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Harmful Reporting

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Harmful Reporting

DRAFT

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Abstract

Title IX is used in many ways; perhaps most prominent and controversial is its use to address issues of sexual harassment and sexual assault on college campuses. The regulations governing that use have just been changed, with the Department of Education issuing new final regulations on xx. The recent spotlight aside, an aspect of Title IX that has gotten too little attention has been the move towards having all or nearly all university employees categorized as “mandatory reporters.” A mandatory reporter is one who must report an allegation of sexual assault to the university’s Title IX coordinator. This report must be made even if it is against the wishes of the student who discloses that she or he was the victim of the assault.

This widespread use of mandatory reporters, perhaps counterintuitively, confers harm on the individual disclosing the assault. It also does not achieve the intended goals, one of which is often stated as making it known that the institution takes sexual assault very seriously. Moreover, anointing all employees, including non-supervisory faculty members, as mandatory reporters actually drives down student desire to disclose. This in turn prevents student survivors from getting the support they need in order to have equal education opportunities regardless of sex, which is the core purpose of Title IX. Therefore, having a wide-spread mandatory reporting requirement not only inhibits disclosure but may itself be a violation of Title IX.

Other phenomena presently influence the willingness to disclose or report sexual assault. The #MeToo Movement and the Harvey Weinstein trial reveal much about the challenges and trauma associated with disclosing and reporting. Further, some state legislatures have codified mandatory reporting and others have considered or will consider it. There are better ways to comply with Title IX and protect survivors and those ways must become more widespread.

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I. Introduction

“You are entering a four-year struggle to maintain bodily autonomy. There will be young men who kiss you roughly before you decide whether you want them to. There will also be the male “friend” who sneaks into your bed at night when you’re passed out, drunk and naked and ever so trusting of the sanctity of your bedroom. He will act bewildered when you scream at him to leave. Neither of you will mention the incident again.”¹

Assume you are a faculty member who has had the above student in several classes and you have a close relationship with her. She comes in your office to tell you about the above incident or worse. As she begins her saga, you are compelled to say to her: I am sorry but if you tell me anything that can be deemed to be sexual assault, I am a mandatory reporter and must report the details of what you share with me to our institution’s Title IX coordinator. When the student says that she does not want the incident officially reported, you must say, I am sorry, then you should not tell me. The student retreats from your office, which may be adorned with a sign declaring it to be a safe space.

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¹ Caitlin Donohue, *Letter To Myself Upon Entering College, in* INDELIBLE IN THE HIPPOCAMPUS: WRITINGS FROM THE ME TOO MOVEMENT (Shelly Oria ed., 2019).

The above scenario depicts the Title IX procedures in over two-thirds of the nation's institutions of higher education. This article argues that this reality is harmful to victims of sexual assault and is contrary to the purpose of Title IX. Title IX is used prominently and sometimes controversially to address issues of sexual harassment and misconduct on college campuses. Title IX regulations have recently changed, with the Department of Education issuing new final regulations on xx. This recent public spotlight aside, an aspect of Title IX that has gotten too little attention despite its outsized impact has been the move towards having nearly all university employees be categorized as "mandatory reporters." A mandatory reporter is one who must report an allegation of sexual assault to the university's Title IX coordinator. This report must be made even if it is against the wishes of the student who discloses that she or he was the victim of the assault.

Having this widespread allocation of employees as mandatory reporters harms survivors of sexual assault. Anointing nearly all employees, including non-supervisory faculty members, as mandatory reporters drives down student desire to disclose assault. This in turn prevents student survivors from getting the support they need in order to have equal education opportunities regardless of sex, which is the core purpose of Title IX. Therefore, have wide-spread mandatory reporting may itself be a violation of Title IX.

On xxx, the U.S. Department of Education (DOE) issued new Title IX regulations² to govern the handling of campus sexual assault³ under Title IX of the 1972 Education Act.⁴ When initially proposed in November 2018,⁵ the regulations received much attention; over

² Dept. of Education [date/cite to be completed when final regulations are issued.]

³ The proposed regulations refer to sexual assault and sexual harassment collectively as sexual harassment. Sexual harassment is defined in the proposed regulations as "either an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; or unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or sexual assault as defined in 34 C.F.R. 668.46(a), implementing the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act)." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61466 (proposed November 29, 2018) (to be codified at 34 C.F.R. pt. 106) [hereinafter Proposed Title IX Regulations].

⁴ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2012).

⁵ The proposed regulations were issued on November 29, 2018. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (proposed November 29, 2018) (to be codified at 34 C.F.R. pt. 106). As of October 3, 2019, there are 124,149 public comments. *See*

120,000 official comments were made.⁶ The proposed regulations were released about a year after DOE's Office of Civil Rights (OCR) rescinded several of its guidance documents that were intended to assist institutions of higher learning in appropriately handling allegations of sexual assault.⁷

These new regulations are the latest pronouncements in the approximately 20 years of applying Title IX to allegations of sexual assault on college campus.⁸ They have been both criticized and

generally Comments on Proposed Rules of Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Under Title IX of the Education Amendments of 1972, <https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=ED-2018-OCR-0064>. The Act requires a 60-day notice and comment period. See *A Guide to the Rule Making Process*, Office of the Federal Register (Jan. 2011) at 5, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

The partial shutdown of the federal government ran from December 22, 2018 to January 23, 2019. Li Zhou, *Why the Government Shutdown Finally Ended*, VOX (Jan. 25, 2019, 5:40PM), <https://www.vox.com/policy-and-politics/2019/1/25/18197354/government-shutdown-tipping-point>. It appears that the notice and comment period was extended to January 30, 2019. U.S. DEP'T. OF EDUC., NOTICE OF PROPOSED RULEMAKING; EXTENSION OF COMMENT PERIOD (2019).

⁷ The 2011 Dear Colleague letter and the 2014 guidance were rescinded on September 22, 2017. Letter from Candice Jackson, Acting Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Colleague, at 1 (Sept. 22, 2017) <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>. See also Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. at 61463. At the same time that it rescinded the 2011 and 2014 documents, OCR released a Q & A on Campus Sexual Misconduct, referred to as Interim Guidance. *Id.* See also *id.* at 61465.

⁸ See Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 639–41 (1999) (“This Court has indeed recognized an implied private right of action under Title IX, *Canon v. University of Chicago*, 441 U.S. 677, 691 (1979), and we have held that money damages are available in such suits. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).”). See also U.S. Dep't. of Educ., Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (1997); U.S. DEP'T. OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001); Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Colleague (Apr. 4, 2011) <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; U.S. DEP'T OF EDUC., OFFICE F-FOR CIVIL RIGHTS, Q&A ON TITLE IX AND SEXUAL VIOLENCE (2014);

Letter from Candice Jackson, Acting Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Colleague (Sept. 22, 2017) <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>. To view the complete history of the Office for Civil Right's Policy Guidance regarding Title IX and sexual discrimination, visit the U.S. Dep't. of Educ.'s website at

praised.⁹ Much of the controversy has been about procedural matters such as burden of proof, right to cross-examination, and the nature of the proceeding.¹⁰ Other controversies include substantive matters such as how sexual harassment is defined, the physical scope of Title IX protections, e.g., off-campus housing, and when a university violated Title IX’s protective safeguards in OCR administrative proceedings.

An issue receiving less publicized scrutiny – under the old regime and in the conversation about the new regulations – is the determination of who has an obligation to report an allegation of sexual assault to the institution’s Title IX coordinator or designee, who then may have an obligation to begin a Title IX investigation.¹¹ Mandated reporters, called “responsible employees”¹² in OCR regulations and guidance, were increasingly defined to include more and more university employees.¹³ These “responsible employees” were mandated to report

<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html>.

⁹ Emily Yoffe, *Reining In the Excesses of Title IX*, ATLANTIC (Sept. 4, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/title-ix-reforms-are-overdue/569215/>.

¹⁰ Often the debate circled around the issue –acknowledged or not-- of how much a Title IX investigation should resemble a criminal proceeding. See generally Margaret Drew, *It's Not Complicated: Containing Criminal Law's Influence on the Title IX Process*, 6 TENN. J. RACE GENDER & SOC. JUST. 191 (2017).

¹¹ Title IX coordinator is a term first seen in 2001. U.S. DEP’T. OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) [hereinafter OCR’s 2001 Guidance]. See also JACQUELYN D. WIERSMA-MOSLEY AND JAMES DILORETO, *THE ROLE OF TITLE IX COORDINATORS ON COLLEGE AND UNIVERSITY CAMPUSES* 1 (2018) (“Originally established for the first time within OCR’s 2001 guidance document and again within the 2011 *DCL*, campuses must appoint a specific Title IX coordinator with the primary responsibility of coordinating campus compliance with Title IX, including grievance procedures for resolving Title IX complaints.”).

¹² The term responsible employee was found first in OCR’s 2001 guidance policy and was defined as: “any employee who has the authority to take action to redress harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has authority or responsibility.” U.S. DEP’T. OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001).

¹³ Examples include: Faculty and Resident Assistants. See *Responsible Employees/Mandated Reporting*, MICHIGAN TECH, <https://www.mtu.edu/title-ix/policy/responsible-employees/> (last visited Oct. 11, 2019) (stating responsible employees include “some select undergraduate student employees such as resident assistants (RAs) and orientation team leaders (OTLs).”); *FAQs Regarding Title IX Best Practices and Compliance*, MARQUETTE UNIVERSITY, <https://www.marquette.edu/sexual-misconduct/title-ix-faq.php> (last visited Oct. 11, 2019) (“Examples of University employees who have a duty to report include . .

a disclosure of sexual assault irrespective of whether the student disclosing the assault wanted the assault to be officially reported. As the group “responsible employees” grew larger over time so, too, grew concern over the consequences of having so many mandatory reporters.

Although sexual assault survivor groups,¹⁴ legal scholars,¹⁵ and social scientists¹⁶ all have written of the harms of mandatory reporting, it still lacks the attention needed in view of its outsized negative impact. Accordingly, this article will demonstrate how the dramatic expansion of university employees who are deemed responsible employees/mandatory reporters, even if well-intended, harms survivors. Further, this expansion impedes the appropriate implementation of Title IX as a means to combat educational inequity based on sex. First, the article will examine the harms wrought by mandatory reporting, especially if done against the wishes of the survivor. Next, the article will consider how insights drawn from the #Me Too Movement may shed light on the value and harms of mandated reporting.¹⁷ The article will then review the history of Title IX policy and assess the effect of the new Title IX regulations on the responsible employee/mandatory reporter debate.

. faculty, adjunct faculty, staff, residence hall directors, [and] resident assistants”); *Mandatory Reporters (Responsible Employees)*, The University of Texas at Austin, <https://titleix.utexas.edu/mandatory-reporters> (last visited Oct. 11, 2019) (stating responsible employees include faculty members and resident assistants); *Office of Title IX Compliance, Information for Responsible Employees*, Appalachian State University, <https://titleix.appstate.edu/responsible-employees> (last visited Oct. 11, 2019) (stating responsible employees include faculty and residence life staff).

¹⁴ *Survivor survey on mandatory reporting*, NATIONAL ALLIANCE TO END SEXUAL VIOLENCE (2016), <http://endsexualviolence.org/where-we-stand/survivor-survey-on-mandatory-reporting>.

¹⁵ See e.g., Merle Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REVIEW 71 (2017); Alexandra Brodsky, *Against Taking Rape Seriously: The Case Against Referral Laws for Campus Gender Violence*, 53 HARV. C.R.-C.L. L. REV. 131 (2018). Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U L. REV. 1146 (2019).

¹⁶ Lindsay M. Orchowski, Amy S. Untied, & Christine A. Gidycz, *Social Reactions to Disclosure of Sexual Victimization and Adjustment Among Survivors of Sexual Assault*, 28 J. INTERPERSONAL VIOLENCE 2005 (2013).

¹⁷ The #MeToo Movement is, in many ways, about sexual assault/harassment survivors who do not initially report and then, at some later point, often much later, decide to disclose. Since a key concern with mandated reporting is that survivors will not seek help if they know their disclosure will be reported to others even if they oppose such action, seeking to understand this phenomenon seems critical: the goal is to assist not harm survivors. See also Lena Felton, *How Colleges Foretold the #MeToo Movement*, ATLANTIC (Jan. 17, 2018), <https://www.theatlantic.com/education/archive/2018/01/how-colleges-foretold-the-metoo-movement/550613/>.

In its next section, the article will analyze recent proposed and enacted state laws that require institutions of higher education to report allegations of sexual assault to local law enforcement.¹⁸ In some cases, if adopted as proposed, these laws would elevate the impact of mandatory reporting beyond what has long been deemed required under Title IX.¹⁹ The article will then look at institutions of higher education that have resisted the universality of responsible employees and have chosen instead a more nuanced and appropriate approach.²⁰ It will, further, consider the comprehensive draft of the American Law Institute on the question of proper procedural frameworks for Title IX reporting.²¹ In conclusion, the article will argue that a move toward a narrower class of mandatory reporters will facilitate the goals of Title IX.²²

II. Broadly Inclusive Mandatory Reporting²³ is Harmful and Impedes the Purpose of Title IX

A. Introduction

¹⁸ See e.g., VA CODE ANN. § 23.1-806 (2015). See *infra* Part IV for a discussion of state laws linking sexual assault disclosures in a university setting with an option or mandate of referrals to a local (and non-campus) law enforcement agency. The following states have introduced legislation requiring IHE to make referrals to local law enforcement: Texas, Georgia, Maryland, New Jersey, Oklahoma, Rhode Island, California, New York, and Virginia, BRODSKY, *supra* note 19, at 139 n. 46-47.

