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

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Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance and the Persistent Problem of Campus Peer Sexual Violence
by Nancy Chi Cantalupo

ABSTRACT

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

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In 2009, the *Journal of College and University Law* published my comprehensive review of the law governing school liability when one of a school’s students sexually assaults or is otherwise sexually violent toward another of the school’s students. My central conclusion as a result of that review was that schools face much greater liability from inadequately protecting student victims1 of such peer sexual violence than schools do from expelling and otherwise disciplining students found responsible for perpetrating the violence. Furthermore, my review of not only the law but also the social science research regarding peer sexual violence on college and university campuses indicates that the liability scheme reflects quite accurately how the problem of campus peer sexual violence is perpetuated by the college or university itself. Finally, because of these dynamics, school processes that imitate and draw from procedures used in the criminal justice system both do not help a school address campus peer sexual violence and actually create greater risks of liability for the school. I concluded that, because of the much greater liability faced by the school for not properly protecting student victims of peer sexual violence, the law creates an incentive for schools to disassociate their internal processes and procedures related to student misconduct from a criminal model and to create a *sui generis* administrative model that responds to the goals and powers of schools, not those of a coercive state.

Given how clear this legal incentive is, why do a wide variety of sources indicate that many colleges and universities appear to act exactly opposite to the incentives that the liability scheme sets up? This wide variety of sources includes a recent, in-depth, nine-month investigation on campus peer sexual violence, conducted by the Center for Public Integrity (“CPI”) in late 2009 and early 2010, with companion pieces by National Public Radio, four regional news networks, and Nightline.2 In addition, the CPI study simply confirms what I have

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1 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 which I regard to include a wider range of actions that may not fit certain legal or readers’ definitions of “sexual assault” or “rape.” The term therefore includes “sexual assault” or “rape,” as well as other actions involving physical contact of a sexual nature 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. I use “school” and “institution” to identify either K-12 schools or higher education institutions, although I use “college,” “university,” “campus” or “higher education” to refer to the latter category of schools. Finally, my definition of “report” and “reporting” is not a technical one. I regard a report as any time a victim tells any professional with any role or authority to help her about the violence, including but not limited to medical, counseling, security or conduct-related, residential life or other student affairs personnel, as well as faculty and community or campus advocates.

heard repeatedly from lawyers, faculty and administrators involved in cases of campus peer sexual violence both within and outside of schools: that school adjudications of campus peer sexual violence cases are “kangaroo courts” with the deck stacked in favor of the alleged perpetrator, and that a survivor of campus peer sexual violence needs independent representation and cannot rely on her school to protect her rights. These impressions are further confirmed by the facts of various cases litigated under Title IX of the Educational Amendments of 1972 (“Title IX”), cases where the court has reached the “deliberate indifference” prong of the test for school liability set out in Gebser v. Lago Vista Independent School District, 524 US 274 (1998) (“Gebser”) and Davis v. Monroe County Board of Education, 526 U.S. 629 (1999) (“Davis”).

Accordingly, this article explores the reasons behind many schools’ tendency to act against their own liability interests in the area of campus peer sexual violence and asks how the law does or does not encourage schools to act in this fashion. Part I reviews what we know about both campus peer sexual violence and how many colleges and universities handle reports of such violence. This review reveals that colleges and universities face serious information problems when it comes to campus peer sexual violence, information problems that create incentives opposite to those created by the existing liability structure. These information problems, at best, cause schools to be generally unaware of the laws and the underlying campus peer sexual violence problem, and, at worse, create countervailing incentives for schools to actively avoid knowledge of both.

Part II then examines what, if anything, the law does to alleviate or exacerbate these information problems and the incentives that can arise from them. Several legal deficiencies emerge from this examination, including problems arising from the “actual notice” prong of the Gebser/Davis test, problems related to the Department of Education’s administrative enforcement of Title IX, and problems with the campus crime reporting provisions of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”). Part II discusses each deficiency in turn, how each serves to enable the lack of knowledge and avoidance of knowledge by schools about peer sexual violence happening on their campuses, and how each fails to solve the information problems faced by schools, students, and parents.

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

I. Campus Peer Sexual Violence: The Problem and the Information Problems

Is it fair to characterize campus peer sexual violence as an epidemic? The statistics suggest yes. The comprehensive studies on campus-based, peer sexual violence that have been completed over the last several decades consistently find that 20-25% of college women are
victims of attempted or completed non-consensual sex during their time in college.\textsuperscript{3} Estimates of the victimization of college men range from 6\textsuperscript{-}15\%,\textsuperscript{5} but “since so few men report, information is limited about the extent of the problem.”\textsuperscript{6} However, we do know that “[c]ollege men who are raped are usually raped by other men.”\textsuperscript{7}

College and university women are particularly vulnerable to sexual violence. “Women ages 16 to 24 experience rape at rates four times higher than the assault rate of all women, making the college (and high school) years the most vulnerable for women. [Furthermore,] college women are more at risk for rape and other forms of sexual assault than women the same age but not in college.”\textsuperscript{8} Sexual assaults most often happen during the times college women are most vulnerable, during a victim’s first-years in college,\textsuperscript{9} often during the first week they are on campus.\textsuperscript{10}

\textsuperscript{3} Brenda J. Benson et al., \textit{College Women and Sexual Assault: The Role of Sex-related Alcohol Expectancies}, 22 J. FAM. VIOLENCE 341, 348 (2007); Christopher P. Krebs et al., \textit{The Campus Sexual Assault Study: Final Report}, 5-3 (Nat’l Criminal Justice Reference Serv., Oct. 2007), available at http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf (finding that 19% of students in the sample had experienced attempted or completed sexual assault since entering college, but noting that over 50% of the sample had completed less than 2 years of college and therefore discussing the incidence reported by college seniors, where 26% had experienced attempted or completed sexual assault since entering college, to predict a woman’s risk during her overall college career). \textit{See also} Bonnie S. Fisher et al., \textit{The Sexual Victimization of College Women} 10 (2000), available at: http://www.ncjrs.gov/pdffiles1/nij/182369.pdf, Carol Bohmer & Andrea Parrot, \textit{Sexual Assault on Campus: The Problem and The Solution} 6 (Lexington Books 1993). Note: although some of the studies that are cited here are somewhat old, they are included because the findings of the older studies are quite consistent with the most recent ones, even when the studies have been conducted in different decades. This indicates that the findings of older studies are still valid in terms of what we see today. PLEASE NOTE THAT THIS ARTICLE IS IN THE PROCESS OF BEING EDITED FOR PUBLICATION. THEREFORE, THE FOOTNOTES HAVE NOT YET BEEN COMPLETED, AND THEIR PROPER NUMBERING IS NOT REFLECTED IN THIS DRAFT.

\textsuperscript{4} See Krebs et al., \textit{supra} note 3, at 5-5.
\textsuperscript{5} See Bohmer & Parrot, \textit{supra} note 3, at 6.
\textsuperscript{6} Rana Sampson, \textit{Acquaintance Rape of College Students} 3 (U.S. Dep’t of Just., Problem-Oriented Guides for Police Series No. 17, 2003), available at: http://www.cops.usdoj.gov/pdf/e03021472.pdf.
\textsuperscript{7} \textit{Id.} at 3.
\textsuperscript{8} \textit{Id.} at 2. \textit{But see} Katrina Baum & Patsy Klaus, Bureau of Just. Stat., \textit{Violent Victimization of College Students}, 1995-2002 3 (2005), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/vvcs02.pdf (finding that college students were less likely to be the victim of sexual assault than non-students). The discrepancy in these two findings is due to the wording of questions asked during data collection. See Fisher, et al., \textit{supra} note 3, at 13 (explicitly comparing the difference between the National Crime Victimization Survey methodology and results and the National College Women Sexual Victimization study methodology and results). The conclusions of Baum and Klaus are based on the National Crime Victimization Survey, which gathers information on sexual assault by asking category-centered questions, such as “Has anyone attacked or threatened you in [this way]: rape, attempted rape or other type of sexual attack.” See Bureau of Justice Statistics, \textit{Violent Victimization of College Students, 1995-2002}, http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=593 (last visited Feb. 27, 2011). The conclusions that Sampson cites are based on studies such as the National College Women Sexual Victimization study, which use behavior-oriented questions, such as “Has anyone made you have sexual intercourse by using force or threatening to harm you or someone close to you?” See Fisher, \textit{supra} note 3, at 6. Other than the wording of the questions, the basic methodology of the two studies was identical, yet behavior-oriented questions have been found to produce 11 times the number of reported rapes. \textit{Id.} at 11.
\textsuperscript{9} See Krebs et al., \textit{supra} note 3, at XIV.
\textsuperscript{10} See Bohmer & Parrot, \textit{supra} note 3, at 26.
The vast majority of sexual violence that student victims experience is not at the hands of a stranger but of someone they know. In one study, 12.8% of completed rapes, 35% of attempted rapes and 22.9% of threatened rapes took place on a date. Typical perpetrators include classmates and friends of the survivor and boyfriends or ex-boyfriends.

Studies on college men indicate that 6-14.9% of them “report acts that meet legal definitions for rape or attempted rape,” and that a small number of repeat perpetrators commit most of the sexual violence and likely contribute to other violence problems as well. A 2002 study surveyed 1882 male students at a university and found that 6.4% self-reported acts qualifying as rape or attempted rape. Of this group, 63.3% reported committing repeat rapes averaging about six rapes a piece. 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), 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 a piece) and 3.5 times that of single-act rapists (3.98 acts of violence a piece). A more limited study in 1987 “found that 96 college men accounted for 187 rapes.”

