Sexual Harassment and Assault in the Academy: Observations from a Title IX Lawyer

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Introduction

ON JUNE 3, 1972, President Richard Nixon signed into law the Education Amendments Act of 1972, which provides in part 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."[1] Now widely known as Title IX, this law was championed by Senator Birch Bayh of Indiana, who promoted it as "a strong and comprehensive measure" to combat "the continuation of corrosive and unjustified discrimination against women in the American educational system."[2] This article—which is based on my work of nearly four decades representing victims of sexual violence and harassment—explores how Title IX has helped to reduce such discrimination, the continuing problem posed by sexual violence and sexual harassment at American universities, and some suggestions for improving the system.

1.1 Title IX and Sports

Initially, Title IX gained prominence as a tool for women to obtain equal access to school athletic programs.[3] Under Title IX, schools that receive federal funding, which includes the vast majority of high schools and

1. Education Amendments Act of 1972, 20 U.S.C. A § 1681 Et. Seq. (1972).

2. 118 Cong. Rec. 5803, 5806-07 (1972) (statement of Sen. Birch Bayh).

3. Deborah Brake, "The Struggle for Sex Equality in Sport and the Theory Behind Title IX," *University of Michigan Journal of Law Reform* 34, pt. 1/2 (2001): 13-150.

universities in the United States, are required to provide equal opportunities to women and men participating in school sports, including equal access to teams and school funding for equipment, travel, and coaches.[4]

Title IX's effects on sports have been remarkable. It sparked an explosion of new sports for women in high school and college, leading to the creation of new women's competitions and professional leagues, including women's soccer and the women's Olympic marathon.[5] Title IX allowed women to recognize a new purpose for their bodies beyond reproduction; for the first time, women were given legal support to use and glory in their bodies like men. Since Title IX's passage, schools and universities have seen more than a 1,000 percent increase in the number of women participating in sports: from 310,000 in 1971 to 3,373,000 in 2012.[6]

Another trend spurred by Title IX is the growth of sports where women and men compete together.[7] I believe this growth will continue, and ultimately reduce the popularity of designated "men's sports" and "women's sports." Interest, size, weight, and competence will determine the composition of teams, not gender.

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4. See 34 C.F.R. Part 106.

5. Allen Barra, "Before and After Title IX: Women in Sports," *New York Times*, Aug. 6, 2012, http://www.nytimes.com/interactive/2012/06/17/opinion/sunday/sundayreview-titleix-timeline.html?_r=0.

6. Ibid.

7. E.g., sailing and equestrian sports have co-ed competitions. Further, formerly gender-segregated sports have begun integrating. For example, women are increasingly present on high school varsity football teams. See Micheline Maynard, "The Kicking Queen," *New York Times*, 3 October 2011, http://www.nytimes.com/2011/10/04/sports/homecoming-queen-and-winning-field-goal-on-same-night.html?_r=1&mtrref=www.motherjones.com&gwh=3894A3FB24F74235A959DAB39C36F613&gwt=pay; Elyse Wanshel, "High School Football Team Recruits Female Player," *The Huffington Post*, 1 September 2016, http://www.huffingtonpost.com/entry/female-kicker-alabama-high-school-football-team_us_57c7122ae4b0e60d31dcb719.

1.2 Title IX and Gender Equality

The effort to expand opportunities for women in sports provoked some controversy, as athletic departments had to give women access to facilities and funds that had been devoted entirely to men. Over time, however, the idea of equal access to sports became normative, and feminist lawyers started to explore whether Title IX could be used to promote equal treatment for women students at universities more broadly.[8] In the 1970s, when the law was passed, crude exclusion of women from educational opportunities was already on the wane; Ivy League universities were in the process of co-educating, and gender-blind admissions were at least on the way to becoming the norm. Attention thus focused on the realities of women's experiences and what was inhibiting them from fully participating in campus life.

Sexual assault was a major one. Even in 1957, sexual assault was sufficiently visible at universities that sociologists published about it in reputable academic journals.[9] When the term "sexual harassment" was coined in the 1970s, it rapidly became part of the national lexicon as it so clearly captured an experience that was widespread but was not culturally recognized.[10] Soon, activists and lawyers began to think about how to use Title IX to combat the sexual violence and sexual harassment that were rife in universities and detrimental to the lives of female students.

1.2.1 Alexander v. Yale

Here I think it is useful to recount my own experiences during the early years of Title IX, which illustrate both the power of the law to catalyze progress, and the practical problems women encounter in trying to combat sexual violence and harassment on campus.

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8. *History of Title IX*, TitleIX.info, http://www.titleix.info/history/history-overview.aspx.

9. E.g., Clifford Kirkpatrick and Eugene Kanin, "Male Sex Aggression on a University Campus," *American Sociological Review* 22, no. 1 (Feb. 1957): 52–58, http://www.jstor.org/stable/2088765.

10. Sascha Cohen, "A Brief History of Sexual Harassment in America Before Anita Hill," *TIME*, 11 April 2016, http://time.com/4286575/sexual-harassment-before-anita-hill/.

I arrived at Yale in 1973, four years after women were first admitted as undergraduates, to a campus where many professors and male students still thought women did not belong. Some of my earliest activism drew directly from Title IX: I was on the underfunded women's swim team, which was not even provided swimsuits for competition, while the well-funded men's team received swimsuits, countless practice hours at the pool, and special training tables with excellent food. This inequity changed after we held a press conference at the gym and dropped our towels to reveal our bare backsides painted with "WE NEED SWIMSUITS!"

