

SAVING TITLE IX VALUES: THE CAMPUS SAVE ACT AS A CRITICAL TOOL FOR SURVIVORS AND ALLIES

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INTRODUCTION

In a foundational law review article published in 1991, Terry Nicole Steinberg proposed a solution to the then-little-considered issue of campus sexual assault.¹ Her idea was simple: the Department of Education could use Title IX to compel schools to address sexual violence against women.² Although neither sexual harassment nor sexual assault were mentioned in the law itself, courts had already recognized that such acts could constitute sex discrimination.³ Steinberg argued that the requirement under Title IX to treat male and female students equally could be understood to obligate schools to address sexual assault because crimes of that nature disproportionately affect

¹ Terry Nicole Steinberg, *Rape on College Campuses: Reform Through Title IX*, 18 J.C. & U.L. 39, 39–41 (1991).

² *Id.* at 51–52, 66–68.

³ *See, e.g.*, *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65–67 (1986) (holding that unwelcome sex constituted sexual harassment that is actionable under Title VII and that in an employer-employee context, rape could be considered sex discrimination).

women.⁴ To fulfill this obligation, Steinberg opined that “a college must design a rape-prevention program under which security measures overlap with ensuring female students the full benefits of a college’s academic programs.”⁵

By 2011, Steinberg’s vision was beginning to come to pass.⁶ While the Department of Education’s Office of Civil Rights (“OCR”) had opened only a handful of Title IX investigations in the twenty-year period since she had published her piece,⁷ the Obama Administration was taking steps to more aggressively hold colleges and universities accountable for sexual violence on their campuses. In April 2011, OCR announced a new guidance document, the 2011 Dear Colleague Letter, explaining how schools must handle reports of sexual assault.⁸ OCR soon began to disclose publicly its investigations of educational institutions,⁹ and an additional guidance document detailed the procedures colleges and universities were expected to use in resolving sexual assault complaints.¹⁰ Resolution agreements between OCR

⁴ Steinberg, *supra* note 1, at 66.

⁵ *Id.*

⁶ See Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847, 1855 (2017) (suggesting that the 2011 Dear Colleague Letter (“2011 DCL”) was the culmination of efforts to have Title IX recognized as a tool to combat campus sexual assault). Previous administrations had expressed that Title IX regulatory enforcement against colleges and universities could occur, but the Department of Education’s Office for Civil Rights (“OCR”) did little to act on that possibility. See *infra* note 7 and accompanying text.

⁷ The actual number of investigations that were opened during this period is subject to some dispute in the literature. Freedom of Information Act requests from the Center for Public Integrity show that OCR resolved at least 24 investigations between 1998 and 2008. CTR. FOR PUB. INTEGRITY, SEXUAL ASSAULT ON CAMPUS: A FRUSTRATING SEARCH FOR JUSTICE 74 (2010), <https://cloudfront-files-1.publicintegrity.org/documents/pdfs/Sexual%20Assault%20on%20Campus.pdf> [<https://perma.cc/F6PJ-S4UX>]. But other sources show that many fewer investigations were opened, and most of those were opened in 2011. See, e.g., *Investigations, TITLE IX: THE CHRONICLE OF HIGHER EDUC.*, <https://projects.chronicle.com/titleix/investigations> [<https://perma.cc/3ESY-37LG>] (showing that between the Steinberg article’s publication and the end of 2011, twenty-five separate OCR cases were opened).

⁸ Russlynn Ali, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Sexual Violence (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/D563-UJW5>] [hereinafter 2011 DCL].

⁹ See 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> [<https://perma.cc/U357-TLMK>]; see also *About The Chronicle’s Title IX Investigation Tracker*, CHRON. HIGHER EDUC., <http://projects.chronicle.com/titleix/about> [<https://perma.cc/L756-PNQJ>].

¹⁰ See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/RT4M-VM4J>] [hereinafter 2014 Q&A].

and educational institutions reinforced these strong requirements for Title IX compliance.¹¹

But for survivors of campus sexual assault, the 2016 election brought with it the fear that the new administration could quickly sweep away the expanded understanding of Title IX made under President Obama's eight years in office. President Trump's Secretary of Education, Betsy DeVos, was clear early in her tenure that she took a critical view of Obama-era Title IX policies.¹² While noting that "acts of sexual misconduct are reprehensible, disgusting, and unacceptable,"¹³ she voiced concern that the current Title IX regime was systematically biased against the accused.¹⁴ And when Secretary DeVos took meetings to reconsider the Department of Education's guidance on Title IX, she made a point of meeting with accused students' families.¹⁵ On September 22, 2017, the Department of Education rescinded the two key Obama Administration guidance documents on campus sexual assault—the 2011 Dear Colleague Letter and the 2014 Questions and Answers on Title IX Sexual Violence—with the goal of providing more due process to accused students.¹⁶ To many, Secretary DeVos's new guidance documents, issued to replace the newly revoked documents,¹⁷ were a step backward in the fight to ensure survivors' rights under Title IX.¹⁸

¹¹ See, e.g., Letter from Joel J. Berner, Reg'l Dir., Office for Civil Rights, U.S. Dep't of Educ., to Martha Minow, Dean, Harvard Law School (Dec. 30, 2014), <https://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf> [<https://perma.cc/NM96-LC8R>].

¹² See Press Release, U.S. Dep't of Educ., Secretary DeVos Prepared Remarks on Title IX Enforcement (Sept. 7, 2017), <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement> [<https://perma.cc/TXM6-QQ78>] (alleging that "the prior administration weaponized the Office for Civil Rights to work against schools and against students").

¹³ *Id.*

¹⁴ See *id.* ("[A]ny school that uses a system biased toward finding a student responsible for sexual misconduct also commits discrimination.").

¹⁵ See Erica L. Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-ix-education-trump-candice-jackson.html> [<https://perma.cc/FJ53-D52A>]; see also Anemona Hartocollis & Christina Capecchi, 'Willing to Do Everything,' Mothers Defend Sons Accused of Sexual Assault, N.Y. TIMES (Oct. 22, 2017), <https://www.nytimes.com/2017/10/22/us/campus-sex-assault-mothers.html> [<https://perma.cc/W94Y-48XK>].

¹⁶ See Press Release, U.S. Dep't of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct> [<https://perma.cc/58VH-9ELH>] (claiming that the old guidance documents "created a system that lacked basic elements of due process and failed to ensure fundamental fairness").

¹⁷ See Candice Jackson, Office for Civil Rights, U.S. Dep't of Educ., "Dear Colleague" Letter on Campus Sexual Misconduct (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [<https://perma.cc/KW5P-A653>] [hereinafter 2017 DCL]; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [<https://perma.cc/8AS3-5D4F>].

¹⁸ See, e.g., *Coalition Letter Opposing Department of Education Decision to Rescind and Replace Title IX Guidance*, NAT'L WOMEN'S LAW CTR. (Sept. 25, 2017), <https://nwlw>

This new era of Title IX enforcement presents a challenge much like the one facing Steinberg over twenty-five years ago today. Experiences of non-consensual sexual contact remain disconcertingly common on college campuses: one-third of undergraduate women have experienced at least one instance of such unwanted contact by the time they are seniors.¹⁹ One-fifth of all women in college will experience attempted or completed sexual assault during their undergraduate years.²⁰ Without the promise of strong Title IX enforcement, activists must take up the mantle of Steinberg and consider the other legal options available to combat the ongoing crisis of campus sexual assault.

It is against this backdrop that this Note considers how a lesser-known legal tool might become the new champion of survivors' rights. The Campus Sexual Violence Elimination Act ("SaVE Act") was passed in 2013 to much fanfare,²¹ but its full power was little considered in an era in which Title IX was enforced vigorously.²² This Note examines how the SaVE Act might fill some of the void left in the wake of the Obama-era guidance documents' revocations. After explaining briefly the major changes to Title IX enforcement during the Obama Administration—namely the 2011 Dear Colleague Letter—this Note explores the requirements of the SaVE Act and how they codify many of the Obama-era Title IX values and obligations. This Note then provides several arguments about why the SaVE Act represents the best means for survivors and advocates to enforce the gains made in the previous administration. Concluding with a reminder of the enforcement realities under an administration apparently hostile to Title IX, this Note concludes that careful advocacy could still allow those fighting for survivors to take up the mantle of Steinberg's call to action twenty-five years ago and use the SaVE Act to force schools to focus on providing not only proper adjudica-

.org/resources/coalition-letter-opposing-department-of-education-decision-to-rescind-and-replace-title-ix-guidance [https://perma.cc/X2VD-MPVH]; see also Adam Harris, *Senate Democrats Urge DeVos to Reinstate Obama Guidance on Sexual-Assault Policy*, CHRON. HIGHER EDUC. (Sept. 28, 2017), https://www.chronicle.com/blogs/ticker/senate-democrats-urge-devos-to-reinstate-obama-era-title-ix-guidance/120394 [perma].

