

## For the Title IX Civil Rights Movement: Congratulations and Cautions

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On September 25, 2015, the *Yale Law Journal* held a “Conversation on Title IX” that confirmed the existence of a new civil rights movement in our nation and our schools. The movement’s leaders are smart, courageous survivors of gender-based violence—virtually all of whom are current undergraduates or recent college graduates. Joining them are multiple generations of anti-gender-based violence activists, attorneys, leaders, and scholars. These generations include those who began using and changing the law to address gender-based violence in the 1960s and 70s, whether by working to end sexual harassment in the workplace,<sup>1</sup> by reforming the criminal law of rape,<sup>2</sup> or by developing new legal mechanisms to protect and empower the victims and survivors of domestic violence.<sup>3</sup> Also included are those who have doggedly continued such work—even expanded it in important ways beyond the criminal law<sup>4</sup>—during decades often characterized by “backlash” against various women’s

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1. See generally Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 1-39 (Catherine A. MacKinnon & Reva Siegel eds., 2004).
  2. See generally Holly Hogan, *Law Reform Efforts: Rape and Sexual Assault in United States of America*, INT’L MODELS PROJECT ON WOMEN’S RTS. (May 6, 2012), <http://www.impowr.org/content/law-reform-efforts-rape-and-sexual-assault-united-states-america> [http://perma.cc/5JJE-Q8VX].
  3. See generally Indiana Coalition Against Domestic Violence, *History of the Battered Women’s Movement*, IND. COALITION AGAINST DOMESTIC VIOLENCE (Sept. 1999), <http://www.icadvinc.org/what-is-domestic-violence/history-of-battered-womens-movement> [http://perma.cc/WZG6-C7K3].
  4. See generally Ilene Seidman & Susan H. Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467 (2005); *VRLC History*, VICTIM RTS. L. CTR., <http://www.victimrights.org/about-vrlc/vrlc-history> [http://perma.cc/CZM2-HD3W].

movements.<sup>5</sup> As a result, it is fair to say that this campus-based civil-rights movement can and will continue to exert the collective strength of advocates to solving the problem of gender-based violence in educational institutions and in society as a whole.

The educational environment is the focus of this movement for reasons both disturbing and hopeful. On the disturbing side of this coin, Vice President Joseph Biden has spoken with dismay about current rates of violence against women in college, where virtually no progress has been made in the twenty-one years since the Violence Against Women Act (VAWA) passed in 1994.<sup>6</sup> On the hopeful side is Title IX of the Educational Amendments of 1972 (Title IX),<sup>7</sup> the groundbreaking civil rights statute prohibiting sex discrimination in education. Included in Title IX's definition of sex discrimination are sexual and other forms of gender-based violence, which are commonly considered severe forms of sexual harassment, itself a type of sex discrimination that violates Title IX.<sup>8</sup>

The movement has also played an active role in using and improving the effectiveness of another law, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), which was amended by VAWA in 2013 to add more provisions requiring colleges and universities to prevent and respond to gender-based violence in a variety of ways.<sup>9</sup> However, movement leaders have wisely chosen Title IX as their lead banner and organizing point. As a civil rights statute, Title IX guarantees broad rights to an equal education, following in the steps of older civil-rights statutes such as Title VII of the Civil Rights Act of 1964, which safeguards equal employment

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5. See generally SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991) (discussing various forms of backlash against the women's movement that began in the 1980s).
  6. Vice President Joseph Biden, Remarks at Syracuse University (Nov. 12, 2015) (transcript on file with author); see also The White House, *President Obama Speaks at the Launch of the "It's On Us" Campaign*, YOUTUBE (Sept. 19, 2014), <http://www.youtube.com/watch?v=VWzicOSoPqI> [<http://perma.cc/9AWQ-ZU5V>]. See generally Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (containing Title IV, also known as the Violence Against Women Act).
  7. 20 U.S.C. §§ 1681-1688 (2012).
  8. See Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Student by School Employees, Other Students, or Third Parties*, U.S. DEP'T EDUC. 6 (2001) [hereinafter *Revised Guidance*], <http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf> [<http://perma.cc/67TN-QVQ8>] (“[I]f the conduct is more severe, e.g., attempts to grab a female student’s breasts or attempts to grab any student’s genital area or buttocks, it need not be as persistent to create a hostile environment. Indeed, a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.”).
  9. 20 U.S.C. § 1092(f) (2012).

opportunity.<sup>10</sup> In addition, because it was passed into law over forty years ago, Title IX is available for survivors to use now, without requiring the many years generally needed to pass a whole new statute and build administrative and court-based enforcement mechanisms. Therefore, although schools' compliance with Title IX and the statute's enforcement still require significant improvements,<sup>11</sup> today's movement can build upon a legal foundation established by previous waves of the pro-equality and anti-gender-based violence movements. Movement activists can, and will, continue to improve Title IX's ability to protect students' civil rights to equal educational opportunity.

But in doing so, the Title IX movement must remain vigilant against pushes to "criminalize" Title IX.<sup>12</sup> Suggestions that gender-based violence

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10. Several factors make Title IX more powerful than the Clery Act (as amended by VAWA). First, Title IX's broad civil rights mandate can potentially reach a wider range of behavior than the Clery Act's more narrow provisions and specific directives. For instance, Title IX, as interpreted by the Office for Civil Rights in the Department of Education, requires schools to fulfill the wide-ranging mandate of taking "prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects." *Revised Guidance*, *supra* note 8, at 12. In contrast, the Clery Act's provisions are more specific, such as rules requiring that schools allow student accusers and accused students "the same opportunities to have others present during a campus disciplinary proceeding." *See* 20 U.S.C. § 1092(f)(B)(iv)(I) (2012).

Second, Title IX is more powerful because it is enforced in multiple ways, whereas the Clery Act only has one enforcement mechanism. The Clery Act is only enforced administratively by the Department of Education, but Title IX is enforced both administratively and through private lawsuits, *see, e.g.*, *Davis v. Monroe Cty Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60 (1992); *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979), which are potentially much more expensive than administrative enforcement, even though the standard for the private right of action has been criticized for being insufficiently protective of victims' rights, *see* Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Abuse in Education*, 125 *YALE L.J.* (forthcoming 2016).

11. In less than one year after the Office for Civil Rights issued a list of colleges and universities being investigated based on allegations that they mishandled cases of sexual violence reported to them, *see U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, U.S. DEP'T EDUC., (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations> [<http://perma.cc/LH9D-Q8FA>], the number of schools under investigation more than doubled to a disturbing 137 colleges and universities, Tyler Kingkade, *Notre Dame, Stung By 'The Hunting Ground,' Is Under U.S. Investigation For Sexual Harassment Cases*, *HUFFINGTON POST* (Apr. 17, 2015), [http://www.huffingtonpost.com/2015/04/17/notre-dame-sexual-harassment-hunting-ground\\_n\\_7082702.html](http://www.huffingtonpost.com/2015/04/17/notre-dame-sexual-harassment-hunting-ground_n_7082702.html) [<http://perma.cc/AC6H-8YC4>]. This large number of investigations shows the significant gap between the rules that schools are supposed to follow and schools' successful compliance with those rules.

