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## Title IX and Social Media: Going Beyond the Law

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TITLE IX AND SOCIAL MEDIA:  
GOING BEYOND THE LAW

*Emily Suran\**

ABSTRACT

*The U.S. Department of Education is currently investigating over eighty colleges and universities for civil rights violations under Title IX. From a punitive standpoint, these investigations likely will have minimal impact. Indeed, since the Alexander v. Yale plaintiffs first conceived of Title IX in a sexual harassment context, the non-discriminatory principles of Title IX have proven disappointingly difficult to enforce. However, in today's world of grassroots social activism, Title IX has taken on a new, extralegal import. Title IX has become a rallying cry for college activists and survivors. Despite (or perhaps because of) its limitations as a law, it has prompted an unprecedented shift in the cultural landscape. In this Note, I will examine the evolution of Title IX as a means to combat sexual harassment and sexual assault on college campuses.*

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## INTRODUCTION

Though projections vary, there is no question that sexual violence impacts far too many students on college campuses. Studies indicate that “as many as 25 to 28.5 percent of women and 14 percent of men may experience sexual assault while in college,” and 81 percent of all students report some form of sexual harassment over the course of their school careers.<sup>1</sup> A recent report from the White House asserts that one in five college women are the victims of sexual assault.<sup>2</sup> Since many college-related incidents go unreported, the statistics approximating how many women experience harassment and assault likely underestimate the true scope of the problem.<sup>3</sup> A National Institute of Justice study found that college women are at greater risk for rape and other forms of sexual assault than women in the general population.<sup>4</sup> But despite the clear pervasiveness of the problem, an estimated 63 percent of universities shirk their legal responsibility to address sexual violence.<sup>5</sup>

The National Institute of Justice has estimated that fewer than 5 percent of the incidents that could qualify as harassment or rape are reported to law enforcement officials.<sup>6</sup> Women fail to report rapes or other incidents of victimization for a variety of reasons.<sup>7</sup> One, which I will explore in this Note, is the common belief that the legal or administrative outcomes, if any,

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1. WOMEN FACULTY FORUM, REPORT OF THE WOMEN FACULENABLE TY FORUM COUNCIL ON SEXUAL MISCONDUCT AT YALE 6 (2009) (internal citations omitted), *available at* [http://provost.yale.edu/sites/default/files/files/WFFReportonSexualMisconductatYale\\_2009.pdf](http://provost.yale.edu/sites/default/files/files/WFFReportonSexualMisconductatYale_2009.pdf).
  2. 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 2, 5 (2014) [hereinafter NOT ALONE], *available at* [http://www.whitehouse.gov/sites/default/files/docs/report\\_0.pdf](http://www.whitehouse.gov/sites/default/files/docs/report_0.pdf).
  3. *Measuring Frequency*, NAT'L INST. JUSTICE (Oct. 1, 2008), <http://www.nij.gov/topics/crime/rape-sexual-violence/campus/pages/measuring.aspx>.
  4. BONNIE S. FISHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, NAT'L INST. OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 1 (2000), *available at* <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.
  5. Press Release, Congresswoman Jackie Speier, Congresswomen Speier and Maloney Call for Education Department to Act on Campus Sexual Assault (Jan. 29, 2014) [hereinafter Congresswomen Speier and Maloney Call for Education Department to Act on Campus Sexual Assault], *available at* [http://speier.house.gov/index.php?option=com\\_content&view=article&id=1339%3Acongresswomen-speier-and-maloney-call-for-education-department-to-act-on-campus-sexual-assault&catid=20&Itemid=14](http://speier.house.gov/index.php?option=com_content&view=article&id=1339%3Acongresswomen-speier-and-maloney-call-for-education-department-to-act-on-campus-sexual-assault&catid=20&Itemid=14).
  6. FISHER ET. AL., *supra* note 4, at 23.
  7. The U.S. Department of Justice published a report in 2000 that presents data explicating the prevalence and nature of sexual violence against college-aged women. Pertinently, the researchers found that, “[w]omen may not define a victimization as a rape for many reasons (such as embarrassment, not clearly understanding the legal

will not be worth the stress of the process for an individual survivor.<sup>8</sup> Studies have confirmed that underreporting on college campuses relates to the fact that the victim and perpetrator often know each other.<sup>9</sup> College-age victims may face complicated social ramifications after pursuing disciplinary or legal action against a classmate or peer. The potential fallout that might accompany an unsatisfactory administrative response understandably incentivizes coping in silence.<sup>10</sup> And so, college-aged victims—the largest category of victims—are particularly disinclined to report crimes committed against them.<sup>11</sup>

In 1977, a group of female students and one male professor rerouted history by giving campus sexual violence a legal hook. As co-plaintiffs against Yale University, these individuals prompted the evolution of sex discrimination claims by invoking Title IX of the Educational Amendments of 1972 (“Title IX”) as a legal shield against sexual harassment and violence in educational institutions.<sup>12</sup> The suit failed on technical grounds, but it established the foundation for all future sexual harassment lawsuits against schools.<sup>13</sup> Moreover, it started an invaluable conversation about the responsibility of schools to protect their students from sexual discrimination.

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definition of the term, or not wanting to define someone they know who victimized them as a rapist) or because others blame them for their sexual assault.” See *id.* at 15.

8. For examples of how the process produces stress, see *id.* at 23 (“[A]nswers included not wanting family or other people to know about the incident, lack of proof the incident happened, fear of reprisal by the assailant, fear of being treated with hostility by the police, and anticipation that the police would not believe the incident was serious enough and/or would not want to be bothered with the incident.”).
9. *Id.* at 17 (“For both completed and attempted rapes, about 9 in 10 offenders were known to the victim. Most often, a boyfriend, ex-boyfriend, classmate, friend, acquaintance, or coworker sexually victimized the women.”). See generally *Most Victims Know Their Attacker*, NAT’L INST. JUST. (Oct. 1, 2008), <http://www.nij.gov/topics/crime/rape-sexual-violence/campus/pages/know-attacker.aspx> (“About 85 to 90 percent of sexual assaults reported by college women are perpetrated by someone known to the victim; about half occur on a date.”).
10. In June 2014, James Madison University found three men responsible for sexually assaulting and harassing a female student and widely sharing a video of the attack. The University punished these men by expelling them after graduation. Tyler Kingkade, *James Madison University Punished Sexual Assault with ‘Expulsion After Graduation’*, HUFFINGTON POST BREAKING SILENCE BLOG (June 18, 2014, 7:43 PM), [http://www.huffingtonpost.com/2014/06/18/james-madison-university-sexual-assault\\_n\\_5509163.html](http://www.huffingtonpost.com/2014/06/18/james-madison-university-sexual-assault_n_5509163.html) (last visited Nov. 22, 2014). (“Butters said she has decided to withdraw from the university. Her grades had slipped during the adjudication process, causing her to lose financial aid.”).
11. FISHER ET. AL., *supra* note 4, at 23.
12. *Alexander v. Yale Univ.*, 459 F. Supp. 1 (D. Conn. 1977), *aff’d*, 631 F.2d 178 (2d Cir. 1980).
13. Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 814–15 (2002) (arguing that the sexual

In this Note, I will focus on Title IX complaints rather than Title IX lawsuits, for reasons I will explain in Section I. These complaints have little legal force, but they send a powerful message not only to schools, but also to all the college-aged survivors who might otherwise succumb to isolation and the resultant victim-blaming mentality.<sup>14</sup> Title IX complaints make it clear that sexual violence is more than an individual problem; it's a cultural one.

I will demonstrate how online social networks have seized and propagated an idea of Title IX as a form of protection against sexual violence that has resulted in a watershed moment for college-aged survivors of sexual violence. While Title IX with regard to sexual harassment and assault on college campuses does not have much legal force qua law, it has developed a vast sociological force over the past several years.<sup>15</sup> Title IX's legal limitations became the source of its power. Frustration with Title IX bred and continues to breed grassroots unrest, which, in the age of social media, has resulted in real and vital changes in the social and cultural fabric of our country.<sup>16</sup>

In Section I, I discuss the history of Title IX as a legal basis for combating sexual harassment and violence on college campuses. I also explore the history of 'rape culture' and how Title IX has been envisaged as a legal means of changing that culture. In Section II, I examine the legal limitations of Title IX and focus on the case history relating to peer-on-peer sexual harassment. I posit that the Supreme Court's narrow interpretation of Title IX with reference to this particular type of harassment has contributed to the popularity of Title IX complaints as a legal alternative. In Section III, I discuss the new generation of Title IX complaints. I present two case studies: first, the 2011 Title IX complaint filed against Yale University, a private institution; second, the 2013 Title IX complaint filed against the University of North Carolina at Chapel Hill, a public institution. While Title IX complaints have been filed at many schools across the country, I chose these two because of their status as well-respected pillars of learning and because of the high level of media attention both complaints attracted. In Section IV, I discuss the effect social networks have had on the Title IX movement. I argue that Title IX in the age of social media has become imbued with powerful moral force well beyond its legal scope.

In my conclusion, I contend that social media has become the enforcement power Title IX lacks. Social media seizes on the folk morality of

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harassment doctrine did not arise when legislatures passed sexual discrimination laws, but rather that sexual harassment law is the result of common law, built up slowly, one case at a time).

14. *See infra* Section IV.

15. *See infra* Section IV.

16. *See infra* Section IV.

Title IX, which, to put it simply, is the idea that Title IX is supposed to combat sexual violence on college campuses. The pervasiveness of online social networks enable student activists to connect in such a way that schools nationwide are on alert: a Title IX complaint could hit you next. While Title IX complaints have not been legally intimidating in the past, the folk morality behind them has become so pervasive and persistent that the legal landscape is changing in response. If Title IX had substantial legal force originally, then it would not have inspired the vigorous grassroots activism of the past several years and so it never would have achieved this immense cultural impact. The symbolic value of Title IX in an age where universities are highly accountable to a vigilant and informed national public has compelled widespread preemptive and reactive policy reforms. Title IX might not have had legal teeth to start, but the mere existence of the law has given survivors a platform from which to speak—and the voice of the people has power to change a culture more than any law.

## I. HISTORICAL BACKGROUND

### A. *What is 'Rape Culture'?*

Rape was once relegated to nightmares of dark streets, to stranger danger, and to certain types of women.<sup>17</sup> But along with the sexual revolution came an evolution in the understanding of rape.<sup>18</sup> In the early 1980s, new conceptions of rape entered the public consciousness: acquaintance rape, date rape, and marital rape.<sup>19</sup> Rape was no longer something strange, but something recognizable and often perpetrated by someone familiar. People began to understand that rape is not an aberration of our culture, but rather, it is a part of it.

The origin and definition of the term, 'rape culture,' is murky, but the phrase has made its way into popular culture.<sup>20</sup> Blackwell's *Encyclopedia of Sociology* proposes "that the term rape culture emerged simultaneously from a number of sources in the 1970s as a part of the anti-rape crusade of the women's movement."<sup>21</sup> Importantly, rape culture is not a scare-tactic

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17. See NICOLA GAVEY, *JUST SEX?: THE CULTURAL SCAFFOLDING OF RAPE* 1 (Jane Ussher ed., Routledge 1st ed. 2005).

18. *Id.* ("A new era of sexual permissiveness relaxed the relationship between sex and commitment. . . . On a different, but ultimately related, front there has also been a dramatic shift in how we understand rape.").

19. *Id.*

20. *Rape Culture*, BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY (George Ritzer ed., 2007) [hereinafter *Rape Culture*, BLACKWELL].

21. *Id.*

term; it demonstrates the reality of rape in a gender-biased society.<sup>22</sup> “A cultural or societal explanation of rape moved causation from a micro to a macro level.”<sup>23</sup> The growth of vocal feminism brought attention to the fact that rape does not just impact individuals in isolation. As long as sexual inequality and gendered power dynamics endure, rape will be a systemic and collective problem.<sup>24</sup> Some researchers have suggested that rape culture is really just a subculture of a generally violent culture, or perhaps a circumstance created by certain social settings like gangs and fraternities.<sup>25</sup> However, while rape culture might be more prevalent in certain social milieus than others, “everyday taken-for-granted normative forms of heterosexuality work as a cultural scaffolding for rape.”<sup>26</sup> Rape culture, then, is not a subculture at all; it’s the prevailing heterosexual power hierarchy to which we have all been inured.