¹⁹ DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 23 (rev. ed. 2017), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf [https://perma.cc/4AAA-RCGJ].

²⁰ CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY xviii (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf [https://perma.cc/ADG4-YBPG].

²¹ See, e.g., Tyler Kingkade, *College Sexual Assault Victim Advocates Hail VAWA Passage*, HUFFINGTON POST (Mar. 1, 2013), https://www.huffingtonpost.com/2013/03/01/college-sexual-assault-vaawa_n_2786838.html [https://perma.cc/L5H7-LRE6]; Joseph Shapiro, *Law Targets Sexual Violence on College Campuses*, NPR (Mar. 6, 2013), https://www.npr.org/sections/thetwo-way/2013/03/07/173657424/law-targets-sexual-violence-on-college-campuses [https://perma.cc/FS34-V9F2].

²² But see, e.g., Susan Hanley Duncan, *The Devil Is in the Details: Will the Campus SaVE Act Provide More or Less Protection to Victims of Campus Sexual Assaults?*, 40 J.C. & U.L. 443, 452–62 (2014) (assessing the potential of the SaVE Act shortly after its enactment).

tion of sexual violence but also the tools to prevent such sexual violence in the first place.

I. THE VALUES AT STAKE: OBAMA-ERA TITLE IX

Though the Obama Administration broke new ground with its comprehensive guidance documents on Title IX compliance for higher education institutions, prior administrations had also considered Title IX. Title IX, part of the Education Amendments of 1972,²³ was widely understood as “a contract between the Government and the recipient of funds” requiring that the recipient would not discriminate on the basis of sex.²⁴ Beginning in the late 1990s, the Department of Education promulgated increasingly lengthy guidance documents to ensure recipients were in a position to meet federal government funding requirements. These documents elaborated on a school’s obligation to remedy “hostile environments” on its campus, including through effective grievance procedures for allegations of sexual harassment and sexual assault.²⁵ But these documents were often vague. The 2001 Guidance, for example, explained that a school could meet its Title IX obligations “[a]s long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence,”²⁶ but largely left it to the school to determine what amounted to “prompt and effective action.”²⁷ While the 2001 Guidance took the novel step of announcing that Supreme Court interpretation of Title IX in private-right-of-action cases did not control OCR’s oversight,²⁸ OCR did little to enforce its understanding of these Title IX obligations.²⁹

The Obama Administration took a more aggressive stance toward Title IX, making the issue of campus sexual violence a focus of the Department of Education.³⁰ The pinnacle of Obama-era Title IX policy came with the

²³ Pub. L. No. 92-318, 86 Stat. 373 (1972) (codified as amended at 20 U.S.C. §§ 1681–1688 (2012)).

²⁴ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

²⁵ *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,038–40 (Mar. 13, 1997); OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES iii–vi (2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/27TH-ZHZF>] [hereinafter 2001 REVISED GUIDANCE].

²⁶ 2001 REVISED GUIDANCE, *supra* note 25, at 12.

²⁷ *See id.* at 5–15.

²⁸ *See id.* at i–ii.

²⁹ *See* NAT’L WOMEN’S LAW CTR., SLIP-SLIDING AWAY: THE EROSION OF HARD-WON GAINS FOR WOMEN UNDER THE BUSH ADMINISTRATION AND AN AGENDA FOR MOVING FORWARD 5 (2004), <https://www.nwlc.org/wp-content/uploads/2015/08/AdminRecordOnWomen2004.pdf> [<https://perma.cc/5RLP-HYUE>].

³⁰ *See, e.g.*, Press Release, U.S. Dep’t of Educ., Vice President Biden Announces New Administration Effort to Help Nation’s Schools Address Sexual Violence (Apr. 4, 2011), <https://www.ed.gov/news/press-releases/vice-president-biden-announces-new-administration-effort-help-nations-schools-ad> [<https://perma.cc/5LN7-Y8RA>].

OCR's 2011 policy memorandum, commonly known as the 2011 Dear Colleague Letter ("2011 DCL").³¹ OCR framed the letter as a reminder to educational institutions of their obligations under Title IX³²: should schools fail to respond to sexual violence, thereby creating a hostile environment for female students, OCR had the authority to deprive those schools of federal funds.³³ Unlike previous administrations' guidance documents, the 2011 DCL made sexual violence—rape, sexual assault, sexual battery, and sexual coercion—its central focus.³⁴ It rejected force as a component of sexual violence,³⁵ bringing federal policy in line with a handful of hard-won changes to the force requirement in state rape laws.³⁶ And the demands on educational institutions to address sexual violence complaints were spelled out with greater clarity than ever before. Not only were schools required to respond to sexual violence that occurred on campus, but they were also responsible for addressing community members' "off-campus" conduct that could detrimentally affect students' access to educational opportunities.³⁷ The 2011 DCL's new, explicit procedural standards for educational institutions' investigations and adjudications of sexual violence complaints included the command that schools provide "prompt and equitable" resolutions of complaints of sexual violence.³⁸ Cross-examination of a complainant by an alleged perpetrator was "strongly discourage[d],"³⁹ and schools were expected to provide adequate interim measures to the complainant throughout any and all proceedings.⁴⁰ Most critically to survivors and activists,⁴¹ and most contro-

³¹ 2011 DCL, *supra* note 8. Title IX mandates that "[n]o 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." 20 U.S.C. § 1681(a) (2012).

³² See 2011 DCL, *supra* note 8, at 1.

³³ *Id.* at 16.

³⁴ Tani, *supra* note 6, at 1874 (citing 2011 DCL, *supra* note 8, at 1–2).

³⁵ OCR explained that sexual violence is a "physical sexual act[] perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol," 2011 DCL, *supra* note 8, at 1, and that it includes "rape, sexual assault, sexual battery, and sexual coercion," *id.* at 1–2. See also Tani, *supra* note 6, at 1874 (describing this definition of sexual violence in the 2011 DCL as "reject[ing] physical force as the dividing line between cognizable and noncognizable sexual violence").

³⁶ See, e.g., State ex rel. M.T.S., 609 A.2d 1266, 1278–80 (N.J. 1992) (moving away from the force requirement in rape law to a focus on protecting sexual autonomy). A majority of states still include "force" as an element in their statutory definitions of rape. See Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 25 (2017) ("About two-thirds of states still rely on the concept of "force" in criminalizing rape."); see also *id.* at 25 n.132 (listing jurisdictions that at the time included "force" in the statutory offense definition).

³⁷ 2011 DCL, *supra* note 8, at 4.

³⁸ *Id.* at 6.

³⁹ *Id.* at 12.

⁴⁰ See *id.* at 15.

⁴¹ See, e.g., Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 281, 288–91 (2016) (defending, and noting the importance of, the preponderance of the evidence standard in Title IX proceedings); see also Amy Chmielewski, Note, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 145 (2013)

versially to others,⁴² the 2011 DCL stated that schools must employ the “preponderance of the evidence” standard of proof in these adjudicatory hearings.⁴³ The guidance document concluded with recommendations on “proactive measures” that schools should employ to improve campus cultures and train community members to meet their Title IX obligations.⁴⁴

Whether the 2011 DCL has legal force is subject to some dispute,⁴⁵ but the institutional and cultural changes it wrought in schools were dramatic. Colleges and universities across the United States modified the standard of proof required under their sexual assault policies to the preponderance of the evidence standard.⁴⁶ The public discussion of the 2011 DCL and due process in school grievance procedures illustrated that schools were substantially changing their approaches to campus sexual assault in the years after the federal guidance.⁴⁷ Indeed, campus activists began to cite to the 2011 DCL

(“Much of the media attention directed at the Dear Colleague Letter has focused on the preponderance of the evidence standard . . .”).

