A PRINCIPLED AND LEGAL APPROACH TO TITLE IX REPORTING

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Institutions of higher education identify "responsible employees" to further their compliance with Title IX. Responsible employees typically report instances of campus gender-based violence to the institution, usually to the Title IX coordinator. Unfortunately, most colleges and universities make virtually every employee a responsible employee. This "wide-net" approach to reporting, sometimes referred to as universal mandatory reporting, produces two categories of related unintended consequences: (1) it weakens the autonomy of victims when they need their autonomy most, thereby undermining their sense of institutional support and aggravating their psychological and physical harm from the assault; and (2) because of

these negative consequences, it deters some victims from accessing the help they need and from invoking university processes designed to hold their perpetrators accountable.

After describing the drawbacks of wide-net reporting policies, this Article examines whether current law and guidance permits colleges and universities to limit the number of responsible employees. It argues that recent guidance from the Office for Civil Rights (OCR) increases institutional discretion beyond what existed even under Obama-era guidance and allows institutions to move away from wide-net reporting policies. Nonetheless, because some troubling language still remains in OCR guidance, this Article urges the Trump administration to inform colleges and universities expressly that they can narrow the number of responsible employees.

The Article then describes in detail the components of a legally sufficient and principled reporting policy. The Article identifies key principles that should guide an institution's formulation of policy, discusses which employees should be made responsible employees, and analyzes several tricky categories of employees. To facilitate reporting and to support survivors, the Article recommends that all employees be obligated both to report for a survivor if the survivor wants to report and to offer the survivor access to confidential support services. Several other aspects of reporting policies that deserve consideration are also highlighted.

Finally, the Article argues that institutions cannot credibly justify their wide-net policies by invoking concerns about liability. No reliable estimates exist about the relative liability risks attending different types of policies. The purported institutional advantages of wide-net reporting policies, including the simplification of matters for employees and the removal of perpetrators from campus, appear overstated. Moreover, the liability risks associated with wide-net policies, including the increased institutional vulnerability when employees do not report or when students do not want them to report, are typically ignored.

The Article concludes by urging colleges and universities to revise their reporting policies to better advance the goals of Title IX.

I. THE CURRENT SITUATION

Betsy DeVos, the U.S. Secretary of Education, said during her confirmation hearings that "sexual assault in any form or in any place

is a problem."[1] She vowed that if she were confirmed, she would work to understand "the past actions [of the Office for Civil Rights within the Department of Education] and the current situation better, and to ensure that the intent of the law is actually carried out in a way that recognizes both the rights of the victims as well as those who are accused."[2]

To live up to her pledge, Secretary DeVos should give attention to the topic of "responsible employees." These are the employees who are required to report disclosures of gender-based violence to their institutions. An examination of this topic reveals that guidance on this issue from the Office for Civil Rights (OCR) has been, and continues to be, confusing and harmful. The recent withdrawal of both the 2011 *Dear Colleague Letter*[3] and the 2014 *Questions and Answers on Title IX and Sexual Violence*,[4] along with the concurrent dissemination of the 2017 *Dear Colleague Letter*[5] and the 2017 *Questions and Answers on Campus Sexual Misconduct*,[6] have not fixed the problem. Rather, the Department of Education needs to promulgate new regulations or guidance that can facilitate colleges' and universities' adoption of better reporting policies.[7]

Others should join Secretary DeVos and study the topic of responsible employees. Otherwise, members of Congress who are concerned about campus sexual violence may inadvertently codify an interpretation of the Title IX guidance that has harmed survivors.[8]

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1. *Education Secretary Confirmation Hearing*, 115th Cong. (2017), *available at* https://www.c-span.org/video/?421224-1/education-secretary-nominee-betsy-devos-testifies-confirmation-hearing (transcript from closed captioning) (statement from Betsy DeVos, at 1:16:49, in response to Senator Bob Casey, Jr.).

2. *Id.*

3. Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Colleague (Apr. 4, 2011) [hereinafter 2011 Dear Colleague Letter], http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

4. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, Q&A ON TITLE IX AND SEXUAL VIOLENCE (Apr. 24, 2014) [hereinafter "2014 Q&A on Title IX and Sexual Violence"], http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

5. Letter from Candice Jackson, Acting Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Colleague (Sept. 22, 2017) [hereinafter "2017 Dear Colleague Letter"], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

6. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, Q&A ON CAMPUS SEXUAL MISCONDUCT (2017) [hereafter "2017 Q&A on Campus Sexual Misconduct"], https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

7. *See* 2017 Dear Colleague Letter, *supra* note 5, at 2 (noting that the Department will engage in rulemaking on the topics previously addressed by the withdrawn guidance).

8. This would be the case if the Campus Accountability and Safety Act, S. 856, 115th Cong. (2017), https://www.congress.gov/bill/115th-

In addition, campus administrators may miss their opportunity to maneuver within existing guidance to create more effective and victim-centered reporting policies and to seek regulatory guidance from OCR that would insure the longevity of those improved reporting policies.

A. Legal Background

Responsible employees are an important part of an institution's Title IX compliance regime. Schools have a duty to address gender discrimination, including gender-based harassment,[9] and specifically sexual violence[10] and domestic violence.[11] This obligation arises once the school "knows or reasonably should know of an incident of sexual misconduct."[12] A school is deemed to know about the misconduct once

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congress/senate- bill/856/text, is adopted. The bill would define responsible employee in a new section of the Higher Education Act: "[T]he term 'higher education responsible employee' means an employee of an institution of higher education who—(A) has the authority to take action to redress sexual harassment; or (B) has the duty to report sexual harassment or any other misconduct by students or employees to appropriate school officials." *Id.* at § 125. Any attempt to codify the Obama-era guidance as legislation at the state level may also create this problem.

9. Title IX of the Education Amendments of 1972 obligates institutions of higher education to address discrimination on the basis of sex. *See* 20 U.S.C. §§ 1681–88 (2012). The law applies to any educational program or activity that receives federal financial assistance, and its protection extends to the entire institution. Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988). In the 1980s, sexual harassment was identified as a form of gender discrimination covered by Title IX. *See* OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981), *cited in* U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT'S NOT ACADEMIC 2 (Sept. 1988) (on file with author).

10. Sexual misconduct is now a well-recognized type of sexual harassment addressed by Title IX. *See* Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J.L. & FEM. 123, 188–90 (2017). "Sexual violence," which the executive branch now call "sexual misconduct," covers a range of behavior, including "sexual battery" and "sexual coercion" as well as "rape" and "sexual assault." *See* 2011 Dear Colleague Letter, *supra* note 3, at 1. The most prevalent sexual misconduct is "unwanted sexual contact and sexual coercion . . . followed by incapacitated rape and attempted or completed forcible rape." *See* Lisa Fedina et al., *Campus Sexual Assault: A Systematic Review of Prevalence Research From 2000-2015*, TRAUMA, VIOLENCE & ABUSE 11 (2016).

11. See 2017 Q&A on Campus Sexual Misconduct, *supra* note 6, at 2 ("[W]hen addressing allegations of dating violence, domestic violence, sexual assault, or stalking, institutions are subject to the Clery Act regulations as well as Title IX").

12. 2017 Q&A on Campus Sexual Misconduct, *supr*a note 6, at 1–2. Once a school has notice, "it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been

a responsible employee knows about it or in the exercise of reasonable care should know about it.[13]

The Department of Education defined who is a responsible employee in its *2001 Revised Sexual Harassment Guidance*. It said:

> A responsible employee would include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.[14]

This definition was reiterated in guidance issued by OCR during the Obama administration,[15] and again in 2017 when the Department of Education replaced the Obama-era guidance with new guidance.[16]

Responsible employees typically report student disclosures of gender-based misconduct to the Title IX coordinator, who then takes further action. A report to the Title IX coordinator was, in fact, required by the 2014 OCR guidance.[17] That guidance also required the responsible employee to relay everything that the student disclosed to him or her, including the victim's and perpetrator's names.[18] This obligation existed even if the student did not want the school to take further action.[19] The report would typically lead the

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created, and prevent harassment from occurring again." U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 15 (2002) [hereinafter "2001 Revised Guidance"], http://www2.ed.gov/about/offices/ list/ocr/docs /shguide.pdf.

13. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,042 (Mar. 13, 1997) [hereinafter "1997 Guidance"], https://www.gpo.gov/fdsys/pkg/FR-1997-03-13/pdf/97-6373.pdf; 2001 Revised Guidance, *supra* note 12, at 13.

14. 2001 Revised Guidance, *supra* note 12, at 13.

15. *See* 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 15–16.

16. *See* 2017 Dear Colleague Letter, *supra* note 5, at 2 (reaffirming a commitment to the 2001 Revised Guidance, *supra* note 12).

17. 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 14 (a responsible employee must "report incidents of sexual violence to the Title IX coordinator or other appropriate school designee").

18. *Id.* at 16.

19. Only an employee with special training, such as the Title IX coordinator, could consider the survivor's request for confidentiality. *See* 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 18–20.

Title IX coordinator to initiate an investigation and perhaps disciplinary proceedings,[20] and, at times, a call to the police.[21]

Most schools developed their reporting policies in response to pre-2017 guidance. When the Department of Education in 2017 signaled a willingness to give institutions of higher education more discretion to craft their internal policies, the question arose whether schools could now alter their reporting policies, and if so, what would be permissible. Because OCR left intact the definition of "responsible employee" from 2001, the answer is less clear than it should be.

B. Factual Landscape

Today the overwhelming majority of institutions of higher education designate virtually *all* of their employees as responsible employees and exempt only a small number of "confidential" employees.[22] Kathryn Holland, Lilia Cortina, and Jennifer Freyd recently examined reporting policies at 150 campuses and found that policies at 69% of the institutions made all employees mandatory reporters, policies at 19% of the institutions designated nearly all employees as mandatory reporters, and only 4% of institutional

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20. The Title IX coordinator was supposed to try to respect the student's request for confidentiality, but the Title IX coordinator could not assure it because the school needs to be able to investigate and prevent the recurrence of sexual violence. *See* 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 18–20. This position continues even after the withdrawal of the Obama-era guidance. Older guidance expressed the same idea. *See* U.S. DEP'T OF EDUCATION, SEXUAL HARASSMENT: IT'S NOT ACADEMIC 9–10 (2008) ("The school should take all reasonable steps to investigate and respond to the complaint in a manner consistent with a request for confidentiality from a student."); *id.* (noting factors the school should weigh in accessing the request for confidentiality against its responsibility to provide a safe and nondiscriminatory environment for all students).

21. Some schools report to the police, although an internal procedure may exist before that occurs. *See, e.g.*, UNIV. OF VA., POLICY ON SEXUAL AND GENDER-BASED HARASSMENT AND OTHER FORMS OF INTERPERSONAL VIOLENCE 9 (2015), http://uvapolicy.virginia.edu/policy/HRM-041; Jeremy D. Heacox, *S-A: Clery Act Responsibilities for Reporting Allegations of Peer-on-Peer Sexual Assaults Committed by Student-Athletes*, 10 WILLAMETTE SPORTS L.J. 48, 61 (2012) (noting "[Marquette] university now reports any allegations of sexual assault to the sensitive crimes unit of the local police department"). Reporting to law enforcement is sometimes in response to a state law mandate. *See, e.g.*, Jessica Horton Act, S.C. CODE ANN. § 59-154-10 (2015); VA. CODE ANN. § 23.1-806 (F), (G) (West 2016); WIS. STAT. ANN. § 940.34 (West 2017).

22. KATHRYN J. HOLLAND, LILIA M. CORTINA & JENNIFER J. FREYD, *Compelled Disclosure of College Sexual Assault*, AMERICAN PSYCHOLOGIST 10 (2017), http://dynamic.uoregon.edu/jjf/articles/hcfaccepted2017.pdf.

policies named a limited list of reporters.[23] The authors concluded, "[T]hese findings suggest that the great majority of U.S. colleges and universities—regardless of size or public vs. private nature—have developed policies designating most if not all employees (including faculty, staff, and student employees) as mandatory reporters of sexual assault."[24] At some institutions, these reporting obligations have even been incorporated into employees' contracts.[25]

The number of institutions with broad policies, sometimes known as universal mandatory reporting or required reporting,[26] and hereafter called "wide-net" reporting policies, has grown over time. Approximately fifteen years ago, in 2002, only 45% of schools identified some mandatory reporters on their campuses, and these schools did not necessarily categorize almost every employee in that manner.[27] The trend since then is notable, particularly because it contravenes the advice from a Congressionally-mandated study, published in 2002 by the National Institute of Justice.[28] The authors of that study suggested that wide-net reporting policies were unwise.[29] After examining almost 2,500 institutions of higher education, they warned:

> 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

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23. *Id.* at 8–9. The remaining 8% of the policies "provided an *ambiguous* definition. They did not designate all employees as mandatory reporters, but also did not clearly identify those who were." *Id.* at 9.

24. *Id.* at 10.

25. Sine Anahita, *Trouble with Title IX*, AAUP (May–June 2017), https://www.aaup.org/article/trouble-title-ix#.WSRpshot6ao.email (discussing University of Alaska, Fairbanks) ("[I]n 2016, the mandatory reporting rule appeared in our individual contracts . . . . The new contract language did not go through regular governance processes but simply appeared unannounced.").

26. This reporting scheme is different than several other mandatory schemes with which it is often confused, including the following: a state requirement that child abuse be reported, typically to the state child protection agency; the Clery Act's requirement that de-identified information about certain crimes be reported to the Clery Act coordinator for crime statistic purposes; and a state requirement that law enforcement take certain actions, such as arrest, in response to certain criminal acts, such as domestic violence.

27. *See* HEATHER M. KARJANE, BONNIE S. FISHER & FRANCIS T. CULLEN, CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND 88 (Oct. 2002).

28. *Id.*

29. *See* KARJANE, FISHER & CULLEN, *supra* note 27.

> include an 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 counterproductive to the victim's healing process.[30]

C. Explanation for the Rise in Wide-Net Reporting Policies

What caused this expansion of wide-net reporting policies? No statutory change explains it. In fact, the term "responsible employee" does not exist, and has never existed, in Title IX itself. Nor is the increase due to a change in the administrative regulations. The regulations mention the phrase "responsible employee" only once and the phrase has always had a very narrow meaning. Specifically, the regulations say:

> *Designation of responsible employee*. Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.[31]

This regulation is commonly understood to require schools to designate a Title IX coordinator.[32]

Guidance from OCR in 2001, and reiterated by the agency in 2014, expanded who must be labeled a responsible employee, and the language set the backdrop for the explosion in wide-net policies. The 2014 guidance, like the 2001 guidance, contained three criteria that defined responsible employees:

> Who is a "responsible employee"?
>
> Answer: According to OCR's 2001 Guidance, a responsible employee includes any employee: who has the authority to

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30. *See id.* at vi, xi, xiii, 81.

31. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106.8(a) (2014). This regulation also requires recipients to publish grievance procedures providing for prompt and equitable resolution of complaints.

32. *See* 2011 Dear Colleague Letter, *supra* note 3, at 7.

> 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 designee; or whom a student could reasonably believe has this authority or duty.[33]

The criteria in the 2001 and 2014 guidance, and the documents themselves, did not require institutions to make almost every employee a responsible employee. So what happened? Several extra-legal factors are likely to blame. First, trade publications and others started talking about the second category of employee that appeared in the OCR guidance: an employee "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 designee . . . ."[34] The question was raised whether this language meant all employees had to be made responsible employees.[35] For example, John Gaal and Laura Harshbarger, writing in the *Higher Education Law Report* asked, "And does OCR really mean that *any* employee who has *any* 'misconduct' reporting duty is a 'responsible employee'? . . . We simply do not know."[36] Administrators started concluding, erroneously, that any employee who has an obligation to report any other misconduct at the institution must be labeled a responsible employee. Several OCR resolution letters issued at the end of 2016 bolstered this broad interpretation.[37]

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33. *See* 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 15.

34. *Id*.

35. John Gaal & Laura Harshbarger, *Responsible Employees and Title IX,* HIGHER EDUC. L. REP. (May 12, 2014), http://www.higheredlawreport.com/2014/05/responsible-employees-and-title-ix/.

36. *Id.* (emphasis added).

37. *See infra* text accompanying notes 263–80.

Second, professional organizations made available templates for wide-net reporting policies,[38] and encouraged their adoption.[39] The press helped disseminate the templates.[40] Well-known attorneys recommended these wide-net reporting policies to general counsel.[41] Institutions likely adopted the wide-net reporting policies because it was easy to do so, no alternative approach was similarly touted,[42] faculty were often not involved in the policy decisions,[43] and administrators found comfort in following the crowd.[44]

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38. A model reporting policy by ATIXA, for example, says, "The College has defined all employees, both faculty and professional staff, as mandatory reporters, except those designated as 'confidential.'" ASSOCIATION OF TITLE IX ADMINISTRATORS, MANDATORY REPORTERS: A POLICY FOR FACULTY, TRUSTEES, AND PROFESSIONAL STAFF 4 (2015) [hereinafter ATIXA], https://atixa.org/wordpress/wp-content/uploads/2012/01/Mandatory-Reporters-Policy-Template_1215.pdf. Previously ATIXA took the position that many mandatory reporters could file Jane Doe reports to keep the information about the victim from the Title IX coordinator. Brett A. Sokolow, *Mandatory Reporting for Title IX: Keep it Simple*, CHRONICLE OF HIGHER EDUC. (Sept. 23, 2013), at http://www.chronicle.com/article/Mandatory-Reporting-for-Title/141785/. For-profit businesses may have incentives to create and solve Title IX problems, whether or not those problems actually exist.

39. ATIXA, *supra* note 38, at 1 ("The language of the [Clery] Act would allow the College to exclude some faculty some of the time and many professional staff from the obligation to report. Such an approach, however, risks creating confusion for faculty and staff, takes a minimalist approach to the ethical obligation to inform our community about serious crimes, and makes the institution more vulnerable to enforcement action.").

40. *See* Colleen Flaherty, *Faculty Members Object to New Policies Making all Professors Mandatory Reporters of Sexual Assault,* HIGHER EDUC. L. REP. (Feb. 4, 2015), https://www.insidehighered.com/news/2015/02/04/faculty-members-object-new-policies-making-all-professors-mandatory-reporters-sexual (providing a hyperlink to a wide-net reporting policy template from ATIXA). Flaherty also quotes many people who find fault with wide-net policies.

41. GINA M. SMITH & LESLIE M. GOMEZ, EFFECTIVE IMPLEMENTATION OF THE INSTITUTIONAL RESPONSE TO SEXUAL MISCONDUCT UNDER TITLE IX AND RELATED GUIDANCE 12–13, 19 (June 19–22, 2013), http://www.higheredcompliance.org/resources/resources/05D_13-06-38.pdf.

42. Legal scholarship on this particular topic has been almost non-existent. One article recommended moving away from blanket mandatory reporting policies that injure victims' emotional safety, but the article did not engage with OCR guidance, offer principles for deciding who should be a mandatory reporter, or discuss the impact of a narrower policy on the institution's legal liability. *See generally* 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. & CIV. RTS. L. REV. 401 (2015).

43. AM. ASS'N OF UNIV. PROFESSORS, *The History, Uses, and Abuses of Title IX* 69, 87 (2016) [hereinafter AAUP], at https://www.aaup.org/file/TitleIXreport.pdf.

44. *See* Judith Newcombe & Clinton Conrad, *A Theory of Mandated Academic Change*, 52 J. HIGHER EDUC. 555, 566 (1981) (mentioning how administrative leadership looks to other institutions to see the perceptions and reactions to new

D. Title IX Justification for Wide-Net Reporting Policies

Institutions with wide-net reporting policies defend these policies by claiming that they are best for survivors.[45] Administrators cite examples of employees who failed to report sexual harassment or violence despite survivors' wishes for reports,[46] and claim that wide-

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mandates); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 148 AM. SOC. REV. 147, 151 (1983) (noting that "[u]ncertainty is also a powerful force that encourages imitation" among organizations). *See, e.g.*, Eilis Donohue, *College to Update Policy on Title IX Reporting*, THE MISCELLANY NEWS (Sept. 26, 2106), http://miscellanynews.org/2016/09/28/news/college-to-update-policy-on-title-ix-reporting/ (citing Vassar's Interim President Jonathan Chenette regarding Vassar's shift to a policy that has almost all employees labeled as responsible employees) ("Other [higher education] institutions have moved to designating faculty and almost all employees as responsible reporters. In our region, the following is a partial list of institutions designating all faculty as responsible reporters: Wesleyan, Bard College, Marist College, Mount Saint Mary College and Sarah Lawrence.").

45. The terms "survivor," "victim," and "complainant" are used interchangeably throughout the Article to refer to the person who alleges to be a victim of sexual violence. The terms survivor and victim are not meant to imply that the allegations have been founded. Occasionally, the Article employs pronouns. The female pronoun is used to refer to the survivor and the male pronoun is used to refer to the alleged perpetrator. These pronouns reflect the generally gendered nature of campus sexual misconduct. *See* Christopher Krebs et al., *Campus Climate Survey Validation Study Final Technical Report*, BUREAU OF JUSTICE STATISTICS 69–71 (2016), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5540 ("Based on significance tests conducted to compare prevalence rates between males and females, the prevalence of sexual assault, sexual battery, and rape were significantly lower for males than females at each of the nine participating schools."). However, the use of these pronouns is not meant to imply that same-sex sexual violence or female-on-male sexual violence does not exist.

46. This fact pattern is apparent in case law but also in the media and literature. *See, e.g.*, McGrath v. Dominican Coll. of Blauvelt, 672 F. Supp. 2d 477, 483–84 (S.D.N.Y. 2009) (rejecting motion to dismiss claim for deliberate indifference when allegations stated that various administrators did not move forward with Title IX process, among other things); Patrick Redford, *Lawsuit: Text Messages Show How Baylor Coaches Turned Football Program into Disciplinary 'Black Hole*,*'* DEADSPIN (Feb. 2, 2017, 11:20 PM), http://deadspin.com/lawsuit-text-messages-show-how-baylor-coaches-turned-f-1791947070 (detailing text messages sent between football coaches that suggest allegations of sexual assault by football players would be kept from judicial affairs); LEE MADIGAN & NANCY C. GAMBLE, THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM X (1989) (relaying the story of an eighth-grader who was sexually assaulted in a high school in 1958 and how the principal's "casual attitude" to her report lead her to fear that her perpetrator would soon return to school, causing her to transfer from the school, and experience "the second rape —apathy from those she told and the need to flee for her own sense of safety"). High profile cases like that involving Jerry Sandusky and others at Penn State also were part of the background. *See* FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE

net reporting policies minimize the opportunity for such inappropriate responses. Relatedly, administrators claim that wide-net reporting policies help institutions identify victims in order to offer them resources and support.[47] Studies show that most administrators do not believe that wide-net reporting policies create a barrier to reporting,[48] but rather they believe the policies encourage reporting.[49] Finally, proponents of wide-net reporting policies claim that these policies allow them to collect data on the prevalence of sexual assault and to ensure that perpetrators are identified and disciplined.[50]

These particular justifications make wide-net reporting policies appear consistent with the spirit of Title IX, insofar as they seem consistent with institutional commitments to reduce campus sexual violence. Consequently, when students at Knox College petitioned for a policy that would limit the number of responsible employees, the president of the college responded, "If you're looking for a critique of our policy, you're not going to find it in Title IX."[51]

PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY (2012), http://health-equity.lib.umd.edu/3956/1/REPORT_FINAL_071212.pdf.

47. Flaherty, *supra* note 40 ("Despite the language about risk and exposure, ["Brett Sokolow, president and chief executive of the NCHERM Group, a risk management firm that advises colleges and universities on issues including sexual assault, [and] also…executive director of the Association of Title IX Administrators, or ATIXA"], said these new policies are about more than shielding institutions from high-profile lawsuits alleging they've dropped the ball on sexual assault. 'That may be the motivation for some institutions, perhaps, but for most institutions, we want to know about what's happening so we can address it,' he said, estimating that 'many dozens' have moved to this kind of policy. 'There are so many resources on college campuses that we can direct victims to, to give a quality response.'"); *see also* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW, STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLEGES AND UNIVERSITIES, COUNCIL DRAFT NO. 1 § 3.5 cmt. (2017) [hereinafter ALI, COUNCIL DRAFT NO. 1]; *cf.* Jane K. Stoever, *Mirandizing Family Justice*, 39 HARV. J.L. & GENDER 189, 233 (2016) ("Mandatory reporting laws are premised on the State's interest in protecting vulnerable individuals, assuming they lack the decisional capacity to protect themselves.").

48. KARJANE, FISHER & CULLEN, *supra* note 27, at 77, 79 (finding approximately 59% of administrators thought policies with "designated mandatory reporters" had "no effect" on the likelihood of assaults being reported and 29% perceived it only "somewhat discourages").

49. *Id.* at 92 (noting, however, that these views are not confirmed by student victims).

50. *See, e.g.*, SMITH & GOMEZ, *supra* note 41, at 13 (discussing "central record keeping for the assessment of patterns").

51. *Students Challenge Mandatory Reporting Requirements*, THE KNOX STUDENT (March 4, 2015), http://www.theknoxstudent.com/news/2015/03/04/studentschallenge-mandatory-reporting-requirements/#.V93cTrU5GGY.

E. A New View: Wide-Net Reporting Policies are Inconsistent with the Spirit of Title IX

This Article argues that wide-net reporting policies are in fact inconsistent with the spirit of Title IX. Even if wide-net policies were once thought beneficial to help break a culture of silence around sexual violence in the university setting,[52] the utilitarian calculus has now changed and these policies do more harm than good. Part II articulates the harm survivors experience when they are involuntarily thrust into a system designed to address their victimization: these policies undermine their autonomy and sense of institutional support, aggravating survivors' psychological and physical harm. These effects can impede survivors' healing, directly undermining Title IX's objective of ensuring equal access to educational opportunities and benefits regardless of gender. In addition, Part II argues that because of the negative consequences of reporting, wide-net reporting policies discourage students from talking to *any* faculty or staff on campus.[53] Fewer disclosures result in fewer survivors being connected to services and fewer offenders being held accountable for their acts. Holding perpetrators accountable is critical for creating a climate that deters acts of violence. Because wide-net policies chill reporting, these policies violate the spirit of Title IX.

Part III then debunks the myth that the law requires wide-net reporting policies. Nothing requires colleges and universities to designate all campus employees as responsible employees, not Title IX, not the related regulations, and not OCR guidance. The American Law Institute (ALI), in a draft of its *Project on Sexual and Gender-Based Misconduct on Campus: Procedural Frameworks and Analysis,* said as much in its discussion of faculty reporting obligations: "Nothing in the official OCR regulations or guidance appears to require that all faculty be designated as mandatory reporters."[54] The

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52. Jessica Bennett, *Title IX Complaint Against Yale: Women Allege a "Culture of Silence" on Campus*, DAILY BEAST (April 2, 2011), http://www.thedailybeast.com/title-ix-complaint-against-yale-women-allege-a-culture-of-silence-on-campus.

53. *See infra* notes 133–34, 147–61 and accompanying text.

54. *See* ALI, COUNCIL DRAFT NO. 1, *supra* note 47, at § 3.5 reporters' notes.

American Association of University Professors (AAUP) took a similar position,[55] as have some Title IX experts.[56]

Part III reviews the relevant OCR guidance to determine the contours of institutional discretion. Its examination starts in 1997 in order to give context to the later description of responsible employees. It argues that schools have had the ability, even before 2017, to adopt more narrowly tailored policies. The 2017 guidance signals OCR's intention to allow schools continued leeway to adopt nuanced policies. However, because the 2017 guidance also reiterates problematic language from the 2001 guidance, Part III encourages OCR to clarify further that narrower reporting polices are, in fact, permissible.

Part IV describes a reporting policy that is legally sufficient, but much better for survivors than a wide-net reporting policy. It draws on the work of a Senate Work Group at the University of Oregon (UO) that identified principles to guide the development of such a reporting policy.[57] Under the UO's policy, all employees are "responsible," but their responsibilities differ and do not necessarily require reporting to the Title IX coordinator. "Designated reporters" are the mandatory reporters. They have administrative prominence in the institution, and students generally expect these employees to take action to address sexual violence. Other employees are either confidential employees or "student-directed employees." The former have a legal privilege to keep student communications private. Student-directed employees lack a statutory privilege, but they are required by the reporting policy to keep a student's disclosures private absent the student's request for the employee to report. Both confidential and

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55. AAUP, *supra* note 43, at 84 ("College and university administrations often designate all faculty members as mandated reporters, although Title IX does not require such a broad sweep.").

56. *See, e.g.*, Cherie A. Scricca, *Identifying and Training Responsible Employees–Training on the Front Lines*, NACUA 2015 ANNUAL CONFERENCE 2–3 (June 29, 2015) ("Thus current OCR Guidance documents appears to take the view that a school may choose how to identify Responsible Employees, as long as they are clearly identified and the school adequately publicizes that information.); *see also* REPORT OF THE UNIVERSITY OF OREGON PRESIDENT'S REVIEW PANEL 31 (2014), https://president.uoregon.edu/sites/president2.uoregon.edu/files/reviewpanelreport_web.pdf ("Title IX does not require universal mandatory reporting. Rather, it specifies that University community members have clear information regarding which individuals are and are not offices of notice . . . . Accordingly, it appears that the University has considerable discretion in designating who is and is not a mandatory reporter under Title IX.").

57. This author chaired that Work Group. Other members of the group were Phyllis Barkhurst, Melissa Barnes, McKenna O'Dougherty, Jennifer Freyd, Bill Harbaugh, and Darci Heroy. Missy Matella and John Bonine were not officially members, but both were active participants.

student-directed employees must ask the student if the student wants the employee to report the incident to the Title IX coordinator and/or to connect the student with confidential support services, and then the employee must follow the student's direction.

Part V argues that a narrowly tailored policy poses no more liability risk for an institution than a wide-net policy. It suggests that proponents of a wide-net policy overstate its advantages for funneling complaints to a person with knowledge about the multiple legal regimes implicated by a disclosure (e.g., Title VII,[58] Title IX, and Clery[59]) and for removing perpetrators from campus. In addition, it argues that proponents of wide-net reporting policies often ignore the liability risks that these policies create for institutions, including when employees fail to report when they should, and when employees report against survivors' wishes. Part V concludes that wide-net reporting policies provide no discernable liability advantages.

The analysis that follows should prove useful to institutions that take seriously the ALI's suggestion that they use their "informed independent judgment" to determine who should be designated as mandatory reporters.[60] It should assist university presidents in their efforts to move their institutional policies forward in thoughtful ways.[61] It should also help policy makers at OCR draft future guidance and regulations as well as policy makers in Congress formulate new laws.[62] It may also head off improvident state-lawmaking efforts to expand mandatory reporting policies (such as by making certain students mandatory reporters[63]) and to redress the withdrawal of the Obama-era guidance with imprecise laws.[64]

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58. 42 U.S.C. § 2000e–e-17 (2012).

59. 20 U.S.C. § 1092(f) (2012).

60. *See* ALI, COUNCIL DRAFT NO. 1, *supra* note 47, at § 3.5 cmt.

61. *See* Newcombe & Conrad, *supra* note 44, at 573 (arguing, *inter alia*, that college presidents, in particular, have an important role in implementing mandates under Title IX).

62. *See id.* at 574–75 (arguing, *inter alia*, that government intervention to enforce Title IX mandates is particularly important when there are forces working at cross purposes and that new guidance has to be done carefully to avoid unintended consequences).

63. S.B. No. 576, 2017 Leg., 85th Sess. (Tex. 2017) (requiring officers of student organizations to report to the "institution's chief executive officer"). This bill was left pending in the house committee. *See Texas Legislature Online - 85(R) History for SB 576*, TEXAS LEGISLATURE ONLINE HISTORY, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=85R&Bill=SB576.

64. *See* S. 706 § 2(a), (o), 190th Gen. Ct. of the Commonwealth (Mass. 2017), at https://malegislature.gov/Bills/190/S706 (codifying the definition of responsible employee found in the 2001 revised guidance and imposing reporting obligations on those responsible employees).

II. THE PROBLEM WITH WIDE-NET REPORTING POLICIES

Wide-net reporting policies have unintended consequences.[65] For students who disclose their victimization, these policies infringe their autonomy (that is, self-determination[66]) and aggravate the psychological and/or physical harm caused by the violence itself. Undoubtedly, these categories of injury overlap; interfering with a survivor's autonomy can contribute to psychological and/or physical harm, and psychological or physical harm can impede a person's exercise of autonomy. Subpart A discusses these types of injury in order to explore them in more depth. While these categories may not capture all of the harm that might exist, they probably come close.[67]

Subpart B describes how wide-net reporting policies also create an atmosphere that discourages some survivors from disclosing to anyone on campus. Because of the negative effects of disclosing in a system that removes a survivor's autonomy (and can harm a survivor psychologically and physically), wide-net reporting policies inhibit reporting by victims themselves,[68] even if they may increase reporting by employees. Fewer disclosures by survivors create two problematic effects. First, the institution's ability to connect survivors with support and services decreases. Second, the institution's ability to hold perpetrators accountable also decreases. If perpetrators are not held accountable, then the campus culture inadequately deters sexual violence and, in fact, makes victimization possible.

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65. *See generally* Jennifer Freyd, *The Problem with "Required Reporting" Rules for Sexual Violence on Campus*, HUFFINGTON POST BLOG (Apr. 25, 2016), https://www.huffingtonpost.com/jennifer-j-freyd/the-problem-with-required_b_9766016.html; Michele Moody-Adams, *The Chilling Effect of Mandatory Reporting of Sexual Assault*, THE CHRON. OF HIGHER EDUC. (March 11, 2015), http://www.chronicle.com/blogs/conversation/2015/03/11/the-chilling-effect-of-mandatory-reporting-of-sexual-assault/.

