THE CAMPUS SEXUAL VIOLENCE ELIMINATION ACT: IS IT ENOUGH TO COMBAT SEXUAL ASSAULT ON CAMPUS?

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TABLE OF CONTENTS

I. INTRODUCTION 1841
II. BACKGROUND - TITLE IX AND SEXUAL VIOLENCE 1845
III. NEW REQUIREMENTS UNDER THE SAVE ACT 1847
A. Expansion of Reporting Requirements 1847
B. Preventative Education Programs 1849
C. Grievance Procedure Requirements 1850
IV. EVALUATION - IS THE SAVE ACT EFFECTIVE? 1852
A. Consent 1853
B. A "Prompt, Fair and Impartial" Hearing 1861
1. Impartiality 1862
a. Athletes and Sexual Misconduct Claims 1863
b. Structural Conflicts of Interest 1865
2. Fairness and Due Process 1868
3. Towards a Uniform Solution 1872
IV. CONCLUSION 1875

I. INTRODUCTION

American colleges and universities are in a state of crisis. Sexual violence, an issue that once lingered in the background of college life, has come to the forefront of culture and politics, shining a light on the often shocking way in which colleges and universities deal with sexual assault cases. Indeed, as of June 2015, there were 124 higher education institutions under investigation by the Department of Education for

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having sexual assault policies that potentially violate Title IX of the Education Amendments of 1972.[1]

The way in which colleges and universities respond to these complaints is not the only problem: rates of sexual assault continue to increase, placing college students at significant risk.[2] According to a 2007 study, roughly one in five women experiences sexual assault in some form as an undergraduate student.[3] This high rate of sexual assault plaguing college campuses has prompted students and activists to fight for victims' rights and seek policies that will protect students from what has become an imminent harm.[4] The White House has also

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1. Tyler Kingkade, *124 Colleges, 40 School Districts Under Investigation for Handling of Sexual Assault*, HUFFINGTON POST (July 24, 2015, 02:06 PM), http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault_55b19b43e4b0074ba5a40b77.

2. Using data provided by the Department of Education, the Washington Post has published the number of alleged incidents of sexual violence on college campuses with more than 1000 students from 2010 to 2012. *Sex Offenses on U.S. College Campuses*, WASH. POST, http://apps.washingtonpost.com/g/page/local/sex-offenses-on-us-college-campuses/1077/ (last visited May 12, 2016). The schools with the highest numbers include: Pennsylvania State University (84), Harvard University (83), and University of Michigan–Ann Arbor (64). *Id.* The most concerning numbers were those of schools with small enrollment, like Amherst College, whose enrollment totals 1817 students, which had forty-five reported cases of sexual assault from 2010 to 2012. *Id.*

3. CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT pt. 5 at 1 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf. This statistic has recently been called into question based on the fact that the Kreb's CSA Study only surveyed two large college campuses and based the finding on a broad definition of sexual assault. *See* Jake New, *One in Five?*, INSIDE HIGHER ED. (Dec. 15, 2014), https://www.insidehighered.com/news/2014/12/15/critics-advocates-doubt-oft-cited-campus-sexual-assault-statistic. The study defined sexual assault as . . . "rape (assaults involving oral, vaginal or anal sex, or vaginal or anal penetration with a finger or object) and sexual battery (assaults involving sexual contact only, such as forced kissing or fondling)." KREBS ET AL., *supra*, pt. 3 at 14.

4. John Lauerman, *Harvard Graduates Wear Red Tape in Sexual Assault Policy Protest*, BLOOMBERG (May 29, 2014, 11:41 AM), http://www.bloomberg.com/news/2014-05-29/harvard-graduates-wear-red-tape-in-sexual-assault-policy-protest.html (describing a protest conducted by Harvard students in which protesters wore red tape on their graduation cap "in support of victims of sexual assault and to protest the school's response to campus attacks"); Jennifer Ludden, *Student Activists Keep Pressure on Sexual Assault*, NPR (Aug. 26, 2014, 4:59 AM), http://www.npr.org/2014/08/26/343352075/student-activists-keep-sexual-assault-issues-in-the-spotlight (discussing the creation of Know Your IX, a group focused on educating students on their Title IX rights); Roberta Smith, *In a Mattress, A Lever for Political Art and Protest*, N.Y. TIMES (Sept. 21, 2014), http://www.nytimes.com/2014/09/22/arts/design/in-a-mattress-a-fulcrum-of-art-and-political-protest.html?_r=0 (highlighting a student protest at Columbia University in which a female student carried a mattress around campus "to call attention to her plight and the plight of other women who feel university officials have failed to deter or adequately punish such assaults").

been active in advocating for victims' rights and created the White House Task Force to Protect Students from Sexual Assault in January 2014.[5] In addition to circulating high-profile public service announcements featuring well-known celebrities,[6] the Task Force has created an online resource, NotAlone.gov, to inform students of their rights under Title IX and provide easy access to required security disclosures and Title IX resolutions.[7]

However, while awareness campaigns and prevention programs are crucial to cure colleges and universities of a "rape culture,"[8] the commission of these offenses is only one part of the problem. Colleges and universities must, in addition to protecting students from discrimination on the basis of sex,[9] provide both accused students, and their accusers, with fair disciplinary hearings.[10] The challenging nature

5. Memorandum from President Barack Obama on Establishing a White House Task Force to Protect Students from Sexual Assault to the Heads of Executive Departments and Agencies (Jan. 22, 2014), http://www.whitehouse.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a; *see also* The President and Vice President Speak on Preventing Sexual Assault (Jan. 22, 2014), http://www.whitehouse.gov/photos-and-video/video/2014/01/22/president-and-vice-president-speak-preventing-sexual-assault.

6. *See* The White House, *1 is 2 Many PSA: 60 Second*, YOUTUBE (Apr. 29, 2014), https://www.youtube.com/watch?v=xLdElcv5qqc.

7. NOT ALONE: TOGETHER AGAINST SEXUAL ASSAULT, https://www.notalone.gov/ (last visited May 12, 2016).

8. It is difficult to precisely define "rape culture." Generally speaking, a fair definition could be "a complex of beliefs that encourages male sexual aggression and supports violence against women . . . a society where violence is seen as sexy and sexuality as violent." Joyce Williams, *Rape Culture, in* BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY (George Ritzer ed., 2007) (quoting EMILIE BUCHWALD ET AL., TRANSFORMING A RAPE CULTURE v (1993)) (alteration in original). A more expansive definition looks at rape culture as "not an either/or phenomenon but [something that] exists in varying degrees, from the institutionalization of rape to its perfunctory punishment as crime. In the most strident form of rape culture, women are the property of men who deny them respect and the right to control their own bodies." *Id.* (citing SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE (1975)).

9. The Department of Education Office of Civil Rights ("OCR") has "long recognized that sexual harassment of students engaged in by school employees, other students, or third parties is covered by Title IX. . . . [This] policy and practice is consistent with the Congress' goal in enacting Title IX—the elimination of sex-based discrimination in federally assisted education programs." Sexual Harassment Guidance Notice, 62 Fed. Reg. 12,034, 12,034 (Mar. 13, 1997).

10. Letter from Russlyn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. 12 (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter 2011 Dear Colleague Letter]. In this guidance the Assistant Secretary notes that "[p]ublic and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections

of this dichotomy is evident from the difficulties that colleges and universities have faced in promulgating procedures that address the needs of both victims and the accused in investigating and adjudicating complaints of sexual violence.[11]

In response to growing concerns over the prevalence of sexual violence on college campuses and the lackluster response by the institutions to address this problem, Congress passed the Campus Sexual Violence Elimination Act ("SaVE Act"),[12] which was signed into law by President Obama on March 6, 2013, as part of the Violence Against Women Reauthorization Act of 2013 ("VAWA Reauthorization").[13] The SaVE Act amends the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act") and mandates that colleges and universities receiving federal funds implement preventative education programs, disclose certain crime statistics regarding sexual assault and other sexual harassment incidents, and disclose procedures for adjudicating such claims.[14] Mandatory compliance with the SaVE Act began on October 1, 2014.[15] The Department of Education ("Department") released final regulations for the section on October 20, 2014.[16]

This Note will discuss and analyze the amendments to the Clery Act made by the SaVE Act and determine whether the SaVE Act and its regulations adequately address the key issues that colleges and

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for the complainant." *Id.*

11. *See, e.g.*, Walt Bogdanich, *Reporting Rape and Wishing She Hadn't: How One College Handled a Sexual Assault Complaint*, N.Y. TIMES (July 12, 2014), http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html.

12. Joseph Shapiro, *Law Targets Sexual Violence on College Campuses*, NPR, http://www.npr.org/blogs/thetwo-way/2013/03/07/173657424/law-targets-sexual-violence-on-college-campuses (last updated Mar. 15, 2013).

13. *Id.* Inclusion in the VAWA Amendments was the saving grace of the SaVE Act, which had originally been introduced in 2011, but eventually died in committee. *See* S. 834 (112th): Campus SaVE Act, GOVTRACK.US, https://www.govtrack.us/congress/bills/112/s834 (last visited May 12, 2016).

14. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89. The SaVE Act was incorporated into the Violence Against Women Reauthorization Act in 2013. Tyler Kinkade, *Campus SaVE Act Depends on Reauthorization of Violence Against Women Act*, HUFFINGTON POST (Feb. 19, 2013, 02:53 PM), http://www.huffingtonpost.com/2013/02/19/campus-save-act-vawa_n_2640048.html. This Note will refer to § 304 of the VAWA Reauthorization Act as the SaVE Act.

15. Letter from Lynn B. Mahaffie, Acting Assistant Sec'y, Office of Postsecondary Educ., U.S. Dep't of Educ. (July 14, 2014), https://www.ifap.ed.gov/dpcletters/GEN1413.html [hereinafter 2014 Dear Colleague Letter].

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

universities face in responding to complaints of sexual assault. Part II will provide background on the duties and obligations of institutions of higher education to investigate and adjudicate claims of sexual assault. Part III will take an in-depth look at the requirements of the SaVE Act and its implementing regulations. Part IV will argue that the current formulations of the SaVE Act and its regulations do not adequately address the key issues that colleges and universities face in responding to complaints of sexual violence and make recommendations on how the Department and Congress may address these issues in the future.

