

# TITLE IX AND CRIMINAL LAW ON CAMPUS: AGAINST MANDATORY POLICE INVOLVEMENT IN CAMPUS SEXUAL ASSAULT CASES

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*This Note argues that policy proposals mandating law enforcement involvement in campus sexual assault cases are harmful to survivors of sexual assault and are inconsistent with Title IX. Title IX's gender-equality goals require schools to address sexual assault as a civil rights issue, with a focus on its impact on survivors' continued access to education. Mandatory police involvement proposals will frustrate that goal. These proposals take a criminal law view rather than a civil rights approach, and in doing so, import obstacles that survivors have long faced in the criminal system into the campus process. What is more, these proposals will have the effect of making it more difficult for survivors, particularly those from marginalized communities, to report their sexual assaults to their schools. If survivors are not able to report, they will not be able to access the accommodations they need to continue their education, and schools will not have the information they need to adequately combat sexual assault on campus. Efforts at reform would be better served by focusing on improving the campus process than on limiting survivors' options.*

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INTRODUCTION

In 1977, Yale student Ronni Alexander quit flute lessons after an instructor sexually harassed and assaulted her.<sup>1</sup> With no mechanism for reporting such behavior to the school, Alexander and several other victims of sexual harassment and assault at Yale brought the suit that laid the groundwork for our current understanding of Title IX of the Education Amendments of 1972 (“Title IX”) as a mechanism for ensuring that colleges and universities address sexual violence.<sup>2</sup> Title IX, a law protecting civil rights in education, provides that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .”<sup>3</sup> and *Alexander v. Yale University* was the first case to use Title IX to challenge a university’s non-responsiveness to sexual violence and harassment.<sup>4</sup> The case was dismissed because the plaintiffs had graduated, but the court recognized sexual harassment as a

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<sup>1</sup> *Alexander v. Yale Univ.*, 631 F.2d 178, 181 (2d Cir. 1980).

<sup>2</sup> The legal strategy on which this case was premised was developed by Catharine MacKinnon, who advised the plaintiffs in this case. See Tyler Kingkade, *How a Title IX Harassment Case at Yale in 1980 Set the Stage for Today’s Sexual Assault Activism*, HUFFPOST: COLLEGE (June 10, 2014, 1:15 PM), [https://www.huffingtonpost.com/2014/06/10/title-ix-yale-catherine-mackinnon\\_n\\_5462140.html](https://www.huffingtonpost.com/2014/06/10/title-ix-yale-catherine-mackinnon_n_5462140.html).

<sup>3</sup> 20 U.S.C. § 1681(a) (2012).

<sup>4</sup> *Title IX—The Nine*, ACLU, <https://www.aclu.org/other/title-ix-nine> (last visited June 19, 2019) (describing the plaintiffs in the case as the first to use Title IX in this way).

form of sex discrimination, and that university inaction on sexual harassment could constitute a violation of the civil rights protected by Title IX.<sup>5</sup>

In recent years, Title IX has reemerged as a key tool for campus activists fighting to ensure that colleges and universities uphold their obligations to prevent and respond to sexual violence.<sup>6</sup> Activists around the country have garnered (positive and negative) attention for their assertion that sexual violence is a form of discrimination under this law, and that to fulfill their obligations under Title IX, colleges and universities must take sexual violence seriously.<sup>7</sup> Activists argue that Title IX imposes an independent obligation on schools to address gender-based violence, but recently, commentators and critics have begun to question the ability of schools and universities to

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<sup>5</sup> *Alexander v. Yale Univ.*, 459 F. Supp. 1, 4 (D. Conn. 1977) (“In plaintiff Price’s case, for example, it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education . . .”). While the plaintiffs did not win, they achieved their objectives. The plaintiffs, for the most part, were not seeking monetary damages from Yale (one sought \$500). *Id.* at 3. Rather, they sought a holding that sexual harassment constituted sex discrimination in violation of Title IX and an injunction ordering Yale to implement a grievance procedure for sexual harassment. *Id.* at 2, 4. After the case had been heard in the district court, Yale instituted a grievance procedure. *See Appeals Court Dismisses Yale Sex Harassment Suit*, HARV. CRIMSON (Oct. 2, 1980), <http://www.thecrimson.com/article/1980/10/2/appeals-court-dismisses-yale-sex-harassment>.

<sup>6</sup> For purposes of this Note, “sexual violence” encompasses sexual assault as well as domestic violence and intimate partner abuse; due to the scope of the proposed reform discussed in this Note, the term is meant only to apply to conduct that could be subject to criminal sanctions. The terms “sexual violence” and “gender-based violence” are used interchangeably. For more on sexual violence as violence, see generally, for example, SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975). *But see* CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 134–36, 173–74 (1989), which cautions that the description of rape as a crime of violence fails to fully interrogate the problematic power dynamics of heterosexuality. Those making allegations of sexual violence are referred to as “complainants” in school disciplinary processes, while those accused are referred to as “respondents.” Those terms are used throughout this Note. Where the truth of an allegation is not at issue, this Note uses the terms “survivor” and “victim” interchangeably. For a discussion of the usage of the terms “survivor” and “victim,” see, for example, Dana Bolger, “*Hurry Up and Heal*: Pain, Productivity, and the Inadequacy of ‘Victim vs. Survivor,’” *FEMINISTING* (2015), <http://feministing.com/2014/12/10/hurry-up-and-heal-pain-productivity-and-the-inadequacy-of-victim-vs-survivor>; Parul Sehgal, *The Forced Heroism of the ‘Survivor,’* N.Y. TIMES MAG. (May 3, 2016), <https://www.nytimes.com/2016/05/08/magazine/the-forced-heroism-of-the-survivor.html>.

<sup>7</sup> *See, e.g.,* Vanessa Grigoriadis, *Meet the College Women Who Are Starting a Revolution Against Campus Sexual Assault*, THE CUT (Sept. 21, 2014), <https://www.thecut.com/2014/09/emma-sulkowicz-campus-sexual-assault-activism.html>; KC Johnson, Opinion, *Campus Sexual Assault Policies Are Unfair to the Accused. This Case Shows You How*, WASH. POST (Aug. 16, 2017), [https://www.washingtonpost.com/opinions/campus-sexual-assault-policies-are-unfair-to-the-accused-this-case-shows-how/2017/08/16/2ab6781e-7de0-11e7-a669-b400c5c7e1cc\\_story.html](https://www.washingtonpost.com/opinions/campus-sexual-assault-policies-are-unfair-to-the-accused-this-case-shows-how/2017/08/16/2ab6781e-7de0-11e7-a669-b400c5c7e1cc_story.html).

handle sexual assault adjudications on their own.<sup>8</sup> They argue that taking sexual assault seriously means treating it criminally, rather than through internal, school-based processes.<sup>9</sup> As a result, some have proposed integrating or supplanting school responses with law enforcement involvement, requiring any student who reports a sexual assault to their school to also report it to the police.<sup>10</sup> These proposals would, in general, make it such that schools cannot address civil rights violations and take steps to ensure that students are able to learn in an environment free from sexual violence unless the police are involved.<sup>11</sup> This Note argues that such proposals are inconsistent with the civil rights goals of Title IX, ineffective as a response to commentators' concerns, and inadvisable as a matter of policy.

Part I of this Note describes the problem of sexual assault on college campuses and recent proposals advocating increased police involvement. Part II argues that proposals for mandatory police involvement in campus sexual assault cases are flawed, both theoretically and as a matter of policy. Part III suggests alternative areas for reform.

## I

### SEXUAL ASSAULT ON COLLEGE CAMPUSES

In recent years, campus sexual assault has been frequently referred to as an “epidemic.”<sup>12</sup> It is clear that the problem is widespread and devastating to its victims, and many have been working to address problems in college and university responses that leave campus sexual assault unaddressed or addressed inappropriately. Several waves of activism and policy change have responded to the issue,

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<sup>8</sup> See, e.g., Michelle Goldberg, *Why the Campus Rape Crisis Confounds Colleges*, THE NATION (June 5, 2014), <https://www.thenation.com/article/why-campus-rape-crisis-confounds-colleges> (noting that some victims' advocates think college rape should be handled by the criminal legal system, not schools); Jed Rubinfeld, Opinion, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <https://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html> (questioning schools' ability to handle campus sexual assault internally).

<sup>9</sup> See, e.g., Goldberg, *supra* note 8; Rubinfeld, *supra* note 8.

<sup>10</sup> Goldberg, *supra* note 8; Rubinfeld, *supra* note 8; see also *infra* Section I.B.

<sup>11</sup> See *infra* Section I.B.

<sup>12</sup> See, e.g., Natalie Denby, *The Sexual Assault Epidemic Is Real*, HUFFPOST (Aug. 29, 2016, 12:51 AM), [https://www.huffingtonpost.com/entry/yes-the-sexual-assault-epidemic-is-real\\_us\\_57be7905e4b06384eb3e4ae0](https://www.huffingtonpost.com/entry/yes-the-sexual-assault-epidemic-is-real_us_57be7905e4b06384eb3e4ae0); Genny Rogers, Ivy Lee & John Gabrieli, Opinion, *As You Were Saying: Time to Act on Assault 'Epidemic,'* BOS. HERALD (Feb. 28, 2018, 12:00 AM), <https://www.bostonherald.com/2018/02/28/as-you-were-saying-time-to-act-on-assault-epidemic>; Tina Tchen & Valerie Jarrett, *We Cannot Turn Our Backs on this Epidemic: Sexual Assault on College Campuses*, FORBES: CIVIC NATION (Sept. 21, 2017, 3:19 PM), <https://www.forbes.com/sites/civication/2017/09/21/we-cannot-turn-our-back-on-this-epidemic-sexual-assault-on-colleges-campuses>.

each framed as an effort to improve the ways in which colleges and universities respond to sexual violence experienced by students.

### A. *The Student Movement Against Campus Sexual Assault*

Student activists across the country have picked up where *Alexander* left off. While Title IX has been in force since 1972, it had come to be known as largely a law requiring schools to fund women's sports on an equal basis to men's.<sup>13</sup> However, in 1999, the Supreme Court held that if a school knew of and acted with deliberate indifference towards student-on-student sexual harassment, it would be a violation of Title IX.<sup>14</sup> In recent years, students across the nation have worked to remind schools that their Title IX obligations include preventing and addressing sexual assault.<sup>15</sup> These efforts were bolstered by guidance from the Obama Administration's Department of Education.<sup>16</sup> The Obama Administration's guidance followed growing

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<sup>13</sup> See Lily Rothman, *How Title IX First Changed the World of Women's Sports*, TIME (June 23, 2017), <http://time.com/4822600/title-ix-womens-sports> (explaining that Title IX has "recently" been used to combat sexual harassment and assault but is better known for its role in changing college athletics).

<sup>14</sup> *Davis ex rel. Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 644 (1999).

<sup>15</sup> See, e.g., Richard Pérez-Peña, *College Groups Connect to Fight Sexual Assault*, N.Y. TIMES (Mar. 19, 2013), <https://www.nytimes.com/2013/03/20/education/activists-at-colleges-network-to-fight-sexual-assault.html>.

<sup>16</sup> In 2011, the Department of Education issued a "Dear Colleague Letter," which reiterated that sexual violence is a form of sexual harassment, which itself is a form of sex discrimination prohibited by Title IX, in addition to specifying certain procedures schools would be required to follow in adjudicating campus sexual assault in order to be considered compliant with Title IX. U.S. Dep't of Educ., Off. of the Assistant Secretary for Civ. Rts., Russlynn Ali, *Dear Colleague Letter* (Apr. 4, 2011), <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html>. This letter "made clear that the federal government would aggressively police" schools' Title IX obligations. Sarah Brown, *What Does the End of Obama's Title IX Guidance Mean for Colleges?*, CHRONICLE OF HIGHER ED.: STUDENTS (Sept. 22, 2017), <https://www.chronicle.com/article/What-Does-the-End-of-Obama-s/241281>. The Obama White House also created a task force on campus sexual assault that brought attention to the issue. See 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 (2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Documents/1.4.17.VAW%20Event.Guide%20for%20College%20Presidents.PDF>. Recently, the Trump Administration withdrew the Obama-era guidance and issued interim guidelines rolling back some protections for campus victims of gender-based violence. See Press Release, Dep't of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct>. Betsy DeVos, the Secretary of Education, has also proposed new rules that would further undo the Obama-era push for stronger protections and enforcement. See Ruth Lawlor, *How the Trump Administration's Title IX Proposals Threaten to Undo #MeToo*, WASH. POST (Feb. 4, 2019), <https://www.washingtonpost.com/outlook/2019/02/04/how-trump-administrations-title-ix-proposals-threaten-undo-metoo>.

national awareness of the epidemic of gender-based violence on college campuses. Approximately 23.1% of undergraduate women, 5.4% of undergraduate men, and 21% of undergraduate trans and nonbinary students have experienced rape or sexual assault.<sup>17</sup> Students were increasingly engaging in activism to hold their schools accountable for mishandling or ignoring gender-based violence, and the Obama-era guidance was responding to a growing sense of urgency.<sup>18</sup>

With the Obama-era guidance on their side, students from over one hundred schools filed complaints with the Department of Education's Office for Civil Rights alleging violations of Title IX at their school.<sup>19</sup> In relying on Title IX, these activists drew a critical link between student-to-student sexual violence and inequality of educational opportunity.<sup>20</sup> They argued that schools had an obligation under Title IX to address gender-based violence because it impeded the ability of student victims to learn, on the basis of their gender.<sup>21</sup>

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<sup>17</sup> *Campus Sexual Violence: Statistics, RAPE, ABUSE, AND INCEST NATIONAL NETWORK*, <https://www.rainn.org/statistics/campus-sexual-violence> (last visited Apr. 8, 2019). This Note uses singular "they" pronouns when referring to sexual assault victims generically, though it uses appropriate personal pronouns in reference to particular victims. This Note also draws on existing research, which tends to either assume that victims are women or to focus on female victims. When referring to that research, this Note uses female pronouns to reflect the scope of the research referenced. Likewise, some arguments in this Note draw on stereotypical ideas about women and about femininity. When discussing those arguments, this Note uses terms like "women" or "female," in service of those specific points.

