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# HARMFUL REPORTING

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## ABSTRACT

*Title IX is used in many ways; perhaps most prominent and controversial is its use to address issues of sexual harassment and sexual assault on college campuses. The regulations governing that use have just been changed, with the Department of Education issuing new final regulations on May 6, 2020. The recent spotlight aside, an aspect of Title IX that has gotten too little attention has been the move towards having all or nearly all university employees categorized as “mandatory reporters.” A mandatory reporter is one who must report an allegation of sexual assault to the university’s Title IX coordinator. This report must be made even if it is against the wishes of the student who discloses that she or he was the victim of the assault.*

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

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

## I. INTRODUCTION

*“You are entering a four-year struggle to maintain bodily autonomy. There will be young men who kiss you roughly before you decide whether you want them to. There will also be the male*

*'friend' who sneaks into your bed at night when you're passed out, drunk and naked and ever so trusting of the sanctity of your bedroom. He will act bewildered when you scream at him to leave. Neither of you will mention the incident again."*<sup>1</sup>

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

This scenario depicts the Title IX procedures in over two-thirds of the nation's institutions of higher education. This article argues that this reality is harmful to sexual assault survivors and is contrary to the purpose of Title IX. Title IX is used prominently and sometimes controversially to address issues of sexual harassment and misconduct on college campuses. Title IX regulations have recently changed, with the Department of Education issuing new final regulations on May 19, 2020.<sup>2</sup>

The recent attention to the new regulations aside, an aspect of Title IX that has gotten too little attention—despite its outsized impact—is the move at a majority of institutions towards having nearly all university employees being categorized as “mandatory reporters.” A mandatory reporter is one who must report an allegation of sexual assault to the university's Title IX coordinator. This report must be made even if it is against the wishes of the student who discloses that she or he was the victim of the assault.

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

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1. Caitlin Donohue, *Letter to Myself Upon Entering College*, in INDELIBLE IN THE HIPPOCAMPUS: WRITINGS FROM THE ME TOO MOVEMENT 181, 183 (Shelly Oria ed., 2019).

2. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

The U.S. Department of Education (DOE) issued its new regulations<sup>3</sup> to govern the handling of campus sexual assault<sup>4</sup> under Title IX of the 1972 Education Act<sup>5</sup> approximately 18 months after the proposed regulations were released. When initially proposed in November 2018,<sup>6</sup> the regulations received much media attention and over 124,000 official comments were submitted to the department.<sup>7</sup> The proposed regulations came about a year after DOE's Office of Civil Rights (OCR) rescinded several of its guidance documents that had been intended to assist institutions of higher learning in appropriately handling allegations of sexual assault.<sup>8</sup>

These new regulations are the latest pronouncements in the approximately 20 years of applying Title IX to allegations of sexual assault on college campus.<sup>9</sup> The

3. *Id.*

4. *Id.* at 30033 n.57 (“The final regulations define sexual harassment in § 106.30 as follows: Sexual harassment means conduct on the basis of sex that satisfies one or more of the following: (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct; (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or (3) ‘Sexual assault’ as defined in 20 U.S.C. 1092(f)(6)(A)(v), ‘dating violence’ as defined in 34 U.S.C. 12291(a)(10), ‘domestic violence’ as defined in 34 U.S.C. 12291(a)(8), or ‘stalking’ as defined in 34 U.S.C. 12291(a)(30).”).

5. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2018).

6. The proposed regulations were issued on November 29, 2018. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. at 61462. As of October 3, 2019, there are 124,149 public comments. *See generally* REGULATIONS.GOV, TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, <https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=ED-2018-OCR-0064> [<https://perma.cc/9WRA-LNHN>]. The Act requires a 60-day notice and comment period. *See A Guide to the Rule Making Process*, OFF. OF THE FED. REG. at 5 (Jan. 2011), [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) [<https://perma.cc/D8LV-GPQG>]. The partial shutdown of the federal government ran from December 22, 2018 to January 25, 2019. Li Zhou, *Why the Government Shutdown Finally Ended*, VOX (Jan. 25, 2019), <https://www.vox.com/policy-and-politics/2019/1/25/18197354/government-shutdown-tipping-point> [<https://perma.cc/NT66-WLBV>]. It appears that the notice and comment period was therefore extended to January 30, 2019. *See* Notice Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 84 Fed. Reg. 409 (Jan. 28, 2019).

7. As of October 3, 2019, there were 124,149 public comments. *See generally* REGULATIONS.GOV, *supra* note 6.

8. The 2011 Dear Colleague letter and the 2014 guidance were rescinded on September 22, 2017. Candice Jackson, *Dear Colleague*, U.S. DEP’T OF EDUC., OFFICE FOR CIV. RTS., (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [<https://perma.cc/VDE9-BYW3>]. *See also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. at 61463. At the same time that it rescinded the 2011 and 2014 documents, OCR released a Q & A on Campus Sexual Misconduct, referred to as Interim Guidance. *Id.* at 61464–465.

9. *See Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639–41 (1999) (“This Court has indeed recognized an implied private right of action under Title IX, *Canon v. University of Chicago*, [441 U.S. 677, 691 (1979)], and we have held that money damages are available in such suits.”) (citing *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60 (1992)). *See also* U.S. Dep’t. of Educ., Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (Mar. 13, 1997); U.S. DEP’T. OF EDUC., OFFICE FOR CIV. RTS., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), <https://www2.ed.gov/about/offices>

regulations have been both criticized and praised.<sup>10</sup> Much of the controversy has been about procedural matters such as burden of proof and mandatory live hearings with cross-examination.<sup>11</sup> Other controversies include substantive matters such as how sexual misconduct is defined, the physical scope of Title IX protections, e.g., off-campus housing or overseas programs, and what triggers a university's Title IX's investigative obligation.

An issue receiving less publicized scrutiny—under the old regime and in the conversation about the new regulations—is the determination of who has an obligation to report an allegation of sexual assault to the institution's Title IX coordinator or designee, who then may have an obligation to begin a Title IX investigation.<sup>12</sup> Mandated reporters, called “responsible employees”<sup>13</sup> in OCR regulations and guidance, have been increasingly defined to include more and more university employees.<sup>14</sup> These “responsible employees” were mandated to report a disclosure of sexual assault irrespective of whether the student disclosing the assault wanted it to be officially reported. As employees encompassed by the phrase

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/list/ocr/docs/shguide.pdf [Hereinafter OCR's 2001 Guidance] [https://perma.cc/E4X5-PHTV]; Russlynn Ali, *Dear Colleague*, U.S. DEP'T OF EDUC., OFFICE FOR CIV. RTS. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [https://perma.cc/UL6Q-WQZP]; U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, Q&A ON TITLE IX AND SEXUAL VIOLENCE (2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [https://perma.cc/QZB3-CWFY]; Jackson, *supra* note 8.

10. Emily Yoffe, *Reining in the Excesses of Title IX*, THE ATLANTIC (Sept. 4, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/title-ix-reforms-are-overdue/569215/> [https://perma.cc/W25D-7VMY].

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

12. Title IX coordinator is a term first seen in 2001. *See* OCR's 2001 Guidance, *supra* note 9, at 13. *See also* Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAV. SCIS. 38 (2018) (“Originally established for the first time within OCR's 2001 guidance document and again within the 2011 *DCL*, campuses must appoint a specific Title IX coordinator with the primary responsibility of coordinating campus compliance with Title IX, including grievance procedures for resolving Title IX complaints.”).

13. The term responsible employee was found first in OCR's 2001 guidance policy and was defined as: “any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.” OCR's 2001 Guidance, *supra* note 9, at 13.

14. Examples include: Faculty and Resident Assistants. *See Reporting Expectations and Requirements*, MICHIGAN TECH, <https://www.mtu.edu/title-ix/policy/responsible-employees/> [https://perma.cc/M3WD-F5VU] (stating responsible employees include “resident assistants (RAs), [and] orientation team leaders (OTLs)”); *FAQS Regarding Title IX Best Practices and Compliance*, MARQUETTE U., <https://www.marquette.edu/sexual-misconduct/title-ix-faq.php> [https://perma.cc/T252-FDT8] (“Examples of University employees who have a duty to report include . . . faculty, adjunct faculty, staff, residence hall directors, [and] resident assistants. . . .”); *Mandatory Reporters (Responsible Employees)*, U. OF TEX. AT AUSTIN, <https://titleix.utexas.edu/mandatory-reporters> [https://perma.cc/BD75-Q4YU] (stating responsible employees include faculty members and resident assistants); *Office of Title IX Compliance: Information for Responsible Employees*, APPALACHIAN ST. U., <https://titleix.appstate.edu/responsible-employees> [https://perma.cc/8WWJ-VY6E] (stating responsible employees include faculty and residence life staff).

“responsible employees” grew larger over time so, too, grew concern over the consequences of having so many mandatory reporters.

Although sexual assault survivor groups,<sup>15</sup> legal scholars,<sup>16</sup> and social scientists<sup>17</sup> have written about the harms of mandatory reporting, these harms have yet to be widely understood or acknowledged. Accordingly, this article will demonstrate both how the dramatic expansion of university employees who are deemed responsible employees/mandatory reporters, even if well-intended, harms survivor and how it impedes the appropriate implementation of Title IX as a means to combat educational inequity based on sex. First, the article examines the harms wrought by mandatory reporting, especially if done against the wishes of the survivor. Next, the article considers how insights drawn from the #MeToo Movement shed light on the value and harms of mandated reporting.<sup>18</sup> The article then reviews the history of Title IX policy and assesses the effect of the new Title IX regulations on the responsible employee/mandatory reporter debate.

In its next section, the article analyzes recent proposed and enacted state laws that require institutions of higher education to report allegations of sexual assault to local law enforcement.<sup>19</sup> In some cases, if adopted as proposed, these laws would elevate the impact of mandatory reporting beyond what has long been deemed required under Title IX.<sup>20</sup> The article then highlights institutions of higher education that have resisted the sirens’ call of universality of mandatory reporters and have chosen instead a more nuanced and appropriate approach.<sup>21</sup> Thereafter, the article considers the comprehensive draft of the American Law Institute on the question of proper procedural frameworks for Title IX reporting.<sup>22</sup> In conclusion, the article

15. *Survivor Survey on Mandatory Reporting*, NAT’L ALL. TO END SEXUAL VIOLENCE, <http://endsexualviolence.org/where-we-stand/survivor-survey-on-mandatory-reporting> [https://perma.cc/UEQ8-9UJZ].

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

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

18. The #MeToo Movement, in many ways, centers on sexual assault/harassment survivors who do not initially report and then, at some later point, often much later, decide to disclose. Since a key concern with mandated reporting is that survivors will not seek help if they know their disclosure will be reported to others even if they oppose such action, seeking to understand this phenomenon seems critical: the goal is to assist not harm survivors. See also Lena Felton, *How Colleges Foretold the #MeToo Movement*, THE ATLANTIC (Jan. 17, 2018), <https://www.theatlantic.com/education/archive/2018/01/how-colleges-foretold-the-metoo-movement/550613/> [https://perma.cc/845H-M78A].

19. See e.g., VA CODE ANN. § 23.1-806 (2015). See also *infra* Part IV for a discussion of state laws linking sexual assault disclosures in a university setting with an option or mandate of referrals to a local (and non-campus) law enforcement agency. The following states have introduced legislation requiring IHE to make referrals to local law enforcement: Texas, Georgia, Maryland, New Jersey, Oklahoma, Rhode Island, California, New York, and Virginia. Brodsky, *supra* note 16, at 139 n. 46–47.

20. Brodsky, *supra* note 16, at 143–44.

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

22. The American Law Institute’s forthcoming publication is expected to consist of eleven chapters, which discuss procedural frameworks for colleges and universities. See *Principles of the Law, Student*

argues that a move toward a narrower class of mandatory reporters will facilitate the goals of Title IX.<sup>23</sup>

## II. BROADLY INCLUSIVE MANDATORY REPORTING<sup>24</sup> IS HARMFUL AND IMPEDES THE PURPOSE OF TITLE IX

### A. Introduction

Sexual assault on college campuses is both prevalent and under-reported.<sup>25</sup> Although the statistics vary, by virtually any measure it happens with some frequency and often remains unreported.<sup>26</sup> Further, in all-too-recent history, reported allegations of campus sexual assault were essentially ignored.<sup>27</sup>

Sexual assault can have an impact on a survivor that ripples throughout all aspects of that person's life, education included.<sup>28</sup> A combination of these three factors—prevalence, underreporting, and impact—led many to argue, often from the best of intentions, for a wide-spread requirement for mandatory reporting on college campuses. After all, if an assault does not get reported, the argument goes, then the survivor cannot get support, the perpetrator is not held accountable, and other parties are potentially at risk.<sup>29</sup> Moreover, in the Title IX context, a report that finds its way to an institution's Title IX coordinator may be the start of a formal grievance process

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*Sexual Misconduct: Procedural Frameworks for Colleges and Universities*, A.L.I., <https://www.ali.org/projects/show/project-sexual-and-gender-based-misconduct-campus-procedural-frameworks-and-analysis/> [https://perma.cc/X728-R5XP]. For further discussion of the ALI's forthcoming publication, see *Student Sexual Misconduct*, THE ALI ADVISER, <http://www.thealiadviser.org/campus-sexual-misconduct/> [https://perma.cc/N49V-BU5Q].

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

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

25. SOFI SINOZICH & LYNN LANGTON, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995-2013, U.S. DEP'T OF JUST. (Dec. 2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> [https://perma.cc/BZP3-A547].

26. See generally DAVID CANTOR, BONNIE FISHER, SUSAN CHIBNALL, REANNE TOWNSEND, HYUNSHIK LEE, CAROL BRUCE, & GAIL THOMAS, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, WESTAT (Sept. 21, 2015), [https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU\\_Campus\\_Climate\\_Survey\\_12\\_14\\_15.pdf](https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf) [https://perma.cc/V72Q-WV4A] (detailing extensive survey data on campus sexual assault).

27. See Anya Kamenetz, *The History of Campus Sexual Assault*, NPRED (Nov. 30, 2014), <https://www.npr.org/sections/ed/2014/11/30/366348383/the-history-of-campus-sexual-assault> [https://perma.cc/84SU-PL33].

28. See generally Christopher Wilson, Kimberly A. Lonsway & Joanne Archambault, *Understanding the Neurobiology of Trauma and Implications for Interviewing Victims*, END VIOLENCE AGAINST WOMEN INT'L (Nov. 2016), <https://www.nationalpublicsafetypartnership.org/clearinghouse/Content/Resource-Documents/The%20Neurobiology%20of%20trauma%20and%20interviewing%20victims.pdf> [https://perma.cc/3NQP-XKJV].

29. Kathryn J. Holland, Lilia M. Cortina & Jennifer J. Freyd, *Compelled Disclosure of College Sexual Assault*, 73 AM. PSYCH. 256, 260–264 (2018).

that enables a school to ensure that the survivor is not deprived of educational opportunities on the basis of sex.<sup>30</sup> Thus, many colleges and universities have decided that nearly all of their employees are mandatory reporters.<sup>31</sup> In one study, Drs. Holland, Cortina, and Freyd found that 69% of institutions surveyed designated their entire work staff as mandatory reporters.<sup>32</sup> Nineteen percent classified most employees that way and only four percent designated few employees in that manner.<sup>33</sup>

Facially, reporting may seem like a social good on many levels. Nonetheless, survivors often choose not to report to authorities who can take action.<sup>34</sup> If a survivor won't make an official report, the argument continues, an employee to whom they disclose, even informally, should have to report to the Title IX coordinator so that the corrective process can commence.<sup>35</sup> This course of action may be based in part on a misunderstanding of trauma-informed theory, namely that a survivor's unwillingness to lodge an official complaint is one of the effects of the trauma and, while understandable, such a hesitancy can be overridden in the name of justice, healing, and safety.<sup>36</sup>

But such a belief is misguided. Overriding a survivor's choice is not, in fact, therapeutic. Trauma-informed experts explain that trauma informed Care (TIC) "recognizes that . . . interventions (especially those that are mandated) can be disempowering and oppressive, which can replicate traumagenic . . . conditions; TIC proactively seeks to avoid retraumatization in the service delivery setting."<sup>37</sup> And as those working with domestic violence survivors know, a core principle of TIC is to restore the survivor's choice and control.<sup>38</sup>

Whatever the benefits of trauma-informed theory, a trauma-informed process should, at a minimum, not inflict more trauma.<sup>39</sup> Overriding a survivor's decision not to report is likely to cause increased trauma. One consequence of sexual assault is the feeling—and reality—of loss of control over one's body and one's self.

30. 20 U.S.C. § 1681 (2018).

31. Holland et al., *supra* note 29, at 259 (identifying the following four assumptions as policies that are effectuated by broadly defined mandatory reporting requirements: (1) uncovering more sexual violence; (2) benefitting survivors; (3) benefitting employees; and (4) benefitting the institution).

32. *Id.*

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

34. See *infra* Part II. E. for a discussion.

35. Christina Mancini, Justin T. Pickett, Corey Call & Sean Patrick Roche, *Mandatory Reporting (MR) in Higher Education: College Students' Perceptions of Laws Designed to Reduced Campus Sexual Assault*, 4 CRIM. JUST. REV. 219, 220 (2016).

36. Meg Mott, *The New Title IX Guidelines Benefit Survivors*, INSIDE HIGHER ED (Dec. 17, 2018), <https://www.insidehighered.com/views/2018/12/17/new-title-ix-guidelines-help-survivors-well-accused-opinion> [https://perma.cc/994X-8LK5].

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

38. Joshua M. Wilson, Jenny E. Fauci, & Lisa A. Goodman, *Bringing Trauma-Informed Practice to Domestic Violence Programs: A Quantitative Analysis of Current Approaches*, 85 AM. J. OF ORTHOPSYCHIATRY 586, 590 (2015).

39. *Id.* at 588.



Overriding a choice not to report underscores and exacerbates that loss of control. Thus, it undermines the healing process.<sup>40</sup>

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

## B. Disclosure and Reporting

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

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

*Your story is yours. And you get to decide how to tell it.*"<sup>41</sup>

Disclosure and reporting of sexual assault are two different, albeit related, concepts. Reporting, which can be formal or informal, involves telling someone in a position to take action and/or provide support and resources to the survivor.<sup>42</sup> Telling an institutional employee could activate one or both of the above responses. Title IX requires that an institution provide clear notice about which employees have mandatory reporting obligations.<sup>43</sup>

Disclosure, on the other hand, may be as "simple" as telling someone about the event. Disclosure most commonly occurs to a trusted person, such as a friend, relative, or mentor. Survivors generally choose this option over an official report. Sometimes, however, a disclosure may help create the conditions that will lead a survivor who is not initially inclined to making a formal report to decide to report.

Disclosure and reporting can each have negative and positive results.<sup>44</sup> The tenor of the results of either action will often be dictated by the response of the person

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40. Holland et al., *supra* note 29, at 261. Even in the presence of conflicting results, there are many studies that demonstrate that reporting against a survivor's wishes can increase depression and anxiety.

41. Kaitlyn Greenidge, *Your Story is Yours*, in INDELIBLE IN THE HIPPOCAMPUS: WRITINGS FROM THE ME TOO MOVEMENT 15, 19–20 (Shelly Oria ed., 2019).

42. The U.S. Military has implemented a system that incorporates both informal and formal reporting. See Andrew R. Morral, Terry L. Shell, Matthew Cefalu, Jessica Hwang & Andrew Gelman, *Estimates for Installation-And Command-Level Risk Of Sexual Assault and Sexual Harassment From the 2014 Rand Military Workplace Study*, in 5 SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY 81–82 (2018), [https://www.rand.org/pubs/research\\_reports/RR870z7.html](https://www.rand.org/pubs/research_reports/RR870z7.html) [<https://perma.cc/K9SM-3NEA>].

43. 34 C.F.R. § 106.8(a) (2019).

44. Courtney E. Ahrens, Janna Stansell & Amy Jennings, *To Tell or Not to Tell: The Impact of Disclosure on Sexual Assault Survivors' Recovery*, 25 VIOLENCE & VICTIMS 631, 633 (2010).

told and the sensitivity and efficacy of any process that follows.<sup>45</sup> If the reaction is appropriate and helpful, it may result in providing resources and support to the survivor.<sup>46</sup>

Many survivors of sexual assault may desire to disclose confidentially.<sup>47</sup> The reasons for this are as numerous as they are logical. In addition to physical injury and trauma, sexual assault is humiliating.<sup>48</sup> It may lead the survivor to blame herself.<sup>49</sup> Social and cultural reactions heavily contribute to this. Some intractable rape myths include notions such as she deserved it, she liked it, she was dressed provocatively, she was drunk, it wasn't really rape, it was consensual, it was a false report, only strangers rape, all rape is violent, only straight women can be raped, it couldn't have happen because men can't be raped. Studies of the rape myth suggests that persons holding these beliefs are likely to engage in victim/survivor blaming.<sup>50</sup> The survivor is not immune from holding those beliefs. She may be asking herself what happened or did it really happen?<sup>51</sup> She may ponder what she did to encourage, cause, or deserve it.

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

45. Emily R. Dworkin & Nicole Allen, *Correlates of Disclosure Cessation After Sexual Assault*, 24 VIOLENCE AGAINST WOMEN 85, 90 (2018).

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

47. WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, KEY COMPONENTS OF SEXUAL ASSAULT CRISIS INTERVENTION/VICTIM SERVICE RESOURCES 1 (2014), <https://www.justice.gov/archives/ovw/page/file/910266/download> [<https://perma.cc/YR3U-NQGG>].

48. Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner? These Are Eight Reasons Why Victims of Sexual Harassment Don't Come Forward*, PSYCH. TODAY (Nov. 16, 2017), <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner> [<https://perma.cc/3N72-QFTC>].

49. *Id.*

50. *How to Avoid Victim Blaming*, HARV. L. SCH. HALT, <https://orgs.law.harvard.edu/halt/how-to-avoid-victim-blaming/> [<https://perma.cc/N5BS-YRLR>].

51. The impact of trauma affects the memory in ways that may lead to someone thinking the discloser is lying because she doesn't remember the details. *See*

NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, FALSE REPORTING: OVERVIEW (2012), [https://www.nsvrc.org/sites/default/files/2012-03/Publications\\_NSVRC\\_Overview\\_False-Reporting.pdf](https://www.nsvrc.org/sites/default/files/2012-03/Publications_NSVRC_Overview_False-Reporting.pdf) [<https://perma.cc/VV5Z-3YGR>].

52. Francine Banner, *Institutional Sexual Assault and the Rights/Trust Dilemma*, 13 CARDOZO PUB. L., POL'Y & ETHICS J. 97, 145–48 (2014).