66. *See* Catriona Mackenzie & Natalie Stoljar, *Introduction: Autonomy Refigured*, *in* RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 3, 5 (Catriona Mackenzie & Natalie Stoljar eds., 2000). I recognize the feminist critiques, including those that invoke "relational autonomy," i.e., that women's autonomy is limited and shaped by the "impact of social and political structures, especially sexism and other forms of oppression." *See* Carolyn McLeod & Susan Sherwin, *Relational Autonomy, Self-Trust, and Health Care for Patients Who are Oppressed*, *in* RELATIONAL AUTONOMY 259, 260.

67. Other harm might include, for example, the financial and reputational harm caused if her disclosure is forwarded to the criminal justice system and she is charged with making a false claim because the investigation does not convince the police that an assault occurred. *See, e.g.*, Lisa Avalos, *Prosecuting Rape Victims While Rapists Run Free: The Consequence of Police Failure to Investigate Sex Crimes in Britain and the United States*, 23 MICH. J. GENDER & L. 1, 14–16 (2016).

68. *See infra* notes 133–34, 147–61 and accompanying text.

A. For Those Who Disclose: Infringed Autonomy, Loss of Control, Psychological Harm, and Physical Harm

When virtually all faculty and staff are made mandatory reporters, a survivor often cannot disclose her victimization to her preferred confidant without triggering a potential university investigation, and sometimes also a criminal investigation.[69] Nor can she stop those effects when a third party reports an incident without her knowledge or against her wishes, which is not uncommon,[70] or when she inadvertently discloses to a mandatory reporter herself.

1. Infringed Autonomy

A wide-net reporting policy constrains a survivor's choices and thereby affects her autonomy.[71] While the infringement of an adult victim's autonomy is often assumed to be self-evidently problematic,[72] some may question whether such an infringement is, in fact, problematic in the university setting. After all, universities limit student choice all the time and no one thinks much about it. For example, students cannot take any course at any time, but must typically fulfill certain prerequisites and take classes when and where they are offered.[73] Why then is it problematic to require a survivor to talk to a designated confidential resource if she wants her conversation about her victimization to remain confidential?

First, that arrangement, while perhaps reasonable at first glance, affects a particularly important choice and consequently impacts a

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69. *See supra* note 45 for an explanation about why this author uses the female pronoun.

70. *See, e.g.*, Persis Drell, *Provost Reports on Title IX Process*, STANFORD (May 31, 2017, 10:00 AM), https://parents.stanford.edu/2017/05/31/provost-reports-on-title-ix-process/ (noting that during the first fifteen months of the pilot process for addressing Title IX complaints related to sexual harassment, stalking, relationship violence and sexual violence involving students, there were 65 reports initiated by students that went through the process and 61 unverified reports, "mostly from third parties, of prohibited conduct in which complainants did not want to come forward").

71. HOLLAND, CORTINA, & FREYD, *supra* note 22, at 19 ("[E]ven when university officials do everything possible to respect requests for confidentiality, Responsible Employee reports made against a survivor's wishes already disregarded that individual's desire for confidentiality and autonomy.").

72. *See, e.g.*, Benjamin Pomerance, *Finding the Middle Ground on a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse*, 16 MARQ. BENEFITS & SOC. WELFARE L. REV. 439, 473, 491 (2015).

73. *See, e.g.*, UNIV. OF ORE. SCHOOL OF JOURNALISM AND COMMC'NS, *Academic Requirements*, http://journalism.uoregon.edu/students/undergrad/academicrequirements/.

survivor's autonomy more than other restricted student choices.[74] The decision in whom to confide is a critical one, touching upon aspects of freedom of association, freedom of speech, and privacy. Simply, speaking privately with the person of one's choice about a sexual assault is an important part of liberty. It can affect one's self-definition and self-direction.[75]

Second, the survivor's situation makes the availability of a preferred confidant very important. Constrained choices affect people differently depending upon their circumstances.[76] Allowing a survivor to choose her support person in the aftermath of a sexual assault is a particularly significant exercise of autonomy. Stated another way, violations of autonomy are cumulative, with each violation compounding the harmful effects of the other.[77] Laura Hanson, a rape victim, spoke of this reality when she criticized wide-net reporting policies.[78] She said such a policy "puts adults in a position they would not normally be in. As an adult, you don't expect

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74. *See generally* Sarah E. Ullman & Liana Peter-Hagene, *Social Reactions to Sexual Assault Disclosure, Coping, Perceived Control and PTSD Symptoms in Sexual Assault Victims*, 24 J. COMMUNITY PSYCHOL. 495, 496, 504 (2014) (explaining that negative social reactions, including an attempt to control the victim's actions, can negatively affect a survivor's recovery).

75. *See id.* For example, a confidant's advice, and even the confidant's reaction, can have a long-term effect on the survivor's recovery. If a person does not listen, validate, and have positive regard, then the survivor has a higher self-perceived threat of stigma and is less likely to disclose to law enforcement, which in turn can increase the rate of sexual revictimization. *See* Audrey K. Miller, et al., *Stigma-Threat Motivated Nondisclosure of Sexual Assault and Sexual Revictimization: A Prospective Analysis*, 35 PSYCHOL. OF WOMEN Q. 119, 125–26 (2011).

76. *See* Camilla Mortensen*, Rape Survivors Testify Against Required Reporting*, EUGENE WEEKLY.COM (May 26, 2016, 3:00 AM) (citing psychology professor Jennifer Freyd), http://www.eugeneweekly.com/20160526/news-features/rape-survivors-testify-against-required-reporting.

77. *See generally* McLeod & Sherwin, *supra* note 66, at 259. The authors explain that people need "a certain degree of self-trust to be able to act autonomously." *Id.* at 261. This includes trusting one's "capacity to choose effectively," *id.* at 263, trusting one's ability to "act on the decisions," *id.* at 264, and trusting "the judgments . . . that underlie [the] choices." *Id.* Unfortunately, "abuse can prevent the development of or can destroy existing self-trust of all the three main types, resulting in the diminished autonomy of the agent." *Id.* at 272. The authors then explain, albeit in the context of medical care providers, "If health-care professionals, especially physicians, further consolidate their already disproportionate power in relation to patients, especially those from oppressed groups, they exacerbate a problematic power differential and further reduce the already limited autonomy of their patients." *Id.* at 267. The goal should be to empower victims so they can restore their autonomy. *Id.* at 276.

78. Mortensen*, supra* note 76.

decisions to be taken away from you, especially in a situation where you are already vulnerable."[79]

The impact of a constrained choice will affect survivors differently.[80] Victims of campus sexual assault have to make many choices,[81] including whether to speak to a university employee at all.[82] A wide-net policy may not affect all survivors negatively because some survivors would never tell anyone at the university, others would prefer to tell someone who is labeled "confidential" under a wide-net reporting policy, and still others would want to tell a mandatory reporter. Yet some survivors will find that a wide-net reporting policy limits their ability to seek out support and comfort, to begin their recovery, to obtain needed resources, and to continue their education.[83] A policy that maximized victim choice, in contrast, would permit all survivors to flourish. Leigh Goodmark calls such a policy "anti-essentialist."[84] She explains, "Creating space for choice honors the differences between women, recognizing that race, class, sexual orientation, disability status, and a multiplicity of other variables color how a particular woman might want to respond to a particular incidence of violence at a particular moment in time."[85]

Apart from wide-net reporting policies' effect on the autonomy of particular survivors, these policies indirectly affect the autonomy of all women. The ALI recognized that institutions of higher education have a "mission" to socialize their students as they respond to campus

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79. *Id.*

80. *Cf.* Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 819 (1999) (noting constraints on autonomy make some women "afraid to live, work, or walk in particular areas, or reluctant to engage in particular practices or voice particular views" or "stunt women's tastes, values, and conceptions of themselves").

81. Kathy Abrams noted that commentators overlook the many choices that exist and that are part of self-direction. *Id.*

82. *Id.* (discussing partial autonomy). *See also* Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U.L. REV. 1, 26–27 (2009).

83. Consequently, wide-net reporting policies only serve women who want to report to the Title IX office or who have confidants that are already designated as confidential by the institution, but they disserve all other survivors. *See id.* ("The problem with policies like mandatory arrest is that they reify two goals—safety and perpetrator accountability—and marginalize autonomy").

84. *Id.* at 45, 1 ("Domestic violence law and policy prioritizes the goals of policymakers and battered women's advocates-safety and batterer accountability-over the goals of individual women looking for a way to address the violence in their relationships. The shift of decision making authority has profoundly negative implications for the autonomy of women . . . .").

85. *Id.* at 46

sexual assault.[86] In calling for due process within disciplinary hearings, the ALI said: "schools are modeling a way of thinking and behaving to their students."[87] Of course, colleges and universities should model respect for adults' autonomy as well as for due process. Both are foundations of our constitutional democracy.[88]

When a school takes away choice from an adult survivor, the school signals the acceptability of paternalism; women are not competent to make decisions about their own lives, but need someone else to do it for them. It also signals the acceptability of selfishness; administrators can elevate the institution's interests above the survivor's interests, not unlike the way that the perpetrator elevates his interests over the survivor's. As if these messages weren't bad enough, the university's response also signals a lack of equal regard for women as a class because most survivors of sexual violence on campus are women,[89] and university employees are often not required to report against the wishes of other crime victims.[90]

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86. *See* ALI, COUNCIL DRAFT NO. 1 *supra* note 47, at §1.2 reporters' notes, §1.7 reporters notes.

87. *See* ALI, COUNCIL DRAFT NO. 1 *supra* note 47, at § 1.2 reporters' notes; *see also id.* at § 1.7 cmt. ("When an accusation of sexual assault or related forms of misconduct is made . . . the processes for investigation and resolution have educative functions insofar as they convey to participants and observers the university's or college's view about fair procedures . . . .") Schools must also help students "understand[] the plurality of viewpoints that may exist on the same subject and how to evaluate them." *Id.* at § 1.4 reporters' notes.

88. JOHN LOCKE, A LETTER CONCERNING TOLERATION 26–27 (J. Brook 1796) (1796).

89. *See* Krebs *supra* note 45, at 69–71.

90. This will vary by school, but many mandatory reporting policies are directed toward gender-based violence in particular. At some campuses, employees are not mandatory reporters for most crimes, other than gender-based harassment, sexual assault, dating violence, domestic violence and stalking. *See, e.g.*, UNIV. OF OREGON, ANNUAL CAMPUS SECURITY AND FIRE SAFETY REPORT, 19 (2016) (describing "Required Reporters"). The disparate treatment was recognized by the National Association of Student Personnel Administrators in the context of mandatory reporting to law enforcement. *See* NATIONAL ASSOCIATION OF STUDENT PERSONNEL ADMINISTRATORS, AN OPEN LETTER TO ELECTED LEADERS OF THE 50 UNITED STATES 3 (2015), https://www.naspa.org/images/uploads/main/Joint_omnibus_bill_statement_letterhead.pdf ("Mandatory referral thus singles out an entire subgroup of adult violence victims from other adults with the same abilities and treats them legally as children. The fact that those infantilized in this manner are mainly women and girls makes these bills particularly contrary to Title IX's purposes."); *see infra* text accompanying notes 466–68, 473.

2. Loss of Control

Apart from the fact that wide-net reporting policies remove survivors' ability to access their preferred confidants, wide-net reporting policies also leave survivors without the ability to control their situation in certain instances.[91] If a survivor inadvertently discloses to an employee who has a reporting obligation or if someone else discloses the survivor's situation to an employee with such an obligation, then the survivor cannot, herself, stop the process from moving forward.[92]

This Subpart discusses how the survivor is harmed by a loss of control in the aftermath of a victimization. The mere fact of control is particularly important to a survivor's healing. In addition, a survivor can experience institutional betrayal when a trusted confidant reports against the survivors' wishes, and such betrayal can cause harm too. Finally, survivors can experience professional, social and even physical retaliation, either by the perpetrator or by third parties, when a report is made. In short, a survivor's inability to decide for herself whether or not to report an incident can cause her both serious psychological and physical consequences.

a. Psychological Harm

In her 1999 *Harvard Law Review* article, Linda Mills criticized mandatory interventions in domestic violence cases because of the unintended consequences.[93] She argued that mandatory interventions often inflict emotional abuse on the survivor,[94] thereby allowing the state to "inadvertently replicate the very violence it aims to eradicate."[95] Mandatory interventions would "effectively revictimize the battered woman, first by reinforcing the batterer's judgments of her, and then by silencing her still further by limiting

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91. *See supra* note 20; *infra* note 249.

92. *See supra* note 20; *infra* note 249.

93. Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999).

94. Mills suggested that this emotional abuse had severe effects. *Id.* at 612 ("[T]hese [mandatory arrest and prosecution] policies reinforce the negative dynamics of rejection, degradation, terrorization, isolation, missocialization, exploitation, emotional unresponsiveness, and confinement intrinsic to the battering relationship. State perpetuation of these dynamics systematically denies the battered woman the emotional support she needs to heal. Although we can never precisely measure the effects of this state violence, studies of emotional trauma's impact on its victims suggest that this form of abuse would have long-term and devastating effects.").

95. *Id.* at 554.

how she could proceed."[96] Mills labeled mandatory arrest, prosecution, and reporting as themselves "forms of abuse."[97] She criticized professionals' ". . . unwavering support for mandatory interventions that render victims helpless"[98] and advocated for an empowerment model instead,[99] whereby victims would be connected to services and afforded emotional support.[100]

Mills' analysis applies well to campus survivors who are domestic violence victims, even though in the campus context an educator and not a police officer might be the one to remove her control.[101] It needs only a slight modification when applied to survivors of campus sexual violence. Power dynamics can differ when the perpetrator is an acquaintance, and not an intimate partner, and the sexual assault is an isolated incident. Nonetheless, acquaintance assaults are "psychologically debilitating . . . because they call into question a woman's behavior, judgment, and sense of trust in ways that other rapes do not."[102] An institutional response that overrides the survivor's own preferences also calls into question a woman's judgment, and thereby produces additional harm. The insensitivity found in the criminal justice system is often described as the "second rape," and wide-net reporting policies convey a similar insensitivity.[103]

In addition, removing the survivor's choice about reporting removes the survivor's ability to control her situation in the aftermath of her victimization. Yet control matters greatly to a

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96. *Id.* at 556.

97. *Id.* at 554.

98. *Id.* at 556.

99. *Id.* at 555 ("I argue that mandatory state interventions rob the battered woman of an important opportunity to acknowledge and reject patterns of abuse and to partner with state actors (law enforcement officers, prosecutors, and medical professionals) in imagining the possibility of a life without violence."); *see also* Goodmark, *supra* note 82, at 29 ("If, as most scholars agree, domestic violence is characterized by a power imbalance between the parties, restoring power to women who have been battered should be a priority when crafting domestic violence law and policy. For that reason, empowerment has been a central, though not always well-defined, theme in the battered women's movement.").

100. Mills, *supra* note 93, at 555. Mills suggests a survivor-centered approach characterized by acceptance, respect, reassurance, engagement, resocialization, empowerment, and liberation. *Id.* at 597–607.

101. *See id.*

102. Deborah Rhode, *Social Research and Social Change: Meeting the Challenge of Gender Inequality and Sexual Abuse*, 30 HARV. J.L. & GENDER 11, 16 (2007).

103. MADIGAN & GAMBLE, *supra* note 46, at 127.

survivor's recovery,[104] often reducing symptoms of post-traumatic stress disorder (PTSD).[105] Research has shown that it is present control, rather than past control (understanding why the assault occurred) or future control (controlling whether one will be assaulted again in the future), that furthers recovery most.[106] Professor of psychology Ellen Zurbriggen explained: "Rape, sexual assault, and sexual harassment are traumatic in part because the victim loses control over his or her own body. A clearly established principle for recovery from these traumatic experiences is to rebuild trust and to reestablish a sense of control over one's own fate and future."[107] Domestic violence survivors have the same need. Mills explained that victims who lack control are disempowered and that hinders their recovery: "No intervention that takes power away from the survivor can possibly foster her recovery, no matter how much it appears to be

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104. KARJANE, FISHER & CULLEN, *supra* note 27, at 83 ("[H]aving just experienced a profoundly disempowering event, victims of sexual assault need to reassert their ability to control basic aspects of their lives and environments."); Ryan M. Walsh & Steven E. Bruce, *The Relationships Between Perceived Levels of Control, Psychological Distress, and Legal System Variables in a Sample of Sexual Assault Survivors*, 17 VIOLENCE AGAINST WOMEN 603, 611 (2011) ("[R]esults suggest that an important factor against post traumatic stress and depressive symptomology within these domains is a perception by victims that they are in control of their recovery process as those in the present study who felt they were in control of their recovery also endorsed significantly lower levels of both PTSD and depressive symptomology."); Patrica A. Frazier, Heather Mortensen & Jason Steward, *Coping Strategies as Mediators of the Relations among Perceived Control and Distress in Sexual Assault Survivors*, 52 J. OF COUNSELING PSYCHOL. 267, 273 (2005) ("Perceived control over the recovery process was associated with less distress because it was associated with less use of social withdrawal and greater use of cognitive restructuring.").

105. Ullman & Peter-Hagene, *supra* note 74, at 504 ("Our results revealed that perceived control over recovery and maladaptive coping mediated the effects of positive and negative social reactions to assault disclosure on PTSD symptoms."); *see also* Liana C. Peter-Hagene & Sarah E. Ullman, *Social Reactions to Sexual Assault Disclosure and Problem Drinking: Mediating Effects of Perceived Control and PTSD*, 29 J. OF INTERPERSONAL VIOLENCE 1418, 1433 (2014) ("The current findings suggest that enhancing perceived control over recovery may be important for reducing PTSD."); *cf.* Janine M. Zweig & Martha R. Burt, *Predicting Women's Perceptions of Domestic Violence and Sexual Assault Agency Helpfulness: What Matters to Program Clients?* 13 VIOLENCE AGAINST WOMEN 1149, 1171 (2007) (noting that survivors find services more helpful when they feel in control of their interactions with the provider).

106. *See generally* Patricia A. Frazier, *Perceived Control and Distress Following Sexual Assault: A Longitudinal Test of a New Model*, 84 J. OF PERSONALITY AND SOC. PSYCH. 1257 (2003).

107. Letter from Eileen Zurbriggen, Professor of Psychology, et al. to Daniel Hare, Chair, Academic Senate of the University of California System (Oct. 26, 2015), http://ucscfa.org/wp-content/uploads/2015/10/UCSC-faculty-comments-on-SVSH-policy-10.26.15.pdf (discussing reporting against the survivor's wishes).

in her immediate best interest."[108]

Apart from the harm caused by questioning a survivor's judgment and undermining her sense of control, the institution's response can also produce psychological harm when it acts against the survivor's wishes. This type of institutional betrayal[109] can increase a survivor's post-trauma psychological symptoms,[110] and produce educational disengagement.[111] Students at Knox College who were opposed to wide-net reporting policies described instances of this phenomenon: "Survivors who have trusted faculty members to keep information confidential have seen those professors turn around and tell the administration. . . . [S]urvivors on this campus have been routinely forced through an often abrasive process for which they were emotionally unprepared."[112]

In an ideal world, no student would ever be surprised when his or her disclosure results in a report to the Title IX office because the student would want that to occur. In fact, OCR used its 2014 guidance to try to minimize surprises. Institutions were to tell students which employees were obligated to report to the Title IX office; responsible employees were to tell a student before the student disclosed that the employee was not a confidential resource,[113] and true "confidential employees" were exempted from having reporting obligations.[114]

Even with these rules, students sometimes think they are talking to an employee who will keep their information private, but they are not. Students don't necessarily know the details of the reporting policy,[115] just

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108. Mills, *supra* note 93, at 577 (citing JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 133 (1997)); KARJANE, FISHER, & CULLEN, *supra* note 27, at 83 (citing the "widely" held view of advocates that mandatory reporting polices are detrimental to the healing process because they take control away from the victim).

109. Institutional betrayal is the term for "when the university exacerbate[s] sexual violence victimization" through its own action or inaction. Marina N. Rosenthal, Alec M. Smith, & Jennifer J. Freyd, *Still Second Class: Sexual Harassment of Graduate Students*, 40 PSYCH. OF WOMEN Q. 364, 369 (2016); *id.* at 374 (reporting that one of the most commonly reported types of institutional betrayal is "making it difficult to report the experience").

110. Carly P. Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. OF TRAUMATIC STRESS 119 (2013). Mills speaks of the degradation the survivor experiences when her views are disregarded. Mills, *supra* note 93, at 589–90.

111. *See* CARLY P. SMITH, MARINA N. ROSENTHAL & JENNIFER J. FREYD, THE UO SEXUAL VIOLENCE AND INSTITUTIONAL BETRAYAL CAMPUS SURVEY 34–36 (Oct. 24, 2014), http://dynamic.uoregon.edu/jjf/campus/SmithRosenthalFreydGSU22-24 October2014.pdf.

112. *Students Challenge Mandatory Reporting Requirements*, *supra* note 51.

113. 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 16–17.

114. *Id.* at 22–24**.**

115. UNIV. OF NOTRE DAME, 2016 SEXUAL CONDUCT AND CAMPUS CLIMATE

as they don't know the intricacies of most other school policies.[116] An employee isn't always able to warn a student about the employee's reporting obligations either. Sometimes the employee does not know of this responsibility at the time of the disclosure, forgets this responsibility, or lacks time to give a warning before the student blurts out information. Students also sometimes disclose their victimization over email or in a term paper before the employee has an opportunity to give a meaningful warning.[117]

Even when a warning is given, the warning may not mean much to the survivor depending upon the effects of traumatic distress and/or alcohol and drugs. For example, some survivors return to their dorms inebriated and speak in an altered state to a resident assistant, not fully comprehending the implications of a disclosure even if a warning is given. Some of these survivors may later regret having communicated information about their sexual assault, but their change of heart is irrelevant. Instead, the student experiences institutional betrayal. These survivors are drawn into an unwanted process and that itself causes them distress.

b. Physical Harm

Mandatory reporting can also expose survivors to physical harm, both from their perpetrators as well as from others. To the extent that a report becomes known by the perpetrator, he might respond with violence. Focus groups on mandatory reporting in other contexts reveal that victims of intimate partner violence often face retaliation by their abusers when their disclosures trigger police involvement.[118]

QUESTIONNAIRE REPORT 2 (2016) (reporting that only 39% of students agreed with the statement, "You know how to report such incidents to the University administration."). Approximately half of the students thought the university's policies with respect to sexual assault, dating violence, domestic violence, and stalking were clear. *Id.* at 3.

116. *Cf.* JOY D. BONNER, IS STUDENTS' KNOWLEDGE OF THE STUDENT CONDUCT CODE ASSOCIATED WITH THEIR CONDUCT-CODE BREAKING BEHAVIORS ON CAMPUS? 26 (2017) (on file with the University Honors Program Theses, Georgia Southern University), http://digitalcommons.georgiasouthern.edu/cgi/viewcontent.cgi?article=1315&context=honors-theses (reporting that while "79.2% students are aware of the code's existence . . . only 55.3% of students participating in the study reported ever reading the code").

117. *See* Anahita, *supra* note 25.

118. Cris M. Sullivan & Leslie A. Hagen, *Survivors' Opinions About Mandatory Reporting of Domestic Violence and Sexual Assault by Medical Professionals*, 20 AFFILIA 346, 352–53 (2005) ("Many of the women talked about the retaliatory violence they experienced at the hands of their abusers and said that the retaliation assault was often more violent than the original beatings. These participants believe that it

A batterer who feels he is losing control over his victim can be particularly dangerous.[119] The college student who commits both sexual and physical violence "may be especially prone to anger and needs for power and control."[120] In fact, these perpetrators are known for their high rate of post-separation violence.[121] At worst, the new violence can be lethal.[122] Because an educational institution cannot guarantee the student's protection,[123] policies that make virtually every employee a mandatory reporter put some survivors in harm's way.[124]

People associated with the perpetrator may also retaliate against the victim. Retaliatory behavior can extend beyond harassment to

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should be a victim's choice to have the hospital contact the police . . . . ").

119. Walter S. DeKeseredy, *Abusive Endings: Separation and Divorce Violence Against Women*, 22 DOMESTIC VIOLENCE RPT. 53 (Apr./May 2017); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 64–65 (1991) ("At least half of women who leave their abusers are followed and harassed or further attacked by them. In one study of interspousal homicide, more than half of the men who killed their spouses did so when the partners were separated. . . . Men who kill their wives describe their feeling of loss of control over the woman as a primary factor . . . ."); Deborah M. Goelman, *Shelter from the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence after the Violence Against Women Act of 2000,* 13 COLUM. J. GENDER & L. 101, 108 (2004) ("[T]he risk of assault is highest immediately following separation and when women attempt permanent separation through legal or other action."); Kathryn Oths & Tara Robertson, *Give Me Shelter: Temporal Patterns of Women Fleeing Domestic Abuse* 66 HUMAN ORGANIZATION 249, 253 (2007) ("Many times a woman . . . fear[s] continued or escalated violence with the imminent release of her abuser from jail or when he [is] served an arrest warrant or protection order.").

120. Jennifer Katz & Hillary Rich, *Partner Covictimization and Post-Breakup Stalking, Pursuit, and Violence: A Retrospective Study of College Women*, 30 J. FAM. VIOL. 189, 191 (2015).

121. *Id.* at 196.

122. Ruth E. Fleury, Cris M. Sullivan & Deborah I. Bybee, *When Ending the Relationship Doesn't End the Violence: Women's Experiences of Violence by Former Partners*, 6 VIOLENCE AGAINST WOMEN 1363, 1371 (2000) (noting that 72% of the women in study who were assaulted post-separation experienced "severe or potentially lethal violence"; 25% of the women experienced this type of violence "more than once a month").

123. *See* Mia M. McFarlane, *Mandatory Reporting of Domestic Violence: An Inappropriate Response for New York Health Care Professionals*, 17 BUFF. PUB. INT. L.J. 1, 23 (1998–99) ("The inability of the system to protect domestic violence victims from retaliation by their abusers is one reason for opposing mandatory reporting.").

124. *See, e.g.*, Virginia Daire, *The Case Against Mandatory Reporting of Domestic Violence* Injuries, 74 FLA. B.J. 78, 79 (2000). In addition, a campus inquiry may cause a perpetrator to destroy evidence needed for a successful prosecution or other legal action that would have advanced the victim's safety.

include other criminal behavior, such as threats to physical safety.[125] A lawsuit against Baylor University, for example, alleged that members of the football team sent harassing text messages and burglarized the survivor's apartment after she reported.[126] While the law prohibits retaliation by the perpetrator and third parties,[127] the law, unfortunately, does not deter all such acts. The same can be said about separation violence; the law proscribes it, but it still occurs.

Finally, reporting can trigger social ostracism and/or professional disadvantages for the victim. Consider the graduate student who experiences sexual harassment by someone within a small department, or by someone who sits on her dissertation committee, or by someone whose work drew her to the university.[128] Reporting may cost her the soft benefits that are critical in academia, such as references, connections, and support.[129] Or consider the student who accuses the college's star football player of sexual misconduct. The social repercussions can be devastating.[130]

The social ostracism and the professional repercussions that constitute retaliatory conduct can be sufficiently severe that even if not accompanied by physical violence, a survivor's health can suffer.[131] A survivor may rightly perceive that prohibitions against

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125. *See* Goodwin v. Penridge School Dist. Case 2:17-cv-02431-LDD, ¶2 (E.D. Pa. May 30, 2017), https://nwlc.org/wp-content/uploads/2017/05/Goodwin-v.-Pennridge-Complaint-Filed-5.30.17.pdf (alleging "[a]fter Miss Goodwin reported the rape to officials at PHS, the rapist and his friends embarked on a years'-long campaign of physical and verbal sexual harassment against her, shoving her in the halls; calling her a 'bitch' and threatening her over text message").

126. Devon Sayers & Darran Simon, *Baylor University Lawsuit Alleges Gang Rape*, CNN, (May 18, 2017, 1:00 AM), http://www.cnn.com/2017/05/17/us/baylor-university-gang-rape-lawsuit/index.html.

127. *See* Letter from Seth M. Galanter, Acting Assistant Secretary for Civil Rights, U.S. Dep't of Educ., to Colleague (Apr. 24, 2013), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201304.pdf; 2001 Revised Guidance, *supra* note 12, at 17.

128. Nancy C. Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University* Faculty, UTAH L. REV. (forthcoming Spring 2018).

129. *Id.* (relaying graduate student's experience of sexual harassment, including "anxiety over what the professor might do to prevent her from graduating and/or securing positive references for jobs or other academic appointments," and noting that these impacts are "quite common").

130. *See, e.g.*, THE HUNTING GROUND (Chain Camera Pictures 2015) (vividly illustrating the attacks launched against Erica Kinsman when she accused Jameis Winston, former Florida State University quarterback, of sexual assault).

131. *See generally* Carly P. Smith & Jennifer J. Freyd, *Insult, Then Injury: Interpersonal and Institutional Betrayal Linked to Health and Dissociation*, J. OF AGGRESSION MALTREATMENT & TRAUMA 1 (2017); Lillia M. Cortina & Vicki J. Magley, *Raising Voice, Raising Retaliation: Events Following Interpersonal*

retaliation cannot effectively remedy or prevent such ostracism or the loss of particular professional benefits.

Although a Title IX coordinator might defer to a survivor who wishes to remain anonymous or to have no further action taken,[132] the absence of a guarantee, as well as not always heeding her preference, can cause survivors to suffer real repercussions. Consequently, survivors should be able to decide for themselves if they want to report.

B. For Those Who Don't Disclose: Isolation, Lack of Support, Inability to Hold Perpetrators Accountable

In light of the potential negative effects from disclosing and the lack of control over the process, it should not be surprising that wide-net reporting policies reduce the likelihood that some survivors will report their victimization to the institution. Field research by Heather Karjane, Bonnie Fisher, and Francis Cullen found that "any policy or procedure that students (particularly student victims) perceived as a risk to their ability to control information about their victimization functioned as a barrier to reporting."[133] The 2014 *Report of the University of Oregon's President's Review Panel* similarly noted that the "overwhelming majority of students" with whom the panel spoke said that "a broad, and certainly a universal, mandatory reporting requirement serves as a serious disincentive to reporting incidents of sexual misconduct."[134]

Any policy that decreases the number of disclosures to the university is problematic. For the survivor, her silence increases the

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Mistreatment in the Workplace, 8 J. OF OCCUPATIONAL HEALTH PSYC. 247, 262 (2003) (demonstrating that those who were highly mistreated at work suffered psychological and physical distress from retaliation); HUMAN RIGHTS WATCH, EMBATTLED: RETALIATION AGAINST SEXUAL ASSAULT SURVIVORS IN THE US MILITARY 26 (May 18, 2015) (noting "[m]any considered the aftermath of the assault—bullying and isolation from peers or the damage done to their career as a result of reporting—worse than the assault itself").

132. *See supra* note 20.

133. KARJANE, FISHER, & CULLEN, *supra* note 27, at 85; Sam Staley, *Title IX Privacy Ban Thwarts Campus Sexual Assault Policies*, THE BEACON (Mar. 10, 2016, 10:10 AM), http://blog.independent.org/2016/03/10/title-ix-attack-on-privacy-thwarts-campus-sexual-assault-policies/; NATIONAL INSTITUTE OF JUSTICE, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 8 (2005) ("[A]ny policy that compromises or restricts the victim's ability to make informed choices about how to proceed may deter reporting.").

134. REPORT OF THE UNIVERSITY OF OREGON PRESIDENT'S REVIEW PANEL, *supra* note 56.

chance that she will be isolated and without support.[135] Rana Tahir, a 2013 graduate of Knox College, articulated this harm well. She said:

> Knox is a small school . . . . If a survivor's friends are also friends with the assailant which is often the case, he or she may be uncomfortable or scared to talk to a friend. If he or she can't turn to a professor or other mentor, then we've basically isolated someone who shouldn't have to face what can be a traumatic experience alone.[136]

A wide-net policy also makes it less likely the survivor will access the support and resources that she may need for educational success. The policy may scare the survivor away from approaching any services on campus,[137] or may keep her from talking to an employee who can inform her of them. This means, for example, that she may never receive the college's assistance in protecting herself from encountering the perpetrator,[138] or benefit from an on-campus legal service that could help her navigate the overlapping civil, criminal, and disciplinary systems.[139]

Isolation can also affect her physical well-being.[140] For example, her physical injuries may worsen if she delays seeking help because she is worried about mandatory reporting. She may lose the opportunity to use an emergency contraceptive or a post-exposure prophylaxis for AIDs. She may never get the psychological support she needs and, as a result, may self-medicate or engage in self-

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135. *See* Mills, *supra* note 93, at 591–92 (suggesting that the isolation caused by compulsory processes can mimic the social isolation imposed by the batterer and thereby undermine recovery).

136. *Students Challenge Mandatory Reporting Requirements*, *supra* note 51.

137. *See* University of Oregon's Organization Against Sexual Assault, *Statement Regarding UO Responsible Employee Duty to Report Sexual Harassment and Sexual Assault Policy* (May 10, 2016), http://uooasa.weebly.com/news-and-events/statement-regarding-uo-responsible-employee-duty-to-report-sexual-harassment-and-sexual-assault-policy ("Required reporting discourages survivors of harassment, abuse, and violence from seeking help from on-campus resources and from their fellow students, staff, and faculty.").

138. *See* RANA SAMPSON, ACQUAINTANCE RAPE OF COLLEGE STUDENTS 13 (2011) ("Many drop out of school because, if they stay, they might regularly face their attacker in class, in their dorm, in the dining hall, or at campus functions and events. Since most victims do not report, colleges cannot intervene to protect them from reencountering their attackers.").

