

---

## We Are Not Done: A Federally Codified Evidentiary Standard is Necessary for College Sexual Assault Adjudication

Jennifer James

Follow this and additional works at: <https://via.library.depaul.edu/law-review>



Part of the [Law Commons](#)

---

### Recommended Citation

Jennifer James, *We Are Not Done: A Federally Codified Evidentiary Standard is Necessary for College Sexual Assault Adjudication*, 65 DePaul L. Rev. (2017)

Available at: <https://via.library.depaul.edu/law-review/vol65/iss4/5>

This Comments is brought to you for free and open access by the College of Law at Digital Commons@DePaul. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Digital Commons@DePaul. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# WE ARE NOT DONE: A FEDERALLY CODIFIED EVIDENTIARY STANDARD IS NECESSARY FOR COLLEGE SEXUAL ASSAULT ADJUDICATION

## INTRODUCTION

“If you are a young woman who goes to college, you are more likely to be sexually assaulted than if you didn’t . . . .”<sup>1</sup> U.S. Senator Kirsten Gillibrand’s words send a chilling message to college students and their parents: sexual assault is an ongoing epidemic on college campuses.<sup>2</sup> In fact, one in five women experiences attempted or com-

---

1. Michael Stratford, *U.S. Senators Announce Campus Sexual Assault Legislation*, INSIDE HIGHER ED (July 31, 2014, 3:00 AM), <https://www.insidehighered.com/news/2014/07/31/us-senators-announce-campus-sexual-assault-legislation> (quoting Sen. Kirsten Gillibrand). “[O]ne in five of every one of those young women who is dropped off for that first day of school, before they finish school, will be assaulted . . . .” Glenn Kessler, *One in Five Women in College Sexually Assaulted: The Source of This Statistic*, WASH. POST, May 1, 2014, <http://www.washingtonpost.com/blogs/fact-checker/wp/2014/05/01/one-in-five-women-in-college-sexually-assaulted-the-source-of-this-statistic/> (quoting Joe Biden, U.S. Vice President). Although the one in five statistic is pervasive in the discussion around campus sexual assault, the accuracy of this statistic has been questioned. See, e.g., Dana Goldstein, *The Dueling Data on Campus Rape*, MARSHALL PROJECT (Dec. 11, 2014, 10:04 AM), <https://www.themarshallproject.org/2014/12/11/the-dueling-data-on-campus-rape> (challenging the one in five statistic). But see Nick Anderson & Scott Clement, *College Sexual Assault: 1 in 5 College Women Say They Were Violated*, WASH. POST, June 12, 2015, [http://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/?wpisrc=a\\_l\\_exclusive](http://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/?wpisrc=a_l_exclusive) (concluding that one in five women are violated while in college, according to a recent poll of college students regarding sexual assault).

2. See Teresa Watanaba, *Congresswoman Urges Better Protections Against Campus Sexual Assault*, L.A. TIMES, Apr. 15, 2014, <http://www.latimes.com/local/lanow/la-me-ln-campus-sexual-assault-20140415,0,3836845.story#axzz2z4G6N0XG>. Throughout this Comment, the terms “sexual violence” and “sexual assault” are used interchangeably to refer to the spectrum of sexual misconduct that is subject to disciplinary hearings and potential punishment under most college codes of conduct. This includes “non-consensual sexual intercourse,” which is “any sexual intercourse by any person upon another without consent . . . . It includes oral, anal and vaginal penetration” as well as any “non-consensual sexual contact,” which is “contact of a sexual nature, however slight.” *Important Information Regarding Sexual Assault, Sexual Misconduct, Dating Violence, Domestic Violence, Stalking, and Conduct That Creates a Hostile Environment*, UNIV. NOTRE DAME, <http://dulac.nd.edu/community-standards/important/> (last visited Nov. 14, 2014). Further, the terms “victim,” “survivor,” “complainant,” and “accuser” are used to indicate a female student who has made an official sexual assault complaint with the university against another student. The terms “accused,” “assailant,” and “perpetrator” are used to indicate a male student who has been accused of assaulting another student and is, or could be, subject to a disciplinary hearing by the institution. When referring to postsecondary education institutions, these terms “university,” “college,” “institution,” and “school” are used interchangeably. Unless otherwise indicated, all of these terms refer to both public and private institutions that receive federal funding of any kind and are therefore subject to Title IX and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery

pleted sexual assault during her undergraduate education.<sup>3</sup> Since the passing of Title IX of the Education Amendments of 1972 (Title IX),<sup>4</sup> the federal government has taken steps to respond to and thwart sexual violence at the undergraduate level.<sup>5</sup> Despite federal efforts, however, the prevalence of college sexual violence has tremendously increased.<sup>6</sup> Students no longer tolerate this rise in violence:<sup>7</sup> they are protesting the mishandling of reports of sexual assault, the uneven implementation of responses among campuses, and the ineffective adjudication of student sexual assault.<sup>8</sup>

---

Act). See generally Education Amendments of 1972 (Title IX), Pub. L. No. 92-318, § 901(a), 86 Stat. 235, 373 (codified as amended at 20 U.S.C. §1681(a) (2012); Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended at 20 U.S.C. §§ 1001-61aa-1). This Comment does not insinuate that men are not sexual assault victims during their undergraduate careers or that all alleged assailants are men. In fact, 6% of men reported that they were victims of completed or attempted sexual assault during college and 4.8% reported that they were forced to penetrate another person at some point in their lives. *Id.* However, statistically speaking, the majority of sexual assault victims are women. *Id.*

3. CHRISTOPHER P. KREBS ET AL., NIJ GRANT NO. 2004-WG-BX-0070, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY, at xviii (Oct. 2007); see also CTRS. FOR DISEASE CONTROL & PREVENTION, Sexual Violence: Facts at a Glance (2012), <http://www.cdc.gov/ViolencePrevention/pdf/SV-DataSheet-a.pdf> (estimating 19%).

4. Pub. L. No. 92-318, §§ 901-07, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681-88 (2012)) (forbidding sex-based discrimination in higher education).

5. The federal government expanded the protections that Title IX affords by passing the Clery Act. Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), Pub. L. No. 101-542, §204, 104 Stat. 2381, 2885-87 (1990) (codified as amended 20 U.S.C. § 1092(f)) (2014) (mandating that universities annually report the number of crimes, including acts of sexual violence, that happen on or around their campuses to the federal government). The Clery Act also contains a Victims' Bill of Rights for of sexual assault victims on college campuses. See 20 U.S.C. § 1092(f)(8)(B).

6. Compare BONNIE S. FISCHER ET AL., U.S. DEP'T OF JUSTICE, NCJ 182369, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10 (Dec. 2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf> (reporting that 2.8% students were subject to a completed rape, an attempted rape, or both during any given academic year), with KREBS ET AL., *supra* note 3 (reporting that 20-25% of college-aged women will experience a completed or attempted sexual assault during their college education).

7. See, e.g., Jordi Gasso, *Students, Admins React to Title IX Complaint*, YALE DAILY NEWS (Apr. 4, 2011), <http://yaledailynews.com/blog/2011/04/04/students-admins-react-to-title-ix-complaint/> (commenting on the sexual assault policy at the author's school, and noting: "It's not a zero-tolerance policy, but a tolerance policy" (quoting Hannah Zeavin, Yale student)).

8. See, e.g., Emma Bogler, *Students Protest Sexual Assault Policy, Stand with Survivors at Speak-out*, COLUM. DAILY SPECTATOR, <http://columbiaspectator.com/news/2014/09/12/students-protest-sexual-assault-policy-stand-survivors-speak-out> (last updated Sept. 12, 2014, 11:37 PM); Tyler Kingkade, *Harvard Students Protest Sexual Assault Policy at Commencement (PHOTOS)*, HUFFINGTON POST, [http://www.huffingtonpost.com/2014/05/29/harvard-students-sexual-assault\\_n\\_5411614.html](http://www.huffingtonpost.com/2014/05/29/harvard-students-sexual-assault_n_5411614.html) (last updated May 29, 2014, 3:59 PM); Tyler Kingkade, *When Colleges Threaten To Punish Students Who Report Sexual Violence*, HUFFINGTON POST (July 22, 2015), [http://www.huffingtonpost.com/entry/sexual-assault-victims-punishment\\_55ada33de4b0caf721b3b61c](http://www.huffingtonpost.com/entry/sexual-assault-victims-punishment_55ada33de4b0caf721b3b61c) (reporting on students who protested a sexual assault victim's gag order); Francesca Trianni, *Columbia Student Pledges To Carry a Mattress Every Day Till Alleged Rapist Leaves Campus*, TIME

In response to this movement against the status quo, the federal government has sought to address students' concerns.<sup>9</sup> As of mid-2015, an unprecedented 124 universities are under federal investigation for how they handle claims of student sexual violence.<sup>10</sup> The federal government also responded in 2013 when Congress passed the Violence Against Women Reauthorization Act of 2013 (VAWA 2013),<sup>11</sup> which amended the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act).<sup>12</sup> The amended Clery Act contains a section on campus sexual assault that provides a detailed mandate on how colleges should prevent and respond to sexual assault on their campuses.<sup>13</sup> Some of these obligations provide a codified clarification of existing interpretation of federal laws while others establish new federal regulations.<sup>14</sup> Although VAWA 2013 demands the greatest changes colleges have needed to implement since 1972,<sup>15</sup> the U.S. Department of Education (DOE) left a huge gap in the legislation.<sup>16</sup> The final rules promul-

---

(Sept. 2, 2014), <http://time.com/3259455/columbia-student-pledges-to-carry-a-mattress-every-day-till-alleged-rapist-leaves-campus/>.

9. See *infra* notes 10–16 and accompanying text (discussing how the federal government responded by passing the Violence Against Women Reauthorization Act of 2013).

10. Tyler Kingkade, *124 Colleges, 40 School Districts Under Investigation for Handling of Sexual Assault*, HUFFINGTON POST (July 24, 2015), [http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault\\_55b19b43e4b0074ba5a40b77](http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault_55b19b43e4b0074ba5a40b77); see Tyler Kingkade, *Barnard College Joins List of 94 Colleges Under Title IX Investigations*, HUFFINGTON POST (Jan. 7, 2015), [http://www.huffingtonpost.com/2015/01/07/barnard-college-title-ix-investigations\\_n\\_6432596.html](http://www.huffingtonpost.com/2015/01/07/barnard-college-title-ix-investigations_n_6432596.html); Tyler Kingkade, *List of 94 Postsecondary Institutions That Have Pending Title IX Sexual Violence Investigations*, SCRIBD. (Jan. 7, 2015), <http://www.scribd.com/doc/251988486/List-of-94-Postsecondary-Institutions-That-Have-Pending-Title-IX-Sexual-Violence-Investigations>.

11. Pub L. No. 113-4, 127 Stat. 54 (codified as amended in scattered section of the U.S. Code).

12. Pub. L. No. 101-542, § 204, 104 Stat. 2381, 2385–87 (codified as amended at 20 U.S.C. § 1092(f) (2012)).

13. Violence Against Women Reauthorization Act of 2013 § 304 (codified as amended 20 U.S.C. § 1092(f)); see also HOGAN LOVELLS U.S. LLP, AM. COUNCIL ON EDUC., NEW REQUIREMENTS IMPOSED BY THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT 1, 1 (2014) [hereinafter NEW VAWA REQUIREMENTS], <http://www.acenet.edu/news-room/Documents/VAWA-Summary.pdf>.

14. See NEW VAWA REQUIREMENTS, *supra* note 13, at 1.

15. See Emily Crockett, *New Federal Rules Will Change the Way Colleges Handle Sexual Assault*, RH REALITY CHECK (Oct. 23, 2014, 9:51 AM), <http://rhrealitycheck.org/article/2014/10/23/new-federal-rules-will-change-way-colleges-handle-sexual-assault/> (“The final [VAWA 2013] regulations reflect the most sweeping change to federal campus sexual assault policy in 20 years, bringing significant changes to how colleges and universities prevent and respond to this serious challenge . . . .” (quoting S. Daniel Carter, Dir., 32 National Campus Safety Initiative)); Jake New, *Education Department Publishes Final Rules on Campus Crime Reporting*, INSIDE HIGHER ED (Oct. 20, 2014, 3:00 AM), <https://www.insidehighered.com/news/2014/10/20/education-department-publishes-final-rules-campus-crime-reporting>.

16. Max Lewontin, *In Rules on Campus Sexual Violence, Education Dept. Emphasizes Training*, CHRON. HIGHER EDUC. (Oct. 20, 2014), <http://chronicle.com/article/In-Rules-on-Campus-Sexual/149521/>.

gated by the DOE do not mandate a specific evidentiary standard for campus sexual assault adjudication but, rather, only require a university to establish and publish an evidentiary standard of its own choosing.<sup>17</sup>

This Comment argues that the lack of a federally codified evidentiary standard in campus sexual assault adjudication will defeat any progress made by VAWA 2013, which leaves many of the problems regarding campus sexual assault adjudication unremedied. This Comment explains why the evidentiary standard of preponderance of the evidence should be codified into the Clery Act and what consequences will likely arise without a uniform national standard for sexual assault adjudication in positive law.

Part II provides an in depth overview of Title IX, VAWA, and the Clery Act.<sup>18</sup> Part III presents an analysis as to why a preponderance of the evidence standard should be written into the Clery Act.<sup>19</sup> Part III further argues that the problems with campus sexual assault will persist, and new consequences will arise, without a federally codified evidentiary standard.<sup>20</sup> Part IV addresses the impact a national codified evidentiary standard would have on victims, the accused, and the colleges as well as the impact of failing to adopt this standard.<sup>21</sup> Part V provides a conclusion.