Other studies, as well as news items from various campuses, indicate that there are many rape supportive attitudes among college men. For instance, in October of 2010, a Yale fraternity had its pledges chant outside the university’s women’s center, “No means yes! Yes means anal!” This incident was not an isolated one, but was merely a repeat of an incident involving fraternity men, the campus Women’s Center and the same chant in 2006. A student member of the Women’s Center said that such incidents “tend to repeat themselves every year or two” at Yale, and this last incident spurred a group of Yale students to file a Title IX complaint against Yale. Moreover, sociological studies have confirmed wide subscription to such attitudes among college men beyond those at Yale. A 2001 study found significant peer support for

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11 See Id. at 26. See also KREBS ET AL., supra note 3, at 5-18; FISHER ET AL, supra note 3, at 17.
12 See FISHER ET AL, supra note 3, at 17.
13 See id. at 19. See also KREBS ET AL, supra note 3, at 5-15.
14 David Lisak & Paul M. Miller, Repeat Rape and Multiple Offending Among Undetected Rapists, 17 VIOLENCE & VICTIMS 73, 73 (2002).
15 See id. at 76.
16 See id. at 78.
17 See id. at 80.
18 See id. at 78.
19 See id.
20 See id.
21 See id. at 80.
24 Id.
sexual violence among college men. A study in 1993 found that 5-8% of college men commit rape knowing it is wrong; 10-15% of college men commit rape without knowing that it is wrong; and 35% of college men indicated some likelihood that they would rape if they could be assured of getting away with it. Finally, a 1987 study indicated that 30% of men in general say they would commit rape and 50% would “force a woman into having sex” if they would not get caught.

As indicated, these studies suggest linkages between such cultural attitudes and the actual occurrence of campus peer sexual violence. Multiple studies have shown that perpetrators share characteristics such as macho attitudes, high levels of anger at women, the need to dominate women, hyper-masculinity, anti-social behavior and traits, lack of empathy, and abuse of alcohol. The 2001 study mentioned above indicates that, especially in light of the lack of strong anti-violence messages from campus authority figures, male peer support for sexual violence likely encourages some men to perpetrate who might not otherwise do so.

With this rate of peer sexual violence, why does the general public appear to know so little about it, or at least about its full scope? The surface reason is that 90% or more of survivors of sexual assault on college campuses do not report the assault, but this reason begs the further question: why do survivors not report? The vast majority of the reasons that victims give have to do with victims’ fears that they will not be believed or will face hostile treatment, especially from authority figures. Fear of hostile treatment or disbelief by legal and medical authorities prevents 24.7% of college rape survivors from reporting. Other factors include not seeing the incidents as harmful, not thinking a crime had been committed, not thinking what had happened was serious enough to involve law enforcement, not wanting family or others to know, lack of proof, and the belief that no one will believe them and nothing will happen to the perpetrator. Moreover, the stakes of a victim’s report not being credited are quite high for the victim. Not being believed and official mishandling can increase survivor trauma.

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28 See BOHMER & PARROT, supra note 3, at 21.
29 See id. at 6.
30 See id. at 8.
32 See e.g., Lisak & Miller, *supra* note 12, at 73; Schwartz et al., *supra* note 24, at 628; BOHMER & PARROT, *supra* note 3, at 23.
33 Schwartz et al., *supra* note 24, at 630, 641.
35 See id. at 23. See also BOHMER & PARROT, *supra* note 3, at 13, 63; WARSHAW, *supra* note 28, at 50.
36 See FISHER ET AL., *supra* note 3, at 23.
37 See id.
38 See id.
39 See id. at 24.
40 See id.
42 See BOHMER & PARROT, *supra* note 3, at 5, 198.
Given that studies on attitudes of law enforcement, judges, juries, and prosecutors indicate that survivor’s fears are often well-founded, it is quite understandable that survivors would avoid reporting. Stories culled from news stories and cases indicate that survivors fare no better—possibly worse—at many colleges and universities. The treatment that victims can often expect from their schools when they make a report includes the following:

1) The school does nothing at all.44
2) The school talks to the alleged perpetrator, who denies the allegations, makes no determination as to which story is more credible, and then does nothing, including nothing to protect the victim from any retaliation from the alleged perpetrator or his friends as a result of her report.46
3) The school waits or investigates so slowly that it takes months or years for the survivor to get any redress.47

47 See, e.g., Williams v. Bd. of Regents, 477 F.3d 1282, 1297 (11th Cir. 2007) (finding the school took eight months to respond to reports of a gang rape); Letter from John E. Palomino to Karl Pister (June 15, 1994), in University of California, Santa Cruz, OCR Case No. 09-93-2141 (on file with author) [hereinafter University of California, Santa Cruz Letter]; 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]; 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); Letter from Frankie Furr to James E. Nelson (Aug. 5, 2005), in Richardson Independent School District, OCR Case No. 06031283 (on file with author) [hereinafter Richardson Independent School District Letter].
4) School officials investigate in a biased way, including through their treatment of the survivor or characterization of her case,48 or setting up fact-finding procedures and hearings with significantly more procedural rights for the accused than the survivor.49

5) School officials investigate and determine that the sexual violence did occur, but do not discipline or minimally discipline the assailant and do not protect the survivor from any retaliation.50

6) School officials investigate and determine that the sexual violence did occur, then move the victim out of her classes or housing or off the school bus that the assailant also takes. The assailant experiences no disruption to his schedule, housing or transportation to and from school.51

7) School officials tell the victim not to tell anyone else, including parents and the police.52

8) School officials investigate, including by holding a hearing to determine whether the allegations are true, find the perpetrator responsible, then tell the victim she cannot tell anyone about the findings or she will be brought up on disciplinary charges.53

9) School officials require or pressure the survivor to confront her assailant or go through mediation with him before allowing her to file a complaint for investigation.54


49 See Letter from Gary D. Jackson to Jane Jervis (Apr. 4, 1995), in The Evergreen State College, OCR Case No. 10922064 (on file with author) [hereinafter Evergreen State College Letter]; University of California, Santa Cruz Letter, supra note 44.


51 See, e.g., Siewert, 497 F. Supp. 2d at 954 (finding that after victim repeatedly harassed and assaulted the only action the school took was to move the victim to a different classroom); James v. Indep. Sch. Dist. No. 1-007, 2008 U.S. Dist. LEXIS 82199, *6 (W.D. Okla. 2008) (same).

52 See, e.g., Oyster River, 992 F. Supp. at 479 (finding that two girls were harassed repeatedly by a boy who exposed himself to them and touched them on their legs and breasts on the school bus and in school; when they reported the behavior, the school’s guidance counselor told them not to tell their parents because it could subject the school to lawsuits); Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1248 (10th Cir. 1999) (finding that after a male student repeatedly raped a student with spastic cerebral palsy, the school did not inform and told the victim not to inform her mother).

10) School officials distribute a press packet to local media about a survivor after she reports an assault, stating that she was charged by the school with alcohol consumption and “disorderly conduct” in connection with the events at issue in her report.  

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

12) School officials admit or re-admit student athletes even with knowledge that they have past criminal or disciplinary violations, including sexual violence.

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

Furthermore, when schools are sued for such mishandling, the settlements can often be quite large. For instance, in Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. Colo. 2007) (“Simpson”) when two college women were gang-raped as a part of an unsupervised football recruiting program that the university had evidence was leading to sexual violence, the university ultimately paid $2.5 million to one plaintiff, $350,000 to another, hired a special Title IX analyst and fired some 13 university officials, including the President and football coach. In a case where a student was raped and murdered at Eastern Michigan University and the university did not tell the family or campus for several months that they suspected a fellow student, the school eventually agreed to pay $350,000 in fines for 13 separate violations of the
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Clery Act and settled with the survivor’s family for $2.5 million. The case eventually led to the President, Vice President for Student Affairs and Director of Public Safety being fired, and an estimated $3.8 million in total costs. Other large settlements include an $850,000 settlement by Arizona State University in a case where a student was raped by a football player who had been expelled for misconduct, including sexual harassment, but was readmitted after intervention by the coach. In addition, the University of Georgia paid a six-figure settlement to a plaintiff who was raped by several athletes, including one who the university knew had a criminal record before he was admitted. In light of such large fines and settlements, it is frankly baffling to see schools regularly acting against their clear interests in avoiding quite expensive liability. It seems that something else is going on, and indeed it is.

As I explained in greater detail in my 2009 article, the rate of campus peer sexual violence and the high non-reporting rate perpetuate a cycle whereby perpetrators commit sexual violence because they think they won’t get caught or because they actually haven’t been caught. Then, because survivors do not report the violence, perpetrators are not caught, continue to believe they will not get caught, and continue to perpetrate. Because survivors largely do not report due to the documented disbelieving and/or hostile reactions of others, particularly those in authority, our first steps as campus communities and as a society should be to change these attitudes and our procedures to encourage victims to come forward. If we are going to break the cycle and end the violence, we need survivors to report, and we cannot expect survivors to report unless we treat them better when they do. The existing law and the structure of school liability that it sets up appear to recognize and support this approach.

However, when we do create better responses, and survivors begin to report the violence as a result, a strange thing happens: the campus all of a sudden looks like it has a serious crime problem. In fact, both national and local statistics indicate that every campus currently has this serious crime problem at pretty much the same rate, a rate that tracks the national incidence. However, the non-reporting phenomenon and how it is created means that the schools that are ignoring the problem have fewer reports and look more safe, whereas the schools that encourage victim reporting have more reports and look less safe. Appearances in this case are completely

63 See Rosenfeld, supra note 58, at 420.
the opposite of reality, and the correct conclusion to draw from the number of reports of peer sexual violence on a campus is entirely counterintuitive.

This disconnect between appearance and reality puts any given college or university on the horns of a dilemma: does an institution seek to end the violence by encouraging victim-reporting and otherwise drawing attention to the problem (through, for instance, mandatory prevention-oriented programming at first-year student orientation) but risk gaining a reputation as a dangerous campus, or does the institution ignore the problem and discourage victim reporting either passively (through hard to navigate, confusing or simply non-existent policies and procedures) or actively (through treating victims who report hostilely)? Add into the mix that the campus next door or across town or one step below or above in the rankings may choose Door Number 2 (ignore the problem), leaving a school to explain to potential and current students and their parents why it has so much more crime than a competitor institution. It is this information problem that creates incentives counter to those created by the liability structure of laws such as Title IX and the Clery Act, incentives for schools not only to remain as unaware as possible of the campus peer sexual violence problem in general and any instances of violence happening on their campuses specifically, but also actively to avoid knowledge about both the general problem and specific cases of violence.