II. BACKGROUND - TITLE IX AND SEXUAL VIOLENCE

Before considering the new requirements for higher education institutions pursuant to the SaVE Act, it is important to first explain the existing duties imposed on institutions of higher education by (1) Title IX of the Education Amendments of 1972;[17] (2) the Clery Act;[18] and (3) Department guidance in the form of "Dear Colleague" letters, regulations, and other informal memoranda.[19] In 1972, Congress passed the Education Amendments,[20] which included, among other nondiscrimination requirements, a prohibition on discrimination on the basis of sex in any educational institution receiving federal funds.[21] Since the passage of Title IX, the Department and federal courts have interpreted the broad language of the section to prohibit certain types of discrimination, including sexual harassment.[22] But Title IX does more

17. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (codified as amended at 20 U.S.C. § 1681 *et seq.* (1972)).

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

19. *See, e.g.*, 2014 Dear Colleague Letter, *supra* note 15, at 2–3 (discussing obligations in the wake of VAWA amendments to the Clery Act); 2011 Dear Colleague Letter, *supra* note 10, at 8 (providing guidance on Title IX requirements as related to sexual violence and grievance procedures).

20. Education Amendments of 1972, 86 Stat. at 235.

21. Title IX specifically states that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2012). While Title IX was attached to a bill concerning higher education, it applies broadly to "all levels of education," including elementary and secondary education. KATHERINE HANSON ET AL., MORE THAN TITLE IX: HOW EQUITY IN EDUCATION HAS SHAPED THE NATION 8–9 (2009).

22. *See, e.g.*, Doe *ex rel.* Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1426 (N.D. Cal. 1996) ("Thus it appears that school districts are on notice that student-to-student sexual harassment is very likely in their schools . . . . In light of this knowledge, if a school district fails to develop and implement policies reasonably designed to bring incidents of severe or pervasive harassment to the attention of the appropriate officials it

than just prohibit discrimination on the basis of sex. It also requires schools to "designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under [Title IX]"[23] and provide students with notice of the identity and the contact information for the Title IX Officer.[24] Schools must additionally "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [Title IX]."[25] In regard to complaints of sexual harassment, the Department's Office for Civil Rights ("OCR"), which enforces Title IX on colleges and universities,[26] has provided guidance on the preferred standards for adjudicating claims of student-on-student sexual harassment.[27] In a controversial 2011 "Dear Colleague" letter,[28] the OCR urged schools to adopt grievance standards which, inter alia, are written in "language appropriate to the age of the school's students," adopt a preponderance of the evidence standard for disciplinary procedures involving sexual violence, and provide both the accuser and accused student the opportunity to present witness testimony and evidence in their support.[29] The requirements promulgated by this letter will be discussed in more detail in conjunction with the SaVE Act regulations.

Lastly, schools are required to comply with the Clery Act.[30] Originally enacted in 1990 as the Campus Security Act, the Clery Act creates certain mandatory disclosure requirements for any institution receiving federal funds.[31] These disclosures must be made in an annual

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must be inferred that the district intended the inevitable result of that failure, that is, a hostile environment."); see also Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,046 n.3 (Mar. 13, 1997) for a discussion on the applicability of Title IX to claims of sexual harassment.

23. 34 C.F.R. § 106.8(a) (2015).

24. *Id.*

25. *Id.* § 106.8(b).

26. *About OCR*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/aboutocr.html (last modified Oct. 15, 2015).

27. 2011 Dear Colleague Letter, *supra* note 10, at 9–10.

28. See Stephen Henrick, Note, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 59–66 (2013) for a discussion on the problematic aspects of the Dear Colleague letter and arguments both in support of, and in opposition to the adoption of the standards espoused by the letter.

29. 2011 Dear Colleague Letter, *supra* note 10, at 8–12.

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

31. *Id.* § 1092(f)(1). The Clery Act was passed in the wake of a tragic incident at Lehigh University in 1986 in which nineteen-year-old Jeanne Clery was raped and murdered in her college dorm room by another student. *Our History*, CLERY CTR. FOR

security report that is made available—through publication or by mail—to students and employees.[32] Among the disclosures mandated by the Clery Act are crime statistics for any incidents that occur "on campus, in or on noncampus buildings or property, and on public property."[33] So-called "Clery geography" includes noncampus buildings in order to reach properties owned or controlled by student organizations or owned or controlled by the institution but not located in the main campus area.[34] In addition to crime statistics, the Clery Act requires institutions to make available a statement of policy addressing the institution's sexual assault prevention programs and the procedures for investigating and adjudicating any claims of sexual violence.[35]

III. NEW REQUIREMENTS UNDER THE SAVE ACT

The Campus SaVE Act requires schools to not only improve their policies surrounding sexual misconduct, but to also properly educate and inform students, faculty, and administration on the definitions of sexual assault crimes, how to file a complaint, the disciplinary process, and how to prevent these incidents from occurring.[36] This Part will discuss these requirements in detail, as well as the recently finalized implementing regulations for the section,[37] which further define how schools may comply with the SaVE Act.

A. Expansion of Reporting Requirements

The SaVE Act makes several important amendments to the Clery Act in regard to what type of sexual violence crimes schools must disclose in their annual security reports. Prior to the SaVE Act, the Clery Act merely required the disclosure of statistics regarding "sex

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SECURITY ON CAMPUS, http://clerycenter.org/our-history (last visited May 12, 2016). Upon discovering "the lack of information provided [to] students and families about the rapid increase of violent and non-violent incidents on campuses," Clery's parents "realized that while crimes were being reported to campus authorities, administrators often failed to provide adequate warnings about those incidents—even more troubling, there were no uniform laws mandating them to do so." *Id.* They began lobbying Congress and four years later they were successful in passing the Clery Act. *Id.*

32. 20 U.S.C. § 1092(f)(1).

33. *Id.* § 1092(f)(1)(F).

34. *Id.* § 1092(f)(6)(A)(ii).

35. *Id.* § 1092(f)(8)(A).

36. Violence Against Women Act, 79 Fed. Reg. 62,752, 62,752–53 (Oct. 20, 2014) (to be codified at 34 C.F.R. pt. 668).

37. *Id.*

offenses[—]forcible or nonforcible."[38] The SaVE Act expands this requirement, mandating the disclosure "of domestic violence, dating violence, and stalking incidents that were reported to campus security authorities or local police agencies."[39] The SaVE Act further expands the scope of reportable crimes of intentional discrimination to include crimes on the basis of "national origin, sexual orientation [and] gender identity."[40] It is important to note the definitions of each of the added offenses: (1) dating violence, (2) domestic violence, and (3) stalking and why they were included in the SaVE Act amendments to the Clery Act. First, dating violence is defined 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."[41] This addition is especially important in the context of campus incidents of sexual violence as most claims involve someone the victim knows, and, further, 23.7% of completed rapes and 14.5% of attempted rapes are committed by a victim's boyfriend or ex-boyfriend.[42] Domestic violence is defined as a "felony or misdemeanor crime of violence" that is committed by a person with whom the victim had a marital relationship; or with whom the victim cohabitates with, has a child with, or is in any other relationship covered by "the domestic or family violence laws of the jurisdiction in which the crime of violence occurred."[43] Stalking, which has increasingly become a type of victimization female college students face,[44] is defined as "[e]ngaging in a course of conduct directed at a specific person that would cause a reasonable person to—[f]ear for the person's safety or the safety of others; or [s]uffer substantial emotional distress."[45] Another key definition promulgated by the SaVE Act regulations is the adoption of the FBI's Uniform Crime Reporting Program's definition of rape, which defines rape as "[t]he penetration, no matter how slight, of the vagina

38. 20 U.S.C. § 1092(f)(1)(F)(i)(II).

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

40. *Id.* § 304(a)(1)(B)(ii)(I), 127 Stat. at 89.

41. Violence Against Women Act, 79 Fed. Reg. at 62,784.

42. BONNIE S. FISHER ET AL., UNSAFE IN THE IVORY TOWER: THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 71 fig.3.1 (2010).

43. Violence Against Women Act, 79 Fed. Reg. at 62,784.

44. According to a study conducted during the 1996–1997 academic year across about 230 universities, 13.1% of college women were victims of some form of stalking during the academic year. FISHER ET AL., *supra* note 42, at 165–66. This finding is supported by a recent study conducted by the Massachusetts Institute of Technology ("MIT"), which found that fourteen percent of female undergraduates experienced an incident of stalking while at MIT. OFFICE OF THE CHANCELLOR, MASS. INST. OF TECH., SURVEY RESULTS: 2014 COMMUNITY ATTITUDES ON SEXUAL ASSAULT 4 tbl.2.1 (2014).

45. Violence Against Women Act, 79 Fed. Reg. at 62,784.

or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."[46] While the SaVE Act and its regulations do expand the scope of the disclosures that a school must make in their annual security report, there is a caveat. The regulations make a significant change that allows an institution to withhold certain reported crimes from its annual security report statistics "where sworn or commissioned law enforcement personnel have fully investigated the [incident] and, based on the results . . . , have made a formal determination that the crime report is false or baseless and therefore 'unfounded.'"[47] The Department noted that it believed some institutions may improperly label incidents as "unfounded," and thus required institutions to include the number of reports that were determined to be "unfounded" in order to properly formulate further guidance on the issue.[48]

B. Preventative Education Programs

Under the SaVE Act, schools must include in their security report a detailed statement describing programs that will promote awareness of rape and sexual violence crimes.[49] The regulations further delineate the purpose of these awareness programs, requiring the programs be "[c]omprehensive, intentional, and integrated programming, . . . intended to *end* dating violence, domestic violence, sexual assault, and stalking."[50] In order to meet this standard, the programming must be "culturally relevant, inclusive of diverse communities and identities, sustainable, responsive to community needs, and informed by research[,] . . . [as well as] [c]onsider environmental risk and protective factors as they occur on the individual, relationship, institutional, community, and societal levels."[51] This definition was crafted so as to alter cultural ideas about sexual violence and to "focus on changing the social norms and stereotypes that create conditions in which sexual violence occurs."[52] These preventative education programs are intended for any new student or employee.[53] The programs must include "a statement that the institution . . . prohibits the [offenses] of dating

46. *Id.* at 62,789 app. A.
47. *Id.* at 62,786.
48. *Id.* at 62,765–66, 62,786.
49. *Id.* at 62,769.
50. *Id.* at 62,784 (emphasis added).
51. *Id.*
52. *Id.* at 62,758.
53. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304(a)(8)(B)(i)(I), 127 Stat. 54, 90.

violence, domestic violence, sexual assault, and stalking," the definition of the prohibited sexual misconduct offenses, and "safe and positive options for bystander intervention."[54] In addition to informing students of the school's stance on these offenses, the school must also make available the definition of each offense, and the definition of consent.[55]

