

Reworking Sexual Assault Response on University Campuses: Creating A Rights-Based Empowerment Model to Minimize Institutional Liability

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INTRODUCTION

Sexual assault¹ on university² campuses is a pervasive problem with lasting implications for students who have been sexually assaulted, students accused of sexual assault, and universities. A quick Internet search reveals a multitude of troubling statistics about the prevalence and effects of sexual assault on university campuses over the past forty years.³ Recent studies show that between one-fifth

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1. Sexual assault, as used in this Note, refers to rape or attempted rape, although it can include other sexual contact or acts performed without the explicit consent of the recipient. *Sexual Assault*, U.S. DEP'T OF JUSTICE (Jan. 2014), <http://www.ovw.usdoj.gov/sexassault.htm>. The Department of Education's Office for Civil Rights defines sexual violence as "physical or sexual acts 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." Russlynn Ali, *Dear Colleague Letter*, OFF. FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., 1 (Apr. 4, 2011), http://www.whitehouse.gov/sites/default/files/dear_colleague_sexual_violence.pdf. This definition of sexual violence includes rape, attempted rape, sexual battery and sexual coercion. *Id.* Each of these acts is a form of sexual harassment under Title IX of the Education Amendment Act of 1972. *Id.* at 2.

2. In this Note, "university" refers to all institutions of higher education that receive federal funds, including graduate or professional schools, four-year colleges, and community colleges. For the purpose of sexual assault response, Title IX, the Clery Act, and the Family Educational Rights and Privacy Act (FERPA) affect all universities. OFF. FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) [hereinafter REVISED GUIDANCE]. As a condition of continued federal funding, universities must comply with Title IX's regulations to address the sexual harassment of their students. *Id.* at 2.

3. For a detailed discussion of sexual assault on university campuses, see Kristen Lombardi et al., *Sexual Assault on Campus: A Frustrating Search for Justice*, THE CTR. FOR

and one-quarter of female university students will experience either attempted or completed rape during a typical undergraduate course of study, which lasts for five-years.⁴ The effects of experiencing a sexual assault can be devastating. Post-traumatic stress disorder, sexually transmitted disease, increased likelihood of substance abuse, depression, sleep disorders, eating disorders, and higher suicide rates are prevalent physical and psychological impacts of sexual assault.⁵

Skyrocketing numbers of student complaints⁶ regarding inadequate university responses to student-on-student sexual assault have attracted media attention,⁷ created public outcry, and focused

PUB. INTEGRITY, (last updated Apr. 19, 2013), <http://www.publicintegrity.org/accountability/education/sexual-assault-campus>. See also Mhaire Fraser, *Obama's Regulations on Sexual Assault for College Campuses*, CARE2 MAKE A DIFFERENCE (Aug. 25, 2011, 6:00 PM), <http://www.care2.com/causes/obamas-regulations-on-sexual-assault-for-college-campuses.html>; Elaine Grant, *Federal Efforts Target Sexual Assaults at Colleges*, NAT'L PUB. RADIO (Apr. 5, 2011), <http://www.npr.org/2011/04/05/135135544/federal-effort-targets-sexual-assaults-at-colleges>; and *Campus Safety*, RAPE, ABUSE, & INCEST NAT'L NETWORK, <http://www.rainn.org/public-policy/campus-safety> (last visited Jan. 11, 2014).

4. BONNIE FISHER, FRANCIS CULLEN & MICHAEL TURNER, *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* 10 (2000).

5. For an in-depth discussion of the effects of sexual assault, see *Effects of Sexual Assault*, RAPE, ABUSE & INCEST NAT'L NETWORK, <http://www.rainn.org/get-information/effects-of-sexual-assault> (last visited Mar. 13, 2015).

6. With the March 11, 2015 launch of an investigation into American University's sexual assault response, the total number of universities under federal investigation is 104. Nick Anderson, *Feds Launch a Sexual Violence Investigation at American University*, THE WASHINGTON POST (Mar. 18, 2015), <http://www.washingtonpost.com/news/grade-point/wp/2015/03/18/feds-launch-a-sexual-violence-investigation-at-american-university/>. This is almost twice the number of universities under investigation in May 2014 when the Department of Education Office for Civil Rights publicly released a list of fifty-five universities under investigation for possible mishandling of sexual assault response. Press Office, U.S. Department of Education, *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations* (May 1, 2014), <https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>. See also Kathleen Megan, *Stronger Law on Campus Sexual Assault Sought*, THE COURANT (Jan. 30, 2014), <http://cqcengage.com/nysasbo/app/document/1539232;jsessionid=goRzFFN4cWHErj3tkuJitrn9.undefinied>; Claire Kim, *Shutdown Puts College Sexual Assault Investigations on Pause*, MSNBC (Oct. 7, 2013), <http://www.msnbc.com/the-last-word/shutdown-pauses-sexual-assault-investigations>; Richard Perez-Pena & Ian Lovett, *2 More Colleges Accused of Mishandling Assaults*, N.Y. TIMES (Apr. 18, 2013), <http://www.nytimes.com/2013/04/19/education/swarthmore-and-occidental-colleges-are-accused-of-mishandling-sexual-assault-cases.html>.

7. See generally Megan, *supra* note 6; Allison Fu, *State Assembly Bill Aims to Improve Colleges' Responses to Sexual Assault*, THE DAILY CALIFORNIAN (Jan. 8, 2014), <http://www.dailycal.org/2014/01/08/state-assembly-bill-aims-improve-colleges-responses-sexual-assault/>; Tyler Kingkade, *Cornell Revamps Sexual Assault Policies, Takes Proactive Approach*,

university attention towards revising sexual assault response procedures.

Student complaints are commonly asserted by a female who alleges sexual assault by a peer, friend, or acquaintance.⁸ Media portrayal of female university students bringing Title IX claims, civil lawsuits, or voicing outrage at the lack of university response has drawn public attention to the issue of student-on-student sexual assault. Often the media has portrayed universities as reluctant to address sexual assaults where the reporting student knows the accused student, which is the most common form of sexual assault.

Media outlets, however, often paint incomplete pictures of victims and, in turn, propagate and reinforce rape myths.⁹ Rape myths are “attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women.”¹⁰ Rape mythology perpetuates ideas about the personal and situational characteristics that make a “good victim” through victim-blaming stereotypes, such as the belief that a woman is manipulating a sexual encounter to avoid the negative social consequences of admitting to consensual sex.¹¹

THE HUFFINGTON POST (Jan. 8, 2014), http://www.huffingtonpost.com/2014/01/08/cornell-sexual-assaultpolicies_n_4379840.html?utm_hp_ref=breakingthesilence; Jason Felch, *College Shelved More Assault Reports*, L.A. TIMES (Dec. 7, 2013), <http://articles.latimes.com/2013/dec/07/local/la-me-occidental-assaults-20131207>; Lombardi, *supra* note 3.

8. See generally Emma Sulkowicz, *My Rapist is Still on Campus*, TIME (May 15, 2014), <http://time.com/99780/campus-sexual-assault-emma-sulkowicz/>; Alan Scherzaiger, *Swimmer's Death Casts Light on Campus Sexual Assaults*, ABC NEWS (Jan. 29, 2014), <http://bigstory.ap.org/article/swimmers-death-casts-light-campus-sex-assaults>.

9. See Olivia Exstrum, *Northwestern Student Reports Sexual Assault to the Police*, THE DAILY NORTHWESTERN (Mar. 6, 2015), <http://dailynorthwestern.com/2015/03/06/campus/northwestern-student-reports-sexual-assault-to-police/>; Todd Lighty, Stacy St. Clair & Jodi Cohen, *Few Arrests, Convictions in Campus Sex Assault Cases*, CHI. TRIB. (June 16, 2011), http://articles.chicagotribune.com/2011-06-16/news/ct-met-campus-sexual-assaults-0617-20110616_1_convictions-arrests-assault-cases (stating that convicting a “clean-cut college student” of sexually assaulting a classmate after a night of drinking is more difficult for jurors because of antiquated perceptions of who commits sex crimes).

10. Teri Aronowitz, Cheryl Ann Lambert & Sara Davidoff, *The Role of Rape Myth Acceptance in the Social Norms Regarding Sexual Behavior Among College Students*, 29 J. CMTY. HEALTH NURSING 173, 175 (2012) (quoting S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE, 12 (1975)).

11. LISA ANNE ZILNEY & LAURA J. ZILNEY, RECONSIDERING SEX CRIMES AND OFFENDERS: PROSECUTION OR PERSECUTION 118–19 (2009).

