

Against Taking Rape “Seriously”: The Case Against Mandatory Referral Laws for Campus Gender Violence

*Alexandra Brodsky*¹

In response to growing national concern about gender violence on college campuses, legislators have proposed a rash of state and federal bills that would require schools to refer all sexual assault reports to the police, regardless of the student victims’ wishes. These so-called “mandatory referral” laws appeal to a popular intuition that the best way to address rape is to involve law enforcement. Yet surveys, victims’ criticism, and the history of other efforts to force survivors into the criminal legal system show that such bills would discourage survivors who wish to avoid criminal intervention from reporting to their schools and, as a result, directly undermine the wellbeing of victims and reduce opportunities for accountability. Despite clear shortcomings, opponents of campus rape reform have been able to champion these counter-productive bills under the guise of supporting survivors by co-opting a historically salient feminist strategy: demanding that policymakers take gender violence “seriously,” which the public imagination equates with criminal prosecution. This Article maps the political landscape that gives rise to mandatory referral bills, explains the proposals’ failures as a matter of policy, and calls for a new rhetoric of taking victims’ needs seriously.

INTRODUCTION

At the start of 2016, Senator Bernie Sanders, then a candidate for the Democratic presidential nomination, sat down for an interview with the television network Fusion. The moderator asked Sanders about his views on a hot topic, campus sexual assault. The Senator replied:

Rape and assault is rape and assault. Whether it takes place on campus or on a dark street. And if a student rapes a fellow student, that has got to be understood to be a very serious crime. It has got to get outside of the school and have a police investigation. And that has to take place. Too many schools are seeing this as ‘well, it’s a student issue, let’s deal with it.’ I disagree with that. It is a crime and it has to be treated as a serious crime. And you are seeing now the real horror of many women who have been assaulted or raped, sitting in a classroom alongside somebody who

¹ Legal Fellow, National Women’s Law Center; J.D., Yale Law School. The views in this article are my own and do not necessarily reflect those of my employer. I am indebted to Elizabeth Deutsch for her partnership in thought and justice. This article is a direct result of our joint work. My thanks go also to Julie Goldscheid, Michelle Anderson, the editors of the Harvard Civil Rights-Civil Liberties Law Review, and all the young advocates leading the fight for survivors’ educations.

raped them. Rape is a very, very serious crime and it has to be prosecuted.²

In many ways, Sanders's comments reflected generations of feminist activists who demanded that lawmakers and law enforcement recognize the gravity of gender violence,³ particularly domestic abuse and sexual assault—that they, in short, take such violence “seriously.”⁴ Some second-wave feminist rape reform advocates used this rhetoric to support police interventions desired by victims for their protection.

Far from winning the affection of gender violence survivors and their allies, Sanders's comments infuriated student organizers.⁵ Sanders likely did not recognize that his statement channeled a controversial policy strategy that runs directly contrary to what student organizers have pushed for: responses that address the real needs of real victims. Despite intuitive appeal, forcing colleges and universities to turn over gender violence complaints to the police would discourage students who wish to avoid criminal investigations from reporting violence to schools. As a result, these policies would block survivors' access to essential services and accommodations, like mental health support and dorm changes, and frustrate administrators' attempts to discipline wrongdoers.

Since approximately 2011, a national student movement has forced the country to grapple with alarming rates of gender violence on college and university campuses.⁶ In parallel, the Department of Education ramped up its efforts to enforce the federal anti-discrimination law Title IX, which requires schools to prevent and respond appropriately to reports of sexual harassment, assault, and abuse. While some of these reforms have focused on punishment, many have expanded the robust array of services schools are required to provide to survivors in the wake of violence in order to ensure continued equitable educational opportunities.⁷

² Tyler Kingkade, *Bernie Sanders Comments on Campus Rape, and Totally Drops the Ball*, HUFFINGTON POST (Jan. 12, 2016), http://www.huffingtonpost.com/entry/bernie-sanders-campus-rape_us_5695431ee4b086bc1cd5616e [https://perma.cc/QYA4-FWQH].

