS STRENGTH PACKAGE (2008), available at [http://www.mencanstoprape.org/usr\\_doc/MCSR\\_Campus\\_Strength\\_Program.pdf](http://www.mencanstoprape.org/usr_doc/MCSR_Campus_Strength_Program.pdf).

111. See THE WHITE RIBBON CAMPAIGN, EXERCISE 1: LIFE IN A BOX: MEN SHOULD... WOMEN SHOULD... 32, available at [http://www.whiteribbon.ca/educational\\_materials/exercise1.pdf](http://www.whiteribbon.ca/educational_materials/exercise1.pdf).

reasons, from this point forward, this article focuses primarily on what institutions should do to address peer sexual violence.

## II. LAWS APPLICABLE TO PEER SEXUAL VIOLENCE ON CAMPUS

Institutions of higher education should care about peer sexual violence and the cycle of non-reporting and violence, at the very least for the sake of their students. Campus peer sexual violence indicates a fundamental breakdown in our institutions' educational missions. These missions include an obligation to create a healthy environment where students can fulfill their educational goals and to educate students on personal and professional issues such as fostering healthy relationships, treating others with dignity regardless of factors such as gender, and becoming ethical professionals. Nevertheless, in some ways, institutions themselves have the least direct interest in addressing the problem because of countervailing pressures on the institution. The broad-based, comprehensive institutional change required to significantly reduce or eliminate what we now know about peer sexual violence is a resource-intensive endeavor. In addition, schools may face pressures related to image and fear of negative publicity that may influence them either to suppress reporting or at least not to encourage it.<sup>112</sup>

Such countervailing pressures might be more powerful if it were not for recent developments in the law that collectively impose serious liability on schools that ignore campus crime problems such as rampant gender-based violence. Legislation, case law, and regulatory enforcement applicable to campus crime and violence have responded to the high rate of peer sexual violence on campus by increasingly focusing on those crimes. Second, they have improved legal protections for survivors, while school action or inaction affecting other students, including alleged perpetrators, has remained at a fairly low level of liability. Third, they respond to the non-reporting problem, particularly to the indications that victims do not report because they fear the responses of institutional authorities, by attempting to regulate these responses.

### A. Increased Legal Concern with Peer Sexual Violence in Schools

Peer sexual violence on college campuses is primarily addressed by several different federal legal schemas, including, in rough order of passage, Title IX of the Educational Amendments of 1972 ("Title IX"),<sup>113</sup> the Crime Awareness and Campus Security Act of 1990, renamed the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime

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112. A detailed examination of issues related to these countervailing pressures and their interactions with the law related to sexual violence on campus is beyond the scope of this article, but is a part of the author's next project.

113. 20 U.S.C. §§ 1681–88 (2006).

Statistics Act (“Clery Act”) in 1998,<sup>114</sup> and the Violence Against Women Act of 2000 (“VAWA”).<sup>115</sup> In any given case, there may also be other federal or state laws that apply.<sup>116</sup>

VAWA is relevant here only because it provides funding for grants to combat violence against women, including grants given to college and university campuses to fund programs that focus on peer sexual violence.<sup>117</sup> As such, it does not create liability for institutions, but does require institutions to operate in certain ways in order to receive and retain grant funding. Therefore, VAWA will not be discussed in detail in this paper, except as grant criteria can help inform what lawmakers and regulators envision as proper responses to peer sexual violence on campus, and how violence against women experts recommend colleges and universities deal with the problem.

In fact, the addition of the campus grants to VAWA in its first reauthorization (the first Violence Against Women Act was passed in 1994),<sup>118</sup> demonstrates the first phenomenon mentioned above: applicable laws have increasingly responded to the high rate of peer sexual violence on campus. This phenomenon can also be seen in the history of the Clery Act, which originally focused on requiring colleges and universities to disclose campus crime statistics, but was amended in 1992 to add “The Campus Sexual Assault Victim’s Bill of Rights.”<sup>119</sup> This amendment deals specifically with the creation and communication to students of institutional programs, policies and procedures designed to prevent sexual violence and to respond to it properly once it occurs.<sup>120</sup>

Even aside from this addition, however, enforcement of the Clery Act has often involved and focused on peer sexual violence. Since the Clery Act does not create a private right of action,<sup>121</sup> enforcement of the Act is conducted through the Case Management Teams of the Department of Education’s regional offices (“DOE”). A private party may file a

114. 20 U.S.C. § 1092(f).

115. See GARRINE P. LANEY, VIOLENCE AGAINST WOMEN ACT: HISTORY AND FEDERAL FUNDING, 2 (Cong. Research Serv., CRS Report for Congress Order Code RL 30871, Dec. 1, 2005), available at <http://holt.house.gov/pdf/CRSonVAWADec2005.pdf>.

116. See THE EDUCATOR’S GUIDE TO CONTROLLING SEXUAL HARASSMENT, ¶¶ 330–32 (Travis Hicks ed., 2008) [hereinafter EDUCATOR’S GUIDE].

117. See U.S. Department of Justice, Office on Violence Against Women, Grants to Reduce Domestic Violence, Dating Violence, Sexual Assault, and Stalking on Campus, [http://www.ovw.usdoj.gov/campus\\_desc.htm](http://www.ovw.usdoj.gov/campus_desc.htm) (last visited Apr. 22, 2009).

118. See Laney, *supra* note 115, at 2.

119. See Security on Campus, Inc., Campus Sexual Assault Victim’s Bill of Rights, [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=133:campus-sexual-assault-victims-bill-of-rights&catid=54:faq](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=133:campus-sexual-assault-victims-bill-of-rights&catid=54:faq) (last visited Apr. 21, 2009).

120. 20 U.S.C. § 1092 (f)(8) (2006).

121. 20 U.S.C. § 1092 (f)(8)(C).

complaint with the DOE, and the DOE can fine or withhold federal funding from schools that “flagrantly or intentionally” violate the Clery Act or fail to remedy their violations.<sup>122</sup> According to Security on Campus, Inc., the watchdog group formed by the parents of Jeanne Clery (the slain college student after whom the Clery Act is named), four post-secondary institutions have been fined to date for violations of the Clery Act. All four cases involved failure to properly report peer sexual violence.

Probably the most visible case involving the Clery Act is the 2006 rape and murder of Laura Dickinson in her dormitory room at Eastern Michigan University (“EMU”) by a fellow student. The University initially told Dickinson’s family that her death involved “no foul play,” then informed the family over two months later of the arrest of the student since convicted of raping and murdering her.<sup>123</sup> Security on Campus, Inc. filed a complaint against EMU for violations of the Clery Act.<sup>124</sup> The University eventually agreed to pay \$350,000 in fines for thirteen separate violations of the Clery Act, the largest fine ever paid, and settled with Dickinson’s family for \$2.5 million.<sup>125</sup> The case eventually led to the President, Vice President for Student Affairs, and Director of Public Safety at EMU being fired,<sup>126</sup> and an estimated \$3.8 million in costs from the fines, the settlement with the Dickinson family, and “severance packages, legal fees and penalties.”<sup>127</sup>

Before EMU, the institution that was assessed the largest fine was Salem International University (“SIU”), which was originally investigated as a result of a complaint by the local Chief of Police who suspected that the University was not meeting the reporting requirements of the Clery Act.<sup>128</sup> The investigation found that the University had not included in its campus

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122. Security on Campus, Inc., How To File A Jeanne Clery Act Complaint, [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=298%3Aclerycomplaint&catid=64%3Acleryact&Itemid=60](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=298%3Aclerycomplaint&catid=64%3Acleryact&Itemid=60) (last visited Apr. 22, 2009).

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

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

125. Geoff Larcom, *Eastern Michigan University to Pay \$350,000 in Federal Fines Over Laura Dickinson Case*, THE ANN ARBOR NEWS, June 06, 2008, [http://blog.mlive.com/annarbornews/2008/06/eastern\\_michigan\\_university\\_to.html](http://blog.mlive.com/annarbornews/2008/06/eastern_michigan_university_to.html).

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

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

128. Letter from John S. Loreng to Fred Zook 2 (Dec. 17, 2001), available at <http://www.securityoncampus.org/pdf/SIUprdl.pdf> [hereinafter SIU Letter].

crime report five forcible sex offenses which DOE found had been reported to the University.<sup>129</sup> For this and other violations discussed in more detail below, DOE fined the school \$200,000.<sup>130</sup> The next highest fine was \$27,500 assessed against Miami University of Ohio (“MOH”), again for a combination of underreporting various crimes, including sex offenses and other violations related to sexual violence.<sup>131</sup> Lastly, in 2000, Mount St. Clare College (“MSCC”) in Clinton, Iowa, was fined \$15,000, in part for two rapes that were reported to police but did not appear in the College’s reports since the perpetrators were never charged with crimes.<sup>132</sup>

Finally, the evolution of the application and enforcement of Title IX has progressively included more cases regarding peer sexual violence in schools. Title IX prohibits sexual harassment in schools as a form of sex discrimination.<sup>133</sup> This includes both quid pro quo harassment and hostile environment harassment. Quid pro quo harassment involves the exchange of a benefit or avoidance of a detriment for sexual favors between a superior and an inferior in a given power structure. As such, it does not tend to be the type of harassment involved in cases of peer sexual violence, although such cases could occur, if relatively rarely. More commonly, peer sexual violence is considered a case of hostile environment sexual harassment, where the harassment is “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit,”<sup>134</sup> due to the severity of even a single instance of sexual violence.<sup>135</sup>

Under Title IX jurisprudence, schools may be held liable for peer sexual harassment in two ways: 1) through administrative enforcement by the

129. *Id.* at 7.

130. *Id.*; see also *supra* notes 157–58 and accompanying text.

131. Letter from Fran Susman & Gerald Sikora to James Garland, President, Miami Univ. (Sept. 11, 1997), available at [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=180.&Itemid=75](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=180.&Itemid=75).

132. Donna Leinwand, *Campus Crime Underreported*, USA TODAY, Oct. 4, 2000, at A1.

133. UNITED STATES DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS 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].

134. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).

135. See REVISED GUIDANCE, *supra* note 133, 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.*

Department of Education's Office of Civil Rights ("OCR"),<sup>136</sup> and 2) through private suits.<sup>137</sup> OCR's authority to enforce Title IX derives from the fact that schools agree to comply with Title IX in order to receive federal funds, and an institution risks that federal funding if OCR investigates, usually in response to a complaint, and finds a violation of Title IX.<sup>138</sup> Fortunately for schools, OCR must work with a school to achieve voluntary compliance by the school with Title IX and its regulations before taking steps to terminate a school's funding.<sup>139</sup> While suits brought by private individuals also derive from schools' receipt of federal funds,<sup>140</sup> in this case, such suits may result in a school having to pay significant monetary damages to a plaintiff, if the plaintiff can show that a school had "actual notice" of the harassment, but acted with "deliberate indifference" to it.<sup>141</sup> Because administrative enforcement gives schools an opportunity to comply with Title IX, OCR has the discretion to define compliance more broadly than the limited standard of what constitutes "actual notice" and "deliberate indifference."<sup>142</sup>

OCR enforcement generally takes place as a result of a complaint's 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.<sup>143</sup> This investigation often includes a close review of institutional policies and procedures, as well as the steps the school took to resolve a complaint.<sup>144</sup> It also includes a review of the school's files relating to past sexual harassment cases that required a school to respond in some way.<sup>145</sup> OCR also interviews those involved in the case, particularly relevant school personnel.<sup>146</sup> 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" ("CTR") signed by the school.<sup>147</sup> Even when OCR does not find a school in violation of Title IX or its regulations, it may find "technical violations" in its policies or procedures and require a school to make

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136. EDUCATOR'S GUIDE, *supra* note 116, at ¶ 321.

137. *Id.* at ¶ 102.

138. REVISED GUIDANCE, *supra* note 133, at 3.

139. *Id.* at 15, n.85.

140. *Id.* at 2.

141. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 661 (1999) (discussing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 US 274 (1998)).

142. REVISED GUIDANCE, *supra* note 133, at iii.

143. *Id.* at 14.

144. *Id.*

145. U.S. Department of Education, How the Office of Civil Rights Handles Complaints, <http://www.ed.gov/about/offices/list/ocr/complaints-how.html> (last visited Apr. 22, 2009).

146. *Id.*

147. EDUCATOR'S GUIDE, *supra* note 116, at ¶ 322.

changes to those policies as directed by OCR.<sup>148</sup> Once a case is resolved, OCR takes no further action besides monitoring any agreement it may have made with the school.<sup>149</sup> On a more proactive basis, schools may look to OCR's policy guidance to determine how to comply with OCR's requirements so as to make a complaint and investigation less likely.<sup>150</sup>

One survey of peer harassment cases against schools from approximately 1992 until 2008<sup>151</sup> shows a steady increase in individuals bringing such cases before both OCR and courts.<sup>152</sup> This is especially true in terms of private suits. In the period after 1999, when *Davis v. Monroe County Board of Education* held that private individuals could make claims under Title IX for peer sexual harassment,<sup>153</sup> the number of cases decided by courts involving claims of peer sexual harassment in education doubled in comparison to the cases during the period prior to 1999. In addition, the total number of such cases decided in the three years between 1992 and 1994 equaled the number of similar cases decided in 1995 alone. Moreover, over this period, one can see a shift between peer sexual harassment cases decided by OCR as opposed to by courts. While OCR cases resulting in a letter of finding/commitment to resolve ("LOF/CTR") are the vast majority of cases prior to 1995, by 1999 the number of cases handled by OCR as opposed to by private lawsuit is roughly equal and post-1999, peer sexual harassment claims being decided by courts outnumber those decided by OCR nearly three to one. This not only represents an increase in overall liability for schools but a trend towards the arguably more expensive version of such liability, given OCR's obligation to seek the school's voluntary compliance before sanctioning a school with fines or by withholding federal funds. Finally, of the forty Title IX court cases considered for this paper,<sup>154</sup> twenty-four resulted in a denial of the

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148. See, e.g., Letter from Linda Howard-Kurent to Norman Cohen (Aug. 17, 2001), in Utah Coll. of Massage Therapy, OCR Case No. 08012022-B, at 2 [hereinafter Utah College of Massage Therapy Letter].

149. REVISED GUIDANCE, *supra* note 133, at 14.

150. See generally *id.*

151. This survey is taken from the EDUCATOR'S GUIDE, *supra* note 116, at app. IV, which contains significant sexual harassment cases and OCR letters of finding and commitments to resolve dating back to the mid-1980s. While the survey does not pretend to be absolutely comprehensive, it is one of the most comprehensive collections of information about such cases, especially the OCR investigations.

152. LOFs and CTRs are generally only available to the general public after members of the public file a Freedom of Information Act ("FOIA") request and OCR redacts the LOF/CTR, generally to eliminate the complaining student and/or victim's name. Court opinions involving claims of peer sexual harassment are more accessible, but, like most reported opinions, deal with issues presented at the appellate level. Therefore, most published court opinions deal with whether a claim under Title IX can survive a motion to dismiss or a motion for summary judgment.

153. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 632 (1999).

154. These 40 cases only include peer sexual harassment cases where the harassment constituted sexual violence according to the definition discussed in note 5,

school's motion to dismiss or for summary judgment, while the school prevailed in only sixteen.

#### B. "Victim-Centered" Enforcement and Encouragement of Reporting

The history and current approaches to enforcement of the Clery Act and Title IX also indicate that the laws relating to peer sexual violence on campus are increasingly protective of victims' rights. The concern with those rights is linked, moreover, to how violations of those rights may be discouraging victims from reporting, as well as not only not deterring peer sexual violence but actually encouraging it.

##### 1. The Clery Act: No Cover-ups of Campus Crime

The Clery Act is primarily concerned with providing the public, including the campus community and those outside the community such as prospective students and their parents, with accurate information about crimes occurring on campuses. The amendment of the Clery Act to include the Campus Sexual Assault Victim's Bill of Rights is a prime example of the linkages increasingly being made between protecting victims' rights, reporting and, ultimately, preventing campus crime. This amendment requires institutions to publish policies that inform both on-campus and off-campus communities of the programs that the institution provides designed to prevent sexual violence and the procedures in place to respond to sexual violence once it occurs.<sup>155</sup> It further specifies that an institution's educational programs should raise awareness of campus sexual violence.<sup>156</sup> Also, procedures adopted to respond to such violence must include: procedures and identifiable persons to whom to report;<sup>157</sup> the right of victims to notify law enforcement and to get assistance from institution officials in doing so;<sup>158</sup> encouragement to victims and instructions as to how to preserve evidence of sexual violence;<sup>159</sup> notification to students regarding options for changing living and curricular arrangements and assistance in making those changes;<sup>160</sup> 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.<sup>161</sup>

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above, and where the court reached the issue of deliberate indifference (as opposed to not discussing deliberate indifference because of the court's ruling on another prong of the *Davis* test).

155. 20 U.S.C. § 1092 (f)(8)(A) (2006).

156. *Id.* § 1092 (f)(8)(B)(i).

157. *Id.* § 1092 (f)(8)(B)(iii).

158. *Id.* § 1092 (f)(8)(B)(v).

159. *Id.* § 1092 (f)(8)(B)(iii).

160. *Id.* § 1092 (f)(8)(B)(vii).

161. *Id.* § 1092 (f)(8)(B)(iv)(I).

Several of the cases mentioned above, which have resulted in fines to institutions for violating the Clery Act, have involved violations of the Campus Sexual Assault Victim's Bill of Rights or general concerns about the school's failure to assist victims in reporting and getting resources. In the SIU case, for instance, DOE indicated that SIU did not regularly provide counseling and other victim support services, that "several interviewees including former employees stated that students are actively discouraged from reporting crimes to law enforcement or seeking relief through the campus judicial system,"<sup>162</sup> and that complaints are "often met with threats, reprisals, or both."<sup>163</sup> Furthermore, both the institution's policies and evidence of its practice indicated that it would not make accommodations for new living and academic arrangements for victims following an assault and that survivors were inadequately informed of their rights to pursue disciplinary action against the assailant.<sup>164</sup> Similarly, in the case resulting in a fine for MOH, the institution was found to have "failed to initiate and enforce appropriate procedures for notifying both parties of the outcome of any institutional disciplinary proceeding brought alleging a sex offense."<sup>165</sup> Finally, in the MSCC case, the institution was ultimately required to "agree reluctantly to add other alleged assaults to [its] crime reports under pressure from the government."<sup>166</sup>

The Clery Act is also concerned with potential victims, and therefore includes an obligation that institutions give timely warnings of "crimes considered to be a threat to other students and employees."<sup>167</sup> Although EMU was found in violation of many aspects of the Clery Act, one of the issues of deepest concern was the fact that campus police suspected that the victim's death was a rape and homicide early on in their investigation and, within two weeks of discovery of the body, identified as a suspect another student who possibly had keys to the victim's dormitory.<sup>168</sup> However, not only did EMU not warn or release any information about these suspicions to the campus community until ten weeks later, when the suspect was arrested, but the University actually told the victim's parents and issued a press release indicating that there was no "foul play" involved in the death.<sup>169</sup>

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162. SIU Letter, *supra* note 128, at 16.