²⁴ BRODSKY, *supra* note 16 at 143-144.

²⁰ The University of Oregon is one example. It adopted a policy, effective in September 2017, in which it instituted three categories of reporters. See *infra* Part III.

²¹ The American Law Institute's forthcoming publication is expected to consist of eleven chapters, which discuss procedural frameworks for colleges and universities. The publication is titled: PRINCIPLES OF THE LAW, STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLEGES AND UNIVERSITIES. AMERICAN LAW INSTITUTE, *Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities*, <https://www.ali.org/projects/show/project-sexual-and-gender-based-misconduct-campus-procedural-frameworks-and-analysis/> (last visited Oct. 11, 2019). For further discussion of the ALI's forthcoming publication, see ALI Adviser, *Student Sexual Misconduct*, <http://www.thealiadviser.org/campus-sexual-misconduct/> (last visited Oct. 11, 2019).

²² Although at first glance this might seem counter-intuitive as increasing the reporting of sexual assault has been sought for a long time, this article will demonstrate that mandatory reporting against a survivor's wishes is not a desirable outcome.

²³ Reporting and disclosure are terms that can be used imprecisely and interchangeably, but they are different. See *infra* Part II. D. for discussion. In this section, the word reporting generally means when a college employee reports to the Title IX coordinator or designee a disclosure of sexual assault that has been made to that employee.

Sexual assault on college campuses is both prevalent and under-reported.²⁴ Although the statistics vary, by virtually any measure it happens with some frequency and often remains unreported.²⁵ Further, in quite recent history, reported allegations of campus sexual assault were not taken seriously.²⁶

Sexual assault can have an impact on the survivor that ripples throughout all aspects of that person's life, education included.²⁷ A combination of these factors—prevalence, underreporting, and impact—led many to argue, often from the best of intentions, for a wide-spread requirement for mandatory reporting on college campuses. After all, if an assault does not get reported, the argument goes, then the survivor cannot get support, the perpetrator is not held accountable, and other parties are potentially at risk.²⁸ Moreover, in the Title IX context, a report that finds its way to the Title IX coordinator may be the start of a formal grievance process that enables a school to ensure that the survivor is not deprived of educational opportunities on the basis of sex.²⁹ Thus, many colleges and universities have decided that nearly all of their employees are mandatory reporters.³⁰ In one study, Drs. Holland, Cortina, and Freyd found that 69% of institutions surveyed designated their entire work staff as mandatory reporters.³¹

²⁴ Sofi Sinozich & Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, U.S. Department of Justice (Dec. 2014), <https://www.bjs.gov/content/pub/pdf/rsavca9513.pdf> (does this support?)

²⁵ Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, WESTAT (Sept. 21, 2015), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf

²⁶ Anya Kamenetz, *The History of Campus Sexual Assault*, NPR ED (Nov. 30, 2014), <https://www.npr.org/sections/ed/2014/11/30/366348383/the-history-of-campus-sexual-assault>.

²⁷ See Christopher Wilson, Kimberly A. Lonsway, Joanne Archambault, *Understanding the Neurobiology of Trauma and Implications for Interviewing Victims*, END VIOLENCE AGAINST WOMEN INTERNATIONAL (EVAWI) <https://www.cccd.edu/employees/hr/equity/Documents/Inclusion/EVAWI.pdf> for a discussion of the effects that flow from sexual assault.

²⁸ Kathryn J. Holland et al., *Compelled Disclosure of College Sexual Assault*, 73 AM. PSYCHOLOGIST 256, 260-264 (2018).

²⁹ 20 U.S.C. § 1681.

³⁰ HOLLAND, *supra* note 28 at 259. Holland identifies the following four assumptions as policies that are effectuated by broadly defined mandatory reporting requirements: (1) uncovering more sexual violence; (2) benefitting survivors; (3) benefitting employees; and (4) benefitting the institution.

³¹ *Id.*

Nineteen percent classified most employees that way and only four percent designated few employees in that manner.³²

Facially, then, reporting may seem like a social good on many levels. Nonetheless, survivors often choose not to report to authorities who can take action.³³ If a survivor won't make an official report, the argument continues, an employee to whom they disclose, even informally, should have to report to the Title IX coordinator so that the corrective process can commence.³⁴ This course of action may be based in part on a misunderstanding of trauma-informed theory, namely that a survivor's unwillingness to lodge an official complaint is one of the effects of the trauma and, while understandable, such a hesitancy can be overridden in the name of justice, healing, and safety.³⁵ But overriding a survivor's choice is not, in fact, therapeutic. As trauma-informed experts have noted: "Trauma informed Care (TIC)] recognizes that ... interventions (especially those that are mandated) can be disempowering and oppressive, which can replicate traumagenic ... conditions; TIC proactively seeks to avoid retraumatization in the service delivery setting."³⁶ And for those working with domestic violence survivors, a core principle of trauma informed care is restoring choice and control.³⁷

Whatever the benefits of trauma-informed theory, a trauma-informed process should, at a minimum, not inflict more trauma.³⁸ Overriding a survivor's decision not to report is likely to cause increased trauma. One consequence of sexual assault is the feeling—and reality—of loss of control over one's body and one's self. Overriding a choice not to

³² *Id.* Another 8% of schools designate fewer than all but had definitions too ambiguous to define further.

³³ See *infra* at Part II. E. for a discussion.

³⁴ Christina Mancini et al., *Mandatory Reporting (MR) in Higher Education: College Students' Perceptions of Laws Designed to Reduced Campus Sexual Assault*, 4 CRIM. JUST. REV. 219 (2016).

³⁵ Meg Mott, *The New Title IX Guidelines Benefit Survivors*, INSIDE HIGHER ED (Dec. 17, 2018), <https://www.insidehighered.com/views/2018/12/17/new-title-ix-guidelines-help-survivors-well-accused-opinion>.

³⁶ JILL S. LEVENSON, GWENDA M. WILLIS, & DAVID S. PRESCOTT, *TRAUMA-INFORMED-CARE: TRANSFORMING TREATMENT FOR PEOPLE WHO HAVE SEXUALLY ABUSED* (2017) at 3.

³⁷ Joshua M. Wilson, Jenny E. Fauci, & Lisa A. Goodman, *Bringing Trauma-Informed Practice to Domestic Violence Programs*, 85 AM. J. OF ORTHOPSYCHIATRY 586, 586 (2015).

³⁸*Id.* See also, WILSON, *supra* note 27 for a discussion of the effects that flow from sexual assault.

report underscores and exacerbates that loss of control. Thus, it undermines the healing process.³⁹

Trauma inducement aside, most survivors at the University level are adults. Thus, autonomy principles dictate that the survivor controls whether, when, and to whom disclosure or reports are made. Otherwise, survivors are faced with a Hobson's choice: disclose and risk undesired reporting or don't disclose and forgo being connected with options for support and healing.

B. Disclosure and Reporting

"You will learn that no one is entitled to your story. You can tell it or not tell it.

People who are trying to build a philosophical argument are not entitled to your story. People who say ignorant things on the internet are not entitled to your story. People who are trying to write a novel about sexual trauma – because it's, like, so fascinating, and maybe could you give some notes – are not entitled to your story. People who do not care about your personal or emotional safety are not entitled to your story.

*Your story is yours. And you get to decide how to tell it."*⁴⁰

Disclosure and reporting of sexual assault are two different albeit related concepts. Reporting, which can be formal or informal,⁴¹ involves telling someone in a position to take action and/or provide support and resources to the survivor. Telling an institutional employee could activate one or both of the above responses. Title IX requires that an institution provide clear notice about which employees have mandatory reporting obligations.⁴²

Disclosure, on the other hand, may be as "simple" as telling someone about the event. Disclosure most commonly occurs to a trusted person, such as a friend, relative or mentor. Survivors generally choose

³⁹ HOLLAND, *supra* note 28 at 261. Even in the presence of conflicting results, there are many studies that demonstrate that reporting against a survivor's wishes can increase depression and anxiety.

⁴⁰ Kaitlyn Greenidge, *Our Story is Yours*, in INDELIBLE IN THE HIPPOCAMPUS: WRITINGS FROM THE ME TOO MOVEMENT (Shelly Oria ed., 2019).

⁴¹ The U.S. Military has implemented a system that incorporates both informal and formal reporting. MORRAL ET AL., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE US MILITARY VOLUME 5: ESTIMATES FOR INSTALLATION-AND COMMAND-LEVEL RISK OF SEXUAL ASSAULT AND SEXUAL HARASSMENT FROM THE 2014 RAND MILITARY WORKPLACE STUDY (2018), https://www.rand.org/pubs/research_reports/RR870z7.html

⁴² 34 CFR 106.8(a).

this option over an official report. Sometimes, however, a disclosure may help create the conditions that will lead a survivor not initially inclined to making a formal report to decide to report.

Disclosure and reporting each can have negative and positive results.⁴³ The tenor of the results will often be dictated by the response of the person told and the sensitivity and efficacy of any process that follows.⁴⁴ If the reaction is appropriate and helpful, it may result in providing resources and support to the survivor.⁴⁵ Moreover, it can direct the survivor to information about how and where to report and provide support for the reporting process.⁴⁶

Many survivors of sexual assault may desire to disclose confidentially.⁴⁷ The reasons for this are as numerous as they are logical. In addition to physical injury and trauma, sexual assault is embarrassing and humiliating.⁴⁸ It may lead the survivor to blame herself.⁴⁹ Social and cultural reactions heavily contribute to this. Some intractable rape myths include notions such as she deserved it, she liked it, she was dressed provocatively, she was drunk, it wasn't really rape, it was consensual, it was a false report, only strangers rape, all rape is violent, only straight women can be raped. Studies of the rape myth suggests that persons holding these beliefs are likely to engage in victim/survivor blaming.⁵⁰ The survivor is not immune from those beliefs. She may be asking herself what happened or did it really

⁴³ Courtney E. Ahrens, Janna Stansell, & Amy Jennings, *To Tell or Not to Tell: The Impact of Disclosure on Sexual Assault Survivors' Recovery*, 25 VIOLENCE & VICTIMS 631 (2010).

⁴⁴ Emily R. Dworkin & Nicole Allen, *Correlates of Disclosure Cessation After Sexual Assault*, 24 VIOLENCE AGAINST WOMEN 85 (2018).

⁴⁵ Amy S. Untied, Katherine W. Bogen, Lindsay M. Orchowski, *Reducing the Risk of a "Second Assault": Engaging the Community to Enhance Social Reactions to Disclosure of Sexual Victimization in SEXUAL ASSAULT RISK REDUCTION AND RESISTANCE: THEORY, RESEARCH, AND PRACTICE* 195, 197 (Lindsay M. Orchowski & Christine A. Gidycz eds., 2018).

⁴⁶ *Id.*

⁴⁷ White House Task Force to Protect Students from Sexual Assault, *Key Components of Sexual Assault Crisis Intervention/Victim Service Resources* 1-3 (2004).

⁴⁸ Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner? These Are Eight Reasons Why Victims of Sexual Harassment Don't Come Forward*, PSYCHOLOGY TODAY (Nov. 16, 2017), <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner>.

⁴⁹ *Id.*

⁵⁰ *How to Avoid Victim Blaming*, HARVARD LAW SCHOOL HALT, <https://orgs.law.harvard.edu/halt/how-to-avoid-victim-blaming/> (last visited Nov. 11, 2019).

happen?⁵¹ She may ponder what she did to encourage, cause, or deserve it.

Beyond the harm inflicted by persistent rape myths, survivors may be subject to threats and retaliation.⁵² These realities can shape a person's decision on whether to make an official report. Further, survivors may rightly fear that they will lose control of the process if they make an official report.⁵³ As a volunteer at sexual assault/harassment support event observed: "The survivor is stripped of their power and control, and one of the only aspects that remains in their control is if, how, when, and to whom to share their story."

Survivors may also suspect that the process will be unfair.⁵⁴ Or some survivors may simply wish to be able to continue their education free from fear of further assault, retribution or vilification. This should be possible—it is, after all, the *raison d'être* of Title IX: educational access free from sex-based harm.⁵⁵ Often it may be that disclosing, not

⁵¹ The impact of trauma effects the memory in ways that may lead to someone thinking the discloser is lying because she doesn't remember the details. See National Sexual Violence Resource Center, False Reporting: Overview (2012), https://www.nsvrc.org/sites/default/files/2012-03/Publications_NSVRC_Overview_False-Reporting.pdf

⁵² Francine Banner, *Institutional Sexual Assault and the Rights/Trust Dilemma*, 13 CARDOZO PUB. LAW, POLICY & ETHICS J. 97, 145-148 (2015).

⁵³ Olivia Whiteley, *Commentary: Bill would rob victims of their autonomy. Again.*, THE SALT LAKE TRIBUNE (Mar.4, 2018), <https://www.sltrib.com/opinion/commentary/2018/03/04/commentary-bill-would-rob-victims-of-their-autonomy-again/>.

⁵⁴ Much of the current debate regarding Title IX focuses on the perceived unfairness to the accused. Press Release, U.S. Secretary of Educ., Betsy DeVos, Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All (Nov. 16, 2018), <https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all>.

