

# INVESTIGATIVE VS. MANDATORY REPORTING: WEAPONIZING TITLE IX AGAINST JOURNALISTS

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*In 2019, NPR and ProPublica published a series of articles about faculty sexual assault coverups at the University of Illinois. Administrators responded by requiring journalists at the NPR station at Springfield to be “responsible employees,” or “mandatory reporters,” under federal Title IX rules—eliminating the confidentiality that assault survivors might need before telling journalists their stories. This Article discusses the nascent problem and its implications for educational institutions and the academic press. After reviewing the history of Title IX, we provide a detailed account of the Illinois case and give a battery of recommendations to prevent future university attempts at weaponizing Title IX against journalists. We urge legislatures and universities to eliminate the “wide-net” mandatory reporter designation and to expand responsible-employee carveouts to include university-affiliated journalists and student reporters who work at campus media outlets.*

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## I.

### INTRODUCTION

#### A. *Unsettling Statistics*

Every sixty-eight seconds, an American is sexually assaulted.<sup>1</sup> Nine out of ten of those survivors are women.<sup>2</sup> Despite the rise of the #MeToo movement in the 2000–10s, women do not often report being sexually assaulted. One 2020 study puts the figure at 23% in the population at large.<sup>3</sup> For men, the study suggests even lower numbers: only 3% of men report their assaults.<sup>4</sup>

Sexual misconduct on college campuses poses a serious and growing problem. In a 2019 survey by the Association of American

1. *About Sexual Assault, RAPE, ABUSE, AND INCEST NAT’L NETWORK*, <https://rainn.org/about-sexual-assault> [<https://perma.cc/4DQH-B3WA>] (last visited Sept. 3, 2021) (RAINN describes itself as “the nation’s largest anti-sexual violence organization,” offering hotlines and other resources to sexual assault survivors and helping bring perpetrators to justice.).

2. Victoria Brown, Gregory Haffner, Dana Holmstrand, Caroline Oakum, Elana Orbuch, Victoria Pavlock, & Samantha Pepperl, *Twenty-First Annual Review of Gender and the Law: Annual Review Article: Rape & Sexual Assault*, 21 *GEO. J. GENDER & L.* 367, 374 (2020).

3. *Id.* at 376. (finding that college women report sexual assault less frequently, at 20%, and the cases of sexual assault survivors who choose to participate in the criminal justice system will likely not go to trial because of insufficient evidence or plea deals offered to perpetrators.)

4. The study further notes that “Men already face unique barriers to reporting, such as concern about being called homosexual and the societal pressure to appear masculine; laws that do not acknowledge their victimization may reinforce the stereotype that men cannot be raped.” *Id.* at 374. For this reason, there is a growing movement to make gender-specific rape and sexual assault laws gender-neutral, to acknowledge the possibility of female, male, and non-binary survivors.

Universities (AAU), completed by 181,752 students across thirty-three universities, 13% of students reported experiencing “nonconsensual sexual contact by physical force or inability to consent”—with higher rates reported by women, transgender or gender-nonconforming individuals, and undergraduate students.<sup>5</sup> The AAU’s 2019 survey expanded upon a 2015 survey across twenty-seven universities, in which 11.7% of students reported experiencing either unwanted penetration or sexual touching.<sup>6</sup>

Virtually every college campus offers awareness and reporting training (both mandatory and voluntary), advocacy groups, classes, and a variety of resources and personnel devoted to supporting and assisting those who have suffered sexual trauma, harassment, or discrimination. But those resources often go untapped. The AAU’s 2019 findings about survivors’ willingness to report revealed that only 29.5% of women, 42.9% of transgender or gender-nonconforming individuals, and 17.8% of men said that they contacted university support or advocacy organizations if they suffered nonconsensual penetration.<sup>7</sup>

Survivors of sexual assault cite a variety of reasons why they do not report their experiences to authorities or those outside their circles

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5. DAVID CANTOR, BONNIE FISHER, SUSAN CHIBNALL, SHAUNA HARPS, REANNE TOWNSEND, GAIL THOMAS, HYUNSHIK LEE, VANESSA KRANZ, RANDY HERBISON & KRISTEN MADDEN, ASS’N OF AM. UNIVS., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT, at ix (rev. 2020), [https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7\\_\(01-16-2020\\_FINAL\).pdf](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf) (using the abbreviation TGQN to denote students who listed their gender identity as one of the following categories: transgender woman, transgender man, nonbinary/genderqueer, gender questioning, or gender not listed).

6. DAVID CANTOR, BONNIE FISHER, SUSAN CHIBNALL, REANNE TOWNSEND, HYUNSHIK LEE, CAROL BRUCE & GAIL THOMAS, ASS’N OF AM. UNIVS., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT 16 (rev. 2017), <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf>. See also Brown et al., *supra* note 2, at 374–76 (2020) (summarizing additional statistics on sexual assault).

7. The report divides responses into those involving unwanted penetration and those of unwanted sexual touching. The report defines an instance of sexual penetration where “one person puts a penis, finger, or object inside someone else’s vagina or anus.” Sexual touching is defined as “kissing; touching someone’s breast, chest, crotch, groin, or buttocks; or grabbing, groping, or rubbing against another person in a sexual way, even if the touching is over the other person’s clothes.” For reference, sexual harassment is defined as “behaviors with sexual connotations that interfered with an individual’s academic or professional performance, limited the individual’s ability to participate in an academic program, or created an intimidating, hostile, or offensive social, academic, or work environment. CANTOR ET AL., *supra* note 5, at v.

of family and friends,<sup>8</sup> including their own feelings of guilt and shame, fear that they will not be believed, concern that the system will not work on their behalf, and knowledge that most perpetrators go unpunished (less than 1% of reported assaults result in a felony conviction).<sup>9</sup> The AAU 2019 study echoes some of these same rationales: student survivors said they could “handle it themselves,” thinking that the incident was not serious enough to warrant outside or formal intervention and experiencing feelings of embarrassment or shame that kept them quiet.<sup>10</sup>

Significant percentages of survivors also told the AAU that they thought no campus resources could help them (reported by 21.9% of the women, 19.6% of the men, and 36.3% of transgender/gender-non-conforming students).<sup>11</sup> But these individuals did not stay completely silent. Over three-quarters of all respondents said that they told someone else—usually friends, family members, or medical professionals.<sup>12</sup>

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8. See, e.g., Marla E. Eisenberg, Katherine Lust, Michelle A. Mathiason & Carolyn M. Porta, *Sexual Assault, Sexual Orientation, and Reporting Among College Students*, 36(1-2) J. INTERPERSONAL VIOLENCE 62, 65, 73–74 (2021) (finding that while 57.4% of female and 37.1% of male heterosexual survivors talked to their social contacts about their sexual assaults, no men and only 4.4% of the women told a campus authority; similar trends were found among sexual minorities such as pansexual and LGBTQ students). In addition, this study reports that the “effectiveness of [campus support] services varies considerably, and research has shown that certain post assault experiences, particularly with the medical and legal systems, may be retraumatizing for victims” and “other studies have demonstrated that women who do report the assault and seek assistance find the [reporting] experience helpful, beneficial, healing, and associated with lower levels of regret, self-blame, distress, and posttraumatic stress disorder (PTSD), especially when assisted by an advocate within the medical or legal system. . .” *Id.* at 65.

9. Brown et al., *supra* note 2, at 375. See Kimberly A. Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 157 (2012) (finding similarly low reporting, prosecution, and conviction rates: of 100 rapes committed, only between five and twenty are reported, resulting in 0.4–5.4 prosecutions, 0.2–5.2 convictions, and 0.2–2.8 incarcerations).

10. CANTOR ET AL., *supra* note 5, at 30 (noting that “Across the genders. . . the most common responses for penetration was that they could handle it themselves (48.8% women, 60.4% men, 40.1% TGQN [trans, gay, queer, nonconforming] students), the incident was not serious enough to contact a program or resource (47.4% women, 42.5% men, 42.0% TGQN students), and because the person felt embarrassed, ashamed, or that it would be too emotionally difficult to report (41.7% women, 27.9% men, 36.0% TGQN students)”).

11. *Id.*

12. *Id.* at 32 (“Overall, 85.9 percent of women, 78.6 percent of men, and 83.1 percent of TGQN students who had experienced nonconsensual penetration told at least one other person.”). See also Courtney E. Ahrens, Rebecca Campbell, N. Karen Ternier-Thames, Sharon M. Wasco, & Tracy Sefl, *Deciding Whom to Tell: Expectations and Outcomes of Rape Survivors’ First Disclosures*, 31 PSYCH. WOMEN Q. 38,

Telling one's story of surviving assault has long been considered a necessary component of the healing process. As sociologist Susan Rose puts it, "Ultimately, recovering from trauma is not just an individual act but a collective process: it demands dialogue."<sup>13</sup> That communicative act, as the AAU data demonstrate, can take many forms, and most listeners in whom survivors confide were not occupying official university roles. Not surprisingly, "journalist" does not appear on the AAU's list of common confidantes either. Yet some college sexual assault and harassment survivors, whether to support their own recoveries or to shed light on a crisis that university officials might prefer to stay hidden, want to share their experiences with the public but without their names attached. They have trusted journalists to tell those stories.<sup>14</sup> And as more survivors' stories get told, administrative officials who prefer to keep the extent of sexual misconduct on university campuses hidden from public knowledge must find innovative ways to suppress truthful information.

The vitality of the academic press, to both institutional responsibility and restorative justice, must be acknowledged.<sup>15</sup> Student and university-affiliated journalism advances several important policy objectives of Title IX: promoting university accountability for sexual misconduct, even in climates of lax regulatory enforcement and litig-

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45 (2007) (finding that "the vast majority of rape survivors initially disclose to informal support providers").

13. Susan D. Rose, *Naming and Claiming: The Integration of Traumatic Experience and The Reconstruction of Self, in Survivors' Stories of Sexual Abuse*, in *TRAUMA: LIFE STORIES OF SURVIVORS* 173 (Kim Lacy Rogers, Selma Leydesdorff, & Graham Dawson eds., 2004).

14. See, e.g., Ken Armstrong & T. Christian Miller, *An Unbelievable Story of Rape*, MARSHALL PROJECT (Dec. 16, 2015), <https://www.themarshallproject.org/2015/12/16/an-unbelievable-story-of-rape#.P8UN3xvjd> [<https://perma.cc/KY2K-SVLL>].

15. As the name suggests, restorative justice is an alternative to a punishment-based approach to criminal acts that focuses on the repairing of harm, usually in a collaborative process. See, e.g., Margo Kaplan, *Restorative Justice and Campus Sexual Misconduct*, 89 TEMP. L. REV. 701, 704 (2017) (describing restorative justice as processes that "generally bring together victims, responsible parties, and other harmed parties (including community representatives) to explore the harm done by the offense and collectively determine how best to repair it"). Among possible repairs is the creation and maintenance of "activities to reinforce anti-sexual violence norms in the campus community," Mary P. Koss, Jay K. Wilgus, & Kaaren M. Williamsen, *Campus Sexual Misconduct*, 15 TRAUMA, VIOLENCE & ABUSE 242, 252 (2014). Student media can build awareness of campus values and provide important publicity for such activities, particularly in the areas of sexual assault and harassment. As one scholar puts it, "College media are important sites for . . . raising awareness about the prevalence of sexual assault and the conditions—including institutional failures—that allow it to occur." Barbara G. Friedman, *'An Obligation to Ourselves and Our Peers': College Newspapers Frame the Cause of Campus Sexual Assault*, 48 MEDIA REPORT TO WOMEN 6, 8 (2020).

ious respondents;<sup>16</sup> expanding restorative justice options that emphasize survivors' self-determination and psychological autonomy;<sup>17</sup> and enhancing institutional responsiveness to sexual assault allegations.<sup>18</sup> By limiting choices about whether and how to report alleged instances of sexual assault, universities' mandatory reporting requirements counterintuitively diminish survivors' agency in the aftermath of victimization.<sup>19</sup> Loss of control disincentivizes survivors from sharing information or cooperating with investigatory authorities<sup>20</sup>—and, by extension, inhibits the healing process.<sup>21</sup> Clearly, such treatment smacks of university paternalism; adult women survivors are doubtless competent to make personal decisions.<sup>22</sup> But the broader implications of wide-net reporting tactics are even more worrisome.<sup>23</sup>

Extending mandatory reporting requirements to university-affiliated journalists impedes Title IX's objectives of legal equity and gender equality by injecting criminal-justice elements into Title IX's civil-rights framework.<sup>24</sup> Precluding a survivor's choice in whom to confide touches on—and to an extent, frustrates—constitutional aspects of speech, privacy, and association.<sup>25</sup> These concerns, however, are not solely academic. Survivors routinely turn to student journalists to tell their stories,<sup>26</sup> likely due to comfort with peer reporting and

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16. Erin E. Buzuvis, *Title IX and Official Policy Liability: Maximizing the Law's Potential to Hold Education Institutions Accountable for Their Responses to Sexual Misconduct*, 73 OKLA. L. REV. 35, 37 (2020). See Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L. J. 2038 (2016).

17. Kathryn J. Holland, Lilia M. Cortina, & Jennifer J. Freyd, *Compelled Disclosure of College Sexual Assault*, 73 AM. PSYCH. 256 (2018).

18. Mary P. Koss, Jay K. Wilgus & Kaaren M. Williamsen, *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance With Title IX Guidance*, 15 TRAUMA, VIOLENCE, & ABUSE 242, 243 (2014).

19. Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 93 (2017). See also Kathryn J. Holland, Allison Cipriano & T. Zachary Huit, "A Victim/Survivor Needs Agency": *Sexual Assault Survivors' Perceptions of University Mandatory Reporting Policies*, 2020 ANALYSES SOC. ISSUES AND PUB. POL'Y 1, 11 (reporting survivors' preferences for "a policy that respects survivors' wishes and allows them to control decisions that are made").

20. Weiner, *supra* note 19, at 102.

21. *Id.* at 92.

22. *Id.* at 91.

23. *Id.* at 84–86.

24. Meghan Racklin, *Title IX and Criminal Law on Campus: Against Mandatory Police Involvement in Campus Sexual Assault Cases*, 94 N.Y.U. L. REV. 982, 993–94 (2019).

25. Weiner, *supra* note 19, at 89.

26. See Avani Kalra, *Covering Misconduct Allegations as a High School Journalist*, COLUM. JOURNALISM REV. (Oct. 3, 2019), [https://www.cjr.org/united\\_states\\_project/press-freedom-high-school.php](https://www.cjr.org/united_states_project/press-freedom-high-school.php) [<https://perma.cc/Y2PF-9H67>];

concerns with administrative bureaucratic entanglement. Based on the increasing number of student-censorship incidences related to sexual assault reporting<sup>27</sup> and the proliferation of professional guidance designed to help student journalists navigate the complexities of Title IX,<sup>28</sup> this nascent issue must be explicated and redressed. In this Article, we suggest that “wide-net”<sup>29</sup> mandatory reporter designations—one path to university secrecy—be eliminated, thereby protecting journalists’ investigations into how the institution may have mishandled previous cases of sexual misconduct.

### B. A Nascent Problem

In the fall of 2019, a series of articles appeared on the websites of ProPublica and National Public Radio-Illinois (NPR-IL, a University of Illinois (U of I) affiliate).<sup>30</sup> This joint investigatory project<sup>31</sup> fo-

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Gabriel Greschler, *Criticized, Sued, and Overcharged: Are Barriers to Reporting on Sexual Assault Surmountable for Student Journalists?*, STUDENT PRESS L. CTR. (May 8, 2018), <https://splc.org/2018/05/barriers-to-reporting-on-sexual-assault-on-campus/> [<https://perma.cc/5ACU-F3U8>]; Holly McDede, *Los Gatos Student Journalists Say Adviser Censored Reporting on Sexual Assault*, KQED (Aug. 13, 2021), <https://www.kqed.org/news/11884066/los-gatos-student-journalists-say-adviser-censored-reporting-on-sexual-assault> [<https://perma.cc/ZYN6-WQ45>].

27. E-mail from Mike Hiestand, Senior Couns., Student Press L. Ctr., to Genelle I. Belmas, Assoc. Professor, Sch. Journalism & Mass Commc’ns, Univ. Kan. (Sept. 17, 2021, 19:17 CST) (on file with author) (noting that approximately a dozen students or advisers have reached out to the Student Press Law Center in the past few years for assistance with Title IX reporting concerns).

28. See *Guide for Journalists*, KNOW YOUR IX, <https://www.knowyourix.org/press-room/guide-for-journalists/> [<https://perma.cc/UVG8-LTE7>] (last visited Oct. 24, 2021); Barbara Allen, *‘Understanding Title IX’ Is a New Poynter Course to Help Student Journalists Navigate This Complex Federal Law*, POYNTER (Apr. 18, 2021), <https://www.poynter.org/educators-students/2021/understanding-title-ix-is-a-new-poynter-course-to-help-student-journalists-navigate-this-complex-federal-law/> [<https://perma.cc/6KH2-KPPT>].

29. See *infra* notes 102–106 and accompanying text for discussion of “wide-net” approaches to responsible employee designation.

30. NPR Illinois reported on several sexual assault allegations against University of Illinois at Urbana-Champaign faculty. As part of ProPublica’s “Local Reporting Network” with NPR, NPR Illinois cross-posted its articles on ProPublica’s website. See, e.g., Rachel Otwell & Alex Mierjeski, *One Campus. Seven Professors Facing Harassment Accusations. Few Consequences*, NPR ILL. (Aug. 27, 2019), <https://www.nprillinois.org/post/one-campus-seven-professors-facing-harassment-accusations-few-consequences> [<https://perma.cc/Q8T4-KL4T>].

31. ProPublica began its Local Reporting Networks initiative in 2018 to assist local news outlets with investigative stories. Some outlets lacked the necessary resources to conduct rigorous reportage. According to ProPublica, “That issue [of a lack of resources] is exacerbated by the fact that the strongest accountability reporting these days often relies on a mix of specialized skills that can be scarce in local newsrooms, including data, research, design and social media.” *About the Local Reporting Network*, PROPUBLICA, <https://www.propublica.org/about/local-reporting-network> [<https://perma.cc/Q8T4-KL4T>].

cused on allegations of sexual assault by U of I Urbana-Champaign faculty members against students or other faculty and claims that the harassers were quietly allowed to resign, were paid while not working, had their reputations protected, or even went on to serve as prestigious Fulbright scholars.<sup>32</sup>

While the stories were doubtless embarrassing for the university, administrators did not demand that they be removed from the NPR-IL website (which would be pointless, as they were also published on ProPublica). Instead, the university took a different approach: telling NPR-IL reporters that henceforth, they would be considered “responsible employees” under federal Title IX regulations—which means that if these journalists were told of a sexual assault suffered by a student or university employee, they would be required to report it to the university’s Title IX officer, even if the alleged victim/survivor<sup>33</sup> requested anonymity.<sup>34</sup>

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/perma.cc/Y7QL-Z2J8] (last visited Sept. 3, 2021). To date, twenty local news organizations have joined the network, and ProPublica Illinois, the original, has its own section on the ProPublica site. The 2018 ProPublica Illinois annual report claims during that year, more than a dozen major investigations were undertaken, resulting in 150 articles on topics “ranging from gun trafficking to property taxes to immigration.” PROPUBLICA, PROPUBLICA ILLINOIS—OUR FIRST YEAR 2 (2018), <https://assets.propublica.org/propublica-illinois-2018-report.pdf>.

32. Otwell & Mierjeski, *supra* note 30.

33. We support those who have suffered sexual violence to refer to themselves and their experiences using their preferred terminologies (or without a label at all—*see, e.g.*, Jessica Williamson & Kelly Serna, *Reconsidering Forced Labels: Outcomes of Sexual Assault Survivors Versus Victims (and Those Who Choose Neither)*, 24 VIOLENCE AGAINST WOMEN 668, 681 (2018) (articulating an importance “to not only allow for and respect self-labeling, but to also allow for and respect lack of labeling.”). It has become common to use the term “survivor” because of matters related to individual agency and empowerment as well as public perceptions and understandings of the term. *See, e.g.*, Michael Papendick & Gerd Bohner, “Passive Victim—Strong Survivor”? *Perceived Meaning of Labels Applied to Women Who Were Raped*, 12(5) PLoS ONE, at 16 (2017), <https://doi.org/10.1371/journal.pone.0177550> (noting that in a series of experiments, “‘survivor’ was associated with positive valence, activity, strength, and optimism, whereas ‘victim’ was associated more with negative valence, passivity, weakness, and helplessness.”). Not everyone who has experienced sexual assault agrees with this label; *see, e.g.*, Danielle Campoamor, *I’m Not a Sexual Assault “Survivor”—I’m a Victim*, HARPER’S BAZAAR (May 21, 2018), <https://www.harpersbazaar.com/culture/features/a20138398/stop-using-survivor-to-describe-sexual-assault-victims/> [<https://perma.cc/9RTN-BBN6>]. Further complicating matters, jurisprudential literature often uses “victim” because of the term’s legal connotations. Thus, in this Article, when describing Title IX and its progeny (or in direct quotes), we use “victim.” When describing a harmed individual or in non-legal settings, we use “survivor.”

34. Charles Ornstein, *An Editor’s Note From ProPublica*, NPR ILL./PROPUBLICA (Oct. 10, 2019), <https://www.nprillinois.org/post/editors-note-propublica#stream/0> [<https://perma.cc/K7YT-MB3Q>].



This “mandatory reporting” requirement (a term eliminated in the most recent version of Title IX) may also apply where students *inadvertently* disclose instances of sexual assault: to a professor on an essay assignment or to a roommate who is a student-employee.<sup>35</sup> Outside of school-specific reporting carveouts—typically for health-care workers, counselors, or clergy—most university employees have a duty to report instances of sexual assault, discrimination, or harassment.<sup>36</sup>

U of I’s order regarding professional journalists, however, appears to be the first of its kind among public universities, and its chilling effects could be damaging to sources and reporters alike. As one commentator aptly put it, “[W]hen a student comes to a newsroom to share her story with journalists, it’s doubtful that she believes she is making a report for purposes of having it forwarded to the Title IX office.”<sup>37</sup>

Title IX of the Education Amendments of 1972 is a federal law that prohibits discrimination on the basis of sex.<sup>38</sup> Any educational institution that receives federal funds must comply with Title IX requirements. Passed initially to redress inequalities in athletics, the Act expanded during the Obama administration to encompass all forms of sexual harassment, including sexual assault.<sup>39</sup> In May 2020, then-De-

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35. Some universities broadly define incidences that must be reported for Title IX purposes. Fayetteville State University, for example, mandates reporting of instances of disclosure “within a class assignment, or share[d] during a discussion.” *Required Reporters*, FAYETTEVILLE ST. UNIV., <https://www.uncf.edu/faculty-and-staff/divisions-departments-and-offices/division-of-legal-audit-risk-and-compliance/title-ix/report-concerns-to-the-title-ix-office/required-reporters> [https://perma.cc/ZSZ7-6ZMV] (last visited Oct. 21, 2021). This language is repeated in Wake Forest University’s policy (which also includes third-party observations or reports). *Mandatory Reporters*, WAKE FOREST UNIV., <https://titleix.wfu.edu/information-for-wfu-employees/mandatory-reporters/> [https://perma.cc/Q9J5-BFJU] (last visited Oct. 21, 2021). Finally, the University of Texas at Austin includes the above language plus a list of words or actions to watch for, such as “jokes or comments of a sexual nature” and “‘I’m not really sure, but . . .’” *Mandatory Reporters (Responsible Employees)*, UNIV. TEX. AUSTIN, <https://titleix.utexas.edu/mandatory-reporters> [https://perma.cc/8R2J-5FTB] (last visited Oct. 21, 2021).

36. See *infra* notes 65–90 and accompanying text for a discussion of the expansion of “mandatory reporter” designations at IHEs.

37. Frank LoMonte, *College Media Labs May Increasingly Clash with Their Universities*, POYNTER (Nov. 21, 2019), <https://www.poynter.org/business-work/2019/college-media-labs-may-increasingly-clash-with-their-universities/> [https://perma.cc/KU3W-XVVD].

38. Education Amendments Act of 1972 Title IX, 20 U.S.C. §§ 1681–1688 (2020).

39. See, e.g., K.C. Johnson & Stuart Taylor, *The Path to Obama’s ‘Dear Colleague’ Letter*, VOLOKH CONSPIRACY (Jan. 31, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/> [https://perma.cc/5NE3-VABZ] (discussing how in 2010, the new Department

partment of Education Secretary Betsy DeVos announced revisions to Title IX that took effect on Aug. 14, 2020. These changes, among other requirements, narrowed the definition of sexual harassment and made suggestions about who can, and who must, be designated as a “responsible employee” (i.e., individuals who must report allegations of sexual assault or harassment about which they learn to their Title IX coordinator).<sup>40</sup>

Institutions of higher education (IHEs) continue to have broad discretion in their designations of who is a responsible employee with reporting responsibilities,<sup>41</sup> and it is this latitude that forms the basis of our concern. Such “wide-net” approaches typically include a large number of university employees, some of whom, as we will argue, may have good reason to keep survivors and their stories confidential.

In this Article, we argue that U of I’s response to the ProPublica/NPR-IL stories through its use of Title IX reporting requirements to prevent further investigation not only results in a chilling effect on the media but is also unnecessary under both previous and current Title IX rules. Part II offers a short history of Title IX and the 2020 rules. Part III discusses the Illinois case in depth. Part IV offers recommendations to fight future attempts to use Title IX as a weapon against journalists. Among our recommendations, we suggest that universities or state legislatures expand responsible employee carveouts to include both professional, university-affiliated journalists and student reporters who work at campus media outlets.

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of Education’s Office of Civil Rights director “all but begged” sexual assault victims to file Title IX complaints against their universities, promising that “we will use all of the tools at our disposal including referring to Justice or withholding federal funds or going to adjudication to ensure that women are free from sexual violence.”).

40. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (codified at 34 C.F.R. pt. 106) [hereinafter 2020 Title IX Rules].

41. Indeed, DOE’s decision to allow IHEs to continue to have this latitude was explicit and emphatic:

The Department also intends to leave postsecondary institutions wide discretion to craft and implement the recipient’s own employee reporting policy to decide (as to employees who are not the Title IX Coordinator and not officials with authority) which employees are mandatory reporters (*i.e.*, employees who must report sexual harassment to the Title IX Coordinator), which employees may listen to a student’s or employee’s disclosure of sexual harassment without being required to report it to the Title IX Coordinator, and/or which employees must report sexual harassment to the Title IX Coordinator but only with the complainant’s consent.

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,043 (Dep’t of Educ. May 19, 2020).