139. *See* Weiner, *supra* note 10, at 201–05 (describing such a service at University of Oregon).

140. Andrea C. Gielen et al., *Women's Opinions About Domestic Violence Screening and Mandatory Reporting*, 19 AM. J. PREV. MED. 279, 281 (2000).

harm.[141] She may delay a sexual assault examination, and thereby hurt her ability to hold the perpetrator accountable and later experience the psychological and physical consequences associated with remorse.[142]

A policy that decreases the number of disclosures to the university also means the university is less able to provide survivors with the support and information that may increase their willingness to report. This is a terrible effect because universities typically cannot hold perpetrators accountable for their sexual misconduct unless their victims disclose it and cooperate with the investigation.[143] Currently, only about 10% of students talk to any campus employee about their victimization.[144]

A reporting rate of only 10% inadequately deters gender-based violence. If only a small number of victims ultimately report gender-based violence, a would-be perpetrator knows that he has excellent odds that he will never be held accountable. This situation

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141. KARJANE, FISHER, & CULLEN, *supra* note 27, at 137 (noting that underreporting means "victims of sexual assault are unlikely to secure the counseling and support they need to cope with and heal from this potentially traumatic event in their lives making it more probable that they will engage in 'self-blame,' self-medication (e.g., disordered eating and excessive drinking) and other self-destructive behaviors").

142. *Cf.* Isabelle Bauer et al., *Regret Intensity, Diurnal Cortisol Secretion, and Physical Health in Older Individuals: Evidence for Directional Effects and Protective Factors*, 22 PSYCHOLOGY AND AGING, 319, 328 (2007) (noting the health effects of intense regret among older individuals).

143. Some would also claim that this is a problem because universities then lack fuller information about what is actually happening on campuses. Katharine Baker's recent article provocatively suggests that people aren't talking enough about how bad the conduct actually is. Katharine K. Baker, *Campus Misconduct, Sexual Harm and Appropriate Process: The Essential Sexuality of It All*, 66 J. LEGAL EDUC. 777, 778 (2017). She posits that until nonconsensual sexual activity is understood better in all of its forms, there is unlikely to be consensus on how campuses should be addressing it. More information would help efforts to understand and address the phenomenon better.

144. JENNIFER J. FREYD, MARINA N. ROSENTHAL, & CARLY P. SMITH, PRELIMINARY RESULTS FROM THE UO SEXUAL VIOLENCE & INSTRUMENTAL BEHAVIOR CAMPUS SURVEY 19 (Sept. 2014), http://dynamic.uoregon.edu/jjf/campus/UO-campus-results-30Sept14.pdf; Rosenthal, Smith, & Freyd, *supra* note 109 at 370 (noting only 6.4% of graduate students report their sexual harassment by faculty/staff); Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 680 (2009) ("The fact that 90% of campus sexual violence survivors are exercising their veto [not to report] demonstrates that we are not taking their needs into sufficient consideration when crafting our responses."). The Review Panel said, "Students tell us that as long as they believe that the University uses this broad mandatory reporting requirement, they will be reluctant to make reports to anyone whom they believe will pass the information on." REPORT OF THE UNIVERSITY OF OREGON PRESIDENT'S REVIEW PANEL, *supra* note 56.

inadequately deters first-time offenders and leaves perpetrators on campus to reoffend.[145] That is, a campus may become more dangerous *because of* its mandatory reporting policy. In contrast, when victims have choices, victims are more likely to share information and cooperate with authorities.[146]

Wide-net reporting policies clearly inhibit the willingness of some students to talk to a university employee about an unwanted sexual experience.[147] This effect is not surprising in light of studies on the effect of mandatory reporting in other contexts. Studies document that women sometimes refuse to seek medical care when their doctors

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145. This assumes that the perpetrators are conscious of the climate. There is some evidence that climate may affect behavior. *See* Sarah R. Edwards, Kathryn A. Bradshaw, and Verlin B. Hinsz, *Denying Rape but Endorsing Forceful Intercourse: Exploring Differences Among Responders*, 1 VIOLENCE & GENDER 188, 190–91 (2014) (finding nearly one-third of men endorsed intentions to use force to obtain sex if nobody would ever know and there wouldn't be any consequences).

146. You Have Options (YHOP) is a law enforcement program that allows survivors who talk to the police to decide whether to obtain information only or to direct a partial or complete investigation. According to YHOP, the ability of a victim to control decisions, such as whether an arrest is made, ultimately provides investigators with more accurate information and increases survivors' willingness to identify their assailant or participate in the criminal process. YOU HAVE OPTIONS PROGRAM, at http://www.reportingoptions.org/about (last visited Nov. 22, 2017). In fact, according to YHOP founder Detective Carrie Hull, "We shifted our focus as a team to what does a survivor want, and out of that came better healing, but also identifying way more perpetrators." Katie Van Syckle, *The Tiny Police Department in Southern Oregon that Plans to End Campus Rape*, THE CUT (Nov. 9, 2014), http://nymag.com/thecut/2014/11/can-this-police-department-help-end-campus-rape.html. The U.S. military utilizes a similar model by offering restricted and unrestricted reporting options. Restricted reporting is rated more favorably by military survivors. *See* Michelle A. Mengeling et al., *Reporting Sexual Assault in the Military: Who Reports and Why Most Servicewomen Don't*, 47 AMER. J. OF PREVENTATIVE MED., 17, 18, 20–22 (2014); *see also* KARJANE, FISHER, & CULLEN, *supra* note 27, at 94 ("Policies that respect the victim's need (and ability) to make his or her own decision at each and every juncture of the process of seeking information, support, treatment, and, possibly, justice within the campus and/or the criminal justice system have been found to facilitate students coming forth and reporting the crime.").

147. *See* Melissa L. Barnes & Jennifer J. Freyd, Who Would You Tell?: College Student Perspectives Regarding Sexual Violence Reporting on Campus. Poster presented at the 22nd International Summit on Violence, Abuse & Trauma, San Diego, CA, 21-27 September 2017 (finding 58% of undergraduates surveyed would be inclined to disclose to a university employee about an unwanted sexual experience if they knew the university had a policy that required all employees to report the sexual violence incident to a university official)*; see also* Christina Mancini et al., *Mandatory Reporting in Higher Education: College Students' Perception of Laws Designed to Reduce Campus Sexual Assault*, 41 CRIM. JUST. REV. 219, 225, 229–30 (2016) (finding 15% would be deterred from reporting under a mandatory reporting policy). For a fuller discussion of these studies, see *infra* text accompanying notes 150–61.

are mandatory reporters,[148] or forego calling the police when a state has a mandatory arrest law.[149]

Yet the evidence about the effect of wide-net reporting policies on students' disclosures to their colleges and universities is not totally consistent. Two conflicting studies are most relevant. Research by Christina Mancini and her colleagues in 2015 surveyed 397 undergraduates and found that 56% of the students surveyed said they would be more likely to report their sexual victimization under a mandatory reporting law, and only 15% of the students said they would be deterred from reporting under a mandatory reporting law.[150] In contrast, a study by Melissa Barnes and Jennifer Freyd in 2016–17 of 486 undergraduates found that most students would be less likely to talk to a university employee about an unwanted sexual experience if the university had a wide-net reporting policy.[151] Interestingly, survey respondents in the Mancini study saw their own

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148. Virginia Daire, *The Case Against Mandatory Reporting of Domestic Violence Injuries*, 74 FLA. B.J. 78, 79 (2000) ("Mandatory reporting can actually discourage battered women from seeking medical care or from confiding in their physicians."); *see* Andrea Carlson Gielen et al., *Women's Opinions About Domestic Violence Screening and Mandatory Reporting*, 19 AM. J. PREVENTATIVE MED. 279, 283–84 (2000) (finding that 2/3 of survey respondents felt mandatory reporting would decrease a women's likelihood of disclosing and those who were survivors of intimate partner violence and who had not disclosed their abuse to a health care provider reported being less likely to reveal abuse to a health care provider under a mandatory reporting regime); Sullivan & Hagen, *supra* note 118, at 350 (60 out of 61 survivors of intimate partner violence in a focus group strongly opposed mandatory reporting by health professionals).

149. Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws*, 93 J. OF PUB. ECON. 85, 95 (2009) (finding that reporting declined by about 12% in mandatory arrest states); Meghan A. Novisky & Robert L. Peralta, *When Women Tell: Intimate Partner Violence and the Factors Related to Police Notification*, 21 VIOLENCE AGAINST WOMEN 65, 77, 81 (2015) (finding that violence is "significantly more likely to be reported to law enforcement when victims perceive mandatory arrest policies favorably" but may suppress reports for other victims; concluding "mandatory arrest policies may be increasing perceptions among women that the costs of reporting are too high for the consideration of involving law enforcement"); *see also* Laura Dugan, *Domestic Violence Legislation: Exploring its Impact on the Likelihood of Domestic Violence, Police Involvement, and Arrest*, 2 CRIMINOLOGY AND PUB. POL'Y 283, 302–03 (2003) ("[M]andatory arrest appears to reduce the chances that police discover an incident . . . , suggesting that by assuring arrest, persons are less inclined to seek police assistance.") (finding that third parties, rather than victims, are less likely to report).

150. Mancini et al., *supra* note 147, at 226, 229–30.

151. *See also* Barnes & Freyd, *supra* note 147 (finding "[s]tudents indicated they would be more inclined to disclose when considering a policy requiring respect for student decisions about reporting to the university (75%) compared to a policy requiring employees to forward disclosures (42%)").

response as likely to be different than others' responses.[152] Most students, 57.2%, thought victims might reduce their help seeking behavior if a school had a wide-net reporting policy and 64.7% thought such a policy might re-traumatize victims.[153]

What exactly explains these divergent results is unclear. However, the responses of those surveyed by Mancini about their own behavior may have been overly optimistic for two reasons. First, the policy may not have been contextualized for respondents. Without context, many people assume mandatory reporting is a good idea.[154] In fact, it appears that the researchers asked about the effect that mandatory reporting would have on the survey respondents themselves first, and then later asked about its likely effect on others. It was only when they asked questions about others that they gave respondents information about the potential negative effects of mandatory reporting.[155] Consequently, the order of the questions may have affected the results.

Second, the difference in responses may have had something to do with the likelihood that the respondents saw themselves as survivors.[156] Mancini acknowledged that such information is important to explore.[157] Other studies have found differences in receptiveness to mandatory reporting between the general populations and survivors.[158] A 2015 internet survey conducted by

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152. Mancini et al., *supra* note 147, at 229.

153. *Id.*

154. Thanks to Kathryn Holland for this insight.

155. *See* Mancini et al., *supra* note 147, at 226 ("Students were asked to indicate their approval toward MR, perceptions of how faculty might respond to their obligation to report, and possible outcomes of the laws. Concerning this last point, we aimed to incorporate both the assumed positive effects advanced by advocates (e.g., reduced sexual assault, greater victim assistance) and the potential unintended consequences of the policies (e.g., diminished victim autonomy, increased trauma for victims).").

156. Since both surveys used convenience samples, it is unlikely there were more survivors in the pool of respondents at one of the universities. However, it is possible that the perceived risk of victimization differed given the levels of information on campus about the problem of sexual assault.

157. *Id.* at 232 ("Similarly, it seems particularly important to examine whether views of MR laws differ across students depending on either their prior victimization experience or their actual or perceived risk of future sexual victimization.").

158. *See, e.g.*, Michael A. Rodríguez et al., *Mandatory Reporting of Domestic Violence Injuries to the Police: What Do Emergency Department Patients Think?*, 286 J. AM. MED. ASS'N 580, 581 (2001) (finding approximately 29% of nonabused emergency room patients opposed mandatory reporting but approximately 44% of abused patients opposed it); Andrea Carlson Gielen et al., *Women's Opinions About Domestic Violence Screening and Mandatory Reporting*, 19 AM. J. PREVENTATIVE MED. 279, 283 (2000) (finding a higher proportion of abused women than nonabused

the National Alliance to End Sexual Violence and Know Your IX found that "[a]lmost 90% of survivors responded 'yes,' they should retain the choice whether and to whom to report."[159] It is notable, however, that Barnes and Freyd did not find that student opinions differed depending upon whether the respondents had an unwanted sexual experience on campus.[160]

Holland, Cortina, and Freyd conclude that the conflicting research suggests that "[m]any questions remain unanswered and deserve the attention of psychological science."[161] Until this happens, universities and colleges should assume that mandatory reporting inhibits disclosures in light of the evidence that suggests it does, at least for some victims. Universities should try to increase the number of reports by developing a policy that can accommodate *both* the students who would be more inclined and less inclined to report with a mandatory reporting policy. Part IV proposes such a policy.

Wide-net reporting policies cause various types of harm, but do survivors benefit in any way from such policies? Do they surface more incidents so that campuses can help survivors and confront perpetrators? Do they permit data collection that is accurate and helpful?[162] If these benefits exist, they have not been empirically demonstrated. Ten years ago, Deborah Rhode identified the lack of research to justify campus sexual assault policies.[163] That problem

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women preferred a policy that allowed the women to decide whether to report).

159. *Survivor Survey on Mandatory Reporting*, NATIONAL ALLIANCE TO END SEXUAL VIOLENCE, http://endsexualviolence.org/where-we-stand/survivor-survey-on-mandatory-reporting (finding that 79% of respondents believed required reporting to police would chill disclosures and reports; 72% of respondents were concerned about losing control over the investigative process due to required reporting).

160. *See also* Barnes & Freyd, *supra* note 147.

161. HOLLAND, CORTINA & FREYD, *supra* note 22, at 12. The conflicting research cited by the authors consists of three studies, but only one was exactly on point. *See id.* at 10–12.

162. The small number of cases captured by a reporting policy presents an inaccurate view of what is actually happening on campus. Campuses need to conduct anonymous campus climate surveys to assess what is happening on campus. *See* Amy Becker, *91% of Colleges Reported Zero Incidents of Rape in 2014*, AMER. ASSOC. UNIV. WOMEN, http://www.aauw.org/article/clery-act-data-analysis/ (Nov. 23, 2015) ("Schools should consider conducting climate and victimization surveys, which are critical tools for schools to better document both reported and unreported incidents of sexual violence, understand why survivors are not reporting, and assess administrative and cultural issues on campus that undermine reporting.").

163. Deborah Rhode, *Social Research and Social Change: Meeting the Challenge of Gender Inequality and Sexual Abuse*, 30 HARV. J.L. & GENDER 11, 16 (2007) ("Sexual assault policies and education programs are a standard fixture of campus life, but as with sexual harassment training, no body of research establishes their effectiveness.").

continues. In 2017, Holland, Cortina, and Freyd noted, "A review of the literature reveals limited research to support assumptions regarding the benefits of compelled disclosure."[164] In fact, Holland, Cortina and Freyd argue that many of the assumptions behind these policies are either unproven or wrong. The commentary to the ALI Draft on the *Project on Sexual and Gender Based Misconduct on Campus* also recognized the lack of empirical data to support the claim that mandatory reporting policies produce more information about perpetrators for universities.[165]

Most important, many of the purported benefits from wide-net reporting policies do not necessitate a wide-net policy to achieve them. It is undoubtedly a problem when a survivor wants her college to take action against her perpetrator and the employee to whom she discloses fails to report the incident to the Title IX office. However, all employees can have reporting obligations when the survivor wants them to forward her information to the institution, and this requirement can exist without the adoption of a wide-net reporting policy. Similarly, it is important to get resources to survivors, yet institutions can make resources accessible to survivors independent of a wide-net reporting policy. Universities can obligate their employees to inform survivors about resources and to refer survivors to confidential resources who can talk further about available options. But institutions can do this without adopting wide-net reporting policies.

III. OCR GUIDANCE REDUX: WIDE-NET REPORTING POLICIES ARE NOT REQUIRED

Given that wide-net reporting policies are bad for student survivors, can colleges and universities move away from them? As suggested above, neither Title IX nor the related regulations expressly state that an institution of higher education must adopt a wide-net reporting policy.[166] To the extent that campus administrators have a contrary idea, it stems from OCR guidance and particularly its phrase "other misconduct." The guidance suggests that employees who have an obligation to report other misconduct must also report gender-based violence. Administrators claim that

164. HOLLAND, CORTINA & FREYD, *supra* note 22, at 24; *see also* Mancini et al., *supra* note 147, at 231 (observing "virtually no research exists to speak to how victims have fared under MR policies").

165. *See* ALI, COUNCIL DRAFT NO. 1, *supra* note 47, at § 3.5.b cmt (noting the "empirical uncertainty").

166. *See supra* text accompanying notes 31–36.

limiting who are responsible employees would require them to change all of the institution's policies related to other misconduct. Administrators also cite a few OCR resolution letters that seem to disapprove of more narrowly tailored reporting policies.

While a verbatim reading of OCR guidance supports the administrators' conclusion, this Part argues that the object and purpose of Title IX, as well as the history of the OCR guidance, provides a strong argument that a verbatim reading is not required. This part argues that schools can reduce the number of responsible employees without changing every other misconduct policy first. This conclusion is based on a careful analysis of pre-2017 OCR guidance, and is buttressed by the agency's 2017 *Q&A on Campus Sexual Misconduct*. In addition, as discussed below, the OCR resolution letters are not cause for concern. When read in context, they suggest the type of narrower reporting policy that could satisfy OCR.

Nonetheless, because there are mixed signals, OCR should make it clearer that Title IX does not require an institution to adopt a wide-net reporting policy. It should declare that an institution violates Title IX if its reporting policy discourages reporting.

A. Unraveling the "Other Misconduct" Knot

As explained earlier, the 2001 guidance contains the "other misconduct" language.[167] The 2001 guidance, which remains in force even after the dissemination of the 2017 guidance,[168] describes three categories of employees who should be labeled as responsible employees. The second prong led schools to adopt wide-net reporting policies: a responsible employee is any employee "who has the duty to report to appropriate school officials sexual harassment or other misconduct by students or employees."[169] This "other misconduct" category sweeps in a lot of employees because faculty must typically report academic misconduct,[170] researchers must often report

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167. *See supra* text accompanying note 14.

168. *See* 2017 Dear Colleague Letter, *supra* note 5, at 2; 2017 Q&A on Campus Sexual Misconduct, *supra* note 6, at 1. The Department also sent out the 2001 Revised Guidance as part of a 2006 Dear Colleague Letter that addressed sexual harassment. Letter from Stephanie Monroe, Assistant Secretary for Civil Rights, U.S. Dep't of Education, Office for Civil Rights, to Colleague (Jan. 25, 2006), https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html.

169. 2001 Revised Guidance, *supra* note 12, at 13. The 2014 guidance modified the wording slightly. See *infra* text accompanying note 222.

170. *See* UNIVERSITY OF OREGON, FACULTY GUIDE FOR ADDRESSING ACADEMIC MISCONDUCT AND REPORTING § 2.3, http://policies.uoregon.edu/vol-3-administration-student-affairs/ch-1-conduct/student-conduct-code (last visited June 30, 2017).

research misconduct,[171] and campus security authorities must report offenses set out in the Clery Act.[172] At some universities, everyone has the obligation to report fraud and economic waste.[173]

The breadth of the second prong is made even more sweeping when read in combination with the third prong. The third prong requires that responsible employees include those employees "who a student could reasonably believe has this . . . responsibility."[174] So, for example, a professor who was exempt from reporting academic misconduct would still be a responsible employee if a student could reasonably believe that the professor had an obligation to report academic misconduct.

Of course, even an expansive reading of the guidance doesn't *require* that everyone at the institution be labeled a responsible employee for Title IX purposes. An institution could insulate some employees from a Title IX reporting duty by narrowing its other misconduct policies and informing students of the change.

Yet, this approach would not be the best. An institution would probably find it onerous to change its other policies. The changes might undermine those other policies or cost the institution a substantial amount of money. For example, a school couldn't change who is a campus security authority unless it were willing to forego federal funds. Similarly, a school could not eliminate its research misconduct policies unless it were willing to forego federal funding from entities like the National Science Foundation. It would be ridiculous for a university to change all of these other policies in order to fix the reporting policy problem for survivors of gender-based violence. It is no wonder that schools default to wide-net reporting policies.

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171. UNIVERSITY OF OREGON, UO POLICY STATEMENT 09.00.02, ALLEGATIONS OF RESEARCH MISCONDUCT § 2 (last updated Feb. 24, 2012), http://policies.uoregon.edu/vol-2-academics-instruction-research/ch-6-research-general/allegations-research-misconduct (stating "members at all levels of the academic community (students, postdoctoral fellows, faculty, and staff) have a responsibility to encourage high research integrity and report instances of what they, in good faith, believe to be a lack of integrity in scholarship and research"); NSF Research Misconduct, 45 C.F.R. § 689.4 (requiring NSF awardees to address research misconduct).

172. 20 U.S.C. § 1092(f) (2016); *see also* The U.S. DEPARTMENT OF EDUCATION, OFFICE OF POSTSECONDARY EDUCATION, HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING (June 2016), https://www2.ed.gov/admins/lead/safety/handbook.pdf.

173. UNIVERSITY OF OREGON, UO INTERNAL MANAGEMENT DIRECTIVE, FRAUD WASTE AND ABUSE REPORTING (last updated July 1, 2014), http://policies.uoregon.edu/ fraud-waste-and-abuse-reporting-0.

174. 2001 Revised Guidance*, supra* note 12, at 13.

However, OCR's 2001 guidance (and the OCR resolution letters[175]) do not foreclose schools' ability to adopt more narrowly tailored reporting policies, even without the schools changing their policies that address other misconduct. Although the guidance is an interpretive rule that indicates how OCR will interpret the law, a school will not lose federal funding automatically if the school violates the guidance. That remedy is not a first step, but a last step, for a violation of Title IX.[176] In fact, OCR has never eliminated federal funding for an institution's inadequate Title IX policy; rather, OCR works with the institution to refine the policy to meet the requirements of Title IX.[177] Even if a school persisted in defiance of OCR's directions, it is not clear that it would lose its funding. The 2001 OCR guidance is a "significant guidance document"[178] and is therefore not law.[179] To the extent that its provision about responsible

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175. As for the legal weight of the letters of finding, *see* note 254 *infra*.

176. *See* Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 288 (1998) (explaining that "an agency may not initiate enforcement proceedings until it 'has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.' [20 U.S.C. § 1682]. The administrative regulations implement that obligation, requiring resolution of compliance issues 'by informal means whenever possible,' 34 CFR § 100.7(d) (1997), and prohibiting commencement of enforcement proceedings until the agency has determined that voluntary compliance is unobtainable and 'the recipient . . . has been notified of its failure to comply and of the action to be taken to effect compliance,' § 100.8(d); *see* § 100.8(c).").

177. Tyler Kingkade, *Colleges Warned They Will Lose Federal Funding For Botching Campus Rape Cases*, HUFFINGTON POST (July 14, 2014, 5:54 PM), https://www.huffingtonpost.com/2014/07/14/funding-campus-rape-dartmouth-summit_n_5585654.html.

178. DEP'T OF EDUC., SIGNIFICANT GUIDANCE DOCUMENTS 7 (October 7, 2016), https://www2.ed.gov/policy/gen/guid/significant-guidance3.docx. Although the 2001 revised guidance was created after notice and public comment, *see* Administrative Procedure Act, 5 U.S.C. § 553 (rule making), it is unlikely to be a legislative rule. *See* Texas v. United States, 201 F. Supp. 3d 810, 829–30 (N.D. Tex. 2016) (discussing the difference between legislative rules, interpretative rules, and general statements of policy). The 2001 revised guidance does not create a binding "line in the sand" by which agency discretion is removed. *Id.* at 830. However, the notice and comment should make the 2001 revised guidance less susceptible to court invalidation for being arbitrary and capricious. *See* 5 U.S.C. § 706(2)(a) (final agency action is to be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

179. *See* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432, 3,436 (Jan. 25, 2007) (mentioning the non-legally binding nature of a significant guidance document). OCR's guidance is not binding on courts, although it is persuasive. Riccio v. New Haven Bd. of Educ., 467 F. Supp. 2d 219, 226 n.8 (D. Conn. 2006) ("The OCR's guidance constitutes a body of informed judgment from the federal agency charged with administering Title IX's policies. While it is not binding on this court, this court can look to the OCR for guidance."); Equity in Athletics, Inc. v. Dep't

employees conflicts with Title IX or the Title IX regulations, an institution could ask a court to invalidate it.[180] For these reasons, campuses have breathing room to act like problem solvers and innovators, and develop narrower, more ethical, and more effective reporting policies.

Nonetheless, administrators might still be reluctant to abandon a school's wide-net reporting policy unless they believed a narrower approach was consistent with the guidance. After all, OCR holds institutions accountable for noncompliance with its guidance.[181] While an institution could try to invalidate the guidance in court, this option is probably unrealistic. Institutions settle with OCR;[182] they do not challenge its guidance.[183] In addition, an OCR investigation is a time-consuming and expensive process that an institution should try to avoid. Therefore, most administrators will need some assurance that a narrower reporting policy is consistent with the guidance before they abandon their schools' wide-net reporting policies.

For this reason, this section demonstrates how the other misconduct language in the guidance can be read to allow a more

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of Educ., 504 F. Supp. 2d 88, 108–09 (W.D. Va. 2007) (although "not subject to the APA's notice and comment procedures," the guidance is "entitled to deference and is 'controlling unless plainly erroneous or inconsistent with the regulation'").

180. Guidance can be challenged if it is "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997) (citing Robertson v. Methow Valley Citizens Council, 490 U. S. 332, 359 (1989) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945))). Arguably the guidance on responsible employees is inconsistent with the regulation. *See supra* text accompanying note 31.

181. *See* SMITH & GOMEZ, *supra* note 41, at 977 ("recent enforcement efforts by OCR have held institutions accountable for the tenets set forth in these guidance documents").

182. *See* Catherine Y. Kim, *Presidential Control Across Policymaking Tools,* 43 FLA. ST. U.L. REV. 91, 121 (2015) ("there has not been a single instance over the past quarter century in which an enforcement decision [by OCR] resulted in the final agency action necessary for judicial review," citing 5 U.S.C.A. § 704).

183. Joe Cohn, *Second Department of Education Official in Eight Days Tells Congress Guidance is Not Binding*, FIRE, (Oct. 2, 2015), https://www.thefire.org/second-department-of-education-official-in-eight-days-tells-congress-guidance-is-not-binding/ (quoting Senator Lankford saying, "The challenge that I hear over and over again from institutions of higher education is, they have a tremendous number of guidance documents that are coming to them, and they do not feel the freedom to be able to come back to Education, the Department of Ed, and say this smells a lot like a regulation to me because this is also where a stream of funding comes from. And so, they feel like they have to take it. Where other entities, obviously private businesses, they get a guidance document come down, they file lawsuits, and they challenge, and they push back on it. Institutions of higher education are actually leaning back and saying, I don't feel the freedom to be able to challenge this for fear that we'll also have other things.").

nuanced reporting policy. Paying attention to Title IX's object and purpose and the history of the guidance allows one to reach this conclusion. In fact, a close reading of the guidance from 1997 to 2017 demonstrates the following: not every employee has to be a responsible employee; students' expectations are critical for defining when other misconduct policies matter to the identification of responsible employees; institutions can relax the application of the other misconduct criterion if it would otherwise cause student survivors to be deprived of the support they need on campus; and responsible employees do not always need to pass on detailed information to the Title IX coordinator in contravention of the survivor's wishes. All of this suggests that the guidance should not constrain schools' ability to craft more nuanced and ethical reporting policies.

1. 1997 Guidance

OCR started using the term "responsible employee" in 1997 to mean something more than it meant in the Title IX regulations, i.e., more than a Title IX coordinator.[184] OCR initially left the term undefined even as it was simultaneously suggesting who at a school might be a responsible employee. From the start, it was clear that not all employees were necessarily responsible employees. In fact, OCR framed its analysis in the 1997 guidance by articulating and rejecting two positions advanced by those who commented on the proposed guidance:

> [S]ome commenters stated that OCR should find that a school has received notice only if 'managerial' employees, 'designated' employees, or employees with the authority to correct the harassment receive notice of the harassment. Another commenter suggested, by contrast, that any school employee should be considered a responsible employee for purposes of notice.[185]

Instead of adopting either of these positions, OCR suggested that responsible employees would include those so designated by the school, as determined by "the authority actually given to the employee,"[186] as well as personnel not so "designated" if "it would be

184. *See supra* text accompanying notes 31–32.
185. 1997 Guidance, *supra* note 13, at 12034, 12036–37.
186. *Id.* at 12037, 12050 n.65.

reasonable for a student to believe the employee is an agent or responsible employee" based on "the age of the student."[187] It gave a very useful example involving young children: "For example, young students may not understand those designations and may reasonably believe that an adult, such as a teacher or the school nurse, is a person they can and should tell about incidents of sexual harassment regardless of that person's formal status in the school administration."[188]

The guidance provided some additional examples of responsible employees, although it did not say whether these individuals would be responsible employees because they were so designated or because students might expect them to be. These employees included "a principal, campus security, bus driver, teacher, an affirmative action officer, or staff in the office of student affairs."[189]

The 1997 guidance did not use the language "other misconduct" to identify a responsible employee. Rather, the 1997 guidance was focused on what now is understood as the first and third categories of the 2001 guidance, as mentioned above.[190] Specifically, it was focused on who has the authority to take action to redress sexual violence and whom a student could reasonably believe has this authority. In addition, the 1997 guidance was not focused on sexual violence in analyzing who should be a responsible employee (in fact, it hardly focused on sexual violence at all for any purpose). The 1997 guidance only mentioned "sexual assault" twice, once in connection with the inappropriateness of mediation,[191] and once in connection with potential interim measures, such as offering the student different classes or housing.[192] Finally, the 1997 guidance acknowledged the concern of some commenters that failing to respect a student's wish for confidentiality could discourage reporting.[193] It encouraged schools "to honor a student's request that his or her name be withheld, if this can be done consistently with the school's obligation to remedy the harassment and take steps to prevent further harassment."[194] It emphasized that the school's response needed to be "reasonable."[195]

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187. *Id.* at 12037.
188. *Id.*
189. *Id.* at 12040.
190. *See supra* text accompanying note 33.
191. 1997 Guidance, supra note 13, at 12045.
192. *Id.* at 12043.
193. *Id.* at 12037.
194. *Id.*
195. *Id.* at 12043.

2. 2001 Revised Guidance

OCR gave more content to the concept of a responsible employee in its 2001 guidance, although OCR made no additional references to sexual assault. The 2001 guidance was meant to revise the 1997 guidance and provide more direction to those institutions that were subject to Title IX, especially in light of the Supreme Court cases of *Gebser v. Lago Vista Independent School District*[196] and *Davis v. Monroe County Board of Education*.[197] In those cases, the Supreme Court held that Title IX liability would exist only if an "appropriate person" had "actual knowledge" of the sexual harassment and acted with "deliberate indifference."[198] An appropriate person was defined as "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf."[199] In *Davis*, the Supreme Court indicated that the principal was the only official in that case who might trigger liability for the defendant, even though teachers also knew a fifth-grader was sexually harassing another fifth-grader.[200] But the Supreme Court

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196. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 274 (1998).

197. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 629 (1999). That case involved a fifth-grader who for months was subjected to sexual harassment by a classmate. The school did virtually nothing to stop the abuse, leading the victim to suffer in her studies and contemplate suicide. *Id.* at 634. The perpetrator's actions deprived the victim of an educational opportunity because the violence was "severe, pervasive, and objectively offensive." *Id.* at 650. In finding the school board violated Title IX, the Supreme Court explained that the school board was not directly responsible under Title IX for the child's acts. *Id.* Rather, the school board was responsible for "its *own* decision to remain idle in the face of known student-on-student harassment in its school[]." *Id.* at 661. The school did not "respond to known peer harassment in a manner that [was] not clearly unreasonable." *Id*. at 648–49. The school had the "authority to take remedial action," and the school had "control over the harasser and the environment," *id.* at 644, but the school did too little to stop the abuse. To the Court, these facts constituted deliberate indifference and subjected the school district to liability. *Id.* at 647; *see also* 2001 Revised Guidance, *supra* note 12, at i–ii ("Purpose and Scope of Revised Guidance").

198. *Davis*, 526 U.S. at 650; *Gebser*, 524 U.S. at 290.

199. *Gebser,* 524 U.S. at 290; *see also Davis*, 526 U.S. at 654 (holding that the Board of Education could be liable if the petitioner could show "both actual knowledge and deliberate indifference on the part of the Board").