The proposed Title IX regulations expressly focus on fixing what some argued was a due process deficit for the accused. However, many survivors also perceived that the process that ensued from their report of campus sexual assault—or sometimes the lack of a process ensuing—was unfair and biased against them. See Laura Garcia, "Enough Is Enough": Examining Due Process In Campus Sexual Assault Disciplinary Proceedings Under New York Education Law Article 129-B, 69 Rutgers U. L. Rev. 1697, 1702–06 (2017); Drew Barnhart, *The Office Of Civil Rights' Failing Grade: In The Absence Of Adequate Title IX Training, Biased Hearing Panels and Title IX Coordinators Have Harmed Both Accusers and Accused In Campus Sexual Assault Investigations*, 85 UMKC L. Rev. 981, 982–84 (2017); Emily D. Safko, *Are Campus Sexual Assault Tribunals Fair?: The Need For Judicial Review and Additional Due Process Protections In Light of New Case Law*, 84 Fordham L. Rev. 2289, 2322–25 (2016).

⁵⁵ Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Colleague (Apr. 4, 2011) <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> ("Title IX . . . and its implementing regulations . . . prohibit discrimination on the basis of

reporting, will achieve this goal.⁵⁶ And mandatory reporting, with its possibility of discouraging disclosure, will impede this goal. In short, if one of the goals is to increase the number of official reports, finding ways to encourage more and more effective disclosure is an important way to help achieve that goal.⁵⁷

Fortunately, there are new and better ways to disclose. One key improvement is simple if not easy: resist the trend to make all employees mandatory reporters under Title IX.⁵⁸ However, even as the term responsible employee is scrubbed from Title IX regulations, universities will still need to determine which of their employees are obliged to report a campus sexual assault disclosed to them.⁵⁹ If universities continue to believe that having more mandatory reporters conveys their commitment to dealing with sexual assault, they must be disabused of that belief.

Other new efforts include more nuanced reporting processes. One such process is Callisto.⁶⁰ Callisto is a sexual assault reporting on-line platform founded in 2015 by Jessica Lane, an epidemiologist and survivor of college sexual assault. It describes its vision and mission as follows: “Our vision is a world where sexual assault is rare and survivors are supported. Our mission is to create technology that combats sexual assault, supports survivors, and advances justice.”⁶¹ One student leader at a school that has adopted Callisto noted that the desire to report online may be a “generational change.”⁶² College students are, after all, of the generation that often use texts and emails for unpleasant topics.⁶³

sex in education programs or activities operated by recipients of Federal financial assistance.”).

⁵⁶ See *supra* Part I.D. for a discussion of how wide-spread mandatory reporting requirements can inhibit disclosure.

⁵⁷ Shannon Najmabadi, *To Curb Sexual Assaults, Colleges Give Students Alternative Reporting Options*, CHRONICLE OF HIGHER EDUCATION (Nov. 29, 2016), <https://www.chronicle.com/article/To-Curb-Sexual-Assaults/238528>.

⁵⁸ See *supra* Part III.C. for discussion of schools who have bucked the ubiquitous mandatory reporter trend.

⁵⁹ See *infra* at xx for a discussion of the new Title IX regulations.

⁶⁰ Callisto, <https://www.projectcallisto.org/> (last visited Nov. 10, 2019).

⁶¹ *Id.*

⁶² NAJMABADI, *supra* note 57.

⁶³ *Id.* Student embrace of this on-line platform is evidenced in a student Title IX advisory group’s dismay with its institution’s choice not to adopt Callisto. Emilie Cochran, *UW denies implementation of Callisto sexual assault reporting services, students demand answers*, BADGER HERALD (Mar. 27, 2019),

Significantly, Callisto allows on-line anonymous reporting that will link survivors and law enforcement if a sexual assault perpetrator is identified more than once.⁶⁴ This linkage is important as it is estimated that up to 90% of campus sexual assaults are committed by repeat offenders.⁶⁵ The identification of a perpetrator as a serial attacker is now one of the two circumstances in which the new Title IX regulations mandate that a grievance process be commenced.⁶⁶

Another newer reporting program is “You have options.” You have options is a law-enforcement based program that gives the survivor a range of options, thus allowing the survivor to remain in control of the process.⁶⁷ You have options is a victim-centric model; the reporting options available to a survivors are:

- **Information Only Report:** Any report of sexual assault where, at the reporting party’s request, no investigative process beyond a victim interview and/or a complete or partial Inquiry into Serial Sexual Assault (ISSA) is completed.
- **Partial Investigation:** Any report of sexual assault where some investigative processes beyond the victim interview and a complete or partial Inquiry into Serial Sexual Assault (ISSA) have been initiated by law enforcement. This may include, but is not limited to, interviewing of

<https://badgerherald.com/news/2019/03/27/uw-denies-implementation-of-callisto-sexual-assault-reporting-services-students-demand-answers/>.

⁶⁴ Jessica Ladd, *The Reporting System That Sexual Assault Survivors Want*, TED (Feb. 2016),

https://www.ted.com/talks/jessica_ladd_the_reporting_system_that_sexual_assault_survivors_want.

⁶⁵ This number has varied but there is no doubting that the vast majority of sexual assaults are committed by those who have done it more than once. John D. Foubert, Angela Clark Taylor, & Andrew F. Wall, *Is Campus Rape Primarily a Serial or One-Time Problem? Evidence From a Multicampus Study*, VIOLENCE AGAINST WOMEN (Mar.18, 2019).

⁶⁶ See DEP’T OF EDUC., *supra* note 5 at 61469 (“We also propose adding paragraph (b)(2), stating that when a recipient has actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint; if the Title IX Coordinator files a formal complaint in response to such allegations, and the recipient follows procedures (including implementing any appropriate remedy where required) consistent with § 106.45 in response to the formal complaint, the recipient’s response to the reports is not deliberately indifferent.”)

⁶⁷ You Have Options Program, Sexual Assault Reporting, <https://www.reportingoptions.org/> (last visited Nov. 10, 2019).

witnesses and collection of evidence such as a sexual assault forensic examination (SAFE) kit.

- **Complete Investigation:** Any report of sexual assault where all investigative procedures necessary to determine if probable cause exists for a criminal sexual assault offense have been initiated and completed.⁶⁸

So far, the number of schools adopting alternative reporting programs is small. Approximately a dozen schools use Callisto⁶⁹ and seven campus law enforcement programs employ You Have Options.⁷⁰ Perhaps schools will feel freer to adopt procedures that permit more leeway in disclosing now that there is less Title IX focus on a broad category of mandatory reporters. Also, DOE, in its 2017 Interim Guidelines, stated that the Resolution Agreements between OCR and individual schools remain in place but no longer have precedential value. Hence, the University of Montana Resolution Agreement, with its naming of all employees as responsible employees/mandatory reporters no longer has “blueprint” status.⁷¹ Thus, to the extent schools believed that all or nearly all of their employees needed to be classified as “responsible employees” in order to steer clear of OCR Title IX trouble, that fear can now abate.

C. Personal Autonomy

There are other reasons to reject the facile non-solution of ubiquitous mandatory reporting. Prior to its extensive use in Title IX matters, mandatory reporting had been commonly required in situations where there were allegations of harm towards a minor or an otherwise impaired person.⁷²

⁶⁸ Sarah Estill, *Responding to Sexual Assault: The You Have Options Program* (Office of Community Oriented Policing Services, Washington, D.C.), Apr. 2018, at 1.

⁶⁹ Callisto, <https://www.projectcallisto.org/what-we-do> (last visited Nov. 10, 2019).

⁷⁰ You Have Options Program, Sexual Assault Reporting, <https://www.reportingoptions.org/> (last visited Nov. 10, 2019).

⁷¹ U.S. Dep’t. of Educ., Office for Civil Rights, *Q & A on Campus Sexual Misconduct* at 7 (2017) <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

⁷² For instance, there are statutorily prescribed mandatory reporters for suspected child abuse. The Federal Child Abuse Prevention and Treatment Act requires each State to have provisions or procedures for requiring certain individuals to report known or suspected instances of child abuse and neglect. 42 U.S.C. § 5106(b)(2)(B)(i). *See also* Mass. Gen. Laws c. 119, § 21 (discussing which individuals are mandatory reporters of child abuse and neglect).

Competent adults enjoy the legal right of autonomy.⁷³ While there may be times to override a competent adult's decision, that should be the exception not the norm. Making a decision that others do not agree with or believe not to be in the best interests of the decision-maker is not a basis on which to deprive persons of their personal autonomy.⁷⁴ College students are (nearly always) adults. Therefore, college student survivors of sexual assault should be afforded their right to decide whether and when to make an official report, with all its attendant consequences.⁷⁵

This right to choose, e.g., the right to be in control of the process or in control of whether there is even a process in the first instance is even more important under Title IX, with its civil rights focus.⁷⁶ As Professor Merle Weiner has said: "survivors' needs should be given significant weight. After all, Title IX is meant to serve them."⁷⁷

Also, there are the autonomy interests of the mandated reporter. Although certainly secondary to the interests of the person disclosing, the reporter's interests are a legitimate focus. That is especially true if the reporter is someone who has relationship with the person disclosing. Indeed, it may be because of that relationship that a survivor has chosen to disclose.

D. Survivor Healing Includes Survivor Empowerment

Disclosure is important to survivor healing. For disclosure to serve effectively as part of the healing process, a supportive response to the that disclosure is imperative. A negative response, such as victim-blaming or diversion from the story, exacerbates the experience and

⁷³ See generally, Justine A. Dunlap, *Mental Health Directives: Having One's Say?*, 89 KY. L. J. 327 (2001).

⁷⁴ *Id.*

⁷⁵ If the immediate safety of others was at stake, that could justify overriding a survivor's preference not to report. See ALI principle 3.4, which supports a general deference to a disclosing/reporting student's choice as to whether an investigation should commence. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW, STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLEGES AND UNIVERSITIES (2018) at 70. See *infra* at Part V for a discussion of the ALI draft.

⁷⁶ Title IX is intended to safeguard equity in higher education and to protect against discrimination based on sex. Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ., 119 S.Ct. 1661, 1669 (1999). Sexual misconduct has long been held to be a form of sex discrimination for the purpose of activating Title IX. *Id.*

⁷⁷ WEINER, *supra* note 16, at 134.

adds to the trauma.⁷⁸ However, healing is about more than disclosure and a supportive response thereto. Dr. Judith Herman, in her seminal book *Trauma and Recovery*,⁷⁹ states that:

[t]he first principle of recovery is the empowerment of the survivor. ... Many benevolent and well-intentioned attempts to assist the survivor founder because this fundamental principle of empowerment is not observed. No intervention that takes power away from the survivor can possibly foster her recovery, no matter how much it appears to be in her immediate best interest.⁸⁰

Herman's words are largely geared to therapists as they seek to help trauma survivors, including survivors of sexual assault. But they are equally apt to situations of sexual assault in a higher education setting. As is known beyond quibble, sexual assault is at its core the loss of control over one's self.⁸¹ And in the words of Herman over 25 years ago, the "principle of restoring control to the traumatized person has been widely recognized."⁸²

For a survivor to choose to disclose but not report a sexual assault only to have the disclosure reported against the survivor's wishes violates both autonomy and control. If it is reported to a person in an official capacity who has an institutional obligation to commence a grievance process, that constitutes further loss of control.⁸³ To exacerbate the situation even more, it is a loss of control directly caused by those who are supposed to be institutional helpers. It is the antithesis of promoting healing in the survivor.

Moreover, forced reporting against a survivor's wishes is contrary to the purpose and intent of Title IX. As a civil rights statute, Title IX is

⁷⁸ Lindsay M. Orchowski & Christine A. Gidycz, *Psychological Consequences Associated With Positive and Negative Responses to Disclosure of Sexual Assault Among College Women: A Prospective Study*, 21 VIOLENCE AGAINST WOMEN 803 (2015).

⁷⁹ JUDITH HERMAN, *TRAUMA AND RECOVERY* (1992).

⁸⁰ *Id.* at 133.

⁸¹ Sarah E. Ullman & Liana Peter-Hagene, *Social Reactions to Sexual Assault Disclosure, Coping, Perceived Control and PTSD Symptoms in Sexual Assault Victims*, 42(4) J. COMM. PSYCHOL. 495, 496 (2014).

⁸² HERMAN, *supra* note 79, at 134.

⁸³ Not all institutions require their Title IX coordinators to commence a grievance process, but it is that coordinator, not the survivor, who makes this determination. So survivor control remains lacking.

to be used to help the student survivor receive equitable educational opportunities.⁸⁴ To force reporting and to prolong or reinstitute the lack of control is likely to impede a survivor's ability to access educational service on the basis of her sex and should itself be deemed a breach of Title IX.⁸⁵

III. The #MeToo Impact

"IT STARTS WHEN YOU say it in words, that first push of bravery. The shock of hearing yourself tell another human: I was raped.

Sometimes that silence takes years to break. Sometimes forever.

You are a survivor now. Things are going to change – you must accept that you have entered a process of transformation. It's going to take time but if you keep doing the work, you will get through it. I guarantee it.

*Eventually you realize that you are not alone. From #MeToo to All Of Us. Our individual stories add up to a great big society in need of serious healing and transformation."*⁸⁶

Salma Hayek, Rachael Denhollander, and Christine Ford⁸⁷

Over the past several years, high profile cases have shifted the sexual assault conversation. As one lawyer and Title IX investigator said: "One sign of progress is that we're talking more openly about these things and not just through the 'whisper network'... ."⁸⁸

⁸⁴ BRODSKY, *supra* note 16, at 132.