163. *Id.*

164. *Id.* at 22.

165. Letter from S. Daniel Carter, Senior Vice President, Security on Campus, Inc., to Douglas Parrott (Oct. 7, 2004), *available at* [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=179.&Itemid=75](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=179.&Itemid=75).

166. Leinwand, *supra* note 132.

167. 20 U.S.C. § 1092(f)(3) (2006).

168. U.S. DEPARTMENT OF EDUCATION, FEDERAL STUDENT AID, SCHOOL PARTICIPATION TEAM—DENVER, OPE ID 00225900, PROGRAM REVIEW REPORT 6 (2007), [http://www.emich.edu/DOE\\_report/EMU\\_Final\\_Draft.pdf](http://www.emich.edu/DOE_report/EMU_Final_Draft.pdf).

169. *Id.* at 6–7.

Many of the cases not leading to fines under the Clery Act also deal with sexual violence,<sup>170</sup> and have also resulted in important victim-centered enforcement designed to encourage reporting. For instance, an issue quickly arose under the Clery Act as to the parameters of the portion of the Campus Sexual Assault Victim's Bill of Rights that states, "both the accuser and the accused shall be informed of the outcome of any campus disciplinary proceeding brought alleging a sexual assault."<sup>171</sup> First, there was disagreement as to how this provision interacted with the Family Educational Rights and Privacy Act ("FERPA"). FERPA generally does not allow educational institutions to disclose information from a student's educational record, which could include the results of student disciplinary proceedings, to anyone besides the student unless the student gives written consent.<sup>172</sup> Even if, as the implementing regulations for the Clery Act state, "[c]ompliance with this paragraph does not constitute a violation of the Family Educational Rights and Privacy Act (20 U.S.C. 1232g),"<sup>173</sup> there was a question of whether the accuser, once informed of a disciplinary procedure's outcome, could then re-disclose that information. Colleges and universities concerned about these questions sought to resolve them by requiring survivors to sign nondisclosure agreements before they were informed of the outcome of disciplinary proceedings.<sup>174</sup>

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170. Letter from S. Daniel Carter, Senior Vice President, Security Campus, Inc., to Rosemary K. Torpey (Aug. 19, 2004), *available at* [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=185](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=185); Press Release, Security on Campus, Inc., Federal Review Concludes Campus Crime Reporting Deficiencies Corrected By California State University And The University Of California Systems (Apr. 4, 2008), *available at* [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=215:press-release-federal-review-concludes-campus-crime-reporting-deficiencies-corrected-by-cal-state-univ-a-the-univ-of-ca-systems&catid=1:soc-news&Itemid=79](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=215:press-release-federal-review-concludes-campus-crime-reporting-deficiencies-corrected-by-cal-state-univ-a-the-univ-of-ca-systems&catid=1:soc-news&Itemid=79); Press Release, Security on Campus, Inc., U.S. Dept. of Education Asked To Review Crime Reporting At St. Mary's College (Nov. 16, 2002), *available at* [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=225.&Itemid=75](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=225.&Itemid=75); Press Release, Security on Campus, Inc., U.S. Department Of Education Requires Ohio State University To Improve Campus Crime Reporting (Feb. 12, 2007), *available at* [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=150.+&Itemid=75](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=150.+&Itemid=75).

171. 20 U.S.C. § 1092 (f)(8)(B)(iv)(II).

172. Letter from LeRoy S. Rooker to S. Daniel Carter Senior Vice President, Security Campus, Inc. (Mar. 10, 2003), *available at* <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/carter.html>.

173. 34 C.F.R. § 668.46(b)(11)(vi)(B) (2008).

174. Press Release, Security on Campus, Inc., Georgetown University Violated Rights Of Rape Victims According To Federal Review (July 27, 2004), *available at* [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=196:press-release-georgetown-university-violated-rights-of-rape-victims-according-to-federal-review-&catid=1:soc-news&Itemid=79](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=196:press-release-georgetown-university-violated-rights-of-rape-victims-according-to-federal-review-&catid=1:soc-news&Itemid=79); Letter from Nancy Paula Gifford, Area Case Director, U.S. Department of Education, to S. Daniel Carter, Senior Vice President, Security Campus, Inc. (Nov. 3, 2008), *available at* [http://www.uvavictimsofrape.com/images/Clery\\_Act\\_Ruling.pdf](http://www.uvavictimsofrape.com/images/Clery_Act_Ruling.pdf).

Understandably, victims and victims' advocates objected to such measures because they compelled victims' silence.<sup>175</sup> In light of how difficult many survivors find it to come forward at all, and the reasons listed above for why they do not report, such a "gag-rule" could facilitate victim-blaming responses. In light of the typical dynamics of campus sexual violence cases, where the perpetrator and victim know each other and have a common group of acquaintances but where the alleged violence took place without any witnesses, survivors often find their credibility being judged not only in formal disciplinary processes but also informally by everyone around them.<sup>176</sup> Getting a neutral panel to find that her account of events was credible, never mind that what happened to her was wrong, can therefore be very important to a survivor. An inability to re-disclose the very finding that establishes her credibility and her assailant's culpability significantly diminishes the value of going through the process at all. Even worse, it can allow the perpetrator to exploit the victim's compelled silence by lying about the outcome to others. All in all, it sets a victim up to feel re-victimized by the system.<sup>177</sup>

DOE settled the question in response to a complaint filed by Kate Dieringer and Security on Campus, Inc. In its resolution of the complaint, DOE made clear that such compelled nondisclosure agreements were illegal under the Clery Act. Under the University's policy, a student who refused to execute an agreement would be barred from receiving judicial outcomes and sanctions information. As a result, a key aim of the Clery Act—providing access to key information to be used by affected persons in their recovery process—is defeated.<sup>178</sup> Most recently, DOE has confirmed this judgment in a November 2008 letter to another university in response to a complaint regarding a similar policy. In doing so, it states that by requiring survivors of alleged sexual assaults to abide by a confidentiality policy that is inconsistent with the letter and spirit of the Clery Act, the school had violated the Clery Act.<sup>179</sup>

The language of both of these letters indicates that the Clery Act and its enforcement agents are concerned both with survivors' rights, as well as how greater protection of those rights will facilitate survivors' abilities to report their cases. Cumulatively, enforcement of the Clery Act to date

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175. Kate Dieringer, *Campus Injustice: A Story of Predatory Rape at Georgetown University*, [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=186](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=186) (last visited Apr. 22, 2009); UVA Victims of Rape, *Clery Act Violation*, <http://www.uvavictimsofrape.com/Clery%20Act%20Violation.htm> (last visited Apr. 22, 2009).

176. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 194.

177. Dieringer, *supra* note 175.

178. Letter from John S. Loreng to John J. DeGioia, President, Georgetown Univ. (Apr. 18, 2003), [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=211](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=211) (last visited January 20, 2009).

179. UVA Victims of Rape, *supra* note 175.

suggests that both the law and the interpreters and enforcers of the law are as much if not more concerned with how colleges and universities treat survivors and with how that treatment facilitates or hinders prevention of campus crime, as they are with the underlying sexual violence.

## 2. Court Enforcement of Title IX: What Counts as “Deliberate Indifference”

Enforcement of Title IX by courts and OCR in peer sexual violence cases demonstrates similar concerns and approaches to those increasingly evident in the enforcement of the Clery Act. As courts have begun articulating and applying the basic parameters for school liability in private suits set forth by the Supreme Court in *Davis*, the types of institutional responses that violate Title IX are becoming more evident.<sup>180</sup> As with enforcement of the Clery Act, one sees greater concern with victims’ rights and with recognition of how victim-centered approaches can assist with reporting and prevention than with the underlying sexual violence.

Lower courts have articulated the test that *Davis* established in a variety of ways. Nevertheless, most have defined a cause of action for peer harassment that requires the plaintiff to establish that the school is a recipient of federal funding;<sup>181</sup> that the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school;<sup>182</sup> that the school had actual knowledge or notice of the harassment;<sup>183</sup> and that the school was deliberately indifferent to the harassment.<sup>184</sup>

So many schools receive federal funds of some kind that the first prong is generally not in controversy. In addition, most cases of peer sexual violence such as a sexual assault, are accepted as being “severe, pervasive, and objectively offensive” enough “to deprive the plaintiff of access to the educational opportunities or benefits provided by the school,”<sup>185</sup> even if they happen only once.<sup>186</sup> Therefore, most litigation in these cases focuses

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180. Note that the cases discussed in this section draw from case law involving peer sexual violence both at secondary schools and colleges and universities, since Title IX does not draw distinctions between these two kinds of institutions. See REVISED GUIDANCE, *supra* note 133, at 2.

181. *S.S. v. Alexander*, 177 P.3d 724, 726 (Wash. Ct. App. 2008).

182. *Id.*; see also *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 258–59 (6th Cir. 2000); *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999).

183. *Soper*, 195 F.3d at 854.

184. *Id.*

185. *Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 444 (D. Conn. 2006); *Alexander*, 177 P.3d at 737.

186. *Id.* But see *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1358 (M.D. Ga. 2007) (finding that a female student who was drugged and raped by a male student had not shown the discrimination she suffered to be severe, pervasive, or objectively

on the actual knowledge and deliberate indifference prongs. Because the deliberate indifference prong deals with proper institutional responses to peer sexual harassment, it is this prong that is of particular relevance here.

Courts have defined an institutional response as deliberately indifferent “when the defendant’s response to known discrimination is clearly unreasonable in light of the known circumstances, and when remedial action only follows after a lengthy and unjustified delay.” The deliberate indifference “must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it.”<sup>187</sup> In the case of peer sexual violence such as a sexual assault, with a few exceptions discussed at greater length below, schools are rarely held responsible for the sexual violence itself.<sup>188</sup> Instead, the focus is on the institutional response post-violence. As such, doing nothing at all is clearly unacceptable.<sup>189</sup> Schools must at least investigate claims of peer harassment,<sup>190</sup> and that investigation cannot involve merely accepting an accused student’s denial at face value and not engaging in any credibility determinations.<sup>191</sup> If their investigations indicate that harassment did occur, some kind of disciplinary action is likely required.<sup>192</sup> While it is acknowledged that victims have no right to demand any particular disciplinary or remedial action on the part of a

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offensive).

187. *Doe v. Hamden Bd. of Educ.*, No. 3:06-cv-1680, 2008 U.S. Dist. LEXIS 40269, at \*20–21 (D. Conn. May 19, 2008) (quoting *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 751 (2d Cir. 2003)), and *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 645 (1999)).

188. *Derby Bd. of Educ.*, 451 F. Supp. 2d at 445–46; *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000); *Alexander*, 177 P.3d at 738.

189. *S.G. v. Rockford Bd. of Educ.*, No. 08 C 50038, 2008 U.S. Dist. LEXIS 95522, at \*15–16 (N.D. Ill. Nov. 24, 2008); *James v. Indep. Sch. Dist. No. 1-007*, No. CIV-07-434-M, 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); *Derby Bd. of Educ.*, 451 F. Supp. 2d at 447–48; *Bashus v. Plattsmouth Cmty. Sch. Dist.*, No. 8:05CV300, 2006 U.S. Dist. LEXIS 56565, at \*10–11 (D. Neb. Aug. 3, 2006); *Doe v. E. Haven Bd. of Educ.*, 430 F. Supp. 2d 54, 63–65 (D. Conn. 2006); *Martin v. Swartz Creek Cmty. Sch.*, 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, 1310–11 (D. Kan. 2005); *Ray*, 107 F. Supp. 2d at 1170. *But see* *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1129 (10th Cir. 2008) (McConnell, concurring in part and dissenting in part).

190. *See* *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 259 (6th Cir. 2000); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238 (10th Cir. 1999); *Bruning*, 486 F. Supp. 2d at 915–16; *Ross*, 506 F. Supp. 2d at 1357; *Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. 467, 481 (D.N.H. 1997); *Alexander*, 177 P.3d at 738.

191. *Alexander*, 177 P.3d at 740.

192. *Vance*, 231 F.3d at 262; *Hamden Bd. of Educ.*, 2008 U.S. Dist. LEXIS 40269, at \*5; *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007); *Oyster River Coop. Sch. Dist.*, 992 F. Supp. at 481; *Alexander*, 177 P.3d at 739.

school,<sup>193</sup> if the particular disciplinary action taken fails to protect the victim or stop the harassment, courts may fault the school for taking inadequate disciplinary action.<sup>194</sup> Disciplining the harasser and the victim equally has been frowned upon by courts,<sup>195</sup> and when schools are aware that a response method is not achieving the goal of stopping the harassment, they may not continue using that method alone and to no avail.<sup>196</sup> Finally, unjustified delay in responding can result in a school being viewed as deliberately indifferent.<sup>197</sup>

These cases and others demonstrate that courts are vigilant in responding to indications that schools are discouraging victims from reporting such violence, minimizing the violation, and/or displaying hostility toward the victim or bias in favor of the assailant. In *Doe v. Oyster River Cooperative School District*,<sup>198</sup> 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.<sup>199</sup> Similarly, in *Murrell v. School District No. 1*,<sup>200</sup> the school had actual knowledge that a male student repeatedly raped a student with spastic cerebral palsy, did not inform the victim's mother, and told the victim not to inform her mother.<sup>201</sup> In *Vance v. Spencer County Public School District*,<sup>202</sup> and *Franklin v. Gwinnett County*

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193. *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 175 (1st Cir. 2007); *Hamden Bd. of Educ.*, 2008 U.S. Dist. LEXIS, at \*22; *Kelly v. Yale Univ.*, NO. 3:01-CV-1591 (JCH), 2003 U.S. Dist. LEXIS 4543, at \*4 (D. Conn. Mar. 26, 2003); *Clark v. Bibb County Bd. of Educ.*, 174 F. Supp. 2d 1369, 1374 (M.D.Ga. 2001).

194. *M. v. Stamford Bd. of Educ.*, No. 3:05-CV-0177 (WWE), 2008 U.S. Dist. LEXIS 51933, at \*28 (D. Conn. July 7, 2008); *Seiwert*, 497 F. Supp. 2d at 954; *Derby Bd. of Educ.*, 451 F. Supp. 2d at 447.

195. *Seiwert*, 497 F. Supp. 2d at 954; *Doe v. Erskine Coll.*, No. 8:04-23001-RBH, 2006 U.S. Dist. LEXIS 35780, at \*35 (D.S.C. May 25, 2006); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1310-11 (D. Kan. 2005).

196. *Patterson v. Hudson Area Sch.*, No. 08-1008, 2009 U.S. App. LEXIS 25, at \*32 (6th Cir. Jan. 6, 2009); *Vance*, 231 F.3d at 261; *Martin v. Swartz Creek Cmty. Sch.*, 419 F. Supp. 2d 967, 974 (E.D. Mich. 2006); *Jones v. Ind. Area Sch. Dist.*, 397 F. Supp. 2d 628, 645 (W.D. Pa. 2005); *Alexander*, 177 P.3d at 739. *But see* *Porto v. Town of Tewksbury*, 488 F.3d 67, 74 (1st Cir. 2007).

197. *Williams v. Bd. of Regents*, 477 F.3d 1282, 1289 (11th Cir. 2007); *Doe v. E. Haven Bd. of Educ.*, 200 F. App'x 46, 49 (2d Cir. 2006); *J.K. v. Ariz. Bd. of Regents*, No. CV 06-916-PHX-MHM, 2008 U.S. Dist. LEXIS 83855, at \*54 (D. Ariz. Sept. 29, 2008).

198. 992 F. Supp. 467, 481 (D.N.H. 1997) (granting in part and denying in part the defendants' motion for summary judgment).

199. *Id.* at 479.

200. 186 F.3d 1238 (10th Cir. 1999).

201. *Id.* at 1248.

202. 231 F.3d 253, 259 (6th Cir. 2000) (allowing a Title IX claim against school district and a § 1983 action against principal and teacher and denying a § 1983 action against the school district).

*Public School*,<sup>203</sup> the court notes the failure of the school to report peer sexual violence to law enforcement or to inform the survivor of her right to do so.<sup>204</sup>

With regard to minimizing and hostile behaviors, a court noted that a dean publicly characterized the sexual assault on the plaintiff in *Kelly v. Yale University*,<sup>205</sup> as “not legal rape,”<sup>206</sup> and in *Seiwert v. Spencer-Owen Community School Corporation*,<sup>207</sup> the school told the harassment victim, in the face of death threats from other students, that “some threats aren’t as serious as others.”<sup>208</sup> In *Doe v. Derby Board of Education*,<sup>209</sup> the court expressed suspicion that the school’s inappropriate response to Doe’s rape was due to her assailant’s father being on the school board.<sup>210</sup> Likewise, in *Doe v. Erskine College*,<sup>211</sup> school officials who were previously sympathetic became “rude” to the victim when she revealed her assailant’s name. They told her that her assailant was “very bright, very intelligent, and ‘going places,’” and resisted enforcing a judicial stay-away order because “both students . . . have a right to an education and . . . the male student had not been found guilty of any crime.”<sup>212</sup> In *Patterson v. Hudson Area School*,<sup>213</sup> *Theno v. Tonganoxie Unified School District No. 464*,<sup>214</sup> and *Doe v. Brimfield Grade School*,<sup>215</sup> teachers and school officials made statements indicating that they agreed with the harassers or laughed in the face of the harassment.<sup>216</sup> Finally, in *S.S. v. Alexander*,<sup>217</sup> the court states:

S.S. has provided ample evidence to raise a jury question on the issue of the UW’s deliberate indifference. [M]inimizing the

203. 503 U.S. 60 (1992) (allowing a damages remedy under Title IX).

204. *Franklin*, 503 U.S. at 64; *Vance*, 231 F.3d at 262 (affirming a jury verdict for student in Title IX action).

205. NO. 3:01-CV-1591 (JCH), 2003 U.S. Dist. LEXIS 4543 (D. Conn. Mar. 26, 2003) (allowing a Title IX action to proceed).

206. *Id.* at \*3.

207. 497 F. Supp. 2d 942 (S.D. Ind. 2007) (denying defendants’ motion for summary judgment in Title IX action).

208. *Id.* at 954.

209. 451 F. Supp. 2d 438 (D. Conn. 2006) (denying defendant’s motion for summary judgment in Title IX case).