## II. BACKGROUND

A comprehensive discussion of the laws and cases impacting campus sexual assault adjudication is necessary before considering why a national codified evidentiary standard is an essential addition to the newly amended Clery Act.

Title IX and the case law interpreting it made campus sexual assault a form of prohibited sex discrimination in an education program.<sup>22</sup> VAWA 1994 focused the attention of the nation on the pervasive problem of gendered violence.<sup>23</sup> The Clery Act, which was amended by VAWA 2013, requires universities to respond to claims of sexual

---

17. Violence Against Women Act; Final Rule, 79 Fed. Reg. 62,772 (Oct. 20, 2014) (to be codified at 24 C.F.R. pt. 668).

18. See *infra* notes 22–111 and accompanying text.

19. See *infra* notes 112–87 and accompanying text.

20. See *infra* notes 188–239 and accompanying text.

21. See *infra* notes 240–70 and accompanying text.

22. See *infra* notes 25–66 and accompanying text (discussing the effects of sexual violence claims under Title IX).

23. See *infra* notes 69–92 and accompanying text (discussing the legislative history before VAWA 2013 and its application to sexual violence on college campuses).

assault in particular ways.<sup>24</sup> Understanding the incorporation of Title IX, VAWA 2013 and the Clery Act make up the web of laws and regulations regarding campus sexual assault. Through their enactments and subsequent amendments, a complicated jurisprudence has emerged.

### A. *Title IX of the Education Amendments of 1972*

Title IX states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.”<sup>25</sup> Regardless of how small the allotment of federal funding is or where it is allocated, universities in receipt of this funding are subject to this statute.<sup>26</sup> Title IX prohibits discrimination when federal resources are used and provides students effective protection against these discriminatory practices.<sup>27</sup> Title IX protects students from gender discrimination by conditioning a university’s receipt of federal funding on its compliance with the statute.<sup>28</sup> For example: if a school is found in violation of Title IX, the federal government can sanction the school by removing all of its federal funding.<sup>29</sup> Title IX is applied to an overwhelming majority of universities, including both public and private schools.<sup>30</sup> In fact, very few colleges decline federal funding, especially student federal financial aid; thus, Title IX virtually applies to almost all U.S. colleges.<sup>31</sup>

---

24. See *infra* notes 93–111 and accompanying text (outlining the formation, requirements, and expansion of the Clery Act).

25. 20 U.S.C. §1681(a) (2012).

26. *Id.* §1687 (defining the term “program or activity” to mean all the operations of a college, university or other postsecondary institute); *NCAA v. Smith*, 525 U.S. 459, 468 (1999) (“Entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX . . .”).

27. KLINTON W. ALEXANDER & KERN ALEXANDER, *HIGHER EDUCATION LAW: POLICY AND PERSPECTIVES* 484 (2011). For interpretation purposes, Title IX does not have an extensive legislative history because it originated as a floor amendment and had no Committee Report discussing the provision. *Bd. of Educ. v. Bell*, 456 U.S. 512, 527–29 (1982) (discussing the House and Senate debates that preceded the vote to pass Title IX).

28. See 20 U.S.C. §1682 (“[S]uch termination or refusal [of federal funding] shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding [of noncompliance] has been made, and shall be limited in its effect to the particular program, or part therefore in which noncompliance has been so found . . .”).

29. *Id.* However, this sanction has never been implemented and lawmakers argue, that it never will because as it is not realistic to impose such an extreme punishment. Stratford, *supra* note 1.

30. David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 243 (2005).

31. *Id.*

In its plain text, Title IX does not include sexual assault as a form of sex-based discrimination in the education setting.<sup>32</sup> Years after the enactment of Title IX, the U.S. Supreme Court interpreted it to include sexual harassment, which encompasses sexual assault.<sup>33</sup> In *Gebser v. Lago Vista Independent School District*,<sup>34</sup> the U.S. Supreme Court interpreted sexual harassment by a teacher as a form of sex-based discrimination under Title IX.<sup>35</sup> To establish that a school has violated Title IX, the Court ruled that the plaintiff must prove a school exhibited “deliberate indifference” to known acts of sexual harassment.<sup>36</sup> In *Davis v. Board of Education*,<sup>37</sup> the Court interpreted “deliberate indifference” to include known student to student sexual assault.<sup>38</sup> Because of these monumental decisions, a university’s handling of campus sexual assault fell under the Title IX regulations implemented by the DOE.<sup>39</sup> These regulations only provided the universities with one sentence of explanation on how they must respond to a complaint of sexual assault.<sup>40</sup>

Title IX does not expressly authorize a private remedy for a student injured by a violation of the statute, but the Court interpreted that an implied right of action exists.<sup>41</sup> The Court held that when a university violates Title IX, a student can bring a private action against her school for compensatory damages.<sup>42</sup> Although some plaintiffs have successfully pled Title IX complaints,<sup>43</sup> the burden is high for a plain-

32. Matthew R. Triplett, Note, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 496 (2012). See generally 20 U.S.C. §§ 1681–88.

33. *Davis v. Bd. of Educ.*, 526 U.S. 629, 633 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280–81, 86 (1998).

34. 524 U.S. 274.

35. *Id.* at 290–91 (holding that notice of the harassment is vital to the Title IX enforcement scheme). The Court further outlined what type of school agent must be notified trigger a Title IX. *Id.* at 290. The Court specified that “[a]n ‘appropriate person’ under § 1682 is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination.” *Id.*

36. *Id.* at 290.

37. 526 U.S. 629.

38. *Id.* at 650–51.

39. 34 C.F.R. § 106.8(b) (2000).

40. 34 C.F.R. § 106.8(b) (2015). The single sentence provided is: “A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.” *Id.*

41. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 683, 688–89 (1979).

42. *Id.* at 688–89.

43. See, e.g., *Williams v. Bd. of Regents*, 477 F.3d 1282 (11th Cir. 2007). A female student was raped by three student athletes, and she alleged that the university violated Title IX by failing to respond adequately to her complaint. *Id.* at 1288–90. The Eleventh Circuit held that she had an actionable complaint because she proved that the institution recruited the athlete who controlled most of the rape with knowledge of his history of sexual violence, failed to supervise this athlete

tiff to prove that her institution showed “deliberate indifference to the known acts” regarding a sexual assault.<sup>44</sup> Some scholars argue that fear of Title IX liability gives colleges great incentive to overzealously adjudicate accusations of sexual assault.<sup>45</sup> However, it is not easy for a student to successfully litigate a Title IX complaint because the student must show that her school: (1) “received federal funds”; (2) had adequate actual knowledge of the conduct; (3) responded to the known conduct with deliberate indifference; and (4) “deprived her of equal access to educational opportunities through its ‘clearly unreasonable’ response to ‘severe, pervasive, and objectively offensive’ harassment.”<sup>46</sup>

In his dissent in *Gebser*, Justice Stevens opined that the “actual knowledge” standard encourages universities to avoid knowledge rather than implement procedures to support victims.<sup>47</sup> The federal courts have defined an institution’s response as deliberately indifferent “‘when the defendant’s response to known discrimination is clearly unreasonable in light of the known circumstances,’ and when remedial action only follows after ‘a lengthy and unjustified delay.’”<sup>48</sup> This definition provides universities with little incentive to do more than the bare minimum when responding to claims of sexual assault.<sup>49</sup>

Needing to prove “actual knowledge” of the assault and a “deliberately indifferent” response creates a high, difficult burden for plaintiffs to establish a violation of Title IX, leaving a defendant-university with a greater likelihood to prevail on a motion to dismiss or a motion for summary judgment.<sup>50</sup> The *Davis* Court maintained the high evi-

---

while he lived in student housing, failed to adjudicate the assault in a reasonable timeframe, and did not take steps to prevent future attacks. *Id.* at 1296–97.

44. Grayson Sang Walker, Note, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 110–11 (2010).

45. See, e.g., Triplett, *supra* note 32, at 497. One report indicated that universities found the accused student responsible for sexual assault 45% of the time. Jake New, *Colleges Investigate Most Sex Assault Cases, Study Says*, INSIDE HIGHER ED (Jan. 29, 2015, 3:30 AM), <https://www.insidehighered.com/quicktakes/2015/01/29/colleges-investigate-most-sex-assault-cases-study-says> (citing HOMEPAGE, <https://www.ue.org/risk-management/higher-education-resources/> (no longer accessible)).

46. Walker, *supra* note 44, at 100 (quoting *Davis v. Bd. of Educ.*, 526 U.S. 629, 650 (1999)).

47. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 300-01, 304 (1998) (Steven, J., dissenting).

48. *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 751 (2d Cir. 2003) (citations omitted) (quoting *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 141 (2d Cir. 1999) and *Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 761 (2d Cir. 1998), respectively).

49. Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 642-43 (2009).

50. *Gallagher v. Delaney*, 139 F.3d 338, 343 (2d Cir. 1998) (discussing that the dangers in the “robust use of summary judgment to clear trial dockets are particularly acute in sex discrimination cases”), *abrogated by* *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72 (2d Cir. 2015);

dentiary bar for Title IX plaintiffs by further instructing lower courts to dismiss Title IX complaints or grant the defendant's summary judgment motion when a reasonable jury could not conclude that the school's response to the sexual violence was "clearly unreasonable."<sup>51</sup>

Because campus sexual assault is a violation of Title IX and Congress assigned the DOE's Office for Civil Rights (OCR) to regulate and enforce Title IX, OCR is charged with regulating and enforcing a university's handling of sexual assault.<sup>52</sup> The OCR publishes official regulations that provide clarifications and interpretations of statutes.<sup>53</sup> An example of these publications are the "Dear Colleague Letters."<sup>54</sup> In these letters, OCR interprets and expands on Title IX with the goal of providing university administrations a better and clearer understanding of how to comply with Title IX.<sup>55</sup> "Dear Colleague Letters" add an important layer of guidance from the OCR and the DOE to regulate enforcement of Title IX throughout universities.<sup>56</sup> Courts sometimes give high deference to the OCR's guidance letters regarding Title IX enforcement.<sup>57</sup> However, because these letters are not

---

Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 737–54 (2007) (examining multiple sex discrimination cases in which original and thought provoking arguments were never litigated because a summary judgment ruling disposed of the case); Walker, *supra* note 44, at 114.

51. *Davis v. Bd. of Educ.*, 526 U.S. 629, 649 (1999) ("In an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or directed verdict, could not identify a response as not 'clearly unreasonable' as a matter of the law.").

52. See 34 C.F.R. § 106.1 (2015). When OCR's Assistant Secretary discovers a higher education institution has "discriminated against persons on the basis of sex in an education program or activity," the institution needs to take "remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination." *Id.* § 106.3(a); see also *Title IX and Sex Discrimination*, U.S. DEP'T EDUC., [http://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) (last revised Apr. 2015).

53. See *Reading Room*, U.S. DEP'T EDUC., <http://www2.ed.gov/about/offices/list/ocr/publications.html#General> (last updated Oct. 15, 2015) (providing a list of various publications to help colleges navigate Title IX); see, e.g., U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, ASSISTANT SEC'Y OF EDUC., REVISED SEXUAL GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (Jan. 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (issuing a revised guidance letter after going through the notice and comment process).

54. See Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, to Colleagues (Apr. 4, 2011) [hereinafter Apr. 4, 2011 Dear Colleague Letter], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

55. Triplett, *supra* note 32, at 495–96.

56. *Id.* at 496.

57. See, e.g., *Biediger v. Quinnipiac Univ.*, 691 F.3d 85 (2d Cir. 2012) (affirming the district court's decision that the OCR guidance letters are entitled to substantial deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). OCR guidance letters are the agency's interpretations of any ambiguity in its own regulation, and there is no reason to think that the agency's interpretations do not reflect its "fair and considered judgment on the matter in question." *Id.* (quoting *Mullins v. City of New York*, 653 F.3d 104, 114 (2d Cir. 2011)). See generally *Chevron*, U.S.A.,

positive law, institutions are not required to universally implement their instructions.<sup>58</sup>

The Dear Colleague Letter released on April 4, 2011 has been the most discussed Title IX OCR guidance document to date and remains a major factor in the nationwide discussion of college sexual assault.<sup>59</sup> In that Dear Colleague Letter, OCR discussed a college's obligation to respond to sexual violence on its campus and suggested procedural requirements for a college's response to this type of claim.<sup>60</sup> The letter stated that schools should "[a]dopt and publish grievance procedures providing for prompt and equitable resolution of . . . sex discrimination complaints."<sup>61</sup> A university's investigation into a complaint must be "[a]dequate, reliable and impartial" and both parties have the right to present witnesses and evidence in a hearing.<sup>62</sup> The Dear Colleague Letter recommended that all administrators implementing these procedures must have sexual violence complaint training.<sup>63</sup>

Most importantly, for this Comment, the Dear Colleague Letter suggested that schools should use a preponderance of the evidence standard when adjudicating complaints.<sup>64</sup> On one side of the debate, critics argue that the Dear Colleague Letter affords too many rights for a victim and hinders the due process rights for the accused.<sup>65</sup> On the other hand, supporters of the letter think more can be done to

---

Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding that courts should defer to agency interpretations of the statutes they administer, unless the interpretations are unreasonable).

58. See NEW VAWA REQUIREMENTS, *supra* note 13, at 2 (recognizing that OCR has the authority to interpret the statute but questioning whether the guidance in a Dear Colleague Letter would withstand judicial review); Apr. 4, 2011 Dear Colleague Letter, *supra* note 54, at 1 n.1 ("This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations.").

59. Triplett, *supra* note 32, at 489–90. See generally Apr. 4, 2011 Dear Colleague Letter, *supra* note 54, at 1.

60. See Apr. 4, 2011 Dear Colleague Letter, *supra* note 54, at 2.

61. *Id.* at 6.

