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MANDATORY REPORTING OF CAMPUS SEXUAL ASSAULT AND DOMESTIC VIOLENCE: MOVING TO A VICTIM-CENTRIC PROTOCOL THAT COMPORTS WITH FEDERAL LAW

by JILL C. ENGLE*

INTRODUCTION

This Article will examine "mandatory reporting" of campus domestic violence and sexual assault[1] by faculty members when a student discloses this kind of incident to them. This Article describes the legal and social landscape of mandatory reporting and the attendant challenges, along with the policies and practices that colleges should adopt for faculty reporting to comply with federal law while still remaining sensitive to victim needs.[2] Interest in getting campus reactions to these problems "right" is at an elevated level nationwide in the wake of certain high profile allegations of sexual violence at numerous colleges,[3] including Columbia,[4] Vanderbilt,[5] Yale,[6] Florida State,[7] and the University of Virginia.[8]

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* Clinical Professor of Law and Family Law Clinic Director, Penn State Law. Immense gratitude to Courtney Kiehl for invaluable research assistance and self-aware professionalism; and to my scholarly partners at Penn State in REACH (Research, Engagement And Community Healing): Mark Brennan, Rosemary Jolly, and Sarah Clark Miller. This is dedicated to all survivors and warriors for social justice against gender-based violence.

1. There is considerable debate about the vernacular used to describe the types of misconduct discussed herein, some or all of which could be described as "gender-based violence," "intimate partner violence," "sexual violence," "sexual harassment," "sexual assault," and "domestic violence," with the terms "abuse" and "crime" being applicable in many instances as well. For simplicity's sake, the author uses these terms herein when they relate precisely to legal authority or the words used by another source, but also uses the terms "campus violence" and "abuse" to refer generally to these acts in the setting of higher education, which is the focus of this article.

2. *See, e.g.*, Jeannie Suk, *The Trouble with Teaching Rape Law*, NEW YORKER (Dec. 15, 2014), http://www.newyorker.com/news/news-desk/trouble-teaching-rape-law (explaining that "[w]e are currently in the middle of a national effort to reform how sexual violence is addressed on college campuses").

3. *See* Alexander Nazaryan, *"The Hunting Ground" Gives a Harrowing Look at College Rape*, NEWSWEEK (Feb. 11, 2015), http://www.newsweek.com/hunting-ground-gives-harrowing-look-college-rape-305606 (describing a documentary film about campus sexual violence that garnered significant media and scholarly attention in early 2015).

4. *See* Katie McDonough, *The "Perfect Victim" Myth: How Attempts to Discredit Rape Survivors Stand in the Way of Real Change*, SALON (Feb. 3, 2015), http://www.salon.com/2015/02/03/the_perfect_victim_myth_how_attempts_to_discredit_individual_survivors_stand_in_the_way_of_real_change/ (describing media coverage of the Columbia University rape accuser Emma Sulkowicz and alleged perpetrator Paul Nungesser).

5. Allen Blinder & Richard Pérez-Peña, *Vanderbilt Rape Convictions Stir Dismay and Denial*, N.Y. TIMES (Jan. 29, 2015), http://www.nytimes.com/2015/01/29/us/vanderbilt-rape-trial-didnt-stir-

At Penn State, the Jerry Sandusky child sex abuse scandal[9] prompted numerous reform efforts, including University president Eric Barron appointing a task force to comprehensively examine the issue soon after he took office in 2014.[10] The Penn State Sexual Assault Task Force's recommendations and the struggle of one Penn State department to articulate faculty-reporting obligations on their syllabi are examined as a case study in Section V *infra*. A research project to develop a more extensive set of recommendations for supporting Penn State sexual assault victims is also discussed, and it is a project on which I partner with our University's Weiss Chair in the Humanities, Rock Ethics Institute and UNESCO Chair.

I. THE LEGAL AUTHORITY IS COPIOUS AND CONFUSING

A threshold problem is simply that the legal reporting requirements concerning campus crime are numerous and in some instances, discordant and ripe for misinterpretation.[11] The three germane pieces of federal legal authority are Title IX of the Educational Amendments of 1972 ("Title IX"),[12] the Jeanne Clery Disclosure of Campus Security Policy and Campus Crimes Statistics Act of 1991 (the "Clery Act"),[13] and the Campus Sexual Violence Elimination Act of 2013 (the "SaVE Act"), which is embedded within the 2013 reauthorization of 1994's Violence Against Women Act.[14] To a lesser extent, student rights case law[15] and

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students-on-campus.html?_r=0.

6. Benjamin Meuller, *Yale Restricts a Fraternity After Sexual Misconduct*, N.Y. TIMES (Feb. 14, 2015), http://www.nytimes.com/2015/02/15/nyregion/yale-restricts-a-fraternity-after-sexual-misconduct.html.

7. Sean Rossman, *Florida State Seeks Change of Venue in Jameis Winston Sexual Assault Case*, USA TODAY (Feb. 10, 2015), http://www.usatoday.com/story/sports/ncaaf/2015/02/10/florida-state-jameis-winston-sex-assault-case/23190107/.

8. Sara Ganim & Scott Bronstein, *UVA Rape Case: What We Do and Don't Know*, CNN (Feb. 8, 2015), http://www.cnn.com/2015/02/07/us/uva-campus-update/.

9. Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, And Social Institutional Reform*, 102 CAL. L. REV. 1553, 1556 (2014) (stating that "widespread sexual assault remains in . . . the nation's elite colleges and universities, in the locker room showers at [the] Pennsylvania State University, at the hands of the prestigious Horace Mann School's 'Prep School Predators,' and . . . around the country").

10. Susan Snyder, *Penn State Creates Task Force on Sexual Assault*, PHILA. INQUIRER (July 2, 2014), http://www.philly.com/philly/blogs/campus_inq/Penn-State-creates-task-force-on-sexual-assault-.html. Barron became President upon the retirement of Rodney Erickson, who was appointed president upon the ouster of Graham Spanier in 2011 when the Sandusky allegations became public. *Id.*

11. *See, e.g.*, Lauren P. Schroeder, *Cracks in the Ivory Tower: How the Campus Sexual Violence Elimination Act Can Protect Students From Sexual Assault*, 45 LOY. U. CHI. L.J. 1195, 1198, 1202 (2014) (discussing at length Title IX, the Clery Act, and the Campus SaVE Act as "the history of legislation protecting students from sexual assault and students' current rights and remedies" and explaining that "[b]ecause Title IX is such a short statute with little direction, schools look to specific guidance materials provided by the Department of Education to determine the specific requirements of Title IX").

12. 20 U.S.C. § 1681 (2006 & Supp. V 2011).

13. *Id.* § 1092(f). The Clery Act was originally called the Crime Awareness and Campus Security Act and was promulgated as such in 1990.

14. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 89

Title VII of the 1964 Civil Rights Act are sometimes implicated,[16] though neither of these are discussed for purposes of this article. Furthermore, most colleges have internal procedures for reacting to allegations of bad behavior by students, but the extent to which those are intermingled—or not—with local and state criminal justice systems can be bewildering to faculty, administrators, judges and law enforcement, and more importantly, victims and their advocates.[17]

A. Title IX

Since its inception, Title IX has been the relevant statute for most cases of gender-based violence, including sexual assault and harassment, on college campuses.[18] In April 2011, the United States Department of Education changed the playing field regarding Title IX when the Department's Office of Civil Rights sent a "Dear Colleague" letter to schools nationwide, explaining their obligations under Title IX to react to reports of sexual violence on their campuses, among other things.[19] As Brent Sokolow, Executive Director of the Association of Title IX Administrators, noted in the *Chronicle of Higher Education* in 2013, the letter's interpretation by some college administrators has unleashed a "runaway train on mandatory reporting [that] needs to be brought back into the station."[20] Sokolow added that, "Title IX is intended to empower victims, not make them into observers who merely watch from the sidelines as administrators get carried away with resolving complaints that the victims never made."[21] When universities are careful to comply with the intent of Title IX's sexual harassment provisions, alongside its legal obligations, meaningful victim support and university legal compliance can peacefully coexist.[22]

(2013).