12. Alexandra Brodsky, *Don't Criminalize College Responses to Sexual Violence*, *AL JAZEERA AM.* (Feb. 13, 2014), <http://america.aljazeera.com/opinions/2014/2/title-ix-sexual-assaulttrape-collegecampuscriminaljusticegatto.html> [<http://perma.cc/65UE-V4ZV>].

violating Title IX can be punished like criminal offenses and that Title IX proceedings should therefore follow the procedures of the criminal justice system conflate Title IX with criminal laws against rape and sexual assault.<sup>13</sup> This conflation fundamentally undermines Title IX's central purpose: to protect and promote equal educational opportunity for *all* students, including *both* the alleged perpetrators *and* the victims of gender-based violence.<sup>14</sup>

By prohibiting gender-based violence as a form of sex discrimination, Title IX recognizes that such violence is both a cause and a consequence of gender inequality, an insight that has been understood throughout the globe for many decades.<sup>15</sup> Because, as the Secretary General of the United Nations has stated, “[v]iolence against women is a form of discrimination and a violation of human rights . . . [that] can only be eliminated . . . by addressing discrimination, promoting women’s equality and empowerment, and ensuring that women’s human rights are fulfilled,”<sup>16</sup> Title IX’s main goals are creating rights and remedies for victims and ending not only harassment and violence but also its discriminatory effects.

In contrast, the criminal law is not concerned with establishing equality, and it gives few, if any, rights to violence victims. A primary goal of the criminal law is to keep the abstract community as a whole safe from violence, which it achieves, in part, by incarcerating criminal actors<sup>17</sup> while at the same

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13. *Id.*

14. See, e.g., *Equal Access to Education: Forty Years of Title IX*, U.S. DEP’T JUST. 2 (2012), <http://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf> [<http://perma.cc/QT9G-DQX8>] (“Congress passed Title IX in response to the marked educational inequalities women faced prior to the 1970s.”). It is also worth noting that when Title IX is violated, it is violated by the school, not by individuals. Under Title IX, *the school* is responsible for addressing gender-based violence that creates a hostile educational environment. This responsibility is designed to spur schools to address and end discriminatory behavior among school community members, and schools that take effective steps to address and end such behavior will escape Title IX liability under either enforcement method. *Revised Guidance*, *supra* note 8, at ii–iii.

15. See, e.g., Nancy Lombard, *Gendered Violence: A Cause and a Consequence of Inequality*, EUR. COMMISSION, <http://enege.eu/sites/default/files/14-Nancy-Lombard.pdf> [<http://perma.cc/6FMS-YA2F>].

16. *Ending Violence Against Women: From Words to Action*, UNITED NATIONS SECRETARY-GEN., at i (2006), [http://www.un.org/womenwatch/daw/public/VAW\\_Study/VAWstudyE.pdf](http://www.un.org/womenwatch/daw/public/VAW_Study/VAWstudyE.pdf) [<http://perma.cc/G8NL-MRE7>].

17. WAYNE R. LAFAVE, *PRINCIPLES OF CRIMINAL LAW* 10, 12 (2003) (“The broad aim of the criminal law is, of course, to prevent harm to society . . . . This it accomplishes by punishing those who do harm . . . . [A difference between civil laws like tort law and criminal law is] that criminal punishment, with emphasis on imprisonment, is on the whole more drastic than the sanctions . . . imposed by the civil law.”).

time providing safeguards to avoid punishing innocent defendants.<sup>18</sup> As a result, criminal cases are structured as adversarial proceedings between a defendant and the whole community, represented by the state's prosecutor.<sup>19</sup> Moreover, because defendants face potential incarceration, death, and the loss of legal rights, the state must meet high procedural standards designed to protect defendants' liberty against unjust exercises of the government's immense power to punish.<sup>20</sup> Therefore, the criminal system is primarily focused on the defendant's, not the victim's, rights.<sup>21</sup>

Additionally, the push to criminalize Title IX forgets who has to enforce the rules. Educational institutions are not empowered to incarcerate students. Indeed, schools have no power to enforce the criminal law at all. However, schools not only have the power, but also the *obligation*, to comply with the civil rights requirements of Title IX.

Nevertheless, recent state and federal legislation continues the attempt to criminalize Title IX. This legislation generally advances one of three proposals. First, there has been a concerted effort to import criminal due process requirements into campus disciplinary and grievance proceedings.<sup>22</sup> Second, a range of lawmakers have proposed legislation mandating that school officials refer all reports of sexual violence, including through the school's Title IX system, to law enforcement.<sup>23</sup> Third, a number of states have passed statutes requiring colleges and universities to adopt "affirmative consent" or so-called "yes means yes" policies.<sup>24</sup> As the remainder of this Essay will detail, the first two proposals conflict with and dangerously undermine Title IX's equality mandate, but the effect of the third is more equivocal. This Essay considers each one of these criminalization efforts. It then briefly proposes two methods

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18. *Id.* at 16 ("The law has always been concerned with the risk of innocent persons being subjected to criminal proceedings, and thus certain evidentiary tests must be met at several points in the criminal process.").

19. *Id.* at 12 ("With crimes, the state itself brings criminal proceedings to protect the public interest."); *id.* at 16-22 (discussing the "Characteristics of Criminal Procedure," including the roles of state employees like police and prosecutors in enforcing the criminal law, including the prosecutor's discretion to decide when a defendant's alleged crime should be prosecuted).

20. *Id.* at 16-17.

21. *Id.* at 7 (discussing, e.g., "basic premises" of criminal law regarding the *defendant's* right not to be charged with a crime unless the defendant's bad acts, bad states of mind, and the concurrence of both exist, but not mentioning victims or any victims' rights); *id.* at 12 (discussing the fact that "the state itself brings criminal proceedings to protect the public interest but not to compensate the victim").

22. See sources cited *infra* Part I.

23. See sources cited *infra* Part II.

24. See sources cited *infra* Part III.

of retaining the benefits of affirmative consent policies while minimizing the damage they could do to Title IX rights.

### I. IMPORTING *CRIMINAL* DUE PROCESS INTO INTERNAL, ADMINISTRATIVE TITLE IX PROCEEDINGS

The first category of legislative proposals seeks to criminalize Title IX by infusing unequal *criminal* procedures into campus-based *administrative* proceedings, thus undermining Title IX's equality goals. In 2015, at several state bills and one congressional bill, as initially proposed, would have created rights for students and student organizations accused of misconduct that would not be equally available to student victims.<sup>25</sup> While the state and federal bills vary somewhat, all of these bills would give accused students and organizations various rights associated with criminal trials that would create conflicts with schools' Title IX obligations and upset the U.S. Supreme Court's decades-old balance regarding school discipline. These bills would also create rights only for students or student organizations found responsible for and sanctioned for sexual violence (but not for other misconduct), including rights to seek judicial review of university proceedings and to allow the sanctioned student or organization to obtain monetary damages against the school.<sup>26</sup> Thus, students found responsible for sexually victimizing another student or students would become the only students in the country who may ask a court to overrule the decisions of school disciplinary proceedings made pursuant to the schools' own policies.