That was an unusual victory. Yale more often swept its mistreatment of women under the rug. This was true in the case of Calvin Hirsch, Yale Class of 1976, who was accused of raping a student. Hirsch had gone to the movies at Yale with a woman student and then asked to stay with her that night, claiming he had received some difficult news from his elderly parents and he wanted the comfort of staying the night with a friend. The woman agreed, reluctantly; she did not want to be unkind to him. She slept in her bed next to Hirsch that night with layers of clothes on but woke in the middle of the night with Hirsch on top of her, choking her, tearing off her clothes and then entering her—all to her cries of "don't, please don't." No alcohol or drugs were involved. The student reported the rape to the Yale Police as soon as Hirsch left, to others, and later to the Master of her residential college, a head administrator responsible for the safety and well-being of students under his charge. The police told her that the rape was a "private problem" and not something they had the skills or the brief to address. She was stymied.[11]

This incident, just one example of a widespread phenomenon we now call "date rape"—a term I was instrumental in coining—fuelled my activism around sexual harassment and assault at Yale, which included preparing a report on the status of women at Yale at the request of the Yale Corporation.[12] While collecting submissions for the report from

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11. I recently wrote Hirsch, who is now a doctor specializing in geriatrics in the University of California Davis Health System, about these allegations, and he has denied them, claiming the sex was consensual.

12. Ann Olivarius, ed., *A Report to the Yale Corporation from the Yale*

many diverse women, I came across a surprising number of accounts of women who had been pressured for sex by professors, many of them very influential and senior in their fields, who used their roles as gatekeepers to sought-after programs to coerce women students into sex. Some women had complained of their abuse to deans or professors they trusted, but there was no established procedure for reporting or handling such complaints, so even flagrant serial offenders were not identified.

I took the women's accounts, maintaining the anonymity of parties involved at first, to Yale administrators. They expressed deep concern, but delayed action, trying to run out the clock as we headed towards graduation. When I pressed them to take action, they sought the names of the professors involved, which the students ultimately gave permission to release; then they wanted the names of the students, which again took time to work out with the students; then they wanted to know which students were complaining against which professors; more negotiation. Just before graduation, the University Secretary, Sam Chauncey, phoned to say I was about to be arrested for defamation. Arrest for defamation is impossible in Connecticut—there defamation is a civil, not criminal offense—but his intent to intimidate me was clear.

Faced with Yale's stone wall, I and four other women filed suit, in what became the landmark case *Alexander v. Yale*.[13] The only relief we sought in the suit was for Yale to create a central grievance procedure so that women and men who wanted to bring sexual harassment complaints forward would know where and how to bring them. Yale adamantly refused, for reasons that seemed to stem more from pride and intransigence than anything else, despite the harm harassment and rape were causing to women students' well-being and academic lives.

When it became clear that the case would go to trial, Yale played dirty.

Undergraduate Women's Caucus, (1977), http://wff.yale.edu/sites/default/files/files/1977_Report_to_the_Yale_Corporation.pdf.

13. Alexander v. Yale Univ., 459 F. Supp. 1 (D. Coon. 1977), affirmed, 631 F.2d 718 (2d Cir. 1980) (hereafter Alexander v. Yale); and Pamela Y. Price, "Eradicating Sexual Harassment in Education," in *Directions in Sexual Harassment Law*, ed. Catherine A. MacKinnon and Reva B. Siegal (New Haven, CT: Yale University Press, 2004), 60–66; see esp. "The Personal Herstory," 61.

The deputy director of Yale's Office of Public Information disparaged the plaintiffs' reputations to reporters, for example telling *TIME* Magazine reporter Jack White that I was flunking out (I graduated *summa cum laude* and won Rhodes and Marshall Scholarships just months later) and was a lesbian (intended, at the time, as an insult; I am straight and was dating my now husband). Further, I learned that Chauncey doctored evidence by erasing my name from his appointment book in an effort to undercut our claim that we had met him repeatedly as we pursued all internal remedies (then a requirement of the law, but no longer) before suing.

In the end, the court held for the first time that failure by a university to adequately address pervasive sexual harassment denied women their rights under Title IX.[14] Nevertheless, our case was dismissed because all the plaintiffs had graduated, and therefore were held to no longer need relief from the University.[15]

Several years after the case, Yale finally did institute a sexual harassment grievance procedure. Today, almost every university in the United States has one, and Title IX sexual harassment regulations have become known and respected worldwide.[16]

1.2.2 A Persistent Problem

Alexander v. Yale set an important precedent from which other Title IX cases have flowed. It also taught me valuable lessons about how universities—even the Yale I loved—circle the wagons when women

14. Alexander v. Yale.

15. The law has changed since then so that plaintiffs may bring cases successfully even after graduation.

16. Ann E. Simon, "Alexander v. Yale University: An Informal History," in Mackinnon and Siegal, *Directions in Sexual Harassment Law*, 51–59. British students and university leaders have recently called for a similar set of streamlined rules to govern grievance and discipline procedures for allegations of sexual violence. See Karen McVeigh, "University leaders call for new rules on sexual violence allegations," *Guardian* (Manchester), 17 March 2016, https://www.theguardian.com/education/2016/mar/17/university-leaders-call-for-new-rules-on-sexual-violence-allegations.

stand up against harassment and assault. Unfortunately, these lessons are still relevant today. More than forty years after Title IX became law, sexual harassment and sexual violence in our universities remain at epidemic levels. In 2015, the Association of American Universities (AAU) published a report on sexual assault and sexual misconduct at twenty-seven institutions of higher learning, the largest such study to date.[17] Almost half (47.7 percent) of respondents said that, since enrolling at their universities, they had experienced levels of sexual harassment that (1) interfered with their academic/professional performance, (2) limited their ability to participate in academic programs, and/or (3) "created an intimidating, hostile or offensive social, academic or work environment."[18] The rates were highest among female undergraduates (61.9 percent) and students identifying as transgender, genderqueer, nonconforming, or questioning (TGQN; 75.2 percent).[19]

Across all students, regardless of gender identity or class year, the study found that 21.2 percent of those surveyed had been the victim of sexual assault by physical force/threat of physical force, incapacitation, coercion, or in the absence of affirmative consent.[20] Nearly one in three college women and TGQN students had experienced sexual

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17. David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct, The Association for American Universities* (21 September 2015), https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/AAU_Campus_Climate_Survey_12_14_15.pdf (hereafter AAU Survey).