Rape myths also distort ideas about who is committing sexual assault by reinforcing the idea that a sexual assault committed by an acquaintance at a party or in a dorm room is less believable than a sexual assault committed by someone the victim does not know, and therefore, could not anticipate becoming sexually violent.¹² From both the perspective of the victim and perpetrator, rape myths are not reflective of the reality of sexual assault on university campuses.¹³

In contrast to what common rape myths suggest, most sexual assaults at universities are perpetrated by someone who is known to the victim, often involve alcohol or illicit substances, do not involve physical force resulting in injuries, and frequently occur late at night.¹⁴ Most statistics fail to reflect male or LGBT victims of sexual assault.¹⁵ However, 6.1 percent of male university students were victims of completed or attempted sexual assault during college¹⁶ and the LGBT population experiences sexual assault at rates similar to the general population.¹⁷ Further, many student-on-student sexual assaults occur behind closed doors, in the privacy of an apartment or bedroom, as opposed to other types of crimes that are more likely to occur while in public settings. The private setting typical of a sexual assault presents evidentiary challenges for university officials and law enforcement investigating allegations and creates opportunities for victim blaming or rationalizing the perpetrator's behavior.¹⁸ Most sexual assaults on university campuses do not conform to the type of sexual assault imagined in rape mythology. These assaults are not

12. *Id.*

13. FISHER ET AL., *supra* note 4, at 1.

14. *Id.* at 17. Of attempted and completed rapes on college campuses, nine out of ten offenders were known to the victim, with a boyfriend, ex-boyfriend, classmate, acquaintance, friend or co-worker being most frequently identified as the perpetrator. *Id.* See also Lighty et al., *supra* note 9 (explaining that campus sex crimes are difficult to investigate and prosecute because the incidents often involve alcohol and conflicting accounts of consent).

15. See Lee van der Voo, *Sexual Violence on Campus: Not Just a Crime of Men Against Women*, INVESTIGATEWEST (Oct. 25, 2010), <http://www.invw.org/node/941>, for a discussion of LGBT sexual assault rates and additional barriers to reporting faced by LGBT individuals.

16. Christopher Krebs, Christine Lindquist, Tara Warner, Bonnie Fisher & Sandra Martin, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT 68 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

17. van der Voo, *supra* note 15.

18. FISHER ET AL., *supra* note 4, at 18 (reporting that sixty percent of on-campus sexual assaults occurred in the victim's residence, thirty percent occurred in another residence and ten percent occurred in a fraternity house).

typically committed by a stranger in the dark. Instead, sexual assaults on university campuses most often occur behind closed doors and at the hands of someone known to the victim.

The phenomena of increasing student complaints to the Office of Civil Rights for the Department of Education (OCR)¹⁹ is sufficient to suggest that universities' existing sexual assault response procedures are not based upon the realities of how sexual assault occurs and is perceived on their campuses. When the increasing number of OCR complaints are considered along with the significant number of students who self-report sexual assault and the exceptionally low law-enforcement reporting rates,²⁰ a deeper concern about how current university sexual assault response procedures may be stifling student recognition and reporting of sexual assault on campus emerges.

Because most sexual assaults that occur on university campuses do not conform to the "good victim" and "masked stranger" rape mythology, the development of a realistic understanding of how sexual assault occurs on university campuses is essential to the development of campus policies that empower all students who experience sexual assault to seek redress and supportive services. The abandonment of "masked stranger" and "good victim" rape mythology adjusted understanding is necessary for implementing university disciplinary processes that abandon "masked stranger" mythology in adjudications that involve students accused of sexual assault.²¹ This examination into how university responses to sexual assault are shaped by legal, criminal justice, and feminist frameworks will provide insight into the disconnect between existing sexual assault response policies, the needs of students who have been sexually assaulted, and the rights of students who are accused of sexual assault.

19. See Perez-Pena & Lovett, *supra* note 6.

20. Fewer than 5 percent of attempted and completed rapes on college campuses were reported to law enforcement officials compared to 35 percent of attempted or completed rapes reported to law enforcement from the general population. FISHER ET AL., *supra* note 4, at 23. See also Lynn Langton, Marcus Berzofsky, Christopher Krebs & Hope Smiley-McDonald, *Victimizations Not Reported to the Police, 2006–2010* 4 (2012), U.S. DEP'T OF JUSTICE, <http://bjs.ojp.usdoj.gov/content/pub/pdf/vnvp0610.pdf>.

21. Lighty et al., *supra* note 9.

This Note will explore how federal statutes, such as Title IX of the Educational Amendments of 1972 (Title IX)²² and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act),²³ rape mythology, and the criminal law have influenced university responses to sexual assault. Part I discusses how statutory and case law frameworks reinforce rape mythology to the detriment of both victims and students accused of sexual assault. Part II discusses how the endorsement of rape mythology has influenced university policy makers' development of sexual assault response procedures, and how the result fails to meet students' needs. The influence of rape mythology on university policy makers poses a significant risk that sexual assault policies will reflect those underlying hetero-normative and factually flawed understandings of sexual assault. Further, universities face barriers to the development of a rights-based empowerment response model because rape mythologies present in existing legal settings are carried over into university response. Part III advances a rights-based empowerment model that remedies the shortcomings of current university response to sexual assault. While larger societal and legal change is necessary to effectively support the aims of Title IX and the Clery Act, universities are well-positioned to move beyond sexual assault response as a zero-sum game that pits the needs of victims against the rights of accused students.²⁴ Universities can reframe sexual assault response processes to respect the needs and rights of both individuals. Through this reframing, universities can foster safer campuses and

22. 20 U.S.C. §§ 1681–88 (2012).

23. 20 U.S.C. § 1092(f)(2012), *implemented by* 34 C.F.R. §§ 668.41 (2010); 668.46 (2010). Although the statute includes other mandates, for the purposes of this note, it is sufficient to know the Clery Act requires universities participating in Title IX financial aid programs to publish an annual campus safety report. *Id.* The Clery Act, as amended in 1992, also includes the Sexual Assault Survivors Bill of Rights, which outlines minimum procedural protections universities must afford students reporting sexual assault. *Id.* For an in-depth description of Clery Act requirements and reporting, *see generally* WESTAT, DIANE WARD & JANICE LEE MANN, U.S. DEP'T OF EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING (2011), *available at* <http://www2.ed.gov/admins/lead/safety/handbook.pdf>.

24. *See* STEPHEN SCHULHOFER, UNWANTED SEX 39 (1998) for a discussion of the relationship between law and social policy in sexual assault. Schulhofer argues the time to assess the impact of legal reform is not immediately after changes to laws but after the attitudes and enforcement patterns become ingrained in society. *Id.*

reduce their own liability because all parties can, and should, have their needs and rights respected.

I. FRAMEWORKS GUIDING THE EVOLUTION OF UNIVERSITY RESPONSE TO STUDENT-ON-STUDENT SEXUAL ASSAULT

Multiple frameworks influence the development of university sexual assault response procedures. Broadly, rape myths and stereotypes inform how Congress, university officials, and students think about sexual assault.²⁵ More formally, Title IX, which prohibits sex discrimination in education, establishes the minimum sexual assault response standards²⁶ that universities must achieve in order to qualify for federal funding. Additional federal statutes, such as the Clery Act and the Family Educational Rights and Privacy Act (FERPA),²⁷ shape university sexual assault response in terms of reporting requirements and the dissemination of information to the campus community and beyond. The Clery Act shapes sexual assault disclosures and codifies the rights of students reporting a sexual assault to university officials.²⁸ Further, FERPA also shapes how universities disclose information about student-on-student sexual assault to internal and external stakeholders through student record privacy mandates.²⁹ In conjunction with the influence of federal statutes, the criminal law plays an important role in university sexual assault response by shaping how universities define,³⁰ investigate,

25. *See id.* *See also* Zilney & Zilney, *supra* note 11, at 118–19.

26. “The legal standards outlined by the Supreme Court under Title VII and Title IX should be viewed as the minimum university response. There are many things colleges and universities should do to combat sexual harassment that may not be legally required.” MARTHA MCCARTHY & SUZANNE ECKES, *CONTEMPORARY ISSUES IN HIGHER EDUCATION LAW* 290 (Joseph Beckham & David Dagley eds., 2005).

27. 20 U.S.C. § 1232(g) (2012) *implemented by* 34 C.F.R. §§ 99.1–99.67 (2010).

28. 20 U.S.C. § 1092(f).

29. *See* Matt Rochleau, *Emerson Vows to Improve Sexual Assault Investigations*, THE BOS. GLOBE (Oct. 10, 2013), <http://www.bostonglobe.com/metro/2013/10/09/emerson-college-vows-improve-sexual-assault-investigations-after-student-complaints/SGcGn14JcasnJiEmxsgNaN/story.html>. Emerson College President Pelton declined to comment directly about recent Title IX complaints filed by two female students, citing federal privacy laws. *Id.*

30. For a detailed discussion of how the evolution of criminal rape law has influenced modern understandings of sexual assault, see Schulhofer, *supra* note 24, at 17–46. The criminal law construct of rape has traditionally included aspects of force, resistance, and physical injury. *Id.* Additionally, the expectation that a victim of sexual assault would quickly report the crime

and collaborate with local law enforcement after a student makes a sexual assault allegation.³¹

A. Rape Mythology Informs Sexual Assault Policy Development

To fully analyze university responses to sexual assault, it is necessary to consider how beliefs about the nature of sexual assault have shaped the underlying statutes and case law. Value systems that inform the statutes and case law are passed through and potentially amplified by university policy makers' own beliefs about sexual assault. Operational beliefs about sexual assault and levels of rape myth endorsement on university campuses vary by population, with students perceiving the prevalence and consequences of sexual assault differently than university officials, or than the policymakers shaping legislative mandates.³² In a 2015 survey, 77 percent of college and university presidents surveyed agree or strongly agree their campus "is doing a good job protecting women from sexual assault on campus" and 90 percent agree or strongly agree their university provides appropriate due process for students accused of sexual assault.³³

University policy makers have often relied on sexist, heteronormative, and outdated beliefs about sexual assault when developing response policies. For example, the myth that sexual assault is a crime committed by strangers³⁴ influenced universities to model sexual assault responses after the criminal justice system,

and the existence of corroborating evidence were common requirements found in early criminal law. *Id.* These concepts continue to be seen in much modern criminal law. *Id.*; see also ZILNEY & ZILNEY, *supra* note 11, at 118–22.

