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Institution-Specific Victimization Surveys: Addressing Legal and Practical Disincentives to Gender-Based Violence Reporting on College Campuses

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Abstract

This review brings together both the legal literature and original empirical research regarding the advisability of amending the *Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act* or creating new Department of Education regulations to mandate that all higher education institutions survey their students approximately every 5 years about students' experiences with sexual violence. Legal research conducted regarding the three relevant federal legal regimes show inconsistent incentives for schools to encourage victim reporting and proactively address sexual violence on campus. Moreover, the original research carried out for this article shows that the experience of institutions that have voluntarily conducted such surveys suggests many benefits not only for students, prospective students, parents, and the general public but also for schools themselves. These experiences confirm the practical viability of a mandated survey by the Department of Education.

Keywords

law, sexual harassment, sexual violence, Title IX, Clery, accused students, due process, surveys

Since at least the mid-1980s, surveys measuring the incidence and prevalence of sexual violence against college students, particularly women, have consistently shown a *general* prevalence of such violence in 20–25% range among college women *as a whole*. Thus, 20–25% of college women nationally are sexually victimized while in college, overwhelmingly by men who they know (Benson, Gohm, & Gross, 2007; Bohmer & Parrot, 1993; Fisher, Cullen, & Turner, 2000; Koss, Gidycz, & Wisniewski, 1987; Krebs, Lindquist, Warner, Fisher, & Martin, 2007). Some of these studies have used a national sample (e.g., Fisher et al., 2000), whereas others have studied students at one college or university or a small group of institutions as exemplary of college and university students generally (e.g., Krebs et al., 2007). Although the number of single schools whose students have been surveyed is small, both the incidence rates found by surveys administered with a national sample and those administered with students at a single school display consistently high rates of sexual violence.[1] Nevertheless, at least according to publicly available information, very few schools have surveyed their own students specifically for the purpose of assessing the incidence of sexual violence at their own institutions and confirming their own campus' prevalence rates.

As a result, although most college and university administrations are likely aware of the general or national sexual violence incidence rates, few have prevalence or incidence data reflecting the size of the problem on their specific campuses. Most members of the campus community know still less about the occurrence of this violence in their own community. The general public, including prospective students and their parents, know the least.

The reason for this lack of knowledge is not only due to most schools' failure to survey their students. In fact, general or nationally representative studies have repeatedly shown that 90% or more of student victims do not report their victimization (Bohmer & Parrot, 1993, p. 63; Fisher et al., 2000, p. 24; Koss et al., 1987, p. 169). Therefore, schools that rely strictly on victim reporting, as most schools do, likely get relatively few reports in comparison to the sexual violence actually occurring. The research has also confirmed that victims' reasons for not reporting are dominated by beliefs that others, especially those in positions of authority, will not believe the victim (Bohmer & Parrot, 1993, p. 63; Fisher et al., 2000, p. 24; Warshaw, 1988, p. 50). Such hostile responses on the part of police and other law enforcement in the criminal justice system are well documented in the research (Seidman &

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Vickers, 2005, p. 468). Nevertheless, many schools still rely on such traditional criminal justice methods as the primary method by which victims can report.

In light of the extremely high nonreporting rates and the reasons victims give for not reporting, some institutions have begun to depart from traditional criminal justice reporting mechanisms and to set up alternative mechanisms such as on-campus rape crisis counselors or victims' advocates (Karjane, Fisher, & Cullen, 2002, p. 132). At these institutions, survivors are perceived to report the violence at greater rates (Karjane et al., 2002, p. 87).

However, this increased reporting creates a strange result: the campus suddenly looks like it has a serious crime problem. The high rate of violence and the low rate of victim reporting combine, so that the schools that ignore the sexual violence have fewer reports and look safer, whereas the schools that encourage victim reporting have more reports and look less safe. Appearances in this case are completely the opposite of reality, and the correct conclusion to draw from the number of reports of 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, and risk gaining a reputation as a dangerous campus? Or does the institution ignore the problem and discourage victim reporting either passively or actively and appear to be a less dangerous institution? Add into the mix that the campus across town or one step below or above in the rankings may choose to ignore the problem, leaving a school to explain to potential and current students and their parents why it appears to have so much more crime than a competitor institution. Thus, this dilemma creates clear incentives for schools *not* to encourage victim reporting.

Legally, this dilemma and its incentives to suppress victim reporting are further exacerbated by the federal legislation and administrative regulations that apply to sexual violence in education, particularly by a statute called the *Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act* (*Clery*). At the same time, *Clery* and the significantly more powerful sexual harassment prohibitions under *Title IX of the Educational Amendments of 1972* (*Title IX*) also require schools to respond to and seek to prevent sexual violence once they are aware of specific instances of violence. Moreover, as both lawsuits by individual plaintiffs and enforcement by the Departments of Education (ED) and Department of Justice (DOJ) increase, so does the risk of very expensive liability for schools that do not respond properly once violence occurs.

This combination of the incentive to discourage victim reporting on the front end and the risk of liability from inadequate responses on the back end further intensifies the dilemma facing schools. On one hand, by not addressing sexual violence proactively through, for instance, creating and staffing a dedicated victims' services office on campus, fewer victims are likely to come forward, and schools at least believe that they are less likely to have to deal with the threats to their public image that could come with more victims reporting. On the other hand, when a case of sexual violence comes along where a victim does report, this same campus has no dedicated staff member with expertise in how best to respond to sexual violence and is more likely to be unprepared in many other ways. The school in this situation is left scrambling to learn how to respond while an active case is rapidly developing, and often making many mistakes along the way, mistakes that could ultimately prove to be very expensive.

This legal environment and the dilemma that both underlies and is exacerbated by it leads, full circle, back to the surveys already mentioned. Schools surveying their students do not have to rely on victim reporting to determine whether they need to respond to a widespread campus sexual violence problem or to develop response systems hurriedly in the shadow of a rapidly developing and potentially high publicity case. Instead, these institutions can employ such surveys to assess the extent and dynamics of the sexual violence problem among their students and use the survey results to inform their institutional responses to the specific manifestations of the problem on their campuses, well ahead of any high-profile or ultimately high-liability report of sexual violence. Thus, when a high- or even low-profile case comes to light, the school will be prepared to address it competently and in compliance with the law. Even better, understanding the incidence and dynamics of such violence on their campuses will help institutions craft prevention efforts that will stop or at least reduce the violence itself and therefore lessen the chances of high, as well as low, profile cases occurring in the first place.

This article sets out both legal and experience-based reasons for schools to undertake such surveys. It first discusses the legal support for these surveys, including the legal requirements that schools must meet under *Title IX* and *Clery*. Second, it reviews the results of a fact-finding and information gathering investigation regarding surveys that have been conducted voluntarily by individual schools to measure the incidence of sexual violence among the institution's students. Third, it brings these analyses together with a proposal that *Clery* be amended or ED pass regulations requiring all schools to conduct surveys of students along the lines of those conducted by two particular the model universities. Previous articles have proposed this solution (Cantalupo, 2011, 2012), and the research reviewed here adds support to this recommendation based on the actual experiences of schools that have conducted such surveys with their students. This research confirms the practical viability and benefits of the ED survey to students, prospective students, parents, the general public, and schools themselves.

The Legal Environment Surrounding Campus Peer Sexual Violence

Prior legal research has collected and analyzed the three major federal legal regimes that define a higher education institution's responsibilities to respond to incidents of campus peer sexual violence, *Title IX*, *Clery*, and case law regarding the due process rights of students at state institutions who are accused

of an offense that could result in suspension or expulsion (Cantalupo, 2009). *Title IX* and *Clery* are federal statutes with accompanying administrative and court enforcement structures that focus mainly on how an institution responds to victims and reports of violence. While *Clery* applies just to colleges and universities, *Title IX* applies to all schools. Therefore, cases under *Title IX* involving one level of schooling (e.g., a high school) are relevant legal precedents for schools at other levels (e.g., an elementary school or a college).[2] The due process precedents focus on the institution's obligations to students accused of perpetrating violence and are again applicable to schools at all schooling levels regardless of the level of school involved in a specific case. Various state laws may also be applicable in any given case, but those laws are beyond the scope of this article. This section will review the legal research on each set of federal laws, with a focus on the way in which these laws create the serious potential for expensive liability when schools inadequately respond to peer sexual violence, while at the same time, they encourage institutions to passively or actively suppress victim reporting of sexual violence, which in turn sets schools up for greater risks of facing that costly liability.

Title IX

Title IX prohibits sexual harassment in schools as a form of sex discrimination (Office for Civil Rights, 2001, p. 2). 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" (*Davis v. Monroe County Board of Education*, 1999, p. 632). Because of the severity of sexual violence, generally, even a single instance of violence will be considered sexual harassment (Office for Civil Rights, 2001, p. 6).