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

This is a much more complicated picture than the stranger rape myth, and it is just as true on college and university campuses as in any other place. In fact, the situation may be even more complicated on campuses. Sociologists and criminologists studying campus peer sexual violence have used a theory called the routine activities theory to posit that sexual violence occurs so much on college campuses because there are a surfeit of “motivated offender[s] [and] suitable target[s] and an absence of capable guardians all converg[ing] in one time and space.” They suggest that all three elements must be present for there to be a significant crime problem and the failure of schools to act as “capable guardians” elevates the influence of peer support to

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65 See Schwartz et al., *supra* note 24, at 630. See also Elizabeth Ehrhardt Mustaine & Richard Tewksbury, *Sexual Assault of College Women: A Feminist Interpretation of a Routine Activities Analysis*, 27 CRIM. JUST. REV. 89, 101 (2002). Schwartz and his colleagues provide an explanation for the history and use of the routine activities theory in explanations of criminal violence generally and sexual violence on college campuses specifically. The original theory apparently focused almost entirely on the victims’ “suitable targets,” and has been criticized for seeking to
In other words, sexual violence supportive cultures can lead to higher incidences of sexual violence and the institution itself, if it is ignoring the problem and failing to act as a “capable guardian,” is helping to create the problem. Therefore, colleges and universities that want to be “capable guardians” and to address the campus peer sexual violence problem are left with having not only to explain why increased reports of sexual violence are a good thing, but also why the vast majority of campus sexual violence cannot be addressed through better lighting, blue light phones, and police escort services. Complicated pictures and persistent myths are particularly hard to explain in our sound-bite society.

There are still other, less central, but also important information problems exacerbating schools’ tendencies toward passive lack of and active avoidance of knowledge. First, the vast majority of professionals working on the front lines in residence life, student conduct, public safety and other departments where survivors are likely to report are not lawyers and are neither hired for nor trained in knowledge about campus peer sexual violence. Many are honestly unaware of the basic facts of campus peer sexual violence, never mind what the law requires of schools and school officials, yet they are the ones creating and applying the policies and procedures, as well as responding to any reports that victims do make on campus. Moreover, many realize that they are untrained when they are confronted with the problem and, especially if there is no time or resources with which to educate themselves, trying to ignore or make the problem go away may be the most attractive option.

Second, education and efforts to combat violence against women are both notoriously underfunded areas. This means that comprehensive training for the wide swath of personnel who could have contact with a campus peer sexual violence survivor is often viewed by a school as too expensive when there are so many other important matters vying for limited resources. Responding at all, never mind adequately, to even a single report of peer sexual violence can also require a tremendous amount of resources, and is, by its nature, going to result in at least one very unhappy student. That student may be unhappy enough to sue or complain to the Department of Education, an even greater resource drain. Under these circumstances, not knowing about the violence to begin with or making a report go away as soon as possible once again looks like a very attractive option.

II. The Role of the Law and Legal Enforcement in Perpetuating and Exacerbating Campus Peer Sexual Violence Information Problems

“deflect[] attention away from offenders’ motivation.” Schwartz et al., supra note 24, at 625. Schwartz and various colleagues have therefore deliberately focused on the “motivated offender” part of the equation, including by proposing a feminist version of routine activities theory. Id. at 628. In addition, while they note that the “absence of capable guardians” aspect of the theory’s equation is the least studied, they highlight the effect that a rape-supportive culture has on all three parts of the equation, in that it “gives men some of the social support they need… to victimize women [while women’s] internalization of [the same culture] can contribute both to the availability of “suitable targets” and to the lack of deterrence structures to act as effective guardianship.” Id. at 630.

66 Id. at 646.

67 Note that this characterization is made based on my nearly 15 years of experience working in various parts of university administration, including both student and academic affairs, as well as my interactions with higher education professionals from all over the country when I attend and present on the law related to campus peer sexual violence at various national higher education conferences.
At first glance, these information problems, especially the central one, seem pretty intractable. Higher education in the United States is a competitive business, and those institutions competing for students are overwhelmingly private entities. Even publicly-funded state schools still compete for the best students, their tuition dollars and their future alumni donations. A school’s reputation is critically important in such a competitive system. Although factors such as academic reputation, curriculum and cost likely count as the most important criteria with most students and parents, a reputation as a dangerous place—especially as a place where daughters and young women are victims of rape in large numbers—must be damaging to a school.

Indeed, the idea that potential students and parents should know about the level of crime—especially violent crime—on a campus was a key motivator behind the Clery Act. A primary aim of the Clery Act has to do with campus crime reporting, setting out requirements for schools to report and publish certain categories of crime that occur on campus. Schools that violate the Clery Act may be fined by the Department of Education (“DOE”), the largest fine to date being the $350,000 against Eastern Michigan University mentioned above. As this case and other cases involving large fines against schools for violating the Clery Act demonstrate, because sexual violence is the most common form of violent crime on college campuses today, the Clery Act and the issue of campus peer sexual violence have become quite important to each other.

However, of the federal statutes that apply to campus peer sexual violence, the Clery Act is arguably not the most important, especially with regard to protecting victims of campus peer sexual violence. That honor belongs to Title IX, which prohibits sexual harassment in schools as a form of sex discrimination. Peer sexual violence is generally considered a case of hostile environment sexual harassment that is “so severe, pervasive and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” Because of the severity of sexual violence, generally, even only a single instance of violence will be considered hostile environment sexual harassment.

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68 The studies that have sought to measure the Clery Act’s achievement of the Clerys’ original goals, including students’ selection of schools based on safety issues, have overall found that students and parents overwhelmingly do not consult Clery Act statistics and/or do not use those statistics in choosing schools. Dennis E. Gregory and Steven M. Janosik, Research on the Clery Act and ts Impact on higher Education Administrative Practice, in Bonnie S. Fisher and John J. Sloan, III, eds., Campus Crime: Legal, Social and Policy Perspectives, 2nd Ed., 30, 60 (2007).
71 See REVISED GUIDANCE, supra note 66, 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.”).
Title IX is enforced in two ways when peer sexual violence is at issue: first, through survivors’ private right of action against their schools and second, through administrative enforcement by the Department of Education’s Office of Civil Rights (“OCR”). Both enforcement jurisdictions derive from the fact that schools agree to comply with Title IX in order to receive federal funds.

In general, the private right of action requires a plaintiff/survivor to reach a higher standard but, if a plaintiff can meet that standard, as suggested above, the damages that the school could be required to pay are quite significant. While most cases settle, the settlements give a sense of what both sides anticipate the damages awarded by a jury will be.

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

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

a. Court Enforcement of Title IX and the Actual Knowledge Test

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

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73 See THE EDUCATOR’S GUIDE TO CONTROLLING SEXUAL HARASSMENT, ¶ 102 (Travis Hicks, ed. 2008) [hereinafter EDUCATOR’S GUIDE].
74 See id. ¶ 321.
75 See REVISED GUIDANCE, supra note 66, at 2-3.

Cantalupo, Burying Our Heads in the Sand
1) The school is a recipient of federal funding76
2) The sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school,77
3) The school had actual knowledge/notice of the harassment,78
4) The school was deliberately indifferent to the harassment,79

The precedent that has developed under the fourth, “deliberate indifference” prong was the focus of my 2009 article, where my overall conclusion was that it was as robust as a deliberate indifference standard can be. However, a look at the full corpus of cases shows that many cases never make it to the fourth prong of the test. Too many are thrown out as a result of the third prong, requiring that a plaintiff show that the school had actual knowledge or notice of the harassment.

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

First, the actual knowledge prong requires that the school has actual knowledge of the harassment, begging the question of who represents the school. There is significant variation on this question. In some cases, especially ones where the harasser is a teacher or school official, if only another teacher or school official of equal rank has knowledge of the harassment, courts have found this knowledge to be insufficient to qualify as knowledge by the school.80 Courts are more open to allowing teachers to count as the school in peer sexual harassment cases,81 but this is not guaranteed82 and others who would seem to be in similar positions of authority as teachers, such as bus drivers,83 coaches,84 and school “paraprofessionals,”85 have been judged to be

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77 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).
78 Id.
79 Id.
82 Peer v. Porterfield, 2007 U.S. Dist. LEXIS 1380, at *28-30 (W.D. Mich. 2007) (stating notice must be to an “official … capable of terminating or suspending the individual” – held to apply to principal but not necessarily teachers); M. v. Stamford Bd. of Educ., 2008 U.S. Dist. LEXIS 51933, at *25-26 (D. Conn. 2008) (holding that actual knowledge did not exist until assistant principal was informed, even though other school officials were previously aware of the incident).
“inappropriate persons.” This leads to confusing variation, requiring survivors to know and parse through school hierarchies in specific and diverse contexts based on the identities of the perpetrators and the relationships between the person with knowledge and the harasser.

Second, variation has emerged as to what kind of knowledge constitutes actual knowledge. If a school is aware of a student’s harassment of other students besides the victim who is reporting in a given case, must the school have actual knowledge of the harassment experienced by that particular victim? Courts have resolved the issue in different ways. In a review of the peer harassment cases where this question was posed, they are fairly evenly split between courts that find that the school must have actual knowledge of the harassment experienced by the particular survivor bringing the case, those that state that the school’s knowledge of the peer harasser’s previous harassment of other victims is sufficient to meet the actual knowledge standard, and ambiguous decisions. While the Circuit Court cases are all in the second and third categories (no knowledge of specific victim required or ambiguous), few cases appear to get appealed beyond the district court, and this review shows that the district courts are all over the place in terms of their decisions on this issue.