Providing accused students with a set of rights that are not advanced to survivors fundamentally conflicts with Title IX's "procedural equality" requirements. This term encompasses many of the specific rules that were first articulated by the Department of Education's Office for Civil Rights (OCR) under the general heading "Prompt and Equitable Grievance Procedures"<sup>27</sup> and

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25. See, e.g., H.R. 3408, 114th Cong. (2015), <http://www.congress.gov/bill/114th-congress/house-bill/3408/text> [<http://perma.cc/Z2FK-DS9G>]; H. 3453, 121st Gen. Assemb., Reg. Sess. (S.C. 2015), [http://www.scstatehouse.gov/sess121\\_2015-2016/bills/3453.htm](http://www.scstatehouse.gov/sess121_2015-2016/bills/3453.htm) [<https://perma.cc/9RJP-TTFQ>]; S. 2150, 64th Leg. Assemb., Reg. Sess. (N.D. 2015), [http://legiscan.com/ND/text/2150/id/1063516/North\\_Dakota-2015-2150-Introduced.pdf](http://legiscan.com/ND/text/2150/id/1063516/North_Dakota-2015-2150-Introduced.pdf) [<https://perma.cc/8WDC-D3AA>].
26. H.R. 3408, 114th Cong. (2015), <http://www.congress.gov/bill/114th-congress/house-bill/3408/text> [<http://perma.cc/Z2FK-DS9G>]; Jake New, *First, Do No Harm*, INSIDE HIGHER ED (Feb. 19, 2015), <http://www.insidehighered.com/news/2015/02/19/open-letter-calls-legislators-reconsider-campus-sexual-assault-bills> [<http://perma.cc/Y7CP-X34N>].
27. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP'T EDUC. 10-12, 14, 26, 32, 37 (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<http://perma.cc/R38U-BXDC>] [hereinafter *Title IX Q&As*]; Office for Civil Rights, *Dear Colleague Letter: Sexual Violence*, U.S. DEP'T EDUC. 6, 8-9, 18 (Apr. 4,

follows the fundamental principle that both parties to a proceeding get equal rights within the rules that govern the proceeding. These rights include whether the accused person and victim are considered parties to the proceeding; whether they are represented by an attorney, advisor, or advocate; what kind of access to evidence (including exculpatory evidence) they have; what privacy protections they are given; whether each may be present at any hearing and for what portion of the hearing; and who may appeal any decision made by the fact-finder. All are provided equally under Title IX, but *unequally* under the criminal law.

In fact, because protecting equality is not a goal of the criminal justice system, criminal procedures have no reason to keep the status of defendants and victims in the proceeding equal. As a result, victims get vastly fewer procedural rights than defendants do.<sup>28</sup> Victims are not parties to criminal cases but are considered “complaining witnesses” who may not remain in the courtroom beyond giving their testimony. As non-parties, victims have no attorney representation in the courtroom, and the victim has no control over the prosecution’s presentation of her or his case.<sup>29</sup> Moreover, criminal discovery requirements, such as the *Brady* rule, require the prosecutor to disclose any evidence that may support the defendant’s innocence, whereas nothing requires the defendant to disclose evidence supporting the truth of the victim’s report.<sup>30</sup> Defendants can thus demand disclosure of sensitive private information such as medical and counseling records on the basis that they are relevant to the victim’s credibility and are a kind of exculpatory evidence, but the victim—or even the prosecutor—cannot make reciprocal evidentiary demands.<sup>31</sup>

In contrast, Title IX requires that victims and accused students be treated as equal parties to a grievance proceeding. OCR has made clear that “[w]hile a school has flexibility in how it structures the investigative process, for Title IX purposes, a school must give the complainant any rights that it gives to the alleged perpetrator.”<sup>32</sup> Therefore, if a school allows accused students rights such as those listed above, which are commonly provided to criminal defendants, it must give student complainants the same rights—all at the same level as guaranteed to the accused.

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2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<http://perma.cc/2R7H-P9UQ>] [hereinafter 2011 DCL]; *Revised Guidance*, *supra* note 8, at 19-21.

28. See Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 675-80 (2009).

29. See *id.* at 676.

30. See *id.* at 677.

31. See *id.* at 678.

32. See *Title IX Q&As*, *supra* note 27, at 26; see also 2011 DCL, *supra* note 27, at 11.

As Alexandra Brodsky, moderator of the September 25 Conversation lunch panel, first pointed out,<sup>33</sup> Title IX's procedural equality requirements have not only resulted in an expansion in victims' rights beyond what victims receive under the criminal law, but they have also expanded *accused students'* rights in campus disciplinary proceedings. Under U.S. Supreme Court precedent, because campus disciplinary procedures are administrative and not criminal proceedings, schools have to guarantee—at most—that the accused student had notice and an opportunity to be heard.<sup>34</sup> A long list of criminal due process rights have been rejected repeatedly by courts judging the fairness of campus disciplinary proceedings, including the right to be accompanied by an attorney in campus proceedings.<sup>35</sup> However, when VAWA amended the Clery Act to guarantee that both students involved in disciplinary proceedings for dating violence, domestic violence, sexual assault, and stalking were entitled to an “advisor of their choice,”<sup>36</sup> and the negotiated regulations later defined “advisor” to include attorneys,<sup>37</sup> accused students' rights were significantly expanded. Although VAWA specifically gave both accuser and accused the right to an advisor of their choice, had the statute only given this right to the accuser, Title IX's requirements would have required that accused students also receive that right. Thus, the VAWA amendments provide a concrete example of how Title IX's requirement of procedural equality can increase the rights of both survivors and accused students.

Along with the rule that both students are considered parties in Title IX proceedings, Title IX's most important procedurally equal rule requires schools to use a preponderance of the evidence standard when investigating and resolving Title IX complaints.<sup>38</sup> Civil rights systems require the preponderance standard because it is the most equal of all standards of proof. First, the preponderance standard allows survivors to prevail on their allegations as long as just over fifty percent of the evidence supports their allegations. Second, the preponderance standard gives as equal as possible presumptions of truth-telling to both parties, whereas the standards used by the criminal system such

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33. Alexandra Brodsky, *Fair Process, Not Criminal Process Is the Right Way To Address Campus Sexual Assault*, AM. PROSPECT (Jan. 21, 2015), <http://prospect.org/article/fair-process-not-criminal-process-right-way-address-campus-sexual-assault> [http://perma.cc/27KN-R9KV].

34. See generally Nancy Chi Cantalupo, “Decriminalizing” *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 513-14 (2012).

35. *Id.* at 515.

36. 20 U.S.C. § 1092(f)(8)(B)(iv)(II) (Supp. 2014).

37. See Violence Against Women Act, 79 Fed. Reg. 62752, 62774 (Oct. 20, 2014); Monica Vendituoli, *Colleges Face New Requirements in Proposed Rules on Campus Sexual Assault*, CHRON. HIGHER EDUC. (June 20, 2014), <http://chronicle.com/article/Colleges-Face-New-Requirements/147275> [http://perma.cc/9G7R-6PSJ].