Title IX is enforced in two ways when peer sexual violence is at issue: first, through a survivor's private right of action against her school (*Cannon v. University of Chicago,* 1979; *Franklin v. Gwinnett County Public Schools,* 1992), and second, through administrative enforcement by the Office for Civil Rights (OCR) of ED (Office for Civil Rights, 2001, p. i). Both enforcement jurisdictions derive from the fact that schools agree to comply with *Title IX* in order to receive federal funds (Office for Civil Rights, 2001, pp. 2–3).

The private right of action requires a plaintiff/survivor to reach the standard set out by two Supreme Court cases, *Gebser v. Lago Vista Ind. Sch. Dist.* (1998) and *Davis v. Monroe County Bd. of Educ.* (1999). In order to make out a violation of *Title IX*, this standard requires that a school act with "deliberate indifference" in the face of "actual knowledge" of an incident of sexual violence (*Vance v. Spencer County Public School District*, 2000, pp. 258–259). If a plaintiff can meet that standard, the damages that the school could be required to pay are quite significant. While most cases settle out of court, the settlements give a sense of what both sides anticipate the damages awarded by a jury would be. The largest settlement in a *Title IX* case to date was in *Simpson v. University of Colorado Boulder* (2007), 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 US$2.85 million to the plaintiffs, hired a special *Title IX* analyst, and fired some 13 university officials, including the President and football coach (Rosenfeld, 2008, p. 418). Other large settlements include six-figure settlements by Arizona State University (Muggeridge, 2009) and the University of Georgia (Rosenfeld, 2008, p. 420).

Beyond these high-profile cases, there have been many other instances where courts have allowed a *Title IX* claim to proceed to a jury for a determination as to whether the school violated the statute. Schools have been found to have acted with deliberate indifference for the following general categories of institutional responses to a report of sexual violence:

1. The school does nothing at all (e.g., *McGrath v. Dominican Coll.*, 2009; *Rinsky v. Boston Univ.*, 2010).
2. The school talks to the alleged perpetrator, who denies the allegations, makes no determination as to which story is more credible (*S.S. v. Alexander*, 2008), 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 (e.g., *Doe v. Erskine Coll.*, 2006).
3. School officials tell the victim not to tell anyone else, including parents and the police (*Murrell v. Sch. Dist. No. 1*, 1999).
4. The school waits or investigates so slowly that it takes months or years for the survivor to get any redress (e.g., *Albiez v. Kaminski*, 2010; *Williams v. Bd. of Regents*, 2007).
5. School officials investigate in a biased way, such as through their treatment of the survivor or characterization of her case (e.g., *Babler v. Arizona Bd. of Regents*, 2010; *Kelly v. Yale Univ.*, 2003).
6. The school determines or acknowledges that the sexual violence did occur but fails to or minimally disciplines the assailant or other students engaging in retaliatory harassment, or also disciplines the victim of the violence (e.g., *Doe ex rel Doe v. Coventry Bd. of Educ.*, 2009; *Terrell v. Del. State Univ.*, 2010).
7. School officials investigate and determine that the sexual violence did occur and proceed to remove the victim from classes, housing, or transportation services where she would encounter her assailant, resulting in significant disruption to the victim's education but none to the assailant's (*James v. Indep. Sch. Dist. No. 1-007*, 2008).
8. The school requires or pressures the survivor to confront her assailant or to go through mediation with him before allowing her to file a complaint for investigation (*S.S. v. Alexander*, 2008).

In addition, the case law in this area increasingly gives a sense of when school responses *are* adequate under *Title IX*, since two clear trends emerge from cases where courts *have* granted schools' motions for summary judgment or to dismiss the plaintiffs' *Title IX* claims. First, once a school has knowledge of an incidence of sexual violence, the case law suggests that separating the students involved (e.g., by moving the alleged perpetrator, suspending him, or both) can help a school avoid a "deliberate indifference" finding (e.g., *Theriault v. Univ. of S. Me.*, 2004). Second, a smaller group of schools have avoided being found deliberately indifferent because they expelled the perpetrators after determining them to be responsible for peer sexual violence (e.g., *Doe v. North Allegheny Sch. Dist.*, 2011).

These cases show that schools can face significant liability if they respond improperly to a report of sexual violence. They also make clear that the focus of *Title IX* case law is forward-looking, scrutinizing whether the school's institutional responses avoided or led to further risk for or actual occurrence of harassment or violence against a survivor. Therefore, proper responses often require actions that may not be the actions most school officials would immediately think of taking, such as moving an accused student out of housing or classes prior to an investigation or any determination as to the "truth" of the victim's report.

However, other cases reveal instances where the victim was not able to successfully show that the school had "actual knowledge" of the violence, due to three problems with the "actual knowledge" standard and how it has been applied by the courts as a whole. First, the actual knowledge prong requires that *the school* has actual knowledge of the harassment, raising the question of who represents the school. Some courts allow teachers to count as the school in peer sexual harassment, including sexual violence, cases (e.g., *Jones v. Ind. Area Sch. Dist.*, 2005), but this is not guaranteed (e.g., *M. v. Stamford Bd. of Educ.*, 2008), and others who would seem to be in similar positions of authority as teachers, such as bus drivers (*Staehling v. Metro. Gov't of Nashville & Davidson County*, 2008), coaches (*Halvorson v. Indep. Sch. Dist. No. I-007*, 2008), and other school professionals or "paraprofessionals" (e.g., *Noble v. Branch Intermediate Sch. Dist.*, 2002) have been judged to be "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? In peer harassment cases where this question was posed, the decisions are fairly evenly split between courts that find that the school must have actual knowledge of the harassment experienced by the particular survivor bringing the case (e.g., *Ross v. Mercer Univ.*, 2007), 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 (e.g., *J.K. v. Ariz. Bd. of Regents*, 2008) and ambiguous decisions (e.g., *Ostrander v. Duggan*, 2003)..

Finally, the actual knowledge standard, as U.S. Supreme Court Justice, John Paul Stevens, noted in his dissent in *Gebser v. Lago Vista Ind. Sch. Dist.* (1998, p. 296), encourages schools to avoid knowledge rather than set up procedures that allow survivors easily to report what happened to them. This is in contrast to the constructive knowledge standard that asks whether the defendant knew, or reasonably should have known, that a risk of harassment existed (*Gebser v. Lago Vista Ind. Sch. Dist.*, 1998, p. 296). A constructive knowledge standard creates incentives for schools to set up mechanisms likely to flush out and address harassment, since there is a substantial risk that a court will decide that the school "should have known" about the harassment anyway. In addition, the rule adopted by the Supreme Court in the sexual harassment in employment cases caused many employers to adopt sexual harassment policies and procedures (Grossman, 2003, p. 4). Employers did so because under this standard, if they have such policies and procedures in place, but a plaintiff fails to use them, the employer has a defense against liability for the harassment (*Faragher v. City of Boca Raton*, 1998, p. 807; *Burlington Industries, Inc. v. Ellerth*, 1998, p. 764).

A decade plus of experience with the actual knowledge standard demonstrates that these are not the incentives created by the standard. In fact, as already noted, doing nothing at all is both most schools' response of choice, even though it is also the response that is most likely to qualify as deliberate indifference under the same review standard. Unlike with the behavior encouraged by the standard used in the employment context, there has not been a rush to develop policies, procedures, and training on sexual harassment and sexual violence among schools as there has been among employers. Instead, the actual knowledge standard gives schools incentives to suppress reporting, at least passively.

Contrary to the court standard, OCR has opted to use a constructive knowledge standard when it investigates schools for violations of *Title IX* in peer sexual harassment cases, including those involving sexual violence. 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 (Office for Civil Rights, 2001, p. 14). This investigation often includes a close review of institutional policies and procedures, as well as the steps the school took to resolve a complaint (Office for Civil Rights, 2001, p. 14). In addition, in a website entitled *How the Office for Civil Rights Handles Complaints*, OCR specifies that it will look at all files relating to past sexual harassment cases and interview those involved, particularly relevant school personnel (U.S. Department of Education, n.d.-a). OCR cases are generally resolved through a "letter of finding" (LOF) and may require a school to change its policies and procedures, but the law does not empower OCR with the ability to award monetary damages

to victims for violations of their rights. In fact, OCR's only financially based enforcement power allows it to withhold all federal funds from a school, but the law does not provide a mechanism for awarding those dollars to student survivors.