<sup>18</sup> See Juliet Eilperin, *Biden and Obama Rewrite the Rulebook on College Sexual Assaults*, WASH. POST (July 3, 2016), [https://www.washingtonpost.com/politics/biden-and-obama-rewrite-the-rulebook-on-college-sexual-assaults/2016/07/03/0773302e-3654-11e6-a254-2b336e293a3c\\_story.html?utm\\_term=.30641d02a56b](https://www.washingtonpost.com/politics/biden-and-obama-rewrite-the-rulebook-on-college-sexual-assaults/2016/07/03/0773302e-3654-11e6-a254-2b336e293a3c_story.html?utm_term=.30641d02a56b) (explaining that the Obama Administration's action on campus sexual assault was "spurred in part by an emboldened group of survivors who have gone public with their complaints about their schools' unresponsiveness"); Alia Wong, *The Renaissance of Student Activism*, ATLANTIC (May 21, 2015), <https://www.theatlantic.com/education/archive/2015/05/the-renaissance-of-student-activism/393749> (describing growing student activism).

<sup>19</sup> Cynthia L. Cooper, *Pressured by Activists and Legislators, Colleges Grapple with Rape on Campus*, PERSPECTIVES, Summer 2015, at 5 ("By the end of 2014, 102 Title IX complaints about sexual assault on campus were filed, compared with 19 in 2011; in the first quarter of 2015, 51 already had been filed . . ."). In June 2017, there were 339 open investigations at 239 colleges. Benjamin Wermund, *Title IX List Going Out of Print?*, POLITICO (June 29, 2017, 10:00 AM), <https://www.politico.com/tipsheets/morning-education/2017/06/29/title-ix-list-going-out-of-print-221112>.

<sup>20</sup> *Alexander* focused on staff-on-student sexual violence and harassment. *Alexander v. Yale Univ.*, 631 F.2d 178, 181 (2d Cir. 1980).

<sup>21</sup> See, e.g., Katherine Mangan, *How a Student Used Title IX to Force Her College to Change Its Response to Cases of Sexual Assault*, CHRON. HIGHER EDUC. (June 26, 2018), <https://www.chronicle.com/article/How-a-Student-Used-Title-IX-to/243763> (explaining that Title IX was predominantly associated with sports before students began using it as an innovative way to address sexual assault on campus); Jonah Newman & Libby Sander, *Promise Unfulfilled?*, CHRON. HIGHER EDUC. (Apr. 30, 2014), <https://www.chronicle.com/>

Professor Nancy Chi Cantalupo explains that “[b]y prohibiting gender-based violence as a form of sex discrimination, Title IX recognizes that such violence is both a cause and a consequence of gender inequality.”<sup>22</sup> That is, it recognizes that gender-based violence—violence perpetuated against someone because of their gender<sup>23</sup>—is by definition discriminatory, and such violence perpetuates inequality by impeding survivors’ ability to learn due to the impact of trauma.<sup>24</sup>

While current activist efforts center Title IX enforcement and focus on schools’ internal disciplinary processes, earlier activist efforts were dedicated to ensuring that schools could not sweep accusations of gender-based violence under the rug, requiring them to acknowledge that crimes were occurring on campus. The Clery Act, passed in 1990, requires federally funded colleges and universities to collect and disseminate statistics about crimes committed on or near campus, including sexually violent crimes.<sup>25</sup> An incident is subject to Clery Act disclosure only if it is reported to campus law enforcement or local law enforcement.<sup>26</sup> If a crime is not reported to campus security or local law enforcement but is pursued through disciplinary processes,<sup>27</sup> it would not show up in a school’s Clery Act disclosure. In 1992, the Clery Act was amended to include the Campus Sexual Assault Victims’ Bill of Rights, which required that schools tell students about

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article/Promise-Unfulfilled-/146299 (describing activists’ use of Title IX’s gender equity requirements to combat sexual violence).

<sup>22</sup> Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 *YALE L.J. F.* 281, 284 (2016).

<sup>23</sup> Title IX protects all students from sexual violence because sexual violence is a type of sex-based harassment. See *Sex-Based Harassment*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue01.html> (last visited June 25, 2019) (noting that sexual violence is a form of sex-based harassment and that “[a]ll students can experience sex-based harassment, including male and female students, [and] LGBT students. . . . Title IX protects all students from sex-based harassment, regardless of the sex of the parties, including when they are members of the same sex”).

<sup>24</sup> As such, Title IX protects against sexual violence *per se*, since it is a form of sex-based harassment, *see id.*, and it requires schools to take steps to mitigate the consequences of sexual trauma for a victim’s education. *See id.* (noting that where there is sex-based harassment, a school “must take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects”).

<sup>25</sup> Disclosure of Campus Security Policy and Campus Crime Statistics (Clery Act), 20 U.S.C. § 1092(f) (2012).

<sup>26</sup> *Id.*

<sup>27</sup> This may happen in instances of gender-based violence, which is most relevant for purposes of this Note and certainly for proponents of mandatory police involvement in sexual violence cases. However, this could happen for a variety of incidents; a student whose laptop is stolen, or one who is punched by another student, for instance, could report the theft to campus security and/or to administrators.

their right to report a crime to the police.<sup>28</sup> This was a step forward, but more recent accounts of campus sexual assault continue to include stories of administrators encouraging students to keep quiet about sexual violence,<sup>29</sup> and activist groups continue to insist that schools make clear to complainants that they may report to law enforcement as well as to school officials.<sup>30</sup> Activists emphasize that survivors should be able to make this decision for themselves, without pressure from school administrators.

### B. Mandatory Police Involvement Proposals

While student activists have generated their own proposals for reforms to strengthen campus-based sexual violence adjudication and prevention<sup>31</sup> and have worked to preserve Title IX protections,<sup>32</sup>

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<sup>28</sup> Higher Education Amendments § 486.

<sup>29</sup> See, e.g., Higher Education Amendments of 1992, Pub. L. No. 102-325, § 486, 106 Stat. 448 (1992); Angie Epifano, Opinion, *An Account of Sexual Assault at Amherst College*, AMHERST STUDENT (Oct. 17, 2012, 12:07 AM), <http://amherststudent.amherst.edu/?q=article%2F2012%2F10%2F17%2Faccount-sexual-assault-amherst-college> (describing an encounter in which an administrator advised Epifano, who claimed she had been raped by a classmate, that “[p]ressing charges would be useless”). Epifano’s account was foundational to the modern movement against campus sexual assault; see, e.g., Rosemary Kelly & Shaina Mishkin, *Angie Epifano Profile: How One Former Amherst Student Sparked a Movement Against Sexual Assault*, HUFFPOST (June 2, 2013, 11:34 AM), [https://www.huffpost.com/entry/angie-epifano-profile\\_n\\_3353941](https://www.huffpost.com/entry/angie-epifano-profile_n_3353941). Alexandra Brodsky, a survivor of campus sexual violence and an influential advocate, co-founder of Know Your IX, and lawyer, has also said that school officials discouraged her from reporting her assault to the police. See Cooper, *supra* note 19, at 4.

<sup>30</sup> See, e.g., KNOW YOUR IX, CAMPUS ORGANIZING TOOLKIT 37 (2016), <https://www.knowyourix.org/wp-content/uploads/2016/12/Toolkit-Final.pdf>; STUDENTS ACTIVE FOR ENDING RAPE, SEXUAL ASSAULT POLICY CHECKLIST, [https://www.barcc.org/assets/pdf/Sexual\\_Assault\\_Policy\\_Checklist.pdf](https://www.barcc.org/assets/pdf/Sexual_Assault_Policy_Checklist.pdf) (last visited June 25, 2019); see also Enough is Enough, N.Y. EDUC. LAW §§ 6443–44 (2015) (requiring, among other things, that colleges and universities adopt, implement, and distribute a “Students’ Bill of Rights” containing several provisions, including one guaranteeing that students have a right to report sexual assault to local law enforcement).

<sup>31</sup> Student activists, including the author, were involved in drafting New York State’s “Enough is Enough” law, which created a uniform definition of consent for colleges and universities in the state, provided mechanisms for confidential reporting and reporting of aggregate data, mandated prevention education for all students, and created a uniform amnesty policy for students whose sexual assault report also involved their own minor disciplinary infraction, among other changes. N.Y. EDUC. LAW §§ 6439–49.

<sup>32</sup> Activists have been deeply involved in resisting efforts by the Department of Education under Betsy DeVos to roll back protections for survivors of sexual assault on campus enacted during the Obama Administration. See, e.g., Lauryn Gutierrez, *#INeedIX: Survivors of Sexual Assault on Campus Want DeVos’ Time*, REWIRE (July 18, 2017, 6:44 PM), <https://rewire.news/photos/2017/07/18/ineedix-survivors-sexual-assault-campus-want-devos-time>; Joelle Rosenberg, *#DearBetsy Is Back: Calling on the Trump Administration to Uphold Title IX Protections for Survivors*, MS. MAG. (Aug. 7, 2017), <http://msmagazine.com/blog/2017/08/07/betsy-devos-dearbetsy-campaign-trump-administration-title-ix-campus-rape>.



voices from outside of the student movement have also suggested legislative reforms to campus sexual violence processes. In some ways echoing students' concerns about schools ignoring crimes on campus, one proposed reform, with support from actors across the political spectrum, calls for mandatory police involvement with any campus-based adjudication of sexual violence where the allegations could also amount to a crime.<sup>33</sup> Amidst persistent concerns about schools' mishandling of sexual assault cases, legislation to that effect has been introduced in Georgia,<sup>34</sup> Virginia,<sup>35</sup> and at the federal level.<sup>36</sup>

In Virginia, this bill passed into law. The Virginia and Georgia proposals are similar in that any complaint made to the school based on facts that could constitute a felony is required to be reported to law enforcement, and the school can also investigate the allegation for its own disciplinary purposes. The federal law works differently: No report is made to law enforcement without the consent of the complaining student, but if the student does not so consent, the school cannot investigate. In the absence of this kind of legislation, a student who experiences sexual assault is able to report the assault to the police just as any victim of sexual assault would be able to. They may do this in addition to or instead of reporting to their school, and their school, if students report to them, is required to inform the victim of their right to report to the police.<sup>37</sup> What these proposals would do—

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<sup>33</sup> The Rape, Abuse, and Incest National Network (RAINN), the Fraternity and Sorority Political Action Committee (FratPAC), and the Foundation for Individual Rights in Education (FIRE), among others, have supported such proposals. See Letter from the Rape, Abuse, and Incest National Network, to White House Task Force to Protect Students from Sexual Assault (Feb. 28, 2014) [hereinafter RAINN Letter], <https://www.rainn.org/images/03-2014/WH-Task-Force-RAINN-Recommendations.pdf> ("Colleges and universities must . . . [p]artner with local law enforcement on each investigation, starting immediately after a crime is reported."); see also Tyler Bishop, *Forcing Colleges to Involve Police in Sexual-Assault Investigations?*, ATLANTIC (Nov. 19, 2015), <https://www.theatlantic.com/education/archive/2015/11/forcing-colleges-to-involve-police-in-sexual-assault-investigations/416736> (noting that, while the National Panhellenic Conference (NPC), the North-American Interfraternity Conference (NIC), and other fraternity and sorority groups withdrew support for the Safe Campus Act, which would have mandated police involvement, they previously supported the proposal and FIRE continues to support it); Tyler Kingkade, *Fraternity Groups Push Bills to Limit College Rape Investigations*, HUFFPOST (Aug. 4, 2015, 5:15 PM), [https://www.huffingtonpost.com/entry/fraternity-groups-college-rape\\_us\\_55c10396e4b0e716be074a7f](https://www.huffingtonpost.com/entry/fraternity-groups-college-rape_us_55c10396e4b0e716be074a7f) (noting FratPAC's support for the Safe Campus Act); Robert Shibley, *Time to Call the Cops: Title IX Has Failed Campus Sexual Assault*, TIME: IDEAS (Dec. 1, 2014), <http://time.com/3612667/campus-sexual-assault-uva-rape-title-ix> (articulating FIRE's support for mandatory police involvement).

<sup>34</sup> H.B. 51, 154th Gen. Assemb., Reg. Sess. (Ga. 2018), <http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/51>.