53. *See* Olivia Whiteley, *Commentary: Bill Would Rob Victims of Their Autonomy. Again.*, SALT LAKE TRIB. (Mar. 4, 2018), <https://www.sltrib.com/opinion/commentary/2018/03/04/commentary-bill-would-rob-victims-of-their-autonomy-again/> [<https://perma.cc/6XFY-JHV8>].

and control, and one of the only aspects that remains in their control is if, how, when, and to whom to share their story.”<sup>54</sup>

Survivors may also suspect that the process will be unfair.<sup>55</sup> Or some survivors may simply wish to be able to continue their education free from fear of further assault, retribution, or vilification. This should be possible—it is, after all, the *raison d’être* of Title IX: educational access free from sex-based harm.<sup>56</sup> Often it may be that disclosing but not reporting will achieve this goal.<sup>57</sup> And mandatory reporting, with its possibility of discouraging disclosure, impedes this goal. In short, if one of the goals is to increase the number of official reports, finding ways to encourage more *and* more effective disclosure is an important way to help achieve that goal.<sup>58</sup>

Fortunately, there are new and better ways to disclose. One key improvement is simple if not easy: resist the trend to make all employees mandatory reporters under Title IX.<sup>59</sup> However, even as the term “responsible employee” is scrubbed from Title IX regulations, universities will still need to determine which of their employees are obliged to report a campus sexual assault disclosed to them.<sup>60</sup> If universities continue to believe that having more mandatory reporters conveys their commitment to dealing with sexual assault, they must be disabused of that belief.

It is true that the road to increasing mandatory reporters on campus was not straight; this journey is discussed in detail in section IV. Although it may take some time to undo, now is the critical time to take action. Realizing that there is harm, not

54. Carmel Deamicis, *Which Matters More: Reporting Assault or Respecting a Victim’s Wishes*, THE ATLANTIC (May 20, 2013), <https://www.theatlantic.com/national/archive/2013/05/which-matters-more-reporting-assault-or-respecting-a-victims-wishes/276042/> [https://perma.cc/G4Q2-D5LX].

55. Much of the current debate regarding Title IX focuses on the perceived unfairness to the accused. Press Release, Betsy DeVos, U.S. Sec’y of Educ., Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students (May 6, 2020), <https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students> [https://perma.cc/6HEH-9CVY]. The new Title IX regulations expressly focus on fixing what some argued was a due process deficit for the accused. However, many survivors also perceived that the process that ensued from their report of campus sexual assault—or sometimes the lack of a process ensuing—was unfair and biased against them. See Laura Garcia, “Enough Is Enough”: Examining Due Process In Campus Sexual Assault Disciplinary Proceedings Under New York Education Law Article 129-B, 69 RUTGERS U. L. REV. 1697, 1702–06 (2017); Drew Barnhart, *The Office Of Civil Rights’ Failing Grade: In The Absence Of Adequate Title IX Training, Biased Hearing Panels and Title IX Coordinators Have Harmed Both Accusers and Accused In Campus Sexual Assault Investigations*, 85 UMKC L. REV. 981, 982–84 (2017); Emily D. Safko, *Are Campus Sexual Assault Tribunals Fair?: The Need For Judicial Review and Additional Due Process Protections In Light of New Case Law*, 84 FORDHAM L. REV. 2289, 2322–25 (2016).

56. Russlynn Ali, *Dear Colleague*, U.S. DEP’T OF EDUC., OFFICE FOR CIV. RTS. 1 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [https://perma.cc/UL6Q-WQZP] (“Title IX . . . and its implementing regulations . . . prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance.”).

57. See *infra* Part II.D. for a discussion of how wide-spread mandatory reporting requirements can inhibit disclosure.

58. Shannon Najmabadi, *To Curb Sexual Assaults, Colleges Give Students Alternative Reporting Options*, THE CHRON. OF HIGHER EDUC. (Nov. 29, 2016), <https://www.chronicle.com/article/To-Curb-Sexual-Assaults/238528> [https://perma.cc/RL22-JCJR].

59. See *supra* Part XI.B & C for discussion of schools who have bucked the ubiquitous mandatory reporter trend.

60. See *infra* Part IV for a discussion of the new Title IX regulations.

benefit, in having all or nearly all employees be mandatory reporters is critical in this moment for at least two reasons. First, it is clear that Title IX does not require it. Second, the new methods of reporting offer to many survivors a preferable way to proceed.

These new efforts include more nuanced reporting processes. One such process is Callisto.<sup>61</sup> Callisto is a sexual assault reporting on-line platform founded in 2015 by Jessica Lane, an epidemiologist and survivor of college sexual assault. It describes its vision and mission as follows: “Our vision is a world where sexual assault is rare and survivors are supported. Our mission is to create technology that combats sexual assault, supports survivors, and advances justice.”<sup>62</sup> One student leader at a school that has adopted Callisto noted that the desire to report online may be a “generational change.”<sup>63</sup> Today’s college students are, after all, of the generation that often use texts and emails for unpleasant topics.<sup>64</sup>

Significantly, Callisto allows on-line anonymous reporting that automatically links survivors and law enforcement if a sexual assault perpetrator is identified more than once.<sup>65</sup> This linkage is important as it is estimated that up to 90% of campus sexual assaults are committed by repeat offenders.<sup>66</sup>

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

*1. Information Only Report:* Any report of sexual assault where, at the reporting party’s request, no investigative process beyond a victim interview and/or a complete or partial Inquiry into Serial Sexual Assault (ISSA) is completed.

*2. Partial Investigation:* Any report of sexual assault where some investigative processes beyond the victim interview and a complete or partial Inquiry into Serial Sexual Assault (ISSA) have been initiated by law enforcement. This may include, but is not

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61. CALLISTO, <https://www.projectcallisto.org/> [<https://perma.cc/E4AX-VMB4>].

62. *Id.*

63. Najmabadi, *supra* note 58.

64. *Id.* Student embrace of this on-line platform is evidenced in a student Title IX advisory group’s dismay with its institution’s choice not to adopt Callisto. Emilie Cochran, *UW Denies Implementation of Callisto Sexual Assault Reporting Services, Students Demand Answers*, BADGER HERALD (Mar. 27, 2019), <https://badgerherald.com/news/2019/03/27/uw-denies-implementation-of-callisto-sexual-assault-reporting-services-students-demand-answers/> [<https://perma.cc/F622-MHFR>].

65. Jessica Ladd, *The Reporting System That Sexual Assault Survivors Want*, TED (Feb. 2016), [https://www.ted.com/talks/jessica\\_ladd\\_the\\_reporting\\_system\\_that\\_sexual\\_assault\\_survivors\\_want](https://www.ted.com/talks/jessica_ladd_the_reporting_system_that_sexual_assault_survivors_want) [<https://perma.cc/3DAU-YDDL>].

66. This number has varied but there is no doubting that the vast majority of sexual assaults are committed by those who have done it more than once. See John D. Foubert, Angela Clark Taylor, & Andrew F. Wall, *Is Campus Rape Primarily a Serial or One-Time Problem? Evidence From a Multicampus Study*, VIOLENCE AGAINST WOMEN Mar. 2019, at 9.

67. YOU HAVE OPTIONS PROGRAM, <https://www.reportingoptions.org/> [<https://perma.cc/ASR6-HJPW>].

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

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

So far, only a small number of schools have adopted alternative reporting programs. Approximately a dozen schools use Callisto<sup>69</sup> and two campus law enforcement programs employ You Have Options.<sup>70</sup> Perhaps schools will feel freer to adopt procedures that permit more leeway in disclosing now that Title IX does not focus on a broad category of mandatory reporters. Also, DOE, in its 2017 Interim Guidelines stated that the Resolution Agreements between OCR and individual schools remain in place but no longer have precedential value.<sup>71</sup> Hence, the University of Montana Resolution Agreement, with its naming of all employees as responsible employees/mandatory reporters no longer has “blueprint” status. Thus, to the extent schools believed that all or nearly all of their employees needed to be classified as “responsible employees” in order to steer clear of OCR Title IX trouble, that fear can now abate.

### C. Personal Autonomy

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

Competent adults enjoy the legal right of autonomy.<sup>73</sup> While there may be times to override a competent adult’s decision, that should be the exception, not the norm. Making a decision that others do not agree with or believe not to be in the best interests of the decision-maker is not a basis on which to deprive persons of their personal autonomy.<sup>74</sup> College students are (nearly always) adults. Therefore, college

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68. Sarah Estill, *Responding to Sexual Assault: The You Have Options Program*, OFFICE OF CMTY. ORIENTED POLICING SERVS., WASHINGTON, D.C. (Apr. 2018), [https://cops.usdoj.gov/html/dispatch/04-2018/yhop\\_article.html](https://cops.usdoj.gov/html/dispatch/04-2018/yhop_article.html) [<https://perma.cc/DEU7-JBEB>].

69. CALLISTO, MOBILIZING FOR A CALLISTO CAMPUS, [https://mycallisto.org/assets/docs/student\\_activism\\_toolkit.pdf](https://mycallisto.org/assets/docs/student_activism_toolkit.pdf) [<https://perma.cc/A85U-DQDW>].

70. YOU HAVE OPTIONS PROGRAM, <https://www.reportingoptions.org/directory> [<https://perma.cc/Y8P6-LKMF>].

71. U.S. DEP’T. OF EDUC., OFFICE FOR CIVIL RIGHTS, Q & A ON CAMPUS SEXUAL MISCONDUCT at 7 (2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [<https://perma.cc/E83N-TV5A>]. See also *infra* p. 29 for further discussion of Resolution Agreements.

72. For instance, there are statutorily prescribed mandatory reporters for suspected child abuse. The Federal Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106(b)(2)(B)(i) (2018), requires each State to have provisions or procedures for requiring certain individuals to report known or suspected instances of child abuse and neglect. See also Mass. Gen. Laws ch. 119, § 21 (2008) (discussing which individuals are mandatory reporters of child abuse and neglect).

73. See generally, Justine A. Dunlap, *Mental Health Advance Directives: Having One’s Say?*, 89 KY. L. J. 327 (2000).

74. *Id.* at 386.

student survivors of sexual assault should be afforded their right to decide whether and when to make an official report, with all its attendant consequences.

This right to choose, e.g., the right to be in control of the process or in control of whether there is even a process in the first instance is even more important under Title IX, with its civil rights focus.<sup>75</sup> As Professor Merle Weiner has said: “survivors’ needs should be given significant weight. After all, Title IX is meant to serve them.”<sup>76</sup>

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

#### D. Survivor Healing Includes Survivor Empowerment

Disclosure is important to survivor healing. For disclosure to serve effectively as part of the healing process, a supportive response to the that disclosure is imperative. A negative response, such as victim-blaming or diversion from the story, aggravates the situation and adds to the trauma.<sup>77</sup> However, healing is about more than disclosure and a supportive response thereto. Dr. Judith Herman, in her seminal book *Trauma and Recovery*,<sup>78</sup> states that:

The first principle of recovery is the empowerment of the survivor. . . . Many benevolent and well-intentioned attempts to assist the survivor founder because this fundamental principle of empowerment is not observed. No intervention that takes power away from the survivor can possibly foster her recovery, no matter how much it appears to be in her immediate best interest.<sup>79</sup>

Herman’s words are geared largely to therapists as they seek to help trauma survivors, including survivors of sexual assault. But the principle is equally apt to situations of sexual assault in a higher education setting. As is known beyond quibble, sexual assault is at its core the loss of control over one’s self.<sup>80</sup> And in the words of Herman over 25 years ago, the “principle of restoring control to the traumatized person has been widely recognized.”<sup>81</sup>

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75. Title IX is intended to safeguard equity in higher education and to protect against discrimination based on sex. See *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 638 (1999). Sexual misconduct has long been held to be a form of sex discrimination for the purpose of activating Title IX. *Id.* at 639.

76. Weiner, *supra* note 16, at 134.

77. See Lindsay M. Orchowski & Christine A. Gidycz, *Psychological Consequences Associated with Positive and Negative Responses to Disclosure of Sexual Assault Among College Women: A Prospective Study*, 21 VIOLENCE AGAINST WOMEN 803, 815 (2015).

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

79. *Id.* at 133.

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

81. HERMAN, *supra* note 78, at 134.

For a survivor to choose to disclose but not report a sexual assault only to have the disclosure reported against that survivor's wishes violates both autonomy and control. If the reporting is to a person in an official capacity who has an institutional obligation to commence a grievance process, that constitutes further loss of control.<sup>82</sup> To exacerbate the situation even more, it is a loss of control directly caused by those who are supposed to be institutional helpers. It is the antithesis of promoting healing in the survivor.

Moreover, forced reporting against a survivor's wishes is contrary to the purpose and intent of Title IX. As a civil rights statute, Title IX is to be used to help the student survivor receive equitable educational opportunities.<sup>83</sup> To force reporting and thus to prolong or reintroduce the lack of survivor autonomy is likely to impede a survivor's ability to access educational service on the basis of her sex. This itself should be deemed a breach of Title IX.<sup>84</sup>

### III. THE #METOO IMPACT

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

*Sometimes that silence takes years to break. Sometimes forever.*

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

*Eventually you realize that you are not alone. From #MeToo to All Of Us. Our individual stories add up to a great big society in need of serious healing and transformation."*<sup>85</sup>

#### Salma Hayek, Rachael Denhollander, and Christine Blasey Ford<sup>86</sup>

Over the past several years, high profile cases have shifted the sexual assault conversation into a more open space. As one lawyer and Title IX investigator said:

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

83. See Brodsky, *supra* note 16, at 132.

84. Institutional revictimization is not new. See generally, Justine A. Dunlap, *The "Pitiless Double Abuse" of Battered Mothers*, 11 AM. U. J. GENDER, SOC. POL'Y, & L. 523 (2003).

85. Quito Ziegler, *The Great Transition*, in INDELIBLE IN THE HIPPOCAMPUS: WRITINGS FROM THE ME TOO MOVEMENT 83, 83–84 (Shelly Oria ed., 2019).

86. Salma Hayek is one of the scores of women who have accused Harvey Weinstein. Sara Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (Oct. 27, 2017, 11:27 AM), <https://www.usa-today.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/> [https://perma.cc/MAR4-VNFR]. Rachael Denhollander was a survivor of Larry Nassar. Rachael Denhollander Shares Impact of Larry Nassar Abuse in New Memoir,

“One sign of progress is that we’re talking more openly about these things and not just through the ‘whisper network’ . . . .”<sup>87</sup>

In October 2017, the media published accounts of accusations of sexual assault against Harvey Weinstein.<sup>88</sup> In the wake of this, Alyssa Milano added a # to the MeToo Movement that was founded in 2007 by Tarana Burke.<sup>89</sup> Millions of women responded.<sup>90</sup> This grassroots movement helped underscore the ubiquity of sexual harassment and sexual assault. But on most college campuses, this was already known yet largely unacknowledged.<sup>91</sup> In part due to Campus Climate Surveys, institutions of higher learning were aware of the wide-spread nature of sexual assault.<sup>92</sup> What had been known, if not addressed adequately, on college campuses was now being made known elsewhere and everywhere. #MeToo appeared also to resonate on college campuses, as reports of sexual assault there rose during this time. At Harvard, for instance, reports were up 20%.<sup>93</sup>

While accusations against Weinstein were increasing<sup>94</sup> and #MeToo was having its impact, further unfolding was the extent of former Michigan State University sports doctor Larry Nassar’s abuse. In January 2018, Nassar was

CBS THIS MORNING PODCAST (Oct. 2019), <https://soundcloud.com/cbsthismorning/rachael-denhollander-shares-impact-of-larry-nassar-abuse-in-new-memoir> [<https://perma.cc/P7PZ-FD4Y>]. Christine Blasey Ford accused Brett Kavanaugh, now a U.S. Supreme Court Justice, of sexual assault. *Kavanaugh’s Nomination in Turmoil as Accuser Says He Assaulted Her Decades Ago*, N.Y. TIMES (Sept. 16, 2018), <https://www.nytimes.com/2018/09/16/us/politics/brett-kavanaugh-christine-blasey-ford-sexual-assault.html> [<https://perma.cc/RKE2-GHA5>].

87. Katherine Mangan, *Will Fury Over Harvey Weinstein Allegations Change Academe’s Handling of Harassment?*, CHRON. OF HIGHER EDUC. (Oct. 13, 2017), <https://www.chronicle.com/article/Will-Fury-Over-Harvey/241453> [<https://perma.cc/CW5K-7W2E>] (quoting Alexandra Tracy Ramirez, Esq.). See also Tuerkheimer, *supra* note 16, at 1168–71 (detailing the “whisper network” in greater depth).

88. Numerous news outlets had for years tried to corroborate long-told rumors about Weinstein. Weinstein was able to kill many stories before the New York Times and the New Yorker magazine each published accounts in 2017. See generally JODI KANTOR & MEGAN TWOHEY, *SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT* (2019). Weinstein was finally charged criminally in New York on May 25, 2018. See Benjamin Mueller & Alan Feuer, *Arrested on Rape Charges, Weinstein Posts \$1 Million Bail*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/nyregion/harvey-weinstein-arrested.html> [<https://perma.cc/85SP-H9KN>]. His trial began January 22, 2020. See Jan Ransom & Alan Feuer, *Weinstein Trial Begins with Vivid Descriptions of Several Sexual Attacks*, N.Y. TIMES (Jan. 22, 2020), <https://www.nytimes.com/2020/01/22/nyregion/harvey-weinstein-trial.html> [<https://perma.cc/EH65-RYUB>].

89. See generally Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/A3KE-59N6>].

90. See *id.*

91. Felton, *supra* note 18.

92. CHRISTOPHER KREBS, CHRISTINE LINDQUIST, MARCUS BERZOFKY, BONNIE SHOOK-SA & KIMBERLY PETERSON, BUREAU OF JUSTICE STATISTICS, *CAMPUS CLIMATE SURVEY VALIDATION STUDY FINAL TECHNICAL REPORT* (Jan. 2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf> [<https://perma.cc/5AJD-VSVX>].

93. Felton, *supra* note at 18.

94. Approximately ninety women ultimately accused Weinstein of sexual misconduct, including rape. Ishani Nath, *The Disturbingly Long List of All the Women Who Have Accused Harvey Weinstein (So Far)*, FLARE (Jan. 21, 2020), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/5CZ9-R6JY>].



sentenced to up to 175 years in jail.<sup>95</sup> The sentencing occurred after 156 women spoke of their experience of his abuse.<sup>96</sup> Prior to sentencing, Nassar wrote a letter to the judge stating: “Hell hath no fury like a woman scorned.”<sup>97</sup> It seems likely that this comment contributed to the judge saying to Nassar at sentencing: “You don’t get it.”<sup>98</sup>

Nine months later, Christine Blasey Ford came forward with accusations of sexual assault against then-nominee to the U.S. Supreme Court, Brett Kavanaugh.<sup>99</sup> After they both testified before the Senate judiciary committee, he was confirmed. He now sits as an associate justice on the Supreme Court; Blasey Ford, on the other hand, received death threats and had to hire security details for her family’s safety.<sup>100</sup> But people still wonder why there is a hesitancy to disclose.

The point of examining the #MeToo movement and ancillary events here is to mine what they reveal about the challenge of disclosure and the pervasiveness of sexual misconduct. Even prior to the attention-grabbing #MeToo Movement, it was well-established that sexual assault on college campuses was rampant and under-addressed.<sup>101</sup> #MeToo served to personalize some of the trauma. The allegations against Harvey Weinstein or Brett Kavanaugh highlighted the truth that survivors delay disclosure or only disclosed informally rather than to official actors.<sup>102</sup> But these high-profile situations, one can hope, help demonstrate the difficulties and perils of disclosure. They help explain—at least to those who are willing to hear—that disclosure is not such a binary choice.<sup>103</sup>

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

95. See Sophie Gilbert, *A New Film Reveals How Larry Nassar Benefitted from a Culture of Silence*, ATLANTIC (May 2, 2019), <https://www.theatlantic.com/entertainment/archive/2019/05/new-film-exposes-how-larry-nassar-was-able-abuse/588571/> [https://perma.cc/9RYR-AVMP].

96. See *id.*

97. Des Bieler, *Here Are the Larry Nassar Comments that Drew Gasps in the Courtroom*, WASH. POST (Jan. 24, 2018, 8:23 PM), <https://www.washingtonpost.com/news/early-lead/wp/2018/01/24/here-are-the-larry-nassar-comments-that-drew-gasps-in-the-courtroom/> [https://perma.cc/5ADP-BZE3].

98. Des Bieler, *Larry Nassar Lawyers Claim ‘Death Warrant’ Judge’s Comments Led to Prison Attack*, WASH. POST (July 25, 2018, 6:16 PM) <https://www.washingtonpost.com/news/early-lead/wp/2018/07/25/larry-nassar-lawyers-claim-death-warrant-judges-comments-led-to-him-being-assaulted/> [https://perma.cc/BA52-QCZD].

99. Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, WASH. POST (Sep. 16, 2018, 10:28 PM), [https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b\\_story.html](https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html) [https://perma.cc/YR5L-BX5S].

100. Janell Ross, *‘Vile Hatred, Hero Worship’: Christine Blasey Ford Faces an Unsettling Future*, GUARDIAN (Oct. 10, 2018, 1:00 PM), <https://www.theguardian.com/us-news/2018/oct/10/christine-blasey-ford-faces-unsettling-future> [https://perma.cc/MC2Z-BQ3D].

101. Felton, *supra* note 18; Tuerkheimer, *supra* note 16.

102. See *infra* Part III for a discussion.

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

Larissa Boyce, a former member of Michigan State University's junior gymnastic team, reported Nassar in 1997.<sup>104</sup> He was finally sentenced in 2018; that math is not encouraging to a survivor deciding whether to disclose.

Disclosing is hard; that difficulty is amplified when the accused has power over the accuser's situation or career or employment or advancement in some life sphere.<sup>105</sup> The difficulty is further amplified when that person can threaten consequences that he or she is quite capable of executing. Just ask the Harvey Weinstein accusers. Many stayed silent out of fear.<sup>106</sup>

Disclosing is hard; that difficulty is amplified when the person accused is a high-profile "model-citizen." Just ask Christine Blasey Ford. Her accusations against then-federal circuit judge Kavanaugh either were not believed or deemed insignificant or irrelevant to the process of picking a Supreme Court justice. Disclosing is hard even for established professionals who might, in other circumstances, come supercharged with credibility.<sup>107</sup> Now try to imagine how hard it would be for a college freshman.

With this seeming flurry of accusations and MeToo responders, some numbers about the incidence of false reports may prove instructive. First, for college campuses, one early study found that less than five percent of sexual assaults were reported to the police.<sup>108</sup> Although the number may have increased incrementally in the last generation, still about 90% of sexual assaults do not get reported.<sup>109</sup> So of the

104. Dan Murphy, *Former Gymnast: MSU President Couldn't Fit Attending Hearing Into Schedule*, ESPN (Jan. 18, 2018), [https://www.espn.com/college-sports/story/\\_/id/22143668/former-gymnast-says-michigan-state-university-president-not-fit-larry-nassar-hearing-schedule](https://www.espn.com/college-sports/story/_/id/22143668/former-gymnast-says-michigan-state-university-president-not-fit-larry-nassar-hearing-schedule) [https://perma.cc/47AQ-2R7E]; Scott Cacciola, *'This Is the Beginning of Our Story'*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/sports/larry-nassar-victims.html> [https://perma.cc/LC4A-YB8P].

105. Harvey Weinstein is alleged to have threatened his victims with never again getting work. See Molly Redden, *'You'll Never Work Again': Women Tell How Sexual Harassment Broke Their Careers*, GUARDIAN (Nov. 21, 2017, 7:07 AM), <https://www.theguardian.com/world/2017/nov/21/women-sexual-harassment-work-careers-harvey-weinstein> [https://perma.cc/S64B-CEB6].

