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# "Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual Assault

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## Introduction

The critical issues of sexual violence and sexual assault have rightfully gained greater attention at universities and colleges in our country.[1] Though these issues are not confined to university campuses, a few key reasons help explain the emphasis on sexual violence and sexual assault, as well as sexual harassment, within the higher education world. First, at many institutions of higher education, vast numbers of young adults live independently and in close proximity to one another for the first time. Second, federal law imposes reporting, response, and prevention requirements on colleges and universities that are not present in other contexts. And third, students, parents, faculty, staff, alumni, members of governing boards, members of the community, and members of the state and federal governments all appropriately expect that colleges and universities will provide a safe and secure learning and working environment.

Student activists, along with some members of the federal government, played a pivotal role in raising awareness of sexual violence and sexual assault on campuses in the years before 2010, when these issues began to attract national notice. During those years, it was clear that universities and colleges needed to make major strides in their education, prevention, and response efforts in this context. But it also became clear that universities and colleges possessed a unique opportunity to influence and even lead the broader societal changes necessary to eliminating sexual violence and sexual assault. From a procedural standpoint, higher education institutions are well positioned to improve the regulatory structures required or encouraged by federal law and policies. Such improvements will ensure victims are better served by campuses,

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1. I use the terms "colleges," "universities," "schools," "campuses," and "institutions" interchangeably throughout this essay. I likewise use the term victim and survivor interchangeably.

perpetrators are more effectively handled and sanctioned, and prevention is better implemented to make the whole campus safer. More broadly, universities and colleges, by virtue of their education and research missions and expertise, are well positioned to undertake the necessary education and research, and prevention and response actions, that leadership in this arena will require. And many universities and colleges—including the University of California—have been answering the call to do so.

These institutional efforts, however, face considerable challenges. The still evolving Department of Education (ED)[2] regulatory apparatus that surrounds campus sexual violence and sexual assault drives these institutions to devote significant resources to prescriptive compliance regimes, often at the expense of improving prevention, response, and support programs. Both by federal rule and by agency "guidance," universities and colleges are required to act as investigators and adjudicators of sexual violence and sexual assault cases, even where victims choose not to pursue criminal prosecution and do not want law enforcement involvement. At the same time, university student conduct processes may be inadequate if they end up supplanting the criminal justice system. Student conduct processes do have a role to play in addressing incidents of sexual violence and sexual assault, but they possess considerable limitations—from a lack of subpoena power to a lack of clarity over authority regarding off-campus incidents, and from restricted investigative abilities to limitations on what sanctions they can impose.

From a legal standpoint, campuses face significant obstacles. Even for law enforcement and criminal courts, investigating and adjudicating sexual violence and sexual assault cases often means grappling with the profound complexity inherent to these cases, and the difficulties that can arise are significant. The cases cover a broad continuum of conduct, from offensive statements to gang rape. And they can present harrowing questions to the campuses that must handle them.[3] How should a campus proceed when it first receives a report of an assault months after it occurred? What if the people involved have graduated? What if the incident occurred off campus but involved students enrolled at the university? What are the best steps to take when no available forensic evidence can be identified; when no corroborating physical evidence or witnesses have been found; and when no power to subpoena or compel the production of evidence exists?

2. I use the acronym "ED" to refer to the United States Department of Education throughout this essay.

3. *See, e.g.*, Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 103–17 (2015); Emily Yoffe, *The College Rape Overcorrection*, SLATE, Dec. 7, 2014, http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html; Nicole Ng and Vivian Wang, *Enough Alcohol to Call it Rape?* YALE DAILY NEWS, Nov. 7, 2014, http://yaledailynews.com/blog/2014/11/07/after-uwc-complaint-two-students-wait/.

Underlying any critique of the current processes for investigation, adjudication, and prevention shaped by federal law is the concern that we in higher education are doing right by those who have suffered sexual violence and sexual assault, and doing all that is within our power to prevent sexual violence and sexual assault from happening in the first place. Thus, vigorous prevention and response efforts are paramount. For all of us who are university leaders, the objectives are clear: combat sexual violence, sexual assault, and sexual harassment on our campuses; navigate the legal and regulatory challenges inherent to doing so; and, more broadly, foster a culture of respect, inclusion, and civility.

## I. Efforts at the University of California to Prevent and Respond to Sexual Violence and Sexual Assault

As noted in the Introduction, the issues of sexual violence and sexual assault on university and college campuses started to gain national prominence in 2010–11. As a result, when I became President of the University of California in 2013, all 10 UC campuses had programs and procedures in place, some of which were nationally recognized,[4] to combat this issue and those related to it. This was a solid start, but I felt that more could be done as a university system.