15. *See, e.g.*, Nancy Chi Cantalupo, *"Decriminalizing" Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 492 (2012) [hereinafter Cantalupo, *Decriminalizing*] (stating that "three areas of federal law [are implicated in campus sexual violence inquiries]: Title IX . . . the Clery Act, and case law regarding the due process rights of students") (emphasis added).

16. Nancy Chi Cantalupo, Jessica Lenahan (Gonzalez) v. United States *& Collective Entity Responsibility for Gender-Based Violence*, 21 AM. U. J. GENDER, SOC. POL'Y & THE L. 231, 235 (2013).

17. *See, e.g.*, Cantalupo, *Decriminalizing*, *supra* note 15, at 492, 525 (asserting that campus institutional "responses are not only not solving the problem . . . but they are contrary to both the spirit and letter of the applicable law" and that such approaches "perpetuate a high victim non-reporting rate that is likely to be caused in large part by survivors' documented fear and distrust of law enforcement's and other school officials' attitudes towards survivors").

18. *See* Schroeder, *supra* note 11, at 1201 ("Some experts argue that Title IX is the most important federal statute that applies to campus sexual violence").

19. *Dear Colleague Letter*, U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

20. Brent A. Sokolow, *Mandatory Reporting for Title IX: Keep It Simple*, CHRONICLE OF HIGHER EDUC. (Sept. 23, 2013), http://chronicle.com/article/Mandatory-Reporting-for-Title/141785/.

21. *Id.*

22. *See, e.g.*, Nancy Chi Cantalupo, *Masculinity & Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State*, 73 MD. L. REV. 887, 943, 983 (2014) [hereinafter Cantalupo, *Masculinity*] (explaining that Title IX jurisprudence makes it a liability for a university to ignore or fail to take action on instances of sexual assault and violence, and urging colleges and the federal Department of Education to promulgate "resources and . . . incentives for schools to intervene in the

B. The Campus SaVE Act

In 2013, Congress took action to build on and clarify the Title IX obligations of colleges and universities to protect abuse victims by passing the SaVE Act, which went into effect in March 2014.[23] One critical aspect of the SaVE Act is its call for increased transparency regarding the frequency of campus violence.[24] The SaVE Act states that institutions must collect statistics from a broad range of campus officials including resident advisors, deans, athletic coaches, campus police or security, and local law enforcement.[25] The SaVE Act, however, does not specify who is a mandatory reporter or how faculty should tell students what will happen if they disclose—only that victims are to be provided with a written explanation of a student or employee's rights and options, regardless of whether the crime took place on or off campus.[26] The SaVE Act also requires universities to publish procedures for reporting sexual violence, including information on how to preserve evidence of the crime, information on who to report the incident to and how, and the right to decline formally reporting to authorities.[27] This is a crucial development in federal law towards normalizing student victim autonomy regarding reporting.

C. The Clery Act

Though Title IX and the Clery Act are often discussed in concert, the Clery Act is a different piece of legislation altogether, which can compound the confusion related to their separate requirements.[28] The Clery Act was a public policy response to lobbying efforts by the family of Jeanne Cleary, who was raped and murdered in her Lehigh University dorm room in 1986.[29] Its intent is to raise public awareness about the safety—or lack thereof—on university campuses and surrounding communities, allowing applicants and their parents have access to complete[30] information about the prevalence of crime in the area before they choose a

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traditionally masculine hidden curriculum that" enables the cultivation of sexual harassment and violence").

23. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89-92 (2013); *VAWA Reauthorization*, CLERY CTR. FOR SECURITY ON CAMPUS, http://clerycenter.org/article/vawa-reauthorization (last visited Mar. 19, 2015); Schroeder, *supra* note 11, at 1195; Susan Hanley Duncan, *The Devil is in the Details: Will the Campus SaVE Act Provide More or Less Protection to Victims of Campus Assaults?*, 40 J.C. & U.L. 443, 454 (2014).

24. 20 U.S.C. § 1092(f)(1)(F)(iii); *see also Understanding the Campus SaVE Act*, KNOW YOUR IX, *available at* http://knowyourix.org/understanding-the-campus-save-act/ (last visited Apr. 2, 2015) (stating that increased transparency is one aspect of the Act's requirements that campuses report more categories of crimes).

25. *Understanding the Campus SaVE Act*, *supra* note 24.

26. *Id.*

27. *Id.*

28. *See, e.g.*, Schroeder, *supra* note 11, at 1216 (stating that "[d]espite Title IX and the Clery Act, campus responses to sexual assault reports are very often inadequate" after discussing each law's requirements).

29. *Our History*, CLERY CTR. FOR SECURITY ON CAMPUS, http://clerycenter.org/our-history (last visited Apr. 2, 2015) (explaining Jean Clery's murder and her parents' efforts to pass the Act in the aftermath).

30. Theoretically, of course.

college.[31] The touchstone of mandatory reporting under the Clery Act is whether or not the reporting individual is defined as a Campus Security Authority ("CSA"), and it gives each school the autonomy to develop their own definition of a CSA.[32]

Clery is distinct from Title IX and the SaVE Act in that it has no gender equity component. This is important for several reasons. First, it can cause confusion among administrators, faculty, and students about its purposes.[33] Reporting norms, and more importantly, victim experiences, often differ when an individual is victimized by an unknown assailant, versus an assailant known to the victim, where the assault occurs on campus[34] or through intimate partner violence, both of which have significant gender-based implications.[35] Furthermore, recent studies suggest that a relatively small cohort of repeat offenders perpetuates sexual violence on campuses.[36] Clery is not designed to address these phenomena, focusing as it does on requirements for the disclosure of statistics about certain criminal offenses on campuses.[37] Language in the Clery Act refers to the expectation that colleges should report "all crimes," although it also specifies "bias-related crimes," which include, but are not limited to, those rooted in gender-based violence.[38] The crimes

31. *See, e.g.*, Cantalupo, *Decriminalizing*, *supra* note 15, at 511 (citing H.R. REP. NO. H11499-01, at 1 (1990) (Conf. Rep.) (statement of Rep. Gooding)) (explaining that "[t]he primary purpose of the Clery Act was to increase transparency around campus crime so that prospective students and their parents could make more knowledgeable decisions about which schools to attend").

32. 20 U.S.C. § 1092(f)(4)(B)(i); *see also* 34 C.F.R. § 668.46(a) (2012) (defining broadly who may qualify as a "Campus Security Authority").

33. *See, e.g., Intersection of Title IX and the Clery Act*, NOT ALONE, *available at* https://www.notalone.gov/assets/ferpa-clerychart.pdf (last visited Apr. 2, 2015) (providing a side-by-side outline of the two laws, the purpose of which is "to clarify the reporting requirements of Title IX and the Clery Act in cases of sexual violence and to resolve any concerns about apparent conflicts between the two laws"); *see also Summary of Federal Laws*, OFFICE OF GEN. COUNSEL, CATHOLIC UNIV. OF AM., *available at* http://counsel.cua.edu/fedlaw/campussecurity.cfm (last visited Apr. 2, 2015) (discussing the myriad of "Miscellaneous Laws Affecting Students," including the Clery Act, the SaVE Act, and the Title IX "Dear Colleague Letter," among other federal laws, all on one webpage with little distinction).

34. *See* Cantalupo, *Decriminalizing*, *supra* note 15, at 482-83 ("Between twenty and twenty-five percent of college and university women are victims of attempted or completed nonconsensual sex during their time at college or university, overwhelmingly at the hands of someone they know.").

35. *See id.* at 483-84 (discussing the higher rates of sexual violence against college-aged women compared to college-aged men and suggesting that this could be due to lower reporting by men).

36. *See* David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 73 (2002) (providing studies that indicate high rates of both repeat rape and multiple types of offending); *see also* Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795, 828 (2013) (opining that "a significant part of the high underreporting rate [for sexual violence] reflects victims who fail to report crimes committed by first-time sex offenders or individuals who have offended before but have never been caught").

37. The Clery Act requires "prompt reporting of *all* crimes to the campus police and the appropriate law enforcement agencies," but it also lists the crimes about which colleges must report statistics including murder, sex offenses, robbery, aggravated assault, burglary, motor vehicle theft, manslaughter, arson, and crimes involving bodily injury. 20 U.S.C. § 1092(f)(1)(F) (emphasis added).