210. *Id.* at 447.

211. No. 8:04-23001-RBH, 2006 U.S. Dist. LEXIS 35780 (D.S.C. May 25, 2006) (denying defendant’s motion for summary judgment in Title IX action).

212. *Id.* at \*33–34.

213. No. 08-1008, 2009 U.S. App. LEXIS 25 (6th Cir. Jan. 6, 2009) (allowing a Title IX claim to proceed).

214. 394 F. Supp. 2d 1299 (D. Kan. 2005) (denying defendant’s motion for judgment as a matter of law in Title IX action).

215. 552 F. Supp. 2d 816 (C.D. Ill. 2008) (allowing a Title IX action to proceed).

216. *Patterson*, 2009 U.S. App. LEXIS 25, at \*4; *Brimfield Grade Sch.*, 552 F. Supp. 2d at 823; *Theno*, 394 F. Supp. 2d at 1310–11.

217. 177 P.3d 724 (Wash. Ct. App. 2008) (allowing a Title IX action to proceed).

effects of her rape, . . . keeping the matter out of the public eye to avoid negative publicity, . . . discouraging S.S. from filing a police report, top administrators not notifying the UW's own police force of the report of a violent sex crime, . . . wearing S.S. down until she believed that further complaints would be futile, . . . [and] questioning her truthfulness when she expressed dissatisfaction with the results of the mediation are all claims supported by evidence in this case.<sup>218</sup>

In addition to acknowledging the linkages between poor treatment of victims and reporting of peer sexual violence, these cases also echo the Clery Act's concern with connections between victims' rights and violence prevention. In the Campus Sexual Assault Victim's Bill of Rights, the Clery Act provides that colleges and universities must notify students of "options for, and available assistance in, changing academic and living situations after an alleged sexual assault incident, if so requested by the victim and if such changes are reasonably available."<sup>219</sup> While subsequent enforcement has not focused very specifically on this provision in the Clery context, Title IX case law indicates that schools will be liable for not taking steps to protect the victim from having to constantly confront her assailant while continuing with her education.<sup>220</sup> Most importantly, these precedents demonstrate that colleges and universities particularly risk liability when their failure to protect the victim results in the victim being further harassed or retaliated against by the assailant or third parties.<sup>221</sup> As such, this line of cases focuses on another way in which a victim-centered approach is linked

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218. *Id.* at 740.

219. 20 U.S.C. § 1092 (f)(8)(B)(vii) (2006).

220. *S.G. v. Rockford Bd. of Educ.*, No. 08 C 50038, 2008 U.S. Dist. LEXIS 95522, at \*10 (N.D. Ill. Nov. 24, 2008); *Doe v. Hamden Bd. of Educ.*, No. 3:06-cv-1680, 2008 U.S. Dist. LEXIS 40269, at \*17 (D. Conn. May 19, 2008); *Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 444 (D. Conn. 2006); *Doe v. Erskine Coll.*, No. 8:04-23001-RBH, 2006 U.S. Dist. LEXIS 35780, at \*33-34 (D.S.C. May 25, 2006); *Kelly v. Yale Univ.*, NO. 3:01-CV-1591 (JCH), 2003 U.S. Dist. LEXIS 4543, at \*11-12 (D. Conn. Mar. 26, 2003); *Alexander*, 177 P.3d at 742-43.

221. *Patterson*, 2009 U.S. App. LEXIS 25, at \*33; *Rockford Bd. of Educ.*, 2008 U.S. Dist. LEXIS 95522, at \*10, \*14-15; *M. v. Stamford Bd. of Educ.*, No. 3:05-CV-0177 (WWE), 2008 U.S. Dist. LEXIS 51933, at \*28 (D. Conn. July 7, 2008); *Hamden*, 2008 U.S. Dist. LEXIS 40269, at \*17; *Brimfield Grade Sch.*, 552 F. Supp. 2d at 823; *James v. Indep. Sch. Dist. No. 1-007*, No. CIV-07-434-M, 2008 U.S. Dist. LEXIS 82199, at \*6 (W.D. Okla. Oct. 16, 2008); *Derby Bd. of Educ.*, 451 F. Supp. 2d at 444-45; *Erskine*, 2006 U.S. Dist. LEXIS 35780, at \*39; *Bashus v. Plattsmouth Cmty. Sch. Dist.*, No. 8:05CV300, 2006 U.S. Dist. LEXIS 56565, at \*10-11 (D. Neb. Aug. 3, 2006); *Doe v. E. Haven Bd. of Educ.*, 200 F. App'x 46, 59-60 (2d Cir. 2006); *Martin v. Swartz Creek Cmty. Sch.*, 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*, 394 F. Supp. 2d at 1310-11. *But see* *Snethen v. Bd. of Pub. Educ.*, No. 406CV259, 2008 U.S. Dist. LEXIS 22788, at \*17-21 (S.D. Ga. 2008); *C.R.K. v. U.S.D. 260 Bd. of Educ.*, 176 F. Supp. 2d 1145, 1163-65 (D. Kan. 2001).

in crucial ways to the prevention of violence such as peer sexual violence.

This court enforcement of Title IX has demonstrated a relatively clear understanding of the dynamics that often follow peer sexual violence at a school or on a campus and the implications of those dynamics for the victim's health, well-being, and ability to continue with and enjoy the benefits of her education, which is the central goal of Title IX. In *Derby*, for instance, a middle school student was raped by a high school student, where the two schools were housed in the same building.<sup>222</sup> The school suspended the perpetrator for 10 days and then allowed him to return to school.<sup>223</sup> In finding that these actions could be judged by a jury to be deliberately indifferent to the harassment, the court stated that

Sally Doe's affidavit states that she saw Porto, Jr. many times during the school year and that the experience of seeing him "was very upsetting" and made the "school year very hard." Thus, even absent actual post-assault harassment by Porto, Jr., the fact that he and plaintiff attended school together could be found to constitute pervasive, severe, and objectively offensive harassment.<sup>224</sup>

Similarly, in *Doe v. Hamden Board of Education*,<sup>225</sup> the victim was raped during the summer off the grounds of her high school by another student. The court stated that

A reasonable jury could conclude that Garcia's presence at school throughout the school year was harassing to Mary Doe because it exposed her to multiple encounters with him. Further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided to her at school.<sup>226</sup>

Finally, in *S.G. v. Rockford Board of Education*,<sup>227</sup> the plaintiff was a first-grader who was taken to a closet by another first-grader who "proceeded to sexually batter, harass and abuse her, physically and emotionally, in an aberrant sexual manner."<sup>228</sup> When the assailant was not disciplined in any way, he continued to stalk her at the school, directing at her sexual innuendos and comments that she was "hot".<sup>229</sup> Defendants argued that these actions were not severe enough to be actionable, but the court disagreed, stating that, while these actions "may not, standing alone,

222. *Derby Bd. of Educ.*, 451 F. Supp. 2d at 440–41.

223. *Id.* at 441.

224. *Id.* at 444 (citations omitted).

225. 2008 U.S. Dist. LEXIS 40269.

226. *Id.* at \*16–17.

227. 2008 U.S. Dist. LEXIS 95522.

228. *Id.* at \*2–\*3 (citations omitted).

229. *Id.* at \*3.

amount to actionable harassment, in light of the sexual battery alleged, those actions become much more offensive and severe. This is especially true of plaintiffs' allegation that the problem student continued to 'stalk [L.G.] on the playground and other locations . . . .'<sup>230</sup> In all three cases, the courts noted that the victims ended up having to change schools themselves in order to avoid their assailants.<sup>231</sup>

Several courts have added to this understanding by indicating that, even when a school does separate the students, *how* the school does so can reflect on whether its institutional response could qualify as deliberately indifferent. For instance, some courts have indicated that requiring a victim to change her housing, classes, or campus employment to avoid her assailant can be indicia of deliberate indifference. In *S.S.*, the plaintiff, who had a highly sought-after job as a student assistant equipment manager for the football team, was assaulted by one of the players.<sup>232</sup> In allowing the case to proceed to a jury on the deliberate indifference issue, the court noted that a jury could consider as evidence the university's repeated suggestion to the plaintiff that she leave her job, while her rapist would remain on the team.<sup>233</sup> The *James v. Independent School District No. 1-007*<sup>234</sup> and *Seiwert* courts criticized the schools for responding to plaintiffs' being repeatedly harassed and assaulted by taking only one action: moving the victim to a different classroom.<sup>235</sup> While there have been cases where a

230. *Id.* at \*10.

231. *See id.* at \*12; *Hamden*, 2008 U.S. Dist. LEXIS 40269, at \*17; *Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 445 (D. Conn. 2006). Indeed many of the plaintiffs in these cases end up leaving their schools. Besides the *Rockford Board of Education*, *Hamden*, and *Derby* plaintiffs, the *Patterson*, *Vance*, *James*, *Brimfield Grade School*, *Seiwert*, *Bruning*, and *Theno* plaintiffs all left their schools in whole or in part. *See Patterson v. Hudson Area Sch.*, No. 08-1008, 2009 U.S. App. LEXIS 25, at \*12 (6th Cir. Jan. 6, 2009); *Vance v. Spencer County Pub. Sch. Dist.*, 231 F. 3d 253, 256-57 (6th Cir. 2000); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 820 (C.D. Ill. 2008); *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007); *Bruning v. Carroll Cmty. Sch. Dist.*, 486 F. Supp. 2d 892, 910-11 (N.D. Iowa 2007); *James v. Indep. Sch. Dist. No. 1-007*, No. CIV-07-434-M, 2008 U.S. Dist. LEXIS 82199, at \*6 (W.D. Okla. Oct. 16, 2008); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1309 (D. Kan. 2005).

232. *S.S. v. Alexander*, 177 P.3d 724, 728 (Wash. Ct. App. 2008).

233. *Id.* at 740.

234. 2008 U.S. Dist. LEXIS 82199.

235. *See id.* at \*6; *Seiwert*, 497 F. Supp. 2d at 954; *see also Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. 467, 472 (D.N.H. 1997); *Doe v. Erskine Coll.*, No. 8:04-23001-RBH, 2006 U.S. Dist. LEXIS 35780, at \*30-31 (D.S.C. May 25, 2006).

While this Court acknowledges the Supreme Court's admonition in *Davis* that the deliberate indifference question is not a mere 'reasonableness standard' that transforms every school disciplinary decision into a jury question, in a case such as this, the issue seems best suited for a jury to consider the range of all known circumstances, from the District's apparently efficient response on February 26, 2004, to its earlier decision not to remove Gordon from the classroom or more closely monitor his interaction with students.

school's decision to change the victim's school or living arrangements instead of the perpetrator's has been upheld,<sup>236</sup> courts do not appear to question changing an accused student's arrangements, even while an investigation is still ongoing.<sup>237</sup>

Finally, the court concern regarding separating the victim and accused student, even before an investigation has been completed, reflects an understanding of the harassment and retaliation that victims can face after reporting an assault, whether the harassment is from the accused perpetrator or his friends. In *Derby*, the student was harassed by her assailant's friends, who would drive by her and shout "slut" from their vehicle.<sup>238</sup> In *Erskine*, the student was repeatedly harassed by both the accused student and his friends to such an extent that she stated that she was referred to on campus as the "rape girl,"<sup>239</sup> and the ongoing trauma eventually led her to attempt suicide, after which she was diagnosed with Post Traumatic Stress Disorder and had to deal with a state mental hospital representative who was considering whether to institutionalize her.<sup>240</sup> Similarly, in *Doe v. East Haven Board of Education*,<sup>241</sup> after plaintiff reported to police that two older students had assaulted her, she was subjected to five weeks of constant harassment by classmates, including being called "a slut, a liar, a bitch, a whore" and having a tennis ball thrown at her. She, too, was eventually taken to the hospital for threatening suicide.<sup>242</sup>

Furthermore, courts have expressed concern that a school's failure to respond properly to initial or repeated instances of harassment can actually

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Zamora v. N. Salem Cent. Sch. Dist., 414 F. Supp. 2d 418, 425–26 (S.D.N.Y. 2006).

236. *Erskine Coll.*, 2006 U.S. Dist. LEXIS 35780, at \*30–31 (finding Title IX not violated where victim of sexual touching by another student was moved to another class as soon as school officials learned of incident); *see also* KF's Father v. Marriot, No. CA 00-0215-C, 2001 U.S. Dist. LEXIS 2534, at \*56 (S.D. Ala. Feb. 23, 2001).

237. *Gabrielle M. v. Park Forest-Chicago Heights*, 315 F.3d 817 (7th Cir. 2003) (involving school officials who moved harasser to another class after second incident); *Staebling v. Metro. Gov't of Nashville & Davidson County*, No. 3:07-0797, 2008 U.S. Dist. LEXIS 91519, at \*32–3 (M.D.Tenn. 2008) ("Plaintiffs in this case cannot survive summary judgment because there is absolutely no evidence that Jenna was subjected to sexual harassment on the bus after this incident. Quite the contrary, the undisputed evidence is that the perpetrator was taken off the bus and ultimately sent to another school."); *Clark v. Bibb County Bd. of Educ.*, 174 F. Supp. 2d 1369, 1372 (M.D. Ga. 2001) (addressing case where both students were moved to separate classes after one touched the other's buttocks twice); *Wilson v. Beaumont Independent School Dist.*, 144 F. Supp.2d 690 (E.D. Tx. 2001) (refusing to fault teacher for physically segregating the perpetrator from the rest of the class and principal for transferring the alleged perpetrator to another school).

238. *Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 444 (D. Conn. 2006).

239. *Erskine Coll.*, 2006 U.S. Dist. LEXIS 35780, at \*22.

240. *Id.*

241. 430 F. Supp. 2d 54 (D. Conn. 2006)

242. *Id.* at 59–60.

encourage the harassers. In *Derby*, for instance, in questioning why the school did not consider expelling the assailant, the court notes that the assailant was the son of a member of the board and was later expelled after he sexually assaulted a second student.<sup>243</sup> In *Ray v. Antioch Unified School District*,<sup>244</sup> the court accepted plaintiff's claim that as a consequence of the school's deliberate indifference to other students harassing plaintiff for his perceived sexual orientation and his transgendered mother, "Defendant Carr became emboldened, and assaulted and severely injured Plaintiff while on his way home from school."<sup>245</sup> In *Seiwert*, after the school's failure to respond to a similar state of escalating harassment, the court went as far as to state that "the students at OVMS who were bullying S.S. could have actually construed the School Corporation's inaction as tacit approval of their behavior, prompting them to engage in even greater acts of bullying."<sup>246</sup>

The same concern with how school responses to peer sexual violence may actually encourage further violence is echoed by another line of Title IX cases where the facts indicate that a school's actions actually facilitate or make women vulnerable to sexual violence. For instance, in *Simpson v. University of Colorado Boulder*,<sup>247</sup> the plaintiffs alleged that the University of Colorado ("CU") "sanctioned, supported, even funded"<sup>248</sup> a football recruiting program where the risk of peer sexual violence occurring was so obvious that the University's failure to address it constituted deliberate indifference.<sup>249</sup> In overturning the district court's denial of the university's motion for summary judgment, the Tenth Circuit found that the football coach "maintained an unsupervised player-host program to show high-school recruits 'a good time'" despite knowing generally "of the serious risk of sexual harassment and assault during college-football recruiting efforts; . . . that such assaults had indeed occurred during CU recruiting visits; . . . [and] that there had been no change in atmosphere since" the last assault.<sup>250</sup>

Along the same lines, in *Williams v. Board of Regents of the University System of Georgia*,<sup>251</sup> the plaintiff was gang-raped by three fellow students, the leader of whom was recruited by the University of Georgia ("UGA") basketball team and admitted to the University even though the coach,

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243. *Derby Bd. of Educ.*, 451 F. Supp. 2d at 447–48.

244. 107 F. Supp. 2d 1165 (N.D. Cal. 2000).

245. *Id.* at 1168.

246. *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007).

247. 500 F.3d 1170 (10th Cir. 2007).

248. *Id.* at 1177.

249. *Id.* at 1185.

250. *Id.* at 1184.

251. 477 F.3d 1289 (11th Cir. 2007).

athletics director, and President had knowledge that he had criminal and disciplinary problems, including sexually violent behavior, resulting in his dismissal from another school and plea of no contest to misdemeanor criminal charges.<sup>252</sup> The Eleventh Circuit denied the University's motion to dismiss because this admission, combined with UGA's taking 8 months to respond to Williams's report and the University's failure "to inform student-athletes about the applicable sexual harassment policy" could show that it had been deliberately indifferent to the harassment.<sup>253</sup>

CU settled Lisa Simpson's case for \$2.5 million, paying another \$350,000 to her co-plaintiff, hired a special Title IX analyst, and fired some 13 university officials, including the President and football coach.<sup>254</sup> While the exact amount of UGA's settlement with Williams has not been disclosed, it is in the six-figure range.<sup>255</sup> Therefore, a number of Title IX scholars and lawyers also see hopeful signs in cases like *Simpson* and *Williams*.<sup>256</sup> They retain this optimism despite criticizing the Supreme Court's actual notice and deliberate indifference standards as too strict and too vague<sup>257</sup> and alleging that too many lower courts have "narrowly construed this standard and raised the bar disturbingly high for students, offering woefully little protection."<sup>258</sup> These hopes that private suits for damages for Title IX violations will "equal[] out the litigation playing field, so that schools start to be equally afraid of the rape survivor suing them"<sup>259</sup> appear to be bearing fruit.

### 3. OCR Enforcement of Title IX: Comprehensive, "Injunctive" Relief

In addition to these indications that Title IX case law is providing survivors of peer sexual violence in schools with increasingly more powerful remedies against schools that fail to respond properly, survivors

252. *Id.* at 1297.

253. *Id.* A plaintiff has prevailed in a recent, similar case against Arizona State University ("ASU"), where the perpetrator sexually assaulted a fellow student in the dormitory they shared. Although he had been expelled from a high school to college transitional summer program at ASU for various instances of misconduct, including sexual harassment, the perpetrator was allowed, after the head coach intervened, to enroll as a freshman and play on the football team. See *J.K. v. Arizona Bd. of Regents*, No. CV 06-916-PHX-MHM, 2008 U.S. Dist. LEXIS 83855 (D. Ariz. Sept. 29, 2008).

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

255. *Id.* at 420. The ASU plaintiff has settled for \$850. See Lester Munson, *Landmark Settlement in ASU Rape Case*, ESPN, Jan. 30, 2009, <http://sports.espn.go.com/espn/otl/news/story?id=3871666>.

256. *Id.* at 421.

257. *Id.* at 412.

258. Linda Wharton, *Comments from the Spring 2007 Harvard Journal of Law & Gender Conference*, 31 HARV. J.L. & GENDER 378, 387 (2008).