⁸⁵ Institutional revictimization is not new. *See generally*, Justine A. Dunlap, *The "Pitiless Double Abuse" of Battered Mothers*, 11 AM. U. J. GENDER SOC. POLICY AND LAW 523 (2003).

⁸⁶ Quito Ziegler, *The Great Transition*, in INDELIBLE IN THE HIPPOCAMPUS: WRITINGS FROM THE ME TOO MOVEMENT (Shelly Oria ed., 2019).

⁸⁷ Rachael Denhollander was a survivor of Larry Nassar. *Rachael Denhollander Shares Impact of Larry Nassar Abuse In New Memoir*, CBS THIS MORNING PODCAST (Oct. 2019), <https://soundcloud.com/cbsthismorning/rachael-denhollander-shares-impact-of-larry-nassar-abuse-in-new-memoir>. Salma Hayek is one of the scores of women who have accused Harvey Weinstein. Sara Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (Oct. 27, 2017, 11:27 AM), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/>.

Christine Blasey Ford accused Brett Kavanaugh, now a U.S. Supreme Court Justice, of sexual assault.

⁸⁸ Katherine Mangan, *Will Fury Over Harvey Weinstein Allegations Change Academe's Handling of Harassment?*, CHRONICLE OF HIGHER EDUCATION (Oct. 13, 2017) (quoting Alexandra Tracy Ramirez, Esq.), <https://www.chronicle.com/article/Will->

In October 2017, the media published accounts of accusations of sexual assault against Harvey Weinstein.⁸⁹ In the wake of this, Alyssa Milano added a # to the MeToo Movement that was founded in 2006 by Tarana Burke.⁹⁰ Millions of women responded.⁹¹ This grassroots movement helped underscore the ubiquity of sexual harassment and sexual assault. But on most college campuses, this was a known phenomenon.⁹² In part due to Campus Climate Surveys, institutions of higher learning were aware of the wide-spread nature of sexual assault.⁹³ What had been known, if not addressed adequately, on college campuses was now being made known elsewhere and everywhere. #MeToo appeared also to resonate on college campuses, as reports of sexual assault there rose during this time. At Harvard, for instance, reports were up 20%.⁹⁴

While accusations against Weinstein were increasing⁹⁵ and #MeToo was having its impact, so too was unfolding the extent of former Michigan State University sports doctor Larry Nassar's abuse. In January 2018, Nassar was sentenced to up to 175 years in jail.⁹⁶ The sentencing occurred after 156 women spoke of their experience of his abuse.⁹⁷ Prior to sentencing, Nassar wrote in a letter to the judge

[Fury-Over-Harvey/241453](#). For a detailed discussion of the “whisper network,” See TUERKHEIMER, *supra* note 16.

⁸⁹ Numerous news outlets had for years tried to corroborate long-told rumors about Weinstein. JODI KANTOR AND MEGAN TOWEY, SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT (2019). Weinstein was able to kill many stories before the New York Times and the New Yorker magazine each published accounts in 2017. Weinstein was finally charged criminally in New York on May 25, 2018. Benjamin Mueller & Alan Feuer, *Arrested on Rape Charges, Weinstein Posts \$1 Million Bail*, NY TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/nyregion/harvey-weinstein-arrested.html>. His trial began January 22, 2020. Jan Ransom & Alan Feuer, *Weinstein Trial Begins With Vivid Descriptions of Several Sexual Attacks*, NY TIMES (Jan. 22, 2020), <https://www.nytimes.com/2020/01/22/nyregion/harvey-weinstein-trial.html>.

⁹⁰ Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>.

⁹¹ *Id.*

⁹² FELTON, *supra* note 17.

⁹³ Krebs et al, *Campus Climate Survey Validation Study Final Technical Report*, BUREAU OF JUSTICE STATISTICS (Jan. 2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf>.

⁹⁴ FELTON, *supra* note at 17.

⁹⁵ Approximately 90 women ultimately accused Weinstein of sexual assault, including rape. RANSOM, *supra* note 89.

⁹⁶ Sophie Gilbert, *A New Film Reveals How Larry Nassar Benefitted From a Culture of Silence*, ATLANTIC (May 2, 2019), <https://www.theatlantic.com/entertainment/archive/2019/05/new-film-exposes-how-larry-nassar-was-able-abuse/588571/>.

⁹⁷ *Id.*

stating: “Hell hath no Fury like a woman scorned.”⁹⁸ It seems likely that this comment contributed to the judge saying to Nassar at sentencing: “You don’t get it.”⁹⁹

Nine months later, Christine Blasey Ford came forward with accusations of sexual assault against then-nominee to the U.S. Supreme Court Brett Kavanaugh.¹⁰⁰ After they both testified before the Senate judiciary committee, he was confirmed; he now sits as an associate justice on the Supreme Court. Blasey Ford received death threats and had to hire security details for her family’s safety.¹⁰¹

The point of examining the #MeToo movement and ancillary events here is to mine what they reveal about the challenge of disclosure and the pervasiveness of sexual misconduct. Even prior to the attention-grabbing #MeToo Movement, it was well-established that sexual assault on college campus was rampant and under-addressed.¹⁰² #MeToo served to personalize some of the trauma. The allegations against Harvey Weinstein or Brett Kavanaugh highlighted the truth that survivors delay disclosure or only disclosed informally rather.¹⁰³ But these high-profile situations, one can hope, help demonstrate the difficulties and perils of disclosure. They help explain—at least to those who are willing to hear—that disclosure is not such a binary choice.¹⁰⁴

Indeed, disclosing is hard and often yields poor results. Just ask the survivors of Larry Nassar’s assaults. Many disclosed over many years. For those who chose to disclose, the results of that disclosure were

⁹⁸ Des Bieler, *Here are the Larry Nassar comments that drew gasps in the courtroom*, WASHINGTON POST (Jan. 24, 2018), <https://www.washingtonpost.com/news/early-lead/wp/2018/01/24/here-are-the-larry-nassar-comments-that-drew-gasps-in-the-courtroom/>.

⁹⁹ *Id.*

¹⁰⁰ Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, WASHINGTON POST (Sep. 16, 2018, 10:28 PM), https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html.

¹⁰¹ <https://www.theguardian.com/us-news/2018/oct/10/christine-blasey-ford-faces-unsettling-future>.

¹⁰² FELTON, *supra* note 17; TUERKHEIMER, *supra* note 16.

¹⁰³ See *infra* at Part III for a discussion.

¹⁰⁴ Further, the choice to disclose is further complicated by the identity of the perpetrator. Betrayal trauma theory postulates that an assault by someone who is in a close relationship with the survivor rather than by a stranger has more difficult trauma repercussions. Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119 (2013).

disheartening. For example, Larissa Boyce, a former member of Michigan State University's junior gymnastic team, reported Nassar in 1997.¹⁰⁵ He was finally sentenced in 2018—21 years later!

Disclosing is hard; that difficulty is amplified when the accused has power over one's situation or career or employment or advancement in some life sphere.¹⁰⁶ The difficulty is further amplified when that person can threaten consequences that he or she is quite capable of executing. Just ask the Harvey Weinstein accusers. Many stayed silent out of fear.¹⁰⁷

Disclosing is hard: that difficulty is amplified when the person is accused is a high-profile "model-citizen." Just ask Christine Blasey Ford, whose accusations against then-federal circuit judge Kavanaugh either were not believed or deemed insignificant or irrelevant to the process of picking a Supreme Court justice. Disclosing is hard even for established professionals who might, in other circumstances, come supercharged with credibility.¹⁰⁸ Now try to imagine how hard it would be for a college freshman.

With this seeming flurry of accusations and MeToo responders, some numbers about the incidence of false reports may prove instructive. First, for college campuses, one early study found that less than five

¹⁰⁵ Dan Murphy, *Former Gymnast: MSU President Couldn't Fit Attending Hearing Into Schedule*, ESPN (Jan. 18, 2018), https://www.espn.com/college-sports/story/_/id/22143668/former-gymnast-says-michigan-state-university-president-not-fit-larry-nassar-hearing-schedule; Scott Cacciola, 'This Is the Beginning of Our Story', NY Times (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/sports/larry-nassar-victims.html>.

¹⁰⁶ Harvey Weinstein is alleged to have threatened his victims with never again getting work. Molly Redden, *'You'll Never Work Again': Women Tell How Sexual Harassment Broke Their Careers*, GUARDIAN (Nov. 21, 2017, 7:07 AM), <https://www.theguardian.com/world/2017/nov/21/women-sexual-harassment-work-careers-harvey-weinstein>.

¹⁰⁷ In trial testimony, one of Weinstein's accusers disclosed to a friend but declined to go to the police because of what Weinstein could do. Alan Feuer & Jan Ransom, *Rosie Perez, at Weinstein Trial, Backs Up Rape Allegation*, NY TIMES (Jan. 24, 2020), <https://www.nytimes.com/2020/01/24/nyregion/harvey-weinstein-rosie-perez-trial.html>.

¹⁰⁸ For example, Christine Blasey Ford is a professor at Palo Alto University and Stanford University PsyD Consortium. She received her undergraduate degree from the University of North Carolina at Chapel Hill, and went on to receive graduate degrees from Pepperdine University, University of Southern California, and Stanford. Additionally, she holds a Ph.D. in Educational Psychology: Research Design. Ali Rogan, *Who is Christine Blasey Ford?*, ABC NEWS (Sep. 27, 2018, 4:01 AM), <https://abcnews.go.com/Politics/christine-blasey-ford/story?id=57989558>.

percent of sexual assaults were reported to the police.¹⁰⁹ Although the number may have increased incrementally in the last generation, still about 90% of sexual assaults do not get reported.¹¹⁰ So of the approximately 5-10% that are reported, it has been estimated that false reports occur between 2-10% of the time. However, this number may itself be inflated due to misunderstanding what constitutes a false report.¹¹¹ A report that lacks evidence to arrest, prosecute, or otherwise go forward is not a false report.¹¹² A report that is delayed is not a false report.¹¹³ So the 2-10% false report figure, when properly viewed as a percentage of the small percentage of reported sexual assault, is actually less than .5%.¹¹⁴

Also in the fall of 2017, as Weinstein accusations and #MeToo tweets were accelerating, the Department of Education rescinded “Obama-era” Title IX guidance and issued its own Interim Guidance. It announced plans to promulgate new Title IX regulations. Although expected, this led to concern being raised by some and calls of “it’s about time” by others. To be sure, prior Title IX procedures, particularly those from in 2011 and 2014, had been subject to their own outcry. For instance, after the 2014 guidance was issued, 28 Harvard Law Professors wrote an op-ed in the Boston Globe objecting to the guidance and suggesting gross violations of due process.¹¹⁵ But this new step, tinged too with a highly controversial Secretary of Education and a President accused of multiple sexual assaults and taped saying he could commit sexual assault with impunity,¹¹⁶ added

¹⁰⁹Bonnie S. Fisher, Francis T. Cullen, & Michael G. Turner, *The Sexual Victimization of College Women*, DEP’T OF JUSTICE (Dec. 2000) at 24, <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

¹¹⁰ Michael Dolce, *College Is Starting Again, And With It The Threat Of Campus Sexual Assault. A Lawyer Offers Advice*, NBC News (Sept. 2, 2019), <https://www.nbcnews.com/think/opinion/college-starting-again-it-threat-campus-sexual-assault-lawyer-offers-ncna1048511>; Catherine Thorbecke, *April Marks Sexual Assault Awareness Month and the Statistics Are Staggering*, ABC News (Apr. 3, 2018), <https://abcnews.go.com/GMA/News/april-marks-sexual-assault-awareness-month-statistics-staggering/story?id=54112555>.

¹¹¹ Katie Heaney, *Almost No One is Falsely Accused of Rape*, THE CUT (Oct. 5, 2018), <https://www.thecut.com/article/false-rape-accusations.html>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Elizabeth Bartholet et al., *Rethink Harvard’s sexual harassment policy*, BOSTON GLOBE (Oct. 14, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>.

¹¹⁶ David A. Fahrenthold, *Trump recorded having extremely lewd conversation about women in 2005*, WASHINGTON POST (Oct. 8, 2016), <https://www.washingtonpost.com/politics/trump-recorded-having-extremely->

in its own way to the public attention being paid to the issue of sexual assault.

IV. The Mandatory Reporting Juggernaut

A. Introduction

Since its enactment in 1972, Title IX has provided that “[no] person ... 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.”¹¹⁷ In its early days, Title IX was often used as a way to equalize opportunities and expenditures for women’s sports, at both the high school and post-secondary level.¹¹⁸ In the 20-30 years following Title IX’s passage, however, the law was defined to include sexual harassment and other misconduct as behaviors that ran afoul of federal statutes such as Title IX and Title VII.¹¹⁹ During this period, courts were also determining that gender discrimination was not only a violation of federal statutes but also violated constitutional rights.¹²⁰

In the Title IX arena, the U.S. Supreme Court found, in *Franklin v. Gwinnett Co.*, that when a school district was aware of teacher-to-student sexual harassment, it could be held liable.¹²¹ Seven years later, in *Davis v. Monroe*, the Court extended that principle to cover student-on-student harassment.¹²² The standard set in *Davis* for civil liability, however, was fairly narrow. First, a school district’s actions in dealing with peer harassment were entitled to deference.¹²³ Second, those actions would absolve a district from liability provided that the

[lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html](http://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix)

¹¹⁷ 20 U.S.C. § 1681(a)(3)–(6). There are some institutional exceptions including, e.g., some religious institutions, same-sex schools, and military service academies.