106. In trial testimony, one of Weinstein's accusers disclosed to a friend but declined to go to the police because of what Weinstein could do. See Alan Feuer & Jan Ransom, *Rosie Perez, at Weinstein Trial, Backs Up Rape Allegation*, N.Y. TIMES (Jan. 27, 2020), <https://www.nytimes.com/2020/01/24/nyregion/harvey-weinstein-rosie-perez-trial.html> [https://perma.cc/UC8L-TUJH].

107. For example, Christine Blasey Ford is a professor at Palo Alto University and Stanford University PsyD Consortium. She received her undergraduate degree from the University of North Carolina at Chapel Hill, and went on to receive graduate degrees from Pepperdine University, University of Southern California, and Stanford. Additionally, she holds a Ph.D. in Educational Psychology: Research Design. Ali Rogan, *Who is Christine Blasey Ford?*, ABCNEWS (Sept. 27, 2018, 4:01 AM), <https://abcnews.go.com/Politics/christine-blasey-ford/story?id=57989558> [https://perma.cc/A52U-WGY2].

108. BONNIE S. FISHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN*, U.S. DEP'T OF JUSTICE at 24 (Dec. 2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf> [https://perma.cc/6JFU-B8EQ].

109. Michael Dolce, *College is Starting Again, and With it the Threat of Campus Sexual Assault. A Lawyer Offers Advice*, NBC NEWS (Sept. 2, 2019, 3:04 AM), <https://www.nbcnews.com/think/opinion/college-starting-again-it-threat-campus-sexual-assault-lawyer-offers-ncna1048-511> [https://perma.cc/ER42-MPHP]; Catherine Thorbecke, *April Marks Sexual Assault Awareness Month and the Statistics Are Staggering*, ABCNEWS (Apr. 3, 2018, 4:04 AM), <https://abcnews.go.com/GMA/News/april-marks-sexual-assault-awareness-month-statistics-staggering/story?id=54112555> [https://perma.cc/WC5N-LTB9].

approximately 5-10% that are reported, it has been estimated that false reports occur between 2-10% of the time.<sup>110</sup> However, this number may itself be inflated due to misunderstanding what constitutes a false report.<sup>111</sup> A report that lacks evidence to arrest, prosecute, or otherwise go forward is not a false report.<sup>112</sup> A report that is delayed is not a false report.<sup>113</sup> So the 2-10% false report figure, when properly viewed as a small percentage of the small percentage of reported sexual assault, is actually less than .5%.<sup>114</sup>

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

#### IV. THE MANDATORY REPORTING JUGGERNAUT

##### A. Introduction

Since its enactment in 1972, Title IX has provided that “[no] person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>117</sup> In its early days, Title IX was often used as a way to equalize opportunities and expenditures for women’s sports, at both the high school and post-secondary level.<sup>118</sup> In the 20–30 years following Title IX’s

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110. See Katie Heaney, *Almost No One is Falsely Accused of Rape*, THE CUT (Oct. 5, 2018), <https://www.thecut.com/article/false-rape-accusations.html> [<https://perma.cc/4X2C-BXCV>].

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. Elizabeth Bartholet et al., Opinion, *Rethink Harvard’s Sexual Harassment Policy*, BOS. GLOBE (Oct. 14, 2014, 9:00 PM), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> [<https://perma.cc/5CEE-28YT>].

116. David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), [https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4\\_story.html](https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html) [<https://perma.cc/S2Y9-HNLK>].

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

118. See R. Shep Melnick, *The Strange Evolution of Title IX*, NAT’L AFFS., (Summer 2018), <https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix> [<https://perma.cc/9MU5-DZSJ>] (“Title IX initially focused on what happens in the classroom. That focus soon shifted to the playing field, then shifted again to bedrooms and bathrooms.”).

passage, however, the law was interpreted to include sexual harassment and other misconduct as behaviors that ran afoul of federal statutes such as Title IX and Title VII.<sup>119</sup> During this period, courts were also determining that gender discrimination was not only a violation of federal statutes but also violated constitutional rights.<sup>120</sup>

In construing Title IX, the U.S. Supreme Court found, in *Franklin v. Gwinnett County Schools*, that when a school district was aware of teacher-to-student sexual harassment, it could be held liable.<sup>121</sup> Seven years later, in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, the Court extended that principle to cover student-on-student harassment.<sup>122</sup> The standard set in *Davis* for civil liability, however, was fairly narrow. First, a school district's actions in dealing with peer harassment were entitled to deference.<sup>123</sup> Second, those actions would absolve a district from liability provided that the actions were not "clearly unreasonable" when taking into account what the district knew at the time.<sup>124</sup>

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

Requiring that a wide swath of university employees be responsible employees, a.k.a. mandatory reporters, seems to be grounded in several factors. First, there was the phenomenon that, for years, universities conducted virtually no investigations of sexual assaults alleged to have occurred on their campuses. Accordingly, schools were combatting years of non-action.

Second, there was more than a decade of often unclear interpretive guidance from the Office of Civil Rights within the U.S. Department of Education, the administrative body charged with enforcing Title IX. This left schools uncertain as

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

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

121. 503 U.S. 60, 76 (1992).

122. 526 U.S. 629, 643 (1999).

123. See *id.* at 648 ("[C]ourts should refrain from second-guessing the disciplinary decisions made by school administrators.") (citation omitted).

124. *Id.*

125. OCR's 2001 Guidance, *supra* note 9.

126. OCR's 2001 Guidance, *supra* note 9, at 13.

127. *Id.* at 12–13. This standard has changed under the new regulations, which have reinstituted the *Davis* standard of actual knowledge. See *id.*

128. *Id.* at 13.

129. *Id.* at 15.

to who should report.<sup>130</sup> Schools thus adopted definitions and policies that were perceived as being viewed favorably by OCR. Finally, operating alongside these drivers was mounting social attention to the widespread issue of campus sexual assault.<sup>131</sup>

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

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

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

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130. Weiner, *supra* note 16, at 137–38.

131. An indirectly related phenomenon that occurred two decades before was the increased use of non-discretionary practices in intimate partner violence cases, such as mandatory arrest and mandatory or “no-drop” prosecution. In both situations, survivors—usually women—were not to be trusted to make the “right” choice. Justine A. Dunlap, *Soft Misogyny: The Subtle Perversion of Domestic Violence Reform*, 46 SETON HALL L. REV. 775, 797 (2016).

132. WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, 6–8 (2014).

133. See Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 643 (1999) (“We consider here whether the misconduct identified in *Gebser*—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does.”).

134. See *supra* Part II for a detailed discussion of the positive and negative consequences of mandated reporting. See *infra* Part VI for a discussion of possible solutions to the issues surrounding mandatory reporting.

135. See Brodsky, *supra* note 16, at 143–45, 143 n.83. See generally Tyler Kingkade, 28 Groups that Work with Rape Victims Think the Safe Campus Act is Terrible, HUFFPOST (Sept. 17, 2015), [https://www.huffpost.com/entry/rape-victims-safe-campus-act\\_n\\_55f300cce4b063ecbfa4150b](https://www.huffpost.com/entry/rape-victims-safe-campus-act_n_55f300cce4b063ecbfa4150b) [<https://perma.cc/VH9C-F86T>].

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

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

A tortuous road has led to many universities requiring that most if not all of their employees must report any disclosure of sexual assault<sup>139</sup> to the school’s Title IX officer or his or her designee.<sup>140</sup> The root of mandatory reporting is grounded in the term “responsible employee.”<sup>141</sup> This term, which appeared only once in a heading in the old Title IX regulations, was first defined in OCR 2001 guidance.<sup>142</sup>

Although the 2001 guidance policy remained in place even after DOE rescinded other significant OCR policies and guidance in 2017,<sup>143</sup> the phrase “responsible employee” does not appear in the new regulations. It is reasonably safe, therefore, to predict there will be little to no vitality to this phrase going forward in

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136. Emily Yoffe, *The Problem with #BelieveSurvivors*, THE ATLANTIC (Oct. 3, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/brett-kavanaugh-and-problem-believesurvivors/572083/> [<https://perma.cc/TP5S-N8C8>].

137. See WORLD HEALTH ORG., RESPONDING TO INTIMATE PARTNER VIOLENCE AND SEXUAL VIOLENCE AGAINST WOMEN: WHO CLINICAL AND POLICY GUIDELINES, 41 (2013), [https://apps.who.int/iris/bitstream/handle/10665/85240/9789241548595\\_eng.pdf;jsessionid=3A558BA5D4F2403F4E4978E4DB47D7C0?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/85240/9789241548595_eng.pdf;jsessionid=3A558BA5D4F2403F4E4978E4DB47D7C0?sequence=1) [<https://perma.cc/FU9Y-BHU7>].

138. As of April 2018, this discussion draft has not been ratified by the ALI. PRINCIPLES OF THE L.—STUDENT SEXUAL MISCONDUCT § 3.5 (AM. L. INST., Discussion Draft Apr. 17, 2018).

139. It has long been settled that if sexual misconduct is severe, persistent or pervasive, it can create a hostile environment that must be addressed by the institution. See *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 631 (1999) (“It is not necessary to show an overt, physical deprivation of access to school resources to make out a damages claim for sexual harassment under Title IX, but a plaintiff must show harassment that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victims are effectively denied equal access to an institution’s resources and opportunities.”). See also Emme Ellman-Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 MICH. L. REV. 155, 162 (2017) (discussing how the 2011 OCR guidance reiterated “that a ‘hostile environment’ is one in which harassment is sufficiently severe, persistent, or pervasive . . .”).

140. Holland et al., *supra* note 29, at 259 (“Over two thirds (69%, n=101) of the 146 policies identified all employees—i.e., all faculty and staff employed by the school—as mandatory reporters of sexual assault.”). At least part of the problem results from the use of various forms of guidance from OCR that is sometimes directed more at some forms of sexual harassment than others. This is true because OCR guidance is responsive to questions that have been posed to it.

141. Weiner, *supra* note 16, at 132.

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

143. Jackson, *supra* note 8.

OCR enforcement of Title IX law and regulations.<sup>144</sup> However, since up to 69% of institutions classify all employees as mandatory reporters and 19% so classify most employees, there is still work to be done.<sup>145</sup> The removal of this term from the new regulations does not foretell that institutions of higher education will now reverse course.<sup>146</sup> It remains, therefore, important to understand how mandatory reporting became nearly universal and why it is harmful.<sup>147</sup>

The 2001 guidance—which is still in force—provided the potential for a school’s culpability for student-to-student, a.k.a. peer harassment, when the school was on notice of a sexually hostile environment and did not take immediate and effective steps to ameliorate the environment.<sup>148</sup> The 2001 guidance defines notice as occurring when a “responsible employee” knew or should have known of the harassment.<sup>149</sup> A “responsible employee” was then defined to include “any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.”<sup>150</sup>

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

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144. See Jim Hermes, *Washington Watch: What ED’s Title IX Proposal Means for Your College*, CMTY. COLL. DAILY (Nov. 20, 2018), <http://www.ccdaily.com/2018/11/eds-title-ix-proposal-means-college/> [<https://perma.cc/9G4W-CFAP>] (positing that the proposed regulations are in “stark contrast” with the current practice vis a vis who has to report and when an institution is on notice and must take action based on a report).

145. Holland et al., *supra* note 29 at 259.

146. See *id.*

147. See Weiner, *supra* note 16.

148. OCR’s 2001 Guidance, *supra* note 9.

149. *Id.*

150. *Id.* The phrase “any other misconduct” in the second clause of this definition could theoretically capture all faculty who, for instance, have a duty to report cheating—which is clearly “other misconduct.” Professor Merle Weiner carefully sets out the fallacy of this broad interpretation. Weiner, *supra* note 16 at 107–11. She analyzed the use of that term in OCR guidance for over twenty years and concluded that the second prong of the responsible employee definition: an employee “who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees,” is best read as a subset of the third prong: “an individual who a student could reasonably believe has this authority or responsibility.” Although there is much to support this interpretation, Weiner argues that a prime reason is the 2014 Q&A document that specifically responded to the question of who constitutes a responsible employee. In its response, OCR stated that schools must be clear on who is and who is not a responsible employee and must make those categories clear to students so that students can make informed choices regarding disclosure. If all, or nearly all, employees should be deemed responsible employees, this clear categorization would be unnecessary. Further, Weiner explains, OCR guidance distinguished between all employees, who are obliged to inform students of reporting options and available services, and responsible employees, who must report an allegation of a sexual assault to the Title IX coordinator. Logically, these two categories are not the same, have different obligations, and the second group is smaller than the first.

2001 policy.<sup>151</sup> Both the 2011 and 2014 OCR guidance documents have been rescinded.

During the timeframe of these now-rescinded documents, OCR also began to conduct more frequent investigations of schools alleged to be in violation of Title IX.<sup>152</sup> Further, OCR started maintaining a public list of the investigations, a move that received bipartisan Congressional support.<sup>153</sup> It is likely that increased OCR administrative actions against individual institutions contributed to the widening embrace of the term “responsible employee” to include most university employees. This is so because the resolution agreements that OCR entered into with individual institutions suggested to some that OCR preferred or even demanded a broad definition of responsible employees.<sup>154</sup> For instance, the 2013 Resolution Agreement with the University of Montana provided that, going forward, “all employees . . . except those who are statutorily barred from reporting,” are required “to report sexual assaults and harassment of which they become aware to the Title IX Coordinator.”<sup>155</sup> In addition, the agreement’s proclamation that it was to “be a blueprint”<sup>156</sup> for institutions of higher learning across the country “to protect students from sexual harassment and assault” no doubt enhanced the view that it contained the appropriate governing standards that would keep schools Title IX compliant.

In subsequent years, other OCR actions at specific colleges and universities enforced the belief that OCR was pushing a broad definition of “responsible employee.”<sup>157</sup> For instance, in its enforcement interaction with Wesley College three years after the University of Montana Resolution Agreement “blueprint,” OCR expressed concerns about the potentially “over-inclusive” classification of “quasi-confidential” employees who could receive students disclosures without reporting identifying information.<sup>158</sup>

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151. Off. for Civ. Rts., *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP’T OF EDUC. (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/2ZMD-U2SU>].

152. Jennifer Steinhauer & David S. Joachim, *55 Colleges Named in Federal Inquiry into Handling of Sexual Assault Cases*, N.Y. TIMES (May 1, 2014), <https://www.nytimes.com/2014/05/02/us/politics/us-lists-colleges-under-inquiry-over-sex-assault-cases.html> [<https://perma.cc/6TZP-UZSR>].

153. Tyler Kingkade, *55 Colleges Face Sexual Assault Investigations*, HUFFPOST (July 1, 2014), [https://www.huffpost.com/entry/college-sexual-assault\\_n\\_5247267](https://www.huffpost.com/entry/college-sexual-assault_n_5247267) [<https://perma.cc/Z826-4UHH>].

154. The University of Montana had one of the first resolution letters. See Letter from Anurima Bhargava, Chief, U.S. Dep’t of Just., Educ. Opportunities Section, and Gary Jackson, Reg’l Dir., U.S. Dep’t of Educ., Seattle Off., to Royce Engstrom, President, Univ. of Mont., and Lucy France, Couns., Univ. of Mont., 12 (May 9, 2013), <https://www2.ed.gov/documents/press-releases/montana-missoula-letter.pdf> [<https://perma.cc/A7CL-23PN>]. See also Weiner, *supra* note 16 at 125–28.

155. See Letter from Anurima Bhargava and Gary Jackson to Royce Engstrom and Lucy France, *supra* note 154, at 12.

156. *Id.* at 1.

157. Weiner, *supra* note 16, at 126–29.

158. See Letter from Beth Gellman-Beer, Supervisory Att’y, U.S. Dep’t of Educ., Off. for Civ. Rts. Phila., to Robert E. Clark II, President, Wesley Coll., 15 (Oct. 12, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf> [<https://perma.cc/P438-95YX>]. This is unfortunate because the ability to have this intermediate category is an important part of the solution. To only permit a small category of confidential employees—i.e. those in some counseling or equivalent category—with everyone else being a responsible employee with



OCR interactions with individual institutions were taken as applicable to other institutions, even if the schools were so different as to make OCR recommendations or resolutions for one school logically inapposite to another. After all, Title IX applies to an enormous range of schools which limits the practicality of overly specific OCR guidance. As the move towards a broad definition of “responsible employee” grew, third parties started weighing in on the issue of who should be a responsible employee.<sup>159</sup> Early on, outside groups often supported broadly defining responsible employees.<sup>160</sup>

OCR’s 2017 Q&A on Campus Sexual Misconduct continued the use of the phrase responsible employee as it addressed the question of a school’s responsibility to combat campus sexual misconduct.<sup>161</sup> It referenced the retained 2001 policy guidance, stating that an institution must have a Title IX coordinator and that other employees “may be considered responsible employees” who can help “connect” the student to the Title IX coordinator.<sup>162</sup> There was no mention whether a mandatory reporting obligation attached to a “responsible employee.”

The new Title IX regulations do not use the term “responsible employee.” In fact, they omit the phrase in the one place it was used in the prior regulations, to wit: in the title of 34 CFR 106.8(a).<sup>163</sup> The old regulations captioned it “Designation of responsible employee.” New Section 106.8(a) is entitled “Designation of coordinator” and provides that each institution must “designate at least one employee to coordinate its efforts to comply with its responsibilities” under Title IX. This language is largely the same as that found in the previous regulations. The proposed regulations explained that the heading was changed to eliminate confusing language.<sup>164</sup> Further, public commentary following the issuance of the proposed regulations noted the reduced emphasis on “responsible employees.”<sup>165</sup>

## V. STATE LAWS AND THE EFFORT TO CODIFY MANDATORY REPORTING

Colleges and universities have been debating and enacting policy on their definitional scope of Title IX “responsible employees” and those who would have an obligation to make an official report.<sup>166</sup> State and federal legislators also have

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mandatory reporting obligation is contrary to what survivors want and need, and is not required by Title IX. *See infra* Part IV. A–B for a discussion.

159. *See, e.g.,* Sine Anahita, *Trouble with Title IX*, AM. ASSOC. OF UNIV. PROFESSORS (May–June 2017), <https://www.aaup.org/article/trouble-title-ix#.XZ5DkVVKipo> [<https://perma.cc/6YHK-XQ2Q>].

160. *See, e.g.,* Weiner, *supra* note 16, at 80–84.

161. Off. for Civ. Rts., *Q & A on Campus Sexual Misconduct*, U.S. DEP’T OF EDUC., 2 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [<https://perma.cc/97D3-QB6K>].

162. *Id.*

163. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61481 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

164. *Id.*

165. Sarah Brown & Katherine Mangan, *What You Need to Know About the Proposed Title IX Regulations*, CHRON. OF HIGHER EDUC. (Nov. 16, 2018), <https://www.chronicle.com/article/what-you-need-to-know-about-the-proposed-title-ix-regulations> [<https://perma.cc/D6AU-QTUI>].

166. *See* Weiner, *supra* note 16, at 99–106 (examining the nuances between disclosing versus reporting).

been debating the idea of mandatory reporting.<sup>167</sup> In addition, at least two states have codified the use of the term responsible employee.<sup>168</sup> At their core, many of the laws being proposed, modified, and sometimes enacted<sup>169</sup> deal with the interplay between campuses and local law enforcement when a campus receives a report of a sexual assault.<sup>170</sup>

Beginning in 2013, a raft of bills introduced in state legislatures focused on the relationship between schools and local law enforcement vis-à-vis the reporting of campus sexual assault.<sup>171</sup> In 2015, federal legislation was proposed.<sup>172</sup> The latter, an amendment to the Clery Act, decreed that an institution could not conduct an internal investigation if it did not make a law enforcement referral.<sup>173</sup> It died in the 115<sup>th</sup> Congress and was reintroduced in April 2019 during the 116<sup>th</sup> Congress's 1<sup>st</sup> Session.<sup>174</sup> After being introduced with 15 bipartisan co-sponsors, it was referred to the Health, Education, Labor and Pensions Committee.<sup>175</sup>

In the state legislatures where bills were introduced between 2013 and 2017, the proposed legislation generally falls into three categories. First, there are bills that either encourage or mandate cooperation between campuses and local law enforcement.<sup>176</sup> For instance, a bill might lead to a Memorandum of Understanding (MOU) between the two entities. The states that have passed MOU-type laws include Illinois,<sup>177</sup> Louisiana,<sup>178</sup> Minnesota,<sup>179</sup> and Washington.<sup>180</sup>

Second are the bills proposing what are sometimes called mandatory referral laws.<sup>181</sup> This type of statute generally requires universities to make a referral

167. See Brodsky, *supra* note 16.

168. DEL. CODE ANN. tit. 14, § 9001(a)–9007(a) (West 2017). This statute was passed in 2016 and had effective dates in both 2017 and 2018. *Id.* See also HAW. REV. STAT. § 304A-120 (2017). Massachusetts has pending legislation, S.B. 2203, 2017-2018 Leg., 190th Sess. (Mass. 2017), introduced November 2, 2017.

169. See Brodsky, *supra* note 16, at 139. Of fourteen bills introduced in eleven state legislatures, only four were passed with significant revisions. See *infra* text accompanying notes 184–91 for a discussion of the changes to, e.g., the Virginia and California statutes.

170. See Brodsky, *supra* note 16, at 138–44 for an excellent discussion of these mandatory “referral” laws, which burgeoned in 2014 and 2015.

171. *Id.* at 138.

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

173. *Id.*

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

175. S. 976.

176. Brodsky, *supra* note 16, at 139.

177. 110 ILL. COMP. STAT. 12/10 (2015).

178. LA. STAT. ANN. § 17:3399.14 (2015).

179. MINN. STAT. § 135A.15 (2019).

180. WASH. REV. CODE § 28B.112.020 (2015); WASH. REV. CODE § 28B.112.005 (2015).

181. Alexandra Brodsky uses that term in her article to differentiate these from administrative mandatory reporting laws within a university's Title IX schema. Brodsky, *supra* note 16, at 133 n.9

of a disclosed sexual assault to local law enforcement, often within 24 hours of the disclosure.<sup>182</sup> These bills were introduced in several states. In all four states where some type of referral law was passed, the legislative process resulted in modification to the bills as initially proposed.<sup>183</sup> For instance, the California law passed specifies that campus referrals to local law enforcement will only include non-identifying information unless the victim/survivor consents to the release of identifying information after being informed of the right to have such information withheld.<sup>184</sup> Consequently, the bill to codify mandatory referrals resulted in a law that emphasized the right, not the requirement, to involve law enforcement.<sup>185</sup>

Likewise, the mandatory referral bill introduced in Virginia in 2014, not long after the discredited Rolling Stone article about a botched fraternity rape investigation done by campus authorities, also resulted in a less rigid law that appears to be a thoughtful compromise of interests. As introduced, it was a mandatory referral bill opposed by students who argued that it would reduce reporting and infringe on confidentiality.<sup>186</sup> As passed, the law provides that institutions must establish a review committee of at least three persons comprising a law enforcement representative, the Title IX coordinator or delegate, and a student affairs representative.<sup>187</sup> The Title IX coordinator, upon receiving information from a responsible employee that an act of sexual violence may have been committed, must report that information—complete with any personally identifying information—to the committee. The committee meets and determines if a criminal referral without the survivor’s consent is warranted.<sup>188</sup> A referral “shall immediately”<sup>189</sup> occur if it is “necessary to protect the health or safety of the student or individual” and pursuant to FERPA<sup>190</sup> regulations that say that referral is warranted if there is an “articulable and significant threat to the health or safety of a student or other individuals. . . .”<sup>191</sup>

The third type of state legislation being introduced codifies the term “responsible employee.” Delaware and Hawaii have statutorily defined the term.<sup>192</sup> The Delaware statute defines responsible employees to include, *inter alia*, “[f]aculty, teachers, or professors.”<sup>193</sup> Pursuant to the statute, responsible employees who

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(“These laws are sometimes referred to in the press as “mandatory reporting” laws. For consistency, and to avoid confusion with other regimes of mandatory reporting within the university, I will refer to these laws as mandatory referral statutes.”).