200. In *Davis*, the fifth-grade girl, who was harassed by another fifth-grade child, repeatedly reported the incidents to her classroom teacher, her physical education teacher, and another teacher. *Davis*, 526 U.S. at 633–34. The mother also talked to two of the teachers, and one teacher said she had told the principal. *Id.* at 634. At one point the girl and her friends wanted to talk to the principal, but were rebuffed by a teacher. *Id.* The mother did eventually talk to the principal, but his response was inadequate. *Id.* In holding that the school board might be liable, and that the lawsuit was wrongly dismissed, the Court did not expressly say that only notice to the

emphasized that its holding did not limit whose inaction might subject a school to *administrative* enforcement.[201]

After *Gebser* and *Davis*, OCR wanted to make clear that administrative enforcement could in fact be triggered by the inaction of people who were not within the Court's narrow definition of appropriate persons.[202] OCR's position made perfect sense in light of *Davis*; after all, many teachers in *Davis* knew of the harassment, and the child and parent would have reasonably thought they would take action (in fact, one teacher told the parent that she would report the matter[203]). OCR's response also made sense because in neither case was there a written policy telling students and parents who were the responsible employees.[204] Consequently, for the first time, the 2001 guidance embodied the other misconduct language. It said:

> A responsible employee would include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.[205]

Now, it is possible that OCR intended to create a broad category comprised of employees with "any" reporting duty in addition to the category of employees with disciplinary authority or the duty to report sexual harassment. If so, the other misconduct language could

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principal could give rise to liability in the case. *Id.* at 631. However, when the Court applied the law to the facts, the Court implied that was true. It only mentioned that the "multiple victims . . . were sufficiently disturbed by [the male child's] misconduct to seek an audience with the school principal." *Id.* at 653–54. It did not mention that alerting the teachers was sufficient. *Id. Gebser* also involved a minor. *Gebser*, 524 U.S. at 274. In that case, there was no question whether the principal was an official who might trigger Title IX liability for the district, but there was no evidence that he had actual notice of the sexual relationship between the student and the teacher. *Id.* The Court rejected the Title IX claim against the school district. *Id.*

201. 2001 Revised Guidance, *supra* note 12, at 3 ("The Court was explicit in *Gebser* and *Davis* that the liability standards established in those cases are limited to private actions for monetary damages. *See*, *e.g.*, *Gebser*, 524 U.S. 283, and *Davis*, 526 U.S. at 639. The Court acknowledged, by contrast, the power of Federal agencies, such as the Department, to 'promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate,' even in circumstances that would not give rise to a claim for money damages. *See, Gebser*, 524 U.S. at 292.").

202. *See also* 2001 Revised Guidance, *supra* note 12, at 34 n.74.

203. *Davis*, 526 U.S. at 634.

204. *Id.* at 635; *Gebser*, 524 U.S. at 291.

205. 2001 Revised Guidance, *supra* note 12, at 13.

be read as an independent basis on which to identify a wide range of responsible employees for purposes of administrative enforcement. However, the other misconduct language in prong two is better understood as a subset of the third prong. A student might reasonably think that a person has the authority to redress the harassment or the duty to report sexual harassment to appropriate school officials if the person has an obligation to report other types of misconduct. In fact, OCR gave no reason why the other misconduct category should itself constitute an independent basis for identifying a responsible employee. Such language was not necessary to address the factual situation in *Gebser* or *Davis*, other than to help shed light on who a student might reasonably believe had the authority to take action to redress the harassment or the responsibility to report the incident to the appropriate school officials.

Reading the other misconduct language as subordinate to the third prong makes sense in light of the guidance's language describing the highly fact dependent way in which a responsible employee is identified under the third prong. A "reasonable belief" rests on people's expectations and the factors that influence those expectations. A footnote explained that "factors such as the age and education level of the student, the type of position held by the employee, and the school's practices and procedures, both formal and informal" would determine whether someone was a responsible employee or whether it would be reasonable for the student to believe the person was a responsible employee, even if the person was not.[206]

The Department of Education reaffirmed its commitment to the 2001 revised guidance in 2017.[207]

3. 2011 Dear Colleague Letter

In 2017 the Department of Education withdrew the 2011 *Dear Colleague Letter* and the 2014 *Q&A on Title IX and Sexual Violence*,[208] although these documents still shed important light on how the 2001 revised guidance might be interpreted going forward. That is, the 2011 and 2014 guidance provided institutions with flexibility to identify a smaller number of responsible employees. Because this aspect of the 2011 and 2014 guidance is consistent with the 2017 guidance, the 2011 and 2014 guidance helps one predict what OCR might actually allow going forward.

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206. *Id.* at 33 n.74.
207. *See* 2017 Dear Colleague Letter, *supra* note 5.
208. *Id.* at 1.

The 2011 *Dear Colleague Letter* emphasized a school's responsibility to address student-on-student sexual violence—a form of sexual harassment—when such acts came to the school's attention. Yet, interestingly, the 2011 *Dear Colleague Letter* gave scant attention to the issue of who is a responsible employee. While the 2011 *Dear Colleague Letter* referred generally to the 2001 guidance, and said that it "supplements" the 2001 guidance, it did not expressly incorporate any of the language about responsible employees from the 2001 guidance.[209]

One can only guess why not. Perhaps OCR thought the 2001 guidance was clear and no further elaboration was necessary. Or perhaps someone at OCR recognized that the 2001 guidance—with its other misconduct language and the potential for that language to be broadly interpreted—seemed ill-suited for situations that involved sexual violence perpetrated against adults. After all, OCR recognized that sexual violence raised "unique concerns,"[210] but the 2001 guidance, like the 1997 guidance before it, focused mostly on children when discussing responsible employees, although admittedly, the guidance was supposed to apply to "students at every level of education."[211]

Although the 2011 *Dear Colleague Letter* did not address the topic of responsible employees outright, it indicated that not everyone had to be a responsible employee and that the other misconduct language was not an independent basis for identifying a responsible employee. The 2011 letter expressly stated that campus law enforcement employees should not report unless the complainant consents. The 2011 *Dear Colleague Letter* said, "Schools should instruct [school] law enforcement unit employees both to notify complainants of their right to file a Title IX sex discrimination complaint with the school in addition to filing a criminal complaint, and to report incidents of sexual violence to the Title IX coordinator if the complainant consents."[212] The implication, of course, is that campus law enforcement need not be responsible employees even though the *sin qua non* of a campus police officer's job is to report other misconduct to school authorities.

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209. 2011 Dear Colleague Letter, *supra* note 3, at 2.

210. 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at i (discussing that the 2011 *Dear Colleague Letter* "[p]rovides guidance on unique concerns that arise in sexual violence cases . . . .").

211. *Id.* at 5. The discussion of confidentiality again suggested that a reasonable response may differ when a student does not want to file a complaint and asks that her information be held private. *Id.* at 17.

212. 2011 Dear Colleague Letter, *supra* note 3, at 7.

The 2011 *Dear Colleague Letter* also implied that other employees who might have obligations to report other types of misconduct were similarly not necessarily responsible employees for purposes of Title IX. This interpretation emerges from the letter's discussion of the need to train people "to report harassment to appropriate school officials."[213] Such training is required for those who were "likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors."[214] The inclusion of campus law enforcement in this group—after OCR explicitly said that they should defer to the complainant's wishes before reporting—suggests that others in the group might similarly not have to report automatically, i.e., in defiance of the survivor's wishes.

The emphasis on the importance of respecting a survivor's autonomy was evident not only in the quotation about campus law enforcement, but also in other parts of the 2011 letter. In fact, the importance of respecting the survivor's autonomy was emphasized much more than in the prior guidance. It was evident, for example, in the following places: the importance of having clear grievance procedures so students could invoke the process only if they chose to do so;[215] the importance of obtaining the complainant's consent before an investigation began;[216] and the requirement that the school take "all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation."[217] OCR warned, "A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence."[218]

Finally, the 2011 *Dear Colleague Letter* made clear that OCR wanted schools to structure their response so that survivors would come forward to report. In particular, OCR encouraged schools to change their disciplinary policies to afford amnesty to victims or third parties when the incidents also involved alcohol, drugs, or other violations of school or campus rules.[219]

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213. *Id.* at 4.
214. *Id.*
215. *Id.*
216. *Id.* at 5.
217. *Id.*
218. 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 19.
219. 2011 Dear Colleague Letter, *supra* note 3, at 15.

In sum, prior to 2014, there was little attention given to who a responsible employee should be for purposes of reporting sexual or domestic violence. However, the following was clear: (1) not everyone had to be a responsible employee; (2) responsible employees had to include those employees with authority to redress the situation or the obligation to report and those employees who students would reasonably think had such authority or responsibility; (3) the different expectations of elementary-age students and college-age students would lead to different "responsible employees" at the various levels of schooling; (4) some employees who had obligations to report other misconduct did not have to report to the Title IX coordinator absent the survivor's consent; (5) a school needed a "reasonable response" when it received notice of harassment; (6) schools had to respect survivor's autonomy in formulating policy; and (7) schools should try to eliminate barriers to reporting.

4. 2014 Guidance

The guidance on responsible employees changed in 2014. At that time, in response to requests for technical assistance, the Office for Civil Rights used a question and answer format to "further clarify the legal requirements and guidance articulated in the [*Dear Colleague Letter*] and the 2001 guidance."[220] OCR specifically asked and answered the question "Who is a 'responsible employee'?"[221] At the most basic level, its response was simply to reiterate the 2001 guidance:

> Answer: According to OCR's 2001 Guidance, a responsible employee includes any employee: who has the 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 designee; or whom a student could reasonably believe has this authority or duty.[222]

Yet a closer reading of the 2014 guidance provides many clues about how OCR might interpret the other misconduct language going forward. Three points are notable. First, and significantly, the 2014

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220. 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at ii.

221. *Id.* at 2.

222. *Id.* at 15. The wording was slightly different from the 2001revised guidance, but that did not alter the meaning.

guidance reinforced the idea that not all employees needed to be labeled responsible employees. OCR said, "A school must make clear to all of its employees and students *which staff members* are responsible employees so that students can make informed decisions about whether to disclose information to those employees."[223] It also very clearly indicated that RAs might be responsible employees at some institutions, but not at others.[224]

However, OCR also made clear that *all* employees, even if they are not responsible employees, had obligations to tell complainants about reporting options, available services, etc. After the sentence about schools' obligations to make clear which staff members are responsible employees, OCR said:

> A school must also inform *all* employees of their own reporting responsibilities and the importance of informing complainants of: the reporting obligations of responsible employees; complainants' options to request confidentiality and available confidential advocacy, counseling, or other support services; and complainants' right to file a Title IX complainant with the school and to report a crime to campus or local law enforcement.[225]

The contrast between the responsibilities of all employees and the responsibilities of responsible employees again suggests that the categories can differ. Although every employee had obligations when a survivor discloses, the obligations did not necessarily include reporting the disclosure to the institution.

Second, the 2014 guidance signaled that the other misconduct language should in fact be subsumed into the language about whom a student could reasonably believe has the authority to take action to redress sexual violence or the duty of reporting incidents to the Title IX coordinator. OCR again made clear that student expectations were very relevant to identifying a responsible employee and those expectations were influenced by many factors. The 2014 guidance stated:

> Whether an employee is a responsible employee will vary depending on factors such as the age and education level of

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223. *Id.* (emphasis added).

224. *Id.* at 17.

225. 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 15 (emphasis added).

> the student, the type of position held by the employee, and consideration of both formal and informal school practices and procedures. For example, while it may be reasonable for an elementary school student to believe that a custodial staff member or cafeteria worker has the authority or responsibility to address student misconduct, it is less reasonable for a college student to believe that a custodial staff member or dining hall employee has this same authority.[226]

While OCR never explicitly said that the other misconduct language is subordinate to the language about "student expectations," neither did it say that the other misconduct language trumps the language about student expectations when students would not reasonably expect someone to be a responsible employee. In fact, one way to make sense of the quotation in the previous paragraph is to recognize that other misconduct policies inform student expectations, they do not independently confer responsible employee status. After all, custodial staff or dining hall employees may be obligated to report student theft of custodial supplies or food, or vandalism in the dorm rooms or the cafeteria, but college students know that custodial staff and dining hall employees lack the authority to take action to redress sexual assault or the responsibility to report sexual assault to the Title IX coordinator.

The relevance of other misconduct policies to assessing students' reasonable expectations was reinforced in OCR's discussion of resident assistants (RAs). OCR said that RAs were obligated to report sexual assault if RAs had the obligation to report other misconduct, and OCR gave as examples "drug and alcohol violations or physical assault."[227] However, if RAs did not have such an obligation and if schools "clearly informed" students that RAs were available for confidential discussions,[228] then RAs need not be responsible employees. The guidance makes perfect sense if students' reasonable expectations determine who has reporting obligations. Students' reasonable expectations would be shaped by RAs' obligation to report drug and alcohol violations and physical assault because those acts are of the same general type as sexual violence.

Moreover, students' expectations can be shaped by the school's communications. Since OCR explicitly recognized that practices

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226. *Id.* at 15.
227. *Id.*
228. *See id.*

and procedures (which are generally contained in policies) shape student expectations about who is a responsible employee, OCR would probably agree that practices and procedures can also shape student expectations about who is not a responsible employee. That is, practices and procedures can operate in both directions. By resolving ambiguities, practices and procedures either create student expectations or negate them. After all, college students are adults. They know that institutional policies allocate responsibilities to different people.

The benefit of subsuming the other misconduct language into the prong on students' reasonable expectations is that most employees would not be responsible employees even if they were obligated to report other misconduct. For a student to have a reasonable expectation that an employee would report sexual assault based upon the employee's obligation to report other misconduct, the student would have to know the following: that the employee has an obligation to report other misconduct; that the other misconduct is similar enough to sexual assault to give rise to a reasonable expectation; and that an institutional policy, about which the student might reasonably know, did not absolve the employee of an obligation to report sexual misconduct.

This interpretation allows colleges to require particular employees to report fraud and waste, but not sexual misconduct. Most college students would not know about the fraud and waste policy and, if they did, they would be old enough to know that the obligation to report fraud and waste is very different than the obligation to report sexual assault. If there were any ambiguity, a written policy could clarify it. The approach just described for interpreting other misconduct aligns with OCR's desire to enhance survivors' autonomy. For example, in 2014, OCR mentioned a number of steps that schools should take to increase survivors' autonomy,[229] building upon its advice in the 2011 *Dear Colleague Letter*.[230]

Third, the 2014 guidance also suggested, for the first time, that the other misconduct rule could be disregarded altogether in those instances in which students would be harmed by not being able to report confidentially to someone who might otherwise have an obligation to report other misconduct. In fact, OCR gave schools

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229. *See, e.g.*, *id.* at 16 (emphasis added) (schools "should make *every effort* to respect this request" for confidentiality). OCR said expressly, "OCR *strongly supports* a student's interest in confidentiality in cases involving sexual violence." *Id.* at 18 (emphasis added).

230. *See supra* text accompanying notes 215–18.

permission to exempt certain employees from a reporting obligation even though they might have obligations to report other misconduct. The 2014 guidance explicitly exempted from reporting responsibilities not only certain professionals who provide "counseling, advocacy, health, mental health, or sexual assault-related services to students who have experienced sexual violence,"[231] but also certain nonprofessionals who "provide assistance to students who experience sexual violence."[232] These "include all individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers ('non-professional counselors or advocates'), including front desk staff and students."[233] These individuals could be freed of reporting obligations because OCR "wants students to feel free to seek their assistance and therefore interprets Title IX to give schools the latitude not to require these individuals to report incidents of sexual violence in a way that identifies the student without the student's consent."[234] OCR mentioned that "these non-professional counselors or advocates are valuable sources of support for students," and "strongly encourages schools to designate these individuals as confidential sources."[235] These exemptions from the responsible employee designation indicated that the other misconduct language should be applied in a way that is consistent with the goals of Title IX itself.

All in all, a comprehensive examination of OCR guidance prior to 2017 suggests that the other misconduct language could and should be interpreted in a way that furthers OCR's goals of increased reporting and respecting survivors' autonomy. Consequently, a policy that limited the number of responsible employees appeared acceptable so long as the policy clearly specified who had reporting obligations and the responsible employee designation generally matched students' reasonable expectations. Universities were never required to change all of their other misconduct policies (for academic misconduct, fraud/waste, and whatever else) in order to exempt some employees from mandatory reporting obligations.

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231. 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 22. The employees were exempt because "OCR recognizes the importance of protecting the counselor-client relationship, which often requires confidentiality to ensure that students will seek the help they need." *Id.*

232. *Id.* at 23.

233. *Id.*

234. *Id.*

235. *Id.*

5. 2017 Guidance

In 2017, the Department of Education withdrew the 2011 and 2014 guidance.[236] In its place, the Department issued two new significant guidance documents in the form of a new *Dear Colleague Letter* and a *Q&A on Campus Sexual Misconduct*.[237] There are four notable points about these documents with respect to responsible employees.

First, the 2017 guidance reiterated OCR's endorsement of the 2001 revised guidance.[238] The 2001 revised guidance was cited throughout the *Q&A* document and called out specifically in the new *Dear Colleague Letter*.[239] In addition, the 2017 guidance cited directly to the section of the 2001 revised guidance that defined responsible employees, i.e., the section that mentioned other misconduct as part of the definition.[240]

Second, the 2017 guidance contains language that suggests that OCR will interpret the 2001 revised guidance in a sensible manner, and will not require that the responsible employee category comprise every employee who has an obligation to report any misconduct. The 2017 *Q&A* specifies that each school must have a Title IX coordinator, but "other employees *may* be considered 'responsible employees.'"[241] This permissive language softens the more mandatory language in the 2001 revised guidance.

Third, OCR has shifted away from the troubling language in the 2014 guidance that required a responsible employee to pass on all information on to the Title IX coordinator, whether desired by the survivor or not.[242] In 2017, OCR emphasized that the school must "respond appropriately."[243] In addition, OCR described the function of a responsible employee as follows: "to help the student to connect to the Title IX Coordinator."[244] It is not "help" if the student doesn't want to connect to the Title IX coordinator; in such a situation,

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236. 2017 Dear Colleague Letter, *supra* note 5, at 1.

237. *Id.* at 2 (noting that the document is a "significant guidance document"); 2017 Q&A on Campus Sexual Misconduct, *supra* note 6, at 7 (noting that the document is a "significant guidance document").

238. 2017 Dear Colleague Letter, *supra* note 5.

239. *See, e.g.*, 2017 Q&A on Campus Sexual Misconduct, *supra* note 6, at nn. 2, 5, 9, 10, 12, 13, 14, 15, 17, 24, 30; *see also* 2017 Dear Colleague Letter, s*upra* note 5, at 2.

240. *See, e.g.*, 2017 Q&A on Campus Sexual Misconduct, *supra* note 6, at 1.

241. *Id.* at 2.

242. *See supra* text accompanying notes 17–19.

243. 2017 Q&A on Campus Sexual Misconduct, *supra* note 6, at 1.

244. *Id.* at 2 (emphasis added).

reporting can harm.

In fact, this part of the 2017 guidance is reminiscent of language in the 1997 guidance and the 2001 revised guidance. Those documents defined responsible employees for purposes of identifying who counts as giving notice to the institution for purposes of taking corrective action;[245] they did not specify *what* the responsible employee must do with the information once received, especially when the survivor did not want to report further.[246] Rather the earlier guidance said that the school needed to have "a reasonable response,"[247] and emphasized that a reasonable response depended on such factors as the age of the student and the desire of the student for confidentiality.[248] While the response could not "preclude the school from responding effectively to the harassment and preventing harassment of other students,"[249] a reasonable response to a survivor who was not ready to report might only require the following if there were no imminent risk of physical harm to others: inform the student that Title IX prohibits retaliation;[250] offer services that would allow the student to resume her education; defer to the student's wishes until she wanted to report; and help the student report whenever she chose to do so. If this response would be reasonable or appropriate for a responsible employee, then a school should be able to remove employees from the responsible employee category so long as the employees must still respond in this way.

Fourth, despite the fact that the Obama-era guidance has been withdrawn, the parts of that guidance that softened the harsh language from the 2001 guidance should not, and need not, be forgotten. After all, the 2017 guidance suggests that the Obama-era guidance was problematic because it "impose[d] new mandates related to the procedures to which educational institutions investigate, adjudicate and resolve allegations of student-on-student sexual misconduct."[251] OCR's desire to give schools more flexibility to

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245. 1997 Guidance, *supra* note 13, at 12036–37; 2001 Revised Guidance, *supra* note 12, at 13.

246. 1997 Guidance, *supra* note 13, at 12043–44; 2001 Revised Guidance, *supra* note 12, at 17.

247. 1997 Guidance, *supra* note 13, at 12043; 2001 Revised Guidance, *supra* note 12, at 17.

248. 1997 Guidance, *supra* note 13, at 12034, 12043; 2001 Revised Guidance, *supra* note 12, at 17.

249. 1997 Guidance, *supra* note 13, at 12043.

250. *Id.*; 2001 Revised Guidance, *supra* note 12, at 17.

251. 2017 Dear Colleague Letter, *supra* note 5, at 1. In fact, the new guidance expressly addressed some of the most controversial topics, such as the burden of proof. *See* 2017 Q&A on Campus Sexual Misconduct, *supra* note 6, at 5 (indicating the

address sexual misconduct means that schools should be able to disregard those parts of the Obama-era guidance that imposed new reporting mandates,[252] but rely on those parts that softened the 2001 revised guidance.

Even if one disagrees with much of what has been argued in this Part, and particularly the conclusion that the other misconduct language should be considered subordinate to the third prong (that focuses on whether a student could reasonably believe an employee had the necessary authority or duty), one could still interpret the language "other misconduct" narrowly and avoid its application to most employees. In context, the language may only refer to misconduct relevant to Title IX. The internal tensions within the guidance and the other textual clues outside of the definition suggest a reading that aligns with the general purpose of Title IX as a whole. Although the 2014 guidance made this interpretation challenging because it said that an RA would be a responsible employee if the RA had an obligation to report "drug and alcohol violations or physical assault,"[253] that guidance has now been withdrawn.

Overall, campuses have a solid basis for moving forward with a more narrowly tailored reporting policy, i.e., one that is developed with victims' needs in mind.

B. Resolutions and Letters of Findings

Despite the above analysis and the fact that schools can move away from wide-net reporting policies and remain compliant with Title IX, schools have sometimes been afraid to do so because of signals from OCR that it prefers wide-net reporting policies. The signals have come largely in the form of school-specific letters of findings and resolutions. As this section will suggest, the importance of these signals has been overblown. Not only are the letters and resolutions in which these signals appear not policy guidance,[254] but

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acceptability of either a preponderance of the evidence standard or a clear and convincing evidence standard). It also mentioned appeals by survivors, *id.* at 7 (noting that a school can allow only the respondent to appeal), and the timeframe for a prompt investigation, *id.* at 3 (noting that there is "no fixed time frame" by when a school must complete its investigation).

252. *See, e.g.*, *supra* text accompanying notes 17–19.

253. *See supra* text accompanying note 227.

254. *OCR Complaint Processing Procedures*, U.S. Dep't of Educ. Office for Civil Rights, at 2 (last updated Feb. 2015), https://www2.ed.gov/about/offices/list/ocr/docs/complaints-how.pdf ("Letters of findings are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such."). Sometimes, but not always, their limited scope is reflected in the letters of findings themselves. For

the specifics of the letters and resolutions make them less than definitive on the particular issue in question.

University of Montana's well-publicized resolution was perhaps the first such document.[255] It caught people's attention because OCR called it a "blueprint"[256] and attorneys who advise universities highlighted its importance.[257] This resolution required University of Montana to label virtually all of its employees as responsible employees with obligations to report to the Title IX coordinator.[258]

Yet, the resolution's treatment of reporting obligations is less proscriptive than other parts of the resolution because of the context that prompted the new reporting policy.[259] The mandatory reporting provision was adopted "for the purpose of ensuring that individuals subject to discrimination are consistently and promptly receiving necessary services and information,"[260] not for purposes of discipline. Moreover, it was necessary because the University of Montana previously had multiple departments addressing sexual harassment complaints in an uncoordinated fashion. [261] The letter of findings discussed how the Dean of Students handled a complaint against a student and how the Title IX coordinator handled another complaint against the same student, but neither were aware that multiple complaints existed.[262] This context suggests that OCR might have

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example, the Hunter College letter, discussed *infra*, made clear, "This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such." Letter to Jennifer J. Raab, President, Hunter College of the City University of New York, from Timothy C. Blanchard, Office for Civil Rights, Region II, Case No. 02-13-2052 (Oct. 31, 2016), p. 24 [hereinafter Hunter Letter of Findings].

255. *See* Resolution Agreement, Univ. of Montana-Missoula, OCR Case No. 10126001, DOJ DJ Number 169-44-9, at 4 (May 8, 2013), https://www.justice.gov/sites/ default/files/crt/legacy/2013/05/09/montanaagree.pdf.

256. *See also* Letter of Findings to Univ. of Montana, Re: DOJ Case No. DJ 169-44-9, OCR Case No. 10126001, p. 1 (May 9, 2013) [hereinafter Letter of Findings], at https://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf ("The Agreement will serve as a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault.").

257. Smith & Gomez, *supra* note 41, at 6.

258. Resolution Agreement, University of Montana-Missoula, OCR Case No. 10126001, DOJ DJ Number 169-44-9, at 4 (May 8, 2013), https://www.justice.gov/sites/ default/files/crt/legacy/2013/05/09/montanaagree.pdf ("a requirement that all employees who are aware of sex-based harassment, except for health-care professionals and any other individuals who are statutorily prohibited from reporting, report it to the Title IX coordinator regardless of whether a formal complaint was filed").

259. *See generally id.*

260. *Id.* at 8.

261. Letter of Findings, *supra* note 254, at 2–3.

262. *Id.* at 27.

been satisfied if all reports from responsible employees went to one source, e.g., the Title IX coordinator, and if all students were connected with services even if they elected not to report. The particular solution chosen by the University of Montana to address its problems was not the only possible solution.

Institutions have similarly interpreted other case-specific letters and resolutions as sending a signal, although a close examination of the letters and resolutions raises questions about the signal they exactly send. For example, on October 12, 2016, a regional office of OCR entered findings of fact and a resolution with Wesley College.[263] OCR had "concerns" regarding Wesley College's designation of responsible employees.[264] The college had "three reporting categories: (1) confidential reporting, (2) formal reporting, and (3) quasi-confidential reporting."[265] OCR had no problems with the first and second categories. The first category referred to "campus counselors, the employee assistance program, and on-campus clergy/chaplains."[266] The second category—the formal reporting option—was triggered when a report was made to members of the Title IX Team.[267] The third category—quasi-confidential reporting[268]—caused concerns.

The third category was described in the *Student Handbook* as such:

> You can seek advice from certain resources who are not required to tell anyone else your private, personally identifiable information unless there is cause for fear for your safety, or the safety of others. These resources include those without supervisory responsibility or remedial authority to address sexual misconduct, such as [Resident Advisors], faculty members, advisors to student organizations, career services staff, admissions officers, student activities personnel, Student Life staff members, and many others . . . . Some of these resources, such as RAs, are instructed to share Incident Reports with the supervisors, but they do not share any personally identifiable information about your report

263. Letter to Robert E. Clark II, President, Wesley College from Beth Gellman-Beer, Supervising Attorney, OCR Phila., U.S. Dep't of Educ., The Office for Civil Rights, Case No. 03-15-2329 (Oct. 12, 2016) [hereafter "Wesley College Letter"].

264. *Id.* at 28.

265. *Id.* at 13.

266. *Id.*

267. *Id.* at 14.

268. *Id.*

> unless you give permission, except in the rare event that the incident reveals a need to protect you or other members of the community.[269]

In analyzing the policy, OCR had "concerns that the quasi-confidential category detailed in the Student Conduct Procedures is overly inclusive; to the extent there are staff and persons who may receive confidential reports at the College, the number should be very limited."[270] OCR mentioned that confidentiality is permissible for those with professional licenses, those in a pastoral role, and those "who work or volunteer in an on-campus sexual assault center, survivor advocacy office, health center, or similar entity."[271]

On October 31, 2016, the same regional office of OCR entered findings of fact and a resolution with Hunter College.[272] Through its "Procedure A," Hunter College limited its responsible employees to employees so designated.[273] In particular, it had a narrow list of responsible employees.[274] Its policy read:

> "Responsible Employees" have a duty to report incidents of sexual/gender-based harassment and sexual violence to the Title IX Coordinator. They are identified as the Title IX Coordinator and his/her staff; Office of Public Safety employees; the Dean of Students and all of the staff housed in those offices; Residence Life staff in housing owned or operated by CUNY or a CUNY college, including all Resident Assistants; the college President, Vice Presidents, and Deans; Athletic staff; Department Chairpersons and Executive Officers; Human Resources staff; Office of General Counsel employees; attorneys of CUNY colleges and their staff; labor designees of CUNY colleges and their staff; faculty members leading or supervising students on off-campus trips; faculty or staff advisors to student groups; employee managers; SEEK/College Discovery staff; Childcare Center staff of CUNY colleges; and, Directors of "Educational Opportunity Centers" affiliated with CUNY colleges.[275]

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269. *Id.* at 14.
270. *Id.* at 15.
271. *Id.*
272. *See* Hunter Letter of Findings, *infra* note 254.
273. *Id.* at 7–9.
274. *Id.* at 8.
275. *Id.*

OCR stated the following about this list: "OCR has concern that Procedure A's definition of 'responsible employees' is too narrow and thus may result in instances where the College fails to discharge its obligations under 34 C.F.R. § 106.31."[276] OCR did not elaborate further. Therefore, it is not clear if OCR thought a key administrator was omitted from the list or if it wanted the school to have a wide-net reporting policy.

Apart from the ambiguous message sent by OCR's findings, the Wesley and Hunter letters must be kept in perspective for other reasons. OCR was "concerned," but it never said the colleges' reporting policies violated the law.[277] In fact, in the Wesley case, OCR so much as admitted that Wesley's "quasi-confidential" category did *not* violate the law: "Pursuant to the *Title IX Policy and Procedures,* most resources on campus fall in the middle of these two extremes, meaning that neither the College, *nor the law*, requires them to divulge private information that is shared with them, except in rare circumstances."[278] In addition, OCR did not make Wesley College eliminate the "quasi-confidential" category of employee as part of the official resolution.[279] Similarly, OCR did not make Hunter College change its reporting policy as part of its resolution.[280]

What makes the meaning of the OCR's response even more unclear is that it appears as if Wesley College did not defend the quasi-confidential category of employees or explain that it was an integral part of a well-thought out approach to meeting survivors' needs and increasing survivors' reporting. In fact, when OCR interviewed college staff, none "were aware of the quasi-confidential reporting category."[281] Two Title IX team members could not describe the category and they were "unsure of the intent of this category" because they thought virtually all employees were responsible employees.[282] OCR also noted that there was "conflicting information" about reporting obligations and confidential reporting, and the policy

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276. *Id.* at 11 (citing 2001 Revised Guidance, *supra* note 12) (defining "responsible employee"). 34 C.F.R. § 106.31 (2001) is the general regulation that requires institutions not to discriminate against persons on the basis of sex in educational programs or activities receiving federal financial assistance.

277. *See generally* Hunter Letter of Findings, *supra* note 254; Wesley College Letter *supra* note 263.

278. Wesley College Letter, *supra* note 263, at 14 (emphasis added).

279. *See generally id*.

280. *See* Hunter Letter of Findings*, supra* note 254, at 23–24 (bulleted list).

281. Wesley College Letter, *supra* note 263, at 15.

282. *Id*. at 14.

did "not adequately describe the 'quasi-confidential' reporting option."[283]

Most important, the Wesley College and Hunter College policies were nothing like the policy that this Article will recommend in the next Part. No one in the quasi-confidential category at Wesley College nor anyone outside the responsible employee category at Hunter College was *required* to inquire whether the student wanted to report and then required to follow the student's wishes.

Overall, neither the law nor OCR guidance, including OCR's letters of finding and resolutions, unambiguously require wide-net reporting policies. Institutions of higher education can, and should, narrow the breadth of their responsible reporting policies. Doing so would be consistent with OCR's desire that institutions be victim-focused in designing their reporting policies.[284]

C. OCR Should Clarify the Guidance

While OCR guidance can and should be read as giving institutions flexibility to design more narrowly tailored reporting policies without having to alter a slew of unrelated "other misconduct" policies, the guidance is not altogether clear. Contrast the current murky language with OCR's language in the 1980s and 1990s. At that time, OCR called it an "exemplary procedure" for a school to afford the complainant "a variety of sources of initial, confidential, and informal consultation concerning the incident(s), without committing the individual to the formal act of filing a complaint . . . ."[285]

The ambiguity perpetuated by the more recent guidance will inevitably deter some schools from revising their reporting policies. As a result, OCR should make explicit that it will permit schools to limit those employees who need to report disclosures to the Title IX

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283. *Id.* at 15.

284. Sokolow, *supra* note 38 ("The Office for Civil Rights realizes that its instructions are being misinterpreted, and the office's lawyers have been working to assure campuses that counselors and advocates are not required reporters, and that *the goal is to be as victim-driven as possible* in how campuses respond to notices. Yes, there will be cases in which a campus must pursue an investigation despite a victim's unwillingness; after all, the campus must be protected from those who pose a threat.") (emphasis added); *see also id.* (comment of W. Scott Lewis) ("Rachel Getman from the OCR Program Legal Group has publicly addressed this issue twice this year, in exactly the way Brett stated.").

285. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT'S NOT ACADEMIC 4 (1988); U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT'S NOT ACADEMIC 3 (1995). The 1997 and 2008 versions of this pamphlet do not contain this language.

coordinator when the survivor does not want such a report to be made. OCR can do this in various ways, but it would make good sense for OCR to explain that the "other misconduct" category will be interpreted as a subset of the third category, e.g., students' reasonable expectations, and that students' reasonable expectations will be assessed in light of the school's policies and procedures and the age of the student.

This clarification would encourage schools to revise their wide-net reporting policies so that they do not undermine victims' autonomy and cause victims' additional psychological and physical harm. As schools adopt reporting policies that are tailored to meet survivors' needs, survivors' disclosures and reporting should increase. OCR's recent letter to University of New Mexico observed: "Increased reporting is a positive signal."[286] It can show "students' awareness of, and confidence in, the University's procedures to address sexual harassment and sexual assault."[287] As reporting increases, deterrence becomes more likely because schools will be able to hold perpetrators accountable.

IV. A BETTER POLICY

What should a more nuanced policy look like? Specifically, whom should the institution designate as a responsible employee, and, if not everyone, what are the duties of the employees who are not responsible employees? The need for some deeper thinking is evident from the debate in the popular press about whether faculty should be labeled as "responsible employees." In fact, many faculty around the country do not want to be categorized as responsible employees.[288]

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286. Letter to President Frank, Univ. of New Mexico from U.S. Dep't of Justice, at 4 (April 22, 2016).