38. See *Title IX Q&As*, *supra* note 27, at 13-14, 26, 40; 2011 DCL, *supra* note 27, at 10-11.

as “beyond a reasonable doubt” or even “clear and convincing evidence” give a heavy presumption in favor of the accused. The criminal standards can be taken—and studies suggest that many victims do take them this way<sup>39</sup>—as a societal belief that victims lie. Sexual violence cases are often credibility contests. Therefore, a process that builds a strong presumption in favor of the accused can be seen as a symbol that we believe that the likelihood that victims *across the board* will lie is *so much greater* than that perpetrators will lie that we have to build safeguards against that lying into the very *structure* of our proceedings. Such an assumption is manifestly unequal because giving presumptions in favor of one side or the other is by definition treating them unequally. In addition, in the context of sexual violence, a systemic assumption that victims lie is a kind of gender-stereotyping that is widely recognized as a violation of equality rights, a point that Adele Kimmel’s Feature for the September 25 Conversation makes with regard to Title IX and harassment of LGBT students.<sup>40</sup>

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39. Such studies estimate that as many as ninety percent or more of survivors of sexual assault on college campuses do not report the assault due to reasons that anticipate disbelief on the part of others, including fear of hostile treatment or disbelief by legal and medical authorities; not wanting family or others to know; lack of proof; and the belief that no one will believe them, and nothing will happen to the perpetrator. See, e.g., BONNIE S. FISHER ET AL., *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* 23-24 (2000); CAROL BOHMER & ANDREA PARROT, *SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION* 13, 63 (1993); ROBIN WARSHAW, *I NEVER CALLED IT RAPE* 50 (1988); Nick Anderson & Scott Clement, *1 in 5 Women Say They Were Violated*, WASH. POST (June 12, 2015), <http://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated> [<http://perma.cc/3XHP-GHXG>]; Katherine Mangan, *1 in 4 Female Undergrads Experienced Sex Assault or Misconduct, AAU Survey Finds*, CHRON. HIGHER EDUC. (Sept. 21, 2015), <http://chronicle.com/article/1-in-4-Female-Undergrads/233281> [<http://perma.cc/B3TQ-TJ7E>].
40. Adele P. Kimmel, *Title IX: An Imperfect but Vital Tool To Stop Bullying of LGBT Students*, 125 YALE L.J. (forthcoming 2016) (manuscript at 4). Harassment and violence directed at certain students because of gender stereotypical attitudes is a clear violation of Title IX based on the same analysis as Kimmel undertakes with regard to LGBTQ students. Common myths about sexual- and relationship-violence victims, such as “the woman scorned,” inaccurately stereotype women who report sexual or relationship violence as leveling false accusations of rape to get revenge. See, e.g., *An Open Letter to Higher Education About Sexual Violence from Brett A. Sokolow, Esq. and The NCHERM Group Partners*, NCHERM GROUP 5 (2014), <http://www.ncherm.org/wordpress/wp-content/uploads/2012/01/An-Open-Letter-from-The-NCHERM-Group.pdf> [<http://perma.cc/338N-45QS>] (“In another recent case, a long-term relationship between two students involved many consensual sexual acts. The couple broke up. The male student started dating another student on campus, at which point the former girlfriend filed a complaint that there were non-consensual acts amongst many prior and subsequent consensual acts that they engaged in. Perhaps, but the timing is suspicious, and there is no evidence to suggest any concern about the behaviors during the time they were dating. Again, there is often a chasm between what is alleged and what evidence is able to prove. . . . We hate that some of [these cases] provoke tired old victim-blaming tropes, such as the woman scorned . . . .”). Victim-blaming attitudes are often highly gendered as well, focusing on, for instance, how women dress, see *Myths and Facts About Sexual Violence*, GEO. LAW, <http://www.law.georgetown.edu/campus-life/advising>

Allowing schools to adopt a criminalized standard of proof such as “clear and convincing” evidence or “beyond a reasonable doubt,” as at least one of these bills does,<sup>41</sup> would also create legal and administrative barriers for student survivors of gender-based violence that do not apply to the vast majority of comparable populations involved in civil or civil rights proceedings, all of which use the preponderance standard. To name just a few, these groups include: other students alleging other kinds of sex discrimination; students alleging discrimination based on other protected categories, like race or disability; gender-based violence survivors seeking protection orders in civil court; students alleging other forms of student misconduct; and students accused of sexual or any other misconduct who sue their schools in civil court. In reality the preponderance standard is used in the vast majority of cases, not only in internal disciplinary proceedings<sup>42</sup> but also in other administrative or civil court proceedings<sup>43</sup> and under other civil rights statutes that protect

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-counseling/personal-counseling/sarvl/general-information.cfm [http://perma.cc/86GP-FWE4], or how much they drink, see Antonia Abbey et al., *Alcohol and Sexual Assault*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, <http://pubs.niaaa.nih.gov/publications/arh25-1/43-51.htm> [http://perma.cc/BAB4-4YG8] (listing perpetrators' "[s]tereotypes about drinking women being sexually available and appropriate targets" as one of the "Pathways Through Which Alcohol Contributes to Sexual Assault"), as somehow excusing violence perpetrated against those women or indicating that in fact the women consented to the sexual activity at issue. These stereotypes all suggest that women lie about being victimized, despite much empirical data confirming that rates of false reporting are the same, if not lower, for sexual violence allegations as for allegations of other crimes. See generally Kimberly A. Lonsway et al., *False Reports: Moving Beyond the Issue To Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 3 VOICE 1 (2009), [http://www.ndaa.org/pdf/the\\_voice\\_vol\\_3\\_no\\_1\\_2009.pdf](http://www.ndaa.org/pdf/the_voice_vol_3_no_1_2009.pdf) [http://perma.cc/9P2F-HVUP]. There is also scientific evidence that sexual trauma causes neurological changes to victims' brains that lead victims to appear as if they are lying if investigators do not use new techniques developed to help victims remember details about the violence in light of the neurological changes. See Rebecca Campbell, *The Neurobiology of Sexual Assault*, U.S. DEP'T JUST. (Dec. 3, 2012), <http://www.nij.gov/multimedia/presenter/presenter-campbell/pages/welcome.aspx> [http://perma.cc/6SKW-2PER]. Thus, for an anti-sex-discrimination statute prohibiting gender stereotyping to use any standard other than the preponderance standard would be unacceptable.

41. H.R. 3408, 114th Cong., § 163(b) (2015).
42. Research shows that the majority of higher education institutions had voluntarily adopted a preponderance of the evidence standard for *all* student conduct proceedings by the early 2000s. See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 1000 (2004); Heather M. Karjane et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 122 tbl.6.12 (2002), <http://www.hhd.org/sites/hhd.org/files/mso44.pdf> [http://perma.cc/9Z57-PHR5]. Therefore, using a different standard from the preponderance standard in cases involving sexual or other forms of gender-based violence would mean that student victims of gender-based violence would be less protected than students who are victimized by another student *in any other way*.
43. Letter from Fatima Goss Graves, Vice President of Educ. and Emp't at the Nat'l Women's Law Ctr., to Catherine Lhamon, Assistant Sec. for Civil Rights 7-10 (Nov. 21, 2013).

equality. These include other education-related statutes and civil rights statutes outside of education, like Title VI of the Civil Rights Act of 1964, which prohibits discrimination in schools based on race, and Title VII, which prohibits sexual harassment in employment settings.<sup>44</sup>

Indeed, separating out sexual violence victims for different procedural treatment would enact a new kind of damaging “exceptionality [for] rape,” as Michelle Anderson discusses in her paper for the September 25 Conversation.<sup>45</sup> Using anything more stringent than a preponderance standard would symbolize that we as a society are comfortable with giving one group of women and girls, as well as men and boys who are gender-minorities and victimized because of it, *unequal* treatment when compared to everyone else. As such, recent legislative efforts to make it possible for schools to replace the preponderance standard with “clear and convincing” or “beyond a reasonable doubt” evidentiary standards demonstrate the dangers of importing the standards of the criminal justice system into Title IX’s very different legal regime, which advances equality goals and principles that are not shared by the criminal law.