## II. HISTORY OF TITLE IX

Title IX protections, if not the law itself, have existed in rudimentary form since the late 1960s.<sup>42</sup> But only since the Obama administration has the law become a powerful tool to combat both sex-based discrimination and, more importantly, sexual harassment and assault. Tracing Title IX's journey brings into focus its origins and past and recent interpretative developments. Furthermore, since its passage in 1972, Title IX has been augmented by several other statutes intended to support survivors in their quests for justice as well as to shore up the fight against sexual assault and violence.

### A. *Origins*

The original purpose of Title IX, as noted above, was to address inequalities in athletics between men and women.<sup>43</sup> Over time, it morphed into much more. The law stemmed from an executive order from President Lyndon Johnson.<sup>44</sup> Executive Order 11246 originally prohibited federal contractors from employment discrimination based on race, color, religion, or national origin; Johnson issued an amendment to that order in 1967, Executive Order 11375, that included discrimination based on sex.<sup>45</sup>

Bernice Sandler, who was a part-time faculty member in education at the University of Maryland in the late 1960s and early 1970s, first envisioned an expansion of the orders on behalf of women in the college setting.<sup>46</sup> Sandler, often dubbed “the godmother of Title IX,”<sup>47</sup> died in 2019 at the age of ninety. She wrote that in 1969, after having been told by a senior male faculty member, “Let’s face it, you come on too strong for a woman” to be considered for a full-time faculty position at Maryland, she had a “eureka” moment while reading about

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42. Iram Valentin, *Title IX: A Brief History*, 2 HOLY CROSS J.L. & PUB. POL’Y 123, 127 (1997).

43. See *supra* Section I.B.

44. Valentin, *supra* note 42, at 124.

45. *Id.* These Executive Orders are found at 30 Fed. Reg. 12,319 (1965) and 32 Fed. Reg. 14,303 (1967), respectively.

46. *Id.*

47. Katharine Q. Seelye, *Bernice Sandler, ‘Godmother of Title IX,’ Dies at 90*, N.Y. TIMES, (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/obituaries/bernice-sandler-dead.html>; Emily Langer, *Bernice Sandler, ‘Godmother of Title IX’ Who Championed Women’s Rights on Campus, Dies at 90*, WASH. POST (Jan. 7, 2019), [https://www.washingtonpost.com/local/obituaries/bernice-sandler-godmother-of-title-ix-who-championed-womens-rights-on-campus-dies-at-90/2019/01/07/9633e7b4-1297-11e9-90a8-136fa44b80ba\\_story.html](https://www.washingtonpost.com/local/obituaries/bernice-sandler-godmother-of-title-ix-who-championed-womens-rights-on-campus-dies-at-90/2019/01/07/9633e7b4-1297-11e9-90a8-136fa44b80ba_story.html).

Johnson's executive orders. She realized that because most IHEs held federal contracts, they could not discriminate on the basis of sex.<sup>48</sup>

Sandler and other women began compiling data about hiring practices and gender representation at various universities and colleges, filing complaints with the U.S. Department of Labor.<sup>49</sup> They also engaged female senators and representatives; Rep. Edith Green (D-Ore.), chair of the Special Sub-committee on Education of the Committee on Education and Labor, initiated the legislation that eventually became Title IX of the Education Amendments of 1972.<sup>50</sup> Sandler reported that the bill benefited from the lack of interest by higher education lobbyists and Congress because they either did not see sex discrimination as a problem or did not read or understand the law.<sup>51</sup> Title IX has now been applied in hundreds of cases with issues ranging from sports to hiring practices to sexual assault, but there is still much to do in terms of gender equity and equality in the higher education setting.<sup>52</sup> Sandler celebrated this broader application of Title IX beyond its initial legislative aims, and beyond her initial tempered expectations, writing

When Title IX was passed I was quite naïve. I thought all the problems of sex discrimination in education would be solved in one or two years at most. When two years passed, I increased my estimate to five years, then later to ten, then to fifty, and now I realize it will take many generations to solve all the problems.<sup>53</sup>

Despite (or perhaps, because of) this ponderous advance, Title IX has benefited from an amalgam of federal acts designed to strengthen its original legislative objectives of sex-based protection. They include such provisions as protecting sexual-assault survivors by broadening law enforcement's jurisdiction, expanding crime reporting and preven-

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48. Bernice Resnick Sandler, *Title IX: How We Got It and What a Difference It Made*, 55 CLEV. ST. L. REV. 473, 474–75 (2007) (“I actually shrieked aloud for I immediately realized that many universities and colleges had federal contracts, were therefore subject to the sex discrimination provisions of the Executive Order, and that the Order could be used to fight sex discrimination on American campuses.”).

49. *Id.* at 475–76.

50. Sandler further reported that the bill's hearings contained a litany of “horror stories, mainly about women employed on campus such as departments refusing to hire women, or refusing to promote them or give them tenure; or women who received many thousands of dollars less salary than their male counterparts; or women working full-time as faculty, with no benefits, no office, no salary, because their husbands also taught at the same university.” *Id.* at 477.

51. *Id.* (noting that “The lobbyist for the American Council on Education was contacted about the hearings, and he declined to testify, stating ‘There is no sex discrimination in higher education,’ and ‘even if there was, it wasn’t a problem.’”)

52. Valentin, *supra* note 42, at 129.

53. Sandler, *supra* note 48, at 488.

tion mechanisms, and providing legal remedies for lesser-included types of gender-based violence. These legislative complements to Title IX and their amendments merit a brief discussion here.

### 1. *Clery Act*

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990 (Clery Act) requires IHEs to meet certain crime prevention, intervention, and disclosure standards.<sup>54</sup> The act is named after a nineteen-year-old freshman who, in 1986, was raped and murdered in her Lehigh University dorm room.<sup>55</sup>

The Clery Act mandates four primary duties for IHEs receiving federal funding. These institutions must (1) disseminate an Annual Security Report to all current and prospective students and employees that contains campus crime statistics from the preceding two calendar years;<sup>56</sup> (2) maintain a public crime log of on- or near-campus criminal activity which must include the nature, date, time and location of each alleged incident;<sup>57</sup> (3) give students and staff timely warnings of serious or ongoing campus-community threats;<sup>58</sup> and (4) disclose educational programming, disciplinary processes, and victim-rights protocols.<sup>59</sup>

In 2013, Congress enacted the Campus Sexual Violence Elimination (Campus SaVE) Act, the most recent Clery Act amendment. This act mandates the adoption of certain disclosure requirements, disciplinary procedures, and prevention and training mechanisms. It expanded IHE reporting to include incidences of domestic violence, dating violence, sexual assault, and stalking.<sup>60</sup> The Campus SaVE Act also requires IHEs to maintain statistics on the above-mentioned offenses,<sup>61</sup> guarantee reasonable accommodations and protective measures to vic-

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54. 20 U.S.C. § 1092.

55. *About Us*, CLERY CTR., <https://clerycenter.org/about-page/> [<https://perma.cc/JU4C-8BR9>] (last visited Nov. 2, 2021).

56. § 1092(f)(1).

57. § 1092(f)(4)(A).

58. § 1092(f)(1)(J)(i).

59. This portion of the Clery Act, also known as the Campus Sexual Assault Victims' Bill of Rights, was signed into law by President George H. W. Bush in July 1992. It requires that accusers are notified of their law-enforcement reporting options, that accusers and the accused have the same rights to have others present, that both parties are informed of disciplinary proceeding outcomes, and that accusers are notified of academic and other counseling services as well as options for changing their academic and living situations. § 1092(f)(8).

60. Violence Against Women Act § 904, 25 U.S.C. § 1304 (2013).

61. *Id.* at § 304(a)(4)(B).

tims,<sup>62</sup> provide education and awareness programs,<sup>63</sup> and set procedural standards for institutional disciplinary actions.<sup>64</sup> Augmenting the Clery/Campus SaVE foundation is the Violence Against Women Act, discussed below, a Clinton administration expansion of Title IX protections.

## 2. *Violence Against Women Act*

The Violence Against Women Act of 1994 (VAWA)<sup>65</sup> is a legislative complement to the Clery Act which further expanded Title IX's jurisdictional reach to include the investigation and prosecution of gender-motivated violent crimes. Cosponsored by then-Sen. Joe Biden (D-Del.) and Sen. Orrin Hatch (R-Utah), and signed into law by President Bill Clinton,<sup>66</sup> VAWA is designed to improve law enforcement and judicial responses to domestic violence: crimes historically treated as private matters between husbands and wives.<sup>67</sup>

The law created new federal sex crimes, prescribed enhanced sentencing for repeat offenders, and mandated restitutions for victims.<sup>68</sup> VAWA paved the way for the creation of the Office on Violence Against Women which, in turn, has awarded more than \$8 billion in federal grants to state, local, and tribal governments, non-profit organizations, and IHEs.<sup>69</sup> These grants have funded battered women's shelters, domestic violence prevention programs, and, notably, the National Domestic Violence Hotline—a 24-hour confidential service for victims of domestic abuse.<sup>70</sup>

In 2000, VAWA suffered a blow when the U.S. Supreme Court struck down its civil redress provision for victims of sex-based vio-

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62. *Id.* at § 304(a)(5)(B)(ii).

63. *Id.* at § 304(a)(5)(B)(i)(I).

64. *Id.* at § 304(a)(5)(B)(iv).

65. 34 U.S.C. § 12291.

66. Cosponsors - S.11 - 103rd Congress (1993–1994): Violence Against Women Act of 1993, S.11, 103rd Cong. (1993), CONGRESS, <https://www.congress.gov/bill/103rd-congress/senate-bill/11/cosponsors>. (last visited Dec. 30, 2021)

67. U.S. DEP'T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, TWENTY YEARS OF THE VIOLENCE AGAINST WOMEN ACT: DISPATCHES FROM THE FIELD 1 (2016), <https://www.justice.gov/ovw/file/866576/download>.

68. LISA N. SACCO, CONG. RSCH. SERV., R45410, THE VIOLENCE AGAINST WOMEN ACT (VAWA): HISTORICAL OVERVIEW, FUNDING, AND REAUTHORIZATION 1 (2019) (noting that VAWA enhanced investigations and prosecutions of sex offenses by allowing for “enhanced sentencing of repeat federal sex offenders; mandating restitution to victims of specified federal sex offenses; and authorizing grants to state, local, and tribal law enforcement entities to investigate and prosecute violent crimes against women.”).

69. *Id.* at 4.

70. 42 U.S.C. § 10413.

lence in *U.S. v. Morrison*.<sup>71</sup> The Court held that VAWA's civil rights remedies permitting victims of gendered-motivated crimes to sue in federal court violated the Fourteenth Amendment's Equal Protection Clause.<sup>72</sup> The case involved the alleged assault and repeated rape of Virginia Tech freshman Christy Brzonkala by fellow students Antonio Morrison and James Crawford. When VAWA was enacted, controlling Commerce Clause precedent suggested that Congress had the power to regulate activities which, under rational basis review, substantially affected interstate commerce.<sup>73</sup> Lower courts upheld the civil redress provision, finding that Congress had a legitimate legislative interest to provide domestic violence victims civil redress—on account of taxpayer-born costs of healthcare and criminal justice.<sup>74</sup> In *Morrison*, Chief Justice William Rehnquist, writing for a sharply divided five to four majority, held that Congress lacked the constitutional authority under the Commerce Clause to create a federal cause of action because gender-motivated crimes were not themselves economic in nature.<sup>75</sup>

The four dissenters pointed to several problems with the majority opinion. Justice Stephen Breyer, joined by Justice John Paul Stevens and in part by Justices David Souter and Ruth Bader Ginsberg, attacked the majority's reading of the Commerce Clause, saying that its "language says nothing about either the local nature, or the economic nature, of an interstate commerce-affecting cause,"<sup>76</sup> and thus the majority opinion unduly limited the clause's reach. Justice Souter, on the other hand, joined by all three of his dissenting colleagues, pointed to voluminous congressional findings about the impact of sexual assault in the years before VAWA was enacted that, he claimed, "explicitly stated the predicate for the exercise of its Commerce Clause

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71. *United States v. Morrison*, 529 U.S. 598, 601 (2000).

72. *Id.*

73. *See, e.g., Maryland v. Wirtz*, 392 U.S. 183, 190 (1968) (quoting *Katzenbach v. McClung*, 379 U.S. 294, 303–04 (1964)) ("Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.")

74. *See, e.g., Anisimov v. Lake*, 982 F. Supp. 531, 535 (N.D. Ill. 1997) (claiming that "[a] quick survey of the judicial and scholarly views on the significance of *Lopez* indicates that this Court is not alone in its uncertainty concerning how the Supreme Court will approach these issues when it considers future challenges to congressional authority under the Commerce Clause") (footnote omitted).

75. *Morrison*, 529 U.S. at 613.

76. *Id.* at 657 (Breyer, J., dissenting).

power”<sup>77</sup>—contrary to the majority’s position that the clause could not be so broadly extended.

Other critics of the majority decision compared the decision to post-Reconstruction courts limiting racial equality legislation after the Civil War.<sup>78</sup> In addition, Commerce Clause scholars have offered a variety of objections against the majority and suggestions of how the Court could have upheld the Act based on previous laws such as the Federal Kidnapping Act.<sup>79</sup>

Later Congresses have been less kind to VAWA. The law underwent a contentious reauthorization battle in 2012–13, with House Republicans attempting to limit several important provisions. These provisions included the ability of Indian tribal courts to adjudicate domestic violence issues on reservations, the extension of protections to lesbian, gay, bisexual, and transgender victims, and the expansion in the numbers of temporary visas issued to undocumented immigrants who have suffered sexual abuse.<sup>80</sup> The full House ultimately passed a version of the bill that included these provisions, with all Democrats and 87 Republicans voting in favor of the legislation.<sup>81</sup> President Obama signed the reauthorization in March 2013, which expired on Feb. 15, 2019.<sup>82</sup> The House version of a second reauthorization bill was introduced on Mar. 8, 2021<sup>83</sup> and, as of this writing, has passed

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77. *Id.* at 634 (Souter, J., dissenting).