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

The Simpson case provides a more specific example of the range of court reasoning on this issue. In that case, the Tenth Circuit denied the university’s summary judgment motion on

86 Wharton, supra note 76, at 388.
87 Id. at 388-89.
the basis that the university “sanctioned, supported, even funded” a football recruiting program where the risk of peer sexual violence occurring was so obvious that the school’s failure to address it constituted deliberate indifference. In denying the university’s motion for summary judgment, the Court found that the football coach “maintained an unsupervised player-host program to show high-school recruits ‘a good time’” despite knowing generally “of the serious risk of 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.

However, the district court that decided the case had found that the actual knowledge standard had not been met because some three to seven prior incidents of sexual harassment and assault (the plaintiffs alleged seven and the court found that the university had notice of three) only proved that “some players, and some recruits, had engaged in sexual harassment and sexual assault,” but not that they put the university “on notice of a risk that CU football players and recruits would sexually assault female University students as part of the recruiting program, including the risk that those assaults would be aided or exacerbated by excessive alcohol use by players, recruits, and female students.” Thus, the district court in Simpson seemed to believe that the actual knowledge requirement is not met until the school was able to predict with clairvoyant accuracy that exactly what did happen in the case would happen.

The 10th Circuit’s decision in Simpson, as well as the Arizona State University case and the 11th Circuit decision in Williams v. Bd. of Regents provide some hope for the future that actual knowledge will be defined by courts in a broader sense. However, there is still significant variation among courts, and the idea that even facts as egregious as those in Simpson could be seen as being insufficient to establish actual knowledge by the district court means that there is still a good chance that schools with knowledge of a serious sexual violence problem among its students will not be held liable. Given what we know about the factors that contribute to the incidence of campus peer sexual violence, especially the role that male peer support can play in encouraging some male students who may not otherwise have become offenders to perpetrate sexual violence, the idea of knowledge used by the 10th Circuit in Simpson is much closer to reality than that used by the Simpson district court. That is, research shows that campus cultures that are sexual violence-supportive contribute to individual cases of peer sexual violence, and the law should therefore create incentives for schools both to understand this insight and to act upon it. The current confusion over what constitutes actual knowledge at best does not send this clear message and at worst creates incentives in exactly the opposite direction.

This brings the discussion around to the final problem with the actual knowledge standard. The standard that the Gebser Court created but did not define was not the only choice of standard. In fact, the plaintiff, many amici and the Department of Education either advocated or actually used a constructive knowledge standard, which asks whether the defendant knew or reasonably should have known that a risk of harassment existed. Such a standard creates

89 Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1177 (10th Cir. 2007).
90 Id. at 1185.
91 Id. at 1184.
93 Schwartz et al., supra note 24, at 641.
incentives for schools to set up mechanisms likely to flush out and address harassment, since there is a substantial risk that a court will decide that the school “should have known” about the harassment anyway. In addition, the rule adopted by the Supreme Court in the sexual harassment in employment cases, *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus.* v. *Ellerth*, 524 U.S. 742 (1998), caused many employers to adopt sexual harassment policies and procedures.94 Employers did so because if they had such policies and procedures in place, but a plaintiff failed to use them, the employer had a defense against liability for the harassment.95

These are not the incentives created by the actual knowledge standard. Rather, the actual knowledge standard, as Justice Stevens noted in his dissent to *Gebser*, encourages schools to avoid knowledge rather than set up procedures by which survivors can easily report.96 After all, if schools can avoid knowledge, then they need not respond, and a court will not evaluate whether they acted with deliberate indifference. Justice Stevens’ dissent was in part a response to the Court’s suggestion that the actual knowledge standard is designed to “avoid diverting education funding from beneficial uses where a [school] was unaware of discrimination in its programs and is willing to institute prompt corrective measures.”97 A decade plus of experience with the actual knowledge standard demonstrates that Justice Stevens had it right and that schools are not “willing to institute prompt corrective measures.” In fact, as already noted, doing nothing at all is both the school response of choice and the response that is most likely to qualify as a violation of a different prong of the same review standard. Unlike with the *Faragher/Ellerth* approach, there has not been a rush to develop policies, procedures and training on sexual harassment among schools as there has been with employers. As Professor David Wolitz asked at a workshop where I presented my 2009 paper, “I remember this issue getting a lot of attention when I was in college in the 1990s. Why has nothing changed since then?” Experience now proves what common sense and Justice Stevens suggested 12 years ago: the problem will persist until schools start making sure that they have knowledge about what is actually occurring among their students, and they will not acquire that knowledge until the law requires them to do so, or at least until the law does not encourage them to do the opposite.

b. Problems with Administrative Enforcement of Title IX

The good news is that the Department of Education Office of Civil Rights does use a constructive knowledge standard when it investigates schools for violations of Title IX in peer sexual harassment cases. The bad news is that very few people know how to initiate an investigation and almost no one knows about the results of those investigations. In addition, OCR’s proactive guidance, which is easily available to the general public, is relatively vague. This particular information problem compromises the effectiveness of OCR’s school regulation quite broadly and contributes to both passive unawareness and active avoidance of awareness on the part of schools. Although the current administration is making admirable efforts to change

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97 *Id.* at 289.
this situation by issuing a recent Dear Colleague Letter (DCL)\(^98\) and posting the results of recent investigations in OCR’s electronic reading room,\(^99\) these efforts are limited in comparison with the scope of the problem.

OCR enforcement generally takes place as a result of a complaint being filed regarding a school’s response to a sexual harassment case, which causes OCR to undertake a fairly comprehensive investigation of that school’s response system.\(^100\) This investigation often includes a close review of institutional policies and procedures, as well as the steps the school took to resolve a complaint\(^101\) and files relating to past sexual harassment cases that required a school to respond in some way.\(^102\) OCR also interviews those involved in the case, particularly relevant school personnel.\(^103\) 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.\(^104\) 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 changes to those policies as directed by OCR.\(^105\) Once a case is resolved, OCR takes no further action besides monitoring any agreement it may have made with the school.\(^106\)

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

This level of detailed review and guidance is much-needed on the ground at most schools. For the front-line educational administrators and professionals actually dealing with cases of peer sexual violence, the devil is often in the details. When one student sexually assaults another student in the same dorm, which student should the school move out of the dorm while the school is investigating the case? What standard of proof should the student code of conduct adopt in adjudications of such cases and can or should it be different from the standard

\(^98\) http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html
\(^99\) http://www2.ed.gov/about/offices/list/ocr/publications.html
\(^100\) See REVISED GUIDANCE, supra note 66, at 14.
\(^101\) See id.
\(^103\) See Educator’s Guide, supra note 69, ¶ 322.
\(^104\) See supra, note 66, ¶ 2.
\(^105\) See supra, note 66, ¶ 2.
\(^106\) See REVISED GUIDANCE, supra note 66, at 14.
used for other conduct code violations (e.g. plagiarism)? What is the scope of the school’s obligations to protect the students’ confidentiality, especially when there is ambiguity and/or a potential conflict in the regulations? Can a school issue a stay away order between students where an official charge under the student code of conduct has not been filed? Can a school require, encourage or allow mediation of sexual harassment or violence cases? Should a survivor be allowed to appeal a hearing board decision in a student conduct case and, if so, what access to evidence, the transcript of the hearing and any written basis of the judgment should she have? These are just some of the questions that come up regularly for the “first responders” and policymakers at schools.

These are also questions that do not show up in most Title IX lawsuits or in OCR’s 2001 proactive guidance on how to respond to peer sexual harassment and violence. Moreover, while the DCL has made a good start at answering a number of these questions, it does not answer them all, and the nature of individual cases is that new questions are sure to arise. Therefore, having access to OCR’s LOFs could resolve many of these questions for the people who really need such answers.

1. Lack of a well-publicized complaint procedure

Despite how helpful they could be to both survivors and campus policymakers and administrators, neither information about the complaint procedure nor the results of those investigations are particularly accessible or well-publicized. In the case of OCR complaints, while information is posted on the OCR website, this is the only place that it seems to appear. Even OCR’s own guidance and the recent DCL, while referring to OCR investigations, never explain how one would go about initiating an investigation or where one might file a complaint. While it is clear that the main audience for the guidance is schools, the guidance obviously is likely to be read by a wider swath of the general public than just the regulated entities. In addition, at no place on the OCR websites dealing with the complaint process is sexual harassment mentioned, so these pages are not terribly easy to find through simple internet searching. The Center for Public Integrity’s series on campus sexual violence confirms that “few students know they have the right to complain” and “the number of investigations into sexual assault-related cases is ‘shockingly low.’”

2. Violations of the Freedom of Information Act

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107 See generally, id.
109 See REVISED GUIDANCE, supra note 66, at i, iii, 5-6, 8, 10, 11, 14-15, 20-22; http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf, 9 -12, 16.
110 The OCR website containing the recent DCL includes a “Know Your Rights” flyer that includes information about the OCR complaint process. http://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.html However, it is unclear what schools are supposed to do with this flyer, if anything. The DCL does not require that schools post the flyer.
111 Lax Enforcement of Title IX, supra note 55.
Still, the two websites devoted to the OCR complaint process look like a no-holds-barred publicity campaign compared to the publicly available information devoted to OCR’s resolutions of the complaints that are filed. In fact, the only way that anyone other than a complainant or the school being investigated can see the resolution of most cases is through filing a Freedom of Information Act (‘‘FOIA’’) request. If one wishes to see various OCR Letters of Finding but one does not know which ones in particular one needs to see, one must file a blanket FOIA request for all of the LOFs in a particular timeframe, against a particular school, or similar. With the exception of a couple of recent cases,112 the letters are not available in the DOE public FOIA reading room.