38. *See* Diane Ward & Janice Lee Mann, *The Handbook for Campus Safety and Security Reporting*, U.S. DEP'T OF EDUC. 33-35 (Feb. 2011), *available at* https://www2.ed.gov/admins/lead/safety/handbook.pdf (providing that the Clery Act requires institutions to disclose three general categories of crime statistics: criminal offenses, hate crimes, and arrests and

for which schools must disclose statistics are numerous and range from murders to liquor law violations.[39] Many of these crimes, such as robbery and murder, are often perpetrated by strangers, whereas intimate partner violence and sexual harassment (including assaults), covered by Title IX, are principally perpetrated by someone the victim knows.[40] Finally, the Clery Act requires schools to report crime statistics,[41] which inherently involves a backwards-looking inquiry, as opposed to a proactive victim-centric or time-sensitive inquiry. This sheds light on its primary purpose: to inform the public about safety on college campuses in a way that lends itself to a comparative analysis for potential students and their families, and to provide administrators and policymakers with the opportunity to take steps to improve campus security.[42] Again, both are backwards-looking inquiries. Although the Clery Act was eventually amended to include a victim "rights" component,[43] the Act does not purport to set out expertise in victim advocacy, and does not address non-sexual gender based crimes such as battery or stalking by a romantic partner.[44]

The aforementioned procedural mandates of the Clery Act are not necessarily sensitive to victim needs and preferences. A collateral problem is Clery's limitation to certain crimes, which do not always capture intimate partner violence (except, for example, "aggravated assault"). The SaVE Act does address this gap by requiring colleges and universities to report statistics for domestic violence, dating violence, and stalking (as defined by the Violence Against Women Act).[45] The SaVE Act also expands educational programming requirements, specifying that they are presented to all incoming employees and students, and focused on

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referrals for disciplinary action).

39. 20 U.S.C. § 1092(f)(1)(F).

40. *See* Cantalupo, *Decriminalizing*, *supra* note 15, at 487 ("[I]n reality—a reality that has been confirmed repeatedly in the college and university context—the vast majority of sexual violence perpetrators are those who are known to the victims: acquaintances, dates, friends, husbands, family members, religious advisors, employers, supervisors, and others."); McLeod, *supra* note 9, at 1567 ("[The] overarching problem . . . is the mismatch between the reality of commonly experienced sexual harm in the United States and the focus of the dominant statutory framework on quite unusual offenses by presumably dangerous strangers . . . [which] constitute a very small percentage of sexual assaults").

41. *See* Jeremy Heacox, *S-A: Clery Act Responsibilities for Reporting Allegations of Peer-on-Peer Sexual Assaults Committed by Student-Athletes*, 10 WILLAMETTE SPORTS L. J. 48, 52 (Fall 2012) (reporting that "[p]ursuant to the Clery Act, universities have an ongoing duty to '[c]ollect, classify and count crime reports and crime statistics'") (citing 20 U.S.C. § 1092(f)(13)).

42. *See* Bonnie S. Fisher et al., *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 STETSON L. REV. 61, 71 (2002) (explaining that the Clery Act was passed in an effort to make campus crime statistics publicly available, both to raise awareness of crime among current students and employees, and to enable potential students and employees to make informed decisions).

43. *See* 20 U.S.C. § 1092(f)(8)(A)-(B) (describing a university's responsibility to notify alleged victims of their options for pursuing justice through local law enforcement, available counseling services, and the ability to change classes or living situations).

44. Student Right-To-Know and Campus Security Act of 1990, Pub. L. No. 101-542, 104 Stat. 2384 (codified as amended at 20 U.S.C. § 1092(f)).

45. 20 U.S.C.A. § 1092(f)(1)(F)(iii) (West 2013); *see also Understanding the Campus SaVE Act*, KNOW YOUR IX, http://knowyourix.org/understanding-the-campus-save-act/ (last visited Apr. 3, 2015) (providing that the SaVE Act covers sexual assault, domestic violence, dating violence, and stalking in order to protect students from a range of sexual violence).

"primary prevention and awareness."[46] The SaVE Act's educational programming requirements are precise and comprehensive, referencing risk reduction, consent to sexual acts, and related concerns that are victim-sensitive, in a way unprecedented in federal higher education law.[47]

D. Victim Sensitivity and Reporting Requirements: The Current Legal Landscape

Prior to the SaVE Act, the ways in which self-reported victimization impacted students went largely unaddressed. For example, the Clery Act explains what must be disclosed, and requires schools to tell students to whom they should report[48]—their CSAs. The designated CSAs may or may not be mandatory reporters under other federal or state laws. The Clery Act, however, does not address whether students must be informed about what will happen if they disclose their own victimization. This collateral aspect of crime reporting—the impact on the victim—was not part of the Clery Act's purview, and while its 2008 victims' bill of rights addresses victim impact to an extent, it is limited to sexual violence.[49] Title IX and the SaVE Act, by contrast, are rooted in public and legislative intent to address victim/student experiences with discriminatory behavior, including but not limited to violence and other abuse.[50] The SaVE Act is particularly sensitive to the rights of students to know the campus safety climate, what to expect if they disclose being victimized, and the responsibilities of the school regarding that disclosure. The SaVE Act, in fact, is quite extensive in its mandates on those procedures, stating that:

> [S]tudents or employees reporting victimization will be provided with their written rights to: Be assisted by campus authorities if reporting a crime to law enforcement; Change academic, living, transportation, or working situations to avoid a hostile environment; Obtain or enforce a no contact directive or restraining order; Have a clear description of their institution's disciplinary process and know the range of possible sanctions; Receive contact information about existing counseling, health, mental health, victim advocacy, legal assistance, and other services available both on-campus and in the community.[51]

46. Schroeder, *supra* note 11, at 1225-26.

47. *Id.*

48. *See* 20 U.S.C. § 1092(f)(8)(B)(iii) (providing that each institution shall develop and distribute a statement of policy regarding procedures students should follow if a sex offense occurs).

49. 20 U.S.C. §§ 1092(f)(8)(A)-(B).

50. *See* Dana Bolger, *9 Things to Know About Title IX*, KNOW YOUR IX, http://knowyourix.org/title-ix/title-ix-the-basics/ (last visited Apr. 3, 2015) (providing that Title IX is not just about sports; it is a prohibition against sex-based discrimination in education); *see also Understanding the Campus SaVE Act*, KNOW YOUR IX, http://knowyourix.org/understanding-the-campus-save-act/ (last visited Apr. 3, 2015) ("[T]he SaVE Act "increases transparency on campus about incidents of sexual violence, guarantees victims enhanced rights, sets standards for disciplinary proceedings, and requires campus-wide prevention education programs.").

51. 20 U.S.C. § 1092(f)(8)(A)-(B); *The Campus Sexual Violence Elimination (SaVE) Act*, CLERY CTR., *available at* http://clerycenter.org/campus-sexual-violence-elimination-save-act (last visited Apr.

Ultimately, however, the SaVE Act does not specify how reporting should be done, aside from an "in writing" requirement.[52] This leaves critical questions unanswered and hinders the ability to foster reporting systems that account for victim sensitivity and trauma reduction. Title IX and the Clery Act are largely silent on the collateral consequences that reporting may have on victims and their interest in results that may run counter to those expected by traditional legal or school disciplinary systems.[53] Over the last few decades, however, federal anti-crime laws,[54] and even Supreme Court decisions,[55] have increasingly recognized that sensitivity to victims' needs and preferences is crucial to generating appropriate public responses to crime.[56] This is particularly salient in the gender-based violence area because victim behavior is often counterintuitive, differing from established norms in our systems of criminal justice, and other top-down institutions like higher education.[57] College administrators are grappling with how to balance that victim sensitivity with their legal and social obligations.