⁴² Critics were outspoken against the mandated use of the preponderance of the evidence standard. *See, e.g.,* Ryan D. Ellis, *Mandating Injustice: The Preponderance of the Evidence Mandate Creates a New Threat to Due Process on Campus*, 32 REV. LITIG. 65, 80–82 (2013); Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 107 n.8 (2015); Barclay Sutton Hendrix, Note, *A Feather on One Side, A Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 610–15 (2013).

⁴³ 2011 DCL, *supra* note 8, at 10.

⁴⁴ *Id.* at 14–15 (noting that these measures may include educational programs that provide definitions of and school policies on sexual violence and harassment and the development of materials on sexual violence for employee handbooks and student organizations).

⁴⁵ *See, e.g.,* Letter from Larry Alexander et al., Professors of Law from Institutions Throughout the United States, to State and Federal Lawmakers, College Administrators, and Officials at the U.S. Department of Education Office of Civil Rights (June 1, 2016), <http://www.saveservices.org/wp-content/uploads/Law-Professor-Open-Letter-May-16-2016.pdf> [<https://perma.cc/HNZ8-ZRBC>] (arguing that the 2011 DCL could not be considered to have the force of law because it did not go through notice-and-comment procedures); Ashe Schow, *State Legislator to Sue the Federal Government*, WASH. EXAMINER (Apr. 22, 2016), <http://www.washingtonexaminer.com/state-legislator-to-sue-the-federal-government/article/2589294> [<https://perma.cc/SC66-ADAA>] (discussing a lawsuit that alleged the 2011 DCL violated the Administrative Procedure Act).

⁴⁶ *See, e.g.,* Allie Gragreen, *Rules Shift After Federal Push*, INSIDE HIGHER ED. (May 2, 2011), https://www.insidehighered.com/news/2011/05/02/ocr_title_ix_letter_prompts_universities_to_change_sexual_assault_procedures [<https://perma.cc/LJF6-7MG7>].

⁴⁷ *See, e.g.,* Eugene Volokh, *Open Letter from 16 Penn Law School Professors About Title IX and Sexual Assault Complaints*, WASH. POST (Feb. 19, 2015), <https://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> [<https://perma.cc/2F3Q-Z8CW>]; Halley, *supra* note 42, at 103–17; 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 [<https://perma.cc/6EXH-XS5X>]; Elizabeth Bartholet et al., *Rethink Harvard’s Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> [<https://perma.cc/Q9A7-XWVP>]; *see also* Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 886 (2016) (describing an “ambivalence” about

in Title IX complaints.⁴⁸

II. THE CAMPUS SAVE ACT

Despite the Obama Administration's strong Title IX policies, concerns about the prevalence of sexual violence on college campuses continued. Worried that universities and colleges were still shirking their Title IX obligations,⁴⁹ Congress passed the SaVE Act in 2013 as part of the Violence Against Women Act Reauthorization,⁵⁰ which focused primarily on federal programs to reduce and prevent domestic violence and rape.⁵¹ The SaVE Act amended the Clery Act,⁵² a crime-reporting law for educational institutions receiving federal funds, to include a broader array of sexual violence crimes and to mandate that colleges and universities receiving federal funds implement prevention programs and certain minimum procedural standards in their adjudicatory proceedings for such crimes.⁵³ Early on, the SaVE Act was regarded as "a sister statute to Title IX."⁵⁴

A. Requirements of the Campus SaVE Act

The goal of the SaVE Act was to provide at least some codification of the 2011 DCL, and the final version of the law that went into effect on March 7, 2014 largely achieved that aim.⁵⁵ Although the Act creates at a

the growing number of federal regulations around sexual interactions, particularly on campus).

⁴⁸ Richard Pérez-Peña, *College Groups Connect to Fight Sexual Assault*, N.Y. TIMES (Mar. 19, 2013), <http://www.nytimes.com/2013/03/20/education/activists-at-colleges-network-to-fight-sexual-assault.html> [https://perma.cc/PA28-FDHE].

⁴⁹ See, e.g., 159 CONG. REC. E179 (2013) (statement of Rep. Carolyn Maloney) (stating that the goal of the Campus SaVE Act was to help women be able to pursue educational goals without concern about sexual assault, stalking, dating violence, and domestic violence on campus); see also Kristen Lombardi, *Sexual Assault on Campus: A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010), <http://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault> [https://perma.cc/PA28-FDHE] (finding that even when schools were finding students responsible for alleged sexual assaults on campus, those students were unlikely to face consequences for those actions); cf. Caitlin Emma, *The Push on Campus Sexual Violence*, POLITICO (Nov. 26, 2013) <https://www.politico.com/story/2013/11/campus-sexual-violence-reports-100363> [https://perma.cc/L7ZS-D3S5] ("The Obama administration is more aggressive than predecessors in handling campus-based sexual violence, but advocates say the Education Department still isn't going far enough on several basic fronts.").

⁵⁰ See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54.

⁵¹ See generally LISA N. SACCO, CONG. RESEARCH SERV., R42499, THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING (2015).

⁵² Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2012).

⁵³ See § 304, 127 Stat. at 89–92.

⁵⁴ Rebecca Leitman Veidlinger, *Coming Soon to a College or University Near You . . . VAWA*, 41 J.C. & U.L. 591, 592 (2015).

⁵⁵ See S. Daniel Carter, *The Federal Jeanne Clery Act Already Addresses Many Concerns About Campus Sexual Assault Cases*, HUFFINGTON POST (Sept. 14, 2017), <https://>

minimum an information-reporting regime for all schools receiving federal funds, its procedural requirements essentially mandate substantive rules that align with the major goals of Obama-era Title IX enforcement. Regulations promulgated pursuant to the SaVE Act, for example, require that schools disclose any procedures employed for disciplinary actions related to “dating violence, domestic violence, sexual assault, or stalking” in an annual safety report (“ASR”).⁵⁶ These reporting obligations, although facially procedural, provide substantive details on what the statements must include—such as explaining that both parties may have a representative, that the school will provide prompt notice of outcomes, and that the school will inform parties of the availability of interim measures⁵⁷—and this framework effectively requires schools to actually *implement* the programs reported so that the ASR reporting on the programs’ existence is accurate. The SaVE Act’s provisions serve roughly three goals, and they can be divided into three categories accordingly: transparency, accountability, and prevention.

1. *Transparency*

The basic goal of the SaVE Act is to build upon the reporting requirements of the Clery Act. The Clery Act requires universities and colleges to disclose crime statistics for incidents that occur “on campus, in or on non-campus buildings or property, and on public property.”⁵⁸ But where the Clery Act required the disclosure of only “sex offenses[,] forcible or nonforcible,”⁵⁹ the SaVE Act mandates disclosure of “domestic violence, dating violence, and stalking incidents that were reported to campus security authorities or local police agencies.”⁶⁰ Regulations under the SaVE Act adopt the FBI’s Uniform Crime Reporting definition of rape,⁶¹ which focuses on consent rather than the issue of force. Codifying the 2011 DCL’s recognition that most claims of campus sexual violence involve someone the survivor knows, the SaVE Act defines dating violence as “[v]iolence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.”⁶² Schools must include all of these statements and statistics in an ASR that they distribute and make available to the campus community.⁶³ Through these requirements for transparency, then,

www.huffingtonpost.com/entry/the-federal-jeanne-clery-act-already-addresses-many_us_59bb128ce4b06b71800c37f7 [https://perma.cc/5BWV-LN2B].

⁵⁶ See 34 C.F.R. § 668.46(b)(11)(vi) (2018).

⁵⁷ See *id.* § 668.46(k)(1)(iv), (2)(iii)-(v).

⁵⁸ 20 U.S.C. § 1092(f)(1)(F) (2012).

⁵⁹ *Id.* § 1092(f)(1)(F)(i)(II).

⁶⁰ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304(a)(1)(B)(iii), 127 Stat. 54, 89.

⁶¹ 79 Fed. Reg. 62,751, 62,789 App. A (2014) (defining rape as “[t]he penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim”).