182. *Id.* at 140–41.

183. *Id.* at 140–43.

184. CAL. EDUC. CODE § 67383 (West 2014); Brodsky, *supra* note 16, at 139.

185. Brodsky, *supra* note 16, at 139.

186. *Id.* at 141.

187. *Id.*

188. VA. CODE ANN. § 23.1-806 (2016); 34 C.F.R. § 99.36 (2009). The law specifies that the Title IX coordinator or any other responsible employee can report directly to law enforcement with the victim’s consent. VA. CODE ANN. § 23.1-806B.

189. VA. CODE ANN. § 23.1-806(F).

190. Federal Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g.

191. *Id.* § 2(a).

192. DEL. CODE ANN. tit. 14, § 9001A (2017). This statute was passed in 2016 and had effective dates in both 2017 and 2018. *Id.* HAW. REV. STAT. § 304A-120 (2016). Massachusetts has pending legislation. See H.B. 1209, 191 Gen. Ct. (Mass. 2019).

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

become aware of a sexual assault must notify campus police within 24 hours who, in turn, must within 24 hours notify local law enforcement. The responsible employee must also inform the victim that a report will be made, tell them of their rights pursuant to the state Victim's Bill of Rights, and offer them services.<sup>194</sup> It is unfortunate that the right of a Delaware victim not to have an official report made is not honored.

The Hawaii statute provides that “[a]ll University of Hawaii faculty members” are designated as “responsible employees” under Title IX and “shall report any violations of University of Hawaii executive policies regarding sexual harassment, sexual assault, domestic violence, dating violence, and stalking to the Title IX coordinator. . . .”<sup>195</sup> As the Hawaii law specifically links responsible employees to Title IX, it is unclear what impact the removal of responsible employee from the Title IX regulations will have.

Finally, a more recent bill that was enacted in one state deserves special mention and opprobrium. As of January 1, 2020, Texas SB 212<sup>196</sup> requires all non-student employees of postsecondary educational institutions to report to their institutions’ Title IX coordinator or deputy any incident of dating violence, sexual assault, sexual harassment or stalking that they have witnessed or of which they become aware.<sup>197</sup> Failure to comply is a criminal misdemeanor and will lead to termination of employment.<sup>198</sup> This law has received much pushback from across the spectrum. Survivor groups oppose it.<sup>199</sup> The organization “Foundation for Individual Rights in Education (FIRE)” calls it a terrible law.<sup>200</sup> A Forbes opinion piece calls it “the worst of both worlds.”<sup>201</sup> This law, like the one in Virginia, had its origins in a college Title IX investigation that was beyond botched. Some have termed this the “Baylor Effect.”<sup>202</sup>

It is important to keep track of state law activity on this issue, regardless of the new Title IX regulations’ impact on the widespread categorization of responsible employees. On one level, state laws have always been germane to Title IX reporting. For instance, state laws regarding privileged communications can (and do) dictate who universities designate as confidential employees. These laws could even turn a responsible employee, i.e., one who has an obligation to report disclosure to the

194. DEL. CODE ANN. tit. 14, § 9002A(b) (2018).

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

196. TEX. EDUC. CODE ANN., § 51.252 (West 2020).

197. *Id.*

198. Andrew Kreighbaum, *States Wade Into Title IX Debate*, INSIDE HIGHER ED. (June 19, 2019), <https://www.insidehighered.com/news/2019/06/19/texas-legislation-contrasts-devos-take-campus-sexual-misconduct> [<https://perma.cc/66KV-8LH7>].

199. *Id.*

200. *Id.*

201. Evan Gerstmann, *Don't Throw Professors In Jail For Respecting Student Confidentiality*, FORBES (May 28, 2019), <https://www.forbes.com/sites/evangerstmann/2019/05/28/dont-throw-professors-in-jail-for-respecting-student-confidentiality/#1f3b828127b9> [<https://perma.cc/T8UC-HMUM>].

202. Kreighbaum, *supra* note 198.

school's Title IX Coordinator, into a confidential source.<sup>203</sup> In addition, state laws on mandatory reporting for child abuse would supersede a school's confidentiality policy regarding disclosure by students under 18 years of age. However, state laws codifying mandatory reporting should be challenged as being harmful to survivors.

## VI. MORE CONSIDERED OPTIONS

*"Come on. Know better. Somebody, know better."*<sup>204</sup>

### A. Limiting Mandatory Reporters

Even before the 2011 and 2014 OCR guidance documents were rescinded, and Title IX regulations were changed to omit any reference to "responsible employees," federal law, regulation, or agency "guidance" did not require all university employees to be "responsible employees" with a concomitant reporting obligation.<sup>205</sup> Although many institutions appeared to perceive it that way, the focus on all employees as responsible employees was largely in now-withdrawn OCR guidance.<sup>206</sup> It is surely gone from the newly effective regulations.<sup>207</sup>

Nonetheless, in recent years, many institutions of higher learning have declared that most, if not all, non-confidential employees are responsible employees with mandatory reporting obligations.<sup>208</sup> These determinations may be the result of extensive internal processes. Thus, schools are unlikely to rush to change their policies to a less expansive mandatory reporter requirement. Although they may no longer fear a Title IX investigation, there may be little incentive for schools to change recent policies that have been laboriously enacted or seen by some to embody best practices.

Further, some colleges and universities have expressed concern that the new regulations are in some ways more prescriptive and will make complaint resolution more time-consuming and expensive. The Association of Independent Colleges and Universities in Massachusetts (AICUM) made that assertion in its comments to the proposed regulations.<sup>209</sup> AICUM also articulated a concern that the proposed

203. This caveat is found in the now-rescinded 2014 Guidance document. See U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/4F26-QMG4>]. However, it has also been codified in University policies. Weiner, *supra* note 16, at 157–58.

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

205. See Weiner, *supra* note 16, at 111–13.

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

207. DEP'T OF EDUC., *supra* note 6 at 61481. Sarah Brown & Katherine Mangan, *What You Need to Know About the Proposed Title IX Regulations*, CHRON. OF HIGHER EDUC. (Nov. 16, 2018), [https://www.chronicle.com/article/What-You-Need-to-Know-About/245118?cid=trend\\_right\\_a](https://www.chronicle.com/article/What-You-Need-to-Know-About/245118?cid=trend_right_a) [<https://perma.cc/N8JN-RSQ2>].

208. Holland et al., *supra* note 29, at 260.

209. Letter from Richard Doherty, President, Coll. of the Holy Cross to Secretary Betsy DeVos, Secretary of Education 1 (Jan. 23, 2019), <http://aicum.org/wp-content/uploads/2019/01/AICUM-public-comments-on-Notice-of-Proposed-Rulemaking-%E2%80%99CNPRM%E2%80%99D-amending-regulations-implementing-Title-IX-of-the-Education-Amendments-of-1972-Title-IX%E2%80%99D->

regulations would deter victims from coming forward.<sup>210</sup> AICUM's comments noted that, over the past decade, its member institutions<sup>211</sup> have given close attention to the theretofore under-addressed issue of campus assault. The schools engaged in "foundational efforts to shift the culture of campuses" and to "above all" build trust with individuals.<sup>212</sup>

While a hesitance to reformulate policy recently enacted is understandable, a school that remains committed to a universal or near universal definition<sup>213</sup> of employee as mandatory reporter risks retaining policies that could harm survivors, actually impeding disclosure and, paradoxically, reporting.<sup>214</sup> It is also arguable that the policies themselves violate Title IX by inhibiting survivors from accessing the services needed to receive an equal education, defined here as access to educational opportunities free from sex-based harassment (including sexual assault and sexual violence) and discrimination.<sup>215</sup> Therefore, in addition to highlighting the dangers of those policies, it is important to know there are alternatives.

### **B. University of Oregon's Three Tiers of Employees— "A Better Policy"**<sup>216</sup>

In 2017, the University of Oregon concluded a more-than-eight-month process of assessing its policy on which university employees should be required to report disclosures.<sup>217</sup> As a result, it adopted a three-tiered taxonomy for employee reporting.<sup>218</sup> Those three categories are confidential employee,<sup>219</sup> designated reporter,<sup>220</sup> and student-directed employee.<sup>221</sup>

The first two are familiar, in concept if not in scope. A confidential employee does not need to report a disclosure of sexual assault against the discloser's wishes but is required to provide information to the disclosing student regarding

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Docket-ID-ED-2018-OCR-0064.pdf [<https://perma.cc/NB74-JUN8>] (AICUM noted that this would operate to the disadvantage of everyone in the process, including respondents, witnesses and higher educational institutions).

210. *Id.* at 16.

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

212. *Id.* at 1–2.

213. Virtually all schools have created a category of "confidential employees," counselors and the like, who are exempted from disclosing against the wishes of the discloser. Weiner, *supra* note 16, at 77, 122–23. At one time, however, OCR guidance was interpreted by some to mandate disclosure by this category of employees. *Id.* at 130 n.284.

214. *See id.* at 87–107 for a discussion of how these policies generate harm.

215. *Id.* at 166–83.

216. *Id.* at 131–36.

217. Memorandum from Darci Heroy, University of Oregon, on Responsible Reporting to Campus (May 2017), <https://prevention.uoregon.edu/reportingmemo> [<https://perma.cc/428C-UZZ3>].

218. *Id.* This new policy was enacted simultaneously with the university's adoption of Callisto, the on-line anonymous reporting system. *See* Weiner, *supra* note 16, at 149–55 for a discussion of Callisto and other on-line reporting options.

219. Heroy, *supra* note 217.

220. *Id.*

221. *Id.*

resources and reporting options.<sup>222</sup> This category encompasses those who could “oppose successfully an application for a court order seeking disclosure.”<sup>223</sup> It includes health care and counseling professionals as well as the University Ombud and members of the crisis intervention and sexual violence support services teams.<sup>224</sup> Certain attorney employees also fall within this category.<sup>225</sup> As is typical with this category generally, it roughly conforms with those who have a legal privilege.<sup>226</sup>

The second category of designated reporter is equivalent to the responsible employee or mandatory reporter concept. Designated reporters must report disclosures to the Title IX coordinator. However, the University of Oregon’s policy defines this category in a relatively narrow fashion, especially when compared to its overbroad definition at the vast majority of institutions. At Oregon, designated reporters include high-level employees, supervisory employees, and those with special student responsibilities such as a director of student conduct.<sup>227</sup> This more limited scope of employees who are designated reporters rests on the notion that these are “employees who have the authority to address prohibited conduct and whom students would reasonably expect to have the authority to remedy prohibited conduct. . . .”<sup>228</sup>

Significantly, under the University of Oregon’s 2017 policy, rank and file faculty members are not designated reporters.<sup>229</sup> There has been significant critique nationally over defining “responsible employee” to include non-supervisory faculty members.<sup>230</sup> This objection has been voiced by the American Association of University Professors<sup>231</sup> as well as individual faculty at specific institutions.<sup>232</sup> In addition, Professor Weiner’s analysis of this issue suggests that a proper reading of pertinent OCR guidance and U.S. Supreme Court cases lead to the conclusion that all faculty ought not be designated as responsible employees.<sup>233</sup> Other scholars have

222. UNIV. OF OR., *Student Sexual and Gender-Based Harassment and Violence Complaint and Response Policy: Policy No. V.11.06*, in UNIV. OF OR. POL’Y LIBR., II. E (Sept. 15, 2017), <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/student-sexual-and-gender-based-harassment-and> [<https://perma.cc/5V7D-57C2>]. See also Heroy, *supra* note 217.

223. UNIV. OF OR., *supra* note 222, at I.

224. *Id.* at II. E.

225. *Id.*

226. The policy has useful explanations as to limits concerning privilege in the context of the policy. *Id.*

227. Heroy, *supra* note 217. Further, the Title IX Coordinator may change which employees are designated reporters “as necessary.” UNIV. OF OR., *supra* note 222, at II. D.

228. UNIV. OF OR., *supra* note 222, at I. The policy also provides that, if an employee falls within both the confidential employee and designated reporter category, the confidential employee designation prevails.

229. See *id.*

230. See, e.g., Weiner, *supra* note 16, at 131–33.

231. *The History, Uses, and Abuses of Title IX*, BULL. OF THE AM. ASS’N OF UNIV. PROFESSORS, at 69, 84 (July–Aug 2016) <http://www.aaup.org/file/TitleIXreport.pdf> [<https://perma.cc/SQC8-B9VE>].

232. See Colleen Flaherty, *Endangering a Trust*, INSIDE HIGHER ED. (Feb. 4, 2015), <https://www.insidehighered.com/news/2015/02/04/faculty-members-object-new-policies-making-all-professors-mandatory-reporters-sexual> [<https://perma.cc/EG9W-GJ96>].

233. Weiner, *supra* note 16, at 138–41.

also focused on the obvious disadvantages of faculty betraying student confidences.<sup>234</sup>

### C. Other Institutions that Limit Mandatory Reporters

The University of Oregon's narrower structuring of the designated reporter, a.k.a. responsible employee, category shares company with a few other schools. Other schools that have likewise opted not to stretch the responsible employee category to all non-confidential employees include institutions as diverse as Brown University,<sup>235</sup> Cal-Tech,<sup>236</sup> The Catholic University of America,<sup>237</sup> Hofstra University,<sup>238</sup> University of Nebraska-Lincoln,<sup>239</sup> New York University,<sup>240</sup>

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234. See, e.g., Smith & Freyd, *supra* note 103. Obviously, universities and colleges should clearly publish which employees are mandatory reporters; however, part of the definition, per OCR guidance and U.S. Supreme Court cases, of a responsible employee turns on student expectations.

235. BROWN UNIV., TITLE IX AND GENDER EQUITY: I AM A RESPONSIBLE EMPLOYEE (2020), <https://www.brown.edu/about/administration/title-ix/get-help/i-am-responsible-employee> [<https://perma.cc/ZP2V-SRAE>].

236. THOMAS F. ROSENBAUM, CALTECH INSTITUTE POLICY: SEX- AND GENDER-BASED MISCONDUCT 6 (Aug. 2020), [http://hr.caltech.edu/documents/2925/caltech\\_institute\\_policy-gender\\_based\\_misconduct.pdf](http://hr.caltech.edu/documents/2925/caltech_institute_policy-gender_based_misconduct.pdf) [<https://perma.cc/3LKN-ECLV>].

237. CATHOLIC UNIV. OF AM., SEXUAL OFFENSES POLICY (EMPLOYEES AND THIRD PARTIES) (Nov. 18, 2020), <https://policies.catholic.edu/faculty-staff/employment/eeo/sexharass.html> [<https://perma.cc/7ZBX-MXZL>].

238. HOFSTRA UNIV., STUDENT POLICY PROHIBITING DISCRIMINATORY HARASSMENT, RELATIONSHIP VIOLENCE, AND SEXUAL MISCONDUCT 9 (2019-2020), <https://www.hofstra.edu/pdf/studentaffairs/deanofstudents/commstandards/commstandards-policies-sexualassault.pdf> [<https://perma.cc/3Y7C-FKVZ>].

239. UNIV. OF NEB.-LINCOLN, UNL EMPLOYEES TITLE IX RESPONSIBILITY GUIDE, <https://www.unl.edu/equity/TitleIXDownload/UNL%20Employees%20Title%20IX%20Guide.pdf> [<https://perma.cc/3EQK-YX6V>].

240. N.Y.C UNIV., SEXUAL MISCONDUCT, RELATIONSHIP VIOLENCE, AND STALKING POLICY 5 (Apr. 19, 2018), <https://www.nyu.edu/content/dam/nyu/compliance/documents/SexualMisconductPolicy-April%202018.pdf> [<https://perma.cc/K8G3-SCJX>].



University of Michigan,<sup>241</sup> University of North Carolina,<sup>242</sup> and the University of South Carolina.<sup>243</sup> Many of these policies were reviewed or updated in 2018 or 2019.

Where the Oregon policy breaks new and important ground is in its novel and thoughtful category of “student-directed employee.”<sup>244</sup> A student-directed employee is any employee who does not fall within one of the other two categories and “[t]his includes most faculty, staff, administrators and student-staff.”<sup>245</sup> Student-directed employees have three basic responsibilities.<sup>246</sup> First, they are required to provide disclosing students with information about campus support and reporting options.<sup>247</sup>

Second, they are required to consult with a confidential employee, who is a person with more expertise.<sup>248</sup> This consultation is intended to ensure that student-directed employees have the information needed to both assist the disclosing student

241. UNIV. OF MICH., POLICY AND PROCEDURES ON STUDENT SEXUAL AND GENDER-BASED MISCONDUCT AND OTHER FORMS OF INTERPERSONAL VIOLENCE 11 (Feb. 7, 2018), <https://hr.umich.edu/sites/default/files/um-policy-and-procedures-on-student-sexual-misconduct-and-other-forms-of-interpersonal-violence.pdf> [<https://perma.cc/3LX6-HDES>].

242. UNIV. OF N. C. AT CHAPEL HILL, POLICY ON PROHIBITED DISCRIMINATION, HARASSMENT AND RELATED MISCONDUCT INCLUDING SEXUAL AND GENDER-BASED HARASSMENT, SEXUAL VIOLENCE, INTERPERSONAL VIOLENCE AND STALKING VIII.A (Aug. 13, 2020), <https://unc.policystat.com/policy/7019871/latest/> [<https://perma.cc/RS4U-NSMQ>]. Under this policy, only employees with administrative or supervisory responsibilities or those designated as Campus Security Authorities are responsible employees. After setting forth the scope of the category, the policy provides that responsible employees “must safeguard an individual’s privacy, but are *required* by the University to immediately share all details about a report of Prohibited Conduct. . . .” *Id.* (emphasis in the original). The policy does not provide guidance on how the responsible employee is to comply with these seemingly contradictory mandates. Moreover, all other employees except those designated as “confidential resources” and all students are “*strongly encouraged*” to share “any information about such conduct” with appropriate personnel—i.e. Title IX Compliance Coordinator. *Id.* at VIII.B (emphasis in the original). Thus, this policy wisely narrows the scope of responsible employees. But it undercuts that good by strongly encouraging reporting—presumably against a discloser’s wishes. And while also mandating that an individual’s privacy will be safeguarded, it is not hard to understand the frustration and harm that results from such policies. *See* Smith & Freyd, *supra* note 103, at 122–23 (discussing institution betrayal); *cf.* UNIV. OF OR., *supra* note 222, at Intro (“In all cases, the University’s response is designed to consider the victim’s preferences regarding the University’s response, and to provide deference to a victim’s wishes wherever possible.”).

243. UNIV. OF S. C., OFFICE OF EQUAL OPPORTUNITY PROGRAMS, SEXUAL MISCONDUCT, INTIMATE PARTNER VIOLENCE AND STALKING 7 (Nov. 16, 2018), <http://www.sc.edu/policies/ppm/eop105.pdf> [<https://perma.cc/N24Y-MX7S>].

244. UNIV. OF OR., *supra* note 222, at II.F.

245. UNIV. OF OR., *supra* note 222, at II. F.

246. *See id.* at III. C. The Oregon policy contains much detail and specificity to guide both employees and students. This is particularly helpful and stands in contrast to the rather muddled policies extant elsewhere.

247. UNIV. OF OR., *supra* note 222, at III.C. 3–4.

248. *Id.* at III. C. 9. They must consult with “confidential employees” who are employees with special knowledge and who are positions who are not required to report. *Id.*

and to assess the level of risk present.<sup>249</sup> This consultation also serves to ensure that student-directed employees are themselves supported.<sup>250</sup>

Third, student-directed employees must assist students who wish to report with the process of reporting.<sup>251</sup> Having this category of employee enables a student to disclose, be assured of support, and get assistance in reporting to the Title IX coordinator if that is the student's wish. But if it is not his or her wish, confidentiality is assured, absent the risk of imminent risk of serious harm.<sup>252</sup> And, most critically, the survivor still has access to support.

Prior to this policy change, the University, like many others, had considered nearly all employees to be "responsible employees." According to Professor Weiner, the chair the university group that devised the policy, the group was guided by nine "first principles," which Professor Weiner believes are largely "generalizable" to other institutions.<sup>253</sup> Those principles include what should be the non-negotiable concept of "do no harm."<sup>254</sup> By conceptualizing and creating the "student-directed" employee category and providing clear guidance therefor, the policy has the promise of living up to this principle. Of course, one must always be mindful of and guard against the risk—or perhaps even the inevitability—of unintended consequences.<sup>255</sup>

The ALI Principles Discussion draft, in its Section 3.5.b. principle, suggests that colleges and universities "should consider alternative approaches to . . . defining the obligations of those who are neither mandatory reporters nor confidential resources, with a view toward improving the options for students seeking advice and support for responding to sexual misconduct."<sup>256</sup> The University of Oregon policy is such an alternative approach. Indeed, in its reporters' notes to this principle, ALI cites to the University of Oregon's "different approach" in creating the student-directed employee. This middle category of employees, who are neither responsible employees with their mandatory reporter function nor confidential resources, is "a promising direction" for institutions to contemplate.<sup>257</sup>

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249. *Id.* The presence of imminent risk is the core exception to a student-directed employee's obligation to keep a confidential disclosure confidential. *Id.* at III. C. 10(a). Further, the student-directed employee is required to inform a student of this exception when a conversation begins. *Id.* at III. C. 2.

250. *Id.* at III. C. 9.

251. *Id.* at III. C.

252. *Id.* at III. C. 10(a). The exception policy may also mandate reporting if the student is under 18, i.e. not a legal adult, and discloses behavior that would constitute abuse. *Id.* at III. C. 10(b). In this circumstance, the student-directed employee must comply with state law on child abuse reporting. *Id.*

253. Weiner, *supra* note 16 at 133–34 (citation omitted).

254. *Id.* Harm can occur when reporting happens contrary to a survivor's wishes. See *id.* at 88, 88 n.71, for a discussion of harm.

255. See Dunlap, *supra* note 131, for a cataloguing of the harms that have arisen as a result of "reforms" in intimate partner violence law and policy.

256. PRINCIPLES OF L., STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLS. AND UNIVS., § 3.5.b (AM. L. INST., Discussion Draft 2018).

257. *Id.* § 3.5.b reporters' notes.