OCR's approach is both more comprehensive and more exacting than the court standard. Thus, in addition to the aforementioned list of institutional responses that have gotten schools in trouble in private lawsuits, each category of which includes OCR investigations where schools have been found in violation of *Title IX*, OCR has additionally found *Title IX* violations when a school's policies and procedures did not follow OCR's requirements, such as when schools create fact-finding procedures and hearings with significantly more procedural rights for the accused than the survivor (e.g., Coleman, 2007); adopt a higher standard of proof than "preponderance of the evidence" (e.g., Goldbecker, 2004); and/or have policies or procedures that are contradictory, confusing, and/or not coordinated (e.g., Hibino, 2012), that do not provide clear time frames for prompt resolutions of complaints (e.g., Kallem, 2004), or that violate more "technical" *Title IX* requirements (e.g., Howard-Kurent, 2001).

Despite these differences, OCR's enforcement, like enforcement of *Title IX* in the court context, encourages schools to avoid, passively or actively, knowledge of campus peer sexual violence. First, OCR's complaint process is not well publicized. Only a single page entitled *How to File a Discrimination Complaint with the Office for Civil Rights* is posted on the OCR website (U.S. Department of Education, n.d.-b), and OCR's own guidance and an April 2011 "Dear Colleague Letter" (*DCL*) regarding sexual violence never explain how one would go about initiating an investigation or where one might file a complaint, even while referring to OCR investigations (Office for Civil Rights, 2001, pp. i, iii, 5–6, 8, 10, 11, 14–15, 20–22; Ali, 2011, pp. 9–12, 16). Although recent developments discussed subsequently may be changing this, 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'" (Jones, 2010).

Second, and more critically, lack of publicity regarding OCR's resolution of the complaints that it does receive diminishes the reach of those resolutions because schools that have not been investigated cannot learn from previous investigations and proactively fix any problems with their own response systems. The only way that OCR provides for anyone other than a complainant or the school being investigated to see the resolution of most cases is through filing a Freedom of Information Act (FOIA) request.[3] If schools or individuals wish to see various OCR LOFs but do not know which ones in particular, they must file a blanket FOIA request for all of the LOFs in a particular time frame, against a particular school, or in some similar category. With the exception of a couple of recent cases, links of which are available from a website entitled *Recent Resolutions* (U.S. Department of Education, n.d.-c), the letters are not available in ED's public FOIA reading room. Moreover, even though the only way a member of the public can read the LOFs is through filing a FOIA request, the request process is particularly lengthy for these documents (see also Cantalupo, 2011, pp. 236–239). This means that the vast majority of school officials will not wait for months or expend the labor involved in filing and receiving results from a blanket FOIA request that might not even contain a case that is on point. Thus, although OCR's more exacting "knew or should have known" standard has the potential to fix some of the problems with the "actual knowledge" standard required in private lawsuits, general ignorance about OCR's complaint process, and investigation results fails to create incentives for schools to seek out knowledge of peer sexual violence or at the very least not to avoid that knowledge.

Fortunately, a combination of OCR attention to sexual violence and community activism is changing this picture somewhat. First, OCR has made available several high-profile investigations on its website since 2010, including Yale University (Hibino, 2012), the University of Notre Dame (Osgood, 2011), Eastern Michigan University (EMU; Criswell, 2010a), and Notre Dame College (Criswell, 2010b). In addition, high-profile resolutions in which OCR has worked with DOJ have been posted on the DOJ Civil Rights Division Educational Opportunities Section's website, most recently in a case involving the University of Montana (Bhargava & Jackson, 2013).

In addition, several groups of college students and recent graduates, dominated by sexual violence survivors, have significantly raised the profile of OCR's complaint option and increased public scrutiny of how OCR is investigating or resolving complaints. Two groups, the IX Network (Stancill, 2013) and Know Your IX (Lachman, 2013), have formed informal national networks of students and recent alumni of various schools. The IX Network has worked informally with students and alumni filing complaints against various universities, including Amherst College, Dartmouth College, Occidental College, Swarthmore College, the University of California, University of North Carolina, and the University of Southern California. Know Your IX has launched a website, http://knowyourix.org/, and both groups participated in a protest in front of ED, which was connected to a Change.org petition "demand[ing] that the Department of Education step up to hold colleges and universities publicly accountable for complying with federal law about protecting survivors of sexual assault like us" (ED ACT NOW, 2013).

All of this activity has generated new questions and controversies over OCR's and DOJ's compliance directives and the consequences that those directives might have on issues related to reporting. The issue of greatest recent concern deals with what schools must do once they receive a report of victimization, including issues such as what school staff and faculty are required to report to others at the institution, at what level of detail they must report it, which of these reports require an investigation, and how school officials' reports will affect survivors' willingness to report to school employees in the first place. For instance, OCR states that schools may not be able to guarantee confidentiality to students who report having been victimized (Ali, 2011, p. 5; Bhargava & Jackson, 2013, p. 15),

stating that requests for confidentiality should be weighed "against the following factors: the seriousness of the alleged harassment; the complainant's age; whether there have been other harassment complaints about the same individual; and the alleged harasser's rights to receive information about the allegations" under the Family Educational Rights and Privacy Act (Ali, 2011, p. 5). Some have expressed a concern that when victims cannot be assured of confidentiality, they may choose not to come forward (Spicuzza, 1998). These emerging issues confirm that crafting institutional responses primarily based on victim reporting continues to present various difficulties.

The Clery Act

Past legal research has explained that, like *Title IX*, the *Clery Act* deals with the rights of student survivors once they have reported a victimization (Cantalupo, 2009), primarily through a set of provisions referred to as the *Campus Sexual Assault Victim's Bill of Rights* (CSAVBR). Unlike *Title IX*, *Clery* also deals with the front end, reporting aspect of the campus sexual violence problem, requiring colleges and universities to report to the public any "forcible and non-forcible sex offenses" reported to the college/university, according to the FBI's definitions of such offenses (Cantalupo, 2011). The *Campus Sexual Violence Elimination Act* (*Campus SaVE*) recently made minor amendments to both sets of *Clery* provisions (Buzuvis, 2013). Unlike with *Title IX*, there is no right to private enforcement under *Clery*, so victims can only get injunctive relief (e.g., requiring the school to change its policies or take other actions on a going forward basis) but no monetary compensation for *Clery* violations.

Nevertheless, violating *Clery* can still be quite expensive for schools, since ED has the power to fine schools for violating *Clery*, whereas OCR has no fining capability. CSAVBR requires schools to publish policies that inform both on-campus and off-campus communities of the programs designed to prevent sexual violence provided by the school, as well as the procedures in place to respond to sexual violence once it occurs. It further specifies that a school's educational programs should raise awareness of campus sexual violence. Also, procedures adopted to respond to such violence must include procedures and identifiable persons to whom to report, the right of victims' to notify law enforcement and to get assistance from school officials in doing so, instructions as to how to preserve evidence of sexual violence, notification to students regarding options for changing living and curricular arrangements and assistance in making those changes, and student disciplinary procedures that explicitly treat both accuser and accused equally in terms of their abilities "to have others present" at hearings and to know the outcome of any disciplinary proceeding. *Campus SaVE*, which comes into effect in March 2014, amends *Clery* to include domestic violence, dating violence, and stalking within *Clery*'s purview, to specify information that must be included in campus policies, and to require that notice of these policies be given, in writing, to those who report a victimization.

Probably the most visible sexual violence case involving the *Clery* Act was the 2006 rape and murder of Laura Dickinson in her dormitory room at EMU by a fellow student. The school initially told Dickinson's family that her death involved "no foul play," then informed the family over 2 months later of the arrest of the student since convicted of raping and murdering her (Menard, 2007; Williams, 2008). As a result of a complaint filed against EMU for violations of the *Clery Act* (Menard, 2007), the school eventually agreed to pay US$350,000 in fines for 13 separate violations of the *Clery Act*, the largest fine ever paid in a sexual violence case (according to publicly available information), and settled a state law–based tort case with Dickinson's family for US$2.5 million (Larcom, 2008). The case eventually led to the president, vice president for Student Affairs, and director of Public Safety being fired (Schultz, 2007), and an estimated US$3.8 million in costs from the fines, the settlement with the Dickinson family, and "severance packages, legal fees and penalties" (Schultz, 2007).

According to the publicly available information, before EMU, the largest fine levied against a school was US$200,000 against Salem International University (Loreng, 2001) for not reporting five sex offenses, not regularly providing counseling and other victim support services, "actively discourag[ing victims] from reporting crimes to law enforcement or seeking relief through the campus judicial system" (Loreng, 2001), and responding to survivors' reports with "threats, reprisals, or both" (Loreng, 2001). Furthermore, the school would not make accommodations for new living and academic arrangements for victims following an assault, and survivors were inadequately informed of their rights to pursue disciplinary action against the assailant (Loreng, 2001).