259. *Id.* at 384.

may also look to the administrative remedies of the Office of Civil Rights in the Department of Education. Because these two Title IX enforcement mechanisms operate differently, with different consequences for schools and different remedies for complainants/plaintiffs, they have developed somewhat different compliance standards. OCR provides basically injunctive relief to complainants in that it will direct schools to change policies, procedures, and other responses that do not comply with Title IX, and it gives schools an opportunity to comply with OCR's directives before taking any more punitive measures. Therefore, its substantive standards for what a school must do to comply are higher and more exacting.

As a result, a number of the complaints that Title IX commentators have made regarding the Supreme Court's "actual notice" and "deliberate indifference" standard can be addressed via OCR's enforcement. While this enforcement may be a less powerful "stick" against schools that respond inadequately to harassment and less likely to compensate the student survivors who complain, the relief and remedies it provides are still quite significant in terms of their abilities to change school behavior. OCR has published two editions of its *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, first in 1997<sup>260</sup> and a revised version in 2001 ("*Revised Guidance*").<sup>261</sup> These documents, along with its LOFs/CTRs, demonstrate how OCR can reach a broader range of school action and inaction than the Title IX case law does.

For instance, some Title IX lawyers have suggested seeking a legislative override of the Supreme Court's actual knowledge requirement, in favor of a constructive knowledge approach.<sup>262</sup> This is in fact OCR's standard when it conducts an investigation of an institution's compliance<sup>263</sup> because "OCR always provides the school with actual notice and the opportunity to take appropriate corrective action before issuing a finding of violation."<sup>264</sup> In another example, some Title IX scholars and attorneys have expressed concern over the lack of definition in *Davis* and its predecessor case, *Gebser v. Lago Vista Independent School District*, as to the school officials to whom a survivor must give notice in order to meet the "actual notice" standard.<sup>265</sup> On this issue, OCR's *Revised Guidance* makes clear, "A school has notice if a responsible employee 'knew, or in the exercise of reasonable care should have known,' about the harassment."<sup>266</sup> The

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260. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (1997).

261. REVISED GUIDANCE, *supra* note 133.

262. Rosenfeld, *supra* note 254, at 413.

263. REVISED GUIDANCE, *supra* note 133, at 13.

264. *Id.* at iv.

265. Wharton, *supra* note 258, at 388–89.

266. REVISED GUIDANCE, *supra* note 133, at 13.

definition of “responsible employee” is quite broad, including any employee who “has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.”<sup>267</sup> Finally, OCR makes clear the wide range of methods by which schools can receive notice, including through formal and informal grievances and complaints, through a parent contacting a school official, through a responsible employee witnessing the harassment, or even through indirect methods such as the media or flyers posted around the school.<sup>268</sup>

The *Revised Guidance* makes clear the comprehensiveness of OCR’s approach, as do various LOFs/CTRs issued by the office. For instance, the *Revised Guidance* gives a full page of instructions on how schools may conduct proper investigations into sexual harassment complaints, including what types of evidence should be collected and that determinations should be made based on a totality of the circumstances, with particular attention to credibility determinations.<sup>269</sup> What constitutes “prompt and equitable grievance procedures” from OCR’s perspective gets over two pages.<sup>270</sup> The *Revised Guidance* also gives advice on administrative methods to achieve compliance, such as training for responsible employees so they understand how to respond appropriately.<sup>271</sup> Moreover, it deals with specific situations that often occur in harassment cases and are of particular concern or controversy at many schools, including how to investigate and respond to a complaint if the harassed student does not want her/his name revealed<sup>272</sup> and how to handle the due process rights of the accused.<sup>273</sup>

The LOFs/CTRs also demonstrate both OCR’s comprehensive approach and give further indications to schools as to appropriate responses in certain difficult circumstances. In several investigations where OCR did not actually find enough evidence to support a violation of Title IX based on the facts alleged in the complaint, it nevertheless found violations due to its comprehensive review of the school’s policies and procedures.<sup>274</sup> The most “technical” of these types of violations include failing to appoint or communicate the roles of the Title IX coordinator(s) or other personnel involved in various parts of the harassment response system;<sup>275</sup> unclearly

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267. *Id.*

268. *Id.*

269. *Id.* at 9.

270. *Id.* at 19–21.

271. *Id.* at 13.

272. *Id.* at 17.

273. *Id.* at 22.

274. *See, e.g.*, Utah College of Massage Therapy Letter, *supra* note 148.

275. *Id.*; Letter from Thomas J. Hibino to Roger Gilmore (Mar. 29, 1996), in Maine College of Art, OCR Case No. 01-95-2099 (on file with author) [hereinafter Maine College of Art Letter]; Letter from John E. Palomino to John D. Maguire (July 24,

articulating policies and procedures such as timeframes, investigatory steps, the informal complaint process, recordkeeping requirements and the range of remedies;<sup>276</sup> and not following the school's own procedures.<sup>277</sup>

More substantively, OCR has found the following institutional responses to be inconsistent with or in violation of Title IX's regulations in cases involving peer sexual violence in schools:

- Total lack of policies and procedures that victims can use to complain about harassment or providing too many complicated, conflicting and burdensome complaint procedures<sup>278</sup>
- Failing to treat rape and sexual assault as a Title IX matter<sup>279</sup>
- Failing to take any steps to respond to harassment or prevent harassment from recurring<sup>280</sup>
- Failing to inform victims of their options for redress<sup>281</sup>

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1992), in Claremont Graduate Schools, OCR Case No. 09-92-6002 (on file with author); Letter from John E. Palomino to Karl Pister (Jun. 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]; Letter from John E. Palomino to Robin Wilson (Oct. 23, 1991), in California State University, Chico, OCR Case No. 09-91-2098 (on file with author) [hereinafter California State University Letter].

276. Letter from Thomas J. Hibino to Daniel Kehoe (May 19, 1994), in Millis Public Schools, OCR Case No. 01-93-1123 (on file with author) [hereinafter Millis Public Schools Letter]; Maine College of Art Letter, *supra* note 275; Letter from Howard Kallem to Stephen W. Vescovo (Mar. 26, 2004), in Christian Brothers University, OCR Case No. 04-03-2043 (on file with author) [hereinafter Christian Brothers University Letter]; Letter from Charles R. Love to Glenn Roquemore (Jan. 28, 2003), in Irvine Valley College and the South Orange County Community College District, OCR Case No. 09-02-2105 (on file with author) [hereinafter Irvine Valley College Letter]; University of California, Santa Cruz Letter, *supra* note 275; California State University Letter, *supra* note 275; Letter from Robert E. Scott to William D. Barr (Jun. 26, 2001), in Monterey County Office of Education, OCR Case No. 09-00-1435 (on file with author) [hereinafter Monterey County Office of Education Letter].

277. Letter from Robert E. Scott to Thomas Allcock (Apr. 30, 2003), in Raymond-Knowles Union Elementary School District, OCR Case No. 09-02-1327 (on file with author).

278. Millis Public Schools Letter, *supra* note 276; Letter from John E. Palomino to Ruben Armiñana (Apr. 29, 1994), in Sonoma State University, OCR Case No. 09-93-2131 (on file with author) [hereinafter Sonoma State University Letter]; Letter from Patricia Shelton and C. Mack Hall to James C. Enochs (Dec. 10, 1993), in Modesto City Schools, OCR Case No. 09-93-1319 (on file with author) [hereinafter Modesto City Schools Letter].

279. Letter from H. Stephen Deering to Carolyn M. Getridge (Oct. 29, 1996), in Oakland Unified School District, OCR Case No. 09-96-1203-I (on file with author); Sonoma State University Letter, *supra* note 278; Modesto City Schools Letter *supra* note 278.

280. Letter from Charlene F. Furr to Jimmy D. Hattabaugh (Apr. 16, 2007), in Mansfield School District, OCR Case No. 06-06-1390 (on file with author); Letter from Cathy H. Lewis to Thomas Crawford (Apr. 16, 1993), in Academy School District, OCR Case No. 08-93-1023 (on file with author) [hereinafter Academy School District Letter].

281. Millis Public Schools Letter, *supra* note 275; Sonoma State University Letter,

- Actively discouraging victims from naming their harassers<sup>282</sup>
- Requiring victims to confront their harassers before filing a complaint<sup>283</sup>
- Failing to address victims' safety concerns<sup>284</sup>
- Unjustifiably delaying responses to and investigations of complaints<sup>285</sup>
- Deferring to criminal investigations rather than conducting an independent investigation by school officials<sup>286</sup>
- Inadequately investigating and/or tainting investigations through bias, lack of objectivity, or asking victims inappropriate and humiliating questions<sup>287</sup>
- Keeping incomplete files on investigations and not making credibility determinations regarding the victim's and harasser's stories<sup>288</sup>
- Providing informal complaint processes that lack timelines and other structure<sup>289</sup>
- Giving more procedural rights to the accused than to the accuser in a fact-finding hearing/proceeding<sup>290</sup>
- Prohibiting victims from being accompanied by an attorney<sup>291</sup>
- Placing additional evidentiary burdens on sexual assault victims<sup>292</sup>
- Using a "clear and convincing evidence" instead of a "preponderance of the evidence" standard, as required by Title IX<sup>293</sup>

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*supra* note 278.

282. Sonoma State University Letter, *supra* note 278.

283. Letter from Alan D. Hughes to Susan Whittle (Sept. 14, 2008), in Golden City R-III, OCR Case No. 07-07-1104 (on file with author).

284. Millis Public Schools Letter, *supra* note 275; University of California, Santa Cruz Letter, *supra* note 275.

285. Letter from Frankie Furr to James E. Nelson (August 5, 2005), in Richardson Independent School District, OCR Case No. 06-03-1283 (on file with author) [hereinafter Richardson Independent School District Letter]; Millis Public Schools Letter, *supra* note 276; Irvine Valley College Letter, *supra* note 276; University of California, Santa Cruz Letter, *supra* note 275.

286. Academy School District Letter, *supra* note 280; Millis Public Schools Letter, *supra* note 276.

287. Richardson Independent School District Letter, *supra* note 285; University of California, Santa Cruz Letter, *supra* note 275; Sonoma State University Letter, *supra* note 278.

288. California State University Letter, *supra* note 275.

289. Sonoma State University Letter, *supra* note 278.

290. Letter from Gary D. Jackson to Jane Jervis (Apr. 4, 1995), in The Evergreen State College, OCR Case No. 10-92-2064 (on file with author) [hereinafter Evergreen State College Letter]; University of California, Santa Cruz Letter, *supra* note 275.

291. California State University Letter, *supra* note 275.

292. Letter from Thomas J. Hibino to Lawrence H. Summers (April 1, 2003), in Harvard University, OCR Case No. 01-02-2041 (on file with author).

293. Evergreen State College Letter, *supra* note 290; Letter from Sheralyn Goldbecker to John J. DeGioia (May 5, 2004), in Georgetown University, OCR Case

- Failing to discipline students for harassment<sup>294</sup>
- Giving overly lenient sanctions to harassers and not providing sanctions designed to end the harassment<sup>295</sup>
- Failing to notify victims of outcomes and sanctions imposed on harassers and disciplining victims for re-disclosing information about disciplinary sanctions imposed on harassers<sup>296</sup>
- Not providing adequate training to designated employees<sup>297</sup>

Both the *Revised Guidance* and the LOFs/CTRs surveyed here echo insights from the Title IX case law and the Clery Act. For example, once a school has notice of harassment, it must “take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.”<sup>298</sup> Schools must respond to notice of harassment in some way “whether or not the student who was harassed makes a complaint or otherwise asks the school to take action.”<sup>299</sup> At the same time, institutions should take action that may compromise the victim’s confidentiality only when this is necessary “in the context of [the institution’s] responsibility to provide a safe and nondiscriminatory environment for all students.”<sup>300</sup>

Also like the case law, the *Revised Guidance* takes a similar “victim-centered” approach. It makes specific mention that the school may need to take interim measures during the investigation of a complaint. For example, in the case of sexual assault, a school may need to place “the students immediately in separate classes or in different housing arrangements on a campus.”<sup>301</sup> “Responsive measures of this type should be designed to minimize, as much as possible, the burden on the student who was harassed.”<sup>302</sup> Institutions should “take steps to prevent any

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No. 11-03-2017 (on file with author) [hereinafter Georgetown University Letter].

294. Modesto City Schools Letter, *supra* note 278; Millis Public Schools Letter, *supra* note 276.

295. University of California, Santa Cruz Letter, *supra* note 275; Sonoma State University Letter, *supra* note 278.

296. Letter from Michael E. Gallgher to Conrad A. Jeffries (Dec. 1, 2005), in Schoolcraft College, OCR Case No. 15-05-2030 (on file with author); Christian Brothers University Letter, *supra* note 276; Sonoma State University Letter, *supra* note 275; California State University Letter, *supra* note 275.

297. Millis Public Schools Letter, *supra* note 276; Letter from Thomas J. Hibino to Richard Schneider (June 14, 1995), in Norwich University, OCR Case No. 01-95-2008 (on file with author); Sonoma State University Letter, *supra* note 276; Monterey County Office of Education Letter, *supra* note 276.

298. REVISED GUIDANCE, *supra* note 128, at 15.

299. *Id.* at 15.

300. *Id.* at 17.

301. *Id.* at 16.

302. *Id.*

further harassment”<sup>303</sup> and may “be responsible for taking steps to remedy the effects of the harassment,”<sup>304</sup> especially if an institution delays responding or responds inappropriately to the initial notice of harassment.<sup>305</sup> Finally, institutions should remember to protect the victim, the complainant, and any witnesses from retaliation following a report of harassment.<sup>306</sup>

This approach is consistent with findings OCR has made in its investigations. For instance, OCR found that while Annandale Independent School District #876 had promptly investigated, responded and disciplined a teacher for harassing a student, the school had not attended to the student survivor’s emotional and educational needs.<sup>307</sup> In addition, OCR cited approvingly to the University of Indiana-Bloomington’s immediate transfer of the alleged perpetrator out of the dormitory in which the victim also lived, as well as the steps it took to assist the survivor emotionally and academically after it received notice of the sexual assault.<sup>308</sup>

Moreover, the *Revised Guidance* and many of the LOFs/CTRs discuss in detail what constitutes “prompt and equitable grievance procedures” in these cases. As already noted, these include: notice of the policy, procedure and people responsible for enforcing it; an “adequate, reliable and impartial investigation of complaints;” “[d]esignated and reasonably prompt timeframes;” prevention of the “recurrence of any harassment;” correction of “its discriminatory effects on the complainant and others;” and provisions against retaliation.<sup>309</sup> In addition, accuser and accused students must be given substantially equal procedural rights in fact-finding hearings or similar proceedings, including to an attorney or advocate if one is provided or allowed to one student in the process. Also, such hearings or proceedings must use a “preponderance of the evidence” standard, as the closest standard of proof to an even playing field. Finally, both accuser and accused, or “parties” as the *Revised Guidance* terms them,<sup>310</sup> have an equal right to be notified of the outcome of the complaint.

Several OCR cases have dealt with these issues. In a teacher-on-student harassment case at Evergreen State College, OCR required the College to change hearing procedures that allowed the professor but not the student an opportunity to influence the composition of the fact-finding panel and to

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303. *Id.* at 17.

304. *Id.* at 15.

305. *Id.* at 17.

306. *Id.*

307. Letter from Jeffrey Turnbull to Steve Niklaus (Oct. 15, 2004), in Annandale Inded.Sch. Dist. #876, OCR Case No. 05-04-1185 (on file with author).

308. Letter from Jeffrey Turnbull to Adam Herbert (Mar. 6, 2007), in Indiana University-Bloomington, OCR Case No. 05-02-138 (on file with author).

309. REVISED GUIDANCE, *supra* note 133, at 20.

310. *See, e.g., id.* at 20, 22.

present evidence to the panel.<sup>311</sup> OCR also required the College to change its “clear and convincing evidence” approach to a “preponderance of the evidence” standard of proof,<sup>312</sup> a change that Georgetown University also agreed to make as a result of an OCR investigation.<sup>313</sup> In a case involving Christian Brothers University, OCR stated, “The focus of the entire process seems more on the accused than the accuser.”<sup>314</sup> At the University of California Santa Cruz, OCR found that the process focused only on the due process rights of the accused.<sup>315</sup> Finally, in a case at Sonoma State University, the OCR investigation revealed that, prior to being questioned about the student accusers’ allegations, the accused student was allowed to see and to rebut the factual allegations made in complainants’ reports. The accusers were not permitted a similar opportunity for rebuttal.<sup>316</sup>

An ongoing case at The Ohio State University (“OSU”), resulting from allegations that one male student sexually assaulted two female students within weeks of each other, demonstrates the ways in which the enforcement mechanisms provided by the Clery Act and Title IX work together. The two alleged sexual assaults took place in February of 2002. The survivor of the second alleged assault sued the University in February of 2004. The University was granted summary judgment in the case in September 2006.<sup>317</sup> Security on Campus, Inc., filed a Clery complaint on March 29, 2004, and DOE found the University in violation of the Clery Act on December 20, 2006.<sup>318</sup> Not even a month before the Clery complaint was resolved, a second complaint was filed with DOE, calling on OCR to direct the University to adopt a preponderance of the evidence standard in disciplinary proceedings.<sup>319</sup> The resolution of the OCR complaint has not been published and, presumably, is still ongoing.

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311. Evergreen State College Letter, *supra* note 290.

312. *Id.*

313. See Georgetown University Letter, *supra* note 293.

314. Christian Brothers University Letter, *supra* note 276.

315. Metroactive News and Issues, The Missing 47: UCSC’s Sexual Offense Policy, <http://www.metroactive.com/papers/cruz/11.12.98/rape1-9845.html> (last visited May 20, 2009).

316. Sonoma State University Letter, *supra* note 278.

317. Doe v. Ohio State Univ., No. 2:04-CV-0307, 2006 U.S. Dist. LEXIS 70444, at \*1 (S.D. Ohio Sept. 28, 2006).

318. S. Daniel Carter, Complaint of Non-Compliance with the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, <http://www.securityoncampus.org/pdf/OSUcomplaint.pdf> (last visited May 20, 2009); Letter from John Jaros, Jr. to Karen Holbrook, President, The Ohio State University (Dec. 20, 2006), <http://www.securityoncampus.org/pdf/osufprd.pdf> (last visited May 20, 2009).

319. Press Release, Security On Campus, Inc., Ohio State University’s Handling Of Sexual Assaults Under Federal Review (Nov. 28, 2006), *available at* [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=158:press-release-ohio-state-universitys-handling-of-sexual-assaults-under-federal-review&catid=1:soc-news&Itemid=79](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=158:press-release-ohio-state-universitys-handling-of-sexual-assaults-under-federal-review&catid=1:soc-news&Itemid=79).

