

2014

Will it Really SaVE you? Analyzing the Campus Sexual Violence Elimination Act

Rachel Marshall

American University Washington College of Law

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/lpb>



Part of the [Legislation Commons](#)

Recommended Citation

Marshall, Rachel. "Will it Really SaVE you? Analyzing the Campus Sexual Violence Elimination Act." *Legislation and Policy Brief* 6, no. 2 (2014): 271-293.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Legislation and Policy Brief* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

WILL IT REALLY SaVE YOU?
ANALYZING THE CAMPUS SEXUAL
VIOLENCE ELIMINATION ACT

RACHEL MARSHALL*

INTRODUCTION..... 271

I. BACKGROUND..... 273

 A. TITLE IX..... 273

 B. THE JEANNE CLERY DISCLOSURE OF CAMPUS SECURITY
 POLICY AND CAMPUS CRIME STATISTICS ACT..... 276

 C. THE DEPARTMENT OF EDUCATION’S 2011 DEAR COLLEAGUE
 LETTER 277

 D. SaVE ACT..... 278

II. ANALYSIS..... 279

 A. BECAUSE THE SaVE ACT INITIALLY REQUIRED A LOW
 STANDARD OF EVIDENCE IN CAMPUS PROCEEDINGS AND
 FAILED TO MAKE APPROPRIATE UPDATES TO THE CLERY
 ACT, THE BILL COULD NOT GAIN MOMENTUM TO PASS. 279

 B. THE EXPANDED REPORTING REQUIREMENTS UNDER THE
 SaVE ACT WILL LEAD TO A MORE COMPREHENSIVE AND
 TRANSPARENT PICTURE OF CAMPUS CRIME STATISTICS. 281

 C. THE NEW PREVENTION AND AWARENESS REQUIREMENTS OF
 THE SaVE ACT WILL HELP TO REDUCE OCCURRENCES OF
 SEXUAL VIOLENCE ON COLLEGE CAMPUSES AND CREATE A
 SAFER ENVIRONMENT FOR SURVIVORS. 282

 D. THE INCREASED COLLABORATION REQUIREMENTS IN THE
 SaVE ACT WILL HELP TO FURTHER ACHIEVE THE GOALS OF
 THE CLERY ACT. 287

 E. THE SaVE ACT WILL NOT UNDERMINE THE GUIDELINES OF
 THE DEPARTMENT OF EDUCATION’S 2011 DEAR COLLEAGUE
 LETTER. 289

III. RECOMMENDATIONS 291

CONCLUSION..... 293

INTRODUCTION

Congress initially signed the Violence Against Women Act (VAWA) into law in 1994 as part of the Violent Crime Control and Law Enforcement Act of 1994.¹ With little fanfare and broad bipartisan

* Rachel Marshall is a part-time 3L at the American University, Washington College of Law and a Legislative Policy Associate at the American Civil Liberties Washington Legislative Office. The author gratefully acknowledges the assistance of Professor Amy Myers who advised her in the process of writing this paper. She would also like to thank Deborah Vagins for her encouragement

support, the 106th Congress successfully reauthorized VAWA in 2000 and 2005.² However, the bill suddenly met partisan opposition in 2013.³ While the Violence Against Women Reauthorization Act of 2013 received an overwhelming majority of seventy-eight votes in the Senate, the bill stalled in the House.⁴

Finally, 500 days after the expiration of the last reauthorization of the bill, the House of Representatives passed the bill in a vote of 286 to 138.⁵ With the partisan bickering drawing to a conclusion, President Obama signed the bill into law on March 7, 2013.⁶

Lost in the clamor over other, more controversial sections of the bill was Section 304 of the bill, which contained what is better known as the Campus Sexual Violence Elimination Act, or the SaVE Act, for short.⁷ Among other things, Section 304 in VAWA aims to establish minimum national standards for all college campuses to follow in responding to allegations of sexual assault; it expands campus education programs on sexual assault; and it guarantees counseling, legal assistance, and medical care to sexual assault survivors on campus.⁸ As the rampant

to never quit, as well as her husband, Michael Uehlein, for his patience and unending support. The opinions expressed in this Article are the author's and do not necessarily reflect the policies or official views of the ACLU.

¹ See *The History of the Violence Against Women Act*, U.S. Dept. of Justice, Office on Violence Against Women, <http://www.ovw.usdoj.gov/docs/history-vawa.pdf> (last visited June 18, 2013) (showing that states slowly adopted laws to protect women from violence).

² See *The Violence Against Women Act*, AM. BAR ASS'N GOVERNMENTAL AFFAIRS OFFICE (Apr. 8, 2013), http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/access_to_legal_services/vawa_home.html (noting that the 2005 reauthorization expired in 2011).

³ See Amanda Marcotte, *Stopping Domestic Violence: A Radical Feminist Idea?*, THE AMERICAN PROSPECT (Feb. 19 2013), <http://prospect.org/article/stopping-domestic-violence-radical-feminist-idea> (asserting that objections over the bill from House Republicans stem from a false belief that VAWA is a "radical feminist" bill undermining typical Christian values).

⁴ See 159 CONG. REC. S613 (daily ed. Feb. 12, 2013) (listing the twenty-two senators, all Republican males, who voted against the bill).

⁵ See Amanda Marcotte, *Congress Finally Passes the Violence Against Women Act*, SLATE (Feb. 28, 2013, 12:14 PM), http://www.slate.com/blogs/xx_factor/2013/02/28/the_violence_against_women_act_reauthorized_republicans_finally_allow_vawa.html (opining that House Republicans started to "look like monsters" for opposing the otherwise popular legislation).

⁶ See Josh Lederman, *Obama Signs Violence Against Women Act*, THE HUFFINGTON POST (Mar. 7, 2013, 4:14 PM), http://www.huffingtonpost.com/2013/03/07/obama-violence-against-women-act_n_2830158.html (relating President Obama's sarcastic remarks during the bill's signing ceremony).

⁷ See Tyler Kingkade, *College Sexual Assault Victim Advocates Hail VAWA Passage*, THE HUFFINGTON POST (Mar. 3, 2013, 1:41 PM), http://www.huffingtonpost.com/2013/03/01/college-sexual-assault-vawa_n_2786838.html (asserting that the SaVE Act is the most significant bill on campus sexual assault in twenty years).

⁸ See Kristen Lombardi, *Campus Sexual Violence Elimination Act Headed for President's Signature*, CTR. FOR PUB. INTEGRITY (Mar. 2, 2013, 1:50 PM), <http://www.publicintegrity.org/2013/03/01/12259/campus-sexual-violence-elimination-act-headed-presidents-signature> (explaining how the bill's inclusion in VAWA will lead to a smoother reporting process and overall stronger protections for victims).

problems with sexual assault on college campuses continue to make headlines across the country, advocates of the SaVE Act hailed its inclusion in VAWA and the subsequent passage of the bill as a major victory in the fight against sexual assault on college campuses.⁹

This comment argues that campus sexual assault is a widespread problem that can severely impact a sexual assault survivor's academic success and suggests actions Congress should take to aid prevention efforts and further protect survivors of campus sexual assault.¹⁰ Part II reviews the legislative and legal history and shortcomings of the existing laws that address campus sexual assault, which include Title IX of the Educational Amendments of 1972 (Title IX) and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act).¹¹ Part II also examines the legislative history of the SaVE Act.¹² Part III explores why earlier versions of the SaVE Act initially failed, analyzes the impact the SaVE Act as enacted has on existing law, and examines arguments against the SaVE Act.¹³ Part IV suggests additional changes to the Clery Act, and offers recommendations to increase punishments faced by schools that violate the SaVE Act.¹⁴ Finally, Part V concludes that, while the SaVE Act is a step in the right direction to preventing sexual violence on college campuses and giving victims the protection they deserve, room for improvement still exists.¹⁵

I. BACKGROUND

A. TITLE IX

Title IX of the Education Amendments of 1972, which applies to any educational institution that receives federal financial aid, prohibits institutions from discriminating on the basis of sex.¹⁶ The provision intended to provide protections against sex discrimination

⁹ See *id.* (noting advocates and lawmakers agree the bill will ensure colleges are a safe place to learn).

¹⁰ See *infra* Part IV and V (providing examples of sexual assault survivors' experiences and exploring solutions to the problem).

¹¹ See *infra* Part II (reviewing the persistent problem of sexual assault on school campuses and how this led to the passage of Title IX and the Clery Act).