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

In 2015, the American Law Institute (ALI) began work on a project entitled “Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities.” In April 2018, it issued a discussion draft of the first three of 11 proposed chapters for discussion at its 2018 Annual Meeting.<sup>258</sup> The chapters released were: (1) First Principles for Procedural Frameworks; (2) Notice and Clarity of Policies; Consistency of Implementation; Support and Interim Measures; and (3) Reporting Sexual Assault and Related Misconduct. In addition, it contains an Introductory Note that sets forth in detail the legal landscape over the years since Title IX’s enactment.<sup>259</sup>

In describing the project, the ALI Reporters’ Memorandum explains that it is addressing “an especially dynamic area of law and policy.”<sup>260</sup> It continues that not only is the “federal policy landscape” in flux, but also notes that there is a significant increase in caselaw, due to lawsuits brought by students against universities, as well as increased scholarship on the issues.<sup>261</sup>

Chapter Three of the ALI draft covers the Reporting of Sexual Assault and Related Misconduct, which is the topic most pertinent here. The chapter has eight discrete components addressing both the disclosing and reporting of sexual misconduct. Chapter Three encourages students to both disclose and report.<sup>262</sup> The disclosing should be done in a confidential way that would provide the student with access to “support and care.”<sup>263</sup> The reporting would permit the institution to have “better tracking of and response to incidents.”<sup>264</sup>

Chapter Three recognizes the importance of, wherever possible, respecting the disclosing student’s request to not begin an investigation of the alleged student-perpetrator.<sup>265</sup> It also states that institutions should leave both the choice and manner of reporting with the student.<sup>266</sup>

Further, Chapter Three urges schools to exercise judgment in determining which faculty and staff should have an obligation to report complaints of sexual misconduct to the school’s Title IX coordinator or designee.<sup>267</sup> Advising deliberation in determining which employees are mandatory reporters runs contrary to much current thought and policy, even if it is now less of a focus under the current Title IX

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258. PRINCIPLES OF THE L., STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLS. AND UNIVS. (AM. L. INST., Discussion Draft 2018).

259. *Id.* intro. note at 3–12.

260. *Id.* at xvii.

261. *Id.* at xvii–xviii.

262. *Id.* § 3.3.

263. *Id.*

264. *Id.* at 67.

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

266. *Id.* at 61.

267. *Id.* at 77.

regulations. A deliberative process here is, however, sound policy as Section 3.5 demonstrates. Earlier in the draft, the reporters explain that although perhaps counterintuitive at first glance, respecting the confidentiality request of one who is disclosing an allegation of sexual misconduct will, in fact, enhance the chances that the discloser will ultimately choose to make a formal report.<sup>268</sup> Section 3.5 clearly has Title IX goals in mind when it states that schools should “carefully weigh” the classification of employees who are mandatory reporters in light of the “school’s educational interests in facilitating students’ ability to seek and obtain appropriate guidance.”<sup>269</sup>

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

## VII. CONCLUSION

Title IX is an important tool in the battle to eliminate sex discrimination in educational opportunity. It is, however, an imperfect tool and has led to much dissension over the proper way to implement it. After over 20 years of using it to combat sexual assault on college campuses and in this time of new regulations governing Title IX, it is well to remember both what Title IX is and what it is not. It is a federal law enacted to secure equal education opportunity regardless of an individual’s sex. It is not a criminal statute and does not impose criminal penalties.<sup>270</sup> It is a civil rights statute intended to protect survivors against sexual misconduct in education institutions.

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

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

The goal of Title IX processes should be to get survivors of sexual assault the support they need in order to continue with their educational endeavors. Sometimes that support includes a full investigation pursuant to a report made to the

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268. *Id.* at 66–67.

269. *Id.*

270. Drew, *supra* note 11, at 205.

Title IX coordinator. But sometimes, perhaps often, it is less than that. Perhaps accommodations in a class schedule or student housing. Perhaps counseling.

What does not help a person disclosing is requiring that all helpers on campus—persons to whom a victim may feel most comfortable disclosing—must report the disclosure to a Title IX coordinator or designee even when such a report is against the disclosing student's wishes. This drives down disclosure—which is the opposite of what we all should want. In driving down disclosure, services and accommodations that are intended to achieve the Title IX goals of combatting educational sex discrimination are driven away. Even for those who are on opposite sides of the Title IX procedural challenges, can't this goal be an area of agreement?

# LET'S GET SERIOUS - THE CLEAR CASE FOR COMPENSATING THE STUDENT ATHLETE – BY THE NUMBERS

## A UNIVERSITY OF MICHIGAN ATHLETIC PROGRAM CASE STUDY

By: Professor Neal Newman

### ABSTRACT

*Should college athletes be compensated for their play and if so, how? The first question has been a debate for some time now. But the second question—the “how”—not so much. This writing addresses both questions in depth. With the Ed O'Bannon case that was decided back in August of 2014 and the palaver the Northwestern football team raised in their efforts to unionize, it is acknowledged that the discussions on this issue may have reached its crescendo years ago. That is until now. On September 27, 2019, Gavin Newsom, the Governor of California, signed into law Senate Bill 206. Senate Bill 206 is a law that will allow athletes who compete in collegiate sports for California colleges and universities to profit off of their name, image or likeness; a practice that is currently prohibited under NCAA rules. The law is scheduled to go into effect January 1, 2023.*

*California's passing of S.B. 206 has set off a chain reaction. As of May 25, 2020, over 34 states have drafted their own Pay for Play provisions. California's initiative with a large majority of states following suit has forced the NCAA to do something it has resisted doing for more than 60 years. On April 29, 2020 the NCAA's Board of Governors announced it is moving forward with a plan that would allow college athletes to earn money for endorsements and a host of other activities involving personal appearances and social media content. The NCAA's Pay for Play version is scheduled to go into effect in the fall of 2021. A quick review of some of the groundwork the NCAA is laying on this issue reveals that the NCAA will be attempting to reign in and place tighter restrictions on what the athletes can do by way of endorsement and promotions than the more general provisions found in the respective state Pay for Play provisions.*

*For example, the NCAA's Pay for Play provision will more than likely prohibit her athletes from using their respective universities' names and school logos in any of the athlete's endorsements or promotions thus severely limiting the athletes' ability to use their name, image, or likeness optimally. By contrast, S.B. 206 does not contain such restrictions. Thus, the stage has been set for some wrangling that will occur between the NCAA and the respective states. Dynamics that spark a host of interesting issues for analysis and exploration for another day.*

*But key for the task at hand is the fact that none of these Pay for Play provisions address the prohibition against the universities themselves compensating*

*the college athlete. Those prohibitions are still in place and the NCAA has given every indication that it intends to do everything it can to keep it that way.*

*Accordingly, this writing focuses on the step yet to be taken: The Universities themselves compensating the college athlete. That act would be far more significant as university compensation would reach a larger portion of Division I athletes and not just the highly marketable superstars that pepper the top echelon Division I programs. This writing makes the clear case for universities' compensating their athletes.*

*This writing stands alone in that it also shows the viability of compensating the college athlete by setting the analysis within the context of an NCAA Division I program; namely the University of Michigan. This article proposes with specificity how compensating the college athlete can be done without disrupting existing athletic programs. Popular refrains of athletic program poverty and having to shut down other sports programs are addressed and summarily debunked. The time has come to recognize that these athletes are university employees and are an integral part of the revenue generating component that earns millions for their respective universities. It's time that these athletes be compensated fairly and appropriately for their efforts. This piece makes the clear case for it and quantifies it by the numbers.*

## I. INTRODUCTION

*Amateurism: An athlete is not exploited when he is fairly compensated in a business transaction outside of the institution. To the contrary, one could more persuasively argue that an athlete is exploited when he is expressly disallowed from realizing his value while his reputation and skill are being used to realize a profit for others.<sup>1</sup>*

The question of compensating college athletes has been a topic of debate for some time now.<sup>2</sup> With the Ed O'Bannon case that was decided back in August of 2014 and the palaver being raised by the Northwestern football team in their efforts to unionize,<sup>3</sup> it is acknowledged that the discussions on this issue may have reached its crescendo years ago.

That is until now. On September 27, 2019, Gavin Newsom, the Governor of California, signed into law Senate Bill 206, the *Fair Pay for Play Act*, which will allow athletes who compete in collegiate sports for California colleges and

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1. RAMOGI HUMA & ELLEN J. STAUROWSKY, THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT 10 (2011), <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf> [https://perma.cc/G8ZF-RFBM] (quoting Jay Bilas, former Duke and pro basketball player, current ESPN and CBS sports analyst).

2. See Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [https://perma.cc/EWD6-NQRR].

3. Sheldon D. Pollack & Daniel V. Johns, *Northwestern Football Players Throw a "Hail Mary" but the National Labor Relations Board Punts: Struggling to Apply Federal Labor Law in the Academy*, 15 VA. SPORTS & ENT. L.J. 77 (2015).

universities to profit off of their name, image or likeness; a practice that is currently prohibited under NCAA rules. The law is scheduled to go into effect January 1, 2023.

California's passing of S.B. 206 has set off a chain reaction. As of May 25, 2020, some 34 states have drafted their own *Pay for Play* provisions.<sup>4</sup> California's initiative with a large majority of states following suit has forced the NCAA to do something it has resisted doing for more than 60 years.<sup>5</sup> On April 29, 2020 the NCAA's Board of Governors announced it is moving forward with a plan that would allow college athletes to earn money for endorsements and a host of other activities involving personal appearances and social media content.<sup>6</sup> The NCAA's *Pay for Play* version is scheduled to go into effect in the fall of 2021.<sup>7</sup> A quick review of some of the groundwork the NCAA is laying on this issue reveals that the NCAA will be attempting to reign in and place tighter restrictions on what the athletes can do by way of endorsements and promotions than the more general provisions found in the respective state *Pay for Play* provisions.<sup>8</sup>

For example, the NCAA's *Pay for Play* provision will more than likely prohibit her athletes from using their respective universities' names and school logos in any of the athlete's endorsements or promotions, thus severely limiting the athletes' ability to use their name, image, or likeness optimally.<sup>9</sup> By contrast, S.B. 206 does not contain such restrictions.<sup>10</sup> Thus, the stage has been set for some wrangling that will occur between the NCAA and the respective states. Dynamics that spark a host of interesting issues for analysis and exploration for another day.

The key for the task at hand is the fact that *none* of these *Pay for Play* provisions address the prohibition against *universities* compensating the college athlete. Those prohibitions are still in place and the NCAA has given every indication that it intends to do everything it can to keep it that way.

Accordingly, this writing focuses on the step yet to be taken: The Universities themselves compensating the college athlete. That act would be far more significant and further reaching as compensation from the universities themselves would reach a larger portion of the Division I athletes who play a significant role in revenue generation and not just the highly marketable superstars that pepper the rosters of the top echelon Division I programs.<sup>11</sup>

To the latter point relating to compensation at the university level. Back when the college athlete compensation debates first commenced, many conceded the

4. J. Brady McCollough, *Q&A: What the NCAA's Report on Name, Image and Likeness Means for College Athletes*, LA TIMES (Apr. 29, 2020, 5:11 PM), <https://www.latimes.com/sports/story/2020-04-29/q-a-what-ncaa-report-on-name-image-and-likeness-means> [https://perma.cc/8HFU-K94C].

5. Ralph D. Russo, *Skeptics Loom as NCAA Builds Guardrails Around Compensation*, NBC PHILA. (Apr. 29, 2020, 8:34 PM), <https://www.nbcphiladelphia.com/news/sports/ncaa-board-supports-name-image-and-likeness-compensation-for-student-athletes/2379395/> [https://perma.cc/R9PA-BKQH].

6. *Id.*

7. NCAA BD. OF GOVERNORS, FEDERAL AND STATE LEGISLATION WORKING GROUP FINAL REPORT AND RECOMMENDATIONS 31 (2020), [https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG\\_Report.pdf](https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf) [https://perma.cc/T8V7-6XDT].

8. *See id.*

9. *Id.* at 22.

10. S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019).

11. Speculation on the author's part, but the inference is a reasonable one. Companies seeking athletes to endorse their products are more likely to seek out the high-profile athletes.



arguments being put forth by those who opposed the idea of compensating college athletes and accepted these arguments without question:

*“College athletes are already being paid with an athletic scholarship.”*<sup>12</sup>

*“Paying students to play would ruin college sports.”*<sup>13</sup>

*“[M]ost colleges would have to shut down their programs if they were forced to pay the athletes.”*<sup>14</sup>

*“[O]nly a few programs operate at a profit. They would be the only ones who could survive such a regime.”*<sup>15</sup>

The collective allowed themselves to be convinced that what was being said was accurate. The arguments seemed to make sense. They seemed to follow logically. But here in 2020, for various reasons, the mantel is being picked up and the issue is being revisited. Upon further investigations, it is evident that compensating student-athletes is not only viable, but is the right thing to do.

The issue of paying college athletes must be analyzed through an accounting lens in order to address statements such as: “only a few programs operate at a profit.”<sup>16</sup> The first question that must be asked is how do these programs spend their money? Spending can generally be broken down into two broad categories: “discretionary spending” and “non-discretionary spending.”<sup>17</sup> For example, equipment and uniforms for the players would fall into the “non-discretionary” category.<sup>18</sup> A new state-of-the-art Football Performance Center built next to the

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12. See Zach Dirlam, *There's No Crying in College: The Case Against Paying College Athletes*, BLEACHER REP. (Apr. 2, 2013), <https://www.bleacherreport.com/articles/1588301-theres-no-crying-in-college-the-case-against-paying-college-athletes> [<https://perma.cc/K2YY-H23U>] (making the case that athletes are paid in the form of “tuition” and other expenses).

13. Cody J. McDavis, Opinion, *Paying Students to Play Would Ruin College Sports*, N.Y. TIMES (Feb. 25, 2019), <https://www.nytimes.com/2019/02/25/opinion/pay-college-athletes.html?module=inline> [<https://perma.cc/GP2W-77CW>].

14. See Philip D. Bartz & Nicholas S. Sloey, *The Joy of College Sports: Why the NCAA's Efforts to Preserve Amateurism are Both Lawful and in the Best Interest of College Athletics*, HACKNEY PUB. (Jan. 27 2012), <https://www.bclplaw.com/images/content/5/2/v2/52455/The-20Joy-20of-20College-20Sports-20-20Article-v2.pdf> [<https://perma.cc/78KC-TDZP>] (noting that the majority of college football programs operate at a loss, and could not afford to pay student-athlete salaries).

15. See *id.*

16. See *id.*

17. See, e.g., Daniel Liberto, *Discretionary Expense*, INVESTOPEDIA, <https://www.investopedia.com/terms/d/discretionary-expense.asp> [<https://perma.cc/TC3L-PNVT>].

18. See Jingzhen Yang, *Use of Discretionary Protective Equipment and Rate of Lower Extremity Injury in High School Athletes*, 161 AM. J. EPIDEMIOLOGY 511, 511–12 (2004) (explaining that certain protective equipment and athletic uniforms are required by state and national sports associations).

older, but perfectly functional, fitness facility would fall into the “discretionary” spending category.<sup>19</sup>

Thus, it is with this new perspective that the topic of compensating college athletes was approached. The money is there. It’s simply a matter of sharing, prioritizing, and re-allocating; something athletic departments have been railing against since the conversation on compensating athletes started.

For the Fiscal year ending June 30, 2018, the University of Michigan Wolverines Football program generated \$124,928,493 in revenue.<sup>20</sup> For fiscal year ending June 30, 2018, the University of Michigan Wolverines paid their head coach, Jim Harbaugh, \$7.5 million in salaries, benefits and bonuses.<sup>21</sup> Totaling the salaries of all the University of Michigan athletic coaches both male and female, the total compensation amount for these University of Michigan athletic department personnel totaled \$27,869,781.<sup>22</sup> By comparison, in the form of scholarships consisting of room, board, books, and tuition, the University of Michigan recorded \$ 7,586,460 in “Operating Expenses Per Participant” for the 135 athletes who comprised the University of Michigan Wolverine’s Football roster for the 2017–2018 academic year.<sup>23</sup> Included in this amount are one year scholarships; scholarships that are not guaranteed and are renewable at the University’s discretion.<sup>24</sup> The “Operating Expenses Per Participant” consists of 6% of the total revenue that these athletes generated from their efforts on the field.<sup>25</sup>

In the current literature, few of the commentators broached the topic from the standpoint of sharing and re-allocating.<sup>26</sup> Likewise, few contributions to the conversation endeavor to work through the painstaking steps of laying out the

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19. See, e.g., *Completed and Cancelled Projects*, U. MICH., <https://umacc.umich.edu/projects/completed-projects/glenn-e-schembechler-hall-football-performance-center/> [https://perma.cc/78ZA-ETNS]. The Performance Center was budgeted for \$14.8 million. *Id.* See also Stephen M. Ross Athletic Campus–South Complex, MGOBLUE.COM, <https://mgoblue.com/sports/2017/6/16/facilities-south-complex.aspx> [https://perma.cc/9GWK-J6YV].

20. EADA, *University of Michigan Revenues and Expenses*, U.S. DEP’T EDUC., <https://ope.ed.gov/athletics/#/customdata/search> [https://perma.cc/3ZKE-PV4R] (follow hyperlink; then search name field for “University of Michigan-Ann Arbor” and click continue; then select the University of Michigan-Ann Arbor; then select 2018, Revenues and Expenses; scroll down and click Download to retrieve data).

21. Sarah McCarriston, *Top 25 College Football Coaching Salaries for 2018: Alabama’s Nick Saban Still on Top*, SPORTING NEWS, <https://www.sportingnews.com/us/naaa-football/news/college-football-head-coach-salaries-2018-season-nick-saban-urban-meyer-jim-harbaugh-jimbo-fisher/1aj12i59a90101pg4omwulw3ar> [https://perma.cc/8Y7X-XZ2G].

22. EADA *supra* note 20 (follow hyperlink; then search name field for “University of Michigan-Ann Arbor” and click continue; then select the University of Michigan-Ann Arbor; then select: 2018; Select All Head Coaching Staff; and Select All Assistant Coaching Staff; scroll down and click Download to retrieve data).

23. *Id.*

24. *Id.*

25. This number was derived by dividing the operating expense per student by total football revenue: (\$7,586,460/\$124,928,493). See *id.*

26. See e.g., George Dohrmann, *Pay for Play*, VAULT (Nov. 7, 2011), <https://vault.si.com/vault/2011/11/07/pay-for-play> [https://perma.cc/KU83-Q66C] (explaining that by cutting the “fat” in athletic programs, the more deserving athletes can be compensated).

financial viability along with the specifics on how compensating the athletes would work within the confines of current athletic revenue and expense numbers.<sup>27</sup>

This article, among other things, demonstrates the viability of paying the college athlete. Using the University of Michigan's athletic program as the case study, this article makes the case for which athletes should be paid, how much they should be paid, from where the money would come, and what effect, if any, would such a change have on that respective university's athletic department as a whole.

To be clear, it is anticipated that most athletic directors and coaches will not be receptive to the Model proposed in these pages. This is so because the proposed Model calls for athletic departments sharing the spoils of their financial success with the athletes that have been integral to that success. The discussion will be laid out as follows:

Part II makes the case for which athletes should be paid; generally speaking, compensation should be limited to only those programs that are generating a net-profit based on their current revenue and expense models. In most athletic programs those revenue generating sports are men's football and men's basketball exclusively.<sup>28</sup> Such is the case for the University of Michigan's Athletic Program.

Part III lays out the case for how the compensation Model will work. Here is where the "by the numbers" analysis figures most prominently. Using the University of Michigan's Athletic Program revenue and expense numbers, Part III lays out how paying those income generating athletes can be accomplished without the athletic department affecting its existing menu of non-income generating sports. Part III proposes a Model that most athletic departments are likely to blanch against. But this article's goal is to make clear the viability of such. The athletic department's decisions whether to follow suit will be a matter of choice—but not one borne by economic necessity which has been their claim for years.

Part IV addresses the more common and prevailing arguments that have persisted against compensating the college athlete and explains why many if not all of those arguments ring hollow in the economic and other realities in college sports as they exist today.

Part V discusses the potential impact of the Equal Pay Act and Title IX's "proportionality" requirement between men and women's sports and the athlete as an employee issue.<sup>29</sup> Part V shows how the Title IX lens through which this issue is viewed is in need of recalibration. For example, athletic departments pay women's team coaches a fraction of what men's team coaches are paid even though the two are coaching the same sport;<sup>30</sup> the difference in gender being the only delineating

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27. *But see id.*

28. *See* EADA, *supra* note 20, (Revenues and Expenses).

29. Title IX requires that female and male student-athletes receive athletics scholarship dollars proportionally to their participation. *See Title IX Frequently Asked Questions*, NCAA, <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions> [<https://perma.cc/BC2F-YDJX>].

30. *See* EADA, *supra* note 20, at Revenues and Expenses. *See also* James K. Gentry & Raquel M. Alexander, *Pay for Women's Basketball Coaches Lags Far Behind That of Men's Coaches*, N.Y. TIMES (Apr. 2, 2012), <https://www.nytimes.com/2012/04/03/sports/ncaabasketball/pay-for-womens-basketball-coaches-lags-far-behind-mens-coaches.html> [<https://perma.cc/79JF-EGGL>]. *See also* Tom Hopkins, *Unequal Pay Between Basketball Coaches Highlights Gender Income Inequality*, RECORDER (Apr. 3,

factor.<sup>31</sup> But the Courts have justified these pay disparities for two main reasons. One, as opposed to the current designation for student-athletes, these coaches are university employees—not students;<sup>32</sup> and two, the Courts have found that paying the men's team coaches more is justified due to the added responsibilities commensurate with coaching a sport like men's basketball—a major revenue generator for its respective university—versus women's basketball which by and large is not a major revenue generator for most schools.<sup>33</sup> Part V argues for this legal framework's justified extension to the student-athlete whose involvement in revenue generating activities *in substance* is akin to an employer-employee relationship and therefore should be treated as such.

Part VI, as alluded to earlier, discusses the most recent developments in the college compensation debate; namely California's passing of its *Pay for Play* law, which triggered some thirty-four other states following suit. Now the NCAA, in full reactionary mode, is in the process of crafting its own *Pay for Play* provision. Notable in the NCAA's effort is that the NCAA is looking to pass a Federal *Pay for Play* version that would pre-empt all the state *Pay for Play* provisions and would also contain a number of “guardrails” as the NCAA looks to maintain control over this significant shift in the economics of college sports.<sup>34</sup> Part VI will also discuss the implications that these competing *Pay for Play* provisions might have on the broader concept of college athlete compensation.

Part VII concludes.

## II. WHICH ATHLETES SHOULD GET PAID?

Collegiate athlete compensation should be limited to those sports that generate a net profit. Any other approach would not be viable, practical, or sustainable. It is acknowledged that creating a tiered system among college athletes, where a subset of those athletes are compensated beyond their scholarship to the exclusion of others, might be a dynamic that fosters controversy and conflict. Notions of fairness and collegiality come to the fore; the possible implications of paying the athletes of one sport but not another are acknowledged and appreciated. Those in protest would question how college sports could survive such atrocities.<sup>35</sup>

Once again, those arguments now ring hollow. Collegiate athletics would and will be just fine. The real atrocity stems from the financial weight of college athletics being carried by the few with the beneficiaries of those efforts not willing to share. For example, consider just the Power 5 conferences alone. In 2018, the

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2019), <https://centralrecorder.org/64139/news/unequal-pay-between-basketball-coaches-highlights-gender-income-inequality/> [<https://perma.cc/W7FT-7E7F>].