II. CAMPUS VIOLENCE "MANDATORY" REPORTING REQUIREMENTS ARE AN OVERCORRECTION

On a fundamental level, every educational institution must protect its fiscal and structural integrity.[58] College administrators are justifiably cognizant of the potential economic risks associated with any legal liability resulting from

3, 2015); *see also* Schroeder, *supra* note 11, at 1232 ("[T]he requirements in the SaVE Act that colleges clearly state their procedures and that those procedures meet specific standards will better protect students.").

52. 20 U.S.C. §§ 1092(f)(8)(A)-(B).

53. *See* McLeod, *supra* note 9, at 1608 ("[M]any survivors have little interest in harsh punitive consequences. Instead, they desire clear condemnation of the conduct and acknowledgment of the wrong, which suggests that the specific details of punishment outcomes and the evidentiary threshold producing them hold far less significance than a fair, independent, thoughtful process for restorative redress.").

54. *See, e.g.*, Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (authorizing grant programs for assisting victims of domestic violence).

55. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 891 (1992) (citing domestic violence data showing that pregnant victims may wish to refrain from reporting pregnancy to their spouses for fear of abuse in support of the decision to strike down the portion of the Pennsylvania statute that required spousal notification prior to abortion).

56. *See, e.g.*, McLeod, *supra* note 9, at 1609 ("Institutional policies that promote sexual secrecy and shame, especially those that sanction survivors of sexual abuse, ought also to be a target for preventive reform.").

57. *See* Lave & Orenstein, *supra* note 36, at 827 (explaining that "[m]any scholars contend that the rate of underreporting in sex cases is high," and listing victim embarrassment, fear of retribution by the perpetrator, and distrust of the legal system as contributing factors).

58. *See, e.g.*, AM. COUNCIL ON EDUC., A PRESIDENT'S GUIDE TO THE CLERY ACT 3, *available at* http://www.acenet.edu/news-room/Documents/A-Presidents-Guide-to-the-Clery-Act.pdf (2012) ("Failure to comply with the Clery Act can result in large fines for an institution (up to $27,500 per violation), suspension, or limiting of Title IV funding. In addition, when crime reporting or other safety procedures are mishandled, significant public scrutiny can result, and can cause serious reputational damage to an institution and its senior leadership. By contrast, sound procedures for handling crises can mitigate tragic outcomes, not to mention a public relations nightmare.").

misconduct on their campus.[59] But such concerns are rarely discussed publicly, and studied even less frequently.[60] The scant available data relates to actual dollar-value verdicts in lawsuits, which omits data on settled or withdrawn lawsuits as well as intangible values such as university reputations.[61]

A few scholars have pursued this under-investigated data. Professor Nancy Cantalupo, who has published numerous scholarly articles on Title IX and related issues, asserts that some campus policies and decisions may be based on a misplaced fear of liability.[62] Cantalupo points out in a 2014 *Time* magazine piece that after careful research she found: "schools face exponentially more expensive liability for violating student victims' rights under Title IX . . . than they do for violating accused assailants' due process rights . . . . [T]he top two settlements publicly disclosed in litigated Title IX cases cost those schools $2.8 million and $850,000 . . . ." Cantalupo further discovered:

> [O]ver [fifty] Title IX cases [were] decided unfavorably towards schools and therefore, likely to cost them money. In contrast, I found only three cases where the court decided that the school's disciplinary procedures in a sexual violence case violated due process. In only one of those cases was the student awarded any money, $26,500 of the $5.5 million he claimed he was due. Although legal research can always miss some cases, research by Dean Michelle Anderson of CUNY Law School corroborates this lack of legal victories for accused assailants. These results are quite predictable based on the legal standard set by the U.S. Supreme Court that applies to schools' abilities to discipline students for all kinds of misconduct.[63]

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59. *Id.*; *see also* Cantalupo, *Masculinity*, *supra* note 22, at 944 (explaining that "Title IX gives schools a greater incentive to seek to prevent the sexual violence problem," and citing numerous cases in which universities were held liable for sexual assaults on their campuses).

60. *See* Schroeder, *supra* note 11, at 1216 ("Despite Title IX and the Clery Act, campus responses to sexual assault reports are very often inadequate. A year-long investigation by the CPI determined that students deemed responsible for alleged sexual assaults on college campuses face few consequences, despite the fact that victims' lives are forever changed.").

61. *See, e.g.*, Emily Suran, *Title IX and Social Media: Going Beyond the Law*, 21 MICH. J. GENDER & L. 273, 274 (2014) (explaining that "despite the pervasiveness of the problem, an estimated 63 percent of universities shirk their legal responsibility to address sexual violence").

62. Nancy Chi Cantalupo, *Violating Student Victims' Rights is Expensive*, TIME (May 15, 2014), http://time.com/99697/campus-sexual-assault-nancy-chi-cantalupo/.

63. *Id.*; *But see, e.g.*, Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 4:09 PM), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html (claiming that universities' responses to sexual assault has led to an overcorrection, consequently leading to infringement on male students' rights); United Educators, *Student Sexual Assault: Weathering the Perfect Storm* (2014), *available at* https://www.eduriskssolutions.org/templates/template-article.aspx?id=379&pageid=136 (arguing that educational institutions need to utilize practices and responses that ensure a fair response to both parties); Susan Kruth, *United Educators Statistics Show Strong Claims from Accused Students*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (June 23, 2014), *available at* http://www.thefire.org/united-educators-statistics-show-strong-claims-from-accused-students/ (citing statistics compiled by defense

Research by one law professor, however, does not tend to impact the higher education industry the same way as mattress-carrying students,[64] brutal rape allegations in national magazines,[65] and letters from the federal government.[66] It is clear that higher education is now paying attention to this issue. While question remains as to what its reaction will be in the aggregate, many are already taking action: Penn State's action is discussed more fully later in Section V, as a case study on the issue of mandatory reporting.

In 2014, a *Rolling Stone* article became a flashpoint of the public conversation regarding campus sexual assault; the article told the story of "Jackie" (a nickname or pseudonym depending on the source) who alleged she was brutally gang-raped at a University of Virginia fraternity house in 2012.[67] The author and *Rolling Stone*'s editorial staff have been widely criticized both for potentially inadequate reporting, which came to light when the fraternity and the accused perpetrators responded with outrage, and their handling of the matter in the aftermath of the public criticism.[68]

Although much of the now-retracted article is remarkable, certainly not in the least Jackie's attack, one aspect of it is noteworthy on the issues of victim disclosure and campus reporting norms. In the original article, author Sabrina Rubin Erdely referred to the University of Virginia's new blanket mandatory reporting policy,[69] yet she conflated the reluctance of victims to report with two other separate decisions. The first is the reluctance of victims, like Jackie, to have the matter pursued in the off-campus criminal justice system. However, another distinct decision-making process informs sexual assault victim under-reporting,[70] which the *Rolling Stone* article—and much of the public conversation as a result, in my opinion[71]—fails to adequately distinguish. Consider the decision-making of college administrators related to two additional matters: their pursuit of justice

advocacy groups to support their assertions that campus violence statistics are overestimated).

64. *See* Ariel Kaminer, *Accusers and the Accused, Crossing Paths at Columbia University*, N.Y. TIMES, Dec. 21, 2014, http://www.nytimes.com/2014/12/22/nyregion/accusers-and-the-accused-crossing-paths-at-columbia.html (stating that "students at more than 100 colleges carried their own mattresses (or pillows) to call attention to the problem of campus sexual assault" in October 2014).

65. *See* Sheila Coronel et al., *Rolling Stone and UVA: The Columbia University Graduate School of Journalism Report*, ROLLING STONE (Apr. 5, 2015), *available at* http://www.rollingstone.com/culture/features/a-rape-on-campus-what-went-wrong-20150405 (detailing a retracted *Rolling Stone* article making rape allegations against a student at University of Virginia).

66. *Dear Colleague Letter*, *supra* note 19.

67. Coronel et al., *supra* note 65.

68. *See* Erik Wemple, *The Full Demise of Rolling Stone's Rape Story*, WASH. POST (Dec. 11, 2014), http://www.washingtonpost.com/blogs/erik-wemple/wp/2014/12/11/the-full-demise-of-rolling-stones-rape-story/ (criticizing *Rolling Stone*'s reporting on the University of Virginia rape).

