



Understanding How and Why Title IX Regulates Campus Sexual Violence

Campus sexual violence is one of the most difficult and high-profile issues now confronting higher education. Many ask how we have arrived at the current legal and regulatory climate. To understand where we are now, it's necessary to understand the legal and cultural history behind Title IX and sexual violence.

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It began 42 years ago with the passage of Title IX of the Educational Amendments of 1972. Several generations of students have benefitted from Title IX in the form of increased athletics and professional opportunities. There is no doubt that Title IX had a positive and transformative impact on educational institutions throughout the country, and that process continues. Title IX has a simple command—there should be no discrimination on the basis of sex. How then did it morph into what has become a detailed code on how campuses must investigate and adjudicate sexual violence cases?

That process began with the movement to “reconceptualize rape” in the 1980s. It was accomplished largely through a claim-making and advocacy process in which proponents argued that an epidemic of sexual assaults were occurring on college campuses.¹ Advocates accomplished this reconceptualization by attacking what they called rape myths, including the notion that rape was only accomplished by a violent stranger. Susan Estrich also wrote an influential book, *Real Rape* in 1987, which indicted related rape myths and the criminal justice system's inadequate response to acquaintance rape. We now know that around 90 percent of sexual assaults on campus involve people who know each other.

¹ John Sloan III and Bonnie Fisher describe this process in Chapter Four of their book, *The Dark Side of the Ivory Tower* (2011).

JEANNE CLERY'S LEGACY

The other important marker in that decade was the 1986 rape and murder of Jeanne Clery on Lehigh University's campus. A stranger committed that crime, but it had significance far greater than the tragic facts of the case. Clery's parents' founded the Security on Campus organization and led the legislative effort to enact the 1991 Clery Campus Crimes Act, which has had a profound impact on campuses and sexual assault.

Survivors and advocates like Estrich and the Clery family built media support for the argument that "acquaintance rape" was epidemic and parlayed the media's acceptance of that premise into political and cultural change. Their accomplishments created paradoxical results. On the one hand, the movement convinced most colleges that they had to recognize the problem, take preventive steps, and become more actively involved in regulating their students' sexual lives. This ran counter to the trend since the 1960s, when campuses followed the belief that young adults should have the right to exercise sexual autonomy and learn from their experiences. The tension between that concept, and the reality that colleges have legal responsibilities regarding campus sexual misconduct, causes problems to this day.

On the other hand, despite many positive efforts on campus, advocates were able to create widespread media and public perceptions that campuses didn't care, or that they were more interested in preserving their reputations than protecting students. In addition, acquaintance rapes remained vastly underreported. Even if these "word against word" sexual assaults² were reported, the criminal justice system rarely prosecuted them.

² The new preferred term for the familiar "he said, she said" description for many nonstranger sexual assaults.

Dissatisfaction with the criminal justice system was an important theme for the reformers, and it explains much of what follows. Understanding the interplay between criminal justice, private lawsuits, and regulatory efforts is critical, because uninformed critics on both sides of the political spectrum continue to criticize campuses for investigating and adjudicating what they believe should be criminal matters for police and prosecutors alone. Campus leaders need to understand, however, that campuses have no choice but to get involved, and that it is the morally correct thing to do.



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Suing colleges and universities was one solution to dissatisfaction with the criminal justice system. Allied with advocates and victims' rights organizations, the plaintiffs' bar began to sue schools for failing to protect students. The building blocks began to come together for our current legal framework.

SEXUAL VIOLENCE LINKED TO SEXUAL HARASSMENT

As far as private lawsuits were concerned, the Supreme Court had first recognized a Title IX private right of action in 1979 in a medical student's academic dispute with the University of Chicago. The court first held that sex discrimination encompasses sexual harassment in the *Meritor* employment discrimination case in 1986. In time, sexual violence became recognized as a form of sexual harassment on the far edge of the sexual misconduct spectrum. This analytical construct allows Title IX's nondiscrimination command to be applied to sexual assault and other forms of sexual violence, but the legal basis for imposing campus liability didn't gel until 1987 when Congress passed the Civil Rights Restoration Act. That law overturned the Supreme Court's *Grove City College* decision that limited Title IX's scope only to the precise program receiving federal financial assistance.