18. See Ibid., xvi, xv.

19. Ibid., xvi.

20. Ibid., xiv. The federal government defines consent as "a voluntary agreement to engage in sexual activity" that "can be withdrawn at any time." It also indicates that "someone who is incapacitated cannot consent; past consent does not imply future consent; silence or an absence of resistance does not imply consent; consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another" and "coercion, force, or threat of either invalidates consent." See the White House Task Force to Protect Students from Sexual Assault, *Considerations for School District Sexual Misconduct Policies*, The US Department of Justice (Sep. 2016), https://www.justice.gov/ovw/file/900716/download.

assault—including rape—one or more times before graduation.[21] Moreover, 11.3 percent of senior females and 12.6 percent of senior TGQN students were victims of non-consensual penetration (i.e., rape) through these means, suggesting that status or class year mattered little to perpetrators of sexual assault.[22] A smaller, but significant, number of males experienced non-consensual sexual contact involving penetration (i.e., rape) or sexual touching as a result of physical force or incapacitation; 6.3 percent of senior males reported being the victim of at least one such incident.[23]

Thus, despite the progress that Title IX undoubtedly represents, sexual violence and harassment at universities remain pervasive. Below, I address why Title IX's power has not been fully or adequately realized, and suggest some reforms to improve the system.

2. Title IX in Practice: How Does it Work?

Title IX was designed to protect students, faculty, staff, third parties in school programs, and students involved in school-related off-campus activities from all forms of sexual harassment and sexual violence.[24] Under Title IX, sexual harassment, which is defined as "unwelcome conduct of a sexual nature" including "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature," is considered sufficient to deny an individual the full benefits of her or his education by leading to a hostile learning environment.[25] The law covers student-student harassment/rape,

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21. Ibid.

22. Ibid., xiii.

23. Ibid.

24. See Letter from Russlyn Ali, Assistant Secretary for Civil Rights, US Department of Education, Office for Civil Rights, to Title IX Coordinators 2, 4 April 2011 (hereafter 2011 Dear Colleague Letter), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

25. US Department of Education, Office of Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 13 March 1997, http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (hereafter OCR 1997).

professor-student harassment/rape, and stranger-student harassment/rape.[26] Under Title IX, schools are required to:

1. Adopt and publish grievance procedures;
2. Widely distribute notice of these procedures, for example, on the university's website, in campus handbooks, and via email;
3. Designate and train a Title IX coordinator;
4. Notify students and employees of the coordinator's contact information;
5. Train employees on reporting and response procedures; and
6. Mandate reporting of sexual harassment to the Title IX coordinator by certain trained employees.[27]

If a school "knows or reasonably should know" about an incident of sexual harassment and/or rape that creates a hostile environment, the school is required to take immediate action to eliminate and address the effects of the hostile environment.[28]

2.1 Complaints

Students may bring two types of complaint against a perpetrator of sexual harassment or assault: *informal* and *formal*. *Informal* complaints involve a limited investigation, or no investigation at all, and are focused on reaching a rapid practical result for the complainant.[29] Informal complaints can be made at any time, and may be reopened or formalized at a

26. Ibid.

27. 2011 Dear Colleague Letter. The Trump administration announced its intention to roll back these requirements under the 2011 Dear Colleague Letter guidelines on September 7, 2017, see Susan Svrluga and Nick Anderson, DeVos decries 'failed system' on campus sexual assault, vows to replace it, *Washington Post*, Sep. 7, 2017, available at https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/protesters-gather-anticipating-devos-speech-on-campus-sexual-assault/?utm_term=.1659818574cc (hereafter Devos decries 'failed system').

28. Ibid., 4.

29. Ibid., 8.

later date.[30] While informal complaints can sometimes be useful, I have seen cases where administrators push students to file them rather than formal complaints, which are more visible and in some circumstances must be reported to the government. *Formal* complaints involve a full investigation and disciplinary hearing and must be initiated generally within one year from the most recent incident.[31]

When a student brings a formal complaint, universities are obligated to provide a prompt, thorough, and impartial inquiry.[32] In handling a complaint, a university must:

1. Inform the complainant of their right to file a criminal complaint against their harasser if they so desire;[33]
2. Use a "preponderance of evidence" standard of proof in investigating the guilt of the accused, which is more favorable to accusers than "beyond a reasonable doubt" used in criminal cases;[34]
3. Take actions to remedy the situation.[35] These may include disciplining the perpetrator (e.g., via expulsion, suspension, no-contact directives, educational sanctions, or probation) and providing accommodations for the complainant such as counselling, schedule changes, and tutoring, which are to be offered free of charge;[36]

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30. Ibid.

31. See, e.g., *Sexual Harassment and Sexual Assault*, Carnegie Mellon University, available at http://www.cmu.edu/policies/administrative-and-governance/sexual-harassment-and-sexual-assault.html; 206.03 *Harassment Policy and Procedures*, 206 Georgia State University, available at http://www2.gsu.edu/~wwwfhb/sec20603.html.

32. Dear Colleague Letter, 5.

33. Ibid., 7.

34. Ibid., 10; the preponderance of evidence standard requires that "just enough evidence to make it more likely than not that the fact the claimant seeks to prove is true"; see "Preponderance of Evidence," *The Free Dictionary*, http://legal-dictionary.thefreedictionary.com/Preponderance+of+Evidence.