The most recent and next highest fine of US$165,000 was levied against Yale for six separate reporting violations of *Clery* prior to 2004 (Kingkade, 2013). The fine was reduced to US$155,000 after Yale pointed out that it corrected one violation nearly immediately after making the error, in early 2005 (Hua, 2013). Miami University of Ohio was also apparently fined US$27,500 (Susman & Sikora, 1997), again for a combination of underreporting various crimes, including sex offenses, and "fail[ing] to initiate and enforce appropriate procedures for notifying both parties of the outcome of any institutional disciplinary proceeding brought alleging a sex offense" (Carter, 2004). Finally, in 2000, Mount St. Clare College was evidently the first school to be fined US$15,000, in part for two rapes that were reported to police but did not appear in the school's reports since the perpetrators were never criminally charged (Leinwand, 2000).

As these cases indicate, in addition to its CSAVBR provisions, *Clery* establishes requirements for schools to report and publish certain categories of crime that occur on campus. In fact, the original and primary purpose of *Clery* 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, 1990, p. 1). Therefore, the *Clery Act*'s focus is on establishing requirements for schools to report and publish certain categories of crime that

occur on campus, including sex offenses. Unfortunately, *Clery* depends entirely on victim reporting, in that schools are expected to collect statistics of reports made to certain school officials for certain categories of crime, including sex offenses, and then to report those statistics to the general public. Therefore, it does not acknowledge or address the sexual violence victim nonreporting issue, the public image dilemma facing schools when they try to increase reporting, or the incentives this dilemma creates for schools to suppress reporting.

Clery also encourages schools to think of their responsibilities to respond to sexual violence between students in terms of facilities and the school's role as a landlord, an ineffective perspective that suffers from the persistent myth that sexual violence is primarily committed by strangers and that has been consistently debunked by research on the incidence and perpetration of sexual violence (Fisher et al., 2000; Koss et al., 1987). The statute does this because it bases its reporting requirements on geography (i.e., whether a criminal act took place on, off or adjacent to campus) rather than on the identity of the perpetrator and victim. 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 (Office of Postsecondary Education, 2005, p. 23; 2011, p. 11). Thus, rather than requiring an institution to count criminal acts that take place between its students at any location, the *Clery Act* only counts criminal acts occurring on school property.

In doing so, *Clery* assumes that an institution can protect students from sexual violence through its landlord's obligations involving control of facilities and traditional policing and security methods, such as campus lighting and blue light phones. Such methods focus on protections effective primarily against stranger rapists in that improving campus lighting eliminates dark alleys in which stranger rapists might hide, and blue light phones provide ways to get police protection when fleeing a stranger rapist. As such, they are unlikely to prevent or reduce risk for the vast majority of campus sexual violence cases not occurring in public areas where lighting and phones would be protective.

Indeed, none of these methods are the most effective ways to prevent sexual violence by persons acquainted with the victim, and all of these approaches encourage schools to use the traditional law enforcement reporting methods with their victim reporting suppressing effects. As a result, despite its greater focus than *Title IX* on the front-end reporting of sexual violence, *Clery* does no better and likely worse than *Title IX* in creating the incentives for schools to be open and transparent about crime occurring on campuses, as Clery was originally intended.

Due Process Rights of Accused Students

Research on the case law regarding the due process rights of students accused of conduct warranting suspension or expulsion from a public school demonstrates that these precedents further support many of the same principles discussed in the context of *Title IX* and *Clery*. This case law, of course, is not applicable to the front-end reporting structure because it only comes into play once a report has been made, and the institution's disciplinary procedures are operating. However, on the back end, the case law confirms that there are no legal requirements that institutions treat accused students like criminal defendants with the full panoply of due process rights to which criminal defendants are constitutionally entitled, and therefore that *Title IX*'s and *Clery*'s approaches of placing accusing students and accused students on as equal of a playing field as possible do not engage in constitutional violations. Thus, schools can comply with *Title IX* and *Clery* without significant risk of liability to accused students.

In fact, in the sexual violence context, research has uncovered only three cases where a court found a college to have violated an accused student's due process rights (*Doe v. University of the South*, 2011; *Fellheimer v. Middlebury Coll.,* 1994; *Marshall v. Maguire*, 1980) and in only the *Doe* case did the court require the institution to pay any damages, although these were only a small fraction of the amount for which the accused student asked, basically amounting to a tuition refund (*Doe v. University of the South*, 2011). It appears that no courts have overturned a school's decision to sanction a student for peer sexual violence, even in the *Doe* case. Courts have, however, rejected challenges based on due process requirements for criminal defendants (e.g., *Gomes v. Univ. of Maine Sys.*, 2005) and have consistently reiterated the distinction between disciplinary hearings and criminal proceedings (e.g., *Ray v. Wilmington College*, 1995). Thus, although the due process cases do not address victim reporting, their consistency with *Title IX* and *Clery* demonstrate that they present no barrier to taking a different approach to victim reporting as in the *Title IX* and *Clery* context (for more details on this analysis, see Cantalupo, 2009).

As this review of the law also demonstrates, with the exception of the recent resolution in an action against the University of Montana, mentioned previously and discussed more subsequently, OCR, DOJ, and the courts have not required schools to do surveys of their students regarding their experiences with sexual violence. However, as the University of Montana resolution confirms, OCR and DOJ at least see a survey as allowed by law and well within their powers to require. In addition, as the next section will elucidate, some schools have voluntarily conducted such surveys. The next section will therefore review the research that collected information regarding these voluntary surveys. The final section will explore the possibility of a government-mandated survey in light of both the law and the experiences of schools that have conducted voluntary surveys.

A "Survey" of Campus Peer Sexual Violence Surveys

Emerging from the legal context reviewed previously is the potential usefulness of surveying students at a specific school as a way of overcoming various barriers to victim reporting. However, this utility is purely theoretical absent any schools'

actual use of such surveys. Therefore, this article also reviews research that sought to gather information from schools that have conducted such surveys with their students about the schools' experiences with these surveys. Although a quite small number of schools were identified as having surveyed their students, the information provided regarding those schools' experiences confirmed that these surveys are not just theoretically but are actually useful in achieving a variety of goals. These schools' experiences demonstrate several benefits for schools in conducting such surveys, in addition to avoiding the problematic aspects that exclusive reliance on victim-reporting involves. This section of the article will review the methodology and results of this study.

Methodology

Because this article deals with victim nonreporting as an institutional and legal problem, this study sought to gather information about surveys conducted by schools with their students for institutional purposes. This meant that the survey was conducted at least in part to inform the institution's administration about its students' experiences of violence. Therefore, this study did not seek to gather information about surveys where the research was conducted by faculty, doctoral candidates, or similar researchers *solely* for research purposes (e.g., for a dissertation and/or publication in an academic journal) and was not intended to be sought or shared with the institution's administration.

Because of this focus on surveys with an institutional purpose, inquiries about schools that had conducted institutional surveys were sent via electronic mail to three groups: (1) faculty and researchers who participated in a national scientific meeting involving gender-based violence on college campuses sponsored by the University of Kentucky Center for Research on Violence Against Women (about 23 faculty and researchers in all), (2) an electronic Listserv for campus Women's Center staff, the Women's Resource and Action Centers List (WRAC-L), and (3) an electronic Listserv for campus personnel who work with campus sexual violence programs, the Sexual Assault Program Coordinators (SAPC). WRAC-L has approximately 450 subscribers, is hosted by googlegroups, and is currently maintained by University of Minnesota employees. SAPC has 750 subscribers, and is hosted, moderated, and maintained by University of Virginia employees. The two Listservs were selected because many of the subscribers to these lists are in administrative roles dealing with sexual and other forms of gender-based violence on their campuses and are thus likely to be aware if their campuses had conducted any of the institutional-type surveys with which this study was concerned. Only one e-mail was sent to the SAPC list because it took some time for the author to subscribe to the list, but two e-mails (one original request and one reminder) were sent to the WRAC-L Listserv.

The e-mail made clear that the kinds of surveys most relevant to the research were those conducted specifically on sexual or related forms of gender-based violence and at least in part for institutional purposes. However, it stated that institutional surveys on a wider range of topics that included some questions on sexual or related violence or surveys conducted primarily for faculty research purposes were of secondary interest. The e-mail asked those who knew of or who had been involved in conducting such surveys to contact the author by e-mail or phone if the person was willing to share information about the survey or surveys. It specified that the author would follow up by telephone to conduct a 30- to 45-min interview to discuss the reasons and purposes for conducting the survey and any impact the survey had on the institution's responses to sexual or related violence on campus. It also assured recipients that identities of schools and sources would be kept confidential and that respondents need not share the results of the victimization surveys that their schools had conducted.