In March of 2014, I issued a new presidential policy against sexual violence and sexual harassment. It ensured UC not only complied with the new requirements of the federal Violence Against Women Reauthorization Act, but also provided the necessary support and training for UC faculty, students, and staff. Crucially, this policy also adopted an affirmative consent standard—and it did so six months before California state law required one.[5] Critics claimed, among other arguments, that affirmative consent standards are unfair to those accused of sexual violence.[6] But UC's policy language negates those claims—"consent is an affirmative, unambiguous, and conscious decision by each participant to engage in mutually agreed upon sexual activity."[7] The standard provides greater clarity for both partners than the previous "no means no" stand-

4. *See* Heather M. Karjane, Bonnie S. Fisher & Francis T. Cullen, Nat'l Inst. Of Justice, Campus Sexual Assault: How America's Institutions of Higher Education Respond 24-28 (2002), https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf (identifying University of California, Los Angeles and University of California, Santa Cruz as schools with promising practices in responding to campus sexual assault).

5. Cal. S. B. 967, Cal. Stats. 2014, ch.748, § 1, p. 4919.

6. Samantha Harris, *California 'Affirmative Consent' Bill Puts Colleges in Untenable Position,* June 2, 2014, Foundation for Individual Rights in Education, https://www.thefire.org/california-affirmative-consent-bill-puts-colleges-in-untenable-position/; Emily Yoffe, *The College Rape Overcorrection*, Slate, Dec. 7, 2014, http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html.

7. University of California Policy, *Sexual Harassment and Sexual Violence,* http://policy.ucop.edu/doc/4000385/SHSV.

ard by requiring lucid, affirmative statements or actions at each step of a sexual encounter in order to ensure consent. Put simply, only yes means yes.

This new policy was an important step forward, but the need for greater action remained. In June of 2014, I formed the University of California President's Task Force on Preventing and Responding to Sexual Violence and Sexual Assault. Its charge was to ensure that the University of California employs a fair, consistent, and effective approach to addressing sexual violence, and that the University fosters a culture of trust and safety on its campuses.

Under the direction of Senior Vice President and Chief Audit and Compliance Officer Sheryl Vacca, the Task Force reviewed all UC campus programs and practices that addressed sexual violence and sexual assault, with an eye to adopting a consistent and transparent model that could be implemented uniformly throughout all UC locations.[8]

Throughout the summer of 2014, the Task Force engaged more than 100 university students, staff, faculty, and members of the University's governing Board of Regents, and studied the best practices of more than 200 universities and colleges. In so doing, the Task Force looked to build upon current UC programs and services, fill in any gaps, and make certain that the University advanced a consistent approach to addressing sexual violence and sexual assault throughout the UC system.

In September 2014, the Task Force issued its first report, entitled "Initial Report to the President: President's Task Force on Preventing and Responding to Sexual Violence and Sexual Assault." The report contained seven specific recommendations for implementing a uniform, system-wide approach for prevention, education, and reporting and responding to cases of sexual violence. An eighth recommendation, concerning support services for accused students, was added in January 2015. The recommendations are being implemented in two phases—four were implemented in January 2015, and four will be implemented by July 2015.

These four recommendations were implemented in January 2015:

- Establishment of a consistent "response team" model on all campuses to ensure institutional responses to reported cases of sexual violence are timely and appropriate, and that all involved receive fair, objective, and equal consideration. Two response teams were identified. The first, a Case Management Team, meets biweekly to focus on active cases and assure action and communication occurs with both the victim and the respondent. The second, a Coordinated Community Review Team, consists of community as well as

8. The University of California is a unique enterprise. It consists of ten campuses, five medical centers, three affiliated national laboratories, and a state-wide agricultural and natural resources program with a presence in every county in California. It is home to 238,700 students, 135,900 staff, and 63,600 faculty members and academic appointees. It is the third largest employer in California—the most populous state in the Union—after the federal and state governments.

university members; it reviews policies and procedures and identifies processes that are working well.

- Establishment of a one-stop, confidential advocacy office on every campus. The office provides crisis intervention for complaints; guides survivors to other campus resources such as counseling and temporary housing; assists survivors in understanding their reporting options; and accompanies survivors through the reporting process if they choose to file a report. These are independent offices that are separate from reporting and investigations functions, and they report to campus senior management.
- Establishment of a system-wide website on sexual violence and sexual assault. The site provides a one-stop portal for quick access to campus resources and campus-specific programs, and shares the common terminology, response, and reporting options standardized across all UC campus sexual violence websites.
- Establishment of a comprehensive communications strategy to educate the campus community about sexual violence and sexual assault, as well as to raise awareness about UC programs.