### *B. Using the Law to Fight Culture*

The novel conceptualization of rape culture laid the groundwork for a pivotal moment in legal history. The term ‘rape culture’ began to gain recognition around the same time as the term ‘sexual harassment.’<sup>27</sup> The term ‘sexual harassment’ came about during a 1974 consciousness-raising session that feminist writer Lin Farley held as part of a Cornell University course on women and work.<sup>28</sup> Sexual harassment used to be considered par for the course of being a woman. No one questioned the right of men to harass or the duty of women to grin and bear it.<sup>29</sup> But as more women entered the workforce, it became clear that taking sexual harassment for granted as a

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22. Peggy Reeves Sanday, *The Socio-Cultural Context of Rape: A Cross-Cultural Study*, 37 J. SOC. ISSUES 5 (1981) (showing that tribal societies characterized by sexual equality, gender role complementarities, and an absence of interpersonal violence are also free of rape).

23. *Rape Culture*, BLACKWELL, *supra*, note 20.

24. *See generally* TRANSFORMING A RAPE CULTURE (Emilie Buchwald, Martha Roth & Pamela Fletcher eds., Milkweed Editions 1st ed. 1993) (explaining rape culture as “a complex of beliefs that encourages male sexual aggression and supports violence against women. . . . a society where violence is seen as sexy and sexuality as violent.”).

25. *See, e.g.*, A. Ayres Boswell & Joan Z. Spade, *Fraternities and Collegiate Rape Culture: Why are Some Fraternities More Dangerous Places for Women?*, 10 GENDER & SOC’Y 133, 133–147 (1996).

26. GAVEY, *supra* note 17, at 2.

27. *See id.* at 35 (“By the 1980’s feminist analyses of the rape culture had made their way into mainstream social psychology.”).

28. Reva B. Siegel, *Introduction* to DIRECTIONS IN SEXUAL HARASSMENT LAW 8–9 (Catharine A. MacKinnon & Reva B. Siegel eds., Yale Press 2004).

29. *See* GAVEY, *supra* note 17 (“Women, supposedly, gained a new sexual freedom. With this new freedom has come more talk of women’s sexual rights and pleasures. Many

part of gendered life would be problematic. These women sought work as equally productive members of society, and sexual harassment was an insidious means of perpetuating inequality in the workplace.<sup>30</sup> The idea of sexual harassment as a form of sexual discrimination began to germinate.

While sexual harassment was a pervasive cultural practice and therefore difficult to upend, sexual discrimination was against the law under Title VII.<sup>31</sup> And so, with a bit of legal maneuvering, women in the 1970s finally found a way to fight the abuse that they long considered as just another aspect of a female-gendered life.<sup>32</sup> Although the prevailing culture was firmly against them, the law was not. Feminist lawyer Catharine MacKinnon, along with Lin Farley, led the call for legal condemnation of the cultural perpetuation of sexual inequity.<sup>33</sup> Catharine MacKinnon's groundbreaking 1979 book, "Sexual Harassment of Working Women," critically influenced the legal system's synthesis of sexual harassment claims and antidiscrimination discourse.<sup>34</sup> These two women convincingly argued that workplace harassment and assault were eroticized forms of sex discrimination, and they demanded that the American legal system recognize it as such.<sup>35</sup>

While increasing numbers of women were entering the workforce, increasing numbers of women also were entering coeducational secondary schools.<sup>36</sup> Not surprisingly, these women faced similar types of sex discrimination. Title IX of the Education Amendments of 1972 is a short statute that, in pertinent part, reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."<sup>37</sup> Title IX is modeled after Title VI, which prohibits discrimination based on race, color, or national origin.<sup>38</sup> Congress passed Title IX on June 8, 1972, and President Nixon signed it

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now agree that what was previously just ordinary sex was not always fair and just for women.").

30. Siegel, *supra* note 28.

31. 42 U.S.C.A. § 2000e.

32. Siegel, *supra* note 28 at 2 ("For the first time in history, women extracted from law the means to fight for a practice with which they had been struggling for centuries.").

33. *Id.* at 8–9.

34. *Id.*

35. *Id.* at 8–10.

36. See *Years That Men's Colleges Became Co-ed*, COLLEGEEXPRESS.COM, <http://www.collegeexpress.com/lists/list/years-that-mens-colleges-became-co-ed/366/> (listing dates when colleges became co-ed) (last visited Nov. 19, 2014).

37. 20 U.S.C.A. § 1681(a).

38. 40 U.S.C.A. § 2000d.



into law on June 23, 1972.<sup>39</sup> Initially, Title IX's primary application concerned equalizing athletic opportunities and facilities.<sup>40</sup> But in the spring of 1977, five female undergraduates and one male faculty member at Yale University decided to use Title IX in a totally new way: to combat sexual harassment.<sup>41</sup>

The initial idea for the Title IX suit grew from a survey conducted by the Yale Undergraduate Women's Caucus for a report on the status of female students at Yale a decade after coeducation.<sup>42</sup> While administering the survey, the members of the caucus noticed alarming similarities: repeat offenders, no consequences, and deep shame.<sup>43</sup> A senior Yale administrator told one of the more vocal members of the caucus, Ann Olivarius, that she would be sued for defamation if she publicized her findings on the clearly problematic relationships between certain male faculty members and their female students.<sup>44</sup> Shaken by the threat, Ms. Olivarius went to the New Haven Law Collective for help; from there, she made history.

The New Haven Law Collective took Ms. Olivarius's story, assembled a group of co-plaintiffs, and filed a lawsuit against Yale University.<sup>45</sup> The lawsuit asserted that Yale's failure to adequately protect female students from sexual harassment and to provide an adequate reporting system amounted to violations of Title IX.<sup>46</sup> The complainants asserted rape culture was stifling Title IX's intended effect—to equalize learning opportunities.<sup>47</sup> “Central to their claims was their understanding that, because of sexual harassment, none of the plaintiffs received the education she had come to Yale to get.”<sup>48</sup> The lawsuit was a gamble: the legal claim that sexual harassment in an educational setting could constitute sex discrimination in

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39. 118 CONG. REC. 4953, 5802–03 (1972).

40. See Jennifer Frost, *Title IX of the 1972 Education Amendments*, 6 GEO. J. GENDER & L. 561, 565 (2005).

41. Ann E. Simon, *Alexander v. Yale University: An Informal History*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 51, 51 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

42. *Id.* at 52; Ann Olivarius, *Title IX: Taking Yale to Court*, NEW J. YALE (Apr. 18 2011), <http://www.thenewjournalat Yale.com/2011/04/title-ix-taking-yale-to-court>.

43. Olivarius, *supra* note 42.

44. Simon, *supra* note 41, at 52.

45. *Id.* at 52–53.

46. *Alexander v. Yale Univ.*, 459 F. Supp. 1, 2 (D. Conn. 1977), (explicating the claim against the University and granting the University's motion to dismiss for all except one of the plaintiffs), *aff'd*, 631 F.2d 178 (2d Cir. 1980).

47. *Rape Culture*, BLACKWELL, *supra* note 20 (“A rape culture is a culture of fear for women, one in which girls at a very early age internalize fear and a sense of restriction simply because they are female.”).

48. Simon, *supra* note 41, at 51.

violation of Title IX had never been tested before.<sup>49</sup> The New Haven Law Collective analogized the claim to the just-barely established claim that sexual harassment in employment settings constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964.<sup>50</sup>

A motion to dismiss led to an abrupt end to *Alexander v. Yale*, but the case succeeded on a more fundamental level by opening up the conversation about sexual harassment in education.<sup>51</sup> In granting the motion to dismiss, the district court concluded that sexual harassment in education could be actionable as a form of sex discrimination in violation of Title IX.<sup>52</sup> The goals of the *Alexander v. Yale* complainants were modest: they merely wanted a system for reporting harassment and assault and an internal grievance board for resolving claims.<sup>53</sup> In response to the lawsuit, Yale voluntarily created a Sexual Harassment Grievance Board, which functioned as the primary body for handling sexual misconduct complaints until 2011.<sup>54</sup>

Although *Alexander v. Yale* established an important and novel legal principle, it did not inspire a particularly robust legal history.<sup>55</sup> In fact, between 1977 and 2003, only one published case involving undergraduates cited *Alexander v. Yale*.<sup>56</sup> In the next section, I will explore possible reasons why *Alexander v. Yale* did not set a precedent for more university students to file lawsuits based on Title IX.

49. *Id.* at 52.

50. *See id.* (“The decisive turn in the recognition of the validity of the [Title VII] claim did not begin to occur until the summer of 1977, after we filed *Alexander*.”).

51. Olivarius, *supra* note 42.

Our suit was thrown out on technical grounds. Mostly because all of the plaintiffs had graduated, we were found to be ineligible to bring suit, and one woman was found not to have a “quid pro quo” case because the sexual proposition she endured from a male professor did not actually result in a better grade. However, our legal argument was upheld and found wide acceptance in subsequent cases. In the next five years, hundreds of universities across the country instituted grievance procedures.

52. Simon, *supra* note 41, at 54.

53. Olivarius, *supra* note 42.

54. Alexandra Brodsky, *Was Yale Really Cleared on Sexual Harassment?*, SLATE XX FACTOR BLOG (June 18, 2012, 4:34 PM), [http://www.slate.com/blogs/xx\\_factor/2012/06/18/was\\_yale\\_really\\_cleared\\_on\\_sexual\\_harrassment\\_.html](http://www.slate.com/blogs/xx_factor/2012/06/18/was_yale_really_cleared_on_sexual_harrassment_.html) noting that Yale replaced the Sexual Harassment Grievance Board after the 2011 Title IX complaint with a university-wide committee) (last visited Nov. 22, 2014).

55. *See* Simon, *supra* note 41, at 55–56 (presenting three reasons for the lack of legal history: (1) It is inherently difficult to sue a school as a student; (2) The judiciary took the principles driving these sexual harassment cases for granted, precluding any extensive doctrinal development; and (3) Many schools preempted potential claims by establishing formal policies and procedures regarding sexual harassment).

56. *Id.* at 55.

## II. THE LIMITATIONS OF TITLE IX

*“While Title IX declared, in essence, that gender discrimination was to be a thing of the past, it problematically did not provide a procedural mechanism for accomplishing this goal absent universal, voluntary compliance.”*<sup>57</sup>

Title IX can be the basis of a complaint or a lawsuit. This Note specifically examines Title IX complaints, but a brief explanation of the differences between the two tactics is helpful to understand the current rise of Title IX complaints.

When a school becomes the target of a Title IX complaint, the Office for Civil Rights ostensibly takes responsibility for the case.<sup>58</sup> In practice, however, the schools in question often cut deals with the Office for Civil Rights in order to preempt an external investigation.<sup>59</sup> The settlements often entail the school committing to conducting an internal investigation and reporting back to the Office.<sup>60</sup> A New York Times article in 2011 revealed that since Congress passed Title IX in 1972, the Office for Civil Rights has never punished a school by taking away its federal funding.<sup>61</sup> Removing federal funding is really the only punitive action available. The Office for Civil Rights cannot award compensation to the victim(s) and will not compel the school to allocate funds toward addressing sexual harassment.<sup>62</sup> Moreover, any result a Title IX complaint yields is meant to be school-specific and not precedential.<sup>63</sup>

Title IX lawsuits, in contrast, have the potential to set precedents that bind all schools that receive federal funding and can result in a wider range of relief than can complaints. Victims may file suit one to six years after the

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57. Charles L. Rombeau, *Barnes v. Gorman and Mercer v. Duke University: The Availability of Punitive Damages in Title IX Litigation*, 6 U. PA. J. CONST. L. 1192, 1194–95 (2003).