¹² See *infra* Part II (explaining how advocates of the SaVE Act have been attempting to pass this bill since 2010).

¹³ See *infra* Part III (analyzing how the increased requirements will have a positive impact on existing statutes).

¹⁴ See *infra* Part IV (asserting that additional changes will lead to a decrease in campus sexual assault).

¹⁵ See *infra* Part V (concluding that while SaVE Act makes changes to how colleges deal with sexual assault, the problem is sufficiently pervasive to warrant additional steps).

¹⁶ See 20 U.S.C. § 1681(a) (2012) (stating "[n]o person . . . 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").

at educational institutions, which the Civil Rights Act of 1964 failed to achieve.¹⁷

While Title IX does not explicitly refer to sexual assault, the U.S. Supreme Court has extensively covered the matter.¹⁸ First, in the 1979 U.S. Supreme Court case *Cannon v. University of Chicago*, the Court held that not only could schools found in violation of Title IX be stripped of their federal financial aid, but also that students who were found to have their rights violated must be afforded a private right of action.¹⁹ The Supreme Court later ruled in *North Haven Board of Education v. Bell*, a 1982 case dealing with gender-based employment practices by federally funded education programs, that Title IX must be construed broadly.²⁰

In a particularly pertinent case interpreting Title IX, the Court held that student-on-student sexual harassment can qualify as discrimination under Title IX if it is “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”²¹ To be held responsible for student-on-student harassment, the school must have authority over the harasser and over the environment in which the harassment takes place.²² Further, the school only becomes legally responsible when its response to harassment “is clearly unreasonable in light of the known circumstances.”²³ Finally, this case held that schools found in violation of Title IX may be required to pay damages to victims of student-on-student sexual harassment or assault if the victim can show that the school purposefully ignored reported acts of violence and harassment occurring in school programs and activities.²⁴

¹⁷ See Civil Rights Act of 1964, 42 U.S.C. § 2000d (stating that no program that receives federal financial aid shall discriminate on the basis of race, color, or national origin); 117 Cong. Rec. 30,403 (1971) (statement of Sen. Bayh) (noting that § 2000d does not deal with educational institutions).

¹⁸ See *Know Your Rights and College’s Responsibilities: Title IX and Sexual Assault*, ACLU and SAFER [hereinafter *Know Your Rights*], available at <http://www.aclu.org/files/pdfs/womensrights/titleixandsexualassaultknowyourrightsandyourcollege%27sresponsibilities.pdf> (providing a brief history of Supreme Court cases that articulate a student’s rights under Title IX).

¹⁹ See 441 U.S. 677, 699, 717 (1979) (concluding that the drafters of Title IX envisioned it to be the companion of Title VI, and thus allows for a private right of action).

²⁰ See 456 U.S. 512, 521 (1982) (opining that Congress could have used a more specific term than “persons” had it wanted to restrict the scope).

²¹ See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 632 (1999) (finding that the plaintiff was severely and pervasively harassed because her classmate attempted to touch her breasts and genital area and made vulgar statements over a period of six months).

²² See *id.* at 644 (noting that the plain language of Title IX confines a school’s responsibility over peer harassment to incidents on school grounds).

²³ See *id.* at 648 (stating that no disciplinary actions were taken even though the plaintiff reported multiple incidents of harassment to the school).

²⁴ See *id.* at 635–36 (noting the school deliberately ignored the student’s report of harassment).

The passage and subsequent interpretations of Title IX and the protections it provides to students have immensely improved the lives of student victims of sexual assault.²⁵ More importantly, Title IX has ensured that schools are held accountable for the safety of their students.²⁶ For example, in the 2007 case, *Simpson v. University of Colorado Boulder*, two University of Colorado (UC) students brought an action against the university under Title IX.²⁷ The women claimed in the suit they were sexually assaulted by both UC football players and recruits of the UC football team.²⁸ Not only was the University of Colorado Boulder required to pay a six-figure sum to the women, but the university hired a Title IX analyst to ensure the school is in compliance with the law, and the university also fired over a dozen administration officials.²⁹

Despite the improvements, sexual assault survivors continue to face significant challenges when seeking assistance from their school.³⁰ Take, for example, the difficulties of a student from Swarthmore College, identified only as “D.”³¹ When D reported her assault, which took place on Swarthmore’s campus in 2009, the college’s administration gave her the options, with no alternatives, to write a letter to her assailant or to have a mediated conversation.³² D asked the administration to remove her assailant from their shared dormitory, but the college refused to take action.³³ When she decided to move forward with the campus’s own disciplinary proceedings, she was asked things about her sexual history and questioned as to why she did not run away when she was assaulted.³⁴

In 2001, the Office of Civil Rights in the Department of Education (OCR) issued its revised version of its sexual harassment guidance,

²⁵ See *Know Your Rights*, *supra* note 18 (explaining not only do students have a private right of action under Title IX but can also have the DOE launch an investigation against their school).

²⁶ See 20 U.S.C. § 1681(a) (2012) (requiring schools to be responsible for sex discrimination).

²⁷ See 500 F.3d 1170, 1173 (10th Cir. 2007) (overturning the court’s grant for summary judgment on the grounds that the evidence revealed UC acted with deliberate indifference).

²⁸ See *id.* (discussing UC’s policy of showing football recruits a “good time” during campus visits).

²⁹ See Nancy Chi Cantalupo, “Decriminalizing” Campus Institutional Responses to Peer Sexual Assault, 38 J.C. & U.L. 481, 492 (2012) (explaining that most Title IX cases settle out of court though “many cases” have proceeded to a jury).

³⁰ See 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, 209 (2011) [hereinafter *Burying Our Heads*](calling campus sexual violence an “epidemic”).

³¹ See Max Nesterak, *Brought to Light: Accused Walks, College Demands Silence*, DAILY GAZETTE (Apr. 17, 2013), <http://daily.swarthmore.edu/2013/04/17/brought-to-light-part-two> (explaining D could face disciplinary action for speaking publicly about her College Judiciary Committee proceeding).

³² See *id.* (noting D was told that Swarthmore does not expel students for sexual assault).

³³ See *id.* (describing how D resorted to sleeping on a friend’s floor when the school failed to move her assailant).

³⁴ See *id.* (explaining that this only traumatized D further).

which had initially been issued in 1997.³⁵ In this guidance, the OCR provided a list of instructions on how schools should investigate sexual assault allegations, including taking statements by any witnesses to the alleged incident, investigating the credibility of the involved parties, investigating prior incidents of sexual harassment by the alleged assailant, documenting the victim's behavior or reaction after the incident, and investigating whether the victim took action soon after the alleged incident occurred.³⁶ Further, OCR provided examples of inappropriate responses to reported sexual assault that clearly violates Title IX.³⁷ Despite the fact that D's alleged assault did not occur until 2009, meaning Swarthmore College should have been well aware of OCR's 2001 guidance, the school still failed to abide by the guidelines when addressing D's assault.³⁸

B. THE JEANNE CLERY DISCLOSURE OF CAMPUS SECURITY POLICY AND CAMPUS CRIME STATISTICS ACT

In response to the rape and murder of Lehigh University freshman Jeanne Clery, Congress passed the Campus Security Act in 1991,³⁹ which was later renamed the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act).⁴⁰ The purpose of the legislation is not only to require institutions of higher education to report certain crime statistics and share information about their crime prevention programs with prospective students and their parents, but also to reduce the risk to individuals, both students and staff alike.⁴¹

Just like the issues surrounding the enforcement and proper implementation of Title IX, problems have also existed with enforcing

³⁵ See Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 651 (2009) (examining how the OCR's sexual harassment guidance reaches a broader range of schools than case law alone).

³⁶ See Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, U.S. DEPT. OF EDUC., OFFICE FOR CIVIL RIGHTS (2001), available at <http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf> (noting that these procedures help OCR determine whether a school's grievance procedure is prompt and equitable).

³⁷ See Cantalupo, *supra* note 35, at 653–55 (including asking the victim humiliating questions, and failing to address the victim's safety concerns).

³⁸ See Nesterak, *supra* note 31 (explaining that D was asked many personal and humiliating questions during the campus disciplinary proceedings).

³⁹ See Margie Peterson, *Remembering Jeanne Clery*, NORRISTOWN PATCH (Apr. 5, 2011, 11:24 PM), <http://norristown.patch.com/groups/schools/p/remembering-jeanne-clery>.