62. *Id.* at 9.

63. *Id.* at 12.

64. *Id.* at 11.

65. See, e.g., Peter Berkowitz, *College Rape Accusations and the Presumption of Male Guilt*, WALL ST. J., Aug. 20, 2011, <http://online.wsj.com/news/articles/SB10001424053111903596904576516232905230642> (arguing that by following the OCR's recommended preponderance of the evidence standard "universities are institutionalizing a presumption of guilt in sexual assault cases"); Anonymous, *An Open Letter to OCR*, INSIDE HIGHER ED (Oct. 28, 2011), <https://www.insidehighered.com/views/2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students> (criticizing the OCR for going "too far" in the Dear Colleague Letter); Editorial, *2011 Update to Title IX: The Pendulum Has Swung Too far*, LEGAL INTELLIGENCER (June 16, 2015), <http://www.thelegalintelligencer.com/id=1202729501268/2011-Update-to-Title-IX-The-Pendu>

protect victims and argue that schools need more clarity from the OCR to accomplish this goal.<sup>66</sup>

Title IX and its implementation is only one piece of this puzzle. The next piece of this jurisprudence, VAWA 2013, became relevant to campus sexual assault in its most recent amendment.<sup>67</sup>

### B. *The Violence Against Women Act*

In 1990, the Senate proposed the Violence Against Women Act of 1994 (VAWA 1994)<sup>68</sup> in recognition that the United States had failed to address the problems of domestic violence.<sup>69</sup> Current Vice President Joseph Biden (then a U.S. Senator from Delaware) initiated, and eventually authored, the bill by asking Congress to address the pervasive issue of violence against women.<sup>70</sup> The bill was heavily debated and faced controversy in the four years leading up to its enactment.<sup>71</sup> Finally, Congress responded to the national crisis of domestic vio-

lum-Has-Swung-Too-Far?slreturn=20150705151136 (calling the Dear Colleague Letter's new requirements for sexual assault adjudication unconstitutional).

66. See, e.g., Donna Bickford et al., *Open Letter to Anonymous*, INSIDE HIGHER ED (Nov. 8 2011), <https://www.insidehighered.com/views/2011/11/08/essay-defending-ocr-letter-colleges-and-sexual-assault> ("We would argue that the OCR guidelines, while not perfect, instead provide valuable guidance to campuses looking to support all of their students equitably.").

67. See *infra* notes 68–92 and accompanying text.

68. Pub. L. No. 103-322, § 40001, 108 Stat. 1796, 1902 (codified in part at 42 U.S.C. §§ 13701–14040 (2012)).

69. See S. REP. NO. 103-138, at 37 (1993). Several victimized women testified before Congress that too many state police officers, prosecutors, and even judges were unwilling to treat domestic abuse as an egregious crime. Brief of Senator Joseph R. Biden, Jr. as Amicus Curiae in Support of Petitioners, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), 1999 WL 1072538, at \*25. These testimonies are indicators of "the puzzling persistence" that the "public policies, laws, and attitudes" do not treat crimes against women as seriously as other violent crimes. *Id.* (quoting S. REP. NO. 102-197, at 33 (1991)). This realization led Congress to conclude that "[g]ender bias contributes to the judicial system's failure to afford the protection of the law to victims of domestic violence." *Id.* at \*25–26 (alteration in original) (quoting S. REP. NO. 103-138, at 46 (1993)).

70. *History of the Violence Against Women Act*, LEGAL MOMENTUM, <https://www.legalmomentum.org/history-vawa> (last visited Oct. 27, 2014).

71. *Id.* The most controversial provision in the act provided a private civil cause of action to all victims of gender based violence to sue their assailants for monetary damages. Civil Rights Remedies for Gender-Motivated Violence Act, Pub. L. No. 103-322, § 40302, 108 Stat. 1796, 1941 (1994) (codified as amended at 42 U.S.C. § 13981(c) (2012)). In 2012, the U.S. Supreme Court ruled that the provision allowing for a federal civil remedy for victims of sex-based crimes was unconstitutional. *United States v. Morrison*, 529 U.S. 598, 627 (2000). The Court rejected Congress's argument that because gender-motivated crimes of violence substantially affect the economy, Congress has constitutional authority to enact § 13981 under the Commerce Clause. *Id.* at 613. The Court opined that "regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce . . . [is] the province of the States." *Id.* at 618.

lence, sexual assault, and stalking and passed VAWA 1994 as part of the Violent Crime Control and Law Enforcement Act of 1994.<sup>72</sup>

VAWA 1994 strengthened the requirements regarding investigation and prosecution of sex offenses and provided a number of different services to help women who are victims of violence.<sup>73</sup> VAWA 1994 programs focus on crimes that tend to have a high risk of victimization, such as domestic violence, intimate partner violence, dating violence, sexual assault, and stalking.<sup>74</sup>

Since the original enactment of VAWA in 1994, Congress reauthorized the Act three times.<sup>75</sup> In VAWA 1994, Congress provided appropriation authorizations for the programs under the Act for a certain amount of years; therefore, to keep the Act in effect, Congress must reauthorize its funding once those years have passed.<sup>76</sup> In 2000, Congress reauthorized VAWA (VAWA 2000) through the Victims of Trafficking and Violence Protection Act.<sup>77</sup> In this reauthorization, Congress added programs to further protect battered nonimmigrants, provide transitional housing to victims, and protect elderly and disabled women.<sup>78</sup> It amended interstate stalking and domestic violence laws and mandated funds exclusively for rape prevention and education programs.<sup>79</sup> Further, victims of dating violence were finally added to VAWA 2000 protections.<sup>80</sup>

In 2005, Congress once again reauthorized VAWA through the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005).<sup>81</sup> In this reauthorization, Congress added pro-

72. See Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 42 U.S.C.).

73. LISA N. SACCO, CONG. RESEARCH SERV., R42499, *THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING 2* (2015). Services provided in the VAWA 1994 included grant programs that worked to prevent domestic violence and helped facilitate a more cooperative atmosphere among law enforcement, judicial personnel, and public and private providers pertaining to services of domestic violence victims. *Id.* at 3. Other programs assisted the investigation and prosecution of perpetrators of domestic violence and addressed the various needs of persons in specific populations (e.g., elderly, disabled, children, ethnic and racial groups, and women). *Id.*

74. See *id.* at 4; SHANNAN CATALANO ET AL., U.S. DEP'T. OF JUSTICE, NCJ 228356, *FEMALE VICTIMS OF VIOLENCE* (Sept. 2009), <http://www.bjs.gov/content/pub/pdf/fvv.pdf>.

75. See SACCO, *supra* note 73, at 9.

76. See *id.* at 10; see, e.g., Pub. L. No. 103-322, § 40121, 108 Stat. 1796, 1916 (codified at 42 U.S.C. § 3793).

77. Pub. L. No. 106-386, 114 Stat. 1464, *enacting* Violence Against Women Act of 2000, § 1001, 114 Stat. at 1491 (codified as amended in scattered sections of 42 U.S.C.).

78. See SACCO, *supra* note 73, at 9–10.

79. *Id.* at 10.

80. *Id.*

81. Pub. L. No. 109-271, 120 Stat. 750, *enacting* Violence Against Women Reauthorization Act of 2005, §§ 2–7, 120 Stat. at 751–66 (codified as amended in scattered sections of 42 U.S.C.).

grams to help victims of sexual assault and better develop the public health response to domestic violence.<sup>82</sup> VAWA 2005 reauthorization also created provisions to facilitate better cooperation between law enforcement, health professionals, and victim alliances.<sup>83</sup> It also encouraged communities to start their own initiatives to address issues regarding violence against women.<sup>84</sup>

In 2011, Congress let the authorized programs available under VAWA expire.<sup>85</sup> After the expiration, members of Congress worked to propose reauthorization bills.<sup>86</sup> In 2013, Congress reauthorized VAWA through the Violence Against Women Reauthorization Act of 2013.<sup>87</sup> Included with the various new provisions, VAWA 2013 amended the Higher Education Act of 1965 (HEA).<sup>88</sup> Additionally, VAWA 2013 included the Campus Sexual Violence Elimination Act (SaVE Act),<sup>89</sup> introduced by Senator Bob Casey,<sup>90</sup> which established mandatory provisions for colleges and universities in their prevention programs and response procedures for sexual assault and domestic and dating violence.<sup>91</sup> Universities must now follow the final VAWA

82. SACCO, *supra* note 73, at 10.

83. *Id.*

84. *Id.*

85. *Id.*; Josh Lederman, *Obama Signs Violence Against Women Act*, HUFFINGTON POST (Mar. 7, 2013, 5:12 AM), [http://www.huffingtonpost.com/2013/03/07/obama-violence-against-women-act\\_n\\_2830158.html](http://www.huffingtonpost.com/2013/03/07/obama-violence-against-women-act_n_2830158.html).

86. *Violence Against Women Act Debacle: Why Congress Should Be More Diverse*, ATLANTIC (Jan. 3, 2013), <http://www.theatlantic.com/sexes/archive/2013/01/violence-against-women-act-debacle-why-congress-should-be-more-diverse/266784/>. One bill was passed in the Senate and another was passed in the House; however, neither became law. SACCO, *supra* note 73, at 10 (citing S. 1925, 113th Cong. (2013); H.R. 4970, 113th Cong. (2013)).

87. Pub L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of 42 U.S.C.). This most recent reauthorization was not received with as much support as the 2000 and 2005 reauthorizations. SACCO, *supra* note 73, at 9. In 2000, the House passed the reauthorization of VAWA through the Victims of Trafficking and Violence Protection Act of 2000 with a 371 to 1 vote and the Senate unanimously passed the bill. *Id.* at 9 n.52. The House reauthorized VAWA 2005 with a 415 to 4 vote, and the Senate once again unanimously passed the bill. *Id.* In 2013, the House reauthorized VAWA 2013 with a 286 to 138 vote, and the Senate passed the bill with a 78 to 22 vote. *Id.*

88. 20 U.S.C. § 1092(f) (2012). This part of the HEA is referred to as the Clery Act. *See* Pub. L. No. 103-322, § 20411, 108 Stat. 1796, 1828. *See* Part II.C. for a detailed history of the Clery Act before and after VAWA 2013.

89. Pub. L. No. 101-542 §§ 201–05, 104 Stat. 2381, 2384–87 (codified as amended at 42 U.S.C. § 1092(f)).

90. Tyler Kingkade, *Campus SaVE Act Depends on Reauthorization of Violence Against Women Act*, HUFFINGTON POST, [http://www.huffingtonpost.com/2013/02/19/campus-save-act-vawa\\_n\\_2640048.html](http://www.huffingtonpost.com/2013/02/19/campus-save-act-vawa_n_2640048.html) (last updated Feb. 19, 2013, 6:30 PM).

91. *VAWA Reauthorization*, CLERY CTR., <http://clerycenter.org/article/vawa-reauthorization> (last visited Oct. 28, 2014).

2013 regulations, which were codified by an amendment to the Clery Act as described in the next Section.<sup>92</sup>

*C. The Jeanne Clery Disclosure of Campus Security Policy  
and Campus Crime Statistics Act*

After a fellow student raped and murdered Jeanne Clery in her dorm room at Lehigh University,<sup>93</sup> Congress passed the Crime Awareness and Campus Security Act of 1990,<sup>94</sup> which required universities to keep records and disclose information regarding crimes committed on and near their campuses as well as their campus security policies.<sup>95</sup> In 1992, Congress amended the Act to include the Campus Sexual Assault Victim's Bill of Rights.<sup>96</sup> The Victim's Bill of Rights provides that universities must notify a survivor of sexual assault of: (1) her right to involve law enforcement; (2) the right that the accuser and accused are to be afforded the same opportunity to have others present during any hearings; (3) the right that both parties shall be informed of the outcome of any disciplinary proceeding; (4) the right to be notified of counseling services; and (5) the right be notified of options for change of academic and living situations.<sup>97</sup> This amendment also required universities to report how they implemented ways to promote awareness and prevent sexual assault on their campuses.<sup>98</sup> In 1998, Congress further amended the law to require more information in the reporting requirements and renamed the law the "Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act."<sup>99</sup>

---

92. See 20 U.S.C. § 1092(f).

93. Joseph Shapiro, *Campus Rape Victims: A Struggle for Justice*, NPR, <http://www.npr.org/templates/story/story.php?storyId=124001493> (last updated Mar. 5, 2010, 9:11 AM) (describing the events surrounding the rape, torture, and murder of Jeanne Clery in 1986).

94. Pub. L. No. 101-542, 104 Stat. 2384 (codified as amended in scattered sections of 20 U.S.C.).

95. *Id.* § 203.

96. 20 U.S.C. § 1092(f)(8).

97. *Id.* § 1092(f)(8)(B)(iv)(I); *The Federal Campus Sexual Assault Victims' Bill of Rights*, CLERY CENTER (2012), [hereinafter "*Victims' Bill of Rights*"] <http://clerycenter.org/federal-campus-sexual-assault-victims'-bill-rights>.

98. See *Victims' Bill of Rights*, *supra* note 97.

99. See Higher Education Amendments Act of 1998, Pub. L. No. 105-244, § 486(e), 112 Stat. 1581, 1742-45 (codified as amended at 20 U.S.C. § 1092(f)). See generally *Summary of the Jeanne Clery Act*, CLERY CTR., <http://clerycenter.org/summary-jeanne-clery-act> (last visited Oct. 29, 2014) (explaining the history of the Clery Act).