⁶² *Id.* at 62,784; 34 C.F.R. § 668.46(a).

⁶³ See 20 U.S.C. § 1092(f)(1)(F).

students are able to understand their rights, get a sense of how the school is approaching issues of sexual violence, and use the reports and statistics to hold the school accountable.

2. *Accountability*

The SaVE Act also provides strict directives to schools on how to handle complaints of sexual violence that allow advocates to ensure colleges and universities are taking these complaints seriously. The Act incorporates the 2011 DCL's mandate for prompt and impartial internal investigation and resolution procedures,⁶⁴ and its regulations similarly adopt the 2011 DCL's requirement that alleged sexual assault victims be advised of their right to file internal complaints, criminal complaints, or both.⁶⁵ Schools must include in their ASRs an explanation of procedures that complainants may follow should they experience a sexual offense as defined in the SaVE Act⁶⁶ and the procedures that the institution will use to adjudicate cases of alleged sexual misconduct.⁶⁷

The SaVE Act places further requirements on these procedures: proceedings must be "prompt, fair and impartial . . . and conducted by officials who, at a minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability."⁶⁸ The regulations specify that any investigation in a sexual misconduct case must be "[c]ompleted within reasonably prompt timeframes" and be "[c]onducted in a manner . . . consistent with the institution's policies and transparent to the accuser and the accused."⁶⁹ The regulations go on to explain that the school must ensure that these institutional disciplinary processes are performed with "timely notice of meetings"⁷⁰ and "timely and equal access . . . to any information that will be used,"⁷¹ and that the process must be "[c]onducted by officials who do not have a conflict of interest or bias" against or for either party.⁷² Schools must

⁶⁴ Compare § 304(a)(5), 127 Stat. at 91 (requiring proceedings to "provide a prompt, fair, and impartial investigation and resolution") with 2011 DCL, *supra* note 8, at 5 (stating that "the school's inquiry must in all cases be prompt, thorough, and impartial").

⁶⁵ Compare 34 C.F.R. § 668.46(b)(11)(ii) (requiring educational institutions to inform victims of dating violence, domestic violence, sexual assault, and stalking about their "[o]ptions about the involvement of law enforcement," including their option to "[d]ecline to notify such authorities") with 2011 DCL, *supra* note 8, at 10 ("A school should notify a complainant of the right to file a criminal complaint, and should not dissuade a victim from doing so").

⁶⁶ See 34 C.F.R. § 668.46(b)(11)(ii).

⁶⁷ *Id.* § 668.46(k)(1).

⁶⁸ *Id.* § 668.46(k)(2).

⁶⁹ *Id.* § 668.46(k)(3).

⁷⁰ *Id.* § 668.46(k)(3)(i)(B)(2).

⁷¹ *Id.* § 668.46(k)(3)(i)(B)(3).

⁷² *Id.* § 668.46(k)(3)(i)(C).

assure students that both accusers and accused will have equal opportunities to have others present with them during any proceedings, including an advisor of their choice.⁷³ SaVE Act regulations further require that colleges and universities provide survivors with written information about their rights.⁷⁴ These rights include access to existing supportive resources on and off campus, the availability of accommodations to the student's housing or educational situation, and confidentiality of the applicable processes.⁷⁵

3. *Prevention*

The SaVE Act also codifies some of the values underlying the 2011 DCL through its focus on prevention and education. The 2011 DCL required schools to “take proactive measures to prevent sexual harassment and violence” through educational programs and school-specific materials provided to students, staff, and faculty.⁷⁶ The 2014 Questions and Answers further spelled out the expectations for what schools should include in these programs,⁷⁷ such as explanations of “the role alcohol and drugs often play in sexual violence incidents,” bystander intervention strategies, steps to report incidents of sexual violence, and information on the individuals to whom students could report such incidents.⁷⁸ The SaVE Act regulations take a similar tack in mandating that schools implement and describe in their ASRs programs that will promote awareness of sexual assault and crimes of sexual violence.⁷⁹ These programs must be “[c]omprehensive, intentional, and integrated programming, . . . intended to *end* dating violence, domestic violence, sexual assault, and stalking.”⁸⁰ Programming must include primary prevention and awareness education for incoming students as well as ongoing prevention and awareness education for returning students.⁸¹ Regulations further specify that the programming must be “culturally relevant, inclusive of diverse communities and identities, sustainable, responsive to community needs, and informed by research.”⁸² In developing these programs, schools must evaluate both the risks and cultures of their own communities.⁸³ Looking past the legalese, these regulations recognize the need for a cultural shift to reduce sexual violence—and would seem to support the cultural shift that Title IX advocates, championed by the 2011 DCL. The programs must “fo-

⁷³ *Id.* § 668.46(k)(2)(iii).

⁷⁴ *Id.* § 668.46(b)(11)(ii).

⁷⁵ *See id.*

⁷⁶ 2011 DCL, *supra* note 8, at 14–15.

⁷⁷ *See* 2014 Q&A, *supra* note 10, at 38–42.

⁷⁸ *Id.* at 41–42.

⁷⁹ *See* 34 C.F.R. § 668.46(j)(1)(i).

⁸⁰ *Id.* § 668.46(a) (defining “[p]rograms to prevent dating violence, domestic violence, sexual assault, and stalking”).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

cus on changing the social norms and stereotypes that create conditions in which sexual violence occurs.”⁸⁴ Schools are required not only to state their dedication to prohibiting sexual misconduct, but also to explain how they will provide instruction on “safe and positive options for bystander intervention” to incoming students.⁸⁵ And as mentioned above, the SaVE Act further requires that those conducting the investigations “receive annual training” that is survivor-focused and specific to issues of sexual misconduct.⁸⁶

B. Limitations of the Campus SaVE Act as a Direct Substitute for Title IX Under the 2011 DCL

As critics pointed out soon after its passage, the SaVE Act did not codify all of the 2011 DCL.⁸⁷ Although, as explained above, the SaVE Act was a major step forward in providing legal force to the expectations for colleges and universities in handling sexual violence, political expediency did not permit survivor advocates to claim total victory.⁸⁸ The SaVE Act, therefore, cannot serve as a complete substitute for the Title IX protections offered when the 2011 DCL was in full effect.

Of course, some of the greatest problems with the SaVE Act as a tool for protecting campus sexual assault survivors are the result of lawmakers not addressing the gaps in the 2011 DCL. Current regulations under the Campus SaVE Act do not define consent, concluding that “no determination as to whether that element has been met is required” for administration and enforcement of the Clery Act.⁸⁹ But definitions for the identified sex offenses that schools must report pursuant to the Act do include consent as an element,⁹⁰ which means that colleges and universities are left to develop the definition themselves. While this gap in regulatory definitions offers an opportunity for the federal government to more aggressively set standards for schools under clear statutory language,⁹¹ it presently leaves schools with the ability to set standards that might make it more difficult for survivors to get the relief they deserve. Similarly, the SaVE Act also does not define clearly what an impartial investigation should look like. Just as the 2011 DCL was

⁸⁴ Comment, 79 Fed. Reg. 62,751, 62,758 (Oct. 20, 2014).

⁸⁵ 34 C.F.R. § 668.46(j)(1)(i)(D).

⁸⁶ *Id.* § 668.46(k)(2)(ii).

⁸⁷ See Lauren Van Driesen, Note, *The Campus Sexual Violence Elimination Act: Is It Enough to Combat Sexual Assault on Campus?*, 68 RUTGERS U. L. REV. 1841, 1853–61 (2016).

⁸⁸ See, e.g., *infra* notes 94–99 and accompanying text.

⁸⁹ 79 Fed. Reg. 62,752, 62,756.

⁹⁰ 34 C.F.R. § 668.46(j)(1)(i)(C) (explaining that the Annual Security Report’s “statement of policy that addresses the institution’s programs to prevent dating violence, domestic violence, sexual assault, and stalking” must include “the definition of ‘consent,’ in reference to sexual activity, in the applicable jurisdiction”).