³ Advocates, experts, and survivors use a range of umbrella terms to refer to the set of violence that includes rape, sexual assault, and relationship abuse. These terms include gender violence, gendered violence, gender-based violence, gender-motivated violence, sexual violence, sexualized violence, and violence against women. Each of these terms highlights a different connecting theme, and each has its own limitations. For the sake of consistency, this Article will use “gender violence,” which highlights the gendered roots of such forms of violence—crucial to the context of Title IX—without excluding men and agender people. See generally Julie Goldscheid, *Gender Neutrality and the Violence Against Women Frame*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 307 (2015).

⁴ See *infra* Part V.

⁵ Kingkade, *supra* note 2.

⁶ See *infra* Part I.

⁷ See, e.g., Letter from Catherine Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Know Your IX & the U.S. Students Ass'n (Nov. 17, 2014), <https://www.knowyourix.org/wp-content/uploads/2017/01/20141117-Response-to-Know-Your-IX.pdf> [https://perma.cc/869L-865F].

Spearheaded by men’s rights activists, the conservative mega-donor Koch brothers, and moneyed university lobbies,⁸ the anti-feminist backlash to this project (sometimes unwittingly supported by well-meaning but ill-informed legislators like Senator Sanders) has centered on a series of “mandatory referral”⁹ laws proposed in state legislatures and the United States House of Representatives.¹⁰ Justifications for these laws use the intuitive logic endorsed by Sanders—that taking rape seriously means involving the police—but they ignore victims’ actual needs. It is impossible to know the motives of the policies’ champions with certainty. Yet their persistence in the face of survivor opposition and broad skepticism of legal protections for victims suggests many of the key drivers are not only mistaken but disingenuous in claiming such laws are aimed at reducing violence.¹¹ Marshaling the language of rape reform from a previous, very different era, mandatory referral proponents threaten to run the project of campus sex equality and victim support off its course. Survivors and their real needs are sidelined as policymakers debate how best to avenge them. In this way, the frame of taking gender violence “seriously”—while echoing feminist activism of the past—threatens rather than serves survivors.

In Parts I and II of this Article, I provide an account of the current federal requirements for schools to respond to gender violence and the reactionary spread of mandatory referral laws across the country. Part III presents five primary reasons why mandatory referral laws make for bad policy, even by their own rationale. In Part IV, I trace the ways in which advocates for mandatory referral laws have co-opted second wave advocates’ calls for policymakers to take rape “seriously,” twisting these advocates’ words for regressive ends and failing to learn from the failures of twentieth-century rape reform. Finally, in Part V, I make the case for a paradigm shift in gender violence reform, calling on policymakers to take the needs of survivors seriously.

I. TITLE IX AND ITS BACKLASH

The push to improve school responses to gender violence is grounded in existing legal responsibilities that educational institutions have had for nearly half a century. Schools are required to respond to gender violence under Title IX of the 1972 Education Amendments.¹² The law itself requires,

⁸ Isaac Arnsdorf, *ACE, FIRE on Campus Sexual Assault*, POLITICO (Feb. 25, 2016, 2:00 PM), <http://www.politico.com/tipsheets/politico-influence/2016/02/ace-fire-on-campus-sexual-assault-212896> [https://perma.cc/DS8Z-D2KX].

⁹ These laws are sometimes referred to in the press as “mandatory reporting” laws. For consistency, and to avoid confusion with other regimes of mandatory reporting *within* the university, I will refer to these laws as mandatory referral statutes.

¹⁰ See, e.g., *infra* notes 63–68 and accompanying text; Safe Campus Act, H.R. 3404, 114th Cong. (2015).

¹¹ *Infra* notes 153–82 and accompanying text.

¹² 20 U.S.C. § 1681 et seq. (2012).

subject to limited exceptions, that “[n]o 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.”¹³ Where the police might respond to violence as a matter of public safety, schools are called upon to respond as a matter of sex equality: in the wake of violence, survivors must be able to learn.