287. *Id.*

288. *See* Carmel Deamicis, *Which Matters More: Reporting Assault or Respecting a Victim's Wishes?*, THE ATLANTIC (May 20, 2013), at https://www.theatlantic.com/national/archive/2013/05/which-matters-more-reporting-assault-or-respecting-a-victims-wishes/276042/ ("A chorus of voices clamor in contention, professors angrily arguing against the new policy. Given the sensitive nature of sexual harassment charges, many staff members can't believe the school is asking them to violate their students' trust."); Flaherty, *supra* note 40 ("But while faculty members overwhelmingly support their institutions' transparency and accountability goals, many feel that mandatory reporting will hurt the cause more than help it."); Moody-Adams, *supra* note 65 ("Faculty members have rightly expressed concern that universal mandated-reporter policies are 'basically one-sided,' serving institutional needs but not addressing the needs of students."); Maia R. Silber, *Some Professors Uneasy About Obligation to Report Sexual Assaults,* PITTSBURGH-POST GAZETTE (July 25, 2016), http://www.post-gazette.com/news/education/2016/07/25/Pitt-Students-

The American Association of University Professors (AAUP) has adopted this view too, and in articulating reasons for that position emphasized that faculty members are "differ[ent]" from "most other staff members" on campus in terms of "their degree of responsibility for the academic and personal well-being of students."[289] An observer might reasonably question whether faculty members have more or less responsibility than others for students' "personal" and "academic" well-being, and what significance, if any, that should make to the responsible employee designation. Similarly, an observer might wonder if the American Law Institute's reason for initially segmenting out faculty from other employees made any sense at all. At one point, the ALI reporters claimed that there are "educational reasons to allow faculty to maintain student confidentiality . . . including that some students may be more comfortable reporting to faculty whom they know rather than a service provider whom they have not yet encountered."[290] Is "comfort" an educational reason, and, if so, is such "comfort" limited to interactions with faculty? [291]

While discussions about faculty are often at the center of the debate about responsible reporting, these conversations simply raise the broader question about who exactly should be a responsible employee and why. Because most institutions make virtually "all employees" mandatory reporters, the answer to the question of who must report has implications for more than just faculty; employees who fail to abide by their school's mandatory reporting policies can face termination.[292] Moreover, academic freedom is not the only

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and-Professors-Wonder-Whether-Schools-Should-Require-Faculty-to-Report-Sexual-Assaults/stories/201607130205.

289. AAUP, *supra* note 43, at 84 (arguing faculty should not be included because "faculty members differ from most other staff members in their degree of responsibility for the academic and personal well-being of students").

290. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW, STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLEGES AND UNIVERSITIES, PRELIMINARY DRAFT NO. 1 § 3.3 cmt. (2015). The latest draft has sensibly broadened this language to include staff. ALI, COUNCIL DRAFT NO. 1, *supra* note 47, at § 3.5 reporters' notes.

291. There may be other educational reasons to segment out faculty, such as the impact of mandatory reporting on teaching, especially "in areas involving the study of gender and sexuality." AAUP, *supra* note 43, at 85.

292. *See, e.g.*, ARIZ. STATE UNIV., ACADEMIC AFFAIRS MANUAL (ACD) 401: PROHIBITION AGAINST DISCRIMINATION, HARASSMENT, AND RETALIATION (revised May 23, 2016), https://www.asu.edu/aad/manuals/acd/acd401.html (making termination a potential sanction if an employee's violation of the reporting policy is proven by a preponderance of the evidence); OKLA. STATE UNIV., SEXUAL MISCONDUCT, DISCRIMINATION, AND HARASSMENT POLICY (effective July, 1, 2015), http://www.ou.edu/content/dam/eoo/documents/SMDH%20Policy%20Final%203-8-

reason to exclude faculty from the list of mandatory reporters,[293] and these other reasons may apply to non-faculty employees as well. After all, anecdotal evidence suggests that sexual assault survivors approach certain staff members repeatedly because of their expertise as well as their kindness and accessibility. A policy focused on survivors should not make those employees mandatory reporters because they should remain an accessible resource for survivors. The same concern articulated previously about institutional betrayal applies to staff as well as to faculty.[294]

According to Colby Bruno, Managing Attorney at the Victim Rights Law Center, the question of who should be a "responsible employee" is "the single most question we get asked."[295] For institutions that want to have a more tailored policy, the OCR guidance is fairly unhelpful in isolating who should be on the list of responsible employees. It lacks principles to guide schools in making intelligent decisions. Rather, as noted above, its unartful definition of responsible employee has caused many schools to adopt wide-net reporting policies.[296]

A. Principles That Should Guide A School in Formulating Policy

When a Senate Work Group on Responsible Reporting at the University of Oregon tackled these questions (full disclosure, I chaired the Work Group),[297] it articulated some first principles to guide its efforts to develop a good reporting policy. These principles are worth sharing because they are generalizable to other institutions, although with 5,300 institutions of higher education in the United States, ranging from "beauty schools to Harvard,"[298] they may not be useful to every institution. They are as follows:

1) Be consistent with the core mission of the university.
2) Be based on data, when that data exists.

2017.pdf (indicating that a failure of "supervisors, managers and faculty members with administrative duties or student supervisory duties" to "promptly report" sexual misconduct, discrimination and harassment, to the Sexual Misconduct Officer may result in disciplinary action up to and including termination").

293. AAUP, *supra* note 43, at 85.

294. *See supra* text accompanying notes 109–112.

295. Deamicis, *supra* note 288.

296. *See supra* text accompanying notes 33–44.

297. *See supra* note 57 (identifying the other members).

298. Jeffrey J. Selingo, *How Many Colleges and Universities Do We Really Need*, WASH. POST (July 20, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/07/20/how-many-colleges-and-universities-do-we-really-need/.

3) Be guided by the spirit of Title IX: to protect educational equity.
4) Do no harm.
5) Recognize that student survivors are adults and have autonomy.
6) Respect academic freedom.
7) Protect from liability university employees who are acting pursuant to the policy.
8) Stay grounded in the reality of how the university deals with reports of sexual violence.
9) Be cognizant of the legal and national context in which the policy will operate.[299]

These principles can help guide discussion, although various principles can pull in opposite directions at times. When the principles have to be balanced against each other, survivors' needs should be given significant weight. After all, Title IX is meant to serve them. This orientation is also justified given what we already know about how wide-net reporting policies negatively impact survivors and the absence of clearer data about the effects of reporting policies on reporting practices. After extensive study, Karjane, Fisher, and Cullen concluded, "Protocols for reporting sexual assault and rape should first consider the needs of victims themselves in terms of their healing process . . . [R]esponse and reporting policies should be designed to allow victims as much decision-making authority in the process as possible.[300]

B. An Approach that Furthers Those Principles

Several aspects of a good policy became obvious as the Work Group deliberated. First and foremost, institutions should abandon the terminology "responsible employee." Everyone at the institution should be "responsible" to help address sexual violence. While employees' responsibilities can differ, everyone should still have responsibilities.[301]

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299. University Senate's Responsible Reporting Work Group, *White Paper on the Proposed Responsible Reporting Policy*, UNIV. OF OREGON, Appendix B (Nov. 11, 2016) (on file with author).

300. KARJANE, FISHER, & CULLEN, *supra* note 27, at 138.

301. In fact, the withdrawn OCR guidance indicated as much. 2014 Q & A on Title IX and Sexual Violence, *supra* note 4, at E-3 (describing obligations of pastoral and professional counselors and non-professional counselors or advocates); *id.* at J-1

Second, a school should have three categories of employees: (1) designated reporters, (2) confidential employees, and (3) student-directed employees. While designated reporters are obligated to report regardless of the student's wishes, *all* employees are obligated to ask the student if he or she would like the employee to report, and then do so if the student says yes. Even confidential employees should be required to ask. Schools sometimes assume confidential employees are completely free of reporting obligations,[302] but confidential employees should ask students if they want to report because students may erroneously think that confidential employees automatically report for them.[303]

Third, *all* employees should also be a source of information and support. Not only must employees who are not designated reporters explicitly ask the student if she wants the employee to call the Title IX office and/or to connect her with a confidential resource and then promptly follow the student's instruction, but the employee must give additional information to a student who is not ready to report, including the names and contact information of the Title IX coordinator and confidential support services, as well as information about Title IX protections against retaliation. The employee should make clear that without a formal report, the university typically will not take further action to address the incident because it will not know of it.[304]

(describing training on a wide array of topics for "all employees likely to witness or receive reports of sexual violence").

302. *See, e.g.*, UNIV. OF CALIFORNIA, POLICY OF SEXUAL VIOLENCE AND SEXUAL HARASSMENT § II.D.1, II.D.6, V.B.2, (last updated Nov. 6, 2016), http://policy.ucop.edu/doc/4000385/SVSH. However, some states require confidential resources to report to the police, although the AMA has proposed that survivors should be able to stop a report. *See* Laura G. Iavicoli, *Mandatory Reporting of* Domestic Violence*: The Law, Friend or Foe?*, 72 MT. SINAI J. MED. 228, 230–31 (2005). If such an obligation exists, schools and providers should try to inform survivors before treatment.

303. *See, e.g.*, Michael Moore, *Rape Reporting Requirements at UM Not Well Understood*, MISSOULIAN (Jan. 14, 2012), http://missoulian.com/news/state-and-regional/rape-reporting-requirements-at-um-not-well-understood/article_56d3dab6-3f3b-11e1-a86c-001871e3ce6c.html (describing the erroneously held belief of "a former freshman student who went to the Curry Health Center the morning after a sexual assault. The student decided later not to report the crime to police, but felt that because she had gone to Curry, the university was aware of the incident and would likely initiate its own investigation.").

304. The information should at least be equivalent to what OCR once advised for students who talk to confidential employees. *See* 2014 Q & A on Title IX and Sexual Violence, *supra* note 4, at E-3 ("Pastoral and professional counselors and non-professional counselors or advocates should be instructed to inform students of their right to file a Title IX complaint with the school and a separate complaint with campus

Institutions must tell all employees how to respond in a compassionate manner,[305] and inform them of their obligations. Written information about both topics should be readily accessible. Schools should also train, and then periodically retrain, their employees so that they respond appropriately to disclosures.[306]

C. Listing the Designated Reporters and Obligating Everyone Else to be Responsible Too

Schools with more nuanced policies must determine into which category each employee falls. A list of designated reporters informs students and employees who at the institution must report a disclosure to the Title IX office. A few schools already list a limited number of mandatory reporters, and these schools' policies are useful examples of a more tailored approach.[307]

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or local law enforcement. In addition to informing students about campus resources for counseling, medical, and academic support, these persons should also indicate that they are available to assist students in filing such complaints. They should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials.").

305. The UO policy has the following admonitions in its policy: "Respond with kindness and respect; Listen to what the student wants to tell you before handing out referrals and information; Be sensitive to the needs of the survivor, without being judgmental, paternalistic, discriminatory, or retaliatory." *See* University Senate, *Student Sexual and Gender-Based harassment and Violence Complaint and Response*, UNIV. OF OREGON §§ III.A.1-3 (last updated May 12, 2017), https://prevention.uoregon.edu/sites/prevention1.uoregon.edu/files/Gender%20based%20employee%20reporting%20responsibility%20policy%20effective%20Sept.%2015%2C%202017_0.pdf.

306. Training has always been expected by OCR, although the 2001 revised guidance is not as onerous as the repealed 2014 guidance. *Compare* 2001 Revised Sexual Harassment Guidance, *supra* note 12, at 13 ("[S]chools need to ensure that employees are trained so that those with authority to address harassment know how to respond appropriately, and other responsible employees know that they are obligated to report harassment to appropriate school officials. Training for employees should include practical information about how to identify harassment and, as applicable, the person to whom it should be reported."), *with* 2014 Q & A on Title IX and Sexual Violence, *supra* note 4, at J-1 ("A school needs to ensure that responsible employees with the authority to address sexual violence know how to respond appropriately to reports of sexual violence, that other responsible employees know that they are obligated to report sexual violence to appropriate school officials, and that all other employees understand how to respond to reports of sexual violence.").

307. *See, e.g.*, CAL TECH INST., INST. POLICY: UNLAWFUL HARASSMENT 3-4, http://hr.caltech.edu/documents/46-citpolicy_harassment.pdf; CATHOLIC UNIV. OF AM., RESPONSIBLE EMPLOYEES FOR THE TITLE IX REPORTS OF SEXUAL OFFENSES 3-4, at http://policies.cua.edu/res/docs/ResponsibleEmployees7-13-15.pdf; CITY UNIVERSITY OF NEW YORK, POLICY ON SEXUAL MISCONDUCT 8-9, at http://www.cuny.edu

1. Numbers

Regardless of whom a university identifies as a designated reporter, the university should follow a few general rules. First, for reasons of student convenience and comfort, institutions should make more than just the Title IX coordinator a conduit for reports. Yet institutions should keep the number of designated reporters limited in order to maximize the number of employees who can be supportive resources for students. Because all employees would have an obligation to report to the Title IX coordinator when the student so requests, schools should reject the designation for any employee for whom there is a doubt about the appropriateness of the designation. This approach would minimize misalignments, i.e., situations in which a student would disclose inadvertently to someone who is a designated reporter.

2. Clarity

The list of designated reporters should be as clear as possible. Phrases like "Responsible Employees include the following"[308] will not

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/about/administration/offices/la/Policy-on-Sexual-Misconduct-12-1-14- with-links.pdf; HOFSTRA UNIVERSITY, STUDENT POLICY PROHIBITING DISCRIMINATORY HARASSMENT, RELATIONSHIP VIOLENCE, AND SEXUAL MISCONDUCT 10, at https://www.hofstra.edu/pdf/studentaffairs/deanofstudents/commstandards/commstandards-policies-sexualassault.pdf; STUDENT HEALTH SERVICES, *Sexual Assault Policy 13*, THE UNIVERSITY OF SOUTH CAROLINA, at http://www.sc.edu/policies/ppm/staf108.pdf; UNIVERSITY OF MICHIGAN, POLICY & PROCEDURES ON STUDENT SEXUAL & GENDER-BASED MISCONDUCT & OTHER FORMS OF INTERPERSONAL VIOLENCE 3, at https://studentsexualmisconductpolicy.umich.edu/content/reporting-options. For example, the University of Nebraska at Lincoln says on its website:

> Not all University Employees are designated as Responsible Employees. Most UNL faculty and staff members are not Responsible Employees. Only those individuals identified by title on this webpage are *required* to take action or report incidents of sexual misconduct. The University encourages all other University employees and faculty members to: (1) assist a UNL community member with reporting to the Title IX Coordinator and/or local law enforcement; and/or (2) assist a Community member by directing the individual to resource and reporting options; (3) and/or report concerns to your supervisor or the Title IX Coordinator

UNL Title IX Responsible Employees, http://www.unl.edu/equity/unl-title-ix-responsible-employees. (last visited Oct. 24, 2017).

308. *See, e.g.*, THE CATHOLIC UNIVERSITY OF AMERICA, RESPONSIBLE EMPLOYEES FOR TITLE IX REPORTS OF SEXUAL OFFENSES (last updated July 13, 2015), at http://policies.cua.edu/res/docs/ResponsibleEmployees7-13-15.pdf (defining responsible employees as, *inter alia*, "Officials with significant responsibility for student and campus activities and advising, including but not limited to . . . .").

do. The word "include" suggests that people off the list still have reporting obligations, but students and employees are not informed of those individuals' identities. This makes surprises and institutional betrayal more likely. Also, schools should avoid putting a category of employees on the list if the category requires students to have additional information to determine an employee's reporting status. For example, it is unhelpful to define a mandatory reporter as follows: "Supervisors who have hiring or firing power over at least three employees who are not student or post-doc employees."[309] Students would have difficulty knowing if an employee is or is not a mandatory reporter with that description. Instead, the list should describe people by title and, ideally, by name too.

Once the policy categorizes people, designated reporters should be conspicuously identified. A university can achieve this objective by placing a sticker that identifies the person as a designated reporter on the person's door,[310] by listing employees' reporting statuses in the telephone directory and on the school's website, and by encouraging faculty to describe their and their teaching assistants' reporting statuses on their syllabi and at the end of their email signatures.

3. Who is on the List of Designated Reporters

OCR guidance and case law provide a starting place for determining who specifically should be a responsible employee and therefore listed as a designated reporter, although the guidance must be approached with caution. As already discussed, the OCR guidance lists three categories of employees who should be identified as responsible employees.[311] Part III criticized the second category—an employee *"who has the duty to report to school officials . . . any other misconduct by students or employees"*—as being much too wide to be

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309. THE UNIVERSITY OF MICHIGAN, POLICY AND PROCEDURES ON STUDENT SEXUAL AND GENDER–BASED MISCONDUCT AND OTHER FORMS OF INTERPERSONAL VIOLENCE 12 (last updated July 1, 2016), https://publicaffairs.vpcomm.umich.edu/wp-content/uploads/sites/19/2016/04/SMP-Final-master-version-4.6.16.pdf.

310. UNIVERSITY SENATE, *Student Sexual and Gender-Based Harassment and Violence Complaint and Response*, UNIV. OF OREGON §§ III.B.1, IX.E (last updated May 12, 2017), https://prevention.uoregon.edu/sites/prevention1.uoregon.edu/files/Gender%20based%20employee%20reporting%20responsibility%20policy%20effective%20Sept.%2015%2C%202017_0.pdf.

311. *See supra* text accompanying note 14. OCR says that its categories are not meant to capture the entire universe of responsible employees. *See* 2001 Revised Sexual Harassment Guidance, *supra* note 12, at 13 ("a responsible employee *includes* any employee [who falls into these categories]").

helpful.[312] Rather, the "other misconduct" language is best read as informing the third category regarding students' reasonable expectations.

However, the second category also has another component that deserves attention. A responsible employee includes an employee "*who has the duty to report . . . sexual harassment . . . by students to the Title IX coordinator*."[313] Yet this language is also unhelpful because it produces circular reasoning. Who has a duty to report is the very question that a reporting policy is supposed to determine.

The first category—one "*who has the authority to take action to redress the harassment*"[314]—is a little more helpful, but only marginally. Few officials in the modern university have the unilateral authority to take corrective action to end the discrimination. Due process requirements, union-negotiated protections for employees, and contractual obligations typically require or necessitate that administrators invoke the university's student conduct code process or its Affirmative Action and Equal Opportunity (AAEO) process, depending upon the accused perpetrator's status, in order to trigger corrective action. Nonetheless, this category clearly includes the student conduct code officer, as that person typically determines whether sexual violence occurred and the repercussions. The category might also include employees who are allowed to respond to a finding of sexual violence, such as a coach who has the authority to kick a student perpetrator off of a team. Overall, this category is rather narrow and the identity of the relevant employees rests on an institution's own policies regarding who has the authority to take action to redress sexual violence.

The third category is the most important. It is as follows: an employee "*who a student could reasonably believe has this authority or responsibility*."[315] This category is very important because it stops designated reporter creep: responsible employees are arguably limited to those listed by the university. Once a policy defines those people who have the authority to take action or the duty to report to the Title IX office, and that policy is widely available, then no one else should be considered a responsible employee because a reasonable college student would understand that responsible employees are limited to those on the list.

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312. *See supra* text accompanying notes 170–74.
313. 2001 Revised Guidance, *supra* note 12, at 13 (emphasis added).
314. *Id.* (emphasis added).
315. *Id.* (emphasis added).

In addition, aligning mandatory reporters with student expectations can help avoid unwanted surprises, i.e., situations in which students think they are talking privately to an employee, but the employee has reporting obligations and will share their information.[316] Obviously, not all students have the same expectations. But when students would reasonably believe that an employee is not a designated reporter, then that person should not be made a designated reporter.[317] Schools can only guess about the identity of those individuals because no one has empirically assessed and documented students' beliefs. Nonetheless, some rough approximations are possible. The process of identifying designated reporters should be sensitive to the benefit of exempting employees who are critical sources of support for survivors.

Apart from the OCR guidance, case law also sheds light on who should be designated reporters. The cases do not themselves identify which employees are responsible employees, but they do identify who is an "appropriate person" for purposes of Title IX liability. Appropriate persons should be made designated reporters because schools can be liable for an appropriate person's failure to address student-on-student harassment.[318]

The Supreme Court's definition of an "appropriate person" is very close to the first category in OCR's guidance.[319] The Supreme Court defines an appropriate person as "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures."[320] Case law can help identify the individuals who fall within this category, with two caveats. First, a court's analysis may turn on facts specific to the particular institution. Second, a court may find an employee is an appropriate person because the employee is a mandatory reporter.[321] If so, it may not be necessary to identify employees in that position as designated reporters. A closer analysis of the case would be required.

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316. *See supra* text accompanying notes 115–117.

317. While it is best to resolve ambiguities by not making someone a designated reporter, sometimes only a very small number of students would be surprised that someone was a mandatory reporter. A small number of students with different expectations should not preclude that employee from being labeled a mandatory reporter. Rather the students in the minority should be protected by notice, i.e., by the published list of mandatory reporters and by the mandatory reporters' disclosure at the beginning of the conversation about his or her obligation to report, although these mechanisms are imperfect.

318. *Davis*, 526 U.S. at 643–44.

319. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

320. *Id.* at 290.

321. *See infra* text accompanying notes 436–53.

In light of the above, faculty should not be designated reporters. Absent a reporting policy making them mandated reporters, most students would not believe faculty have reporting obligations. Because faculty members are generally not Clery Act reporters, the AAUP concluded, "faculty members are thus usually not . . . expected to be mandated reporters of incidents about which they are told or happen to learn."[322] In addition, faculty are often a critical source of support for survivors. The AAUP reported,

> As 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. A faculty member may also be the first adult who detects changes in a student's behavior that stem from a sexual assault and can encourage the student to talk about it. Faculty members may thus find themselves in the role of "first responders" to reports of sexual assault. . . .[323]

Consequently, faculty should not be designated reporters.

In contrast, high-level administrators should be designated reporters. Absent a reporting policy, most students would still expect high-level administrators to address sexual harassment. These expectations flow, in part, from the new consumerism that has infected academia as well as from the academic hierarchy and pomp that still exists. Students identify high-level administrators with authority and the ability to address issues like harassment. These administrators include, for example, the president, provost, vice presidents, vice provosts, athletic director, director of campus housing, director of campus operations, director of fraternity and sorority life, deans, associate deans, and department heads.

D. Hard Cases

There are several categories of employees that raise difficult classification issues, although for diverse reasons. Must resident assistants, police officers, coaches, campus security authorities, and employment supervisors be responsible employees? This brief discussion is meant to flag the major considerations.

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322. Am. Ass'n of Univ. Professors (AAUP), *Campus Sexual Assault: Suggested Policies and Faculty Responsibilities VI* (Nov. 2012), https://www.aaup.org/report/campus-sexual-assault-suggested-policies-and-procedures.

323. *Id.*

1. Resident Assistants

OCR's *2014 Questions and Answers* very clearly called out resident assistants (RAs) as employees who had to report sexual misconduct if they had to report other misconduct, such as drug and alcohol violations or physical assault.[324] However, OCR did not always enforce this requirement,[325] and the withdrawal of the 2014 guidance gives colleges and universities even more leeway.

An advantage of making RAs designated reporters is that this categorization immediately transfers the responsibility of responding to a disclosure away from a young, often inexperienced employee to the Title IX coordinator.

Yet making RAs designated reporters is arguably bad policy for two reasons. First, many students rely on their RAs for support and friendship. In fact, when researchers conducting a major study asked a focus group, "To whom do you think victims are most likely to report incidents of sexual assault?," all of the participants said that "victims are most likely to disclose sexual assaults to friends or resident assistants (RAs)."[326] Other studies confirm that RAs are the campus resource to whom students are most likely to turn for information and support.[327] Therefore, it makes sense to treat RAs like women's center or victim service employees, both of whom the withdrawn OCR guidance expressly exempted from mandatory reporting obligations because of their supportive role for students.[328]

Second, because of RAs' accessibility, some survivors will speak to RAs in an altered state, only to regret it later because the disclosure led to a report. In these instances, the survivor's impairment may mean that the RA cannot give an effective warning about the implications of making a disclosure. Consequently, some

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324. 2014 Q & A on Title IX and Sexual Violence, *supra* note 4, at D-5.

325. Wesley College did not make RAs mandatory reporters, although RAs had the obligation to report other misconduct. *See* WESLEY COLLEGE, WESLEY COLLEGE STUDENT HANDBOOK 2016–2017, pp. 24, 37, http://wesley.edu/wp-content/uploads/2015/03/2016-2017-Student-Handbook-updated-Sept2016-2.pdf. While OCR was "concerned" with Wesley College's policy, it did not require Wesley College to change this designation. Wesley College Letter, *supra* note 263, at 15.

326. KARJANE, FISHER, & CULLEN, *supra* note 27, at 49.

327. UNIV. OF NOTRE DAME, 2016 SEXUAL CONDUCT AND CAMPUS CLIMATE QUESTIONNAIRE REPORT 10 Table 21 (2016) (placing residence hall staff above, *inter alia*, employees at the campus police, the counseling center, and the health center), https://titleix.nd.edu/assets/231426/2016_sexual_conduct_and_climate_questionnaire_report_final.pdf.

328. *See* 2014 Q & A on Title IX and Sexual Violence, *supra* note 4, at E-3.

survivors' autonomy will be undermined because their disclosure will be made without informed consent.

Even if RAs are not designated reporters under a nuanced policy, they would be student-directed employees. As such, an RA would be required to disseminate certain information to a survivor,[329] ask the survivor if she would like the RA to report the incident to the Title IX coordinator and/or connect her with a confidential supportive resource, and then follow the survivor's directions.

2. Campus Police

Campus police are another difficult case. On the one hand, good policy reasons exist to keep campus police off the list of designated reporters.[330] If police officers are designated reporters, students may be discouraged from contacting the police when they need police assistance, whether it is for a ride to the hospital for an examination by a sexual assault nurse examiner (SANE) or to remove a harasser from the student's residence. Also, police may be called to the scene by a neighbor or other third party, without a survivor's consent, and the student may not want a report to go to the Title IX coordinator. Finally, minority students, in particular, may have a complicated relationship with the campus police that impedes trust.[331]

On the other hand, many students probably expect campus police to report an incident to the Title IX office. Students' expectations may be influenced by the fact that police are campus security authorities and clearly have reporting obligations under the Clery Act.[332] They

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329. This was a requirement under the withdrawn OCR guidance. See 2014 Q & A on Title IX and Sexual Violence, *supra* note 4, at D-5 ("Regardless of whether a reporting obligation exists, all RAs should inform students of their right to file a Title IX complaint with the school and report a crime to campus or local law enforcement. . . . Additionally, all RAs should provide students with information regarding on-campus resources, including victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. RAs should also be familiar with local rape crisis centers or other off-campus resources and provide this information to students.").

330. The withdrawn OCR guidance permitted keeping campus police off the list of responsible employees. *See supra* text accompanying note 212.

331. KARJANE, FISHER, & CULLEN, *supra* note 27, at 86; *cf.* Kimberly D. Bailey, *Criminal Law Lost in Translation: Domestic Violence, "The Personal is Political," and the Criminal Justice System*, 100 J. OF CRIM. L. & CRIMINOLOGY 1255, 1289–93 (2010) (discussing specific challenges women of color have with law enforcement).

332. HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, *supra* note 172, at 4-2 ("If your institution has a campus police or security department, all individuals who work for that department are campus security authorities.").

might also be influenced by the fact that people rarely have control over the police's response to a crime.

If campus police are made designated reporters, a school may want to ensure that community police, who would not have any reporting obligations within the school, can also respond to students' calls. Students should then be notified of this option in order to maximize their choices.

3. Coaches

Coaches are another difficult category. On the one hand, athletic coaches sometimes protect their players who are accused of sexual violence instead of forwarding the victims' reports to the Title IX office.[333] The fact that coaches may have their own reasons for disregarding the survivor's report suggests that coaches should be designated reporters. The designation would reduce their ability to claim, falsely, that the student did not want a report to be made.

However, athletes are not only perpetrators. They can be victims, too. If athletes who are victimized turn to their coaches for information and support, then their coaches should not be designated reporters.

A policy that treats the complainant's and accused student's coaches differently is a potential solution. A school might forego the designated reporter label only for coaches on the survivor's team. Alternatively, a school might exclude from mandatory reporting obligations only assistant coaches on the survivor's team if there are multiple levels of coaching and students typically are closest to those assitant coaches. Of course, if athletes are not typically close to any of their coaches, but rather would likely disclose to each other, the athletic counselors, or the team managers, then differentiating between survivors' and perpetrators' teams or between types of coaches on survivors' teams might be unnecessary.

A school's approach to coaches should reflect its sports culture, the number of coaches per team, and the disclosure practices of its athletes. The University of Oregon resolved this issue by labeling as "designated reporters" all of the coaches of any team on which the accused student is a member but only the head coaches of any team

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333. *See, e.g.*, Doe v. Univ. of Tennessee, 186 F. Supp. 3d 788, 792 (M. D. Tenn. 2016) (denying motion to dismiss in case in which plaintiffs alleged the creation of an atmosphere that led to their assaults, including improper responses to athletes' sexual misconduct, a failure to report misconduct, attempts to cover-up, failing to implement disciplinary measures, and allowing perpetrators to continue to play for the school); *see also supra* note 46.

on which the complainant is a member.

4. Campus Security Authorities

While all designated reporters will be campus security authorities (CSAs),[334] not all CSAs need to be designated reporters. A federal government handbook on this matter states, "[w]hile there may be some overlap, persons considered to be CSAs for Clery Act reporting are not necessarily the same as those defined as 'responsible employees' for Title IX."[335]

If a school does not want its campus police to have mandatory reporting obligations for the reasons discussed previously,[336] then the school should not make all CSAs mandatory reporters for Title IX purposes. CSAs are defined to include police and others responsible for campus security.[337] Students would be justifiably confused if a school said all CSAs are designated reporters but police are not designated reporters.

Even if a school were to make its police officers designated reporters, it still might want to exempt other CSAs from mandatory Title IX reporting. The CSA category is very broad. Labeling all CSAs

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334. HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, *supra* note 172, at 4-2 ("If you direct the campus community to report criminal incidents to anyone or any organization in addition to police or security-related personnel, that individual or organization is a campus security authority.").

335. *Id.* at 4-5. *See also* WHITE HOUSE TASK FORCE TO PROTECT STUDENTS OF SEXUAL ASSAULT, NOT ALONE 20 (Apr. 2014), https://www.justice.gov/ovw/page/file/905942/download (noting that a Department of Education chart shows that a school's reporting obligation differs under Title IX and the Clery Act) (emphasis omitted). CSAs must report a wide variety of crimes to the institution, including rape, fondling, incest, and statutory rape along with dating violence, domestic violence, and stalking. *See* 34 C.F.R. § 668.46(c)(1)(i)(B) (2016); 34 C.F.R. § 668.46(c)(1)(iv) (2016). CSAs must only report "allegations of *Clery Act* crimes that are reported to them in their capacity as a CSA." HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, *supra* note 172, at 4-5. Incidents they learn "about in an indirect manner" are not covered. *Id.* The information that must be reported is more limited than in the Title IX context. For "alleged criminal incidents" within the category of crime that the Clery Act identifies, CSAs must report the type of crime. *See* 34 C.F.R. § 668.46(c)(1)(i)(B); HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, *supra* note 172, at 4-1. The CSA must also specify if it was on campus, in or on a non-campus building or property, or on public property. *See* 34 C.F.R § 668.46(c)(5) (2016). If it was on campus, it must be noted if it occurred in a dormitory or another residential facility and the general location of the crime. *Id.* The CSA need not, however, include the name of the person who is the victim or the alleged perpetrator. *See* 34 C.F.R § 668.46(c)(7) (2016).

336. *See supra* text accompanying notes 330–31.

337. HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, *supra* note 172, at 4-2.

as designated Title IX reporters will dramatically reduce survivors' access to supportive campus personnel and create moments of unwelcome surprise for some survivors.

The CSA designation includes the following employees: "An official of an institution who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings."[338] The *Handbook for Campus Safety and Security Reporting* (*"Handbook")* provides examples of employees who fall within this category and emphasizes that the categorization depends upon function, not title.[339] The *Handbook* states, "Look for officials (i.e., not support staff) whose functions involve relationships with students."[340] The examples include "all athletic coaches (including part-time employees and graduate assistants)," "a faculty advisor to a student group," "a student resident advisor or assistant," "victim advocates or others who are responsible for providing victims with advocacy services, such as assisting with housing relocation, disciplinary action or court cases, etc.," and "members of a sexual assault response team (SART) or other sexual assault advocates."[341] Faculty are only excluded from the CSA designation if the faculty member does not have any responsibility for student and campus activity beyond the classroom.[342] As a faculty member's responsibilities can change over time, a faculty member's status is fluid.[343] Given the open-ended and broad definition of CSAs, a reporting policy will introduce considerable ambiguity if it makes all CSAs designated reporters.

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338. 34 C.F.R. § 668.46(a) (2016). It also includes,

> (i) A campus police department or a campus security department of an institution. (ii) Any individual or individuals who have responsibility for campus security but who do not constitute a campus police department or a campus security department under paragraph (i) of this definition, such as an individual who is responsible for monitoring entrance into institutional property. (iii) Any individual or organization specified in an institution's statement of campus security policy as an individual or organization to which students and employees should report criminal offenses. . . . Pastoral and professional counselors are specifically excluded.

Id.

339. HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, *supra* note 172, at 4-2 to 4-3.

340. *Id.* at 4-3.

341. *Id.* at 4-2 to 4-3.