Although the student survivor did not prevail in her private suit under Title IX,<sup>320</sup> and the Clery Act violations were not egregious enough to result in a fine, OSU has been litigating and/or cooperating in an investigation for five years now. Even aside from monetary damages, six- and seven-figure settlements, or \$350,000 DOE fines, it is an expensive endeavor to pay the legal fees to litigate a case and to pay staff to assist in and cooperate with an investigation. Thus, there appears to be significant truth to the assertion that statutes like Title IX and the Clery Act are giving institutions incentives to pay attention to victims' rights and to encourage rather than discourage reporting.<sup>321</sup> Institutions that seek to discourage reporting and do not adopt institutional responses that protect basic victims' rights do so at their own legal and budgetary peril.

### C. The Due Process Rights of the Accused

Given Title IX's and the Clery Act's requirements, institutions' responses to these cases are likely to implicate the institution's relationship with the student accused of perpetrating peer sexual violence. This is particularly true if the institution, after an investigation and determination that the report is accurate, takes disciplinary action against the student perpetrator of the violence. Because the Clery Act and Title IX require institutions to make immediate adjustments to survivors' housing and academic arrangements, stay-away orders, etc., the institution may even have to take action affecting the accused student while an investigation is ongoing and before a determination has been made as to whether the violence occurred. Fortunately for schools, the case law on how institutions must treat accused students allows schools to meet the requirements of Title IX and the Clery Act without running afoul of accused students' due process rights.

The laws applicable to institutions' powers to discipline students have long recognized that alleged perpetrators of various kinds of misconduct in school have certain due process rights, and, as indicated, peer sexual violence cases can quickly implicate those rights. Therefore, it is important to understand what the law requires in terms of a school's treatment of an alleged perpetrator in order to get a full picture of proper and legal school responses to peer sexual violence.

The accused student's due process rights, unlike the rights of survivors discussed above, are a matter mainly of case law that has been developing most intensely since the early 1960s. Schools' obligations depend on a variety of factors, including whether the institution is private or public,

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320. *Doe v. Ohio State Univ. Bd. of Regents*, No. 2:04-CV-0307, 2007 U.S. Dist. LEXIS 28314, at \*6 (S.D. Ohio Apr. 17, 2007).

321. Rosenfeld, *supra* note 254, at 421.

what state laws apply,<sup>322</sup> and what kind of disciplinary action is contemplated. All accused students have some due process rights; the variation is in “what process is due.”<sup>323</sup>

Disciplinary action that could result in expulsion from a public school carries the heaviest burden for the institution. Although the Supreme Court has never decided a case involving expulsion from a public institution, in *Goss v. Lopez*,<sup>324</sup> the court considered a 10-day suspension of a group of students from a public high school. Some of the students were involved in a series of demonstrations and protests that involved some destruction of school property, but some of the suspended students claimed to be innocent bystanders and were suspended without a hearing.<sup>325</sup> The Court decided that the students had a property interest in their free public education.<sup>326</sup> In addition, they had a liberty interest because the schools’ charges “could seriously damage the students’ standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.”<sup>327</sup> Since “[t]he *Fourteenth Amendment* forbids the State to deprive any person of life, liberty, or property without due process of law,” the students were entitled to due process consisting of “*some* kind of notice and [] *some* kind of hearing.”<sup>328</sup>

The *Lopez* Court stated that “[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures,”<sup>329</sup> and cited approvingly to *Dixon v. Alabama State Board of Education*,<sup>330</sup> where the Fifth Circuit Court of Appeals defined what was required for cases involving expulsion.<sup>331</sup> *Dixon* involved a group of students who were expelled from the Alabama State College for Negroes for unspecified misconduct and without a hearing but after they had all participated in a sit-in at an all-white lunch counter in Montgomery and several, possibly all, had engaged in other civil rights protests and demonstrations.<sup>332</sup> In overturning the district court, the Fifth Circuit set

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322. Although, as noted above, there is state law variation on the victim’s side of things too. State laws establishing rights of action for survivors are *in addition to* the federal legislative schemes discussed above. In contrast, for the accused, state law is central because the accused’s due process rights may be in part or wholly determined by his contract with the institution.

323. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (discussing the meaning of due process).

324. 419 U.S. 565 (1975).

325. *Id.* at 570.

326. *Id.* at 575.

327. *Id.*

328. *Id.* at 579 (emphasis added).

329. *Id.* at 584.

330. 294 F.2d 150 (5th Cir. 1961).

331. *Goss*, 419 U.S. at 576.

332. *Dixon*, 294 F.2d at 152.

forth the requirements for due process before a state school can expel a student. First, a school must provide notice, including “a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education,”<sup>333</sup> and “the names of the witnesses against him and an oral or written report on the facts to which each witness testifies.”<sup>334</sup> Second, there must be a hearing, “[t]he nature of [which] should vary depending upon the circumstances of the particular case.”<sup>335</sup> In the case of a charge of misconduct, the hearing must “give[] the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail”<sup>336</sup> and the charged 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.”<sup>337</sup>

Both the Supreme Court in *Lopez* and the Fifth Circuit in *Dixon* were careful to specify that these requirements fell short of “a full-dress judicial hearing, with the right to cross-examine witnesses . . . [which] might be detrimental to the college’s educational atmosphere and impractical to carry out.”<sup>338</sup> In *Lopez*, the Court made clear that it was not:

. . . construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.<sup>339</sup>

Thus, even public institutions seeking to expel a student for misconduct have considerable flexibility and are not required to provide the full panoply of due process rights that must be provided to a criminal defendant. 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,<sup>340</sup> most courts review

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333. *Id.* at 158.

334. *Id.* at 159.

335. *Id.* at 158.

336. *Id.* at 159.

337. *Id.*

338. *Id.*

339. *Goss v. Lopez*, 419 U.S. 565, 583 (1975).

340. *Ahlum v. Administrators of Tulane Educ. Fund*, 617 So. 2d 96, 100 (La. Ct.

private schools disciplinary actions under “the well settled rule that the relations between a student and a private university are a matter of contract.”<sup>341</sup> Therefore, private institutions are mainly bound by what they’ve promised students in the school’s own policies and procedures, and courts will review disciplinary actions according to the terms of the contract.<sup>342</sup>

In a representative selection of cases where students have challenged expulsions,<sup>343</sup> while the plaintiff(s) are formally alleging schools’ failures to provide sufficient process, what they really appear to be doing is inviting the courts to substitute their judgments for those of schools on the merits of student disciplinary matters. Courts have steadfastly refused to do that; they upheld expulsions for a range of student behaviors about which people are likely to disagree in terms of whether they merit expulsion. These include:

- Students leaving false bomb threat notes in a school bathroom,<sup>344</sup>
- “Peeping” under womens’ skirts at a university library,<sup>345</sup>
- Smoking,<sup>346</sup>
- Participating in but withdrawing, prior to discovery, from a conspiracy to enter the high school with guns and shoot several students and school officials,<sup>347</sup>
- “Discipline problems” (which plaintiffs alleged were a pretext for retaliation against the students’ parents for objections they made to the school’s curriculum),<sup>348</sup>
- Drinking beer in the school parking lot,<sup>349</sup>
- Attempted possession of a controlled substance,<sup>350</sup>

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App. 1993); *Coveney v. President & Trs. of the Coll. of the Holy Cross*, 445 N.E.2d 136, 137 (Mass. 1983); *Abbariao v. Hamline Univ. Sch. of Law*, 258 N.W.2d 108, 112 (Minn. 1977); *Rollins v. Cardinal Stritch Univ.*, 626 N.W.2d 464, 469 (Minn. Ct. App. 2001).

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

342. *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 243 (D. Vt. 1994); *Centre Coll. v. Trzop*, 127 S.W.3d 562, 567 (Ky. 2003); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000); *Hernandez v. Don Bosco Preparatory High*, 730 A.2d 365, 367 (N.J. 1999).

343. 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.

344. *A.B. v. Slippery Rock Area Sch. Dist.*, 906 A.2d 674 (Pa. Commw. Ct. 2006).

345. *Cloud v. Trs. of Boston Univ.*, 720 F.2d 721 (1st Cir. 1983).

346. *Flint v. St. Augustine High Sch.*, 323 So. 2d 229 (La. Ct. App. 1975).

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

348. *Gaston v. Diocese of Allentown*, 712 A.2d 757 (Pa. Super. Ct. 1998).

349. *Covington County v. G.W.*, 767 So. 2d 187, 188 (Miss. 2000).

350. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 639 (6th Cir. 2005).

- Possession of marijuana,<sup>351</sup>
- Possession of a pellet gun,<sup>352</sup>
- Brushing a teacher's buttocks with the back of a hand on two occasions,<sup>353</sup>
- Attacking and striking other students in the halls of the school,<sup>354</sup>
- Engaging in consensual sexual activity on school grounds,<sup>355</sup>
- Possession of a gun in a college dormitory room,<sup>356</sup>
- Engaging in a series of misbehavior including slashing a teacher's tires and selling illegal steroids,<sup>357</sup>
- Shooting a classmate in the back with a BB gun,<sup>358</sup> and
- Being found by two female students in their dormitory room with two other male students and the female students' roommate, who was inebriated, unconscious, and naked from the waist down, after trying to keep the female students from entering the room.<sup>359</sup>

Courts so consistently resist turning student disciplinary proceedings into judicial proceedings or criminal trials that one court has described the "observation that disciplinary hearings against students and faculty are not criminal trials, and therefore need not take on many of those formalities" as so basic it is "unhelpful."<sup>360</sup>

Courts have stuck to reviewing process and not using process as an excuse to overturn institution actions in peer sexual violence cases as well. In one case, the court found a private college to have given inadequate notice of the charges as promised in its own policies and procedures, but gave the college an opportunity to re-hear the case using the proper charge.<sup>361</sup> In the rest of the cases reviewed for this paper, however, none has overturned an institution's decision to sanction a student for peer sexual violence. In contrast, they have rejected challenges to the admissibility of certain witnesses and evidence;<sup>362</sup> the right to know witnesses' identities

351. *Hammock v. Keys*, 93 F. Supp. 2d 1222, 1229 (S.D. Ala. 2000).

352. *Rogers v. Gooding Pub. Joint Sch. Dist. No. 231*, 20 P.3d 16, 18 (Idaho 2001).

353. *Brown v. Plainfield Cmty. Consol. Dist. 202*, 500 F. Supp. 2d 996, 998 (N.D. Ill. 2007).

354. *Linwood v. Bd. of Educ.*, 463 F.2d 763, 765 (7th Cir. 1972).

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

356. *Centre Coll. v. Trzop*, 127 S.W.3d 562, 563 (Ky. 2003).

357. *Hernandez v. Don Bosco Preparatory High Sch.*, 730 A.2d 365 (N.J. Super. Ct. App. Div. 1999).

358. *S.K. v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 399 F. Supp. 2d 963 (D. Minn. 2005).

359. *Coveney v. President & Trs. of the Coll. of the Holy Cross*, 445 N.E.2d 136 (Mass. 1983).

360. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005).

361. *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 247 (D. Vt. 1994); *see also* *Marshall v. Maguire*, 424 N.Y.S.2d 89 (N.Y. Sup. Ct. 1980).

362. *Cloud v. Trs. of Boston Univ.*, 720 F.2d 721, 724 (1st Cir. 1983); *Brands v.*

and to cross-examine them;<sup>363</sup> and the rights to an attorney;<sup>364</sup> discovery,<sup>365</sup> voir dire,<sup>366</sup> and appeal.<sup>367</sup> They have also allowed a victim to testify behind a screen.<sup>368</sup> In general, they consistently reiterate the distinction between disciplinary hearings and criminal or judicial proceedings.<sup>369</sup>

These cases demonstrate, moreover, that institutions 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.”<sup>370</sup> Courts have relied on this language to allow institutions to take measures protecting victims and accusers. For instance, several courts have made it clear that institutions may protect the identities of accusers and witnesses by allowing them to submit witness statements instead of appearing at the hearing.<sup>371</sup> In doing so, they have recognized that such measures are important to protect students who report misconduct from retaliation.<sup>372</sup> In

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Sheldon Cmty. Sch., 671 F. Supp. 627, 632 (N.D. Iowa 1987); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000).

363. *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 23 (D. Me. 2005); *B.S. v. Bd. of Sch. Trs.*, 255 F. Supp. 2d 891, 899 (N.D. Ind. 2003); *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995).

364. *Coveney*, 445 N.E.2d at 140; *Ahlum v. Administrators of Tulane Educ. Fund*, 617 So. 2d 96, 100 (La. Ct. App. 1993).

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

366. *Id.* at 32.

367. *Id.* at 33.

368. *Cloud v. Trs. of Boston Univ.*, 720 F.2d 721, 724 (1st Cir. 1983); *Gomes*, 365 F. Supp. 2d at 29.

369. *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.”); *Brands v. Sheldon Cmty. Sch.*, 671 F. Supp. 627, 632 (N.D. Iowa 1987) (“[T]he Due Process Clause does not require courtroom standards of evidence to be used in administrative hearings.”); *Granowitz v. Redlands Unified Sch. Dist.*, 129 Cal. Rptr. 2d 410, 414 (Cal. Ct. App. 2003) (“[C]ourts have consistently refused to impose stricter, adversarial, trial-like procedures and proof on public school suspension proceedings.”); *Ray v. Wilmington Coll.*, 667 N.E.2d 39, 42 (Ohio Ct. App. 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.”); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000) (“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.”).

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

371. *Gomes*, 365 F. Supp. 2d at 23; *B.S. v. Bd. of Sch. Trs.*, 255 F. Supp. 2d 891, 899 (N.D. Ind. 2003); *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995).

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

addition, in cases of peer sexual violence, courts have supported institutions taking immediate action and suspending or otherwise separating accused students prior to notice and a hearing.<sup>373</sup>

A volume entitled *School Violence: From Discipline to Due Process*, published in 2004 by the Section of State and Local Government Law of the American Bar Association, includes a chapter on “Student Violence and Harassment.” In it, Jeff Horner and Wade Norman conclude that

The vision of the school district defendant walking into court ensconced in an armor of protection is somewhat accurate, at least in the context of student violence cases . . . . A small chink in the armor of school district defendants has been exposed in the recent Title IX cases, but it applies only to cases of sexual harassment and requires a standard of liability extremely difficult to meet.<sup>374</sup>

This statement is significant for several reasons. First, it acknowledges what the review above suggests in more detail: that schools are more at risk of serious liability when they ignore the rights and needs of victims than perhaps any other group of students. Second, because the essay was published in 2004, its characterization of the “small chink” does not benefit from events since 2004. The case law and regulatory enforcement around both Title IX and the Clery Act since 2004 indicates that the chink continues to widen. Third, events like the Virginia Tech shooting are increasing, as they should, the interest and attention to victims and potential victims of school violence beyond the sexual harassment context. Finally, in light of statistics on the rate of peer sexual violence on college and university campuses (which does not even include all the other forms of sexual harassment that are likely occurring), the implication that the “chink” is small because it applies “only to cases of sexual harassment” is incorrect. All of these developments, as well as more settled case law like that in the due process context, make it clear that, if for no other reason than to avoid liability, institutions must start paying more attention to the

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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.”).

373. *J.S. v. Isle of Wight County Sch. Bd.*, 362 F. Supp. 2d 675, 677–78 (E.D. Va. 2005) (suspending student who sexually assaulted a younger female student in the girls restroom 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) (“[G]iven 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.”); *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”).

374. Jeff Horner & Wade Norman, *Student Violence and Harassment*, in *SCHOOL VIOLENCE: FROM DISCIPLINE TO DUE PROCESS* 14 (James C. Hanks ed., 2004).

rights and needs of victims and potential victims of such violence.

### III. BEST PRACTICES IN RESPONDING TO PEER SEXUAL VIOLENCE

Of course, there are more reasons to pay attention to victims and potential victims than just to avoid liability. The Title IX, Clery Act, and due process cases discussed above give a sense of the wide range of responses schools take to peer sexual violence and of what responses are legally sufficient. However, because of judicial and agency reticence with regard to interfering in the details of institutional decision-making, as well as the fact that both OCR and the court cases arise as a result of complaints, they do not necessarily tell us what responses constitute “best practices.” Even the OCR *Revised Guidance* is oriented more towards legal sufficiency and is fairly vague about the details of proper responses. Therefore, while these legal sources are helpful in defining what institutions *must* do in response to peer sexual violence, they are less helpful in telling us what they *should* do. Due to these factors, this section draws less from the legal framework and more from programmatic, empirical, and practice-oriented materials. These include materials produced by education attorneys, victims’ advocates and government agencies, such as the Office on Violence Against Women (“OVW”) in the U.S. Department of Justice, and researchers who have studied campus response systems to assess their effectiveness in responding to peer sexual violence.