Despite requiring schools to properly inform and educate students on the definition of consent, the regulations provide no guidance on how to define consent, and merely instruct institutions to defer to the definition of consent "in the applicable jurisdiction."[56] In its response to comments on the proposed regulations, the Department explained that it felt such a definition was unnecessary because all reported sex offenses must be included in the security report, regardless of the merits of the claim.[57] However, despite this insistence on not defining consent, prior proposed versions of the regulations adopted an affirmative definition of consent, defining it as "the affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during a sexual encounter."[58]

C. Grievance Procedure Requirements

In addition to the disclosure of prevention and awareness programs, schools are further required by the SaVE Act to include in their security report (1) procedures complainants may follow in the event that a sex offense as defined by the Act has occurred,[59] and (2) the university's procedures for adjudicating cases of alleged sexual misconduct.[60] These proceedings must be "prompt, fair, and impartial . . . and . . . conducted by officials who receive annual training on the issues related to [sexual misconduct offenses] and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability."[61] More specifically, the regulations address how institutions may ensure that such proceedings are "prompt, fair, and impartial."[62] Such a hearing is defined as being:

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54. *Id.*
55. Violence Against Women Act, 79 Fed. Reg. at 62,752.
56. *Id.* at 62,788.
57. *Id.* at 62,755–56.
58. *Id.* (internal quotation marks omitted).
59. § 304(a)(8)(B)(iii), 127 Stat. at 90.
60. *Id.* § 304(a)(8)(B)(iv), 127 Stat. at 91.
61. *Id.* § 304(a)(8)(B)(iv)(I), 127 Stat. at 91.
62. Violence Against Women Act, 79 Fed. Reg. at 62,789.

> [(1)] completed within reasonably prompt timeframes . . . ; [(2)] [c]onducted in a manner that—[i]s consistent with the institution's policies and transparent to the accuser and the accused; . . . [and (3)] [c]onducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused.[63]

In addition, the regulations require that a school describe in detail how alleged victims may file complaints, the procedures for investigating and adjudicating complaints, and how the institution will determine "which type of proceeding to use based on the circumstances of [the] allegation[s]."[64] These requirements are crucial as colleges and universities may have formal and informal routes of adjudicating such allegations. For example, the University of California–Los Angeles has two methods for adjudicating complaints of sexual harassment: early resolution and formal investigation.[65] While parties may agree to resolve the dispute through the early resolution process, the policy suggests that such a route may not be appropriate where "facts are in dispute in reports of serious misconduct, or when reports involve individuals with a pattern of inappropriate behavior or allege criminal acts such as stalking, sexual assault, or physical assault."[66] Thus, by requiring schools to indicate the type of proceedings that are appropriate for certain types of incidents, the policy provides more notice to the student as to what procedure they may have to undergo if they choose to file a complaint.

Perhaps one of the more controversial decisions in promulgating the regulations was the Department's decision to decline a regulation that would mandate the adoption of a preponderance of the evidence standard in adjudicating complaints of sexual misconduct.[67] The SaVE Act requires that schools disclose, in their security reports and grievance procedures, "a statement of the standard of evidence that will be used during any institutional conduct proceeding."[68] In their current form, the regulations merely duplicate the SaVE Act requirement that schools make this disclosure.[69] The Department noted that many

63. *Id.*

64. *Id.*

65. NORMAN ABRAMS, UNIV. OF CAL. L.A., UCLA PROCEDURE 630.1: RESPONDING TO REPORTS OF SEXUAL HARASSMENT 3–5 (2005).

66. *Id.* at 4.

67. Violence Against Women Act, 79 Fed. Reg. at 62,772.

68. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304(a)(8)(A)(ii), 127 Stat. 54, 90.

69. Violence Against Women Act, 79 Fed. Reg. at 62,789.

commentators argued that certain evidentiary standards—namely, either preponderance of the evidence or clear and convincing evidence—be adopted for the purposes of the section.[70] The Department opined that the indication of any specific evidentiary standard was uncalled for, as Title IX required schools adopt a preponderance of the evidence standard.[71] While the Department indicates that such a definition is outside the scope of the SaVE Act, it is interesting to note that previous iterations of the SaVE Act *did* adopt the preponderance of the evidence standard for such proceedings.[72]

IV. EVALUATION - IS THE SAVE ACT EFFECTIVE?

While the SaVE Act does make important strides in opening the dialogue regarding sexual assault on campus,[73] and expanding Clery Act reporting requirements,[74] it fails to address certain fundamental problems that colleges and universities face when dealing with campus sexual assault. This Part will argue that the Campus SaVE Act is insufficient to combat the problem of sexual assault on college campuses for two key reasons: (1) its failure to implement a clear, unambiguous definition of consent and (2) its failure to acknowledge the due process rights of the accused by not defining precise procedures that should be adopted for proper adjudication of complaints of sexual assault.

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70. *Id.* at 62,772.

71. *Id.* While the 2011 Dear Colleague Letter did provide guidance to colleges and universities on the use of the preponderance of the evidence standard, according to a 2014 study by Senator Claire McCaskill, fifteen percent of schools surveyed still did not employ a preponderance of the evidence standard. *See* STAFF OF S. SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, 113TH CONG., SEXUAL VIOLENCE ON CAMPUS fig.F4 (2014), http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf [hereinafter MCCASKILL SURVEY].

72. Campus Sexual Violence Elimination Act, H.R. 2016, 112th Cong. § 3(8)(B)(i)(I)(cc) (2011); *see also* Kristen Lombardi, *Notre Dame Case Highlights Complexities of Sexual Assault Investigations*, CTR. FOR PUB. INTEGRITY (Jan 7., 2013, 6:00 AM), http://www.publicintegrity.org/2013/01/07/11998/notre-dame-case-highlights-complexities-campus-sexual-assault-investigations ("Filed in the fall of 2010, the [SaVE Act] was meant to codify the Title IX guidance, creating minimum, national standards for colleges and universities. Two years later, after lobbying by [the Foundation for Individual Rights in Education] and others brought about changes in the bill, some supporters now actually oppose it. The most notable change: the bill would no longer require schools to use the 'preponderance' standard.").

73. *See* Violence Against Women Act Reauthorization Act of 2013, Pub. L. 113-4, § 304(a)(8)(B), 127 Stat. 54, 90.

74. *Id.* § 304(a)(1)(B)(iii) (amending the Clery Act to require institutions to additionally report allegations of "domestic violence, dating violence, and stalking").

A. Consent

The question of consent is at the heart of every sexual assault case, making its definition—of which students are educated and with which laws are created—a crucial factor in any law that purports to address the issue of sexual assault. While schools are required by the SaVE Act to educate students on the definition of consent, the law provides little to no guidance in how the school should approach such a nuanced and often difficult issue.[75] In their current form, the SaVE Act regulations neglect to provide a clear definition of consent, but instead instruct schools to look to the definition of their jurisdiction.[76] This omission is to the detriment of the SaVE Act as a cohesive definition of an affirmative consent standard would be beneficial not only in preventing sexual assault,[77] but also such a definition would address some of the unique issues that arise in campus sexual assaults, such as the prevalence of drugs and alcohol in these incidents.[78] A consistent definition of consent that would apply to colleges and universities would remove any uncertainty as to what definition of consent governs the complaint. This uncertainty is vast, as definitions of consent differ not only between jurisdictions, but also between schools and the jurisdiction in which they are located.[79] This Section will explore several reasons why the SaVE Act should have defined consent and why future guidance should require institutions to adopt an affirmative definition of consent.

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75. *See* Violence Against Women Act, 79 Fed. Reg. at 62,755–56.

76. *Id.* at 62,788 ("The statement [of policy regarding the school's preventative programs] must include . . . [t]he definition of 'consent,' in reference to sexual activity, in the applicable jurisdiction.").

77. Emily Bazelon, *Hooking Up at an Affirmative-Consent Campus? It's Complicated*, N.Y. TIMES MAG. (Oct. 21, 2014), http://www.nytimes.com/2014/10/26/magazine/hooking-up-at-an-affirmative-consent-campus-its-complicated.html ("In the quest for a safer campus, it probably comes more naturally to institutions to help students learn prevention than to adjudicate disputes over consent after the fact.").

78. FISHER, *supra* note 42, at 79–83.

79. *Compare* State v. Alston, 312 S.E.2d 470, 475 (N.C. 1984) (requiring the State be able to show "by evidence of statements or actions by the victim which were clearly communicated to the defendant and which expressly and unequivocally indicated the victim's . . . lack of consent to the particular act of intercourse"), *with Consent*, UNIV. OF N.C. AT CHAPEL HILL POLICY ON PROHIBITED DISCRIMINATION, HARASSMENT, AND RELATED MISCONDUCT, http://sexualassaultanddiscriminationpolicy.unc.edu/prohibited-conduct/consent (last visited May 12, 2016) (defining consent as "the communication of an affirmative, conscious and freely made decision by each participant to engage in agreed upon forms of Sexual Contact.").

The decision not to include a definition of consent in the regulations concerned many commenters, especially since earlier versions of the regulations contained language-defining consent as "the affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during a sexual encounter."[80] The early draft also indicated that under this definition of consent:

> an individual who was asleep, or mentally or physically incapacitated, either through the effect of drugs or alcohol or for any other reason, or who was under duress, threat, coercion, or force, would not be able to consent. Further, *one would not be able to infer consent under circumstances* in which consent was not clear, including but not limited to the absence of "no" or "stop," or the existence of a prior or current relationship or sexual activity.[81]

This definition propounds the idea of "yes means yes," i.e., that there is only consent to sexual activity where there is an affirmative statement of such.[82] Commenters in support of the inclusion of an affirmative definition of consent in the SaVE Act regulations argued that a clear, unambiguous definition would promote national consistency.[83] The Department rejected these arguments because it "[did] not believe that a definition of consent is needed for the administration and enforcement of the Clery Act."[84] The Department argued that reporting requirements extend to all crimes, proven or unproven, and "if [a crime is] reported to the campus police, [it] must be included in the crime log, regardless of the issue of consent."[85] However, the Department's decision is misguided. If the Campus SaVE Act is to combat sexual assault, it must have some teeth with which to attack the problem.

Indeed, the adoption of an affirmative definition of consent would be a first step in combatting the unique particularities of campus sexual assault cases. The role that alcohol and drugs play in these cases is overwhelming; about eighty percent of sexual assault cases on college campuses involve some form of intoxication.[86] Once alcohol and drugs

80. Violence Against Women Act, 79 Fed. Reg. at 62,755.

81. *Id.* (emphasis added).