Private lawsuits started to increase, but the Supreme Court raised the Title IX liability bar in 1998 with the *Gebser v. Lago Vista School District* decision. *Gebser* is another important historical and regulatory marker. It involved a K-12 school, but its reasoning applied to higher ed also. In a 5-4 decision written by Justice O'Connor, the court held that schools were liable for private damages only if they knew of an employee's harassment (here a teacher's) and then consciously chose to ignore it.³ This is known as the "deliberate indifference" standard. The court majority justices intended to create a high barrier to liability, for they believed that it was inappropriate to impose liability on the school for a teacher's sexual misconduct unless the school failed to redress what it already knew about.

Davis v Monroe County followed *Gebser* a year later. There, Justice O'Connor joined with the liberal *Gebser* dissenters to hold that a school could be subject to private lawsuits for student-on-student sexual harassment, but only if it knew of the harassment and acted with deliberate indifference.



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FIGHTING DELIBERATE INDIFFERENCE

During the next decade a quiet evolution occurred. Campuses and Congress reacted. Understanding that sexual victimization took place, and trying to be sensitive to female students, most campuses passed stricter sexual misconduct policies, created sexual assault response teams, and added victim/survivor resources. Congress amended the Clery Act several times to require specific sexual-assault-related policies and disclosures. That was the beginning of the strange and overlapping federal regulatory regime that now applies to campus sexual assaults. Federal regulatory enforcement was relatively quiet up until 2011, but the plaintiffs' bar began to push

³ Four dissenters would have applied a lesser standard of liability and would have held schools more easily accountable in private lawsuits.

the frontiers of deliberate indifference with lawsuits involving sex scandals in campus athletics programs.

It's hard to win deliberate indifference lawsuits, however, and advocate and survivor groups believed their efforts hadn't accomplished enough. Frustrated with their inability to change the criminal justice system, alter what they saw as a campus "rape culture," or get stricter laws through Congress, advocates ultimately found a way to achieve what they wanted at the regulatory level.

Justice O'Connor's *Gebser* decision created a different standard between regulatory liability and liability for private damages lawsuits. *Gebser* explicitly exempted Title IX regulatory enforcement from the actual knowledge and deliberate indifference requirements. After *Gebser* was decided, the Education Department's Office for Civil Rights (OCR) in its 2001 sexual harassment guidance document was quick to elaborate that its enforcement efforts would apply a lesser standard than actual knowledge or deliberate indifference. Colleges could violate Title IX's regulatory demands if they

knew or should have known about sexual harassment. Colleges also had a duty to eliminate the harassing conduct and ensure the survivor/victim full participation in any education program or activity. OCR could enforce that duty through compliance requirements and "resolution agreements," with the ultimate penalty being its ability to cut off federal aid to the institution.

This is where the advocate/survivor community saw an opportunity to advance their goals. Dissatisfied with the criminal and civil justice systems, and propelled by campus activism and compelling media narratives from sexual assault victims, advocates argued that campuses had to do a better job of responding to and sanctioning a broad

range of misconduct that is now called “sexual violence”.⁴ They also argued that the government was not doing enough. Based on a victim-centered philosophy, advocates prevailed on OCR to issue new guidance that required campuses to create interim remedies, inform survivors about their choices, investigate more thoroughly, lessen the burden of proof, and alter their campus disciplinary systems.

FOCUS ON COMPLIANCE

That of course was the 2011 “Dear Colleague” letter (DCL). It generated a huge reaction from campuses, and many reformed their student conduct and sexual assault policies to ensure that they met the new government standards. Stepped-up enforcement efforts followed. A joint OCR-Department of Justice effort, involving the University of Montana, gained nationwide attention after a press conference said that the unprecedented “resolution agreement” there created a “blueprint” for campus compliance across the country. OCR later walked back on the idea of a blueprint, but opened more investigations in response to victim complaints or media reports.