78. See, e.g., Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 176 (2000). MacKinnon does not stop there: she alleges that rejecting VAWA was a rejection of “the principle that a woman could not, with impunity, be assaulted anywhere in this nation simply because she is a woman.” *Id.* at 177.

79. See, e.g., Donald A. Dripps, *Why Rape Should Be a Federal Crime*, 60 WM. & MARY L. REV. 1685, 1716 (2019) (arguing that the Commerce Clause is the basis for “an extensive list of statutes [that] impose[ ] federal liability for violent crime” including “robbery, kidnapping, carjacking, and human trafficking”); Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 112 (2000) (noting that “[h]ad the Court analyzed the statute as civil rights legislation, it should have upheld the VAWA civil rights remedy as within the realm of traditional federal power.”).

80. Robert Pear, *House Vote Sets Up Battle on Domestic Violence Bill*, N.Y. TIMES (May 16, 2012), <https://www.nytimes.com/2012/05/17/us/politics/house-passes-domestic-violence-bill.html>.

81. The House vote was 286 to 138. *S. 47 (113th): Violence Against Women Reauthorization Act of 2013*, GOVTRAC (Feb. 28, 2013), <https://www.govtrack.us/congress/votes/113-2013/h55>.

82. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

83. Violence Against Women Act Reauthorization Act of 2021, H.R. 1620, 117th Cong. (2021).



the House of Representatives.<sup>84</sup> There is currently no parallel Senate version.

In sum, Title IX, Clery, and VAWA constitute the lion's share of legal remedies available to victims of campus sexual harassment and assault. These acts, together with the Family Educational Rights and Privacy Act (FERPA),<sup>85</sup> the Drug-Free Schools and Communities Act (DFSCA),<sup>86</sup> and a panoply of state and local laws, create an overlapping network of institutional reporting and procedural safeguards designed to curb campus violence and create safer academic communities. To help guide IHEs through this legal web and to make clear their responsibilities "to take immediate and effective steps to end sexual harassment and sexual violence," the Obama administration's Department of Education issued a 2011 "Dear Colleague" letter (DCL) which further clarified reporting obligations, the importance of maintaining victim confidentiality, and how schools must respond when they receive harassment complaints.<sup>87</sup>

### *B. Obama-Era Guidance: "Dear Colleague" Letter (April 2011)*

The Obama administration took a special interest in the prevention of sexual assault; as one researcher put it, the fight against sexual harassment received "unprecedented attention and power during the

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84. On Mar. 22, 2021, the bill was referred to the House Subcommittee on Oversight and Investigations. Violence Against Women Act Reauthorization Act of 2021, H.R.1620, 117th Cong. (2021), CONGRESS, <https://www.congress.gov/bill/117th-congress/house-bill/1620> (last visited Dec. 30, 2021).

85. 20 U.S.C. § 1232g. FERPA is a 1974 federal law that protects the privacy of student educational records. While FERPA protects personally identifiable information, schools may, under some circumstances, release such information without student consent. *See* 34 C.F.R. § 99.31(a)(13) (noting that prior consent is not required to disclose personally identifiable information when the student is "a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. The disclosure may only include the final results of the disciplinary proceeding conducted by the institution of postsecondary education with respect to that alleged crime or offense. The institution may disclose the final results of the disciplinary proceeding, regardless of whether the institution concluded a violation was committed.").

86. 20 U.S.C. § 1011(i). DFSCA is a 1989 federal law, passed as part of Congress's reauthorization of the Higher Education Act, requiring IHEs that receive federal funding to implement drug and alcohol abuse prevention and rehabilitation programs available to students and employees. *See* 20 U.S.C. § 1011(i)(a)(2) (requiring IHEs to provide a biennial review of the institution's prevention program to (A) determine the program's effectiveness and implement changes as needed, (B) determine the number of drug and alcohol-related violations and fatalities that occur on the institution's campus or reported to campus officials (C) determine the number and type of sanctions, and (D) ensure that the sanctions are strictly enforced.).

87. Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for C.R., U.S. Dep't of Educ. At 2 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. [hereinafter DCL 2011].

course of Barack Obama's presidency."<sup>88</sup> As discussed above, President Joe Biden, at the time a Democratic senator from Delaware, was one of the sponsors of the 1994 Violence Against Women Act,<sup>89</sup> which was reauthorized under his tenure as vice president in 2013,<sup>90</sup> and he fought to have it renewed again in 2019 when it expired. He has called it "my proudest legislative accomplishment."<sup>91</sup> In addition, President Obama and then-Vice-President Biden announced the "It's On Us" initiative in 2014,<sup>92</sup> intended to help end campus sexual assault. A fact sheet<sup>93</sup> accompanying the announcement also included a link to the April 2011 "Dear Colleague" letter.<sup>94</sup>

The 2011 DCL clarified the requirements of Title IX regarding complaints of sexual harassment and assault. It provided details on the responsibilities of schools to address sexual violence and examples of education and remedies that schools can offer.<sup>95</sup> In 2014, the DCL was followed up with additional guidance in a 53-page Q&A, outlining the obligations for schools receiving federal funding established by the Office of Civil Rights (OCR).<sup>96</sup>

Title IX guidance during this time coincided with a surge in the number of "responsible employees" designated by universities.<sup>97</sup> Lan-

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88. Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, J. LEGAL EDUC. 822, 822 (2017).

89. Cosponsors, *supra* note 62.

90. *Id.*

91. Joe Biden, *20 Years of Change: Joe Biden on the Violence Against Women Act*, TIME (Sept. 10, 2014, 5:23 PM), <https://time.com/3319325/joe-biden-violence-against-women/>.

92. Tanya Somanader, *President Obama Launches the "It's On Us" Campaign to End Sexual Assault on Campus*, OBAMA WHITE HOUSE: BLOG (Sept. 19, 2014, 2:40 PM), <https://obamawhitehouse.archives.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus>. The initiative has since become part of Civic Nation: a 501(c)(3) nonprofit organization that "empower[s] people to take on the biggest challenges of our time—strengthening democracy; foster civic engagement, social justice and voter participation; addressing public health crises; fighting for gender equity; and more." *About Us*, CIVIC NATION, <https://civication.org/about/> (last visited Sept. 6, 2021).

93. Press Release, Office of the Press Secretary, The White House, FACT SHEET: Launch of the "It's On Us" Public Awareness Campaign to Help Prevent Sexual Assault (Sept. 19, 2014) <https://obamawhitehouse.archives.gov/the-press-office/2014/09/19/fact-sheet-launch-it-s-us-public-awareness-campaign-help-prevent-campus->

94. DCL 2011, *supra* note 81.

95. *Id.* at 14–18 (offering suggestions on Title IX enforcement, remedies, and education).

96. U.S. DEP'T OF EDUC., OFF. OF C.R., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE i–ii (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [hereinafter *Questions and Answers*].

97. Colleen Flaherty, *Faculty Members Object to New Policies Making All Professors Mandatory Reports of Sexual Assault*, INSIDE HIGHER ED (Feb. 4, 2014, 3:00 AM), <https://www.insidehighered.com/print/news/2015/02/04/faculty-members->

guage in the 2014 Q&A specified that a responsible employee was anyone with the power and authority “to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX Coordinator or other appropriate school designees; or whom a student could reasonably believe has this authority or duty.”<sup>98</sup> As a result, the number of university workers who were considered mandatory reporters of sexual harassment or assault violations skyrocketed. One study revealed that at over two-thirds of the 146 colleges and universities whose policies were evaluated, *all* employees were so classified.<sup>99</sup>

Several reasons could explain this dramatic increase, including the 2014 Q&A’s vague definition of who should be designated as a mandatory reporter and the simplicity and clarity of assigning nearly everyone at an IHE to that category.<sup>100</sup> Regardless, this designation has not been universally welcomed. Although a 2018 study found that while most university employees and students both understand and agree with Title IX reporting requirements,<sup>101</sup> faculty members have complained about the loss of student-survivor anonymity and the damage to the faculty-student trust relationship.<sup>102</sup> As one researcher put

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object-new-policies-making-all-professors-mandatory-reporters-sexual (noting that many universities are “adopting policies requiring all faculty members and other professional employees—not just those obligated by law to do so - to report sexual misconduct to designated administrators, who may then initiate investigations and alert authorities.”).

98. *Questions and Answers*, *supra* note 96, at 15 (“Over two thirds (69%, n = 101) of the 146 policies identified *all employees*—that is, all faculty and staff employed by the school—as mandatory reporters of sexual assault.”). The study also reported that 19% of these schools designated “most” employees as responsible employees, 4% mandated “few” employees, and 12 policies were ambiguous. *Id.*

99. Holland et al., *supra* note 17, at 259 (finding that 19% of these schools designated “most” employees as responsible employees, 4% mandated “few” employees, and 12% of policies were ambiguous).

100. Weiner, *supra* note 19, at 80–83.

101. Amie R. Newins, Emily Bernstein, Roslyn Peterson, Jonathan C. Waldron, & Susan W. White, *Title IX Mandated Reporting: The Views of University Employees and Students*, 8 BEHAVIORAL SCIENCES (BASEL, SWITZERLAND) 106 (2018) (finding that 84.5% of university employees would report a student disclosure of sexual assault, 10.3% were unsure and 5.2% would not report).

102. See Flaherty, *supra* note 97 (outlining faculty concerns about their responsible employee status and quoting a professor, who explained that he is “concerned about this [designation] inhibiting conversations and creating a climate in which it’s less likely to be discussed and therefore less safe—even if the intention is pro-safety and anti-sexual assault and all of that.”); see also Jill C. Engle, *Mandatory Reporting of Campus Sexual Assault and Domestic Violence: Moving to a Victim-Centric Protocol that Comports with Federal Law*, 24 TEMP. POL. & C.R. L. REV. 401, 420 (2015) (suggesting that the best protocol is one “that couples legal compliance with victim sensitivity, and avoids blanket mandatory reporting requirements.”); Kathryn J. Holland, *Examining Responsible Employees’ Perceptions of Sexual Assault Reporting Re-*

it, “faculty members and academic advisors also develop close and trusting relationships with students, but mandatory reporting policies may require them to betray students’ confidence if they disclose an assault.”<sup>103</sup> Other university employees with close connections to students who are often designated as mandatory reporters, such as resident assistants (RAs), might feel the same way; the RA’s role requires establishing a high level of trust with students, and that trust can be damaged if, for example, an RA follows policy and reports an allegation of sexual assault or harassment against the wishes of a student.<sup>104</sup> These “wide-net”<sup>105</sup> or “blanket” approaches to designations of responsible employees were intended to maximize institutional capacity to identify and pursue allegations of sexual assault and harassment. Such policies, however, might end up having the reverse effect. According to some studies, the wide-net approach creates more problems than it solves.<sup>106</sup> For example, complainants’ desires for and concerns about their stories’ confidentiality are simply not taken into account—regardless of what the complainant wants. If a responsible employee hears about an alleged assault, that employee *must* report it to the Title IX coordinator or risk university punishment, an outcome that could

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*quirements Under Federal and Institutional Policy*, 19 ANALYSES SOC. ISSUES & PUB. POL’Y 133, 143 (2019) (noting that “faculty members and academic advisors also develop close and trusting relationships with students, but mandatory reporting policies may require them to betray students’ confidence if they disclose an assault”). In its 2012 policy statement, the American Association of University Professors asserted that faculty should not be mandatory reporters for purposes of Clery Act requirements, noting that “[a]s advisers, teachers, and mentors, faculty members may be among the most trusted adults in a student’s life and often are the persons in whom students will confide after an assault”, yet few faculty members believe themselves well equipped to serve the “first responder” role. AM. ASS’N OF UNIV. PROFESSORS, CAMPUS SEXUAL ASSAULT: SUGGESTED POLICIES AND PROCEDURES 370 (2012), [https://www.aaup.org/file/Sexual\\_Assault\\_Policies.pdf](https://www.aaup.org/file/Sexual_Assault_Policies.pdf).

103. Holland, *supra* note 102, at 143.

104. *Id.* at 136.

105. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,042 (Dep’t of Educ. May 19, 2020). (“As of 2017 many (if not most) postsecondary institutions had policies designating nearly all their employees as ‘responsible employees’ and ‘mandatory reporters.’”).

106. Holland *et al.*, *supra* note 96, at 105–06 (evaluating assumptions underlying wide-net approaches, such as the notion that more reporting will result in the surfacing of more incidents, and noting studies that challenge those assumptions); Weiner, *supra* note 100, at 84–87 (promoting a “new view” of mandatory reporting more consistent with the spirit of Title IX); Karen G. Weiss & Nicole V. Lasky, *Mandatory Reporting of Sexual Misconduct at College: A Critical Perspective*, 16 J. SCH. VIOLENCE 259, 265 (2017) (asserting that critics believe “requiring faculty to report known or suspected incidents to Title IX administrators jeopardizes faculty-student relations and limits frank and open discourse between faculty and students both inside and outside of the classroom.”).

deter rather than encourage reporting.<sup>107</sup> As a result, a survivor, not comfortable with having her story divulged to anyone she does not know, may choose not to report the incident at all.