31. See, e.g., EADA, *supra* note 20, at Coaching Staff and Salaries. See also Gentry & Alexander, *supra* note 30.

32. See, e.g., Stanley v. Univ. of S. Cal., 13 F.3d 1313 (9th Cir. 1994).

33. See, e.g., *id.*

34. S.B. 206, 2019–20 Leg., Reg. Sess. (Cal. 2019).

35. McDavis, *supra* note 13.

teams comprising the Power 5 conferences generated approximately \$2.75 billion in revenue.<sup>36</sup>

Not sharing this pool of money with those who helped generate it should be what is controversial. To keep the discussion and the arguments simple, compensation should be limited to those sports that are generating a net profit. “Profit” is a function of revenue minus expenses.<sup>37</sup> As explained earlier, there are some expenses that an entity or organization must incur to operate. And then there are discretionary expenses. The discretionary items on which athletic departments spend their money is where attention must be focused.

To be fair, the expenses deemed discretionary and non-discretionary may be debatable as an athletic director may argue that a multi-million-dollar training facility is crucial and therefore non-discretionary for a high-profile program like the University of Michigan to perform and achieve at expected levels. The idea being that a “state-of-the-art” training facility is a draw for top level recruits. The assumption being—those facilities will be part of the attraction for a sought-after athlete in choosing the University of Michigan over some other program.

Now, to challenge this thinking and to view it from another perspective, what do you think the draw would be if instead, the expenditures for these multi-million-dollar state of the art facilities went directly toward compensating the athletes? The overall point here being—let’s be careful regarding the argument of an athletic program’s “profitability.” If you scan any particular athletic program’s expenditures it is more than likely that there are expenses in there that are discretionary, are not vital, and could be re-allocated in ways that could make the program even more successful.

Considering these paradigms and looking at them through the lens of the University of Michigan Athletic program, for the 2016–2017 fiscal year, the University of Michigan Men’s Football team generated a profit of \$81,475,112.<sup>38</sup> The Michigan men’s basketball team program generated a profit of \$10,044,627.<sup>39</sup> These were the only two teams that operated at a net profit in the University of Michigan’s Athletic Program. Accordingly, in keeping with the formula of compensating profitable athletic programs, these two programs would be eligible for their athletes being compensated. Before digging deeper into how the compensation

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36. Zach Barnett, *The Power 5 Schools Made How Much in 2018?*, FOOTBALL SCOOP (May 24, 2019), <https://footballscoop.com/news/the-power-5-schools-made-how-much-in-2018-conference-distributions-acc-big-ten-sec-big-12-pac-12-b1g/> [https://perma.cc/8GQY-4XLZ].

37. Profit is a synonym for net income. Net income is calculated as revenues minus expenses. Expenses include the explicit costs of doing business. See FRED PHILLIPS, ROBERT LIBBY & PATRICIA A. LIBBY, *FUNDAMENTALS OF FINANCIAL ACCOUNTING* 9–11 (6th ed. 2019). See also *id.* at 18 (explaining Generally Accepted Accounting Principles).

38. This number was derived by taking total football revenue of \$124,928,493 minus total team expenses of \$43,453,382. See EADA, *supra* note 20 (follow hyperlink; then search name field for “University of Michigan” and click continue; then select University of Michigan-Ann Arbor; then download the revenue and expense data for 2017; subtract football expenses from football revenue to get profit).

39. This number was derived by calculating total football revenue of \$124,928,493 minus total team expenses of \$43,453,382. See *id.* (follow hyperlink; then search name field for “University of Michigan” and click continue; then select University of Michigan; then download the revenue and expense data for 2017; subtract men’s basketball expenses from men’s basketball revenue to get profit).

Model would work, we want to reiterate and highlight the fact that the University of Michigan spent \$14.8 million on the *Glenn E. Schembechler Hall Football Performance Center*.<sup>40</sup> While the author is mindful of the fact that capital expenditures such as this Performance Center arguably enhances the experience for the student-athlete, it must be acknowledged, however that these expenditures are discretionary; spending that the Michigan athletic department could have allocated for other purposes.

### III. THE PROPOSAL

#### A. The Criteria

Careful thought must go into proposing a Model that alters a regime that has been in place and entrenched for decades. Many have lamented that it can't be done. But for a few exceptions, those that said it could be done didn't get into specifics. Within this context, for such a controversial proposal to work, the proposed Model must have certain characteristics.

First, the Model must be objective. If there is anything arbitrary about the Model then it is subject to being abused or misapplied.

Second, the Model must be scalable; both up and down. Not all athletic programs are created equal so a "one size fits all" Model would be vulnerable (and rightfully so) to attack, criticism, abuse, and misapplication. A scalable Model, however, is one that can adapt to any athletic department's economic realities.

Third, it should be noted that this Model's success hinges on athletic departments operating their programs with integrity. These athletic departments are expected to use the same cost metrics that it used prior to implementing the Model. It is anticipated that costs would stay essentially the same as they were prior to implementing the Model with the only difference being a portion of the expense pool being reallocated to those student-athletes whose sports are generating a net profit. Therefore, it is incumbent upon the athletic programs to operate with integrity and to continue being fiscal stewards over their athletic programs. Sudden or erratic changes in a program's profitability would call into question whether the program was operating in good faith.

Fourth, the key to a viable Model is one that leaves all of the university's current sports offerings intact and operating as they did prior to the Model's implementation. Leaving current programs fully intact is key as that negates one of the oft cited arguments against college athletes being compensated, which is that other programs would have to be shut down in order to extend compensation to those sports that are contributing to the bottom line versus taking away from it.<sup>41</sup>

Fifth, the compensation number should be tied to that particular team's financial performance. Tying the number to that team's financial performance underscores the notion of "merit pay."<sup>42</sup> When revenues increase for example, then

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40. The Performance Center was budgeted for \$14.8 million. See UNIVERSITY OF MICHIGAN, *supra* note 19.

41. Bartz & Sloey, *supra* note 14.

42. The Fair Labor Standards Act does not require or address the issue of merit pay. See Fair Labor Standards Act, 29 U.S.C. § 201-19. See also *Merit Pay*, U.S. DEPT. OF LABOR,

the corresponding compensation increases. Likewise, when revenue decreases, then the corresponding compensation would decrease. By compensating the athletes in this fashion, the amount going to the athletes will always be in line with that sport's fiscal reality.

Finally, the Model must be clear and transparent. The author recognizes potential arguments in opposition. Any lack of clarity or lack of transparency would foster an environment of potential abuse or improper application, which further illustrates why clarity and transparency are paramount. Objectivity; scalability; being in good faith; leaving all other programs intact; clarity; and transparency are the key characteristics for a workable college athlete compensation Model.

## B. The Model

Broadly speaking, this is how the proposed Model would work. The premise is simple. Athletes would be compensated by drawing upon that portion of an athletic program's expenses that is used for compensating athletic department personnel; making one additional slice of the pie with that newly sliced portion going towards compensating those college athletes that fall under the criteria of being part of a profitable program. Yes—that would mean that athletic directors, coaches, and other ancillary athletic department personnel would all end up potentially taking home a little bit less, so that the athletes can likewise reap the benefits of their revenue generating efforts.

When the Model is laid out by the numbers, it is evident that the Model is both fair and viable. In fact, it becomes evident that the unfairness stems from not sharing with the main component that makes these programs so viable. Again turning to the University of Michigan's athletic program, in 2017–2018, the University of Michigan's athletic program generated revenue of \$188.1 million.<sup>43</sup>

Regarding expenses, the University of Michigan recorded \$185 million in expenses for the fiscal year ending 2018,<sup>44</sup> recording a net profit of \$2.5 million.<sup>45</sup> However, the key expense number for this proposed Model is the one where all the athletic program salaries are totaled. That number would include the coach's salaries from all the athletic programs combined; both the income and the non-income generating sports. The money generated from the football and men's basketball programs are supporting and subsidizing all of these other programs. Thus, all of these salaries should be included in the pool of money from which a portion would be drawn to compensate the players.

The athletic director's salary should be included in the pool as well. The University of Michigan paid Warde Manuel \$842,550 as the University of

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<https://www.dol.gov/general/topic/wages/meritpay> [<https://perma.cc/BX2Q-SDCK>] (defining “merit pay” as “a raise in pay based on a set of criteria set by the employer . . . [that] usually involves the employer conducting a review meeting with the employee to discuss the employee's work performance during a certain time period”).

43. Zach Shaw, *Inside the Michigan Athletic Department's 2018 and 2019 Budgets*, MICH. INSIDER (June 23, 2018), <https://247sports.com/college/michigan/Article/Inside-the-revenues-expenses-and-changes-in-the-Michigan-athletic-departments-2018-and-2019-budgets-119307980/> [<https://perma.cc/2M28-DMXZ>].

44. *Id.*

45. *Id.*

Michigan's athletic director during the 2017–2018 fiscal year,<sup>46</sup> paying Jim Harbaugh \$7,504,000 during that same period.<sup>47</sup> During the 2017–2018 fiscal year, the combined salaries of all the athletic program coaches in the University of Michigan's Athletic program totaled \$28,869,781 making the total compensation amount in Michigan's athletic program equal to \$29,712,331.<sup>48</sup>

To be clear, paying the football, and men's basketball team players would be confined to the salary pool that makes up athletic department compensation. So the athletic department is not paying any additional money. The Model simply re-allocates the existing pie.

The question then becomes, what percentage of that number should be re-allocated to paying the players? That is a difficult question because no precedent has been set. But the number should not be random. There should be some methodology or thought process behind the number. The number should be consistent and fair. And the number should be steeped in some kind of economic reality or basis. The temptation would be to use the NFL's pay scale for possible benchmarks. But the revenue and cost structures are so different that attempting to reconcile the two may be an apples and oranges comparison.

### C. Applying the Model to the University of Michigan Athletic Program

Taking into account all of the above criteria and its corresponding rationale, 5% of the revenue the team generates should be set aside for player compensation. How was the 5% derived? Admittedly, this number is somewhat arbitrary. But starting with a conservative number that underscores the notion of fairness by all metrics pre-empts arguments that would cut against the Model. Additionally, after calculating athlete compensation based off of the 5% revenue figure, the resulting compensation numbers are conservatively below what some commentators have assessed as the fair market value for the athlete's participation in their respective sport.<sup>49</sup> Thus, the 5% of generated team revenue is the starting point.

The players would be paid by reallocating a portion of the salaries paid to ALL the coaches that comprise that university's athletic program. All of the salaries paid to these coaches comes from the revenue generated from the profitable athletic teams. The integral revenue generating component of these programs are the athletes on the field. It is acknowledged that this new Model is a considerable change from current practice. With the basic Model outlines set forth, let's again turn to the University of Michigan's Athletic Program.

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46. 2017–18 *University of Michigan Salaries*, UMSALARY.INFO, <https://www.umsalary.info/deptsearch.php?Dept=athletics&Year=2> [<https://perma.cc/58QQ-N4RQ>].

47. See EADA, *supra* note 20 (follow "Michigan" hyperlink under "School" column).

48. This amount was derived by adding the athletic director's salary to the total coaching salary: (\$28,869,781 + \$842,500). See EADA, *supra* note 20, at Revenues and Expenses; see also 2017–18 *University of Michigan Salaries*, *supra* note 46.

49. See STAUROWSKY & HUMA, *supra* note 1, at 4 ("If allowed access to the fair market like the pros, the average FBS football and basketball player would be worth approximately \$121,048, and \$265,027 respectively (not counting individual commercial endorsement deals).").



At the time of drafting, the most current financial information available on the University of Michigan's athletic program was the fiscal year ending June 30, 2018. Thus, fiscal year 2018 will be used for applying the Model.

For fiscal year 2018, the University of Michigan athletic program had the following teams showing a net profit:

Team	Participants	Revenue	Expenses	Net Profit	Gross Margin
Football	135	\$124,928,493	\$43,453,382	\$81,475,111	65%
Men's Basketball	16	\$20,027,574	\$9,982,947	\$10,044,627	50%

The total salary amount paid to all the University of Michigan athletic coaches for fiscal year 2018, was \$28,869,781.<sup>50</sup> To reiterate how this compensation Model is to work, player compensation is to come from the coaches' salary money pool.

#### 1. *The 5% Allocation Applied to the Wolverine Football Program*

Applying this matrix to the University of Michigan Wolverine Football Program, the allocation would work as follows. First off, 5% of the total revenue that the football team generated for fiscal year 2018 was \$6,246,425 (5% times \$124,928,493).<sup>51</sup> That would be the total amount allocated to the 135 players that comprises the University of Michigan's football roster.<sup>52</sup> The amount would be re-allocated from the \$29,712,311 currently paid to all University of Michigan athletic coaches—both men and women plus the athletic director.<sup>53</sup> As a result, the coaches salary pool would be reduced to \$23,465,906; a 21% re-allocation in all.<sup>54</sup> Granted, the amount seems substantial. But again—putting it in context—it is a re-allocation toward fairness, and a re-allocation that involves including a component that was integral to generating that revenue. It is a reallocation to what should have been done in the first place. And it is a reallocation toward the true economic realities of these sports endeavors. Granted, it can be hard to put the genie back into the bottle. But it should never have gone down this path in the first place.

Additionally, an athletic department would have discretion as to the pool from which the money would be drawn. One suggestion would be to take a disproportionate amount from the football coaches' salaries. The author is not blind,

50. See EADA, *supra* note 20, at Revenues and Expenses.

51. See *id.* (reporting that total football revenue was \$124,928,493).

52. See *id.* (reporting the operating expenses through a team-by-team breakdown as to the number of participants).

53. Amount was derived by adding the Athletic Director's salary to Total Coaching Salary: (\$28,869,781 + \$842,500). See *id.*; see also *2017–18 University of Michigan Salaries*, *supra* note 46.

54. Amount was derived from: (\$29,712,331 - \$6,246,425) = \$23,465,906.

however, to the realities of the marketplace. It is the head football coach who is primarily responsible for the revenue generating product as he is the orchestrator of the product put on the football field.<sup>55</sup> Any athletic department that begins cutting the head football coach's salary to reallocate that amount to players risks losing that coach to another program, or so the argument goes.

The author is not blind to the potential fallouts from this proposed compensation Model. However, an across-the-board requirement for all the Power 5 Conference teams would put everyone on equal footing and no one would have an advantage in that regard. Also, in looking at the Model with an open mind, one might appreciate and consider the potential positive effects such a Model could have on recruiting. A "player centric" Model may do wonders for recruiting that an inflated coach's salary could never do. Those universities that truly embrace this Model may attract recruits in a way that a Jim Harbaugh or a Nick Saban never could. And, if that turns out to be the case, the other programs would then be forced to follow suit or fall behind as the talent pool gravitates disproportionately toward those programs deciding to compensate their players fairly and appropriately.

In any event, as discussed earlier, any athletic department would have the discretion to draw that money from any current pool of expenses. The salary pool makes the most sense, but close scrutiny of any major athletic programs' budget can find a few million to re-allocate to accommodate this proposed Model. The millions of dollars spent on discretionary capital expenditures discussed earlier is just one example. The point is, the money is there. It's just a matter of institutional will in reallocating it.

## 2. *Allocating the Money Pool Within the Team*

The next challenge would be allocating that \$6,246,425 amongst the 135 players listed on the Wolverine's football roster. The obvious challenge here is the amount paid to each individual player. Should it be a simple equal allocation amongst the 135 players? Or should a team have a more bifurcated compensation structure? Some might take issue with paying the 3rd string kicker the same amount as the starting quarterback. One is integral to the program's success and the other may not ever set foot on the field.

Some type of salary scale would be in order—the NFL wage scale could be used as a basis for allocating pay amongst the players.<sup>56</sup> But, the NFL model is

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55. The author is not lost as to the impact that a head football coach can have on its program. The University of Michigan's recent history with its football program illustrates this very fact. In 2008 the University of Michigan Hired Rich Rodriguez as its head coach and after a failed three-year campaign hired Bready Hoke. During that seven-year period, the Wolverines went 46 and 42. The program finally turned around when the University of Michigan hired Jim Harbaugh in 2015. Though many feel like Harbaugh has not performed up to his pedigree, it is a significant improvement from what was happening with the program under the two previous coaches. The overall point here being that the head football coach is a very important position in high level college sports programs. And for that reason, they are able to command and are compensated very well for what they do. See *Michigan Wolverines School History*, SPORTS REFERENCE., <https://www.sports-reference.com/cfb/schools/michigan/index.html> [https://perma.cc/7XNZ-Q85N].

56. The Agreement is 316 pages in total, with a good portion of those 316 pages dedicated to player compensation. A careful reading of those provisions related to compensation quickly reveals how complicated and protracted the NFL's compensation system is. See NAT'L FOOTBALL LEAGUE,

protracted and complicated.<sup>57</sup> In keeping with the theme of avoiding things that could quagmire the process, a simpler payment regime would be called for here at the college level.

A more straightforward process would be to allocate the \$6.2 million pool between the starters and back up players. A proposed allocation—the first- and second-string players would receive 50% of the \$6.2 million and the back-ups would receive the remaining 50%.

Applying this proposed allocation, the compensation would work as follows:

For purposes of this salary allocation, the 11 starters on offense and the 11 starters on defense would be considered your first-string players. The immediate backups to these players would be your second-string players. Depending on the coaching philosophy at any particular school, your special teams may be comprised of a combination of starters from your offense and defensive sets with some back up players mixed in.<sup>58</sup> Given the relatively shorter period of time that the special teams players spend on the field, paying them as starters would not be appropriate. As for your 22 first- and second-string players you could further delineate the allocation with two thirds going to your first-string players and the remaining third going to your second-string players.

Applying this regime to the University of Michigan's football team, the 44 players comprising the first and second string would then split an allocated pool of \$3,123,213.<sup>59</sup> With a two-thirds to one-third allocation between starters and backups, each of the 22 starters would then receive annual compensation of \$94,646.<sup>60</sup> The 22 back up players would each then receive \$47,323.<sup>61</sup> With the University of Michigan's 135 Man Roster, the remaining 91 third string, reserve, practice squad players, etc., would receive the remaining \$3,123,213. If divided equally, that would be an annual compensation of \$34,321 per player. An overall fair stratification of the \$6.2 million pool.

These numbers may seem high, but not when put into context. Those players that start for a Power 5 conference football team have a unique and coveted skill set. Only a small fraction of the population possesses this skill set.

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COLLECTIVE BARGAINING AGREEMENT (2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [<https://perma.cc/W9C5-Y98W>].

57. *See id.*

58. *See* Richard Lezin Jones, *Patriots Reward Starters by Using Them on Special Teams*, N.Y. TIMES (Feb. 4, 2005), <https://www.nytimes.com/2005/02/04/sports/football/patriots-reward-starters-by-using-them-on-special-teams.html> [<https://perma.cc/YV8G-RS25>] (explaining that the New England Patriots tend to break traditional approaches and place a large number of their starters on special teams).

59. Amount was derived from:  $((\$6,246,425/2) = \$3,123,213)$ .

60. Amount was derived from:  $((\$3,123,213 \times 2/3)/22) = \$94,646$ .

61. Amount was derived from:  $((\$3,123,213 \times 1/3)/22) = \$47,323$ .

Currently, there are 347 Division I schools.<sup>62</sup> 254 of those schools have football programs.<sup>63</sup> But there are only 64 teams that comprise the Power 5 Conferences.<sup>64</sup> Estimating an average roster size of 85 members per team, we are looking at approximately 21,590 players. This does not even take into consideration the number of high school players who were siphoned off in the transition from high school to college. Out of these 21,590 players, 5,440 players per year have the talent and skill level to play for a Power 5 conference team.<sup>65</sup> Out of those 5,440 players, 1,408 comprise the starting offensive and defensive players on those respective teams.<sup>66</sup> Thus, your Power 5 starting 22 on each of the respective teams represents 6.5% of an already select group of athletes.<sup>67</sup> Thus, given the unique and highly coveted skill sets these athletes possess, and given the value these athletes generate for their respective universities, these numbers are more than fair and are more than appropriate.

### 3. *The Allocation for Basketball and any Other Income Generating Teams*

Performing the same analysis for the University of Michigan men's basketball team, the compensation pool to be allocated to the basketball players would be \$1,001,379.<sup>68</sup> Allocating that \$1,001,379 amongst the basketball team's

62. See *List of NCAA Division I Schools*, ATHLETICS SCHOLARSHIPS, <https://www.athleticscholarships.net/division-1-colleges-schools.htm> [https://perma.cc/UHP3-627W] (noting that those 347 DI schools are located "across 49 different states" and "range from smaller private schools to the largest universities in the US").

63. "There are 125 Division I FCS football teams and 129 FBS football teams. FCS, or the Football Championship Subdivision, comprises 14 conferences: the Big Sky, Big South, CAA, Independent, Ivy, MEAC, Missouri Valley, Northeast, Ohio Valley, Patriot, Pioneer, Southern, Southland and SWAC conferences. FCS football teams compete in a 24-team playoff for the NCAA Division I Football Championship . . . FBS, or the Football Bowl Subdivision, consists of 11 different conferences: the ACC, American, Big 12, Big Ten, C-USA, Independent, MAC, Mountain West, PAC-12, SEC and Sun Belt conferences. FBS football teams compete in a four-team tournament culminating in the National Championship Game to determine the national champion." NEXT COLL. STUDENT ATHLETE, *Full List of Division I Football Teams: Find the Right Team for Your Athletic and Academic Goals*, NCSA SPORTS, <https://www.ncsasports.org/football/division-1-colleges> [https://perma.cc/45MV-S8EJ].

64. *Power Five Conferences*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Power\\_Five\\_conferences](https://en.wikipedia.org/wiki/Power_Five_conferences) [https://perma.cc/UA86-BRWJ] (last updated Oct. 25, 2020). "In college football, the term Power Five Conferences refers to five athletic conferences whose members are part of the Football Bowl Subdivision (FBS) of NCAA Division I, the highest level of collegiate football in the United States. The conferences are the Atlantic Coast Conference (ACC), Big Ten Conference, Big 12 Conference, Pac-12 Conference, and Southeastern Conference (SEC). The term 'Power Five' is not defined by the National Collegiate Athletic Association (NCAA), and the origin of the term is unknown. It has been used in its current meaning since at least 2006." *Id.* The ACC has 14 teams, the Big Ten has 14 teams, the Big 12 has 10 teams, the Pac 12 has 12 teams, and the SEC has 14 teams. All tolled the Power 5 Conferences are comprised of 64 teams. *Id.*

65. The 5,440-player estimate is based on a conservative estimate of 85 players per team times the 64 times that comprise the Power 5. The actual numbers are likely higher. These numbers are conservative estimates simply to illustrate the point.

66. Number derived by multiplying the 64 teams that comprise the Power 5 conferences by the 22 players per team that comprise the offense and defense: (64 x 22 = 1,408).

67. Number derived by: (1,408/21,590).

68. Being 5% of University of Michigan's \$20,027,574 basketball revenue.

16-man roster comes to a compensation allocation of \$63,955 annually per player. Completing the loop here, the \$1,001,379 paid to the players on the University of Michigan men's basketball team would be drawn from the same \$23 million coaches salary pool mentioned earlier. Reiterating—the amounts being proposed here are significant. But that is the whole point. The contribution that these players are making to these revenue generating efforts are significant and would not have happened without their participation. A similar analysis would be performed for any other sport regardless of gender as long as they were profitable. The only difference would be the dollar amounts—which, again, are based on the revenue generated by the sport in question.