#### A. Response Systems Generally: Elements of a Comprehensive, Victim-Centered Approach

The OVW is in fact one of the best sources of this information since it administers the grant programs authorized and funded by the Violence Against Women Act, including the Grants to Reduce Domestic Violence, Dating Violence, Sexual Assault, and Stalking on Campus.<sup>375</sup> Because these grants are designed to fund the creation and improvement of campus response systems, their criteria include many best practices regarding institutional responses to peer sexual violence on campuses. These criteria indicate the following:

- Responses must be “comprehensive” and “coordinated.” Responses should therefore include the whole range of campus administration and services such as “campus victim services, campus law enforcement, health services, housing authorities, campus administration, student organizations, and disciplinary boards.” These offices should work “in partnership with community-based nonprofit victim advocacy organizations and local criminal justice or civil legal

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375. U.S. Department of Justice, Office on Violence Against Women, *supra* note 117.

agencies.” This comprehensive and coordinated approach is intended “to enhance victim safety and hold offenders accountable,” as well as “demonstrate to every student that violence against women in any form will not be tolerated and sexual assault, stalking, domestic violence, and dating violence are crimes with serious legal consequences.”<sup>376</sup>

- Schools “must develop services and programs tailored to meet the specific needs of victims” as well as “prevention programs that seek to change the attitudes and beliefs that permit, and often encourage, such behavior.”<sup>377</sup>
- Schools should develop and implement:
  - Institutional abilities to “appreh[en]d, investigat[e], and adjudicat[e] persons committing domestic violence, dating violence, sexual assault, and stalking on campus;”<sup>378</sup>
  - “[C]ampus policies, protocols, and services that [] effectively identify and respond to these crimes,” including student conduct policies that “encourage reporting of violence against women crimes,” and make clear “that victims who come forward to report that they have been victimized will not be penalized if they violated the institution’s alcohol, substance abuse, or other policies during the violent incident;”<sup>379</sup>
  - Training for “campus administrators, security personnel, and personnel serving on campus disciplinary or judicial boards to more effectively identify and respond to violent crimes against women on campus,” particularly campus police and “members of campus disciplinary boards;”<sup>380</sup>
  - “[D]ata collection and communication systems;”<sup>381</sup>
  - Provision of physical facilities and systems (lighting, communications, etc.);<sup>382</sup>
  - “[V]ictim service programs [which include] programs providing legal, medical, [and] psychological counseling;”<sup>383</sup>
  - Provision of “assistance and information about victims’ options on and off campus to bring disciplinary or other legal action, including assistance to victims in immigration matters” and the dissemination of information about such resources;<sup>384</sup>

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376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

-“[E]ducation programs for the prevention of this violence,” including “mandatory prevention and education programs about violence against women for all incoming students, working in collaboration with campus and community-based victim advocacy organizations.”<sup>385</sup>

Another source of best practices comes from a report commissioned and published by the National Institute of Justice of the U.S. Department of Justice’s Office of Justice Programs (“NIJ”), entitled *Sexual Assault on Campus: What Are Colleges and Universities Doing About it*.<sup>386</sup> This publication is based on a longer study entitled *Campus Sexual Assault: How America’s Institutions of Higher Education Respond*,<sup>387</sup> in which the authors surveyed 1015 campus sexual assault policies and talked with 1001 campus administrators. As a part of this review, they identified eight schools of those surveyed that had representative “promising practices.”<sup>388</sup> These practices include having “a reader-friendly, easily accessible, and widely distributed statement of the school’s definitions and expectations regarding sexual conduct.” These policies “clearly define[] sexual misconduct,” make clear the actual circumstances of most campus sexual violence (e.g. the prevalence of non-stranger sexual assault), and provide both the survivor and those who know the survivor with steps, resources, and information about the response options that are available.<sup>389</sup> Similar to OCR’s requirements, the report indicates that good sexual assault policies identify a specific person or office to contact for reports and complaints, encourage reporting and prohibit retaliation, and state the sanctions for misconduct.<sup>390</sup>

In addition, the report notes that all eight of these institutions have anonymous, confidential and third-party reporting. It advises that the best approaches include protocols that allow for different kinds of reporting and school responses that “allow the victim to participate in decisionmaking, to exert some control over the pace of the process, and to be in charge of making decisions as she/he moves through the campus adjudication and/or the local law enforcement system.”<sup>391</sup> Response protocols should be written to ensure a “victim-centered response,” including ensuring confidentiality for survivor and accused and minimizing “the need for the victim to retell the experience multiple times.”<sup>392</sup> Promising adjudication

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385. *Id.*

386. HEATHER M. KARJANE ET AL., *SEXUAL ASSAULT ON CAMPUS: WHAT ARE COLLEGES AND UNIVERSITIES DOING ABOUT IT* (2006), available at <http://www.ncjrs.gov/pdffiles1/nij/205521.pdf>.

387. *Id.*

388. *Id.* at 4.

389. *Id.* at 12.

390. *Id.* at 13.

391. *Id.*

392. *Id.*

practices include offering a range of options, balancing between the rights of the accuser and accused, and, echoing both the Title IX and due process case law, remembering that such adjudications “are not criminal proceedings.”<sup>393</sup> Finally, the report advises providing comprehensive, coordinated victims’ services,<sup>394</sup> including a designated, centralized response coordinator who can “guide the victim through all aspects of the process,” coordinate “the school’s education and prevention efforts, provide staff and faculty training, . . . [and lead] a campus-wide response network.”<sup>395</sup>

Several of these practices are echoed by two other sources for best practices written by and drawing from the practice of attorneys at the Victim Rights Law Center (“VRLC”), which represents sexual assault victims in a range of civil and criminal proceedings, including in student disciplinary proceedings.<sup>396</sup> The VRLC’s recommendations include developing comprehensive services and resources for victims with coordination between on and off campus service providers;<sup>397</sup> developing clear, accessible policies and publicizing them,<sup>398</sup> and making sure that policies and procedures are responsive to the realities of surviving sexual violence. Responsive policies and procedures should protect victims’ privacy and maximize their control over responses as much as possible.<sup>399</sup> They should encourage and eliminate barriers to reporting<sup>400</sup> and assist a victim in reporting to police.<sup>401</sup> Finally, they should develop interim measures to protect a victim’s safety and health prior to the conclusion of a formal complaint process.<sup>402</sup>

The best practices indicated here emphasize several themes. First, they indicate that schools should be looking particularly to the work of professional victims’ advocates, including attorneys, counselors, researchers, programs, and organizations, as sources for best practices. In fact, the NIJ study states, “Many field research campuses report that instituting [a designated, centralized response coordinator as the authors advise] has increased the reporting of campus sexual assault.”<sup>403</sup> Likewise, OVW actually conditions funding in part on an institution’s partnering with these experts. These best practices counter a certain reluctance on the part

393. *Id.* at 14.

394. *Id.*

395. *Id.* at 132.

396. See BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at Foreword; Reardon, *supra* note 96, at 395.

397. Reardon, *supra* note 96, at 402–04.

398. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17.

399. *Id.*

400. *Id.*

401. *Id.* at 5.

402. *Id.* at 5, 6, 9.

403. KARJANE ET AL., *supra* note 386.

of schools to draw on these advocates' expertise because of concern that they are or may appear biased. The OVW criteria and the NIJ study make clear that this concern is misplaced, and appear to agree with the court in *Gomes v. University of Maine Systems*.<sup>404</sup> In that case, plaintiffs claimed that the chair of the hearing panel that found them responsible for sexual assaulting a classmate was biased because she served on the board of a local victims' advocacy organization. The court responded by stating:

[I]t is difficult to take seriously the Plaintiffs' claim of bias. After all, Dr. Allan's volunteer activity has been directed against sexual assault, which is a crime and a violation of the Code. There is not exactly a constituency in favor of sexual assault, and it is difficult to imagine a proper member of the Hearing Committee not firmly against it. It is another matter altogether to assert that, because someone is against sexual assault, she would be unable to be a fair and neutral judge as to whether a sexual assault had happened in the first place.<sup>405</sup>

Linked to the emphasis on partnering with and encouraging institutions to benefit from the expertise of victims' advocates, the best practices literature also emphasizes the improvement and expansion of services for survivors and other victim-centered responses. The services contemplated are clearly designed to be holistic and to give survivors as many options as possible for handling the diverse consequences and effects such violence can have on their lives. In addition, they allow the survivor to remain in control of the process as much as possible and encourage her to report the violence to someone, this generally being the first step to accessing the necessary services as well as holding the perpetrator responsible. This holistic approach is also linked to the emphasis on coordinated and comprehensive response systems.

These sources also agree that several practices are of particular importance in creating this victim-centeredness. As the VRLC states,

[T]here are common concerns that many victims share. For example, in the aftermath of an [assault], most sexual assault victims experience the need to reclaim their sense of autonomy and control. They want the right to decide whether, how, when and to whom the assault will be disclosed. They want and need safe housing, employment, access to medical care and financial stability. And, they want and deserve a legal system that validates their harms and provides a venue for criminal and civil justice. At the core, victims want and need healing and recovery.<sup>406</sup>

Given these common concerns, policies, procedures, and practices

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404. 365 F. Supp. 2d 6 (D. Me. 2005).

405. *Id.* at 31–32.

406. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 25.

should privilege a survivor's privacy and control over the process wherever possible.<sup>407</sup> The NIJ study suggests that having both anonymous and confidential reporting options is one type of "victim-driven policy."<sup>408</sup> It draws the general conclusion that "any policy or procedure that compromises or, worse, eliminates the student victim's ability to make her or his own informed choices throughout the reporting and adjudication process not only reduces reporting rates, but may also be counterproductive to the victim's healing process."<sup>409</sup> In terms of privileging the healing process, the VRLC discusses the need for schools to respond with some interim measures, stating that these "initial steps . . . will certainly affect the victim's overall experience."<sup>410</sup> Such measures include issuing stay away orders, making new dormitory assignments, changing students' coursework and schedules, reducing their course loads, excusing absences from class, giving extensions, and offering the option to withdraw from courses or take a leave of absence.<sup>411</sup> Furthermore, writing these precautions into the institution's policies and procedures can give students fair notice that the school will take these steps.<sup>412</sup>

In addition, the NIJ study, the VRLC, and other commentators, such as Michelle Anderson, then Villanova University School of Law professor and now Dean of City University of New York School of Law, agree that institutions should be careful not to adopt policies that penalize victims and create barriers to reporting. All three particularly target policies that punish survivors for alcohol or drug use.<sup>413</sup> Given the prevalence of alcohol and/or drugs in most instances of campus peer sexual violence, including the use of them to coerce sex, such policies can discourage "a large majority of victims" from reporting.<sup>414</sup> This may be because victims are fearful of being sanctioned under such policies,<sup>415</sup> as there have been consequences as devastating as ending numerous female Air Force Academy cadets' careers.<sup>416</sup> However, survivors may be as much, if not more, deterred from reporting because such policies signify an overall non-victim-supportive attitude on the part of the institution. After all, such policies encourage victims not to acknowledge that the violence was a

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407. Reardon, *supra* note 96, at 403; KARJANE ET AL., *supra* note 386, at 83, 85, 94.

408. KARJANE ET AL., *supra* note 386, at 93.

409. *Id.* at 81.

410. Reardon, *supra* note 96, at 405.

411. *Id.* at 403, 405.

412. *Id.* at 411.

413. KARJANE ET AL., *supra* note 386, at 81; 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, 951 (2004); Reardon, *supra* note 96, at 405.

414. Reardon, *supra* note 96, at 403.

415. KARJANE ET AL., *supra* note 386, at 81.

416. Anderson, *supra* note 413, at 951.

crime,<sup>417</sup> and “promote[] the notion that [a survivor] somehow contributed to or was to blame for her rape, that she was able to control it, and that certain behaviors can nullify her consent.”<sup>418</sup>

Lastly, and most relevant to the focus of the remainder of this article, all of these sources emphasize the proper treatment of violence against women as criminal misconduct that must be appropriately handled by the systems and professionals that deal with such misconduct, particularly campus police and disciplinary boards. The OVW criteria include enhanced training for police and disciplinary boards, better data collection and communication systems, and increased coordination with law enforcement and advocacy services off campus. All of these criteria are oriented towards increasing the likelihood that campuses will hold perpetrators responsible for violence against women, including peer sexual violence. This is not to say that any of these sources suggest institutions push survivors to use criminal processes off-campus rather than processes available on campus. Rather, the emphasis on training and coordination can be seen as efforts to expand victims’ options, to improve the options on campus, and to separate them from the criminal justice system.

#### B. Student Disciplinary Proceedings Specifically: Treating All Students with “Equal Care, Concern, Dignity, and Fairness”

Nevertheless, in many respects these sources do not give much detailed guidance as to what constitutes proper handling of violence against women by entities such as campus police and disciplinary boards, or what these entities should do in order to effectively investigate and adjudicate such cases. Certainly partnering with victims’ advocacy organizations will help bring useful expertise on violence against women and how to respond to it generally. As the courts and legislatures have acknowledged, however, colleges and universities are unique entities and environments that must and should structure their responses to such violence according to unique legal requirements and unique goals beyond requirements mandated by law. Therefore, it is helpful to consider best practices developed for student disciplinary systems in general, to assess these practices for their applicability to cases of peer sexual violence, and to take into account best practices developed in sexual violence cases in particular.

In a pamphlet published by the insurer United Educators and the National Association of College and University Attorneys, Edward N. Stoner addresses a series of issues for institutions of higher education to consider in constructing or changing their student disciplinary code and procedures. These include jurisdiction, structure, and membership of hearing boards, the structure of the sanctioning process, recordkeeping, and

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417. KARJANE ET AL., *supra* note 386, at 81.

418. Reardon, *supra* note 96, at 404.

the presence of advisers and lawyers in disciplinary hearings.<sup>419</sup> This pamphlet focuses preliminarily on three related points: 1) the goals behind student conduct policies and 2) the differences between those goals and the purposes of the criminal system, which make 3) thinking about student discipline systems in terms of the criminal law inappropriate and counterproductive.<sup>420</sup>

Stoner characterizes the central goal of student disciplinary systems as 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.”<sup>421</sup> He reminds college and university administrators and lawyers that this goal means that “*student victims are just as important as the student who allegedly misbehaved.*”<sup>422</sup> a principle that “is critical” to resolving “[c]ases of student-on-student violence.”<sup>423</sup> 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.”<sup>424</sup> Therefore, he advises that student disciplinary systems use the “‘more likely than not’ standard used in civil situations” and avoid describing student disciplinary matters with language drawn from the criminal system.<sup>425</sup>

Kathryn M. Reardon, drawing on her work as an attorney at the VRLC representing student survivors in disciplinary proceedings, agrees with Stoner’s core approach but disagrees with some of the details in how to attain this equality. For instance, in a related article, Stoner suggests that both accusing and accused students in disciplinary hearings be “responsible for presenting [their] information, and, therefore, advisors are not permitted to speak or to participate directly.”<sup>426</sup> Reardon, on the other hand, expresses concern about the dynamics of a victim having to act as her own advocate in a hearing and to question and be questioned by her own assailant.<sup>427</sup> The two agree, however, that investigations of complaints

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419. EDWARD N. STONER II, REVIEWING YOUR STUDENT DISCIPLINE POLICY: A PROJECT WORTH THE INVESTMENT 12–13 (2000), available at [http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/16/60/ab.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/16/60/ab.pdf).

420. *Id.* at 7–11.

421. *Id.* at 7.

422. *Id.* (emphasis in original).

423. *Id.* at 7–8.

424. *Id.* at 7.

425. *Id.* at 10.

426. Edward N. Stoner II & John Wesley Lowery, *Navigating Past the “Spirit of Insubordination”: A Twenty-First Century Model Student Conduct Code with Model Hearing Script*, 31 J.C. & U.L. 1, 42 (2004).

427. Reardon, *supra* note 96, at 412.

should be in the hands of school officials, not in the hands of the individual students,<sup>428</sup> and that if the accused student is provided an attorney/advisor or advised to get one, the accusing student should have equal rights to do so.<sup>429</sup>

In this sense, there is a remarkable degree of agreement between education attorneys, victims' advocates, researchers, OCR, the Clery Act, and courts. Although their motivations may vary, all of these groups and entities agree that emulating or drawing from the criminal system in addressing cases of peer sexual violence in institutions is not helpful at best and damaging or not legally sufficient at worst. All are concerned about victims' rights and recognize that schools need to be more protective of those rights. Finally, most, if not all, are committed to treating student victims and alleged perpetrators equally wherever possible, at least until a determination as to responsibility for the violence has been made.

#### IV. TYPICAL PRACTICES IN RESPONDING TO PEER SEXUAL VIOLENCE: THE CASE OF STUDENT DISCIPLINE

Despite this remarkable level of agreement, many student disciplinary codes and procedures retain many of the characteristics of criminal systems, which are more oriented towards the goals and concerns of the criminal law and are generally not helpful in meeting the goals and concerns of institutions, victims' advocates, or education lawmakers. Indeed, around crime in general and such issues as sexual and domestic violence in particular, the criminal justice system itself has been the intense focus of reform efforts to make it both more effective in addressing the problem of such violence and more sensitive to the civil rights of crime victims.<sup>430</sup> While these efforts have been successful to an extent,<sup>431</sup> in many ways, they have arguably not resulted in meaningful civil rights protections for crime victims, especially sexual violence survivors, nor have they addressed the underlying problem of deterring the violence.<sup>432</sup>

Some commentators suggest that part of the reason why this effort has not made greater strides is because the goals of the criminal justice system and the goals of a survivor may be very different, especially right after the crime. As the VRLC points out, following an assault, most victims' "most

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428. *Id.* at 408; Stoner & Lowery, *supra* note 426, at 39.

429. Reardon, *supra* note 96, at 411; Stoner & Lowery, *supra* note 426, at 42.

430. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 7–8; Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 289 (1999).

431. Examples of success include the passage of state and federal victims' rights statutes, state constitutional amendments protecting victims' rights, and efforts to pass a federal constitutional amendment. *See* Beloof, *supra* note 430, at 289; BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 21, 378–79.

432. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 8; Beloof, *supra* note 430, at 326.

urgent needs include physical safety, emotional well-being, economic security, and educational stability. These needs are most acute in the first six months following an assault.”<sup>433</sup> The VRLC adds in a footnote:

In the current dominant legal paradigm, such needs are placed at the periphery of our legal response to sexual assault, or, at worst, are conceptualized as a personal rather than legal problem. This acute disjuncture between what victims seek and what the criminal justice system offers likely accounts for some of the failures of sexual assault law reform over the last thirty years. Because the criminal justice system offers remedies such as vindication, meaning, and a sense of justice that are consistent with higher-level needs, and fails to offer solutions for more basic needs, it makes sense that many victims do not make a criminal complaint immediately after an assault.<sup>434</sup>

This disjuncture may also account for survivors who fail to report and engage the criminal system at all. As victims’ rights scholar Douglass Beloof comments, “The individual victim of crime can maintain complete control over the process only by avoiding the criminal process altogether through non-reporting.”<sup>435</sup> Therefore, a general lack of reporting is itself a commentary by survivors as to the effectiveness of the system in addressing survivors’ needs. In discussing the reasons why a victim might “[e]xercise the veto” over reporting a crime, Beloof reiterates many of the reasons why student survivors do not report or will likely be discouraged from reporting. These reasons include

the victim’s desire to retain privacy; the victim’s concern about participating in a system that may do [her] more harm than good; the inability of the system to effectively solve many crimes . . . ; the inconvenience to the victim; the victim’s lack of participation, control, and influence in the process; or the victim’s rejection of the model of retributive justice.<sup>436</sup>

This review of the criminal justice system should give schools further pause in adopting the criminal model for their own responses, especially if they wish to encourage reporting of criminal acts. Nevertheless, many institutions continue to “criminalize” their disciplinary procedures. For instance, although best practices in the student disciplinary context and legal requirements under Title IX recommend or require a “preponderance of the evidence” standard of proof,<sup>437</sup> many colleges and universities

433. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 6.

434. *Id.* at 5.