Some faculty members also say they would prefer not to be required to report allegations given in confidence; the mandatory report is a violation of the trust between professors and students.<sup>108</sup> Still other criticisms of the wide-net approach stem from a more jaded view of the university's role in sexual assault and harassment cases: a desire to avoid financial liability and public disgrace. As American Association of University Professors (AAUP) Associate Secretary Anita Levy put it, "What seems to be happening is that institutions are really going overboard to make sure they've dotted all their i's and crossed all their t's," adding that AAUP supports a less sweeping approach to assigning mandatory reporting status to faculty members.<sup>109</sup>

Beyond debate, the impact of the 2011 DCL, and the accompanying Q&A document, has been profound.<sup>110</sup> The Obama-era rules and guidance documents received mixed reviews. Sexual assault survivor organizations and survivors themselves hailed them as successful attempts to combat sexual assault on campus.<sup>111</sup> Alternatively, critics

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107. See, e.g., Brian A. Pappas, *Out from the Shadows: Title IX, University Ombuds, and the Reporting of Campus Sexual Misconduct*, 94 DENV. L. REV. 71, 85 (2016) (describing how "[f]undamentally, Title IX Coordinators cannot guarantee confidentiality."). Texas and Louisiana have taken this requirement a step further; see *infra* notes 162–66 and accompanying text.

108. *Id.* at 84 (illustrating the need to balance several goals: "Mandatory reporting requirements put pressure on faculty members, resident advisors, and others lacking a privilege, yet who promise privacy or confidentiality to students approaching them for assistance.").

109. See Flaherty, *supra* note 91. See also Jenna Gerdson & Jonelle Walker, *Who Reports Mandatory Reporters?* 29 THEATRE TOPICS 161, 164 (2019) (calling mandatory reporting "a performance by the university in the worst sense of the word, going through the gestures without enacting the performative supposedly desired").

110. See, e.g., Jason M. Shepard & Kathleen B. Culver, *Culture Wars on Campus: Academic Freedom, the First Amendment, and Partisan Outrage in Polarized Times*, 55 SAN DIEGO L. REV. 88, 136 (2018) (noting that the "Dear Colleague" letter "invit[ed] investigations into a broader scope of conduct than had traditionally been defined as discrimination or harassment.").

111. See, e.g., Letter from Nat'l Women's L. Ctr. *et al.* to John King, U.S. Sec'y of Educ. (July 13, 2016), <https://nwlc.org/wp-content/uploads/2016/07/2016.7.13-Title-IX-Support-Sign-On-Letter.final.pdf>. (noting that the DCL and Q&A documents "have provided much needed clarification of what Title IX requires schools to do to prevent and address sex discrimination in educational programs" and have spurred schools to address cultures that for too long have contributed to hostile environments which deprive many students of equal educational opportunities."). See also Tiffany Buffkin, Nancy Chi Cantalupo, Mariko Cool, & Amanda Orlando, *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education's Executive Order 13777 Comment Call*, 9 CAL. L. REV. ONLINE 71, 75 (2019) (analyzing 12,000 comments about Title IX in public comments

asserted that the pendulum had swung too far in favor of complainants, resulting in a lack of procedural due process for those accused.<sup>112</sup> The cause of increased reporting remains unclear: whether attributable to the Obama Department of Education's guidance, to a rise in the actual occurrences of sexual assault and harassment, or to shifts in campus culture that empower sexual assault survivors.<sup>113</sup> Nevertheless, OCR received more complaints after the guidance was issued, showing an increase from eleven complaints in 2009 to 164 in 2015.<sup>114</sup>

The Trump administration wasted no time addressing Title IX guidance under Secretary DeVos's leadership. In September 2017, just seven months after her appointment, DeVos rescinded the 2011 DCL and 2014 Q&A guidance that she claimed "ignored notice and comment requirements, created a system that lacked basic elements of due process and failed to ensure fundamental fairness"<sup>115</sup> and released a new, much shorter Q&A document. This interim document,<sup>116</sup> only seven pages long, announced DeVos's plan to issue new rulemaking and signaled the administration's approach to Title IX compliance.<sup>117</sup>

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about an executive order and finding that "an overwhelming 11,893 comments supported Title IX and urged the Department [of Education] to uphold the 2011 DCL" and that "Only 137 comments—one percent of the Title IX comments—criticized Title IX and an even smaller number, 123 comments, explicitly requested that ED rescind the 2011 DCL.").

112. See, e.g., Joe Dryden, David Stader & Jeanne L. Surface, *Title IX Violations Arising from Title IX Investigations: The Snake Is Eating Its Own Tail*, 53 IDAHO L. REV. 639, 664-65 (2017) (opining that "to classify a shunned kiss or a regrettable sexual experience as a sexual assault is overly broad and universities are sweeping up far too many innocent students in their efforts to comply with the suggestions included in the 2011 DCL."). Some also feared that the guidance would result in overzealous investigations and an ultimate drop in reporting; see Brent A. Sokolow, *Mandatory Reporting for Title IX. Keep It Simple*, CHRON. HIGHER EDUC. (Sept. 23, 2013), <https://www.chronicle.com/article/mandatory-reporting-for-title-ix-keep-it-simple/> ("It sometimes feels as if administrators have become Rapist Hunters in some bizarre new reality show, expected to track down every allegation, rumor, gossip, or shred of notice so that no possible act of sexual violence falls through the cracks.").

113. Weiner, *supra* note 19, at 80-81 (suggesting that publicity by trade publications and professional organizations advocating a wide-net reporting approach may in part explain some of the increase in reports).

114. Halley Sutton, *OCR reports dramatic increase in sexual assault reports since 2005*, 13 CAMPUS SEC. REP. 9 (2016).

115. DEPARTMENT OF EDUCATION ISSUES NEW INTERIM GUIDANCE ON CAMPUS SEXUAL MISCONDUCT, U.S. DEP'T OF EDUC. (Sept. 22, 2017), <https://content.govdelivery.com/accounts/USED/bulletins/1b8b87c>.

116. Q&A ON CAMPUS SEXUAL MISCONDUCT, U.S. DEP'T OF EDUC. (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

117. See Nancy Conrad & Linda Perkins, *US Department of Education Issues New Interim Guidance on Campus Sexual Misconduct*, EDUC. L. ALERT (Sept. 29, 2020), <https://www.whiteandwilliams.com/pp/alert-3233.pdf> (noting that the interim gui-

It was followed in May 2020 by 554 pages in the *Federal Register* detailing the new rules, responding to commenters, and discussing the rule's departures from the previous Title IX era.

### C. DeVos Title IX Rules (May 2020)

The revised Title IX rules were announced and published in the *Federal Register* on May 19, 2020<sup>118</sup> and took effect on August 14, 2020. Several key departures from previous rules outlined in the document include: a change in the definition of sexual harassment;<sup>119</sup> the conditions under which an institution has “actual knowledge” of an assault or harassment for purposes of Title IX liability;<sup>120</sup> and, perhaps most controversially, requirements that complainants be cross-examined at required live hearings (although not by their accusers and via videoconference if desired).<sup>121</sup> The cross-examination requirement is fluid; the First Circuit in February 2021 declined to allow intervenors in a case challenging those requirements on First and Fifth Amendment grounds,<sup>122</sup> and in July 2021, a federal district court overturned the requirement as arbitrary and capricious.<sup>123</sup> Other recent judicial guidance, however, suggests a need to retain cross-examination to protect the due process rights of the accused, particularly when witness credibility is at issue.<sup>124</sup>

But if Title IX watchers were hoping for clarity in the designation of responsible employees at universities and colleges, they were disappointed. After describing the “rubric” that had been used in the Obama-era rules for designating mandatory reporters at both K-12 and IHEs (individuals with authority to redress or with the duty to report

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dance demonstrates “a clear and unmistakable change in how the OCR will assess a school’s compliance with Title IX”).

118. 2020 Title IX Rules, *supra* note 40.

119. *Id.* at 30,032 (defining sexual harassment as “severe, pervasive, and objectively offensive” conduct that effectively denies a person equal educational access).

120. *Id.* at 30,038.

121. *Id.* at 30,046–55. A summary of the rule appears at 30,053: the new rule “requires a live hearing with cross-examination conducted by the parties’ advisors at postsecondary institutions” and makes these hearings optional for primary and secondary schools.

122. *Victim Rts. L. Ctr. v. Rosenfelt*, 988 F.3d 556, 563 (1st Cir. 2021) (defending the government’s “strategic and policy choice to defend the Rule’s promulgation on non-constitutional grounds”).

123. *Victim Rts. L. Ctr. v. Cardona*, No. CV 20-11104-WGY, 2021 WL 3185743 (D. Mass. July 28, 2021).

124. *See Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018); *see also Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019).

to others, or who a student believed would have this authority),<sup>125</sup> the 2020 rules separate the two groups.

In both settings, a report to the designated Title IX Coordinator or “officials with authority” to correct the situation triggers the institution’s response obligations.<sup>126</sup> However, in primary and secondary schools, *all* employees are considered “officials with authority” for this purpose. Relying on the doctrine of *in loco parentis*, where schools stand “in place of the parent,” the DeVos rules eliminate the Obama-era rubric in elementary and high schools, recognizing that students there “often talk about sexual harassment experiences with someone other than their teacher, and that it is unreasonable to expect young students to differentiate among employees for the purpose of which employees’ knowledge triggers the school’s response obligations and which do not.”<sup>127</sup> Thus, in the K-12 setting, the guidance for designating responsible employees is clear: *All employees*, from cooks and janitors to principals and teachers, must report upon learning of an alleged incident.

In the higher education setting, however, the line blurs. The Department recognized the development of the wide-net approach to designating responsible employees—and also some of the problems with it.<sup>128</sup> But the DeVos rules do not mandate any group of higher-education employees by title as reporters; instead, they give broad latitude to universities and colleges to determine for themselves who will be a responsible employee. The 2020 rules provide the following guidance:

postsecondary institutions to decide which of their employees must, may, or must only with a student’s consent, report sexual harassment to the recipient’s Title IX Coordinator (a report to whom always triggers the recipient’s response obligations, no matter who makes the report). *Postsecondary institutions ultimately decide which officials to authorize to institute corrective measures on behalf of the recipient.*<sup>129</sup>

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125. 2020 Title IX Rules, *supra* note 40, at 30,038 (referencing earlier guidance and the DCL).

126. *Id.* (“Determining whether an individual is an ‘official with authority’ is a legal determination that depends on the specific facts relating to a recipient’s administrative structure and the roles and duties held by officials in the recipient’s own operations.”).

127. *Id.* at 30,039.

128. *Id.* at 30,041 (the former guidance “may have resulted in college and university policies that have unintentionally discouraged disclosures or reports of sexual harassment by leaving complainants with too few options for disclosing sexual harassment to an employee without automatically triggering a recipient’s response.”).

129. *Id.* (emphasis added).



The Department reviews some studies that suggest that the wide-net approach is problematic for a variety of reasons<sup>130</sup> but goes on to assert that the goals of these new rules are to support complainants and to bestow upon higher-education institutions “wide discretion”<sup>131</sup> in determining who to designate as a responsible employee. Nor are the ways in which responsible employees might gain “actual knowledge” of an occurrence of sexual assault or harassment limited. Such knowledge could be imparted “through a newspaper article” as well as through a written or oral report, the rules note.<sup>132</sup>

While, in principle, the 2020 rules could result in significant cut-backs in the numbers and types of university employees who must report allegations of sexual assault or harassment, in practice, that outcome is unlikely. According to one Title IX consultant, wide-net mandatory reporting has become so ingrained in campus culture, faculty and staff will continue to report even if they need not; or, as she put it, “You can’t untrain them.”<sup>133</sup> Even so, “untraining” (or “re-training”) is not without precedent. A wide-net approach to mandatory reporting, as few as fifteen years ago, was rare<sup>134</sup> and in fact discouraged:

Any policy or procedure that compromises, or worse, eliminates the student victim’s ability to make her or his own informed choices about proceeding through the reporting and adjudication process—such as mandatory reporting requirements that do not include an

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130. *See id.* at 30,042–43 and *infra* notes 147–57 and accompanying text.

131. *Id.* at 30,043.

132. *Id.* at 30,115 (emphasis added). The full quote, for context, is provided below: With respect to both elementary and secondary schools as well as post-secondary institutions, the Department does not limit the manner in which the recipient may receive notice of sexual harassment. Although imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge, a Title IX Coordinator, an official with authority to institute corrective measures on behalf of the recipient, and any employee of an elementary and secondary school may receive notice through an oral report of sexual harassment by a complainant or anyone else, a written report, through personal observation, *through a newspaper article*, through an anonymous report, or through various other means. The Department will not permit a recipient to ignore sexual harassment if the recipient has actual knowledge of such sexual harassment in its education program or activity against a person in the U.S., and such a recipient is required to respond to sexual harassment as described in § 106.44(a).

133. Sarah Brown, *6 Questions Colleges Are Asking About the New Title IX Regulations*, CHRON. HIGHER EDUC. (May 6, 2020), <https://www.chronicle.com/article/6-questions-colleges-are-asking-about-the-new-title-ix-regulations/> [https://perma.cc/PN7C-T7JD].