The e-mail asked those recipients who knew of schools that had conducted such a survey but who did not have sufficient information about the survey to forward the e-mail to someone at the school who could share such information. Recipients were also invited to forward the request onto other relevant Listservs and contacts. At least one recipient forwarded the request on to the Listserv of the Division on Women and Crime of the American Society of Criminology. Other recipients may have also sent the request to other Listservs or individuals but did not inform the author that they did so. Finally, the e-mail invited recipients who were at schools that had not conducted such a survey but who wanted their schools to do so to e-mail that wish to the author, again specifying that their identities and schools' identities would be kept confidential.

Those who responded to the research request were interviewed by telephone about the context surrounding the surveys. Interviews lasted an average of 45 min and ranged from 33 min to an hour and 10 min. Questions dealt with how and for what reasons the institution decided to conduct a survey, whether the survey had been repeated over multiple years, with whom the survey results were shared and whether they were made available to the general public, whether the survey data had resulted in any changes in institutional responses to sexual or related violence at the school, and, if so, what those changes were. For those schools that repeated surveys, questions also investigated issues such as the reasons for repeating the survey, whether incidence rates changed between surveys, and what respondents believed led to those changes or the lack thereof.

The study was methodologically limited by a variety of factors, which collectively prevented it from using a methodology with rigorous empirical controls. First, it was seeking information about surveys of a very specific kind: those focused on sexual or related violence and conducted for institutional purposes, surveys which anecdotal evidence and the legal and practical disincentives reviewed previously suggest are relatively rare. Second, anecdotal and experience-based evidence also indicates that knowledge of institutional surveys tends to be limited to those employees responsible for or particularly concerned about the topic of the survey, and knowledge of surveys on such controversial topics as sexual violence is likely to be kept to an even smaller group of employees with higher expectations of confidentiality

about the data gathered. E-mails were sent to WRAC-L and SAPC subscribers precisely because those lists include subscribers who are college and university employees working in offices likely to know about institutional research being conducted regarding sexual or related gender-based violence.

Third, responses to the research request e-mail may have been discouraged by recipients' awareness of the enhanced confidentiality surrounding their schools' surveys, as noted previously. In addition, though the author promised confidentiality, recipients may not have had sufficient confidence in that promise, coming as it did from a relative stranger. Furthermore, the author's profession as a lawyer and a Title IX expert may have discouraged recipients from speaking with her due to the heightened concern about compliance on many campuses in light of the recent spurt of OCR complaints discussed previously.

As a result of all of these factors, the sample size of schools whose survey experiences are discussed subsequently is very small in comparison to the number of institutions of higher education in the United States. In addition, the small number of schools who responded may not accurately represent the number of schools who have done institutional surveys with their students. As indicated in the ''Implications for Policy, Practice, and Future Research'' section, other avenues of research focusing on schools participating in studies such as the American College Health Assessment or ones that have received Office of Violence Against Women (OVW) grants may yield more information about schools' use of these surveys.

Results

The research resulted in information regarding institutional surveys conducted on sexual violence or interpersonal violence at 15 different colleges or universities, ranging from large state universities to small and midsized private institutions, as well as historically Black colleges and universities. One university made its survey instrument available to other schools in its region, resulting in the survey being administered at another seven institutions. Respondents affiliated with another four schools expressed interest in conducting such surveys but had not yet done so.

Of these 15 institutions, the majority conducted surveys specifically related to the incidence of sexual violence. Only one school had solely measured the incidence of sexual violence as a part of a survey dealing with a range of other issues, although several others mentioned participating in other surveys not exclusively focused on sexual or related violence.

The most frequently stated reason for doing a survey on incidence rates was to assess the need for and effectiveness of existing programs and institutional responses to sexual violence. Eight of the fifteen schools gave this specific reason, and six others gave similar reasons such as assessing students' awareness and perceptions of campus sexual violence resources and reasons for not reporting. Two also gave the additional reason that merely conducting the survey itself educated students about the seriousness of the issue in the eyes of the university and community, as well as about some of the dynamics of the problem. These campuses varied between institutions with numerous educational programs and a coordinated range of services related to sexual violence, including a victims' services office with full-time staff, and schools with no such office or coordinated programs and services.

Three campuses, including some that were looking to assess their sexual violence programs and services, conducted the surveys due to pressure from the campus or outside community, including around high-profile cases or more general student or faculty/staff activism related to the institution's responses to sexual violence. In addition, at least three schools conducted their surveys in connection with or at the same time as overall efforts related to a grant funded by the OVW at DOJ. Six other schools conducted surveys funded by the National Institutes of Justice (NIJ), also at DOJ.

With regard to the most prominent reason for doing the survey, assessing the campus' sexual violence programs and services, when interviewees were asked about whether the survey results actually influenced the institution's responses or incidence rates, answers were mixed. First, nine schools had conducted the surveys once but not followed up, or at least not by using a substantially similar survey instrument, making results from one survey difficult or impossible to compare with the others. In addition, two schools had conducted the research recently or were preparing to repeat or modify a past survey, so it was too early to assess the impact of the results.

In three cases, the survey results spurred significant changes, although other factors, especially organized student and faculty/staff activism around the issue, were also significant pressures toward change. In addition, those who initiated the survey at one school used it to confirm the need for the sexual violence services and programs that the campus had already established. Therefore, the survey results in these cases may have functioned primarily as additional evidence and a tool for advancing the activists' goals.

Related to the involvement of campus activists, another factor that interviewee answers indicated influenced what schools did with the survey results was the degree to which the survey results were made public. Only two of the schools that conducted surveys fully publicized the research results, both schools where activism was also a major factor. Three additional schools made survey results semipublic, by including the survey results in annual reports on campus crime, addressing the data on sexual violence as a part of campus briefings regarding broad-based research on general campus climate issues, or releasing information on the results to a limited number of student activists involved in ongoing efforts to revamp university policies and procedures (knowing that those activists could release the information to the public if they wished to do so). The remainder of the schools had only released the results to a limited number of employees and none of these schools made major changes to their campus responses.

In addition, at six schools that worked with outside researchers to conduct surveys, the researchers offered to do open

forums and other follow-up programs regarding the data gathered by the surveys. Despite this request, only two of these schools held limited briefings involving only university employees. While one school's briefing was to a "packed room" of seemingly engaged audience members, that school appeared not to do anything significant with the data. In addition, an Office for Civil Rights complaint was subsequently filed against that school for mishandling sexual violence cases. At the other school, the briefing was less well attended and those who attended explicitly discussed their concerns about the effects on the school's public image of releasing the data.

Two universities presented models for the type of survey that this study recommends in the following section. Both are large public institutions but are located in different regions of the country, one in the Northeast and one in the South.[4] Both have surveyed their students multiple times using research instruments (one focused primarily on experiences of sexual violence and the other surveying sexual and physical violence and stalking) using experientially based questions, and both have publicly announced the results of the surveys to their campus and wider communities. Faculty members at these universities have designed the surveys and led the research teams. The Presidents' offices have funded all of the surveys in whole or in part, and all of the surveys have been conducted for institutional purposes to measure the rate of sexual violence among the student population of that university in order to inform the university's responses to the problem. Both universities have also been awarded OVW grants, although at the second university the grant was not linked to the campus' survey, since the university applied for the OVW grant prior to the completion of the survey.

One of these universities has conducted sexual violence surveys 4 times with their students, with a period of 6–12 years between the surveys. In all cases, the surveys were administered with a random sample of students in February. The sample in the first survey was 524 women undergraduate students, in the second 651 undergraduates of all genders (64% women), in the third 2,405 undergraduates (64% women), and in the fourth 4,406 students (65% women), or 40% of the entire undergraduate student population. The first two surveys used paper-and-pencil surveys administered in academic classes exclusively, and the third and fourth used approximately half paper-and-pencil and half web-based surveys, raising the number of students surveyed and cutting the costs of the survey significantly. All surveys defined "unwanted sexual experiences," "sexual contact," and "sexual intercourse," then asked students how many times during the current academic year "someone had sexual contact with you when you didn't want to" and "you had sexual intercourse with someone when you didn't want to." The most recent survey also asked questions about stalking and physical violence, as well as questions drawn from the Sexual Experiences Survey developed by Koss, Gidycz, and Wisniewski (1987), related to use of force or threats, incapacitation, or coercion by someone in a position of authority.

In the first survey, 37% of women undergraduates experienced unwanted sexual contact, unwanted sexual intercourse, or both. In the second, that number dropped to 21%, and in the third it remained steady at 21%. In the fourth survey, it again dropped to 16%. Thus, between the first and the second, as well as the third and the fourth surveys, the sexual violence incidence rates went down. However, incidence rates stayed steady during the period between the second and third surveys. The university began major new innovations in its response to sexual violence in the years between the first and second and the third and fourth surveys, including creating and staffing a victims' services office in the first period and beginning a bystander intervention program in the period between the third and fourth surveys. In contrast, it made no significant changes to its existing response systems between the second and third surveys. While causation is impossible to determine absolutely, the concurrence of the innovations adopted and the drop in incidence of sexual violence on campus is unlikely to be purely coincidental.