The DOE’s own regulations implementing FOIA state that the agency will keep in its public reading room: “final opinions and orders in adjudications… and copies of all agency records regardless of form or format released to the public pursuant to a FOIA request that the Department determines are likely to be the subject of future FOIA requests.”113 “Adjudications” is undefined by the regulations, but even if OCR’s “final opinions and orders” in its complaint investigations are not strictly adjudications, they almost certainly fit into the category of “agency records… released to the public pursuant to a FOIA request… likely to be the subject of future FOIA requests.” While it is true that DOE must determine that a particular, already released record is likely to be requested again, in this case, several bits of evidence indicate that at least some LOFs have been requested multiple times and yet there is a continuing categorical exclusion of these LOFs from the DOE public reading room. This evidence includes the fact that the Center for Public Integrity filed a blanket FOIA request for OCR sexual harassment investigations from 1998-2008.114 In addition, I have filed FOIA requests for a series of LOFs in OCR cases, cases about which I was aware through a publication called The Educator’s Guide to Controlling Sexual Harassment.115 This publication files blanket FOIA requests, then synopsizes the cases involving new or unique legal points, facts and/or conclusions. Therefore, there is a group of LOFs that not only are “likely to be the subject of future FOIA requests” but actually have been requested multiple times.116 Combined with the fact that The Educator’s Guide’s summaries of OCR cases increases the likelihood that they will be requested, it seems clear that the DOE would see this as proof that the LOFs are “likely to be the subject of future FOIA requests.”

As already mentioned, absent making the LOFs available in the public reading room, the only way a member of the public can read the LOFs is through filing a FOIA request. Again

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112 See http://www2.ed.gov/about/offices/list/ocr/docs/investigations/index.html. These recent cases are a positive step demonstrating this administration’s recognition of and willingness to address the problem, but are still quite inadequate when compared to the sheer scope of the problem and number of past investigations not available in the reading room.

113 34 C.F.R. § 5.10(b) (2011).

114 Lax Enforcement of Title IX, supra note 55.

115 See EDUCATOR’S GUIDE, supra note 69.

116 A final set of requests about which I am aware were filed by the Georgetown Law Library. Upon my mentioning the general inaccessibility of the LOFs to Georgetown Law Librarians, Kumar Jayasuriya, Sarah Rhodes and Sara Burriesci, they decided to experiment with developing Georgetown’s own database of LOFs to provide as a service to the public. They filed some blanket FOIA requests to obtain a certain number of LOFs directly from the DOE to assess whether they could be placed into a database. The files they received from DOE were generally so illegible (from a technical perspective) that the project has been stalled while a technical solution is sought.
according to its own regulations, DOE has 20 working days (i.e. a little under a month) after the request is received by the appropriate office to “determine whether to comply with the request.”\(^{117}\) However, in “unusual circumstances,” this time period may be extended to a time “arranged with the Department… within which the FOIA request will be processed.”\(^{118}\) “Unusual circumstances” include “[t]he need to search for and collect the requested agency records from field facilities or other establishments that are separate from the office processing the request.”\(^{119}\) Since OCR investigations are conducted by local enforcement offices, \(^{120}\) “unusual circumstances” are in fact usual circumstances and put all FOIA requests related to OCR’s investigations in the category where there is no definite deadline for the DOE’s response and it must be “arranged with the Department.”\(^{121}\) It is therefore impossible to know how quickly or how slowly a FOIA request might be fulfilled, and there is room for it to be quite slow indeed.

Based on this evidence, it appears that DOE is engaging in a systemic FOIA violation, one which virtually eliminates a method that could alleviate one of the information problems discussed above: the lack of awareness of the non-lawyer first responders and policymakers at many schools. Such front-line staff might find the time to search files in a public FOIA reading room to see if the DOE has ever investigated a complaint that might throw light on the school’s own particular policy or implementation question. However, they are not going to take the months and the amount of labor it would take to file and receive results from a blanket FOIA request that might not even contain a case that is on point.

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

Several other information problems occur as a result of the systemic FOIA violation in which DOE is engaging, including a general lack of accountability for OCR and piecemeal enforcement of Title IX’s requirements. First, the lack of transparency regarding OCR’s investigations makes it extremely difficult to check those investigations for consistency or adequacy. From the few cases I have seen, I have already noticed significant variation between regions in terms of their findings in peer sexual violence cases and suspect that these might have to do, in part, with the quality of the investigations conducted. For instance, when University of California at Santa Cruz was investigated in 1994, the investigation clearly involved a wide swath of people on campus, not only those officials who had dealt with the case.\(^{122}\) Yet in other investigations, there is evidence that OCR never attempted to speak with anyone but the complainant and the school officials being investigated.\(^{123}\) Such investigations unsurprisingly often result in “complainant said, defendant school said” situations where ultimately OCR finds

\(^{117}\) 34 C.F.R. 113, § 5.21(c) (2011).
\(^{118}\) 34 C.F.R. 113, § 5.21(e) (2011).
\(^{121}\) 34 C.F.R. 113, § 5.21(e) (2011).
\(^{123}\) E-mail from Carolyn Hurwitz, Aug. 15, 2010 (on file with author).
that there was “insufficient evidence” to support the complainant’s allegations.\textsuperscript{124} Third party evidence might have broken such a stalemate, had OCR sought to speak to third parties.

As mentioned above, the Center for Public Integrity undertook the kind of review that would be next to impossible for most schools or advocates to accomplish; it did a blanket FOIA request for 11 years worth of OCR Title IX investigations (1998-2008), and found 24 investigations (out of 210 campus sex discrimination investigations) into “allegations that colleges and universities botched sexual assault cases.”\textsuperscript{125} Only 5 of these found the schools responsible for violating Title IX, and in some cases OCR didn’t find violations for some pretty serious school behavior. For instance, although OCR’s own guidance makes clear that retaliation by the school against a survivor for reporting an assault is a violation of Title IX,\textsuperscript{126} when Boston University “distributed a press packet with information about an alleged rape victim, noting that she was fined for “disorderly conduct” and drinking alcohol on the night she was allegedly raped,”\textsuperscript{127} OCR did not find the school in violation of Title IX. In contrast, the U.C. Santa Cruz investigation found violations of Title IX due to “unclear information about sex offense policies, poor recordkeeping and inconsistent disciplinary procedures.” In the primary investigation discussed by CPI, moreover, OCR accepted a series of the University of Wisconsin’s excuses for why it delayed addressing a student’s report of sexual assault, including that the school had put its process on hold because a criminal investigation was occurring.\textsuperscript{128} This was despite the clear statement in OCR’s own guidance that “Police investigations or reports… do not relieve the school of its duty to respond promptly and effectively.”\textsuperscript{129} Such disparate findings raise real questions about how consistent OCR’s enforcement is, but the systemic FOIA violation makes it nearly impossible to check the accuracy of such suspicions.

In addition, both the FOIA violation and the underlying questions about the quality and consistency of the investigations themselves lead to a situation of piecemeal enforcement where some schools are being held to a higher standard than others. For instance, prior to the recent DSL, which clarifies that this rule applies to all schools, only schools that had been investigated had been required to adopt a preponderance of the evidence standard for school hearings of peer sexual violence cases.\textsuperscript{130} Nothing about a preponderance of the evidence standard appears in the Revised Guidance, so this appeared to be a requirement that OCR had developed through its investigations, despite OCR’s disclaimer on its website that “Letters of findings are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such.”\textsuperscript{131} Although the DSL has now alleviated this problem, this could have presented a separate problem under the Freedom of Information Act, which states, in the section on public reading rooms, that:

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{124} See, \textit{e.g.}, Letter from Sheralyn Goldbecker to John J. DeGioia (May 5, 2004), in Georgetown University, OCR Case No. 11-03-2017 (on file with author) [hereinafter Georgetown University Letter].
  \item \textsuperscript{125} \textit{Lax Enforcement of Title IX, supra} note 55.
  \item \textsuperscript{126} \textit{See REVISED GUIDANCE, supra} note 66, at 20.
  \item \textsuperscript{127} \textit{Lax Enforcement of Title IX, supra} note 55.
  \item \textsuperscript{128} \textit{id.}
  \item \textsuperscript{129} \textit{See REVISED GUIDANCE, supra} note 66, at 21.
  \item \textsuperscript{130} \textit{See Evergreen State College Letter, supra} note 46; Georgetown University Letter, \textit{supra} note 116.
  \item \textsuperscript{131} \textit{How the Office for Civil Rights Handles Complaints, supra} note 102.
\end{itemize}
\end{footnotesize}
A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

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

(ii) the party has actual and timely notice of the terms thereof.\(^\text{132}\)

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

This piecemeal enforcement has several consequences. First, schools are not being treated the same, with schools that have been investigated and those that have not being treated differently, but possibly those schools who have been investigated also potentially being treated differently from each other. This is hardly fair to schools, and it is entirely possible that part of the reason why different schools are being held to different standards has to do with how well some schools negotiate versus how well some offices or administrations of OCR negotiate. This is because of the structure of OCR enforcement, which seeks voluntary compliance because OCR has no ability to do less than withhold federal funds for a violation of Title IX. It has no ability to fine a school, for instance, or to take other punitive measures short of the “nuclear option” represented by withholding federal funds.\(^\text{133}\) Since the comfort level with using OCR’s nuclear option seems about the same as the United States’ and Soviet Union’s during the Cold War,\(^\text{134}\) essentially OCR is left to negotiate a settlement with schools with all of the damage to its negotiating position that an empty threat can do. This leads to uneven enforcement.

It also exacerbates the central information problem discussed in part one of this article: the idea that colleges and universities are in a kind of competition with each other with regard to their public images and the reporting of sexual violence on campus. Because enforcement of Title IX is not uniform, some schools are able to get away with adopting policies more likely to suppress—or at least not encourage—victim reporting. Only the schools that have been investigated are compelled to come into compliance with Title IX and respond in a fashion that is likely to increase reporting, as the overall Title IX liability scheme encourages. Given 1) how few people are even aware of the complaint process, 2) the possibility that OCR will not insist on full compliance even if a school is investigated, and 3) the virtual guarantee that OCR will never take any money away from the school anyway, it seems much less costly to gamble that one might be investigated and found to have violated Title IX than to risk looking like a dangerous campus.