69. Coronel et al., *supra* note 65.

70. *See* Schroeder, *supra* note 11, at 1196-97 (citing BONNIE S. FISHER ET AL., U.S. DEP'T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10 (2000), *available at* https://www.ncjrs.gov/pdffiles1/nij/182369.pdf (citing data claiming that "95.2% of completed rapes and 95.8% of attempted rapes are not reported to law enforcement officials")).

71. *See, e.g.*, Jeannie Suk, *The Trouble with Teaching Rape Law*, NEW YORKER (Dec. 15, 2014), *available at* http://www.newyorker.com/news/news-desk/trouble-teaching-rape-law (providing an example of the public conversation, alleging that an overinflated sense of public concern about victim trauma and triggers has hindered her academic freedom as a law professor to teach about rape law).

against alleged perpetrators, and their obligation to protect other potential victims once a report is made.[72]

The follow-up report on Rolling Stone's article, led by Columbia School of Journalism Dean Steve Coll, points out "Erdely's choice of the University of Virginia as a case study was well timed. The week she visited campus, an 18-year-old UVA sophomore went missing and was later found to have been abducted and killed. The university had by then endured a number of highly visible sexual assault cases."[73] Jesse L. Matthew Jr. was accused of killing the missing UVA sophomore, Hannah Graham, but the crimes allegedly attributable to him, and the sexual assaults "Jackie" described, were entirely different cases. To suggest that a victim of any such crime shirks some sort of civic duty rising to disclosure of their victimization is deaf not just to victim autonomy, but also to the complexities of campus crime and gender-based violence. As Coll's report notes:

> Over the years, the Department of Education has issued guidelines that stress victim confidentiality and autonomy. This means survivors decide whether to report and what assistance they would like. 'If she did not identify any individual or Greek organization by name, the university was very, very limited in what it can do,' said S. Daniel Carter, a campus safety advocate and director of the nonprofit 32 National Campus Safety Initiative.[74]

The allegations reported in *Rolling Stone* coincided with a rash of similar high-profile reports of sexual violence on college campuses, including the Vanderbilt football rape case resulting in at least one convicted player[75], and allegations against Florida State University football player Jameis Winston.[76] Criminal charges were dropped against Winston, but the alleged victim announced her lawsuit against Florida State for its handling of the matter just a few weeks later.[77] The *Washington Post* reported in late 2014 that colleges are grappling with

72. *See* Emily Bazelon, *The Stanford Undergraduate and the Mentor*, N.Y. TIMES (Feb. 11, 2015), *available at* http://www.nytimes.com/2015/02/15/magazine/the-stanford-undergraduate-and-the-mentor.html?_r=0 (explaining that "[s]ome critics are now charging that universities are overcompensating for past mistreatment of victims. Even as they're attacked for giving victims short shrift, schools are being denounced for inadequately protecting the rights of the accused.").

73. Coronel et al., *supra* note 65 (citing T. Ress Shapiro, *For Hannah Graham's Family, 'Nightmare' Leaves Enduring Uncertainty and Loss*, WASH. POST (Nov. 14, 2014), *available at* http://www.washingtonpost.com/local/education/for-hannah-grahams-family-nightmare-leaves-enduring-uncertainty-and-loss/2014/11/14/4849784a-6c2c-11e4-a31c-77759fc1eacc_story.html).

74. *Id.*

75. Jessica Luther, *A Look at Complex Vanderbilt Rape Case that Left Community Reeling*, SPORTS ILLUSTRATED (Feb. 10, 2015), *available at* http://www.si.com/college-football/2015/02/09/vanderbilt-rape-case-brandon-vandenburg-cory-batey.

76. Walt Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html.

77. Ashley Fantz & Steve Almasy, *Jameis Winston Accuser Files Suit against Florida State University*, CNN (Jan. 8, 2015), *available at* http://www.cnn.com/2015/01/07/justice/jameis-winston-

the establishment of sound protocols and the interplay between reporting and potential sanctions.[78] The piece claims:

> Some worry about unintended consequences of mandatory sanctions [such as expulsion, for perpetrators of sexual violence on campuses]. 'My fear is that it would potentially hurt reporting, and hurt persons who want to come forward who may want a different outcome than expulsion,' says Matt Gregory, president of the Association for Student Conduct Administration.[79]

American University's Vice President of Campus Life, Gail Short Hanson, discussed her school's "case-by-case" decision-making protocol as to sanctions such as expulsion for sexual misconduct in the same article. Hanson stressed that "I've never encountered anything that's not controversial around this topic. People desire clarity, and there's not a lot of clarity here. There's only trying your best to understand what happened . . . [and] taking the appropriate steps to achieve justice."[80]

Clarity may seem like an elusive goal, particularly to a college administrator like Hanson, who is responsible for numerous goals on this front that are constantly intersecting and diverging. The SaVE Act was a legislative attempt to lend clarity to the legal maelstrom confronting college administrators,[81] with a widely used campus training called "CampusClarity" generated by a private training organization emerging as one of its primary manifestations.[82] The SaVE Act articulates its goals as being rooted in prevention and awareness of sexual misconduct and related offenses on college campuses.[83] The SaVE Act is steeped in this prevention-based approach, echoing a growing recognition in the gender-based violence advocacy field to serving the "justice" needs Vice President Hanson referred to by focusing primarily on "understanding"—to borrow her language again—the unique and unpredictable needs of victims.[84]

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78. Nick Anderson, *Colleges Often Reluctant to Expel for Sexual Violence—With U.Va. a Prime Example*, WASH. POST (Dec. 15, 2014), http://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for-sexual-violence—with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e_story.html.

79. *Id.*

80. *Id.*

81. *See* Schroeder, *supra* note 11, at 1224-25 (explaining that "[t]he goal of the Campus SaVE Act is to close the gap in current laws by requiring colleges and universities to clearly explain their policies on sexual assault, stalking, dating violence, and domestic violence, so that all young people can focus on their intellectual passions during college, rather than having to deal with the mental and physical exhaustion of abuse").

82. *See About Us*, CAMPUSCLARITY https://home.campusclarity.com/about-campusclarity/ (last visited May 7, 2015) ("In 2013, we introduced CampusClarity and currently help nearly 200 schools comply with the SaVE Act and Title IX through extensive, engaging online training.").

83. *See* Schroeder, *supra* note 11, at 1226 ("[T]he Campus SaVE Act requires that [campus sexual assault awareness] programs be of primary prevention and awareness for all incoming students and new employees.").

84. *See id.* ("[The Act's mandatory p]rograms must teach participants safe and positive outcomes

III. SOUND REPORTING POLICIES FOR COLLEGE FACULTY BALANCE COMPLIANCE WITH COMPASSION

A. Reporting Policies and College's Legal Obligations

In a 2014 *Atlantic Monthly* article, some of the divided loyalties colleges and their employees face are articulated by Department of Education Office of Civil Rights attorney Rachel Gettler: "if the Title IX coordinator has information indicating that the alleged perpetrator has previously sexually assaulted other students on campus, it may be necessary to override this student's request for confidentiality in order to pursue disciplinary action against the alleged perpetrator."[85] The Association of Title IX Administrators ("ATIXA") recommended a template for a campus reporting policy. It begins by stating: "This document is intended to outline the College's policy regarding *mandated* reporting of concerning behaviors, discrimination, harassment and crimes by employees. It briefly explains the meaning and purpose of *mandatory* reporters, outlines the legal context and articulates a straightforward set of guidelines "for all employees to follow."[86] In commentary, the ATIXA document notes that:

> The language of the [Clery] Act would allow the College to exclude some faculty some of the time and many professional staff from the obligation to report. *Such an approach, however, risks creating confusion for faculty and staff,* takes a minimalist approach to the ethical obligation to inform our community about serious crimes, and makes the institution more vulnerable to enforcement action.[87]

This highlights the confusion created by many aspects of the Clery Act.[88] Failing to make mandatory reporter exceptions due to potential "confusion" is potentially misleading given the presence of attorneys, clergy, counselors, and others on campuses who may have a competing legal obligation or choice to *not*

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for bystander intervention that an individual can use to prevent harm or intervene if there is a risk of sexual assault . . . [and] the Campus SaVE Act clarifies minimum standards for institutional discipline proceedings and improves transparency so individuals reporting rape better know their rights . . . ."); *see also* Jill Laurie Goodman, *The Idea of Violence Against Women: Lessons from* United States v. Jessica Lenahan, *the Federal Civil Rights Remedy, and the New York State Anti-Trafficking Campaign,* 36 N.Y.U. REV. OF L. & SOC. CHANGE 593, 606 ("[The modern] measure of success of the idea of violence against women is its power to change laws and policies that, in turn, change lives by freeing women and girls from violence and the threat of violence").