134. Weiner, *supra* note 19, at 78 (noting that only 45% of schools had mandatory reporters on their campuses).

anonymous reporting option or require the victim to participate in the adjudication process if the report is filed—not only reduces reporting rates but may be counter productive to the victim’s healing process.<sup>135</sup>

Thus, wide-net approaches to mandatory reporting were once thought necessary to combat a “culture of silence,” as one scholar put it,<sup>136</sup> but now the pendulum has swung the other way. In addition, the fact that the 2020 rules went into effect during a pandemic, when most schools offered classes in a hybrid or online-only format, made dramatic change difficult.

Immediately following the new Title IX’s May 2020 debut, at least four lawsuits<sup>137</sup>—including one by 18 attorneys general<sup>138</sup>—were filed to block the regulations on constitutional and procedural grounds. One group filed a motion to intervene as defendants with the Department of Education to ensure that the rules were enacted.<sup>139</sup> And the state of Texas joined the Department as a defendant in the attorneys’ general case—perhaps to stop the Biden administration from simply not responding to the suit.<sup>140</sup>

These suits alleged that the Department’s regulations were arbitrary and capricious and violated the Fifth Amendment’s equal protection guarantee. The attorneys general argued that by expanding the rights of the accused and narrowing the definition of sexual harassment, the new rules would block schools from investigating certain

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135. HEATHER M. KARJANE, BONNIE S. FISHER & FRANCIS T. CULLEN, *CAMPUS SEXUAL ASSAULT: HOW AMERICA’S INSTITUTIONS OF HIGHER EDUCATION RESPOND XI* (2002).

136. Weiner, *supra* note 19, at 84. Weiner adds that “the utilitarian calculus has now changed and these policies do more harm than good.” *Id.*

137. *Know Your IX v. DeVos*, No. CV RDB-20-01224, 2020 WL 6150935 (D. Md. Oct. 20, 2020); *New York v. U.S. Dep’t of Educ.*, 477 F. Supp. 3d 279 (S.D.N.Y. 2020); *Victim Rts. L. Ctr. v. DeVos*, No. 1:20-CV-11104 (D. Mass. June 10, 2020).

138. Signing on were Pennsylvania, New Jersey, California, Colorado, Delaware, District of Columbia, Illinois, Massachusetts, Michigan, Minnesota, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, and Wisconsin. *Pennsylvania v. DeVos*, 480 F. Supp. 3d 47 (D.D.C. 2020).

139. Greta Anderson, *Understanding the Lawsuits Against New Title IX Regulations*, *INSIDE HIGHER ED* (July 13, 2020), <https://www.insidehighered.com/print/news/2020/07/13/understanding-lawsuits-against-new-title-ix-regulations>.

140. Memorandum in Support of Texas’ Partially Opposed Motion to Intervene, *Pennsylvania v. DeVos*, 480 F. Supp. 3d 47 (D.D.C. 2020) (No. 20-CV-01468-CJN, ECF No. 130-1). In its motion to join, the state of Texas claimed that “The Department [of Education] will cease adequately representing Texas’ interests only after January 20, 2021 when the new administration takes over and begins implementing its own policies,” and that Biden’s statements about the 2020 rules were “evidence of an unavoidable, fundamental divide between Texas and the Department under the President-elect’s incoming administration.” *Id.* at 10, 17. Judge Edward Chen granted the petition on Apr. 7, 2021.

sexual abuse claims and discourage students from reporting assaults. And the suits keep coming—on March 8, 2021, a women’s organization at Berkeley High School asked a California federal court to enjoin the DeVos rules, alleging that the rules deny “students the legal protections of Title IX that they previously enjoyed.”<sup>141</sup>

#### D. Biden Administration’s Response

President Biden has issued two executive orders regarding Title IX as of this writing. Executive Order 13988, issued on the day of his inauguration, is a general order calling on agency heads to review rules impacting sex discrimination and to ensure that new actions combat overlapping forms of discrimination.<sup>142</sup> Executive Order 14021, issued in March 2021 and aimed at Title IX specifically, requires the Secretary of Education not only to examine current Title IX guidance but to issue new guidance.<sup>143</sup> Biden was not coy about targeting the DeVos rules:

The Secretary of Education shall consider suspending, revising, or rescinding—or publishing for notice and comment proposed rules suspending, revising, or rescinding—those agency actions that are inconsistent with the policy set forth in section 1 of this order [ensuring educational environments free of sex discrimination and sexual assault] as soon as practicable and as appropriate and consistent with applicable law, and may issue such requests for information as would facilitate doing so.<sup>144</sup>

In response, the Department of Education issued a “Letter to Students, Educators, and other Stakeholders re Executive Order 14021” in April 2021 that made clear the intention to review the current Title IX rule and implementation, issue new guidance in the form of a Q&A document (which it did in July 2021), offer a public hearing to discuss the law (also held in June 2021), and possibly announce a Notice of

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141. Complaint at 5, *Women’s Student Union v. U.S. Dep’t. of Educ.*, No. 3:21-CV-01626-EMC (D.D.C. Mar. 8, 2021)

142. Exec. Order No. 13988, 86 Fed. Reg. 14, 7023-24 (Jan. 25, 2021) (calling for agency heads to “consider whether to revise, suspend, or rescind such agency actions, or promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination” and, if undertaking an action based on sex discrimination, “seek to ensure that it is accounting for, and taking appropriate steps to combat, overlapping forms of discrimination, such as discrimination on the basis of race or disability.”).

143. Exec. Order No. 14021, 86 Fed. Reg. 46, 13803-04 (Mar. 11, 2021). (calling special attention to LGBTQ+ individuals, requiring the Secretary of Education “to account for the significant rates at which students who identify as lesbian, gay, bisexual, transgender, and queer (LGBTQ+) are subject to sexual harassment, which encompasses sexual violence”).

144. *Id.* at 13803.

Proposed Rulemaking.<sup>145</sup> As the DeVos Title IX amendments were issued via the Administrative Procedures Act rulemaking process, the law cannot be changed merely through executive order, hence the intention to start the process of new rulemaking. In addition, the letter defined the Department's goal for its new Q&A guidance: "to provide additional clarity about how OCR interprets schools' existing obligations under the 2020 amendments, including the areas in which schools have discretion in their procedures for responding to reports of sexual harassment."<sup>146</sup>

Plaintiffs in the DeVos suits focused primarily on the cross-examination and live-hearing requirements, or on the Department's administrative process, rather than on the new rules' suggestions for IHE responsible employee designations. Although the ProPublica/NPR-IL situation predates the 2020 Title IX rules, there is nothing in those changes—and no forecast for Biden administration changes—that would either mandate or even encourage alterations to the responsible employee categorization at any IHE.

As promised, the Department of Education did issue a new 67-page Q&A document in July 2021.<sup>147</sup> While this document makes clear that the 2020 rules continue to be in effect while they are under revision,<sup>148</sup> it gives little guidance to IHEs determining who should be a Title IX responsible employee. The Biden Department of Education, the document explains, "is unable to provide examples of types of individuals who have this authority because the determination of whether a person is an official who has authority to institute corrective measures on behalf of the institution depends on facts specific to that institution."<sup>149</sup> This statement provides no obvious clues as to how the Biden administration will ultimately craft its determination of "responsible employee."

The hearings, held June 7-11, 2021,<sup>150</sup> showed this to be an emerging issue for student journalists. Finley Muratova, a student sex-

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145. Letter from Suzanne B. Goldberg, Acting Asst. Sec. for C.R., U.S. Dep't of Educ. Off. for C.R., *Letter to Students, Educators, and Other Stakeholders Re Executive Order 14021* (Apr. 6, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf>.

146. *Id.* at 3.

147. *Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)*, U.S. DEP'T EDUC. (July 20, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>.

148. *Id.* at 3.

149. *Id.* at 10–11.

150. U.S. DEP'T OF EDUC., VIRTUAL PUBLIC HEARING ON TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 (June 7, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-publichearing-complete.pdf>.

ual-assault survivor and journalist from American University, told the committee that she had interviewed more than 20 sources regarding their experiences with the Title IX process. She testified:

Over the last year I've heard numerous stories of pain and despair from fellow student survivors and all of them had one thing in common, that being severe mistreatment by their college's Title IX office. . . . In my field of work stories like these seem never ending [sic]. These are the stories of young people who turned to their schools for protection but instead of receiving help they suffered further.<sup>151</sup>

American University currently takes a wide-net approach to its designation of responsible employees, with only four narrow categorical exceptions: medical providers, ordained clergy, professional counselors, and victim advocates.<sup>152</sup> Student reporters like Muratova may function as victim advocates for some survivors. As discussed earlier,<sup>153</sup> many survivors do not turn to traditional university sources of support and advice when choosing to talk about their experiences—particularly when they believe that the university bears some responsibility for their pain. Enabling survivors to tell stories like those Muratova heard is precisely the kind of pathway to healing and university accountability that Title IX was intended to foster.

What might the 2020 Title IX rules governing mandatory reporter designation mean for professional and student journalists who want to investigate the implementation of Title IX at IHEs? The Student Press Law Center reported in 2017, when DeVos first announced the planned Title IX changes, that Title IX allegations impacted earlier requests under the Freedom of Information Act made by student journalists; some articles about sex (even satirical pieces) that appeared in college media were also implicated.<sup>154</sup> The facts of the University of Illinois Urbana-Champaign case<sup>155</sup> and the experiences of NPR-IL reporters in the fall of 2019 provide an excellent example of the harms

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151. *Id.* at 823–25 (statement of Finley Muratova, American University senior and survivor of sexual abuse).

152. AM. UNIV., UNIVERSITY POLICY: TITLE IX SEXUAL HARASSMENT POLICY 7 (2021), <https://www.american.edu/policies/au-community/upload/title-ix-sexual-harassment-policy-revision-10-26-2021-web.pdf>.

153. *See supra* notes 10–14 and accompanying text.

154. Samuel Breslow, *What Title IX Reform Could Mean for Student Journalists*, STUDENT PRESS L. CTR. (Sept. 11, 2017), <https://splc.org/2017/09/what-title-ix-changes-could-mean-for-student-journalists/> [<https://perma.cc/RE5P-PXHE>].

155. *See supra* notes 30–37 and accompanying text.

resulting from a wide-net approach to mandatory-reporter designations.<sup>156</sup>

### III.

#### THE ILLINOIS CASE

In response to the assignment of responsible-employee conditions to Illinois NPR reporters, NPR-IL staff wrote an open letter to university administrators, reminding them of the importance of the work the journalists there do and requesting an exception from reporting requirements under Title IX.<sup>157</sup> Administrators refused, citing a commitment to campus safety.<sup>158</sup> The two media organizations responded by saying that all source contacts containing complaints of sexual harassment henceforth would be handled by ProPublica.

Reactions from other media sources were swift and harsh. Isabel Lara, a spokeswoman for NPR in Washington, said that her organization “believes it is critically important for member station newsrooms to have independence in news gathering and editorial decisions”—especially when two-thirds of NPR member stations are licensed to, or affiliated with, colleges or universities.<sup>159</sup> Frank LoMonte, legal correspondent for the Poynter Institute and director of the Brechner Center for Freedom of Information at the University of Florida (and past executive director of the Student Press Law Center), said that the U of I case study sets a dangerous precedent: “journalists invariably will clash with image-sensitive administrators, particularly when the reporting spotlight shines inward toward the campus itself.”<sup>160</sup> The Reporters Committee for Freedom of the Press sent a letter to the U of I

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156. For an example of wide-net reporting practices, see *FAQs about Employee Reporting Obligations*, UNIV. ILL., <https://wecare.illinois.edu/faq/employees/> (last visited Sept. 10, 2021) (noting that “Because the definition of responsible employee is so broad, you should consider yourself a responsible employee unless you qualify as a confidential resource or you are an undergraduate student employee not holding one of the positions listed above.”).

157. NPR Illinois Leadership and News Staff, *Open Letter: The University Of Illinois Must Protect First Amendment Rights*, NPR ILL. (Oct. 10, 2019), <https://www.nprillinois.org/post/open-letter-university-illinois-must-protect-first-amendment-rights#stream/0> [<https://perma.cc/7EED-4VX7>].

158. Mary Hansen & Rachel Otwell, *NPR Illinois Journalists Can’t Report Freely on University of Illinois Sexual Misconduct. These Organizations Want that to Change*, PROPUBLICA (Nov. 8, 2019), <https://www.propublica.org/article/npr-illinois-journalists-cant-report-freely-on-university-of-illinois-sexual-misconduct-these-organizations-want-that-to-change> [<https://perma.cc/QM2Y-4YU5>].

159. Karen Zraick, *University of Illinois Is Stifling NPR Reporting on Sexual Misconduct, Critics Say*, N.Y. TIMES (Nov. 12, 2019), <https://www.nytimes.com/2019/11/12/business/media/npr-university-of-illinois-aclu-sexual-misconduct.html>.

160. LoMonte, *supra* note 37.

Board of Trustees condemning the university's actions, noting that "[m]andatory reporting of journalists' confidential sources will chill coverage of the University's handling of sexual misconduct [and] . . . allow systemic abuses like those already uncovered to continue in secret."<sup>161</sup>

There are two types of journalists (professional and student) implicated in situations like this, and those groups share the risk of a change in Title IX status. Rachel Otwell, the author of many of the NPR-IL/ProPublica sexual assault stories, is a professional journalist previously employed by NPR, not a student reporter. However, as discussed earlier, universities may continue to designate whomever they wish, including professional reporters like Otwell, to be responsible employees with mandatory reporting requirements under the 2020 Title IX rules.