This barebones law became the basis for requiring schools to better address gender violence on campuses soon after its passage. Four years after Title IX’s enactment, several Yale University students brought a suit, known as *Alexander v. Yale*, arguing that the university had violated Title IX for failing to respond to repeated instances of gender violence and sexual harassment at the hands of faculty and staff.¹⁴ One plaintiff, Pamela Price, for example, had a professor demand sexual favors in exchange for a better grade.¹⁵ When she didn’t acquiesce, she received a “C” rather than an “A” in the class.¹⁶ The university, meanwhile, lacked both a mechanism by which Price or the other plaintiffs could raise these issues with the school or any established procedures through which it could respond.¹⁷ Drawing on their advisor Catharine MacKinnon’s recent theoretical work, the plaintiffs argued that sexual harassment constitutes a form of sex discrimination. Thus, the plaintiffs explained, Yale had violated its Title IX responsibility to ensure gender-equitable educational opportunities in failing to provide adequate remedial measures.¹⁸

While the students’ case was ultimately dismissed for mootness (all the students had graduated by the time the court reached its final determination), the Second Circuit accepted the plaintiffs’ theory of Title IX liability for sexual harassment.¹⁹ Recognizing that sexual harassment, including violence, constitutes forms of gender discrimination, the district court below had reasoned that under Title IX, schools have a legal obligation to respond.²⁰ The litigation prompted Yale to establish response procedures,²¹ and

¹³ *Id.* § 1681(a).

¹⁴ *Alexander v. Yale Univ.*, 631 F.2d 178, 181–83 (2d Cir. 1980).

¹⁵ *Id.* at 182.

¹⁶ *Id.*

¹⁷ *Id.* at 184 (describing that Yale University adopted procedures in 1979, following the initiation of litigation, to address complaints of gender violence and harassment).

¹⁸ *Id.*

¹⁹ *Id.* at 180–81 (citing Health, Education, and Welfare regulations requiring that schools “adopt grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part”); *see also* 45 C.F.R. § 86.8(b) (1980).

²⁰ *Alexander*, 631 F.2d at 180–81.

²¹ *Id.* at 184; *see also* Ann Olivarius, *Title IX: Taking Yale to Court*, NEW JOURNAL (Apr. 18, 2011), <http://www.thenewjournalat Yale.com/2011/04/title-ix-taking-yale-to-court> [https://perma.cc/5MX2-Z8HX] (describing the Yale Sexual Harassment Grievance Board established in response to the litigation).

the practice soon spread to other schools.²² The Supreme Court subsequently endorsed the theory underlying *Alexander* and confirmed that Title IX liability encompassed not only professor-on-student misconduct,²³ like the kind Pamela Price experienced, but also peer-on-peer harassment.²⁴

Since *Alexander*, the Department of Education’s regulations and guidance have spelled out with more detail how schools can comply with the law.²⁵ (While some of these documents have not survived the Trump administration, others have, at least for now.²⁶)

These documents stress the importance of school-based services and accommodations—untethered from pursuing formal disciplinary procedures—that survivors need to continue to learn. These include mental health care, academic support, extended deadlines, flexibility dropping or changing classes, dorm changes, and informal measures to keep accused students and reporting students apart.²⁷ While the public debate about Title IX has largely

²² Patsy T. Mink, *Title IX – The Nine*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/title-ix-nine?redirect=womens-rights/title-ix-nine> [https://perma.cc/9575-CEEC].

²³ *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992).

²⁴ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 646–47 (1999).

²⁵ In 2001, after two Title IX sexual harassment cases reached the Supreme Court, the Department of Education republished a slightly edited sexual harassment guidance that had previously gone through notice and comment. See Office for Civil Rights, Revised Sexual Harassment Guidance, Dept. of Educ. 2, 6 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [https://perma.cc/VCN9-P6J9] [hereinafter “Revised Guidance”]. The high-profile 2011 Dear Colleague Letter issued by the Department of Education’s Office for Civil Rights (OCR), and rescinded in the fall of 2017, focuses in particular on responses to peer-on-peer violence. Russlyn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Sexual Violence (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [https://perma.cc/C9SP-9GQV] [hereinafter DCL]. The agency further spelled out these responsibilities in the also-rescinded 2014 guidance. See Office for Civil Rights, U.S. Dep’t of Educ., Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [https://perma.cc/KXC3-FW3H] [hereinafter Questions and Answers]. While the current Department of Education rescinded both of these documents, they were largely based on requirements put forth by courts and in the Revised Guidance.

²⁶ See Candice Jackson, Acting Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term= [https://perma.cc/77BN-YYVN] (rescinding 2011 and 2014 guidance documents on Title IX and sexual violence).