31. It is important to note that while the criminal law may guide university disciplinary processes, these processes are not criminal proceedings. Letter from Russlynn Ali to Colleagues, *supra* note 1, at 9–11. University disciplinary processes are internal institutional proceedings entirely separate from any criminal charges brought by the prosecutor. *Id.*

32. Scott Jaschik & Doug Lederman, *The 2015 Inside Higher Ed Survey of College & University Presidents*, INSIDE HIGHER ED 3 (2015), http://big.assets.huffingtonpost.com/2015IHE_PresidentsSurvey.pdf (stating that 32 percent of university presidents surveyed believe that sexual assault is prevalent at American colleges and universities, but only 6 percent of the same sample agree that sexual assault is prevalent at their institution).

33. *Id.* at 18. But note, the language of the question reflects the heteronormative and paternalistic idea that the university is responsible for protecting women from sexual assault. *Id.*

34. Recent studies show nine out of ten students sexually assaulted on university campuses know their attacker. FISHER ET AL., *supra* note 4, at 17.

which has largely codified this same assumption.³⁵ In addition, students themselves endorse rape myths that blame victims, especially if alcohol or drugs were involved in the sexual assault.³⁶ Campus security and local police approach sexual assault prevention and interactions with sexual assault victims from a law enforcement perspective. University officials often balance considerations of university liability with student safety. The multiple perspectives and gaps in the knowledge of each stakeholder group results in university programming and policies that inadvertently reinforce “good victim” and “masked stranger” rape mythology.³⁷

B. Federal Statutes Shaping Sexual Assault Policies

1. Title IX

Title IX³⁸ is the primary source of federal law prohibiting discrimination on the basis of sex in educational programs and activities operated by recipients of federal financial assistance.³⁹ The law shapes sexual assault policy and response on university campuses in several ways. First, Title IX provides universities with incentives

35. See Nancy Chi Cantalupo, “Decriminalizing” *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 488–90 (2012) for a description of how viewing sexual assault as a stranger crime leads to university policies directing students to report sexual assault to campus police and following criminal justice inspired university disciplinary procedures.

36. In a recent study of 237 university students, 41 percent believed that “if a woman is raped while she is drunk, then she is partly responsible.” Aronowitz et al., *supra* note 10, at 179. Within the same sample, 63 percent believed that a male pushing for sex is acceptable if a woman has made out with him. *Id.* See also Kate B. Wolitzky-Taylor et al., *Reporting Rape in a National Sample of College Women*, 59(7) J. AM. C. HEALTH 581, 585 (2011) (finding forcible rapes 6.77 times more likely to be reported than rapes involving drugs or alcohol).

37. “To the extent that services promote individual and victim-centered strategies, universities support patriarchal norms that restrict women’s independent use of public space. These interventions inadvertently support the myths that most rapes are stranger rapes and that women’s behaviors increase their risk.” Aronowitz et al., *supra* note 10, at 189.

38. 20 U.S.C. §§ 1681–88, *supra* note 22, implemented by 34 C.F.R. §§ 106.1–106.71 (2010). In relevant part, Title IX states, “No person in the United States shall, on the basis of sex, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .” *Id.* § 1681(a).

39. Jurisdiction is derived from institutions accepting federal financial aid. In doing this, universities agree to comply with federal statutes including Title IX. Cantalupo, *supra* note 35, at 491–92.

to develop sexual assault response procedures that meet the needs of students while minimizing institutional liability. Second, the OCR, which is the administrative agency responsible for Title IX enforcement, provides extensive guidance about the minimum standards universities must maintain when responding to sexual assault.⁴⁰ Finally, Title IX provides legal standing for students to bring personal damages claims against universities for student-on-student sexual assault in cases where the university has failed to respond appropriately.⁴¹

Title IX and its implementing regulations⁴² establish the affirmative duty of universities to prevent student-on-student sexual harassment, which includes sexual assault, where administrators have constructive knowledge of the harassment and the harassing conduct is sufficiently serious so as to deny the victim full participation in the opportunities provided by the university.⁴³ Title IX provides universities with a minimum standard of response to student on student sexual assault. However, the implementing regulations as stated in 34 C.F.R. Part 106 fail to provide sufficient specificity to allow universities to implement appropriate procedures.⁴⁴

The OCR enforces Title IX and plays an important role in shaping university response to sexual assault. In addition to enforcement, one of the OCR's major functions includes providing specific and detailed technical guidance to universities to ensure institutional policies and responses to sexual assault comply with Title IX requirements.⁴⁵ Because of the ability to provide technical guidance,

40. See 34 C.F.R. § 106.1-106.71 (2010); See also Ali, *supra* note 1, but see Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49 (2013) for an argument that OCR enforcement is primarily concerned with protecting victims of sexual assault at the expense of the rights of accused students.

41. *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60 (1992) (holding students could use Title IX to seek monetary damages against a school district for sexual harassment perpetrated by school personnel).

42. 34 C.F.R. § 106.

43. *Revised Guidance*, *supra* note 2, at 12; MCCARTHY & ECKES, *supra* note 26, at 281.

44. MCCARTHY & ECKES, *supra* note 26, at 279.

45. "OCR also provides technical assistance to help universities achieve voluntary compliance with the civil rights laws that OCR enforces. An important part of OCR's technical assistance is partnerships designed to develop creative approaches to preventing and addressing

the OCR has tremendous power to shift the legal framework and advocate for progressive sexual assault response.

The OCR most recently issued guidance for Title IX compliance in the Dear Colleague Letter issued on April 4, 2011 (Dear Colleague Letter). In it the OCR emphasizes consent, discusses the importance of providing education to administrators and students, and sets an example by using language that is inclusive of male and LGBT victims.⁴⁶ At issuance, the Dear Colleague Letter prompted dialogue among university officials because it signaled a renewed focus on sexual assault prevention and response.⁴⁷ The Dear Colleague Letter followed several major enforcement actions from the OCR.⁴⁸ The Dear Colleague Letter identifies the three main components of Title IX compliance as disseminating a notice of nondiscrimination, designating a Title IX coordinator,⁴⁹ and adopting and publishing

discrimination.” *Office of Civil Rights (OCR)*, U.S. DEPT. OF EDUC., <http://www2.ed.gov/about/offices/list/om/delegations/ocr.html> (last visited Feb. 11, 2015).

46. Ali, *supra* note 1.

47. See generally, Allie Grasgreen, *Call to Action on Sexual Harassment*, INSIDE HIGHER ED (Apr. 4, 2011), https://www.insidehighered.com/news/2011/04/04/education_department_civil_rights_office_clarifies_colleges_sexual_harassment_obligations_title_ix. See also Press Release, Office of the Vice President, Vice President Biden Announces New Administration Effort to Help Nation’s Schools Address Sexual Violence (Apr. 4, 2011), available at <http://www.ed.gov/news/press-releases/vice-president-biden-announces-new-administration-effort-help-nations-schools-address-sexual-violence>.

48. The OCR seeks to obtain voluntary Title IX compliance from universities, but when this does not occur, the OCR may initiate proceedings to withdraw federal funding from the institution or refer the university to the US Department of Justice for litigation. Ali, *supra* note 1, at 16. When voluntary compliance is reached, the OCR issues a Resolution Letter and a Resolution Agreement to the institution. *Id.* The OCR reached Resolution Agreements with the State University of New York, the University of Montana-Missoula, Merrimack College, and the University of Notre Dame among others. OCR Resolution Letter to State Univ. of N.Y., Case No. 02-11-6001 (Oct. 31, 2013), available at <http://www2.ed.gov/about/offices/list/ocr/docs/Investigations/02116001-a.pdf>; OCR Resolution Letter to Univ. of Mont., Case No. 10126001 (May 9, 2013), available at <http://www2.ed.gov/documents/press-releases/montana-missoula-letter.pdf>; OCR Resolution Letter to Merrimack Coll., Case No. 01-10-6001 (Sept. 8, 2012), available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/01106001-a.pdf>; OCR Resolution Letter to Univ. of Notre Dame, Case No. 05-11-6901 (June 30, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/05072011-a.pdf>. To view the full Resolution Letters, Resolution Agreements, and other case materials, go to *Recent Resolutions*, U.S. DEPT. OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/index.html#title9rev> (last visited Feb. 11, 2015).