4. Lack of Proactive Enforcement

When interviewed by the Center for Public Integrity, the Deputy Head of Enforcement during the George W. Bush administration attempted to justify many of the enforcement inadequacies listed above by saying that investigations are less effective than the behind-the-


\(^\text{133}\) Lax Enforcement of Title IX, supra note 55.

\(^\text{134}\) Id.
scenes “technical assistance” and other proactive methods adopted by OCR to get schools to come into compliance. However, he also noted that the Revised Guidance published by the Clinton Administration on one of its last days in office was shelved immediately and not followed by the subsequent administration, although it was not publicly rescinded nor were advocates and others aware of its “shelved” status. In addition, as CPI also notes, OCR’s budget and staff were cut over the course of the Bush Administration, despite an increase in complaints to be investigated, impacting the office’s ability to provide both proactive guidance and technical assistance.

Evidence such as the DCL, other Dear Colleague Letters, particularly the one on the application of Title IX to bullying, and the posting of recent compliance reviews and complaint resolutions in the reading room show that the Obama administration is thankfully taking enforcement much more seriously., Nevertheless, there are still significant deficiencies in the proactive steps that OCR takes. First, it is not clear whether the “technical assistance” mentioned by the former Deputy Head of Enforcement was allocated to schools other than those being investigated and if this was the case, whether that has changed under the current administration. Therefore, this method cannot qualify as a purely proactive or preventative approach—if anything, it is designed to prevent recidivism.

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

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135 id.
136 id.
137 id.
138 http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html
Finally, although the Obama administration does appear to be taking a more proactive approach, there are still relatively few attempts on the part of OCR to engage in any proactive enforcement such as random compliance reviews. This means that nearly the entire burden of enforcement falls on those who file complaints, most likely the survivors of the sexual violence, who may be too worn out to complain, given that they have not only been through the traumatizing violence itself, but likely a re-victimizing school process (else, why would they complain?). This structure is therefore unlikely to alter the risk-benefit analysis of a school that would rather risk being investigated and found to have violated Title IX than to risk looking like a dangerous campus.

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

The ultimate audience about whom schools are concerned when they face the dilemma of encouraging victim reporting but looking like a dangerous campus is potential/current students and their parents. Therefore, if the understandable lack of awareness of this audience could be alleviated, this could influence a school to address the school’s own unawareness, as well as reduce incentives for schools to actively avoid knowledge and generally not discourage schools from adopting effective campus peer sexual violence response systems. In fact, this was at least in part the motivation behind the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.

The Clery Act was spearheaded by the parents of Jeanne Clery, a Lehigh first year student who was raped and murdered by a fellow student while she was sleeping in her dorm room. The primary purpose of the Act was to increase transparency around campus crime so that prospective students and their parents could make more knowledgeable decisions about which schools to attend. Rep. Gooding, who sponsored the bill in the House, stated that:

“The assumption behind these bills is that making this information available will help students decide which institution to attend, will encourage students to take security precautions while on campus, and will encourage higher education institutions to pay careful attention to security considerations.”

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

According to the 2005 Handbook for Campus Crime Reporting, institutions are required to report crimes based on four factors: 1) where the crime occurred; 2) the type of crime; 3) to whom the crime was reported; and 4) when the crime was reported. Reporting requirements split university locales into three categories: on campus (including residence halls), non-campus and public property. Criminal acts must be reported in three categories: type of crime (homicide, sex offenses, forcible and non-forcible, robbery, aggravated assault, burglary, motor vehicle theft, and arson), arrests or disciplinary actions related to liquor law violations, drug law violations, and illegal weapons possession, and hate crimes. All reported crimes are defined by the Federal Bureau of Investigation’s *Uniform Crime Reporting Handbook* (*UCR*), not local or state law definitions. A crime is considered “reported” — and thus necessary for the school to disclose — if it is brought to the attention of a “campus security authority” or the local police. Notably, “campus security authority” does not include faculty, campus physicians, or counselors (mental health, professional and pastoral). Finally, institutions are instructed to include an incident in its statistics under the year in which it was reported, not the year the incident took place.

Institutions are required to disclose all reported crimes, regardless of whether these reports led to investigations or disciplinary actions, and regardless of whether the survivor chooses to file an official police report or press charges. In addition, it is immaterial whether or not the perpetrator or survivor is associated with the school. A crime is considered to be “reported” if it is “brought to the attention of a campus security authority or the local police.” Institutions are prohibited from

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


145 Id.


152 Id. at 50. http://www2.ed.gov/admins/lead/safety/handbook-2.pdf at 76.


154 Id.
including personal identifying information about the victim or perpetrator of any reported crimes.\footnote{155}

A review of school reports demonstrates significant differences between reports. Often, schools do not report in the third category (to whom a report was made), even though it is required.\footnote{156} In addition, there is ample discretion given to schools in defining the boundaries of the first category. Both providing a map showing the boundaries used and updating campus boundary definitions on an annual basis are encouraged, but not required.\footnote{157} There is no automatic review process of these boundaries — an institution’s geographic definitions will only be reviewed if a complaint is brought.\footnote{158} Finally, there is variation in whether schools include statistics gathered from local police. Institutions are expected to contact local law enforcement agencies to obtain statistics and compile them with university statistics.\footnote{159} However, the institution is only expected to make a good faith effort in obtaining local law enforcement statistics, a vagary that may result in different outcomes for schools in the same jurisdiction.\footnote{160} If local law enforcement statistics are not broken down in a way that identifies the specific geographic area the crime occurred in, making officials unable to determine if the crime took place within Clery boundaries, the institution is not obligated to include law enforcement statistics and is advised to provide a statement indicating that police statistics did not comport with Clery reporting requirements.\footnote{161} Similarly, if the local law enforcement agency does not

\footnote{155} Id. at 79. http://www2.ed.gov/admins/lead/safety/handbook-2.pdf at 55.


\footnote{159} CAMPUS CRIME REPORTING HANDBOOK, supra note 132, at 54. http://www2.ed.gov/admins/lead/safety/handbook-2.pdf at 82.

\footnote{160} Id. Two universities in similar areas of Washington, DC, reported different abilities to obtain local law enforcement statistics. See, Georgetown University Campus Security Data, 2006-2008 (on file with author) (reporting that local police statistics are not available); American University Campus Security Data, 2006-2008 (on file with author) (reporting that local statistics are included with campus statistics). Note that in 2009, Georgetown University began including local police statistics in its annual campus security data. See http://ope.ed.gov/security/index.aspx (select “Get data for one institution/campus” and search “Georgetown University”).

\footnote{161} CAMPUS CRIME REPORTING HANDBOOK, supra note 132, at 54; http://www2.ed.gov/admins/lead/safety/handbook-2.pdf at 87.
comply with the institution’s request (it is not required to do so under Clery), the institution needs to document this, but do no more.162

Even in terms of Clery’s central and original purpose, giving potential students and their parents ways to evaluate the safety of a given campus, the variation that comes from the ample discretion given to schools, and the lack of proactive enforcement makes meaningful comparisons between schools difficult. Schools can minimize the crimes that they count by using their discretion in such areas as drawing the boundaries of the various locations in which they have to report and gathering statistics from local police. In addition, like with OCR’s enforcement of Title IX and despite the efforts of the organization created by the Clerys, Security on Campus, Inc., there is little knowledge of the complaint procedure and few complaints.163 This lack of awareness, combined with the lack of proactive compliance reviews by the Department of Education, means that schools are rarely held accountable for violations.

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

In fact, an amendment proposed to the Senate version of the Clery Act would have required universities to report all crimes against students regardless of whether they were committed on college campuses.164 However, the amendment was dropped when the Senate and House versions were reconciled. The original House sponsor, Rep. Gooding, explained the rejection in a manner demonstrating that his concept of campus security and crime suffered from the stranger rapist myth: “Considering the fact that our goal is to provide students with information on crimes on their campus, the inclusion of all information on crimes against students would have skewed the data reported to students in such a manner that they would never know if their school’s security system was effective in protecting students.”165 He also stated, with regard to another part of Clery, which requires schools to send out timely campus warnings about crime, that “[i]t is unconscionable that a woman can be raped on a college campus and

162 Id.
163 In fact, most complaints are filed by Security of Campus, Inc. itself. One exception was the case involving Salem International University (“SIU”), which was originally investigated as a result of a complaint by the local Chief of Police who suspected the school was not meeting the reporting requirements of the Clery Act. See Letter from John S. Loreng to Fred Zook (Dec. 17, 2001) at 2, available at http://www.securityoncampus.org/pdf/SIU/prdl.pdf.
steps are not taken to warn female students and faculty members so they can take steps to assure they do not become the next victim.”166 Obviously, these comments contemplate mainly warnings about stranger rapists (e.g. “a rape occurred in the northwestern corner of the Quad at 2am this morning; the suspect was described as such and such and is still at large”), since warning about acquaintance rapists would require including the kind of information that would identify the survivor and/or suspect both exactly and unnecessarily for purposes of capture (e.g. “a rape occurred in Old North dormitory, room X, at 2am this morning”).