342. *Id.* at 4-5.

343. *Id.* at 4-4.

5. Supervisors

Student employees may experience sexual violence in their workplaces. Title VII requires schools to have in place policies to address sexual harassment disclosed by employees.[344] If a student employee alleged that the school's response to the harassment was unreasonable,[345] a court would typically examine the institution's reporting policy,[346] although a particular reporting structure is not obligatory under Title VII. Employment supervisors should be on the list of designated reporters because their failure to report the abuse to the university could result in Title VII liability.[347]

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344. This discussion only applies to harassment disclosed by the victim, not witnessed by a supervisor.

345. Employers are strictly liable if a supervisor's sexual harassment involves tangible job action against an employee. Otherwise, the employer's liability for a supervisor's harassment is assessed using a negligence standard. Liability will exist unless the employer can show "(a) that [it] exercised reasonable care to prevent and correct promptly . . . harassing behavior, and (b) that the [employee] unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). *See generally* Catherine Fisk & Erwin Chemerinksy, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755 (1999). If a co-worker harasses the student employee, liability is also governed by a negligence standard. *See* 29 C.F.R. § 1604.11(d) (2016); Ortiz v. Hyatt Regency Cerromar Beach Hotel, Inc., 422 F. Supp. 2d 336, 342 (D.P.R. 2006). *See generally* Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. REV. 1029, 1041–42 (2015) (citing *Faragher*, 524 U.S. at 799; 29 C.F.R. § 1604.11(d) (2002)).

346. *See generally* D. Frank Vinik, Ellen M. Babbitt & David M. Friebus, *The "Quiet Revolution" in Employment Law & Its Implications for Colleges and Universities,* 33 J.C. & U.L. 33, 39 (2006) (noting that case law suggests the elements of an effective EEO compliance program include "development, implementation, and publication of effective complaint, investigation, and appeal procedures").

347. Vance v. Ball State Univ., 133 S. Ct. 2434, 2452 (2013); *see also* 29 C.F.R. § 1604.11(d) (2016) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (June 18, 1999), https://www.eeoc.gov/policy/docs/harassment.html [hereinafter EEOC guidance] (explaining that a supervisor cannot maintain confidentiality, but employees below management can confidentially counsel the victim so long as the victim knows that the employee is not able to remedy the situation). Liability is not a certainty, however. Some courts have recognized the importance of the victim's autonomy in assessing the reasonableness of the institution's response. *See, e.g.*, Milligan v. Bd. of Trustees of S. Ill. Univ., 686 F.3d 378, 383 (7th Cir. 2012) (holding that the university did not act unreasonably when a student reported a professor's sexual harassment to the

The Supreme Court defined "supervisor" in *Vance v. Ball State University* as someone the employer has empowered "to take tangible employment actions . . . , i.e., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'"[348] However, federal appellate courts differ by circuit in their views about which

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student's supervisor, but the supervisor did not pursue the matter further because the student had refused the supervisor's offer to talk together to other university officials about the incident); Jackson v. Cty. of Racine, 474 F.3d 493, 501–02 (7th Cir. 2007) (finding that an employer did not act unreasonably when it had notice of a supervisor's sexual harassment but took no action for three months because no victim wished to lodge a formal complaint); Torres v. Pisano, 116 F.3d 625, 639 (2d Cir. 1997) (finding that a supervisor who kept an employee's complaints confidential did not breach his duty to remedy sexual harassment because of the victim's request for confidentiality). Sometimes courts find that the survivor's request for confidentiality is relevant to whether the employer had notice, instead of the reasonableness of the employer's response. *See* Hardage v. CBS Broad. Inc., 427 F.3d 1177, 1186–88 (9th Cir. 2005), *amended on denial of reh'g*, 433 F.3d 672 (9th Cir. 2006), *amended on denial of reh'g*, 436 F.3d 1050 (9th Cir. 2006) (employer's response was reasonable in light of the employee's statement that he would handle the matter himself, his informed and sincere statement of his wishes, and his furnishing of only a vague account about the extent and nature of the supervisor's advances); Faragher v. City of Boca Raton, 111 F.3d 1530, 1538 n.9 (11th Cir. 1997), *rev'd on other grounds*, 524 U.S. 775 (1998) (holding for vicarious-liability purposes that notice to a manager does not constitute notice to management when the complainant asks the manager, as a friend, to keep the information confidential); Greenwood v. Delphi Auto. Sys., Inc., 257 F. Supp. 2d 1047, 1063–65 (S.D. Ohio 2003) (holding that the employer could not be held liable for its failure to take prompt corrective action for the period during which the employee made it clear that, despite having informed management about numerous alleged incidents of sexual harassment, he did not want to file a complaint and he wanted to resolve the situation himself, and the employer took prompt corrective action following the employee's subsequent complaints); Hooker v. Wentz, 77 F. Supp. 2d 753, 757–59 (S.D. W. Va. 1999) (granting summary judgment when plaintiff confided in her immediate supervisor about sexual advances but asked that he not report it to others and the plaintiff did not use company's complaint procedure); Chambers v. Wal-Mart Stores, Inc., 70 F. Supp. 2d 1311, 1319–20 (N.D. Ga. 1998) (holding for vicarious-liability purposes that notice to a manager does not constitute notice to management when the complainant asks the manager, as a friend, to keep the information confidential); Sims v. Med. Ctr. of Baton Rouge, Inc., No. CIV. A. 96-3371, 1997 WL 436258, at *1–2, *4 (E.D. La. Aug. 1, 1977) (granting summary judgment and finding that the company took prompt, remedial action as a matter of law by respecting the plaintiff's requests for confidentiality; plaintiff refused to file a formal complaint after the Director of Human Resources asked her several times if she wanted to do so); Elezovic v. Ford Motor Co., 697 N.W.2d 851, 862 (Mich. 2005) ("plaintiff's telling two supervisors in confidence about one instance of Bennett's improper conduct does not constitute notice, notwithstanding Ford's policy that required the supervisors to report the information to human resources personnel").

348. 133 S. Ct. 2434, 2443 (2013).

supervisors' knowledge is imputed to the employer: some say any supervisor, but others say only the victim's and perpetrator's supervisors.[349] A school should look at the case law in its jurisdiction to see whether its designated reporters should include all employment supervisors or just the victim's and perpetrator's supervisors. Even if the list of designated reporters only includes the latter, any other supervisor to whom the survivor discloses should be obligated to ask the survivor if he or she wants to report, and if the student says yes, then the supervisor should be required to report for the student.

E. Other Issues

A school should consider a few additional issues when crafting its reporting policy. Four of the most important are briefly discussed here.

1. Information Escrow Systems

An information escrow system is an online system that allows a survivor to report the incident to the university electronically and to store evidence related to the incident until she is ready to report.[350] Such a system often has a matching function that allows a survivor to specify that her report to the university should only be forwarded to the university when another survivor has identified the same perpetrator.[351] Proponents of these systems suggest that this matching feature increases reporting because survivors like it when another student's report can bolster their own credibility.[352]

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349. *Compare* Swinton v. Potomac Corp., 270 F.3d 794, 804–05 (9th Cir. 2001) (identifying management-level employees as the harasser's supervisor, the harassed employee's supervisor, and any supervisor who is a required reporter), *with* Hall v. Gus Constr. Co., 842 F.2d 1010, 1015 (8th Cir. 1998) (an employer is liable if management-level employees knew, or should have known, about the alleged harassment).

350. Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145, 150 (2012).

351. *Id.*

352. *Id.* at 147–48, 160–61, 174 (articulating the benefits and disadvantages of such an "allegation escrow" system in both game theory and real-life terms, and suggesting that such a system may increase reporting).

Third-party vendors currently exist and offer these systems.[353] At least one vendor uses an open-source program that would allow a school to create its own information escrow system.[354]

A school should consider several issues, in addition to cost, before committing to an information escrow system. First, does the Title IX coordinator have the ability to input data into the system? Reports that go directly to the Title IX office (without first being processed through the information escrow system) should be entered into the information escrow system. Otherwise, reports in the escrow system may be erroneously orphaned.[355] A survivor who uses the information escrow system may want her information forwarded to the university when a match exists, but that will not occur if the other victim went directly to the Title IX office and her report was not added to the database. FERPA may prohibit a Title IX coordinator from entering a student's information into a third-party database without the survivor's consent.[356] Therefore, a reporting protocol should include securing the survivor's permission to enter her information into the third-party escrow system.[357] Since some escrow systems require that the information be transmitted from the survivor's own email account, the Title IX coordinator may need to ask the survivor to enter her information into the escrow system as part of the intake process.

Second, will an information escrow system effectively convey important information to the survivor? If not, will the existence of such a system funnel survivors away from more effective resources, such as a campus advocate or an attorney? Consider, for example, the importance of telling a survivor about methods of evidence collection. Evidence can be critical if the perpetrator is to be held accountable in the disciplinary, civil, or criminal systems. While an online resource can inform a survivor about the type of information that she should collect and save, and how to do so, some survivors may not read the information or may have unanswered questions. Valuable evidence may be lost.[358] On the other hand, perhaps the escrow system will

353. *See, e.g.*, PROJECT CALLISTO, https://www.projectcallisto.org (last visited July 6, 2017); LIGHTHOUSE, http://lighthouse.vertiglolabs.com (last visited July 6, 2017).

354. *Sexual Health Innovations Announces Callisto Code is Open Source*, DIGITAL JOURNAL (May 27, 2016), http://www.digitaljournal.com/pr/2954484.

355. *See* Ayres & Unkovic, *supra* note 350, at 148.

356. *See* 20 U.S.C. § 1232g (2013).

357. Ayres & Unkovic, *supra* note 350, at 174.

358. Ayres & Unkovic think that the computer can be programmed to take the survivor "through a series of questions that are more likely to address all the elements of a sexual harassment claim." *Id.* at 169. One has to wonder whether the computer

allow a survivor to get advice about evidence collection more quickly, and will facilitate preservation of evidence because it is convenient. Schools will want to consider carefully to whom survivors should be channeled and how best an online escrow system can deliver important information to survivors, if it is offered.

2. Anonymous Reporting

Anonymous reporting means different things to different people. In one study, for example, an "anonymous reporting option" was described as allowing a student to get assistance, information, and support referrals without formally entering a university process, although the crime would be documented in the campus crime statistics.[359] For others, anonymous reporting does not necessarily allow a student to access services, but rather is merely an online form that relays information about an assault without giving the survivor's name.[360]

Many sources recommend an anonymous reporting option, including the American Law Institute[361] and the American Association of University Professors,[362] although the meaning of anonymous reporting is often not defined. Some states require universities to provide this option.[363] Unfortunately, too little analysis exists regarding whether this option should be offered, given its benefits and limitations.

The main benefit of anonymous reporting is that it may encourage some survivors to come forward who would not otherwise.[364] While

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will in fact be capable of navigating any nuances, whether a survivor will give up on answering the questions without an advocate there to support her, and whether answers memorialized during a traumatic experience might be incorrect in some details and whether the report will come back to undermine the survivor's case. After all, there may not be a basis for refusing to turn over the report to the accused during proceedings.

359. KARJANE, FISHER & CULLEN, *supra* note 27, at 93 ("The anonymous reporting option allows student victims to come forward and talk to a trusted school official without the possibility of losing control of the process (e.g., mandated reporters at schools that do not offer anonymous reporting).").

360. *See, e.g.*, UNIV. OF OREGON, ANONYMOUS REPORT FORM SEXUAL HARASSMENT, SEXUAL ASSAULT, PARTNER VIOLENCE & STALKING, https://president.uoregon.edu/sites/president2.uoregon.edu/files/aaeo_anonymous_report_form.pdf (last visited July 7, 2017).

361. *See* ALI, COUNCIL DRAFT NO. 1, *supra* note 47, at §3.2.

362. AAUP, *supra* note 322, at § V.5.

363. *See, e.g.*, MINN. STAT. ANN. § 135A.15.5 (West 2015).

364. KARJANE, FISHER & CULLEN, *supra* note 27, at 93 ("There was strong agreement among field interviewees that an anonymous reporting option increases

an institution may not be able to take formal action against a perpetrator without a known complainant,[365] an anonymous report may allow the institution to identify patterns and problems that should be addressed. An anonymous report may also "bolster the credibility of a non-anonymous report."[366]

On the other hand, survivors may have a false sense of what an anonymous report can do for them. Such reports usually cannot lead to discipline, unless the perpetrator admits the accusation.[367] In addition, these reports may be viewed with suspicion, in part because "the victim cannot be questioned further about the incident,"[368] and the victim is "unwilling to confront and face" the accused.[369] Other problems include the possibility that anonymous reports may not be truly anonymous, putting the survivor's privacy at risk.[370] In addition, the accused may never receive repose if there has been an

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reporting of campus sexual assault."); *see* ALI, COUNCIL DRAFT NO. 1, *supra* note 47, at § 3.2 cmt. ("While anonymous reporting may provide the basis for general education and safety efforts, it should not by itself provide the basis for enforcement efforts targeted at any individual, because it does not allow the school to assess either the credibility of the reporter or whether the report is made in good faith.").

365. *Compare* SOUTHERN UTAH UNIV., SEXUAL ASSAULT ANONYMOUS REPORTING FORM, https://www.suu.edu/titleix/pdf/titleix-anonymous-reporting-form.pdf ("This form is designed to facilitate the anonymous report of a sexual assault to assist Southern Utah University in understanding current sexual violence trends at our campus. Filing this form will not result in an investigation unless the victim later decides to make a formal report to law enforcement. Completing this form does not constitute a police report nor a student conduct report. You will not be contacted by the university unless you indicate a desire to be contacted (you may request to be contacted at the end of this form)."), *with* REED COLLEGE, TITLE IX, CONFIDENTIAL AND ANONYMOUS REPORTING, http://www.reed.edu/title-ix/ ("Any community member wishing to make an anonymous report of a violation of Title IX may do so by completing a secure online form. While it is inherently difficult to gather the full facts in response to anonymous reports, the college will nonetheless conduct an investigation. The investigation will be as thorough as is practicable and will be appropriate to the specific report.").

366. Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L. J. 125, 150 n.155 (2000).

367. *See id.*

368. *Id.*

369. Norman D. Bishara, Elletta Sangrey Callahan & Terry Morehead Dworkin, *The Mouth of Truth*, 10 N.Y.U. J. L. & BUS. 37, 91 (2013).

370. Samantha Iannucci, *"Due" the Process: The Sufficiency of Due Process Protections Afforded by University Procedures in Handling Sexual Assault Allegations*, 95 OR. L. REV. 609, 637–38 (2017).

anonymous report. At one university, for example, "an informal complaint is never truly closed."[371]

It is important to assess whether anonymous reporting should still exist when the institution's reporting policy offers survivors student-directed and confidential reporting options, especially if there is an online information escrow system. Students might be queried about the need for this additional option, assuming a school has adopted these other reporting methods.

3. Third-party Information

How should a reporting policy address information that comes from third parties? Such information can come from many different sources, including from a friend of the survivor. Assuming that the event did not also create a hostile environment for the third party (so that the information disclosed could constitute a first-person disclosure) and the survivor does not report her own victimization to the institution, how should employees be told to respond to a third-party report?

If a designated reporter obtains information from a third party, the designated reporter should report the information to the Title IX coordinator. OCR does not differentiate between first-person and third-person reports.[372] Neither do the courts. An institution can be liable if an appropriate person has actual knowledge of a problem and acts with deliberate indifference, regardless of how that person obtained the information.[373]

However, if the third party conveys information to a confidential employee or to a student-directed employee, the situation differs. That employee should not have an obligation to make a formal report unless the victim indicates that she wants a report to be made. If the third party wants to make a report regardless of the survivor's wishes, then the employee should direct the third party to a designated reporter or the Title IX office. However, if the third party

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371. Jose A. Cabranes, *For Freedom of Expression, for Due Process, and for Yale: The Emerging Threat to Academic Freedom at a Great University*, 35 YALE L. & POL'Y REV. 345, 361 (2017).

372. 2001 Revised Guidance, *supra* note 12, at 13.

373. Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TUL. L. REV. 387, 423 (2002) ("Because the Court [in *Gebser*] did not frame this element as requiring a formal report, actual knowledge should be interpreted to mean that notice may be obtained through firsthand observation of particular events, reports from bystanders, and informal or formal reports from students.").

would prefer the survivor make the reporting decision for herself, then the student-directed or confidential employee should encourage the third party to ask her friend to talk to a confidential or student-directed employee directly. The student-directed or confidential employee should provide the third party with information about resources and reporting options to share with the victim.

Alternatively, when a third party shares information with someone other than a designated reporter, the institution may want to reach out to the survivor to see if the student wants to report the incident or be connected with services. This outreach effort should be made by a trained, confidential advocate because the outreach, if done improperly, may put the survivor's safety in jeopardy (especially if the victim experienced domestic violence) or cause her embarrassment. Therefore, a policy might require student-directed and confidential employees to contact the university's trained, confidential advocate when in receipt of information from a third party.

4. Exceptions

Schools will want to consider what exceptions should exist to a student-directed employee's obligation to keep a student's disclosure private.[374] State law may require some exceptions. For example, state law may require employees to report misconduct involving minors.[375]

In addition, a school may want to include a "*Tarasoff* exception": an exception that would require employees to report to the Title IX office if the student discloses that the alleged perpetrator poses an imminent risk of serious harm to another identifiable individual.[376] This exception is warranted because an institution may face liability under tort law or Title IX if it fails to act reasonably to protect the identified student.[377] Any resulting liability would not technically track the *Tarasoff* situation because *Tarasoff* involved a psychotherapist who interacted with the perpetrator.[378] Nonetheless, a court might extend *Tarasoff* and impose liability for a subsequent

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374. Confidential employees will generally be guided by their profession's ethical rules.

375. *See, e.g.*, OR. REV. STAT. § 419B.010 (2015).

376. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 347 (Cal. 1976).

377. A majority of states recognize a *Tarasoff* exception. *See* George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The Tarasoff Duty and the Jaffee Footnote*, 74 WASH. L. REV. 33, 47 (1999).

378. Melissa L. Gilbert, *"Time-Out" for Student Threats?: Imposing a Duty to Protect on School Officials,* 49 UCLA L. REV. 917, 919 (2002).

victim's attack in this context. The adoption of such an exception would often be consistent with other policies on campus that address threats,[379] as well as align with institutional values. If an institution incorporated such an exception into its reporting policy, it should inform its students about the exception.[380]

V. WIDE-NET POLICIES DO NOT REDUCE AN INSTITUTION'S OVERALL RISK OF LIABILITY

So far, this Article has argued that a more nuanced reporting policy has discernable benefits and is legally permissible. Yet, would such a policy expose the institution to liability? Reporting policies have historically been shaped by administrators' liability concerns.[381] Administrators may worry that a nuanced reporting policy would decrease institutional compliance with different laws; after all, no longer would all disclosures be funneled to someone who knows the institution's obligations under the Clery Act,[382] Title VII, and other relevant laws. Administrators may also worry that a narrower

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379. *See, e.g.*, SOUTHERN ILLINOIS UNIV. EDWARDSVILLE, THREAT ASSESSMENT POLICY - 2C12 & 3C13, http://www.siue.edu/policies/2c12.shtml (describing one of five behaviors that will activate the threat assessment team: "The individual makes a threat of violence towards a specified person(s), including themselves or the community as a whole. The threat might be direct or indirect, implicit or explicit, veiled or outright, but leaves a reasonable observer in fear of his or her safety. The threat might take the form of verbal or written statements and/or might occur through various electronic media."); UNIV. OF CHICAGO, CAMPUS VIOLENCE PREVENTION POLICY & BEHAVIORAL INTERVENTION TEAM, https://studentmanual.uchicago.edu/ViolencePreventionPolicy ("When someone, whether a member of the University of Chicago community or not, jeopardizes that environment or threatens a person or people with violence, the University must call upon its full resources to promptly assess the situation, intervene as appropriate, and support those who raised concerns about the threat and others who may be involved.").

380. *Cf.* Elisia Klinka, *It's Been a Privilege: Advising Patients of the* Tarasoff *Duty and Its Legal Consequences for the Federal Psychotherapist-Patient Privilege*, 98 FORDHAM L. REV. 863, 888 n.203 (2009) (discussing how informed consent in the therapeutic context requires a psychotherapist to tell patients about the obligation to disclose this type of information).

381. All the participants of a focus group assembled for a National Institute of Justice funded study on campus sexual assault "agreed that liability concerns played a significant role in the development of their institutions' sexual assault policies." KARJANE, FISHER, & CULLEN, *supra* note 27, app. at 51

382. 20 U.S.C. § 1092(f) (2012). The Clery Act requires schools to gather and publish crime statistics so that people know what is happening on their campuses. The Act also requires that institutions of higher education provide information on their policies and services. *See generally* Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (1992), *amended by* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

reporting policy would increase risks to other students because known perpetrators would not be removed from campus.

This Part argues that wide-net reporting policies' purported benefits for the institution are overstated. The benefits are actually unquantifiable and potentially illusory. Moreover, wide-net reporting policies increase the risk of institutional liability in certain ways. There are risks to the institution when employees disregard their reporting obligations to honor students' requests not to report. Disregarding a survivor's desire for privacy raises its own potential claims.

This discussion will illustrate that a comparative assessment of potential liability is pure guesswork. Consequently, liability concerns are not a good reason for schools to maintain wide-net reporting policies. Rather, a school should select the reporting policy that best comports with the principles identified above and the school's aspirations for addressing survivors' needs and treating them with respect.

A. Compliance with Other Laws

Proponents of wide-net reporting policies claim that these policies funnel all disclosures to one person who is knowledgeable about the school's obligations under a variety of other laws,[383] and thereby minimize the opportunity for mistakes. While wide-net policies probably do offer such an advantage, it is likely that the size of this advantage is modest, at best. After all, the same funneling will occur under a more nuanced policy if a student discloses to a designated reporter or requests that a student-directed or confidential employee report to the Title IX coordinator. In addition, there is no problem at all if the student discloses to a student-directed or confidential employee who has no reporting obligations under other laws. An honest assessment should reveal that the funneling

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383. *See* W. Scott Lewis et al., *The Top 10 Things We Need to Know about Title IX (That the DCL Didn't Tell Us)*, NCHERM GROUP, LLC & AXITA 11 (2013) (recommending mandatory reporting because it would be "both impractical and a potential intellectual impossibility" to train employees accurately on the various laws); *see also* Flaherty, *supra* note 40 (reporting that an adviser to educational institutions said, "If everybody's a mandated reporter, it simplifies who's who, and it simplifies the training."); ATIXA, *supra* note 38, at 2 ("As with the other laws, the definition of 'responsible employee' under Title IX would allow the College to treat only some faculty and staff as mandated reporters but with the same possibility of confusion and risk of institutional exposure.").

benefits of a wide-net reporting policy would be lost in only a limited number of instances.

Moreover, campuses can reduce this risk by training employees who have multiple roles to meet their multiple legal obligations. If campuses tell employees their specific legal obligations, the information is not overwhelming or confusing.[384] Campuses can further reduce the risk by having information about employees' obligations available in writing and by encouraging employees with multiple roles to direct questions about their legal obligations to a confidential resource.[385]

Finally, any potential disadvantage associated with the loss of a wide-net reporting policy's funnel must be balanced against the gains that a narrower Title IX reporting policy offers for the application of the other laws. For example, employers are advantaged under Title VII when they have a system that increases reporting overall. Courts look at whether the employer's complaint system is effective when assessing the employer's reasonable care to prevent harassment from happening in the first place.[386] The Supreme Court has said that the employer's negligence can be proven with "[e]vidence that an employer . . . effectively discouraged complaints from being filed."[387]

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384. Employees typically fall into one of four categories: (1) Designated reporters or student-directed employees who are asked to report and can satisfy their obligations under Title IX, the Clery Act, and Title VII by reporting to the Title IX coordinator (who will forward the relevant information to the Clery coordinator or AAEO office); (2) Employees who are campus security authorities (CSAs) under Clery, but not designated reporters, will have obligations to report under Clery (typically de-identified information), but will not report to the Title IX coordinator without the student's request; (3) Employees who are neither CSAs nor designated reporters will only have obligations to report under Title IX and only if the student agrees; and (4) Employees who are designated reporters because they are employment supervisors will have an obligation to report to the Title IX coordinator when workplace harassment is disclosed (but possibly only when the employee is the perpetrator's or victim's supervisor, *see* text accompanying note 349 *supra*) or when it occurred in any context and the survivor asked them to report, and report to the Clery coordinator de-identified information only if they are a CSA. However, all employees might have an obligation to report to the Title IX coordinator, regardless of their categorization, if the disclosure reveals an imminent risk of serious harm to an identifiable individual or if the victim is a minor. *See generally* text accompanying notes 375–77.

385. Questions might also be directed to the Title IX coordinator if the employee is told to inquire solely about the employee's reporting obligation and not to disclose any private information that prompted the call. However, this approach poses the risk of inadvertent disclosures.

386. Vance v. Ball State Univ., 133 S. Ct. 2434, 2451 (2013) (an employer is liable if "the employer was negligent in permitting . . . harassment to occur," and relevant evidence includes "the nature and degree of authority wielded by the harasser").

387. *Id.* at 2453.

Similarly, for administrative enforcement purposes, the Equal Employment Opportunity Commission describes an effective complaint system as one that is "designed to encourage victims to come forward."[388] A more nuanced Title IX reporting policy may increase reporting overall, thereby benefiting an employer in the Title VII context.

B. Subsequent Victims and the Repeat Offender

Administrators may be worried about repeat offenders. They can imagine the institution being sued by a student who was attacked by a perpetrator who never came to the school's attention because the first victim asked a student-directed employee not to report. The second victim most likely would allege that the institution was negligent or violated Title IX.[389] These claims might fail for various reasons, but this Subpart focuses primarily on the difficulty a claimant would have proving that a more nuanced policy was unreasonable (as required for a negligence claim) or clearly unreasonable (as required for a Title IX claim). The Subpart will then illustrate that this repeat-offender scenario also produces liability risks for schools with wide-net policies, and the risks may actually be greater with a wide-net policy.

1. Negligence

The victim of a serial perpetrator would face numerous obstacles bringing a successful negligence suit against an institution for its nuanced reporting policy. In fact, almost every element of the tort—

388. EEOC guidance, *supra* note 347.

389. *See, e.g.*, Ross v. Univ. of Tulsa, 180 F. Supp. 3d 951, 954 (N.D. Okla. 2016). The litigant might also bring a claim against the employee on a negligence theory and against the employer on a respondeat superior theory. This claim would face many of the same doctrinal hurdles outlined in the text, especially with regard to duty. While a litigant might also assert a claim against a state university pursuant to 42 U.S.C. § 1983, that claim would likely fail because there is no constitutional right to be protected from private violence. *See* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989); *see also* Johnson v. City of Seattle, 474 F.3d 634, 641 (9th Cir. 2007) (stating that while the state can affirmatively create a danger and thereby be subject to liability, liability cannot arise from inaction); J.K. v. Ariz. Bd. of Regents, No. CV 06-916-PHX-MHM, 2008 WL 4446712, at *6 (D. Ariz. Sept. 30, 2008) (rejecting that a failure to report a perpetrator's conduct to judicial affairs could constitute "affirmative conduct" giving rise to a state-created danger).

duty,[390] breach,[391] cause-in-fact,[392] and proximate cause[393]—might pose difficulty. Admittedly, making predictions about some of these elements is challenging because the relevant tort doctrine is often convoluted or in flux. Even assuming stable doctrine, it is impossible to predict accurately the likely success of the university's arguments about the effect of its nuanced reporting policy on each element. For example, assume a jurisdiction determines duty by foreseeability.[394] Would a court impute a student-directed employee's knowledge of risk to the university when the university's policy clearly says that a student-directed employee will not communicate to the Title IX coordinator those risks that do not pose an imminent threat of serious harm unless the disclosing student consents? Would the school be absolved of a duty because the second student assumed the risk by attending the university?[395] Would a court find that a university with

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390. *See* Brett A. Sokolow et al., *College and University Liability for Violent Campus Attacks,* 34 J.C. & U.L. 319, 321 (2008) ("Establishing that the school owed a duty to protect its students may be the most significant challenge faced by a plaintiff seeking to bring a negligence action against a college or university for injury caused by a violent student."); *see also* DAN B. DOBBS ET AL., THE LAW OF TORTS § 418 (2d ed. 2015) ("[S]ome courts have been unwilling to require colleges to exercise reasonable care to protect one college student from another, even when the college knows it has admitted a dangerous student.") (citing cases).

391. Thomas v. Board of Trustees, 895 N.W.2d 692, 699 (2017).

392. A report to the Title IX coordinator does not necessarily result in a perpetrator being removed from campus, especially if the first survivor is not a willing participant in the Title IX process. In addition, it might be difficult to establish that the university would have removed the student from campus as opposed to impose some discipline that would have allowed the person to remain on campus.

393. Historically, and sometimes still, courts find proximate cause is lacking when the immediate cause of the plaintiff's harm is the act of a third party criminal. *See generally* DOBBS, *supra* note 390, § 209.

394. Tyler Brewer, *The Restatement (Third) of Torts: Combating Sexual Assaults on College Campuses by Recognizing the College-Student Relationship*, 44 J. L. & EDUC. 345, 352 (2015).

395. Arguably, the student assumes the risk of a student-directed or confidential employee not reporting another student's disclosure to the institution, and the institution is relieved of the duty to act for the student's benefit when there was no report. The Clery Act is based on the idea that the student is a consumer who will notice the level of security provided to students and select a college based upon her preferences. *Cf.* U.S. DEPARTMENT OF EDUCATION, *supra* note 172, at 1-1; Mullins v. Pine Manor College, 449 N.E.2d 331, 336–37 ("[Prospective students and their parents] may inquire as to what other measures the college has taken. If the college's response is unsatisfactory, students may choose to enroll elsewhere. . . .") (imposing obligation to act with reasonable care when college voluntarily assumed duty to provide security). Admittedly, this approach to limiting the institution's duty reminds one of the victim blaming that historically hampered rape victim's recovery, and that feminists convincingly condemned. *See* Martha Chamallas, *Gaining Some Perspective*

a nuanced policy lacks a tort duty for reasons of public policy, e.g., to preserve the college's discretion to adopt the reporting policy it thinks best for its students overall or to respect the privacy of the first victim?[396]

Nonetheless, for purposes of analysis, this Article assumes that a plaintiff could establish duty, damages, cause-in-fact, and proximate cause. Even if this assumption is unrealistic in some states at present, the law might change: institutional liability for third-party criminal conduct has been expanding over time,[397] and the Restatement (Third) of Torts seems likely to continue that trend.[398]

Therefore, this Subpart only analyzes breach. Does a school breach the duty of reasonable care if its policy requires a student-directed employee to honor a student's request not to report an alleged perpetrator and another student is later attacked by the same perpetrator? Breach requires that the defendant failed to exercise the care that a reasonable person would have exercised under like circumstances. Breach rests upon both the foreseeability of the risk and the unreasonableness of the response in light of the risk. While a university's general counsel might feel uneasy that the institution's liability would turn on the jury's determination of breach, a judge could still decide the issue so long as reasonable people could not disagree.[399]

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in Tort Law: A New Take on the Criminal Attack Cases, 14 LEWIS & CLARK L. REV. 1351, 1381 (2010).

396. The Restatement (Third) allows a court to limit the duty of reasonable care for reasons of policy. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7(b) (AM. LAW INST. 2011).

397. Brewer, *supra* note 394, at 388 ("the current trend is to impose a duty upon the college-student relationship"). Yet, today, often the duty still turns on something other than the university-student relationship. *Compare* Nero v. Kansas State University, 861 P.2d 768 (Kan. 1993) (finding the university owed the student staying in its dorm, who was allegedly sexually assaulted by a student the university knew was accused of sexually assaulting another student, a duty based on the obligation of landlord to tenant) *with* Weckhorst v. Kansas State Univ., 241 F. Supp. 3d 1154, 1179–80 (D. Kan. 2017) (finding the university did not owe the student a duty when she was allegedly raped in a fraternity). *See generally* Eric A. Hoffman, *Taking A Bullet: Are Colleges Exposing Themselves to Tort Liability by Attempting to Save their Students*?, 29 GA. ST. U. L. REV. 539, 581 (2013) ("[C]ourts have found that colleges owe their students a duty when the institution has notice of possible harm and the present ability to intervene.").

398. RESTATEMENT (THIRD) OF TORTS, *supra* note 396, at § 40(b)(5) (identifying the school-student relationship as "special" for purposes of giving rise to a duty to act); *id.* cmt. g ("[I]t applies to risks created by the individual at risk as well as those created by a third party's conduct, whether innocent, negligent, or intentional."); *id.* § 3 cmt. g (discussing the foreseeable likelihood of harm).

399. Chamallas, *supra* note 395, at 1380 ("However, even under the

In terms of foreseeability, a reasonable person might not foresee that a student who is alleged to have attacked one student would attack another student. The disclosure by the first victim is unlikely to identify another specific person as a future target. Even an unknown future victim might not be reasonably foreseeable. While repeat offenders exist, most campus perpetrators are not repeat offenders.[400] Research by Lisak and Miller initially suggested that a small number of serial perpetrators committed most of the sexual violence,[401] but research published in 2015 by Kevin Swartout and colleagues challenged that conclusion.[402] Swartout's research found that men who perpetrate rape "across multiple college years" are "a small percentage of campus perpetrators."[403]

In designating a policy, a reasonable actor would also consider other factors that could minimize or eliminate any such risk.[404] These factors might include campus policies and programs that are aimed at preventing sexual assault, as well as campus support services that might lead the survivor to report at a later date. In fact, if a nuanced

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Restatement's approach, courts are still entitled to take a case away from the jury by, for example, determining that the specific precautions taken by defendants were adequate as a matter of law (i.e., no breach of duty) or for lack of causation. Additionally, courts are authorized to declare a policy exception from the duty to exercise reasonable care in "exceptional" cases."). *See, e.g.,* RESTATEMENT (THIRD) OF TORTS, *supra* note 396 at § 7 cmt. j (discussing foreseeability).