On March 7, 2013, President Barack Obama signed VAWA 2013.<sup>100</sup> This reauthorization amended the Clery Act.<sup>101</sup> Because these amendments required modification of the Clery Act's regulations, the DOE was charged with promulgating new regulations through "negotiated rulemaking."<sup>102</sup>

The VAWA 2013 amendments to the Clery Act notably require institutions to compile statistics of sexual assault, dating violence, domestic violence, and stalking incidents.<sup>103</sup> The amendments also codified the requirement of various policies and procedures in responding to and adjudicating sexual assault.<sup>104</sup> The statute, in more detail than ever before, requires schools to implement programs to help build awareness and prevent sexual violence.<sup>105</sup> The major provisions oblige the colleges to provide "prompt, fair, and impartial disciplinary proceeding[s,]" which officials who are appropriately trained and do not have a "conflict of interest or bias for or against the accuser or the accused" precede over.<sup>106</sup> Both parties must be afforded the opportunity to have others present at any hearings, including an advisor of their choice, and each must receive simultaneous written notification of the proceeding's result and any available appeal procedures.<sup>107</sup> Further, the proceeding must be concluded in a "reasonably prompt timeframe."<sup>108</sup> The parties must be given "timely notice of meetings at which one or the other or both may be present[,]" and all involved, including both parties and appropriate officials, must be

---

100. NEW VAWA REQUIREMENTS, *supra* note 13, at 1; Lynn Mahaffie, *Implementation of Changes Made to the Clery Act by the Violence Against Women Reauthorization Act of 2013*, FED. STUDENT AID (May 29, 2013), <http://www.ifap.ed.gov/eannouncements/052913ImplementationofChangesMade2CleryActViolenceAgainstWomenReauthorizationAct2013.html> (announcing the DOE's process to start the negotiated rulemaking process to finalize the amendments to the Clery Act).

101. Mahaffie, *supra* note 100.

102. *Id.* Section 492 of the HEA, 20 U.S.C. § 1098a, mandates the Secretary of the DOE to involve the public in the development of proposed regulations affecting programs authorized by Title IV of the HEA. Violence Against Women Act; Proposed Rule, 79 Fed. Reg. 35,418, 35,420 (proposed June 20, 2014) (to be codified in 34 C.F.R. p. 668). After receiving the feedback and recommendations from the public, including the individuals and representatives of the institutions most affected, the Secretary must subject the proposed regulations to the negotiated rulemaking process. *Id.* If the negotiators reach a consensus on the regulations, the DOE can agree to publish, without alteration, the regulations. *Id.* However, the Secretary can reopen the process or provide written explanation to the participants explaining why the Secretary decided to depart from the agreed proposal during the negotiations. *Id.*

103. *See* Violence Against Women Act; Final Rule, 79 Fed. Reg. 62,752.

104. *Id.*

105. *See id.*

106. *See id.*

107. *Id.*

108. *Id.*

given “timely and equal access to information that will be used” during any disciplinary meeting or hearing relating to the matter.<sup>109</sup>

Despite all of these detailed changes, a universal standard of evidence for sexual assault adjudications did not appear in the finalized regulations.<sup>110</sup> The amendments only mandated that colleges disclose in their annual report that they have made a statement of a standard of evidence to be applied in sexual violence adjudication.<sup>111</sup> To fill in the gaps between Title IX and the Clery Act, Congress should codify a national preponderance of the evidence standard, which will create a more comprehensive jurisprudence and therefore provide stable, clear laws for universities, consistent rights for the accused, and a proper forum for victims to receive equitable justice.

### III. ANALYSIS

A national codified evidentiary standard for college sexual assault adjudication is necessary, or its absence will create alarming consequences for victims, the accused, and colleges. While attending college, women are at a high risk for sexual assault because of large concentrations of men and women coming into contact with one another in a variety of public and private places.<sup>112</sup> The high consumption of alcohol and other substances at social gatherings can lead to incapacitation of college women, leaving them vulnerable to victimization.<sup>113</sup> However, many sexual assaults go unreported to law enforcement or campus officials, perhaps giving campus administration the false impression that its current response efforts are adequate.<sup>114</sup>

Collectively, campus administrations’ responses to student sexual assault have been far from sufficient as indicated by the high number of colleges under investigation for mishandling the sexual assaults and the outcry from student victims.<sup>115</sup> The most recent amendments to

---

109. See Violence Against Women Act; Final Rule, 79 Fed. Reg. 62,752 (Oct. 20, 2014).

110. *Id.* at 62,772.

111. *Id.* at 62,772; see also Violence Against Women Act; Proposed Rule, 79 Fed. Reg. 34,418, 35,453–454 (proposed June 20, 2014) (to be codified in 34 C.F.R. pt. 668).

112. RANA SAMPSON, U.S. DEP’T OF JUSTICE, PROBLEM-ORIENTED GUIDES SERIES No. 17, ACQUAINTANCE RAPE OF COLLEGE STUDENTS 2 (2003), <http://www.cops.usdoj.gov/pdf/e03021472.pdf> (discussing the factors that can lead to sexual assault on college campuses).

113. KREBS ET AL., *supra* note 3, at xviii; SAMPSON, *supra* note 112, at 12; Anderson & Clement, *supra* note 1.

114. SAMPSON, *supra* note 112, at 1; SOFI SINOZICH & LYNN LANGTON, U.S. DEP’T OF JUSTICE, NCJ 248471, SPECIAL REPORT: RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013, at 9 tbl.8 (Dec. 2014), <http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> (finding that 80% of sexual assault among students goes unreported to police).

115. See *supra* note 8 and accompanying text (providing examples of students protesting the mishandling of sexual assault reports); see, e.g., Anonymous, *Dear Harvard: You Win*, HARV.

the Clery Act under VAWA 2013 are potentially the most pervasive in governing campus sexual violence because they provide the most detailed codified regulations for the prevention of and response to sexual assault to date.<sup>116</sup> However, without a national mandated standard of evidence, these regulations will not fix existing problems and will instead create negative externalities that endanger both the victim and the accused. The Dear Colleague Letter guidance did not suffice to alleviate the issues it intended to fix; otherwise, codifying most of its suggestions regarding equitable disciplinary proceedings would not be necessary in the amended Clery Act.<sup>117</sup>

This Comment is a proponent of the preponderance of the evidence standard and argues that this standard should be codified.<sup>118</sup> Preponderance of the evidence requires a finding of “more likely than not” that the sexual assault occurred.<sup>119</sup> Although it is heavily debated to its appropriateness, preponderance of the evidence provides a better safeguard for an equitable implementation of rights between the victim and the accused.<sup>120</sup> “Clear and convincing evidence” and “beyond a reasonable doubt” are inappropriate standards because neither grave liberties nor criminal consequences are at risk.<sup>121</sup> Preponderance of the evidence is used in the majority of civil cases and campus sexual assault adjudication is most similar to a civil remedy.<sup>122</sup> However, without codifying this standard on the federal level, injustice for

---

CRIMSON (Mar. 31, 2014), <http://www.thecrimson.com/article/2014/3/31/Harvard-sexual-assault/?page=single> (providing an opinion piece to Harvard, that criticizes its archaic policies and explaining that the author has not received the support needed to cope with her assailant living in her house).

116. Crockett, *supra* note 15.

117. See *Understanding the Campus SaVE Act*, KNOW YOUR IX, <http://knowyourix.org/understanding-the-campus-save-act/> (last visited Nov. 7, 2014) (describing students’ rights under the SaVE act (prior to the negotiated rulemaking) and providing some detail on how to submit a violation of ones rights under the SaVE Act).

118. See generally Apr. 4, 2011 Dear Colleague Letter, *supra* note 54, at 10–11 (explaining why schools should use a preponderance of the evidence standard).

119. Amy Chmielewski, Comment, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 162; Lavinia M. Weizel, Note, *The Process That Is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1632 (2012) (arguing for the recommended preponderance of the evidence standard).

120. See Weizel, *supra* note 119, 1645–54 (applying the balancing test introduced in *Matthews v. Eldridge*, 424 U.S. 319, at 335); Carol E. Tracy & Terry L. Fromson, *Sexual Assaults as a Civil Rights Violation Under Title IX*, LEGAL INTELLIGENCER (July 24, 2015), <http://www.thelegalintelligencer.com/home/id=1202732986928/Sexual-Assault-as-a-Civil-Rights-Violation-Under-Title-IX?mcode=1202615324341&curindex=0&slreturn=20150704120433>.

121. Tracy & Fromson, *supra* note 120.

122. *Id.*

sexual assault victims, a loss of due process rights for the accused, and confusion for universities will relentlessly continue.

This Part explains the many reasons why there is a need for Title IX or the Clery Act to have a codified standard of evidence for campus sexual assault disciplinary hearings. These reasons include: (1) the OCR's current reliance on a guidance document has not resolved the problems of sexual assault adjudication;<sup>123</sup> (2) the OCR's recommended standard of evidence does not have the affect of positive law due to how it was created by OCR;<sup>124</sup> (3) the universities do not have a strong incentive to accommodate Title IX recommendations because OCR does not implement sanctions;<sup>125</sup> and (4) the risk that universities will go too far and implement lower than then the recommended standard.<sup>126</sup>

*A. Continued Reference to OCR's Recommendation of Preponderance of the Evidence Will Not Ensure Its Universal Implementation in College Sexual Assault Adjudication*

Since 2011, the guidelines in the Dear Colleague Letter have been the reference for how colleges should handle sexual assault claims; however, colleges still fail to implement those guidelines.<sup>127</sup> Despite the four year precedent of colleges failing to abide by the guidance of OCR, the negotiated rulemaking committee decided that allowing schools to refer to the OCR's Dear Colleague Letter to establish their own standards of evidence for sexual assault adjudication would suffice.<sup>128</sup>

*1. The Problems of Campus Sexual Assault Adjudication Persisted After the OCR's Dear Colleague Letter*

Experts argue that Title IX is the most important federal statute that concerns campus sexual violence.<sup>129</sup> However, surveys have

123. See *infra* notes 129–50 and accompanying text.

124. See *infra* notes 152–87 and accompanying text.

125. See *infra* notes 190–224 and accompanying text.

126. See *infra* notes 225–39 and accompanying text.

127. See, e.g., *supra* note 10 (providing examples of universities that are under federal investigation for the way they handled student sexual violence claims).

128. See *infra* note 167 and accompanying text (discussing one senator's attempt to codify the language of the Dear Colleague Letter).

129. See, e.g., 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 (2011) (arguing that Title IX is the most important tool in protecting students from campus sexual violence).

shown that universities failed to properly follow this law.<sup>130</sup> Results from a 2014 study that surveyed 236 universities showed that “41% [of the universities] surveyed had not conducted a single sexual-assault investigation in the past five years” and 21% of the schools investigated fewer incidents than were actually reported.<sup>131</sup> Senator Clair McCaskill, a major pioneer for stronger campus sexual assault laws and the senator leading these surveys, called this a per se violation of the “black-letter law in this country.”<sup>132</sup> These surveys indicate that the current implementation of Title IX through guidance documents is not a productive method of assuring that victims receive proper advocacy from their university. Since the Dear Colleague Letter publication, the problems surrounding sexual assault adjudication have persisted and, in some instances, intensified due to the confusion of conflicting laws and guidance.<sup>133</sup> The guidelines did not change the fact that college sexual assault adjudication remains tumultuous, operating with little transparency and often leaving a complainant with regret due to her university’s inability to properly respond to or adjudicate her claim.<sup>134</sup>

The Dear Colleague Letter’s guidelines greatly influenced the proposed regulations, and the negotiated rulemaking committee codified most of the recommendations in the Clery Act.<sup>135</sup> By taking this opportunity to codify OCR’s solutions to these problems, the government acknowledged that these issues were not solved by the status quo of Title IX guidance documents because if they were, there would be no need to put them in the Clery Act. For instance, although the Dear Colleague Letter recommends that the accuser and the accused

---

130. See, e.g., Eliza Gray, *Colleges Are Breaking the Law on Sex Crimes, Report Says*, TIME (July 9, 2014), <http://time.com/2969580/claire-mccaskill-campus-sexual-assault-rape/>; Tyler Kingkade, *National Survey Finds Many Colleges Still Failing Investigating Sexual Assault*, HUFFINGTON POST, [http://www.huffingtonpost.com/2014/07/09/survey-college-sexual-assault\\_n\\_5569258.html](http://www.huffingtonpost.com/2014/07/09/survey-college-sexual-assault_n_5569258.html) (last updated July 10, 2014, 12:59 PM). Senator McCaskill, Member of the Subcommittee on Financial & Contracting Oversight, distributed surveys to 350 universities. *Id.* From the 236 responses, the subcommittee commissioned an unprecedented report. *Id.* Of the 40% of schools that fail to conduct a single sexual assault in the past five years, 6% were large public universities. *Id.* The national sampling also provided that 22% of universities gave their athletic departments oversight of sexual violence cases involving student athletes, a fact that Senator McCaskill finds “borderline outrageous.” Gray, *supra* note 130.

131. See Gray, *supra* note 130 (indicating that some schools report seven times more incidents of sexual assault than are actually investigated).

132. *Id.*

133. See Triplett, *supra* note 32, at 506–10.

134. See, e.g., Walt Bogdanich, *Reporting Rape, and Wishing She Hadn’t: How One College Handled a Sexual Assault Complaint*, N.Y. TIMES, July 12, 2014, [http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html?\\_r=1](http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html?_r=1) (telling the story of a victim’s process through a college sexual assault adjudication process).