In addition, these federal rules are floors, not ceilings, and states may expand their reach. In fact, a Texas law that took effect September 1, 2019, now requires all university employees to report allegations of sexual misconduct<sup>162</sup>—and they can lose their jobs and suffer criminal penalties if they do not.<sup>163</sup> The law explicitly excludes students from the list of mandatory reporters,<sup>164</sup> but if a student is also a university employee (for example, a paid student journalist), it is not obvious whether the employee status or the student status would be binding. The state of Louisiana passed a similar bill signed by Gov. John Bel Edwards (D) on June 29, 2021 and effective on that date.<sup>165</sup> In the Louisiana version, however, several positions that students can hold are specifically identified as employees with reporting require-

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161. Letter from the Reps. Comm. for Freedom of the Press, to Univ. of Ill. of Trs. (Nov. 6, 2019) <https://www.rcfp.org/wp-content/uploads/2019/11/11.06-RCFP-Letter-to-University-of-Illinois-Board-of-Trustees.pdf>.

162. TEX. EDUC. CODE ANN. §§ 51.251–51.290 (West 2019) at § 252(a) (“An employee of a postsecondary educational institution who, in the course and scope of employment, witnesses or receives information regarding the occurrence of an incident that the employee reasonably believes constitutes sexual harassment, sexual assault, dating violence, or stalking and is alleged to have been committed by or against a person who was a student enrolled at or an employee of the institution at the time of the incident shall promptly report the incident to the institution’s Title IX coordinator or deputy Title IX coordinator.”).

163. *Id.* at § 51.255(c) (“A postsecondary educational institution shall terminate the employment of an employee whom the institution determines in accordance with the institution’s disciplinary procedure to have committed an offense under Subsection (a).”).

164. *Id.* at § 51.251(3) (“‘Employee of a postsecondary educational institution’ does not include a student enrolled at the institution.”).

165. 2021 La. Sess. Law Serv. §§ 17:3399.11–3399.17 (West).

ments (teaching assistants and resident advisers<sup>166</sup>), suggesting that Louisiana schools may be more likely to include other student employees in that group, particularly those with managerial powers, like editors-in-chief.

Illinois already has college student speech protection enshrined in statute. The Illinois College Campus Press Act<sup>167</sup> was signed in 2007 and became effective June 1, 2008. All state-sponsored campus publications are considered public fora and not subject to prior review. Moreover, the law makes students accountable for what they publish: “Expression made by a collegiate student journalist, collegiate student editor, or other contributor in campus media is neither an expression of campus policy nor speech attributable to a State-sponsored institution of higher learning.”<sup>168</sup>

It may be that the NPR-IL situation is unique—and, so far, it seems to have been. But partnerships between universities and NPR stations are common: as noted earlier, two-thirds of NPR member stations are either licensed to or partnered with universities.<sup>169</sup> It is more likely that, in the age of increased university secrecy and concern about allegations of sexual assault, other institutions of higher education are closely watching the developments in Springfield. Thus, it is important to consider solutions to ensure that Title IX rules are not weaponized against this form of journalism.

#### IV. REMEDIES

Whether or not other universities follow Illinois’s lead, a path to combating “bad publicity” resulting from media coverage of university Title IX procedures and results is now open. The Illinois case is a blueprint that provides IHEs one simple way to shut down bothersome investigations, at least from media organizations that reside on their own campuses: eliminate survivors’ abilities to speak to those outlets anonymously. According to Student Press Law Center senior counsel Mike Hiestand, at least a dozen advisers or students have contacted the SPLC for assistance with questions of whether they are mandatory reporters who must follow Title IX rules.<sup>170</sup> As Hiestand points out,

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166. *Id.* at § 3399.11(3)(b) (“‘Employee’ does not include a student enrolled at a public postsecondary institution, unless the student works for the institution in a position such as a teaching assistant or a residential advisor.”).

167. 110 ILL. COMP. STAT. 13/1 (2008).

168. *Id.* at § 25.

169. Zraick, *supra* note 159.

170. Email from Mike Hiestand to Genelle I. Belmas, *supra* note 27.



“Title IX was never intended to make student journalists snitch on their classmates against their will. Doing so—especially when the issue is being raised confidentially—puts the student journalist in an impossible situation, both legally and ethically.”<sup>171</sup>

Given the broad latitude that current Title IX rules extend to IHEs in assigning responsible-employee status to their faculty and staff, there is no reason to suspect this trend will abate.<sup>172</sup> Moreover, it is likely that when the Biden Department of Education rolls back or reverses some of the more controversial elements of the 2020 rules, the deference that version of Title IX gives to IHEs to assign responsible-employee status to a broad swath of their employees will not be altered. Our proposals, discussed below, to combat the abuse of Title IX against journalists are divided into legal/policy and extra-legal suggestions.

### A. *Legal/Policy Suggestions*

#### 1. *Amend Title IX*

A narrow problem requires a narrow remedy. Amending Title IX to include an explicit carveout excusing university-affiliated journalists and their media advisors, whether student or professional, from their “responsible employee” designations would efficiently resolve the difficulty. This solution, however, is as quixotic as it is ideal. As noted earlier, the U of I case study is one of only a few examples<sup>173</sup> to

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171. *Id.*

172. In fact, “the Baylor effect” may well result in IHEs nervous about a similar scandal designating even more campus workers as responsible employees under Title IX. The phenomenon was named for the 2016 scandal at Baylor University in Texas, where a spate of undisclosed and covered-up allegations of sexual assault by members of the football team resulted in the firing of the team’s head coach and the stepping down as president of Ken Starr. See Andrew Kreighbaum, *Texas Legislation Contrasts With Devos Take on Campus Sexual Misconduct*, INSIDE HIGHER ED. (June 19, 2019), <https://www.insidehighered.com/print/news/2019/06/19/texas-legislation-contrasts-devos-take-campus-sexual-misconduct>.

173. Another example is the Tarleton College reprimand of journalism instructor and media adviser Dan Malone in 2018. A letter sent to Malone accuses him of failing to report an instance of sexual assault of which he and his staff became aware while reporting on accusations leveled by several women against a history professor. Memorandum from Delli Styron, Dean of Coll. of Liberal & Fine Arts, to Dan Malone (May 16, 2018) <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2018/10/25161D201/5162018-Reprimand-Letter.pdf>. See also Nell Gluckman, *Student Journalists Wrote About Allegations Against a Professor. Then the Articles Disappeared*, CHRON. HIGHER EDUC. (Aug. 17, 2021), <https://www.chronicle.com/article/student-journalists-wrote-about-allegations-against-a-professor-then-the-articles-disappeared> (describing the removal of the articles from the news organization’s website as demanded by university administration in response to demands from the professor’s attorney).

date of a college or university weaponizing Title IX to suppress press freedom. A carveout amendment addressing such a discrete problem would probably be too narrow to pass through a politically polarized Congress.

## 2. *Amend Title IX Guidance*

Under a more realistic approach, the Biden administration could maintain Title IX as it is in this area but change the recommendations associated with its implementation. The Department of Education should issue new guidance, through an updated “Dear Colleague” Letter and Q&A document, recommending an explicit carveout for university-affiliated journalists. Our recommendation is both realistic—amending Title IX would prove too burdensome—and concordant with the four corners of the Department’s rule itself: to “achieve important policy objectives that arise in the context of a school’s response to reports, allegations, or incidents of sexual harassment in a school’s education program or activity, including respect for *freedom of speech and academic freedom*.”<sup>174</sup>

Based on the rule’s plain language, First Amendment freedoms of speech and inquiry are paramount to the aims and objectives of Title IX specifically and the Department of Education generally. Guidance from the Department to excuse university-affiliated journalists from responsible-employee status appropriately balances the aims of Title IX against First Amendment tenets of free expression.

In addition to a responsible-employee carveout for university-affiliated journalists, we recommend a similar exception for student journalists. Releasing student journalists from a potential responsible-employee designation would encourage open and honest communication between these journalists and their confidential sources. This would protect student reportage, elicit better journalism, and safeguard First Amendment press freedom.

However, as enticing as these recommendations are, they are unlikely to occur. The rise in blanket designations for mandatory reporting occurred during the Obama administration under guidance that pushed schools for ever more Title IX vigilance, and a Biden Department of Education is unlikely to reverse that trend. Furthermore, there are few circumstances to date in which the statute has been used to impede journalistic investigations, and, as a result, there is very little political will or impetus to amend Title IX to circumvent them.

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174. 2020 Title IX Rules, *supra* note 40, at 30,035 (emphasis added) (footnote omitted).

### 3. Amend State Shield Laws

A third and somewhat more likely legal remedy to this nascent problem is amending state shield laws to include journalist-source confidentiality. To date, forty-nine states and the District of Columbia have given journalists some level of protection for refusing to testify or disclose confidential information in court, including identities of sources.<sup>175</sup> These statutory and common law protections are known as shield laws, and they are designed to protect the so-called reporters' privilege. Despite many attempts to pass a federal shield law, most recently in 2017 by Reps. Jamie Raskin (D-Md.) and Jim Jordan (R-Ohio),<sup>176</sup> not one has been codified.<sup>177</sup>

A majority of states' shield laws apply to anyone who regularly gathers and distributes news to the public, including unpaid students.<sup>178</sup> A minority of states, however, do not extend these protections to student journalists, freelance journalists, bloggers, or anyone who does not regularly engage in journalism "for financial gain or livelihood."<sup>179</sup> The Illinois shield law, for example, does not define a "journalist" in terms broad enough to positively assert protections for student journalists. A "reporter" is defined in the state's shield law as "any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis; and includes any person who was a reporter at the time the information sought was procured or obtained."<sup>180</sup>

The Supreme Court's 1988 decision in *Hazelwood v. Kuhlmeier*<sup>181</sup> further exacerbated this disparate legal treatment of the student press. The Court, in a five-to-three decision, held that public schools retain powers to censor student speech "inconsistent with 'the

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175. Reporter's Privilege Compendium (illustration), in REP. COMM. FOR FREEDOM PRESS, <https://www.rcfp.org/reporters-privilege/> (last visited Sept. 10, 2021).

176. Press Release, Off. Rep. Jamie Raskin, Reps. Raskin & Jordan Introduce Bipartisan Federal Press Shield Law (Nov. 14, 2017), <https://raskin.house.gov/2017/11/11/rep-raskin-jordan-introduce-bipartisan-federal-press-shield-law>.

177. Jane E. Kirtley, *Shield Laws*, FIRST AMEND. ENCYCLOPEDIA (2020), <https://www.mtsu.edu/first-amendment/article/1241/shield-laws>.

178. *Know Your Rights: Confidentiality and Shield Laws*, STUDENT PRESS L. CTR., (Aug. 18, 2014) <https://splc.org/2014/08/know-your-rights-confidentiality-and-shield-laws/>.

179. Arielle Giordano, *Protecting the Free Flow of Information: Federalism Shield Laws in the Digital Age*, 23 COMM'LAW CONSPECTUS 191, 206 (2014) (describing a 2013 House shield law bill's definition of a journalist as "a person who, for financial gain or livelihood is engaged in journalism." (citing H.R. 1962, 113th Cong. § 4 (2013))).

180. 735 ILL. COMP. STAT. ANN. 5/8-902(a) (West 2001).

181. *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988).

shared values of a civilized social order’”<sup>182</sup> so long as the school’s actions are “reasonably related to [matters of] legitimate pedagogical concerns.”<sup>183</sup> The *Hazelwood* case drastically tipped the balance of First Amendment press rights against high school student journalists. The theoretical implications for college journalists are discussed below.<sup>184</sup>

Recognizing a gap in legal protection, some scholars have urged state legislatures to codify press-freedom protections for student journalists.<sup>185</sup> The Student Press Law Center’s “New Voices” initiative has helped pass student-press protection laws in seven additional states since 2015, bringing the total to fourteen.<sup>186</sup> As of March 22, 2021, New Voices legislation has been introduced in ten additional state legislatures with more expected.<sup>187</sup> Even so, these laws are limited to protecting student journalists from prior review and prior restraint by campus administrators. They do not extend journalist-source confidentiality to the student press. New Voices laws function to combat *Hazelwood*, designating campus media as general-purpose public fora. They do not, as of now, affect the government’s ability to demand confidential information from student reporters.

We propose expanding state shield statutes, as applied to the professional and student press, to give university-affiliated journalists a qualified privilege to refuse to disclose confidential sources obtained in the news-gathering process. But this recommendation is not without problems. Of the forty-nine jurisdictions that give journalists *some* level of protection, only eighteen states have codified, absolute protection (in certain circumstances). The other thirty-one states provide either a qualified privilege or a court-recognized common law privilege. Additionally, Wyoming does not provide journalists any protection, either statutory or common law. In short, this patchwork of state-by-state approaches is not ideal. But in the absence of federal protection, state-level shield law amendments may be a viable alternative.

Not extending reporters’ privilege to IHEs, furthermore, undercuts Title IX objectives. Survivors who allege university misconduct

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182. *Id.* at 272 (quoting *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

183. *Id.* at 273.

184. *See infra*, Section IV.B.2.

185. Jonathan Peters, Genelle Belmas & Piotr Bobkowski, *A Paper Shield: Whether State Privilege Protections Apply to Student Journalists*, 27 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 763, 765–802 (2016).

186. *New Voices*, STUDENT PRESS L. CTR., <https://splc.org/new-voices/> (last visited Sept. 10, 2021).

187. *Id.*

in the reporting process are left with insufficient channels for communicating their experiences anonymously. Student journalists like Finley Muratova<sup>188</sup> who promise their survivor-sources confidentiality (consistent with state law)<sup>189</sup> will be unfairly surprised to discover that their schools may pretextually pierce their legal privilege to cloak university misdeeds—as happened to NPR reporters at U of I.