⁴⁰ See Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2012) [hereinafter Clery Act] (mandating that schools receiving government aid abide by these requirements)

⁴¹ See Dennis E. Gregory & Steven M. Janosik, *The Clery Act: How Effective Is It? Perceptions from the Field—The Current State of the Research and Recommendations for Improvement*, 32 STETSON L. REV. 7, 39–40 (2002) (asserting that educational institutions have seen relative success in achieving the Clery Act's goals).

and implementing the Clery Act at colleges across the country.⁴² Twelve students at Swarthmore College recently filed a complaint with OCR.⁴³ In the complaint, the students allege that Swarthmore has continuously underreported incidents of sexual misconduct to the annual Clery Security report.⁴⁴ Further, two of the students reported that members of the Swarthmore staff have told them that the college fails to report or even investigate claims of sexual assault, and at least one instance had occurred where a staff member destroyed evidence in a sexual assault case.⁴⁵

Perhaps one of the Clery Act's greatest flaws is that the Department of Education (DOE) is limited to punishing a school with a fine when it investigates a claim that a school has violated the Clery Act and finds that the school has indeed violated the Clery Act.⁴⁶ The maximum fine is currently capped at \$27,500, and the DOE is not required to fine a school even if found to have violated the Clery Act.⁴⁷ To make matters more difficult for sexual assault survivors, the DOE has no power under the law to force a school found in violation of the Clery Act to make improvements to its reporting policies.⁴⁸

C. THE DEPARTMENT OF EDUCATION'S 2011 DEAR COLLEAGUE LETTER

The problems that continued with sexual assault on college campuses prompted the OCR to issue yet another round of new guidance for enforcing and implementing Title IX in the form of a Dear Colleague Letter (Letter) issued by the DOE's Assistant Secretary for Civil Rights, Russlynn Ali.⁴⁹ The Letter explains that all schools receiving

⁴² See Bonnie S. Fisher et al., *Reporting Sexual Assault and the Clery Act: Situating Findings from the National Campus Sexual Assault Policy Study Within College Women's Experiences*, in *CAMPUS CRIME* 63, 67 (3d ed., 2013) (noting only thirty-seven percent of colleges fully complied with the Clery Act).

⁴³ See Max Nesterak, *Clery Complainants To File Title IX Complaints, Join National Movement Against Sexual Assault*, *DAILY GAZETTE* (Apr. 19, 2013), <http://daily.swarthmore.edu/2013/04/19/clery-complainants-join-national-movement-against-sexual-assault-to-file-title-ix-complaints> (explaining the complaint was filed just days after Swarthmore announced its review of sexual assault procedures).

⁴⁴ See *id.* (asserting that school officials discouraged students both from reporting sexual assault to law enforcement and from going through the campus' internal disciplinary proceedings).

⁴⁵ See *id.* (explaining that a faculty member approached students to ask if they were aware of "sexual assault cover-ups").

⁴⁶ See Clery Act, 20 U.S.C. §§ 1092(f)(8)(C), 1092(f)(13) (providing that the DOE may fine schools in violation of the Clery Act, but students have no private right of action).

⁴⁷ See Diane Ward and Janice Lee Mann, *Handbook for Campus Safety and Security Reporting*, (Feb. 2011), available at <http://www2.ed.gov/admins/lead/safety/handbook.pdf> (warning schools not to retaliate against anyone who reports a violation of the Clery Act).

⁴⁸ See Clery Act § 1092(f)(2) (asserting that the DOE cannot force schools adopt particular policies and procedures).

⁴⁹ See Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office of Civil Rights, to Title IX Coordinators, 1 (Apr. 4, 2011) [hereinafter Letter], available

federal funding must disseminate a notice of nondiscrimination, must designate a Title IX coordinator, who is responsible for ensuring the school is complying with the requirements of Title IX, and must adopt and publish grievance procedures that will provide for timely and fair solutions of all sex discrimination complaints.⁵⁰ The Letter also provides guidance for more effectively preventing sexual harassment and sexual violence.⁵¹

D. SaVE Act

Realizing Title IX and the Clery Act were not doing enough to deal with sexual assault on college campuses, Representative Thomas Perriello introduced the Campus Sexual Violence Elimination Act (SaVE Act) on November 30, 2010 in the 111th Congress.⁵² The bill aimed to amend Title IV of the Higher Education Act of 1965, which includes the Clery Act, to require schools to publish a specific statement of policy regarding a school's sexual assault programs and the procedures the school follows when handling such offenses in the school's annual security report.⁵³ Further, the bill sought to improve how schools inform students of their rights regarding sexual assault claims and how the schools handle those claims, and the bill would require the DOE to seek direct counsel from the Attorney General in promulgating new guidelines.⁵⁴ Unfortunately, the House bill, nor its companion bill in the Senate, ever succeeded in gaining the leverage it needed to survive the legislative process.⁵⁵

The SaVE Act was again introduced in the House and Senate in 2011.⁵⁶ Proponents of the SaVE Act felt much more confident about the reintroduction of the bill.⁵⁷ Sexual assault prevention advocates believed the proposed legislation might actually gain traction this

at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (promulgating new guidance to help schools meet their obligations under Title IX).

⁵⁰ See *id.* at 6 (explaining that these steps help prevent harassment and shows sexual violence will not be tolerated).

⁵¹ See *id.* at 14–15 (suggesting schools to implement preventative education programs, to create victim resources, to provide counseling, to train school staff how to deal with incidents of sexual assault, and to develop materials to disburse to incoming students during orientation).

⁵² See SaVE Act, H.R. 6461, 111th Cong. (2010) (noting the bill had the support of six cosponsors).

⁵³ See *id.* (improving the prevention of sexual violence on college campuses by providing more information on how schools deal with sexual assault).

⁵⁴ See *id.* (explaining that these changes must be implemented by the 2011 school year).

⁵⁵ See *id.* (showing the bill never made it out of the committee level); SaVE Act, S. 4039, 111th Cong. (2010) (showing the bill never made it out of the committee level).

⁵⁶ See SaVE Act, S. 834, 112th Cong. (2011) (making changes to the Higher Education Act of 1965 to improve education and prevention related to sexual assault on college campuses).

⁵⁷ See Lauren Sieben, *Education Department Issues New Guidance for Sexual Assault Investigations*, THE CHRON. OF HIGHER EDUC. (Apr. 4, 2011), <http://chronicle.com/article/Education-Dept-Issues-New/127004> (expressing hope that the Letter would help channel support for the SaVE Act).

time, particularly with the recent release of the OCR Letter providing updated guidance on the implementation and enforcement of Title IX.⁵⁸ Advocacy groups planned visits to lobby Members of Congress to cosponsor the bill as well as support final passage of the bill, and nearly twenty groups joined together in a coalition in support of the bill.⁵⁹ Again, the bill floundered in the committee process in both the House and the Senate.⁶⁰

II. ANALYSIS

A. BECAUSE THE SAVE ACT INITIALLY REQUIRED A LOW STANDARD OF EVIDENCE IN CAMPUS PROCEEDINGS AND FAILED TO MAKE APPROPRIATE UPDATES TO THE CLERY ACT, THE BILL COULD NOT GAIN MOMENTUM TO PASS.

The issuance of the Letter on Title IX was a clear indication that sexual assault on colleges needed not just additional guidance, but also a legislative solution.⁶¹ Yet the proposed SaVE Act, which aimed to address those very problems, continued to falter.⁶² The biggest concern stemmed from provisions for the rights of the accused.⁶³ The bill would have required schools to use only a preponderance of the evidence standard in determining whether a student is guilty of committing sexual assault.⁶⁴ This is, in fact, the same standard required by the Letter issued by the OCR in 2011.⁶⁵ Some worried that the bill's interpretation would assume that self-identified sexual assault survivors are almost always correct, and, even more worrisome, that the accused assailant would not be granted the same rights to information and assistance as

⁵⁸ See *id.* (noting that the Letter indicated OCR was taking a proactive step to prevent sexual assault).

⁵⁹ See *Work to End Campus Sexual Assault and Violence*, ASSOCIATION OF AMERICAN UNIVERSITY WOMEN BLOG (Sept. 16, 2011), <http://www.aauw.org/2011/09/16/work-to-end-campus-sexual-assault-and-violence> (describing how 800 people gathered in June to lobby congress on the SaVE Act).

⁶⁰ See H.R. 2016, 112th Cong. (2011) (explaining that the bill was last referred to the Subcommittee on Higher Education and Workforce Training); S. 834 112th Congress (2011) (noting that the bill was last referred to the Committee on Health, Education, Labor, and Pensions).