35. Ibid., 15.

36. Ibid., 16–17.

4. Complete all aspects of an investigation, including fact finding, hearings/other decision-making processes, imposing sanctions, or organizing relief for the complainant, within sixty days of receiving a complaint;[37] and
5. Notify the complainant of the status of the investigation, and of the outcome of their case.[38]

2.2 Protections Against Retaliation

Importantly, universities are also required to protect a complainant from retaliation during and after investigation of their claim.[39] Universities themselves are forbidden from retaliating against the complainant, by, for example, forcing them to take leave, rescinding scholarships, pressuring them not to file a complaint, encouraging them to keep their complaint "confidential," publishing bad press about them, or unfairly limiting their educational, employment, or extracurricular opportunities.[40]

Title IX protections against retaliation are vital given the nature of the complaints involved and the small, often intimate social worlds they disrupt. Indeed, 22 percent of all undergraduate students, including 27.5 percent of all female students and 42.1 percent of TGQN students, believe that reprisal by the perpetrator is very likely to occur in response to a report of sexual harassment.[41] Fear of retaliation is, in fact, often why incidents of sexual harassment go unreported.[42] According to the AAU data, only 28 percent of incidents or fewer are reported to law enforcement or Title IX coordinators, no matter how serious the harassment or rape.[43]

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37. Ibid., 11.

38. Ibid.

39. Ibid., 4.

40. See Letter from Seth M. Galanter, Assistant Secretary for Civil Rights, US Department of Education, Office for Civil Rights, to Title IX Coordinators 2 (24 April 2013), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201304.html.

41. *AAU Campus Climate Survey*, 38.

42. *The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system.

43. *AAU Campus Climate Survey*, iv.

2.3 How is Title IX Enforced?

A. The Office for Civil Rights (OCR)

The agency that enforces Title IX is the Office for Civil Rights (OCR) of the US Department of Education (DOE), which is tasked with protecting civil rights in federally-funded education programs.[44] OCR is dedicated to combating discrimination on grounds of race, color, age, and, importantly, sex.[45] When OCR finds that a school has not taken appropriate action to respond to a claim of sexual harassment or sexual violence, the agency is required to seek remedies for the complainant and the student body of that school.[46] In seeking remedies and disciplining educational institutions, OCR has the right to revoke a school's federal funding or refer it to the US Department of Justice (DOJ) for litigation if it finds the school in violation of Title IX.[47] Students may also choose to bypass their school's Title IX channels and report sexual harassment and assault directly to OCR for a formal investigation.[48]

B. Private enforcement

In *Cannon v. University of Chicago*, the Supreme Court ruled that students have a private right of action under Title IX, which means that they can sue the school for damages if it has violated its obligations under Title IX.[49] In *Franklin v. Gwinnett County Public Schools*, the United States Supreme Court clarified that victims may pursue financial damages.[50]

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44. *Title IX and Sex Discrimination*, US Department of Education (Apr. 2015), http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html. *About OCR*, US Department of Education (Oct. 15, 2015), http://www2.ed.gov/about/offices/list/ocr/aboutocr.html.

45. Ibid.

46. 2011 Dear Colleague Letter, 16.

47. Ibid.

48. "How to File a Title IX Complaint," Know Your IX, http://knowyourix.org/title-ix/how-to-file-a-title-ix-complaint/ (hereafter "How to File a Complaint").

49. Cannon v. University of Chicago, 441 U.S. 677 (1979).

50. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).

In the wake of this decision, some plaintiffs have won multi-million-dollar awards from courts or in privately negotiated settlements. For example, in *Simpson v. University of Colorado*, $2.85 million was awarded by the court after a student was gang-raped during a football recruiting program.[51] Plaintiff Lisa Simpson threw a party in her own off-campus apartment, which was attended by a group of football players and recruits. She became intoxicated and went to bed in her own room. She woke to two recruits undressing her and was subsequently sexually assaulted by several of the football recruits and players. Another student was also assaulted by at least one football player at the same party. Simpson reported the assaults to the staff at a local hospital, and her roommate reported the assaults to several administrators, including the director of the Office of Victim's Assistance. Despite knowing the details of this case and other significant cases of sexual violence, the University of Colorado failed to remedy the hostile sexual environment.[52] It refused to pursue sexual assault charges against the football players and recruits and even continued to recruit one of the perpetrators to the football team.

Another example comes from the University of Connecticut, where five students claimed that the school failed to take any effective action after receiving numerous sexual harassment and assault complaints, including a report of rape of a student by a member of the hockey team.[53] The plaintiffs were collectively awarded $1.3 million by the court, with one plaintiff receiving nearly $900,000.[54]

My firm litigates in the Title IX arena regularly.[55] We are often sur-

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51. Simpson v. Univ. Of Colo., 220 F.R.D. 354 (2004).

52. Ibid.

53. See Tyler Kingkade, "UConn Settles Sexual Assault Lawsuit for $1.3 Million, But Won't Admit Guilt," *The Huffington Post*, Jul. 18, 2014, http://www.huffingtonpost.com/2014/07/18/uconn-sexual-assault -lawsuit_n_5599481.html.

54. Ibid.

55. For a recent example involving the University of Rochester, see the following news articles: Vivian Wang, "Sexual Harassment Charges Roil Elite University Department," *New York Times*, Sept. 15, 2017, available at https://mobile.nytimes.com/2017/09/15/nyregion/rochester-university-sexual

prised by how self-righteous universities can be in these cases, contending that their educational mission should buy them some leniency.[56] Over time, the amount of damages universities are willing (or compelled by the courts) to pay for Title IX violations has been notably increasing.

3. Title IX's Failures

Although Title IX and its enforcing regulations describe to universities what they must do to comply, and these procedures have brought victims of sexual harassment, violence, and rape justice in some cases, the law is neither perfect nor perfectly enforced.