At the second of these model universities, the survey has been administered twice, with the time in between survey administrations running about 3 years. The surveys measured students' experiences with sexual, physical, and stalking victimizations and used a random sample of 1,010 female graduate and undergraduate students in the first survey and 2,001 in the second survey. Both surveys were done via an anonymous, telephonic method in the spring semester. The section of the study dealing with victimization prevalence asked whether students had experienced physical, sexual, or stalking victimization during the students' time at the university. For women who reported victimization during their time at the university, a subsequent section of the study gathered information regarding the context of the victimization.

In the first survey, 36.5% of students reported sexual, physical, or stalking victimization, including 20.9% reporting sexual victimization including coercion, sexual assault, and rape. Three years later, the total number had dropped to 34.1%, and the sexual victimization prevalence had dropped to 19.1%. Although this was not a statistically significant drop, it showed a trend in the right direction, which was corroborated by other evidence in the second survey. For instance, students in the second survey had a more accurate understanding of the dynamics of sexual violence in the campus context and reporting of victimization increased by one and one half times. It should also be noted that the interval between surveys was one half to one quarter the length of the other model university's intervals. The second model university may eventually achieve a statistically significant drop if its institutional changes are given more time to affect the campus.

Like the first university did between its first and second and between its third and fourth surveys, the second university adopted new institutional responses to sexual, physical and stalking-related violence between the two surveys it administered, including opening a victims' services office. That new office made significant changes to campus prevention and education programs, and the campus also improved safety of public spaces and identified and revised relevant policies and procedures.

Interestingly, when interviewees at these two universities discussed the effect of the surveys on their institution's public image, they talked only about the positive effects. At one university, an interviewee mentioned that the university regularly tells prospective students and their parents about the survey results because they "normalize[] your institution" and the university "isn't afraid of the data." Student and parental reactions, moreover, recognize the accuracy of the data: "When you tell them that it's no different here, we just want to be proactive and straight-forward [about the problem]. they kind of go 'yeah.' They're fine; they get it; it doesn't scare them away."

At the other university, when the President's office released the data to the public, it did a full press briefing, complete not only with the survey results but also how the university planned to address the problem. The (nontenured) faculty member who led the push to do the survey and to release the results in such a public manner promised the President's office that she would take all calls and inquiries from the public regarding the survey, including any negative ones. In the only call she received from a prospective student or a parent, a mother told her that she was sending her daughter to the university because of the survey and the school's response to the survey results. This experience confirms the experiences of the first model university, where an interviewee stated that concerns about the effects on public image of "having this data out there ... is a false fear."

Finally, the faculty involved in the sexual violence surveys at both of these universities have not only contributed to the health and safety of their students, they have also added significantly to their research and publication records by mining the data from these surveys and writing academic articles about the survey findings. Thus, these universities have gotten multiple benefits and experienced almost no detriments from conducting these surveys.

Implications for Policy, Practice, and Future Research: A Government-Mandated Survey

Due to the serious disincentives to encouraging reports of victimization that was presented in the first section of this article, the author has suggested elsewhere that the *Clery Act* should be amended or regulations under the *Clery Act* be created either to add an obligation that every school conduct victimization surveys with its students (Cantalupo, 2011). The information collected here, regarding the positive experiences of schools voluntarily conducting such surveys, adds to the reasons for Congress and/or ED to adopt this approach. It also provides some models, already being used with significant success, models that concretize the original, largely theoretical, proposal and help present a variety of options for how different aspects of the survey can be designed.

Under this more fleshed-out proposal, schools would be required to administer to all or a random sample of their students a standard survey developed by ED every 5 years or in a similarly appropriate interval. The survey would ask students questions designed to determine the incidence of sexual and related forms of gender-based violence (such as stalking and physical violence from an intimate partner) on that specific campus. While measuring victimization rates would be the primary purpose of such a survey, schools could be given the option of adding questions that serve other purposes such as gathering information about contextual factors for the violence (e.g., was force, incapacitation, or coercion involved; did the victim know the assailant) or assessing the effectiveness of current institutional responses (e.g., whether students know about policies and procedures, how survivors are accessing services, if survivors reported the violence, to whom and what response did they receive). Schools would submit results of their surveys to ED and publish them in their campus crime report. Especially in light of the experience of the first model university discussed in the previous section, the surveys could be administered via a web-based method to keep costs low.

Requiring such a survey would take schools out of their current "middle-man" position and set up a mechanism by which students report directly to the public about the actual incidence of sexual and related forms of violence among students. As such, institutions would no longer have to rely only on victim reporting in determining the scope and dynamics of the problem that the law requires them to address. With a fuller and more accurate picture of the incidence and dynamics of sexual violence among the institution's own students, a school could put new response systems into place, such as the victims' services offices and bystander intervention programs used to such great effect by the model universities discussed previously. By having such response systems in place, particularly by bringing expert victims' services professionals onto its staff, schools would be much more likely to be prepared for sexual and other gender-based violence cases, including the high-profile and/or particularly complicated cases many schools will have to manage. They will also be in a better position to create prevention programs that will reduce sexual violence on the campus as a whole, thereby reducing the chances of those high-profile and complicated cases. Thus, having accurate data on sexual and related violence among their students will set schools on the path most likely to minimize the expensive liability they risk in such cases.

The benefits for students, prospective students, and parents of the proposed survey are clear, since prospective students and parents will have more accurate information about the incidence rates of sexual violence on various campuses where the prospective student might live. In addition, this information will be comparable school to school, since all schools will use the same survey instrument. Once students are on campus, moreover, they will get better education and services related to violence that almost certainly will impact their lives in some way.

Less obvious but no less important, this study shows that the benefits for schools of requiring such data collection do not end with the reduction of liability discussed previously. First, a required survey would get rid of the "false fear" regarding public image that both the legal analysis and the research conducted for this article indicate exists at many schools. Particularly in the beginning, evidence suggests that the surveys are

likely to "normalize" each institution's experiences in the sense that the incidence rates of violence at individual schools are likely to be similar to the national average. The survey results of nine schools were shared as a part of the research discussed here (even though the survey results were not requested), and all nine schools' sexual violence incidence rates were close to those found in national studies. Moreover, the experience of the two model universities discussed previously indicates that high sexual violence rates may not harm a school's public image in the eyes of prospective students and their parents if the data are both similar to national statistics and are presented in the context of educational programs and services that the school provides to address the problem. Last but hardly least, by taking schools' current public image dilemma and the counterintuitive effects of low victim-reporting off the table, schools that address the sexual violence problem proactively and comprehensively will reap reputational benefits for doing so, rather than experiencing reputational harm as they currently fear they will.

Second, the research presented here illuminates a different benefit of the mandated survey, particularly for those schools conducting these surveys at their own expense and for the federal government, which funded a third to a half of the surveys discussed in this study. Although a mandated survey administered nationwide would inevitably be more expensive, it would also be much more efficient to create one survey to be administered individually by schools than to constantly recreate individual surveys for one or a small group of schools. In addition, it is worth noting that the data of the individual surveys discussed in the previous paragraph were not always easily comparable due to differences in the survey instruments such as the types of sexually violent behaviors measured and the time periods about which students were asked (e.g., violence occurring in the last year or since the student came to college). The use of the same instrument with a survey mandated by ED would also be more efficient because it would make comparisons much easier. Even schools that have been investigated by OCR and/or DOJ would potentially benefit, in light of the Resolution Agreement those agencies recently entered into with the University of Montana (UM), which requires the university "[t]o develop one or more annual climate surveys for all students to ... (2) gather information regarding students' experience with sex discrimination while attending the University" (Bhargava & Jackson, 2013, p. 29). If UM were already administering a mandated ED survey, DOJ/OCR may not have needed to order it to undertake this research, which the UM will have to fund, never mind that the university might have avoided the investigation entirely if it was already conducting such research and using the data to craft effective institutional responses.

The experience of both of the model universities identified by this study also indicates that schools that have an accurate sense of the scope and dynamics of the sexual violence problem among the institution's students may experience additional benefits. For instance, the surveys done by this study's two model universities have led to their faculty using the data collected for many scholarly publications. While this would be less likely with a mandated survey that faculty could not design themselves, the legislation or rule could be crafted to allow and set parameters for individual faculty members to add questions to the survey to pursue research interests related to sexual or other forms of gender-based violence. Doing so could encourage faculty scholarship and publication in the area and bring in research grants. The faculty scholarship and publication that were enabled by the data collected by the model universities' surveys demonstrate a significant additional benefit to schools of this research.