49. The designation of a Title IX coordinator is significant because it recognizes the need for a collaborative relationship between university administrators and university police. Ali, *supra* note 1, at 7–8. See *id.* for a detailed description of Title IX coordinator responsibilities.

grievance procedures for the prompt and equitable resolution of sex discrimination complaints.⁵⁰ The Dear Colleague Letter also emphasizes the importance of providing proactive educational programs to students. Further, it highlights the necessity of sexual assault response training for university employees, which is a step toward the development of university policies and procedures that effectively combat rape myths, gendered notions of sexual assault, and university responses biased in favor of “good victims.”⁵¹ Educating university policy makers’ and students about the realities of sexual assault on college campuses is one step towards the development of more empowering frameworks for sexual assault response because education has the potential to bring biases to light and creates opportunities for policy makers to develop best practices that do not reinforce rape mythology.

In addition to prohibiting sexual harassment and empowering the OCR to promulgate standards of compliance, the second major role of Title IX in the university sexual assault context is to provide students with legal standing to pursue either injunctive relief or monetary damages if an institution is not in compliance with Title IX.⁵²

In order to successfully bring a Title IX claim against a university,⁵³ student victims face a substantial legal burden. The student must establish that the university had actual knowledge of the sexual assault, and was deliberately indifferent to sexual harassment that was so severe, pervasive, and objectively offensive that it deprived the student of access to educational benefits or opportunities provided by the university.⁵⁴ Additionally, in order for the institution

50. *Id.* at 8. University grievance procedures, often couched in student conduct codes, provide universities with a mechanism for discovering and correcting sexual harassment. *Revised Guidance*, *supra* note 2, at 14.

51. Ali, *supra* note 1, at 14–15.

52. Again, it is important to note that pursuing a Title IX claim through the civil court is distinct from university grievance procedures and OCR complaints, which can only mandate administrative compliance. *Id.* at 6.

53. Sexual assault is considered sexual harassment under Title IX. *Id.* at 1-2.

54. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644–45 (1999) (establishing elements needed to prevail in student-on-student sexual harassment claim as (1) the defendant received federal funds; (2) sexual harassment occurred; (3) university exercised substantial control over harasser and the context in which the harassment occurred; (4) the university had actual knowledge of the harassment; (5) the university was deliberately indifferent to the

to be held liable, it must exert substantial control over both the victim and perpetrator of the harassment.⁵⁵ The deliberate indifference of the institution must have increased the vulnerability of the victim to the harassment such that the victim was prevented from partaking in the benefits of educational opportunities.⁵⁶

This standard places an exceptionally high burden on students to show actual knowledge and deliberate indifference. The standard is reflective of the idea that universities are only liable for their own misconduct and not for the misconduct of its students.⁵⁷ Further, it serves to protect universities from liability in all but the most extreme cases.

2. The Clery Act

The Clery Act is the primary Federal crime-reporting act that requires universities to collect crime statistics, issue timely warnings, and publish an annual campus security report.⁵⁸ Unlike Title IX, the Clery Act does not create a privately enforceable cause of action against educational institutions.⁵⁹ Rather, the Department of Education enforces the Clery Act by imposing injunctive relief and fines on universities when they are found to be in violation.⁶⁰

The Clery Act requires universities to publicly disclose forcible and non-forcible sex offenses that occur both on-campus and off-campus.⁶¹ Such required reporting creates incentives for universities

harassment; and (6) the harassment deprived the victim of educational benefit or opportunities provided by the university).

55. *Id.* at 650. *See also* MCCARTHY & ECKES, *supra* note 26, at 281 for an argument that the substantial control requirement allows universities greater flexibility than elementary or secondary schools because universities generally have less control over their students.

56. MCCARTHY & ECKES, *supra* note 26, at 281.

57. *Stefanowicz v. Bucknell Univ.*, No. 10-CV-2040, 2010 WL 3938243, at *4 (M.D. Pa. Oct. 5, 2010).

58. *Westat et al.*, *supra* note 23, at 5–6.

59. *See* 20 U.S.C. § 1092(f)(14)(A)(i) (2012); *see also* *Lewen v. Edinboro Univ. Of Pa.*, No. 10-164, 2011 U.S. Dist. LEXIS 110590, at *11, *22-23 (W.D. Pa. Sept. 28, 2011); *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744, 759-60 (E.D. Tenn. 2009).

60. *See* 20 U.S.C. § 1092(f)(13); *see also* *Doe*, 687 F. Supp. 2d at 759–60; *Lewen*, 2011 U.S. Dist. LEXIS 110590, at *11, *22-23.

61. 34 C.F.R. § 668.46(c)(2014). Although approximately 80 percent of universities complete the federally required annual crime disclosure statements, only 37 percent accurately report numbers under the federal requirements. Difficulty interpreting definitions of on-campus,

to discourage students from reporting sexual assault to law enforcement⁶² and also for campus police to classify sex offenses as other types of crimes to avoid the public perception of a “dangerous campus.” For example, in March 2012, Washington State University was found to have downgraded two reported sexual assaults because the victims in both cases were unavailable or declined to provide campus police with follow-up information regarding the assaults.⁶³ In both cases, the downgraded offense was not considered a sexual crime, and neither was included in the annual campus safety report. This is just one example illustrating how easily university officials, including university police officers, can manipulate sexual assault statistics. This malleability may be a reflection of the importance university administrators and campus police place on forcible sexual assaults perpetrated by a stranger. Because this is a self-reporting standard university officials or campus police retain the discretion to downgrade a sexual assault complaint that does not fit the traditional understanding of sexual assault. The opportunity to self-report allows for sexual assaults to be filtered through the rape mythology lens. As such, sexual assaults that do not conform with that archetype are less likely to be reported as sexual assaults.

In addition, the Clery Act requires timely public notice when crime poses an ongoing danger to the campus community.⁶⁴ In the context of sexual assault, timely notice is required when a perpetrator has not been apprehended by law enforcement or when university officials are unable to take protective measures through university

off-campus, and even the term student contributed to disparities. *Laws to Make Campuses Safer*, NAT'L INST. OF JUSTICE, <http://www.nij.gov/nij/topics/crime/rape-sexual-violence/campus/laws.htm> (last visited Feb. 9, 2014). Additionally, many universities failed to distinguish between forcible and non-forcible sex offenses. *Id.*

62. But universities must inform students of their right to report a sexual assault to law enforcement, the procedures for doing so, and support personnel available to assist them. 20 U.S.C. § 1092(f)(8)(B)(iv); Ali, *supra* note 1, at 10. Additionally, universities are prohibited from discouraging or delaying a student who wishes to report a sexual assault to law enforcement. Ali, *supra* note 1, at 10.

63. *In re Wash. State Univ.*, No. 11-56-SF, 2012 WL 983368, at *2 (E.D.O.H.A. Mar. 12, 2012).

64. For a description of all ten Clery Act reporting requirements, see Westat et al., *supra* note 23, at 53.

disciplinary processes.⁶⁵ While timely notice is reactive with respect to the initial crime, the purpose of the timely notice is proactive. “The intent of a warning regarding a criminal incident(s) is to enable people to protect themselves.”⁶⁶ In effect, the warning shifts the responsibility of crime prevention on the potential victims, and enables victim blaming in the event of a sexual assault because the victim failed to adequately protect him or herself. These requirements send a clear message to students that they have the responsibility to protect themselves against the threat of sexual assault as opposed to placing enhanced focus on the blameworthiness of individuals committing sexual assault. Additionally, timely notice postings may be interpreted by students as an indicator of the importance university officials and campus police place on the threat of the masked stranger; however, sexual assaults committed by fellow students remain largely invisible.

Because of their highly visible nature,⁶⁷ timely notice requirements propagate rape mythology in that they perpetuate the image of sexual assault perpetrated by the “masked stranger” because timely notice postings are rarely issued after a student reports a sexual assault committed by an acquaintance. The posting of timely notice occurs almost exclusively after stranger sexual assaults for several reasons. Where the victim knows the attacker, the assault is less likely to be reported to campus or law enforcement authorities, and it is impossible to issue a timely notice when the sexual assault is unreported. Additionally, even when a sexual assault perpetrated by someone the victim knows is reported, there is a higher probability that the assault may be considered as a one-time event that does not pose an ongoing risk to the campus community because of the pre-

65. *Id.* at 111–13. Three factors university officials consider when deciding whether to issue timely notice are: (1) the nature of the crime, (2) the continuing danger to the campus community, and (3) the possible risk of compromising law enforcement efforts. *Id.* Where the perpetrator of a sexual assault has been apprehended, there is no continuing risk to the campus community. *Id.* at 112.

66. Westat et al., *supra* note 23, at 111.

67. *Id.* at 111–15. Timely notice is typically provided through postings in highly visible locations on-campus and through institutional e-mail notifications. *Id.* at 115. For examples of timely notice, see *Id.* at 115–16. Both examples provided in the official Handbook for Campus Safety and Security Reporting are from heterosexual stranger rapes. *Id.*

existing relationship.⁶⁸ Sexual assaults committed by fellow students remain largely invisible as these assaults rarely receive timely notice postings. There is a stark contrast between the highly public timely notice requirement and the private channels for addressing sexual assault committed by fellow students.