-harassment.html?rref=collection%2Fsectioncollection%2Fnyregion&action=click&contentCollection=nyregion&region=rank&module=package&version=highlights&contentPlacement=1&pgtype=sectionfront&referer=https://www.nytimes.com/section/nyregion; Alexandra Witze, "Scientists' sexual-harassment case sparks protests at University of Rochester," *Nature*, Sept. 14, 2017, available at http://www.nature.com/news/scientists-sexual-harassment-case-sparks-protests-at-university-of-rochester-1.22620; and Madison Pauly, "She Was a Rising Star at a Major University. Then a Lecherous Professor Made Her Life Hell," *Mother Jones*, Sept. 8, 2017, available at http://www.motherjones.com/politics/2017/09/she-was-a-rising-star-at-a-major-university-then-a-lecherous-professor-made-her-life-hell/. The complaint my firm filed with the Equal Employment Opportunity Commission can be found at https://www.scribd.com/document/358502273/University-of-Rochester-Eeoc.

56. Another relevant law in this area is the Clery Act, which requires universities to issue an annual report detailing incidents of sexual violence on campus, and to institute policies and educational efforts to combat it. Although it has focused welcome attention on the problem, some universities have become adept at massaging the figures they report, for example by excluding rapes that occur in student apartments adjacent to campus but not owned by the university. See The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. §1092(f); Michael Stratford, *Clery Fines: Proposed vs. Actual*, Inside Higher Ed (Jul. 17, 2014), https://www.insidehighered.com/news/2014/07/17/colleges-often-win-reduction-fines-federal-campus-safety-violations (discussing tendency of university to convince DOE officials to reduce their fines or enter settlements).

3.1 OCR Enforcement

Title IX's clearest failure is its lax enforcement by OCR.

First, OCR does not proactively monitor university compliance with Title IX. Instead, it chooses to assess a school's compliance only *after* it has received notice of a potential violation, which it obtains based on reports from the news, advocacy groups and parents, among other sources.[57] While this is understandable as a way of husbanding OCR's limited resources, it means many schools can reasonably calculate that they are not on the top of OCR's list, so they put their Title IX responsibilities on the back burner.

Second, even when OCR finds a problem, it is lenient. Its usual way of resolving an investigation is to have the school sign a voluntary pledge to address the shortcomings OCR has identified.[58] OCR's lack of real teeth here means schools may again feel they can avoid making the necessary investment in new Title IX policies and enforcement.[59]

OCR's leniency is perplexing, given that it has the nuclear option of reducing or even terminating federal funding to universities that fail to comply with Title IX.[60] Because this never happens, universities rightly view it as an "empty threat."[61] In fact, OCR seems hesitant to use many of its enforcement rights, including the right to call an administrative hearing and the right to refer cases for litigation to the DOJ.[62] Politically,

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57. See Tyler Kingkade, "Education Department Clarifies Title IX 'Compliance Reviews Are Not Random,'" *The Huffington Post*, May 2, 2016, http://www.huffingtonpost.com/2014/05/02/education-department-compliance-reviews-title-ix_n_5254075.html.

58. ED Act Now, "Know Your IX" (blog), http://knowyourix.org/i-want-to/take-national-action/.

59. Allison Renfrew, "The Building Blocks of Reform: Strengthening Office of Civil Rights to Achieve Title IX's Objectives," *Penn State Law Review* 117, no. 2 (2012), 570 (discussing how the threat of litigation and financial damage is a strong incentive for schools to comply with Title IX).

60. 2011 Dear Colleague letter, 16.

61. Renfrew, "Building Blocks,"580; ED Act Now, "Know Your IX."

62. Diane Heckman, "Women & Athletics: A Twenty Year Retrospective on Title IX," special issue, *University of Miami Entertainment & Sports Law Review* 9, no. 1 (1992).

it is understandable that OCR opts for "jawboning" rather than tough enforcement, but this means that universities rightly calculate they have little to worry about.[63] A study that surveyed attorneys, administrators, and compliance personnel about Title IX enforcement highlights this: it found that interviewees did not think OCR was an important influence in Title IX compliance.[64] OCR was viewed as only a "moderate deterrent to discrimination" and received negative reviews, including complaints about its ineptitude in mediation and in understanding the perspective of complainants, in addition to its unwillingness to learn the facts of a case necessary to resolve it properly.[65]

Third, OCR imposes unreasonable time restrictions on filing complaints, while failing to adhere to its own investigative timelines. Complaints must be made within 180 days of the incident referred to, and though some exceptions are made, this excludes many otherwise valid complaints.[66] In the case of sexual harassment, and especially for victims of sexual violence, this time limit ignores the reality that it can take years for survivors to come to terms sufficiently with the physical and psychological damage done to seek redress publicly.

Fourth, although OCR's investigations should take no more than 180 days, this deadline is frequently violated. Since 2011, 334 cases have been opened and only 55 resolved. The average case lasts 1.4 years, and some have taken more than five years to resolve.[67] Investigations often last long after the complainants have graduated and left the schools in

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63. Renfrew, "Building Blocks," 580.

64. Julie A. Davies and Lisa M. Bohon, "Re-imagining Public Enforcement of Title IX," *Brigham Young University Education and Law Journal* 2007, no. 1: 25-81, http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1234&context=elj.

65. Ibid.

66. "How to File a Complaint."

67. "Title IX: Tracking Sexual Assault Investigations," *The Chronicle of Higher Education*, http://projects.chronicle.com/titleix/#recent_developments. Sara Lipka, "How to Use The Chronicle's Title IX Tracker, and What We've Learned," *The Chronicle of Higher Education*, Jun. 2, 2016, http://www.chronicle.com/article/How-to-Use-The-Chronicle-s/236676?cid=T9NEWS.

question.[68] The DOE has cited understaffing at OCR as the reason for these delays.[69]

Fifth, OCR is inconsistent in the way it assesses Title IX claims among its twelve regional offices, both in investigation practices and outcomes.[70] For example, one OCR office might conduct a thorough investigation including interviews of large numbers of people beyond those directly involved in a complaint, while another might speak only to the complainant and the defendants.[71] Further, while one OCR office might require that a complainant prove the alleged harassment occurred before starting an investigation, another will assume the harassment occurred and start investigating immediately.[72]

OCR has defended its record by arguing that it has not been appropriated the funds to support the work it is mandated to do.