⁶¹ See Letter, *supra* note 49, at 2 (noting a study by the NIJ that revealed that one in five women are victims of sexual assault or attempted sexual assault during college).

⁶² See H.R. 2016, 112th Cong. (2011) (noting the recently introduced versions of the bill stalled at the committee level).

⁶³ See Wendy Kaminer, *The SaVE Act: Trading Liberty for Security on Campus*, THE ATLANTIC (Apr. 25, 2011, 3:42 PM), <http://www.theatlantic.com/national/archive/2011/04/the-save-act-trading-liberty-for-security-on-campus/237833> (asserting that the SaVE Act goes too far in "attacking freedoms").

⁶⁴ See *id.* (noting that the bill implicitly assumes the guilt of students accused of sexual violence by using such a low standard of proof).

⁶⁵ See Letter, *supra* note 49, at 10 (asserting that a preponderance of the evidence standard should be used because the Supreme Court applies the same in Title VII litigation).

the alleged survivor receives.⁶⁶

There were also concerns that the SaVE Act failed to make the appropriate updates needed to make the Clery Act more effective.⁶⁷ As currently enacted, the Clery Act collects information on crimes based solely on reporting from victims to school officials, which fails to take into consideration the number of crimes that likely go unreported each year.⁶⁸ Further, a crime is only considered reported for purposes of disclosure of campus crime statistics if it is reported to a campus security authority.⁶⁹ However, the definition of a campus authority fails to include campus employees to whom students are most likely to report an alleged incident of assault.⁷⁰

Fortunately, in 2013, the Senate included the SaVE Act in its version of the VAWA.⁷¹ The House version of VAWA did not initially include the SaVE Act.⁷² But members of Congress later elected to add the bill back into VAWA after the Obama Administration opposed the House version, partially due to its failure to include the SaVE Act.⁷³ The reauthorization of VAWA finally passed through Congress, and the President signed it into law, thus overcoming opponents of the legislation.⁷⁴

⁶⁶ See Kaminer, *supra* note 63 (claiming that the SaVE Act would require schools to punish a student even if there's only a "50.0001%" chance that he or she is actually guilty).

⁶⁷ See *Burying Our Heads*, *supra* note 30, at 259 (asserting that the Clery Act will only attain its original goal if the approach to collecting information is changed).

⁶⁸ See Clery Act, 20 U.S.C. § 1092(f)(8)(B)(v) (2012) (noting schools must inform students of their options for reporting incidents of sexual assault).

⁶⁹ See *Burying Our Heads*, *supra* note 30, at 245 (noting that a crime is also considered reported if brought to the attention of local police).

⁷⁰ See *id.* at 259 (explaining faculty, campus physicians, and counselors are not considered a campus security authority).

⁷¹ See Kingkade, *supra* note 7 (noting this is the most comprehensive reform addressing campus sexual violence in two decades).

⁷² See *id.* (explaining that Speaker Boehner went as far as accusing a sexual assault survivor of promoting a Democratic agenda in her advocacy for the SaVE Act).

⁷³ See *Statement of Administration Policy: S. 74 – Violence Against Women Reauthorization Act of 2013*, Exec. Office of the President, Office of Mgmt. and Budget, (Feb. 26, 2013), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saps47r_20130226.pdf (arguing that the House version of VAWA omits crucial provisions that would mitigate the high rates of sexual violence on college campuses).

⁷⁴ See *New Campus Obligations Under Violence Against Women Act*, American Council on Education (Mar. 20, 2013), <http://www.acenet.edu/news-room/Pages/MEMO-New-Campus-Sexual-Assault-Policies-and-Procedures-Under-Violence-Against-Women-Act.aspx> (urging schools to review their obligations under both the Clery Act and Title IX when modifying their policies).

B. THE EXPANDED REPORTING REQUIREMENTS UNDER THE SAVE ACT WILL LEAD TO A MORE COMPREHENSIVE AND TRANSPARENT PICTURE OF CAMPUS CRIME STATISTICS.

One of the main goals of the Clery Act is to ensure that potential students and their parents are aware of the crime statistics of a college to better inform their school selection.⁷⁵ Initially, the Clery Act required that college campuses must report statistics on murder, rapes, robberies, aggravated assaults, burglary, motor vehicle theft, manslaughter and larceny.⁷⁶ The SaVE Act will now require that campuses also report crimes of domestic violence, dating violence, and stalking.⁷⁷ The addition of these three crimes helps to address what some assert is the Clery Act's misguided focus on the stranger rapist.⁷⁸ Crimes of sexual violence often occur more frequently at the hands of acquaintances rather than strangers, and this change, which better represents a sexual assault survivor's experience, will now be reflected in schools' crime statistics with the inclusion of domestic violence, dating violence, and stalking.⁷⁹

The SaVE Act also expands the hate crimes category, adding national origin and gender identity in cases where a victim is intentionally targeted based on their actual or perceived characteristics, such as sexuality or religion.⁸⁰ This expansion of reporting requirements could prove particularly useful in studying campus crime statistics, as the current guidelines used by schools to determine what constitutes a hate crime are far from inclusive.⁸¹ The most recent data on crimes from the DOE showed a decrease of a little over two hundred hate crimes reported nationally from 2010 to 2011.⁸² The number of hate crimes has

⁷⁵ See Bonnie S. Fisher et al, *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 STETSON L. REV. 61, 63 (2002) (noting that the Clery Act allows prospective students and their parents to learn the security procedures the school follows).

⁷⁶ See 20 U.S.C. § 1092(f)(1)(F)(i) (1990) (requiring schools to provide the 3 most recent years of statistics).

⁷⁷ See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 § 304(a)(3)(A) (2013)[hereinafter VAWA] (stating that these terms are defined in § 40002(a) of the Violence Against Women Act of 1994).

⁷⁸ See *Burying Our Heads*, *supra* note 30, at 248 (noting that the concept of the stranger rapist goes against what we know about campus peer sexual violence).

⁷⁹ See Michael Planty, Ph.D. et al., *Female Victims of Sexual Violence, 1994–2010*, BUREAU OF JUSTICE STATISTICS, 1 (March 2013), available at <http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf> (finding that between 2005 and 2010, seventy-eight percent of sexual violence occurred by someone the victim knew).

⁸⁰ See VAWA, Pub. L. No. 113-4, 127 Stat. 54 at § 304(a)(1)(B)(ii) (expanding 20 U.S.C. § 1092(f)(1)(F)(ii) to broaden the definition of a hate crime).

⁸¹ Cf. *Burying Our Heads*, *supra* note 30, at 261 (expressing disdain for the Clery Act's current use of the FBI's UCR Handbook to define crimes).

⁸² See *The Campus Safety and Security Data Analysis Cutting Tool*, U.S. Dep't. of Educ., Office of Postsecondary Educ., available at <http://ope.ed.gov/security/> (accessed July 6, 2013) (showing that

decreased quite significantly in the past several years, but may increase with the addition of gender identity and national origin to the list, which will provide a more comprehensive list of hate crimes.⁸³

**C. THE NEW PREVENTION AND AWARENESS REQUIREMENTS
OF THE SAVE ACT WILL HELP TO REDUCE OCCURRENCES
OF SEXUAL VIOLENCE ON COLLEGE CAMPUSES AND
CREATE A SAFER ENVIRONMENT FOR SURVIVORS.**

The new prevention and awareness requirements in the SaVE Act account for some of the most significant changes in how colleges must address sexual violence.⁸⁴ Current requirements in the Clery Act require that schools provide a statement of policy that articulates the procedures a survivor of sexual assault should follow.⁸⁵ The statement must address education programs to promote awareness of various sex offenses, steps a student should follow after a sex offense occurs, and various notifications regarding student rights and resources after a sex offense occurs, and the SaVE Act aims to take these requirements one step further.⁸⁶

In addressing reporting procedures and disciplinary actions in regards to crimes of sexual violence, the SaVE Act now requires schools to publish specific details of campus proceedings.⁸⁷ The policy statement must articulate the procedures students should follow in the event of sexual violence, and these procedures must emphasize the importance of preserving evidence in order to prove a criminal offense occurred.⁸⁸ The procedures also must list to whom the alleged offense should be reported, and what options a survivor has should they choose to report the offense to both campus and local law enforcement.⁸⁹ In order to ensure that campus disciplinary proceedings are fair and transparent, the policy statement must include the standard of evidence used to

in previous years the number of hate crimes has increased).