58. Katie Thomas, *Long Fights for Sports Equity, Even With a Law*, N.Y. TIMES, July 29, 2011, available at [http://www.nytimes.com/2011/07/29/sports/review-shows-title-ix-is-not-significantly-enforced.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/07/29/sports/review-shows-title-ix-is-not-significantly-enforced.html?pagewanted=all&_r=0).

59. *Id.*

Schools that find themselves the subject of a complaint can cut an investigation short by signing an agreement with the Office for Civil Rights. In many cases, the agreements do not include specific changes to the programs. Instead, the office asks the schools to investigate themselves and report their findings months, and sometimes years, later.

60. *Id.*

61. *Id.*

62. *Pros and Cons of Filing a Title IX Lawsuit*, KNOW YOUR IX, <http://knowyourix.org/title-ix/pros-and-cons-of-filing-a-title-ix-lawsuit/> (last visited Nov. 22, 2014).

63. *Id.*

alleged violation depending on the jurisdiction. As might be expected, Title IX lawsuits have more stringent requirements than Title IX complaints. A victim must be the one to file a Title IX lawsuit, whereas anyone can sign onto a Title IX complaint.<sup>64</sup> In addition to the solidarity aspect, many students opt to file a complaint rather than a lawsuit because filing a complaint with the Office for Civil Rights is free.<sup>65</sup> Even if a Title IX lawsuit ends with a favorable outcome for the victim, the lawsuit will be expensive, and the prospect of a favorable outcome is dim. To succeed in a Title IX lawsuit, the victim must prove that the school had actual knowledge of the harassment and deliberately ignored it.<sup>66</sup>

To understand the limitations of Title IX, it is important to recognize how difficult courts have made it for plaintiffs to obtain relief through a Title IX lawsuit. Courts recognize three types of sexual harassment: quid-pro-quo, hostile environment, and peer-to-peer.<sup>67</sup> Quid-pro-quo harassment arises “when the receipt of benefits or the maintenance of the status quo is conditioned on acquiescence to sexual advances.”<sup>68</sup> A hostile sexual environment exists only when “(1) plaintiff belongs to a protected group; (2) plaintiff was subjected to harassment; (3) the harassment was based on sex; (4) the harassment was so pervasive or severe that it altered the conditions of plaintiff’s education; and (5) [there was] knowledge by school officials.”<sup>69</sup> Peer-to-peer sexual harassment is a specific sort of hostile environment claim; it “occurs when students are subjected to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment.”<sup>70</sup> Since the two complaints I present as case studies in Section III are based on peer-to-peer sexual harassment claims,<sup>71</sup> I will focus on the case law relevant to this type of sexual harassment, in particular.

The majority opinion in *Davis Next Friend LaShonda D. v. Monroe County Board of Education* defines the standard for liability in peer-to-peer sexual harassment.<sup>72</sup> In that case, a minor girl experienced continued sexual harassment by a peer student on school grounds.<sup>73</sup> The girl reported the incidents to her teachers and the school principal, but no disciplinary action

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64. *Id.*

65. *Id.*

66. *Id.*

67. See *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220, 1226 n.7 (7th Cir. 1997).

68. *Mary M.*, 131 F.3d at 1226 n.7.

69. *Mary M.*, 131 F.3d at 1228.

70. *Mary M.*, 131 F.3d at 1226 n.7.

71. As opposed to quid-pro-quo.

72. *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999).

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

resulted.<sup>74</sup> The girl's grades dropped, and she experienced thoughts of self-harm.<sup>75</sup> The District Court dismissed the girl's Title IX claim but the Eleventh Circuit reversed on appeal.<sup>76</sup> The Circuit Court took a cue from Title VII jurisprudence and reasoned, "Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment."<sup>77</sup> The Supreme Court granted certiorari over the case in order to resolve the question of whether "a recipient of federal educational funds can be liable in a private damages action arising from student-on-student sexual harassment."<sup>78</sup> In the relevant part of the decision, the Supreme Court held that federal-funding recipients can only be liable for direct damages resulting from peer-to-peer sexual harassment when there is deliberate indifference with regard to known sexual harassment that is so severe that it bars the victim's access to equal educational opportunities and benefits.<sup>79</sup> In addition, the harassment must occur in a context that is under the control of the federal funding recipient, i.e. the school.<sup>80</sup> The Court explicitly stated that peer harassment "is less likely to satisfy these requirements than is teacher-student harassment."<sup>81</sup> The Court further circumscribed the potential of Title IX by upholding the right of school administrators to use discretion in dealing with harassment and by deeming that deliberate indifference occurs only where the funding recipient responds to harassment in a way that is "clearly unreasonable."<sup>82</sup> Most damningly for any potential Title IX plaintiffs, the majority declared that so long as the school is not acting in a way that is "clearly unreasonable," Title IX imposes absolutely no requirement that a school actually remedy the peer harassment.<sup>83</sup>

Notably, the deliberate indifference standard for school liability under Title IX is more lenient than the agency and negligence standards for employer liability under Title VII.<sup>84</sup> Therefore, the law does not protect stu-

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74. *Davis*, 526 U.S. at 633–34.

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

76. *Davis*, 526 U.S. at 636.

77. *Davis*, 526 U.S. at 636 (quoting 74 F.3d 1186, 1193 (11th Cir. 1996), *vacated*, 91 F.3d 1418 (11th Cir. 1996) and *on reh'g*, 120 F.3d 1390 (11th Cir. 1997)).

78. *Davis*, 526 U.S. at 637–38.

79. *Davis*, 526 U.S. at 650–54.

80. *Davis*, 526 U.S. at 645.

81. *Davis*, 526 U.S. at 653.

82. *Davis*, 526 U.S. at 648–49.

83. *See Davis*, 526 U.S. at 648–49.

84. Karen E. Edmonson, Note, *Davis v. Monroe County Board of Education Goes to College: Holding Post-Secondary Institutions Liable under Title IX for Peer Sexual Harassment*, 75 NOTRE DAME L. REV. 1203, 1217 (2000) (citing Jeffery A. Thaler, *Are Schools Protecting Children from Harassment?*, 35 TRIAL 32, 32 (1999)).

dents—who are arguably more vulnerable to sexual harassment—as well as it does employees.<sup>85</sup>

The Court created the *Davis* standard of liability for peer-to-peer sexual harassment in the context of a primary school, but the standard also applies to institutions of higher education.<sup>86</sup> The dissent in *Davis* raised concerns that the majority created standards easy to allege and prove—concerns that have not come to fruition. But more interestingly for the purpose of this Note, the dissent pointed out a few reasons why the application of the standard to a university might be problematic.<sup>87</sup> Primarily, universities do not have control over their students the way lower schools do, making the majority’s standard unworkable.<sup>88</sup> Karen Edmonson, writing while a student at Notre Dame Law School, rejects this criticism. She argues that the majority opinion sets a standard with sufficient flexibility such that it can be used in a university context.<sup>89</sup> Contrary to the dissent, Edmonson contends that the majority does not suggest a school must exercise complete control over its student body in order for it to incur liability.<sup>90</sup> Rather, the majority considers the extent of control as a factor in determining whether a school’s response is reasonable.<sup>91</sup> She argues that universities cannot exercise the control of a primary school, and so a reasonable university response to harassment inherently will be lower.<sup>92</sup> While practical realities make universities unable to control the school environment to the same extent as primary schools, the *Davis* standard, as Edmonson understands it, is problematic. *Davis* provides a reasonability loophole that grants leave for post-secondary schools not to act when they technically could. Under the *Davis* standard, winning a Title IX lawsuit against a post-secondary school is exceedingly difficult because a court using the *Davis* standard will allow universities the maximum leeway for reasonability.

Indeed, the first time a court applied the *Davis* standard in a university context, it determined that peer-to-peer sexual harassment would be

85. *Id.*

86. *See generally id.*

87. *Id.* at 1218.

88. *Davis*, 526 U.S. at 648–49.

89. Edmonson, *supra* note 84, at 1219.

90. *Id.* (“A close reading shows, however, that the majority opinion does not state that all schools must have complete control over every student’s actions throughout the day. Common sense tells us that this is impossible . . .”).

91. *Id.*, at 1220. Edmonson significantly alters the majority’s language. The majority uses a “not clearly unreasonable” standard, which is not necessarily equivalent to “reasonable.”

92. *Id.*

unlikely to satisfy the requirements, just as the *Davis* majority predicted.<sup>93</sup> Edmonson admits that the *Davis* standard sets up “a difficult challenge to prove a university liable under Title IX.”<sup>94</sup> Regardless, she supports the “bright-line standard for all schools” inclusive of primary, secondary and post-secondary institutions because, in her opinion, it settles confusion.<sup>95</sup> However, a standard that grants colleges and universities—the places with the greatest concentration of peer-to-peer sexual harassment and assault—the very widest latitude to ignore sexual misconduct completely misunderstands the uniquely insidious nature of campus sexual violence.<sup>96</sup>

Subsequent decisions further stunted the legal potential of Title IX. In *Mercer v. Duke University*, the Fourth Circuit opined that even intentional violations of Title IX could not give rise to punitive damages.<sup>97</sup> By dismissing an entire category of damages, the court essentially removed the incentive for schools to address Title IX violations in an aggressive manner. Without the potential for punitive damages, “schools may simply find that paying compensatory damages is cheaper than complying with Title IX.”<sup>98</sup> While concern for reputation might seem like enough to incentivize a university, schools easily can mitigate damage by pointing to the lack of legal fallout.<sup>99</sup>

Legal precedent has rendered Title IX a decidedly unattractive basis for a lawsuit. And so, despite the unavailability of direct relief or compensatory damages, complaints based on Title IX actually have more potential to promote reform.

The Office for Civil Rights has the discretion to handle Title IX complaints as it sees fit, and many advocates of campus safety have expressed concern that this discretion has led to weak enforcement.<sup>100</sup> Nancy Chi

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93. In *Adusumilli v. Illinois Institute of Technology*, the plaintiff actually brought a Title IX suit alleging sexual harassment by both professors and peers. No. 98-3561, 1999 WL 528169, at \*1 (7th Cir. July 21, 1999). Since she only reported incidents involving her peers to her school, the court declined to even consider the professor-student sexual harassment when making their decision to affirm the dismissal of the case. *Id.*

94. Edmonson, *supra* note 84, at 1232.

95. *Id.*

96. See generally FISHER ET. AL., *supra* note 4.

97. Rombeau, *supra* note 57, at 1192.

98. *Id.*

99. The effect of social media heavily compromises this tricky balance. As I will demonstrate in Sections IV and V, the impact of students speaking out on the Internet and creating grassroots campaigns to enforce Title IX has made it impossible for universities not to take Title IX seriously.

100. See Allie Gragreen, *Tide Shifts on Title IX*, INSIDE HIGHER ED (Apr. 24, 2012), <http://www.insidehighered.com/news/2012/04/24/ocr-dear-colleague-letter-prompts-big-change-sexual-assault-hearings-unc> (“The [Dear Colleague] letter, issued shortly after the department made waves with multiple settlements stemming

Cantalupo, a current Researcher at Georgetown Law and a Research Fellow with the Victim Rights Law Center, contends that the lackluster legal enforcement of Title IX encourages schools to ignore sexual misconduct on their campuses.<sup>101</sup> In response to these concerns, the Department of Education issued a Dear Colleague letter (“DCL”) in 2011 to elucidate how the Department should examine and enforce Title IX complaints.<sup>102</sup> The 2011 DCL supplemented a 2001 document titled, “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,” issued by the Office of Civil Rights.<sup>103</sup> The DCL elaborates how a campus can be a hostile educational environment.<sup>104</sup> The standard is low: one single instance of sexual violence is sufficient to create a hostile educational environment. But a hostile educational environment is not necessarily a violation of Title IX; the environment must be so hostile that it interferes with a student’s ability to learn or participate in educational or extracurricular activities.<sup>105</sup> The DCL importantly sets some minimum requirements: Every school receiving federal funding must have a Title IX Coordinator whose contact information is easily accessible; every school must publish a grievance procedure outlining the complaint, investigation, and disciplinary process for addressing sex discrimination in its various forms; and schools must handle Title IX complaints promptly.<sup>106</sup> The DCL also reminds schools of their obligations under the Clery Act<sup>107</sup> to inform students of their reporting options.<sup>108</sup> The DCL is not law, but it provides guidance to schools seeking to comply with Title IX, and it sets

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from sexual harassment cases, was part of a crackdown of sorts by the Obama administration on Title IX violations.”).

101. Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 227 (2011) (examining both Title IX and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”), and concluding that neither successfully addresses the issue of peer-to-peer sexual violence on college campuses and both perversely exacerbate a series of “information problems”).
102. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER (2011) [hereinafter DEAR COLLEAGUE LETTER], available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.
103. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.
104. DEAR COLLEAGUE LETTER, *supra* note 102.
105. *Id.*
106. *Id.*
107. 20 U.S.C.A. § 1092. Commonly known as the Clery Act, this federal law was enacted in 1990 for the purpose of providing college and university students with important information about campus crime and security policies.
108. DEAR COLLEAGUE LETTER, *supra* note 102.



expectations for students on how their schools ought to be complying with the law.<sup>109</sup>

Title IX, far from being the envisaged law to end gender discrimination, has been disappointing. As the basis of a lawsuit, the courts have interpreted Title IX's requirements so narrowly that plaintiffs rarely achieve positive outcomes. And where Title IX serves as the basis of a complaint, the Office for Civil Rights has yet to prove its grit in enforcing a positive outcome for complainants.<sup>110</sup>

### III. THE NEW GENERATION OF TITLE IX COMPLAINTS: CASE STUDIES

Today's Title IX complainants are well-connected and well-versed in their legal rights. The *Alexander v. Yale* plaintiffs were utilizing an untested legal theory and had only moderate hopes for a reporting system.<sup>111</sup> The current generation of complainants, conversely, includes staunch activists who know the letter of the law and the power of folk morality. These women (and men) are weary of moderate requests; they demand nothing short of the overthrow of rape culture.<sup>112</sup>

In this section, I will examine two high-profile Title IX complaints to provide a representative look at how these complaints arise and what impact they might have.

#### A. Yale University

*"I don't think that the sexual culture is worse here than it is at other places . . . but the fact that we seem to have one incendiary, miso-*

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109. In Section IV, I will discuss how the federal government's rhetoric regarding Title IX has become stronger since the 2011 DCL.

110. Thomas, *supra* note 58.

The Office for Civil Rights certainly has the power to enforce the law: any school that is found to be violating Title IX risks losing its federal funds. But that punishment has never been used since Congress passed the law in 1972. And the office cannot cite any instance in which a case of suspected discrimination against female athletes was referred to the justice department for additional action. The situation has led many to ask how a federal law can be effective if it is not significantly enforced.

111. Olivarius, *supra* note 42.

112. Alissa Quart, *The New Weapon Against Campus Rape*, TAKEPART (Nov. 11, 2013), <http://www.takepart.com/article/2013/11/11/new-weapon-against-rape-on-campus> ("This activism is unprecedented and very organized," says Harvard Law School professor Diane Rosenfeld of the efforts of Brodsky and others.").

*gynistic act a year seems to say that the university isn't being punitive enough against these large-scale activities.*<sup>113</sup>

On March 30, 2011, sixteen Yale students and recent alumni sent a press release to the Yale Daily News.<sup>114</sup> By the next morning, the press release became common knowledge to everyone on campus, and on Friday afternoon, top school administrators made their first official statements.<sup>115</sup> The press release revealed that on March 15, twelve women and four men joined together to file a Title IX complaint against Yale University.<sup>116</sup> The cosignatories were a mix of campus sexual violence survivors and allies.<sup>117</sup> Their complaint included some personal testimonies, but based on details released to the press (the complaint was never made public), it seems that the twenty-six-page complaint focused on campus-wide incidents.<sup>118</sup>

The complaint claimed that Yale's failure to adequately respond to numerous incidents of sexual misconduct on campus created such a sexually hostile environment that it negatively impacted all students.<sup>119</sup> The complaint cites three major on-campus incidents that targeted all female students: (1) In 2008, a group of Zeta Psi fraternity pledges photographed themselves outside the Yale Women's Center holding a sign that read "We Love Yale Sluts";<sup>120</sup> (2) In 2009, an e-mail titled, "The Preseason Scouting Report," circulated among athletic teams and fraternities—the 'Report' ranked 53 freshmen women according to how drunk one would have to be

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113. Lisa W. Foderaro, *At Yale, Sharper Look at Treatment of Women*, N.Y. TIMES, Apr. 7, 2011, [http://www.nytimes.com/2011/04/08/nyregion/08yale.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/04/08/nyregion/08yale.html?pagewanted=all&_r=0) (Student quote from Caroline Tracey, a Yale College sophomore).

114. Jordi Gassó, *Yale Under Federal Investigation for Possible Title IX Investigations*, YALE DAILY NEWS BLOG (Apr. 1, 2011), <http://yaledailynews.com/blog/2011/04/01/yale-under-federal-investigation-for-possible-title-ix-violations/> (last updated Apr. 2, 2011, 10:32 AM) [hereinafter Gassó, *Yale Under Federal Investigation*].

115. *Id.*

University spokesperson Tom Conroy said administrators had been verbally briefed by the Office for Civil [Rights] [sic] about its inquiry. Later that evening, Yale College Dean Mary Miller alluded to University regulations and past responses to instances of sexual misconduct in an e-mail sent to members of the Yale community.

116. *Id.*

117. One major difference between complaints and lawsuits based on Title IX is that complaints do not need to be brought by victims.

118. Foderaro, *supra* note 113.

119. Gassó, *Yale Under Federal Investigation*, *supra* note 114.

120. Lawrence Gipson, *A Year Later, Little Impact from 'Sluts' Controversy*, YALE DAILY NEWS BLOG (Feb. 16, 2009), <http://yaledailynews.com/blog/2009/02/16/a-year-later-little-impact-from-sluts-controversy/>.

to hook up with her;<sup>121</sup> and (3) In 2011, the Delta Kappa Epsilon pledge class marched on Old Campus (where ten of the twelve residential colleges house their freshmen) chanting, “No means yes; yes means anal.”<sup>122</sup> The complaint acknowledged the existence of the various committees and reports Yale had created in past years to address these and other incidents of sexual hostility, but asserted that these committees and reports had had minimal impact for individual students and, moreover, had failed to ameliorate the hostile culture on campus.<sup>123</sup>

A few complainants became public faces for the complaint, most notably Alexandra Brodsky, whose contributions as an activist I will explore further in Sections IV and V. Brodsky and her co-complainants knew they were making history with this complaint, and the choice to have some complainants speak candidly and non-anonymously to various news outlets was an influential one.<sup>124</sup> Though the complaint itself included some anonymous testimonies, the general choice to go for a high degree of transparency and publicity ensured that this complaint would have an impact no matter what the Office for Civil Rights (OCR) uncovered in its investigation.

Indeed, the University took the complaint and subsequent investigation seriously. On April 20, 2011, Yale’s President, Richard Levin, created an Advisory Committee on Campus Climate, which he tasked with exploring options and making recommendations on how Yale might most effectively combat sexual harassment, violence and other misconduct on campus.<sup>125</sup> The Advisory Committee ultimately released its report on September 15, 2011, after conducting extensive research into Yale’s specific history with sexual misconduct, reviewing a multitude of materials on best practices, and having countless conversations with members of the Yale

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121. Lauren Rosenthal & Vivian Yee, *Vulgar E-mail Targets Freshmen*, YALE DAILY NEWS BLOG (Sept. 3, 2009), <http://yaledailynews.com/blog/2009/09/03/vulgar-e-mail-targets-freshmen/> (“The e-mail classified the women into several categories, including ‘sobriety,’ ‘five beers,’ ‘ten beers,’ and ‘blackout’ . . .”).

122. Sam Greenberg, *DKE Chants on Old Campus Spark Controversy*, YALE DAILY NEWS CROSS CAMPUS BLOG (Oct. 14, 2010), <http://yaledailynews.com/crosscampus/2010/10/14/dke-chants-on-old-campus-spark-controversy/>.

123. Jordi Gassó, *Students, Admins React to Title IX Complaint*, YALE DAILY NEWS BLOG (Apr. 4, 2011), <http://yaledailynews.com/blog/2011/04/04/students-admins-react-to-title-ix-complaint/> [hereinafter Gassó, *Students, Admins react to Title IX complaint*] (discussing the motivation behind the Title IX suit filed in 2011).

124. Quart, *supra* note 112 (quoting Alexandra Brodsky, “Going public as a survivor means something very different now: If someone Googles me, they know a scary thing that happened freshman year. It’s a strange way to exist.”).

125. MARGARET H. MARSHALL, KIMBERLY M. GOFF-CREWS, LIBBY H. SMILY & SETH P. WAXMAN, REPORT TO THE PRESIDENT AND FELLOWS OF YALE UNIVERSITY OF THE ADVISORY COMMITTEE ON CAMPUS CLIMATE 31 (2011) (letter from President Levin to Margaret H. Marshall).

community.<sup>126</sup> The resultant Campus Climate report was supposedly not meant to preempt or in any way interfere with the OCR investigation.<sup>127</sup> Rather, the report was meant to provide Yale with a set of recommendations to create a better campus culture with regard to sexual climate and a basis for implementing said recommendations wholly separate from Title IX-specific considerations.<sup>128</sup> Recommendations included: (1) improving the reporting and disciplinary mechanism; (2) providing more resources for students who wish to discuss options and seek support; (3) expanding opportunities for engaged discussion on consent and healthy relationships throughout the first and subsequent years; (4) adopting clearer guidelines for student activities on and off campus; and (5) enlisting student and administrative leaders to spearhead programming that promotes sexual and gender respect.<sup>129</sup> Some of these recommendations were already being implemented, including the creation of a University-wide Committee to streamline the reporting and disciplinary process for sexual misconduct, and the creation of Communication and Consent Educators (CCEs), a group of about forty undergraduates hired to offer prevention and intervention workshops for other students.<sup>130</sup>

Fifteen months after the Office for Civil Rights opened its investigation, Yale reached a voluntary agreement with the OCR.<sup>131</sup> On Friday, June 15, 2012, the OCR officially announced the investigation into Yale had been closed after thoroughly assessing “whether the university had designated a Title IX Coordinator, whether the university had grievance procedures to promptly and equitably address complaints under Title IX, and whether the university had allowed a sexually hostile environment to be created on campus by not sufficiently responding to notice of sexual harassment.”<sup>132</sup> Under the voluntary resolution agreement, Yale committed itself to upholding its new grievance procedures and better informing the community of available resources devoted to resolving and responding to issues

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126. *Id.* at 6.

127. *Id.* at 7 (“Our report is not a response to, nor is it intended to address, any pending investigation or complaint involving Yale.”).

128. *Id.* (“We are aware that the recommendations we make may be inconsistent with the position of OCR, and while we will consider its views with respect, we have not attempted to anticipate them.”).

129. *Id.* at 12–28.

130. *Id.* at 14, 20–21.

131. Gavan Gideon & Caroline Tan, *Department of Education Ends Title IX Investigation*, YALE DAILY NEW BLOGS (June 14, 2012), <http://yaledailynews.com/blog/2012/06/15/departement-of-education-ends-title-ix-investigation/>.