435. Beloof, *supra* note 430, at 306.

436. *Id.*

437. Evergreen State College Letter, *supra* note 290; Georgetown University

continue to use “clear and convincing evidence” in cases of peer sexual violence and a very small group even require proof that is “beyond a reasonable doubt.”<sup>438</sup> The NIJ study found that of the institutions that mention a burden of proof at all for disciplinary hearings (only 22.4% of the schools that responded), 3.3% use “beyond a reasonable doubt,” 81.4% use “preponderance of the evidence,” and 15.3% use some other standard.<sup>439</sup> A separate study of sixty-four institutions conducted by Dean Anderson similarly found that many schools were silent on the standard of proof. Of those that did articulate one, a majority of schools used “preponderance of the evidence,” but a few retained a “clear and convincing evidence” requirement.<sup>440</sup>

Dean Anderson gives another example of institutional adoption of criminal procedures, this time procedures that have actually been long discredited even in the criminal justice system. Her focus is on the adoption by certain schools of doctrines of “prompt complaint,” “corroboration,” and “cautionary instructions,” doctrines that have been removed from the criminal laws of almost all states.<sup>441</sup> She uses the example of the sexual assault complaint procedures adopted by Harvard College in May 2002. These procedures required that complaints “be brought to the College in a timely manner” and be supported by “independent corroborating evidence.”<sup>442</sup> They also “cautioned officials against pursuing reports in which the complainant’s only evidence is her ‘credible account’ of sexual abuse.”<sup>443</sup> In her survey of other schools’ policies, she found a number of other institutions that explicitly state that there is a time limit on sexual assault claims or heavily imply that non-prompt complaints may be held against a survivor.<sup>444</sup> Although she found no institutions that explicitly required corroboration besides Harvard, she expresses concern regarding policies that are silent on the burden of proof, because they allow theories of proof like corroboration to enter into judgments in campus proceedings without there being a method to confront such illegitimate decision-making methods.<sup>445</sup>

Another approach that continues to be used in student disciplinary systems is the treatment of the victim as something less than a full party to the case. In many conduct hearings, a college or university official “prosecutes” the case. Stoner advises against using language such as

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Letter, *supra* note 293.

438. KARJANE ET AL., *supra* note 386, at 122.

439. *Id.*

440. Anderson, *supra* note 413, at 1000.

441. *Id.* at 949.

442. *Id.* at 950.

443. *Id.*

444. *Id.* at 947.

445. *Id.* at 1000.

“prosecutor” in a student code of conduct.<sup>446</sup> The issue of language aside, however, many institutions continue to have someone acting in a prosecuting function in hearings, usually a college or university official or a student.<sup>447</sup> This means that student victims function more as “complaining witnesses”<sup>448</sup> and the presentation of their case is not within the control of the victim or of her advocate. In the criminal system, the victim is not a party to the case,<sup>449</sup> the prosecutor is not the victim’s advocate, and the prosecutor and victim often do not have the same interests in a case.<sup>450</sup> Furthermore, in the criminal context, under the rule of witness sequestration, a complaining witness may not generally even remain in the courtroom beyond giving her testimony.<sup>451</sup> Because of the higher standard of proof, in order to win the case, many prosecutors will voluntarily follow this rule and exclude the victim in order to make the evidence supporting their case as unassailable as possible.

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446. See Stoner, *supra* note 419, at 10.

447. See, e.g., Julie Jargon, *The War Within: As America Prepares to Invade Iraq, Female Air Force Cadets Wage Their Own Battle*, DENVER WESTWORD NEWS, Jan. 30, 2003, <http://www.westword.com/2003-01-30/news/the-war-within/> (discussing an “Article 23” proceeding used at the Air Force Academy as a hybrid civilian grand jury and preliminary hearing prior to a court martial, in which “the Air Force prosecutes the accused rapist, making the victim—who is a prosecution witness rather than a principal party—more of a bystander to the proceedings”); University of Maryland Office of Student Conduct, Description of Community Advocate, <http://studentconduct.umd.edu/usj/sjapp.html> (last visited April 14, 2009) (indicating that the “community advocate” position functions as a “student prosecutor”); Hamden-Sydney College Student Court, [http://www.hsc.edu/studentlife/government/student\\_court.html](http://www.hsc.edu/studentlife/government/student_court.html) (last visited April 14, 2009) (describing role of “Student Investigator” in student court proceedings as “moderately prosecutorial”); Oklahoma City University School of Law, Student Conduct Code, Section 3.02, [http://www.okcu.edu/law/academics/academics\\_conduct.php](http://www.okcu.edu/law/academics/academics_conduct.php) (last visited April 14, 2009); Mississippi College School of Law Honor Code, Investigation and Hearing Procedures, [http://www.mc.edu/law/student/honor\\_code.htm](http://www.mc.edu/law/student/honor_code.htm) (last visited April 14, 2009); Washburn University School of Law, Part IV(A)(2), <http://washburnlaw.edu/policies/honorcode.php> (last visited April, 2009); Southern Methodist University Dedman School of Law Student Code of Professional Responsibility, Section 1A, <http://www2.law.smu.edu/Default.aspx?DN=80e4fa2c-04b6-4b90-99d1-34784e315b31> (last visited May 28, 2009); Georgia State University College of Law Honor Code, Section 12(2)(1), <http://law.gsu.edu/registrar/bulletin/honorcode.php> (last visited May 28, 2009).

448. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 364.

449. *Id.* at 63.

450. See BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 81; see also Jargon, *supra* note 447 (“Major Vladimir Shifrin . . . says the prosecuting attorney represents the academy, not the victim. ‘The Air Force would be my client, and I would prosecute the case in the best interest of the government, not necessarily in the best interest of the victim . . .’”).

451. The rule on witness sequestration is an evidentiary doctrine whereby the court may exclude witnesses from the courtroom for times other than the witness’s testimony, in order to prevent witnesses’ testimonies from influencing each other and to keep witnesses from one side from colluding with each other. See 75 AM. JUR. 2D Trial §§ 176–77.

In addition to being excluded from the courtroom, in the criminal system, complaining witnesses have little control over discovery of evidence by the defendant. If they disclose information to the prosecutor, which they may have to do in order for the prosecutor to make the case, under the Brady exculpatory evidence rule,<sup>452</sup> the prosecutor may be required to disclose some or all of that evidence to the defendant.<sup>453</sup> Even more critically, since the victim is not a party and the prosecutor is not her attorney, that relationship and information disclosed in the course of that relationship is not privileged in any way. Therefore, the victim cannot prevent it from being disclosed to the defendant either by operation of the Brady or other legal discovery rules or simply because the prosecutor has some other reason, which serves the prosecution's interests, for the disclosure. On top of all this, neither the prosecutor nor the victim has an equal right of discovery as to the defendant's case and evidence.<sup>454</sup>

All of these factors are likely to have an impact on both the ability of the hearing board to make its findings and on the victim's health and well-being. With regard to the hearing, it is commonly recognized that cases of peer sexual violence on college campuses tend to occur without third party eye witnesses to the alleged violence itself. Therefore, the determination of whether the hearing board believes the alleged victim's or the alleged perpetrator's version of events is the more credible one rides largely on the relative credibility of those two people.<sup>455</sup> This means that the alleged victim is as much on trial as the alleged perpetrator, and the fact-finders will be looking at her version of events with the same degree of skepticism as they are looking at the alleged perpetrator's version. Despite this fact, in the criminal system, the accused assailant has all of the procedural advantages of being able, for instance, to obtain evidence such as a victim's "medical history, past alcohol or drug use, prior consensual sexual contact, or history of previous sexual assaults" to damage the victim's credibility.<sup>456</sup> The ability to use such evidence to impact the defendant's credibility is not equally offered to the victim because she is merely a complaining witness. If she were a party to the case, as she would be in, say, a civil tort suit, she would generally have rights to open discovery of evidence in the possession of the defendant equal to those the defendant would have from her.<sup>457</sup>

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452. See *Brady v. Maryland*, 373 U.S. 83 (1963).

453. See *BEYOND THE CRIMINAL JUSTICE SYSTEM*, *supra* note 17, at 21.

454. *Id.* at 370. Because the Brady rule is a constitutional right of due process requiring that the prosecution disclose any evidence tending to prove the defendant's innocence, it does not apply to the prosecution, since the state does not have due process rights, nor to the victim, who is not a party to the case. See 23 AM. JUR. 2d *Depositions and Discovery* § 280.

455. *BEYOND THE CRIMINAL JUSTICE SYSTEM*, *supra* note 17, at 47.

456. *Id.* at 41, 47.

457. FED. R. CIV. P. 26(b)(1).

In addition to its impact on the evidence presented, the imbalance resulting from the victim's non-party status can impact the fact-finder's ability to observe her demeanor and compare it to the accused's demeanor for credibility purposes. As a complaining witness, under the rule on witness sequestration, the victim is excluded from the courtroom with the exception of when she gives her testimony.<sup>458</sup> As a party, she has a right to be present throughout the proceeding. Allowing the victim to remain in the room is arguably of most consistent benefit to the fact-finder, who has more opportunity to observe the victim as well as the accused and to draw conclusions regarding credibility based on a wider range of circumstances, reactions and behaviors. The concern animating the rule on witnesses—that a complaining witness's presence in the courtroom, where she can hear the other witness's testimony, may cause her to change her own testimony if she is recalled to the witness stand<sup>459</sup>—also gets to the issue of the reliability of her account from the fact-finder's perspective. However, the fact that the accused is also a witness who is asked to testify as to his version of the events, and he is not excluded, makes this concern less compelling.

Having the alleged victim present throughout a proceeding is of most consistent benefit to the fact-finders because fact-finders are entitled to draw inferences based on demeanor,<sup>460</sup> and the victim cannot always be assured that they will draw the inferences that she wants them to draw. Nevertheless, there could be substantial benefits to the victim from being in the room throughout the proceeding, in terms of equalizing her status with that of the alleged assailant. Most significantly, by being present throughout the proceeding, a victim can make sure that her humanity is before the fact-finder as much as the accused's humanity is. Discrimination and unequal treatment is often enabled by dehumanizing the target of the discrimination.<sup>461</sup> The alleged victim and alleged perpetrator are more likely to be treated equally if they are both present throughout the proceeding and the fact-finders are not able to forget that both of them are real people.

The fact-finders' awareness of both the alleged victim's and alleged perpetrator's humanity also can have important, positive implications for the victim's health and well-being. It can be a difficult experience as a victim to have one's honesty and credibility called into question—to find oneself “on trial” through no fault of one's own—and this is inevitably what fact-finders in these cases have to do in order to do their jobs. But to

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458. 75 AM. JUR. 2D Trial §§ 176–77.

459. *Id.*

460. 58 AM. JUR. 2D Trial §306.

461. See e.g., Stanford University, Discrimination Against Blacks Linked To Dehumanization, Study Finds, SCIENCE DAILY, Feb. 8, 2008, available at <http://www.sciencedaily.com/releases/2008/02/080207163811.htm>.

have this happen when the procedures are, in fact, inequitable, can lead victims to characterize the experience as “re-victimizing.”<sup>462</sup> Moreover, experiencing sexual violence is a very disempowering experience. Therefore, minimizing a survivor’s control over the process and not providing victims with advocates whose loyalty and obligation is to the survivor rather than the community or the state can also feel re-victimizing.<sup>463</sup> Procedures that do not allow a survivor any control over decisions such as how her case is presented, what evidence may be protected via privilege, and whether she can remain in the room for the entire proceeding are unnecessary strains to put on her and may lead to complaints and lawsuits against the institution.<sup>464</sup>

These strains are unnecessary because many of these procedural approaches are used to advance goals that, as Edward Stoner indicates, are simply inapplicable in the student disciplinary context. Certainly precedents such as *Lopez* and its progeny characterize suspension and expulsion as deprivations of the liberty and property of students (at public institutions, where the government is involved and the Fourteenth Amendment is therefore applicable). However, as Stoner also notes and the due process precedents implicitly acknowledge, these deprivations of liberty and property are less onerous than to the sentences that can be ordered for criminal defendants, including, for sex offenses, significant jail time, and potential requirements to register as a sex offender. High standards of proof, the interest of the community/state as represented by the prosecutor, the treatment of the victim as a complaining witness, and unequal rights to discovery and disclosures of evidence are all procedural protections provided in the criminal context because the defendant could go to jail if found guilty. Given that institutions cannot send students to jail, these procedures must have a different purpose to be justified. If the goal is to treat all students, including the student victims, equally, then procedures that lead to the victim being treated unequally are unnecessary, unjustified and, given the state of the law applicable to these cases, unwise.

#### V. RECONCEIVING INSTITUTIONAL RESPONSES TO ORDINARY AND EXTRAORDINARY CAMPUS VIOLENCE

Cumulatively, the liabilities facing colleges and universities, the advice of experts coming from a variety of perspectives on student peer violence, the possible links between peer sexual violence and institution shootings,

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462. Dieringer, *supra* note 175.

463. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 224, 363.

464. See Dieringer, *supra* note 175; Security On Campus, Inc., Security On Campus Alleges Georgetown University Silences, Violates Rights Of Campus Rape Victims, [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=182:soc-alleges-georgetown-silence-rape-victims&catid=1:soc-news&Itemid=79](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=182:soc-alleges-georgetown-silence-rape-victims&catid=1:soc-news&Itemid=79) (last visited April 14, 2009).

and the disconnect between these phenomena and what colleges and universities are actually doing calls for a major reconception of our institutional responses to both “ordinary” and “extraordinary” campus violence. Although it is critically important to address both kinds of violence, the disturbing frequency of peer sexual violence adds both urgency and opportunity to the project in that case. In addition, as already stated, evidence suggests that addressing the problems in the case of peer sexual violence may well help address the problems of school shootings. For these reasons, changing and adjusting our systems related to peer sexual violence should be a top priority, and one we can use to develop approaches to apply to campus violence such as mass shootings. Therefore, this article concludes with some recommendations for how to adopt better practices that align more with what the experts advise, as well as for how to bring our institutional responses into compliance with the law. It also includes recommendations that may be particularly useful in responding to extraordinary violence.

Most critically, we need to take victims’ needs as our starting point in crafting our responses to peer sexual violence, an approach which complies with the law and with best practices. The epidemic nature of peer sexual violence on campus, the overwhelming non-reporting of this violence, and the cycle of non-reporting and violence perpetuation lead to one overwhelming conclusion: we *need* victims to come forward and report. If we even hope to address, reduce and eliminate the violence, we must keep in mind the victim’s “veto power” and what the exercise of that veto power could say about our responses and processes. The fact that 90% of campus sexual violence survivors are exercising their veto demonstrates that we are not taking their needs into sufficient consideration when crafting our responses.

Another look at Professor Beloof’s list of what non-reporting signifies generally about survivors’ views about a particular response suggests some particular steps to take in this area. That list includes “the victim’s desire to retain privacy; the victim’s concern about participating in a system that may do [her] more harm than good; the inability of the system to effectively solve many crimes . . .; the inconvenience to the victim; the victim’s lack of participation, control, and influence in the process; or the victim’s rejection of the model of retributive justice.”<sup>465</sup> In conjunction with the case law and the advice of advocates such as the VRLC, this list suggests that institutions should provide centralized and well-known victims’ advocates, “de-criminalize” student disciplinary proceedings, and create and give survivors easy access to “interim measures.” Such measures can help institutions begin the necessary cultural shifts required to respond effectively to both ordinary violence and to extraordinary

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465. Beloof, *supra* note 430, at 306.

violence.

A. Protecting Survivors' Privacy: the Importance of a Central, Well-Known Institutional Advocate

Privacy concerns and to some extent “the victim’s lack of participation, control, and influence in the process”<sup>466</sup> suggest the need for several measures, especially since experience suggests that privacy is one of the areas over which survivors are most concerned with maintaining control.<sup>467</sup> First, schools need to provide a central and well-known on-campus victims’ advocate and service provider. This person should be charged with assisting the victim in a comprehensive fashion that is protected at all times with a confidentiality privilege that the survivor holds and the advocate must honor. Such an advocate is central to maximizing a survivor’s privacy. Because the advocate is a centralized and well-known reporting point, if a student goes to the advocate, the student minimizes the number of times and people to whom she must tell her story. The advocate can have a student referred to her from another office, refer the student out to other on- or off-campus resources, or contact those offices on behalf of a student. Moreover, the advocate is required to keep the survivor’s story confidential, so the student need not worry about finding another appropriate confidential place to report. Finally, the advocate plays a key role in meeting many of victims’ other needs, a point which is developed in more detail below.

As the NIJ study found, privacy and a sense of control are also assisted by having multiple reporting options, including anonymous reporting, whereby a victim may note an incident “for the record” and not take any further action, but hold open the possibility of reporting more formally later.<sup>468</sup> In addition, third parties may report violence anonymously. While it can be done in other ways, it is helpful to have a central advocate in this case as well, since having a central repository for anonymous reports makes it easier to avoid any double reporting.

A student’s decision to go through a formal complaint process, involving an investigation and a hearing, can often risk her privacy and control over disclosures. As VRLC attorney Kathryn Reardon explains, “During investigations, private facts about the occurrence of the assault and the students involved are disclosed to outside parties. College campuses are sheltered, highly social environments. Through the spread of personal information and rumors, the hostile environment is not only prolonged, but

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466. *Id.*

467. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 11; *see also* Reardon, *supra* note 96, at 402.

468. KARJANE ET AL., *supra* note 386, at 133.

becomes contagious.”<sup>469</sup> Furthermore, once word gets out, the VRLC’s experience is that the community response can be “toxic,” “with some students choosing loyalty to the victim and others to the assailant.”<sup>470</sup> In light of these dynamics, an advocate can play an important role in alerting campus authorities to the possibility of this toxic environment occurring, making sure that all information about the case is kept under lock and key, and informing any witnesses that they may not discuss the case outside of the formal proceedings.<sup>471</sup>

B. Minimizing the Chances of Revictimization by the Process:  
Disciplinary Procedures that Are Fair and Equitable

Proceeding down Professor Beloof’s list, to a certain extent the issues of “the victim’s concern about participating in a system that may do them more harm than good; . . . [and] the victim’s lack of participation, control, and influence in the process” collectively lead to several recommendations related to disciplinary proceedings.<sup>472</sup> First and foremost, student disciplinary proceedings must be “de-criminalized.” Because the central idea of a criminal proceeding is that it involves two main interests, the individual defendant’s and the state’s, it does not acknowledge or protect the rights of the victim. Criminalizing these procedures not only goes against the educational goal of creating good environments in which students live and learn, but, in the case of peer sexual violence in particular, it also puts an institution at greater risk for liability under Title IX and the Clery Act. To add insult to injury, it does not even keep up with reforms in the criminal justice system.