3.2 Excessively Restrictive Standards in Title IX Litigation

One way of redressing the weaknesses of OCR in enforcing Title IX would be to make it easier for victims of sexual violence and harassment

68. Jake New, "Justice Delayed," *Inside Higher Ed*, May 6, 2015, https://www.insidehighered.com/news/2015/05/06ocr-letter-says-completed-title-ix-investigations-2014-lasted-more-4-years.

69. See letter from Assistant Secretary for Civil Rights Catherine Lhamon to Senator Barbara Boxer, April 28, 2015, http://www.boxer.senate.gov/press/related/150428EducationDepartmentReponsetoLetter.pdf (hereafter Letter to Senator Boxer).

70. See Renfrew, "Building Blocks," 578. See Sudha Setty, "Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement," *Columbia Journal of Law and Social Problems* 32, no. 3 (1999): 340 (discussing research which indicates that OCR compliance officers across regional offices use significantly different standards during investigations).

71. Ibid.

72. See Stephen Henrick, "A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses," *Northern Kentucky Law Revie*w 40, no. 1 (2013): 67 (discussing internal inconsistency in treatment of cases by OCR Atlanta and inter-office differences in opinion on a complaint against Sonoma State University).

to bring their own private claims in court. But while successful cases can be brought, the obstacles to doing so are unfairly high—again reducing the incentive for universities to build robust systems to combat sexual violence and harassment.

Two cases, *Gebser v. Lago Vista Independent School District* and *Davis v. Monroe County Board of Education,* set the tough standard individuals must meet to succeed in bringing Title IX claims.[73] In these cases, the Supreme Court ruled that a complainant must show that the school being sued had "actual knowledge" of the violence or harassment, and, further, that the school's response to the violence or harassment was so lacking that it amounted to "deliberate indifference to discrimination."[74] Moreover, damages may be awarded only if the mistreatment in question was "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[75]

There are several issues with these requirements. First, the mandate that the school have actual knowledge of harassment or assault is problematic because the Supreme Court did not clarify which school officials' knowledge trips the school's liability.[76] A university president or Title IX coordinator would presumably trigger it—but what about a professor or a coach or part-time adjunct lecturer? Since Title IX requires only "relevant" employees, including certain designated teachers and administrators, to receive Title IX training and to report sexual assault to the appropriate Title IX officials, some lower courts have held that a school can escape liability if a victim puts on notice a teacher or other lower administrator who is not in this chain of command.[77]

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73. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (hereafter *Gebser*). Davis v. Monroe County Bd. Of Educ., 526 U.S. 629 (1999) (hereafter *Davis*).

74. *Gebser*. This standard was first applied in Gebser.

75. *Davis* at 650.

76. *Gebser*. See Diane Heckman, "Is Notice Required in a Title IX Athletics Action Not Involving Sexual Harassment?" *Marquette Sports Law Review* 14, no. 1 (2003): 175-232, 181.

77. See *Title IX Resource Guide* from Office for Civil Rights Assistant Secretary Catherine E. Lhamon, April 2015, http://www2.ed.gov/about/

Second, courts have defined the standard of "deliberate indifference" in a way that is far too hostile to students' legitimate rights.[78] Several courts have held that an incompetent or ineffective response to a complaint of sexual violence or harassment does not render a school liable.[79] Together, the practical result of these standards is that most successful cases require that a high-level administrator must have been alerted to sexual harassment or violence perpetrated against a victim, and also that the university's response was to do virtually nothing, or to actively deceive the student.

Third, the requirement that the harassment experienced by the complainant be "severe, pervasive, and objectively offensive," meaning that a school's mishandling of a single allegation of rape—no matter how damaging the assault was to the victim—might not provide a basis for a suit, if the victim cannot prove that the rape caused or illustrated a "pervasive" problem on campus.[80]

These standards are too daunting for most students to bring a successful complaint against their university, even when the university's response to the sexual harassment or violence they suffered was next to nothing.[81]

3.3 Failures at the University Level

The shortcomings of OCR and of private lawsuits would not matter if universities themselves properly implemented Title IX. Unfortunately, although some universities do a creditable job complying with Title IX, most do not.

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offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf; 2011 Dear Colleague Letter; Heckman, "Is Notice Required."

78. See Linda Wharton, speech at the Spring 2007 Harvard Journal of Law & Gender Conference (available in Lexie Kuznick and Megan Ryan, "Changing Social Norms? Title IX and Legal Activism: Comments from the Spring 2007 *Harvard Journal of Law & Gender* Conference," (2007), *Harvard Journal of Law and Gender* 31, no. 2 (2008): 367-77.

79. Ibid.

80. *Davis*.

81. Julie Davies, "Assessing Institutional Responsibility for Sexual Harassment in Education," *Tulsa Law Review* 77, no. 2 (2002): 387-442.

First, many universities fail to comply with Title IX's mandate to educate students about sexual harassment and violence.[82] The AAU survey found that only 24 percent of students felt educated about how their university defines sexual assault, and only 25.8 percent knew where to make a report of sexual assault or misconduct.[83] These numbers indicate that universities are not effectively communicating and advertising their Title IX policies and resources—and educating students is the simplest of their responsibilities under Title IX.