132. Press Release, U.S. Dep’t of Educ., U.S. Department of Education Announces Resolution of Yale University Civil Rights Investigation (June 15, 2012), *available at* <http://www.ed.gov/news/press-releases/us-department-education-announces-resolution-yale-university-civil-rights-invest>.

of sexual misconduct.<sup>133</sup> There was no disciplinary action against Yale.<sup>134</sup> The voluntary resolution was not unexpected; most Title IX investigations end in this conciliatory way with schools managing to avoid fines as well as explicit admissions of wrongdoing.<sup>135</sup> Yale most importantly agreed to maintain the University-wide Committee on Sexual Misconduct—a committee that began to take shape before the complaint was filed but was not fully established until July 2011—as the primary mechanism for students wishing to report sexual misconduct.<sup>136</sup> The University agreed that the University-wide Committee would promptly and equitably respond to complaints of sexual misconduct under Title IX.<sup>137</sup> Further, the University agreed to widely and helpfully publicize its avenues of redress.<sup>138</sup> Yale, notably, allows students to report in two ways: informally and formally.<sup>139</sup> These two types of complaints are not necessarily reflective of the severity of the crime; they can also reflect the victim's desire to not go through a process that mimics the criminal justice system.<sup>140</sup> In the end, the complainants, who said they did not wish to punish Yale by getting federal funding taken

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133. Gideon & Tan, *supra*, note 131.

134. *Id.* (stating, “[t]he June 11 voluntary resolution agreement states that it ‘does not constitute an admission’ of noncompliance.”).

135. *Id.*

136. Prior to the University-Wide Committee, there were separate grievance boards for the various Yale schools. The most notable of these, Yale College's Sexual Harassment Grievance Board, was created in direct response to the *Alexander v. Yale* lawsuit. See Olivarius, *supra* note 42.

137. Voluntary Resolution Agreement between Yale Univ. & U.S. Dep't of Educ. Office for Civil Rights, OCR Compl. No. 01-11-2027 (June 11, 2012), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/01112027-b.pdf>.

138. *Id.*

139. For a discussion on the pros and cons of having informal and formal complaint options, see Gavan Gideon & Caroline Tan, *Universities Weigh Complaint Options*, YALE DAILY NEWS BLOG (Feb. 7, 2012), <http://yaledailynews.com/blog/2012/02/07/universities-weigh-complaint-options/>.

140. Caroline Wentworth, *Wentworth: Processing the Informal Complaint*, YALE DAILY NEWS BLOG (Feb. 6, 2012), <http://yaledailynews.com/blog/2012/02/06/wentworth-processing-the-informal-complaint/>.

For many, the prospect of facing a full investigation and trial in order to punish their attacker is more than they can handle. With the informal complaint process, they can seek changes that will reduce the likelihood of day-to-day contact with the attacker. In a world in which sexual assaults are already grossly underreported, the informal complaint system allows victims to take action without enduring the potentially painful and often lengthy formal process.

away, might have gotten more or less what they wanted: a more responsive and supportive school.<sup>141</sup>

In the couple of years since the Title IX investigation into Yale began, there have been significant changes on campus. The most noticeable one, perhaps, was the launch of the Communication and Consent Educators (CCEs), a group of about forty paid and trained peer educators, in the fall of 2011.<sup>142</sup> The CCEs conducted mandatory workshops for freshmen in early 2012 and began piloting bystander intervention workshops that spring.<sup>143</sup> The reactions to the CCE workshops and the perceived CCE agenda have been mixed, but the creation of the program demonstrated Yale's commitment to changing the conversation around sex and sexual misconduct on campus.<sup>144</sup> "What the communication and consent educators are doing is well above what would be required in any kind of Title IX sense," said Melanie Boyd, the university official charged with leading the program.<sup>145</sup>

However, when the University released its fourth semi-annual report of sexual misconduct complaints in 2013, there was a heavy backlash.<sup>146</sup> Most of the backlash focused on the seemingly light disciplinary action in response to cases of what the school termed "nonconsensual sex."<sup>147</sup> This terminology triggered significant criticism as some believed the term non-

141. Gassó, *Students, Admins React to Title IX Complaint*, *supra* note 123 (noting that Brodsky also said the complaint was "not an attempt to deprive Yale of its federal funding.")

142. David Burt, *Peer Educators to Tackle Sexual Consent*, YALE DAILY NEWS BLOG (Sept. 14, 2011), <http://yaledailynews.com/blog/2011/09/14/peer-educators-to-tackle-sexual-consent/>. The idea for the program germinated before the Title IX complaint was filed, but its creation was probably expedited as a result of the pending investigation.

143. Caroline Tan, *Workshops Teach Intervention Strategies*, YALE DAILY NEWS BLOG (Apr. 19, 2012), <http://yaledailynews.com/blog/2012/04/19/workshops-teach-intervention-strategies/>.

144. For a largely negative appraisal of the CCEs, see Elaina Plott, *CCE: The New Insiders*, YALE DAILY NEWS WEEKEND (Sept. 27, 2013), <http://yaledailynews.com/weekend/2013/09/27/cce-the-new-insiders/>.

145. Burt, *supra* note 142.

146. See YALE UNIV. OFFICE OF THE PROVOST, REPORT OF SEXUAL MISCONDUCT: BROUGHT FORWARD FROM JANUARY 1 THROUGH JUNE 30, 2013 (2013), *available at* [http://provost.yale.edu/sites/default/files/files/FINAL\\_Jul2013\\_Report\\_Sexual\\_Misconduct\\_Complaints\\_7-31-13.pdf](http://provost.yale.edu/sites/default/files/files/FINAL_Jul2013_Report_Sexual_Misconduct_Complaints_7-31-13.pdf); *see also* YALE UNIV. OFFICE OF THE PROVOST, REPORTS: REPORTS OF SEXUAL MISCONDUCT (2014), *available at* [http://provost.yale.edu/sites/default/files/files/FINAL\\_Jul2014\\_Report.pdf](http://provost.yale.edu/sites/default/files/files/FINAL_Jul2014_Report.pdf) (compiling reports since 2011 as well as other Title- IX related reports).

147. Julia Zorthian, *Salovey Responds to Sexual Misconduct Concerns*, YALE DAILY NEWS CROSS CAMPUS BLOG (Aug. 5, 2013), <http://yaledailynews.com/crosscampus/2013/08/05/salovey-responds-to-sexual-misconduct-concerns/>.

consensual sex was overly vague and minimized the crimes of assault and rape.<sup>148</sup> In response, Yale University Title IX Coordinator and Deputy Provost Stephanie Spangler said “the report [ . . . ] employs the term ‘non-consensual sex’ rather than ‘rape’ or more explicit language to allow the University to impose sanctions for behaviors that may not meet a criminal standard.”<sup>149</sup> The University went on to publish a list of scenarios to clarify how it might handle a range of unacceptable sexual encounters that are not rape per se.<sup>150</sup>

Regardless of the backlash, it is important to note that the report included the largest number of complaints since its inception in 2011.<sup>151</sup> Rather than being evidence of a worsening culture, the higher number of complaints might indicate that more students understand the reporting procedures and are choosing to take part in them.

Ultimately, while the 2011 Title IX complaint did not lead to any official negative consequences for Yale, the complaint and subsequent investigation instigated a more frank campus dialogue about sexual misconduct.<sup>152</sup> And so, the goal of the Title IX complaint, to some extent, came to fruition: Post-investigation, Yale has a more open environment—one where people feel more supported in their choices to intervene as bystanders, report crimes and offenses, and demand changes in accordance with the ideal of Title IX.<sup>153</sup>

### B. *University of North Carolina at Chapel Hill*

In January 2013, three current students, one recent alumna, and a former Assistant Dean of Students submitted a Title IX complaint against the University of North Carolina at Chapel Hill (UNC), “claiming that UNC violated the rights of sexual assault victims and facilitated a hostile

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148. Shyamala Ramakrishna, *On the Fourth Semiannual report of Complaints of Sexual Misconduct*, BROAD RECOGNITION (Aug. 28, 2013), <http://broadrecognition.com/uncategorized/on-the-fourth-semiannual-report-of-complaints-of-sexual-misconduct/> (“Yale policy language denoting ‘nonconsensual sex’ was deemed redundant and vague . . . and many students saw Yale’s evasion of the words ‘rape’ and ‘sexual violence’ as a euphemistic cover-up tactic.”).

149. Cynthia Hua, *Sex Misconduct Report Spurs Criticism of Disciplinary Procedures*, YALE DAILY NEWS BLOG (Aug. 5, 2013), <http://yaledailynews.com/blog/2013/08/05/sexual-misconduct-report-spurs-criticism-of-yales-disciplinary-procedures/>.

150. *Sexual Misconduct Scenarios*, YALE U., <http://smr.yale.edu> (last visited Nov. 22, 2014).

151. Hua, *supra* note 149.

152. See, e.g., Burt, *supra* note 142.

153. See Plott, *supra* note 144.

environment for students reporting sexual assault.”<sup>154</sup> The UNC complaint was one of many to follow in the wake of the Title IX complaint filed against Yale in 2011, but it is particularly interesting given UNC’s status as a prestigious public university with a long-standing student-run judicial system and honor code system.<sup>155</sup>

Three of the women who filed the complaint against UNC (the fourth student who signed the complaint chose to remain anonymous) have spoken publicly about the personal experiences that prompted them to file the Title IX complaint.<sup>156</sup> Andrea Pino, a senior in 2013 when the complaint was filed, kept silent for a year after being raped as a sophomore.<sup>157</sup> When she realized she was not alone in her experience of victimization, she and a group of fellow sexual assault survivors went to University administrators with hopes of discussing how the University could better handle sexual misconduct on campus.<sup>158</sup> They were told emphatically that the school was in compliance with Title IX and nothing more could be done.<sup>159</sup> Annie Clarke, a 2011 graduate, tried to report a sexual assault in 2007, only to be told that she ought to think about how she, the victim, might have behaved differently.<sup>160</sup> Clarke’s realization that the response she got in 2007 was still being given years later to others with similar experiences prompted her to co-file as an alumna.<sup>161</sup> Landen Gambill, a sophomore in 2013, pressed charges against her long-term boyfriend, who subjected her to months of

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154. Caitlin McCabe, *5 Submit Complaint Against UNC over Sexual Assault*, DAILY TARHEEL (Jan. 16, 2013, 11:52 PM), <http://www.dailytarheel.com/article/2013/01/5-submit-complaint-against-unc-over-sexual-assault>. The 34-page complaint was not simply about Title IX. The complaint also alleged that the University violated the Clery Act, Title VI, and Title VII of the Civil Rights Act of 1964. For the purposes of this Note, I primarily will address the Title IX concerns.

155. *Topics: Honor System*, DAILYTARHEEL.COM, [http://www.dailytarheel.com/section/honor\\_system](http://www.dailytarheel.com/section/honor_system) (last visited Nov. 22, 2014).

156. McCabe, *supra* note 154.

157. Andrea Pino, *Rape, Betrayal and Reclaiming Title IX*, HUFFINGTON POST BREAKING SILENCE BLOG (Apr. 29, 2013, 2:05 PM), [http://www.huffingtonpost.com/andrea-pino/more-that-a-teal-ribbon\\_b\\_3165293.html](http://www.huffingtonpost.com/andrea-pino/more-that-a-teal-ribbon_b_3165293.html) (last updated Jan. 23, 2014, 6:58 PM).

158. *Id.*

159. *Id.*

No school is safe because their idea of Title IX is betraying us. . . . Students are attending schools that betray them, campuses in which violence has become a part of the experience, and in which, despite popular belief, there is no punishment for rape, rather a punishment for coming forward.