¹¹⁸ See R. Shep Melnick, *The Strange Evolution of Title IX*, NATIONAL AFFAIRS, Summer 2018, <https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix> (“Title IX initially focused on what happens in the classroom. That focus soon sifted to the playing field, then shifted again to bedrooms and bathrooms.”).

¹¹⁹ In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the U.S. Supreme Court held that sexual harassment in the workplace could violate Title VII. *Id.*

¹²⁰ ON THE BASIS OF SEX (Focus Features 2018). This movie depicts Ruth Bader Ginsburg, Associate Justice of the U.S. Supreme Court, and her efforts to gain constitutional protection for gender equality.

¹²¹ *Franklin*, 503 U.S. at 76.

¹²² *Davis*, 526 U.S. at 643.

¹²³ See *id.* at 648 (“courts should refrain from second-guessing the disciplinary decisions made by school administrators.”) (citation omitted).

actions were not “clearly unreasonable” when taking into account what the district knew at the time.¹²⁴

The Davis case limited civil liability to situations in which a school district or institution actually knew of the harassment. However, two years later and under a Republican Administration, the DOE’s Office of Civil Rights issued a 2001 Guidance document.¹²⁵ This guidance, which went through a public notice and comment process but not official rulemaking,¹²⁶ provided that, for agency enforcement actions, the standard would be whether a school “knew or should have known” about the alleged harassment.¹²⁷ The 2001 Guidance document also used for the first time the phrase “responsible employee.”¹²⁸ If an institution’s responsible employee knew or should have known of the harassment, then an institution’s federal funding could be in jeopardy.¹²⁹

Requiring that a wide swath of university employees be mandatory reporters seems to be grounded in several factors. First, there was the phenomenon that, for years, universities conducted virtually no investigations of sexual assaults alleged to have occurred on their campuses. Second, there was more than a decade of often unclear interpretive guidance from the Office of Civil Rights within the U.S. Department of Education, the administrative body charged with enforcing Title IX. This left schools uncertain as to who should report.¹³⁰ Schools thus adopted definitions and policies that were perceived as being viewed favorably by OCR. Operating alongside these drivers was mounting social attention to the widespread issue of campus sexual assault.¹³¹

¹²⁴ *Id.*

¹²⁵ U.S. DEP’T. OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001).

¹²⁶ U.S. DEP’T OF EDUC., *supra* note 5 at 13.

¹²⁷ U.S. DEP’T. OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 12–13 (2001). (This standard has changed under the new regulations, which have reinstated the Davis standard of actual knowledge. *See* U.S. DEP’T OF EDUC., *supra* note 5.)

¹²⁸ U.S. DEP’T. OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 12–13 (2001).

¹²⁹ *Id.*

¹³⁰ WEINER, *supra* note 16.

¹³¹ An indirectly related phenomenon that occurred two decades before was the increased use of non-discretionary practices in intimate partner violence cases, such as mandatory arrest and mandatory or “no-drop” prosecution. The relation between

In sum, there was: (1) greater knowledge that campus sexual assault was a large and largely unaddressed problem;¹³² (2) a turn in societal values and gender-equity advocacy that created a demand to address the problem of sexual assault, both on campus and in intimate relationships; (3) a federal law that had been recently interpreted to create a civil rights remedy to the problem;¹³³ (4) a federal agency that, across multiple presidential administrations, increased its enforcement of the civil rights remedy and, in so doing, gave guidance that could be interpreted in a variety of ways; and (5) a new and growing fear on the part of universities and their risk managers that they could be held liable for failing to address the issue of sexual assault specifically and sexual misconduct more generally. A combination of these factors led, perhaps inexorably, to an overapplication of the principle of mandatory reporting.

As mandatory reporting became an obligation for most or all of an institution's employees, there was also increased concern that it was a harmful over-correction, the efficacy of which was in doubt. Concerns raised included: (1) a view that federal law and/or policy did not require widespread mandatory reporting; (2) identifying the multiple ways in which mandatory reporting actively harms survivors; and (3) an understanding that there are better ways to protect survivors while also being in compliance with Title IX.¹³⁴

These concerns were raised by many groups across multiple constituencies. First and foremost, survivor groups generally oppose a widespread definition of mandatory reporters.¹³⁵ One of the contemporary tropes is that survivors should be told that they are

the two survivors- usually women- can be trusted to make the “right” choice. Justine A. Dunlap, *Soft Misogyny: The Subtle Perversion of Domestic Violence Reform*, 46 SETON HALL L. REV. 775, 797 (2016).

¹³² White House Task Force to Protect Students from Sexual Assault, Not Alone 2, 6–8 (2014).

¹³³ See *Davis*, 526 U.S. at 643 (“We consider here whether the misconduct identified in *Gebser*—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does.”).

¹³⁴ See *infra* Part I, B–G for a detailed discussion of the positive and negative consequences of mandated reporting. See *infra* Part III for discussion of possible solutions to the issues surrounding mandatory reporting.

¹³⁵ See Brodsky, *supra* note 16, at 143–45, 143 n. 83. See generally Tyler Kingkade, *28 Groups that Work with Rape Victims Think the Safe Campus Act is Terrible*, HUFFINGTON POST (Sept. 13, 2015), http://www.huffingtonpost.com/entry/rape-victims-safe-campus-act_us_55f300cce4b063ecbfa4150b.

believed.¹³⁶ Whether one accepts that, survivors—or any other group especially affected by an issue—should be listened to very carefully when they speak of and from their experience. It is a perspective that non-survivors do not have and it deserves to be heard. If survivors are largely against mandatory reporters, that should be heard particularly. In addition to survivor groups, medical associations have opposed reporting assault when the survivor has requested confidentiality.¹³⁷ Also, legal scholars such as the American Law Institute have studied the issue and drafted language that opposes wide-spread universal mandatory reporting.¹³⁸

B. The Title IX “Responsible Employee” Narrative---DOE/OCR Guidance Then and Now

A tortuous road has led to many universities requiring that most if not all of their employees must report any disclosure of sexual assault¹³⁹ to the school’s Title IX officer or his or her designee.¹⁴⁰ The root of mandatory reporting is grounded in the term “responsible

¹³⁶ Emily Yoffe, *The Problem with #BelieveSurvivors*, THE ATLANTIC (Oct. 3, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/brett-kavanaugh-and-problem-believesurvivors/572083/>.

¹³⁷ WORLD HEALTH ORGANIZATION, RESPONDING TO INTIMATE PARTNER VIOLENCE AND SEXUAL VIOLENCE AGAINST WOMEN: WHO CLINICAL AND POLICY GUIDELINES (2013), at 41, https://apps.who.int/iris/bitstream/handle/10665/85240/9789241548595_eng.pdf;jsessionid=3A558BA5D4F2403F4E4978E4DB47D7C0?sequence=1

¹³⁸ April 2018, this discussion draft has not been ratified by the ALL. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW, STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLEGES AND UNIVERSITIES (2018).

¹³⁹ It has long been settled that if sexual misconduct is severe, persistent or pervasive, it can create a hostile environment that must be addressed by the institution. *See Davis*, 526 U.S. at 631 (“It is not necessary to show an overt, physical deprivation of access to school resources to make out a damages claim for sexual harassment under Title IX, but a plaintiff must show harassment that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victims are effectively denied equal access to an institution’s resources and opportunities.”). *See also* Emme Ellman-Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 MICH. L. REV. 155, 162 (2017) (discussing how the 2011 OCR guidance reiterated “that a ‘hostile environment’ is one in which harassment is sufficiently severe, persistent, or pervasive . . .”).

¹⁴⁰ HOLLAND, *supra* note 28 at 259 (“Over two thirds (69%, n=101) of the 146 policies identified all employees – that is, faculty and staff employed by the school – as mandatory reporters of sexual assault”). At least part of the problem results from the use of various forms of guidance from OCR that is sometimes directed more at some forms of sexual harassment than others. This is true because OCR guidance is responsive to questions that have been posed to it.

employee.”¹⁴¹ This term, which appeared only once, in a heading, in the old Title IX regulations, was first defined in OCR 2001 guidance.¹⁴²

Although the 2001 guidance policy remained in place even after DOE rescinded other significant OCR policies and guidance in 2017,¹⁴³ the phrase “responsible employee” does not appear in the new regulations. It is reasonably safe, therefore, to predict there will be little to no vitality to this phrase going forward¹⁴⁴ in OCR enforcement of Title IX law and regulations.¹⁴⁵ Nonetheless, many schools have, over the past decade, moved toward categorizing most or all employees as “responsible employees” who have a mandatory reporting obligation.¹⁴⁶ It is estimated that 69% of institutions classify all employees as mandatory reporters and 19% so classify most employees.¹⁴⁷ It remains, therefore, important to understand how mandatory reporting became nearly universal and why it is harmful.¹⁴⁸

The 2001 guidance –which is still in force-- provided the potential for a school’s culpability for student-to-student, aka peer harassment, when the school was on notice of a sexually hostile environment and did not take immediate and effective steps to ameliorate the environment.¹⁴⁹ The 2001 guidance defines notice as occurring when a “responsible employee” knew or should have known of the

¹⁴¹ WEINER, *supra* note 16, at 132.

¹⁴² WEINER, *supra* note 16, at 114. Although the term was used in a 1997 OCR guidance document, it was not fully defined and that guidance document was not focused on sexual assault. *Id.*

¹⁴³ JACKSON, *supra* note 7.

¹⁴⁴ Jim Hermes, *Washington Watch: What ED’s Title IX proposal means for your college*, COMMUNITY COLLEGE DAILY (Nov. 20, 2018), <http://www.ccdaily.com/2018/11/eds-title-ix-proposal-means-college/>. (This article posits that the proposed regulations are in “stark contrast” with the current practice vis a vis who has to report and when an institution is on notice and must take action based on a report).

¹⁴⁵ “Another change that has already generated a lot of debate is that colleges would be legally responsible for handling only those formal complaints that are made by an official who has the ability to remedy the situation. That doesn’t include reports from professors, resident advisers, and others.” Sarah Brown & Katherine Mangan, *What You Need to Know About the Proposed Title IX Regulations*, CHRONICLE OF HIGHER EDUCATION (Nov. 16, 2018), <https://www.chronicle.com/article/What-You-Need-to-Know-About/245118>.

¹⁴⁶ HOLLAND, *supra* note 28.

¹⁴⁷ *Id.* at 259.

¹⁴⁸ See WEINER, *supra* note 16.

¹⁴⁹ Office of Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEPARTMENT OF EDUCATION, at 13 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> [hereinafter 2001 Guidance].

harassment.¹⁵⁰ A “responsible employee” was then defined to include “any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.”¹⁵¹

The next significant guidance from OCR, the 2011 Dear Colleague Letter, did not directly discuss the phrase “responsible employee.” However, the 2014 OCR Q & A on Title IX and Sexual Violence did in response to a direct question about who is a “responsible employee.” It reiterated, rather unhelpfully, the language from the 2001 policy.¹⁵² Both of these have now been rescinded.

During this time period, OCR also began to conduct more frequent investigations of schools alleged to be in violation of Title IX.¹⁵³ Further, OCR started maintaining a public list of the investigations, a move that received bipartisan Congressional support.¹⁵⁴ It is likely that increased OCR administrative actions against individual institutions

¹⁵⁰ *Id.*

¹⁵¹ *Id.* The phrase “any other misconduct” in the second clause of this definition could theoretically capture all faculty who, for instance, have a duty to report cheating—which is clearly “other misconduct.” Professor Merle Weiner carefully sets out the fallacy of this broad interpretation. WEINER, *supra* note 19 at 107-111. She analyzed the use of that term in OCR guidance for over twenty years and concluded that the second prong of the responsible employee definition: an employee “who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees,” is best read as a subset of the third prong: “an individual who a student could reasonably believe has this authority or responsibility.” Although there is much to support this interpretation, Weiner argues that a prime reason is the 2014 Q & A document that specifically responded to the question of who constitutes a responsible employee. In its response, OCR stated that schools must be clear on who is and who is not a responsible employee and must make those categories clear to students so that students can make informed choices regarding disclosure. If all, or nearly all, employees should be deemed responsible employees, this clear categorization would be unnecessary. Further, Weiner explains, OCR guidance distinguished between all employees, who are obliged to inform students of reporting options and available services, and responsible employees, who must report an allegation of a sexual assault to the Title IX coordinator. Logically, these two categories are not the same, have different obligations, and the second group is smaller than the first.

¹⁵² 2014 *Questions and Answers on Title IX and Sexual Violence*, UNITED STATES DEPARTMENT OF EDUCATION (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

¹⁵³ Jennifer Steinhauer & David S. Joachim, *55 Colleges Named in Federal Inquiry Into Handling of Sexual Assault Cases*, NY TIMES (May 1, 2014), <https://www.nytimes.com/2014/05/02/us/politics/us-lists-colleges-under-inquiry-over-sex-assault-cases.html>.