The next four recommendations are scheduled to be implemented by July 2015:

- Mandatory training programs to educate students, staff, and faculty about prevention and response to sexual violence.
- Adoption of system-wide standards for investigation and resolution of allegations of sexual violence and sexual assault.
- Implementation of system-wide standards for data collection to track cases of sexual violence.
- Establishment of services for individuals accused of sexual violence. While campuses currently provide services to respondents, they are not consistent across the university.[9]

The Task Force will report to me and the Board of Regents in September 2015 on the implementation of the second phase of recommendations, and the performance of the recommendations that were implemented in January. Going forward, the President of the University of California will receive annual reports on the performance of the program. Periodic review and updates will occur as needed to ensure that the UC approach complies with new laws and regulations.

The goals are clarity and uniformity. The idea is to be proactive—not reactive. Throughout the University of California, the rules must be clear, uniform, and understandable, and access to resources for students, staff, and faculty must be readily and easily available. To that end, prevention and response efforts to sexual violence and sexual assault can be seen as communications and cultural

9. This is the eighth recommendation that was added in January 2015.

challenges, and not just legal ones. But make no mistake—the legal landscape presents its own set of challenges and opportunities for improvement.

## II. The Legal Landscape Governing Colleges and Universities' Response to Sexual Violence and Sexual Assault on Campus

UC's work to develop best practices and policies for all areas of sexual violence prevention, response, and investigation has occurred against the backdrop of a complex regulatory scheme. Throughout the last four years, institutions of higher education have seen an explosion in new requirements imposed by the Department of Education, Congress, and state legislatures.[10] Brave student survivors must be credited for bringing the issue to the forefront, garnering national attention for the problem and prompting the federal government to act. While these new regulatory requirements are driven by the important goals of ending sexual violence and improving how colleges respond to such incidents, and have been key to ensuring that colleges and universities do much more to prevent and respond to sexual violence on campus, it is not yet clear that current compliance mandates are fully furthering those objectives.

Two separate federal laws, both enforced by the Department of Education, regulate campuses' handling and reporting of sexual violence cases. Title IX of the Education Amendments of 1972, as amended, prohibits sex discrimination in federally funded education programs and activities.[11] Sexual harassment, including in its most extreme form sexual violence, is a form of prohibited sex discrimination under Title IX. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (the "Clery Act") requires institutions to compile and disclose certain crime statistics and crime prevention and safety policies, including those relating to sexual assault.[12]

### *A. Title IX*

10. Many state legislatures have responded to the increased awareness of sexual violence on campus by enacting or proposing state laws with various requirements. David Crary, *Problems Arise for State Efforts to Curb Campus Sex Assaults*, U.S. News, Mar. 6, 2015, http://www.usnews.com/news/us/articles/2015/03/06/problems-arise-for-state-efforts-to-curb-campus-sex-assaults. For example, in 2014, California passed an affirmative consent law and a law requiring the immediate reporting of sexual assault and other violent crimes to local law enforcement. *See* Cal. S. B. 967, Cal. Stats. 2014, ch. 748, § 1, p. 4919, and Cal. A. B. 1433, Cal. Stats. 2014, ch. 798, § 1, p. 5339. These state laws add yet another layer of compliance complexity for universities, but a discussion of them is beyond the scope of this essay.

11. 20 U.S.C. §§ 1681 et seq. (2012); 34 C.F.R. pt. 106 (2014).

12. 20 U.S.C. § 1092(f) (2012).

Title IX does not explicitly reference sexual harassment or sexual assault, but it has been interpreted to prohibit both.[13] The Department of Education's Office for Civil Rights ("OCR"), which is the office primarily responsible for enforcing Title IX, issued administrative guidance in 1997 that identified sexual harassment as a form of sex discrimination.[14] The 1997 guidance noted that schools could be responsible for violations of Title IX based on the conduct of other students.[15] The U.S. Supreme Court subsequently has confirmed this interpretation of Title IX and outlined the appropriate standards for determining when a school is liable for money damages in a private lawsuit brought by or on behalf of a student who has been sexually harassed.[16] The Court held that a school must act with "deliberate indifference to known acts of harassment in its programs or activities" where the harassment is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[17]

OCR issued revised guidance in 2001, emphasizing that "preventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn."[18] OCR distinguished the legal standard for administrative enforcement from the standard adopted by the Court for private causes of action for damages. Rather than actual knowledge of sexual harassment, OCR requires only that a school knew or should have known of the harassment.[19] A school obtains knowledge through its "responsible employee[s]," which OCR defines broadly as any employee who "has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility."[20]

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13. 20 U.S.C. § 1681 (2012) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.").

14. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (1997), http://www2.ed.gov/about/offices/list/ocr/docs/ sexhar01.html.

15. *Id.*

16. Davis v. Monroe County Bd. of Educ., 526 U.S. 629; Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

17. *Davis*, 526 U.S. at 633.

18. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES ii (2001) [hereinafter REVISED GUIDANCE], http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

19. *Id.* at 12.

20. *Id.* at 13, 33 n. 74.

Ten years later, in April 2011, OCR issued its first guidance document specifically addressing sexual violence as a form of sexual harassment and discrimination.[21] Commonly referred to as the "Dear Colleague Letter," OCR identified it as a "significant guidance document"[22] for educational institutions. The April 2011 Dear Colleague Letter outlined schools' independent responsibilities under Title IX to investigate and address sexual violence, regardless of whether law enforcement is also conducting a criminal investigation. It established the preponderance of the evidence standard for grievance and disciplinary proceedings. The Dear Colleague letter reemphasized the importance of having a Title IX Coordinator designated to coordinate compliance on campus, and defined the components of a grievance procedure for addressing complaints within reasonably prompt timeframes, as well as steps schools should take to prevent and remediate the effects of sexual harassment and sexual violence.[23]

The April 2011 Dear Colleague Letter generated significant compliance questions for campuses. Three years later, having received many requests for technical assistance from schools attempting to comply, OCR issued another significant guidance document.[24] On April 29, 2014—the same day President Obama's White House Task Force to Protect Students from Sexual Assault issued its first "Not Alone" Report[25]—OCR issued a set of Questions and Answers on Title IX and Sexual Violence. The April 2014 guidance provides detailed information not only about the procedures and policies schools should have in place to investigate and address complaints, but also about proactive efforts schools are expected to take in the areas of preventive training and education.

Unfortunately, OCR neglected to provide notice or an opportunity for comment in advance of issuing either the Dear Colleague Letter or the April 2014 Questions and Answers guidance regarding Title IX and sexual violence, even though both documents clearly imposed new mandates on schools.[26]

21. Russlynn Ali, *Dear Colleague Letter*, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS (Apr. 4, 2011) [hereinafter *Dear Colleague Letter*], http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

22. Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

23. *Dear Colleague Letter*, *supra* note 21.

24. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

25. WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT (Apr. 29, 2014), https://www.notalone.gov/assets/report.pdf.

26. In fact, OCR only allowed notice and comment for the 2001 Revised Guidance; all other guidance related to sexual harassment and sexual violence has not been open for comment. Halley, *supra* note 3. *See also* TASK FORCE ON FED. REGULATION

Campuses facing these new mandates had no opportunity to provide feedback for the Department of Education's consideration prior to the issuance of the guidance documents and were left with significant uncertainty and confusion about how to appropriately comply after they were implemented.[27]

While the Dear Colleague Letter and the 2014 Questions and Answers documents were being issued, OCR's enforcement efforts on campuses increased. OCR enforces Title IX through compliance reviews and investigation of complaints submitted to OCR. If OCR believes a campus has not taken appropriate measures to address sexual violence, it "may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation."[28] In May 2013, OCR and the Department of Justice published their joint resolution agreement with the University of Montana.[29] The agencies publicized the agreement as a "blueprint" for compliance with Title IX.[30] The Montana Resolution Agreement contained requirements not addressed in the 2011 Dear Colleague Letter, however, causing additional confusion for colleges and universities regarding OCR's expectations.[31]

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OF HIGHER EDUC., RECALIBRATING REGULATION OF COLLEGES AND UNIVERSITIES 14 (Feb. 12, 2015), http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf.

27. The Task Force on Federal Regulation of Higher Education specifically identified these guidance documents as an example of overly complex regulation of institutions of higher education. Specifically, their report stated, "In at least one case, a guidance document meant to clarify uncertainty only led to more confusion. A 2011 'Dear Colleague' letter on Title IX responsibilities regarding sexual harassment contained complex mandates and raised a number of questions for institutions. As a result, the Department was compelled to issue further guidance clarifying its letter. This took the form of a 53-page 'Questions and Answers' document that took three years to complete. Still, that guidance has raised further questions. Complexity begets more complexity." TASK FORCE ON FED. REGULATION OF HIGHER EDUC., *supra* note 26, at 12.