400. *See* Kevin M. Swartout et al., *Trajectory Analysis of the Campus Serial Rapist Assumption*, 169 JAMA PEDIATRICS 1148, 1152 (2015).

401. *See* David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists,* 17 VIOLENCE AND VICTIMS 73, 80 (Feb. 2002) ("A majority of the undetected rapists in this sample were repeat offenders. . . . These repeat rapists each committed an average of six rapes and/or attempted rapes and an average of 14 interpersonally violent acts.").

402. Swartout, *supra* note 400 at 1152 ("Many researchers, policymakers, journalists, and campus administrators have assumed that 1 small subgroup of men accounts for most rapes committed on college campuses. Our findings are inconsistent with that perspective."); *see* Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education,* 125 YALE L.J. 2038, 2054 (2016) ("Reassuring as it is to think that a few bad apples commit most campus rapes, recent empirical work has found this conclusion to be seriously overstated numerically and flawed as a focus for policy.").

403. Swartout, *supra* note 400, at 1153. Nor do we know anything about the recidivism rates for behavior that is short of criminal, but would still be considered prohibited conduct under Title IX, such as "tak[ing] sex from another student" because of "coercion or intimidation or willful ignorance." Baker, *supra* note 143, at 777.

404. RESTATEMENT (THIRD) TORTS, *supra* note 396 at § 7(b) (a reasonable person would consider the likelihood of harm "between the time of the actor's alleged negligence and the time of the harm itself").

reporting policy has a *Tarasoff* exception[405]—so that employees have to make a report to the Title IX coordinator regardless of a student's consent if there is an "imminent risk of serious harm"—then an employee's decision not to report suggests that the foreseeability of what happened was, in fact, non-existent or minimal.[406]

Even if the risk to another individual is not so improbable that a reasonable person would ignore it, the employee's action (as dictated by the institution's policy) may still be reasonable. A reasonableness assessment is primarily a cost-benefit analysis. If the risk of repetition is low, a reasonable institution would not adopt costly precautions to prevent it. Cost here includes nonmonetary considerations, such as survivors' loss of autonomy, survivors' decreased wellbeing, and the overall level of safety on campus. As Part II suggested, wide-net reporting policies cause considerable harm.[407] In contrast, a more nuanced reporting policy respects survivors' autonomy (which helps survivors heal), decreases survivors' traumatic distress by eliminating unwanted or unanticipated reporting, and potentially increases the overall reporting of sexual violence. These are all "highly significant interests."[408]

The fact that wide-net policies deter disclosures, whereas narrower policies may increase disclosures, makes nuanced policies arguably safer overall. Institutions need survivors to disclose in order to have any chance of removing serial perpetrators from their campuses or deterring first-time offenders. Institutions also need employees to comply with reporting policies and survivors to cooperate with the investigations if reporting policies are to have their desired effect.[409] A nuanced policy is designed to achieve these

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405. *See Tarasoff*, 551 P.2d at 347.

406. *See supra* text accompanying notes 376–77.

407. *See supra* Part II.

408. *Cf.* The Florida Star v. BJF, 491 U.S. 524, 537 (1989) (noting the importance of "the privacy of victims of sexual offenses; the physical safety of such victims, who may be targeted for retaliation …; and the goal of encouraging victims of such crimes to report these offenses without fear of exposure," although noting these interests did not allow the state to impose tort liability on a newspaper that published the sexual assault survivor's name in violation of a statute, primarily because the First Amendment required a different balance in the context of that case).

409. For a discussion of how employees disregard their reporting obligations under wide-net policies, see *infra* text accompanying note 432. For a case in which the first survivor did not want to participate, *see generally* Ross v. Univ. of Tulsa, 180 F. Supp. 3d 951 (N.D. Okla. 2016). The survivor's cooperation is especially important because survivors sometimes delay their reports, making successful disciplinary proceeding more difficult as evidence becomes compromised. *See also* Gina Maisto Smith & Leslie M. Gomez, *The Regional Center for Investigation and Adjudication: A*

outcomes.

A nuanced reporting policy embodies a reasonable response by the institution and its employees when a student elects not to report. The employee must offer to connect the survivor with resources, provide the survivor with information about how to report, explain that the law prohibits retaliation, and tell the survivor about any third-party escrow system that allows her to preserve evidence.[410] The employee's response, coupled with the institution's acts to minimize risks of sexual violence (such as prevention education, services like safe ride, and/or restricting access to alcohol and fraternities),[411] contribute to the reasonableness of a school's nuanced reporting policy.

Apart from the fact that a nuanced policy is not an unreasonable policy, many institutions also will be protected by discretionary immunity.[412] This defense, which can protect public institutions in many situations,[413] works best when a school has a more nuanced reporting policy. Discretionary immunity exists when the state entity makes "a policy choice among alternatives" and the state entity has the authority to make that policy choice.[414] This type of immunity typically protects the institution, its officers, and its employees who are acting pursuant to it.[415] As a result, discretionary immunity should protect the institution and the employee when the employee (who is not a designated reporter) follows the policy, even if that means following the student's direction not to report after the

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Proposed Solution to the Challenges of Title IX Investigations in Higher Education, 120 PENN. STATE L. REV. 977, 985 (2015) ("There is significant underreporting, both on college campuses and in society at large. When cases are reported, there is often a delay in reporting, which can result in the loss of whatever physical or other forensic evidence may have been available at the time of the incident.").

410. *See supra* text accompanying notes 301–06, 350–52.

411. *See generally* Oren R. Griffin, *A View of Campus Safety Law in Higher Education and the Merits of Enterprise Risk Management*, 61 WAYNE L. REV. 379, 398–401(2016) (discussing risk management strategies including risk avoidance by forgoing particular activities or programs).

412. Discretionary immunity is found in the Federal Torts Claims Act. DOBBS, *supra* note 390, § 336 at 335–37. Many states also recognize discretionary immunity under state law. *Id.* at § 344 at 369–70. *See, e.g.,* OR. REV. STAT. § 30.265(6)(c) (2017).

413. DOBBS, *supra* note 390, § 336 at 335–37.

414. *See* Westfall v. State ex. Rel. Oregon Dep't of Corrections, 324 P.3d 440, 447 (Or. 2014). A university's choice is not preempted by federal law. Not only is OCR's guidance not binding law, but it gives the institution discretion with regard to the contours of its reporting policy. *Id.*

415. DOBBS, *supra* note 390, § 350 at 393–99. *See, e.g.*, *Westfall*, 324 P.3d at 450 ("Once a discretionary choice has been made, the immunity follows the choice. It protects not only the officials who made the decision, but also the employees or agents who effectuate or implement that choice in particular cases.").

employee directly asks the survivor if she wants to report to the Title IX office. Immunity would exist for any harms resulting from the implementation of the policy. But as described below, an institution is not protected by discretionary immunity if an employee follows the student's request not to report and that response violates the school's policy.[416]

Finally, even if a school faces an increased risk of liability by foregoing its wide-net policy, the institution must assess its true exposure in light of the availability of insurance, the existence of damage caps, and the state's law about several liability. With respect to the latter, Ellen Bublick explained, "When jurisdictions do not retain joint and several liability for negligent tortfeasors, comparison of intentional and negligent torts can dramatically reduce rape victims' ability to recover damages from negligent defendants."[417] These considerations make less convincing an institution's concern about potential liability, although they admittedly do not address the human cost of a subsequent victimization.

2. Title IX: Deliberate Indifference "Before" an Assault

The repeat offender scenario could potentially result in a Title IX claim, too. While Title IX claims most frequently arise when an appropriate person at the institution responds to the survivor's report of sexual violence with deliberate indifference,[418] sometimes claims arise when the institution was deliberately indifferent to a survivor's safety *prior to* the assault happening.[419] This type of claim has two variations,[420] both of which might be raised.

One variation would focus on the student-directed employee's failure to report the specific information revealed by the first victim. This claim would face a variety of hurdles. For example, the first student's report must have gone to an "appropriate person."[421] Yet, as

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416. *See infra* text accompanying note 457.

417. *See* Ellen M. Bublick, *Who is Responsible for Child Sexual Abuse? A View from the Penn State Scandal,* 17 J. GENDER, RACE & JUSTICE 297, 303–04 (2014) (citing her own testimony to the Pennsylvania House Judiciary Committee).

418. *Gebser*, 524 U.S. at 290; *Davis*, 526 U.S. at 642–43. The survivor's victimization must also be serious enough to rise to the level of sexual harassment. *See, e.g.*, *Davis*, 526 U.S. at 650.

419. "Prior" claims are still relatively new. Not all courts accept that institutional acts "prior" to the plaintiff's attack can support Title IX liability. *See generally* Lucy B. Bednarek and Darcy L. Proctor, 56 No. 7 DRI For Def. 71 (2014).

420. *See generally* Doe v. Univ. of Tennessee, 186 F. Supp. 3d 788, 788 (M. D. Tenn. 2016).

421. *See* Escue v. N. Okla. Coll., 450 F.3d 1146, 1153 (10th Cir. 2006).

discussed below, an employee is less likely to be an "appropriate person" if the employee is not designated as a responsible employee.[422] In addition, to be deliberately indifferent, the appropriate person must have known of a "substantial risk" of harm to the plaintiff, meaning the prior complaint could not have been too dissimilar, too distant in time, or too vague.[423] If the reporting policy contains a *Tarasoff* exception,[424] then the chance that such facts would exist is rather low. In addition, successful "prior" claims typically rest upon many bad facts, not solely an employee's failure to pass on an earlier report.[425]

The second type of "prior" claim would require that the school had an official policy that rendered the plaintiff more vulnerable to assault and reflected deliberate indifference.[426] The problem with this claim is the requirement of deliberate indifference. Deliberate indifference means the policy is "clearly unreasonable" in light of the known facts.[427] If a narrowly tailored policy is not unreasonable, as described above,[428] then it is not clearly unreasonable either.[429] Even if a nuanced policy were not in accordance with Title IX best practices or the OCR's guidance, that fact alone would not make the institution deliberately indifferent.[430] Rather, in order for a policy to give rise to

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422. *See infra* text accompanying notes 433–53.

423. *See Escue*, 450 F.3d at 1154 (10th Cir. 2006); Doe v. Bradshaw, 203 F. Supp. 3d 168, 185 (D. Mass. 2016) ("the case law is clear that only reliable and unambiguous reports have been deemed sufficient to provide actual knowledge"); Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325, 1346 (M.D. Ga. 2007).

424. *See supra* text accompanying notes 376–77.

425. *See* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1184 (10th Cir. 2007); Ross v. Univ. of Tulsa, 180 F. Supp. 3d 951, 971 (N.D. Okla. 2016); *Doe*, 186 F. Supp. 3d at 788; *Ariz. Bd. of Regents*, 2008 WL 4446712 at *17.

426. *See* Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 290 (1998). For a discussion of deliberate indifference in the context of an official policy, *see Simpson*, 500 F.3d at 1178 (stating that a violation of Title IX exists "when the violation is caused by official policy, which may be a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient"). *See also Doe*, 186 F. Supp. 3d at 788.

427. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 648 (1999).

428. *See supra* text accompanying notes 400–11.

429. Courts adjudicating prior claims have acknowledged the importance of honoring a student's preferences in evaluating whether a school was deliberately indifferent. *See, e.g., Ross*, 180 F. Supp. 3d at 968–69.

430. Numerous cases now establish that an employee's failure to report to the AAEO office, to follow Title IX regulations, or to comply with OCR guidance does not itself establish the institution's deliberate indifference. *See e.g.*, Hayut v. State Univ. of N.Y., 352 F.3d 733, 752 (2d Cir. 2003); Roe v. St. Louis Univ., 746 F.3d 874 (8th Cir 2014); Butters v. James Madison Univ., 208 F. Supp. 3d 745 (W.D. Va. 2016); Karasek v. Regents of the Univ. of Cal., 2016 WL 4036104 at *11 (N.D. Cal. July 28, 2016) ("Failure to adhere to the [2011 Dear Colleague Letter] may be bad policy, but

a successful claim of deliberate indifference, "the need for …[a different policy must be] so obvious."[431] The current national debate about reporting policies indicates no solution is "obvious." Therefore, it would not be deliberately indifferent to adopt any of the policies described in this Article (or to implement that policy choice).

3. Liability Risks Under Wide-Net Policies

If anything, a wide-net policy makes a school *more likely* to be sued successfully when a subsequent victim is attacked. This scenario is possible because well-meaning responsible employees acquiesce to student requests not to file a report with the Title IX coordinator. In fact, anecdotal evidence gathered by this author suggests that many employees, particularly faculty members, disregard their reporting obligations under wide-net reporting policies, claiming that it is unethical to report without the student's consent.[432]

When a responsible employee acts in contravention of the wide-net policy, the institution faces considerable Title IX exposure because the employee is more likely to be viewed as an "appropriate person."[433] The Supreme Court defined an appropriate person as "an

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standing alone it does not constitute deliberate indifference."); Ross v. Univ. of Tulsa, 2015 WL 4064754 *4 (N.D. Okla. Apr. 15, 2015). *But see* Doe 1 v. Baylor Univ., 240 F. Supp. 3d 646, 659–60 (W.D. Tex. 2017) (indicating that non-compliance with administrative guidance can be relevant to the assessment of deliberate indifference, although it generally will not be sufficient on its own). Nor does it establish negligence. As the Eastern District of Tennessee explained in *Doe v. University of the South*, "If the Court were to allow a regulation used in administering a federally-created right to create a state negligence per se claim, it would effectively eviscerate the *Gebser* rule." 2011 WL 1258104 at *14 (E.D. Tenn. Mar. 31, 2011). This reasoning has been followed by a number of courts. *See, e.g.*, Ross v. Univ. of Tulsa, 2015 WL 4064754 at *4 (N.D. Okla. Apr. 15, 2016) ("[a]llowing a Title IX regulatory violation to establish a negligence per se claim is inconsistent with the Supreme Court's holding in *Gebser* that a defendant must act with 'deliberate indifference' in order to subject itself to money damages."); A.J. v. Victor Elementary Sch. Dist., 2011 WL 1005009 at *7 (Cal. Ct. App. Mar. 22, 2011). *But see* Leader v. Harvard Univ. Bd. of Overseers, 2017 WL 1064160 at *7 (D. Mass. Mar. 17, 2017) (noting that violation of regulation can be relevant evidence as to whether the school was negligent).

431. *Simpson*, 500 F.3d at 1178 (citing City of Canton v. Harris, 489 U.S. 378, 390 (1989)).

432. *See* AM. ASS'N. OF UNIV. PROFESSORS, STATEMENT ON PROFESSIONAL ETHICS 2 (2009); s*ee also,* Deamicis, *supra* note 288 (reporting that the campus newspaper included a staff editorial that encouraged RAs to maintain the anonymity of survivors even though the policy required otherwise because "[w]hen a policy doesn't embody the values it's supposed to protect, sometimes it's worth breaking").

433. A wide-net policy also makes it more likely a complaint would reach an appropriate person because the complaint is always supposed to be forwarded.

official . . . with authority to take corrective action to end the discrimination."[434] While some courts have refused to equate a "responsible employee" with an "appropriate person,"[435] increasingly other courts have found that the "responsible employee" designation is a significant factor in assessing whether the employee is an "appropriate person."

An illustrative case is *Wilborn v. Southern Union State Community College*.[436] In *Wilborn*, a woman filed suit against Southern Union State Community College and other defendants for sexual harassment allegedly perpetrated by two teachers.[437] She experienced the harassment when she was the only female in a summer session hosted by the Central Alabama Skills Training Consortium [CASTC].[438] She complained to Ron Brown, the program's case manager. He was not high up in the program's or college's administrative structure.[439] Rather, his job was to recruit participants into the program, determine their eligibility, complete paperwork, enroll them in the program, and "maintain those participants in the program until they complete the program."[440] He did not have the power to select the students who were ultimately enrolled.

Brown was, however, a "responsible employee," in the sense that he had reporting obligations once he learned of sexual harassment. Students were told that "if they felt uncomfortable reporting a problem to either instructor, they could report it directly to . . . Brown. If Brown received a serious complaint, including complaints about sexual harassment, he was obligated to inform [the Training

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434. *See* Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 290 (1998).

435. Plamp v. Mitchell Sch. Dist. No. 17-2, 565 F.3d 450, 458–59 (8th Cir. 2009) (holding guidance counselor was not an appropriate person for purposes of teacher-on-student harassment even though guidance counselor was "required by the sexual-harassment policy to report suspected instances of abuse or harassment to the administration," but recognizing that guidance counselors and teachers might be appropriate persons in some instances); Douglas v. Brookville Area Sch. Dist., 836 F. Supp. 2d 329, 346 (W.D. Penn. 2011) (holding that music teacher was not an appropriate person even though every school employee was required to report cases of suspected child abuse to the principal pursuant to school district policy); *see also* Johnson v. N. Idaho Coll., 2009 WL 3303714, at *1 (9th Cir. Oct. 13, 2009) (unpublished decision) (implying in *obiter* that a counselor at a college who had an obligation to report harassment to the AAEO office was not an appropriate person for purposes of Title IX).

436. 720 F. Supp. 2d 1274 (M.D. Ala. 2010).

437. *Id.*

438. *Id.* at 1283.

439. *Id.* at 1284.

440. *Id.*

Coordinator for CASTC]."[441] Consequently, the court concluded that Brown was an "appropriate person" for purposes of Title IX liability. The court explained:

> To be sure, Brown lacked the power to fire or discipline the alleged perpetrators of the harassment. However, [plaintiff] has offered evidence that Southern Union granted him the power, and imposed the *obligation,* to collect complaints from program participants and report them to Southern Union officials endowed with the power to fire or discipline.[442]

Other courts have similarly relied on the employee's reporting obligations to classify the person as an appropriate person for purposes of Title IX liability,[443] and some of these cases involve lower-level employees, as was the case in *Wilborn v. Southern Union State Community College*.[444] For example, the court denied the school district's motion for summary judgment in *Jones v. Indiana Area School District*,[445] holding that teachers and guidance counselors were "appropriate persons" for purposes of Title IX liability because the school district policy directed complaints of sexual harassment to teachers and guidance counselors, among others.[446] Higher-level administrators have also been considered appropriate persons when they were conduits for reports, even though they themselves lacked

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441. *Id.*

442. *Id.* at 1306.

443. *See* J.K. v. Ariz. Bd. of Regents, No. CV 06-916-PHX-MHM, 2008 WL 4446712, at *13 (D. Ariz. Sept. 30, 2008) (finding that the head football coach and the Executive Director of Academic Success (who was also the Director of the Summer Bridge program for high school students) were appropriate persons because they both "had the authority, and apparently the obligation, to report [the perpetrator's] conduct to Judicial Affairs for possible Code of Conduct violations"); Ross v. Univ. of Tulsa, 180 F. Supp. 3d 951, 967 (N.D. Okla. 2016) (suggesting knowledge of campus police could trigger Title IX liability because, *inter alia*, campus police were designated in the school's policy as proper recipients of a sexual violence report, but noting in *obiter* that the designation of "appropriate person" might not reach all of those who had reporting obligations, including "a low-level official university employee, … an unrelated off-campus entity, or even . . . a professor or counselor); Addison v. Clarke County Bd. of Educ., 2007 WL 2226053, at *3 (M.D. Ga. Aug. 2, 2007) (assuming for purposes of motion to dismiss that school had knowledge of acts because bus driver and bus driver's aide had notice of acts and they were responsible employees).

444. Wilborn v. S. Union State Cmty. College, 720 F. Supp. 2d 1274, 1276 (M.D. Ala. 2010).

445. *See* Jones v. Indiana Area Sch. Dist., 397 F. Supp. 2d 628, 657 (W.D. Penn. 2005).

446. *Id.* at 643.

the power to institute corrective measures.[447]

Courts confronting the issue in the future will probably continue to find that the responsible employee designation is relevant to whether an employee is an appropriate person.[448] Courts discussing Title IX have noted that courts addressing Title VII have already reached this conclusion: "If the employer has structured its organization such that a given individual has the authority to accept notice of a harassment problem, then notice to that individual is sufficient to hold the employer liable."[449] Otherwise the employer might establish an ineffective grievance mechanism and undermine the goal of preventing discrimination.[450]

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447. *See* Jennings v. Univ. of N.C., 482 F.3d 686, 700–01 (4th Cir. 2007) (holding that the university's legal counsel was an appropriate person because the university counsel was "an official responsible for fielding sexual harassment complaints" in case involving students who complained about the soccer coach's sexual harassment of players); Yog v. Tex. S. Univ., 2010 WL 4053706, at *5 (S.D. Tex. Oct. 14, 2010) (holding that the university's compliance officer was an appropriate person, even though the compliance officer simply played a role in the overall process of instituting corrective measures by investigating and reporting the investigation's results to the provost); *see also id.* at *4 ("Courts that have addressed this issue have held that notice given to any employee whom the defendant school has designated to respond to harassment complaints is sufficient to satisfy Title IX's notice requirements.").

448. *See* MacKinnon, *supra* note 402 at 2054.

449. *Yog*, 2010 WL 4053706, at *5 (*citing* Williamson v. City of Houston, 148 F.3d 462 (5th Cir. 1998)). *See also* Massey v. Akron City Bd. of Educ., 82 F. Supp. 2d 735, 744 n. 7 (N.D. Ohio 2000) ("A school also receives notice when notice is given to any employee whom the school has designated to respond to harassment complaints."). For cases discussing this rule in the employment context, *see* Distasio v. Perkin Elmer Corp., 157 F.3d 55 (2d Cir. 1998); *Williamson,* 148 F.3d at 466; Bonenberger v. Plymouth Twp., 132 F.3d 20, 27 n. 7 (3d Cir. 1997).

450. *Yog*, 2010 WL 4053706, at *5 (finding compliance officer, who did not have disciplinary power over harasser, was an appropriate person under Title IX); *cf.* Janet Philibosian, *Homework Assignment: The Proper Interpretation of the Standard for Institutional Liability if We are to Protect Students in Cases of Sexual Harassment by Teachers*, 33 SW. U. L. REV. 95, 112–13 (2003) (discussing the concept of appropriate person in the context of a teacher's sexual abuse of a child) ("Too literal an interpretation of this requirement could easily insulate institutions from liability by allowing them to severely limit the powers of certain supervisory personnel. Many lower courts consider the principal of a school to be an appropriate person within the standard even if the principal lacks the ultimate authority to terminate a teacher's employment."). In fact, some courts have already said that reporting obligations are determinative for identifying "management-level employees" in the Title VII context. Management-level employees impute knowledge to the employer. As the Ninth Circuit explained, management-level employees include supervisors without supervisory authority over the harassed or the harasser if they have "an official . . . duty to act as a conduit to management for complaints about work conditions," including the harassment. Swinton v. Potomac Corp., 270 F.3d 794, 804–05 (9th Cir. 2001).

Using the employer's designation of responsible employees to determine "appropriate persons" also makes sense because the Supreme Court's test for an appropriate person simply does not work well in the context of a large public institution of higher education. As noted above, few officials have the unilateral "authority to take corrective action to end the discrimination."[451] In addition, at many institutions, everyone, whether the president or a faculty or staff member, can initiate the processes that may lead to corrective action (e.g., an expulsion through the student conduct code process) or interim measures (e.g., academic accommodations arranged by the appropriate office), thereby necessitating a better criteria for differentiating between employees who are, and are not, appropriate persons.[452] Consequently, a court should identify "appropriate persons" by using the university's own designation of "responsible employees" (i.e., those employees who must report prohibited conduct to the Title IX coordinator or AAEO officer). Such an approach aligns legal responsibility with the realities of a modern public university.

Relying on the university's own designation of a "responsible employee" also has the advantage of reinforcing the Supreme Court's pronouncement that Title IX liability should not rest on constructive notice or vicarious liability.[453] Because Congress and OCR have given institutions discretion to identify who are the "responsible employees," the institution has control over, and should have responsibility for, its choices. The institution can train and monitor

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451. *See supra* text accompanying note 314. The test for determining who is an appropriate person can be found in Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

452. That is the reality at the University of Oregon.

453. The rationale behind this formulation was summarized by the Ninth Circuit:

> In *Gebser,* the Court held that principles of *respondeat superior* and constructive notice are inadequate to impose Title IX liability on a school district for a teacher's sexual abuse of a high school student. Noting that Title IX's express enforcement scheme, termination of federal funding, requires "an opportunity for voluntary compliance" before suspending or terminating funding, *Gebser* held that the judicially implied private right of action similarly should not impose liability "without regard to the recipient's knowledge or its corrective actions upon receiving notice." Monetary damages premised on constructive notice or *respondeat superior* for sexual harassment, the Court held in *Gebser,* would entail a risk that "the recipient of funds was unaware of the discrimination." Rather, in cases like this one *that do not involve official policy of the recipient entity,* . . . a damages remedy will not lie under Title IX unless an official who . . . has authority to address the alleged discrimination and to institute corrective measures . . . has actual knowledge of discrimination . . . and fails adequately to respond.

Mansourian v. Regents of Univ. of Cal., 602 F.3d 957, 966–67 (9th Cir. 2010) (citing *Gebser*, 524 U.S. at 285, 287, 289) (internal citations omitted) (emphasis in original).

those persons whom it selects as responsible employees, and therefore "appropriate persons," for purposes of Title IX.

While wide-net policies make it more likely that well-intentioned employees who do not report are appropriate persons,[454] these policies also make it more likely that the failure to report would be deemed "deliberately indifferent." Although it should always be relevant that the employee was trying to respect the first victim's privacy,[455] it would also be relevant that the employee was violating the institution's reporting policy.[456] Moreover, the employee's violation of the institution's policy would mean that the institution probably could not successfully rely on discretionary immunity to defeat a negligence claim.[457] The violation also makes it more likely that there would be a finding of breach if a negligence claim were brought.[458]

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454. It is unclear how a court would treat a student-directed or confidential employee who only had a reporting obligation when the student wanted the employee to report. It is possible that a court would find the reporting obligation sufficient to also designate such a person an appropriate person. That conclusion, however, would require that the student asked the employee to report, something that would not have happened in the scenario being discussed. *See also* note 433 *supra*.

455. An employee's effort to accommodate a student's request for confidentiality can mean the employee's response was not "clearly unreasonable." *See*); Roe v. St. Louis Univ., 746 F.3d 874, 883 (8th Cir 2014) (citing *Gebser*, 524 U.S. at 291–92) (noting that the student's "expressed desire for confidentiality" meant that the "alleged failure to comply with the [Title IX] regulations" and notify the Title IX coordinator "does not establish actual notice and deliberate indifference"); *Butters*, 208 F. Supp. 3d at 755 (granting summary judgment to the university when student complained about the university's refusal to move forward with the process without the student's involvement because the school wanted to give the student some control over the process).

456. *See* Takla v. Regents of Univ. of California, 2015 WL 6755190, *6 (C.D. Cal. Nov. 2, 2015) (allowing claim alleging violation of university policy to survive a motion to dismiss). *But see* Oden v. Northern Marianas College, 440 F.3d 1085, 1089 (9th Cir. 2006) (school's nine-month delay in convening a hearing on the plaintiff's Title IX sexual harassment allegations, in violation of the school policy, was insufficient to create a triable issue of fact on deliberate indifference when no evidence suggested that delay was more than "negligent, lazy, or careless" and did not prejudice plaintiff); Butters v. James Madison Univ., 208 F. Supp. 3d 745, 755 (W.D. Va. 2016) (affirming grant of summary judgment because, *inter alia*, the school's failure to follow its own policy and have a more "victim-friendly" process was not dispositive of whether the school's response was "clearly unreasonable").

457. *See, e.g.*, Westfall v. State ex. Rel. Oregon Dep't of Corrections, 324 P.3d 440, 449 (Or. 2014)

458. *See, e.g.*, Cole v. Multnomah Cty., 592 P.2d 221, 224 (Or. Ct. App. 1979) (defendant's own rule admissible on issue of negligence); Jett v. Ford Motor Co., 183 Or. App. 260, 266–69 (2002), *rev'd on other grounds*, 335 Or. 493 (2003) (a company's internal safety manual was "relevant to the reasonableness of plaintiff's conduct in getting out of the delivery truck without first shifting into 'park' and shutting off the

C. Original Victims and Reporting Failures

As just discussed, wide-net reporting policies create liability risks for institutions when well-meaning employees follow a survivor's request and do not report to the Title IX office in violation of the institution's policy. The prior Subpart analyzed the institution's exposure when a perpetrator attacks a subsequent victim and that victim sues. Now this section considers, instead, a claim by a victim who alleges that the employee's failure to report her attack hindered her education or harmed her in some other way. While wide-net and nuanced reporting policies alike create liability risks for an institution when a survivor wants an employee to report and the employee does not do so, the risks are arguably greater with a wide-net policy.

Schools face obvious risks from three types of employees regardless of the type of reporting policy they have: those who are malfeasant, inept, or ignorant. Reporting obligations do not guarantee that employees will actually comply with their obligations and report, as both case law and news reports reveal.[459] Yet most of the problems arise because employees are malfeasant, not because they are inept or ignorant. Employees who are willing to comply with a reporting policy are just as able to comply with a nuanced policy as a wide-net policy. The actions required by a nuanced policy are not difficult and the persons who are subjected to it are not usually inept. Moreover, more nuanced reporting policies have the advantage of funneling students who know they want to report to designated reporters. The reduced number of responsible employees means that they can be exceptionally well-trained and monitored to reduce the possibility of malfeasance, ineptitude or ignorance. This benefit is important because these employees are most likely to be appropriate

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ignition"); RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM. § 13 cmt. f (AM. LAW INST. 2010) ("[E]ven if [evidence of internal standards] is admissible, it does not set a higher standard of care for the actor; rather, it merely bears on the ultimate question of whether the actor has exercised reasonable care.").

459. *See, e.g.*, *Statement to Dallas Morning News Regarding Sexual Assault Not Reported to Judicial Affairs*, BAYLOR UNIV. (Nov. 11, 2016), http://www.baylor.edu/thefacts/news.php?action=story&story=174834. Title IX itself does not deter employees from disregarding their obligations under wide-net reporting policies because employees face no liability under Title IX. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 257 (2009) ("Title IX reaches institutions and programs that receive federal funds . . . but it has consistently been interpreted as not authorizing suit against school officials, teachers, or other individuals . . . .").

persons.

Although a narrowly tailored policy would not protect an institution when a designated reporter does not report or when a student-directed or confidential employee fails to report after a student asks the employee to do so, [460] it should better protect the institution in one particular non-reporting situation: when the student asks the employee not to report, but the student later misremembers and asserts that she asked for a report to be made[461] and that the employee's failure to report harmed her. Under a narrower policy, the factual question—what did the student request—will determine liability. Under a wide-net policy, the resolution of the factual question in the school's favor would be

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460. In this context, an institution must avoid misfeasance and nonfeasance because of the duty undertaken regardless of the type of policy. *See, e.g.*, Hayut v. State Univ. of N.Y., 352 F.3d 733, 755 (2d Cir. 2003) (noting in *dicta* that school may have been liable for duty undertaken when the plaintiff alleged that she was harmed by the defendants' failure to immediately notify the AAEO office of her sexual harassment complaint, expeditiously investigate it, and mitigate any harm from the harassment, but that the school did not voluntarily undertake that duty and Title IX regulations did "not impose a duty on each and every school official within that institution to report sexual harassment allegations to the designated AAO."); BARRY A. LINDAHL, 1 MODERN TORT LAW: LIABILITY AND LITIGATION § 3:81 (2d ed. June 2016 update) ("One who volunteers to act, although under no duty to do so, is thereafter charged with the duty to exercise due care and is liable for negligence in connection therewith . . . . The voluntary undertaking doctrine applies to governmental and nongovernmental entities."); *see also* Peterson v. Multnomah Cty. Sch. Dist. No. 1, 668 P.2d 385, 393 (Or. App. 1983); RESTATEMENT (SECOND) OF TORTS § 323, § 324A (AM. LAW INST. 1965) (describing negligent performance of undertaking to render services, and describing liability to third person for negligent performance of undertaking); *cf.* Mullins v. Pine Manor College, 449 N.E.2d 331, 336 (duty to provide security at college was voluntarily undertaken). For liability, the Restatement requires that the undertaking increased the risk of harm to the plaintiff or the plaintiff relied on it. RESTATEMENT (SECOND) OF TORTS §§ 323, 324A (AM. LAW INST. 1965). The latter might exist if the undertaking is part of a published policy and the plaintiff expected the university employee to comply with the policy. Without reliance, the increased risk generally must not be from simply failing to eliminate a preexisting risk. *See* Regents of Univ. of Calif. v. Superior Court, 193 Cal. Rptr. 3d 447, 466–67 (Cal. Ct. App. 2015).