160. McCabe, *supra* note 154.

161. Annie E. Clarke, *Why I am Filing an Office for Civil Rights Complaint and Clery Act Complaint Against UNC-Chapel Hill*, HUFFINGTON POST C. BLOG (Jan. 16, 2013, 3:12 PM), [http://www.huffingtonpost.com/annie-e-clark/why-i-am-filing-an-office\\_b\\_2489641.html](http://www.huffingtonpost.com/annie-e-clark/why-i-am-filing-an-office_b_2489641.html) (last updated Mar. 18, 2013, 5:12 AM).



sexual abuse and rape, in the University Honor Court in 2012.<sup>162</sup> The results were disappointing: her alleged rapist voluntarily withdrew with no mark on his record; she was told that if he were to return, the school would notify her and ensure that he lived as far away from her as possible.<sup>163</sup> Two weeks prior to filing the complaint, Gambill found out (not through the school's initiative) that not only had her rapist returned to campus, but he was living across the street from her.<sup>164</sup> These three women, all victims of both rape and an ineffective reporting and disciplinary system, used their personal stories to illustrate how UNC generally failed to address sexual misconduct complaints appropriately.<sup>165</sup>

The student accounts found substantial support in the testimony of Melinda Manning, a former assistant dean of students who stepped down a month before signing onto the complaint.<sup>166</sup> Manning's experiences, which she documented in the January complaint, "serve as a large-scale indictment of the actions of high-level University administrators—specifically, Dean of Students Jonathan Sauls, Vice Chancellor for Student Affairs Winston Crisp, and the Office of University Counsel."<sup>167</sup> Manning states that Sauls, her direct supervisor, and Crisp intimidated her with threats and warnings when she attempted to reform the University's handling of sexual assault cases, which, ostensibly, was part of the focus of her position at the University.<sup>168</sup> Furthermore, Manning claims that in 2011, the University Counsel's office told her that the number of sexual assaults she recorded for the 2010 academic year was "too high."<sup>169</sup> The complaint alleges that the number of sexual assaults in the University's Clery Report for 2010 was three lower than the number Manning submitted to the Office of University Coun-

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162. McCabe, *supra* note 154.

163. *Id.*

164. *Id.*

165. Richard Pérez-Peña, *Students Initiate Inquiry into Harassment Reports*, N.Y. TIMES (Mar. 7, 2013), <http://www.nytimes.com/2013/03/08/education/students-initiate-inquiry-into-harassment-reports.html?hpw&pagewanted=print>.

166. Richard Pérez-Peña, *College Groups Connect to Fight Sexual Assault*, N.Y. TIMES (Mar. 19, 2013), <http://www.nytimes.com/2013/03/20/education/activists-at-colleges-network-to-fight-sexual-assault.html?pagewanted=all> [hereinafter Pérez-Peña, *College Groups Connect to Fight Sexual Assault*].

167. Andy Thomason & Caitlin McCabe, *Complaint: UNC Pressured Dean to Underreport Sexual Assault Cases*, DAILY TAR HEEL (Jan. 17, 2013, 11:07 PM), <http://www.dailytarheel.com/article/2013/01/50f8ca9bc71da>.

168. *Id.* "Much of her work focused on training programs for those involved with the system used for reporting sexual assault."

169. *Id.*

sel.<sup>170</sup> A second federal investigation was opened, in addition to the Title IX investigation, to examine a possible violation of the Clery Act.<sup>171</sup>

The Office for Civil Rights opened a third investigation into UNC after Landen Gambill filed an additional Title IX complaint in March 2013.<sup>172</sup> The University Honor Court had charged Gambill with an honor code violation, and in response she filed a Title IX complaint alleging that that the charge amounted to retaliation as a whistle-blower—a direct violation of Title IX as per the 2011 Dear Colleague Letter.<sup>173</sup> The University Honor Court charged her with creating an intimidating environment for her ex-boyfriend and alleged abuser.<sup>174</sup> Ultimately, the University Honor Court dropped its charges against Gambill.<sup>175</sup> The University, for its part, maintained that no University officials or administrators have any say in University Honor Court charges and so any retaliation claims are inherently unfounded.<sup>176</sup> The charges of the honor code violation, however, create some large questions. Gambill never named her rapist though, admittedly, students probably knew who he was given their relationship.<sup>177</sup> The story she presented was meant to exemplify UNC's mistreatment of sexual violence victims and mishandling of complaints and resultant disciplinary procedures; she did not intend to intimidate her abuser, who she did not even know was back on campus at the time she decided to file the January 2013

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170. Caitlin McCabe & Hailey Vest, *University Counters Sexual Assault Complaint Allegation*, DAILY TAR HEEL (Jan. 24, 2013, 11:45 PM), <http://www.dailytarheel.com/article/2013/01/51020dceb20ee#print>.

171. Jane Stancill, *UNC-Chapel Hill to Review How it Deals with Sexual Assault Cases*, NEWSOBSERVER.COM (May 1, 2013), <http://www.newsobserver.com/2013/05/01/2863604/unc-chapel-hill-to-review-how.html> [hereinafter Stancill, *UNC-Chapel Hill to Review How it Deals with Sexual Assault Cases*].

172. Tyler Kingkade, *UNC Faces Federal Investigation into Retaliation Complaint by Sexual Assault Survivor*, HUFFINGTON POST BREAKING SILENCE BLOG (July 7, 2013, 4:15 PM), [http://www.huffingtonpost.com/2013/07/07/unc-investigation-retaliation\\_n\\_3555886.html](http://www.huffingtonpost.com/2013/07/07/unc-investigation-retaliation_n_3555886.html) [hereinafter Kingkade, *UNC Faces Federal Investigation*] (last updated Jan. 23, 2014, 6:58 PM).

173. *Id.*

174. *UNC to Delay Honor Court Case Against Outspoken Student*, WRAL.COM (Mar. 26, 2013), <http://www.wral.com/apnewsbreak-unc-student-files-intimidation-charge/12269931/> (noting that the 2012 Honor Court case found Gambill's former boyfriend not guilty of sexual assault but guilty of sexual harassment).

175. Kingkade, *UNC Faces Federal Investigation*, *supra* note 172.

176. Caitlin McCabe & Paula Seligson, *Landen Gambill Says Honor Court Charge is Retaliatory*, DAILY TAR HEEL (Feb. 26 2013, 12:15 AM), <http://www.dailytarheel.com/article/2013/02/sexual-assault-victim-charged> (“‘Given that these charging decisions are made by student attorney generals and not by campus administrators, a claim of retaliation by the University would be without merit,’ [Karen Moon, director of UNC News Services] said.”)

177. *Id.*

complaint.<sup>178</sup> An investigation commissioned by UNC found that there was no evidence of retaliation, but suggested that the Honor Code needed some overhauling.<sup>179</sup>

The five women who filed the January 2013 Title IX complaint hoped for big results, not only for their school, but also for the larger movement against rape culture.<sup>180</sup> UNC denied some allegations outright, but it also acknowledged the need for change.<sup>181</sup> When the January complaint was filed, Chancellor Holden Thorp reached out to Amherst College President Carolyn Martin for advice.<sup>182</sup> At the time, Amherst was not yet the subject of a Title IX investigation, although the school faced major scrutiny after a sexual assault scandal surfaced in October of that same academic year.<sup>183</sup> On Martin's advice, Thorp enlisted Gina Maisto Smith, a legal and policy expert who helped Amherst revise its sexual misconduct policies.<sup>184</sup> In April, Chancellor Holden Thorp announced the creation of a full-time Title IX coordinator (a requirement as per the 2011 Dear Colleague Letter) and appointed Christi Hurt as the interim coordinator while UNC conducted a national search.<sup>185</sup>

On May 1, 2013, the University announced the creation of a twenty-one-member student, faculty, and staff taskforce to examine UNC's policies and procedures, which were last revised in 2011-12 in response to the 2011

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178. *Id.*

179. Jane Stancill, *Federal Officials to Investigate Retaliation Complaint Against UNC*, NEWSOBSERVER.COM (July 5, 2013), <http://www.newsobserver.com/2013/07/05/3013066/federal-officials-to-investigate.html>.

180. See Annie E. Clarke, *supra* note 161.

I hope that the Office for Civil Rights Complaint against UNC does for implementation and practice what Alexander and other cases did for policy change. I hope that our case brings other stories of assault and cover-up into the light, and inspires justice-seeking action and nationwide change. This is not just about UNC; this is about higher education institutions and rape culture worldwide.

181. McCabe & Vest, *supra* note 170.

182. *Id.*

183. Pérez-Peña, *College Groups Connect to Fight Sexual Assault*, *supra* note 166; see Shaina Mishkin & Daniel Rodriguez, *Amherst College Facing 2 Sexual Assault Complaints*, BOSTON GLOBE (Nov. 16, 2013), <http://www.bostonglobe.com/metro/2013/11/16/students-file-federal-complaint-against-amherst-college-alleging-mishandling-sexual-assaults/cxRn6t3sWaGKOVbK3hbg5N/story.html> (providing that Amherst faced Title IX complaints of its own in November 2013).

184. McCabe & Vest, *supra* note 170.

185. Caitlin McCabe, *Thorp Names Interim Title IX Coordinator*, DAILY TAR HEEL (Apr. 17, 2013, 11:32 PM), <http://www.dailytarheel.com/article/2013/04/thorp-adds-new-equality-adviser>.

Dear Colleague Letter.<sup>186</sup> Before the revisions, an entirely student-run Honor Court heard sexual assault cases; after the 2011-12 revision, a three-person panel consisting of a student, a faculty member, and a staff member took the place of the Honor Court in presiding over these cases.<sup>187</sup> In November 2013, Chapel Hill announced that Howard Kallem, previously the chief regional attorney of the District of Columbia Enforcement Office for the U.S. Department of Education's Office for Civil Rights, would fill the permanent position of Title IX Compliance Coordinator.<sup>188</sup> He arrived on campus in January 2014, with expectations to lead a five-person team devoted entirely to Title IX compliance.<sup>189</sup> The results of these initiatives and hires are yet to be seen, but one thing is clear: While technical compliance with Title IX might be legally sufficient, it is no longer acceptable to students on these campuses. Students expect and demand more from their schools, and survivor activism coupled with media attention will provide the enforcement mechanisms the law itself lacks.

#### IV. THE SOCIAL NETWORK EFFECT

##### A. Sexual Assault Survivors and Web 2.0

*"You don't need to be in a survivors' group meeting to hear these stories anymore," Ms. Bolger said. "The human connection is the same, but social media lets you do it on a completely different scale."*<sup>190</sup>

*"The Internet is a really important piece of [Title IX organizing]," says Brodsky. "We were all able to connect interschool: [Amherst activist] Dana Bolger and I were put in touch via email. The UNC students got in touch by Facebook. We all communicated via Skype."*<sup>191</sup>

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186. Stancill, *UNC-Chapel Hill to Review How it Deals with Sexual Assault Cases*, *supra* note 171.

187. *Id.* When Gambill pressed charges against her former boyfriend, the student-run Honor Court heard the case. McCabe & Seligson, *supra* note 176 (noting that the shift away from using the Honor Court occurred in August 2012).

188. Rachel Nash, *UNC Names New Title IX Compliance Coordinator*, CHAPELBORO.COM (Nov. 6, 2013, 2:00 PM), <http://chapelboro.com/news/unc/unc-names-new-title-ix-compliance-coordinator/>.

189. Amanda Albright, *New Title IX Department Leader Arrives at UNC*, DAILY TARHEEL (Jan. 8, 2014, 5:46 PM), <http://www.dailytarheel.com/article/2014/01/title-ix-coordinator>.

190. Pérez-Peña, *College Groups Connect to Fight Sexual Assault*, *supra* note 166.

191. Quart, *supra* note 112.

Since *Alexander v. Yale* first conceived of Title IX as a law that could protect female students from discriminatory sexual harassment, some major cultural developments have affected how we perceive sexual harassment and assault. In 1977, silence surrounded incidents of sexual violence. But we now live in an era of self-promotion in which we publicly curate our identities. We can reimagine ourselves as survivors instead of victims with relative ease; we can become activists with the click of a button. The communications theorist Joss Hands notes the year 2006 as the pivotal year for “Web 2.0”—“a by now ubiquitous term that loosely refers to the proliferation of user-created content and websites specifically built as frameworks for the sharing of information and for social networking[.]”<sup>192</sup> Notably, 2006 was the year that *Time* elected to make “You” the Person of the Year, highlighting the many individuals who continuously build Web 2.0 and have thereby not only changed the world, but also changed “the way the world changes.”<sup>193</sup>

The Internet has transformed victims into survivors and survivors into activists.<sup>194</sup> One of the most striking examples of this transformation can be seen in the case of a former Amherst student, Angie Epifano. In October 2012, Epifano published a graphic and detailed account of the fallout after a fellow Amherst student allegedly raped her.<sup>195</sup> Her personal account of a rape and its aftermath was not the first of the genre, but it sparked a remarkable reaction.<sup>196</sup>

Perhaps inspired by Epifano’s blunt recounting of the crime and her harrowing path to find solace, perhaps inspired by the numerous Title IX complaints that were being filed against colleges and universities across the country, perhaps inspired by the social media-driven spirit of the times,

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192. Jonny Jones, *Social Media and Social Movements*, INT’L SOCIALISM (Apr. 4, 2011), [http://www.isj.org.uk/index.php4?id=722#130jones\\_16](http://www.isj.org.uk/index.php4?id=722#130jones_16).