¹⁵⁴ Tyler Kingkade, *55 Colleges Face Sexual Assault Investigations*, HUFFPOST (May 1, 2014), https://www.huffpost.com/entry/college-sexual-assault_n_5247267.

contributed to the widening embrace of the term “responsible employee” to include most university employees. This is so because the resolution agreements that OCR entered into with individual institutions suggested to some that OCR preferred or even demanded a broad definition of responsible employees.¹⁵⁵ For instance, the 2013 Resolution Agreement with the University of Montana provided that, going forward, “all employees . . . , except those who are statutorily barred from reporting,” are required “to report sexual assaults and harassment of which they become aware to the Title IX Coordinator.”¹⁵⁶ In addition, the agreement’s proclamation that it was to “be a blueprint”¹⁵⁷ for institutions of higher learning across the country “to protect students from sexual harassment and assault” no doubt enhanced the view that it contained the appropriate governing standards that would keep schools Title IX compliant.

In subsequent years, other OCR actions at specific colleges and universities enforced the belief that OCR was pushing a broad definition of “responsible employee.”¹⁵⁸ For instance, in its enforcement interaction with Wesley College some three years after the University of Montana Resolution Agreement “blueprint,” OCR expressed concerns about the potentially “over-inclusive” classification of “quasi-confidential” employees who could receive students disclosures without reporting identifying information.¹⁵⁹

OCR interactions with individual institutions were taken as applicable to other institutions, even if the schools were so different as to make OCR recommendations or resolutions for one school logically inapposite to another.¹⁶⁰ After all, Title IX applies to an enormous

¹⁵⁵ The University of Montana had one of the first resolution letters. *See* Letter from Anurima Bhargava and Gary Jackson to Royce Engstrom and Lucy France (May 9, 2013), <https://www2.ed.gov/documents/press-releases/montana-missoula-letter.pdf>. *See* WEINER, *supra* note 16 at 125-128.

¹⁵⁶ *See* Letter from Anurima Bhargava and Gary Jackson to Royce Engstrom and Lucy France (May 9, 2013), <https://www2.ed.gov/documents/press-releases/montana-missoula-letter.pdf>.

¹⁵⁷ *Id.* at 2.

¹⁵⁸ WEINER, *supra* note 16 at 126-129.

¹⁵⁹ *See* Letter from Beth Gellman-Beer to Robert E. Clark II (Oct. 12, 2016), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/0315232_9-a.pdf. This is unfortunate because the ability to have this intermediate category is an important part of the solution. To only permit a small category of confidential employees—i.e. those in some counseling or equivalent category—with everyone else being a responsible employee with mandatory reporting obligation is contrary to what survivors want and need and is not required by Title IX. *See infra* Part IV. A-B. for a discussion.

¹⁶⁰ In 2017, the Department of Education said that the Montana agreement was still in force but no longer had any precedential value. *See* Office For Civil Rights, *Q & A*

range of schools which limits the practicality of overly specific OCR guidance. As the move towards a broad definition of “responsible employee” grew, third parties started weighing in on the issue of who should be a responsible employee.¹⁶¹ Often, and especially early on, outside groups supported broadly defining responsible employees.¹⁶²

OCR’s 2017 Q&A on Campus Sexual Misconduct continued the use of the phrase responsible employee as it addressed the question of a school’s responsibility to combat campus sexual misconduct.¹⁶³ It referenced the retained 2001 policy guidance, stating that an institution must have a Title IX coordinator and that other employees “may be considered responsible employees” who can help “connect” the student to the Title IX coordinator.¹⁶⁴ There was no mention whether a mandatory reporting obligation attached to a “responsible employee.”

The new Title IX regulations do not use the term “responsible employee.” In fact, they omit the phrase in the one place it was used in the prior regulations, to wit: in the title of 34 CFR 106.8(a).¹⁶⁵ The old regulations captioned it “Designation of responsible employee.” New Section 106.8(a) is entitled “Designation of coordinator” and provides that each institution must “designate at least one employee to coordinate its efforts to comply with its responsibilities” under Title IX. This language is largely the same as the old regulations. The proposed regulations explained that the heading was changed to eliminate confusing language.¹⁶⁶ Further, public commentary following the issuance of the proposed regulations noted the reduced emphasis on “responsible employees.”¹⁶⁷

V. State Laws and the Effort to Codify Mandatory Reporting

A on Campus Sexual Misconduct, United States Department of Education, 7 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

¹⁶¹ See, e.g. Sine Anahita, *Trouble with Title IX*, American Association of University Professors (AAUP) (May – Jun. 2017), <https://www.aaup.org/article/trouble-title-ix#.XZ5DkVVKipo>.

¹⁶² See, e.g. WEINER, *supra* note 16 at 80-84.

¹⁶³ Office For Civil Rights, *Q & A on Campus Sexual Misconduct*, UNITED STATES DEPARTMENT OF EDUCATION (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

¹⁶⁴ *Id.* at 2.

¹⁶⁵ DEP’T OF EDUC., *supra* note 5 at 78.

¹⁶⁶ DEP’T OF EDUC., *supra* note 5 at 78.

¹⁶⁷ BROWN, *supra* note 145.

Colleges and universities have been debating and enacting policy on their definitional scope of Title IX “responsible employees” and those who would have an obligation to make an official report.¹⁶⁸ State and federal legislators also have been debating the idea of mandatory reporting.¹⁶⁹ In addition, at least two states have codified the use of the term responsible employee.¹⁷⁰ At their core, many of the laws being proposed, modified, and sometimes enacted¹⁷¹ deal with the interplay between campuses and local law enforcement when a campus receives a report of a sexual assault.¹⁷²

Beginning in 2013, a raft of bills introduced in state legislatures focused on the relationship between schools and local law enforcement vis a vis the reporting of campus sexual assault.¹⁷³ In 2015, there was also federal legislation proposed on the topic.¹⁷⁴ The latter, an amendment to the Clery Act, decreed that an institution could not conduct an internal investigation if it did not make a law enforcement referral.¹⁷⁵ It died in the 115th Congress and was reintroduced in April 2019 during the 116th Congress’s 1st Session.¹⁷⁶ After being introduced with 15 bipartisan co-sponsors, it was referred to the Health, Education, Labor and Pensions Committee.¹⁷⁷

In the state legislatures where bills were introduced between 2013 and 2017, the proposed legislation generally falls into three categories.

¹⁶⁸ See WEINER, *supra* note 16 at 99-106 for a discussion of disclosing versus reporting.

¹⁶⁹ See BRODSKY, *supra* note 16.

¹⁷⁰ Sexual Assault Policy for Institutions of Higher Education, Del. Code Ann. tit. 14 § 9001a – 9007a (West 2017). This statute was passed in 2016 and had effective dates in both 2017 and 2018. *Id.* Campus Safety and Accountability, Haw. Rev. Stat. § 304A-120. Massachusetts has pending legislation, S. Bill 2203, 2017-2018 Leg., 190th Sess. (Mass. 2017), introduced November 2, 2017.

¹⁷¹ See BRODSKY, *supra* note 16 at 139. Of 14 bills introduced in 11 state legislatures, only 4 were passed and those passed with significant revisions. See *infra* at page 31 for a discussion of the changes to, e.g., the Virginia and California statutes.

¹⁷² See BRODSKY, *supra* note 16 at 138-144 for an excellent discussion of these mandatory “referral” laws, which burgeoned in 2014 and 2015.

¹⁷³ Brodsky, *supra* note 16 at 138.

¹⁷⁴ Safe Campus Act, H.R. 3408 § 163(c)(1), 114 Cong. (2015).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* The Safe Campus Act was introduced during the 114th Congress but not signed into law. In 2015, the bill was reintroduced as The Campus Accountability and Safety Act, S. 856, 115th Cong. (2015). This bill was introduced by Senator Claire McCaskill during the 115th Congress, but did not pass. In April 2019, the Campus Accountability and Safety Act, S. 976, 116th Cong. (2019-2020), introduced by Senator Kirsten Gillibrand during the 116th Congress has been referred to the Committee on Health, Education, Labor, and Pensions. The two versions of the Campus Accountability and Safety Act, are identical, and neither proposes to reintroduce the internal investigation bar proposed in the Safe Campus Act in 2015.

¹⁷⁷ Campus Accountability and Safety Act, S. 976, 116th Cong. (2019-2020).

First, there are bills that either encourage or mandate cooperation between campuses and local law enforcement.¹⁷⁸ For instance, a bill might lead to a Memorandum of Understanding (MOU) between the two entities. The states that have passed MOU-type laws include Illinois,¹⁷⁹ Louisiana,¹⁸⁰ Minnesota,¹⁸¹ and Washington.¹⁸²

Second are the bills proposing what are sometimes called mandatory referral laws.¹⁸³ This type of proposed statute generally would require universities to make a referral of a disclosed sexual assault to local law enforcement, often within 24 hours of the disclosure.¹⁸⁴ These bills were introduced in several states. In all four states where some type of referral law was passed, the legislative process resulted in modification to the bills as initially proposed.¹⁸⁵ For instance, the California law passed specifies that campus referrals to local law enforcement will only include non-identifying information unless the victim/survivor consents to the release of identifying information after being informed of the right to have such information withheld.¹⁸⁶ Consequently, the bill to codify mandatory referrals resulted in a law that emphasized the right—not the requirement—to involve law enforcement.¹⁸⁷

Likewise, the mandatory referral bill introduced in Virginia in 2014, not long after the discredited Rolling Stone article about a botched fraternity rape investigation done by campus authorities, also resulted in a less rigid law that appears to be a thoughtful compromise of interests. As introduced, it was a mandatory referral bill was opposed by students who argued that it would reduce reporting and infringe on confidentiality.¹⁸⁸ As passed, the law provides that institutions must establish a review committee of at least three persons comprising a law enforcement representative, the Title IX coordinator or delegate, and

¹⁷⁸ BRODSKY, *supra* note 16 at 139.

¹⁷⁹ ILL. COMP. STAT. act 12/10 (2015).

¹⁸⁰ LA. STAT. ANN. § 3399.14 (2015).

¹⁸¹ MINN. STAT. § 135A.15 (2019).

¹⁸² WASH. REV. CODE c.92, § 5 (2015); WASH. REV. CODE § 28B.112.005 (2015).

¹⁸³ Alexandra Brodsky uses that term in her article to differentiate these from administrative mandatory reporting laws within a university's Title IX schema. BRODSKY, *supra* note 16, at 133 n.9 (“These laws are sometimes referred to in the press as “mandatory reporting” laws. For consistency, and to avoid confusion with other regimes of mandatory reporting within the university, I will refer to these laws as mandatory referral statutes.”).

¹⁸⁴ BRODSKY, *supra* note 16, at 140–41.

¹⁸⁵ *Id.* at 140–43.

¹⁸⁶ CAL. EDUC. CODE § 67383 (2014); Brodsky, *supra* note 13, at 139.

¹⁸⁷ BRODSKY, *supra* note 16, at 139.

¹⁸⁸ *Id.* at 141.

a student affairs representative.¹⁸⁹ The Title IX coordinator, upon receiving information from a responsible employee that an act of sexual violence may have been committed, must report that information—complete with any personally identifying information—to the committee. The committee meets and determines if a criminal referral without the survivor’s consent is warranted.¹⁹⁰ A referral “shall immediately”¹⁹¹ occur if it is “necessary to protect the health or safety of the student or individual” and pursuant to FERPA¹⁹² regulations that say that referral is warranted in the event that there is an “articulable and significant threat to the health or safety of a student or other individuals[.]”¹⁹³

Delaware and Hawaii have statutorily defined the term responsible employee.¹⁹⁴ The Delaware statute defines responsible employees to include, *inter alia*, “[f]aculty, teachers, or professors.”¹⁹⁵ Pursuant to the statute, responsible employees who become aware of a sexual assault must notify campus police with 24 hours who, in turn, must within 24 hours notify local law enforcement. The responsible employee must also inform the victim that a report will be made, tell them of their rights pursuant to the state Victim’s Bill of Rights and offered them services.¹⁹⁶ It is unfortunate that the right of a Delaware victim not to have an official report made is not honored.

The Hawaii statute simply provides that “[a]ll University of Hawaii faculty members” are designated as “responsible employees” under [Title IX] and “shall report any violations of University of Hawaii executive policies regarding sexual harassment, sexual assault, domestic violence, dating violence, and stalking to the Title IX coordinator...”¹⁹⁷ As the Hawaii law specifically links responsible

¹⁸⁹*Id.*

¹⁹⁰ VA. CODE. ANN. § 23.1-806 (2016); 34 C.F.R. § 99.36. The law specifies that the Title IX coordinator or any other responsible employee can report directly to law enforcement with the victim’s consent. *Id.* See also VA. CODE. ANN. § 23.1-806B.

¹⁹¹ VA. CODE. ANN. § 23.1-806F.

¹⁹² Federal Education Rights and Privacy Act, 20 U.S.C. § 1232g.

¹⁹³ VA. CODE. ANN. § 23.1-806 (2016); 34 C.F.R. § 99.36.

¹⁹⁴DEL. CODE. ANN. tit. 14, § 9001A (2017). This statute was passed in 2016 and had effective dates in both 2017 and 2018. *Id.* HAW. REV. STAT. § 304A-120 (2016). Massachusetts has pending legislation. See Mass. S. Bill 2203, 191st Cong. (2019).

¹⁹⁵ DEL. CODE. ANN. tit. 14, § 9001A(3) (2017).