## II. MANDATORY REFERRAL

The second major effort to criminalize Title IX is demonstrated by legislative proposals to mandate that campus officials refer all reports of sexual violence that they receive to law enforcement,<sup>46</sup> essentially turning a victim’s report to school authorities into an indirect report to law enforcement. Mandatory referral undermines Title IX’s equality principles and purposes both symbolically and practically. Symbolically, mandatory referral actually discriminates against survivors and is thus a direct violation of Title IX. Practically, it limits the number and diversity of reporting options that victims can use, which seriously impedes—and in an unknown but likely to be large number of cases may even eliminate—victims’ access to a range of Title IX rights that the criminal system does not and *cannot* provide.

Mandatory referral discriminates on the basis of gender in clear violation of Title IX, because restricting survivors’ options by turning all reports into a report to law enforcement perpetuates stereotypical attitudes that infantilize victims. Mandatory referral treats student victims of gender-based violence, most of whom are women and girls, differently from similarly situated adults. This differential treatment is in direct contrast to Title IX’s prohibition on sex discrimination in federally funded educational activities.

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44. *Id.* at 8. See also 2011 DCL, *supra* note 27, at 10–11.

45. Michelle J. Anderson, *Title IX Resistance*, 125 YALE L.J. (forthcoming 2016) (manuscript at 3).

46. See New, *supra* note 26; H.R. 3403, 114th Cong. (2015).

This discrimination occurs because mandatory referral operates under the same premises as state “mandatory reporting” laws, nearly all of which seek to protect children<sup>47</sup> and others who have significant legal dependencies, such as the elderly or persons with certain disabilities.<sup>48</sup> For the most part, mandatory reporting exists for these groups because of their greater vulnerability, which comes in part from their legal dependence on others. However, college victims are adults without legal dependencies. They are as capable of deciding whether they should go to police as, for instance, an adult male student who experiences a violent mugging or a non-student adult victim of sexual violence, neither of whose report would be mandatorily referred to law enforcement. Thus, mandatory referral would treat student survivors legally as children without any reasonable justification for doing so. Differential treatment without a reasonable justification falls under the definition of discrimination.<sup>49</sup> That those infantilized in this manner are mainly women and girls makes mandatory referral proposals particularly contrary to Title IX’s purposes.

Even if mandatory referral did not directly discriminate in this fashion, it practically discourages many survivors from reporting. It does so in two primary ways, both of which occur when criminal law processes are substituted for Title IX’s equality-based processes, which is the *de facto* effect of mandatory referral. First, the criminal process gives victims little control over fundamental decisions about the investigation and prosecution of their reports, including decisions about protecting their privacy. It is thus riskier for a survivor to report through the criminal justice system than through a Title IX process, because Title IX empowers victims, not police and prosecutors, to make fundamental decisions regarding the handling of their reports.<sup>50</sup> Second, while

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47. See, e.g., CAL. PENAL CODE § 11165.9 (West 2007) (“Reports of suspected child abuse or neglect shall be made by mandated reporters . . . to any police department or sheriff’s department . . .”).

48. See, e.g., CONN. GEN. STAT. § 17b-451 (2015) (“A mandatory reporter . . . who has reasonable cause to suspect or believe that any elderly person has been abused, neglected, exploited or abandoned . . . shall, not later than seventy-two hours after such suspicion or belief arose, report such information or cause a report to be made in any reasonable manner to the Commissioner of Social Services or to the person or persons designated by the commissioner to receive such reports.”); OHIO REV. CODE ANN. § 5123.61 (C)(1) (“Any person listed in division (C)(2) of this section, having reason to believe that a person with mental retardation or a developmental disability has suffered or faces a substantial risk of suffering any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of that person, shall immediately report or cause reports to be made of such information to the entity specified in this division.”).

49. *Discrimination*, BLACK’S LAW DICTIONARY (7th ed. 1996) (“2. Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.”).

50. See *supra* Part I, especially the analysis regarding survivors’ Title IX status as equal parties to the proceeding, not merely “complaining witnesses” as they are in criminal trials.

the potential risks to survivors are higher, the likely benefits are fewer, because the criminal system is not structured to provide victims with the services, resources, and remedies for halting the effects of trauma that Title IX requires schools to provide.

These different risks and benefits increase the likelihood that survivors will choose to report through a Title IX process, but because mandatory referral makes a Title IX report into a criminal report, it essentially eliminates the lower risk-higher benefit option. Thus, mandatory referral increases the likelihood that victims who do not want to report to law enforcement will not report to anyone, thereby restricting access to the legal rights that Title IX, as well as the Clery Act and VAWA, provide. This loss is particularly damaging because the legal rights that these laws provide *do not exist* under criminal laws. In addition, without reporting, neither survivors nor the community as a whole can identify the person who committed the violence. To the extent that mandatory referral discourages reporting, then, it increases the violence's harm to the victim(s) as well as to society as a whole.

We know that mandatory referral discourages victim reporting because research shows that the rates of reporting to law enforcement are quite low. The authors of *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform* aggregate data from multiple studies to show that victims report sexual violence to police somewhere between five and twenty percent of the time.<sup>51</sup> Professor Douglas Beloof explains that these low rates reflect a collective rejection by victims of the criminal system and the lack of control it provides victims: "The individual victim of crime can maintain complete control over the process only by avoiding the criminal process altogether through non-reporting."<sup>52</sup> In discussing why a victim might "exercise th[is] veto" over reporting a crime, Professor Beloof lists several reasons including

the victim's desire to retain privacy; the victim's concern about participating in a system that may do [her/him] more harm than good; the inability of the system to effectively solve many crimes . . . ; the inconvenience to the victim; the victim's lack of participation, control, and influence in the process; or the victim's rejection of the model of retributive justice.<sup>53</sup>

This analysis acknowledges that, in the criminal system, the survivors do not decide how their reports will be handled—police and prosecutors decide if and how a case will be investigated and prosecuted. In contrast, OCR's Title IX

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51. 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).

52. Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 307.