²⁷ E.g., Revised Guidance, *supra* note 25, at 16–17; Dana Bolger, *Gender-Based Violence Costs: Schools’ Financial Obligations Under Title IX*, 125 *Yale L.J.* 2106, 2112 (2016) (charting the evolution of OCR’s recommendations for victims services); *Crisis Counseling for Sexual Assault & Relationship Violence*, GEO. U. STUDENT HEALTH SERVS., <https://studenthealth.georgetown.edu/crisis-counseling/sexual-assault-relationship-violence> [https://perma.cc/L8UZ-28KN]; *Sexual Harassment and Assault Response & Education Center*, YALE U., <http://sharecenter.yale.edu/> [https://perma.cc/CDK7-2UEG]; *What Can I Expect When I Contact SAPAC for Services?*, U. OF MICH. SEXUAL ASSAULT PREVENTION & AWARENESS CTR., <https://sapac.umich.edu/article/what-can-i-expect-when-i-contact-sapac-services> [https://perma.cc/NN6P-5WZE]; *Sexual Assault*, MIAMI U. STUDENT COUNSELING SERV., <http://miamioh.edu/student-life/student-counseling-service/resources/mental-health-topics/sexual-assault/index.html> [https://perma.cc/U2KP-KUQT].

focused on methods of discipline,²⁸ many students report violence to their schools not to pursue sanctions against an assailant but rather to gain access to these services, which they often need to stay in school.²⁹ Colleges' responsibility to provide such support directly flows from the heart of Title IX's mandate: gender violence should never stand in the way of a student's opportunity to learn.

Despite these legal requirements, students report that schools have overwhelmingly failed to protect them from gender violence and to respond appropriately when victims have filed reports.³⁰ Some schools have refused to investigate students' reports.³¹ Others have denied survivors necessary accommodations and even encouraged them to drop out.³² These shortcomings came to light through a concerted effort of students to publicly address their institutions' wrongdoing. From 2011 to 2015, students filed federal Title IX

²⁸ See, e.g., Elizabeth Bartholet et al., Opinion, *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> [https://perma.cc/DFT8-M6JJ]; Alexandra Brodsky, *Fair Process, Not Criminal Process, Is the Right Way to Address Campus Sexual Assault*, AM. PROSPECT (Jan. 21, 2015), <http://prospect.org/article/fair-process-not-criminal-process-right-way-address-campus-sexual-assault> [https://perma.cc/P4CU-RXJS]; Nancy Gertner, *Sex, Lies and Justice*, AM. PROSPECT (Jan. 12, 2015), <http://prospect.org/article/sex-lies-and-justice> [https://perma.cc/SUB5-5XCG]; Nancy Chi Cantalupo, "Decriminalizing" Campus Institutional Responses to Peer Sexual Violence, 38 J.C. & U.L. 481, 512 (2012); Holly Hogan, *The Real Choice in a Perceived "Catch-22": Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings*, 38 J.L. & EDUC. 277, 289 (2009).

²⁹ See, e.g., Anonymous: *On Assault Narratives*, YALE DAILY NEWS (Feb. 1, 2012), <http://yaledailynews.com/blog/2012/02/01/anonymous-on-assault-narratives/> [https://perma.cc/NU26-3STU].

³⁰ See, e.g., Compliance Resolution Letter from Thomas J. Hibino, Reg'l Dir., Office for Civil Rights, Region 1, U.S. Dep't of Educ., to Anthony P. Monaco, President, Tufts Univ. (Apr. 28, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/01102089-a.html> [https://perma.cc/AJ5J-7KYS] (detailing university's failures to respond appropriately to reports of sexual harassment); Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2060-61 (2016) (summarizing media and legal accounts of schools' failures to address sexual harassment); Claire Gordon, *Rape Victims Say Bob Jones University Told Them To Repent*, AL JAZEERA AM. (June 18, 2014), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/6/18/bob-jones-universitysexualabuse.html> [https://perma.cc/8LMR-H833] (describing experiences of student sexual assault survivor who left college after her dean told her they had to "find the sin in [her] life that caused [her] rape"); Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 950 (2004) (describing uniquely onerous university requirements for rape victims reporting to their schools).

³¹ See, e.g., *Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154, 1160-75 (D. Kan. 2017) (denying university's motion to dismiss based on rape survivor's claims that administrators refused to investigate her reports of sexual assault by a student who later assaulted another classmate).