135. See *Understanding the Campus SaVE Act*, *supra* note 117.

receive equal access to information, colleges have failed to implement this recommendation.<sup>136</sup> For example, during a sexual assault disciplinary hearing, a panel at Hobart and William Smith College questioned the complainant about a campus police report she had never seen.<sup>137</sup>

Not only have documents been withheld from a complainant, but victims have been prevented from hearing testimony. A student at the University of Toledo was forced to leave her sexual assault hearing at one point because she was considered a “witness to her own rape.”<sup>138</sup> As a witness, she could not be present for testimony other than her own because student privacy laws did not permit her access to the disciplinary records of another student.<sup>139</sup> The Dear Colleague Letter addressed this issue, clarifying that the DOE has noted that if there is a direct conflict between the requirements of student privacy laws and requirements of Title IX, such that the conflict would interfere with the enforcement of Title IX, the Title IX requirements should prevail.<sup>140</sup> This is an example of the injustice done to, and the empowerment withheld from, a victim when a university is confused about the applicable law and does not follow the recommended guidance.

---

136. See Apr. 4, 2011 Dear Colleague Letter, *supra* note 54, at 11. “Throughout a school’s Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing.” *Id.* The letter goes further to provide an example, stating:

a school should not conduct a pre-hearing meeting during which only the alleged perpetrator is present and given an opportunity to present [his] side of the story, unless a similar meeting takes place with the complainant . . . and a school should not allow the alleged perpetrator to review the complainant’s statement without also allowing the complainant to review the alleged perpetrator’s statement.

*Id.* at 11–12.

137. Bogdanich, *supra* note 134.

138. Meredith Clark, *Students File Four New Sexual Assault Complaints*, MSNBC, <http://www.msnbc.com/msnbc/students-file-four-new-sexual-assault-complaints> (last updated Sept. 3, 2014, 4:25 PM) (reporting that, after admitting to having sex without the victim’s consent, an assailant only received \$25 fine, probation, and ten hours of sexual assault education).

139. See Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g(b) (2012). This statute provides “conditions for availability of . . . educational records.” *Id.* §1232g(a). It defines “educational records” as all encompassing “records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” *Id.* §1232g(a)(4)(A).

140. See Apr. 4, 2011 Dear Colleague Letter, *supra* note 54, at 13 n.32.

Exclusion of the victim from a disciplinary hearing also occurred at the University of Notre Dame.<sup>141</sup> A victim testified to and answered questions from the panel with the assailant present, however, when it was the assailant's time to speak and to be questioned, the victim was dismissed from the hearing.<sup>142</sup> After her assailant was "not found responsible for any sexual misconduct," the student spoke out about how confusing the result was and if she had the opportunity to hear what he said, maybe she could make some sense of the decision.<sup>143</sup> The student felt that this process created a situation in which, as the victim, she had to defend herself and the perpetrator was treated as a victim of the circumstances.<sup>144</sup>

Another indication that reliance on OCR guidance fails to fully implement a proper procedure for sexual assault adjudication, including the use of the preponderance of the evidence standard, is that some schools continued to disregard this standard when adjudicating sexual violence. It took Princeton University almost three and a half years after the publication of the OCR's recommended standard to change its clear and convincing standard, a much harder standard of proof, to the recommended preponderance of the evidence standard.<sup>145</sup> This change only came after the university was found to be in violation of Title IX and the OCR requiring the university to sign a resolution agreement.<sup>146</sup> Three years after the Dear Colleague Letter and during the OCR's investigation, Harvard also finally changed its policy to in-

---

141. See, e.g., Maddy Zollo, *Define "Consent": Sexual Assault and Rape at ND*, SCHOLASTIC, Feb. 26, 2009, at 14 (describing a rape victim's story and her disappointing path through the Notre Dame disciplinary process).

142. *Id.* Although this incident happened prior to the Dear Colleague Letter, it reveals the climate of the sexual assault disciplinary hearings prior to the 2011 Title IX investigation of Notre Dame's handling of campus sexual assault cases. The disciplinary process has since changed at Notre Dame, not due to the Dear Colleague Letter but, rather, a Title IX investigation after a victim of sexual assault committed suicide after she was sexually assaulted by a Notre Dame football player and the story made national news. See *Department of Education Reaches Settlement Agreement with Notre Dame*, WNDU, [http://www.wndu.com/home/headlines/ND\\_agrees\\_to\\_changes\\_in\\_sexual\\_assault\\_responses\\_124870269.html](http://www.wndu.com/home/headlines/ND_agrees_to_changes_in_sexual_assault_responses_124870269.html) (last updated July 1, 2011, 6:33 PM). This investigation ended in a voluntary resolution by the university, which changed the majority of the procedures Notre Dame used in adjudicating sexual assault. *Civil Rights Office Announces Settlement Agreement on Discrimination Investigation at Notre Dame*, U.S. DEPT. EDUC. (July 1, 2011), <http://www.ed.gov/news/press-releases/civil-rights-office-announces-settlement-agreement-discrimination-investigation-notre-dame>.

143. See Zollo, *supra* note 142, at 16 (quoting a sexual assault victim).

144. *Id.*

145. Press Release, Princeton University Found in Violation of Title IX, Reaches Agreement with U.S. Education Department To Address, Prevent Sexual Assault and Harassment of Students (Nov. 5, 2014) [hereinafter Press Release, Princeton], <http://www.ed.gov/news/press-releases/princeton-university-found-violation-title-ix-reaches-agreement-us-education-dep>.

146. *Id.*

clude a preponderance of the evidence standard for sexual assault hearings.<sup>147</sup>

Although many universities changed their policies after the publication of the “Dear Colleague Letter,” the reluctance by others can be viewed as an indication that confusion exists as to the document’s legal force.<sup>148</sup> Two states, California and Connecticut, have taken the lead to combat any confusion regarding what standard should be used by codifying preponderance of the evidence as the legally mandated standard in university sexual assault adjudication.<sup>149</sup> These states require universities receiving state funding to comply with its laws.<sup>150</sup> Other states may follow suit by codifying preponderance of the evidence; however, federal codification would provide a more standardized process and sexual assault adjudication would not vary throughout states and universities. If colleges’ federal funding is conditioned on the abiding with Title IX and the Clery Act regulations, then the standard of evidence required in sexual assault adjudication should be universal and consistent rather than a state-by-state issue.

Without a national codified evidentiary standard, progress in sexual assault adjudication will not fully be achieved because reliance on the OCR’s Dear Colleague Letter has failed to bring about universal change in the ways universities handle sexual assault and an uneven implementation of its guidelines continues to exist five years after its publication.

## 2. *Preponderance of the Evidence is Not Currently Required by Positive Law*

Because the OCR’s Dear Colleague Letter is not positive law, it fails to legally bind colleges to use the preponderance of the evidence

147. *A New Sexual Assault Policy: Harvard Unveils University-Wide Procedures, Will Create Centralized Investigatory Office*, HARV. GAZETTE (July 2, 2014), <http://news.harvard.edu/gazette/story/2014/07/a-new-sexual-assault-policy/>.

148. See Admin, *Standard of Evidence Survey: Colleges and Universities Respond to OCR’s New Mandate*, FIRE (Oct. 28, 2011) [hereinafter *Standard of Evidence Survey*], <http://www.thefire.org/standard-of-evidence-survey-colleges-and-universities-respond-to-ocrs-new-mandate/> (listing the schools that changed their adjudication policies as of October 2011, which was six months after the Dear Colleague Letter publication).

149. See CAL. EDUC. CODE § 67386(a)(3) (West 2012) (“A policy that the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence.”); CONN. GEN. STAT. ANN. § 10a-55m(b)(5)(B) (West 2014) (“[D]isciplinary proceedings shall be conducted by an official trained annually in issues relating to sexual assault, stalking and intimate partner violence and shall use the preponderance of the evidence standard in making a determination concerning the alleged assault, stalking or violence . . .”).

150. See CAL. EDUC. CODE § 67386; CONN. GEN. STAT. ANN. §§ 10a-1, 10a-55m.

standard in adjudicating campus sexual assault cases.<sup>151</sup> When the regulations were going through the negotiated rulemaking process, the committee decided not to establish preponderance of the evidence, or any other standard, in the Clery Act.<sup>152</sup> The negotiated rulemaking committee reasoned that their exclusion of an evidentiary standard from the amended Clery Act would not affect universities' interpretations of Title IX because they would still be required to follow the OCR's guidance, particularly the Dear Colleague Letter.<sup>153</sup> However, the legal authority of the Dear Colleague Letter's recommendations is questionable and cannot be assumed.<sup>154</sup>

While the DOE and the OCR have the legal authority to interpret and enforce Title IX,<sup>155</sup> those agencies must follow the mandated procedure in the Administrative Procedure Act (APA)<sup>156</sup> and their enabling statutes to enact positive law for Title IX issues.<sup>157</sup> One of the APA's most important aspects is the notice and comment requirement, which mandates an agency to solicit and consider comments from the public on the rules it seeks to promulgate.<sup>158</sup> This process

151. See Apr. 4, 2011 Dear Colleague Letter, *supra* note 54, at 1 n.1; Michael Linhorst, *Rights Advocates Spar over Policy on Sexual Assault*, CORNELL DAILY SUN (Apr. 4, 2012, 12:00 AM), <https://wayback.archive-it.org/2566/20140829052253/http://cornellsun.com/blog/2012/04/04/rights-advocates-spar-over-policy-on-sexual-assault/> (“[The Dear Colleague Letter] is not an administrative regulation, has not been subjected to notice and comment, and thus does not have the status of law.” (quoting Professor Cynthia Bownan)).

152. Violence Against Women Act; Proposed Rule, 79 Fed. Reg. 35,418, 35,443 (proposed June 20, 2014) (codified in part at 34 C.F.R. pt. 668).

153. See *id.* at 35,443–44.

154. See Mariana Barillas, *Dem Senators: Colleges Shouldn't Wait for the Justice System When Dealing with Sexual Assault*, CAMPUS REFORM (June 6, 2015 4:19 PM), <http://www.campus-reform.org/?ID=6553> (reporting that Senator McCaskill and Senator Gillibrand stated that colleges should consider using a preponderance of evidence standard, suggesting that it is not a mandate); Eugene Volokh, *Open Letter from 16 Penn Law School Professors About Title IX and Sexual Assault Complaints*, WASH. POST, Feb. 19, 2015, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/19/open-letter-from-16-penn-law-school-professors-about-title-ix-and-sexual-assault-complaints/> (reporting on a letter from law professors questioning the legal affect of the Dear Colleague Letter); *Rights Advocates Spar over Policy on Sexual Assault*, CORNELL DAILY SUN (Apr. 4, 2012); *Standard of Evidence Survey*, *supra* note 148 (noting that the OCR's Dear Colleague Letter did not follow the APA and attempted to change the law without due process).

155. 20 U.S.C. § 1682 (2012).

156. 5 U.S.C. § 552 (2012).

157. *Id.*; see *Chevron, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (holding that the Court will defer to agency interpretations).

158. 5 U.S.C. §§ 553(b)–(d). The APA states, in pertinent part:

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. . . .

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views,

ensures that affected parties will be given the opportunity to assert any concerns regarding the regulation prior to its adoption.<sup>159</sup> The notice and comment process also helps avoid arbitrary and irrational regulations by subjecting the rules to critical input of interested parties.<sup>160</sup>

The APA indicates that statements not meant to prescribe a standard on parties, such as informal interpretations, need not be subjected to the notice and comment process;<sup>161</sup> however, the APA does not carefully distinguish what constitutes a rule that must go through this process.<sup>162</sup> Judicial interpretation indicates that if an agency's statements or documents are intended to establish a mandatory rule or standard, it is considered legislative and ought to be subjected to the notice and comment rulemaking process.<sup>163</sup>

During the negotiated rulemaking process of the new regulations under the Clery Act, the committee debated whether a standard of evidence, particularly the preponderance of the evidence standard, should be codified in the Act.<sup>164</sup> Several commenters supported codi-

---

or arguments . . . . After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. . . .

(d) The required publication or service of a substance rule shall be made not less than 30 days before its effective date . . . .

*Id.*

159. Ryan D. Ellis, Note, *Mandating Injustice: The Preponderance of the Evidence Mandate Creates a New Threat to Due Process on Campus*, 32 REV. LITIG. 65, 82–83 (2013) (arguing that the OCR's Dear Colleague Letter should be subjected to notice and comment to allow affected parties to address their concerns about new regulations).

160. *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978).

161. See 5 U.S.C. § 553(b)(A).

162. See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them To Bind the Public?*, 41 DUKE L.J. 1311, 1373 (1992) (determining whether an agency document should be considered legislative material depends on whether the agency intended the document to be binding).

163. See, e.g., *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (holding that although an agency's interpretation of a law receives judicial deference, an interpretive rule by a agency that changes prior statutory interpretation without notice and comment is not the legal norm, and the difference between an interpretive rule and a substantive rule turns on how closely the agency's interpretation is drawn linguistically to the actual language of the statute); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (holding that a policy statement does not have “a present-day binding effect,” in other words, it does not “impose any rights and obligations,” and it also “genuinely leaves the agency and its decisionmakers free to exercise discretion”) (quoting *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987)).