<sup>35</sup> VA. CODE ANN. § 23.1-806 (2019).

<sup>36</sup> Safe Campus Act of 2015, H.R. 3403, 114th Cong. (2015).

<sup>37</sup> See 20 U.S.C. § f(8)(B)(iii)(III).

or, in the case of Virginia, now in fact do—is limit any victim’s ability to choose who they report to by automatically reporting to the police once the victim reports to the school, in at least some circumstances.<sup>38</sup>

Under the Virginia law, every postsecondary institution in the state that receives public funds must establish a review committee for allegations of sexual violence, and the review committee must include a member of law enforcement.<sup>39</sup> After receiving a report of sexual violence, the committee assesses the crime, and if the law enforcement official or any other committee member believes that the facts alleged constitute a felony, the report is turned over to law enforcement.<sup>40</sup> Following that review, both the school and law enforcement retain the ability to move forward with investigation and adjudication.<sup>41</sup> It is thus possible that under the Virginia law a report of sexual violence might not be turned over to law enforcement and might only be pursued internally by the school (if, for instance, no committee members believe that the facts alleged constitute a felony, but do believe that they potentially constitute a disciplinary violation), but every student who reports sexual violence to school administrators runs the risk that the report could be turned over.

The bill proposed in Georgia<sup>42</sup> did not have the same requirements with regard to a review committee, but similarly provided that most administrators who receive a report of sexual violence where the alleged facts could constitute a felony must turn the report over to law enforcement.<sup>43</sup> Like the Virginia law, the Georgia law would have allowed schools to investigate the allegation for their own disciplinary purposes as well, but reporting students would necessarily risk involvement with law enforcement.<sup>44</sup>

The federal bill, known as the Safe Campus Act, would require institutions of higher education to report allegations of sexual assault to law enforcement, provided that the complainant has consented.<sup>45</sup> The school may not conduct any disciplinary investigation or adjudica-

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<sup>38</sup> See, e.g., VA. CODE ANN. § 23.1-806 (enumerating circumstances in which school officials are required to report certain allegations of sexual violence and creating narrow exceptions to the general rule).

<sup>39</sup> VA. CODE ANN. § 23.1-806(D).

<sup>40</sup> *Id.* § 23.1-806(G).

<sup>41</sup> *Id.* § 23.1-806(H).

<sup>42</sup> While the bill did not pass, its sponsors have indicated that it might be reintroduced, pending changes in Title IX guidance from the Department of Education. Martha Dalton, *Georgia Lawmakers Table Campus Sexual Assault Bill*, WABE (Jan. 24, 2018), <https://www.wabe.org/georgia-lawmakers-table-campus-sexual-assault-bill>.

<sup>43</sup> H.B. 51, 154th Gen. Assemb., Reg. Sess. (Ga. 2018), <http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/51>.

<sup>44</sup> *Id.*

<sup>45</sup> Safe Campus Act of 2015, H.R. 3403, 114th Cong. (2015).

tion while law enforcement investigates the incident.<sup>46</sup> If, however, the complainant has not consented to such disclosure, the school may not move forward with any disciplinary processes or provide accommodations to the complainant.<sup>47</sup>

While these proposals vary somewhat, the differences are largely formal; in all mandatory police involvement legislation to date, where allegations of gender-based violence would constitute a crime, students are unable to pursue internal university adjudication without law enforcement involvement. Some commentators suggest that universities should abdicate any role in adjudicating cases of sexual assault in favor of exclusively criminal responses, but to date that suggestion has not been introduced as legislation.<sup>48</sup>

These proposals are driven by several concerns among proponents. The Rape, Abuse & Incest National Network (RAINN)—“the nation’s largest anti-sexual violence organization”<sup>49</sup>—advocates for mandatory law enforcement involvement based on its belief that “the most effective [. . .] way to prevent sexual violence is to use the criminal justice system to take more rapists off the streets.”<sup>50</sup> RAINN also emphasizes its belief that “[r]ape is all too often a crime without consequences” and argues that the way to remedy this is to mandate police involvement in campus sexual assault cases.<sup>51</sup> According to RAINN, it is of paramount importance to “treat [these sexual assaults] as the felonies that they are” by involving law enforcement, particularly because school disciplinary boards are ill equipped to handle something that also constitutes a felony.<sup>52</sup> RAINN acknowledges that the criminal justice system is a “difficult and imperfect” way to address sexual assault but suggests that it is preferable to a

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<sup>46</sup> There is a caveat; the school may investigate, adjudicate, and impose interim sanctions against the respondent if and only if “the institution determines that the imposition of such a sanction is a reasonable measure to promote campus safety and student well-being.” *Id.* Interim sanctions would terminate upon the conclusion of the law enforcement investigation unless an indictment were issued. *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *See, e.g.,* Goldberg, *supra* note 8 (quoting a representative from RAINN who does not believe sexual assault adjudications should be dealt with through schools’ internal processes rather than by police); Samantha Harris, *Law Enforcement Must Take the Lead in Campus Sexual Assault Cases*, N.Y. TIMES: ROOM FOR DEBATE (Aug. 13, 2014, 12:32 PM), <https://www.nytimes.com/roomfordebate/2014/08/12/doing-enough-to-prevent-rape-on-campus/law-enforcement-must-take-the-lead-in-campus-sexual-assault-cases>; Tyler Kingkade, *Bernie Sanders Comments on Campus Rape, and Totally Drops the Ball*, HUFFPOST (Jan. 12, 2016, 3:59 PM), [http://www.huffingtonpost.com/entry/bernie-sanders-campus-rape\\_us\\_5695431ee4b086bc1cd5616e](http://www.huffingtonpost.com/entry/bernie-sanders-campus-rape_us_5695431ee4b086bc1cd5616e).

<sup>49</sup> RAINN, <https://www.rainn.org> (last visited May 21, 2019).

<sup>50</sup> RAINN Letter, *supra* note 33.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

school's internal processes, which, it argues, "will never be up to the challenge."<sup>53</sup> Others echo RAINN's concerns that campus adjudication trivializes rape and sexual assault.<sup>54</sup> Meanwhile, groups like FratPAC and FIRE prefer law enforcement involvement because, they say, schools are incapable of handling such issues on their own and because police involvement would result in more sexual assailants serving time in jail.<sup>55</sup>

Overall, proponents of these laws have two main arguments. First, they argue that schools are inherently unsuited to adjudicating sexual assault, either because they will never be able to do the job well or because it is an inappropriate forum in which to adjudicate allegations of this type. Second, they argue that criminal legal processes are appropriate (even if imperfect) because treating rape and sexual assault as crimes is a way of taking those cases seriously and because the criminal legal response will be more effective at preventing rape and sexual assault.

## II

### AGAINST MANDATORY POLICE INVOLVEMENT PROPOSALS

Mandatory police involvement is theoretically and practically inconsistent with the goals of Title IX. It imports criminal justice norms into Title IX's civil rights framework, glossing over the ways in which a civil rights framework is meaningfully different from a criminal one. The required criminal justice approach would frustrate Title IX's civil rights goals by making it more difficult for students to report, and schools to respond to, sexual violence on campus. These

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<sup>53</sup> *Id.*

<sup>54</sup> See Goldberg, *supra* note 8 (noting that "to some—though by no means all—victims' advocates, treating rape cases as internal disciplinary matters to be handled by amateurs trivializes a serious felony" and quoting RAINN); Rubinfeld, *supra* note 8 (arguing that colleges' internal processes have failed); RAINN Letter, *supra* note 33. Activists respond by arguing that failing to address the civil rights aspects of campus sexual assault is trivializing. See, e.g., Alexandra Brodsky, *Hey Bernie: Campus Rape Is a Civil Rights Issue*, FEMINISTING (Jan. 12, 2016), <http://feministing.com/2016/01/12/hey-bernie-campus-rape-is-a-civil-rights-issue-too>.

<sup>55</sup> Kingkade, *supra* note 33. FratPAC later withdrew its support for the Safe Campus Act following public outcry. See Bishop, *supra* note 33. These groups also cite due process concerns as reasons for supporting these policy proposals—the idea seems to be that if due process protections for the accused on campus are insufficient, as some claim they are, the requirement of law enforcement involvement will essentially substitute criminal due process protections for campus ones. See Kingkade, *supra* note 33. For an argument that these proposals fail to address these concerns, see Alexandra Brodsky, *Fair Process, Not Criminal Process, Is the Right Way to Address Campus Sexual Assault*, AM. PROSPECT (Jan. 21, 2015), <http://prospect.org/article/fair-process-not-criminal-process-right-way-address-campus-sexual-assault>. A broader discussion of due process protections for the accused in campus proceedings is beyond the scope of this Note.

policies would only frustrate Title IX's objectives without meeting the goals of those who support these policies. Title IX is meant to ensure that students do not, as a result of gender-based violence's discriminatory effects, lose access to educational opportunity. Mandatory police involvement makes it more, rather than less, difficult for students to access the rights guaranteed to them by Title IX and does not further Title IX's goal of increasing equity in federally funded education.

*A. Mandatory Police Involvement Is Theoretically Inconsistent with Title IX*

Mandatory police involvement singles out sexual assault as in need of a different kind of response than other student disciplinary violations that may also be criminal. In doing so, these proposals fail to take into account Title IX's norms and goals. Mandatory police involvement proposals reconstruct obstacles to rape reporting that have been, through hard-fought feminist victories, dismantled in the criminal law—and like those old criminal law hurdles, mandatory police involvement is influenced by a societal skepticism towards sexual assault claims and sexual assault victims. This is inconsistent with Title IX's gender equality ethos and, in erecting special burdens for sexual assault survivors, is inconsistent with Title IX's demand that schools address sexual assault as a gender equality issue.

At the same time, mandatory police involvement also builds upon the intuition, in seeming contradiction to the skepticism towards sexual assault discussed above, that sexual assault is serious and should be dealt with seriously—which mandatory police involvement proponents argue means criminally. This ignores Title IX's role as a civil rights statute and its demand for civil rights remedies. Sexual assault on campus may be a crime—in which case, even absent mandatory police involvement laws, student victims are free to seek police involvement if they wish. But Title IX's contribution is to make clear that sexual assault is also a civil rights violation and must be addressed in a way that mitigates the harm to educational access, for instance by ensuring that victims have access to mental and physical healthcare for the consequences of their assault, providing changes to housing so that they can live and study further from their assailant, or providing extensions on an assignment due shortly after an assault.

These competing impulses—to treat sexual assault seriously and also with higher-than-average skepticism—motivate mandatory police involvement proposals, and both operate together to deny survivors the on-campus civil rights response that Title IX mandates.

### 1. *Differing Approaches: Civil Rights and Criminal Justice*

Those advocating for mandatory police involvement seem to fundamentally misunderstand the goals of Title IX and of student activists urging its enforcement. Proponents of mandatory police involvement, in focusing on the criminal nature of sexual violence, fail to understand the essential point that, on campuses, sexual violence also constitutes a violation of students' civil rights. Student activists are not arguing that sexual violence on campus is *not* criminal; rather, they argue that it is *also* a violation of civil rights and that students must have the option of it being addressed as such—an option many will not have if police involvement is required in order to report sexual violence to the school. They argue that schools must respond to sexual violence because to do otherwise violates survivors' civil rights and fails to take seriously rape as an obstacle to education. Activists emphasize that the purpose and function of Title IX-mandated internal campus adjudication and of criminal law enforcement are different. That is, "Title IX's main goals are creating rights and remedies for victims and ending not only harassment and violence but also its discriminatory effects" by requiring schools to address the myriad ways in which sexual victimization can impact education, while "the criminal law is not concerned with establishing equality," but rather with keeping the community as a whole safe from violence, and gives few, if any, rights to violence victims.<sup>56</sup>

This is what defines Title IX as a civil rights law: Title IX is concerned not with punishment of crimes but with eliminating gender-based barriers to education. The key insight of student activists is that sexual violence operates as an obstacle to education in a number of ways that have little to do with punishment and even less to do with the operation of the criminal legal system. Know Your IX, a leading activist group, explains that "[a] criminal trial is brought against a defendant by the state—not the victim—in defense of the state's interests. . . . In contrast, schools, unlike criminal courts, are focused on the victim and are required to make sure he or she has everything they need to continue their education."<sup>57</sup> In accordance with Title IX, schools may take steps to provide student victims of sexual violence with academic accommodations, help moving out of a dorm that is shared with an abuser, and mental and physical healthcare—all of which mitigate the impact of sexual violence and its aftermath on a

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<sup>56</sup> See Cantalupo, *supra* note 22, at 284.

<sup>57</sup> *Why Schools Handle Sexual Violence Reports*, KNOW YOUR IX, <https://www.knowyourix.org/issues/schools-handle-sexual-violence-reports> (last visited May 20, 2019).

victim's ability to continue to learn.<sup>58</sup> A victim may also want to pursue criminal sanctions, and even without mandatory police involvement, they have that option. But “the police just can’t get a survivor an extension on her English paper due the week after he or she was raped.”<sup>59</sup> What is more, the wheels of the criminal justice system turn slowly. A criminal case against an alleged rapist or assailant may take years, during which time the victim would be left to attend school with the person who assaulted them or to drop out.<sup>60</sup> In contrast, schools are in the position to act more quickly and to provide a student victim with accommodations immediately.