461. A survivor's traumatic distress sometimes impairs a survivor's cognition and memory. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS ("DSM") 271–80 (5th ed. 2013) (recognizing threatened and actual sexual violence can cause posttraumatic stress disorder (PTSD), and symptoms of PTSD may include changes in cognition and mood as well as difficulties with concentration, emotional regulation, and sleep); *see also* THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 2 (2014) ("Also, the trauma that often accompanies a sexual assault can leave a victim's memory and verbal skills impaired—and without trauma-sensitive interviewing techniques, a wom[a]n's initial account can sometimes seem fragmented.").

irrelevant. The employee would still have been obligated to report and the employee's violation of the employer's internal policy would typically constitute evidence of negligence.[462]

Although a narrowly tailored policy affords the advantages described in this section, administrators may still prefer a wide-net policy *because* it chills reporting, and thereby decreases the chance of a successful Title IX or negligence claim. An institution needs notice of a complaint through a responsible employee before a survivor can accuse it of responding negligently, acting with deliberate indifference, or violating OCR guidelines. Fewer complaints mean a school has to provide fewer services to remediate harm and employ fewer people to process Title IX complaints.[463] Fewer reports can also lead to the misimpression that a campus is safe,[464] another benefit for the institution. While fewer disclosures may benefit the school for these reasons, no school should be permitted to have as its objective the chilling of disclosures. That result is so contrary to the spirit of Title IX that OCR should make clear that a reporting system is unacceptable if it is designed to suppress disclosures and reporting.

D. Reporting Against the Student's Wishes

Wide-net reporting policies also give rise to a risk of liability when an employee reports against the survivor's wishes. That scenario is much more likely to occur when a school has a wide-net reporting policy. There are various claims a survivor might assert in her lawsuit against her college or university, including a Title IX official policy claim, a Title IX retaliation claim, and a privacy claim.

These claims would be novel in this context, but a zealous attorney might find all of them viable. Courts might agree that they have merit in light of the harm to survivors from mandatory reporting. Therefore, these claims should not be ignored when an institution is trying to assess what type of policy minimizes its

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462. *See supra* note 458.

463. *See* Jill Castellano, *Campus Sexual Assault Can Cost Universities Millions*, FORBES, June 18, 2015 (noting that those with positions subordinate to the Title IX coordinator are paid approximately $83,000 a year and that Penn State's Title IX coordinator, an investigator, a prevention and education coordinator, and a deputy coordinator, will easily cost the school "a six figure value").

464. *See* Corey Raburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, *in* AM. PSYCHOLOGICAL ASS'N, A COLLECTION OF FORENSIC PSYCHOLOGY ARTICLES 16 (2015) ("[I]f a school stands out as having a high rate of sexual assault versus peer schools, it risks attracting fewer students and suffering long-term reputational damage.") (suggesting that schools have substantially undercounted campus sexual assault).

exposure to liability.

While these claims further complicate any overall assessment of the benefit of wide-net policies, they are also important to consider for reasons beyond their potential to result in a judgment against the institution. The fact that these claims involve violations of privacy and equality means that they should influence the contours of institutions' reporting policies regardless of whether the arguments are legally sufficient to result in legal liability. A policy that has a disproportionately negative impact on female students, for example, should not be maintained. In addition, the fact that the following arguments have policy implications as well as legal implications means that private institutions of higher education should take heed of them, even though private schools are not subject to constitutional prohibitions.

1. Title IX Official Policy

Survivors might argue that an institution's sweeping definition of "responsible employee" violates Title IX. If the institution's reporting policy takes away survivors' autonomy, exposes them to retaliation, causes them distress from a loss of control, and/or threatens their safety, each of which can undermine their ability to heal and partake in their education, then the policy arguably violates Title IX.[465] Moreover, a wide-net reporting policy may cause colleges and universities to treat survivors of sexual assault and domestic violence, most of whom are women,[466] differently from other campus victims of crime.[467] Males, who tend to be victimized outside of these particular crime categories, may obtain a level of privacy and autonomy denied to female victims of crime.[468]

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465. After all, Title IX says, "No person in the United States shall, on the basis of sex, be excluded from participation in, *be denied the benefits of*, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a) (2016) (emphasis added).

466. *See supra* note 45.

467. *See supra* text accompanying note 90.

468. This type of discrimination might be amenable to a civil rights claim for violation of the U.S. Constitution or a state constitution if the institution is a state entity. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 258 (2009) (finding "Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights"); *see also, e.g.*, R.I. GEN. LAWS § 16-38-1.1 (2016). Admittedly, Title IX demands "gender salience" in a way that may not be constitutionally problematic, unlike with race-based distinctions. *See* Katharine K. Baker, *Sex Equality, Gender Injury, Title IX, and Women's Education in the United States* 32

Such a claim might be raised by a survivor who talks to a trusted employee on campus only to find out later that the employee had a reporting obligation. Even a survivor who has not yet disclosed her victimization to anyone on campus might bring a suit alleging that the school's policy violates Title IX. After all, the policy can eliminate her opportunity to talk to a campus confidant and get connected to institutional support and services. These two types of survivors, although situated differently, both find that the institution's wide-net reporting policy undermines their ability to reengage with their education.

Because these effects flow directly from the school's wide-net reporting policy, survivors could claim a Title IX violation based on the school's "official policy."[469] The Supreme Court has said that a school's "official policy" can give rise to Title IX liability,[470] and such a claim does not require prior notice to an "appropriate person" and an opportunity to cure.[471] Nancy Cantalupo, one of the foremost

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(draft on file) ("In both Title IX and constitutional sex equality jurisprudence, gender salience is not only consistent with, it may be necessary for, equality."). In addition, a plaintiff's claim of gender discrimination in violation of the U.S. Constitution would have to establish intentional discrimination, that is, that the institution's policy was motivated, at least in part, by a plaintiff's protected status. Bator v. State of Hawaii, 39 F.3d 1021, 1028 n.7 (9th Cir. 2004); Serrano v. Francis, 345 F.3d 1071, 1082 (9th Cir. 2003) (citing Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998)); Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1134 (9th Cir. 2003). While administrators may adopt wide-net reporting policies for reasons unrelated to gender (whether a misinformed belief that they are helping survivors or a desire to deter reporting), gender is arguably involved too because the institution is responding to a federal law that exists to remedy sex and gender-based discrimination. This argument would be similar to the argument that claimants use when they claim reverse gender discrimination, with mixed success, under Title IX for erroneous outcome claims. *See, e.g.*, Neal v. Colorado State Univ.–Pueblo, NO. 16-cv-873-RM-CBS, 2017 WL 633045, *9–13 (D. Colo. Feb. 16, 2017) (discussing such a claim and the courts' treatment of it). A civil rights claim would admittedly have many hurdles, including the need to convince a court that the Department of Education's view of equality as reflected in its Title IX guidance is unconstitutional. *See Sex Equality, Gender Injury, Title IX, and Women's Education in the United States*, *supra*, at 26–27 (discussing cases, including Cohen v. Brown Univ. I, 991 F.2d 888, 896–97 (1st Cir. 1993) and Cohen v. Brown Univ. II., 101 F.3d 155, 172–73 (1st Cir. 1996), where the court deferred to the agency in its analysis of equal protection). Yet, because a restrictive reading of the guidance arguably removes choice from victims, and courts reconciling Title IX and equal protection have been keen to increase victims' choice, there might be less judicial deference to the executive branch. *Sex Equality, Gender Injury, Title IX, and Women's Education in the United States*, *supra*, at 27–28.

469. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

470. *Id.*

471. Mansourian v. Regents of Univ. of Calif., 594 F.3d 1095, 1099, 1103–06 (9th Cir. 2010).

academic experts on universities' Title IX obligations to address sexual violence, has advanced a similar argument in the context of school policies that require referrals to law enforcement.[472] Her argument applies with equal force to mandatory reporting within an institution. She said:

> 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. . . . Differential treatment without a reasonable justification falls under the definition of discrimination. That those infantilized in this manner are mainly women and girls makes mandatory referral proposals particularly contrary to Title IX's purposes.[473]

Schools expose survivors to harm when they turn a disclosure into either an involuntary report to law enforcement or an involuntary report to the Title IX office. Both scenarios can support a Title IX official policy claim.

2. Title IX Retaliation

A survivor may also have a retaliation claim when her private information is forwarded against her will to the Title IX coordinator.

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472. Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L. J. F. 281, 291 (2016).

473. *Id.* at 291–92 (footnote omitted).

In *Jackson v. Birmingham Board of Education*, the Supreme Court explained that retaliation for speaking out against sex discrimination is a form of intentional sex discrimination, actionable under Title IX for damages.[474] As the Supreme Court said, "If recipients were permitted to retaliate freely, individuals who witness discrimination would be loath to report it, and all manner of Title IX violations might go unremedied as a result."[475] The Court explained that the entire Title IX system depends upon reporting because the institution needs "actual notice" of the discrimination before it is obligated to address it.[476] The Court concluded, "If recipients were able to avoid such notice by retaliating against all those who dare complain, the state's enforcement scheme would be subverted."[477]

Under the Supreme Court's reasoning, mandatory reporting should be seen as retaliation. It is punitive to tell a student that her disclosure to almost any employee on campus will be forwarded to the Title IX office for a potential investigation, even against her will. Such a policy discourages survivors from coming forward and exploring how to obtain support and resources from the school and how to formally report to the school when the survivor is ready.[478]

In fact, the way in which mandatory reporting policies play out for survivors satisfies the prima facie elements of a retaliation claim. The prima facie case of retaliation requires showing that the plaintiff "engaged in protected activity," the plaintiff "suffered an adverse action," and "that there was a causal link between the two."[479] A protected activity includes acts falling short of a formal complaint

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474. 544 U.S. 167, 171 (2005).

475. *Id.* at 180 (citing Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969)).

476. *Id.* at 181 (citing *Gebser*, 524 U.S. at 288–90).

477. *Id.*

478. Scholars have argued that even the act of revealing the complainant's name can constitute retaliation in the Title VII context. *See generally, e.g.*, Jamie Darin Prenkert, Julie Manning Magid, Allison Fetter-Harrott, *Retaliatory Disclosure: When Identifying the Complainant is an Adverse Action*, 91 N.C. L. REV. 889 (2013).

479. Emeldi v. Univ. of Or., 673 F.3d 1218, 1223 (9th Cir. 2012) (citing Brown v. City of Tucson, 336 F.3d 1181, 1192 (9th Cir. 2003) (following the Title VII approach to retaliation when determining Title IX retaliation claims)); Doe v. Univ. of Tennessee, 186 F. Supp. 3d 788, 809 (M. D. Tenn. 2016) (citations omitted) ("[I]n order to establish a prima facie case of Title IX retaliation, a plaintiff must show that 1) she engaged in protected activity under Title IX by complaining about Title IX discrimination; 2) this activity was known to the defendant; 3) the defendant, thereafter, took an adverse action against her; and 4) there was a causal connection between the protected activity and the adverse action.").

about discrimination.[480] Revealing gender-based violence to a staff or faculty member, especially if the student is entitled to supportive measures regardless of a formal report,[481] should qualify as a protected activity.[482] Adverse action is defined as action that "well might have dissuaded a reasonable [person] from making or supporting a charge of discrimination."[483] Consequently, mandating that an employee report to the Title IX coordinator without a victim's consent should qualify as adverse action,[484] especially given the

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480. *See* LeGoff v. Trustees of Boston Univ., 23 F. Supp. 2d 120, 128 (D. Mass. 1998) (citing authorities)*; see also* 2013 Dear Colleague Letter, *supra* note 127, at 2. ("[O]nce a student, . . . complains formally or informally to a school . . . the recipient is prohibited from retaliating . . . .").

481. WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, PREVENTING AND ADDRESSING CAMPUS SEXUAL MISCONDUCT: A GUIDE FOR UNIVERSITY AND COLLEGE PRESIDENTS, CHANCELLORS, AND SENIOR ADMINISTRATORS 12 (Jan. 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Documents/1.4.17.VAW%20Event.Guide%20for%20College%20Presidents.PDF; WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, SAMPLE LANGUAGE FOR INTERIM AND SUPPORTIVE MEASURES TO PROTECT STUDENTS FOLLOWING AN ALLEGATION OF SEXUAL MISCONDUCT 1 (Sept. 2014), https://www.justice.gov/ovw/page/file/910296/download (discussing supportive measures).

482. Admittedly, when a student talks to an employee at the institution about the student's own victimization, with the intent to explore how to report or get resources and thereby take advantage of Title IX protections, the student's action falls somewhere between the classic participation and opposition frameworks articulated by the courts. *See generally* Deborah L. Brake, *Retaliation in the EEO Office*, 50 TULSA L. REV. 1, 9–11 (2015) (describing the participation and opposition frameworks). Yet, a court might find that such a conversation is a protected activity, especially because "[c]ourts construe the 'protected activity' requirement broadly." Gregory C. Keating et al., *Responding and Preventing Whistleblower and Retaliation Claims*, SU004 ALI-CLE 1191 (2012); s*ee also* Pereda v. Brookdale Senior Living Communities., Inc., 666 F.3d 1269, 1275–76 (11th Cir. 2012) (finding a pre-eligibility request for post-eligibility maternity leave constituted protected activity under the FMLA because, *inter alia*, the finding would "honor the purpose for which FMLA was enacted"); *id.* at 1276 ("an employee need not be currently exercising her rights or currently eligible for FMLA leave in order to be protected from retaliation"); Hutson v. Covidien, Inc., 654 F. Supp. 2d 1014, 1023–24 (D. Neb. 2009) (permitting an employee's claim for retaliation to proceed when he sought accommodations although he did not have qualifying disabilities under the ADA).

483. *Emeldi*, 673 F.3d at 1225 (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)).

484. *See* Annaleigh E. Curtis, *Ignorance, Intent & Ideology: Retaliation in Title IX*, 40 HARV. J. L. & GENDER 333, 362 (2017) ("It is entirely possible, even likely, that significant portions of what victims of assault and harassment experience following reporting is experienced as retaliatory. Far from being an illusory experience, it probably *is* retaliatory, but to see it as retaliatory, we must abandon the singular focus on individual, simplistic ideas of causation and intent that currently dominate the legal landscape.").

empirical evidence that suggests such policies dissuade some survivors from reporting.[485] In short, the protected activity (talking about the victimization, perhaps to access supportive measures or to learn of reporting options) causes the adverse action (the automatic report to the Title IX coordinator against the victim's will).[486]

The problem for a plaintiff, however, is that a defendant need only show that it had some non-retaliatory reason for the action.[487] The plaintiff must then prove that the defendant's reason is pretextual.[488] As Annaleigh Curtis pointed out, it is unclear what the plaintiff must establish to prove pretext in the Title IX context. [489] Curtis argues that if courts follow the Supreme Court's recent Title VII precedent,[490] Title IX plaintiffs will be disadvantaged because they will have to show that "the desire to retaliate (a strong version of intent) [was] the but-for cause of the adverse action."[491] Yet courts may instead follow the analysis for establishing pretext in "status-based" discrimination cases: "that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives for the decision."[492]

If mixed-motive intent suffices, or if courts adopt Curtis' proposed strict liability test,[493] then victims of mandatory reporting should have an easier time establishing a retaliation claim. Yet a survivor may succeed even if courts require a strong version of intent, e.g., the action was taken for the purpose of retaliation. After all, an institution may prefer its wide-net reporting policy *because* it discourages reporting.

Why would an institution want to discourage reporting? For the reasons mentioned above.[494] A survivor can bolster her theory that the wide-net reporting policy is meant to discourage reporting if campus employees are not required to report most other types of

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485. *See supra* text accompanying notes 133–34, 147–61.

486. *Emeldi*, 673 F.3d at 1223 (identifying causation as the third element of the prima facie case).

487. Curtis, *supra* note 484, at 340.

488. *Id.* at 339.

489. *Id.* at 340.

490. *See generally* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

491. Curtis, *supra* note 484, at 341 (citing *Nassar*, 133 S. Ct. at 2528).

492. *Id.* at 342 (quoting *Nassar*, 133 S. Ct. at 2523). Curtis argues that courts applying Title IX need not follow the approach adopted for Title VII because of differences in statutory language and statutory purpose.

493. Given that victims experience the institution's response as retaliation, Curtis suggests courts adopt a standard of strict liability and not let active ignorance and good motives shield the institution from liability. *Id.* at 359–60.

494. *See supra* text accompanying notes 463–64.

crime, wrongdoing, or student-disclosed victimization against the victim's wishes,[495] or if the institution lacks evidence to show that its wide-net reporting policy achieves any legitimate end.

3. Privacy/42 U.S.C. § 1983[496]

Wide-net reporting policies have serious privacy implications. Lord Hoffmann, of the United Kingdom's House of Lords, noted that human rights law protects the disclosure of private information because privacy is "an aspect of human autonomy and dignity."[497] The U.S Supreme Court, too, has recognized "the individual interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions."[498] Of course, the two aspects of privacy mentioned by the Court are intertwined. As Khiara Bridges observed, "[W]hen an individual's

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495. *See, e.g.*, UO ANNUAL CAMPUS SECURITY AND FIRE SAFETY REPORT 19 (2016) ("Required Reporters"). Clery reporters have an obligation to report Clery crimes, but employees who are not Clery reporters do not have the same obligation. *See* HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, *supra* note 172, chap. 4. The Clery Act does not require all employees to notify the school even of an emergency, despite the fact that it requires the school to give an emergency notification upon confirmation of the threat. *Id.* at chap. 6.

496. Federal law allows a claim for damages when an individual is deprived of "any rights, privileges, or immunities" under the U.S. Constitution or federal law by a person acting under color of state law. 42 U.S.C. § 1983 (2016). The Eleventh Amendment protects state entities from suit, *see* U.S. CONST. amend. XI, and this extends to a state educational institution. *See* Hagel v. Portland State Univ., 237 Fed. Appx. 146, 147–48 (9th Cir. 2007) (citing Rounds v. Or. State Bd. of Higher Educ., 166 F.3d 1032, 1035 (9th Cir. 1999) ("[Portland State University] is an arm of the state of Oregon and, therefore, immune from suit under the Eleventh Amendment.")). However, the Eleventh Amendment "does not bar suits for prospective injunctive relief against individual state officials acting in their official capacity," Pittman v. Or. Emp't Dep't, 509 F.3d 1065, 1071 (9th Cir. 2007) (citing *Ex Parte* Young, 209 U.S. 123, 156–57 (1908)), or for damages against state officials in their *personal* capacity. *See* Hydrick v. Hunter, 500 F.3d 978, 987 (9th Cir. 2007) (citations omitted). Nonetheless, employees are protected by qualified immunity so long as their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (citations omitted).

497. *See* Campbell v. MGN Ltd., [2004] 2 AC 457, ¶50 (Lord Hoffmann).

498. Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983) (quoting Whalen v. Roe, 429 U.S. 589, 599 (1977)) (finding privacy was implicated when defendant forced plaintiff to reveal facts about her sexual history to an investigator who was probing the validity of the plaintiff's claim that a fellow employee at a state prison had sexually assaulted and molested her); *see also* Jennings v. Univ. of N.C., 482 F.3d 686, 702 (4th Cir. 2007) (dismissing privacy claims because coach did not require plaintiff to disclose private information related to her sex life nor did he invade school records to find out such information).

informational privacy is nonexistent or jeopardized, her ability to make autonomous decisions is similarly diminished."[499]

Supreme Court precedent suggests the viability of a privacy claim for survivors subjected to a wide-net reporting policy. In *Whalen v. Roe*, the Supreme Court discussed both aspects of privacy in connection with the state's requirement that a copy of a drug prescription for a Schedule II drug be automatically reported to the state health department when the prescription was filled.[500] In that case, the Court ultimately rejected the claim that a constitutional violation occurred, concluding that the state statute did not sufficiently infringe the plaintiffs' liberty interests.[501] Although evidence showed that mandatory reporting deterred some people from getting their medication, the Court cited the remaining 100,000 prescriptions per month that suggested the regulation was not depriving the public of needed drugs.[502]

Whalen is relevant for survivors subjected to mandatory reporting policies at state institutions of higher education. Courts have already cited *Whalen* when evaluating the constitutionality of state actors' inquiries into sexual matters. For example, when a police department probed the plaintiff about a prior affair and then refused to hire her based on the information she disclosed, the police department's actions implicated both aspects of privacy.[503] Other courts have found that the constitutional right to privacy "is implicated when an individual is forced to disclose information regarding personal sexual matters."[504] All of this suggests that a student might have a

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499. KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 150 (2017). Some commentators have also identified an individual interest in preventing the collection of private information, regardless of the risk that the information will be divulged, because the mere collection can itself be invasive and demeaning, especially if the person subjected to collection is already marginalized. *See, e.g.*, *id.* at 162–69.

500. Whalen v. Roe, 429 U.S. 589, 598–600 (1977). The form contained information about "the prescribing physician; the dispensing pharmacy; the drug and dosage; and the name, address, and age of the patient." *Id.* at 593.

501. *Id.* at 600 (finding the legislation did not "pose a sufficiently grievous threat to either interest to establish a constitutional violation").

502. *Id.* at 602–03.

503. *Thorne*, 726 F.2d at 468.

504. Eastwood v. Dep't of Corr. of State of Okla., 846 F.2d 627, 629–31 (10th Cir. 1988); *cf.* United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) (footnote omitted) (noting that "medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection"). One author states, "Although the Supreme Court has never announced definitively that a right to informational privacy exists, the circuits have trudged ahead and recognized the right." BRIDGES, *supra* note 499, at 158.

Fourteenth Amendment Due Process claim,[505] although other types of privacy claims might also exist.[506]

Yet some obvious obstacles might inhibit a successful privacy claim. First, the right to privacy in this situation is unclear. One court has expressly rejected a privacy claim in the context of a school's effort to address sexual harassment. In *Nicole M. v. Martinez Unified School District,* the principal was protected by qualified immunity when she "encouraged plaintiff to disclose the incidents and perpetrators, promised to keep the conversation confidential, and then failed to do so."[507] Others at the school, including the harasser, learned about the disclosure.[508] The principal was protected by

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505. *Whalen* was a Fourteenth Amendment Due Process claim. *See Whalen*, 429 U.S. at 603–04.

506. Depending upon the facts, a student might be able to allege a privacy tort, *see* RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977) (intrusion into seclusion); *id.* at § 652D (publicity given to private facts), or a claim for intentional infliction of emotional distress. However, unlike England, many states in the U.S. do not recognize the claim of unauthorized disclosure of personal information. *See* Campbell v. MGN Ltd, [2004] 2 AC 457, ¶¶ 12–14, 21–22 (Lord Nicholls of Birkenhead).

It is unlikely that mandatory reporting violates FERPA, at least in the traditional sense. Individuals in the Title IX office would ordinarily be considered "school officials" under FERPA with the requisite need to know—i.e., "a legitimate educational interest." 34 C.F.R. § 99.31(a)(1)(i)(A) (2015). In addition, although FERPA broadly defines "education records" to include all records directly related to a student and maintained by the educational institution, 34 C.F.R. § 99.3 (2015), an oral communication by a student to an employee would not be an education record unless it merely repeats information contained in a record. Even if a staff or faculty member recorded a student's disclosure in writing as a memory aid, that information would fall within the exception for sole possession notes. *See* 34 C.F.R. § 99.3 (2015). *See also infra* note 516. However, a plaintiff might argue that a mandatory reporting policy violates the section of FERPA that says, "No student shall be required, as part of any applicable program, to submit to any analysis or evaluation that reveals information concerning . . . (3) sex behavior or attitudes; (4) illegal, anti-social, self-incriminating, or demeaning behavior; . . . without the prior consent of the student. . . ." 20 U.S.C. § 1232h(b) (2016). Apart from the issue of whether that statutory provision applies in this context, there would be a question whether the student is forced to submit to the evaluation. On the one hand, a Title IX coordinator might not force the student's participation in the Title IX process. On the other hand, the institution would have required a faculty or staff member to forward information without the student's consent and the Title IX office will investigate at times even without the student's consent and participation. In such an instance, the student is arguably being required "to submit" to an "evaluation that reveals information concerning . . . sex behavior." *Id.*

507. 964 F. Supp. 1369, 1385 (N.D. Cal. 1997).

508. *Id.* at 1372.

qualified immunity because there was no clear constitutional right to privacy in this situation.[509]

However, the court's analysis suggests that a privacy claim involving mandatory reporting might succeed.[510] Notably, the court mentioned that the plaintiff wanted the school to take action: "[T]he court finds it hard to imagine how [the principal] could take the action plaintiff desires—action reasonably calculated to end the harassment—without revealing the nature of the harassment, the identity of the harassers and even plaintiff's own identity."[511] Unlike *Nicole M.,* a privacy challenge to a mandatory reporting scheme is likely to be brought by a survivor who *does not want* the school to take action. In that context, a wide-net reporting policy implicates both aspects of constitutional privacy—first, a student's private information is passed on to others when the student does not want that to occur; second, to avoid that outcome, a student must forego her constitutionally protected rights of association with those trusted employees with whom she wants to privately discuss her victimization privately. Because evidence exists that wide-net reporting policies deter some victims from reporting, and maybe large numbers of students,[512] these policies have more profound privacy implications than the mandatory reporting regime in *Whalen.* Moreover, the university has very weak reasons for invading an adult student's privacy when she does not want a report to be made, especially because she is unlikely to cooperate in any investigation.

Second, under any legal theory, the plaintiff must have had a reasonable expectation of privacy,[513] and a school's mandatory reporting policy may eliminate that expectation. Yet a school may be unable to claim that the student has a lower expectation of privacy because of the very policy that the survivor is trying to impugn.[514] Moreover, the student still may have a reasonable expectation of privacy despite the wide-net policy if the reporting policy is not publicized, not known to the particular student, widely disregarded,

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509. *Id.* at 1385.

510. *See generally id.* at 1384–85.

511. *Id.* at 1385 (footnote omitted).

512. *See supra* text accompanying notes 133–134, 151.

513. C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 179 (2005) (quoting Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105, 112 (3d Cir. 1987)) (asking whether the information is "within an individual's reasonable expectations of confidentiality").

514. In the Fourth Amendment context, the government cannot lower the "reasonable expectation" of privacy by legislating it downward. In such situations, the legislation itself is unconstitutional. *See, e.g.*, Knisley v. Pike County Joint Vocational School Dist., 604 F.3d 977, 980 (6th Cir. 2010).

and/or negated by an employee's promise of privacy.[515] In addition, the wide-net reporting policy does not exist in a vacuum; other policies might give students a reasonable expectation of privacy. After all, professional organizations tell their members to treat student communications as confidential,[516] and federal law creates an expectation of privacy for many aspects of students' educational information.[517] Moreover, details about a rape are particularly sensitive and are widely viewed as "private."[518]

Third, in assessing the merits of both the constitutional and tort claims, courts consider to whom the information was disclosed and for what purpose. In the context of a constitutional claim, the Third Circuit has stated, "[t]he right to avoid disclosure of personal matters is not absolute," but entails the "delicate task of weighing competing interests."[519] Some courts have required that the defendant divulge

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515. *See* Brown-Criscuolo v. Wolfe, 601 F. Supp. 2d 441, 449–50 (D. Conn. 2009) (holding that plaintiff had a reasonable expectation of privacy in her work e-mail despite employer's policy permitting routine maintenance to find violations of the policy because, *inter alia*, the policy was widely disregarded).

516. *See Statement on Professional Ethics*, AAUP (2009), https://www.aaup.org/report/statement-professional-ethics (noting professors should "respect the confidential nature of the relationship between professor and student"); *Joint Statement on Rights and Freedoms of Students*, AAUP (1967), https://www.aaup.org/AAUP/pubsres/policydocs/contents/stud-rights.htm#2 (stating that "[i]nformation about student views, beliefs, and political associations that professors acquire in the course of their work . . . should be considered confidential"). Universities themselves or their faculties sometimes "endorse" these statements. *See* Anahita, *supra* note 25 (discussing how faculty senate at University of Alaska, Fairbanks endorsed the AAUP's *Statement on Professional Ethics).*

517. The Family Educational Rights and Privacy Act (FERPA) protects the privacy of a student's "education records." 20 U.S.C. § 1232g (2016); 34 CFR Part 99 (2015). A record is any information "recorded in any way." 34 C.F.R. § 99.3 (2015). The statute broadly defines "education records" to include all records directly related to a student and maintained by the educational institution. 34 C.F.R. § 99.3(a) (2015). As suggested in note 505 *supra*, mandatory reporting policies do not violate the traditional interpretation of FERPA.

518. Anderson v. Blake, 469 F.3d 910, 914–16 (10th Cir. 2006) (suing police for violating plaintiff's constitutional right to privacy when officer released a video tape of alleged rape to news reporters); Bloch v. Ribar, 156 F.3d 673, 683–86 (6th Cir. 1998) (using qualified immunity to dismiss a claim for violation of constitutional right to privacy when sheriff released, during a press conference, highly personal details of rape, but acknowledging that the disclosure implicated plaintiff's privacy).

519. C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 179–80 (2005) (quoting United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980)) (identifying the following as the competing interests: "the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated

the information to a wide audience,[520] although others have only required disclosure to an unauthorized third party.[521] It is unknown where the lines will be drawn in the context of mandatory reporting. Will transmission of information to the Title IX coordinator be seen as disclosure to an unauthorized third party? Will the Title IX coordinator's transmission of information to others, such as the police, constitute disclosure to a wide audience?[522] The fact that the information is transmitted for purposes of offering the survivor services or for apprehending the perpetrator will be relevant, although these purposes should have less significance if the victim is opposed to the transmission of her information or if less intrusive methods exist for accomplishing them.[523]

Without belaboring the point further, this discussion illustrates that the actual contours of such a claim have not yet been fully explored by any court and it is premature to rule out the possibility of a successful claim. In fact, the potential for liability is real. Survivors have started asserting privacy claims against their universities when they are dragged into disciplinary processes against their wishes, so the potential for liability is real.[524]

Overall, it is impossible to say that wide-net reporting policies protect institutions of higher education from liability better than

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public policy, or other recognizable public interest militating toward access"). This balancing sometimes occurs in the context of a qualified privilege to disclose, such as in the context of a common interest. *See, e.g.*, Young v. Jackson, 1572 So.2d 378, 383–85 (Miss. 1990) (affirming summary judgment based upon common interest when employer disclosed fact of employee's hysterectomy to other employees who feared the effects of radiation).

520. *See* Flaskamp v. Dearborn Pub. Sch., 385 F.3d 935, 946–47 (6th Cir. 2004) (holding "the limited dissemination of the information about Flaskamp's relationship and the legitimacy of Smith's questions about the relationship establish that Flaskamp's informational-privacy rights were not violated").

521. *See* E.N. v. Susquehanna Twp. Sch. Dist., NO. 1:09–CV–1727, 2010 WL 4853700, at *2, *12–13, n. 9 (M.D. Pa. Nov. 23, 2010) (refusing to dismiss claim of privacy invasion against Pensiero and noting that Pensiero allegedly divulged details of the assault to a third person—a parent—without E.N.'s consent).

522. *See* Scheetz v. The Morning Call, 946 F.2d 202, 205, 207 (3d Cir. 1991) (discussing how plaintiff could not expect information reported to police as part of potential crime to remain private).

523. The principal risk from the policy proposed *infra* in Part IV involves the possibility that a student-directed employee would disclose the student's victimization when that was not permissible. This risk can be minimized with training and by explaining to students that privacy can never be absolutely assured, although the institution has a commitment to it.

524. Complaint at 13, Jane Doe v. Univ. of Notre Dame du Lac (filed Aug. 17, 2017) (No.71C01-1708-CT-000366), https://www.scribd.com/document/358387376/20170817164842370#.

more narrowly tailored policies. Both approaches expose institutions to some risk of liability and it is impossible to assess the difference in the amount of risk. Thus, there is no assurance that a wide-net reporting policy reduces an institution's potential liability more than a more nuanced policy.

CONCLUSION

Policies that make almost all employees mandatory reporters harm student survivors. Some survivors are deprived of the ability to disclose their victimization to the person on campus that they trust most to give them support and information. If they disclose anyway (sometimes without realizing the implications of a disclosure), or if someone contacts the school without their consent, they lose control over whether the institution will take action consistent with their wishes. This can expose them to psychological and physical harm. Because of these effects, the mandatory reporting regime can deter a student from disclosing to anyone on campus. This result reduces the likelihood that the survivor will be connected with supportive services that would allow her to continue her education; it also reduces the likelihood that the school will hold her perpetrator accountable. Consequently, a wide-net policy can contribute to a campus climate that does not effectively support survivors or deter sexual misconduct.

Fortunately, institutions of higher education can adopt more nuanced reporting policies. Nothing in the law prohibits it. The confusing language in OCR guidance that might lead an institution to conclude otherwise can be read in a way that is more permissive.

Yet, because OCR's guidance is not as clear as it should be, OCR should tell institutions of higher education that they need not make virtually all of their employees mandatory reporters. In fact, OCR should tell institutions that their wide-net reporting policies violate Title IX if they discourage survivors from reporting or accessing services.

Good reporting policies have certain features. All employees should have obligations when a survivor discloses sexual or gender-based violence to them. Even if an employee is not a designated reporter, the employee should be obligated to ask the student if she wants to report to the Title IX office and/or be connected with confidential supportive services. Employees should be required to follow the student's instructions. Institutions should clearly indicate who is a designated reporter and what obligations all employees have under their policy.

The classification of employees as designated reporters should include those who students expect to have the authority to redress the violence or the obligation to report it, and should exclude those who students turn to for support instead of for reporting. Faculty should not be designated reporters, but high-level administrators should be. Schools should carefully consider how to classify employees who are resident assistants, campus police, coaches, campus security authorities, and employment supervisors. A well-crafted policy will be the product of thoughtful conversations about online reporting, anonymous reporting, third-party reports, and necessary exceptions for situations involving minors and imminent risks of serious harm.

Administrators should not hide behind liability concerns as a justification for their institutions' wide-net reporting policies. A wide-net reporting policy does not necessarily decrease an institution's potential liability, and may, in fact, increase it. Instead, an institution's reporting policy should reflect the educational community's aspirations to respect adult students' autonomy and treating students with care. The adoption of a more nuanced reporting policy should, in turn, increase reporting and make the campus safer. So long as administrators, faculty, staff, and students keep Title IX's purpose in mind as they craft their institution's reporting policy, they should be able to design one that is both principled and legal.