82. Conversely, the traditional "no means no" model of consent assumes that consent exists unless there is a denial of consent.

83. Violence Against Women Act, 79 Fed. Reg. at 62,755.

84. *Id.*

85. *Id.* at 62,756.

86. Christopher P. Krebs et al., *College Women's Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since*

are placed into the equation, stories become more divergent and the presence of clear consent often disappears. As noted by a *Slate* columnist, "[l]ooking for a woman who said 'yes' . . . instead of focusing on whether she said no in exactly the right words will help put the role alcohol plays into focus. It will clear up some of the murky gray areas . . . ."[87] These murky grey areas include situations where intoxicated victims may be unable to clearly articulate their lack of consent. No longer would accused parties be able to raise the defense of "she (or he) did not say no," creating a competition of credibility. Instead, if the accuser alleges he or she did not consent to sexual activity, it is then on the accused to show what statements or actions indicated clear and unambiguous consent in the situation. While each case of sexual assault differs, incidents that occur on campus are often similar in that they involve someone the victim knows[88] and the case turns on whether or not the victim actually consented to the sexual activity in question.[89] Consider the following hypothetical: "Jamie and Cameron are at a party. It is crowded on the dance floor and they are briefly pressed together. Later, Jamie encounters Cameron in the hallway and smiles. Cameron, who is now very drunk, follows Jamie into the bathroom" where they have sex.[90] Jamie later brings a complaint with the university stating that Cameron raped her that night and that she did not consent to any of the sexual activity that occurred in the bathroom. However, Cameron claims that Jamie never said no and that they both understood what was happening.

Entering College, 57 J. AM. C. HEALTH 639, 639 (2009). For a more detailed discussion on the role that drugs and alcohol can play in campus sexual assault cases, see FISHER, *supra* note 42, at 79–83.

87. Amanda Marcotte, *Can Affirmative Consent Standards Fix the Problem of Alcohol and Rape?*, SLATE: XX FACTOR (Feb. 18, 2014, 12:57 PM), http://www.slate.com/blogs/xx_factor/2014/02/18/alcohol_and_rape_it_s_time_to_embrace_affirmative_consent_standards.html.

88. In about ninety percent of sexual assaults on college campuses, the victim and the perpetrator know each other in some capacity. KREBS, *supra* note 3, pt. 2 at 3 (citing BONNIE S. FISHER ET AL., U.S. DEPT. OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 17 (2002)).

89. *See, e.g.*, King v. DePauw Univ., No. 2:14-cv-70-WTL-DKL, 2014 WL 4197507, at *12 (S.D. Ind. Aug. 22, 2014).

90. YALE UNIV., SEXUAL ASSAULT SCENARIOS 4 (Sept. 9, 2013), http://smr.yale.edu/sites/default/files/files/Sexual-Misconduct-Scenarios.pdf. Yale University issued this document to clarify the University's definition of nonconsensual sex. *Id.* at 1. The document provides a number of scenarios and delineated whether the given incident presented in each scenario was sexual misconduct and what the likely discipline would be. *Id.* The scenario quoted here originally stated that Cameron forced Jamie to have sex and indicated that because there was no consent, Cameron's likely punishment would be expulsion. *Id.* at 3.

This he-said-she-said dichotomy is typical of sexual assault cases, demonstrating a deeper problem with the sexual culture that exists on college campuses and the issues that can arise from preventative education focused on a "no means no" model of consent. Under a traditional model of consent (and traditional sexual scripts), it is often the responsibility of the female to put a stop to unwanted advances.[91] The affirmative consent model instead places the burden on both parties—they must indicate their consent in a way that their partner will understand and agree.[92] By adopting an affirmative model of consent, there is no question that Jamie and Cameron's situation would be considered sexual assault.[93] The clarity that would arise from the adoption of an affirmative consent standard could significantly affect not only the way sexual assault cases are investigated and adjudicated, but also could act as a force for preventing future sexual assaults.

A national affirmative definition of consent for colleges and universities could play an instrumental role in preventative education and ending the rape culture that has emerged throughout the country, but is especially rampant at colleges and universities.[94] A major aspect of the SaVE Act is preventative education.[95] Institutions are required to provide the applicable definition of consent as part of the mandatory programs to prevent sexual violence.[96] By granting schools discretion in defining consent for the purposes of these programs, there will be inconsistency on how students perceive and understand sexual assault. Indeed, commenters argued "the Department should define 'consent' because it is an essential part of education and prevention programming . . . [and] even if a definition is not needed for recording sex offenses, not having a definition ignores current conversations about campus sexual assault."[97]

In order to implement effective preventative education programs, all colleges and universities need to be held to the same standards.

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91. Kristen N. Jozkowski & Zoë D. Peterson, *College Students and Sexual Consent: Unique Insights*, 50 J. SEX RES. 517, 519 (2013).

92. Violence Against Women Act, 79 Fed. Reg. 62,752, 62,755 (Oct. 20, 2014) (to be codified at 34 C.F.R. pt. 668).

93. *See id.* at 62,752, 62,755. Under the proposed definition of affirmative consent, consent may not be inferred "under the circumstances in which consent was not clear, including but not limited to the absence of 'no' or 'stop.'" *Id.* at 62,755.

94. *See* JOHN J. SLOAN & BONNIE S. FISHER, THE DARK SIDE OF THE IVORY TOWER: CAMPUS CRIME AS A SOCIAL PROBLEM 90–91 (2011).

95. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304(a)(8)(B)(i), 127 Stat. 54, 90.

96. Violence Against Women Act, 79 Fed. Reg. at 62,788.

97. *Id.* at 62,755.

Students of one school should not lag behind others, merely because their school propounds a different definition of consent. Combatting sexual assault on campus means ridding campuses of the culture that leads to vulgar chants by fraternities of: "[N]o means yes" and "yes means anal."[98] It means teaching both male and female students about what it means to consent to sexual activity, how to consent, and how to know if your partner is uncomfortable. By failing to include an affirmative definition of consent, the SaVE Act potentially prevents students at some institutions from engaging in these frank discussions on sex and avoiding dangerous situations later on.

While affirmative consent is a relatively new phenomenon, and there has been little research on how students respond to these policies, we can look to Antioch University as a stalwart regarding affirmative consent and sexual assault prevention. In 1990, a student group, the Womyn of Antioch, "began a campaign to promote a culture free of sexual violence at Antioch College."[99] Their efforts led the school to adopt the Sexual Offense Prevention Policy.[100] The policy includes a definition of consent requiring verbal agreement to engage in sexual activity at every level and during every sexual encounter.[101] This early affirmative consent standard was too much for some and ignited significant controversy.[102] *Saturday Night Live* even performed a sketch

98. Angelica Bonus, *Fraternity Pledges' Chant Raises Concerns at Yale*, CNN (Oct. 18, 2010), http://www.cnn.com/2010/US/10/18/connecticut.yale.frat.chant.

99. *Sexual Offense Prevention Policy ("SOOP") & Title IX*, ANTIOCH C., http://antiochcollege.org/campus-life/residence-life/health-safety/sexual-offense-prevention-policy (last visited May 12, 2016).

100. *Id.*

101. ANTIOCH COLL., STUDENT HANDBOOK 2014–2015, at 42–43 (2014). The key aspects of Antioch's definition of consent are reproduced below.

> Consent is defined as the act of willingly and verbally agreeing to engage in specific sexual conduct. The following are clarifying points: Consent must be obtained each and every time there is sexual activity. All parties must have a clear and accurate understanding of the sexual activity. The person who initiates sexual conduct is responsible for verbally asking for the "consent" of the individual(s) involved. The person with whom sexual conduct is initiated must verbally express "consent" or lack of "consent"[.] Each new level of sexual activity requires consent.

Id.

102. *See* Arun Rath, *The History Behind Sexual Consent Policies*, NPR (Oct. 5, 2014, 5:05 PM), http://www.npr.org/2014/10/05/353922015/the-history-behind-sexual-consent-policies ("We were accused of legislating sex. We were ridiculed pretty heavily. And, of course, what's interesting is that media attention didn't even really explode until 1993, which, of course, was already two years into us living with policy where it wasn't that controversial, because there were already two incoming classes of students who sort of thought this was normal and status quo.").

ridiculing the requirements of the policy and the effect that it would have on sexual intimacy.[103]

Despite the controversy, Antioch's policy remains intact and has acted as a guide for other colleges and universities.[104] While there has been little research on whether the policy effectively changed students' attitudes towards sexual assault or prevented sexual assaults from occurring, the long-lasting nature of the policy and the relatively non-existent rate of sexual assault incidents at Antioch College seem to indicate that the policy has been successful in combatting sexual assault.[105]

What we can definitively learn from the Antioch experience is the importance of education in changing attitudes towards sexual assault and the policies that seek to combat it.[106] As noted, Antioch's affirmative consent policy was openly mocked and derided when passed in the early nineties. Since the 1990s the conversation on sexual assault has changed, and there has been a shift in understanding, bringing about wider acceptance for affirmative consent policies.[107] Indeed, one

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103. For video of the *Saturday Night Live* "Is It Date Rape?" sketch, see Kat Stoeffel, *Why the Campus Rape Debate Seems Like a Bad Rerun*, THE CUT (July 8, 2014, 2:16 PM), http://nymag.com/thecut/2014/07/campus-rape-debate-feels-like-groundhog-day.html.

104. *See* Zoe Mintz, *'Yes Means Yes' Sexual Assault Prevention Law has Prototype in Many College Campus Policies*, INT'L BUS. TIMES (Sept. 29, 2014, 6:21 PM), www.ibtimes.com/yes-means-yes-sexual-assault-prevention-law-has-prototype-many-college-campus-policies-1696683.