Activists emphasize that, in the absence of accessible school-based adjudications,<sup>61</sup> survivors of campus sexual assault will be left on campus—and often in classes and dorm buildings—with their assailant. That is likely to compromise their ability to continue their education, sometimes even forcing them to leave school<sup>62</sup> and imposing heavy financial burdens.<sup>63</sup> They argue that the school's leaving the situation unaddressed thus constitutes a civil rights violation, an interpretation that is bolstered by the *Davis* decision.<sup>64</sup> Activists do not argue that campus sexual assault is *non-criminal* or non-

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See *infra* Section II.A.2 and Section II.B for an explanation of why mandatory police involvement would make school-based adjudications less accessible to many students.

<sup>62</sup> See Emily Bazelon, *The Return of the Sex Wars*, N.Y. TIMES MAG. (Sept. 10, 2015), <https://www.nytimes.com/2015/09/13/magazine/the-return-of-the-sex-wars.html>; Alexandra Brodsky & Dana Bolger, *How Two Girls Are Teaching Students Their Rights to Fight Campus Sexual Assault*, TEEN VOGUE (Jan. 14, 2016), <http://www.teenvogue.com/story/know-your-ix-campus-sexual-assault>; Alexandra Brodsky & Elizabeth Deutsch, *No, We Can't Just Leave College Sexual Assault to the Police*, POLITICO (Dec. 3, 2014), <http://www.politico.com/magazine/story/2014/12/uva-sexual-assault-campus-113294>; Epifano, *supra* note 29; Jennifer Ludden, *Student Activists Keep Pressure on Campus Sexual Assault*, NPR (Aug. 26, 2014, 4:59 AM), <http://www.npr.org/2014/08/26/343352075/student-activists-keep-sexual-assault-issues-in-the-spotlight>.

<sup>63</sup> See generally Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L.J. 2106 (2016) (noting that gender violence can create financial burdens in a number of ways, including the costs of moving, the costs of physical and mental healthcare, and in some cases, the costs that are incurred when a school's lack of support forces a survivor out of school, requiring them to begin paying back loans sooner than anticipated, to lose deposits on apartments, as well as to lose potential employment opportunities due to not finishing their degree).

<sup>64</sup> That is, because sexual assault is a form of gender-based violence, it constitutes a barrier to education on the basis of gender. See Brodsky, *supra* note 54; see also *Davis ex rel. Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643–45 (1999) (holding that “the regulatory scheme surrounding Title IX has long provided funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain non-agents,” and finding that a school will be liable under Title IX where it is deliberately indifferent to gender-based barriers to education caused by other students).

serious;<sup>65</sup> rather, they argue that it is *also* a civil rights violation, and that treating it as an exclusively criminal matter fails to take seriously the ways in which campus sexual assault impedes survivors' access to education and thus violates their civil rights.<sup>66</sup> Because the criminal system is not designed to address civil rights violations, addressing the ways in which gender-based violence perpetuates discrimination in education requires school-based processes and solutions.<sup>67</sup> Civil rights violations require civil rights remedies. In the Title IX context, that means remedies aimed at ensuring that sexual assault is not a barrier to education, rather than remedies aimed at criminal convictions.

## 2. *Criminal Law's Old Obstacles Will Be Resurrected*

Mandatory police involvement in campus sexual assault cases also serves to replicate some of the problems with sexual violence's historic treatment in the criminal law. There is a long history of feminist resistance to laws that differentiated between sexual assault and other forms of violence in ways that reinforced patriarchal assumptions about sex, gender, and violence.<sup>68</sup> Feminists contested the failure to distinguish between sexual violence and consensual sex, or the assumption that sexual violence is more like sex and less like violence, because that failure gave rise to inadequate legal protections for victims of sexual violence.<sup>69</sup> In pushing for reform of rape laws and for the recognition of sexual harassment as a form of discrimination, feminists emphasized similarities between sexual and non-sexual forms of violence and discrimination.<sup>70</sup> This push can be seen most prominently in the 1970s-era efforts to remove unique procedural hurdles that

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<sup>65</sup> It is worth noting that schools can—and do—define sexual misconduct within the context of their student disciplinary codes differently from criminal definitions of sexual assault. This is consistent with the fact that student disciplinary codes prohibit a range of behavior that is not criminal (for example, cheating) in addition to behavior that may also be criminal (for example, theft, drug use, simple assault, and underage drinking).

<sup>66</sup> See, e.g., Brodsky, *supra* note 55.

<sup>67</sup> See Dana Bolger, Opinion, *Where Rape Gets a Pass*, N.Y. DAILY NEWS (July 6, 2014), <http://www.nydailynews.com/opinion/rape-pass-article-1.1854420> (pointing to changes to course and work schedules, dorm reassignments, and extensions on papers and exams as accommodations a school can provide); *Why Schools Handle Sexual Violence Reports*, *supra* note 57 (explaining that sexual assault is a crime, but that it is also a form of discrimination and that schools are required to respond to that aspect of it). Schools can provide remedies for civil rights violations that the criminal justice system cannot; for instance, if a survivor has a paper due the week after they are sexually assaulted, the school can provide them with an extension on that assignment so that their educational outcomes are not unduly impacted by the aftermath of their assault.

<sup>68</sup> See Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 160–65 (2013) (explaining this history).

<sup>69</sup> See *id.*

<sup>70</sup> *Id.* at 160–61.



applied only to rape cases.<sup>71</sup> These unique hurdles “mark[ed] out sexual violence as exceptional and warranting extreme caution in prosecutions of suspected rapists.”<sup>72</sup> In the civil rights context, feminists worked to demonstrate that “sexual harassment was not just a personal problem faced by individual women but a systemic harm that a high percentage of women would confront over the course of their working lives.”<sup>73</sup> Like the pre-1970s treatment of rape and sexual assault in the criminal law, mandatory police involvement for sexual assault but not for other forms of behavior that may violate both criminal law and school disciplinary code again singles out sexual violence as “exceptional and warranting extreme caution”<sup>74</sup>—a notion that feminist scholars and activists worked hard to reform.<sup>75</sup>

Arguments for mandating police involvement because colleges are not competent to handle sexual assault cases specifically and unreasonably single out sexual assault as different from other violent, potentially criminal conduct and introduce a special obstacle into campus-based sexual assault adjudications. Proponents of mandatory police involvement argue that rape should be treated like the felony it is and that other felonies are not handled by schools.<sup>76</sup> But in cases of hazing,<sup>77</sup> for instance, the violent and potentially criminal nature of the acts involved has not led to suggestions that schools *should not* be involved unless police are involved or that schools should not be

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<sup>71</sup> See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 *YALE L.J.* 1940, 1946–48 (2016) (describing the unique procedural hurdles in traditional rape law, including corroboration requirements, cautionary instructions, and a prompt complaint requirement).

<sup>72</sup> Chamallas, *supra* note 68, at 161.

<sup>73</sup> *Id.* at 162.

<sup>74</sup> *Id.* at 161.

<sup>75</sup> See Anderson, *supra* note 71, at 1949–53 (describing progressive rape law reform). For an argument that sexual violence is *violence*, see BROWNMILLER, *supra* note 6; see also Chamallas, *supra* note 68, at 137, 139, 160 (critiquing the law’s treatment of rape and sexual assault as “qualitatively different from other forms of violence” and its “tendency to characterize sexual desire or motivation as different from all other inducements to action,” which, she argues, is rooted in “a traditional ideology that assimilates sexual abuse to consensual sexual conduct and often indiscriminately exempts even harmful sexual behavior from legal penalties”).

<sup>76</sup> See RAINN Letter, *supra* note 33; cf. Alexandra Brodsky, *Against Taking Rape “Seriously”: The Case Against Mandatory Referral Laws for Campus Gender Violence*, 53 *HARV. C.R.-C.L. L. REV.* 131, 148 (2018) (explaining that the fact that schools do not always handle sexual assault reports well “is not an argument for forcing students to choose between reporting to both [the police, who also do not always handle sexual assault well, and to their school] or to neither”).

<sup>77</sup> Hazing often includes sexualized humiliation, which raises interesting questions about sexual exceptionalism in the hazing context. That is, however, beyond the scope of this Note, and the hazing discussed here is assumed to be violent but non-sexual.

involved *at all*.<sup>78</sup> That is, most would agree that schools should be allowed to discipline students, consistent with the general due process requirements for student discipline, regardless of whether police are involved and regardless of the outcome of police involvement.<sup>79</sup> Unlike in sexual assault cases, the violence involved in hazing does not seem to lead to a conclusion that the conduct should be treated as *exclusively* criminal.<sup>80</sup> Michelle Anderson notes a case in which a fraternity hazing ritual ended in the death of a student.<sup>81</sup> The police investigated the homicide, but the school also took action itself to investigate and respond to the hazing. “Fraternity hazing and homicide are both serious crimes,” she notes, “but no one in that case said that the campus is incompetent to adjudicate the case, the court should be the only one to handle it, and the college should get out of the way.”<sup>82</sup> In instances of hazing that do not result in death, many colleges give students the option of handling the case internally through normal disciplinary processes without reporting to the police, while some decide whether or not to involve the police on a case-by-case basis, but that is still quite different from a legislative mandate to involve police in all cases.<sup>83</sup>

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<sup>78</sup> See, e.g., Morganne Mallon, *Hazing Across Campus: How Universities Handle the Dark Side of Student Life*, PENNLIVE (June 18, 2015), [http://www.pennlive.com/midstate/index.ssf/2015/06/how\\_schools\\_handle\\_hazing\\_case.html](http://www.pennlive.com/midstate/index.ssf/2015/06/how_schools_handle_hazing_case.html) (describing the treatment of hazing on college campuses).

<sup>79</sup> See, e.g., *id.* For instance, if there were an instance of hazing in which the facts could reasonably be understood to constitute a felony, and the police made arrests, but the prosecutor ultimately made the decision not to prosecute, few would argue that the school should then be precluded from taking disciplinary action. See *id.* Furthermore, few would argue that the school should not be able to take disciplinary action—again, consistent with the due process requirements that adhere to student discipline—during the *pendency* of any criminal proceedings. See *id.*

<sup>80</sup> Cf. Chamallas, *supra* note 68, at 147–48 (describing the difference in courts’ approaches to violent, non-sexual intentional torts and sexually violent intentional torts). It seems that hazing may be thought of as characteristic of the college experience in a way that sexual violence is not; this assumed connection between hazing and the school environment may then be thought to justify school involvement in responding to hazing. Cf. *id.* at 149 (explaining that courts are comfortable imposing vicarious liability on employers because “anger and violence of men (‘boys being boys’) somehow strikes courts as characteristic of employment in male-dominated workplaces,” and noting that “[i]t is not the gender of the actors that triggers the exceptional treatment but the perceived sexual nature of the act. . . . [I]t is sexual misconduct that is singled out as exceptional and treated as personal, private, and unconnected to employment”). Of course, feminist activists have been trying to demonstrate that sexual violence, for many, *is* characteristic of the college experience. See *supra* notes 12–17 and accompanying text.

<sup>81</sup> See Anderson, *supra* note 71, at 1997.

<sup>82</sup> *Id.*

<sup>83</sup> See Mallon, *supra* note 78 (discussing school policies regarding police involvement in hazing cases in Pennsylvania, where hazing is a crime).

Similar arguments can be made with respect to other student disciplinary violations in which the underlying facts constitute a crime; colleges' and universities' ability to adjudicate instances of stealing, drug use, underage drinking, and nonsexual assault through their internal processes, without the involvement of law enforcement, goes unchallenged. Treating sexual assault differently from other student disciplinary violations in which the underlying facts could also constitute a crime supports the "societal notion that women<sup>84</sup> have a tendency to lie about rape and sexual assault" and that these claims are deserving of a unique degree of skepticism fit for resolution only by criminal law.<sup>85</sup> In doing so, it creates a unique hurdle for victims of sexual assault who want their school to respond; these victims, and these victims alone, must weigh the costs of police involvement before deciding whether to report conduct that is both a disciplinary violation and potentially a felony to their school. These students, and these students alone, must jump through the hoops required by the criminal legal system in order to get their school to respond.

*B. Mandatory Police Involvement Fails Title IX Goals as a Matter of Policy*

Gender-based violence falls within the purview of Title IX because it denies victims equal opportunity in education—it can impact academic performance, alter the kinds of academic opportunities victims pursue, and lead to victims dropping out of school. Reducing the incidence and effects of gender-based violence on campus is a Title IX issue because Title IX is concerned with removing obstacles to equal opportunity in education. Mandatory police involvement proposals frustrate this goal by reducing reporting, particularly among marginalized students<sup>86</sup>—those whose educational opportunity civil rights law should be most concerned with safeguarding. That lack of reporting, in turn, will result in under-detection of rape and sexual assault, which disserves deterrence goals and will distort data. The under-detection and the resultant missing data will deny schools access to the information necessary to combat gender-based violence on campus. It will also deny student victims access to

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<sup>84</sup> While Anderson is referring to specific stereotypes about women, this argument applies with equal force to trans and nonbinary individuals. There are deep societal stereotypes about trans and nonbinary people's supposed propensity to lie that would subject them to the same sort of skepticism here. Additionally, trans women and femme nonbinary people will be subject both to stereotypes about women and those about trans and nonbinary people.