164. Violence Against Women Act; Final Rule, 79 Fed. Reg. 62,752, 62,772 (Oct. 20, 2014); (codified in part at 42 U.S.C. sections 13701 through 14040). See also Violence Against Women Act; Proposed Rule, 79 Fed. Reg. 35,418, 35,443 (proposed June 20, 2014) (to be codified in part at 34 C.F.R. pt. 668).

fying the preponderance of the evidence standard to ensure consistency with the OCR guidance on Title IX.<sup>165</sup> These commenters stated that codifying the standard would help diminish confusion and end disputes over what evidentiary standard should be used when adjudicating these proceedings.<sup>166</sup> Those in opposition to specifying a standard in the regulations argued that Congress considered the proposition and rejected it when debating the VAWA amendments to the Clery Act.<sup>167</sup>

Some negotiators requested a provision that would require a sexual assault disciplinary hearing to mirror the OCR's Title IX guidance, specifically referring to the use of the preponderance of the evidence standard.<sup>168</sup> In response to this, the DOE introduced language that stated universities should, "at a minimum," comply with the OCR.<sup>169</sup> The negotiators were deeply divided about this provision.<sup>170</sup> Those working toward a preponderance of the evidence standard did not like this provision because they would rather eliminate the references to guidance documents and other regulations and just codify the standard in the amended Clery Act.<sup>171</sup> Ultimately, the final regulations require an institution to publish the standard of evidence it will use during disciplinary hearings regarding allegations of sexual assault in its annual security report policy, but did not indicate a particular standard.<sup>172</sup>

The committee decided that they need not provide a standard of evidence or require a minimum compliance with the OCR guidance because Title IX is either judicially interpreted or interpreted by the

---

165. Violence Against Women Act; Final Rule, 79 Fed. Reg. at 62,772.

166. *Id.*

167. *Id.*; Patrick Leahy, Vermont Democratic Senator, made an unprecedented attempt to provide language in the VAWA 2009 reauthorization bill that would force universities to use a preponderance of the evidence standard as the burden of proof in campus disciplinary hearings for sexual assault, codifying the Dear Colleague Letter. Caroline May, *Leahy Bill Could Lower Burden of Proof for Campus Sexual Harassment*, DAILY CALLER (Oct. 27, 2011, 11:32 PM), <http://dailycaller.com/2011/10/27/leahy-bill-could-lower-burden-of-proof-for-campus-sexual-harassment/>. However, following feedback, the Senator decided to remove the language regarding the preponderance of the evidence standard. *Sen. Leahy Removes Potential Threat to Due Process from Violence Against Women Act*, FIRE (Nov. 15, 2011) [hereinafter *Sen. Leahy Removes Threat*], <http://www.thefire.org/sen-leahy-removes-potential-threat-to-due-process-from-violence-against-women-act/> (noting that the removal of this language was important for accused students' due process rights).

168. Violence Against Women Act; Proposed Rule, 79 Fed. Reg. at 35,443.

169. *Id.*

170. *Id.*

171. *Id.*

172. Violence Against Women Act; Final Rule, 79 Fed. Reg. 62,752, 62,772 (Oct. 20, 2014) (to be codified at 34 C.F.R. pt. 668).

DOE.<sup>173</sup> Further, the committee stated that the amended Clery Act provisions do not affect or conflict with Title IX or the OCR guidance documents.<sup>174</sup> While no conflict exists, the negotiated rulemaking committee missed a critical opportunity to codify a crucial element of sexual assault adjudication.

The Dear Colleague Letter was not subjected to the notice and comment rulemaking process.<sup>175</sup> The OCR justifies this procedural absence by maintaining that the letter does not impose new obligations on the universities but, rather, clarifies existing regulations.<sup>176</sup> However, since publishing the Dear Colleague Letter, the OCR has used its contents as interpretive guidance to bind parties through resolution letters.<sup>177</sup> The D.C. Circuit Court considered whether an agency deems a policy interpretation binding as a key indicator that the statement should go through the notice and comment process.<sup>178</sup> Throughout the letter, the OCR uses the words “requirements” and “obligations,” indicating that the OCR is imposing these procedures on the institutions.<sup>179</sup> The OCR claims to be clarifying and explaining the established regulation that a school must “[a]dopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.”<sup>180</sup> However, the OCR has established new, detailed requirements that greatly expand on the one sentence.<sup>181</sup> Because these new requirements are intended to be binding on colleges and require them to greatly change their procedures, the OCR should have subjected the requirements to the notice and comment process.

The current Campus Accountability and Safety Act Bill is further evidence that the Dear Colleague Letter and other Title IX guidance is not considered binding and positive law.<sup>182</sup> This bill proposes codi-

173. *Id.*

174. *Id.*

175. Ellis, *supra* note 159, at 87.

176. *See* Apr. 4, 2011 Dear Colleague Letter, *supra* note 54, at 1 n.1 (stating that the Dear Colleague Letter was only a “significant guidance document” and did “not add requirements to applicable law”).

177. *See* Press Release, Princeton, *supra* note 145 (quoting the “preponderance of the evidence” standard from the Dear Colleague Letter); Press Release, U.S Department of Education Announces Resolution of Yale University Civil Rights Investigation (June 15, 2012) [Press Release, Yale], <http://www.ed.gov/news/press-releases/us-department-education-announces-resolution-yale-university-civil-rights-invest>.

178. *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988).

179. *See* Apr. 4, 2011 Dear Colleague Letter, *supra* note 54, at 2–12.

180. *Id.* at 6; *see* 34 C.F.R. § 106.8(b) (2014).

181. *See* Apr. 4, 2011 Dear Colleague Letter, *supra* note 54, at 9–13.

182. Campus Accountability and Safety Act, S. 590, 114th Cong. (2015); Campus Accountability and Safety Act, H.R. 1310, 114th Cong. (2015).

fyng and subjecting parts of Title IX's guidance to negotiated rulemaking regarding definitions of employees that have the duty to report sexual misconduct by students.<sup>183</sup> By proposing to codify of some parts of Title IX, these members of Congress are trying to assure that the content has the full effect of the law.

By relying on guidance that has neither the force nor permanency of positive law, the committee left the recommended evidentiary standard vulnerable to being ignored and challenged by universities. Without a codified standard of evidence, a university could refuse to comply with the OCR's recommended standard, be sanctioned by losing its federal funding, and sue the OCR and the DOE for their lack of administrative rulemaking process.<sup>184</sup> Although the standard is not codified, if the OCR discovers during an investigation that a school is failing to use preponderance of the evidence, it finds the school in violation.<sup>185</sup> If a college refused to voluntarily remedy the issue, the OCR could remove its federal funding.<sup>186</sup> A college can point to the fact that a standard of evidence was not adopted in the Clery Act during the administrative process as support that the law does not require the preponderance of the evidence standard. This is a possible legal loophole for colleges to get away with not implementing OCR's recommended standard of evidence, in which case the victim, the accused, and the colleges will suffer.<sup>187</sup>

*B. The Consequences of Leaving the Evidentiary Standard of Preponderance of the Evidence Out of the Amended Clery Act*

Without a codified standard of evidence for campus sexual assault adjudication, not only will current problems persist, but new consequences will arise. One of these consequences is a lack of incentive for colleges to implement a preponderance of the evidence standard because the DOE failed to implement sanctions for violation of Title IX.<sup>188</sup> Another consequence is the potential for colleges to establish lower standards of proof when adjudicating sexual assault claims,

---

183. Scott Coffina, *Seven Things To Know About the Campus Accountability and Safety Act*, JD SUPRA (May 8, 2015), <http://www.jdsupra.com/legalnews/seven-things-to-know-about-the-campus-ac-84465/>.

184. See *Standard of Evidence Survey*, *supra* note 148.

185. See *supra* note 177 and accompanying text (discussing the OCR's mandating the preponderance of the evidence standard in a resolution).

186. See *infra* notes 190–98 and accompanying text.

187. *Id.*

188. See *infra* notes 190–212 and accompanying text (discussing that, historically, schools have had a lack of commitment to implement changes after OCR investigations).

which threatens the due process rights of the accused.<sup>189</sup> Codifying a preponderance of the evidence standard in the Clery Act will solve both of these unintended consequences.

### 1. *Lack of Incentive for Colleges To Comply with Title IX*

No university has lost federal funding due to violating Title IX.<sup>190</sup> Besides Title IX liability lawsuits, universities found in violation of Title IX are neither monetarily punished nor experience major repercussions for their actions, or lack thereof.<sup>191</sup> However, various outcomes can occur after a Title IX investigation, including: (1) dismissal of the complaint; (2) administrative closure; (3) a finding of no violation; (4) closure with change; (5) early complaint resolution; or (6) violation with enforcement.<sup>192</sup> Most complaints get dismissed.<sup>193</sup> If the complaint is not dismissed and an investigation is completed, the complaint most frequently ends with a “voluntary resolution agreement” between the school and the DOE to implement various procedures to help improve the university’s compliance and support the student environment.<sup>194</sup> When the OCR finds a university could better implement Title IX, the result is a “resolution agreement,” which outlines what the university must do to be Title IX compliant.<sup>195</sup> A major difference between some of the universities’ resolutions is the use of the word “voluntary.” If the OCR determines that a university did not comply with Title IX, OCR attempts to negotiate a voluntary

---

189. See *infra* notes 225–36 and accompanying text (discussing some of the objecting viewpoints held by some universities regarding the preponderance of the evidence standard).

190. See Stratford, *supra* note 1.

191. See, e.g., Pat Eaton-Robb, *Settlement in Title IX Lawsuit Against UConn*, CBA: CONN. (July 18, 2014, 9:52 AM), <http://connecticut.cbslocal.com/2014/07/18/settlement-in-title-ix-lawsuit-against-uconn/> (reporting a nearly \$1.3 million settlement to five women who claimed that the school responded to their sexual assault complaints with indifference); Sarah Kuta, *CU Pays \$32K To Settle Sex Assault Case That Sparked Title IX Investigation*, DAILY CAMERA (May 10, 2014, 10:00 AM), [http://www.dailycamera.com/cu-news/ci\\_25733222/cu-pays-32k-sex-assault-settlement](http://www.dailycamera.com/cu-news/ci_25733222/cu-pays-32k-sex-assault-settlement) (reporting the settlement between the University of Colorado and a student who claimed the university did not adequately respond after the school found her assailant responsible for nonconsensual sexual intercourse); Howard Pankratz, *\$2.8 Million Deal in CU Rape Case*, DENV. POST (Dec. 5, 2007, 8:53 AM), [http://www.denverpost.com/wintersports/ci\\_7640880](http://www.denverpost.com/wintersports/ci_7640880) (reporting the settlement between University of Colorado and two students who were raped by football players and recruits).

192. Matt Stroud, *Four Charts Show What Happens to Colleges Accused of Discrimination*, BLOOMBERG BUS. (Apr. 8, 2015, 1:58 PM), <http://www.bloomberg.com/news/articles/2015-04-08/four-charts-show-what-happens-to-colleges-accused-of-discrimination>.

193. *Id.*

194. See *id.*; see, e.g., Press Release, Yale, *supra* note 177.

195. See, e.g., Press Release, Princeton, *supra* note 145.

resolution agreement.<sup>196</sup> If the school and OCR come to a voluntary resolution agreement, the violations are considered remedied.<sup>197</sup> However, even when a school is found in “violation” of the statute, the DOE praises the institution’s “commitment to ensuring a community-wide culture of prevention, support, and safety for its students, staff, and community,” which belies any consequence associated with a violation.<sup>198</sup> Further, when a university refuses to negotiate a voluntary resolution agreement, the OCR provides the university with several opportunities to remedy this defiance before it initiates administrative enforcement regarding federal financial planning.<sup>199</sup>

A study released in early 2015 showed that universities do not fully implement the required changes after the DOE finishes an investigation.<sup>200</sup> This study indicated that there is a “statistically significant relationship between reported sexual assault rates and whether a school was being audited by the DoE.”<sup>201</sup> During an OCR audit of a university’s response to sexual assault complaints, the number of reported sexual assaults at the school drastically increases by 44%.<sup>202</sup> When OCR completes its audit the number of reported sexual assaults plummets back to almost identical numbers from pre-investigation, leaving no net change.<sup>203</sup> The results of this study support the suggestion that universities undercut incidents of sexual assault on their campuses.<sup>204</sup> Although this study does not pertain to what happens after a victim reports a sexual assault and a subsequent disciplinary hearing, it provides insight into what a college does after it is subject to the OCR’s scrutiny.<sup>205</sup> Further, it looks into the mentality of universities, suggesting the lack of incentive to accentuate the pervasive problem of

---

196. *OCR Complaint Processing Procedures*, U.S. DEP’T EDUC., <http://www2.ed.gov/about/offices/list/ocr/complaints-how.html> (last updated Feb. 2015).

197. *Id.*

198. *See, e.g., id.* (quoting Catherine E. Lhaman, Assistant Secretary, Office for Civil Rights).

199. *OCR Complaint Processing Procedures*, *supra* note 196.

200. Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSY. PUB. POL. & LAW 1, 7–8 (2015). The study looked at thirty-one large (at least 10,000 students) colleges and universities that had federal audits of reported crime statistics between 2001–2012. *Id.* at 3, 9 app.

201. *Id.* at 5. Audits of a university are performed periodically outside of those made in the case of a formal complaint. *Id.* at 2 n.3. The study further specified that the statistics do not change if the investigation was a routine periodic audit, as the result of a formal complaint, or when a fine or settlement is issued. *Id.* at 6.

202. *Id.* at 5.

203. Yung, *supra* note 200, at 5–6.

204. *Id.* at 5.

205. *See id.* at 6.

sexual assault on their campuses to avoid tarnishing their reputation.<sup>206</sup>

The study also argues that schools lack incentive to report crime because if their crime statistics are higher than other institutions, their enrollment numbers may drop.<sup>207</sup> Similarly, colleges may be deterred from using a preponderance of the evidence standard because it is likely to result in more disciplinary violations. If colleges release the number of students that are disciplined for sexual assault, a similar unintended effect of mandatory crime reporting may occur.<sup>208</sup> Given the choice, or, rather, fearing consequences from their choice, universities may implement a higher standard to protect their reputation.