⁸³ See *The Incidence of Crime on the Campuses of U.S. Postsecondary Education Institutions: A Report to Congress*, U.S. DEPT. OF EDUC., OFF. POSTSECONDARY EDUC., 10 (Jan. 18, 2001) (stating that 2,067 hate crimes were reported on American campuses in 1999).

⁸⁴ See VAWA, Pub. L. No. 113-4, 127 Stat. 54 § 304(a)(3)(A) (noting that § 304(a)(5) completely changes 20 U.S.C. § 1092(f)(8) and adds around a dozen new provisions).

⁸⁵ See Clery Act, 20 U.S.C. §1092(f)(8)(A) (asserting that campus crime statistics reports should include this information).

⁸⁶ See *id.* at § 1092(f)(8)(B)(i)–(vii) (noting that the requirements for the policy statement are vague).

⁸⁷ See generally Cantalupo, *supra* note 35, at 639 (noting that most Clery violations occur due to a school's failure to advise and assist sexual assault survivors).

⁸⁸ See VAWA, Pub. L. No. 113-4, 127 Stat. 54 § 304(a)(5) (amending 20 U.S.C. § 10(f)(8)(B)(iii) to require students be informed about these procedures in writing).

⁸⁹ See *id.* (expanding 20 U.S.C. § 1092(f)(8)(B)(iii) to permit survivors to receive assistance from campus authorities to report the incident to law enforcement or to elect not to notify such authorities).

prove that a sexual offense occurred, and the possible sanctions the accused face.⁹⁰ School officials who conduct campus proceedings must receive annual training on matters pertaining to sexual assault, dating violence, stalking, and domestic violence, along with trainings on how to conduct such investigations and hearings in a professional manner.⁹¹ The SaVE Act also requires that both the accused and the accuser are afforded the same opportunities in campus disciplinary proceedings.⁹²

By requiring schools to publish specific details of the school's internal disciplinary proceedings, students like Sofie Karasek of the University of California, Berkley (UC Berkley) will no longer have to fear that reporting an incident of sexual assault will go ignored.⁹³ Karasek reported her sexual assault to the university under the belief that there would be a formal investigation and that the alleged assailant would be disciplined if found guilty.⁹⁴ Instead, Karasek did not hear back from the university for seven months, and when she finally inquired as to the status of her complaint, she received a short email stating her assailant had been found in violation of UC Berkley's code of conduct.⁹⁵ Another UC Berkley student was denied a rape kit by the university's health center, and instead had to go to a local hospital to receive help.⁹⁶ Karasek has since filed a lawsuit, asserting UC Berkley violated the Clery Act, and she is joined by nine other students.⁹⁷ Under the SaVE Act, a student in Karasek's position will now have a better idea of what to expect when he or she reports an alleged incident of sexual assault, rather than being denied the help he or she needs to address the assault, or forced to remain in the dark with the expectation that administration officials are taking action.⁹⁸

Under the SaVE Act, schools will now be required to include specific protections for survivors of sexual offenses in the policy

⁹⁰ See *id.* (noting that campus proceedings must provide prompt, impartial investigations resulting in timely resolutions).

⁹¹ See *id.* (amending 20 U.S.C. § 1092(f)(8)(B)(iv), which does not contain any requirements for those who conduct the campus disciplinary proceedings).

⁹² See *id.* (including the opportunity to have an advisor of their choice present at all proceedings and to be simultaneously informed of any updates in the case).

⁹³ See Nanette Asimov, *Audit on how universities deal with sex assault*, SF GATE (Aug. 21, 1013, 10:01 PM), <http://www.sfgate.com/news/article/Audit-on-how-universities-deal-with-sex-assaults-4751565.php> (explaining Karasek was raped while on a trip with ten classmates).

⁹⁴ See *id.* (noting Karasek did not report her assault to law enforcement because she found the prospect to be overwhelming).

⁹⁵ See *id.* (explaining the school failed to notify Karasek of any type of investigation into her claim).

⁹⁶ See *id.* (noting that student's alleged assailant was later convicted of rape).

⁹⁷ See *id.* (clarifying that the students are still waiting to find out if the claim will be investigated).

⁹⁸ See *id.* (noting incidents such as Karasek's have led the California General Assembly to look into the issue of how universities address campus sexual assault).

statement provided to students and employees.⁹⁹ Whether the crime took place on or off the campus, schools must provide survivors with a written explanation of their rights and options on how to proceed.¹⁰⁰ If requested, schools must provide survivors with written notification of their options to change their living arrangements, working situations, transportation plans, and academic situations.¹⁰¹ Schools must also provide these options to survivors regardless of whether a survivor decides to report the incident to law enforcement.¹⁰² The policy statement must also include the school's responsibilities regarding any lawful protection order issued by a court.¹⁰³

One of the most substantial changes the SaVE Act makes to the Clery Act is that the policy statement must now describe the campus' programs to educate and promote awareness of stalking, sexual assault, dating violence, rape, and acquaintance rape.¹⁰⁴ To further ensure the effectiveness of such programs, the law provides specific information that the school must include in the policy statement.¹⁰⁵ These new requirements under the SaVE Act will help address many of the weaknesses critics claim exist in the Clery Act.¹⁰⁶

First, schools must provide a clear statement of a zero tolerance policy toward offenses of sexual assault, dating violence, domestic violence, and stalking.¹⁰⁷ While a minor addition to the Clery Act, this is nonetheless an important update.¹⁰⁸ This policy statement will help to assure students that their school takes sexual violence seriously, and if the school fails to live up to that standard, a student can look to the

⁹⁹ See Press Release, Senator Robert Casey, *Casey Calls to Pass Violence Against Women Act Reauthorization* (Feb. 6, 2013), <http://www.casey.senate.gov/newsroom/press/release/?id=e2756792-9069-45db-ba25-91bc3316b431> (calling on DOE to work with colleges to ensure these protections are implemented).

¹⁰⁰ See VAWA, Pub. L. No. 113-4, 127 Stat. 54 § 304(a)(5) (adding a completely new provision to 20 U.S.C. § 1092(f)(8))

¹⁰¹ See *id.* (amending 20 U.S.C. § 1092(f)(B)(vii) to expand the type of aid schools must provide sexual assault survivors to ensure their future safety).

¹⁰² See *id.* (noting assistance must be provided in order to obtain any requested changes).

¹⁰³ See *id.* (including protective orders such as no contact orders and restraining orders).

¹⁰⁴ See *id.* (noting that this programming must be presented to all incoming students and new employees).

¹⁰⁵ Cf. Press Release, *supra* note 99 (noting colleges must develop a clear policy statement regarding crimes of sexual violence).

¹⁰⁶ See generally Cantalupo, *supra* note 35, at 637 (asserting that the Clery Act's enforcement actually fosters peer sexual violence).

¹⁰⁷ See VAWA, Pub. L. No. 113-4, 127 Stat. 54 § 304(a)(3)(A)(5) (expanding 20 U.S.C. § 1092(f)(8)(B) (i) to include a more comprehensive list of sexual violence crimes to be included in the educational programming).

¹⁰⁸ See Kathy Ahn, Note, *The Pendulum Swings Backwards: The Clery Act Must Be Amended to Address University Policies That Discourage Rape Reporting*, 31 WOMEN'S RTS. L. REP. 514, 514 (2010) (noting that while colleges claim to abhor sexual assault, most are highly criticized with how they handle such incidents).

policy statement in order to hold the school accountable for their failure to respond to sexual assault survivors in an appropriate manner.¹⁰⁹

Under the SaVE Act, the education and awareness programs must now explain the definition of consent as applicable to sexual assault in the school's jurisdiction.¹¹⁰ Studies have found that a majority of all cases of rape are not reported to police or campus authorities.¹¹¹ Sexual assault survivors often do not report the assault to authorities because he or she believes that the assault either was not serious enough to report, or he or she is unsure whether a crime actually occurred.¹¹² By providing a clear definition of what constitutes consent, sexual assault survivors should be able to more clearly recognize an incident that warrants reporting and potential legal action.¹¹³

The updates to the Clery Act will mandate that schools provide students and employees with information to help them recognize warning signs of abuse and potential violent attacks.¹¹⁴ Schools must also educate students and employees on the safest options for bystander intervention when an individual tries to prevent harm or intervene in an ongoing attack.¹¹⁵ To eliminate campus sexual violence, as the name of law suggests, colleges must be committed to prevention.¹¹⁶ The SaVE Act's requirement that colleges provide information on warning signs, risk reductions, and ways to intervene should be an effective tool to help colleges stop sexual violence before it begins.¹¹⁷

Finally, along with providing the above information to new students and employees, the school must now engage in an ongoing prevention and awareness campaign for current students and employees.¹¹⁸ The

¹⁰⁹ See *id.* at 521–22 (asserting that colleges are more concerned with their reputation than preventing sexual assault).