Other aspects of the Clery Act also show its deficiencies in capturing campus peer sexual violence in campus crime statistics. The exception of all faculty and counselors from the definition of “campus security authority” demonstrates a lack of understanding of the people to whom sexual violence survivors tend to talk first and often at all.167 While it is possible to defend this exception on the basis that survivors might be dissuaded from talking to these people if they had to pass along the report, it should be noted that Clery requires schools to collect numbers only, in very general categories, and prohibits schools from including in their reports any personal identifying information about the victim or perpetrator of any reported crimes.168 Many counselors report such numbers for various purposes, without running afoul of the confidentiality requirements of their professions.169

In another somewhat baffling and disturbing counting rule, under the Clery Act, homicide, sex offenses and assault are counted as one offense per victim170 — meaning if there are multiple perpetrators and/or multiple violations involved, such as in a gang rape, the incident is still only counted once. In contrast, robbery, burglary and arson are counted as one offense per distinct incident,171 motor vehicle theft is counted as one offense per stolen vehicle,172 and arson and hate crimes are reported alongside the other most serious offense in the incident173 (e.g. an assault that qualified as a hate crime would be counted as one assault and one hate crime). That the rules for counting crime would not require a gang-rape to be counted for every separate violation, especially in a context that is distressingly well-known for the gang-rape phenomenon,174 is bizarre at best and appalling at worst. It is not only a symbolic insult to the

166 Id.
167 See also KREBS ET AL., supra note 3, at 5-21.
169 See, e.g., American Counseling Association, ACA CODE OF ETHICS §B.7.d. (2005), available at http://www.counseling.org/Resources/CodeOfEthics/TP/Home/CT2.aspx (“Use of data derived from counseling relationships for purposes of training, research, or publication is confined to content that is disguised to ensure the anonymity of the individuals involved.”).
170 CAMPUS CRIME REPORTING HANDBOOK, supra note 132, at 75; http://www2.ed.gov/admins/lead/safety/handbook-2.pdf at 37.
171 Id. at 75-76; http://www2.ed.gov/admins/lead/safety/handbook-2.pdf at 40, 44. 51 One could view this counting rule as consistent, in that a robbery perpetrated by three robbers is counted the same as a rape perpetrated by 3 rapists. Email from S. Daniel Carter, June 18, 2011 (on file with author). However, whereas three people can arguably collaborate to rob one house, i.e. commit one violation of the victim’s property, three people cannot collaborate to commit one violation of a victim’s body. Multiple rape perpetrators must involve multiple violations of the victim’s bodily integrity.
172 Id. at 80; http://www2.ed.gov/admins/lead/safety/handbook-2.pdf at 50.
173 Id. at 79; http://www2.ed.gov/admins/lead/safety/handbook-2.pdf at 54, 60-61.
174 In fact, the term “gang-rape” was first coined by Dr. Bernice Sandler in an article written about gang-rape on college campuses. E-mail from Bernice Sandler, May 11, 2011 (on file with author).
survivor of gang-rape, but also provides less incentive to schools to address the gang-rape phenomenon. After all, if a school must only report one sex offense as opposed to ten or even five, what additional incentive does the crime reporting structure really give to schools to take gang-rape seriously?

It appears that this counting rule has its origin in the FBI’s UCR Handbook. The UCR Handbook also defines forcible sex offenses as “carnal knowledge of a female forcibly and against her will,” with the further definition of carnal knowledge as “the act of a man having sexual bodily connections with a woman; sexual intercourse” and the specification that there is carnal knowledge if there is the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis). Although the Clery Act regulations allow schools to use either the UCR Handbook or the National Incident-Based Reporting System (NIBRS) version of the UCR Handbook, which uses “person” instead of woman, depending on which version a school uses, this definition could mean that all male victims of sexual violence are made completely invisible and that sexual violence that does not involve acts that can be characterized as “sexual bodily connections” or attempted “sexual bodily connections” need not be reported, despite how equally violating they might be. Although the Clery Act presumably stays away from state law sex offenses definitions for consistency purposes, considering the amount of reform that has gone into defining sex offenses under state laws, nearly any one of those definitions seems like it would be preferable to these disturbingly antiquated ones.

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176 Id. at 19.

177 Id. at 20.

178 34 CFR 668.46(c)(7) (2010).


180 The UCR definition is based on the common law definition of rape. However, beginning in the 1970s, states began massive reforms of rape laws, making laws gender neutral, eliminating the element of consent, and introducing additional forms of sexual assault that do not include force or threat of force, such as when the victim is incapacitated. See JOEL EPSTEIN & STACIA LANGENBAHN, THE CRIMINAL JUSTICE AND COMMUNITY RESPONSE TO RAPE 8 (1994). See also The Advocates for Human Rights, Sexual Assault in the United States, http://stopvaw.org/a6200a22-49cf-4680-a01b-e862d23ccfb6.html (last visited Feb. 24, 2011). The laws in Michigan and Illinois are considered models of rape law reform. Id. The Michigan statute holds in part:

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

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

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

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

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

(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.
In light of all of these problems, it is no wonder that the Clery Act has not fulfilled its promise for improving our knowledge of what is happening at most schools, never mind solving the dilemma of whether to risk looking like a dangerous campus by encouraging victim reporting. Even if it had avoided allowing schools too much discretion to minimize reporting if they wish to do so (and it should be noted that some schools do not in fact appear to be minimizing reporting—some might even be characterized as maximizing reporting), the ways that it counts crime demonstrates fundamental misunderstandings about how campus peer sexual violence operates. And because campus peer sexual violence “is the most common violent crime on American college campuses today,”\(^{181}\) to be at all accurate, the Clery Act must structure its rules to represent campus peer sexual violence correctly.

### III. Recommendations

In light of the series of information problems discussed in Part II, a whole list of changes is needed if the laws dealing with campus peer sexual violence are going to eliminate the counterincentives to the overall liability scheme’s support of institutional responses that encourage victim reporting. The adoption of these changes could go a long way to eliminating incentives for schools to remain passively unaware and actively avoid knowledge of campus peer sexual violence. It could likewise discourage schools from doing anything that might keep potential students and parents uninformed.

a. Adopt a constructive knowledge approach in Title IX private law suits.

A dozen years of Title IX litigation under *Gebser* and *Davis* have shown that the actual knowledge standard simply does not create incentives for schools to respond adequately to peer

\[(f) \text{ The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, any of the following circumstances:} \]
\[
\quad(i) \text{ When the actor overcomes the victim through the actual application of physical force or physical violence.} \\
\quad(ii) \text{ When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.} \\
\quad(iii) \text{ When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.} \\
\quad(iv) \text{ When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.} \\
\quad(v) \text{ When the actor, through concealment or by the element of surprise, is able to overcome the victim . . . .} \\
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*MICH. COMP. LAWS § 750.520b (2011).* It should be noted that other provisions of Michigan’s penal code hold that the victim need not resist. *MICH. COMP. LAWS § 750.520i 20110.* The Illinois statute holds:

\[(a) \text{ The accused commits criminal sexual assault if he or she:} \]
\[
\quad(1) \text{ commits an act of sexual penetration by the use of force or threat of force; or} \\
\quad(2) \text{ commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent . . . .} \\
\]

*720 ILL. COMP. STAT. 5/12-13 (2011).*

\(^{181}\) *SAMPSON*, *supra* note 5, at 1.
sexual violence. *Gebser* and *Davis* have not even encouraged schools to pass policies or establish effective procedures for addressing campus peer sexual violence and harassment and encouraging victim reporting, changes that the *Faragher/Ellerth* decisions have at least arguably achieved in terms of employer behavior. Unsurprisingly, very little progress has been made in preventing and ending campus peer sexual violence. As a result, we are now left with the unjust result that children and young people with fewer resources to deal with sexual harassment and violence are less protected at their schools, where their attendance for at least the early years is compulsory, than their adult parents are at their non-compulsory workplaces. In addition, little progress has been made in establishing a legislative fix, as invited by the Court in *Gebser*. The proposed 2008 Civil Rights Act sadly died in committee. In light of the litigation experience over the last decade plus and the current failure of Congress to change these unjust results, it is time either for the Supreme Court to revisit its decision in *Gebser* and *Davis* and adopt a constructive knowledge approach to Title IX sexual harassment cases or for Congress to re-introduce and pass legislation similar to the 2008 Civil Rights Act.

b. Improve Office for Civil Rights Enforcement

Both Congress and the Department of Education should take steps to improve OCR’s enforcement of Title IX in peer sexual harassment cases, including by appropriating the funds to increase staff and programs. Happily, the current administration is already making improvements to the proactive guidance and the availability of its enforcement actions to the public. However, these steps are only the beginning.

Specifically, OCR must continue to create proactive guidance giving more specific instructions to schools about how to handle sexual harassment and violence directed at students. The recent DCL, in particular its confirmation that the appropriate standard of proof for disciplinary hearings on sexual harassment and violence is a preponderance of the evidence standard, is already having an effect on schools, nearly a dozen of which have announced that they have changed or are reviewing their standards in light of the guidance. The DCL also clarifies such issues as the complaining and accused students’ equal rights to counsel, access to and advance notice of witnesses and other evidence, and rights to appeal. Nevertheless, certain questions are still open. There is particularly a need to better define a default “equitable” rule by clarifying that, absent an OCR statement to the contrary, when a school gives a right of

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185 http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html, 11.
186 http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html, 12.
any kind to the accused student in a campus disciplinary proceeding or other procedure for investigating complaints and determining responsibility and sanction in peer sexual violence cases, that same right, of the same scope, must be given to the complaining student as well. Better guidance is also needed on what constitutes institutional retaliation against survivors who report. Finally, the guidance should include the creation and publication of a model sexual violence and harassment policy and process for handling complaints under the policy.

To the extent that proactive guidance will never be able to address every question or circumstance that arises under the law, OCR must increase the visibility of its complaint process and the results of its investigations. Letters of Finding that conclude OCR investigations and any “Commitments to Resolve” or settlements reached in such cases dating back to at least the early 1990s should be made accessible to the public through a FOIA electronic reading room. Since DOE is currently engaging in a systemic FOIA violation, making these documents available is required by law anyway and could keep schools and OCR from having to go through expensive investigations if schools can resolve their questions up front and proactively comply. DOE could publicize both the availability of the complaint process and the LOFs through sending information directly to the student government or student media on a campus. Congress or DOE could mandate that information about how to file complaints with DOE under both Clery and Title IX is published in each school’s Clery report and is given to students as a part of the written notification that would be required by the proposed Campus Sexual Violence Elimination (SaVE) Act (see below for more details on the Campus SaVE Act). The DCL’s emphasis on the role of Title IX Coordinators and its requirements for training for all personnel involved in responding to sexual violence cases should also be used to disseminate information about the complaint process and complaint resolutions by requiring the Title IX Coordinators to provide information about OCR’s process to students (like OCR does on its “Know Your Rights” flyer) and including OCR’s guidance and complaint process in personnel trainings.