³² See, e.g., Dana Bolger, *Where Rape Gets a Pass*, N.Y. DAILY NEWS (July 6, 2014), <http://www.nydailynews.com/opinion/rape-pass-article-1.1854420> [https://perma.cc/56W9-G8KK] ("In 2011, my sophomore year of college, I was raped and then stalked by a fellow student. When I went to report my assault to my college dean, he encouraged me to take time off, go home, be 'safe,' focus on my own healing, and put my education on hold - so that the man who raped me could comfortably conclude his.")

complaints at increasing rates.³³ The Department of Education’s Office for Civil Rights (OCR) additionally stepped up their enforcement efforts, entering into robust resolution agreements with schools, some of which included an admission of non-compliance.³⁴

Amidst increased pressure from student survivors and federal regulators, the backlash to stricter Title IX enforcement and resultant university reform grew during the final years of the Obama administration.³⁵ Some lawyers and university lobbyists started to question whether the key OCR guidance, the 2011 Dear Colleague Letter, was issued in accordance with the requirements of the Administrative Procedure Act (APA).³⁶ Critics, most prominently a group of law professors at Harvard, have called for increased procedural protections for students accused of gender violence.³⁷ Skeptics have also cast doubt on surveys indicating high rates of sexual assault and harassment on college campuses.³⁸

At the center of the backlash have emerged two particularly vocal and well-resourced organizations: the Foundation for Individual Rights in Educa-

³³ See Alyssa Peterson & Olivia Ortiz, *A Better Balance: Providing Survivors of Sexual Violence with “Effective Protection” Against Sex Discrimination Through Title IX Complaints*, 125 Yale L.J. 2132, 2138 (2016).

³⁴ *Id.* at 2140 n.37 and 2141 n.39. These resolution agreements included direct tuition reimbursements for survivors and extensive, detailed reforms.

³⁵ See generally Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 Yale L.J. 1940, 1981, 1984–95 (2016).

³⁶ The American Council on Education (ACE), a group with 1,700 institutional members including Harvard, Yale, and Princeton, has lobbied Republican congressmen and senators to question the Department of Education’s authority to direct university responses to gender violence through guidance documents like the 2011 Dear Colleague Letter. The group, which purports to seek clarification about elements of the 2011 Dear Colleague Letter and subsequent 2014 Questions and Answers, has worked behind the scenes to embarrass the Department of Education, including at then-Acting Secretary Dr. John B. King’s confirmation hearing. See Isaac Arnsdorf, *ACE, FIRE on Campus Sexual Assault*, POLITICO (Feb. 25, 2016, 2:00 PM), <http://www.politico.com/tipsheets/politico-influence/2016/02/ace-fire-on-campus-sexual-assault-212896> [https://perma.cc/Y7LS-DS5F] (describing ACE’s contact with Senator James Lankford in advance of his sending the Department of Education a letter challenging the legality of its guidance); see also Letter from Sen. James Lankford to Dr. John B. King, Jr., Acting Sec’y of Educ. (Jan. 7, 2016) [https://perma.cc/T98F-ZYEM]. For a defense of the Dear Colleague Letter from civil rights groups, see Letter from National Women’s Law Center et al. to Dr. John B. King, Jr. Acting Sec’y of Educ. (July 13, 2016), <https://nwlc.org/resources/sign-on-letter-supporting-title-ix-guidance-enforcement/> [https://perma.cc/PD5C-6Q4E].

³⁷ Elizabeth Bartholet et al., Opinion, *Rethink Harvard’s Sexual Harassment Policy*, Bos. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> [https://perma.cc/DFT8-M6JJ]. The Harvard letter came in the wake of the school’s adoption of a new sexual harassment policy following an OCR investigation.