Currently, OCR is investigating close to 100 campuses. The Education Department’s Clery Act Compliance Division also stepped up its enforcement of the Clery Act. It gained additional authority from the 2013 Violence Against Women Act Reauthorization (VAWA), which incorporated into law many of the requirements from OCR’s DCL. Unfortunately, the VAWA reauthorization gave policymaking and enforcement responsibility to the Clery Compliance Division instead of OCR, and already a bureaucratic turf war seems likely as these different parts of the Education Department (ED) work on different schedules and seem to have different views. Even when they work together they have the ability to impose duplicative and conflicting enforcement obligations.

Campus sexual violence thereafter gained the highest level of governmental attention, as President Obama and The White House Council on Women and Girls kicked off an advocacy and publicity effort in January 2014, followed

90 days later by *Not Alone*, the “First Report of the White House Task Force to Protect Students from Sexual Assault.” A new 46-page set of questions and answers (Q&A) from OCR accompanied the Task Force Report. They were designed to illuminate further the requirements outlined in the 2011 DCL. Finally, ED’s Clery side published new regulations to implement the VAWA Reauthorization and Clery Act changes. Those went into effect in October 2014.

Counting the new *Not Alone* website, embedded links in the White House Task Force Report, and the VAWA regulations, the government released nearly on 1,000 pages of new “guidance” in 2014 alone. And there’s more to come.

- The April 2014 OCR Q&A promised 14 future deliverables from the federal government, including additional guidance, research, and “best practices.” Some of these have been issued. Throughout the past year OCR has also issued numerous “findings letters” and “voluntary resolution agreements” with campuses under investigation. These public enforcement actions are not meant to be legal precedent, but they do provide a window into OCR’s enforcement focus and the types of remedies it will impose. Most of these multiple-page resolution agreements, for example, mandate detailed changes to university procedures and require continuing OCR monitoring of campus sexual assault resolutions for years into the future.
- Several U.S. senators have introduced legislation to amend Title IX and add Clery-type fines to OCR’s enforcement powers. Currently, OCR can only threaten to withhold federal financial assistance. That’s a huge club, which the OCR assistant secretary has said gives her all the authority she needs, but ED has never cut off aid from an institution under Title IX. There’s also a possibility that additional legislative changes could be made to Title IX, including mandating periodic campus climate surveys and eliminating the deliberate indifference requirement for civil lawsuits.

⁴ Until that time, most department-issued guidance focused on sexual harassment.

■ State legislatures have also been active: Recent changes in California require “affirmative consent” for sexual activity on campus; the Connecticut Legislature has enacted far-reaching duplicative requirements as part of its reaction to sexual assaults at its flagship university; and Virginia has proposed legislation that would require campuses to report most sex crimes to the police. Expect more from other states.

FOCUS ON CULTURE CHANGE

All of this has provoked a counter-reaction on behalf of those accused of sexual misconduct on campus. Some media commentary, particularly after the *Rolling Stone* controversy at the University of Virginia, has begun to advance a different narrative, questioning some of the statistics and assumptions held by the advocacy and survivor communities. Harvard’s law professors have published a manifesto suggesting that campus disciplinary bodies lack the expertise to adjudicate what can be complex criminal matters. And, many accused students have sued their institutions, claiming they have been unjustly tarred by shoddy investigations and “kangaroo court” procedures.

Colleges and universities are caught in the middle. These forces will play out over the near term, and ultimately the

legal and enforcement regimes will achieve some type of stability. Alarmists and deniers may dominate the media cycle, but more thoughtful observers believe that legal compliance is an important but not adequate answer. They are convinced that campus sexual violence can only be adequately remedied by longer-term cultural initiatives that change individual behavior and foster safer and more compassionate campus climates. Many campuses have begun those steps, but most would agree that there is still much work to be done.

ABOUT THE AUTHOR

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