¹¹⁰ See note 106 (amending 20 U.S.C. § 1092(f)(8)(B)(iv), which does not provide any specific details of what the sexual violence education should include).

¹¹¹ See Fisher, *supra* note 75, at 84 (finding nearly ninety-seven percent of rapes go unreported to campus authorities).

¹¹² See *id.* at 84–85 (citing that these same reasons have been found as the leading reasons survivors fail to report assault in at least three national studies).

¹¹³ Cf. *id.* at 83 (noting crimes on college campuses are currently grossly underreported).

¹¹⁴ See *id.* at 84–85 (requiring such information to be given to students and employees to help reduce the risk of sexual violence).

¹¹⁵ See *id.* (noting intervention should only take place when there is a risk of sexual violence to another person).

¹¹⁶ See Cantalupo, *supra* note 35, at 619 (noting that prevention curtails a vicious cycle of continuing sexual assault).

¹¹⁷ See also *id.* at 615–17 (noting that studies have found that sexual assault most often occurs during a survivor's first year of college, and that college-aged women experience assault at a rate of four times higher than the assault rate of all women).

¹¹⁸ See *id.* (expanding 20 U.S.C. § 1092(f)(8)(B)(iv), which does not specify to whom the educational program should be geared).

Clery Act initially only required schools provide such information to students and employees upon request, and did not require any kind of education campaign.¹¹⁹ However, studies conducted in the early 2000s indicate that very few students are actually aware of the Clery Act and its requirements.¹²⁰ A random sampling of over 1,000 students at three different public colleges and universities revealed that over seventy-one percent of students had never heard of the Clery Act, therefore a majority of students are unaware that their school is required to provide them with information on reporting crimes and addressing and preventing sexual assault.¹²¹ A larger study sent to 305 universities and colleges across the country found very similar results, revealing that seventy-three percent of students were unaware of a school's obligations in dealing with campus crime under the Clery Act.¹²² The new requirements for providing ongoing education on sexual assault and campus procedures for handling sexual assault to students and employees alike under the SaVE Act will help to fight this lack of knowledge.¹²³

Colleges have long addressed safety issues independently of one another, meaning each college could address incidents of sexual assault in a different way, but these new provisions that require schools to state a very specific set of procedures in addressing sexual offenses will help to improve effectiveness in fighting sexual assault on a nationwide basis.¹²⁴ Under the SaVE Act, for example, these changes ensure students and employees should no longer have to face a situation like Tucker Reed who was sexually assaulted as a student at the University of Southern California (USC).¹²⁵ Instead of being provided clear instructions on how to proceed with reporting her offense and moving through prompt, fair campus judicial proceedings, Reed was in university counseling services for a year before the school officials informed her of how to report her assault.¹²⁶ USC also failed

¹¹⁹ See 20 U.S.C. § 1092(f) (1990) (requiring only that the information in § 1092(f)(8) be provided as part of the report on crime statistics and policies).

¹²⁰ See generally Gregory, *supra* note 41, at 41 (noting that a majority of students also did not receive information on their campus' crime statistics).

¹²¹ See *id.* at 40–41 (noting that more women than men knew about the Clery Act).

¹²² See *id.* at 43 (finding most student learned about campus crime from sources other than the report mandated by the Act).

¹²³ See *id.* at 50 (asserting that campus safety programs and specific information on campus safety appear to be an effective way of raising awareness of campus sexual assault).

¹²⁴ See Ahn, *supra* note 108, at 533–34 (asserting that the Clery Act needs to be amended because campus rape continues to be a persistent problem).

¹²⁵ See Tyler Kingkade, *Sexual Assaults Mishandled at Dartmouth, Swarthmore, USC, Complaints Say*, THE HUFFINGTON POST (May 24, 2013, 4:54 PM), http://www.huffingtonpost.com/2013/05/23/sexual-assaults-mishandled-dartmouth-swarthmore_n_3321939.html (noting that, for Reed, this was a “crushing, life-altering, inhuman violence”).

¹²⁶ See *id.* (explaining that her case was later dismissed a year after she finally was able to report

to inform students of potential sanctions for sexual assault, and a USC official later told Reed that the school wished to educate her assailant, rather than punish him.¹²⁷ While all schools are now required to follow specific guidelines when articulating procedures, the new sections remain broad enough that a school should have room to tailor its policy statement based on its unique needs.¹²⁸

Though the SaVE Act specifically amends the Clery Act, the SaVE Act also codifies several provisions provided in the OCR Letter providing guidelines for effectively promulgating Title IX.¹²⁹ For example, the Letter suggests that schools publish their procedures for filing a complaint of sexual violence, and states that schools should provide fair, prompt resolutions in campus disciplinary proceedings.¹³⁰ The Letter also recommends that both the accuser and the accused receive timely notification of any updates in campus disciplinary proceedings.¹³¹ Most notably, the Letter advises schools to create programs for education and prevention that are nearly identical to those required by the SaVE Act.¹³²

D. THE INCREASED COLLABORATION REQUIREMENTS IN THE SAVE ACT WILL HELP TO FURTHER ACHIEVE THE GOALS OF THE CLERY ACT.

The Clery Act initially required only very minimal collaboration between the Secretary of Education and the Attorney General of the United States.¹³³ The SaVE Act makes several changes to the collaboration requirements, including requiring, versus suggesting, the Secretary of Education to consult with the Attorney General to consult and provide technical assistance in complying with provisions of the SaVE Act.¹³⁴ The SaVE Act further increases collaboration between the DOE, the Attorney General, and the Department of Health and

the assault).

¹²⁷ See *id.* (describing how USC's process for handling Reed's case further traumatized her rather than helping her move on).

¹²⁸ See Ahn, *supra* note 108, at 534 (noting that, while universities typically have autonomy to draft their own policies, requiring a university to implement certain policies in regards to sexual assault would not violate their right to academic freedom).

¹²⁹ See *generally* Letter, *supra* note 49, at 3–19 (giving schools more specific guidance to preventing sexual assault).

¹³⁰ See *id.* at 6 (noting that this requirement, much like the SaVE Act requirement, applies to all forms of sexual violence).

¹³¹ See *id.* at 13 (recommending, just like the SaVE Act, that these updates be provided to both parties simultaneously).

¹³² See *id.* at 14–15 (noting that this is a proactive measure to prevent sexual violence).

¹³³ See Clery Act, 20 U.S.C. § 1092(f)(16) (suggesting only that the Secretary could seek the advice and counsel of the Attorney General regarding the development and dissemination of information on dealing with campus safety and emergencies).

¹³⁴ See VAWA, Pub. L. No. 113-4, 127 Stat. 54 § 304(a)(6) (noting that technical assistance should be provided only if a college requests such assistance).

Human Services (HHS) regarding the dissemination of best practices information about campus safety and emergencies, preventing and responding to incidents of sexual violence, and elements of proven polices that prevent such incidents.¹³⁵

One of the biggest issues identified by legal scholars and researchers with the Clery Act is colleges' inability to comply with the law.¹³⁶ Studies have shown that less than ninety percent of colleges have, as required by the law, provided crime statistics for the past three years, and even fewer schools have complied with the requirement that sexual offenses be divided into separate categories of forcible and nonforcible crimes.¹³⁷ This failure to accurately report sexual offenses goes directly against the goal of the Clery Act, which is to provide prospective students and their families, and college communities at large with an accurate depiction of crime statistics.¹³⁸ The failure of colleges to comply with the Clery Act has stemmed not necessarily from unwillingness to comply with the law, but rather from a lack of clarity on the exact requirements of the law.¹³⁹ The Clery Act has been amended multiple times since its initial passage, and research has revealed that school administrations and campus law enforcement are not always aware of all of the changes, nor are they sure what is required by the new set of regulations that has accompanied each change in the Act.¹⁴⁰

The DOE has provided guidance to schools on how to comply with the Clery Act, yet confusion still remains, and advocates believe that college administrators need more guidance.¹⁴¹ While these new collaboration provisions do not go as far as some advocates would like, the combined efforts of the DOE, the Attorney General, and the Secretary of HHS to help schools comply with the changes the SaVE Act requires will lead to a clearer picture of what the Clery Act requires

¹³⁵ See *id.* at § 304(a)(7) (requiring the Secretary of Education to consult with the Attorney General and the Secretary of Health and Human Services on providing information on such matters).