These last benefits for schools also suggest areas for future research. First, it would be helpful to determine whether successful and unsuccessful OVW grant applicants have included conducting surveys of sexual violence incidence rates in their grant applications. Similarly, future research could explore the considerations and decisions to participate or not by the schools who were offered that opportunity in the regional study mentioned previously. Second, gathering more detailed information as to the cost of conducting such surveys could determine how many resources can be conserved through avoiding duplication of effort and other inefficiencies, as well as provide an estimate for the cost of such a survey. Finally, it would be useful to determine how many schools have used broader-based surveys such as campus climate studies (e.g., http://www.rankin-consulting.com/) or the National College Health Assessment (American College Health Association, National College Health Assessment II, n.d.) to measure sexual violence, and whether data from those surveys have impacted the institutions' response systems.

Conclusion

In sum, both legal and experience-based reasons support amending the *Clery Act* or creating new ED regulations mandating that all higher education institutions regulated by ED survey their students approximately every 5 years about students' experiences with sexual violence. Reviews of the legal research conducted regarding the three relevant federal legal regimes show serious disincentives for schools to encourage victim reporting and proactively address sexual violence on campus. Moreover, the original research carried out for this article shows that the experience of institutions that have voluntarily conducted such surveys suggests many benefits not only for students, prospective students, parents, and the general public but also for schools themselves. These experiences confirm the practical viability of the mandated ED survey proposal.

Major Findings

1. Colleges and universities face conflicting legal incentives regarding encouraging victims to report sexual violence. These conflicting incentives are created because schools generally have a high incidence of sexual violence coupled with a very low victim-reporting rate and by the counterintuitive effects on a school's

public image when it provides victims' services that encourage victims to report. Those counterintuitive effects make a school that is doing more to address sexual violence look less safe, due to its high reports of violence, than a school that is ignoring a campus sexual violence problem, not providing services to victims, and therefore continuing to have few to no reports of violence.

2. Institutions that have stopped relying exclusively on victim reporting and that have started anonymously surveying all students regarding their experiences with sexual violence are able to collect more accurate, school-specific data about the incidence rate of sexual violence among their students. These more accurate data have the potential to spur schools to improve their institutional responses to campus sexual violence, although these incentives may not be created if the survey results are not released to the public.
3. Sexual violence surveys' more accurate data can eliminate the public image dilemma that occurs when schools rely mainly on victim-reporting, especially if all schools participate in and administer the same survey to their students. The *Clery Act* should therefore be amended or the Department of Education (ED) should pass new regulations requiring all schools to conduct at regular intervals a common sexual violence survey designed by ED. Doing so would create numerous benefits for students, prospective students, parents, the general public, and even schools themselves.

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Notes

1. For instance, Krebs et al. surveyed students at two schools for a study published in 2007. The report made available to the public showed an average of 19% of the total number of students aggregated from both schools in the survey experiencing completed or attempted sexual assault since entering college. However, in reports written for each individual school and made available for this study, at one school, 20% of the students surveyed experienced completed or attempted sexual assault and at the other 18% of the students surveyed experienced completed or attempted sexual assault. In a study involving some of the same researchers from the 2007 study and using similar methodology but on four different colleges (all Historically Black Colleges and Universities), the average of all the students surveyed who experienced completed of attempted sexual assault in college was a little over 14%. The individual schools' reports, again written for each individual school and made available for this study, showed prevalence rates of 16%, 14% 14%, and 12% (Krebs, Lindquist, & Barrick, 2010).
2. A fair number of cases decided under *Title IX* are against school districts, not colleges and universities. However, while factors like the age of the students and level of close supervision by teachers and other school officials can influence the outcome of a case, there is significant commonality among the kinds of institutional responses that schools at all levels of education use, as well as significant commonality in how courts judge those responses. Moreover, because *Title IX* applies to all levels of education, as long as the school accepts federal funds (Office for Civil Rights, 2001, pp. 2–3), while the factual similarities (such as school type, student age, etc.) are always helpful in comparing cases, legal questions decided in a case involving one kind of school are still applicable to other types of schools, including colleges and universities. How "mandatory" a particular court decision is for another court deciding a similar case depends on factors such as the court's jurisdiction, not the school's characteristics.
3. Note that one company, the National Center for Higher Education Risk Management (NCHERM), has collected a wide range of letter of findings for which NCHERM has filed Freedom of Information Act requests. NCHERM provides those for free to the public at http://www.ncherm.org/resources/legal-resources/ocr-database/.
4. Those who conducted the surveys at these two model universities have agreed to allow the author to share their names with any readers who so inquire. Readers may contact the author for that information.

References

Albiez v. Kaminski, U.S. Dist. LEXIS 59373 (E.D. Wisc. June 14, 2010).

Ali, R. (2011, April 4). Letter to "Dear Colleague". Retrieved from http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf

American College Health Association (n.d.). *National College Health Assessment II*. Retrieved from http://www.acha-ncha.org/docs/ACHA-NCHAII_sample.pdf

Babler v. Arizona Bd. of Regents, Case 2:10-cv-01459-RRB (D. Ariz. 2010).

Bhargava, A., & Jackson, G. (2013). Letter to Royce Engstrom and Lucy France, Esq., in University of Montana-Missoula, DOJ Case No. DJ 169-44-9, OCR Case No. 10126001. Retrieved from http://www.justice.gov/crt/about/edu/documents/casesummary.php#montana

Benson, B.J., Gohm, C. L., & Gross, A. M. (2007). College women and sexual assault: The role of sex-related alcohol expectancies. *Journal of Family Violence*, *22*, 341–351.

Bohmer, C., & Parrot, A. (1993). *Sexual assault on campus: The problem and the solution*. Lanham, MD: Lexington Books.

Burlington Indus., Inc. v. Ellerth , 524 U.S. 742 (1998).

Buzuvis, E. (2013, August 8). Campus SaVE Act codifies institutions' sexual assault response requirements. *Title IX Blog*. Retrieved from http://title-ix.blogspot.com/2013/08/campus-save-act-codifies-institutions.html

Cannon v. Univ. of Chicago, 441 U.S. 677 (1979).

Cantalupo, N. C. (2009). Campus violence: Understanding the extraordinary through the ordinary. *Journal of College and University Law*, *35*, 613–690.

Cantalupo, N. C. (2011). Burying our heads in the sand: Lack of knowledge, knowledge avoidance, and the persistent problem of campus peer sexual violence. *Loyola University Chicago Law Journal*, *43*, 205–266.

Cantalupo, N. C. (2012). "Decriminalizing" campus institutional responses to peer sexual violence. *Journal of College and University Law*, *38*, 483–526.

Carter, S. D. (2004, Oct. 7). Letter to Douglas Parrott (on file with author).

Coleman, M. (2007, June 4). Letter to Valerie I. Harrison, Esq., in Temple University, OCR Case No. 03062060 (on file with author).

Criswell, C. D. (2010a, September 24). Letter to Dave L. Armstrong, Esq., in Notre Dame College, OCR Case No: 15-09-6001. Retrieved from http://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096001.html

Criswell, C. D. (2010b, November 22). Letter to Gloria Hage, Esq., in Eastern Michigan University, OCR Case No: 15-09-6002. Retrieved June 22, 2012 from http://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096002.html

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

Doe ex rel Doe v. Coventry Bd. of Educ., 630 F. Supp. 2d 22 (D. Conn. 2009).

Doe v. Erskine Coll., U.S. Dist. LEXIS 35780 (D.S.C. 2006).

Doe v. North Allegheny Sch. Dist., U.S. Dist. LEXIS 93551 (W.D. Pa. August 22, 2011).

Doe v. Univ. of the South, U.S. Dist. LEXIS 35166 (E.D. Tenn. 2011).

ED ACT NOW (2013). Department of Education: Hold colleges accountable that break the law by refusing to protect students from sexual assault. *Change.org*. Retrieved from https://www.change.org/petitions/department-of-education-hold-colleges-accountable-that-break-the-law-by-refusing-to-protect-students-from-sexual-assault

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

Fellheimer v. Middlebury Coll., 869 F. Supp. 238 (D. Vt. 1994).

Fisher, B., Cullen, F., & Turner, M. (2000). The sexual victimization of college women. Retrieved from http://www.ncjrs.gov/pdffiles1/nij/182369.pdf

Franklin v. Gwinnett County Public Sch., 503 U.S. 60 (1992).

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

Goldbecker, S. (2004, May 5). Letter to John J. DeGioia, in Georgetown University, OCR Case No. 11-03-2017 (on file with author).