¹⁹⁶ DEL. CODE. ANN. tit. 14, § 9002A(a) (2017).

¹⁹⁷ HAW. REV. STAT. § 304A-120(b) (2016). The statute does carve out from the mandated reporting of responsible employee faculty members those faculty who are deemed, pursuant to statute, confidential advocates. *Id.* at 304A-120(a)(5).

employees to Title IX, it is unclear what impact the removal of responsible employee from the Title IX regulations will have.

A more recent bill that went into effect in Texas on January 1, 2020 deserves special mention. SB 212¹⁹⁸ requires all non-student employees of postsecondary educational institutions to report to their institutions' Title IX coordinator or deputy any incident of dating violence, sexual assault, sexual harassment or stalking that they have witnessed or of which they become aware.¹⁹⁹ Failure to comply is a criminal misdemeanor and will lead to termination of employment.²⁰⁰ This law has received much pushback from across the spectrum. The organization “Foundation for Individual Rights in Education (FIRE)” calls it a terrible law.²⁰¹ Survivor groups oppose it.²⁰² A Forbes opinion piece calls it “the worst of both worlds.”²⁰³ This law, like the one in Virginia, had its origins in a college Title IX investigation that was beyond inadequate. Some have termed this the “Baylor Effect.”²⁰⁴

Accordingly, it is important to keep track of state law activity on this issue, regardless of the new Title IX regulations' impact on the widespread categorization of responsible employees. On one level, state laws have always been germane to Title IX reporting. For instance, state laws regarding privilege communications can (and do) impact who universities designate as confidential employees. These laws could even turn a responsible employee, i.e., one who has an obligation to report disclosure to the school's Title IX Coordinator, into a confidential source.²⁰⁵ In addition, state laws on mandatory reporting for child abuse would supersede a school's confidentiality policy with regarding to disclosure by students under 18 years of age.

¹⁹⁸ Tex. Educ. Code Ann. § 51.252 (West).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Andrew Kreighbaum, *Texas legislation contrasts with DeVos take on campus sexual misconduct*, Inside Higher Ed (June 19, 2019), <https://www.insidehighered.com/news/2019/06/19/texas-legislation-contrasts-devos-take-campus-sexual-misconduct>.

²⁰² *Id.*

²⁰³ Evan Gerstmann, *Don't Throw Professors In Jail For Respecting Student Confidentiality*, FORBES (May 28, 2019), <https://www.forbes.com/sites/evangerstmann/2019/05/28/dont-throw-professors-in-jail-for-respecting-student-confidentiality/#1f3b828127b9>.

²⁰⁴ KREIGHBAUM, *supra* note 259.

²⁰⁵ This caveat is found in the now-rescinded 2014 Guidance document. *See* U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, Q&A ON TITLE IX AND SEXUAL VIOLENCE (2014). However, it has also been codified in University policies. WEINER, *supra* note 19, at 157–58.

However, state laws codifying mandatory reporting should be challenged as being harmful to survivors.

VI. More Considered Options

*“Come on. Know better. Somebody, know better.”*²⁰⁶

A. Limiting Mandatory Reporters

Even before the 2011 and 2014 OCR guidance documents were rescinded, and Title IX regulations were changed to omit any reference to “responsible employees,” federal law, regulation, or agency “guidance” did not require all university employees be “responsible employees” with a concomitant reporting obligation.²⁰⁷ Although many institutions appeared to perceive it that way, the focus on all employees as responsible employees was largely in now-withdrawn OCR guidance.²⁰⁸ It is surely gone from the newly effective regulations.²⁰⁹

Nonetheless, in recent years many institutions of higher learning have declared that most if not all non-confidential employees are responsible employees with mandatory reporting obligations.²¹⁰ These determinations may be the result of extensive internal processes. Thus, schools are unlikely to rush to change their policies to a less expansive mandatory reporter requirement. That they no longer would have to fear a Title IX investigation does not necessarily override keeping policies recently enacted or seen by some to embody best practices.

Further, some colleges and universities have expressed concern that the new regulations are in some ways more prescriptive and will make complaint resolution more time-consuming and expensive. The Association of Independent Colleges and Universities in Massachusetts (AICUM) made that assertion in its comments to the

²⁰⁶ Lynn Melnick, *Landscape with Greyhound and Greasewood*, in *INDELIBLE IN THE HIPPOCAMPUS: WRITINGS FROM THE ME TOO MOVEMENT* (Shelly Oria ed., 2019).

²⁰⁷ See *infra* at xx for a discussion of how and why IHEs adopted wide-spread reporting mandates.

²⁰⁸ WEINER, *supra* note 16, at 125. It is true that the phrase was defined in 2001 OCR guidance which was not withdrawn, but since the term no longer appears in the regulations, that definition is functionally moot.

²⁰⁹ DEP’T OF EDUC., *supra* note 5 at 61481. Sarah Brown & Katherine Mangan, *What You Need to Know About the Proposed Title IX Regulations*, *CHRONICLE OF HIGHER EDUCATION* (Nov. 16, 2018), https://www.chronicle.com/article/What-You-Need-to-Know-About/245118?cid=trend_right_a

²¹⁰ HOLLAND, *supra* note 28 at 8-9.

proposed regulations.²¹¹ AICUM also articulated a concern that the proposed regulations would deter victims from coming forward.²¹² AICUM's comments noted that, over the past decade, its member institutions²¹³ have given close attention to the theretofore under-addressed issue of campus assault. The schools engaged in “foundational efforts to shift the culture of campuses” and to “above all” build trust with individuals.²¹⁴

While a hesitance to reformulate policy recently enacted is understandable, a school that remains committed to a universal or near universal definition²¹⁵ of employee as mandatory reporter risks retaining policies that could harm survivors, actually impede disclosure and, ultimately, reporting.²¹⁶ It is also arguable that the policies themselves violate Title IX by inhibiting survivors from accessing the services needed to receive an equal education, defined here as access to educational opportunities free from sex-based harassment (including sexual assault and sexual violence) and discrimination.²¹⁷ Therefore, in addition to highlighting the dangers of those policies, it is important to know there are alternatives.

B. University of Oregon's Three Tiers of Employees— “A Better Policy”²¹⁸

In 2017, the University of Oregon concluded a more-than-eight-month process of assessing its policy on which university employees

²¹¹ Letter Richard Doherty to Secretary Betsy DeVos, (Jan. 23, 2019) <http://aicum.org/wp-content/uploads/2019/01/AICUM-public-comments-on-Notice-of-Proposed-Rulemaking-%E2%80%9CNPRM%E2%80%9D-amending-regulations-implementing-Title-IX-of-the-Education-Amendments-of-1972-Title-IX%E2%80%9D-Docket-ID-ED-2018-OCR-0064.pdf> (AICUM noted that this would operate to the disadvantage of everyone in the process, including respondents, witnesses and higher educational institutions.).

²¹² *Id.* at 16.

²¹³ Its members are 55 schools of higher education, from the Massachusetts Institute of Technology to the New England College of Optometry. Approximately 275,000 students and over 100,00 employees populate the member institutions. *Id.* at 1.

²¹⁴ *Id.* at 1.

²¹⁵ Virtually all schools have created a category of “confidential employees,” counselors and the like, who are exempted from disclosing against the wishes of the discloser. WEINER, *supra* note 13, at 121–23. At one time, however, OCR guidance was interpreted by some to mandate disclosure by this category of employees. WEINER, *supra* note 13 at 130 n.284.

²¹⁶ See WEINER, *supra* note 16, at 87-107 for a discussion of how these policies generate harm.

²¹⁷ WEINER, *supra* note 16, at 166-183.

²¹⁸ WEINER, *supra* note 16, at 131-136.

should be required to report disclosures.²¹⁹ As a result, it adopted a three-tiered taxonomy for employee reporting.²²⁰ Those three categories are confidential employee,²²¹ designated reporter,²²² and student-directed employee.²²³

The first two are familiar, in concept if not in scope. A confidential employee does not need to report a disclosure of sexual assault against the discloser's wishes but is required to provide information to the disclosing student regarding resources and reporting options.²²⁴ This category encompasses those who could "oppose successfully an application for a court order seeking disclosure."²²⁵ It includes health care and counseling professionals as well as the University Ombud and members of the crisis intervention and sexual violence support services teams.²²⁶ Certain attorney employees also fall within this category.²²⁷ As is typical with this category generally, it roughly conforms those who have a legal privilege.²²⁸

The second category of designated reporter is equivalent to the responsible employee or mandatory reporter concept. Designated reporters must report disclosures to the Title IX coordinator.

²¹⁹ Darci Heroy, May 2017 Responsible Reporting Memo, University of Oregon (May 2017),s
<https://web.archive.org/web/20170918105443/https://prevention.uoregon.edu/reportingmemo>.

²²⁰ *Id.* This new policy was enacted simultaneously with the university's adoption of Callisto, the on-line anonymous reporting system. See WEINER, *supra* note 19 at 149-155 for a discussion of Callisto and other on-line reporting options.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ University of Oregon, *Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy: Policy No. V.11.06* (Sept. 15, 2017) at II. E., <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/student-sexual-and-gender-based-harassment-and>. See also HEROY, *supra* note 219.

²²⁵ University of Oregon, *Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy: Policy No. V.11.06* (Sept. 15, 2017) at I., <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/student-sexual-and-gender-based-harassment-and>

²²⁶ University of Oregon, *Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy: Policy No. V.11.06* (Sept. 15, 2017) at II. E., <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/student-sexual-and-gender-based-harassment-and>.

²²⁷ *Id.*

²²⁸ The policy has useful explanations as to limits concerning privilege in the context of the policy. University of Oregon, *Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy: Policy No. V.11.06* (Sept. 15, 2017) at II. E., <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/student-sexual-and-gender-based-harassment-and>.

However, the University of Oregon’s policy defines this category in a relatively narrow fashion, especially when compared to its overbroad definition at the vast majority of institutions. At Oregon, designated reporters include high-level employees, supervisory employees, and those with special student responsibilities such as a director of student conduct.²²⁹ The limited scope of employees who are designated reporters rests on the notion that these are “employees who have the authority to address prohibited conduct and whom students would reasonably expect to have the authority to remedy prohibited conduct... .”²³⁰

Significantly, under the University of Oregon’s 2017 policy, rank and file faculty members are not designated reporters.²³¹ There has been significant critique nationally over defining “responsible employee” to include non-supervisory faculty members.²³² This objection has been voiced by the American Association of University Professors²³³ as well as individual faculty at specific institutions.²³⁴ In addition, Professor Weiner’s analysis of this issue suggests that a proper reading of pertinent OCR guidance and U.S. Supreme Court cases lead to the conclusion that all faculty ought not be designated as responsible employees.²³⁵ Other scholars have also focused on the obvious disadvantages of faculty betraying student confidences.²³⁶

²²⁹ HEROY, *supra* note 219. Further, the Title IX Coordinator may change which employees are designated reporters “as necessary.” University of Oregon, *Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy: Policy No. V.11.06* (Sept. 15, 2017) at II. D., <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/student-sexual-and-gender-based-harassment-and>.

²³⁰ University of Oregon, *Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy: Policy No. V.11.06* (Sept. 15, 2017) at I., <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/student-sexual-and-gender-based-harassment-and>. The policy also provides that, if an employee falls within both the confidential employee and designated reporter category, the confidential employee designation prevails.

²³¹ University of Oregon, *Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy: Policy No. V.11.06* (Sept. 15, 2017) at I., <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/student-sexual-and-gender-based-harassment-and>.

²³² WEINER, *supra* note 16 at 131.

²³³ AAUP, *The History, Uses, and Abuses of Title IX* (Jun 2016), <http://www.aaup.org/file/TitleIXreport.pdf>, at 84.

²³⁴ Colleen Flaherty, *Endangering a Trust*, INSIDE HIGHER ED (Feb. 4, 2015), <https://www.insidehighered.com/news/2015/02/04/faculty-members-object-new-policies-making-all-professors-mandatory-reporters-sexual>.

²³⁵ WEINER, *supra* note 16, at 140-141.

²³⁶ SMITH, *supra* note 104. Obviously, universities and colleges should clearly publish which employees are mandatory reporters; however, part of the definition, per OCR

C. Other Institutions that Limit Mandatory Reporters

The University of Oregon’s narrower structuring of the designated reporter, a.k.a. responsible employee, category shares company with a few other schools. Other schools that have likewise opted not to stretch the responsible employee category to all non-confidential employees include institutions as diverse as Brown University,²³⁷ Cal-Tech,²³⁸ The Catholic University of America,²³⁹ Hofstra University,²⁴⁰ University of Nebraska-Lincoln,²⁴¹ New York University,²⁴² University of Michigan,²⁴³ University of North Carolina,²⁴⁴ and the University of

guidance and U.S. Supreme Court case, of a responsible employee turns on student expectations.

²³⁷ Brown University, Title IX and Gender Equity: I am a responsible employee, <https://www.brown.edu/about/administration/title-ix/get-help/i-am-responsible-employee>

²³⁸ Thomas F. Rosenbaum, Caltech Institute Policy, Gender-based Misconduct, http://hr.caltech.edu/documents/2925/caltech_institute_policy-gender_based_misconduct.pdf

²³⁹ Catholic University of America, Sexual Offenses Policy (Employees and Third Parties), <https://policies.catholic.edu/faculty-staff/employment/ceo/sexharass.html>.