In addition to the public relations consequences, a college's incentive to follow Title IX regulations and guidance is low. Senators McCaskill and Gillibrand lead a bipartisan group of senators in advancing legislation aimed at holding colleges more accountable for their Title IX obligations.<sup>209</sup> The proposed legislation would allow the DOE to impose a fine as high as 1% of a college's operating budget for violating any new or existing provisions of Title IX.<sup>210</sup> The Senators contend that the DOE's current ability to sanction a violating college by stripping all federal funding is unrealistic.<sup>211</sup> The bill also proposes that the fine for violating the Clery Act should be \$150,000 per violation rather than \$35,000.<sup>212</sup> However, this bill fails to provide a standard of evidence.<sup>213</sup> If the Clery Act and Title IX remain without a codified standard of evidence and this pending legislation for stricter penalties is enacted, a college without a preponderance of the

206. *See id.*

207. *Id.*; Jill Castellano, *Campus Sexual Assault Can Cost Universities Millions*, FORBES (June 18, 2015, 10:06 AM), <http://www.forbes.com/sites/jillcastellano/2015/06/18/campus-sexual-assault-can-cost-universities-millions/> (reporting on the cost of sexual assault for universities, including a drop in applicant numbers, reputational damage, litigation, penalties, and prevention).

208. *See* Kyle Feldscher, *7 Michigan State Students Dismissed Since Fall 2011 Due to Sexual Misconduct Violations, Report Shows*, MLIVE, [http://www.mlive.com/lansing-news/index.ssf/2014/12/7\\_michigan\\_state\\_students\\_dism.html](http://www.mlive.com/lansing-news/index.ssf/2014/12/7_michigan_state_students_dism.html) (last updated Dec. 9, 2014, 7:44 PM) (reporting the number of students disciplined for sexual assault at Michigan State University).

209. Stratford, *supra* note 1; *see* Campus Accountability and Safety Act, S. 590, 114th Cong. (2015) (proposing to amend the Clery Act). Another version of the bill is pending in the House of Representatives. *See* Campus Accountability and Safety Act, H.R. 1310, 114th Cong. (2015).

210. Campus Accountability and Safety Act, S. 590, §§ 2, 3(d)(1)(A), 114th Cong. (2015).

211. *See* Stratford, *supra* note 1.

212. S. 590, § 2; Adjustment of Civil Monetary Penalties for Inflation; Final Rule, 77 Fed. Reg. 60,047–48 (Oct. 2, 2012) (codified at 34 C.F.R. pt. 36) (adjusting the fine for a violation of the Clery Act to \$35,000). Further, “[t]he bill would also codify into law things that the Obama administration has already done, as its Education Department has taken a tougher line on campus sexual assault.” Stratford, *supra* note 1. This includes mandating that the DOE publish the names of the institutions under federal investigation. *Id.*

213. *Id.*

evidence standard may have an even higher incentive to legally challenge these higher fines if imposed for not having the correct standard.<sup>214</sup>

A 2015 court decision in San Diego, California may also create a national impact on the way colleges implement Title IX guidance.<sup>215</sup> In that case, the court ruled that John Doe from UC San Diego did not receive a fair hearing for a sexual assault claim.<sup>216</sup> Particularly, the court focused on Doe's right to confront and cross-examine his accuser.<sup>217</sup> Here, the university limited Doe's right to cross-examine his accuser.<sup>218</sup> The court determined that there was not enough evidence based on the hearing to expel Doe from school and vacated his penalty.<sup>219</sup>

The Dear Colleague Letter "strongly discourages" schools from allowing the accused student to cross-examine or confront the accusing student.<sup>220</sup> UC San Diego limited Doe's cross-examination of the student, likely because it felt that its procedure was in compliance with the Title IX guidance; however, while the court ultimately ruled that this made the hearing unfair.<sup>221</sup> This discrepancy of what procedures are necessary and what procedures violate the rights of the accused will create a grave lack of incentive for colleges to follow anything but positive law, including common law. This ruling is regarded as one that could have a "tremendous persuasive influence on other courts."<sup>222</sup> Although the court did not make a finding concerning the standard of evidence used in the case, universities may fear the future loss of similar litigation regarding the standard of evidence due to this precedent.

As discussed *supra*, the amended Clery Act did not subject the preponderance of the evidence standard to the same rulemaking procedure as all of the other rules.<sup>223</sup> A college could argue that

---

214. See *supra* notes 175–187 and accompanying text (arguing that the Dear Colleague Letter and other Title IX guidance are not legally binding).

215. *Ruling in Sex Assault Case: Doe vs. Roe of UC San Diego*, LA TIMES, July 10, 2015, [hereinafter *Doe*], <http://documents.latimes.com/uc-san-diego-sex-assault-case-ruling-doe-vs-regents-uc-san-diego/>; see *Doe v. Regents of the Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL, 2015 WL 4394597 (Cal. Super. Ct. San Diego Cty. July 10, 2015).

216. *Regents*, 2015 WL 4394597, \*4.

217. *Id.* at \*2.

218. *Id.*

219. *Id.* at \*5.

220. Apr. 4, 2011 Dear Colleague Letter, *supra* note 54, at 12.

221. See *Regents*, 2015 WL 4394597, at \*2.

222. Teresea Watanabe, *Ruling in Favor of UC Student Accused of Sex Assault Could Ripple Across U.S.*, LA TIMES, July 15, 2015, <http://www.latimes.com/local/education/la-me-ucsd-male-student-20150715-story.html#page=1> (quoting Amy Wax, Professor, University of Pennsylvania).

223. See *supra* notes 151–187 and accompanying text.

congressional intent and the negotiated rulemaking process kept the preponderance of the evidence standard out of the law and, therefore, should not be reason to impose a penalty on the university.<sup>224</sup>

## 2. *The Risk of Colleges Going Too Far*

Although this Comment's main focus is advocating for the codification of a standard of proof that protects victims, it is necessary to acknowledge the effect this will have on students accused of sexual assault. Since the publication of the Dear Colleague Letter, advocates for students' due process rights have been outraged by the OCR's suggestion of preponderance of the evidence as the standard of proof for sexual assault disciplinary hearings.<sup>225</sup> In 2014, Harvard lowered its standard of proof.<sup>226</sup> This change has not been well received by due process rights advocates.<sup>227</sup> In 2015, the University of Pennsylvania also changed its policy to the OCR recommended preponderance of the evidence standard and it has received similar pushback from a handful of academics.<sup>228</sup>

When a preponderance of the evidence standard entered the discussion during the drafting of VAWA 2013, due process advocates continued to object to the standard.<sup>229</sup> However, the lack of a federally codified standard could pose just as grave of a problem for those who are accused of sexual assault. Without a national codified standard, the DOE could issue another guidance document lowering the stan-

224. See *Standard of Evidence Survey*, *supra* note 148.

225. See, e.g., Berkowitz, note 65 ("Most egregiously, OCR requires universities to render judgment using a 'preponderance of the evidence' standard."); Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 59–60 (2013) (arguing that the preponderance of the evidence standard will increase convictions without regard to guilt or innocence of a student accused of sexual assault); Barclay Sutton Hendrix, Note, *A Feather on One Side, a Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 610–15 (2013) (arguing that the OCR's 2011 Dear Colleague Letter favors the accuser too much and, thus, violates the accused student's procedural due process rights).

226. Matthew Q. Clarida & Madeline R. Conway, *Univ. Announces New Sexual Assault Policy Including Central Office, 'Preponderance of the Evidence' Standard*, HARV. CRIMSON (July 3, 2014), <http://www.thecrimson.com/article/2014/7/3/new-sexual-assault-policies/>.

227. See, e.g., Opinion, *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE, Oct. 15, 2014 [hereinafter *Rethink Harvard*], <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqBM/story.html> (reprinting a statement from twenty-eight members of the Harvard Law School Faculty and advocating for Harvard to withdraw the sexual harassment policy).

228. Volokh, *supra* note 154 (reprinting a letter from sixteen Professors and objecting to the school's new sexual assault policy).

229. See, e.g., Sen. Leahy Removes Threat, *supra* note 167 (lauding the removal of the preponderance of the evidence standard from a draft of VAWA 2009).

dard to something such as substantial evidence.<sup>230</sup> While only a few courts have addressed the necessary evidentiary standard for school disciplinary proceedings, the majority of those courts have held that due process rights require, at a minimum, a substantial evidence standard of proof.<sup>231</sup> Although the OCR guidance does not affect positive law,<sup>232</sup> there are universities that would change their policies if the OCR lowered the standard, just as some did after the OCR issued the Dear Colleague Letter.<sup>233</sup> This change would bring more frequent false findings of sexual assault and, therefore, trample the rights of those accused.<sup>234</sup>

The negotiated rule committee only discussed that an institution should “at a minimum” follow the OCR guidance documents and Title IX interpretations.<sup>235</sup> Thus, without a federally codified standard, a university could take it upon itself to lower the standard used for sexual assault disciplinary hearings. Although the Dear Colleague Letter specifies a preponderance of the evidence standard, it only condemns the use of a higher standard of proof because it views the higher standard as inconsistent with Title IX.<sup>236</sup> It does not refer to a lower standard of proof in any capacity, which leaves open the question as to whether a lower standard could be equitable under Title IX.

230. See Weizel, *supra* note 119, at 1633 (arguing that although substantial evidence is the prevailing standard, a preponderance of the evidence standard is proper in sexual assault disciplinary hearings). Substantial evidence is defined as enough relevant evidence that a reasonable person would support the fact-finder’s conclusion. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The relevant evidence must do more than create a suspicion of the existence of a certain fact. *Id.*

231. See *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 625 (10th Cir. 1975) (holding that the adequacy of the procedure, along with the substantial evidence element, provides the basis and the record to assess whether the action by the university was arbitrary); *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 16 (D. Me. 2005) (stating that a student who was accused of sexually assaulting another student must not be punished except on the basis of substantial evidence); *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (holding that the decision by the university in a disciplinary hearing with expulsion or suspension on the line should be made based on substantial evidence); Lisa L. Swem, Note, *Due Process Rights in Student Disciplinary Matters*, 14 J.C. & U.L. 359, 379 (1987) (describing the substantial evidence standard in a college disciplinary hearing as “the norm” among federal courts).

232. See Apr. 4, 2011 Dear Colleague Letter, *supra* note 54, at 1 n.1.

233. See *Standard of Evidence Survey*, *supra* note 148.

234. See Weizel, *supra* note 119, at 1632 (“Higher standards of proof produce fewer erroneous conclusions that result in a false finding of guilt yet comparatively more erroneous conclusions in which a guilty person goes free.”).

235. Violence Against Women Act; Proposed Rule, 79 Fed. Reg. 35,418, 35,443 (proposed June 20, 2014) (to be codified in 34 C.F.R. pt. 668) (“With regard to the requirement that a disciplinary hearing comply at a minimum with guidance issued by OCR, some non-Federal negotiators strongly supported the provision, while others were strongly opposed to including this provision.”).

236. Apr. 4, 2011 Dear Colleague Letter, *supra* note 54, at 10–11.

Although due process rights advocates argue that a federally codified preponderance of the evidence standard would take away from accused students rights, the alternative could pose more harm. Uncertainty of a standard that would be universally used on campuses provides inconsistent due process. The same facts on two campuses could result in vastly different consequences on either campus, depending on the standard of evidence. Thus, the uniform use of a preponderance of the evidence standard would benefit the accused by standardizing a vital procedural safeguard.<sup>237</sup> This uneven implementation not only brings injustice for victims but also those accused.

While there has been a great deal of progress in the jurisprudence of campus sexual assault, there is a great deal that still needs to be accomplished. The next necessary step is codifying an evidentiary standard of preponderance of the evidence to be used in sexual assault disciplinary hearings. As Title IX, the Clery Act, and their regulations stand today, preponderance of the evidence is only suggested in a guidance document; yet, OCR enforces it as a mandated regulation. This status quo will not sustain and all parties to campus sexual assault, universities, the accused, and victims, will feel a negative impact if preponderance of the evidence is not properly codified.<sup>238</sup> Similarly, the positive impact of a codified standard on all three parties is necessary to properly respond to campus sexual assault.<sup>239</sup>

#### IV. IMPACT

Until there is a significant culture shift, sexual assault on college campuses will continue to be an issue. U.S. culture shifts and social movements lead to, and arguably are, the reason changes in the law occur.<sup>240</sup> A federally codified standard of evidence for college sexual assault adjudication in and of itself will not end the epidemic of sexual assault. However, without a codified standard, college sexual assault adjudications will continue to create confusion with regard to the appropriate standard and threaten the rights of all parties involved: the victims, the colleges, and the accused.

Without a national codified standard of evidence, universities remain vulnerable to due process lawsuits from the accused and Title IX

---

237. Weizel, *supra* note 119, at 1645.

238. See *supra* notes 240–270 and accompanying text.

239. *Id.*

240. See Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 *YALE L.J.* 2740, 2743 (2014) (arguing in the context of the Civil Rights Movement in the 1950s and 1960s, that social movements are not only critical to the change in law but also the cultural shifts that make the durable legal change possible).

violation lawsuits from the sexual assault victims. In the future, colleges may further subject themselves to lawsuits from the accused if they lower the standard of evidence, which is currently permissible under the OCR guidance.<sup>241</sup> A federally mandated evidentiary standard will assure that colleges are implementing the appropriate Title IX protections for victims and due process for the accused.

Lawsuits against universities from both victims and the accused are continuously growing in number.<sup>242</sup> Without a coherent jurisprudence from the federal government, courts will struggle to ascertain a consistent rule that will allow colleges and their students to fully understand what evidence is necessary to prove or disprove during sexual assault adjudication. Providing a federally mandated standard of evidence in the Clery Act may help to eliminate the decision a college may contemplate: by whom would it rather be sued, the victim or the accused?<sup>243</sup> Although a university may still be sued due to improper implementation of the standard if the Clery act is amended, its liability would be due to its own failure to follow the law rather than confusion between the various statutory and common laws, as well as the OCR guidance.