#### 4. Amend University Categorizations of “Responsible Employees”

Our fourth, and arguably most plausible, recommendation is narrowing the “responsible employee” mandatory reporting category to exclude university-affiliated journalists at the institutional level. Recalling the revised Title IX rules discussed above,<sup>190</sup> postsecondary academic institutions have broad discretion over which school employees they designate as “responsible.” The purpose of this discretion, presumably, is to allow individual universities the latitude necessary to create reporting exclusions consistent with state law communication privileges.

If a state recognizes certain communications as privileged, e.g., physician-patient, psychotherapist-patient, clergy-penitent, or journalist-source, it is in the interests of legal certainty and predictability for IHEs located within that state to recognize concomitant Title IX reporting exclusions. Otherwise, students who disclose instances of sexual assault to an on-campus journalist—expecting confidentiality under traditional statutory or common law protections—will be horrified to discover that university administration may order that journalist to reveal their identities in pursuit of “justice” under Title IX.

For these reasons rooted in social justice and predictability of law, individual university Title IX offices typically create mandatory-reporting carveouts *consistent with* state common law and statutory privilege—for healthcare workers, counselors, or clergy. In addition, some universities extend reporting privileges for disclosures made in the following contexts: to student employees (e.g., resident assistants and teaching assistants),<sup>191</sup> in an Institutional Review Board-approved

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188. See *supra* Section II.D.

189. Muratova, who is a senior and student reporter at American University in Washington, D.C., is subject to the District of Columbia shield law. See D.C. Code § 4701–4704.

190. See *supra* Section II.C.

191. UNIV. TENN., POLICY ON SEXUAL HARASSMENT, SEXUAL ASSAULT, DATING & DOMESTIC VIOLENCE, AND STALKING 14 (2021), <https://titleix.utk.edu/wp-content/uploads/sites/96/2021/08/2021-22-Title-IX-Policy.pdf>.

human subjects research project,<sup>192</sup> or in the course of academic work product consistent with the assignment (e.g., public speaking or creative writing assignments).<sup>193</sup> Purdue University, for example, defines mandatory reporters very narrowly:<sup>194</sup>

Under the revised federal Title IX Regulations, many people are no longer mandatory reporters. The current policy lists mandatory reporters as: Individuals employed by the University who hold a title of or equivalent to President, Chancellor, vice president, vice chancellor, vice provost, dean, department head and director, as well as employees in supervisory or management roles, and staff who have authority to institute corrective measures on behalf of the University.

Under this definition, even most faculty members are exempt from Title IX reporting duties.<sup>195</sup> Other schools like Northwestern University,<sup>196</sup> U of I,<sup>197</sup> and most IHEs in Texas and Louisiana,<sup>198</sup> have defined the categories of responsible employees very broadly to include *all university employees*, including undergraduate resident advisors, multicultural advocates, student patrol officers, and teaching assistants.<sup>199</sup>

If the Department of Education empowers academic institutions with wide discretion in how individual Title IX offices define “responsible employees” for purpose of Title IX mandatory reporting purposes—and if some universities, such as Purdue, are making designations of responsible employee the exception rather than the

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192. *Title IX Reporting Exception for Research*, UNIV. N.H., <https://www.unh.edu/research/title-ix-reporting-exception-research> (last visited Sept. 10, 2021); *Title IX Reporting Exception for Human Subjects Research*, N.Y.U., <https://www.nyu.edu/research/resources-and-support-offices/getting-started-withyourresearch/human-subjects-research/forms-guidance/titleix.html> (last visited Sept. 10, 2021).

193. LA. ST. UNIV., OFF. CIV. RTS. & TITLE IX, PERMANENT MEMORANDUM 73, PROHIBITING POWER-BASED VIOLENCE, INCLUDING SEX- & GENDER-BASED HARASSMENT AND DISCRIMINATION, AND SEXUAL MISCONDUCT, 13 (2021) <https://www.lsu.edu/administration/policies/pmfiles/pm-73.pdf>.

194. *Mandatory Reporter Information*, PURDUE UNIV. (Sept. 11, 2021), [https://www.purdue.edu/titleix/Title%20IX/mandatory\\_reporters.php](https://www.purdue.edu/titleix/Title%20IX/mandatory_reporters.php).

195. *Id.* at *supra* note 189. See generally Justine A. Dunlap, *Harmful Reporting*, 51 N.M. L. REV. 1, 2 (2021).

196. NORTHWESTERN UNIV., INTERIM POLICY ON TITLE IX SEXUAL HARASSMENT 13 (2021), <https://www.northwestern.edu/equity/documents/interim-policy-on-title-ix.pdf>. (noting that “*All University employees (including student employees) and graduate students with teaching or supervisory authority, are obligated to promptly report sexual misconduct*” except for certain confidential resources such as those involving healthcare, spiritual support, and the university ombuds).

197. UNIV. ILL., *supra* note 123.

198. See *supra* notes 162–66 and accompanying text.

199. *Id.*

rule—it makes sense to extend reporting carveouts for university-affiliated journalists. This recommendation mirrors guidance from the Society of Professional Journalists’ Board of Directors: “Mandatory reporting of journalists’ confidential sources will chill coverage of the university’s handling of misconduct and allow abuses like those already uncovered to continue in secret.”<sup>200</sup>

Not extending reporters’ privilege to Title IX investigations, especially in jurisdictions with strong statutory protections, like Illinois, severely undercuts reporters’ expectations of their legal rights. Universities that do not create this exception unfairly surprise student and professional journalists and undercut the instruction and function of a free and open press.

The U of I facts necessitate an expansion of state shield laws, especially in student-media settings where the reporters (and their advisors) serve at the pleasure of a higher power. Weaponizing Title IX in this way obstructs student and professional reportage and the First Amendment generally. Universities that label journalists as mandatory reporters damage the trust that sexual-assault survivors place in the student and professional press. And those survivors cannot adequately reveal university misconduct, or begin the healing process, while maintaining their anonymity.

### *B. Extra-Legal Suggestions*

State actors and educational institutions, both secondary and post-secondary, should recognize the benefits of creating exceptions to wide-net Title IX reporting approaches. If, however, these policy makers are unreceptive to student- and university-affiliated journalist carveouts, we suggest two extra-legal remedies to preserve freedom of information and journalist-source confidentiality. Our first suggestion concerns university students; our second suggestion mainly focuses on high school students.

#### *1. Partner with Professional Press*

First, student media organizations should partner with the professional press. These relationships can be similar to the above-mentioned ProPublica/ NPR-IL collaboration. Student media organizations generally, but those investigating Title IX stories specifically, should

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200. Memorandum from Hagit Limor, Legal Def. Fund Comm. Chair, to Soc’y of Pro. Journalists Bd. of Dirs. 44 (June 27, 2020), <https://www.spj.org/pdf/boardmeeting-archive/spj-board-meeting-packet-2020-06-27.pdf>.

report alongside local news outlets to provide a safety net for investigations that include anonymous accounts of sexual assault.

If a university-affiliated journalist, while investigating a school's alleged cover-up of a sexual assault allegation, encounters a source only willing to speak anonymously, the investigative journalist should collaborate with a non-university journalist to interview the source. This approach serves twin objectives: encouraging university Title IX investigations while, simultaneously, giving reporters a mechanism to report newsworthy material. University-affiliated journalists, however, must take care to refer their sources *before acquiring actual knowledge or constructive notice* of the alleged sexual assault.<sup>201</sup> Otherwise, they become mandatory reporters subject to disclosure requirements of their universities' Title IX offices.

## 2. *Report Through Off-Campus Media Channels*

Our second recommendation, geared toward high-school journalists, proposes creating “non-official” student media, disconnected from school-sanctioned communication channels. This proposal circumvents school censorship of controversial topics journalists choose to cover—not Title IX mandatory reporting requirements. As discussed above,<sup>202</sup> the Court's *Hazelwood* decision held that public schools do not offend First Amendment freedoms of speech or press by exercising editorial control over the content of student speech so long as the actions are reasonably related to matters of legitimate pedagogical concern.<sup>203</sup> A journalism instructor who admonishes a student for reporting on sexual assault issues—fearing administrative condemnation or Title IX bureaucratic entanglement—*may*, constitutionally, chill student speech by rationalizing the arguments against coverage using pedagogical subterfuges: e.g., “this topic has a lack of timeliness, impact, and proximity such that it's not newsworthy, and you can't report on it.”

The Court's censorship holding in *Hazelwood* may, in theory, apply to postsecondary institutions.<sup>204</sup> University-student journalists, therefore, are well advised to report through non-official, off-campus media channels, not to avoid Title IX mandatory reporting but to circumvent university censorship. In *Papish v. University of Missouri*

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201. See 2020 Title IX Rules, *supra* note 40.

202. See *supra* Section IV.A.3.

203. *Hazelwood*, 484 U.S. at 273.

204. *Id.* at 291 n.7 (noting the Court “need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”).



*Board of Curators*,<sup>205</sup> the Court held that public universities cannot punish students for indecent or offensive speech that does not disrupt campus order or interfere with the rights of others.<sup>206</sup> The Court reaffirmed this holding in *Hazelwood*:

The distinction that we draw between speech that is sponsored by the school and speech that is not is fully consistent with *Papish v. University of Missouri Board of Curators* (citations omitted), which involved an off-campus “underground” newspaper that school officials merely had allowed to be sold on a state university campus.<sup>207</sup>

A university *may* censor its student media, attempting to extend *Hazelwood*’s theory of pedagogical implicature,<sup>208</sup> despite a parade of lower-court cases suggesting otherwise.<sup>209</sup> It, therefore, behooves university students to supplement their university-channel media reporting with non-official, off-campus publications because the latter receives greater legal protection and is outside the reach of university Title IX reporting requirements.

In *Mahanoy Area School Dist. v. B. L.*, the most recent high-court student-speech case, the Court held that while schools may regulate *some* off-campus student speech in certain contexts (e.g., severe bullying or targeted harassment),<sup>210</sup> a student’s free-speech interests will typically outweigh a school’s special regulatory interests for three reasons: (1) a school rarely stands *in loco parentis* when a student speaks off campus; (2) on- and off-campus speech regulations jointly constitute the totality of a student’s expressive capacity and courts,

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205. 410 U.S. 667 (1973) (per curiam).

206. *Id.* at 667.

207. *Hazelwood*, 484 U.S. at 271.

208. *Hosty v. Carter*, 412 F.3d 731, 738 (7th Cir. 2005).

209. *See, e.g., Bazaar v. Fortune*, 476 F.2d 570, 576 (5th Cir. 1973) (noting that a university does not possess arbitrary power, merely because of its relationship with a student publication, to censor its content absent “special circumstances” such as publication of “legally obscene” material or “significant disruption” on the university campus); *Schiff v. Williams*, 519 F.2d 257, 260 (5th Cir. 1975) (holding that “the right of free speech embodied in the publication of a college student newspaper cannot be controlled except under special circumstances.”); *Stanley v. Magrath*, 719 F.2d 297, 282 (8th Cir. 1983) (holding that a “public university may not constitutionally take adverse action against a student newspaper, such as withdrawing or reducing the paper’s funding, because it disapproves of the content of the paper.”). Several circuits have also explicitly rejected the extension of *Hazelwood* to college media; *see Student Govt. v. Bd. of Tr. of Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (noting that *Hazelwood* “is not applicable to college newspapers”); *Kincaid v. Gibson*, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (asserting that “*Hazelwood* has little application to this case” involving administrative censorship of a college yearbook).

210. *Mahanoy Area Sch. Dist. v. B. L.*, No. 20-255, slip op. at 6 (U.S. June 22, 2021).

therefore, must treat off-campus regulation with skepticism for fear of precluding student speech altogether; and (3) the school has an interest in protecting unpopular student opinions, especially when expression takes place off campus, because America's public schools act as "nurseries of democracy," fostering liberal values of "informed public opinion" and the "marketplace of ideas."<sup>211</sup>

Because these three features, taken together, diminish a school's power to regulate off-campus student speech,<sup>212</sup> we recommend that student journalists use off-campus communication channels to supplement their reporting. Social media and blogs will allow student journalists, fearing administrative censorship, to report on sensitive issues that schools would otherwise quell—like an administration's (mis)handling of sexual assault allegations.

## V.

### CONCLUSION

So far, there has been no public report that a university has imposed mandatory reporting responsibilities on student journalists. However, it could happen. As campus safety consultant S. Daniel Carter put it, "Nothing in current Title IX . . . guidance prohibits an institution from designating all employees, including students who are also employees, as responsible employees . . . if they want to."<sup>213</sup> The Department did not change this possibility in the current rules; in fact, the rules take pains to ensure that universities have flexibility in their designations. Researchers concerned about student press freedom must not only evaluate the threat of this designation happening to collegiate reporters but also consider ways in which such a threat could be combated.

This Article contributes to those descriptive and normative objectives by (1) articulating the nascent and pernicious effects of extending Title IX mandatory reporting requirements to university-affiliated journalists, and (2) recommending preventative measures that state legislatures or universities may employ to preclude academic administrators, at both the secondary and post-secondary levels, from censoring student expression or weaponizing Title IX against journalists. Justice Hugo Black once said that the paramount objective of a

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211. *Id.* slip op. at 7.

212. *Id.* slip op at 8.

213. LoMonte, *supra* note 37.

free press is to prevent *any* part of the government from deceiving the people.<sup>214</sup> Why should public schools be an exception?

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214. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