As helpful as making the complaint process and the result of complaints more accessible will be, OCR should also initiate more investigations or compliance reviews of schools. A certain number of schools could be selected at random every year for a compliance review/investigation. This would not only create incentives for schools to come into compliance on their own, in anticipation of a review, but also provide an avenue for OCR’s technical assistance services to be spread more evenly throughout institutions.

For both proactive and reactive investigations, OCR likely needs to develop methods of achieving more consistency and accountability and a more unified approach among their enforcement office investigators. Therefore, it should make efforts to improve its guidelines and training for all investigators on the most effective investigatory techniques. Unless requested not to do so by the complainant, investigations should at a minimum include talking to people suggested by the complainant and, if policies and processes are at issue, to people in the campus community through open forums or other gatherings of interested parties.

All of these improvements will of course require significantly more resources. Therefore, Congress should appropriate more money for DOE to increase staffing and enforcement efforts. While the current political climate might not be entirely conducive to immediate appropriation of funds, better funding should remain on our list of priorities. In addition, if OCR were given the
power to fine schools, such an approach would help fix two enforcement problems at once: first, by providing OCR with an enforcement mechanism short of the “nuclear option” of withholding all federal funds and second, by potentially adding a funding source for OCR’s work.

c. Amend the Clery Act

The Clery Act has been amended quite a bit since it was first passed, and a new set of amendments has been proposed in this Congress, the Campus Sexual Violence Elimination (SaVE) Act. In its current form, SaVE would add domestic violence, dating violence and stalking to the statistics schools must collect, require schools to include in their annual security report a statement of policy and procedures related to such offenses, mandate that schools provide educational programming promoting awareness about the violence, and encourage cooperation between the Departments of Education and Justice in providing assistance to schools on best practices for responding to and preventing such offenses. The act further requires schools’ procedures to notify student victims of their rights, disciplinary processes, victim services, and safety planning, including how the school will enforce any protective order and protect victim confidentiality. Finally, the school's policy must include the education programming already mentioned, possible sanctions or protective measures imposed following disciplinary action, and procedures available to victims post-violence, including to whom the victim can report, disciplinary procedures, and the options for, and assistance available to change academic, living, transportation, and working situations.

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

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

More specifically, schools should be required to administer a standard survey developed by DOE or a contractor every four years or similarly appropriate interval via a method that will guarantee a high response rate (e.g. requiring a response to the survey in order to graduate or to register for classes) and would ask students questions designed to determine the incidence of sexual violence without depending on individual survivors to come forward to report. The

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189 http://thomas.loc.gov/cgi-bin/bdquery/D?d112:1./temp/~bdSVuw:@@@D&summ2=m&/home/LegislativeData.php
190 Id.
191 Id.
results of the survey should be submitted to DOE and be published in the campus crime report. DOE could also do statistical comparisons of survey results from schools and either make those available to the public or give those compilations to schools confidentially for their own use, along the lines of certain existing multi-school private surveys in which many schools participate voluntarily.192

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

Such a survey does not necessarily need to replace in total Clery’s current reporting structure, although it is worth considering whether the resources that schools and other entities put towards meeting Clery’s current requirements would not be more efficiently and effectively utilized with either such a survey and/or the victim services office discussed below. If the reporting system remains in place, however, Clery must be amended to change its definitions and methods of “counting” reports. Crimes should be counted in a manner that accounts for crimes where both the survivor and alleged perpetrator are members of the campus community (students, faculty and staff), regardless of where the crime occurred. Especially if combined with a territorial approach, such a method would capture almost all crimes where the school has both a responsibility to protect a student, faculty or staff member and/or some control over the alleged perpetrator, the facilities where the crime took place or both. Counting based on people involved would capture many crime reports involving student perpetrators but not taking place on campus (say, in houses owned by fraternities or hotel rooms rented for parties), which is where most campus peer sexual violence occurs.193 At the same time, the territorial approach would capture crimes on campus committed against students or other members of the campus community by outsiders. Together, these approaches would decrease schools’ discretion under Clery and make the reporting system more accurate.

Other methods can also help minimize schools’ discretion in reporting and decrease schools’ incentives to curtail reporting. All campus crime reports should be required to include mandatory standard language explaining how to interpret the data, including some acknowledgement of the significance of the non-reporting problem and the counterintuitive meaning of more sexual violence reports. Like with Title IX, the complaint process should be mandated to appear on every campus report, and DOE should engage in more proactive enforcement, such as reviewing a random selection of campus crime reports for full compliance with Clery, in addition to investigating complaints.

193 See KREBS ET AL., supra note 3, at 5-19;
Any amendments should also get rid of the FBI’s *UCR Handbook*, either by finding a more modern model such as even the FBI’s own NIBRS edition of the *UCR Handbook* or by creating new definitions just for the Clery Act. In particular, multiple perpetrators committing multiple sexually violent acts against a single victim should be counted by violent act, not by victim or by perpetrator (to account for those sexual assault scenarios where one perpetrator commits multiple violent acts) and the definitions should allow male victims to be counted.

A final method, which ideally would be combined with the survey discussed above, would be to require schools, either under Title IX or the Clery Act, to create certain programs related to peer sexual violence and then to funnel reporting through those programs. For instance, one of the most effective ways of addressing the myriad challenges of addressing peer sexual violence on campus is to create a visible (yet confidential) and centralized victims’ services office. In my 2009 article, I focused on how such offices could play the role of confidential advocate for survivors in a variety of campus settings and procedures. However, they can also play critical roles for the institution, especially when it comes to reporting and responding properly to such reports.

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

The victims’ services office can also provide a critical role for the institution by being a source of expertise in an area where schools need a lot more information and training, especially in light of the training requirements and education recommendation contained in the DCL, which will be strengthened further by the Campus SaVE Act, should it be enacted into law. Office staff will have the background and knowledge to implement such training and education programs and can provide deeper expertise in active cases. Faculty and staff can be minimally trained in how to handle reports, mainly by referring them to the victims’ services office as the campus expert, which usually is a relief to the majority of faculty and staff members, who do not feel prepared to deal with such reports. Survivors are also more likely to report to a confidential advocate and all-around resource, and such an office can provide raw numbers without breaching confidentiality. Centralizing reports with a victims’ services office is one of the most effective ways of both getting survivors to report and making sure an institution’s response is effective once a report occurs.

In light of the benefits of such offices, the most effective way for the Clery Act to both capture reports and ensure that sexual violence survivors’ rights are protected (as required by a

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194 http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html, 4, 7, 12, 14-15.
different portion of the Clery Act, commonly referred to as the Sexual Assault Victim’s Bill of Rights) may very well be to mandate that every school create and professionally staff such an office. Such an approach would not only raise reporting, but provide an on-campus expert who would facilitate creation of the right policies and procedures, as well as preventative educational programming. A legal regime that truly wants to end the campus peer sexual violence problem could not do better than mandating such an office at every school.

IV. Conclusion

In the half dozen or so presentations that I have given on my 2009 article on this subject, at nearly every one a college administrator, usually from the judicial affairs or student conduct office, has challenged my characterization of one piece of law related to campus peer sexual violence as a myth. The particular legal controversy involved a supposed conflict between a provision of the Clery Act and the Family Educational Rights and Privacy Act (“FERPA”). FERPA generally does not allow educational institutions to disclose information from a student’s educational record, which would include the results of student disciplinary proceedings, to anyone besides the student unless the student gives written consent.195 However, as early as 2001, the OCR’s Revised Guidance made it clear that FERPA did not override the rights given by Title IX.196 In addition, 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).”197 Despite this relative clear statement, schools were concerned about whether the accuser, once informed of a disciplinary procedure’s outcome, could then re-disclose that information. Many schools therefore required survivors to sign nondisclosure agreements before they were informed of the outcome of disciplinary proceedings.198

Understandably, victims and victims’ advocates objected to such measures because they compelled victims’ silence.199 In light of how difficult many survivors find it to come forward at all, and the reasons listed above for why they do not report, such a “gag-rule” could facilitate victim-blaming responses. Moreover, given the typical dynamics of campus sexual violence cases (where the perpetrator and survivor know each other and have a common group of acquaintances but where the alleged violence took place without any witnesses), survivors often find their credibility being judged not only in formal disciplinary processes but also informally by everyone around them.200 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.

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196 See REVISED GUIDANCE, supra note 66, at 22.
198 See Security on Campus, Georgetown University Violation, supra note 51; Letter from Nancy Paula Gifford to S. Daniel Carter, supra note 51.
200 See BEYOND THE CRIMINAL JUSTICE SYSTEM, supra note 40, at 194.
Even worse, it can allow the perpetrator to exploit the survivor’s compelled silence by lying about the outcome to others. All in all, it sets a victim up to feel re-victimized by the system.  

In 2004, the Department of Education settled the question in response to a complaint filed by a student survivor and Security on Campus. In its resolution of the complaint, the DOE made clear that such compelled nondisclosure agreements were illegal under the Clery Act: “Under the University’s policy, a student who refused to execute an agreement would be barred from receiving judicial outcomes and sanctions information. As a result, a key aim of the Clery Act—providing access to key information to be used by affected persons in their recovery process—is defeated.” The Department of Education confirmed this judgment again in a November 2008 letter to another university in response to a complaint regarding a similar policy. In doing so, it 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.  

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

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

201 See Dieringer, supra note 174.
203 UVA Victims of Rape, supra note 174.