Finally, Clery Act reporting, even if the institution categorizes and discloses the number of reported sexual assaults accurately, does not provide accurate information about the prevalence of sexual assault on university campuses because of the exceptionally low rate of reporting to law enforcement.⁶⁹ Data from self-report surveys indicate a victimization rate of approximately thirty-five sexual assaults per 1000 female students.⁷⁰ Therefore, an institution with a female student enrollment of 10,000 could be expected to have approximately 300 sexual assaults per academic year.⁷¹ However, aggregated Clery Act data for all public and private four-year universities with an enrollment of 20,000 to 29,999 students lists only 900 forcible sexual assaults and one non-forcible sexual assault combined, which is much lower than the rate expected from self-report surveys.⁷²

68. *Id.* at 111–12. University administrators are allowed the discretion to issue timely warning notices “on a case-by-case basis in light of all the facts surrounding a crime.” *Id.* at 112.

69. *See, e.g.*, SPECIAL OVERSIGHT COMMITTEE ON SEXUAL MISCONDUCT, AMHERST COLLEGE, TOWARD A CULTURE OF RESPECT: THE PROBLEM OF SEXUAL MISCONDUCT AT AMHERST COLLEGE, 17-19 (2013), available at https://www.amherst.edu/media/view/452118/original/Toward_a_Culture_of_Respect_Title_IX.pdf.

70. FISHER ET AL., *supra* note 4, at 11.

71. The National Institute of Justice estimates that 300 attempted or completed rapes per 10,000 female students occur during each academic year. *See Sexual Assault on Campus*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/topics/crime/rape-sexual-violence/campus/pages/measuring.aspx> (last visited Feb. 9, 2014).

72. Get Aggregated Data for a Group of Campuses, THE CAMPUS SAFETY AND SECURITY DATA ANALYSIS CUTTING TOOL, <http://ope.ed.gov/security/GetAggregatedData.aspx> (follow “Get Aggregated Data for A group of Campuses” hyperlink; then enter enrollment size of 20,000–29,999, all four-year institution types, data year 2013, and search for each crime category). The final results of this search show that for all public, private, and for-profit four-year institutions with a total student enrollment between 20,000 to 29,999 students, 756 forcible sexual assaults occurred on-campus, ninety-two forcible sexual assaults occurred off-campus, and fifty-two forcible sexual assaults occurred on public property adjacent to campus locations. *Id.* For all institutions within the search criteria the total number of non-forcible sexual assaults reported was one. *Id.* The data for other institution sizes also reflects a surprisingly low number of sexual assaults; for example, for all institutions with 2,000 to 2,999 students enrolled the aggregate number of sexual assaults reported under the Clery Act in 2013 was 653. Get

On the other hand, the Clery Act does afford victims of sexual assault protections in its Campus Sexual Assault Victim's Bill of Rights (CSAVB).⁷³ The CSAVB requires that university officials notify a victim of her option to file a report with law enforcement, provide information about counseling services, and give options for changing her living or academic situation.⁷⁴ The CSAVB requires that both the victim and accused student have the same opportunity to bring third parties to disciplinary proceedings, and both parties must be notified of the outcome of any disciplinary proceeding.⁷⁵

3. FERPA

FERPA is the federal legislation governing the disclosure of educational records.⁷⁶ The two primary functions of FERPA are to ensure student access to his or her own educational record, and to prevent third parties from accessing the educational record without permission from the student.⁷⁷ Under FERPA, an accused student has the right to receive information about sexual assault allegations where the information comprises part of the student's educational record.⁷⁸ This has important implications when a reporting student wishes to remain anonymous, because a university cannot guarantee

Aggregated Data for a Group of Campuses, THE CAMPUS SAFETY AND SECURITY DATA ANALYSIS CUTTING TOOL, <http://ope.ed.gov/security/GetAggregatedData.aspx> (follow "Get Aggregated Data for A group of Campuses" hyperlink; then enter enrollment size of 2,000 to 2,999, all four-year institution types, data year 2013, and search for each crime category). For all institutions with a student enrollment of 30,000 or greater, an aggregate of 884 non-forcible sexual assaults were reported under the Clery Act in 2013. Get Aggregated Data for a Group of Campuses, THE CAMPUS SAFETY AND SECURITY DATA ANALYSIS CUTTING TOOL, <http://ope.ed.gov/security/GetAggregatedData.aspx> (follow "Get Aggregated Data for A group of Campuses" hyperlink; then enter enrollment size of 30,000 or greater, all four-year institution types, data year 2013, and search for each crime category).

73. See 20 U.S.C. § 1092(f)(8)(B)(iv)-(vi).

74. 20 U.S.C. § 1092(f)(8)(B)(iv)-(vi).

75. 20 U.S.C. § 1092(f)(8)(B)(iv)-(v).

76. 20 U.S.C. § 1232(g)(2012), implemented in 34 C.F.R. § 99 (2014).

77. 20 U.S.C. § 1232g(a)-(b).

78. Ali, *supra* note 1, at 5. Records of university law enforcement agencies, such as campus police are not governed by FERPA, and are not considered part of a student's educational record. See 20 U.S.C. § 1232g(a)(4)(B)(ii).

confidentiality if an accused student has a right to review disciplinary process notes as part of the educational record.⁷⁹

Additionally, FERPA may hinder the student's timely access to information that will be used in university disciplinary hearings. This may occur when FERPA bars a victim from accessing the accused student's disciplinary record.⁸⁰ Conversely, FERPA protects the information of victims by denying the accused student access to information about the victim's sexual history or conversations with a counselor.⁸¹ If university officials are considering any of the above information during the disciplinary process, both students are forced to go through the process with incomplete information because they cannot access the complete record.

Finally, FERPA limitations do not apply in several circumstances involving sexual assault. FERPA does not apply to information that the Clery Act requires universities to disclose.⁸² This includes Clery Act mandates requiring that both the victim and accused student be notified of any university disciplinary process outcome, timely notice postings, and crime reporting.⁸³ If a university determines a student is responsible for a sexual assault, it may disclose the final results of the disciplinary process to anyone.⁸⁴ The ability to publicly share the finding that an accused student has been found responsible for a sexual assault has potentially disastrous consequences for accused students, extending far beyond the realm of the university.

C. Federal and State Criminal Law

Both the Clery Act and Title IX draw from the criminal law to define sexual assault. Title IX uses the definition of sexual assault from the United States Code. For proper Clery Act reporting, definitions of what constitutes a sexual offense are drawn from the FBI's National Incident-Based Reporting System version of the

79. Ali, *supra* note 1, at 5.

80. *Id.* at 11 n.29.

81. *Id.*

82. 34 C.F.R. § 99.33(c) (2014).

83. 34 C.F.R. § 99.33(b)-(d)

84. 34 C.F.R. § 99.31(a)(14).

Uniform Crime Reporting Handbook.⁸⁵ However, these definitions of sexual assault may be very different from those used in university student conduct code definitions.⁸⁶ A university's response and ability to seamlessly integrate with local law enforcement authorities also depends on how well university definitions of sexual assault align with the criminal code of the state where the university is located.

D. Due Process

All students are afforded the right to due process, which must be stated in the university student handbook or posted where students have access to the information.⁸⁷ In addition to university publications, case law is an important facet that shapes the right to due process afforded to students who are accused of sexual assault is an important consideration when developing university responses to sexual assault allegations. The courts have interpreted the due process requirements afforded to students at private universities under a more flexible standard than their public counterparts, which is different from other federal statutes that apply equally to any public or private university that accepts federal funding.⁸⁸

The right to due process of an accused student is limited to the university setting and must be distinguished from the constitutional due process rights afforded to criminal defendants. The university disciplinary process is not a criminal proceeding.⁸⁹ It is an entirely separate process conducted by university officials to determine

85. See 34 C.F.R. § 668.46(c)(7) (2014); see also Westat, *supra* note 23, at 34; Cantalupo, *supra* note 35, at 511–12 n.117.

86. See the definitions of sexual assault used in the Dear Colleague Letter for a comparison of criminal justice versus university interpretations of what acts constitute sexual assault. *Sexual Assault*, *supra* note 1; Ali, *supra* note 1, at 1–2.

87. *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (established public schools must provide students with notice and an opportunity to be heard in proportion to the potential sanctions).

88. 419 U.S. at 577–79.

89. Courts have consistently held university disciplinary processes are not criminal proceedings, and are not held to the same procedural requirements as criminal proceedings. See generally *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000) (“A university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts.”).

whether to hold an accused student responsible for a sexual assault allegation.