<sup>85</sup> Anderson, *supra* note 71, at 1948.

<sup>86</sup> See *infra* Section II.B.2.

accommodations to which Title IX entitles them, and which they need to continue their education.

### 1. *Survivors May Not Report at All to Avoid Police Involvement*

Many survivors prefer not to have police involved with the adjudication of their alleged assault and, as such, might not report to anyone if police involvement were mandatory.<sup>87</sup> Many survivors understand that law enforcement does not always treat survivors of sexual assault with respect. Police officers often disbelieve rape victims<sup>88</sup> and overestimate the number of false rape claims.<sup>89</sup> Some police officers estimate that as many as forty to forty-five percent of rape allegations are false;<sup>90</sup> others place that number even higher: One New York City police officer opined that “[f]or every single rape I’ve had, I’ve had 20 that are total bullshit.”<sup>91</sup> It is common for police departments to ignore rape complaints and undercount them in offi-

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<sup>87</sup> Several survivor-activists have made statements to this effect. *See, e.g.*, Katie J.M. Baker, *New California Bill Would Change Rules for Reporting Rapes on College Campuses*, NEWSWEEK (Jan. 6, 2014, 2:44 PM), <http://www.newsweek.com/new-california-bill-would-change-rules-reporting-rapes-college-campuses-225452> (noting that Sofie Karasek, a co-founder of the activist group End Rape on Campus, “never would’ve come forward to campus authorities if she knew they would go to the police”); Cooper, *supra* note 19, at 4 (quoting Alexandra Brodsky saying “I would have never come forward if [mandatory police involvement] had been the only option”). Additionally, in a survey conducted by Know Your IX, eighty-eight percent of survivors believed that were mandatory police involvement policies in place, fewer survivors would report at all. *Resisting Mandatory Police Referral Efforts*, KNOW YOUR IX, <https://www.knowyourix.org/issues/resisting-mandatory-police-referral-efforts> (last visited May 20, 2019).

<sup>88</sup> *See* Emma Sleath & Ray Bull, *Comparing Rape Victim and Perpetrator Blaming in a Police Officer Sample: Differences Between Police Officers with and Without Special Training*, 39 CRIM. JUST. & BEHAV. 646, 659 (2012) (finding that forty percent of male police officers and thirty-four percent of female police officers agree that many rape claims arise from instances in which a woman consented and then changed her mind after the fact); Dana Goldstein, *Overlooking Rape*, MARSHALL PROJECT (Nov. 20, 2014, 2:00 PM), <https://www.themarshallproject.org/2014/11/20/overlooking-rape> (noting widespread disbelief of rape claims among Los Angeles sex crimes detectives). Note that the research cited here, and much of the research cited throughout Section II.B of this Note, draws on scholarship regarding sexual violence victims generally, not campus sexual violence victims specifically. Where that is the case, it is because data about campus sexual violence victims specifically was not available.

<sup>89</sup> *See* Annelise Mennicke, Delaney Anderson, Karen Oehme & Stephanie Kennedy, *Law Enforcement Officers’ Perception of Rape and Rape Victims: A Multimethod Study*, 29 VIOLENCE & VICTIMS 814, 822 (2014) (reporting that eighty percent of officers in the study estimated the number of false rape claims above the level supported by empirical evidence).

<sup>90</sup> Rachel M. Venema, *Police Officer Schema of Sexual Assault Reports: Real Rape, Ambiguous Cases, and False Reports*, 31 J. INTERPERSONAL VIOLENCE 872, 879 (2016).

<sup>91</sup> Claire Gordon, *Why College Rape Victims Don’t Go to the Police*, AL JAZEERA AM. (May 19, 2014, 8:30 PM), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/5/19/why-college-rapevictimsdonatgotothepolice.html>.

cial statistical reports.<sup>92</sup> Indeed, the Department of Justice has found evidence of discriminatory law enforcement practices in responding to sexual violence in cities across the country.<sup>93</sup>

These attitudes towards rape victims can have real consequences for those who do report sexual violence to the police. Some victims are re-traumatized by the experience.<sup>94</sup> That re-traumatization can have serious consequences, including reluctance to seek further help and feelings of guilt, self-doubt, depression, and distrust of others.<sup>95</sup> Fear of this sort of experience may deter victims from reporting—fear of not being believed and lack of trust in the criminal justice system are both noted reasons that victims do not report sexual assault to the police.<sup>96</sup>

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<sup>92</sup> See Goldstein, *supra* note 88 (noting that one researcher found evidence of police under-counting rape in twenty-two percent of the 210 American cities that were studied); see also Catherine Rentz & Alison Knezevich, *A Flawed, Inconsistent Police Response to Sexual Assault in Maryland*, BALT. SUN (Dec. 3, 2016, 2:46 PM), <http://www.baltimoresun.com/news/maryland/investigations/bs-md-rape-investigations-20161203-story.html> (reporting that in Baltimore, “[e]vidence has been destroyed in hundreds of cases, [and] complaints are discarded at a high rate”).

<sup>93</sup> See CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 43–51 (2011), [http://www.justice.gov/crt/about/spl/nopd\\_report.pdf](http://www.justice.gov/crt/about/spl/nopd_report.pdf) (finding patterns of bias and discrimination in the New Orleans Police Department’s handling of sexual violence cases); Letter from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Bill Montgomery, Cty. Attorney, Maricopa Cty., Ariz. 16 (Dec. 15, 2011), [http://www.justice.gov/crt/about/spl/documents/mcso\\_findletter\\_12-15-11.pdf](http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf) (noting hundreds of cases in which the Sheriff’s Office of Maricopa County admittedly was deficient in handling sexual violence cases); Letter from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, & Michael W. Cotter, U.S. Attorney, Dist. of Mont., to John Engen, Mayor, Missoula, Mont. (May 15, 2013), [http://www.justice.gov/crt/about/spl/documents/missoulapdfind\\_5-15-13.pdf](http://www.justice.gov/crt/about/spl/documents/missoulapdfind_5-15-13.pdf) (finding that the Missoula Police Department’s approach to cases of sexual violence “ha[s] the effect of depriving female sexual assault victims of basic legal protections”).

<sup>94</sup> See, e.g., Rebecca Campbell, *Rape Survivors’ Experiences with the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?*, 12 VIOLENCE AGAINST WOMEN 30, 31, 37 (2006) (finding that most rape victims in the study experienced secondary victimization during their encounters with law enforcement). An example of re-traumatizing behavior is asking a rape victim whether they had an orgasm during their assault. See *id.* at 36–37.

<sup>95</sup> *Id.* at 31. It should be noted that school-based adjudications can have similarly re-traumatizing effects. See Katie J.M. Baker, Law & Order: SVU Rips Story from Dozens of Campus Rape Headlines, JEZEBEL (Apr. 25, 2013, 3:06 PM), <https://jezebel.com/law-order-svu-airs-greatest-hits-compilation-of-camp-480867409> (quoting survivor and activist Andrea Pino: “[i]f you ask any of us, the school’s betrayal was worse than the rape itself”). School-based reporting options are not important because they are inherently more sensitive to survivors, but rather because they are intended to focus on the civil rights of the survivor rather than solely the punishment of the alleged perpetrator, as well as for the other reasons discussed throughout this Note. Work is certainly needed to ensure that school administrators and adjudicators are sensitive to the process’s civil rights focus and that they are treating all parties involved with respect.

<sup>96</sup> *Reporting of Sexual Violence Incidents*, NAT’L INST. JUST., <https://www.nij.gov/topics/crime/rape-sexual-violence/pages/rape-notification.aspx> (last modified Oct. 26, 2010).

At the same time, victims report being treated as if they themselves were a suspect when they reported sexual assault to law enforcement.<sup>97</sup> Indeed, when law enforcement officers disbelieve victims, victims have been prosecuted for making a false report that was later proven true.<sup>98</sup> These concerns are exacerbated for survivors who do not fit the social ideal of prototypical rape victims—white, chaste, cisgender women, whose gender presentation is traditionally feminine, who do not have a criminal record, who were not under the influence of any mind-altering substances at the time of their assault, and who were sexually assaulted by a violent stranger.<sup>99</sup> Those survivors who fall outside of that norm may justifiably be more fearful of not being believed, both by people in general and by police specifically.<sup>100</sup>

Many survivors understand that the likelihood of a report made to the police resulting in criminal penalty is low.<sup>101</sup> And they also

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<sup>97</sup> See, e.g., Jan Jordan, *Beyond Belief?: Police, Rape, and Women's Credibility*, 4 CRIM. JUST. 29, 33 (2004) (“They felt the police viewed them suspiciously . . . . Some women said they felt disbelieved by the police right from the start, and commented that they felt the police kept trying to catch them out, to see if they were lying.”); Ken Armstrong & T. Christian Miller, Opinion, *When Sexual Assault Victims Are Charged with Lying*, N.Y. TIMES (Nov. 24, 2017), <https://www.nytimes.com/2017/11/24/opinion/sunday/sexual-assault-victims-lying.html> (“Instead of interviewing her as a victim, they interrogated her as a suspect.”); Goldstein, *supra* note 88 (noting that some Los Angeles sex crimes detectives treat victims as “guilty until proven innocent”).

<sup>98</sup> See, e.g., Lisa Avalos, *Prosecuting Rape Victims While Rapists Run Free: The Consequences of Police Failure to Investigate Sex Crimes in Britain and the United States*, 23 MICH. J. GENDER & L. 1, 14–16 (2016) (collecting examples); Armstrong & Miller, *supra* note 97 (describing cases in which victims were prosecuted for making a false report that was later proven true). And some police interrogation techniques may elicit false information from victims. Due to the way the brain processes trauma, many victims are unable to give a linear account of their assault. See Rebecca Ruiz, *Why Don't Cops Believe Rape Victims?*, SLATE (June 19, 2013, 3:12 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/06/why\\_cops\\_don\\_t\\_believe\\_rape\\_victims\\_and\\_how\\_brain\\_science\\_can\\_solve\\_the.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/why_cops_don_t_believe_rape_victims_and_how_brain_science_can_solve_the.html); see also Armstrong & Miller, *supra* note 97 (describing one prosecuted victim as having been pressured into recanting her story by police officers). Police officers may press victims for a detailed timeline of the assault, and, under pressure, victims may give incorrect information as they try to piece together memories. See Ruiz, *supra*. This, in turn, leaves victims more vulnerable to prosecution themselves.

<sup>99</sup> See Anderson, *supra* note 71, at 1948–49 (describing the importance of chastity in rendering victims believable under traditional rape law); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 588–91, 594–99 (2009) (noting that the criminal justice system also has a long history of vindicating only those rape victims who fit certain prescribed social scripts of acceptable victimhood).

<sup>100</sup> See *supra* notes 88–92 and accompanying text. There is no reason to believe that campus-based adjudications are free from these kinds of biases. While this Note advocates for campus-based adjudications, those adjudications take place in the same social and cultural framework as do police investigations, and it is reasonable to expect that they replicate many of the same biases. Reforms should focus on minimizing the effects of these biases on campus processes.

<sup>101</sup> See Kimberly A. Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN

understand that, if their case were brought to trial, the trial would be potentially re-traumatizing.<sup>102</sup> For survivors, the emotional and temporal toll of a criminal investigation and potential trial may not be worth the small chance that their assailant will face criminal penalty.

What is more, many survivors do not wish to see their assailant arrested or imprisoned and so would not pursue a complaint if that were a plausible outcome. Most survivors of sexual assault know their assailant,<sup>103</sup> and their feelings towards them may be complex, rather than simply punitive. In an ACLU report, advocates who work with domestic violence victims noted that many of their clients “do not want their spouse, partner, live-in, etc. to be arrested, they just want out of a terrible situation.”<sup>104</sup> This is reflective of research indicating that policies increasing the likelihood of arrest or prosecution of perpetrators of sexual assault or domestic violence often lead to decreases in reporting of those crimes.<sup>105</sup> Seeing an intimate partner arrested can be traumatic and can cause long-term health consequences for abuse survivors.<sup>106</sup> The role of potential prison time for assailants in deterring victim reporting may also be exacerbated for victims who live at the intersection of multiple marginalized identities. Some Black women, for instance, report feeling pressure from their communities not to report sexual assaults by Black men to the police

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145, 156 (2012) (finding that “about 5% to 20% of all rapes are reported to law enforcement, 7% to 27% of these reports are prosecuted, and 3% to 26% [of these reports] yield a conviction”).

<sup>102</sup> See generally LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY’S CONTINUED BETRAYAL OF THE VICTIM* (1991) (describing the continued trauma victims face when navigating the criminal legal system).

<sup>103</sup> *Victims and Perpetrators*, NAT’L INST. JUST., <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/victims-perpetrators.aspx> (last modified Oct. 26, 2010) (noting that in general, two-thirds of victims between the ages of eighteen and twenty-nine knew their attacker and that among sexual assault victims in college, nine out of ten knew their attacker).

<sup>104</sup> ACLU, *RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING* 30 (2015), [https://www.aclu.org/sites/default/files/field\\_document/2015.10.20\\_report\\_-\\_responses\\_from\\_the\\_field.pdf](https://www.aclu.org/sites/default/files/field_document/2015.10.20_report_-_responses_from_the_field.pdf).