105. In assessing the success of Antioch College's Sexual Offense Prevention Policy it is important to note the College's uniqueness. The main campus, in Yellow Springs, Ohio, has an extremely small undergraduate population. *See Antioch College Conducting Final Admission Cycle for Four-Year, Full Tuition Scholarships*, ANTIOCH C. (Nov. 21, 2013), http://antiochcollege.org/news/archive/antioch-college-conducting-final-admission-cycle-four-year-full-tuition-scholarships. According to Clery Act data, only 229 students are currently enrolled. Antioch College, THE CAMPUS SAFETY AND SECURITY DATA ANALYSIS CUTTING TOOL, http://ope.ed.gov/security (search "Get Data for one institution/campus" for "Antioch College;" then follow "Antioch College" hyperlink under "Institution/Campus) (last visited Apr. 16, 2016). Even so, Antioch appears to have had no reported sexual assault incidents in several years. *Id.*

106. Nicholas J. Little, Note, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1345 n.153 (2005) (noting that while education programs have a positive effect, they must be conducted "early and often" to be truly effective (quoting Kimberly Lonsway & Chevron Kothari, *First Year Campus Acquaintance Rape Education (FYCARE): Evaluating the Impact of Knowledge, Ideology, and Behavior* (Am. Bar Found., Working Paper No. 9720, 1998))).

107. For example, the National Center for Higher Education Risk Management estimates that about 800 colleges and universities have adopted a "pure consent definition." Press Release, Nat'l Ctr. for Higher Educ. Risk Mgmt., The NCHERM Group Continues to Advocate for Affirmative Consent Policies in Colleges and Schools Across the

scholar has noted that Antioch's early adoption of an affirmative consent standard "was the first policy to seek a rape-free campus community" and encouraged a community "in which gender equality and mutual respect are valued as community norms," in direct opposition to rape culture.[108] While the nationwide adoption of an affirmative consent standard would not immediately reduce the rate of rapes on campus,[109] it would act as a channel through which to cure colleges of the current rape culture and eventually could reduce the rate of rape and sexual assault by educating students on how to gain and give effective consent.

Lastly, the failure to adopt an affirmative definition of consent, as one commenter noted, ignores current conversations and trends in sexual assault laws.[110] Not only have colleges and universities begun to adopt affirmative consent standards for sexual assaults committed on campus,[111] states have begun proposing and passing laws requiring colleges and universities to adopt affirmative definitions of consent as a condition of state funding.

California was the first state to pass such a law. On September, 28, 2014, the Governor of California signed and approved a law requiring that all institutions of higher education receiving state funds adopt a

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Nation (Oct. 10, 2014), http://www.prnewswire.com/news-releases/the-ncherm-group-continues-to-advocate-for-affirmative-consent-policies-in-colleges-and-schools-across-the-nation-278778841.html.

108. PEGGY REEVES SANDAY, FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS 222 (2d ed. 2007).

109. *See* Little, *supra* note 106, at 1345.

110. Violence Against Women Act, 79 Fed. Reg. 62,752, 62,755 (Oct. 20, 2014) (to be codified at 34 C.F.R. pt. 668).

111. Most recently, the University of Virginia issued a proposed sexual misconduct policy for comment that defined consent as being "[i]nformed (knowing), [v]oluntary (freely given), [a]ctive (not passive), meaning that, through the demonstration of clear words or actions, [the parties have] indicated permission to engage in mutually agreed-upon sexual activity." *HRM-041: Policy on Sexual and Gender-Based Harassment and Other Forms of Interpersonal Violence*, U. VA. (Mar. 30, 2015), http://uvapolicy.virginia.edu/policy/HRM-041#Statement. Yale University, the University of North Carolina, and Antioch College have also adopted affirmative consent standards. *See* ANTIOCH COLL., *supra* note 101, at 42 ("Consent means verbally asking and verbally giving or denying consent for all levels of sexual behavior."); *Consent*, *supra* note 79 ("Consent is the communication of an affirmative, conscious, and freely made decision by each participant to engage in agreed upon forms of Sexual Contact."); *Yale Sexual Misconduct Policies and Related Definitions*, YALE UNIV., http://smr.yale.edu/sexual-misconduct-policies-and-definitions (last updated May 10, 2016) ("Sexual activity requires consent, which is defined as positive, unambiguous, and voluntary agreement to engage in specific sexual activity throughout a sexual encounter. Consent cannot be inferred from the absence of a 'no'; a clear 'yes,' verbal or otherwise, is necessary.").

policy addressing sexual assault that explicitly adopts "[a]n affirmative consent standard in the determination of whether consent was given by both parties to sexual activity."[112] The law defines affirmative consent as "affirmative, conscious, and voluntary agreement to engage in sexual activity,"[113] and further noting that "[l]ack of protest or resistance does not mean consent, nor does silence mean consent."[114]

The passage of the California affirmative consent law sparked debate with advocates both in support and in opposition of the law. Among the criticisms were claims that the law is overly vague[115] and a clear example of government overreach.[116] Despite these criticisms, the California law has encouraged other states to propose affirmative consent laws. New York Governor Andrew Cuomo has taken significant steps towards adopting a statewide affirmative consent standard. In October 2014, he recommended the SUNY Board of Trustees to adopt such a standard (in addition to other procedural guidelines)[117] and has since indicated that he will propose a law requiring that all universities receiving state funds to adopt such a standard.[118] California and New York are not the only states that have taken action to adopt affirmative consent standards for colleges and universities; bills, similar to California's law, have also been recently proposed in New Hampshire[119] and New Jersey.[120]

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112. 2014 Cal. Stat. 748 (codified at CAL. EDUC. CODE § 67386(a)(1) (West 2016)). The law additionally requires institutions to adopt a number of procedural rules, including use of the preponderance of the evidence standard and indication that certain defenses (such as lack of knowledge) "shall not be a valid excuse to alleged lack of affirmative consent." *Id.* § 67386(a)(2).

113. *Id.* § 67386(a)(1).

114. *Id.*

115. Asche Schow, *5 Problems with California's 'Affirmative Consent' Bill*, WASH. EXAM'R (Aug. 28, 2014, 8:00 AM), http://www.washingtonexaminer.com/5-problems-with-californias-affirmative-consent-bill/article/2552537.

116. Editorial, *Sex and College Students: Should the Legislature be in the Mix Too?*, L.A. TIMES (May 28, 2014, 4:25 PM), http://www.latimes.com/opinion/editorials/la-ed-affirmative-consent-20140525-story.html.

117. Memorandum from Nancy L. Zimmer, SUNY Chancellor, to SUNY Bd. of Trustees (Oct. 2, 2014), http://www.suny.edu/media/suny/content-assets/documents/boardof trustees/memos/Sexual-Assault-Response-Prevention-REVISED.pdf ("All SUNY campuses [must] adopt a system-wide definition of affirmative consent as a clear, unambiguous, and voluntary agreement between the participants to engage in specific sexual activity, and [to] widely disseminate this definition to the college/university community").

118. Victoria Cavaliere, *Cuomo Wants Statewide 'Affirmative Consent' Campus Sex Assault Bill*, REUTERS (Jan. 17, 2015, 5:01 PM), http://www.reuters.com/article/2015/01/17/us-usa-new-york-sexcrimes-idUSKBN0KQ0U820150117.

119. Kathleen Ronayne, *N.H. Lawmaker Files 'Yes Means Yes' Sex Assault Bill*, BOS.

This trend towards state adoption of law requiring institutions of higher education to adopt affirmative consent standards demonstrates the importance of having a nationwide, consistent definition of sexual assault and consent. While it could be argued that it is best to let each state and college decide how to define consent, in reality, a federal law requiring institutions adopt affirmative consent standards is crucial to preventing sexual assault. Not only would it place all higher education institutions on the same level, it could potentially act as a mechanism through which sexual incidents can be prevented.

B. A "Prompt, Fair and Impartial" Hearing

"Rape culture" is not the only problem currently plaguing college campuses—colleges and universities have struggled to implement appropriate disciplinary proceedings through which to adjudicate claims of sexual assault. At the root of this problem is a lack of clarity as to what types of procedures colleges must adopt in order to protect the rights of both the accused and their accusers. The SaVE Act currently requires schools to adopt "prompt, fair and impartial"[121] grievance procedures for the resolution of sexual assault claims.[122] However, neither the SaVE Act nor the Department's regulations provide clear guidelines on how a school may comply with this vague standard. This broad standard is problematic in two ways: (1) the definition of impartial does not adequately address issues of bias as it only precludes officials from participating in hearings or investigations that "have a conflict of interest or bias for or against *the accuser or the accused*,"[123] and (2) the regulations do not establish any sort of

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GLOBE (Oct. 9, 2014), https://www.bostonglobe.com/metro/2014/10/08/lawmaker-files-yes-means-yes-sex-assault-bill/1eKwtxU6jItgHcDqpbcWAL/story.html; Asche Schow, *New Hampshire's Affirmative Consent Bill Copies California's*, WASH. EXAM'R (Oct. 10, 2014, 5:00 AM), http://washingtonexaminer.com/new-hampshire-affirmative-consent-bill-copies-californias/article/2554618.

120. S. 2478, 216th Leg., Reg. Sess. § 2 (N.J. 2014). The proposed New Jersey bill contains language similar to the California law. *See id.*

121. Violence Against Women Act, 79 Fed. Reg. 62,752, 62,752 (Oct. 20, 2014) (to be codified at 34 C.F.R. pt. 668). This Note does not take issue with the Department's regulations in regards to what constitutes a "prompt" hearing. The regulations define a prompt hearing as occurring "within reasonably prompt timeframes designated by an institution's policy, including a process that allows for the extension of timeframes for good cause with written notice to the accuser and the accused of the delay and the reason for the delay." *Id.* at 62,789.

122. Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, § 304(a)(8)(B)(iv), 127 Stat. 54, 91.

123. Violence Against Women Act, 79 Fed. Reg. at 62,789 (emphasis added).

minimum procedure to which these hearings must adhere in order to protect the rights of the accused perpetrators.[124] This Section will address how the SaVE Act and its implementing regulations ignore current issues colleges and universities are grappling with, and what can be done to implement more effective policies.

1. Impartiality

Impartiality is a major issue in ensuring fair grievance procedures in the context of sexual assault claims. In addition to being an integral protection under Title IX,[125] the right to a neutral arbiter is a fundamental aspect of due process.[126] Claims of apparent bias in the resolution of sexual assault cases are common, and can take several different forms. For example, students at Columbia University have been active in criticizing the school's current procedure and participation of the Dean in resolving appeals.[127] Similar complaints have been raised in response to Harvard University's most recent sexual misconduct policy in that it designates one Title IX compliance officer to investigate, adjudicate, and prosecute all claims.[128] Perhaps more common than accusations regarding the actual adjudicators are accusations that procedures are biased towards protection of student athletes. Indeed, according to a study conducted by the Office of Senator Claire McCaskill, "[a]pproximately 20% of the nation's largest public institutions and 15% of the largest private institutions allow their athletic departments to oversee cases involving student athletes."[129] However, despite the common occurrence of these claims, the SaVE Act, which requires that hearings be impartial,[130] does not sufficiently address how institutions may ensure impartiality.