⁹¹ See Van Driesen, *supra* note 87, at 1861 (lamenting the lack of a consent standard in the SaVE Act, and calling for “a federal law requiring schools [to] adopt affirmative consent standards”).

criticized for permitting schools to implement grievance procedures without a neutral arbiter,⁹² activists and critics alike have noted that neither the SaVE Act nor its regulations sufficiently consider how the structure of investigatory procedures can create conflicts of interest.⁹³

Those areas where the SaVE Act failed to further support legal rights offered under Title IX or incorporate 2011 DCL requirements are the most troubling aspects of the law as a substitute for the 2011 DCL. For example, the SaVE Act does not provide students the ability to enforce its requirements through a private lawsuit. The Act is clear that it provides no private right of action,⁹⁴ which means enforcement through the Department of Education is necessary to hold schools accountable when they fail to meet the law's mandates. But nothing in the new OCR guidance documents removes the private right of action under Title IX.⁹⁵ Activists, survivors, and other parties are still able to bring Title IX suits against educational institutions that fail to fulfill their obligations under the civil rights law. But Title IX lawsuits against schools are notoriously difficult for survivors. Making sure that colleges and universities meet their SaVE Act obligations, therefore, requires a Department of Education that is willing to investigate and hold schools accountable.

The most significant gap between the SaVE Act and the 2011 DCL is that the Act does not require the preponderance of the evidence standard.⁹⁶ In fact, the SaVE Act does not define what standard of evidence schools must adopt in their disciplinary proceedings for sexual assault. Senators ultimately dropped the provision that would have mandated the preponderance of the evidence standard and allowed complainants to appeal the results of the disciplinary hearings.⁹⁷ After notice-and-comment rulemaking for the

⁹² See, e.g., Tovia Smith, *Harvard Law Professors Say New Sexual Assault Policy Is One-Sided*, NPR (Oct. 15, 2014), <https://www.npr.org/2014/10/15/356424999/harvard-law-professors-say-new-sexual-assault-policy-is-one-sided> [<https://perma.cc/3DAS-U68E>] (noting one complaint with Harvard's process is that it is not neutral because "it is run by a single Title IX compliance office that's under pressure to show the government results").

⁹³ See, e.g., Van Driesen, *supra* note 87, at 1865–68.

⁹⁴ 20 U.S.C. § 1092(f)(14)(A) (2012).

⁹⁵ The Supreme Court held that a private right of action for intentional sex discrimination exists under Title IX in *Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979), and confirmed that the right of action includes claims of retaliation for sexual discrimination complaints in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 183 (2005).

⁹⁶ See, e.g., Duncan, *supra* note 22, at 453 (noting the absence of the preponderance standard in the SaVE Act); Michael Stratford, *Standards of Evidence*, INSIDE HIGHER ED (Feb. 25, 2014), <https://www.insidehighered.com/news/2014/02/25/federal-campus-safety-rules-reignite-debate-over-standard-evidence> [<https://perma.cc/29X7-ZW5B>] (pointing out the importance of the Campus SaVE Act's "silen[ce] on evidentiary procedures").

⁹⁷ Telephone Interview with S. Daniel Carter, President, Safety Advisors for Educational Campuses, LLC (Dec. 1, 2017) (notes on file with author); Letter from Robert P. Casey, Jr., U.S. Senator, to Arne Duncan, Sec'y, U.S. Dep't of Educ. (Dec. 20, 2013), <https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-senatorcaseyletter>

implementation of the Campus SaVE Act, though the Department of Education considered whether the reporting requirements should include a definition of the evidentiary standard and whether that standard should be preponderance of the evidence,⁹⁸ the final rule did not include a requirement for any particular evidentiary standard.⁹⁹

Given how controversial and critical the evidentiary standard requirement of the 2011 DCL was, its absence in the SaVE Act potentially undermines the law's effectiveness in achieving the goals of Title IX.¹⁰⁰ At best, the SaVE Act mandates that schools implement a uniform standard to provide a "prompt, fair, and impartial" proceeding and determination.¹⁰¹ While regulations under the Act have, as mentioned, left what standard of proof is necessary in such proceedings unclear, supporters of the SaVE Act argue that the absence of clear guidance on the appropriate burden of proof is not as significant a problem as critics have claimed.¹⁰² Prior to the 2011 DCL, most schools that had a stated standard of proof for adjudicatory proceedings related to sexual-violence complaints used the preponderance of evidence standard.¹⁰³ The 2011 DCL's specific mention of the preponderance standard was mainly to compel those few schools—the majority of which were prominent Ivy League schools, including Harvard University—that had used the clear and convincing evidence standard or similarly higher burdens of proof to fall in line with the procedural requirements used throughout the rest of the country.¹⁰⁴ Given that many educational institutions rewrote policies to

.pdf [<https://perma.cc/FQ9J-FDLW>] ("The original Campus SaVE Act included the preponderance of the evidence standard, along with a requirement that proceedings be 'prompt and equitable,' consistent with requirements under Title IX and current guidance under that statute from the Office of Civil Rights (OCR). The language ultimately included in VAWA does not codify those requirements, but is not intended to supersede them, either.").

⁹⁸ See 79 Fed. Reg. 35,418, 35,443 (June 20, 2014) (proposed rule).

⁹⁹ 79 Fed. Reg. 62,752, 62,772 (Oct. 20, 2014) (final rule).

¹⁰⁰ See, e.g., Duncan, *supra* note 22, at 453.

¹⁰¹ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304(a)(5), 127 Stat. 54, 91.

¹⁰² E.g., Telephone Interview with S. Daniel Carter, *supra* note 97.

¹⁰³ *Id.*

¹⁰⁴ *Id.* Scholars and commentators generally agree that a higher burden of proof is friendlier to accused students and may offer protections to them in instances where there is little available evidence because a higher burden of proof requires a complaining student to provide greater support for his or her claims. 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, 62 (2013) (arguing that 2011 DCL's mandated burden of proof was "the lowest possible threshold"); Jed Rubinfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, 96 TEX. L. REV. 15, 62 (2017) ("Because such cases often come down to a "he said/she said" conflict,' critics have questioned using a proof standard that 'requires a finding of responsibility even if the factfinder is almost 50% sure that the accused student is not guilty.'") (quoting Open Letter from Members of the Penn. Law Sch. Faculty, *Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities 2* (Feb. 18, 2015), <http://media.philly.com/documents/OpenLetter.pdf> [<https://perma.cc/W4VQ-XRSJ>])). A higher burden of proof would, according to such critics, create a process that is farther away from a presumption of the accused's guilt. Cf. Henrick, *supra*, at 61–62 ("[T]he

comply with the 2011 DCL and that campus activists are now attuned to the issue of the standard of proof, it seems unlikely that many schools will change the burden of proof to a clear and convincing standard even under this new OCR regime. But if these schools do change their policies again, the SaVE Act will not provide a basis for challenging the higher burden of proof.

III. THE PROMISE AND ENFORCEMENT REALITIES OF THE SAVE ACT

A. *Codification of Title IX Values Through Requirements for Student Support*

Without the 2011 DCL, survivors and advocates have understandably worried that colleges and universities may take less seriously the issue of campus sexual assault. But the SaVE Act does have promise as a means to keep schools from renegeing on the changes made to better serve sexual assault survivors under the 2011 DCL. First and most importantly, SaVE Act regulations recognize the need to create institutional environments that support survivors and those most at risk for sexual assault. These regulations compel schools to reasonably accommodate requests for protective measures and changes to a complainant's living, academic, transportation, and working situations.¹⁰⁵ The rules were written with the goal of "mov[ing] away from programs that inappropriately place the burden on individuals to protect themselves, instead of focusing on ways to reduce the risk of perpetration."¹⁰⁶ Instead, schools are to introduce programming and initiatives that have proven effective at stopping sexual violence before it occurs and promote positive relationships, healthy behaviors, and bystander intervention.¹⁰⁷

The SaVE Act's imposition of additional reporting requirements on colleges and universities also may help address some of the problems associated with a potentially less transparent OCR. The Trump Administration has already announced that it is unlikely to continue the previous administration's public advertisement of the opening or continuation of Title IX investigations.¹⁰⁸ These disclosures of Title IX investigations provided valuable

[2011 DCL's] most problematic aspect is its formalization of a presumption of guilt in campus adjudications OCR's language implies that the rights of accused students at public colleges do not merit lengthy discussion and further suggests by negative implication that accused students at private institutions, which are still subject to Title IX, do not have any rights at all.")