28. *Dear Colleague Letter*, *supra* note 20, at 16. OCR's authority to enforce Title IX derives from schools' agreement to comply with Title IX to receive federal funds. REVISED GUIDANCE, *supra* note 18, at 3.

29. University of Montana-Missoula Resolution Agreement, DOJ Case No. DJ 169-44-9 (Dep't of Justice May 9, 2013) [hereinafter Montana Resolution Agreement], http://www.justice.gov/crt/about/edu/documents/ montanaagree.pdf; Letter of Findings from U.S. Dep't of Justice & Dep't of Educ. to President Royce Engstrom and Lucy France, Esq., The University of Montana, DOJ Case No. DJ 169-44-9, at 2 (Dep't of Justice May 9, 2013) [hereinafter Montana Findings Letter], http://www2.ed.gov/documents/press-releases/montana-missoula-letter.pdf.

30. Roy L. Austin Jr., Deputy Assistant Attorney General, Civil Rights Division, Speech at the Press Conference on the Agreements with the University of Montana (May 9, 2013), http://www.justice.gov/crt/opa/pr/speeches/2013/ crt-speech-130509.html.

31. For example, the agencies' letter states that interim measures that should be taken may include "taking disciplinary action against the harasser" before the resolution

In May 2014, OCR for the first time published a list on its website of all schools under investigation "for possible violations of federal law over the handling of sexual violence and harassment complaints."[32] The number has grown from 55, to 85 in October 2014,[33] to more than 100 as of March 2015.[34] Yet, OCR investigations often take years to complete, leaving institutions under a cloud of suspicion and in limbo regarding the legal sufficiency of their policies and practices.

The University of California has experienced the challenges presented by these enforcement delays. In May 2013, UC Berkeley learned through media reports that a Clery Act complaint had been filed with the Department of Education concerning the campus' handling of sexual assault complaints.[35] Several months later, the campus learned that the complainants also filed a Title IX complaint with OCR.[36] OCR initiated its Title IX investigation in March 2014. In the meantime, in October 2013, the California State Auditor had initiated an investigation of sexual harassment and sexual violence at the campus.[37] Three

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of the complaint. Montana Findings Letter, *supra* note 29, at 6. Regarding employees' responsibility to report incidents of sexual harassment or sexual violence to the appropriate administrators, the Montana agreement expands the concept of responsible employee by imposing reporting requirements on all university employees not "statutorily prohibited from reporting." Montana Resolution Agreement, *supra* note 29, at 4.

32. Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations.

33. Nick Anderson, *Tally of Federal Probes of Colleges on Sexual Violence Grows 50 Percent Since May,* WASH. POST, Oct.19, 2014, http://www.washingtonpost.com/local/education/tally-of-federal-probes-of-colleges-on-sexual-violence-grows-50-percent-since-may/2014/10/19/b253f02e-54aa-11e4-809b-8cc0a295c773_story. html.

34. Nick Anderson, *Schools Facing Investigation on Sexual Violence: Now More Than 100*, WASH. POST, March 4, 2015, http://www.washingtonpost.com/news/grade-point/ wp/2015/03/04/schools-facing-investigations-on-sexual-violence-now-more-than -100/.

35. Dalina Castellanos, *Complaints Filed Against USC, UC Berkeley Over Rape Reporting,* L.A. TIMES, May 22, 2013, http://articles.latimes.com/2013/may/22/local/la-me-0523-college-rape-20130523; Andrea Guzman, *Students File Charges Against Campus Alleging Mishandling of Sexual Assaults*, THE DAILY CALIFORNIAN, May 23, 2013, http://www.dailycal.org/2013/05/23/sexual-assault/.

36. Tyler Kingkade, *UC-Berkeley Faces New Complaints That It Failed Sexual Assault Survivors* (Feb. 26, 2014) THE HUFFINGTON POST, http://www.huffingtonpost .com/2014/02/26/uc-berkeley-rape-students-complaint_n_4855816.html.

37. CALIFORNIA STATE AUDITOR, REPORT 2013–124, SEXUAL HARASSMENT AND SEXUAL VIOLENCE: CALIFORNIA UNIVERSITIES MUST BETTER PROTECT STUDENTS BY DOING

months after OCR began its review, in June 2014, the Department of Education's Office of Federal Financial Aid initiated a Clery Act compliance audit.