85. Carmel DeAmicis, *Which Matters More: Reporting Assault or Respecting a Victim's Wishes?* ATLANTIC (May 20, 2013), http://www.theatlantic.com/national/archive/2013/05/which-matters-more-reporting-assault-or-respecting-a-victims-wishes/276042/.

86. *Mandatory Reporters: A Policy for Faculty and Professional Staff*, ASS'N OF TITLE IX ADMN'RS 1 (2013) [hereinafter *Mandatory Reporters*], *available at* https://www.atixa.org/wordpress/wp-content/uploads/2012/01/Mandatory-Reporters-Policy-Template.pdf (emphasis added).

87. *Id.* (emphasis added).

88. *See* McLeod, *supra* note 9, at 1613 (explaining that "Clery Act enforcement and monitoring have proven insufficiently rigorous, however, to encourage robust action against sexual harm on college and university campuses").

report such confidential information. For example:

> In what victims' advocates say is an overreaction to the [2011] 'Dear Colleague' letter, universities like Columbia and Barnard aren't just making employees with authority mandatory reporters. They're making every single member of staff or faculty on campus report, aside from a few exceptions like Counseling Services or the Rape Crisis Center.[89]

What if, however, a student who has been raped discloses the rape to a "mandatory reporter" faculty member, but wishes the faculty member to keep the information confidential? And what if the professor to whom a student discloses is asked by the student not to report to anybody, regardless of whether an enigmatic "Title IX coordinator" exists on that campus? Even assuming that the faculty member has mentally sifted through his or her own reporting requirements and options under the Clery Act, Title IX and any other applicable legal authority, significant questions remain unless the college has clearly articulated its protocols and has a system in place for both the faculty reporter and the student victim to review their options in a meaningful way that is both compliant and compassionate. The goal of such protocols should always be to minimize further trauma to the victim, with legal compliance obviously being an important, but not determinative factor.

The sample policy from the ATIXA cited above concedes that Titles VII and IX also contain legal provisions for exemptions to the mandatory reporter status for certain faculty and staff, however it also reiterates the "possibility of confusion and risk of institutional exposure" again and then sets out a model "College Policy" that "defines all employees as mandatory reporters . . . [who must] promptly contact the campus Title IX Coordinator, or [the Director of Sexual Assault Services. She] will take responsibility for prompt notification of the Department of Public Safety . . . ."[90] ATIXA goes on to concede that "a college employee may initially be able to omit personally identifiable information" and predicts that "the College will always be guided by the goals of empowering the victim and allowing the victim to retain as much control over the process as possible, but no employee (other than counselors, health care providers, and clergy) can or should promise confidentiality."[91]

Ultimately, however, such guidance is unhelpful if the victim's desired outcome is confidentiality itself, and the sample policy's next sentence is even more confusing: "Counselors, health service providers, and clergy are voluntary

89. DeAmicis, *supra* note 85; *see also* Jenna Portnoy, *Va. Senate Panel Advances Mandatory Reporting Bill for Campus Sexual Assault*, WASH. POST (Jan. 26, 2015), *available at* http://www.washingtonpost.com/local/virginia-politics/va-senate-panel-advances-mandatory-reporting-bill-for-campus-sexual-assault/2015/01/26/6154700c-a56a-11e4-a2b2-776095f393b2_story.html (describing the Virginia Senate bill that would mandate reporting by all public college faculty, administrators and staff).

90. *Mandatory Reporters*, *supra* note 86, at 2.

91. *Id.*

reporters, not mandated by law, but College policy creates an expectation to report non-personally identifiable information."[92] This middle ground is where the hard work is, and colleges must do more than simply mandate every single campus actor to report, memorialize that there may be exceptions, and suggest that everyone use their best judgment to rectify the two divergent tracks. University policy must be specific and should presume that someone hearing a disclosure works directly with the victim to ascertain a path to reporting that is safe in all manners for that victim. The school should know what crimes are happening, but it should not trigger apocalyptic legal or quasi-legal action. Survivors' health—mental and physical—should be of primary concern.

B. Campus Support for Victims Alongside Reporting Guidelines: SaVEd by the Act

The SaVE Act includes important guidance for universities on victim services, and its inclusion of those alongside reporting requirements is an important step forward in higher education law. The SaVE Act brings together victim advocacy language and legal obligations, such as reporting and disciplinary procedures, in a way that neither Title IX nor the Clery Act accomplished. University administrators should take direction from that innovation, and revise their policies to mandate best practices for victim support in concert with their protocols for reporting and related procedures.

The ATIXA sample policy discussed above does call for mandated reporter status for every individual working on campus, but its proposed "guidelines" also have cogent suggestions for talking with victims. Most notably, the guidelines direct that an employee who hears a disclosure assist the victim with accessing the campus counseling center and if it is closed, to assist in accessing a campus-wide Sexual Assault Response Team that should be available twenty-four hours, seven days a week to help victims.[93] Campus violence legal expert Professor Cantalupo calls for each campus to have a central victim services office: She describes such offices as "one of the most effective ways of addressing the myriad challenges related to addressing peer sexual violence on campus is to create a visible (yet confidential) and centralized victims' services office."[94] Penn State has such an office at its Center for Women Students. It is well developed and follows best practices by coordinating with campus police, the health centers both on- and off-campus, Penn State Counseling and Psychological Services, and the student conduct office, which is in the same building.[95] As discussed further in Section V,

92. *Id.*

93. *Id.* at 4.

94. Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 262 (2011).

95. *See id.* (describing victims' services offices as ideally being "at the hub of [a metaphorical] wheel" comprised of other services such as "the medical center, campus police, counseling services, residence life, individual faculty, the student conduct office, etc."); *see also* Alexandra K. LaMont & Melissa K. McCleery, *Student Perspective: Sexual Misconduct on Campus is Under the Microscope*, PENN STATE NEWS (Feb. 3, 2015), http://news.psu.edu/story/343052/2015/02/02/campus-life/student-perspective-sexual-misconduct-campus-under-microscope (stating that Penn State has "a sensitive and

the infrastructure at Penn State renders it a fertile ground for effective reform, and coordination of faculty obligations for reporting victimization of their students should be included.

Nationwide, reform is happening at a dizzying speed at universities like Penn State: In 2014 Harvard University moved to institutionalize their handling of sexual assault allegations in a procedure some have criticized as an overcompensation and as being too quasi-criminal.[96] Twenty-eight Harvard Law School faculty released a public statement summarizing those criticisms with due process concerns. Soon thereafter, a group of Harvard Law students released a response petition demanding, in part, "[f]or university sexual assault hearings, the criminal justice model may not be appropriate to address the unique problems both student complainants and accused face. That is where Title IX offices like Harvard University's Office for Sexual and Gender-Based Dispute Resolution, and their policies, have a positive role to play."[97] The student petition urged faculty members to "reconsider their position," reminding them that they are extremely influential and that "going to Harvard is a privilege but safety is a right."[98]

Alternatives to the "criminal justice model" bemoaned by the Harvard students and experts alike are burgeoning.[99] Consider Project Callisto, which features a system of sexual assault reporting that was developed by consulting with survivors of sexual violence and balances schools' legal obligations with victim preferences, sound practices respecting those preferences, and accounting for the traumatic nature not just of the crime itself, but the ongoing trauma associated with reporting it.[100] The importance of striking that balance was articulated by Anita Levy, associate secretary of the American Association of University Professors, in a 2014 interview with *Inside Higher Ed*:

> 'What seems to be happening is that institutions are really going overboard to make sure they've dotted all their i's and crossed all their t's,' Levy said, in response to widespread criticism of and legal action against universities alleged to have failed to protect students against assault. 'Our position hasn't changed—we still recommend that faculty members be made mandated reporters only if they're serving in some kind of legally mandated reporter role, such as a

respectful team running the student conduct process for sexual assault and harassment cases").