²⁴⁰ Hofstra University, Student Policy Prohibiting Discriminatory Harassment, Relationship Violence, and Sexual Misconduct 2019-2020 at 9, <https://www.hofstra.edu/pdf/studentaffairs/deanofstudents/commstandards/commstandards-policies-sexualassault.pdf>

²⁴¹ University of Nebraska-Lincoln, UNL Employees Title IX Responsibility Guide, <https://www.unl.edu/equity/TitleIXDownload/UNL%20Employees%20Title%20IX%20Guide.pdf>

²⁴² New York University, Sexual Misconduct, Relationship Violence, and Stalking Policy, at 5, <https://www.nyu.edu/content/dam/nyu/compliance/documents/SexualMisconductPolicy.April%202018.pdf>.

²⁴³ University of Michigan, Interim Policy and Procedures on Student Sexual and Gender-Based Misconduct and Other Forms of Interpersonal Violence, at 11, <https://studentsexualmisconductpolicy.umich.edu/files/smp/SSMP-Policy-PDF-Version011519.pdf>.

²⁴⁴ University of North Carolina at Chapel Hill, Policy on Prohibited Discrimination, Harassment and Related Misconduct Including Sexual and Gender-Based Harassment, Sexual Violence, Interpersonal Violence and Stalking, at Part VI. A., <https://unc.policystat.com/policy/7019871/latest/>. Under this policy, only employees with administrative or supervisory responsibilities or those designated as Campus Security Authorities are responsible employees. After setting forth the scope of the category, the policy provides that responsible employees “will safeguard an individual’s privacy, but are **required** by the University to immediately share all details about a report of *Prohibited Conduct*...” VI. A. [emphasis in the original]. The policy does not provide guidance on how the responsible employee is to comply with these seemingly contradictory mandates. Moreover, all other employees except those designated as “confidential resources” and all students are “**strongly encouraged**”—again emphasis in the original—to share “any information with appropriate personnel—ie Title IX Compliance Coordinator. VI.B. Thus, this policy wisely narrows the scope of responsible employees. But it undercuts that good by strongly encouraging reporting—presumably against a discloser’s wishes. And while also mandating that an individual’s privacy will be safeguarded. It is not hard to

South Carolina.²⁴⁵ Many of these policies were reviewed or updated in 2018 or 2019.

Where the Oregon policy breaks new and important ground is in its novel and thoughtful category of “student-directed employee.”²⁴⁶ A student-directed employee is any employee who does not fall within one of the other two categories and this “includes most faculty, staff, administrators, student-staff.”²⁴⁷ Student-directed employees have three basic responsibilities.²⁴⁸ First, they are required to provide disclosing students with information about campus support and reporting options.²⁴⁹ Second, they are required to consult with a confidential employee, who is a person with more expertise.²⁵⁰ This consultation is intended to ensure that student-directed employees have the information needed to both assist the disclosing student and to assess the level of risk present.²⁵¹ This consultation also serves to

understand the frustration and harm that results from such policies. See SMITH, *supra* note 155, at 122-123, for a discussion on institution betrayal. See also University of Oregon policy principle No. 4. Do No Harm. JD – Do you mean (“In all cases, the University’s response is designed to consider the victim’s preferences regarding the University’s response, and to provide deference to a victim’s wishes wherever possible.) If so this is *University of Oregon, Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy: Policy No. V.11.06 (Sept. 15, 2017)*, <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/student-sexual-and-gender-based-harassment-and>.

²⁴⁵ University of South Carolina, Office of Equal Opportunity Programs, Sexual Misconduct, Intimate Partner Violence and Stalking, at 7, <http://www.sc.edu/policies/ppm/eop105.pdf>.

²⁴⁶ *University of Oregon, Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy: Policy No. V.11.06 (Sept. 15, 2017)* at X., <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/student-sexual-and-gender-based-harassment-and>.

²⁴⁷ *University of Oregon, Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy: Policy No. V.11.06 (Sept. 15, 2017)* at II. F., <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/student-sexual-and-gender-based-harassment-and>.

²⁴⁸ The Oregon policy contains much detail and specificity to guide both employees and students. This is particularly helpful and stands in contrast to the rather muddled policies extant elsewhere.

²⁴⁹ *University of Oregon, Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy: Policy No. V.11.06 (Sept. 15, 2017)* at III. C., <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/student-sexual-and-gender-based-harassment-and>.

²⁵⁰ They must consult with “confidential employees” who are employees with special knowledge and who are positions who are not required to report. *Id.*

²⁵¹ The presence of imminent risk is the core exception to a student-directed employee’s obligation to keep a confidential disclosure confidential. *University of Oregon, Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy: Policy No. V.11.06 (Sept. 15, 2017)* at III. C. 10a., <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/student-sexual-and-gender-based-harassment-and>. Further, the student-

ensure that student-directed employees are themselves supported.²⁵² Third, student-directed employees must assist students who wish to report with the process of reporting.²⁵³ Having this category of employee enables a student to disclose, be assured of support, and get assistance in reporting to the Title IX coordinator if that is the student's wish. But if it is not his or her wish, confidentiality is assured, absent the risk of imminent risk of serious harm.²⁵⁴ And, critically, the survivor still has access to support. Prior to this policy change, the university, like many others, had considered nearly all employees to be "responsible employees." According to Professor Merle Weiner, who chaired the university group that devised the policy, the group was guided by nine "first principles," which Professor Weiner believes are largely "generalizable" to other institutions.²⁵⁵ Those principles include what should be the non-negotiable concept of "do no harm."²⁵⁶ By conceptualizing and creating the "student-directed" employee category and providing clear guidance therefor, the policy has the promise of living up to this principle. Of course, one must always be mindful of and guard against the risk—or perhaps even the inevitability—of unintended consequences.²⁵⁷

The ALI Principles Discussion draft, in its 3.5.b. principle, suggests that colleges and universities "should consider alternative approaches

directed employee is required to inform a student of this exception when a conversation begins. University of Oregon, *Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy: Policy No. V.11.06* (Sept. 15, 2017) at III. C. 2, <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/student-sexual-and-gender-based-harassment-and>.

²⁵² *Id.* Discuss why this matters—not all SD employees will know what to do or how to handle this information.

²⁵³ *Id.*

²⁵⁴ University of Oregon, *Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy: Policy No. V.11.06* (Sept. 15, 2017) at II. C. 10a, <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/student-sexual-and-gender-based-harassment-and>. The exception policy may also mandate reporting if the student is under 18, i.e. not a legal adult, and discloses behavior that would constitute abuse. University of Oregon, *Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy: Policy No. V.11.06* (Sept. 15, 2017) at III. C. 10b, <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/student-sexual-and-gender-based-harassment-and>. In this circumstance, the student-directed employee must comply with state law on child abuse reporting. *Id.*

²⁵⁵ WEINER, *supra* note 16 at 133-134.

²⁵⁶ *Id.* Harm can occur when reporting happens contrary to a survivor's wishes. See WEINER, *supra* note 16, at 88, 88 n.71 for a discussion of harm.

²⁵⁷ See Dunlap, *supra* note 130 for a cataloguing of the harms that have arisen as a result of "reforms" in intimate partner violence law and policy.

to ... defining the obligations of those who are neither mandatory reporters nor confidential resources, with a view toward improving the options for students seeking advice and support for responding to sexual misconduct.”²⁵⁸ The University of Oregon policy is such an alternative approach. Indeed, in its reporters’ notes to this principle, ALI cites to the University of Oregon’s “different approach” in creating the student-directed employee. This middle category of employees, who are neither responsible employees with their mandatory reporter function nor confidential resources, is “a promising direction” for institutions to contemplate.²⁵⁹

D. ALI Draft Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities

In 2015, the American Law Institute (ALI) began work on a project entitled “Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities.” In April 2018, it issued a discussion draft of the first three of 11 proposed chapters for discussion at its 2018 Annual Meeting.²⁶⁰ The chapters released were: 1) First Principles for Procedural Frameworks; 2) Notice and Clarity of Policies; Consistency of Implementation; Support and Interim Measures; and 3) Reporting Sexual Assault and Related Misconduct. In addition, it contains an Introductory Note that sets forth in detail the legal landscape over the years since Title IX’s enactment.²⁶¹

In describing the project, the ALI Reporters’ Memorandum explains that it is addressing “an especially dynamic area of law and policy.”²⁶² It continues that not only is the “federal policy landscape” in flux, but also notes that there is a significant increase in caselaw, due to lawsuits brought by students against universities, as well as increased scholarship on the issues.²⁶³

²⁵⁸ AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW, STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLEGES AND UNIVERSITIES (2018) at 86.

²⁵⁹ *Id.* at 88.

²⁶⁰ AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW, STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLEGES AND UNIVERSITIES (2018).

²⁶¹ *Id.* at 3-12.

²⁶² *Id.* at xvii.

²⁶³ *Id.* at xviii.

Chapter Three of the ALI draft covers the Reporting of Sexual Assault and Related Misconduct, which is the topic most pertinent here. The chapter has eight discrete components addressing both the disclosing and reporting of sexual misconduct. Chapter Three encourages students to both disclose and report.²⁶⁴ The disclosing should be done in a confidential way that would provide the student with access to “support and care.”²⁶⁵ The reporting would permit the institution to have “better tracking of and response to incidents.”²⁶⁶

Chapter Three recognizes the importance of, wherever possible, respecting the disclosing student’s request to not begin an investigation of the alleged student-perpetrator.²⁶⁷ It also states that institutions should leave both the choice and manner of reporting with the student.²⁶⁸

Further, Chapter Three urges schools to exercise judgment in determining which faculty and staff should have an obligation to report complaints of sexual misconduct to the school’s Title IX coordinator or designee.²⁶⁹ Advising deliberation in determining which employees are mandatory reporters runs contrary to much current thought and policy even if it is now less of a focus under the current Title IX regulations. A deliberative process here is, however, sound policy as Sec. 3.5 demonstrates. Earlier in the draft, the reporters explain that although perhaps counterintuitive at first glance, respecting the confidentiality request of one who is disclosing an allegation of sexual misconduct will, in fact, enhance the chances that the discloser will ultimately choose to make a formal report.²⁷⁰ Section 3.5 clearly has Title IX goals in mind when it states that schools should “carefully weigh” the classification of employees who are mandatory reporters in light of the “school’s educational interests in facilitating students’ ability to seek and obtain appropriate guidance.”²⁷¹

²⁶⁴ *Id.* at 66-67.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 67.

²⁶⁷ *Id.* at 96. In addition to addressing just procedural issues, the ALI draft principles focus on colleges and universities, not grades K-12, and peer misconduct, not faculty to student misconduct. Principles at xiii. The introductory note explains that the choice to focus on student-to-student misconduct arose from the “strong sense” of project advisers that this was the area in which “colleges and universities most urgently needed... guidance. *Id.* at 3.

²⁶⁸ *Id.* at 61.

²⁶⁹ *Id.* p. 77.

²⁷⁰ *Id.* at 66-67.

²⁷¹ *Id.*

In sum, the ALI draft principles on disclosing and reporting are themselves the product of a deliberative approach and have much to recommend them. One can hope that when they are finally released (or perhaps even before) and read in conjunction with the new regulations' de-emphasis on a large number of employees who are mandatory reporters, universities will take heed. This approach would, as the draft principles explain, lead to results desired by most.

VII. Conclusion

Title IX is an important tool in the battle to eliminate sex discrimination in educational opportunity. It is, however, an imperfect tool and has led to much dissention over the proper way to implement it. After over 20 years of using it to combat sexual assault on college campuses and in this time of new regulations governing Title IX, it is well to remember both what Title IX is and what it is not. It is a federal law enacted to secure equal education opportunity regardless of an individual's sex. It is not a criminal statute and does not impose criminal penalties.²⁷² It is a civil rights statute intended to protect against sexual misconduct in education institutions.

The accused and the accusers have long wrangled over the proper implementation of Title IX on college campuses. This discord is in part due to efforts to use Title IX in ways that do not heed its mission. This wrangling and the disappointment wrought by poorly done investigations have led to lawsuits against universities by both the accused and the accuser.

One thing is certain: for too long, campus sexual assault was ignored and diminished. The process that ensued afforded little relief to the victim. There may be some semblance of better implementation of late but now the accused have cried foul, alleging a process tilted in favor of the accuser. There is acrimony about whether the accused is being ignored too often or believed too often. This finger-pointing and related concerns about the process involved in the investigation of a Title IX complaint sometimes takes all the air out of the room. And that is a problem because it draws attention away from other areas where fixes are both needed and feasible.

The goal of Title IX processes should be to get survivors of sexual assault the support they need in order to continue with their

²⁷² DREW, *supra* note 10, at 205.

educational endeavors. Sometimes that support includes a full investigation pursuant to a report made to the Title IX coordinator. But sometimes, perhaps often, it is less than that. Perhaps accommodations in a class schedule or student housing. Perhaps counseling. What does not help the accuser is requiring that the all helpers on campus--persons to whom a victim feels comfortable disclosing—must report the disclosure to a Title IX coordinator or designee even when such a report is against the disclosing student's wishes. This drives down disclosure—which is the opposite of what we all should want. In driving down disclosure, services and accommodations that are intended to achieve the Title IX goals of combatting educational sex discrimination are driven away. Even for those who are on opposite sides of the Title IX procedural challenges, can't this be an area of agreement?

DRAFT