¹³⁶ See Fisher, *supra* note 75, at 86 (finding that, despite amendments and policy guidance by the DOE to address reporting difficulties, compliance problems with the Clery Act persist).

¹³⁷ See *id.* at 86–87 (noting that not only did compliance vary across different requirements but also across different types of schools, such as four-year public and private schools, for-profit schools, and two-year schools).

¹³⁸ See *id.* at 88–89 (noting that the problem with compliance stems partially from failure to address the difficulty in measuring crime).

¹³⁹ See Gregory, *supra* note 41, at 21 (noting that the lack of clarity is due to changing interpretations of what crimes need to be reported and who exactly is responsible for reporting).

¹⁴⁰ See *id.* at 57 (explaining specifically that there is a small percentage of campus law enforcement officials who are unaware of their duties required under the law).

¹⁴¹ See 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 (3d ed., 2013) (explaining that confusion among school administrators remains on how to properly comply with the law).

of colleges.¹⁴² In requiring the DOE to collaborate with the Attorney General and HHS, the DOE now has the ability to leverage each agency's experiences to create more stringent and focused guidelines.¹⁴³

E. THE SAVE ACT WILL NOT UNDERMINE THE GUIDELINES OF THE DEPARTMENT OF EDUCATION'S 2011 DEAR COLLEAGUE LETTER.

One of the biggest debates hindering the initial passage of the SaVE Act was due to the argument over the initial requirement that schools must use a preponderance of the evidence standard in sexual assault disciplinary proceedings.¹⁴⁴ When the SaVE Act was included as Section 304 of VAWA, the language mimicked that of the 2011 version of the bill and incorporated the provision calling for "prompt and equitable" proceedings, which is just a term of art for a preponderance of the evidence standard.¹⁴⁵ The inclusion of the term "prompt and equitable" proceedings did not resonate well with opponents of the bill, particularly organizations that advocate for students rights on college campuses, which claimed using such a low standard would curtail students' due process rights.¹⁴⁶ Finally, caving to pressure from the students' rights organizations, Senator Patrick Leahy, chairman of the Senate Judiciary Committee and the main sponsor of the bill, made the decision to remove "prompt and equitable" from the section.¹⁴⁷ Rather than requiring schools to use a "prompt and equitable" standard, the 2013 VAWA reauthorization instead required schools provide a "prompt, fair, and impartial" resolution.¹⁴⁸

While most sexual assault victim advocates were celebrating the inclusion of the SaVE Act in VAWA rather than dwelling on the

¹⁴² See Gregory, *supra* note 41, at 55 (suggesting that campus safety advocates, media, professional organizations, and the DOE should host summits to address how to best achieve the goals of the Clery Act).

¹⁴³ See 156 CONG. REC. E2055 (daily ed. Dec. 2, 2010) (statement of Rep. Thomas S. P. Perriello) (noting the experience the DOJ has in administering grants geared toward reducing campus violence).

¹⁴⁴ Wendy Kaminer, *What's Wrong With the Violence Against Women Act*, THE ATLANTIC (Mar. 19, 2012, 4:15 PM), <http://www.theatlantic.com/national/archive/2012/03/whats-wrong-with-the-violence-against-women-act/254678/> (arguing this standard essentially presumes guilt).

¹⁴⁵ See VAWA, S. 1925, 112th Cong. (2012) (as originally introduced) (requiring the "prompt and equitable" standard to be included in colleges' policy statement).

¹⁴⁶ See Joseph Cohn, *Where FIRE Stands on VAWA*, FIRE (May 31, 2012), <http://thefire.org/article/14530.html> (noting that a trier of fact would only have to conclude that there is a 50.01% chance accusations are true in order to find guilt).

¹⁴⁷ See Caroline May, *Sen. Leahy Removes Potential Threat to Due Process from Violence Against Women Act*, THE DAILY CALLER (Nov. 15, 2011, 10:52 AM), <http://dailycaller.com/2011/11/15/sen-leahy-removes-from-violence-against-women-act/> (noting that the bill would probably not address the standard of proof issue at all).

¹⁴⁸ See VAWA, Pub. L. No. 113-4, 127 Stat. 54 § 304(a)(5) (requiring colleges to provide a statement notifying students that the colleges owe them a prompt and fair resolution to their case).

removal of the preponderance of the evidence standard, not all sexual assault advocates saw the passage of the SaVE Act in a positive light.¹⁴⁹ Sexual assault survivor advocates asserted that the preponderance of evidence standard the OCR guidance recommends is crucial to protect survivors of sexual assault.¹⁵⁰ Contrary to the groups that insisted the preponderance of evidence standard would diminish students' due process rights, sexual assault survivor advocates assert that those accused of sexual assault have no claim to due process.¹⁵¹ Further, such advocates claim that by removing the preponderance of evidence standard, the SaVE Act directly undermines the guidance provided in the Letter and would actually expose women to *more* violence.¹⁵²

However, the SaVE Act does not undermine the Letter because the SaVE Act does not aim to amend Title IX, for which the Letter is meant to provide guidance.¹⁵³ The SaVE Act does codify several recommendations provided in OCR's Letter, but it was meant primarily to improve reporting requirements under the Clery Act.¹⁵⁴ Title IX and the Clery Act work in tandem to address campus sexual assault: Title IX prohibits schools from discriminating on the basis of sex and classifies sexual violence as a type of sex discrimination, whereas the Clery Act is meant to provide the public accurate information on campus crime statistics and inform prospective and current students of how schools handle campus crime, particularly sexual assault.¹⁵⁵ The SaVE Act as enacted may not require schools to include an explicit standard of evidence in their policy statement, but this does not relieve schools of their Title IX obligations, for which they must follow guidance under the Letter.¹⁵⁶

¹⁴⁹ See Lombardi, *supra* note 8 (noting that victim advocates were "delighted" at the passage of VAWA). *But see* Wendy Murphy, *Campus 'Safety' Bill Endangers Rape Prosecutions*, FORBES (May 17, 2012, 12:19 PM), <http://www.forbes.com/sites/womensnews/2012/05/17/campus-safety-bill-endangers-rape-prosecutions> (asserting that the SaVE Act is a "wolf in sheep's clothing").

¹⁵⁰ See Murphy, *supra* note 148 (claiming that in the world of higher education the victim's word is never taken as seriously as the alleged-offender's denial).

¹⁵¹ See Kaminer, *supra* note 143 (claiming that the accused do not enjoy a constitutional right to due process because sexual assault is a form of gender discrimination).

¹⁵² See Murphy, *supra* note 141 (noting that women would be exposed to more violence because the SaVE Act allows schools to avoid compliance with Title IX).

¹⁵³ See VAWA, Pub. L. No. 113-4, 127 Stat. 54 § 304(a)(5) (stating that the Section 304 amends 20 U.S.C. § 1092(f), which is the Clery Act, not Title IX).

¹⁵⁴ See Press Release, *supra* note 99 (explaining that the SaVE Act amends the Clery Act to create uniform reporting standards for instances of sexual violence on college campuses).

¹⁵⁵ See Cantalupo, *supra* note 35, at 633-37 (asserting that both of these laws have become increasingly protective of sexual assault survivors' rights).

¹⁵⁶ See May, *supra* note 146 (noting that the standard requiring a preponderance of evidence was removed from the draft of VAWA because of feedback received by Sen. Leahy). *Cf. Burying Our Heads*, *supra* note 30, at 233-34 (asserting the Letter shows an admirable effort by the Obama administration to better address campus sexual assault).