96. Matthew Q. Clarida, *Law School Profs Condemn New Sexual Harassment Policy*, HARV. CRIMSON (Oct. 15, 2014), http://www.thecrimson.com/article/2014/10/15/law-profs-criticize-new-policy/.

97. Anna Byers et al., *Going to Harvard is a Privilege, Not a Right*, BOS. GLOBE (Oct. 31, 2014), http://www.bostonglobe.com/opinion/2014/10/31/going-harvard-privilege-but-safety-right/ng14NdYb4IT5W7PejkM45J/story.html.

98. *Id.*

99. *See* Alexandra Brodsky, *Fair Process, Not Criminal Process, Is the Right Way to Address Campus Sexual Assault*, AM. PROSPECT (Jan. 21, 2015), http://prospect.org/article/fair-process-not-criminal-process-right-way-address-campus-sexual-assault (arguing that school investigations should not attempt to mirror criminal trials).

100. Tyler Kingkade, *Group Builds Novel Sexual Assault Reporting System—By Talking to Survivors*, HUFF. POST, http://www.huffingtonpost.com/2014/10/21/college-sexual-assault-reporting-callisto_n_6021952.html (last updated Oct. 23, 2014, 2:59 PM).

study-abroad advisor or something like that.'[101]

Levy's remarks are particularly salient in light of the disclosure-related problems faced by Penn State's Women's Studies faculty, paired with simultaneously occurring campus reform that is currently being led by its sexual assault task force discussed below.

IV. PENN STATE: CULTIVATING A VICTIM-CENTRIC APPROACH TO CAMPUS VIOLENCE

A recent phenomenon in Penn State's Women's Studies Department involved controversy over what language faculty should use on their syllabi to notify students about the professor's availability to discuss such matters as well as the faculty member's reporting obligations.[102] The conversation began in 2014, when Women's Studies professors expressed interest in adding disclaimers to their syllabi for Spring 2015, explaining they are considered mandated reporters under federal higher education law so that victims considering disclosure could realize the ramifications.[103] The faculty perceived reticence at this idea from the administration, and continued grappling with how to balance their desire for emotional safety in their classrooms with institutional requirements to report crime.[104] The conundrum faced by Women's Studies faculty, who often teach topics that cultivate disclosure of victimization, is ultimately of concern for all faculty on any campus, given the dialogue and mentorship that often accompanies the student-professor relationship. Transparency, one could assert, would argue in favor of supporting faculty-student dialogue on the topic of disclosure obligations and their collateral consequences.

Weaving such victim-centric approaches into campus reform efforts, however, is challenging. The mandatory reporting issue is but one piece of the larger public concern about sexual assault on campuses.[105] Furthermore, establishment of reporting policies is for the most part in its infancy for college administrators.[106] By

101. Colleen Flaherty, *Endangering a Trust*, INSIDE HIGHER ED. (Feb. 4, 2015), https://www.insidehighered.com/news/2015/02/04/faculty-members-object-new-policies-making-all-professors-mandatory-reporters-sexual ([The AAUP] "published a report on campus sexual assault in 2013 saying that faculty members, in its view, are not mandated reporters due in part to the chilling effect that status might have on communication with students. AAUP's also concerned that such policies could limit the academic freedom of faculty members who teach women's studies or courses dealing with sex . . . in which reports of misconduct might be more likely to arise. Nevertheless, Anita Levy, AAUP's associate secretary, said she continues to hear from faculty members across the country whose institutions are ignoring their concerns and making them mandated reporters.").

102. Statement of Rosemary J. Jolly, Professor, Weiss Chair of the Humanities, Penn State English Department (Jan. 10, 2015) [hereinafter Jolly Statement] (on file with author).

103. *Id.*

104. *Id.*

105. Dana Bolger & Alexandra Brodsky, *Victim's Choice, Not Police Involvement, Should Be Lawmakers' Priority*, MSNBC (Feb. 12, 2015, 6:49 AM), http://www.msnbc.com/msnbc/campus-rape-victims-choice-should-be-lawmakers-priority.

106. Michael Stratford, *Changes to Sexual Assault Bill*, INSIDE HIGHER ED (Feb. 27, 2015), https://www.insidehighered.com/news/2015/02/27/senator-mccaskill-and-others-renew-push-campus-

way of example, at Penn State the university President-appointed "sexual assault task force" addressed it in their January 2015 report, but only in part.[107] Viewed in context, university efforts like Penn State's task force report, must consider an extremely broad array of obligations and constituencies. Penn State's Vice Provost for Student Affairs Damon Sims explained the role of the university's task force on sexual assault:

> The president's charge to the group was to develop a proposal that would position Penn State as a national leader in higher education in addressing the problems caused by sexual assault and sexual harassment . . . . The task force is confident that, building upon the strong foundation of existing support and intervention services and programs, our recommendations will ensure that President Barron's expectations in this regard is realized.[108]

This sweeping statement, while undoubtedly well-intentioned, illustrates one challenge inherent with endeavors like the task force report: balancing the university's public perception concerns against the nuts-and-bolts work of meeting its legal obligations and the well-being of its students. Sims' statement to the press with the task force's January 29, 2015 final report, again highlights the challenge in the university's role: "In the end, what we're trying to do is create a culture here at Penn State that says we don't tolerate this behavior."[109] Fundamentally, that broad statement is both encouraging in its public declaration of zero tolerance, and limited in terms of direction to the system actors who must enforce it, as well as victims seeking university protection.[110]

That said, the task force's final report does include eighteen specific recommendations regarding student protection and legal protocols, including that the university's student discipline process switch from a hearing panel model to a single investigator model, and conducting a campus climate survey on sexual assault beginning as soon as April 2015.[111] One recommendation seeks to clarify which employees are obligated to report an assault and which employees may keep

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sex-assault-make-changes-bill.

107. *Task Force Report Details Recommendations for Halting Sexual Misconduct*, PENN STATE NEWS (Jan. 29, 2015), http://news.psu.edu/story/342644/2015/01/29/campus-life/task-force-report-details-recommendations-halting-sexual.

108. *Students Share Concerns, Offer Insight on Stopping Sexual Assault*, PENN STATE NEWS, (Nov. 12, 2014), http://news.psu.edu/story/334157/2014/11/11/campus-life/students-share-concerns-offer-insight-stopping-sexual-assault (internal quotations omitted).

109. Morganne Mallon & Hannah Sarisohn, *Penn State's Task Force on Sexual Assault and Sexual Harassment Releases Report*, DAILY COLLEGIAN (Jan. 30, 2015, 3:00 AM), http://www.collegian.psu.edu/news/campus/article_edebaeb0-a842-11e4-b77f-8777f12ed9ab.html.

110. Lori Falce, *Penn State Sex Assault Task Force Makes Recommendations to President Eric Barron*, CTR. DAILY TIMES (Jan. 29, 2015), http://www.centredaily.com/2015/01/29/4578577/penn-state-sex-assault-task-force.html.