Second, while the complaint procedures established by Title IX are valuable, universities can manipulate them to divert and minimize cases rather than address them. Indeed, in my practice, I have represented victims of flagrant sexual harassment who were not informed by their Title IX coordinator that they had the right to file a formal complaint. These failures were not oversight; university administrators were trying to avoid investigation, as the harassment in question was perpetrated by valuable professors they wished to protect. Further, universities often choose not to investigate complaints or to take adequate disciplinary action after an investigation. It has been reported that less than one third of students found guilty of sexual assault or rape are expelled; frequently, they are not even suspended, and instead receive minimal punishments such as probation or educational sanctions.[84] For example, I worked on a case at an Ivy League university where the complainant was raped by a fellow student. The victim managed to escape and ran, naked and screaming, into the street in front of her apartment. The perpetrator confessed to having sex with the woman against her will, but denied raping her. When asked in a hearing later why, if he cared about the woman and had not raped her, he did not help her when she was clearly in distress,

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82. See, e.g., *AAU Campus Climate Survey*, xxiv. Students were asked to report their knowledge of campus sexual assault and sexual misconduct policies. Around one fourth of students were very familiar with these procedures, indicating institutional inadequacy in education on sexual harassment policies.

83. Ibid.

84. Tyler Kingkade, "Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion," *The Huffington Post*, Sept. 29, 2014, http://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html.

he declared, "I had to finish myself off first." The only punishment he received from the university's dean was a one-year suspension, after which he returned to the same university where the woman he raped was still enrolled. At no time during the legal or disciplinary processes did he express remorse.

Inadequate responses to sexual harassment and violence claims lead students to feel helpless. The woman in the Ivy League case above was so destroyed by her experience that she contemplated suicide. According to the AAU, a significant percentage of students do not report assault because they do "not think anything would be done about it."[85] This kind of leniency creates a positive feedback loop for sexual predators; research has shown that men are likely to commit more acts of sexual violence in communities where such behavior goes unpunished, and that repeat offenders commit most campus sexual assaults.[86]

Disturbingly, universities often choose to protect star faculty and student athletes over protecting women from sexual violence and harassment. Just as Yale came to the defense of senior professors who were pressing students for sex when I was an undergraduate forty years ago, this kind of denial and stonewalling remains depressingly common. For example, in one particularly high-profile claim, I represented Fernanda Lopez Aguilar, who accused her former advisor, the powerhouse philosophy professor Thomas Pogge of Yale University, of sexual harassment.[87] Pogge was Lopez Aguilar's undergraduate thesis advisor and mentor, and her complaint detailed how he used his prestige and promises of career advancement to promote his sexual access. When she first complained, he retaliated against her by revoking his offer of a prestigious fellowship.

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85. *AAU Campus Climate Survey*, xxi.

86. *Global Perspectives on Sexual Violence: Findings from the World Report on Violence and Health*, National Sexual Violence Resource Center (2004), http://www.nsvrc.org/sites/default/files/Publications_NSVRC_Booklets_Global-perspectives-on-sexual-violence.pdf. David Lisak and Paul M. Miller, "Repeat Rape and Multiple Offending Among Undetected Rapists," *Violence and Victims* 17, no. 1 (2002): 73-84.

87. See Katie J. M. Baker, "Ethics and the Eye of the Beholder," *Buzzfeed News*, May 20, 2016, https://www.buzzfeed.com/katiejmbaker/yale-ethics-professor?utm_term=.ig6lE3wll#.vgmLkWKLL.

Yale mischaracterized Lopez Aguilar's Title IX complaint as a workplace dispute and silenced her by offering her a payoff of $2,000 if she agreed to sign a non-disclosure agreement. Seeing no other avenue for remedies, and without being advised by Yale to seek legal counsel or other options open to her, she signed. But after uncovering further evidence of inappropriate behavior, including letters and a lengthy submission from another sexual partner of Pogge's detailing other instances of his misconduct, Lopez Aguilar filed a federal civil rights complaint against Yale for Title IX violations in 2015. In 2016, more than 160 academics, including renowned professors of philosophy and political theory at Yale, Harvard, Oxford, and other universities signed an open letter condemning Pogge and his actions.[88] Nevertheless, he remains a Yale professor.[89]

As of June 2016, there were 315 ongoing cases against American universities, spanning 195 schools, for mishandling Title IX complaints like Lopez Aguilar's.[90]

4. The Future

Despite its shortcomings, Title IX remains an excellent law for the protection and advancement of women, with a strong framework for effective action.[91] I have seen in my own practice that individual women can indeed bring powerful claims for sexual harassment that not only can win

88. The letter states, "Based on the information that has been made public, we strongly condemn his harmful actions toward women, most notably women of color, and the entire academic community," Open Letter Regarding Thomas Pogge to the Academic Community, https://sites.google.com/site/thomaspoggeopenletter/.

89. See http://philosophy.yale.edu/people/thomas-pogge.

90. Tyler Kingkade, "There Are Far More Title IX Investigations Of Colleges Than Most People Know," *The Huffington Post*, Jun. 6, 2016, http://www.huffingtonpost.com/entry/title-ix-investigations-sexual-harassment_us_575f4b0ee4b053d433061b3d.

91. E.g., OCR 1997; 2011 Dear Colleague Letter; Letter from Catherine Lhamon, Assistant Secretary, US Department of Education, Office for Civil Rights, to Title IX Coordinators, 24 April 2015, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf.

(increasingly) substantial damages, but can also shine a light on sexist assumptions and practices, cause some universities to overhaul the way they do business, and demonstrate to women nationwide that they need not suffer in silence any longer. All over the country, indeed the world, the idea that sexual harassment is widespread and wrong has taken root, and Title IX has been an important part of this culture change.

What lessons can we draw from Title IX's shortcomings described above to strengthen the law?

Before we approach solutions, we must acknowledge several realities, the most important being that sexual assault and harassment, despite real progress, remain deeply entrenched in our culture. We must recognize that people do not become university professors or administrators because they want to regulate the sexual consent practices of undergraduates or graduate students, or to stop their colleagues from having sex with students. Their focus is on developing "world class" educational institutions, not becoming "world class" Title IX enforcers. We must also acknowledge that Title IX is poorly and inconsistently enforced by its underfunded governing body (OCR), and courts have set such high standards for bringing private Title IX complaints against universities for damages that many individual victims of sexual harassment feel there is no point in fighting back.