Gomes v. Univ. of Maine Sys., 365 F. Supp. 2d 6 (D. Me. 2005).

Gooding, Rep. H. R. Rep. No. H11499-01, at 1 (1990) (Conf. Rep.).

Grossman, J. L. (2003). The culture of compliance: The final triumph of form over substance in sexual harassment law. *Harvard Women's Law Journal*, *26*, 4–75.

Halvorson v. Indep. Sch. Dist. No. I-007, U.S. Dist. LEXIS 96445 (W.D. Okla. 2008).

Hibino, T. J. (2012, June 15). Letter to Dorothy K. Robinson, in Yale University, OCR Case No. 01-11-2024. Retrieved from http://www2.ed.gov/documents/press-releases/yale-letter.pdf

Howard-Kurent, L. (2001, Aug. 17). Letter to Norman Cohen, in Utah College of Massage Therapy, OCR Case No. 08012022-B (on file with author).

Hua, C. (2013, July 18). DOE reduces $165,000 fine on Yale for underreporting crime. *Yale Daily News*. Retrieved from http://www.campussafetymagazine.com/channel/university-security/news/2013/07/18/dept-of-ed-reduces-clery-fine-for-yale.aspx

James v. Indep. Sch. Dist. No. 1-007, U.S. Dist. LEXIS 82199 (W.D. Okla. 2008).

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

Jones, K. (2010, February 25). Lax enforcement of Title IX in campus sexual assault cases: feeble watchdog leaves students at risk, critics say. Retrieved from http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1946/

Jones v. Ind. Area Sch. Dist., 397 F. Supp. 2d 628 (W.D. Pa. 2005).

Kallem, H. (2004, March 26). Letter to Stephen W. Vescovo, in Christian Brothers University, OCR Case No. 04-03-2043 .

Karjane, H., Fisher, B., & Cullen, F. (2002). Campus sexual assault: How America's institutions of higher education respond. Retrieved from https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf

Kelly v. Yale Univ., U.S. Dist. LEXIS 4543 (D. Conn. 2003).

Kingkade, T. (2013, May 15). Yale faces $165,000 Clery Act fine for failing to report sex offenses on campus. *The Huffington Post*. Retrieved from http://www.huffingtonpost.com/2013/05/15/yale-clery-act_n_3280195.html

Koss, M. P., Gidycz, C. A., & Wisniewski, N. (1987). The scope of rape: Incidence and prevalence sexual aggression and victimization in a national sample of higher education students. *Journal of Consulting and Clinical Psychology*, *55*, 162–170.

Krebs, C. P., Lindquist, C. H., & Barrick, K. (2010). *The Historically Black College and University Campus Sexual Assault Study: Final Report*. Retrieved from https://www.ncjrs.gov/pdffiles1/nij/grants/233614.pdf

Krebs, C. P., Lindquist, C. H., Warner, T. D., Fisher, B. S., & Martin, S. L. (2007). *The Campus Sexual Assault Study: Final Report*. Retrieved from http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf

Lachman, S. (2013, August 8). Know your IX. *The Nation*. Retrieved from http://www.thenation.com/blog/175668/know-your-ix#

Larcom, G. (2008, June 6). Eastern Michigan University to pay $350,000 in federal fines over Laura Dickinson case. *The Ann Arbor News*. Retrieved from http://blog.mlive.com/annarbornews/2008/06/eastern_michigan_university_to_html

Leinwand, D. (2000, October 4). Campus crime underreported. *USA Today*, p. 1A.

Loreng, J. (2001, December 17). Letter to Fred Zook .

M. v. Stamford Bd. of Educ., U.S. Dist. LEXIS 51933 (D.Conn. 2008).

Marshall v. Maguire, 102 Misc. 2d 697 (N.Y. Sup. Ct. 1980).

McGrath v. Dominican Coll., *672 F. Supp. 2d 477* (S.D.N.Y. Nov. 25, 2009).

Menard, J. (2007, May 10). EMU slaying probe reopens wounds. *The Detroit News*. Retrieved from http://www.detnews.com/apps/pbcs.dll/article?AID=/20070510/METRO/705100402

Muggeridge, T. (2009, February 3). ASU settlement ends in $850,000 payoff. *State Press*. Retrieved from http://www.statepress.com/archive/node/4020

Murrell v. Sch. Dist. No. 1, 186 F.3d 1238 (10th Cir. 1999).

Noble v. Branch Intermediate Sch. Dist., U.S. Dist. LEXIS 19600 (W. D. Mich. 2002).

Office for Civil Rights. (2001). Revised sexual harassment guidance: Harassment of student by school employees, other students, or

third parties. Retrieved from http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf

Office of Postsecondary Education. (2005). *The Handbook for Campus Crime Reporting*. Retrieved from http://www.ed.gov/admins/lead/safety/handbook.pdf

Office of Postsecondary Education. (2011). *The handbook for campus safety and security reporting 73 (2011)*. Retrieved from http://www2.ed.gov/admins/lead/safety/handbook-2.pdf

Osgood, D. (2011, June 30). Letter to The Reverend John I. Jenkins, C. S.C., President, in University of Notre Dame, OCR Case No. 05072011. Retrieved from http://www2.ed.gov/about/offices/list/ocr/docs/investigations/05072011.html

Ostrander v. Duggan, 341 F.3d 745 (8th Cir. Mo. 2003).

Ray v. Wilmington Coll., 106 Ohio App. 3d 707 (Ohio Ct. App. 1995).

Rinsky v. Boston Univ., U.S. Dist. LEXIS 136876 (D. Mass. 2010).

Rosenfeld, D. L. (2008). Changing social norms? Title IX and legal activism: Concluding remarks. *Harvard Journal of Law & Gender*, *31*, 407–422.

Ross v. Mercer Univ., 506 F. Supp. 2d 1325 (M.D.Ga. 2007).

Schultz, M. (2007, October 15). EMU murder trial begins today. *The Detroit News*. http://www.detnews.com/apps/pbcs.dll/article?AID=/20071015/SCHOOLS/710150361/1026/LOCAL]

Seidman, I., & Vickers, S. (2005). The second wave: An agenda for the next thirty years of rape law reform. *Suffolk University Law Review*, *38*, 467–469.

Simpson v. Univ. of Colorado Boulder, 500 F.3d 1170 (10th Cir. 2007).

Spicuzza, M. (1998, November 12–15). The missing 47. *Metroactive News and Issues*. Retrieved from http://www.metroactive.com/papers/cruz/11.12.98/rape1-9845.html

S.S. v. Alexander, 177 P.3d 724 (Wash. App. Div. 1 2008).

Staehling v. Metro. Gov't of Nashville & Davidson County, 2008 U.S. Dist. LEXIS 91519 (M.D.Tenn. 2008).

Stancill, J. (2013, June 1). UNC-CH women wage national campaign against sexual assault. *NewsObserver.com*. Retrieved from http://www.newsobserver.com/2013/06/01/2932161/unc-ch-women-wage-national-campaign.html

Susman, F., & Sikora, G. (1997, September 11). Letter to James Garland.

Terrell v. Del. State Univ., U.S. Dist. LEXIS 74841 (D. Del. 2010).

Theriault v. Univ. of S. Me., 353 F. Supp. 2d 1 (D. Me. 2004).

U.S. Department of Education (n.d.-a). How the Office for Civil Rights handles complaints. Retrieved from http://www.ed.gov/about/offices/list/ocr/complaints-how.html

U.S. Department of Education (n.d.-b), How to file a discrimination complaint with the office for civil rights. Retrieved from http://www2.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt

U.S. Department of Education (n.d.-c). Recent resolutions. Retrieved from http://www2.ed.gov/about/offices/list/ocr/docs/investigations/index.html

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

Warshaw, R. (1988). *I never called it rape: The Ms. report on recognizing, fighting, and surviving date and acquaintance rape*. New York, NY: Harper & Row.

Williams, C. (2008, May 8). EMU killer denies guilt, gets life. *The Detroit News*. Retrieved from http://www.detnews.com/apps/pbcs.dll/article?AID=/20080508/SCHOOLS/805080340/1026

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

Future Reading

Ali, R. (2011, April 4). Letter to "Dear Colleague". Retrieved from http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf

Bhargava, A., & Jackson, G. (2013). Letter to Royce Engstrom and Lucy France, Esq., in University of Montana-Missoula, DOJ Case No. DJ 169-44-9, OCR Case No. 10126001. Retrieved from http://www.justice.gov/crt/about/edu/documents/casesummary.php#montana

Cantalupo, N. C. (2011). Burying our heads in the sand: Lack of knowledge, knowledge avoidance, and the persistent problem of campus peer sexual violence. *Loyola University Chicago Law Journal*, *43*, 205–66.

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