<sup>105</sup> See, e.g., RICHARD FELSON & PAUL-PHILIPPE PARÉ, *THE REPORTING OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT BY NONSTRANGERS TO THE POLICE* 7 (2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/209039.pdf>; Radha Iyengar, Opinion, *The Protection Battered Spouses Don’t Need*, N.Y. TIMES (Aug. 7, 2007), <http://www.nytimes.com/2007/08/07/opinion/07iyengar.html> (“Victims want protection, but they do not always want to see their partners put behind bars.”).

<sup>106</sup> See Belinda Luscombe, *When Not to Arrest an Abuser in a Domestic Violence Case*, TIME (Mar. 5, 2014), <http://time.com/12682/when-not-to-arrest-an-abuser-in-a-domestic-violence-case>.

so as not to contribute to the disproportionate incarceration of Black men.<sup>107</sup>

There is also at least some reason to believe that, where mandatory police involvement is in place, the fact of reporting to their school and proceeding with a school-based adjudication will cause survivors to fare *less* well in the criminal justice system than survivors who report solely to the police. Research indicates that victims who take an active role in their own cases are blamed more for their own victimhood.<sup>108</sup> Bringing a complaint on one's own behalf, either before a school-based administrative body or in civil court, is an inherently more active role than that of a victim in the criminal justice system, where the case is brought by the state.<sup>109</sup> Essentially, it is as if the act of asserting one's rights belies one's claim of victimhood.

This can also be seen in practice; the fact that a rape victim is bringing a civil suit against their alleged assailant can be admitted as impeachment evidence in a criminal case arising from the same facts.<sup>110</sup> Research indicates that, after the introduction of this sort of impeachment evidence, mock jurors "convict the defendant less often, rated the defendant as more credible, and rated the victim as less

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<sup>107</sup> See, e.g., Anita Badejo, *What Happens When Women at Historically Black Colleges Report Their Assaults*, BUZZFEED NEWS (Jan. 21, 2016, 10:53 PM), [https://www.buzzfeed.com/anitabadejo/where-is-that-narrative?utm\\_term=.sfgDWyNrn#.nwe2dOqZa](https://www.buzzfeed.com/anitabadejo/where-is-that-narrative?utm_term=.sfgDWyNrn#.nwe2dOqZa); Bill Torpy, *Morehouse, Spelman Alums Reflect on Sometimes Tense History*, ATLANTA J.-CONST. (May 4, 2013), <http://www.ajc.com/news/morehouse-selman-alums-reflect-sometimes-tense-history/TuWUaXAYIBRWilyRVd0jaP>; see also CHRISTOPHER P. KREBS, CHRISTINE H. LINDQUIST & KELLE BARRICK, *The Historically Black College and University Campus Sexual Assault (HBCU-CSA) Study*, at 2–7 (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/233614.pdf> (finding that Black women are less likely than white women to report sexual victimization to the police and that when they do report, it is more likely that the perpetrator was a stranger or of a different race). This impulse to resist the incarceration of ever more Black men in America is understandable given the racialized reality of mass incarceration. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (describing mass incarceration as a tool for perpetuating the oppression and subjugation of Black people in the United States). That said, one might support resistance to mass incarceration and also be legitimately concerned about this sort of pressure being put on survivors. Nonetheless, depriving Black survivors of civil rights protections because of their compliance with community norms is not a rational means of protesting that norm. Black survivors may also be resistant to reporting where police involvement is mandatory because of their own concerns about the criminal legal system. See *supra* notes 99–100 and accompanying text.

<sup>108</sup> See Pam A. Mueller, *Victimhood & Agency: How Taking Charge Takes Its Toll*, 44 PEPP. L. REV. 691, 714, 718–19 (2017).

<sup>109</sup> See Cantalupo, *supra* note 22, at 292 (“[T]itle IX empowers victims, not police and prosecutors, to make fundamental decisions regarding the handling of their reports.”).

<sup>110</sup> See generally Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557 (2008) (discussing the use of a parallel civil suit as impeachment evidence in a criminal trial for rape).



credible and had less sympathy toward her.”<sup>111</sup> There is reason to believe that a pending school-based adjudication, if introduced as impeachment evidence, could have a similar effect: Survivors might be perceived as selfishly pursuing personal advantage, rather than acting altruistically in the public interest.<sup>112</sup> Survivors would, of course, retain the option of reporting solely to the police and not to their school where mandatory police involvement laws are in place, which could then eliminate the risk that they would be penalized for agentic victim behavior in pursuing a school complaint. If survivors choose to pursue that option, however, they miss out on the civil rights protections afforded by Title IX.

## 2. *Obstacles to Reporting Are Compounded for Marginalized Students*

The difficulties of reporting to the police are compounded for students from over-policed communities.<sup>113</sup> Activists have highlighted the unreasonableness of advocating for mandatory police involvement

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<sup>111</sup> Jonathan M. Golding, Kellie R. Lynch & Nesa E. Wasarhaley, *Impeaching Rape Victims in Criminal Court: Does Concurrent Civil Action Hurt Justice?*, 31 J. INTERPERSONAL VIOLENCE 3129, 3142 (2016).

<sup>112</sup> Cf. *Wooten v. State*, 464 So. 2d 640, 642 (Fla. Dist. Ct. App. 1985) (describing civil plaintiffs as motivated by self-interest and prosecuting witnesses as altruistically acting for the public good); *State v. Doughty*, 399 A.2d 1319, 1324 (Me. 1979) (same). Some of the antipathy towards rape victims who pursue both civil and criminal charges may relate specifically to the *monetary* nature of civil remedies. See Lininger, *supra* note 110, at 1582–88 (noting that judges’ hostility towards prosecuting witnesses in rape cases who are also pursuing civil cases is based on perceptions of such victims as “greedy”). As such, these effects might not be seen to the same extent where a prosecuting witness is also pursuing a school-based adjudication. That said, “greed” is not the sole explanatory factor for this antipathy towards victims pursuing simultaneous civil and criminal complaints. Wagatwe Wanjuki, a sexual assault survivor, activist, and a plaintiff in the Title IX complaint against Tufts University, argues that women are expected to pursue criminal charges because of a societal expectation that women should shoulder the burden of preventing rape and should put their own emotional needs last. See Wagatwe Wanjuki, *Stop Telling Survivors They Must Report to the Police*, FEMINISTING (2014), <http://feministing.com/2014/04/11/stop-telling-survivors-they-must-report-to-the-police>. Pursuing a school-based adjudication could be viewed as a failure to ignore one’s own needs.

<sup>113</sup> The previous Section draws on research and data about the experience of survivors of sexual assault as a group, without reference to the ways in which each survivor’s experience is shaped by their intersecting identities, and the ways in which those intersecting identities engender social privilege or oppression. This Section, by contrast, attempts to sketch out some of the factors that shape the experiences of survivors who are members of one or more historically oppressed groups. There is a way in which this organization could be seen as marginalizing those survivors who are already marginalized, by separating their experiences from those of survivors as a generalized group. This is not the intention of this Note. This organizational choice was made in order to accurately characterize the data used, and to demonstrate that while some barriers to reporting apply to all survivors, there are other obstacles that survivors with more social privilege will not experience, and it is my intention to make clear that any policy that fails to consider the

in light of national movements calling attention to police violence against people of color.<sup>114</sup> Alexandra Brodsky wrote that “[t]he irony is nauseating. In major media outlets you could find, right next to each other, articles about the grand jury decision not to indict the cop who murdered Eric Garner and Virginia’s plans to push more survivors into the criminal justice system.”<sup>115</sup> Student survivors of color may be reluctant to become entangled with a system they view as fundamentally unjust and ill-suited to ensuring the safety of their communities.<sup>116</sup> Many survivors of color are working to build alternatives to incarceration broadly, and for perpetrators of sexual assault specifically.<sup>117</sup> Campus administrative adjudication premised on civil rights norms rather than punishment can provide an alternative to students who are uncomfortable with, or opposed to, criminal enforcement.

Furthermore, Black women’s experience of reporting to the police is shaped by their particular racial and gender identity. The history of the police is intimately tied to the policing and maintenance of slavery, and for Black women, the experience of slavery was inextric-

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experience of those most marginalized fails to realize the promise of Title IX. There is no gender equality in education if equal access is only available to the most privileged.

<sup>114</sup> Indeed, many associated with the Black Lives Matter movement have called for the abolition of the police. See Amna A. Akbar, *Towards a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 460 (2018) (discussing the relationship between the Black Lives Matter movement and police abolition). Activists call the notion of police as a protective force into question, arguing that the police do not protect Black people, and, indeed, are not designed to. See Mychal Denzel Smith, *Abolish the Police. Instead, Let’s Have Full Social, Economic, and Political Equality*, THE NATION (Apr. 9, 2015), <https://www.thenation.com/article/abolish-police-instead-lets-have-full-social-economic-and-political-equality> (“When I say, ‘abolish the police,’ I’m usually asked what I would have us replace them with . . . What people mean is ‘who is going to protect us?’ Who protects us now? If you’re white and well-off, perhaps the police protect you. The rest of us, not so much.”).

<sup>115</sup> Alexandra Brodsky, *How Can Anyone Push Survivors to Report to the Police This Week?*, FEMINISTING (Dec. 5, 2014), <http://feministing.com/2014/12/05/how-can-you-push-campus-survivors-to-report-to-the-police-this-week>.

<sup>116</sup> See Stephen L. Carter, *Policing and Oppression Have a Long History*, BLOOMBERG (Oct. 29, 2015, 6:19 PM), <https://www.bloomberg.com/view/articles/2015-10-29/policing-and-oppression-have-a-long-history> (describing policing’s historical ties to the oppression of communities of color).

<sup>117</sup> See, e.g., INCITE!, *COMMUNITY ACCOUNTABILITY WITHIN THE PEOPLE OF COLOR PROGRESSIVE MOVEMENT* (2005), <https://incite-national.org/wp-content/uploads/2018/08/cmyt-acc-poc.pdf> (outlining a framework for communities of color to develop accountability principles to resist the criminal justice system); Hannah Giorgis, *Many Women of Color Don’t Go to the Police After Sexual Assault for a Reason*, GUARDIAN (Mar. 25, 2015, 7:49 AM), <https://www.theguardian.com/commentisfree/2015/mar/25/women-of-color-police-sexual-assault-racist-criminal-justice> (“As attempts to address the funneling of people of color into prison gain traction, we can renew our efforts to develop our anti-sexual assault work outside of a racist institution that stacks our bodies as collateral damage.”).

cably tied to sexual violation.<sup>118</sup> For many Black women, the image of the police is tied to the protection of, rather than protection from, a system of racialized sexual violence. Furthermore, stereotypes rooted in slavery depict Black women as hypersexual and “un-rapeable;”<sup>119</sup> these stereotypes serve as unique obstacles for Black women who report sexual assaults.<sup>120</sup>

Mandatory police involvement also poses a specific challenge for LGBTQ+ survivors, who may also fear police interactions given a history—and, often, present—of police violence and hostility toward the LGBTQ+ community. The Pride movement was founded by trans women of color, and was based on resistance to police raids experienced by the LGBTQ+ community.<sup>121</sup> The role of police officers in enforcing anti-LGBTQ+ laws perpetuated tensions between the two communities, as did the prevalence of anti-LGBTQ+ attitudes among police officers.<sup>122</sup> While many overt anti-LGBTQ+ laws are no longer

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<sup>118</sup> See Carter, *supra* note 116 (discussing the connection between the police force and Southern slave patrols); Adrienne D. Davis, *Slavery and the Roots of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 457, 457 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (describing slavery as a mechanism of gender supremacy that functioned as an “early and particularly virulent strain of institutionalized sexual harassment”); Dorothy Roberts, *The Paradox of Silence and Display: Sexual Violation of Enslaved Women and Contemporary Contradictions in Black Female Sexuality*, in BEYOND SLAVERY: OVERCOMING ITS RELIGIOUS AND SEXUAL LEGACIES 41, 43–46 (Bernadette J. Brooten & Jacqueline L. Hazelton eds., 2010) (describing the sexual exploitation and violation of Black women during slavery).

<sup>119</sup> See *The Jezebel Stereotype*, FERRIS ST. U.: JIM CROW MUSEUM OF RACIST MEMORABILIA, <https://ferris.edu/HTMLS/news/jimcrow/jezebel/index.htm> (last visited July 10, 2019) (describing the stereotypical depiction of Black women as inherently promiscuous and sexually available, and explaining this stereotype, the roots of this stereotype in slavery, and this stereotype’s use as a justification for sexual assaults on Black women). During slavery, the law, too, considered Black women un-rapeable because it considered them to be property. *Id.* These stereotypes could, of course, also play into the decisionmaking of campus adjudicators—indeed, there is no reason to think they would not. That said, Title IX mandates the investigation of *every* reported sexual assault, so Black women could be assured that their assault would at least be investigated, whereas reporting to the police comes with no such guarantee. Regardless, this point underscores the need to develop campus adjudicatory systems that are cognizant of and responsive to the needs of survivors of color, and that resist the re-inscription of patterns of racism and marginalization present in the criminal justice system.