III. RECOMMENDATIONS

While the SaVE Act makes many improvements to address the rampant problem of campus sexual assault, it fails to address one of the Clery Act's greatest flaws: its method of reporting crimes.¹⁵⁷ The most effective solution to the Clery Act's reporting problem would be to amend the law in order to create a standard, anonymous form of reporting crimes.¹⁵⁸ The amended Clery Act requires schools to have policies which embrace accurate and prompt reporting of all crimes, but the reporting depends upon students reporting the crime to the appropriate campus official.¹⁵⁹ As many studies have shown, the rates of underreporting rape and other crimes of sexual violence are somewhat of a phenomenon.¹⁶⁰ First, female college students are more likely to report incidents of stranger rape rather than rape by an acquaintance, but acquaintance rape is far more common.¹⁶¹ Second, many sexual assault survivors do not believe what happened to them actually constitutes sexual assault.¹⁶² In incidents where little to no physical evidence and/or alcohol is present, college women are not likely to report the crime.¹⁶³ Further, college women often fail to report crimes of sexual assault because they believe the incident was not serious enough, they were not completely sure a crime occurred, or the survivor worries that the police will not take her report seriously.¹⁶⁴

One suggested method of improved reporting involves calling upon the DOE to create a standardized survey that would be provided to all colleges required to report their crime statistics under the Clery Act.¹⁶⁵ This type of survey would prevent colleges from hiding behind

¹⁵⁷ See *Burying Our Heads*, *supra* note 30, at 258–59 (finding that the bill only addresses the information is with Clery Act).

¹⁵⁸ See Fisher, *supra* note 41, at 75 (noting that only four percent of schools currently offer a method of reporting sexual assault anonymously online); *Burying Our Heads*, *supra* note 30, at 259 (noting this method would be more likely to provide comprehensive information).

¹⁵⁹ See *Burying Our Heads*, *supra* note 30, at 259 (asserting that the only way the Clery Act can achieve its purported goal of providing accurate information on crime statistics it must stop depending on victim reporting).

¹⁶⁰ See Fisher, *supra* note 42, at 68 (noting that the Sexual Victimization of College Women Study revealed that less than five percent of rape survivors officially reported the rape to campus officials or law enforcement).

¹⁶¹ See *id.* at 68–69 (explaining that a 2000 study revealed that thirty four percent of rape survivors knew their attacker as a friend, twenty four percent were attacked by a boyfriend or ex-boyfriend, and thirty six percent were attacked by a classmate).

¹⁶² See *id.* at 69 (finding that a majority of sexual assault survivors do not define their experience in legal terms, despite the fact the incident meets the legal standard of rape).

¹⁶³ See *id.* at 69–70 (explaining the 2000 study found that eighty-five percent of sexual assaults that happened when alcohol or drugs were involved go unreported).

¹⁶⁴ See *id.* at 69 (noting the same 2000 study reported that seventy-seven percent of college women believed the sexual assault was not serious enough to warrant reporting).

¹⁶⁵ See *Burying Our Heads*, *supra* note 30, at 259 (suggesting that a contractor might even be hired to create the survey).

non-reporting, and this type of survey would also allow students to report incidents of sexual assault without being forced to come forward and reveal their identity.¹⁶⁶ The survey could also allow third-party witnesses to report incidents, something only about one in three schools currently allow.¹⁶⁷

The Clery Act should also be amended to impose harsher penalties on schools that have been found in violation of the Clery Act.¹⁶⁸ Colleges can be charged up to a maximum of \$27,500 per violation, yet the DOE is under no obligation to fine the maximum amount, or fine the school at all.¹⁶⁹ The DOE penalized Yale University with a \$165,500 fine after a seven year investigation found the school violated the Clery Act; however, such an intense investigation is not the standard procedure.¹⁷⁰ To ensure that colleges give more weight and legitimacy to the Clery Act, the DOE should mandate fees, rather than merely use the fee as a threat.¹⁷¹

The requirements of the Clery Act may be easier to achieve if colleges were also required to create a central victims' services office under the law.¹⁷² Not only could this office provide the types of services mandated by a college's policy statement, but it could serve as a training ground for dealing with sexual assault for a college's administration, and it would create a centralized location for reporting.¹⁷³ Further, this office could be used as a resource by college administrators to ensure they are properly complying with the Clery Act, as well as Title IX.¹⁷⁴

Not only do colleges need to prove they are committed to eliminating campus sexual violence, but Congress needs to prove

¹⁶⁶ See *id.* (suggesting that students be required to fill out the survey before they could sign up for classes or graduate).

¹⁶⁷ See Fisher, *supra* note 42, at 73 (explaining that statistics show survivors are more likely to disclose the incident to friends rather than reporting it to campus authorities or law enforcement).

¹⁶⁸ See generally Ahn, *supra* note 108, at 535–36 (noting higher penalties will help avoid flagrant disregard for the law).

¹⁶⁹ See Clery Act, 20 U.S.C. §§ 1092(f)(8)(C), 1092(f)(13) (noting the fine is limited by 20 U.S.C. § 1094(c)(3)(B) (2012)).

¹⁷⁰ See Tyler Kingkade, *Yale Faces \$165,000 Clery Act Fine For Failing To Report Sex Offenses On Campus*, THE HUFFINGTON POST (May 16, 2013 7:49 PM), http://www.huffingtonpost.com/2013/05/15/yale-clery-act_n_3280195.html (noting that Yale is the first Ivy League school to be fined for a Clery Act violation).

¹⁷¹ See Ahn, *supra* note 108, at 535–36 (noting that fees for violating the Clery Act will ensure compliance and avoid flagrant disregard for the law).

¹⁷² See *Burying Our Heads*, *supra* note 30, at 262 (suggesting a centralized victims' services office should be promoted to students while maintaining confidentiality).

¹⁷³ See *id.* (asserting that a centralized office has been noted as one of the best ways to respond to campus sexual assault).

¹⁷⁴ See Gregory, *supra* note 41, at 57 (noting that there have been so many amendments to the Clery Act, it leads to confusion for colleges as to exactly what is required for compliance).

they are committed as well, beyond just passing laws supporting the prevention of sexual violence.¹⁷⁵ The government should provide financial support to schools to help the schools fully comply with the Clery Act.¹⁷⁶ By providing funding, schools will be able to more easily comply with the Clery Act, and could more easily implement the recommendations listed above.¹⁷⁷

CONCLUSION

Campus sexual assault cannot be taken lightly; it can have a severe impact on the survivor's life.¹⁷⁸ If a survivor is met with adversity when she comes forward, she can feel traumatized all over again.¹⁷⁹ This is why laws like Title IX and the Clery Act must be taken seriously and be fully enforced.¹⁸⁰ When weaknesses in the laws are revealed, they should be amended promptly, just as the SaVE Act does with the Clery Act.¹⁸¹

The SaVE Act is a step in the right direction to solving the surge of campus sexual assault.¹⁸² In requiring schools to clearly articulate their policies in handling sexual assault, requiring continuous education on prevention and survivor assistance, and broadening the definitions of what crimes need to be reported, this will lead to fewer stories of colleges treating survivors as the guilty party.¹⁸³ Students deserve to feel like they are in a safe, nurturing environment when they head to college, and, while the SaVE Act may not entirely save them from danger, it will certainly go a long way to protect them.¹⁸⁴

¹⁷⁵ *Cf. id.* at 54–56 (noting the Clery Act is one of the many unfunded, yet federally mandated, laws).

¹⁷⁶ *See id.* at 54 (explaining many states are facing budget deficits, which may lead to a limit of funding available for campus safety programs).

¹⁷⁷ *Cf. id.* at 55 (asserting that multiple improvements are needed to comply with the Clery Act and achieve safer campuses).

¹⁷⁸ *See generally* Nesterak, *supra* note 31 (describing the story of D, who experienced a cruel and grueling process when she reported her rape to officials at Swarthmore College).

¹⁷⁹ *See id.* (explaining D was asked accusatory questions and precluded from saying she was raped during her campus proceeding).

¹⁸⁰ *Cf. Burying Our Heads, supra* note 30, at 265 (explaining schools must have consistent incentives to adopt responses that will prevent sexual assault).

¹⁸¹ *Cf. id.* (noting that laws must be better enforced and further improved to end campus sexual assault).

¹⁸² *See id.* (noting that, while the SaVE Act makes notable changes, it could go farther to improve the Clery Act).

¹⁸³ *See* Katie McDonough, *Former UNC Dean of Students Says She was Forced to Underreport Sexual Assault Cases*, SALON (Jan. 18, 2013, 1:47 PM), http://www.salon.com/2013/01/18/former_unc_dean_of_students_forced_to_underreport_sexual_assault_cases/ (explaining a UNC official made a rape survivor feel like she was to blame because of her history of clinical depression).

¹⁸⁴ *Cf. Press Release, supra* note 99 (explaining the SaVE Act closes considerable gaps in the Clery Act).