53. *Id.*

guidance empowers *survivors* to initiate an investigation—or not, as they choose. According to this guidance, each school is required to communicate to students a reporting system that includes two paths very similar to the “restricted” and “non-restricted” reporting system used in the military. This system gives victims two reporting choices, one confidential (analogous to the military’s restricted path) and one not (non-restricted). Survivors who choose the non-confidential path initiate an investigation by making an official report that will be forwarded to the Title IX Coordinator, who must investigate unless the victim explicitly requests otherwise and the Coordinator grants that request. Victims who choose to disclose to a confidential person or office get access to services and accommodations, and this disclosure does not result in an investigation unless a victim later decides to change the report to a non-confidential one.<sup>54</sup> In addition, survivors retain a certain amount of control even after an investigation is initiated because Title IX and the Clery Act follow principles of procedural equality.<sup>55</sup>

By reporting via either Title IX path, survivors also gain access to a whole range of services, accommodations, and resources that the criminal justice system cannot provide because it is not designed to provide them. Under both Title IX and the Clery Act (as amended by VAWA), schools must provide supportive and protective measures such as stay-away orders, changes in classes or housing, and various prevention and educational programs.<sup>56</sup> These services and accommodations are vital to restoring survivors’ equal educational opportunity, but survivors cannot access them unilaterally because they require action by school officials to, for instance, change class schedules, move students to new housing, or authorize a tuition refund. Therefore survivors cannot access these services without reporting to their school. Because mandatory referral turns a report to the school into a report to law enforcement, and law enforcement may investigate regardless of a victim’s wishes, victims who do not want a law enforcement investigation would have to forego reporting to the school as well, making it impossible for those victims to access the services and accommodations that Title IX guarantees. Because the criminal justice system does not—and structurally *cannot*—provide those services and accommodations, mandatory referral could thus entirely foreclose survivors’ ability to access those important Title IX rights *or* any comparable rights.

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54. See *Title IX Q&As*, *supra* note 27, at 16-22. For more details on the military two-path reporting system, see *Reporting Options*, MYDUTY.MIL, <http://www.myduty.mil/index.php/reporting-options> [<http://perma.cc/5QAR-7BLD>].

55. See discussion and sources cited *supra* Part I.

56. See 20 U.S.C. § 1092(f)(8)(B)(iii)(IV), (vi), (vii) (Supp. 2014); *Title IX Q&As*, *supra* note 27, at 32-37; 2011 *DCL*, *supra* note 27, at 15-17; *Revised Guidance*, *supra* note 8, at 16. See also Violence Against Women Act, *supra* note 37, at 62758-59, 62761, 62763, 62769-70, 62777, 62781, 62783-85, 62788.

Without access to such services and accommodations, studies show that many survivors are at serious risk of experiencing a downward spiral of damaging health and negative economic and, in the case of students, educational effects. As Dana Bolger's Title IX Conversation research confirms, and as corroborated by Alyssa Peterson, Olivia Ortiz, and Zoe Ridolfi-Starr in their Conversation Features, these effects are very real, very discriminatory, and potentially life-derailing.<sup>57</sup> Previous research also documents the grave health consequences of sexual violence, including increased risk of suicide, substance use, pregnancy, and unhealthy weight control and sexual behaviors.<sup>58</sup> Such studies estimate that the cost of rape and sexual assault (excluding child sexual abuse) to the nation is approximately \$127 billion annually in 2012 dollars, the highest victimization cost in the United States, some \$34 billion more than the next highest (all crime-related deaths except drunk driving and arson).<sup>59</sup>

Bolger's research further confirms what other researchers have shown: current student survivors face trauma-induced health and educational problems such as declines in educational performance, the need to take time off, dropping out of school, and transferring schools.<sup>60</sup> These health and educational effects feed potentially devastating financial consequences. Student survivors can lose financial aid, which may include valuable scholarships requiring a high level of academic performance that experiencing trauma makes challenging to achieve, at least in the short term.<sup>61</sup> Survivors can lose valuable tuition dollars spent on classes that their health makes them unable to finish at all or finish on time. Research with student and employed survivors shows an even more negative impact on those victims who have fewer economic resources.<sup>62</sup> Such disparate impacts likely occur with student survivors who are first generation college students, are on immigrant visas, are

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57. See Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L.J. (forthcoming 2016); Alyssa Peterson & Olivia Ortiz, *A Better Balance: Providing Survivors of Sexual Violence with "Effective Protection" Against Sex Discrimination Through Title IX Complaints*, 125 YALE L.J. (forthcoming 2016); Zoe Ridolfi-Starr, *Transformation Will Require Transparency: Critical Policy Reforms To Advance Campus Sexual Violence Response*, 125 YALE L.J. (forthcoming 2016).

58. See, e.g., Jay G. Silverman et al., *Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*, 286 JAMA 572 (2001).

59. See Ted R. Miller, Mark A. Cohen & Brian Wiersema, *Victim Costs and Consequences: A New Look*, NAT'L INST. JUST. 17 (1996), <http://www.ncjrs.gov/pdffiles/victcost.pdf> [<http://perma.cc/ZXC7-X9C8>]; Rebecca Marie Loya, *Economic Consequences of Sexual Violence for Survivors: Implications for Social Policy and Social Change* 32 (June 2012) (unpublished Ph.D. dissertation, Brandeis University) (on file with author).

60. See Loya, *supra* note 59, at 93-100.

61. See *id.* at 95.

62. See *id.* at 104-05, 107-10.

undocumented, or otherwise face pre-existing barriers and challenges to going to college in the first place.<sup>63</sup> It is probable that these students will have less access to individual and family resources that they can use to overcome trauma and get their educations and lives back on track. In the long term, these negative educational consequences likely translate into lower earnings, as lower grades lead to lower-paying jobs and more difficulty gaining admission to graduate programs that feed into high-paying jobs.<sup>64</sup>

For all of these students, and especially for the ones most vulnerable to intersectional discriminatory consequences, Title IX's requirement that schools provide victims with services and accommodations that can help restore normalcy to survivors' educations and lives is deeply important. The push to criminalize Title IX by mandating that school officials refer student reports of gender-based violence to law enforcement forces survivors to make an often impossible choice that frequently creates insurmountable barriers to accessing these critical services and resources. The fact of the matter is that student survivors *always* have the option of reporting to the police. But forcing them to do so by infantilizing them, as mandatory referral does, is against our fundamental commitment to equality and is highly likely, in practice, to reduce already low rates of reporting even further. Instead, we should be looking, as Catharine MacKinnon did in her presentation for the *Journal's* Title IX Conversation, to equality-based approaches for addressing and ending gender-based violence.<sup>65</sup>

### III. AFFIRMATIVE CONSENT

MacKinnon's search for equality-based approaches brings this Essay to the final area in which recent legislation has been influenced by criminal legal concepts and distracted us from Title IX's status as a civil rights law: state legislative mandates that colleges and universities adopt "affirmative consent" policies. In critiquing the deliberate indifference standard used in private Title IX sexual harassment lawsuits, MacKinnon advocates that Title IX

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63. *See id.* at 104-10.

64. It also bears mentioning that, although this Essay is focused on students in higher education, students at the K-12 (kindergarten through twelfth grade) levels may be even more negatively affected by trauma and its consequences. Although K-12 students may have public-education options that might reduce the initial economic impacts, their ability to recover from trauma and to avoid devastating educational consequences is likely reduced, due to their ages and the disparate impact that students are more likely to experience when they come from low-income families or otherwise have limited educational options beyond the public school. In addition, the negative long-term impact is likely increased by, for instance, trauma-induced lower educational performance, reducing the survivor's ability to get into a better college or to win scholarship money. *See id.* at 95.