Although some student rights advocates condemn the lower recommended standard, a lack of codification gives OCR full discretion to lower the standard recommendation even further.<sup>244</sup> If colleges lower the standard, the rights of the accused would be greatly threatened.<sup>245</sup>

241. See Apr. 4, 2011 Dear Colleague Letter, *supra* note 54, at 10–11.

242. Jonathan Taylor, *Database: Due Process Lawsuits Against Colleges and Universities*, VOICE FOR MALE STUDENTS (June 11, 2014), <http://www.avoicemalestudents.com/list-of-lawsuits-against-colleges-and-universities-alleging-due-process-violations-in-adjudicating-sexual-assault/>; see, e.g., *Doe v. Regents of the Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL, 2015 WL 4394597, at \*2 (Cal. Super. Ct. San Diego Cty. July 10, 2015); Catherine Carlock, *Student Sues Emerson College over Alleged Sexual Assault Response*, BOS. BUS. J. (Jan. 2, 2015, 3:00 PM), <http://www.bizjournals.com/boston/news/2015/01/02/student-sues-emerson-college-over-alleged-sexual.html>; Andrew Greif, *University of Oregon and Dana Altman Sued over Alleged Sexual Assault*, OREGONIAN: OREGONLIVE, [http://www.oregonlive.com/ducks/index.ssf/2015/01/university\\_of\\_oregon\\_and\\_dana.html](http://www.oregonlive.com/ducks/index.ssf/2015/01/university_of_oregon_and_dana.html) (last updated Jan. 8, 2015, 9:31 PM); Teresa Watanabe, *UC Berkeley Sued for Allegedly Failing to Properly Respond to Sex Assault Complaints*, L.A. TIMES, (June 29, 2015 11:01 PM), <http://www.latimes.com/local/lanow/la-me-ln-berkeley-sexual-assault-20150629-story.html>; Teddy Wilson, *Jameis Winston's Accuser Files Title IX Lawsuit Against FSU*, RH REALITY CHECK (Jan. 8, 2015, 5:08 PM), <http://rhrealitycheck.org/article/2015/01/08/jameis-winstons-accuser-files-title-ix-lawsuit-fsu/>.

243. See Triplett, *supra* note 32, at 490.

244. See *supra* notes 235–37 and accompanying text (discussing the “at the minimum” requirement by the promulgated rules, which leaves the universities with discretion regarding a lower standard of evidence).

245. See *supra* notes 232–34 and accompanying text (discussing that the lowering of a standard of evidence could produce more false findings of campus sexual assault and trample the rights of the accused).

A codified standard would provide a more permanent and predictable disciplinary process for the accused.<sup>246</sup> Further, a codified standard would ensure that the OCR could not suddenly publish a guidance document that lowers the standard without going through the necessary process of amending positive law or regulations.<sup>247</sup> Codifying a preponderance of the evidence standard would likely punish more students who are accused, including those falsely accused.<sup>248</sup> As advocates against the preponderance of evidence standard argue, the lower standard may decrease the accuracy of disciplinary hearings and undermine the rights of those accused.<sup>249</sup> Because the hearing is run by administrators of university and not judges or lawyers, without any rules of evidence, a higher evidentiary standard may compensate for the lack of those due process safeguards.<sup>250</sup> However, although the rights of the accused are important, this country's history of disbelieving a victim's claim of sexual violence obliges us to prioritize the justice for those who are victimized.<sup>251</sup>

If the OCR recommended standard is not codified, the amendments to the Clery Act, the DOE's and the OCR's investigations, and the national conversation<sup>252</sup> regarding college sexual assault could potentially be enough to keep colleges using the recommended standard.<sup>253</sup> However, this new status quo would likely not endure with time.<sup>254</sup> As the OCR investigations rise against colleges, those students found responsible for sexual assault are bringing more legal challenges, not

---

246. See *supra* notes 164–66 and accompanying text (discussing the analysis during the notice and commenting process that a codified standard would help eliminate confusion implementing the sexual assault disciplinary hearings).

247. See *supra* notes 230–34 and accompanying text (discussing potential lowering of a standard evidence could produce more false findings of campus sexual assault).

248. *Id.*

249. *The Politics of Campus Sexual Assault*, FIRE (Oct. 11, 2011), <https://www.thefire.org/the-politics-of-campus-sexual-assault/>.

250. Volokh, *supra* note 154 (professors advocating for stronger due process rights); *Rethink Harvard*, *supra* note 227.

251. See Yung, *supra* note 200, at 6 (discussing a study, which highlights universities' reluctance to implement the changes required by the OCR after an investigation); notes 68–92 and accompanying text (explaining the necessity of enacting VAWA because of the pervasive history of violence against women).

252. See, e.g., *THE HUNTING GROUND* (Chain Camera Pictures 2015) (documenting the realities of college sexual assault in an exposé about colleges' administrative responses and its effect on survivors).

253. There are many schools that modified their sexual assault adjudication procedures since the publication of the Dear Colleague Letter in 2011. See *Standard of Evidence Survey*, *supra* note 148 (listing the schools who changed to a preponderance of evidence standard in the first six months after the Dear Colleague Letter).

254. Bills are being introduced that would take significant rights away from victims. Safe Campus Act of 2015, H.R. 3403, 114 Cong. (2015).

only against their schools but also against the DOE, the OCR, and even the Obama Administration.<sup>255</sup> The unprecedented 124 Title IX investigations may eventually plateau, which would cause the OCR to close investigations faster than it opens any new ones.<sup>256</sup> Without this pressure from the OCR, universities may revert back to their old ways of misunderstanding how the laws and regulations interact to provide justice for victims.<sup>257</sup> As indicated by the 2015 study, colleges' adherence to laws governing sexual assault tends to deteriorate post investigation.<sup>258</sup> Further, a bill has been introduced to the House of Representatives that would amend the Clery Act and call for a school to establish a standard of proof that the college considers appropriate for any disciplinary proceeding.<sup>259</sup> Although this bill has significant pushback from many organizations,<sup>260</sup> if it were to pass, the progress that has been accomplished for victims' rights would suffer a serious setback.

After the conversation grows quiet and the investigations close, colleges may push back against the OCR's recommended standard of evidence because, currently, it is not required in the Clery Act. Professors have begun to already publicize their disdain for schools' new policy changes.<sup>261</sup> If universities succumb to the pressure, they may raise their standard. This action may lead to Title IX complaints and investigations; however, the victims whose disciplinary hearings occur in the middle of turmoil will not receive the appropriate standard or adequate justice. Without a federally codified standard of evidence, future victims may be subject to a new OCR publication that

---

255. Nesenoff and Miltenberg, LLP, *In First-Of-Its-Kind Lawsuit, Student Athlete Wrongfully Accused of Sexual Assault Sues Obama Administration and CSU Pueblo for Violating Title IX Gender Discrimination Laws*, PR NEWSWIRE (Apr. 19, 2016), <http://www.prnewswire.com/news-releases/in-first-of-its-kind-lawsuit-student-athlete-wrongfully-accused-of-sexual-assault-sues-obama-administration-and-csu-pueblo-for-violating-title-ix-gender-discrimination-law-300253845.html> (reporting on a lawsuit that is challenging the legality of the Dear Colleague Letter and whether OCR can enforce preponderance of the evidence without having gone through the proper rule making procedure).

256. See *supra* note 10 and accompanying text (noting that 124 schools are under federal investigation for how they handle sexual violence claims).

257. See *e.g.*, Anonymous, *supra* note 115 (criticizing Harvard's archaic policies and explaining that students have been unable to receive the support they needed); Bogdanich, *supra* note 134 (reporting the story of a student who wished she had not reported her attack after going through the school's adjudication process); Zollo, *supra* note 141, at 16 (describing the story of a rape victim and her disappointing path through the Notre Dame disciplinary process).

258. See Yung, *supra* note 200, at 6 fig.6.

259. 114 H.R. 3403.

260. See Tyler Kingkade, *Fraternity Groups Push Bills To Limit College Rape Investigations*, HUFFINGTON POST (Aug. 4, 2015, 5:15 PM), [http://www.huffingtonpost.com/entry/fraternity-groups-college-rape\\_55c10396e4b0e716be074a7f](http://www.huffingtonpost.com/entry/fraternity-groups-college-rape_55c10396e4b0e716be074a7f).

261. See, *e.g.*, Volokh, *supra* note 154; *Rethink Harvard*, *supra* note 227.

raises the standard as quickly as it recommended preponderance of the evidence. A higher standard of proof would likely result in less findings of sexual assault and subsequent disciplinary measures even when it is more likely than not that a sexual assault occurred.<sup>262</sup> Victims would lose confidence in their school's ability to provide justice and keep their sexual assaults unreported, which would likely increase the unreported sexual assaults from an already staggering 80%.<sup>263</sup>

If an evidentiary standard, particularly preponderance of the evidence, for sexual assault adjudication were federally codified, victims throughout the nation would be more likely to receive a permanent, consistent standard, and justice would not vary from college to college. Providing a federal standard would allow victims to feel safer to report their claims because it gives them a sense that justice is easier to achieve than it has been in the past. Further, this standard would allow colleges to punish those responsible for sexual assault, which would, in turn, reduce the number of repeat offenders attacking other victims on college campuses.<sup>264</sup> However, problems may still arise when punishing perpetrators. Disciplining a more accurate number of perpetrators will lead to a number of those disciplined to transfer to other schools.<sup>265</sup> If a perpetrator's punishment is expulsion, it is likely that he will transfer to another school to continue his education. The government and universities must work together to address this issue of balancing students' safety and the accused's rights.<sup>266</sup>

---

262. See Weizel, *supra* note 119, at 1652–53.

263. See Sinozich, *supra* note 114.

264. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 80 (2002) (determining that two-thirds of campus rapes are committed by repeat offenders).

265. See Tyler Kingkade, *How Colleges Let Sexual Predators Slip Away to Other Schools*, HUFFINGTON POST, [http://www.huffingtonpost.com/2014/10/23/college-rape-transfer\\_n\\_6030770.html](http://www.huffingtonpost.com/2014/10/23/college-rape-transfer_n_6030770.html) (last updated Oct. 23, 2014, 10:59 AM) (illustrating how a student whose school found him responsible for sexual assault could transfer to another school without his violation noticed).

266. A bill has been proposed in the District of Columbia that would mark transcripts of students found responsible of sexual assault with a "scarlet letter" to warn other schools. Susan Svrluga, *A 'Scarlet Letter' for Students Implicated in Sex Assaults: D.C. Bill Sparks Debate*, WASH. POST, July 20, 2015, <http://www.washingtonpost.com/news/grade-point/wp/2015/07/20/a-scarlet-letter-for-students-implicated-in-sex-assaults-d-c-bill-sparks-debate/>. See generally C.B. 21-0327 (D.C. 2015) (under council review). Whether this is the answer is unclear, but it is the beginning of a debate regarding how to stop perpetrators from transferring to a different school unnoticed. See Jake New, *States Requiring Colleges To Note Sexual Assault Responsibility on Student Transcripts*, INSIDER HIGHER ED (July 10, 2015, 3:00 AM), <https://www.insidehighered.com/news/2015/07/10/states-requiring-colleges-note-sexual-assault-responsibility-student-transcripts>.

Policy makers, school administrators, police, and the public underestimate the gravity of campus sexual assault.<sup>267</sup> It is likely that the actual rate of campus sexual assault is 44% higher than what the public and the federal government believe.<sup>268</sup> A university failing to advocate for its student victims of sexual assault, whether through reporting, investigating, or disciplining, is reflective of the current pulse of the United States' mentality on rape.<sup>269</sup> The acceptance of "rape myths" and exaggerated belief in false reporting are two main causes of this widespread hostility to college sexual assault complaints.<sup>270</sup> Further recognition from Congress through a codified standard of evidence would help thwart this cultural mentality.

## V. CONCLUSION

The United States is in the middle of a major reform with regard to college sexual assault adjudication, both in the law and the cultural mentality. However, it is not clear how this reform will materialize into the law. What is clear is that the United States has not adequately and fully addressed the epidemic of college sexual assault. Without a federally codified standard of preponderance of the evidence, all parties to a sexual assault lose. With this codified standard, a victim would be assured that her complaint is being adjudicated by a standard that is consistent throughout the nation and would receive a better likelihood of justice. Colleges would be certain what standard they must use when adjudicating sexual assault without fear of legal consequences due to confusion stemming from the myriad of laws and OCR guidance. And, lastly, accused students would be assured that their college does not require a lower standard of proof, which would protect their due process rights. The benefits to colleges and the accused are crucial, however, the importance of righting the wrong of sexual assault must be at the forefront of the solution. An eighteen-year-old woman should not fear sexual assault upon entering college. Additionally, that same woman should not fear grave injustice from her college after she has been assaulted.

*Jennifer James\**

---

267. See Yung, *supra* note 200, at 7 (“[D]epending on the stage in the investigation that the sexual assault is dismissed from official counts, universities might actually be short-circuiting investigations of sexual assaults, allowing serial offenders to prey on more victims.”).

268. *Id.*

269. See *id.* at 6.

270. *Id.*

\* J.D. Candidate 2016, DePaul University College of Law; B.A. 2012, University of Notre Dame. I would like to thank the Editorial Board and Staff of Volumes 64 and 65 for all of their

hard work editing my Comment. I would also like to thank Professor Deborah Tuerkheimer for her guidance and input at the beginning of this process. Last, but certainly not least, I would like to thank my entire family. Thank you to Matthew, Alexa, Brian, Deedee, and Peter for the encouragement and confidence you gave me through this whole process. Most especially, my sister and Superman, Erin, thank you for always being there for me and cheering me on along my version of a “marathon.” And, to my parents, Dan and Jean, thank you for your constant and unwavering support, without which this Comment, and my entire education, would have been impossible.