Recently, there have been an increasing number of male students bringing Title IX suits that allege discrimination in the investigation of a sexual assault allegation against them.⁹⁰ Some of these complaints are based on the mistaken belief that a university disciplinary proceeding is equivalent to a quasi-criminal trial. To bolster this idea, terminology from the criminal law is commonly used by groups advocating for greater protections for accused students.⁹¹ Regardless of the terminology used, it is important to understand that university disciplinary processes utilize student codes of conduct and a preponderance of the evidence standard.⁹² The lower standard of proof and reliance of codes of conduct as opposed to statutes clearly distinguish university disciplinary proceedings from criminal proceedings using criminal statutes and a beyond a reasonable doubt standard. However, despite not being a criminal proceeding, a university disciplinary process may have significant impacts on a student. If a student is found responsible for a sexual assault, potential consequences include fines, removal from university housing, suspension, or expulsion.⁹³ Given the potential

90. John Laueran, *College Men Accused of Sexual Assault Say Their Rights Violated*, BLOOMBERG NEWS (Dec. 16, 2013, 4:00 AM), <http://www.bloomberg.com/news/2013-12-16/college-men-accused-of-sexual-assault-say-their-rights-violated.html>.

91. See Justin Pope, *Title IX Anniversary Prompts Debate Over Civil Rights and Rape*, HUFFINGTON POST (Apr. 21, 2012, 12:02 PM), http://www.huffingtonpost.com/2012/04/23/title-ix-anniversary-prom_n_1445298.html?view=print&comm_ref=false.

92. In the 2011 Dear Colleague Letter, Russlyn Ali clarified that all sexual assault investigations conducted by university disciplinary boards should use a preponderance of the evidence standard. Ali, *supra* note 1, at 10. There is significant debate about whether universities should use this standard or the more stringent “beyond a reasonable doubt” standard used in criminal trials. See COMMITTEE ON WOMEN IN THE ACADEMIC PROFESSION, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Campus Sexual Assault: Suggested Policies and Procedures* (Nov. 2012), <http://www.aaup.org/report/campus-sexual-assault-suggested-policies-and-procedures> (advocating for university disciplinary processes using “clear and convincing” evidentiary standard to protect due process rights of accused students and faculty).

93. For example, a student found responsible for a student conduct code violation at Washington University in St. Louis faces a variety of sanctions: a warning, a fine of not more than \$750, educational remedies, activity limitations, denial of access to certain university facilities, temporary or permanent removal from student housing, suspension or expulsion. UNIVERSITY STUDENT JUDICIAL CODE, 18–19, (2014), *available at* <http://www.wustl.edu/policies/assets/pdfs/university-student-judicial-code.pdf>. At the University of Missouri, Columbia, a student found responsible for violating the Student Conduct Code faces one or

seriousness of the outcome, affording accused students with rights and protections is necessary.

II. ANALYSIS

The complexity of the statutory and case law frameworks guiding university sexual assault response is further complicated by conflicting perspectives about sexual assault, pervasive rape myths, and the tremendous diversity of individual stakeholders at universities. The multiple perspectives of stakeholder groups results in university programming and policies that have produced outcomes that are detrimental to students because they reinforce rape myths and gendered notions of sexual assault to the detriment of both the victim and the accused.

A. Sociocultural Factors

Rape myths influence administrators, faculty, staff, and students.⁹⁴ As such, these myths pose a major challenge to developing university sexual assault responses that reflect the realities of sexual assault on university campuses. Because of rape myth endorsement and victim blaming, many students do not connect their actions or experiences on university campuses with the label of “sexual assault.”⁹⁵ Even if a student self-reports an experience that meets university or criminal definitions of a sexual assault offense,⁹⁶ almost 50 percent of these

more of the following sanctions: warning, a written reprimand including a probationary period, loss of privileges, restitution, discretionary sanctions, residence hall suspension or expulsion, university dismissal, university suspension and university expulsion. THE M-BOOK: THE STUDENT GUIDE TO THE CAMPUS COMMUNITY (2014), available at <http://conduct.missouri.edu/wp-content/uploads/M-Book-2014-2015-Final-Draft-4.0-1-1.pdf>.

94. Aronowitz et al., *supra* note 10, at 177–80.

95. FISHER ET AL., *supra* note 4, at 15 (for incidents classified as rape, 48.8 percent of college women reporting the incidents did not classify their experience as rape); Robin Hattersly Gray, *How to Investigate Campus Sexual Assaults*, CAMPUS SAFETY (June 4, 2012), <http://www.campusafetymagazine.com/article/sexual-assault-investigation-basics>.

96. The three major studies on college student sexual assault use a dual-stage measurement design that asks initial screen questions to determine if a student has experienced an act that may be considered a sexual assault. If the student affirmatively responds to a screen question, additional questions about the incident are asked to gather more specific information and to classify the type of sexual victimization that occurred. See FISHER ET AL., *supra* note 4, at 4–7 for a more detailed explanation of the study methodologies.

students do not classify their experience as such.⁹⁷ Conversely, 23 percent of male students engage in aggressive sexual behaviors such as forced sex that may constitute sexual assault but are not considered as such by those committing the acts.⁹⁸ Thus, both victims and students committing sexual assault may fail to recognize how their experience fits within university or criminal definitions of the term. This knowledge gap presents an opportunity to educate students about the importance of consent, the potential long-term psychological consequences of sexual assault, and the resources available to assist after an assault occurs. It also highlights a need for a coordinated university response to incidents where either the victim or perpetrator does not define an experience as a sexual assault due to rape myth acceptance.

Even if a student defines a sexual assault as such, significant barriers to reporting remain. According to the National Institute of Justice, female students identified two main reasons for not reporting sexual assault to law enforcement: (1) concern about the seriousness of the incident failing to rise to a level where law enforcement intervention was necessary; and (2) the fear of stigmatization.⁹⁹ The stigma of sexual assault may lead to secondary victimization during the various peer, administrative, university, and criminal justice responses. Male students assess more blame to male rape victims than to female victims although victim blaming is still prevalent among peers on university campuses.¹⁰⁰ Both male and female

97. FISHER ET AL., *supra* note 4, at 15.

98. See Aronowitz et al., *supra* note 10 at 180; see also Kristen N. Jozkowski & Zoe D. Peterson, 50(6) J. OF SEX RESEARCH 517, 520 (2013) (finding 27.1 percent of male college students included in study would tell their partner they were going to have sex with them, indicating a directive or command as opposed to seeking consent). However, a distinction between consent and force is necessary. It is a lack of consent that defines sexual assault, not a use of force.

99. FISHER ET AL., *supra* note 4, at 23 (victims cited reasons such as: a personal perception of their sexual victimization as not serious enough to involve the authorities, as well as barriers to reporting such as privacy concerns, a lack of proof the incident occurred, fear of reprisal by the perpetrator, and concerns about the way law enforcement would treat them as reasons for not reporting to law enforcement).

100. Michelle Davies, Jennifer Gilston & Paul Rogers, *Examining the Relationship Between Male Rape Myth Acceptance, Female Rape Myth Acceptance, Victim Blame, Homophobia, Gender Roles, and Ambivalent Sexism*, 27 J. OF INTERPERSONAL VIOLENCE 2807 (2012).

university students identified shame, guilt, embarrassment, and a fear of not being believed as important barriers to reporting sexual assault.¹⁰¹

Additionally, students place little faith in university response to reports of sexual assault and in university disciplinary processes.¹⁰² If a student feels, or believes, that a university disciplinary process is biased, there is little incentive for students who have experienced a sexual assault to report it.¹⁰³ Additionally, the perceived lack of serious consequences that universities can impose results in victims feeling as though the rights of the accused student are given more weight than their own physical safety and right to participate in the university community.¹⁰⁴

Finally, the Clery Act's requirement that universities report crimes that occur on or directly adjacent to campus reinforces the idea that the danger from rapists comes from outside campus.¹⁰⁵ By focusing solely on campus crime, it is implied that if university officials can control the campus environment, sexual assaults will be minimized. Logically, this leads to the idea that individuals committing sexual assaults are not students but campus outsiders—"masked strangers." This perception is supported through the timely notice requirements, which are more likely to be issued in the event of a sexual assault

101. Marjorie R. Sable, Fran Danis, Denise L. Mauzy & Sarah K. Gallagher, *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AM. C. HEALTH 157, 160 (2006).

102. See generally Kristen Lombardi, *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-0>.

103. See van der Voo, *supra* note 15.

104. See Lombardi, *supra* note 3 (describing how Indiana University freshman Margaux J. was "sputtering with rage" after learning that university administrators sanctioned the perpetrator of her sexual assault to suspension for one semester—a summer semester—after finding him responsible for sexual contact without consent); Jenny Wilkinson, *Sexually Assaulted at UVA*, N.Y. TIMES (Apr. 4, 2015), <http://www.nytimes.com/2015/04/05/opinion/sunday/sexually-assaulted-at-uva.html?hp&action=click&pgtype=Homepage&module=c-column-top-span-region®ion=c-column-top-span-region&WT.nav=c-column-top-span-region>; Dana Bolger, *Where Rape Gets a Pass*, N.Y. DAILY NEWS (July 6, 2014), <http://www.nydailynews.com/opinion/rape-pass-article-1.1854420> (explaining that after reporting her rape, she was encouraged by the dean to take time away from school so that the perpetrator could finish his education).

105. See Cantalupo, *supra* note 35, at 511–13.

committed by a stranger than a sexual assault committed by an acquaintance.