<sup>120</sup> See Kali Holloway, *When You’re a Black Woman, You’re Never Good Enough to Be a Victim*, JEZEBEL (Sept. 11, 2014, 2:40 PM), <https://jezebel.com/when-youre-a-black-woman-youre-never-good-enough-to-be-1633065554> (describing the impact that these stereotypes have on Black women, including the many victims of police officer Daniel Holtzclaw, who did not report that he sexually assaulted them because they thought no one would believe them on account of their race).

<sup>121</sup> See *Stonewall, 47 Years Later*, NAT’L CTR. FOR TRANSGENDER EQUALITY (June 28, 2016), <https://transequality.org/blog/stonewall-47-years-later> (describing the central role of trans women of color in the Stonewall Riots).

<sup>122</sup> See CHRISTY MALLORY, AMIRA HASENBUSH & BRAD SEARS, WILLIAMS INST., *DISCRIMINATION AND HARASSMENT BY LAW ENFORCEMENT OFFICERS IN THE LGBT*

in force, the legacy of fear and distrust lingers, and significant problems persist.<sup>123</sup> Some members of the LGBTQ+ community report feeling that police officers will be less helpful in response to their experiences of intimate partner violence as compared to straight female victims,<sup>124</sup> that law enforcement may fail to recognize domestic violence as a crime when it happens in the context of a same-sex relationship, and that they may assume that both parties are equally guilty.<sup>125</sup> Even more troublingly, women and LGBTQ+ people frequently experience sexual harassment and assault while in law enforcement custody.<sup>126</sup> When police themselves are perpetrators of sexual violence against the LGBTQ+ community, law enforcement is likely to be an especially unattractive place to turn for assistance in dealing with sexual violence.<sup>127</sup>

Mandatory police involvement could also functionally close the door to Title IX protections for undocumented students. In addition

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COMMUNITY 6–8 (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf> (summarizing survey data demonstrating high rates of harassment and discrimination against members of the LGBTQ+ community by police officers); German Lopez, *Police Used to Raid Gay Bars. Now They March in Pride Parades*, VOX (June 14, 2017, 8:00 AM), <https://www.vox.com/identities/2017/6/14/15768274/police-lgbtq-pride-stonewall> (describing the history of police raids that targeted the LGBTQ+ community).

<sup>123</sup> See CATHERINE HANSENS ET AL., A ROADMAP FOR CHANGE: FEDERAL POLICY RECOMMENDATIONS FOR ADDRESSING THE CRIMINALIZATION OF LGBT PEOPLE AND PEOPLE LIVING WITH HIV 5 (2014), [http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap\\_for\\_change\\_full\\_report.pdf](http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap_for_change_full_report.pdf) (reporting on the issues of discrimination and violence that exist between police and LGBTQ+ people); MALLORY, HASENBUSH & SEARS, *supra* note 122, at 6–8.

<sup>124</sup> See Catherine Finneran & Rob Stephenson, *Gay and Bisexual Men's Perceptions of Police Helpfulness in Response to Male-Male Intimate Partner Violence*, 14 W.J. EMERGENCY MED. 354, 359–60 (2013).

<sup>125</sup> NAT'L CTR. FOR VICTIMS OF CRIME & NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, WHY IT MATTERS: RETHINKING VICTIM ASSISTANCE FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER VICTIMS OF HATE VIOLENCE AND INTIMATE PARTNER VIOLENCE 8 (2010), [http://victimsofcrime.org/docs/Reports%20and%20Studies/WhyItMatters\\_LGBTQreport\\_press.pdf](http://victimsofcrime.org/docs/Reports%20and%20Studies/WhyItMatters_LGBTQreport_press.pdf) (describing the phenomenon of police assigning the label “mutual abuse” to same-sex incidents of domestic violence).

<sup>126</sup> HANSENS ET AL., *supra* note 123, at 16; see OFFICE FOR VICTIMS OF CRIME, RESPONDING TO TRANSGENDER VICTIMS OF SEXUAL ASSAULT (June 2014), [https://ovc.gov/pubs/forge/sexual\\_numbers.html](https://ovc.gov/pubs/forge/sexual_numbers.html) (“Fifteen percent of transgender individuals report being sexually assaulted while in police custody or jail, which more than doubles (32 percent) for African-American transgender people.”).

<sup>127</sup> This problem is likely to be mitigated in campus-based adjudications. Where “police work is particularly conducive to sexual misconduct because officers perform many of their duties largely absent of supervision, regularly encounter vulnerable civilians, and are susceptible to abusing their power,” campus investigation and adjudication is distinguishable. Candice Bernd, *Police Departments Ignore Rampant Sexual Assault by Officers*, TRUTHOUT (July 2, 2014), <https://truthout.org/articles/police-departments-ignore-rampant-sexual-assault-by-officers>.

to fear that they will not be believed or supported, undocumented students may fear that they will face deportation if they interact with the police, and as such will avoid reporting at all if police involvement is the likely consequence.

While undocumented students could theoretically benefit from programs designed to allow undocumented citizens to safely report crimes, persistent structural and administrative problems prevent these programs from providing a meaningful solution. In 2000, the United States began offering a specialized visa, the U visa, for undocumented victims of certain crimes, including sexual assault and domestic violence,<sup>128</sup> who are willing to cooperate with law enforcement.<sup>129</sup> These visas theoretically allow undocumented survivors to report domestic violence and sexual assault to the police without fear of deportation,<sup>130</sup> but there are serious barriers to access. U visas are capped at 10,000 per year, and there is a backlog 64,000 applicants long as of January 2016.<sup>131</sup> And access to the visas has always depended on the willingness of law enforcement officers to assist, and some police departments refuse to certify that victims cooperated with law enforcement, a necessary precondition to the visa.<sup>132</sup> The application process is also lengthy—it can take months to put together an application, years for someone at the U.S. Citizenship and Immigration Service to read it, and still more years before an applicant makes it to the top of the list for the limited number of available visas. Though deportation proceedings are usually frozen once a victim is on the waiting list for a U visa, a victim has no legal protec-

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<sup>128</sup> The vast majority of U visas go to victims of sexual assault and domestic violence. See LESLYE E. ORLOFF & PAIGE E. FELDMAN, NATIONAL SURVEY ON TYPES OF CRIMINAL ACTIVITIES EXPERIENCED BY U-VISA RECIPIENTS 2 (2011), <http://library.niwap.org/wp-content/uploads/2015/National-Survey-on-Types-of-Criminal-Activities-Updated2011.pdf>.

<sup>129</sup> *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVICES, [https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status](https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status) (last visited July 10, 2019); *Violence Against Women Act (VAWA) Provides Protections for Immigrant Women and Victims of Crime*, AM. IMMIGR. COUNCIL (May 7, 2012), <https://www.americanimmigrationcouncil.org/research/violence-against-women-act-va-wa-provides-protections-immigrant-women-and-victims-crime>.

<sup>130</sup> See Sarah Stillman, *When Deportation Is a Death Sentence*, NEW YORKER (Jan. 8, 2018), <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence> (describing these visas as a way to encourage victims to report to law enforcement).

<sup>131</sup> Hansi Lo Wang, *Immigration Relief Possible in Return for Crime Victims' Cooperation*, NPR (Jan. 20, 2016, 5:02 AM), <https://www.npr.org/2016/01/20/463619424/immigration-relief-possible-in-return-for-crime-victims-cooperation>.

<sup>132</sup> See Nora Caplan-Bricker, *"I Wish I'd Never Called the Police,"* SLATE (Mar. 19, 2017, 8:12 PM), [http://www.slate.com/articles/news\\_and\\_politics/cover\\_story/2017/03/u-visas\\_gave\\_a\\_safe\\_path\\_to\\_citizenship\\_to\\_victims\\_of\\_abuse\\_under\\_trump.html](http://www.slate.com/articles/news_and_politics/cover_story/2017/03/u-visas_gave_a_safe_path_to_citizenship_to_victims_of_abuse_under_trump.html).

tions from deportation in the periods before application and between application and approval.<sup>133</sup> Women have reported fearing that filing for the visa will bring their undocumented status to the attention of law enforcement and subject them to the risk of deportation before they are protected. Advocates and legal service providers echo these fears.<sup>134</sup>

These concerns, coupled with the broader anti-immigrant, pro-deportation rhetoric from the Trump Administration, further discourage undocumented immigrants from reporting sexual violence to the police.<sup>135</sup> Since the start of the Trump presidency, there have been marked decreases in reports of domestic violence and sexual assault among Latinx communities, with no corresponding drops in reporting among other communities of color; police attribute this to fear of deportation.<sup>136</sup> Per one report, based on interviews with service providers and immigrant survivors, “now more than ever, victims are choosing the violence of their own homes over the unknown consequences of exposure.”<sup>137</sup> It is a small leap to say that where police involvement in campus sexual assault is mandatory, victims may choose the violence of their dorm rooms over the consequences of making their immigration status known to law enforcement.

Given the above, requiring any student who wishes to access their Title IX rights to involve themselves with law enforcement could have the perverse result of ensuring that Title IX’s protections are available

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<sup>133</sup> *Id.*

<sup>134</sup> See Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, N.Y. TIMES (Apr. 30, 2017), <https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html> (describing several women who expressed fear that filing a U visa application was to risk deportation); see also Caplan-Bricker, *supra* note 132 (describing advocates’ and lawyers’ concerns). These fears are compounded by Trump Administration policies eliminating protections from deportation for particular categories of undocumented immigrants, including domestic violence survivors, and increasing cooperation between local police departments and immigration officials. See Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states>.

<sup>135</sup> See Maya Rhodan, *Deportation Fears Silence Some Domestic Violence Victims*, TIME (May 30, 2017), <http://time.com/4798422/domestic-violence-deportation-immigration> (documenting the increase in concern from sexual assault survivors about the deportation consequences of reporting).

<sup>136</sup> See *id.* (noting a sharp decline in reported rapes among the Latinx community in Houston since the beginning of the Trump Administration); James Queally, *Fearing Deportation, Many Domestic Violence Victims Are Steering Clear of Police and Courts*, L.A. TIMES (Oct. 9, 2017, 5:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-undocumented-crime-reporting-20171009-story.html> (“In the first six months of 2017, reports of domestic violence have declined among Latino residents in some of California’s largest cities . . .”).

<sup>137</sup> Caplan-Bricker, *supra* note 132.

only to the most privileged students, while survivors with marginalized identities are left unprotected.

### 3. *Lack of Reporting Means Deterrence Goals Will Not Be Served*

If survivors are discouraged from reporting because of mandatory police involvement, Title IX's goals are not being served. Schools that are unaware of sexual violence cannot take steps to ensure a victim's continued access to education, and students who do not come forward because they do not want to be entangled with law enforcement will be deprived of their right to equitable education, with no accessible recourse.

While proponents of mandatory police involvement argue that it is the best way to prevent sexual violence on campus, eliminating the option of reporting sexual violence to an internal investigative body without police involvement actually fails to serve deterrence goals. It is well-known that deterrence goals are better furthered not by increasing the severity of the potential punishment, but rather by increasing the likelihood of detection of wrongdoing.<sup>138</sup> Mandatory police involvement certainly increases the potential severity of sanctions that a campus assailant may be subjected to: The worst a school can do to a student found responsible for sexual violence is expel them, whereas in a criminal case, that same person could, if convicted, face prison time.<sup>139</sup> However, by foreclosing all reporting options to survivors of campus sexual violence who do not wish to be involved with law enforcement, mandatory police involvement will reduce the likelihood of detection. As discussed above, many survivors may not report *at all* if reporting to school administrators would automatically trigger police involvement.<sup>140</sup> Without mandatory police involvement, survivors of campus sexual assault have the option of reporting to campus administrators, to law enforcement, or to both. This increases the likelihood that a survivor will report, since they can choose the option with which they are most comfortable, and thus increases the likelihood that an assailant will be detected. As such, it is likely that a

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<sup>138</sup> See generally VALERIE WRIGHT, SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT (2010), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf> (collecting research and concluding that, taken together, it suggests that certainty of punishment has a greater deterrent effect than severity of punishment).

<sup>139</sup> Again, the likelihood of this is low. See Lonsway & Archambault, *supra* note 101.

<sup>140</sup> See *supra* Sections II.B.1 and II.B.2. A study conducted by Know Your IX and the National Alliance to End Sexual Violence found that eighty-eight percent of survivors of campus-based sexual violence believed that if police involvement were mandated, fewer victims would report to anyone. See *Resisting Mandatory Police Referral Efforts*, *supra* note 87.

system without mandatory police involvement would be a more effective deterrent than would a system in which police involvement is mandated.

#### 4. *Victims Will Not Be Able to Access Needed Support Services*

Campus sexual violence creates serious impediments to education for victims—this is, in fact, why schools are required to respond to campus sexual violence in the first place. For many, it is difficult to continue learning when you share a classroom, dorm building, or library with your rapist.<sup>141</sup> When victims are able to access a campus-based adjudicatory system and a subsequent determination of responsibility is made, they can then access resources and support services that can help them to continue with their education.<sup>142</sup> These can include scheduling changes, counselling, housing changes, extensions on assignments, and more; of course, removal of the perpetrator of sexual violence from the campus can also help survivors to continue their education. Many schools make some of these services, such as counselling, available to victims as soon as they make an administrative report alleging sexual violence, meaning that even survivors who are not able to adequately prove their case in a campus disciplinary proceeding are able to access some accommodations.<sup>143</sup> Conversely, this means that survivors who never report—for instance, because of fear of police involvement—are never able to access accommodations.