65. *See MacKinnon, supra* note 10.

jurisprudence<sup>66</sup> instead adopt the excellent, equality-based due diligence standard of international human rights law.<sup>67</sup> For similar reasons, the Title IX movement should approach the adoption of “affirmative consent” laws and policies with extreme skepticism. Instead, it should look to the “welcomeness” standard in sexual harassment law to achieve the policy goals that appear to be motivating the move towards affirmative consent. While continuing to advocate for affirmative consent may have some usefulness, that advocacy should seek to amend state criminal codes to adopt affirmative consent standards, not inject affirmative consent standards into Title IX’s equality-based system.

The first and umbrella reason why affirmative consent is inappropriate for Title IX systems is that “consent” is a criminal law concept.<sup>68</sup> Robin West explains: “[T]he absence or presence of consent demarcates, broadly and imperfectly, sex that should be regarded as criminal from that which is not.”<sup>69</sup> Therefore, using any definition of consent to define violations of Title IX will criminalize Title IX, thus undermining Title IX’s purposes in similar ways to those discussed in Parts I and II.

Moreover, West points out that the line between consensual and non-consensual sex is often used as a proxy for differentiating harmful from non-harmful sex, encouraging the view that if sexual activity is consensual, it must be good, as in not harmful.<sup>70</sup> When viewed from this lens, the push towards making consent affirmative—i.e., requiring any sexual activity regarded as sitting on the consensual side of the demarcation to have occurred based on an affirmative indication by all those participating that “yes,” they want to engage in this sexual activity—is a push to redefine what sex is harmful and what is not.

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66. In response to a question from the audience on September 25, Professor MacKinnon clarified that, while she has serious concerns about other aspects of the administrative enforcement of Title IX by OCR, she views OCR’s standards for sexual harassment, including how they are applied to sexual and other forms of gender-based violence, as quite solidly based in civil rights and equality law. Professor MacKinnon is not alone in these concerns. See, e.g., Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205 (2011). Her critiques of Title IX law relate to the standards for private Title IX lawsuits.

67. I have argued elsewhere that the due diligence standard, which requires that nation states act with due diligence to prevent, investigate, and punish acts of gender-based violence, bears distinct similarities to OCR’s Title IX standards. See Nancy Chi Cantalupo, Jessica Lenahan (Gonzales) v. United States & *Collective Entity Responsibility for Gender-Based Violence*, 21 AM. U. J. GENDER SOC. POL’Y & L. 231 (2012).

68. See Robin West, *Sex, Law and Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE 221 (Franklin G. Miller & Alan Wertheimer eds., 2010).

69. *Id.*

70. *Id.* at 224.

However, there are other legal ways and reasons to draw this line, and recent state legislation requiring colleges to adopt “affirmative consent” policies forgets these other options.<sup>71</sup> In fact, schools and other entities that are governed by civil rights laws prohibiting sexual harassment have always been required to use the welcomeness standard, which does not rely on consent and which differentiates between harmful and non-harmful sexual activity according to equality purposes and principles.

Laws prohibiting sexual harassment, Title IX included, prohibit sexual attention and activity that is not welcomed or is unwanted by the person towards whom the attention or activity is directed. The differences between welcomeness and consent were discussed as early as the 1986 case *Meritor Savings Bank v. Vinson*,<sup>72</sup> in which the Supreme Court established the claim of hostile environment sexual harassment. The Court stated that “the fact that sex-related conduct was ‘voluntary,’ in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”<sup>73</sup> Lower courts, including several courts of appeal cases decided as recently as 2014, have repeatedly made this distinction, primarily in workplace sexual harassment cases.<sup>74</sup>

In its Title IX guidance, OCR has adopted the welcomeness standard articulated by *Vinson* and developed in later case law. In its 2001 *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students of Third Parties*, OCR has stated that “[c]onduct is unwelcome if the student did not request or invite it and ‘regarded the conduct as undesirable or offensive.’”<sup>75</sup> Citing *Vinson*’s distinction between voluntariness and welcomeness, and noting that fear of retaliation, increased harassment by other students, or negative treatment by teachers or other adults could keep a student from openly objecting to or complaining about harassment, OCR also makes clear that “[a]cquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome.” Finally, OCR rejects the following circumstances as necessarily proving welcomeness: “that a student . . . accepted the conduct” or “willingly participated in conduct on [past]

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71. *Affirmative Consent Laws (Yes Means Yes) State by State*, AFFIRMATIVE CONSENT, <http://affirmativeconsent.com/affirmative-consent-laws-state-by-state> [http://perma.cc/KKS4-GDCQ].

72. 477 U.S. 57 (1986).

73. *Id.* at 68.

74. See *Kramer v. Wasatch Cty. Sheriff’s Office*, 743 F.3d 726, 754 (10th Cir. 2014); *Williams v. Herron*, 687 F.3d 971, 978 (8th Cir. 2012); *Curry v. D.C.*, 195 F.3d 654, 663 n.18 (D.C. Cir. 1999).

75. See *Revised Guidance*, *supra* note 8, at 7-8.

occasion[s]” which “does not prevent him or her from indicating that the same conduct has become unwelcome on a subsequent occasion.”<sup>76</sup>

The current focus on affirmative consent seems to indicate that most schools were neither aware of nor using the welcomeness standard, and thus a reasonably strong, practical argument can be made that affirmative consent at least brings university conduct policies much closer to the welcomeness standard than before. The benefits of this shift are demonstrated in a case that wended its way through the Iowa state courts before the Iowa Court of Appeals finally declared it moot in July 2015 because both students involved had graduated.<sup>77</sup> In that case,<sup>78</sup> a male Iowa State University (ISU) student (and star basketball player), Palo, and a female ISU student, Doe, met up after a night of partying separately. They had been exchanging text messages, none of which mentioned having sex. They previously had a brief consensual sexual relationship, but Doe was dating someone else by the time this meeting occurred.

Palo brought another man, Cruise, to the meet-up, whom Doe also knew but who was not an ISU student. The three went to a vacant house, and Palo and Cruise asked Doe to engage in a “threesome.” She said “no.” At this point, Cruise raped Doe,<sup>79</sup> who said “no” clearly and cried throughout the attack, while Palo walked in and out of the room. After Cruise had completed the rape, he told Palo it was “his turn.” Palo then had sex with Doe—according to him, at this point she said neither “no” nor “yes.”

The Iowa administrative law judge and district court that considered the case appeared to agree that Iowa’s criminal standard required Doe to have said “no” to Palo and to have assumed that Palo was not responsible for criminally sexually assaulting or raping Doe. ISU, however, applied its internal affirmative consent policy, which required a “yes” in either words or actions. It found that Palo violated the policy because, as both parties agreed, Doe never said “yes.” The University President further found that, to the extent Doe was

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76. *See id.*

77. *Palo v. Iowa Bd. of Regents*, No. 14-1540, 2015 WL 4233055, at \*1, \*4 (Iowa Ct. App. July 9, 2015).