¹⁰⁵ 34 C.F.R. § 668.46(b)(11)(v) (2018).

¹⁰⁶ 79 Fed. Reg. 35,418, 35,427 (June 20, 2014).

¹⁰⁷ 34 C.F.R. § 668.46(j)(2)(iv).

¹⁰⁸ See Doug Lederman, *A New Day at OCR*, INSIDE HIGHER ED (June 28, 2017), <https://www.insidehighered.com/news/2017/06/28/trump-administration-civil-rights-officials-promise-colleges-fairer-regulatory> [<https://perma.cc/SF5Y-NNL7>] (noting that the Acting Assistant Education Secretary for Civil Rights "suggested that the publication of the lists [listing schools under investigation] is 'high up on that list of things that will soon be addressed as the agency reconsiders various regulatory efforts'"); see also Dana

signals to prospective and current students about how well a particular educational institution was responding to issues of sexual assault. Although imperfect in many ways, the mandatory disclosure of sexual misconduct reports might continue providing students with similar insight.

B. *A Required Commitment to Prevention*

The greatest power of the SaVE Act is its requirement that institutions of higher education confront campus cultures that may promote sexual violence through preventative measures. As activists and sociologists have pointed out for decades, culture enables and, in some cases, promotes sexual violence against women.¹⁰⁹ The Obama Administration recognized the impact of such cultural signals in its 2014 launch of the “It’s On Us” campaign, which, in addition to promoting the relevant legal guidance documents on sexual assault, provided “tips on what [individuals] can do to be part of the solution.”¹¹⁰ Similarly, the American College Health Association has recognized the enormous power of prevention programs,¹¹¹ and at least one court has found that a lack of prevention education is evidence of deliberate indifference under Title IX.¹¹²

The prevention requirements of the SaVE Act are, therefore, essential to solidifying protections for students at risk for sexual assault and sexual violence on campus. Schools are no longer in compliance by simply addressing sexual assault *ex post*; the SaVE Act requires schools to make *ex ante* decisions about how to make their campuses safer. Incoming students and staff must receive trainings that promote awareness of sexual crimes and how to prevent them.¹¹³ Students and faculty must also receive ongoing awareness training throughout their time in the university system.¹¹⁴

Bolger & Alexandra Brodsky, *Trump’s Administration Wants to Hide Colleges That Have Problems with Sexual Assault*, WASH. POST (June 30, 2017), <https://www.washingtonpost.com/news/posteverything/wp/2017/06/30/trumps-administration-wants-to-hide-colleges-that-have-problems-with-sexual-assault> [https://perma.cc/5G5H-A5JC].

¹⁰⁹ Patricia Yancey Martin, *The Rape Prone Culture of Academic Contexts: Fraternities and Athletics*, 30 GENDER & SOC’Y 30, 39 n.3 (2016); *see also* Peggy Reeves Sanday, *The Socio-Cultural Context of Rape: A Cross-Cultural Study*, 37 J. SOC. ISSUES 5 (1981). *See generally* PEGGY REEVES SANDAY, FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS (1990) (discussing the sociocultural context of rape).

¹¹⁰ *See* Tanya Somanader, *President Obama Launches the “It’s On Us” Campaign to End Sexual Assault on Campus*, WHITE HOUSE BLOG (Sept. 19, 2014), <https://obama.whitehouse.archives.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus> [https://perma.cc/RXU3-KDN7].

¹¹¹ AM. C. HEALTH ASS’N, SHIFTING THE PARADIGM: PRIMARY PREVENTION OF SEXUAL VIOLENCE (2008), http://www.acha.org/documents/resources/ACHA_PSV_toolkit.pdf [https://perma.cc/7LXX-B9ES].

¹¹² *Simpson v. Univ. of Colo.*, 500 F.3d 1170, 1173 (10th Cir. 2007) (reversing summary judgment in favor of a university and remanding the case in part due to the university’s lack of preventative education on sexual assault).

¹¹³ GAIL McCALLION, CONG. RESEARCH SERV., R43759, HISTORY OF THE CLERY ACT: FACT SHEET 2 (2014).

¹¹⁴ *Id.*

Underlying the law is a victim-centered philosophy. Both the statutory¹¹⁵ and regulatory¹¹⁶ language of the SaVE Act require schools to implement sexual violence prevention programs. These programs are crafted not simply to discourage possible perpetrators from committing sexual violence or to inform students of their rights under the SaVE Act and Title IX. Rather, the language of the regulations suggests that these programs are also intended to reshape campus culture, and, read in their most virtuous light, to provide statutory support for the argument often heard by advocates that campus sexual assault is a community problem.¹¹⁷ For example, the SaVE Act requires that educational institutions include bystander education in their training, and all responsible employees under the Act must receive training to help them understand their responsibilities and communicate more effectively with survivors.¹¹⁸ In this sense, the SaVE Act is actually *more* prescriptive on the issue of prevention than the 2011 DCL. While the 2011 DCL only recommended the implementation of prevention programs to promote awareness of sexual misconduct,¹¹⁹ the SaVE Act *requires* them.¹²⁰ The requirement for disclosure to students about the disciplinary and investigative processes may also alleviate students' fears that schools will do (or are doing) nothing at all.¹²¹ Alleviating these fears is an essential step to protecting survivors' rights: not only does it provide greater psychic wellbeing to survivors because they have evidence that their community has not abandoned them, but it also encourages reporting in the first place.¹²²

C. *The Benefits of a (Relative) Lack of Politicization and the Clery Act Fines*

Another reason to champion the SaVE Act in this new era is that the Act, unlike Title IX policies of the previous administration, has the benefit

¹¹⁵ See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54, 90.

¹¹⁶ See Violence Against Women Act, 79 Fed. Reg. 62,752 (Oct. 20, 2014) (codified at 34 C.F.R. § 668.46 (2015)).

¹¹⁷ See Julie Novkov, *Equality, Process, and Campus Sexual Assault*, 75 MD. L. REV. 590, 615 (2016).

¹¹⁸ See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304(a)(5), 127 Stat. 54, 91.

¹¹⁹ 2011 DCL, *supra* note 8, at 14.

¹²⁰ § 304(a)(5), 127 Stat. at 91.

¹²¹ See, e.g., Kristin Jones, *Barriers Curb Reporting on Campus Sexual Assault: Lack of Response Discourages Victims of Rape, Other Crimes*, CTR. FOR PUB. INTEGRITY (Dec. 2, 2009), <https://www.publicintegrity.org/2009/12/02/9046/barriers-curb-reporting-campus-sexual-assault> [<https://perma.cc/GP7F-HQA3>]; see also 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, 213-14 (2011) (providing examples of research and cases showing that some schools have simply ignored student complaints of sexual assault).

¹²² Cf., e.g., Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCHOLOGIST 575 (2014).

of its relative obscurity and lack of politicization. Although the SaVE Act provided the legal means by which the Obama Administration could fine educational institutions that had not employed adequate procedures to respond to complaints of sexual violence,¹²³ coverage of the Department of Education's fight against campus sexual violence almost exclusively focused on Title IX as the legal foundation for any federal interest in the area.¹²⁴ Public debates about federal regulation of sex on college campuses run amok similarly invoked Title IX guidance documents as the primary source of federal power.¹²⁵ The Clery Act, in contrast, is perhaps best known in the news as the legal basis for the record \$2.4 million fine against Penn State in the wake of reporting on former assistant football coach Jerry Sandusky's on-campus sexual offenses.¹²⁶ Apart from this high-profile story unrelated to student-on-student sexual assault and coverage of the SaVE Act's passage, the law seems to have faded mainly into the pages of law reviews¹²⁷ and footnotes of Department of Education letters to schools.¹²⁸

Educational institutions may have an even larger incentive to comply with requirements of the SaVE Act than they did with the 2011 DCL's requirements: the SaVE Act has both clear statutory force and monetary threats to induce compliance. Academics and opponents of the 2011 DCL regarded the guidance warily, often insisting that it did not have the force of law because the guidance did not go through notice-and-comment procedures.¹²⁹ But the SaVE Act, though somewhat vague in the standards it sets out for the adjudication of campus sexual assault cases, has the benefit of a

¹²³ Cf. Tyler Kingkade, *Yale Faces \$165,000 Clery Act Fine for Failing to Report Sex Offenses on Campus*, HUFFINGTON POST (May 16, 2013), https://www.huffingtonpost.com/2013/05/15/yale-clery-act_n_3280195.html [<https://perma.cc/9E4L-4WE8>] (noting that the fine is based on the Clery Act).