The first step towards de-criminalization is to change the survivor’s overall status in the proceeding. Survivors should be given full party status in disciplinary proceedings, particularly during the fact-finding stage of the proceeding. Colleges and universities should dispense with the prosecution model entirely, since a prosecutor represents the interests of the institution and thus is not structurally in a position to be victim-centered. Instead, the accuser and the accused should have equal opportunities and equal protections in presenting their cases and be able to control the presentation of those cases as much as possible. The institution’s interest is arguably sufficiently represented in such a proceeding by the hearing board fact-finders. After all, the hearing board fulfills the institution’s two main goals: to determine what happened; and, if what happened went against the rules that the institution has created to maintain a good living and learning environment, to decide how to deter such violations in the future. If there

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469. Reardon, *supra* note 96, at 408.

470. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 224.

471. *Id.* at 225.

472. Beloof, *supra* note 430, at 306.

is a need for the institution to have an advocate for its goals and perspective, it could be given independent party status. Since, however, the institution is unlikely to have a unique perspective that will aid fact-finding in peer sexual violence cases characterized by few or no witnesses, this status ought to be limited to the sanctioning stage of the proceeding.

Giving the accuser full party status will help ensure that accuser and accused will have substantially similar procedural rights in the proceeding. Equal rights to be present throughout the proceedings will be available to both survivor and alleged assailant because they are both parties. Should either party decide that s/he would like to have a more limited role in the process and not be present throughout the proceeding, that decision will be in that party's control.

In the case of peer sexual violence, the accuser's and accused student's rights should include a right to an advocate who can actively represent the students in the case. This is one of the rare areas where the experts disagree, with college and university attorneys such as Edward Stoner disagreeing with student victims' rights advocates like Kathryn Reardon. Stoner's model code contemplates a proceeding where both students represent themselves, whereas Reardon and her colleagues at the VRLC express concern about a survivor having to cross-examine and be cross-examined by the person she says victimized her. Stoner's model contemplates indirect questioning,<sup>473</sup> so that students would not have to directly cross-examine or be cross-examined, but the VRLC's experience indicates that direct questioning may be the method more in use.<sup>474</sup> In addition, the VRLC believes that student survivors will be deterred from using processes requiring them to be their own advocate in proceedings dealing with a traumatic experience.<sup>475</sup> The VRLC also points out the myriad ways that an advocate can assist a student outside of the hearing itself, including with investigation, negotiating with the accused's representative and making sure the survivor's privacy is protected.<sup>476</sup> Finally, although Stoner's model takes into consideration the case law regarding accused students' due process rights in concluding that the law does not require that institutions provide or allow a student's attorney or adviser to actively represent the student, it does not consider the effect of Title IX. As Kathryn Reardon indicates, requiring a student survivor to present her own case and allowing her accused assailant to cross-examine her, even through the hearing board, may actually perpetuate a hostile environment.<sup>477</sup>

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473. Stoner & Lowery, *supra* note 426, at 43.

474. Reardon, *supra* note 96, at 412; BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 223.

475. *Id.*

476. BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 219–23.

477. *Id.* at 219–23.

There are many ways to provide both students with in-house advocates in such proceedings. For instance, students may be given the option of choosing an advocate from the campus community or bringing in their own advocate, at their own expense. The existence of an in-house victims' advocate mentioned in Section VA above can give survivors the option to ask the advocate to play this role, since presumably the advocate is already familiar with the case. However, any other member of the community may volunteer to serve the role of advocate for either student and could be trained in advance to do so. Another method could be to identify particular advocates for both the accuser and the accused and, again, to make sure that they either already have the knowledge and competence to take on this role, or to train them to do so. Again, having an in-house victims' advocate would give a college or university the option of having this person play that role.

Although colleges and universities may not have a prosecutorial-type interest in the fact-finding portion of a case of peer sexual violence, they do have some interests in the fact-finding stage. Institutions may wish to keep the adversarialness of the process to a minimum and to address the difficulties of keeping disciplinary matters private in communities with dynamics like those mentioned above. The school also generally has an interest in accurate fact-finding and optimal evidence collection, as well as avoiding a proceeding that requires a victim to ask her friends questions like "What do you remember from the night I was raped? Did you see anything unusual? Why didn't you warn me?"<sup>478</sup> For these reasons, investigations and evidence collection should be conducted primarily by the institution. Once collected, all evidence can then be placed in a file and copies of the entire file given to both parties at the same time so they may prepare their cases for the hearing. Any witnesses or evidence not present in the file may not be considered and disputes over evidentiary matters may be directed to the school, not the other party. Such an approach to evidence collection and disclosure can also help keep aggressive/zealous advocacy tactics to a minimum and address some of the institution's concern about the possible increase in such tactics due to active participation by advocates in the proceeding.

#### C. Reducing Negative Educational Impact and Meeting Victims' Immediate Needs: "Interim" Measures

Returning again to Professor Beloof's list, "the victim's concern about participating in a system that may do them more harm than good; the inability of the system to effectively solve many crimes . . .; the inconvenience to the victim; . . . [and] the victim's rejection of the model of

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478. Reardon, *supra* note 96, at 408.

retributive justice”<sup>479</sup> also suggest that schools should be willing and able to take measures outside of and in addition to disciplinary proceedings. Such measures will reduce the negative educational impact that survivors experience following an assault. For instance, a college or university can help the victim alleviate the “inconvenience” of avoiding places where the assailant might be by issuing a stay away order.

Given that sexual violence victims’ needs, especially in the first 6 months following the violence, tend to be basic needs that are unlikely to be addressed through a disciplinary proceeding,<sup>480</sup> if institutions wish to encourage reporting they must have a mechanism for addressing those immediate needs. In addition, it must be acknowledged that some—indeed, most—survivors may not wish to go through a disciplinary proceeding at all, for any or all of the reasons mentioned in the Beloof quote above, as well as a number of additional reasons. An institution’s ability to provide “interim” measures such as adjustments to courses and housing can at least meet survivors’ immediate needs, even if they have little confidence that more formal proceedings will effectively solve the crime or if they reject the system entirely.

In addition, providing interim measures, which appear to be required by law anyway, can help reassure the victim that “participating in a system will [*not*] do them more harm than good.”<sup>481</sup> If the system is both capable of addressing immediate, basic needs like coursework, housing and safety planning, and capable of addressing “higher” needs such as justice, survivors will be more likely to use it in some way and possibly even encouraged to use the mechanism of disciplinary procedures. If they do decide to pursue a disciplinary proceeding, interim measures also serve the institution’s interests more directly. Interim measures can help ensure that the health of both students is as good as possible as they go into a disciplinary proceeding, which is inevitably difficult for both students involved. From a fact-finding perspective, it adds to the reliability of the proceeding if both parties are as equally fit as possible to present evidence.

Many schools find it hard to balance between the accuser’s and accused’s rights in deciding how to structure interim measures. For instance, as the precedents in Part II above suggest, some institutions fail to separate victims and accused assailants by making alternative housing and academic arrangements, issuing stay-away orders, etc. The justification for this failure, especially when it involves requiring the accused student to make adjustments, is often that the accused student has merely been charged and that requiring him to make adjustments prior to a determination of responsibility would be unfair.<sup>482</sup> This attitude exists

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479. Beloof, *supra* note 430, at 306.

480. See BEYOND THE CRIMINAL JUSTICE SYSTEM, *supra* note 17, at 6.

481. Beloof, *supra* note 430, at 306.

482. Kelly v. Yale Univ., NO. 3:01-CV-1591 (JCH), 2003 U.S. Dist. LEXIS 4543,

despite the mandate of the Clery Act that institutions take such measures<sup>483</sup> and the guidance of OCR that the measures minimize the burden on the victim.<sup>484</sup>

This persistence is an example of schools being influenced by criminal concepts (e.g. “innocent until proven guilty”), rather than structuring their responses to “[t]reat . . . all students with *equal* care, concern, dignity, and fairness,” and remembering that “student victims are just as important as the student who allegedly misbehaved.”<sup>485</sup> A refusal to separate the alleged victim and alleged perpetrator to avoid inconvenience to the accused, or to effect a separation only if the accuser agrees to make adjustments, no matter how onerous, is to stay focused exclusively on the needs of “the student who allegedly misbehaved” and to discount those of the victim. There is no question that in these types of circumstances, it may be impossible to treat both students absolutely equally. Someone must move and endure whatever hardships come along with the adjustment. Nevertheless, there are ways to act as reasonably and as fairly as possible given the totality of the circumstances, taking into consideration such factors as who can most afford to move (e.g. the students share a class that is a requirement for one but an elective for the other) and whose health can handle a move (i.e. if the victim is suffering from physical effects of the violence or Post Traumatic Stress Disorder, the upheaval of changing her residence may not be a viable option for her).

#### D. Paying Attention to Victim/Survivors: Some Suggestions for “Extraordinary” Cases

Given the connections between school shootings and gender-based violence discussed in Part I.B. above, focusing on and addressing common factors between the two types of violence may be the most effective way to address them both. Therefore, institutions must develop methods for changing school cultures that are hyper-masculine and support gender-based violence. It is critically important to this endeavor to take steps such as those already suggested to bring as much of the violence into the light of day as possible and to send a message that the institution will not tolerate such violence. However, cultural change will also require broad-based education and training on topics ranging from treating others with basic levels of civility and respect, to intervening in rape culture, to developing healthy forms of masculinity. This recommendation adds still more force to the first recommendation of having an “in-house” expert on peer sexual violence, since that person can help provide such education and training

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\*11–12 (D. Conn. Mar. 26, 2003).

483. 20 U.S.C. § 1092 (f)(8)(B)(vii) (2006).

484. REVISED GUIDANCE, *supra* note 133, at 16.

485. Stoner & Lowery, *supra* note 419, at 7.

and bring in or coordinate other experts to assist. Since cultural change is a big job, more than one expert would be ideal, if not necessary. For instance, creating or increasing staffing for a women's resource center, increasing the faculty in women's, men's and gender studies, and similar methods could assist in achieving this goal.

At a more mundane and perhaps more doable level, the central principle of considering the needs and rights of student victims has the potential to be as applicable to the extraordinary mass shooting context as it is to the ordinary student discipline one. For one thing, paying attention to victims has great potential to sensitize school officials to warning signs and lower-level misconduct, both committed by a potential school shooter or against the potential shooter. For another, while there may have been many attempts to profile school shooters after the shootings, applying those profiles to predict who future shooters might be is highly problematic and ripe for discrimination. Paying attention to the needs of victims gets away from focusing exclusively on the potential shooter and from the impossible task of predicting who is a shooter and who isn't prior to a shooting. Instead, paying attention to victims' needs focuses the institution on what the student has already done, not what he might do, and on the impact those actions have had on others. If Virginia Tech had taken more seriously the effect of Seung-Hui Cho's behavior in class on the other students, some of whom stopped attending class for fear of Cho,<sup>486</sup> or if it had stopped his classmates from laughing at and telling Cho to "go back to China" when he read aloud in class,<sup>487</sup> would Cho have slipped through the cracks as he did? While it is impossible to say for sure, it may be that if the institution had paid attention to either victim/victims,<sup>488</sup> Cho would more likely have been caught in the campus safety-net.

This mundane point is in fact reflected in a significant subset of the Title IX cases discussed in Part II above. All of these cases involve harassment, usually of boys but sometimes of girls, on the basis of gender stereotypes and perceived homosexuality. All describe institutional conditions eerily reminiscent of Michael Kimmel's analysis of the "jockocracies" of

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486. VIRGINIA TECH REVIEW PANEL, *supra* note 2, at 43.

487. Kimmel, *supra* note 60 at 73.

488. While it may seem somewhat hyperbolic to call Cho or the other students "victims" of these classroom behaviors, hostile environments are often made up of many "microinequities" that collectively add up to a serious negative impact on a student's education. See Microinequity, <http://en.wikipedia.org/wiki/Microinequity> (last visited January 20, 2009). In addition, Cho's violent reaction to his classmates certainly indicated that he felt victimized by such treatment, and some commentators suggest that he was a victim of mobbing, which involves the accumulation of numerous humiliations which, in total, can lead to a toxic environment, illness, depression, suicide, and, in rare cases, rampage shootings. See Kenneth Westhues, *Mobbing and the Virginia Tech Massacre*, <http://www.arts.uwaterloo.ca/~kwesthue/vtmassacre.htm> (last visited April 14, 2009).

Columbine and Virginia Tech.<sup>489</sup> In each case, the plaintiff was subjected to years of escalating harassment by multiple peer harassers, beginning with verbal epithets related to being gay or effeminate and usually culminating in severe physical or sexual assaults and the plaintiff leaving the school. For example, in *Brimfield Grade School*, a male student was hit repeatedly in the testicles for nearly a year by six male classmates, a practice of “sac stabbing” resulting in the boy’s having to undergo testicular surgery. When he returned to school he was hit again, breaking open the surgical incision, after which his parents withdrew him from school.<sup>490</sup> In *Bruning v. Carroll Community School District*, three girls were harassed by three boys with whom they were initially friends over the course of 2 years, including being continually kicked, grabbed and poked in their buttocks and genitals, bitten and spat on, scratched on the neck with staples, and given “titty twisters.” Two of the three asked to transfer to alternative schools.<sup>491</sup> In *Seiwert*, plaintiff was withdrawn after 2 years of verbal and physical abuse, including death threats.<sup>492</sup> In *Vance*, for nearly 3 years the plaintiff received constant requests for sexual favors and was continually sexually touched and hit with books before she finally withdrew.<sup>493</sup> In *James*, the plaintiff endured three years of physical and sexual assaults before his parents home-schooled him.<sup>494</sup> In *Patterson*, the harassment lasted four years, with plaintiff being unable to return to school after a classmate forced him into a corner and rubbed his naked penis and scrotum on plaintiff’s neck and face while another classmate made sure plaintiff could not flee.<sup>495</sup> Lastly, in *Theno*, the plaintiff left school after six years of largely verbal abuse that may have been kept in check by the plaintiff’s, a student of Tae Kwon Do, being able to defend himself.<sup>496</sup>

More important than the similarities between the student cultures in these cases and those of Columbine and Virginia Tech are the striking similarities in the behaviors of the teachers and school officials. In *Bruning*, *James*, *Seiwert*, *Vance*, and a final case, *Martin v. Swartz Creek Community Schools*, the schools did nothing or took ineffectual actions.<sup>497</sup>

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489. Kimmel, *supra* note 60, at 78.

490. *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 820 (C.D. Ill. 2008).

491. *Bruning v. Carroll Cmty. Sch. Dist.*, 486 F. Supp. 2d 892, 902–11 (N.D. Iowa 2007).

492. *Seiwert v. Spencer–Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007).

493. *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 256–57 (6th Cir. 2000).

494. *James v. Indep. Sch. Dist. No. 1–007*, 2008 U.S. Dist. LEXIS 82199, \*1, \*6 (W.D. Okla. Oct. 16, 2008).

495. *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 439–44 (6th Cir. 2009).

496. *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d at 1304–06 (D. Kan. 2005).

497. *Bruning v. Carroll Cmty. Sch. Dist.*, 486 F. Supp. 2d 892, 915–6 (N.D. Iowa 2007); *James*, 2008 U.S. Dist. LEXIS 82199, at \*6; *Seiwert*, 497 F. Supp. 2d at 952;

In *Patterson*, *Theno*, and *Brimfield Grade School*, teachers and school officials did more than turn a blind eye; they actually supported the harassers. In *Brimfield Grade School*, after the last incident of “sac stabbing” ruptured plaintiff’s incision, he was told by his coach to “stick up for himself” and on another occasion “to stop acting like a little girl.”<sup>498</sup> In *Patterson*, when plaintiff was physically assaulted by a female classmate, a teacher asked him in front of the full class how it felt to be hit by a girl.<sup>499</sup> After plaintiff was sexually assaulted, his coach informed the team in a meeting at which plaintiff was present that “they should ‘not joke around with guys who can’t take a man joke.’”<sup>500</sup> In *Theno*, most teachers and administrators did nothing, but the football coach laughed openly at harassment that he witnessed. The plaintiff in that case was often equally or more harshly punished by the administration for fights resulting from the harassment.<sup>501</sup>

The success of the plaintiffs in these cases is startling. In the review of post-*Davis* Title IX cases undertaken for this article, all of the plaintiffs from schools with cultures similar to Michael Kimmel’s characterizations of Columbine and Virginia Tech have reached a jury or the jury’s favorable verdict was allowed to stand. This success rate shows that the law is already reflecting a key recommendation of this paper: that proper responses to peer sexual violence should be developed both for their own sake and to help create proper responses to school shootings. Title IX, a statute clearly designed to benefit girls, is now giving boys who are harassed one of their best options for compelling institutions to address the student cultures that give rise to that harassment. One can only hope that this trend will encourage future victims to go to court rather than the gun store.

## VI. CONCLUSION

As this article was submitted for publication, the Supreme Court had just ruled unanimously in *Fitzgerald v. Barnstable School Committee*,<sup>502</sup> a case involving peer sexual violence,<sup>503</sup> that plaintiffs may pursue both Title IX and constitutional claims under Section 1983 against certain institutions and institution officials for sex discrimination.<sup>504</sup> While discussion of

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*Vance*, 231 F.3d at 262; *Martin v. Swartz Creek Cmty. Schs.*, 419 F. Supp. 2d 967, 974 (E.D. Mich. 2006).

498. *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008).

499. *Patterson*, 2009 U.S. App. LEXIS 25, at \*4.

500. *Id.* at \*12.

501. *Theno*, 394 F. Supp. 2d at 1310–11.

502. 129 S. Ct. 788 (2009)

503. *Id.* at 792.

504. Note that the Section 1983 claims only apply to schools and officials that are state actors or entities. *Id.* at 793.

Section 1983 and this recent case is outside the scope of this paper, this decision unquestionably gives survivors of peer sexual violence another way to hold schools liable. As such, it adds to the already significant alignment between the interests of institutions, victims, third party community members, and even perpetrators to reduce such violence.

Given this alignment, schools and all campus community members should be concerned about indications of a very significant campus peer sexual violence problem, including a cycle of non-reporting and perpetuation of violence. In addition, connections and similarities between campus peer sexual violence and more unusual forms of violence such as mass shootings make addressing this problem even more urgent. Breaking the cycle by encouraging reporting should therefore be a top priority, and encouraging reporting requires us to think carefully about the needs of victims of violence. We must address those needs and take them as a starting point for our institutional responses if we wish to avoid victims using their “veto” power and rejecting our systems altogether.

Despite what we now know about campus violence and the alignment of interests in addressing and deterring that violence, many institutions and their response systems are still living in the days when student misconduct was dominated by such offenses as plagiarism. The processes created for such misconduct do not fit current problems of campus violence. Therefore, schools must change their response systems and, given the need for survivors’ assistance in reporting and warning of future violence, institutions must begin the process by paying attention to survivors’ rights, needs, and concerns.