³⁸ Mark J. Perry, *How About a “Renewed Call” for the White House to Stop Spreading False Information About Campus Sexual Assault?*, AEI IDEAS (Apr. 29, 2014, 4:49 PM), <http://www.aei.org/publication/how-about-a-renewed-call-for-the-white-house-to-stop-spreading-false-information-about-campus-sexual-assault/> [https://perma.cc/C6K6-HVQZ]. For a partial defense of one influential study demonstrating significant rates of violence, see Christopher Krebs & Christine Lindquist, *Setting the Record Straight on ‘1-in-5’*, TIME (Dec. 15, 2014), <http://time.com/3633903/campus-rape-1-in-5-sexual-assault-setting-record-straight/> [https://perma.cc/D4FY-HZRB].

tion (“FIRE”), funded in significant part by the conservative mega-donor Koch brothers, and the Fraternity and Sorority Political Action Committee (“FratPAC”).³⁹ While criticizing OCR⁴⁰ and advocating for accused students,⁴¹ the two groups pursued their ultimate goal, prohibiting schools from disciplining students who commit gender violence until the end of a criminal investigation, if ever.⁴²

II. THE RISE OF MANDATORY REFERRAL BILLS

Amidst public criticism of schools’ treatment of survivors and the backlash to that concern, legislators across the country have proposed referring school reports of sexual violence to local law enforcement. Intuitively appealing, this approach has been backed by a wide range of actors, including Senator Sanders, the victims’ rights group RAINN, FIRE, and FratPAC.⁴³ Proponents provide two primary arguments for such policies. First, they claim that criminal intervention will better protect students from violence because of the threat of incarceration.⁴⁴ Second, they say police referrals will better protect the rights of the accused, presumably by displacing the campus

³⁹ Arnsdorf, *supra* note 36; Tyler Kingkade, *Fraternity Groups Push Bills to Limit College Rape Investigations*, HUFFINGTON POST (Aug. 4, 2015, 5:15 PM), http://www.huffingtonpost.com/entry/fraternity-groups-college-rape_us_55c10396e4b0e716be074a7f [<https://perma.cc/B4CE-98KK>].

⁴⁰ E.g., Ari Cohn, *Did the Office for Civil Rights’ April 4 ‘Dear Colleague’ Letter Violate the Law?*, FIRE (Sept. 12, 2011), <https://www.thefire.org/did-the-office-for-civil-rights-april-4-dear-colleague-letter-violate-the-law/> [<https://perma.cc/2SBL-AXCU>] (“It is our conclusion that in issuing this mandate, OCR failed to comply with the required APA procedures, and has robbed the public of its opportunity and duty to participate in the rulemaking process.”).

⁴¹ See, e.g., Open Letter from Joseph Cohn et al., FIRE Coalition, to Russlyn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. (May 7, 2012), <https://www.thefire.org/open-letter-to-ocr-from-fire-coalition/> [<https://perma.cc/XEX7-QET6>]; Maggie Severns, *Greek Leaders Go on the Offensive at UVA*, POLITICO (Dec. 7, 2014, 8:20 PM), <http://www.politico.com/story/2014/12/uva-greek-system-rolling-stone-113385> [<https://perma.cc/2PG7-YG9N>].

⁴² See Alex Morey, *Baylor Rape Controversy More Evidence Colleges Unequipped to Decide Sexual Assault Cases*, FIRE (Sept. 14, 2015), <https://www.thefire.org/baylor-rape-controversy-more-evidence-colleges-unequipped-to-decide-sexual-assault-cases/> [<https://perma.cc/8B8N-PAJ6>]; Robert Shibley, *Time to Call the Cops: Title IX Has Failed Campus Sexual Assault*, TIME (Dec. 1, 2014), <http://time.com/3612667/campus-sexual-assault-uva-rape-title-ix/> [<https://perma.cc/QHE5-5KB3>] (FIRE’s senior vice president arguing that campus responses “encourage[] silence or the avoidance of law enforcement” in the wake of the *Rolling Stone* account of alleged rape at a fraternity house at the University of Virginia); David Glovin, *Fraternities Lobby Against Campus Rape Investigations*, BLOOMBERG NEWS (Mar. 24, 2015, 8:00 AM), <http://www.bloomberg.com/news/articles/2015-03-24/fraternities-lobby-against-campus-rape-investigations> [<https://perma.cc/PRZ7-TWE5>]; see also Arnsdorf, *supra* note 36.

⁴³ Kingkade, *supra* note 39; Joseph Cohn, *Congress Introduces Due Process Legislation: The Safe Campus Act*, FIRE (July 29, 2015), <https://www.thefire.org/congress-introduces-due-process-legislation-the-safe-campus-act/> [<https://perma.cc/8ATD-8DWA>].