193. Lev Grossman, *You—Yes, You—Are TIME’s Person of the Year*, TIME (Dec. 25, 2006), <http://content.time.com/time/magazine/article/0,9171,1570810,00.html>.

194. Activism can be seen all over the Internet. For just a few examples, see #Yesallwomen, TWITTER, <https://twitter.com/hashtag/yesallwomen> (last visited Nov. 22, 2014); PROJECT UNBREAKABLE, <http://projectunbreakable.tumblr.com/> (last visited Nov. 22, 2014); KNOW YOUR IX, <http://knowyourix.org/> (last visited Nov. 22, 2014); FORCE: UPSETTING RAPE CULTURE, <http://upsettingrapeculture.com/> (last visited Nov. 22, 2014).

195. Angie Epifano, *An Account of Sexual Assault at Amherst College*, AMHERST STUDENT (Oct. 17, 2012), <http://amherststudent.amherst.edu/?q=article/2012/10/17/account-sexual-assault-amherst-college>.

196. See Tyler Kingkade, *Amherst College Sexual Assault Survivor’s Column Inspires Other Students to Come Forward*, HUFFINGTON POST BREAKING SILENCE BLOG (Oct. 26, 2012, 3:01 PM), [http://www.huffingtonpost.com/2012/10/26/amherst-rape-survivor-speak-out\\_n\\_2013411.html?hpid=hp\\_hp-top-table-main-amherst-rape-survivor-speak-out\\_n\\_2013411.html?hpid=hp\\_hp-top-table-main-amherst-rape-survivor-speak-out\\_n\\_2013411.html?hpid=hp\\_hp-top-table-main-amherst-rape-survivor-speak-out\\_n\\_2013411.html?hpid=hp\\_hp-top-table-main-amherst-rape-survivor-speak-out\\_n\\_2013411.html?hpid=hp\\_hp-top-table-main-amherst-rape-survivor-speak-out\\_n\\_2013411.html](http://www.huffingtonpost.com/2012/10/26/amherst-rape-survivor-speak-out_n_2013411.html?hpid=hp_hp-top-table-main-amherst-rape-survivor-speak-out_n_2013411.html?hpid=hp_hp-top-table-main-amherst-rape-survivor-speak-out_n_2013411.html?hpid=hp_hp-top-table-main-amherst-rape-survivor-speak-out_n_2013411.html?hpid=hp_hp-top-table-main-amherst-rape-survivor-speak-out_n_2013411.html?hpid=hp_hp-top-table-main-amherst-rape-survivor-speak-out_n_2013411.html) (last updated Jan. 23, 2014, 6:58 PM).

staggering numbers of women have begun telling their stories and self-identifying in the public domain.<sup>197</sup> When one victim breaks through the socially-encouraged bubble of anonymity and asserts her identity as a survivor, more follow.<sup>198</sup>

The news media's general practice of suppressing the names of victims is effectually an allocation of shame.<sup>199</sup> The idea that anonymity provides a protective shield is rooted in the misguided, normative concept of victimhood wherein the only way to avoid further harm is to suppress the incident.<sup>200</sup> But the crime and the harm have already happened; silence only serves to further isolate the victim, fomenting a blame-the-victim mentality.<sup>201</sup> The semantics and strictures of victimization are vital parts of the scaffolding supporting rape culture. Each survivor who publishes her story helps break it down.

Repeatedly finding little solace in the quasi-legal systems put in place by their colleges and universities, survivors have begun instead to turn to the Internet.<sup>202</sup> With this easily accessible platform, the world of a 'victim' has dramatically evolved. Social networks have changed the story of sexual har-

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197. *Id.*

198. *See id.*

199. *See, e.g.,* Zerlina, *Rape Victims and Anonymity*, FEMINISTING (July 26, 2011), <http://feministing.com/2011/07/26/rape-victims-and-anonymity/> ("Critics of rape shield laws argue that this further stigmatizes rape victims and perhaps even sets back the gender equality movement.").

200. *See* Alex S. Jones, *Naming Rape Victim is Still a Murky Issue for the Press*, N.Y. TIMES, June 25, 1989, available at <http://www.nytimes.com/1989/06/25/us/naming-rape-victim-is-still-a-murky-issue-for-the-press.html> ("In large measure, the practice of withholding names grew out of a new sensitivity in the late 1960's and 1970's to the plight of rape victims, who were often characterized as having been raped twice: once by the rapist and once when their identities became known by the press.").

201. Louise Arkel, *Violence to Women, Not the Victim's Name, is the Real Issue*, N.Y. TIMES, July 12, 1990, available at <http://nytimes.com/1990/07/12/us/to-women-not-rape-victim-s-name-is-the-real-issue-755290.html?src=pm>.

Rape remains for many the unspeakable crime. We like to think we help by not mentioning it, by treating the survivor as if it never happened. But rape does happen, every day. . . . [T]he paternalistic platitudes that editors offer are useless, even dangerous. They reek of the desire to suppress the subject, to pretend rape doesn't happen to people we know.

202. *See, e.g.,* Tucker Reed, *After Being Failed by my College's Administration, I Posted My Rapist's Name and Photo on the Internet*, XOJANE (Apr. 25, 2013, 12:00 PM), <http://www.xojane.com/issues/tucker-reed-outs-rapist-at-usc> ("Two months ago, I wrote a Tumblr post in which I revealed my name and the name of my rapist and included several photographs, including one of us together. I wrote, 'I'm not going to hide behind anonymity. I am a part of this society.'"); Gina Tron, *I Got Raped and Then My Problems Started*, VICE (June 27, 2013), [www.vice.com/read/i-got-raped-then-my-problems-started](http://www.vice.com/read/i-got-raped-then-my-problems-started) (detailing one survivor's quest to reclaim her agency).

assessment and violence on college campuses. While violence and inequity are nothing new, the presentation of these stories has changed immensely in the past several years. The stories of sex discrimination on college campuses are no longer confined to covert whispers and anonymous reports (if any report). Students are speaking out and demanding to be heard not only by their schools but also by the general public.<sup>203</sup> The sociological impact of a cadre of Facebook likes and comments and retweets and article shares cannot be quantified. Social media enables anyone to claim the once unique privilege of being heard, and now isolated events and feelings can gather force on the Internet and create collective calls to action.<sup>204</sup> More and more, victims turned survivors turned activists are eschewing the so-called protection of the legal system and the news media; in order to further the movement to end rape culture, they are voluntarily becoming public faces and resources for other survivors and allies.<sup>205</sup> Student survivors have seized the platform of the Internet in an effort to change public perception of sexual violence. In the process, they have turned Title IX into a social referent far more powerful than the 1972 Congress could have imagined.

On March 19, 2013, the New York Times published an article illuminating an interesting trend in the recent spate of Title IX complaints: they were connected.<sup>206</sup> The women who filed the complaint against UNC first corresponded with students who spoke out (though they had not filed a complaint at that time) against Amherst for its mishandling of sexual assault complaints.<sup>207</sup> The Amherst students put the UNC students in touch with some of the leading activists from Yale.<sup>208</sup> The collaboration among students from across the nation's universities did not begin in an organized fashion. "The victims' advocates have talked of creating a formal national organization, but much of their success so far stems from their informal use of modern media, allowing them to connect, collect information and draw attention in a way that would have been impossible a few years ago."<sup>209</sup>

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203. Quart, *supra* note 112.

204. I make this assertion of "anyone" with explicit regard to college students. Obviously, not everyone has access to the Internet.

205. Vanessa Yuan, *An Activist Comes Home*, YALE DAILY NEWS WEEKEND (Aug. 30, 2012), <http://yaledailynews.com/weekend/2013/08/30/an-activist-comes-home/> (quoting Brodsky: "You don't have to be a survivor to recognize that there is a problem," she said. "But there is a sense of urgency when you've had this experience.").

206. Pérez-Peña, *College Groups Connect to Fight Sexual Assault*, *supra* note 166.

207. *Id.*

208. *Id.*

209. *Id.*

In April 2013, a couple of survivor-activists created a central hub to organize efforts to enforce Title IX.<sup>210</sup> In a Huffington Post article, Dana Bolger, a survivor-activist from Amherst College, announced that Alexandra Brodsky, a survivor-activist from Yale University and she would be launching a campaign called Know Your IX.<sup>211</sup>

Along with UNC activists [Annie] Clark and Andrea Pino, we've been growing a national underground, online activist network for student and young alumni survivors and allies. Now, we've developed Know Your IX, a campaign to educate every college student in the U.S. about his or her rights under Title IX by the start of the Fall 2013 academic term.<sup>212</sup>

The campaign has its home on the Know Your IX website, which is meant to offer basic and navigable guidance toward understanding Title IX and related laws. The campaign started and continues to grow as a grassroots effort. The Know Your IX team, a collection of social-media savvy and social justice minded individuals, invites supporters to "Spread the Word" and share their collective resources through all possible means.<sup>213</sup>

Title IX is undoubtedly the rallying cry that gives undergraduate survivors of sexual violence courage to expose their stories. Title IX as a legal conceit proves to survivors that they are not alone, that the problem is systemic and requires the attention of not only their universities, but also of their federal lawmakers. *Alexander v. Yale* might have been dismissed, but it was a success in that it gave survivors a legal context in which to conceptualize the crime committed against them. Our culture has long held a blame-the-victim mentality, and Title IX gives survivors a legal chisel with which to chip away at that mentality. "[College activists] see the beginning of what they hope is a snowball effect, with each high-profile complaint, each assault survivor going public, prompting more people on more campuses to follow suit."<sup>214</sup> While Title IX complaints yield solutions that vary by school, the sheer abundance of these claims in a world crisscrossed by social networks has yielded a noticeable change in the zeitgeist.<sup>215</sup> A nationwide Title IX

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210. Dana Bolger, *Sexual Assault Survivor Activists Launch 'Know Your IX' Campaign*, HUFFINGTON POST BREAKING SILENCE BLOG (Apr. 8, 2013, 6:10 PM), [http://www.huffingtonpost.com/dana-bolger/sexual-assault-survivor-a\\_b\\_3104714.html](http://www.huffingtonpost.com/dana-bolger/sexual-assault-survivor-a_b_3104714.html) (last updated Jan. 23, 2014, 6:58 PM).

211. *Id.*

212. *Id.*

213. *See About KYIX*, KNOW YOUR IX, <http://knowyourix.org/about-ky9/> (last visited Nov. 22, 2014).

214. Pérez-Peña, *College Groups Connect to Fight Sexual Assault*, *supra* note 166.

215. Quart, *supra* note 112.



claim would never work, but social media has created an extra-legal but very real way to achieve the declarative result that a hypothetical nationwide Title IX lawsuit might yield.

Title IX and social networks have changed the sexual violence story from one that is about private shame to one about public outrage. *Alexander v. Yale* used Title IX to establish an understanding that sexual harassment on college campuses is sex discrimination.<sup>216</sup> Social networks have transformed this understanding into something with the potential for meaningful impact.

### B. Activism Yields Results

The heightened attention activists have brought to sexual violence on college campuses is having a measurable impact.