Thus, in less than two years, UC Berkeley experienced three separate and comprehensive investigations of its Title IX and Clery practices related to sexual violence—two of them from different branches of the same federal agency. It has gathered and provided thousands of pages of documents, and devoted hundreds if not thousands of staff hours to responding to these investigations. From a practical perspective, the same people called upon in overlapping investigations are the same ones responsible for leading campus efforts to prevent sexual violence and address student complaints. Much of the time and effort spent looking backwards at years of data and information is time and effort lost to serving the ongoing needs of student survivors.

### *B. The Clery Act*

Standing alone, OCR's guidance regarding sexual violence is detailed and complex. That complexity is compounded when factoring in campuses' obligations under the Clery Act.[38] The Clery Act requires campuses to track and disclose sexual assaults and other violent crimes that are reported on college campuses. Congress initially passed the Clery Act in 1991 in response to the rape and murder of Jeanne Clery, a student at Lehigh University. Campuses must report certain crime statistics and establish and share information about their safety and security policies in an Annual Security Report so that prospective students and their families can make informed decisions about the safety of individual campuses.[39]

Under the Clery Act, any "campus security authority" must report data on crimes reported to campus security authorities or local police if they occurred in areas on and around campus.[40] A campus security authority is a campus police or security department, other individuals responsible for campus security, officials with significant responsibility for student and campus activities, and

MORE TO PREVENT, RESPOND TO, AND RESOLVE INCIDENTS (Jun. 2014), https://www.auditor.ca.gov/pdfs/reports/2013-124.pdf.

38. 20 U.S.C. § 1092(f) (2012). *See, e.g.*, Bonnie S. Fisher et al., *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 STETSON L. REV. 61, 86 (2002) (noting the difficulties of institutional compliance); Dennis E. Gregory & Steven M. Janosik, *Research on the Clery Act and Crime Reporting: Its Impact on the Literature and Administrative Practice in Higher Education*, *in* CAMPUS CRIME 46, 56 (Bonnie S. Fisher & John J. Sloan III eds., 3rd ed. 2013).

39. 20 U.S.C. §§ 1092(f)(1)–(15).

40. 20 U.S.C. § 1092(f)(6). A description of Clery geography may be found in U.S. DEP'T OF EDUC., HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 11–31 (Feb. 2011), https://www2.ed.gov.admins/lead/safety/handbook.pdf.

persons otherwise designated as campus security authorities.[41] Both forcible and non-forcible sex offenses are among the crimes that must be reported.[42]

The Violence Against Women Reauthorization Act (VAWA), passed in 2013 and effective March 2014, contained a new provision, the Campus Sexual Violence Elimination Act (Campus SaVE Act or the Act), that amended the Clery Act to add new crime reporting requirements specifically relating to sexual assault, domestic violence, dating violence, and stalking. As a result, campuses already devoting significant efforts to responding to OCR guidance were now obligated to implement the amendments to the Clery Act that added new requirements related to sexual assault prevention and response.[43]

The Campus SaVE Act added more requirements for campuses to publish specific policy statements in their Annual Security Report about how they train incoming students and employees, as well as how they conduct administrative investigations and address complaints of sexual violence. The Act requires that the applicable disciplinary policy identify the standard of evidence that will be used, but does not specify what the standard should be. Congress' decision not to mandate use of a particular standard, despite the 2011 Dear Colleague Letter's adoption of the preponderance of the evidence standard, has led to considerable confusion about what standard universities must or may use.[44] The Act also requires that campuses provide written notification to victims about resources available both on and off campus that can provide support after they come forward to report an incident of sexual violence, about their options to file a report (or not file a report) with campus or local police, and about their rights to obtain protective orders both on campus and through the criminal and civil courts.[45]

### *C. Federal Expectations of Campus Responsibility for Investigation and Adjudication of Sexual Violence Cases*

The significance of the new legal requirements under Title IX and the Clery Act is that college campuses are being asked to serve in multiple roles—responsible for the prevention, investigation, and adjudication of sexual harassment and sexual violence. But the federal government's expectations, especially related to investigations and adjudication, seem better-suited to a law en-

41. HANDBOOK FOR CAMPUS SAFETY, *supra* note 40, at 73-76.

42. 20 U.S.C. § 1092(f)(1)(F)(i)(II).

43. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89–92 (2013).

44. *See* Susan Hanley Duncan, *The Devil is in the Details: Will the Campus SaVE Act Provide More or Less Protection to Victims of Campus Assaults?* 40 J. C. & U. L. 443, 453 (2014); Rachel Marshall, *Will It Really SaVE You? Analyzing the Campus Sexual Violence Elimination Act*, 6 LEGIS. AND POL'Y BRIEF 271 (2014).

45. *See* Violence Against Women Reauthorization Act § 304.

forcement model rather than the complex, diversely populated academic community found on a modern American campus.