⁴⁴ E.g., Robert Shibley, *Time to Call the Cops: Title IX Has Failed Campus Sexual Assault*, TIME (Dec. 1, 2014), <http://time.com/3612667/campus-sexual-assault-uva-rape-title-ix/> [<https://perma.cc/QHE5-5KB3>].

system with its less robust procedural protections.⁴⁵ The merits of these arguments will be discussed in Part III.

Since 2013, at least eleven states have considered at least fourteen bills that touch on the relationship between reports of gender violence to campus authorities and law enforcement.⁴⁶ Four states have made at least one such proposal law.⁴⁷ The proposals that have thus far become law are relatively mild legislative attempts to draw local law enforcement into campus responses, requiring campus officials to strengthen relationships with the police without mandating criminal intervention.⁴⁸ Many require a memorandum of understanding between the university and local police so that response procedures can, if the reporting student wishes, be coordinated. For example, a California law requires universities to establish policies that facilitate, but do not require, the immediate reporting of violent crime—including sexual assault—to local police.⁴⁹ The California law further shifts the default by requiring victims to opt out rather than opt in to the referral.⁵⁰ Students previously retained the option of reporting to the police in addition to or instead of their school, so the bill did little other than change an easily reversible presumption. Whether or not these bills have helped victims, they do not appear to have done much harm. Crucially, the California law preserves victims’ control over whether a referral is made.

⁴⁵ *E.g.* Cohn, *supra* note 43.

⁴⁶ Legislation was introduced but failed to pass in six states. *See* S.B. 576, 85th Leg. (Tex. 2017); S.B. 71, 2017 Leg., Reg. Sess. (Ga. 2017); H.B. 51, 2017 Leg., Reg. Sess. (Ga. 2017); H.B. 1, 148th Gen. Assemb. (Del. 2015); H.B. 749, 2015 Leg., Reg. Sess. (Md. 2015), S.B. 817, 2015 Leg., Reg. Sess. (Md. 2015); S.B. 578, 2015 Leg., Reg. Sess. (Md. 2015); S.B. 2382, 2014 Leg., Reg. Sess. (N.J. 2014); A.B. 3652, 2014 Leg., Reg. Sess. (N.J. 2014); S.B. 553, 2015, Leg., Reg. Sess. (Okla. 2015); H.B. 5034, 2015 Leg., Reg. Sess. (R.I. 2015). Legislation passed in four additional states. *See generally* Andrew Morse, Brian A. Sponsler & Mary Fulton, *State Legislative Developments on Campus Sexual Violence: Issues in the Context of Safety* 5, NAPSA STUDENT AFFAIRS ADMINISTRATORS IN HIGHER EDUCATION (Dec. 15, 2015), https://www.naspa.org/images/uploads/main/ECS_NASPA_BRIEF_DOWNLOAD3.pdf [<https://perma.cc/4ZHU-YD78>] (reporting eleven state proposals).

⁴⁷ A.B. 913 (Cal. 2015); A.B. 1433 (Cal. 2014); S.F. 5, 89th Leg., Reg. Sess. (Minn. 2015); A.B. 8244, 2015 Leg., Reg. Sess. (N.Y. 2015); S.B. 712, 2015 Leg., Reg. Sess. (Va. 2015), H.B. 1930, 2015 Leg., Reg. Sess. (Va. 2015); H.B. 1785, 2015 Leg., Reg. Sess. (Va. 2015).

⁴⁸ A.B. 913 (Cal. 2015); A.B. 1433 (Cal. 2014); S.F. 5, 89th Leg., Reg. Sess. (Minn. 2015); A.B. 8244, 2015 Leg., Reg. Sess. (N.Y. 2015); S.B. 712, 2015 Leg., Reg. Sess. (Va. 2015), H.B. 1930, 2015 Leg., Reg. Sess. (Va. 2015); H.B. 1785, 2015 Leg., Reg. Sess. (Va. 2015).