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124. *See id.*

125. 34 C.F.R. § 106.8(b) (2015) ("A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [Title IX].").

126. Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

127. Mike Vilensky, *Students Push Tougher Policy on Sexual Assault*, WALL ST. J. (Sept. 28, 2014, 8:57 PM), http://online.wsj.com/articles/students-push-tougher-policy-on-sex-assault-1411952257.

128. Tovia Smith, *All Things Considered: Harvard Law Professors Say New Sexual Assault Policy is One-Sided*, NPR (Oct. 15, 2014, 6:44 PM), http://www.npr.org/2014/10/15/356424999/harvard-law-professors-say-new-sexual-assault-policy-is-one-sided (noting lack of neutrality in having one Title IX compliance officer act as investigator, prosecutor, and judge).

129. MCCASKILL SURVEY, *supra* note 71, at 11.

130. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304(a)(8)(B)(iv), 127 Stat. 54, 91.

a. Athletes and Sexual Misconduct Claims

The most notable type of bias that may arise in investigating and adjudicating sexual assault complaints occurs where the accused student is an athlete. For example, a recent case at Florida State University ("FSU") demonstrates the lack of impartiality exercised by institutions when accusations of sexual assault are made against student athletes. In December 2012, a freshman at FSU reported that she had been raped after a night out at a local bar and it soon came to light that Jameis Winston, the school's star quarterback, was the main suspect in the case.[131]

Despite knowing about the allegations made to police, FSU's athletic department did not question Winston about the allegations until the conclusion of the football season, in January 2014, nearly one year later.[132] While the initial report of the rape was made to the Tallahassee Police, and not FSU, once FSU officials had knowledge of the incident, they had a duty to inquire and investigate the alleged sexual assault.[133] Ultimately, FSU did not begin its investigation into the allegations against Winston until September 2014, almost two years after the university was made aware of the incident.[134]

This kind of conduct by institutions is not unusual where athletes are involved: similar situations have arisen at Duke University,[135] the University of Michigan,[136] and the University of Missouri.[137] It is not a

131. Walt Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html?_r=0.

132. *Id.*

133. *Id.*; *cf.* U.S. DEP'T EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 2–3 (2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (describing a school's duty to inquire and investigate claims of sexual assault, even where knowledge of the assault was acquired "in an indirect manner, from sources such as a member of the local community, social networking sites, or the media."). In order to bring suit under Title IX against a school for failure to investigate a claim of sexual assault, a complaint must show "that a responsible school official knew or should have known about the harassment." Holly Hogan, *What Athletic Departments Must Know About Title IX and Sexual Harassment*, 16 MARQ. SPORTS L. REV. 317, 329–35 (2006).

134. Jared Shanker & Mark Schlabach, *FSU Investigating Jameis Winston*, ESPN (Sept. 5, 2014), http://espn.go.com/college-football/story/_/id/11466541/florida-state-university-follows-title-ix-investigation-qb-jameis-winston.

135. Emma Baccellieri & Nick Martin, *Rasheed Sulaimon at Center of Sexual Assault Allegations Prior to Dismissal*, CHRONICLE (Mar. 2, 2015), http://www.dukechronicle.com/articles/2015/03/02/rasheed-sulaimon-center-sexual-assault-allegations-prior-dismissal#.VPjQEIuUBFw.

136. Matt Slovin & Adam Rubenfire, *Former Kicker Brendan Gibbons Permanently*

new situation either; studies have found that student athletes are involved in a disproportionate amount of sexual assault complaints.[138] Nevertheless, despite the high rates of athletes committing these assaults, they are often given special treatment in the resolution of the claims.[139] There are two main explanations for this phenomenon. First, college athletes provide significant financial benefits to colleges and universities,[140] and scandals involving athletes and sexual assault could possibly lead to decreases in revenue. Moreover, claims against athletes are often widely publicized and may undermine the institution's reputation, as "[t]hese cases, because of their publicity, are often the ones by which the system—the university and law enforcement—is judged for how such reports are handled."[141]

As per the SaVE Act, a requirement that institutions indicate in their grievance policy disclosures a statement that the same procedures be used in *all* cases of alleged sexual violence, including where allegations are against student athletes, is crucial to ensure impartiality in all cases. The National Collegiate Athletic Association ("NCAA") has recently issued a statement urging NCAA member schools to comply with the requirements of Title IX and athletic departments to "[c]ooperate with but not manage, direct, control or interfere with college or university investigations into allegations of sexual violence ensuring that investigations involving student-athletes

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Separated from University for Sexual Misconduct, MICH. DAILY (Jan. 28, 2014), https://michigandaily.com/sports/former-kicker-brendan-gibbons-expelled-sexual-misconduct.

137. Jessica Grose, *University of Missouri Student Allegedly Raped by Football Player. Again, a University Does Nothing*, SLATE: XX FACTOR (Jan. 24, 2014, 4:39 PM), http://www.slate.com/blogs/xx_factor/2014/01/24/university_of_missouri_did_not_pursue_allegations_of_sexual_assault_espn.html.

138. Trisha Ananiades, Student Article, *Penalty on the Field: Creating a NCAA Sexual Assault Policy*, 19 VILL. SPORTS & ENT. L.J. 463, 467–470 (2012) (collecting sources).

139. Diane L. Rosenfeld, Concluding Remarks, *Changing Social Norms: Title IX and Legal Activism*, 31 HARV. J.L. & GENDER 407, 421 (2008) (noting the existence of a "male buddy system in sports in which coaches and others support violent athletes regardless of the collateral consequences, [which] is emblematic of the male privilege that underscores attitudes of male entitlement to sexual access to females (whether the females are interested or not)").

140. For example, in 2012, the FSU athletic department "generated nearly $11 million in profit." Chris Smith, *Florida State's National Championship And Heisman Hopes Could Pay Off Big*, FORBES (Nov. 27, 2013, 09:46 AM), http://www.forbes.com/sites/chrissmith/2013/11/27/florida-states-national-championship-and-heisman-hopes-could-pay-off-big/.

141. Paula Lavigne & Nicole Noren, *Athletes, Assaults and Inaction*, ESPN: OUTSIDE THE LINES (Aug. 25, 2014), http://espn.go.com/espn/otl/story/_/id/11381416/missouri-tulsa-southern-idaho-face-allegations-did-not-investigate-title-ix-cases.

and athletics department staff are managed in the same manner as all other students and staff on campus."[142] Congress, too, has realized that allegations against student athletes must be investigated and adjudicated in the same manner as any other student. The recently re-introduced Campus Accountability and Safety Act ("CASA") places new affirmative requirements on colleges and universities, including a requirement that institutions:

> shall not carry out a different disciplinary process on the same campus for a matter of sexual violence . . . based on the status or characteristics of a student who will be involved in that disciplinary proceeding, including characteristics such as a student's membership on an athletic team, academic major, or any other characteristic or status of a student.[143]

If CASA does pass both houses of Congress, these particular questions of partiality would be adequately addressed by requiring that institutions address any case of sexual assault involving an athlete in the same way they would treat any other case.[144]

b. Structural Conflicts of Interest

While claims of bias in cases involving athletes are common, they are not the only roots of concern where partiality of hearings is involved. Conflicts of interest are additionally present in regards to who is investigating and prosecuting these claims.[145] It is not uncommon for university administrators to seek to protect the university's interests by failing to properly investigate claims,[146] or to discourage victims from filing complaints at all.[147] These incidents often happen because "one or

142. *Executive Committee Statement on Sexual Violence Prevention and Complaint Resolution*, NCAA, http://www.ncaa.org/governance/committees/executive-committee-statement-sexual-violence-prevention-and-complaint-resolution (last visited May 12, 2016).

143. Campus Accountability and Safety Act, S. 590, 114th Cong. § 125(a)(6)(B) (2015). This is the second version of the Campus Accountability and Safety Act that has been introduced in the Senate. The original version of the bill was introduced in July 2014. S. 2982, 113th Cong. (2014).

144. S. 590 § 125(a)(6)(B).

145. *See* CAROL BOHMER & ANDREA PARROT, SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION 92–94 (1993) (explaining how conflicts of interest may arise dependent on the type of administrator that adjudicates sexual assault claims and on their role in the procedure).

146. *See, e.g.*, Bogdanich, *supra* note 131.

147. *See, e.g.*, Ruegsegger v. Bd. of Regents of W. N.M. Univ., 2007-NMCA-030, ¶ 14,

more of the actors in the system may not be disinterested in the outcome of the hearing."[148] Indeed, this bias arises from general concerns regarding the reputation of the university. As Bohmer and Parrot indicate, "[a] highly publicized sexual assault case may have a deleterious effect not only on future enrollments but also on fund-raising efforts. Administrators may have a great stake in the outcome of a case; if there is enough negative publicity, it is possible that heads will roll."[149]

The SaVE Act regulations, however, do not take into account these structural conflicts of interest. The only guidance the regulations provide on how proceedings may be kept impartial is a requirement that proceedings be "[c]onducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused."[150] Several commenters argued that this provision "does not address situations in which inappropriately partial or ideologically inspired people dominate the pool of available participants in a proceeding."[151]

Indeed, this definition of impartiality does not account for situations where the administrator may "feel . . . that they are acting in good faith," but nonetheless have the reputation of the institution always lingering as a factor in their decision.[152] Some have argued that the only way to mitigate these conflicts of interest that are inherent in the way colleges and universities adjudicate claims of sexual assault is to make courts the preferred venue for adjudication of on-campus claims of sexual assault.[153]

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141 N.M. 306, 154 P.3d 681 ("Defendants' deliberate indifference to Plaintiff's sexual assault caused her to resign from the basketball team and discouraged other female students from reporting acts of sexual assault to WNMU administration."); *Lawsuit: USD Discouraged Victim from Reporting Rape*, KPBS (Mar. 4, 2015), http://www.kpbs.org/news/2015/mar/04/lawsuit-usd-discouraged-victim-reporting-rape/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+kpbs%2Ftv+(KPBS+TV%3A+Program+Hightlights) (discussing a recent lawsuit against the University of San Diego that alleges the University actively discouraged a female student from reporting a sexual assault).

148. BOHMER & PARROT, *supra* note 145, at 93.

149. *Id.*

150. Violence Against Women Act, 79 Fed. Reg. 62,752, 62,789 (Oct. 20, 2014) (to be codified at 34 C.F.R. pt. 668).

151. *Id.* at 62,775.