Nevertheless, I believe Title IX can be strengthened such that universities will establish and actually apply more effective tools to combat the current pervasive culture of sexual harassment and violence. I suggest the following steps:

First, OCR should act more robustly to encourage, and if necessary, to compel, compliance. It should conduct regular and random compliance reviews *without* requiring prior knowledge of a school's likely non-compliance. It should also exercise its full or intermediary powers of discipline, including the partial or full rescindment of federal funding, rather than always relying on voluntary agreements with schools to clean themselves up. A bill currently pending in Congress, The Campus Accountability and Safety Act, would enhance this kind of enforcement. The bill proposes reforms to the sexual assault investigation process that would ensure that victims are properly protected and perpetrators are appropriately disciplined. The bill also proposes a civil penalty of up to

1 percent of an institution's operating budget for failure to comply with Title IX requirements.[92]

OCR also should be designated a percentage of the funds its fines generate to boost its enforcement resources.[93] The threat of unannounced reviews, combined with financial sanctions with teeth for non-compliance, would spur improvements in university Title IX performance. OCR should also be required to be more consistent in (1) meeting the timeline of 180 days to investigate and resolve Title IX complaints, and (2) establishing consistent criteria for investigating and deciding complaints among its regional offices.

Second, new laws are needed to remove the many barriers case law has set to finding universities liable for failing to address sexual harassment and violence. In particular, requiring plaintiffs to show that their university was "deliberately indifferent" to a report of sexual harassment or violence, rather than merely negligent, gives universities too many outs for allowing slipshod procedures to persist. Though universities should not be held to a standard of perfection, it should be possible for complainants who can show that their rape or sexual harassment was mishandled to win a case, without having a virtually insurmountable burden of proof, such as being required to show that the university mishandled other similar cases.[94]

Third, universities must initiate change from the bottom up. Much more extensive training, including simulations and role playing, is needed for students and faculty to help them understand what "nonconsensual sex" (i.e., rape) and "sexual harassment" mean in various realistic scenarios. Regular refresher courses should also be required. Schools should outline and regularly reinforce clear definitions of consent, including the role that alcohol or drugs can play in negating a partner's ability to consent, such that perpetrators of sexual violence

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92. See S.590-114th Congress (2015-2016), Campus Accountability and Safety Act (Feb. 26, 2015) at 14. Despite having broad and bipartisan support, the bill died in committee , but was reintroduced in the Senate on April 5, 2017.

93. See Letter to Senator Boxer.

94. See *Davis*.

cannot claim they did not properly understand university policies.[95]

Fourth, most schools already have policies that forbid faculty from having sexual relationships with undergraduates. Some also forbid such relationships with graduate students. Policies that permit graduate student-professor relationships as long as the professor reports it to a department chair or another administrator are an understandable attempt to recognize that real relationships can arise between faculty and graduate students. However, the inherent power dynamics in these relationships makes a genuine graduate student-professor relationship both rare and, on balance, dangerous for a university's educational mission. For example, I have seen many times how favoritism can occur in grading or advancement when a graduate student is in a sexual relationship with a professor; or can be thought to occur when it is absent; or how the professor takes revenge on the student's career when the relationship sours, including in relatively small disciplines where a bad reputation can cripple a career; or how a professor can be in a full flood of infatuation, convinced the student finds him/her ravishing, when the student in fact is ambivalent and cannot figure out how to extricate herself or himself. Universities should prohibit such relationships.

Fifth and finally, I am reminded of a conversation I had thirty years ago with a Yale Law School professor who was highly dubious that sexual harassment and sexual discrimination laws could ever be made to work. I suggested that he should turn his mental telescope around, and be as creative as possible with his high-powered colleagues in trying to design a legal framework that would accomplish this goal, which he favored. I think it is time to convene a group of leading law professors, experts from OCR and universities along with feminist activists to devise a "model program" for Title IX implementation and disciplinary procedures, which universities and OCR could adopt as the gold standard and spread it throughout the country.

5. Self-Help in the Internet Age

95. The 2011 Dear Colleague Letter, 1, indicates that a person may be "incapable of giving consent due to the victim's use of drugs or alcohol."

While Title IX will be strengthened by applying the remedies described above, other routes can and should be pursued in order to create real change in tandem with these solutions. In the age of the internet, public activism outside of the university bubble may be one of the most effective routes for change.

Here, a sexual harassment case my firm took against the University of California at Los Angeles (UCLA) is an instructive example. Kristen Hillaire Glasgow and Nefertiti Takla were sexually harassed by Gabriel Piterberg, a famous history professor, who, in both cases, engaged in uninvited and unwanted sexual conduct such as pushing them up against his car and French-kissing them, regularly propositioning them, and staying in hot sexual pursuit of them after being told to stop. Both women filed Title IX complaints. UCLA claimed one had not been filed at all, and it eventually reached an agreement whereby Professor Piterberg paid a $3,000 fine and was allowed to take a term away at a prestigious institute abroad. Our plaintiffs filed suit, and when the terms of the University's arrangement with Professor Piterberg became public, there was a general outcry that included the student union and many others not connected to our clients. The case received serious attention in newspapers and particularly on social media, and the University came under substantial public pressure to improve its Title IX system that went far beyond the pressure created by our lawsuit alone. A kind of "crowd justice" that names and shames both individual sexual harassers and the institutions that harbor them is likely to be an important tool to combat sexual harassment in the future. Of course, many victims may feel ambivalent about becoming the center of this much attention. Nevertheless, the feelings of shame that harassment often engenders in victims ("Did I somehow cause this? Why didn't I fight back harder? Maybe I imagined it") are giving way to a recognition that harassment is widespread, corrosive, and not the victim's fault.

A powerful way to encourage that recognition and to build a culture that deters sexual harassment and sexual violence is to shine a light in dark places. The internet gives all of us the power to demand change, and to build communities of support and solidarity.

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