The availability of these accommodations is critical to the success of Title IX. Mandating the amelioration of the educational harms

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<sup>141</sup> See, e.g., Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J.C. STUDENT RETENTION: RES. THEORY & PRAC. 1, 242 (2015) (finding that sexual violence results in drops in GPA for victims); Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, BROADLY (Sept. 26, 2017, 12:51 PM), [https://broadly.vice.com/en\\_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus](https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus); Cari Simon, *On Top of Everything Else, Sexual Assault Hurts the Survivors' Grades*, WASH. POST (Aug. 6, 2014, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think/reporting-on-the-drop-in-grades-among-sexual-assault-survivors>).

<sup>142</sup> See Alexandra Brodsky & Elizabeth Deutsch, *No, We Can't Just Leave College Sexual Assault to the Police*, POLITICO (Dec. 3, 2014), <http://www.politico.com/magazine/story/2014/12/uva-sexual-assault-campus-113294> (describing school-specific responses to sexual violence that campuses are able to provide).

<sup>143</sup> See, e.g., *Sexual Misconduct, Relationship Violence, and Stalking Policy*, NYU, <https://www.nyu.edu/content/dam/nyu/compliance/documents/SexualMisconductPolicy.April%202018.pdf> (last visited Aug. 9, 2019) (establishing that “[u]pon receipt” of a report alleging sexual violence, “NYU will take and/or make available reasonable and appropriate measures to protect the Complainant and the Complainant’s access to NYU employment or education programs and activities,” and noting that such accommodations “may include protective measures before the final outcome of an investigation”).



associated with sexual violence is the way in which Title IX ensures that student survivors of gender-based violence can continue learning and performing at a level commensurate with their talents, rather than being pushed out of the educational system. Reforms that deter reporting will mean that more survivors on campus will be without access to these support services; consequently, there may be more survivors who are unable to continue their education.

##### 5. *Lack of Reporting Will Distort Data*

Mandatory police involvement may also result in significant distortions of data on campus sexual assault, and thereby lead to inaccurate public perception of victims of sexual violence on campus. The evidence on criminal penalties for sex offenders is instructive here. In the 1990s, following high-profile rape cases and child homicides allegedly perpetrated by strangers, many states enacted laws increasing criminal punishment for sexual offenses, as well as Sex Offender Registration and Community Notification (SORCN) laws, which impose harsh civil consequences on sex offenders.<sup>144</sup> These increased consequences, in turn, meant that victims who knew their assailants were less likely to report to police, while victims who were attacked by a stranger remained likely to report to police.<sup>145</sup> As a result, data on sexual violence gave the impression that acquaintance and familial rape and sexual violence were rare, which in turn reinforced public impressions that date rape was not a significant problem, leading to underinvestment in its prevention.<sup>146</sup>

As discussed elsewhere in this Note, mandatory police involvement laws may similarly deter reporting by victims of acquaintance rape or dating violence. This would produce statistics that obscure the

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<sup>144</sup> See Anderson, *supra* note 71, at 1954–57 (describing the movement leading to the passage of increased criminal and civil punishments for individuals accused of sex offenses); ROSE CORRIGAN, *UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS* 205–06 (2013) (describing the circumstances leading to the enactment of Megan’s Law and other similar provisions).

<sup>145</sup> See Anderson, *supra* note 71, at 1957–58 (explaining that progressive victims’ advocates opposed these increased penalties because they would make it more difficult for victims who knew their abuser to come forward); CORRIGAN, *supra* note 144, at 220–21 (noting that SORCN laws deter victims who are sexually assaulted by people they know from reporting to the police).

<sup>146</sup> See, e.g., Rose Corrigan, *Making Meaning of Megan’s Law*, 31 *LAW & SOC. INQUIRY* 267, 301–05 (2006) (describing how Megan’s Law “is structured and administered to exclude” many types of sexual assaults, particularly those by acquaintances and family members); Sarah W. Craun & Matthew T. Theriot, *Misperceptions of Sex Offender Perpetration: Considering the Impact of Sex Offender Registration*, 24 *J. INTERPERSONAL VIOLENCE* 2057, 2066–68 (2009) (finding that the public perception of the likelihood that a child will be sexually abused by a stranger is higher than the actual likelihood, and that SORCN laws exacerbate this misperception).

prevalence of those kinds of violence, particularly among victims of color, undocumented victims, and other victims who do not fit within the societal conception of the prototypical victim.<sup>147</sup> This would result in data that over-represents certain kinds of victims while under-representing others; that data, in turn, will reinforce existing ideas about how victims of rape and sexual assault look and act, perpetuating the social barriers that make it difficult for marginalized victims to both report and get the kind of support they need. Under-representative data of this type also runs the risk of both minimizing the problem of sexual assault as a whole and obscuring the true demographics of victimhood. As a result, there may be under-investment of resources in sexual assault broadly, and what investment and policy innovation there is may neglect the needs of the large group of unseen victims.

### III

#### ALTERNATIVE PROPOSALS FOR REFORM

As discussed above, proponents of mandatory police involvement seem to be driven by two primary concerns: that schools are incapable of or ill-suited to the task of adjudicating campus sexual assault and that the criminal legal system will better serve deterrence goals. Mandatory police involvement proposals, however, ignore the ways in which requiring police involvement will further frustrate efforts to eliminate gender-based violence as an obstacle to education, to serve the needs of student victims, and even to meaningfully deter and prevent violence. Several alternative avenues for reform provide meaningful ways to respond to the concerns of proponents of mandatory police involvement through enhancing schools' capability to respond to these cases and enhancing access to justice for victims.

##### *A. Enhance the Procedural Legitimacy of Campus Adjudications*

Proposals for mandatory police involvement are often driven, at least nominally, by concerns about the procedural validity and the legitimacy of campus-based sexual violence adjudications.<sup>148</sup> Policy-makers and activists, then, should devote resources to reforms that strengthen procedural protections and enhance the legitimacy of campus-based adjudications while maintaining adequate protections for survivors. This is in everyone's best interest. Anti-sexual violence

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<sup>147</sup> See Gruber, *supra* note 99, at 588–91, 594–99 (describing the criminal justice system's history of treating rape victims who fit within the societal conception of ideal victimhood more favorably than those who do not).

<sup>148</sup> See *supra* notes 51–55 and accompanying text.

activists have an interest in internal school processes' legitimacy, because legitimate procedures will result in decisions that are respected.<sup>149</sup> Indeed, victims who trust that the process employed is legitimate and will respect their rights and needs may feel more comfortable reporting in the first place. At the same time, those who worry that schools presently lack the competency to handle sexual assault complaints or that internal processes are not adequately protective of the rights of the accused have an interest in improving upon the processes currently in place. Interested parties on both sides of the campus sexual assault debate have proposed numerous reforms in this area, many of which in fact overlap. For instance, legislators or individual schools could work to ensure the independence of internal adjudicatory boards, schools could allow adverse parties to submit written questions for the board to ask the other party so that survivors are not re-traumatized but the need for cross-examination is met, and schools could provide for funded legal representation of both parties.<sup>150</sup>

### B. Give Title IX Teeth

Reform efforts should also focus on ensuring that the protections provided by schools are robust and enforceable, so that they are truly addressing gender-based violence's civil rights dimensions. Policy-makers and activists should develop reforms that create reasonable, proportionate punishment for responsible students while also creating the safe, equitable campus communities that Title IX mandates. One suggested reform—focused on encouraging schools to adequately respond to sexual violence and to adopt preventative measures—

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<sup>149</sup> See, e.g., Brodsky, *supra* note 55 (arguing that procedural legitimacy will ensure that survivors have faith in campus systems and that campus adjudications are not characterized as “kangaroo courts”); see also, e.g., Nancy Gertner, *Sex, Lies and Justice*, AM. PROSPECT (Jan. 12, 2015), <http://prospect.org/article/sex-lies-and-justice> (arguing that feminists should demand adequate procedural protections so as to avoid a backlash to progress on campus-based discrimination); Deborah Tuerkheimer, *Reforming Rape Policies on Campus*, N.Y. TIMES (June 22, 2016), <https://www.nytimes.com/2016/06/23/education/reforming-rape-policies-on-campus.html> (acknowledging campus sexual violence as a form of discrimination and discussing the need for a set of fair procedures that will foster legitimacy).

<sup>150</sup> Compare Brodsky, *supra* note 55 (suggesting increased independence of adjudicatory boards and written questions for adverse parties as potential reforms), with *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 14, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> (suggesting that campus sexual assault proceedings should provide greater opportunity for cross-examination, ensure legal representation for the accused, and ensure greater independence of the adjudicative body).

would allow the Department of Education to fine schools found to be in violation of Title IX a portion of their operating budget.<sup>151</sup>

Currently, the Department of Education is empowered only to entirely pull federal funding from schools found to be in violation of Title IX, which would have a dramatic effect on schools and students.<sup>152</sup> To date, the Department of Education has never taken this step, and activists have expressed concerns both that this “nuclear option” is so severe that the Department of Education is unlikely to ever use it, and that if the Department of Education *were* to use it, it would hurt students rather than help them.<sup>153</sup> While cutting off federal funding to a school would harm students who rely on federal funds for financial aid, fining a school a portion of their operating budget would not have as dramatic a financial impact, and would put the onus on schools, rather than students, to deal with the economic fallout. If the Department of Education were empowered to fine schools a portion of their operating budget, schools would have financial incentives to comply with Title IX, fines could be tailored to reflect the extent of the violation, and students would retain access to needed federal funds.

### C. Provide Anonymous Reporting Options

Reforms to ensure that data on campus sexual assault is reflective of the actual scope of the problem is also key. Schools should implement—and legislators could mandate—anonymous reporting options and campus climate surveys. These would not trigger disciplinary proceedings, since disciplinary proceedings based on anonymous accusations would present serious due process concerns. Schools should provide confidential and anonymous reporting options, including via an online portal, to make reporting simple and accessible to the most students possible, especially students who know their assailant and are reluctant to report them.<sup>154</sup> The school’s sexual misconduct policy, as

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<sup>151</sup> Dana Bolger, one of the co-founders of Know Your IX, is a proponent of this idea. *See* Bolger, *supra* note 67 (expressing support for providing federal authority to issue fines, rather than pull funding altogether). The HALT Act proposes giving the Department of Education this power, as does CASA. H.R. 2680, 114th Cong. § 3 (2015); S. 590, 114th Cong. § 2 (2015).

<sup>152</sup> *See* 20 U.S.C. § 1682 (2012).

<sup>153</sup> *See* Bolger, *supra* note 67 (positing that the Department’s lack of enforcement is due to the bluntness of this instrument). Activists worry that students would be hurt by this response because much federal funding takes the form of scholarship aid. *Id.*

<sup>154</sup> *See* KNOW YOUR IX, STATE POLICY PLAYBOOK 22 (2017), [https://actionnetwork.org/user\\_files/user\\_files/000/016/520/original/Know\\_Your\\_IX\\_State\\_Policy\\_Playbook.pdf](https://actionnetwork.org/user_files/user_files/000/016/520/original/Know_Your_IX_State_Policy_Playbook.pdf) (suggesting expanding anonymous reporting options); *see also supra* notes 103–04 and accompanying text (describing the complexities involved with reporting an assailant with whom a survivor is familiar).

well as the included survivors' bill of rights, should make clear that survivors have these options, as well as the option of making a formal complaint to the school which will then be investigated and adjudicated, and the option of reporting to the police. It should be made clear that a student may pursue all or some of these options simultaneously, or may choose to pursue only one option.<sup>155</sup> Students who report anonymously or confidentially should be referred to all accommodations available independent of a formal adjudication, including the option to move dorm rooms and receive counselling and academic support.

By making reporting simple and accessible, and ensuring that students can report even when they are not ready or willing to take any further action, schools (and legislators who mandate such options) can ensure that data on campus sexual violence is more representative of those who are actually victimized and the manner in which their victimization occurs. This, in turn, can help to ensure that reforms, prevention programs, and response mechanisms are designed and implemented with the demographics of those actually victimized in mind.

### CONCLUSION

While mandatory police involvement in campus sexual assault cases may seem like a reasonable response to widespread sexual violence on college campuses, these proposals fail to consider the ways in which sexual violence functions as an obstacle to gender equality in education separately from its criminal nature. By requiring any student who makes a sexual violence complaint to their school to risk law enforcement involvement, these proposals focus on treating sexual violence as a criminal matter, rather than as a civil rights issue under Title IX. These proposals would create unique hurdles for students alleging sexual misconduct that do not apply to other disciplinary matters and would increase obstacles to reporting, particularly for marginalized students. The policies would not further deterrence goals nor assist schools in gathering the data they need to fully comprehend and address the extent of sexual violence on campus. As such, these proposals would operate to exacerbate sexual violence as an obstacle to education, and thus are inconsistent with Title IX's gender equality goals.

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<sup>155</sup> See KNOW YOUR IX, *supra* note 154, at 21.