111. Tyler Kingkade, *Penn State Task Force Calls for Disclosure of Sexual Assault Punishments*, HUFF. POST (Jan. 29, 2015, 9:00 AM), http://www.huffingtonpost.com/2015/01/29/penn-state-task-force-sexual-assault_n_6566598.html.

that information confidential.[112] Peggy Lorah, task force member and Director of Penn State's Center for Women Students, explained that this recommendation will assist students to find the support they need on campus without the concern of whether or not the information they provide will be kept private.[113]

The unprecedented attention to campus violence currently presents an opportunity for cultural norms on college campuses to transform, alongside the legal reform from the federal government and the institutional reactions by college administrators.[114] The prevailing legal, social, and pedagogical paradigms can and must shift to a victim-sensitive atmosphere, and comprehensive reform is necessary to shift those cultural norms about gender-based violence against college students.[115] A unique partnership to assist with that cultural shift is being spearheaded at Penn State by Dr. Rosemary Jolly, Weiss Chair in the Humanities, in partnership with the author, to balance the university's legal requirements with a campus-wide, victim-centric approach to gender based violence awareness, prevention, and advocacy.[116] Jolly acknowledges the tension that exists between survivors and activists in terms of the duty to report, but is concerned that reactions to federal law have gone too far and are in contradiction with international best practice, which is only to report if it is in the best interest of the victim.[117]

One of Dr. Jolly's strategies is forum theatre, which is a storytelling modality she developed to work with survivors of violence and their community members in other countries.[118] Storytelling is an emerging trend in survivor healing movements in a variety of contexts on and off campuses, such as the SlutWalk initiative, which uses survivor narrative as part of its public awareness campaign against sexual assault.[119] Dr. Jolly envisions using forum theatre, and a related modality she developed called "body mapping" to bring an approach of community treatment to Penn State.[120] Body mapping has never been used with sexual assault survivors, making it a truly innovative aspect to this project. As a victim-sensitive modality rooted in mindfulness, body mapping can be used in concert with other mindfulness-based treatment strategies that exist in numerous forums on Penn State's campus, including robust academic research for using mindfulness to address stress- and trauma-related concerns.[121] The collaboration between Dr. Jolly,

112. Falce, *supra* note 110.

113. *Id.*

114. *See, e.g.*, Deborah Weissman, Professor, Univ. of N.C. Sch. of Law, Statement at the Student Life, Relationships and the Law: Confronting Domestic Violence in Higher Education Conference at the Pepperdine School of Law (Oct. 10, 2014) (transcript available with author) (stating that college administrators must cultivate a culture of "trust, connectedness to campus, and a sense of dignity and respect" and that law schools should address the necessary paradigm shifts so the legal structure changes, being open to the phenomenon of victim reluctance to report violence, and the reasons why).

115. McLeod, *supra* note 9, at 1553.

116. Jolly Statement, *supra* note 102.

117. *Id.*

118. *Id.*

119. *See* Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1461-62 (2014) (describing SlutWalk's use of "stories and first-hand accounts, [] rallies and web-based mobilization protest[s]" and one participant's self-reported "surprising amount of catharsis" as a result).

120. Jolly Statement, *supra* note 102.

121. *See* Lee Carpenter, *Prevention Research Center Receives $1.4 Million Mindfulness Research*

the author, Dr. Sarah Clark Miller of Penn State's Rock Ethics Institute, and UNESCO Chair Dr. Mark Brennan,[122] is a unique opportunity to supplement the task force's recommendations with substantive academic research and tangible support for victim advocacy via the body mapping and forum theatre initiatives. By combining Engle's and Miller's legal and ethical expertise regarding mandatory reporting with Jolly and Brennan's sociological/humanist expertise, campus initiatives like this one can help colleges evolve to a victim-centric culture that is intolerant of campus violence.

CONCLUSION

With public attention to campus sexual assault at an unprecedented high, college administrators face a watershed moment. Their responses to this crisis are being scrutinized by politicians, activists, scholars and media pundits, but their priority must be to victim safety—emotional as well as physical safety. The only path to end is one that couples legal compliance with victim sensitivity, and avoids blanket mandatory reporting requirements, for example the Callisto program described above in Section III(B).[123] Returning to Penn State as a case study, its administrative response shows promising signs, in spite of or perhaps partly due to another public embarrassment in early 2015 involving allegations of sexual misconduct by its Kappa Delta Rho (KDR) fraternity and a Facebook page showing young women in states of undress and apparent intoxication.[124] The University announced it had removed KDR from campus for three years on May 26, 2015 after an investigation of the allegations made public in March, 2015.[125] Also in Spring 2015, Penn State announced several tangible steps towards reform including the replacement of its adjudicative system with a "trained investigator" model for

Grant, PENN STATE NEWS, http://news.psu.edu/story/320367/2014/07/09/society-and-culture/prevention-research-center-receives-14-million (last updated July 30, 2014) (describing a grant from the Institute on Education Sciences which focuses on teaching adolescents mindfulness practices).

122. *See What We Do*, UNESCO CHAIR, PENN STATE COLL. OF AGRIC. SCI., http://agsci.psu.edu/unesco/what-we-do (last visited May 24, 2015) (explaining the UNESCO Chair held by Brennan enables Penn State to work extensively on U.S. and international humanitarian projects, as the UNESCO Chair leads "change through high-quality, evidence-based research; innovative educational programs; effective policy advice and high-impact national and international partnerships . . . .").

123. *See also* Tyler Kingkade, *New System Seen as "Promising" Alternative to Mandatory Reporting of Campus Sexual Assaults*, HUFF. POST, http://www.huffingtonpost.com/2015/02/06/mandatory-sexual-assault-reporting_n_6614278.html (last updated Feb. 6, 2015, 9:59 AM) (describing lobbying efforts to convince Virginia lawmakers to adopt Callisto for its colleges statewide).

124. *See* Danielle Paquette, *At Penn State, One Woman's Rule at Fraternity Parties: Don't Go Upstairs*, WASH. POST (Mar. 24, 2015), http://www.washingtonpost.com/business/economy/at-penn-state-one-girls-rule-at-frat-parties-dont-go-upstairs/2015/03/23/1f87f318-d0a0-11e4-a62f-cc745911a4ff_story.html (describing the allegations that "[p]olice had discovered a private KDR Facebook page featuring photos of women, some of them naked and unconscious").

125. M. Alex Johnson, *Penn State Suspends Kappa Delta Rho Fraternity for Three Years*, NBC NEWS, http://www.nbcnews.com/news/us-news/penn-state-suspends-kappa-delta-rho-fraternity-three-years-n365066 (last updated May 26, 2015, 10:37 PM).

dealing with reports of sexual violence.[126]

Still, the question of reporting requirements for faculty, staff and other campus individuals remains a work-in-progress; and Pennsylvania activists are openly lobbying the Commonwealth's legislature to take a comprehensive, statewide approach.[127] Several states away, Virginia lawmakers did precisely that in May 2015. Governor Terry McAuliffe signed two new Virginia statutes on May 29, 2015, one of which requires a "threat assessment team" to respond to reports and specifies the victim's confidentiality must be protected during the investigation.[128] That same week, Virginia's statewide task force on college sexual assault made public its recommendations for further reform, which include training college employees on "trauma informed" sexual assault investigations that are meaningfully centered around honoring the effects of the trauma experienced by victims.[129] That particular victim-centric reporting structure came about in the law's development when Virginia legislators acknowledged the concerns of campus administrators who approached them about victim reticence to report and its link to lack of anonymity during investigations.[130] This demonstrates that the interests of college administrators, victims and the legal system can indeed align to protect victims' emotional safety and campus safety more generally, without resorting to blanket mandatory reporting policies devoid of victim sensitivity provisions. The watershed moment, it seems, has come to pass.

126. Megan Trimble, *Activists Push for Penn State Sexual Assault Reform; Take the Cause to the Capitol,* HARRISBURG PATRIOT-NEWS, http://www.pennlive.com/midstate/index.ssf/2015/05/penn_state_sexual_assault_gove.html (last updated May 2, 2015, 10:59 PM).

127. *Id.*

128. Heather Mongillo, *Va. Campus Sexual Assault Bills Signed Into Law*, ARLNOW (May 29, 2015, 1:15 PM), http://www.arlnow.com/2015/05/29/va-campus-sexual-assault-bills-signed-into-law/.

129. *See* Tyler Kingkade, *Virginia Task Force Lays Out Plan To Remove Barriers From Reporting Campus Sexual Assault*, HUFF. POST, http://www.huffingtonpost.com/2015/05/28/virginia-campus-sexual-assault_n_7460418.html (last updated May 28, 2015, 5:59 PM) (describing the trauma-informed system as one that "acknowledge(s) the unique circumstances found in rape cases as well as neurobiology related to trauma experienced by victims").

130. *See* Mongillo, *supra* note 128 (explaining that State Senator Barbara Favola wrote an amendment to the bill that incorporated the victim-centric provisions after campus administrators approached her with concerns about protecting victim confidentiality without quelling their willingness to report).