¹²⁴ See, e.g., Alice B. Lloyd, *Can Trump Undo Obama's Title IX Tyranny?*, WEEKLY STANDARD (Nov. 22, 2016), <http://www.weeklystandard.com/can-trump-undo-obamas-title-ix-tyranny/article/2005499> [<https://perma.cc/E7X2-D3QG>].

¹²⁵ See, e.g., Gersen & Suk, *supra* note 47, at 900.

¹²⁶ Letter from Susan D. Crim, Director, Administrative Actions & Appeals Service Group, Federal Student Aid Enforcement Unit, U.S. Dep't of Educ., to Dr. Eric J. Barron, President, Pa. State Univ. (Nov. 3, 2016); see also Nick Anderson, *Feds Seek Record \$2.4 Million Fine Against Penn State in Sandusky Scandal*, WASH. POST (Nov. 3, 2016), https://www.washingtonpost.com/local/education/feds-seek-record-24-million-fine-against-penn-state-in-sandusky-scandal/2016/11/03/7f7b7bf8-a1cd-11e6-8832-23a007c77bb4_story [<https://perma.cc/8RJB-PB66>].

¹²⁷ See, e.g., James T. Koebel, *Campus Misconduct Proceeding Outcome Notifications: A Title IX, Clery Act, and FERPA Compliance Blueprint*, 37 PACE L. REV. 551, 560 (2017); Blair A. Baker, Note, *When Campus Sexual Misconduct Policies Violate Due Process Rights*, 26 CORNELL J.L. & PUB. POL'Y 533, 542 (2017).

¹²⁸ See, e.g., FEDERAL STUDENT AID ENFORCEMENT UNIT, U.S. DEP'T OF EDUC., CAMPUS CRIME FINAL PROGRAM REVIEW DETERMINATION FOR SOUTH CAROLINA STATE UNIVERSITY 12 (2017), https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/clery_act/South_Carolina_State_University_7_6_17_FPRD_Redacted.pdf [<https://perma.cc/3M6C-WV6V>] ("The review team also identified several errors and omissions in a basic review of the 2013 ASR, including disclosures required by . . . the Campus Sexual Assault Victim's Bill of Rights." (emphasis omitted))

¹²⁹ See, e.g., Ellis, *supra* note 42, at 82–90.

robust procedural history. The current requirements of the SaVE Act come from both the original language of the Act as passed by Congress¹³⁰ and the final regulations written through the notice-and-comment process.¹³¹ And the monetary risks of noncompliance are perhaps even more obvious to educational institutions under the SaVE Act than under the 2011 DCL. While under Title IX the Department of Education could only threaten removal of *all* federal funds, an action that has never occurred,¹³² the SaVE Act permits discrete fines for failures to comply,¹³³ which is both easily administrable and more politically palatable. For each inaccuracy or omission, the Department is empowered to fine a school \$54,789.¹³⁴ The Trump Administration supports the fining power of the Department of Education under the Clery Act,¹³⁵ suggesting that it might employ this power under the SaVE Act. Numerous high-profile schools have faced such fines,¹³⁶ and the proliferation of Clery Act compliance consultants suggests that schools are taking these obligations seriously.¹³⁷

¹³⁰ See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89–92 (2013).

¹³¹ See 79 Fed. Reg. 62,752 (Oct. 20, 2014) (final rule).

¹³² See Kristen Gales, *Title IX and the Importance of a Reinigorated OCR*, 37 HUM. RTS. 18, 21 (2010) (“However, OCR has never withheld federal funding for a Title IX violation and has referred only one case for litigation—nearly thirty years ago.”).

¹³³ 20 U.S.C. § 1094(c)(3)(B)(i) (2012).

¹³⁴ Adjustment of Civil Monetary Penalties for Inflation, 82 Fed. Reg. 18,559, 18,560 (Apr. 20, 2017).

¹³⁵ See S. Daniel Carter, *U.S. Department of Education Increases Fines for Violating the Jeanne Clery Campus Safety Law to \$54,789*, HUFFINGTON POST (June 13, 2017, 3:30 PM), https://www.huffingtonpost.com/entry/us-department-of-education-increases-fines-for-violating_us_5940389fe4b04c03fa26160c [<https://perma.cc/B4SF-NTGM>].

¹³⁶ The Federal Student Aid Office publishes redacted versions of its reviews online, see *Clery Act Reports*, FEDERAL STUDENT AID, U.S. DEP’T OF EDUC., <https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports> [<https://perma.cc/83J8-26Z2>], and discussion of several of the larger fines have made it into the mainstream news, see, e.g., Lindsay Ellis, *University of St. Thomas Faces Federal Fines for Underreporting Crime*, HOUSTON CHRON. (Oct. 3, 2017), <https://www.houstonchronicle.com/news/houston-texas/houston/article/University-of-St-Thomas-faces-federal-fines-for-12247827.php> [<https://perma.cc/URR4-8A92>]; Matthew Reagan, *Department of Education Investigates Clery Act Violations at Occidental*, OCCIDENTAL WEEKLY (Sept. 19, 2017), <http://www.theoccidentalweekly.com/news/2017/09/19/departement-education-investigation-finds-numerous-clery-act-violations-occidental/2888645> [<https://perma.cc/SS8G-2RZK>] (“[T]he [Department of Education] may impose substantial fines for these violations.”). *But cf.* Gersen & Suk, *supra* note 47, at 909 (arguing that the threat of removal of all federal funding under Title IX was such a “big stick” that it ensured that schools would comply with the 2011 DCL).

¹³⁷ See, e.g., *Overview of Clery Compliance Audits, Assessments and Training*, D. STAFFORD & ASSOCIATES, http://www.dstaffordandassociates.com/services/#clery_compliance_audits_assessments_training [<https://perma.cc/P575-QN4G>]; *Clery Compliance Retainer Services*, MARGOLIS HEALY, http://www.margolishealy.com/our_services/retainer_services/clery_compliance [<https://perma.cc/2CHZ-CCYP>]; *Clery Act Compliance*, RISELING GROUP, <http://www.riselinggroup.com/management-services-consulting/clery-act-compliance> (last visited Mar. 28, 2018).

D. Enforcement Realities of the SaVE Act

Ultimately, the greatest challenge for the SaVE Act's vitality as a safeguard for Title IX values is whether the Trump Administration is willing to implement it. Republicans have voiced opposition to strong enforcement of the SaVE Act,¹³⁸ but tying enforcement of the law to general campus safety could make the law more palatable than the 2011 DCL. The SaVE Act's association with the Clery Act is key. The Clery Act, after all, was initially introduced as a crime reporting tool,¹³⁹ one that could appeal to those who bill themselves as "tough on crime."¹⁴⁰ Furthermore, while OCR is well known as the enforcement body for Title IX, the Department's Federal Student Aid office ("FSA") instead enforces the Clery Act and the SaVE Act,¹⁴¹ underscoring the framing of the SaVE Act as a law with goals and aims distinct from those of Title IX. Perhaps because of the Act's close association with campus safety rather than the rights of sexual assault survivors, Secretary DeVos initially indicated that she was interested in holding schools accountable for their federal student aid-related Clery Act obligations.¹⁴² The Department of Education, however, has not followed through with that promise.¹⁴³ The Trump Administration appears to be sending briefer and

¹³⁸ See, e.g., *House Republicans Introduce Partisan VAWA that Fails to Protect All Victims*, NAT'L TASK FORCE TO END SEXUAL AND DOMESTIC VIOLENCE AGAINST WOMEN (Feb. 26, 2013), http://www.ncdsv.org/images/NTFESDVAW_HouseRepublicansIntroducePartisanVAWAThatsFailsToProtectAllVictims_2-26-2013.pdf [<https://perma.cc/6JKK-QREU>].