B. Conflicts Between University and Criminal Justice Processes

Many conflicts exist between university and criminal sexual assault responses. If a student is sexually assaulted on a university campus and actually wishes to report it, multiple avenues for reporting exist. The student may confide in a friend, religious leader, or counselor. These individuals are not bound by the Clery Act requirements, so sexual assaults reported solely to these individuals may not be included in Clery numbers reported by the institution.¹⁰⁶ Universities have internal disciplinary processes that can sanction students found responsible for a sexual assault.¹⁰⁷ Filing a complaint with university police or local law enforcement is an additional option. The above reporting methods are not mutually exclusive and a student electing to report may choose which methods to use. For example, one student may choose to report only through the university disciplinary process while another student may choose to report only to a school counselor. A third student may report to the local law enforcement and a school counselor while a fourth student may choose to report to both the university and local law enforcement,

Regardless of the reporting method selected by the student, once a university becomes aware of a sexual assault, it has an affirmative duty to investigate.¹⁰⁸ This investigation is separate from any law enforcement investigation.¹⁰⁹ Parallel investigations conducted by law enforcement and university officials may result in the duplication of investigatory steps. For example, the victim is often asked to provide two statements—one to law enforcement and another to

106. Institutional Security Policies and Crime Statistics, 34 C.F.R. § 668.46(c)(viii)(6) (2009). *See also* Westat et al., *supra* note 23, at 111–15.

107. Ali, *supra* note 1, at 3.

108. “. . . a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation.” Ali, *supra* note 1, at 4.

109. *Id.*

university administrators.¹¹⁰ Different statements and other duplicate investigatory actions create the possibility for different information to be communicated. In part, parallel investigations conducted by law enforcement and university officials creates the possibility for drastically different outcomes. Additionally, different criminal justice and university outcomes can be explained by the different standards of proof applied in each process. University disciplinary procedures typically use a “preponderance of the evidence” standard while the criminal justice system is based on the “beyond a reasonable doubt” standard of proof.¹¹¹ These different standards of proof influence the investigation processes, treatment of students reporting sexual assaults, treatment of those accused of sexual assault, available outcomes, and the actual investigational procedures implemented. For example, the police may decline to prosecute a student accused of sexual assault for a number of reasons, such a lack of physical evidence or because they perceived the victim to be uncooperative. The university, however, may find the same student violated campus policies based on the lower standard of proof or evidence that would be inadmissible in court but allowed in the disciplinary hearing, leading to a university sanction but no criminal prosecution.¹¹²

C. Cross-Filing of Complaints and Retaliation Potential

Because universities have an affirmative duty to investigate any allegation of sexual assault under Title IX, the possibility of cross-filing presents a serious barrier to students reporting sexual assault. Cross-filing occurs when an accused student files a sexual assault complaint against the victim after discovering the victim filed the original sexual assault complaint with the university. Because a cross-filed complaint must be investigated under the same standard as the original complaint, the victim in the original complaint may face

110. Gray, *supra* note 98.

111. Ali, *supra* note 1, at 3 (advising universities that preponderance of the evidence standard is appropriate for Title IX compliance and aligns with the standard used by the Office for Civil Rights in the investigation of Title IX violations).

112. Lighty et al., *supra* note 9. *See also* Wilkinson, *supra* note 107 (explaining that after criminal charges were dismissed against the perpetrator of her sexual assault, the University of Virginia found him responsible for violating the University’s standards of conduct).

a separate disciplinary investigation where she is the accused student. This means that victims lose the protections afforded under the CSAVB in the cross-filed complaint.

The potentially harmful consequences of cross-filing are illustrated in the case of *Stefanowicz v. Bucknell University*,¹¹³ in which a female student filed a Title IX claim seeking a preliminary injunction to prevent Bucknell University from holding a hearing after the accused student in her assault cross-filed a sexual assault claim with the university.¹¹⁴ Despite local police and prosecutors declining to file charges against Stefanowicz, the university was bound to investigate the accused student's cross-filed allegation. The Federal District Court for the Middle District of Pennsylvania held that Bucknell University could proceed with the hearing, as the university was following the stated grievance procedures, was not requiring Stefanowicz to directly face the alleged perpetrator of her sexual assault, and the questions posed during the hearing were required to be relevant and appropriate.¹¹⁵ However, the cross-filed university hearing required Stefanowicz to respond to questions about the incident and her sexual history that the accused student could not have asked during the original hearing because, as the complaining victim, Stefanowicz was protected by the CSAVB.

In order to avoid the harmful outcome of *Stefanowicz*, university administrators should recognize that either party in cross-filed complaints could be a sexual assault victim. Both reporting parties are entitled to be treated as such until the university investigation is

113. *Stefanowicz v. Bucknell Univ.*, No. 10-CV-2040, 2010 WL 3938243 (M.D. Pa. Oct. 5, 2010).

114. Although critics of Title IX have used *Stefanowicz* as an example of a victim opposing a Title IX investigation into a sexual assault by the university, this is misguided. See Stephen Hendrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 59 (2013) (stating that the "complainant so rejected Title IX's demand for colleges to handle cases while criminal charges were pending that she went to court to try to enjoin her school's process until after the criminal proceedings had concluded."). Stefanowicz filed her suit to enjoin an investigation into a cross-filed complaint where the male student she accused of sexual assault subsequently accused Stefanowicz of sexual assault. Instead of attempting to halt a Title IX investigation, as Hendrick would have readers believe, Stefanowicz was actually attempting to halt investigation into a retaliatory accusation that provided the student she had previously accused of sexual assault with additional rights to question her. See Hendrick *supra* at 62; *Stefanowicz*, 2010 WL 3938243.

115. *Stefanowicz*, 2010 WL 3938243, at *5.

completed, meaning that neither party should be required to respond to questions regarding their sexual history or behavior not directly related to the assault alleged in the complaints. Because cross-filing is often used as a retaliatory measure by accused students, it is imperative for university officials to carefully consider the structure and format of disciplinary hearings to avoid placing the original victim's sexual past, actions, and character on "trial" in the cross-filed case.

Aside from the potential for revictimization and trauma for sexual assault survivors, cross-filing poses timeline challenges due to the expedited investigation timeline imposed by Title IX as compared to the standard timeline of a case in the criminal justice system. As part of Title IX, universities are required to provide prompt and equitable procedures for the resolution of sexual assault complaints.¹¹⁶ The OCR sets a maximum timeframe for resolution at sixty days from the time university officials receive the complaint, which is significantly shorter than the span of a criminal proceeding.¹¹⁷ University administrators may use law enforcement notes and documentation in disciplinary hearings,¹¹⁸ therefore, accused students have a significant incentive to delay university hearings if local law enforcement may decline prosecution or drop charges. However, because universities must use a preponderance of the evidence standard compared to criminal cases, where the beyond a reasonable doubt standard is used, a university cannot dismiss an alleged Title IX violation simply because of insufficient evidence to proceed with criminal prosecution.¹¹⁹ The differing timelines and standards of proof can be confusing for both the victim and accused student. University officials should take care to clearly explain the independence of criminal and university processes in order to insure both the victim and the accused student understand the nuances of both types of investigations.

116. Ali, *supra* note 1, at 12.

117. *Id.*

118. *Id.* at 10.

119. *Id.*

III. CREATING A RIGHTS-BASED EMPOWERMENT APPROACH TO SEXUAL ASSAULT

As students file complaints with the Department of Education, bring Title IX suits with increasing frequency, and turn to the media for resolution in the court of public opinion, universities are often forced to prioritize complaints that have the potential to be most costly to the institution. This forced choice is often the result of sexual assault response procedures that focus too narrowly on the rights of either the victim or the accused student.¹²⁰ Failing to create sexual assault response that respects the rights and needs of both the victim and the accused student has the potential to leave one student feeling powerless. This disenfranchisement opens the university to liability from either perspective, creating a zero-sum game in which university response caters to the student who has more social, political, or economic capital. A reformed process of how universities respond to sexual assault should work to meet the needs of all students while minimizing university liability.

Unfortunately, reframing university sexual assault response is not a simple task. In order to be effective, university response must meet statutory mandates, minimize institutional liability, align with criminal law, and protect the right of the student to participate in the life of the institution free from harassment. A rights-based empowerment approach to university sexual assault response integrates each of the above areas into a single, comprehensive, and coordinated plan. This approach shifts the university's focus away from the zero-sum game of "victim versus accused student" and focuses attention towards community accountability and collaborative problem-solving. By moving towards collaboration and mutual accountability, the rights-based empowerment approach to

120. Even within literature, proposed best practices for sexual assault response fail to adequately address the needs and rights of both students who have experienced sexual victimization and those who have been accused of sexual assault. See Patricia Pasky McMahon, *Sexual Violence on the College Campus: A Template for Compliance With Federal Policy*, 57 J. AM. C. HEALTH 361, 364–65 (2008) (model policy for the prevention and response to sexual assault template that includes "guidelines to investigate and punish perpetrators" but fails to include reference to protecting the rights of accused students through the university disciplinary process).

sexual assault response creates opportunities for victims, accused students, and the surrounding community to exercise their rights.