#### IV. THE (INVALID) ARGUMENTS AGAINST THE COMPENSATION MODEL

Pundits, commentators, and scholars have argued against athlete compensation—the most often cited arguments are encapsulated here and are summarily shown to be invalid.

##### A. Not Financially Viable

For the longest time, the most often cited argument for not compensating the college athlete was the proposition that paying college athletes was not financially viable.<sup>69</sup> What you read in the literature was that only a fraction of Division I college programs were even profitable.<sup>70</sup> Overtures of having to shut down other sports programs if the compensation model changed to paying the athletes was a common refrain.<sup>71</sup> Athletic programs expressing that sentiment alone proved to be enough to quash the conversations.

Upon closer review however, those arguments ring hollow. As laid out in the pages prior, compensating the college athlete is financially viable. As outlined in Section II, the proposed Model is scalable and would therefore fit any program. Setting the compensation mark as a percentage of revenue adapts it to fit any athletic program.

Additionally, athletic program expenditures should be scrutinized carefully. As discussed earlier, there is discretionary spending and non-discretionary spending. The discretionary spending is where scrutiny reveals fallacies in the “*it's not financially viable*” argument. When you look at a number of these athletic programs carefully, we see that a great number of them are spending significant amounts on major capital expenditures such as buildings and facilities. As case in point, in 2013 the University of Michigan set out on a capital campaign to build new facilities for

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69. See generally Cody J. McDavis, *Paying Students to Play Would Ruin College Sports*, N.Y. TIMES (Feb. 25, 2019), <https://www.nytimes.com/2019/02/25/opinion/pay-college-athletes.html?module=inline> [<https://perma.cc/UM6C-8CCG>].

70. See generally *id.*

71. See generally *id.*

both its revenue generating and non-revenue generating sports programs.<sup>72</sup> This campaign had a projected cost of \$161 million.<sup>73</sup>

The argument for committing those dollars is the expressed necessity for having a competitive edge over other athletic programs to continue to attract the best and the most talented athletes. But as also mentioned earlier, what if that money were paid directly to the athletes? How attractive would that school become to a five-star recruit that could play at any school of his choosing? As Schwartz points out, a financial analysis would reveal that the athletic programs would likely come out ahead if the trade-off is between capital expenditures in the millions versus athletic compensation for a fraction of that.<sup>74</sup>

Additionally, feasibility studies on paying college athletes have revealed that a lot of athletic programs are run inefficiently with costs being incurred that could be avoided with some belt tightening.<sup>75</sup> Using the University of Michigan as an example: Is a 135-man roster for the football program really necessary? NFL teams, for example, have a mandated 53-man roster. It is easy to conclude that the 53-man roster limit is driven at least in part, if not primarily, by economics. The less players on your roster, the less players the owners have to pay. Likewise, the same efficiencies could be applied to the college ranks. If the NFL can get by with a 53-man roster to cover a 16-game regular season schedule, surely the college ranks could get by with, say, a roster capped at 90 for example.<sup>76</sup> This was the number cited in one feasibility study. A roster cut down to 90 players noted the following savings respectively:

University of Louisville:	\$3,015,263
University of Mississippi:	\$3,013,498
University of Oregon:	\$2,712,410
San Jose State:	\$874,169 <sup>77</sup>

It is therefore reasonable to conclude that the University of Michigan would enjoy similar savings were it to engage in similar roster cutting measures. The overall point here being—the money is there. It's a matter of re-prioritizing that spending. Spending discretionary money to exhaustion and then pleading poverty is no longer a valid argument.

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72. See U. MICH., 2018 ANNUAL REPORT 21 (2018), [https://2018.annualreport.umich.edu/wp-content/uploads/sites/56/2018/12/FY18-U-M-Annual-Report\\_Final.pdf](https://2018.annualreport.umich.edu/wp-content/uploads/sites/56/2018/12/FY18-U-M-Annual-Report_Final.pdf) [https://perma.cc/V52Q-AWYV].

73. See *id.* at 23.

74. See Andy Schwarz, Excuses, Not Reasons: 13 Myths About (Not) Paying College Athletes, Santa Clara University Sports Law Symposium (Sept. 8, 2011), <https://drive.google.com/file/d/0BxM4wdtZ5uI-OWFhNGE1ZTltZTllYS00YmVILTk0YmItYTM4ZDUyY2MwNTE2/view> [https://perma.cc/AY26-WSDG].

75. See George Dohrmann, *Pay for Play: The Mission of our Universities is to Education, but College Sports is Big Business, and No One Wants Young Athletes Exploited*, VAULT (Nov. 7, 2011), <https://www.si.com/vault/2011/11/07/106127622/pay-for-play> [https://perma.cc/KSL9-UFF2].

76. A ninety-man roster was the number suggested in one commentator's analysis. *Id.*

77. *Id.*

## B. Compensation Would Cause a Disproportionate Distribution of Talent

Another often cited criticism of compensating college athletes is the argument that paying college athletes would create a disproportionate distribution of talent and thus would throw the competitive balance of college sports out of whack. The fact of the matter is that a disproportionate distribution of talent *already* exists. Overwhelmingly, Division I talent coalesces around the Power 5 conferences which has been the case for years. Of the NFL rosters for the 2019–2020 season, players from the Power 5 conferences comprised 78% of those rosters.<sup>78</sup> The disproportionate talent distribution already exists. Compensating these athletes would do nothing to widen what is already a chasm.

In fact, some scholars have argued the contrary—noting that the prospect of compensation may, in fact, tip the competitive balance to teams outside the Power 5.<sup>79</sup> The argument there being—instead of enticing a 5 star recruit on top notch facilities, or playing for a high profile program, that smaller program may be able to reach high for a highly sought after recruit simply by outbidding the other schools for that one player.<sup>80</sup> The overall point here being that a competitive imbalance in college sports already exists and compensating college athletes would do nothing to exacerbate that.

## C. Not Fair if All of the Other Sports Are Not Getting Paid

Another false narrative is the one that argues that compensating only a subset of college athletes is not fair to the remaining pool of non-revenue generating sports. Using the University of Michigan as our continuing case study, we see that the University of Michigan has at least 23 non-revenue generating sports.<sup>81</sup> These sports are able to subsist from the revenue being generated from the Men's Football and Basketball programs. From the revenue generated from these teams, these non-income generating sports receive support which goes towards both athletic scholarships for the players and monetary support for the programs themselves. The more pointed question to ask is whether it's fair that sports like golf, lacrosse, women's field hockey, men's and women's swimming, men's and women's cross country, and men's and women's track and field are supported from revenue generated from other sports and not subsist on their own?

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78. According to the article, there were 1,453 players from all the schools, and 1,127 of those players were from the Power 5 Conferences. See Spencer Parlier, *Colleges Most Represented on 2019 NFL Rosters*, NCAA (Jan. 17, 2020), <https://www.ncaa.com/news/football/article/2019-09-03/colleges-most-represented-2019-nfl-rosters> [https://perma.cc/93KL-P94V].

79. "On the other hand, if George Mason wants to win a recruiting war with Duke, it's probably doomed under the current system. Letting Have-Nots use cash is actually the best way to overcome the current unequal playing field. If we allowed schools to choose how much to offer a player, a current 'Have Not' college could use money to steal a player or two from the 'Haves' and help begin the climb to the ranks of the elite." Schwarz, *supra* note 74, at 55.

80. *Id.* at 59.

81. According to the revenue and expense data, the only teams showing a profit are Men's Basketball and Men's Football. Conservatively, the author did not include Men's Ice Hockey or Men's Lacrosse. Not even considering those two teams, that leaves 21 non-revenue generating programs supported by only two teams. See EADA *supra* note 20 (follow hyperlink; then search name field for "University of Michigan" and click continue; then select University of Michigan.).

The point being, the Model here is a purely economic one. Paying athletes that participate in sports that aren't profit generating is simply not economically viable or sustainable. The NCAA cannot continue to have it both ways; running their operation as a business on the one hand with heavily negotiated contracts with their television networks and advertisers, but then failing to fairly compensate a key revenue generating component of that business model. That is the self-serving model for which time has tolled. There no longer is, nor has there ever been, justification for these practices.

#### **D. These Athletes are Already Paid in the Form of a "Free Education"**

Many opponents of compensating collegiate athletes have argued that the athlete is being compensated in the form of a "free education."<sup>82</sup> They opine that the value of an undergraduate education resulting in a degree is valuable beyond measure.<sup>83</sup> Commentators have gone so far as to suggest that the athlete should be grateful for the opportunity to play football or basketball at their respective institutions.<sup>84</sup> Again, upon closer review, these arguments ring hollow.

The "education" that the athlete receives is anything but free. The athlete pays dearly. The reality is, the culture of D1 college football and basketball is this: if the athlete wants to actually get a meaningful, substantive education, he must do so on his own time. Any decision favoring his education over his commitment to his sport, the athlete does at the risk of losing his standing in his respective sport.

National Labor Relations Board regional director Peter Sung Ohr noted that players spend in excess of 50 hours a week honing their craft on the football field in the pre-season and in excess of 40 hours per week once the season starts.<sup>85</sup> Attending school and tending time to one's respective sport as a student-athlete is the equivalent of working two full-time jobs with one so demanding that it often times must be performed to the sacrifice and detriment of the other. First round draft pick Josh Rosen who played quarterback for the University of California, Los Angeles Bruins made these comments in August of 2017 while participating in a question and answer session on a popular fan website, *Bleacher Report*<sup>86</sup>: "Look, football and school don't go together. They just don't. Trying to do both is like trying to do two full-time jobs."<sup>87</sup> The author penning the article further commented, "[b]ut if the 'education'

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82. McDavis, *supra* note 13.

83. *Id.*

84. *See id.* ("For those who think that a free education is insufficient as compensation for playing sports, there are other options: The National Basketball Association's developmental league, for instance, offers \$125,000 contracts to top high-school talent. Such athletes can also pursue a career playing for other domestic or overseas professional leagues.").

85. Jake Novak, *The Ugly Truth About Major College Football*, CNBC (Aug. 13, 2017), <https://www.cnbc.com/2017/08/11/ucla-star-josh-rosen-exposes-an-ugly-truth-about-ncaa-football.html> [https://perma.cc/V8WR-6D2Q].

86. The Arizona Cardinals selected Josh Rosen in the first round. *See NFL Draft & Combine Profile – Joshua Rosen*, NFL, <https://www.nfl.com/prospects/josh-rosen?id=3219524f-5335-7433-3207-a02a4e884405> [https://perma.cc/45UW-9VC4]. He was the tenth player selected. *Id.*

87. Novak, *supra* note 85.



part of the deal is a sham, or at least impossible to attain even if college football players make a decent effort to study and play, then that deal is a fraudulent one.”<sup>88</sup>

The fact of the matter is, the demands put on these “student-athletes” are so great, so time intensive, and so consuming, that they have little, if any, opportunity to major in meaningful, substantive, marketable educational opportunities while they are engaged in their respective sport.

Translating this narrative to the University of Michigan Football program, the results are mixed. Historically, the Graduation Success Rate for the program hovered between a low of 66% in 2006 and a high of 73% in 2000.<sup>89</sup> This is for the period spanning from 1998–2008.<sup>90</sup> Beginning in 2009, however, the football program’s Graduation Success Rate has been trending upward climbing from 79% in 2009 to 91% in 2012, which puts it among the top schools nationally.<sup>91</sup> Overall, the Graduation Success Rate for Division I football programs for the 2009–2012 cohort was 78%, which was the lowest of all the NCAA division one sports, with men’s wrestling at just slightly higher at 79% followed by Men’s Basketball at 83%.<sup>92</sup> To Michigan’s credit, their football program has been trending upward as of late.

However, anecdotal evidence from the athletes themselves paints a very different picture of the notion of a “free education.” According to the account shared by Albert Evans, his “education” was neither free nor was it an education. Albert Evans is a former safety who played for the Purdue Boilermakers from 2007–2011. In 2012 he signed as an undrafted free agent with the Miami Dolphins. In his own words, Mr. Evans gives a very different account than that of a “free education.”

While students who have struggled and planned their lives around having to pay for college may wish they had their college paid for by an athletic scholarship, a lot of the athletes on those scholarships wouldn’t consider or be considered by their college if it wasn’t for their sports. We may see these “opportunities” as good things, but it can be like giving a baby money. Do they really know what to do with it? We recruit the fastest runners and highest jumpers, go into urban cities and country sides, and play on the emotions of young men who want to go pro. Although that opportunity is provided (the NCAA being a breeding ground for pro sports, an argument for another day), we know the percentages of individuals making it pro is microscopic. So while those students who do graduate have that piece of paper, it’s oftentimes a piece of paper they don’t know how to use while

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88. *Id.*

89. *Graduation Success Rate*, NCAA, <https://web3.ncaa.org/aprsearch/gsrsearch> [<https://perma.cc/LVB6-J95M>] (choose “University of Michigan” from drop down; then choose “Football” from drop down; then hit “Search”). The Graduation Success Rate equals the percentage of students that have graduated six years after entering school. See *Graduation Rates*, NCAA, <http://www.ncaa.org/about/resources/research/graduation-rates> [<https://perma.cc/8QB4-9KXG>].

90. *Graduation Success Rate*, *supra* note 89.

91. *Id.*

92. See *Graduation Rates*, NCAA, [https://web3.ncaa.org/aprsearch/public\\_reports/gsrAggr2019/1\\_0.pdf](https://web3.ncaa.org/aprsearch/public_reports/gsrAggr2019/1_0.pdf) [<https://perma.cc/84CD-WVXB>].

surrounded by family and social structures that don't know what to do with them either.

When I was 10 years old, I wrote an article for the local newspaper that asked me what school I wanted to go to and what I wanted to study. I said Purdue University in their school of Engineering. I didn't know that one day I would actually be able to attend Purdue on an athletic scholarship. But I wouldn't be able to go for Engineering. Neither would I be able to go for Athletic Training, my second choice, which I wanted to use to create a path into Physical Therapy School. I was told that the Engineering caseload and class schedule would not work, especially if I had dreams of playing. I was told I would not be able to receive my hours for Athletic Training because they were mostly during football season and spring practice. At that point, I was on my third choice which wasn't even a choice.

I was literally just there to play football. Having two choices of my own was more than a lot of my teammates and friends at other schools could say as they were left undecided and thrown into General Studies, Communications or Organizational Leadership and Supervision. So while those on the outside are complaining of paying for school because that's something they value, imagine getting something for free that you aren't just not interested in, but also something you don't really know what to do with it.

Collegiate sports looks glamorous from your couch. You play on national television. Your friends and family cheer for you. The fans cheer for you. You travel. You get free food. There's a lot of perks.

But you don't get to see what goes on inside those walls. They tell a different story for an 18-22-year-old boy. I didn't really believe that they did with you what they wanted until I arrived on campus. I was recruited as a running back, moved to safety, redshirted, had it pulled, played a few snaps at linebacker, all as a freshman. Then they moved me back to safety as a sophomore. Talk about a whirlwind. What I wanted didn't come into consideration, just what they needed from me.

Players literally feared the film room after a loss or a play they didn't do so well on. I've seen players transfer and careers go to hell because they couldn't take the scolding that would follow. Is that what it means to be an "amateur"?

The pressure of knowing coaches' jobs were based on your performance was a heavier burden than I wished to carry. At one point, I was brought into a coach's office and pleaded with to turn the season around because they feared losing their job. By pleading, I mean crying and family pictures being brought out and asking me to do it for their families. I left that office with a burden I have never forgotten. The kicker is, we got to a bowl game and

won and some of those coaches still moved on to their next position.<sup>93</sup>

Mr. Evan's story is just one of thousands played out over and over, year after year with slightly different thematic variations but with common endings. The story behind the curtain is barely visible to the public. This is intentionally so. No one really wants to see how the sausage is made and the price these athletes pay. They just want the end result. The amazing athletes putting their bodies at risk to entertain on Saturday afternoon and evening. And a failure to compensate these athletes under the guise of "amateurism" and the false concept of the "student-athlete."

The whole notion of a "free" education for these student-athletes is not what the general public assumes it to be. Upon close examinations, the realities are far different. Based on NCAA statistics that compiled data for 2018, 73,557 young men were playing Division I college football; 16,346 of these players were eligible for the 2018 NFL Draft.<sup>94</sup> Just 1.5% or 255 of those players were drafted that year.<sup>95</sup> Honing those odds somewhat, roughly 73% of the players drafted in that 2018 draft came from the Power 5 Conferences.<sup>96</sup> During that year, the Power 5 Conferences had 1,739 draft eligible players with 185 of those players being drafted (i.e. 11%).<sup>97</sup> So, there is already a delineating process that takes place at the college level. Even when narrowing the pool down to just the Power 5 conferences, the statistical probability of being drafted is still remote.

In spite of these statistics, most of these athletes go "all-in" on a proposition that will have a pay-out for only a select few. The coaches for these athletic programs know this very well. But the players have the blinders of youth, which only allows them to see themselves as the exception. That is until the realities hit 3-4 years later where the chips from their all-in bet have been cashed and they have little to show for their efforts. Either a degree of minimal or no use, or no degree at all, and no prospects of playing at the next level. These phenomena are a travesty.

The coaches and athletic departments know the realities here and the minimal prospects of going pro for most players; even the ones in the Power 5 conferences. But the lure of playing at the next level is strong. The coaches are aware of this and they use that as the carrot to get everything they can out of the player. It's clearly in the coach's best interest to get that player totally committed. His job as a coach literally depends on how the players perform. What happens after the player's

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93. Travis Miller, *Here's What a Former Purdue Football Player Wants You to Know About Being a Student Athlete*, HAMMER AND RAILS (Mar. 13, 2018, 12:07 PM), <https://www.hammerandrails.com/2018/3/13/17110940/ncaa-athlete-behind-the-scenes> [<https://perma.cc/D8BY-WL5T>].

94. See *Estimated Probability of Competing in Professional Athletics*, NCAA (Apr. 8, 2020), <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> [<https://perma.cc/SL8N-GTK9>].

95. *Id.*

96. See *id.* (noting that "[t]he five football conferences with autonomous governance accounted for 197 of the 254 [(i.e. 77%)] NCAA draft picks (SEC=64, Big Ten=40, ACC=34 [includes Notre Dame], Pac-12=33, Big 12=26)").

97. See *id.* ("Narrowing further to the five Division I conferences with autonomous governance (ACC, Big Ten, Big 12, Pac-12 and SEC), we estimate that 11% were drafted (197 / 1,769)").

eligibility is used up is not the coach's concern. Nothing about the coach's job hinges on the coach's interactions with the players after they leave the program. So let's dispel with this notion of a "free education." The price is high and the bargained for exchange couldn't be more disproportionate.

#### E. Too Much Money to be Paying 18-21 Year Olds

In reading some of the criticisms from those who opposed the idea of paying college athletes for their time and labor, some have expressed concerns about what these young men, most of whom being between the ages of 18–21, would do if they were to have access to the kind of money being proposed in this Model. Ridiculous and extreme concerns about spending all of their money on weed and alcohol for instance.<sup>98</sup>

Let us make sure we are cautious that any decision on whether or not to compensate a deserving labor pool is not contingent upon where and how that pool will decide to spend *their own money*. If societally, we go down that road, I do not know where we end up. But the point is understood. After all, we are talking about young adults, and the undergraduate years are supposed to be a learning experience. And not just in sociology, psychology, and marketing, but ideally in life lessons as well.

In that regard, the solution is a simple one. The institution can make receiving the money contingent upon the athlete completing a financial literacy course. The course content can touch on things such as money management, investing and saving, budgeting, information on retirement and insurance plans, etc. The dynamic can be set up such that completing the course is part of the earning process; a pre-requisite for receiving the money.

A second protective measure that may allay some of these concerns is having the institution withhold a portion of the student-athlete's compensation until four years after that student enrolled into the university as a freshman. Withholding a *portion* of the money in this fashion serves a two-fold purpose: (1) It takes away any incentive for the student-athlete to leave the institution early for purposes of receiving their compensation now instead of later; and (2) the delay encourages the athlete to stay at the University all four years to complete their education and get their degree. The amount that they actually receive can be tied to some type of living wage index for the area. This is so that the student-athlete can live comfortably, pay their bills, and perhaps support others who may be dependent on them even though they are college students.<sup>99</sup> Such are the realities of life for many of these students.

So, the more the institution is aware of and sensitive to their athlete's particular situations that will likewise result in "win-win" situations for both the athletes and the university.

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98. Mike Chiari, *Colin Cowherd Says College Athletes Would Buy "Weed and Kicks" With Salary*, BLEACHER REP. (Apr. 25, 2014), <https://bleacherreport.com/articles/2041740-colin-cowherd-says-college-athletes-would-buy-weed-and-kicks-with-salary> [https://perma.cc/65R4-RW3Q].

99. See Kevin McNamara, *With Little Money, Many Scholarship Athletes Struggle to Get By*, PROVIDENCE J. (Jan. 24, 2015), <https://www.providencejournal.com/article/20150124/SPORTS/301249983> [https://perma.cc/WE3S-TS8U].

For example, the amount the athlete receives could be tied to a living wage amount for a family of four. The student-athlete receives that amount while enrolled at school. He receives the balance on the graduation date four years after his enrollment. The remaining amount can be held in an interest-bearing trust account until that time. In sum, anyone scrutinizing college athletes compensation is encouraged to be discerning. Upon analysis, the arguments against compensating college athlete rings hollow.

## V. TITLE IX CONSIDERATIONS – PROPERLY RECALIBRATING TITLE IX

Title IX's "equal treatment" mandates have been cited as one of the biggest financial obstacles for paying college athletes.<sup>100</sup> Title IX in relevant part states that "*no person in the United States shall, on the bases 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>101</sup>

This language has been interpreted to mean that whatever you do for men's sports, you must proportionally do for women's sports.<sup>102</sup> Accordingly, those that oppose paying college athletes—namely the NCAA, the coaches, the athletic departments, and other stakeholders—will argue that the Title IX mandates requiring equal or proportional monetary support for both men and women makes the notion of paying *any* athletes above their scholarship a cost prohibitive endeavor.<sup>103</sup>

This "equal treatment" mandate is convenient for the NCAA and the other stakeholders who would stand to take home less financially if required to share their compensation with the athletes who are integral in generating these revenue dollars in the first place. The discussions and analysis on this issue have failed to probe deeply and have failed to give the athletes' relationship with their respective universities the deference it deserves. Pundits and scholars for the most part have accepted Title IX's mandate as a non-movable, non-negotiable, non-challengeable facet of Title IX. If you are going to pay the men, then you must pay the women. Or so the argument goes.

But the argument is a frustrating one and one that has been relied on to exploit because it places idealistic principles of equity and fairness into the context of big business, capitalism, and the economic principles of supply and demand. And these variables simply don't reconcile; not if you are trying to be fair, which Title IX purportedly seeks to do.

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100. See Erin E. Buzuvis, *Athletic Compensation for Women Too? Title IX Implications of Northwestern and O'Bannon*, 41 J. COLL. & UNIV. L. 297, 298 (2015) ("In response to the argument that withholding compensation from athletes whose labor generates millions of dollars of revenue is tantamount to exploitation, the NCAA argues that paying athletes in revenue sports, coupled with the commensurate obligation under Title IX to pay female athletes, would be prohibitively expensive for college athletics as we know it. Ergo, no pay for play.").