¹³⁹ See, e.g., McCALLION, *supra* note 113, at 1 (describing the purpose of the law as "increas[ing] the accountability and transparency of [higher education institutions] in meeting certain responsibilities with regard to the safety and security of students on their campuses"). The Department of Education website similarly explains the Clery Act under the heading "Campus Security." See *Campus Security*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/admins/lead/safety/campus.html> [<https://perma.cc/DL6N-TEX3>].

¹⁴⁰ While the Republican Party has suggested that it is moving away from a "tough on crime" stance to a focus on criminal justice reform, see, e.g., *Republican Platform: Great American Families, Education, Healthcare, and Criminal Justice*, GOP, <https://gop.com/platform/renewing-american-values> [<https://perma.cc/LQJ9-XB37>], the Trump Administration has suggested that many in the Party are still moved by such rhetoric, see, e.g., German Lopez, *Trump's First 100 Days Have Been a Criminal Justice Callback to the 1980s and '90s*, VOX (Apr. 28, 2017), <https://www.vox.com/policy-and-politics/2017/4/28/15457902/trump-criminal-justice-100-days> [<https://perma.cc/32SX-G4LW>]; see also Maurice Chammah, *Two Parties, Two Platforms on Criminal Justice*, MARSHALL PROJECT (July 18, 2016), <https://www.themarshallproject.org/2016/07/18/two-parties-two-platforms-on-criminal-justice> [<https://perma.cc/M397-CMD9>] (noting that the recent Republican Platform "also includes plenty of traditional invocations of law and order").

¹⁴¹ See *Clery Act Reports*, *supra* note 136 (explaining that the FSA Office conducts reviews of institutions believed to be in violation of the Clery Act).

¹⁴² See Press Release, U.S. Dep't of Educ., U.S. Department of Education Expands Focus on Enforcement and Consumer Protections for Students, Parents and Borrowers (Aug. 31, 2017), <https://www.ed.gov/news/press-releases/us-department-education-expands-focus-enforcement-and-consumer-protections-students-parents-and-borrowers> [<https://perma.cc/3GGJ-EWPG>].

¹⁴³ But see Tyler Kingkade, *Feds Launch Investigation of Michigan State University's Handling of Sex Crimes*, BUZZFEED (Jan. 25, 2018), <https://www.buzzfeed.com/tylerking>

more cursory responses to complaints filed with OCR under the Clery Act, and the vast majority of these letters simply state no finding of wrongdoing without significant detail on how OCR made that determination.¹⁴⁴

But even without the promise of administrative redress through OCR, the mere fact that there are codified reporting requirements on sexual violence provides a powerful message to schools and students alike that campus sexual assault is an issue of immense seriousness.¹⁴⁵ Advocates may still flood OCR with complaints, seek media attention for any lack of OCR support in pursuing such claims, and perhaps even use a school's failure to comply with Clery as supporting evidence for "deliberate indifference" in a Title IX suit.¹⁴⁶ Although Secretary DeVos is unlikely to champion survivors, survivors and advocates can champion themselves and point to the SaVE Act as a legal basis for future political and media campaigns for their rights in higher education.

CONCLUSION

The Campus SaVE Act is not a panacea. As critics have noted, even the Act in conjunction with Title IX guidance at its most survivor-protective could not push enough against schools' desires to maintain their public reputations.¹⁴⁷ Schools may determine that they would rather risk fines and investigations than to admit to problems with sexual assault on campus. But student activism against sexual violence and for increased university accountability grew considerably during the Obama Administration, and passion surrounding these issues shows no sign of decreasing.¹⁴⁸ In this moment

kade/michigan-state-university-under-federal-investigation [https://perma.cc/NP3B-D49A].

¹⁴⁴ Benjamin Wermund, *A New Tack on Clery Complaints for the Trump Administration?*, POLITICO (Sept. 15, 2017), <https://www.politico.com/tipsheets/morning-education/2017/09/15/a-new-tack-on-clery-complaints-for-the-trump-administration-222304> [https://perma.cc/P4S4-G2AR].

¹⁴⁵ *Cf.*, e.g., *Campus SaVE Act*, END RAPE ON CAMPUS, <http://endrapeoncampus.org/the-campus-save-act> [https://perma.cc/SU9T-35MM] (outlining of the SaVE Act by the survivor advocacy organization); *Clery Act*, KNOW YOUR IX, <https://www.knowyourix.org/college-resources/clery-act/> [https://perma.cc/7G82-LFD8].

¹⁴⁶ *Cf. Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1175–79 (10th Cir. 2007) (explaining that the "deliberate indifference" standard under Title IX could be supported by evidence of failure to supervise and take steps to educate students).

¹⁴⁷ *Cf. Cantalupo*, *supra* note 121, at 226 (noting that the earlier version of the Clery Act and Title IX "set up a formidable liability scheme where noncompliance can be quite expensive for schools[, but] damage to a school's reputation could be even more expensive, although in a less quantifiable way").

¹⁴⁸ *See*, e.g., Tyler Kingkade, *College Sexual Assault Survivors Form Underground Network to Reform Campus Policies*, HUFFINGTON POST (Mar. 21, 2013), https://www.huffingtonpost.com/2013/03/21/college-sexual-assault-survivors_n_2918855.html [https://perma.cc/85VW-6X8V]; Jennifer Ludden, *Student Activists Keep Pressure on Campus Sexual Assault*, NPR (Aug. 26, 2014), <https://www.npr.org/2014/08/26/343352075/student-activists-keep-sexual-assault-issues-in-the-spotlight> [https://perma.cc/XY95-LAYJ]; *Mission & Vision*, END RAPE ON CAMPUS, <http://endrapeoncampus.org/our-team-1/#whowere> [https://perma.cc/TBQ5-BFAU].

of reckoning with sexual assault and harassment across the country,¹⁴⁹ advocates for survivors are unlikely to back down from the fight against campus sexual assault. The Campus SaVE Act certainly cannot address every problem concerning campus sexual assault, but all law has limits in addressing deeply embedded cultural issues.¹⁵⁰ Scholars have already suggested ways that schools could comply with the SaVE Act in ways that maximally protect survivors while maintaining the rights of the accused.¹⁵¹ Efforts to create new adjudicative bodies or provide support to sexual assault survivors more broadly would help to make the SaVE Act more effective.¹⁵² But in a time in which the Department of Education seems to have abandoned its role as Title IX enforcer, advocates for survivors of campus sexual violence should consider the SaVE Act as at least one step toward saving the Title IX values of the Obama era.

¹⁴⁹ Indeed, stories continue to crop up about schools severing ties with professors who have been accused of sexual harassment or dealing with campus protests around sexual assault on campus. *See, e.g.*, Luis Ferré-Sadurní, *Columbia Professor Accused of Sexual Harassment Steps Down*, N.Y. TIMES (Oct. 31, 2017), <https://www.nytimes.com/2017/10/31/nyregion/columbia-professor-sexual-harassment.html> [<https://perma.cc/X2RL-BHG6>]; Katharine Q. Seelye & Stephanie Saul, *Dartmouth College Professors Investigated Over Sexual Misconduct Allegations*, N.Y. TIMES (Oct. 31, 2017), <https://www.nytimes.com/2017/10/31/us/dartmouth-professors-sexual-misconduct.html> [<https://perma.cc/9YDM-W3AX>].

¹⁵⁰ *See* Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1423 (2005) (“The law cannot do anything about those who agree to unpleasant penetration from their husbands because they imagine it is their ‘wifely duty.’ Nor can the law help a seventeen-year-old boy who agrees to sexual penetration that he does not desire because he hopes it will prove he is a man. The law cannot do anything about a young woman who agrees to dangerous, unprotected penetration in order to impress her friends. It cannot do anything for persons who, having suffered chronic sexual abuse as children, come to think of themselves as their perpetrators thought of them, and so seek to engage in degrading sexual acts.” (footnote omitted)).

¹⁵¹ *See, e.g.*, Laura L. Dunn, *Addressing Sexual Violence in Higher Education: Ensuring Compliance with the Clery Act, Title IX and VAWA*, 15 GEO. J. GENDER & L. 563, 571–84 (2014).

¹⁵² *See, e.g.*, Gina Maisto Smith & Leslie M. Gomez, *The Regional Center for Investigation and Adjudication: A Proposed Solution to the Challenges of Title IX Investigations in Higher Education*, 120 PENN ST. L. REV. 977, 987–1000 (2016).