A rights-based empowerment approach begins with proactive education for students and university officials in order to combat rape myth acceptance and prevent the development of sexual assault response policies based on flawed understandings of how sexual assault operates on college campuses. Further, a rights-based empowerment approach to sexual assault response is vertically and horizontally integrated such that it builds communities of active bystanders, addresses the needs of victims, protects the rights of accused students, integrates university and law enforcement investigation, and promotes collaborative relationships with local social service agencies. It involves a consideration of the existing frameworks created by the criminal law, Title IX and the Clery Act, a challenge to current societal understandings of sexual assault, and a proactive approach to reframing perceptions of sexual assault. By proactively working to reframe both student and university officials perceptions of sexual assault, some barriers to reporting may be reduced, especially for students whose victimization does not fit the socially constructed rape mythology. Additionally, for accused students, a rights-based empowerment approach would help them understand how their alleged behaviors could be considered sexual assault, and would ensure they have an opportunity to a fair disciplinary hearing that respects their right to participate fully in the academic life of the university.

A. Creating University Communities That Do Not Tolerate Sexual Victimization

A rights-based empowerment approach begins with training for university officials in order to deconstruct rape mythology and develop the knowledge base necessary to the development of sexual assault policies that empower survivors while also respecting the rights of accused students. Although providing officials with training about how to respond to sexual assault is a familiar concept, the emphasis of a rights-based empowerment approach to sexual assault training for officials shifts away from the zero-sum game concept of victim versus accused student. A rights-based empowerment

approach uses a feminist lens to build an educational disciplinary process that rewards students for exercising their rights by building communities that reject rape mythology, and hold students accountable to the community. The goal of training officials is to reduce rape myth acceptance, build accurate knowledge about sexual assault, and empower officials to respond appropriately to victims or accused students.¹²¹

At this time, the OCR provides little guidance about what constitutes practical training and fails to provide guidance on providing employees with information and training related to LGBT students, substance use, or consent-based notions of sexual assault that may be most relevant to the types of sexual assault occurring at universities.¹²² Further, the Dear Colleague Letter relies on the assumption that universities will follow their sexual assault procedures and that university sexual assault procedures are in compliance with Title IX guidelines. The Dear Colleague Letter and subsequent guidance from the OCR fail to provide guidance or encourage universities to address the underlying rape mythology that influences individual administrators to perceive students reporting sexual assault as “good” or “bad” victims. Inclusive sexual assault response training for officials is an essential element of changing campus cultures and creating environments where students feel safe reporting sexual assault. After university officials have received training about the realities of sexual assault, they can then design programs aimed to empower students and reduce sexual assault.

The OCR recommends universities develop specific sexual violence training materials for students and employees. This recommendation focuses on ensuring that everyone is aware of the policies, reporting procedures, and resources available. If this type of

121. There are multiple stakeholder groups within university faculty and officials, each of which may have a different opinion regarding the best practices for sexual assault response. For a sample faculty perspective on best practices for sexual assault response, see Committee on Women in the Academic Profession, *supra* note 92. This can be compared with the model sexual assault policies advanced by the National Association for Higher Education Risk Management and policies supported by campus law enforcement agencies. See Brett A. Sokolow, NATIONAL ASSOCIATION FOR HIGHER EDUCATION RISK MANAGEMENT, A MODEL CAMPUS SEXUAL ASSAULT RESPONSE PROTOCOL (2004), http://nchem.org/pdfs/MODEL_CAMPUS_SEXUAL_ASSAULT_RESPONSE_PROTOCOL_2004.pdf.

122. Ali, *supra* note 1, at 15–19.

training is coupled with training about the types of non-stranger sexual assault that most frequently occur on university campuses, it may effectively challenge rape myths and encourage university officials to respond to non-stranger sexual assault in a manner that supports victims and holds perpetrators accountable. As university officials develop, publicize, and follow sexual assault response policies that reflect the challenging issues of consent, promote bystander intervention, and facilitate identification of sexual activities that meet the definition of sexual assault, students may become more willing to exercise their rights to a sexual assault free campus. For example, if university officials understand that many victims of sexual assault are concerned about reporting a friend and possible retaliation, officials will be prepared to proactively discuss options with the victim and more understanding if the victim later recants an allegation or declines to assist in prosecution.

B. Empowering Students to Identify and Report Sexual Victimization

Another approach to reframing university sexual assault response involves embracing proactive approaches by increasing educational programming offered to students. Students are becoming more vocal in holding universities accountable for responding to sexual assault.¹²³ Unfortunately, many students only become vocal after having negative experiences with university response to sexual assault allegations.¹²⁴ Additionally, students often endorse rape myths that do not comport with the realities of sexual assault on university campuses. At the same time, students have indicated a willingness to learn about how sexual assault occurs on college campuses and what they can do to prevent it. A recent survey of university students indicates that 40.1 percent of students are interested in receiving information about sexual assault and relationship violence prevention.¹²⁵ When combined, these student characteristics elucidate

123. See Kim, *supra* note 6; Sulkowicz, *supra* note 8 (23 students filed a Title IX complaint against Columbia University in April 2014); Lauerman, *supra* note 90.

124. Lauerman, *supra* note 90.

125. AMERICAN COLLEGE HEALTH ASSOCIATION, AMERICAN COLLEGE HEALTH ASSOCIATION-NATIONAL COLLEGE HEALTH ASSESSMENT II: REFERENCE GROUP DATA REPORT SPRING 2012, 5 (2012).

the need for student education about sexual assault. Additionally, because students most frequently report sexual assault first to friends, providing students with the skills to refer their friends to the appropriate resources, such as student health centers, residence hall staff, or campus police, serves the dual purpose of providing students with necessary information about the reality of sexual assault and providing pathways for victims to connect with professional sources of care within the university. However, it is important to note that while educational programming and other primary prevention strategies are essential to the development of sexual assault policies that promote rights-based empowerment models of sexual assault response, these educational approaches are distinct from the sexual assault response policy. The educational and primary prevention aspects are proactive interventions designed to challenge rape myth acceptance and build active bystanders to prevent sexual assault. Sexual assault response policies are inherently reactive, they come into play after a student has been sexually assaulted, and define the steps university administrators will take following the report of a sexual assault.

In addition to educational programming, universities must strive to increase student investment in the legitimacy of the university disciplinary process. If students continue to believe the university disciplinary process is skewed, they have little incentive to report sexual assault. University codes of conduct and disciplinary procedures need to be clearly written, concise, and accessible to everyone within the campus community.¹²⁶ Even more important, written procedures need to be followed by university officials. A rights-based empowerment approach to sexual assault response will involve accused students in the university disciplinary process as an educational, as opposed to punitive or shaming, experience. Universities must create methods of sexual assault reporting that facilitate access to critical medical and mental health services without

126. See Committee on Women in the Academic Profession, *supra* note 92 for additional perspective from professors about how universities can establish best practices for sexual assault response. The AAUP outlined 10 best practices for faculty members responding to sexual assault on university campuses. *Id.* at 370–71.

requiring additional reporting to university officials or law enforcement.¹²⁷

C. Building Collaborative Networks Among University Officials, Law Enforcement, and Local Court Systems

Building collaborative approaches among university administrators, law enforcement, and other community support systems will minimize both barriers to student reporting and university liability under Title IX. Collaboration between university officials and law enforcement can minimize duplication of investigatory processes and avoid conflict arising from different approaches to investigating sexual assault.¹²⁸ It will also enhance the types of inclusive support available to students because community collaboration expands resource options beyond those provided on-campus.

CONCLUSION

University responses to student-on-student sexual assault must involve a multi-pronged and proactive approach applying legal frameworks through a rights-based empowerment approach. Otherwise, universities risk perpetuating rape myths and gendered notions of sexual assault through their sexual assault response. This creates invisible and silenced victims, who lack meaningful access to redress because of the circumstances under which they were victimized. Additionally, without university policies that effectively hold perpetrators of sexual violence accountable for their actions, universities are sending a message that reducing institutional liability at the expense of sexual assault survivors is acceptable. In order to effectively reframe sexual assault policies at universities, new forms

127. Including an educational statement about what constitutes sexual assault and campus sexual assault resources in course syllabi may be a powerful means of normalizing conversations about sexual assault prevention, creating a culture of accountability, and depriving perpetrators of the culture of silence that so often enables them to continue victimizing other students. Nadia Dawisha and Karen Dawisha, *How Syllabi Can Help Combat Sexual Assault*, THE CHRON. OF HIGHER EDUC. (Sept. 3, 2014), <http://chronicle.com/blogs/conversation/2014/09/03/how-syllabi-can-help-combat-sexual-assault/>.

128. Gray, *supra* note 93.

of collaboration are necessary. Not only must university officials educate themselves about the realities of sexual assault, they must ensure that campus police and local prosecutors understand that sexual assault involving acquaintances, alcohol, and possibly other marginalized sexual identities is as harmful and important as the archetypal stranger rape. Indeed, because of the role of the university in shaping the perspectives of future generations, there is an enhanced responsibility to develop educational programs that challenge rape myths and present the realities of sexual assault. Universities are uniquely positioned to create cultural change by challenging rape mythology through model collaborations among educators, health care providers, mental health professionals, law enforcement, and university administrators.