152. BOHMER & PARROT, *supra* note 144, at 94.

153. Henrick, *supra* note 28, at 80–86 ("Rather than try to reinvent the wheel on campus, colleges should leave sexual assault adjudication to institutions with procedures that are already in place."); *see also* Robert Carle, *The Trouble with Campus Rape Tribunals*, WITHERSPOON INST.: PUB. DISCOURSE (July 14, 2014), http://www.thepublicdiscourse.com/2014/07/13369/ (arguing that courts are the appropriate venue for adjudication of on campus sexual assault complaints to protect due

Nevertheless, a complete change of venue is unnecessary. While the SaVE Act takes steps to assure that adjudicators in these cases are not biased against the accuser or the accused,[154] any future legislation or guidance should focus on *who* is responsible for investigating and adjudicating claims of sexual assault. There are several possible solutions to solve this problem. For example, Columbia University's procedure for selecting a hearing panel is illustrative of the steps a university may take to ensure a fully impartial panel.[155] Columbia's procedure delineates that the hearing panel can be chosen only from "a small group of specially-trained University student affairs administrators. In certain matters, the University may include retired judges, lawyers or other individuals with relevant experience and special training."[156] The inclusion of a provision that outside parties may be included in the panel permits a solution to permit impartial adjudicators in situations in which it may be more difficult to obtain an impartial administrator. Such a solution may place additional burden on the institution, but it is a burden that other schools have shown a willingness to adopt.[157]

While the inclusion of outside parties on a hearing panel may permit a more impartial hearing, there are additional solutions to this problem that do not require the involvement of outside parties. For example, some have previously suggested that all college disciplinary procedures appoint an adjudicator or adjudicatory panel that "ha[s] no responsibility for university fundraising, ha[s] some type of insulating job security such as tenure, ha[s] had no part in the investigation of the

process rights of accused students).

154. *See* S. 834 (112th): Campus SaVE Act, GOVTRACK.US, https://www.govtrack.us/congress/bills/112/s834 (last visited May 12, 2016).

155. GENDER-BASED MISCONDUCT OFFICE, COLUMBIA UNIV., GENDER BASED MISCONDUCT POLICY FOR STUDENTS 14–15 (2014), http://sexualrespect.columbia.edu/files/sexualrespect/content/007-02606%20Gender%20Based%20Misconduct_JL_F.pdf. While the procedure for choosing the hearing panel would appear to promote impartiality in the sexual misconduct procedures at Columbia, it is important to note that the new policy still permits the Dean of the respondent's school to decide appeals. *Id.* at 17. Student activists were particularly angered by Columbia's decision to maintain this procedure. *See* Samantha Cooney, *Student Activist Groups Issue Statement on New Gender-Based Misconduct Policy*, COLUM. SPECTATOR: SPECTRUM (Aug. 15, 2014, 11:37 AM), http://columbiaspectator.com/2014/08/15/student-activist-groups-issue-statement-new-gender-based-misconduct-policy.

156. GENDER-BASED MISCONDUCT OFFICE, *supra* note 155, at 14.

157. *See, e.g.*, YALE UNIV., UNIVERSITY WIDE COMMITTEE PROCEDURES § 7.3 (2014), http://provost.yale.edu/sites/default/files/files/UWC%20Procedures.pdf (describing impartial investigation procedure in which an outside party is appointed to "gather documents and conduct interviews as necessary to reach a thorough understanding of the facts and circumstances surrounding the allegations of the complaint").

matter in question, and ha[s] had no prior experience with either the matter or the student."[158] However, sexual assault cases do not have as wide a pool of potential adjudicators as other disciplinary actions may, as hearings must "be conducted by officials who receive annual training on the issues related to [sexual misconduct] and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability."[159] Nevertheless, an appropriate balance may be struck between the two approaches above by requiring that schools designate a pool of potential adjudicators that are fully trained, as required under the SaVE Act,[160] and additionally have "no responsibility for university fundraising, [and] have some type of insulating job security such as tenure."[161] An additional requirement that a potential adjudicator may not be a member of the athletic department where an athlete is accused is crucially important.[162] While it should not be required that a school bring in outside parties, the university should be given deference to determine whether such an action is appropriate in any given context based on the potential burden on the university.[163]

2. Fairness and Due Process

A large part of the debate surrounding how to address on-campus sexual assault centers on what type of disciplinary procedures a school must adopt to not only provide an accused student a fair hearing, but also to comply with Title IX standards to protect the accuser.[164] Colleges and universities have notoriously struggled to ensure that both of these

158. James M. Picozzi, Note, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132, 2146 (1987).

159. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304(a)(8)(B)(iv)(I)(bb), 127 Stat. 54, 91.

160. *Id.*

161. Picozzi, *supra* note 158, at 2146.

162. *See supra* notes 129–32 and accompanying text.

163. A university should be given more deference in this situation because, technically speaking, they are not making a policy judgment, but rather an assessment of its resources and finances.

164. *See, e.g.*, Ariel Kaminer, *New Factor in Campus Sexual Assault Cases: Counsel for the Accused*, N.Y. TIMES (Nov. 19, 2014), http://www.nytimes.com/2014/11/20/nyregion/new-factor-in-campus-sexual-assault-cases-counsel-for-the-accused.html?_r=0 (discussing recent backlash against procedures employed by colleges and universities); Emily Yoffe, *The College Rape Overcorrection*, SLATE: DOUBLEX (Dec. 7, 2014, 11:53 PM), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html (discussing the adoption of procedures at colleges and universities that "that presume the guilt of the accused").

obligations are adequately met.[165] The SaVE Act and its regulations do little, if anything, to respond to this debate and fail to delineate clear procedures that a school should adopt in order to both comply with Title IX and effectively protect the rights of both the accused student and the accuser.

From the outset, one of the problems in articulating procedures that should be used in a disciplinary hearing is that public and private institutions are held to differing standards. Disciplinary procedures at public universities are subject to the constitutional protections of the due process clause of the Fourteenth Amendment,[166] whereas private universities' procedures are only invalid where they are fundamentally unfair or arbitrary and capricious.[167] However, while the due process standards for each type of institution are distinct, *all* institutions receiving federal funds must comply with Title IX, which requires schools to adopt "grievance procedures providing for prompt and equitable resolution" of complaints of sexual assault.[168]

Specifically, the only procedural requirements required by the SaVE Act are that (1) proceedings should be "prompt, fair, and impartial;"[169] (2) proceedings should "be conducted by officials who receive annual training on [the relevant issues];"[170] (3) "the accuser and accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding;"[171] and (4) both accuser and accused are to be given notice of the outcome of the proceeding and any

165. A 2005 report issued by the United States Department of Justice indicated that, at that time, "fewer than 40 percent of schools that ha[d] disciplinary procedures" provided accused students with due process. HEATHER M. KARJANE ET AL., U.S. DEP'T JUSTICE, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 8, 10 (2005). While this number has likely improved, Senator McCaskill's 2014 survey indicates that colleges and universities are still struggling to implement procedures that provide both due process for the accused and comply with Title IX requirements. *See* MCCASKILL SURVEY, *supra* note 71, at 10–12.

166. Goss v. Lopez, 419 U.S. 565, 574 (1975) ("[T]he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.").

167. *See* Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 661–64 (2001) (discussing how courts have approached claims that private universities have violated the due process rights of students).

168. 34 C.F.R. § 106.8(b) (2015).

169. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304(a)(8)(B)(iv)(I)(aa), 127 Stat. 54, 91.

170. *Id.* § 304(a)(8)(B)(iv)(I)(bb).

171. *Id.* § 304(a)(8)(B)(iv)(II).

potential changes to a final outcome.[172] In addition, the regulations require disclosure of the type of proceeding that is to be used and how it will be conducted, including a statement on the standard of evidence to be used, the possible sanctions, and the range of protective measures that may be used to protect the victim.[173]

These provisions generally do not provide any clarity as to what procedures would satisfy Title IX and still protect the due process rights of accused students. While the 2011 Dear Colleague letter sought to provide some guidance on this issue, it nonetheless can be synthesized to two key points: (1) any procedural rights granted to the accused student must be granted to the accuser, and vice versa; and (2) a preponderance of the evidence standard must be used.[174] The 2011 Dear Colleague letter may have been a step in the right direction, as it requires the adoption of certain uniform standards,[175] but it still does not provide significant guidance and indeed contradicts other laws with which institutions must comply.[176] Moreover, many have questioned the legal validity of the Dear Colleague letter.[177]

This lack of clarity may lead to great divergence in the types of procedures that institutions have adopted to adjudicate claims of sexual assault. This has already occurred in regard to whether the hearing may be adversarial in nature, more specifically whether students should be permitted to cross-examine witnesses that testify at the hearing.[178] The availability and scope of this particular right in

172. *Id.* § 304(a)(8)(B)(iv)(III).

173. Violence Against Women Act, 79 Fed. Reg. 62,752, 62,789 (Oct. 20, 2014) (to be codified at 34 C.F.R. pt. 668).

174. *See* 2011 Dear Colleague Letter, *supra* note 10, at 9–11.

175. *Id.*

176. Matthew R. Triplett, Note, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 510 (2012) (noting the questions that were left unanswered by the 2011 Dear Colleague letter).

177. *See* Ryan D. Ellis, *Mandating Injustice: The Preponderance of the Evidence Mandate Creates a New Threat to Due Process on Campus*, 32 REV. LITIG. 65, 82–89 (2013) (arguing that the letter is potentially in violation of the Administrative Procedure Act and that provisions included in the letter should be subjected to notice and comment rulemaking).