For example, OCR's guidance regarding the duty of universities to investigate incidents raises many practical questions for campus investigators. The 2011 Dear Colleague Letter and the 2014 Questions and Answers document place strong emphasis on a victim's ability to control the process by requesting confidentiality or requesting that an investigation not be pursued. Yet paradoxically, OCR also states that campuses must still investigate a complaint even when a complainant does not want an investigation, which is inconsistent with respecting the complainant's request not to pursue an investigation.[46] Campuses must notify victims of their various reporting options, but they cannot require a victim to report the crime to law enforcement and cannot unreasonably delay an investigation to accommodate a law enforcement investigation.[47] Campuses also must process a complaint "in accordance with its established procedures" even if the conduct occurred off campus and not in connection with a program or activity of the campus.[48]

OCR's stance raises many questions about the role of the campus investigator in these situations, particularly when the victim does not want law enforcement involved. How is the campus investigator expected to collect, maintain, and preserve evidence at the scene? How does the investigator compel the production of evidence? What if the police believe that the campus investigation will jeopardize their criminal case?[49] Should there be any recognition of an accused student's rights against self-incrimination in the administrative investigation?

Moreover, administrative investigators lack many of the tools necessary to meet the heightened expectations placed on them by these new regulatory requirements. For example, administrators have neither subpoena power nor the authority to issue search warrants.

Similarly, in the area of adjudication, universities are struggling to ensure their student conduct processes, which have traditionally been viewed as educational and remedial in nature, adapt to regulatory expectations that are directed to a punitive model. One controversial aspect of the 2011 Dear Colleague Letter is its requirement that campuses use the preponderance of the evidence standard when adjudicating sexual violence and sexual harassment cases.

Proponents of the preponderance of the evidence standard say it provides a necessary victim-centered approach to adjudication by giving equal weight to

46. *Dear Colleague Letter*, *supra* note 21, at 5.

47. *Id.* at 10; QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE, *supra* note 24, at 27–28.

48. *Dear Colleague Letter*, *supra* note 21, at 4

49. NAT'L CTR. FOR CAMPUS PUB. SAFETY, ET AL., PRACTITIONERS' DISCUSSION OF IMPLEMENTING CLERY/TITLE IX, REPORT ON THE SUMMIT 12 (Aug. 2014), http://www.nccpsafety.org/assets/files/library/Title_IX_White_Paper.pdf.

the credibility of the complainant and the accused.[50] Critics decry the preponderance of the evidence mandate and other victim-friendly procedural requirements as violating the due process rights of those who are accused.[51] Faculty members of the law schools at Harvard University[52] and the University of Pennsylvania[53] have published open letters raising concerns that the burden of proof standard is fundamentally unfair to those accused of sexual violence. Not surprisingly, accused students are bringing reverse Title IX lawsuits contending that the victim-centered approach to adjudication comes at the expense of their rights.[54] And standing in the middle of these important but competing interests are institutions looking for ways to provide a process that is supportive and fair to both victims and those who are accused.

To address OCR's expectation that colleges will handle sexual violence investigations and adjudications in parallel with, or instead of, law enforcement investigations, many institutions are hiring employees or outside consultants with legal and law enforcement backgrounds to ensure that investigations are being performed with appropriate expertise. Similarly, student conduct panels or hearing officers need specialized training and expertise to decide these cases. A cottage industry is being created where law and consulting firms are selling these services so that institutions can attempt to meet ambiguous legal requirements. Colleges and universities are devoting significant resources to setting up new systems to respond to incidents of sexual violence.

Are these roles that are well suited for our nation's institutions of higher education? Survivors are choosing not to report to law enforcement because of their lack of faith and confidence in the criminal justice system. If that is the case, it can be argued that rather than pushing institutions to become surrogates for the criminal justice system, more work should be done to improve that sys-

50. *See, e.g.*, Nancy Chi Cantalupo, *Decriminalizing Campus' Institutional Responses to Peer Sexual Violence*, 38 J. C. & U. L. 483 (2012).

51. *See, e.g.*, Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49 (2013).

52. *See Rethink Harvard's Sexual Harassment Policy*, Letter to the Editor, BOSTON GLOBE, Oct. 15, 2015, http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html.

53. *See* Open Letter from Sixteen Members of the Penn Law School Faculty (February 17, 2014), 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/ ("Although we appreciate the efforts by Penn and other universities to implement fair procedures, particularly in light of the financial sanctions threatened by OCR, we believe that OCR's approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness.").