In 2009, the Office for Civil Rights received a mere eleven Title IX sexual misconduct complaints against colleges and universities.<sup>217</sup> Then, in March 2011, a group of students filed a Title IX sexual misconduct complaint with the Office for Civil Rights against Yale University.<sup>218</sup> A month later, in April 2011, the Office for Civil Rights issued the aforementioned Dear Colleague Letter.<sup>219</sup> While it would be deductive to assert that the Yale complaint spurred the publication of the Dear Colleague Letter, one thing is certain: These two highly publicized and relatively concurrent developments in Title IX history created a watershed moment in the battle against rape culture on college campuses. From spring 2011 onward, the number of sexual harassment and assault-based Title IX complaints has risen precipitously. Between October 1, 2012 and September 30, 2013 alone, complainants filed sixty-two Title IX complaints nationwide that dealt directly with sexual violence and harassment.<sup>220</sup> In the first four months of 2014, the Office received more than thirty complaints.<sup>221</sup> While the Office historically has not released comprehensive information about Title IX investigations, the Obama administration has spurred greater transparency.<sup>222</sup> On

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216. Olivarius, *supra* note 42.

217. *Id.*

218. Gassó, *Yale Under Federal Investigation*, *supra* note 114.

219. DEAR COLLEAGUE LETTER, *supra* note 102.

220. Tyler Bishop, *Title IX Trouble: Vanderbilt One of Many Schools Facing Complaints*, VAND. HUSTLER (Nov. 20, 2013, 12:07 PM) [http://www.insidevandy.com/news/article\\_1927e68e-51aa-11e3-ac6f-001a4bcf6878.html](http://www.insidevandy.com/news/article_1927e68e-51aa-11e3-ac6f-001a4bcf6878.html) (last updated Dec. 30, 2013, 8:55 PM).

221. Jennifer Steinhauer, *Behind Focus on College Assaults, a Steady Drumbeat by Students*, N.Y. TIMES (Apr. 29, 2014), <http://www.nytimes.com/2014/04/30/us/sexual-assault-on-university-campuses.html?src=me&r=0>.

222. *See infra* Section IV.B.

May 1, 2014, the U.S. Department of Education released a list of fifty-five colleges and universities that it was investigating for civil rights violations under Title IX.<sup>223</sup> By October 2014, that number had risen to eighty-five.<sup>224</sup>

Colby Bruno, senior legal counsel at the Victim Rights Law Center in Boston, which represents forty to fifty college sexual assault victims a year, says the law center had a 98 percent failure rate in getting satisfactory resolutions from colleges just five years ago.<sup>225</sup> In 2011, after the Department of Education issued the DCL, the center started to see satisfactory results about 60 percent of the time.<sup>226</sup> In recent months, the center has been achieving a 90 percent success rate.<sup>227</sup> Erin E. Buzuvis, a professor at Western New England School of Law, says that colleges used to be more likely to face lawsuits from accused perpetrators who were disciplined than from unsatisfied victims, and that finding in favor of a victim invited bad press.<sup>228</sup> With weak government oversight and lack of coordination among victims, it was more advantageous for schools to cover up sexual assault on their campuses.<sup>229</sup> Now, the situation is reversed.

In July 2013, a national campaign called ED ACT NOW rallied outside the Department of Education in Washington, D.C. to demand that the Department hold colleges accountable to Title IX.<sup>230</sup> More than 175,000 people signed on to support the campaign.<sup>231</sup> The campaign, a project under Know Your IX, led to President Obama announcing the White House Task Force to Protect Students from Sexual Assault in January

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223. Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014) [hereinafter U.S. Department of Education Releases List], *available at* <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i>.

224. Tyler Kingkade, *85 Colleges Are Now Under Investigation for Sexual Assault Cases*, HUFFINGTON POST (Oct. 15, 2014, 3:21 PM), [http://www.huffingtonpost.com/2014/10/15/colleges-federal-investigation-sexual-assault\\_n\\_5990286.html](http://www.huffingtonpost.com/2014/10/15/colleges-federal-investigation-sexual-assault_n_5990286.html) (last visited Nov. 22, 2014, 11:42 AM).

225. Marcella Bombardieri, *Students' Efforts Put Campus Sex Assaults into Spotlight*, BOSTON GLOBE METRO (May 3, 2014), <http://www.bostonglobe.com/metro/2014/05/02/student-activism-white-house-pressure-elevated-sexual-assault-college-campuses-national-concern/JiMUJDdai4ub1mTuEREPaL/story.html>.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. Allie Grasgreen, *Sexual Assault Activists Protest Level of Federal Title IX Enforcement*, INSIDE HIGHER ED (July 16, 2013, 3:00 AM), <http://www.insidehighered.com/news/2013/07/16/sexual-assault-activists-protest-level-federal-title-ix-enforcement>.

231. Dana Bolger, *White House Uses College-Shaming to Fight Campus Sexual Violence*, ALJAZEERA AMERICA (May 3, 2014, 12:15 AM), <http://america.aljazeera.com/opinions/2014/5/sexual-assault-collegecampusrapeddepartmentofeducationtitleix.html>.

2014.<sup>232</sup> In a clear demonstration of the impact of the student-led activism, the Task Force adopted much of the campaign's platform in its stated goals.

In accordance with the Task Force's imperative of tightening standards and promoting transparency, there has been a call for an update to the 2011 Dear Colleague letter.<sup>233</sup> On January 29, 2014, Congresswomen Jackie Speier (D-San Francisco/San Mateo/Redwood City) and Carolyn Maloney (D-New York) publicly issued a bipartisan letter to the Department of Education, urging the Department to issue new policy guidance with regard to campus investigations and data and to pursue more aggressive and comprehensive enforcement tactics.<sup>234</sup> This letter, signed by thirty-nine members of Congress, requests that the Department issue an updated Dear Colleague Letter to improve policy guidance, coordinate with the Department of Justice to provide better enforcement, and create a central database so students and parents easily can find pertinent data relating to campus safety and sexual violence.<sup>235</sup> The letter also urges the Department to require colleges and universities to conduct anonymous school climate surveys and exit interviews and provide the resultant data to students.<sup>236</sup>

On April 28, 2014, the Task Force released its first report, which includes guidelines that increase the pressure on colleges and universities to take a more proactive role in combating campus sexual violence.<sup>237</sup> Vice President Joe Biden asserted, "Colleges and universities can no longer turn a blind eye or pretend rape and sexual assault don't occur on their campuses [. . .] we need colleges and universities to step up."<sup>238</sup> The guidelines recommend that colleges conduct anonymous surveys about sexual assault cases, adopt anti-assault policies that have been successful at other schools, and create better reporting mechanisms, among other measures.<sup>239</sup> The government also announced that it will create and curate a website, NotAlone.gov, to "tell sexual assault survivors that they are not alone."<sup>240</sup> The twenty-

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232. See THE WHITE HOUSE COUNCIL ON WOMEN & GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION (2014), available at [http://www.whitehouse.gov/sites/default/files/docs/sexual\\_assault\\_report\\_1-21-14.pdf](http://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf).

233. *Id.*

234. Congresswomen Speier and Maloney Call for Education Department to Act on Campus Sexual Assault, *supra* note 5.

235. *Id.*

236. *Id.*

237. NOT ALONE, *supra* note 2.

238. Nick Anderson & Katie Zezima, *White House Issues Report on Steps to Prevent Sexual Assaults on College Campuses*, WASH. POST (Apr. 29, 2014), [http://www.washingtonpost.com/local/education/white-house-issues-report-on-steps-to-prevent-sexual-assault-at-college-campuses/2014/04/28/0ebf1e22-cf1f-11e3-b812-0c92213941f4\\_story.html](http://www.washingtonpost.com/local/education/white-house-issues-report-on-steps-to-prevent-sexual-assault-at-college-campuses/2014/04/28/0ebf1e22-cf1f-11e3-b812-0c92213941f4_story.html).

239. NOT ALONE, *supra* note 2, at 7–8.

240. *Id.* at 2, 17–18.

three-page report concludes, “Our work continues,” indicating the Task Force’s serious commitment to its mission.<sup>241</sup>

A day after the Task Force released its First Report, the U.S. Department of Education released updated guidance describing the responsibilities of colleges, universities and schools under Title IX.<sup>242</sup> The updated guidance does not supplant but rather supplements the 2011 DCL and the 2001 Guidance.<sup>243</sup> As requested by institutions and students alike, the update provides increased clarity about the technical legal requirements.<sup>244</sup>

The Assistant Secretary for Civil Rights Catherine E. Lhamon stated that publishing the list of investigations is part of “an effort to bring more transparency to our enforcement work and to foster better public awareness of civil rights.”<sup>245</sup> The Department will not release specific details about open investigations, but it will disclose whether the Office of Civil Rights has entered into a resolution agreement or dismissed an investigation for insufficient evidence of a violation upon request.<sup>246</sup> Making the list available to the public seems to be a key strategic move in the Obama administration’s quest to put an end to sexual violence on college campuses.<sup>247</sup>

A stronger Title IX will not come about without congressional action, but these recent actions by the White House and the Department of Education have made schools significantly more likely to enforce Title IX internally.

#### V. CONCLUSION: SAME TITLE IX, NEW CONTEXT

*“The common law process interpenetrates law with society in both directions, cohering changing social standards and shaping precedents that exist into new law in response to new or newly perceived facts.”*<sup>248</sup>

*“Perhaps the main success of the [Title IX] complaints is that more women are bringing them.”*<sup>249</sup>

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241. *Id.* at 20.

242. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

243. *Id.* at i–ii .

244. *Id.*

245. U.S. Department of Education Releases List, *supra* note 223.

246. *Id.*

247. *Id.*

248. MacKinnon, *supra* note 13, at 814.

249. Quart, *supra* note 112.

In the era of mass media, the Title IX call for reform commands nationwide attention. Sexual misconduct on campus is no longer the private problem of a student or her university; the entire nation is now watching.

Title IX is supposed to ensure that people are safe and comfortable to pursue their educational opportunities regardless of gender, but gender inequity runs deeper than the law can reach. Rape culture is a root cause of gender inequity, and in the context of a rape culture, Title IX could never have its hoped-for impact. A culture that condones or ignores the prevalence of violence against women cements gender inequity on a sociological level, regardless of the laws on the books.

As a piece of legal machinery, Title IX is relatively ineffective. But as a social conceit, Title IX has immense perceived power. Title IX gave people the legal hook with which they could grapple for change. The law might not be able change a culture, but people can. When sexual violence victims seized on Title IX and began rebranding themselves as survivors and activists, they prompted a shift in culture. The advent of online social networks propelled this shift faster and more effectively than any judicial or administrative decision ever could have. Without any recourse in the courts, online activists have created a Title IX that cannot be dismissed or voluntarily resolved so easily. The watchful denizens of the Internet provide the enforcement power that Title IX lacks.

The judicial restrictions of Title IX's power and implications rendered it a historically ineffective weapon against gender discrimination, but the power of social networks has created an extra-legal way to achieve Title IX's objective. Title IX claims make the problem of sexual violence on college campuses public matters of conversation. While students on campuses might disagree about how to handle sexual violence education and prevention, the fact that they talk about it is valuable. The more speech about sexual violence there is, the less people can ignore that it happens all the time among people they know.

Title IX's legal ineffectiveness, ironically, was vital for this shift in culture. If not for the dissatisfaction of survivors, the public would not have the benefit of so many survivors' stories—stories that have enraged us and compelled us to stand up for our Title IX right to be free from gender inequity in the learning environment and our general human right to be free from a culture of rape.

The new generation of Title IX complainants wants more than the reporting reforms sought in *Alexander v. Yale*; they want true gender equality; they want the end of rape culture. These complainants are politically organized and savvy and their efforts have yielded some massive results in the way of White House attention. Through their individual and collective

efforts, they have transformed the perceived power of Title IX into actual power.

Ultimately, laws are valuable because they create a set of values by which citizens abide. But in the case of Title IX, the law did not create the values; the values have created the law. Title IX was not intended to put an end to sexual violence on college campuses; activists have imposed that goal upon the law. The legal evolution of Title IX is remarkable and the work of activists to bring about this evolution is commendable. Title IX, on the other hand, is a better rallying point than it is a law, and the fight to strengthen the law seems to be slightly misguided effort. A harsher law might have its virtues, but it will not end rape culture. Reducing sexual violence on college campuses requires more than a law; it requires ongoing efforts to shift the public understanding. ❀