178. The OCR has not definitively stated whether parties should be permitted to cross-examine witnesses at hearings. 2011 Dear Colleague Letter, *supra* note 10, at 12. However, the OCR has indicated that if cross-examination is permitted, "[it] strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing." *Id.* This is based in the fact that "[a]llowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment," which would be violation of Title IX. *Id.*

academic disciplinary hearings has been hotly contested.[179] While OCR has stated that "parties [should not be allowed] to question or cross-examine each other during the hearing,"[180] several courts have indicated that, "if [a college disciplinary hearing] is essentially one of credibility, the 'cross-examination of witnesses might [be] essential to a fair hearing.'"[181]

However, not all colleges currently permit parties to cross-examine witnesses. For example, both Yale University and Emory University's hearing procedure permit parties to question witnesses only through submission of questions to the adjudicator, which the adjudicator may then "at its sole discretion . . . choose . . . to ask."[182] Whereas Yale and Emory permit partial cross-examination of witnesses, Princeton University's recently revised grievance procedures does not include any right to cross-examine witnesses.[183] Moreover, according to the McCaskill Survey, only sixty-seven percent of institutions permit accused students to "question and call witnesses" and even less provide such a right to the accuser.[184]

The right to cross-examination is not the only way in which institutions have diverged in articulating procedures for disciplinary

179. *Compare* Open Letter from Members of the Penn Law School Faculty on Sexual Assault Complaints 4 (Feb. 18, 2015), http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf (criticizing the University of Pennsylvania's sexual misconduct policy as it "prohibits a lawyer or other representative for the accused student from cross-examining any of the witnesses against the accused"), *with* SENATOR RICHARD BLUMENTHAL, COLLEGE SEXUAL ASSAULT: BILL OF RIGHTS 6 (2014), http://www.blumenthal.senate.gov/imo/media/doc/College%20Campus%20Sexual%20Assault%20Report%20Final.pdf ("Furthermore, direct interaction between the alleged assailant and the survivor should be limited as much as possible and there should never be direct cross-examination of the survivor by the assailant.").

180. 2011 Dear Colleague Letter, *supra* note 10, 12.

181. Donohue v. Baker, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (second alteration in original) (quoting Winnick v. Manning, 460 F.2d 545, 550 (2d Cir. 1972); *see also* Barclay Sutton Hendrix, Note, *A Feather on One Side, A Brick On Another: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 615–18 (2013) (collecting cases and further applying the *Mathews* test to the right to cross-examine witnesses in college sexual misconduct disciplinary hearings).

182. YALE UNIV., *supra* note 157, § 7.4; EMORY UNIV., POLICIES AND PROCEDURES: SEXUAL MISCONDUCT § 8.2.3, http://policies.emory.edu/8.2 ("Neither party shall be permitted to directly question each other or any witness at the hearing, but they may submit questions to the panel chairperson's consideration.").

183. Princeton Univ., U.S. Dep't of Educ., Office of Civil Rights, No. 02-11-2025, at 3 n.4 (Oct. 12, 2014) ("The University has informed OCR that cross examinations are not utilized in its revised grievance procedures."). Indeed, Princeton's newly revised grievance procedures permit only hearing panelists to ask any questions of the parties, or other witnesses. *See* PRINCETON UNIV., UNIVERSITY-WIDE REGULATIONS § 1.9.12(1) (2014).

184. MCCASKILL SURVEY, *supra* note 71, at fig.F3.12–.13.

procedures.[185] By not taking a definitive stance on the type of procedures that institutions must employ in order to provide accused students with due process rights and accusers with their rights, under Title IX, the SaVE Act may, in effect, cause more harm than good. While some may argue that academic institutions should receive deference in promulgating these policies,[186] others have argued that such deference is inappropriate in cases dealing with quasi-criminal conduct.[187] While it is outside the scope of this Note to indicate specific procedures that should be included in such a model, it is crucial that these questions be addressed in future guidance or legislation.

3. Towards a Uniform Solution

The above two Sections note the most significant problem with the SaVE Act: it requires schools to disclose "prompt, fair and impartial" proceedings, despite providing little guidance on how schools should go about doing so.[188] With such a large amount of schools currently under investigation for violations of Title IX,[189] any law purporting to combat campus sexual assault must resolve the issues with which institutions continue to struggle. Moreover, not providing clear procedures that should be adopted allows for the emergence of divergent policies, allowing some schools to potentially deny students due process. In order to prevent further divergence of procedures and keep all institutions receiving federal funding in compliance with Title IX, Congress should promulgate legislation that delineates clear procedures that colleges and universities must employ in order to comply with both Title IX and due process.[190]

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185. For example, according to the McCaskill Survey only seventy-five percent of schools provide both parties the right to have an advisor or lawyer present at a hearing. *Id.* fig.F3.4–.5. Additionally, only eighty-two percent of schools permit accused students to challenge the impartiality of the hearing panels, and only seventy-eight percent provide such a right to accusers. *Id.* fig.F3.10.11.

186. Courts have generally given academic institutions, specifically private institutions, deference in making disciplinary decisions and delineating the type of procedures employed, so long as they are fundamentally fair. Triplett, *supra* note 176, at 503.

187. Kathy Ahn, Note, *The Pendulum Swings Backwards: The Clery Act Must be Amended to Address University Policies that Discourage Rape Reporting*, 31 WOMEN'S RTS. L. REP. 514, 514–15 (2010).

188. *See supra* Section IV.B.2.

189. *See* Kinkade, *supra* note 1.

190. For guidance on what types of procedures should be employed, see, for example, BOHMER & PARROT, *supra* note 145, at 99–104, and Triplett, *supra* note 176, at 516–26. The Bohmer and Parrot approach provides lists of rights that the accused and accuser

While the easiest and more preferred method through which to implement such a policy would be through regulations promulgated by the Department,[191] it is unclear whether the SaVE Act is the appropriate vessel through which to do so. As noted by the Department in the SaVE Act implementing regulations, one of the purposes of the final regulations is to "[r]equire institutions to *describe* each type of disciplinary proceeding used by the institution; the steps, anticipated timelines, and decision-making process for each type of disciplinary proceeding."[192] The Department is likely to argue, as it did in declining to promulgate regulations requiring compliance with OCR guidance, that "the Clery regulations address only an institution's responsibilities under the Clery Act, and do not affect or conflict with the requirements under Title IX as interpreted by OCR in its guidance documents."[193] Thus, in order to address the questions left open by the SaVE Act regarding defining consent and ensuring a fair and impartial investigation and hearing procedure, a new law should be drafted which acknowledges that reporting requirements, while important, cannot effectively combat sexual assault unless institutions are provided with clear standards on how to properly prevent and adjudicate such claims. While the OCR could issue such guidance, a new law is a better vehicle for such changes, especially in light of the 2011 Dear Colleague Letter's questionable legal status.[194]

The recently proposed CASA is a step in the right direction. Importantly, it places new affirmative duties on colleges and universities through amendments to Part B of Title I of the Higher Education Amendments, which contains "Additional General Provisions."[195] CASA places affirmative duties on institutions to not only adopt a "[u]niform campus-wide process for student disciplinary

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should, respectively, be provided. BOHMER & PARROT, *supra* note 145, at 102–03. Whereas, Triplett presents a judicial model that would apply equally to both parties and does not distinguish between an accused student's and an accuser's rights. Triplett, *supra* note 176, at 516–26.

191. In light of the legislative history of the SaVE Act, which took several years and iterations to pass through Congress, new legislation may be similarly difficult to pass. *See supra* note 13 and accompanying text.

192. Violence Against Women Act, 79 Fed. Reg. 62,752, 62,752 (Oct. 20, 2014) (to be codified at 34 C.F.R. pt. 668) (emphasis added).

193. Violence Against Women Act, 79 Fed. Reg. 35,418, at 35,443–44 (proposed June 20, 2014) (to be codified at 34 C.F.R. pt. 668).

194. Ellis, *supra* note 177, at 82–89.

195. Campus Accountability and Safety Act, S. 590, 114th Cong. § 4(a); Higher Education Act of 1965, 20 U.S.C. § 1011. Included among the "Additional General Provisions" are provisions relating to protection of students' rights to speech and association, as well as binge drinking and drug policies. §§ 1011a, 1011h, 1011i.

proceeding relating to claim[s] of sexual violence,"[196] and further requires the inclusion of certain procedures.[197] While CASA does make strides to address some of the problems illustrated in the previous sections, including mandating that athletes be provided the same process as any other accused students,[198] it still fails to outline the appropriate procedures that should be employed by an institution to ensure compliance with both Title IX and due process guarantees. Indeed, the current iteration of CASA merely states that an institution must provide written notice of "[t]he rights and due process protections available to the victim and the accused student . . . and any other rights or due process protections that the victim or the accused student may have under the institution's policies."[199]

Thus, it would appear that the best option to address the issues raised in the above sections, and provide institutions with clear guidance on the types of procedures that must be employed to ensure Title IX and due process compliance, is a new law that takes into account these crucially important designations. A uniform standard would provide legitimacy for an institution's procedures,[200] and could potentially solve the problems that arise from allowing institutions great deference in defining their procedures, while avoiding the stigma of the 2011 Dear Colleague letter.[201] Such a law should contain a model adjudicatory policy that not only guides institutions in how to ensure an impartial panel through utilization of tenured and appropriately trained employees[202] and include a clear set of procedures to be employed at disciplinary hearings that provide *all accused students* due process rights, while not infringing on a accuser's Title IX rights.[203]

196. S. 590 § 125(b)(6).

197. Currently, CASA requires that institutions provide students with written notice that indicates, inter alia, (1) that there has been a decision to go forward with the disciplinary process "within 24 hours of such a decision;" (2) the "nature of the conduct upon which the complaint is based, and the date on which the alleged incident occurred;" (3) the "[n]ame and contact information for an individual at the institution, who is independent of the disciplinary process, to whom the victim and the accused student can submit questions about any of the information described in the written notice." *Id.* § 125(b)(8)(A)–(E).

198. *Id.* § 125(b)(6)(B).

199. *Id.* § 125(b)(8)(C).

200. Ahn, *supra* note 187, at 514–15.

201. Ellis, *supra* note 177, at 82–89; Henrick, *supra* note 28, at 59–66.

202. *See supra* notes 156–60 and accompanying text.

203. *See supra* Section IV.B.2.

IV. CONCLUSION

The SaVE Act is a first step in combatting sexual assault on campus by requiring institutions to be more transparent about the number of reports that are made and how they deal with any complaints of sexual assault. However, these requirements alone cannot ultimately combat the problems that on-campus sexual assault pose for both institutions and students. The failure of the SaVE Act to provide consistent and clear standards through which to both educate students and adjudicate student claims of sexual assault prevents the SaVE Act from making any real strides in solving this complex problem. Because questions of consent, process, and impartiality are at the heart of the campus sexual assault debate, further guidance that addresses these questions is imperative to ensure that students are safe on campus and, moreover, that no student's rights are violated in adjudicating these complaints. This Note suggests that the best way for this guidance to be promulgated is through a new law, which provides minimum procedures that must be provided in university sexual assault disciplinary actions, enacted as an amendment to the Higher Education Act of 1965. Moreover, any future law that purports to address the issue of campus sexual assault must include clear definitions of consent and identify specific procedures that ensure both Title IX compliance and provide accused students with sufficient due process protections.

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