54. Teresa Watanabe, *More College Men are Fighting Back Against Sexual Misconduct Cases*, L.A. TIMES, June 7, 2014, http://www.latimes.com/local/la-me-sexual-assault-legal-20140608-story.html#page=1.

tem's handling and prosecution of sexual assault cases. Law enforcement has the tools to effectively investigate these crimes. The criminal justice process has the authority to impose serious punishments on offenders, including incarceration. The most serious sanction that a college can impose is dismissal, which is wholly inadequate where a crime has been committed. Having law enforcement conduct investigations ensures, if properly done, that effective investigations will be conducted and that there will be appropriate punishments that have a strong deterrent effect, all to the ultimate benefit of the survivors and the safety of the university community as a whole.

## III. A Need For Partnership

My critique of the current regulatory apparatus relating to sexual violence, sexual assault, and sexual harassment on campus by no means suggests that government oversight and enforcement is not important or necessary, or that it has not been beneficial. Without question, courageous student activists and increased government focus on campus responses to sexual violence have created real momentum for positive change. It has generated a national conversation about sexual assault on campus, what more can be done to prevent it, and how to best remedy its effects. Compliance requirements and external attention from survivors' groups, legislators, and the media, have required institutions to look deeply at what they are doing and how they can improve, and to devote more resources to addressing the problem.

But are these resources being deployed in the most appropriate way? And are they being directed toward measures that truly will be effective in reducing sexual violence on campus? Institutional resources directed at deciphering and responding to complex and sometimes contradictory regulatory requirements are resources that have been diverted away from developing and providing truly effective prevention and response programs. If we want to end sexual violence on campus, this is where we must concentrate our best efforts.

There are several steps the federal government can take to help advance this vital cause. First, in partnership with colleges and universities, the federal government should direct additional efforts and resources toward the discovery and dissemination of evidence-based best practices for prevention, education, investigation, and adjudication. For example, the DOJ's Office of Justice Programs has established a grant program to provide funding for research to better understand current practices in campus investigation and adjudication of student sexual assault cases. This is a step in the right direction and should give institutions a better understanding of what works, and what does not, when complainants do come forward.

Second, the federal government, specifically OCR, should clarify and simplify its guidance that colleges and universities must follow. Providing a clear and uniform set of requirements will increase compliance and reduce the burden and cost inherent in the current regulatory scheme. In doing so, all interested parties should have notice and an opportunity to comment on any proposed requirements to ensure that any programs and approaches will work for

the widely varied types of institutions of higher education. What is effective for a large public research university may not work for a small commuter college. The government should provide training materials that it considers compliant so that institutions need not guess at the required content of mandatory trainings it must provide.[55]

Third, the federal government should streamline its enforcement procedures and adopt a unified approach for Title IX and Clery Act enforcement. Investigations and compliance reviews should be prompt, thorough, and effective. The time period for investigation should be one year rather than multiple years.

Finally, the federal government should work with the law enforcement community to enhance its response to sexual violence cases and its coordination with colleges and universities. Ultimately, many of these cases involve allegations of criminal conduct. If victims have more confidence that their cases will be fairly and sensitively handled and prosecuted, they may be more likely to report them to law enforcement.

## Conclusion

We in higher education are on a pathway to address the issues of sexual violence, sexual assault, and sexual harassment with more vigor and precision than we have in the past. The political and legal landscapes have pushed us in the direction necessary to bring clarity and uniformity to university policies and programs in this arena. Still, the federal government must simplify and streamline the regulatory burdens placed on universities and colleges so that limited resources can be better focused on efforts that directly prevent and respond to sexual violence, sexual assault, and sexual harassment. Evidence-based best practices should be shared so that institutions of higher learning can decrease the incidence of sexual violence, sexual assault, and sexual harassment. And education and prevention should hold a primary focus, though almost nothing in the existing regulatory apparatus—burdensome and expensive as it is—addresses those efforts.

I am certain that no college president in America is ambivalent to these issues. For those of us who lead our country's higher education institutions, the goal is to do what is needed to support survivors, conduct investigations, and ensure a fair process cognizant of the rights of all involved. Claryifing and streamlining the existing governmental oversight can only help us in our efforts.

55. For example, several useful resources were compiled for the White House Task Force to Protect Students from Sexual Assault, including surveys of existing training programs used at some campuses; sample policy language and checklists for those policies; and more recently, a sample memorandum of understanding between the campus and law enforcement. NOT ALONE: TOGETHER AGAINST SEXUAL ASSAULT, https://www.notalone.gov/schools (last visited Apr. 2, 2015).