101. See *Gender Equity and Title IX*, NCAA, <https://www.ncaa.org/about/resources/inclusion/gender-equity-and-title-ix> [https://perma.cc/V5LY-76Q7].

102. See *Gender Equity*, NCAA, at *How is Title IX Applied to Athletics?*, <http://www.ncaa.org/sites/default/files/S-A%2BPamphlet.pdf> [https://perma.cc/U4Z8-ZWEQ].

103. See Buzuvis, *supra* note 100.

The problem with Title IX in this context is that it conveniently disregards economic substance and puts in its place an artificially created construct, which is the antiquated notion of the “student-athlete”—a term the NCAA coined years ago to justify its current and exploitive treatment of the college athlete.<sup>104</sup>

In its early iterations, the “student-athlete” concept was premised upon the idea of college students participating in sports as an enhancement, a furthering of and a complement to the student’s educational experience as a college student.<sup>105</sup> The intended connotation here was that participation in college sports was to be an extra-curricular “add-on,” if you will. Something akin to recreational activities to round out the college student experience. Something the student is doing voluntarily and is by all means secondary to the student’s primary goal, which is to procure his college degree in his chosen field of study with all else being secondary to that primary objective.

But nothing could be further from reality. At least not for the sports that are generating millions for their respective universities. These programs and the athletes that participate in them are responsible for the livelihoods of thousands that live off of the revenue that these programs generate. As documented earlier, these athletes spend anywhere from 35–50+ hours a week on their “recreational” activity. Every aspect of their participation is mandated and controlled. If job performance expectations are not met, then the athlete is subject to scholarship “non-renewal.”<sup>106</sup> What is the substance of the relationship here? Is it one of “student-athlete” or employer-employee? When and where challenged, courts have already made findings of an employer-employee relationship,<sup>107</sup> although courts have found ways to deftly side-step the issue and thus have punted on the question for now.<sup>108</sup>

To date, however, there have been modest challenges to Title IX’s application.<sup>109</sup> This is so because the whole notion of properly compensating college athletes has been stalled. But there should be an open challenge. Once you properly

104. See Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [<https://perma.cc/8XRY-383Q>] (“For all the outrage, the real scandal is not that students are getting illegally paid or recruited, it’s that two of the noble principles on which the NCAA justifies its existence—‘amateurism’ and the ‘student-athlete’—are cynical hoaxes, legalistic confections propagated by the universities so they can exploit the skills and fame of young athletes.”).

105. See *id.*

106. See *Athletic Scholarships: Everything You Need to Know*, NEXT COLL. STUDENT ATHLETE, <https://www.ncsasports.org/recruiting/how-to-get-recruited/scholarship-facts> [<https://perma.cc/33RC-88Y6>] (noting that athletic scholarships may be subject to “non-renewal” for a variety of reasons, including poor performance).

107. See Post-Hearing Brief of Petitioner at 3, *Nw. Univ. v. Coll. Athletes Players Ass’n*, No. 13-RC-121359, 2014 WL 1922054 (N.L.R.B. Mar. 17, 2014).

108. See, e.g., Sheldon D. Pollack & Daniel V. Johns, *Northwestern Football Players Throw a “Hail Mary” but the National Labor Relations Board Punts: Struggling to Apply Federal Labor Law in the Academy*, 15 VA. SPORTS & ENT. L.J. 74, 77 (2015).

109. In the article, the author makes the argument that players should be paid differently based on skill, ability, demand, etc. Similar to the argument made for justifying coaches for men’s basketball versus women’s basketball. See Marc Edelman, *When It Comes to Paying College Athletes, Title IX is Just a Red Herring*, FORBES (Feb. 4, 2014), <https://www.forbes.com/sites/marcedelman/2014/02/04/when-it-comes-to-paying-college-athletes-is-title-ix-more-of-a-red-herring-than-a-pink-elephant/#78851ac51bde> [<https://perma.cc/3Q27-MYH2>].

re-frame the lens as to what is occurring here, which is a labor pool being mischaracterized as “student-athletes,” then the issue can be properly and appropriately addressed.

Athletes that generate millions for their respective institutions—generally football and basketball players—are university employees. As such, they should be compensated appropriately for their labor—period. Extending the argument further, for any sports program that is generating a net profit through the engagement of that sport, the “college-athlete” should be compensated appropriately as employees for their time and labor. Just like any other student who takes a job working for that university. Failure to recognize the economic substance of these relationships for what they are—i.e., employer-employee relationships—results in exploiting a labor pool that is powerless yet is sacrificing their time, their bodies, and their labor to the benefit of other stakeholders. This could not be Title IX’s intended outcome.

In this regard it should be made clear and underscored that the athletes participating in *any* sport regardless of gender that is earning a net profit, should be compensated in accordance with the Model proposed in this writing. It is acknowledged however that very few, if any, women’s teams would qualify under this criteria. Contrary to what many might expect, even popular teams like the Lady Huskies of the University of Connecticut do not operate at a profit.<sup>110</sup> Indeed, *most* teams regardless of gender do not operate at a profit. Generally, it is the men’s basketball and footballs teams that keep their entire athletic programs afloat. And in those instances where none of the teams are operating at a profit, then school tuition and other fees are drawn upon to supplement those team budgets.<sup>111</sup> But again, none of these dynamics negates the propriety of compensating the team sports that generate millions for their respective universities. In fact, this information makes for an even stronger argument as these universities are able to offer the wide array of sports offerings that they do, due to the wide success and profitability of the men’s basketball and football teams.

#### **A. Case and Point—Paying the Men’s Basketball Coaches More Than the Women**

Generally speaking, among Division I college coaches, the coaches for the Division I women’s basketball teams are paid one half to a third of what the Division I men’s basketball team coaches are paid.<sup>112</sup> How is this reconciled under the “equality” mandates of Title IX? According to the case law, it is done quite easily.

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110. Data shows the UConn Lady Huskies breaking even at best. But in no event were they generating a profit. EADA *supra* at note 20 (search “University of Connecticut”; then choose “University of Connecticut”; then click on “Revenues and Expenses”).

111. See Alex Putterman, *UConn Athletic Department in 2018: Generated \$40 Million in Revenue, Incurred \$81 Million in Expenses*, HARTFORD COURANT (Jan. 17, 2019), <https://www.courant.com/sports/hc-sp-uconn-sports-athletic-department-finances-revenue-expenses-20190117-2wdp5gimnvhllywykl6npcmy7u-story.html> [https://perma.cc/TU5W-TFHN].

112. James K. Gentry & Raquel M. Alexander, *Pay for Women’s Basketball Coaches Lags Far Behind That of Men’s Coaches*, N.Y. TIMES (Apr. 2, 2012), <https://www.nytimes.com/2012/04/03/sports/ncaabasketball/pay-for-womens-basketball-coaches-lags-far-behind-mens-coaches.html> [https://perma.cc/87QL-UTZN].

In essence, these matters aren't treated as Title IX issues, but they are treated as employer employee issues and are therefore subject to the Equal Pay Act of 1963.<sup>113</sup>

The key case cited when addressing these issues is *Stanley v. University of Southern California*. In this case, former head coach of the University of Southern California women's basketball team, Marianne Stanley filed suit against the University of Southern California.<sup>114</sup> The complaint set forth various federal and state sex discrimination claims, including violations of the Equal Pay Act (EPA),<sup>115</sup> Title IX,<sup>116</sup> the California Fair Employment and Housing Act (FEHA),<sup>117</sup> and the California Constitution, Cal. Const. article 1, section 8.<sup>118</sup> As summarized by the Ninth Circuit:

The gravamen of Coach Stanley's multiple claims against USC is her contention that she is entitled to pay equal to that provided to Coach (George) Raveling for his services as head coach of the men's basketball team because the position of head coach of the women's team requires equal skill, effort, and responsibility, and [is performed] under similar working conditions.<sup>119</sup>

The case's procedural posture should be noted. In the case, Coach Stanley sought a preliminary injunction. She wanted her position as the USC women's head basketball coach to remain intact pending the outcome of her suit against the University.<sup>120</sup> Her injunction was denied and Coach Stanley appealed. On appeal, the Court explained the burden that the party seeking the injunction must meet.

The party seeking the injunction must (1) show that they will suffer irreparable injury if injunctive relief is not granted; and (2) the party seeking injunctive relief will probably prevail on the merits; and (3) in balancing the equities, the non-moving party will not be harmed more than the party seeking the injunction is helped by the injunction; and (4) granting the injunction is in the public interest.<sup>121</sup>

The Court's analysis with prong (2), the moving party's likelihood of prevailing on the merits is what is most relevant here. As explained in the case, "The thrust of Coach Stanley's argument in this appeal is that she is entitled, as a matter of law, to make the same salary as was paid to the Head Men's Basketball Coach at USC."<sup>122</sup> But the Court disagreed with Coach Stanley's assertion. According to the case, for a plaintiff to meet their burden, the "plaintiff must prove that an employee is paying different wages to employees of the opposite sex for equal work . . . the jobs need not be identical but they must be 'substantially equal.'"<sup>123</sup> Further, the Court explained, "the EPA prohibits discrimination in wages between employees on

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113. 29 U.S.C. § 206(d)(1) (1988).

114. *Stanley v. University of S. Cal.*, 13 F.3d 1313, 1316 (9th Cir. 1994).

115. 29 U.S.C. § 206(d)(1).

116. 20 U.S.C. § 1681(a) (1986).

117. CAL. GOV'T CODE § 12921 (West 1992).

118. *Stanley*, 13 F.3d at 1318.

119. *Id.* at 1319.

120. *Id.* at 1318.

121. *Id.* at 1319.

122. *Id.* at 1321.

123. *Id.* at 1321.



the bases of sex . . . for equal work, on jobs the performance which requires equal skill, effort, and responsibility and which are performed under similar working conditions.<sup>124</sup> Each of these components must be substantially equal to state a claim.”<sup>125</sup>

The Court expressed its doubt that Coach Stanley would be able to meet her proof burden.<sup>126</sup> The sum of the Court’s analysis was that the men’s basketball head coaching job came with more responsibility and requirements than the women’s head coaching job.<sup>127</sup> The Court noted that “Coach Raveling’s responsibilities as head coach of the men’s basketball team require substantial public relations and promotional activities to generate revenue for USC.”<sup>128</sup>

The Court noted that these efforts generated revenue that was 90 times greater than the revenue generated by the women’s basketball team.<sup>129</sup> The Court explained that Coach Raveling was required to conduct twelve outside speaking engagements per year, to be accessible to the media for interviews, and to participate in certain activities designed to produce donations and endorsements for the USC Athletic Department in general.<sup>130</sup> In contrast, the Court noted that Coach Stanley’s position as head coach did not require her to engage in the same intense level of promotional and revenue-raising activities.<sup>131</sup>

Further, the Court noted that Coach Raveling, the men’s head coach, had more experience and more job-related skills which rightfully contributed to the higher pay.<sup>132</sup> The Court also noted that USC had employed Coach Raveling three years longer than Coach Stanley.<sup>133</sup> The Court also noted that Coach Raveling had been a college basketball coach for 31 years, while Coach Stanley has had 17 years’ experience as a basketball coach.<sup>134</sup>

Finally, and perhaps most important and relevant to the issue of “student-athletes” as employees and the commensurate compensation that should follow, the Court noted that an employer *may consider the marketplace value of the skills of a particular individual when determining his or her salary*.<sup>135</sup> Unequal wages that reflect market conditions of supply and demand are not prohibited by the EPA.<sup>136</sup>

Under this final factor, the Court noted that the USC men’s basketball team generated greater attendance, more media interest, larger donations, and produced substantially more revenue than the women’s basketball team.<sup>137</sup> The Court noted that USC placed greater pressure on Coach Raveling to promote his team and to

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124. *Id.*; 29 U.S.C. § 206(d)(1) (1989).

125. *Stanley*, 13 F.3d at 1321.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 1322.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* (citing *Horner v. Mary Inst.*, 613 F.2d 706, 714 (8th Cir. 1980) (emphasis added)).

136. *Id.*

137. *Id.*

win.<sup>138</sup> Evidence showing that a coach has the responsibility to produce a large amount of revenue indicates a substantial difference in responsibility.<sup>139</sup>

### B. As Equal Pay Applies to “Student-Athletes”

Other than the NCAA’s artificial mischaracterization of the “student-athlete,” there is no justification for students who work as football players on the field or basketball players on the court not being paid the fair market value for their services. In no other context does this occur other than in collegiate athletics—specifically in the sports of men’s football and men’s basketball. In substance, form, qualitatively, quantitatively, these athletes are university employees. The failure to recognize them as such is a failure to acknowledge the substance of the college athlete’s relationship to and services provided for that university.

As these matters relate to Title IX, just as the issue of equal pay among college coaches as university employees is taken out of the Title IX context and placed appropriately into the context of the Equal Pay Act, the payment of these “student-athletes” as University employees should be treated in the same fashion. The 35–50 hours a week these athletes spend on their respective sport, coupled with the level of control and emphasis the university exacts upon these athletes, coupled with the vital revenue generating aspect of their endeavors makes them every bit the employee as the coaches overseeing their play.

Once put in the proper context and therefore recalibrated to applying the appropriate and applicable law, i.e. the Equal Pay Act rather than Title IX, only then can an appropriate and just result be reached. Once the lens is properly refocused, we can now revisit the pay aspect for these athlete-employees as they will now be referred to going forward.

In that regard, in applying the EPA as it relates to compensation for the men’s football team, the skill, the talent, the ability, and most importantly, “*the marketplace value of the skills of a particular individual when determining his or her salary*”<sup>140</sup> are allowed if not required under the EPA. In that regard, the extreme popularity of men’s football would have to be considered. The millions of fans that view the sport on television and live at the stadiums on game day is to be considered. Likewise, the hundreds of millions of dollars that these athlete-employees generate would be relevant to the analysis as well. However that compensation number is derived (a version of which was done here in this paper’s Section II), any disparities between men and women on this basis would be justified under the EPA.

As far as the Title IX issues are concerned, just as no Title IX violations were deemed to have occurred with the disparate pay in men’s and women’s basketball coaching salaries, the same should apply here—perhaps even more so as there is no equivalent for women in terms of football. Further, if Title IX zealots are insistent, it should be pointed out that under this regime, scholarships for men’s and women’s sports would not be touched. Salary, or compensation for services produced would be considered a separate compensation narrowed to those considered athlete-employees versus just student-athletes with the amount above and

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138. *Id.*

139. *Id.* (citing *Jacobs v. College of William and Mary*, 517 F. Supp. 791 (E.D. Va. 1980)).

140. *Id.* (emphasis added).

beyond their current scholarship being considered taxable wages just like any other employee.

Accordingly, as long as the derived scholarship component remains equal or proportional between men and women, and as long as any pay to either women or men athlete-employees are derived based on the factors as set forth under the EPA, there should be no issues with compliance with either Title IX or the Equal Pay Act. All that is required here is a correct interpretation of the law as it applies to the college athlete-employee. Any deviation from this is a disingenuous legal interpretation and a self-serving effort by those currently benefiting from this misinterpretation.

And to be fair and to reiterate, the “student-athlete as employee” analysis would apply equally to both men’s and women’s sports. Where women’s teams are operating at a profit and generating revenue for their respective universities, they should and would likewise be compensated in accordance with the same 5% revenue formula. Again, it is acknowledged that this type of strict “by the numbers” analysis may cause some to conclude that pay based on profitability puts men and women’s sports at an inherent disadvantage as men’s sports have perennially been the revenue generating sports at most institutions. Such is an economic reality that cannot be ignored. It would be simplistic to say, “If you think women’s sports should be compensated comparably then go and support those women’s teams.” But that is in fact the answer. The proposed Compensation Model is not based off of gender equity or gender inequities for that matter. The Model is based off of pure economics and the blind financial realities of supply and demand.

## VI. RECENT LEGISLATION ON COLLEGE ATHLETE COMPENSATION

### A. California’s Pay for Play—and the Chain Reaction that Followed

*“For me, it’s a combination of first starting out as a civil rights issue and then, wait a minute: This is like flat-out exploitation of any student,” Skinner said. ‘I don’t know of any other industry that can rely on a large set of people’s talent for which they deny them any earnings and all compensation.’”<sup>141</sup>*

For more than 60 years, the NCAA was able to stave off, frustrate, and thwart all efforts that involved the college athletes under her purview from receiving any compensation beyond the cost of attendance.<sup>142</sup> That was until September of 2019 when California Governor Gavin Newsom signed into law Senate Bill 206 which, as it currently stands, will allow athletes who participate in college athletics in California to hire agents and make money off of their name, image or likeness. The Act is set to go into effect January 1, 2023.<sup>143</sup>

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141. Billy Witz, *California Law Makers Vote to Undo N.C.A.A. Amateurism*, N.Y. TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/09/09/sports/college-athlete-pay-california.html> [https://perma.cc/VR3L-HRT9] (quoting Nancy Skinner, California Democrat in the Legislature and the lawmaker who sponsored S.B. 206).

142. Russo, *supra* note 7.

143. S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019).

The California *Pay for Play* Act was a game changer. The proposed Act reflects a shifting mind set—an acknowledgment that the NCAA's antiquated notion of the "student-athlete" was nothing but an artificially created construct that allowed the NCAA to reap billions off the backs of 18–21 year olds.<sup>144</sup> The Act was the toppling of the first brick of a wall that has been built over years and fortified through an NCAA propaganda machine that vilified student-athletes for engaging in such conduct as selling their jerseys for cash or signing autographs for pocket money to supplement a scholarship package that barely covered their cost of living.<sup>145</sup>

The California *Pay for Play* Act created an intriguing dynamic. The Act put the California legislature at odds with the NCAA. The showdown could best be described as a game of "chicken." But the game was short lived as it was readily apparent who had both the momentum and the stronger hand on the issue of college athlete compensation. Initially, NCAA President Mark Emmert tried to stare down the California legislature with his bluff of desperation stating that California schools may be ineligible to compete in NCAA championship competitions due to the unfair recruiting advantage that California schools would enjoy as a result of the California *Pay for Play* provision.<sup>146</sup>

But the California law makers were not concerned with Emmert's threats as they were well aware of the leverage California wields as the California market is integral to the NCAA's continued viability.

Shortly after California's passing of its *Pay for Play* provision, it became evident who had the high ground and the prevailing argument. As of May 25, 2020, some 34 other states have their own *Pay for Play* provisions in various stages of drafting and approval.<sup>147</sup> Now in complete reactionary mode, in October of 2019, the NCAA convened a committee referred to as the "Federal and State Legislation Working Group" (Working Group).<sup>148</sup> The NCAA's Board of Governors convened this Working Group to investigate possible responses to proposed state and federal legislation regarding the commercial use of student-athlete name, image or likeness ("NIL").<sup>149</sup> The Working Group drafted a report that it submitted to the NCAA's Board of Governors on April 17, 2020.<sup>150</sup> The Report, not surprisingly, recommended that the NCAA draft its own *Pay for Play* provision with the caveat that the provision is "*consistent with NCAA values and principles and with legal precedent.*"<sup>151</sup>

The Working Group's Report, in addition to exploring key provisions and language that it recommends be in the NCAA's final *Pay for Play* provision, also notes various legal challenges with which the NCAA is going to have to contend.

144. See, e.g., Branch, *supra* note 2.

145. See, e.g., Travis Waldron, *University of Georgia Running Back Suspended for Profiting from His Own Signature*, THINKPROGRESS.ORG (Oct. 10, 2014), <https://thinkprogress.org/university-of-georgia-running-back-suspended-for-profiting-from-his-own-signature-b5ce24eb2a6c/> [<https://perma.cc/98VH-XF3H>].

146. Witz, *supra* note 141.

147. NCAA BD. OF GOVERNORS, *supra* note 9, at 27.

148. *Id.* at 1.

149. *Id.*

150. See generally *id.*

151. *Id.* at 1 (emphasis added).

Particularly noteworthy is the fact that the Working Group urged the NCAA's Board of Governors and the NCAA's President to "[e]nsure federal preemption over state name, image and likeness laws" and to "[s]afeguard the nonemployment status of student-athletes."<sup>152</sup>

The author found these two recommendations from the Working Group noteworthy due to the fact that for over 60 years, the NCAA consistently and unabashedly railed against *any* notion of her athletes being paid outside the scholarship and cost of attendance.<sup>153</sup> That, coupled with the fact that the NCAA only now—after the thirty plus odd states have forced the NCAA's hand is the NCAA—is in a reactive mode, putting forth its own version of a *Pay for Play* provision.<sup>154</sup> The NCAA, in doing so, is going to ask Congress to pass a federal *Pay for Play* version that, if enacted, would preempt each of the state versions, and would no doubt contain "guardrails" limiting the extent to which the athletes can use their name, image or likeness.<sup>155</sup> The NCAA's temerity in this regard is head shaking, but not surprising.

With California's initial *Pay for Play* provision, the NCAA's hand was forced. It had no choice at that point. Now the NCAA is in the mode of damage control and is doing what it can to limit its exposure while trying to capture as much control over the process as it can. It is evident that the NCAA is seeking to hold the college athlete compensation line at some limited version of the athlete using their name, image, and likeness while doing everything it can to make sure things don't go beyond that point. All of this while claiming to have the athlete's best interest at heart.

## B. What these Acts Do not Do

What California Senate Bill 206 did was call into question the long standing and antiquated notions of the "student-athlete" and "amateurism." The Act signified long overdue recognition that athletes, just like anybody else with a skill or talent, should be allowed to leverage that skill or talent for compensation. California's passing of its *Pay for Play* provision was the first brick to fall leaving the other states and the NCAA with little choice but to follow suit or be left behind.

What none of these Acts do, however, is provide for payment to all athletes who are participating in revenue generating sports; namely football and basketball at most universities.<sup>156</sup> Under these *Pay for Play* provisions, shoe companies, clothing manufacturers, athletic gear retailers, etc., will seek out those athletes that they deem most able to help market their product, good, or service. Whether this will involve a wide swath of college athletes or a select few is unclear. Speculation suggests that only a select view, more than likely those who have professional level ability anyway, will be the ones receiving these coveted endorsements, and the rest, without any additional intervention will still be in the same predicament of an exploited labor

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152. *Id.* at 27 (emphasis added).

153. Russo, *supra* note 5.

154. See NCAA BD. OF GOVERNORS, *supra* note 7, at 27.

155. See generally *id.* (highlighting the NCAA desire for federal preemption and opposition to individual state NIL legislation).

156. *Contra* S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019).

pool. Thus, these *Pay for Play* provisions are the necessary first step. But the push should continue to allow all athletes to receive fair compensation for the revenue they are generating.

## VII. CONCLUSION

The time has come; way past due actually. The injustice here is exploiting a labor pool that has been integral to the NCAA revenue generating machine for decades. Initially the arguments regarding preserving the integrity of “amateurism” and the notion of the “student-athlete” allowed the status quo to hold. If that ever were the case, it clearly is not today. In substance, shape, form, and essence, these college athletes sacrifice much where others benefit disproportionately. The universities’ arguments of not being financially viable and the dire predictions of having to scuttle athletic programs is alarmist talk designed to squash what should have been done years ago. The money is there. The reasons for doing so are there. It is time for the NCAA and the universities that comprise her to do the right thing. The case for compensating the college athlete is clear.