78. The facts summarized here are taken from documents that comprised part of the record before the Iowa Supreme Court and, after the case was transferred, the Iowa Court of Appeals. I was given access to redacted electronic copies of these documents in order to write an amicus brief for the case. Although the documents I received did not include the record numbers, all of the findings of fact discussed here are taken from two documents: (1) the ISU President’s decision in the case, dated August 30, 2013, which comprised pages 374-77 of the record in the case; and (2) the “Proposed Decision” of the administrative law judge who presided over the hearing on April 24-25, 2013 at pages 296-310 of the record. Both documents are also in my files.

79. All the factfinders and courts that considered the merits of the case referred to Cruise’s actions as a rape, although he was never prosecuted.

silent and unresisting during Palo's assault, she was in shock from the trauma of Cruise's rape and that under the circumstances it would be unreasonable to think Doe affirmatively wished to have sex with Palo. Thus, the University's standard facilitated a more accurate result, and gave Doe some measure of justice. She also received services at and through ISU that allowed her to graduate from ISU on time. Had the case ended there, it would have reached a result that was basically in keeping with Title IX's requirements. Instead, Palo used state law mechanisms to challenge the university's decision and keep ISU in court for nearly three years defending its policy.<sup>80</sup>

If ISU had been allowed to apply its own policies, the result that ISU reached in the *Palo* case would have showed the promising aspects of affirmative consent, and its example adds strength to the arguments that many activists and lawmakers have advanced<sup>81</sup> while pushing for affirmative consent policies. But when the trend of affirmative consent school policies is looked at in the aggregate and in the context of Title IX's purposes and requirements, there is unfortunately more cause for concern than for hope. Although university affirmative consent policies approach welcomeness, even at their most robust, affirmative consent would not adequately advance Title IX's equality principles.

Most importantly, affirmative consent could legitimate sexual behavior that the welcomeness standard would still treat as harmful and unequal. Whereas consent standards judge the victim's behavior and only consider whether that behavior indicated consent from the accused assailant's point of view, welcomeness takes a more equal approach by looking "to whether conduct is both objectively and subjectively unwelcome and offensive."<sup>82</sup> As the First Circuit put it in an early case, "[i]n some instances, a woman may have the responsibility for telling the man directly that his comments or conduct is unwelcome. In other instances, however, a woman's consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the man's conduct is unwelcome."<sup>83</sup> The court ultimately advised that "the fact finder [must] keep[] both the man's and the woman's perspective in mind."<sup>84</sup> Other U.S. Courts of Appeals have confirmed that "a defendant's lack

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80. The case was eventually declared moot. See *Palo*, 2015 WL 4233055, at \*4.

81. Sherry F. Colb, *Making Sense of "Yes Means Yes,"* VERDICT (Oct. 29, 2014), <http://verdict.justia.com/2014/10/29/making-sense-yes-means-yes> [<http://perma.cc/2U8P-H8KU>]; Michael Kimmel & Gloria Steinem, "Yes" is Better Than "No," N.Y. TIMES (Sept. 4, 2014), <http://www.nytimes.com/2014/09/05/opinion/michael-kimmel-and-gloria-steinem-on-consensual-sex-on-campus.html> [<http://perma.cc/6QXF-NH5F>].

82. *Pinney v. Nordstroms, Inc.*, No. 51844-5-1-I, 2004 WL 1380072, at \*3 (Wash. App. June 21, 2004).

83. *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 898 (1st Cir. 1988).

84. *Id.*

of *subjective* knowledge as to whether his advances were unwelcome or were serious enough to affect a term or condition of employment is not determinative,”<sup>85</sup> and the welcomeness standard allows the “classif[ication of] conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment.”<sup>86</sup>

Several cases have specifically discussed welcomeness in the context of gender-based violence like sexual violence or stalking behaviors, such as in a case where a supervisor “pressured and coerced” the plaintiff to come to his house on several occasions where he then isolated and sexually assaulted her.<sup>87</sup> While the Tenth Circuit expressed skepticism as to “whether sex-related conduct with one’s supervisor is truly ‘voluntary,’”<sup>88</sup> it ultimately relied on *Vinson* to decide that the plaintiff’s “‘voluntary’ acts in going to [the supervisor’s] house [did] not make her unreasonable as a matter of law.”<sup>89</sup> In two cases where a plaintiff ended a previous, consensual sexual relationship with a male employee, and the male employee began harassing the plaintiff, the courts did not rely exclusively on the harasser’s point of view, but found the conduct unwelcome based on the plaintiff’s “unresponsiveness” to sexual advances,<sup>90</sup> rejecting as an excuse for the harassment “a defendant’s lack of *subjective* knowledge as to whether his advances were unwelcome or were serious enough to affect a term or condition of employment.”<sup>91</sup>

Given that welcomeness already includes, and indeed goes beyond, the protections provided by affirmative consent, recent moves to require schools to adopt affirmative consent into their sexual harassment policies are at best duplicative and at worst undermine the welcomeness standard. Nevertheless, cases like *Palo* suggest that there is still something significant to gain from instituting an affirmative consent policy. The question is how the Title IX civil rights movement should deal with this dilemma.

This Essay concludes by briefly suggesting two methods for activists to consider. First, the lessons of cases like *Palo* and the victories of the Title IX movement thus far could be leveraged to press for direct changes and reform of consent standards in state criminal codes. Affirmative consent offers a perspective and approach that could improve the way our nation conceives and addresses sexual and other forms of gender-based violence in the criminal system. Second, the Title IX movement could push law and policymakers to

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85. *Williams v. Herron*, 687 F.3d 971, 977 (8th Cir. 2012).

86. *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir.1991).

87. *Kramer v. Wasatch Cty. Sheriff’s Office*, 743 F.3d 726, 754 (10th Cir. 2014).

88. *Id.*

89. *Id.* at 753.

90. *Curry v. District of Columbia*, 195 F.3d 654, 663 n.18 (D.C. Cir. 1999).

91. *Williams v. Herron*, 687 F.3d 971, 977 (8th Cir. 2012).

amend the laws and policies that have recently put affirmative consent standards in place for educational institutions. These policies could and should instead refer to welcomeness, a change easily made by replacing all policy references to consent with references to welcomeness, and prohibit, consistent with Title IX, unwelcome sexual attention and activity.<sup>92</sup>

## CONCLUSION

The *Yale Law Journal's* Conversation on Title IX demonstrated the power and influence that the remarkable student violence-survivors-turned-activists-and-policy-makers have developed over the last several years. This contemporary civil rights movement cannot and should not limit the pride they feel in these admirable accomplishments. Nevertheless, the movement must remain vigilant towards forces hostile to its goals of advancing equality and ending gender-based violence and other forms of discrimination. Some of the most insidious of these hostile forces are found in efforts to criminalize Title IX's substantive and procedural standards. Three current examples include the attempts to import criminal due process requirements into Title IX investigations and grievance procedures, to mandate that school officials refer all reports they receive to criminal law enforcement, and to replace the Title IX equality-based standard of welcomeness with the criminal law's affirmative consent standards.

We should start opposing these criminalization efforts by consistently articulating their incompatibility with Title IX and other civil-rights-, equality-based approaches and working to prevent proposals that would criminalize Title IX from being passed into law. In addition, the movement should consider using the lessons learned from affirmative consent policies to reform state criminal laws, while at the same time replacing references to affirmative consent in the laws and policies applicable to educational institutions with the more equal and more accurate welcomeness standard.

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