⁴⁹ A.B. 1433 (Cal. 2014). In order to participate in state-based financial aid, most post-secondary educational institutions are now required by California law to establish policies for local law enforcement referrals that a student must “opt out” of; however, the “opt out” can be overridden in cases where the school believes that campus or public safety requires police involvement. The law’s sponsor, Assemblyman Mike Gatto, originally sought to introduce a bill that required schools to refer all reported cases to the police, but he was convinced by student activists to change tactic. Katie J.M. Baker, *New California Bill Would Change the Rules for Reporting Rapes on College Campuses*, NEWSWEEK (Jan. 6, 2014), <http://www.newsweek.com/new-california-bill-would-change-rules-reporting-rapes-college-campus-es-225452> [<https://perma.cc/M57B-MYAD>].

⁵⁰ A.B. 1433 (Cal. 2014).

This Article focuses on legislative efforts that go beyond merely providing opportunities for better integration between campus and local law enforcement: they *require* colleges and universities to refer reports of gender violence to the police, including over the survivor's objections. These so-called "mandatory referral" or "mandatory reporting" bills threaten to deny the victim and campus administrators any agency.

Mandatory referral proposals come in two primary forms: the first, which constitutes the vast majority of proposed laws, requires schools to forward all complaints to law enforcement, regardless of the victim's wishes;⁵¹ and the second, which prohibits schools from pursuing disciplinary action against accused students until the police are notified of the report.⁵² As shorthand for this paper, I will call these "Automatic Report" and "Report-or-Stop" proposals respectively. Below, I discuss aspects and examples of Automatic Report bills, which have been introduced in Georgia, Rhode Island, Tennessee, Delaware, and Virginia, and Report-or-Stop bills, which have only been considered by Georgia and the U.S. Congress. I present policy objections to both in Part III below.

A. *Automatic Report Bills*

Automatic Report bills surfaced first, and they have been prevalent on the state level.⁵³ To date, at least seven states have introduced such bills to force immediate police referrals. In 2017, bills to this effect were introduced in both the House⁵⁴ and Senate in Georgia,⁵⁵ though none passed with the relevant language intact. The House of Representatives in Rhode Island proposed one, which was referred to the Judiciary Committee in January 2015⁵⁶; the Tennessee State Senate similarly proposed a law, which was referred to the Senate Education Committee in January 2016⁵⁷; Delaware considered a proposal, but it was ultimately defeated⁵⁸; and Virginia debated one but passed a modified version.⁵⁹ The mild California bill discussed above was originally conceived as a mandatory referral bill.⁶⁰ To date, unmodified mandatory-referral schemes have not yet been enacted, but their failure in some states has not dissuaded legislators from continuing to propose copycat bills in others,⁶¹ suggesting that the possibility of a successful full mandatory

⁵¹ See *infra* notes 54–73 and accompanying text.

⁵² See *infra* notes 74–80 and accompanying text.

⁵³ See Cohn, *supra* note 43.

⁵⁴ H.B. 51, 2017 Leg., Reg. Sess. (Ga. 2017).

⁵⁵ S.B. 71, 2017 Leg., Reg. Sess. (Ga. 2017).

⁵⁶ H.B. 5034, 2015 Leg., Reg. Sess. (R.I. 2015).

⁵⁷ S.B. 2019, 109th Leg., Reg. Sess. (Tenn. 2016).

⁵⁸ H.B. 1, 148th Gen. Assemb., Reg. Sess. (Del. 2016).

⁵⁹ H.B. 1930 (Va. 2015).

⁶⁰ See *supra* note 49 and accompanying text.

⁶¹ For example, Tennessee legislators introduced Tenn. S.B. 2019 in 2016 after mandatory referral bills failed in other states.

referral law is very real. Just this year, a particularly extreme Georgia bill nearly passed in the face of sustained student opposition, passing through the state’s House with a vote of 102-56 before failing in the Senate.⁶²

Virginia provides an illustrative example of how mandatory referral bills that are ultimately passed are softened during the legislative process. There, mandatory referral proposals surfaced as a response to public reports of severe gender violence on campuses that raised questions about schools’ competence to handle such matters.⁶³ After *Rolling Stone* reported an alleged gang rape at the University of Virginia, where the lawmaker’s daughter was enrolled,⁶⁴ one lawmaker said the need for mandatory referrals was clear: “The reason [victims] don’t come forward is because they know that the administration had but one goal and that’s to sweep that sucker under the rug.”⁶⁵ Republican delegate Robert B. Bell proposed a bill that would have required any faculty, staff, or administrator to call the police immediately upon learning that an alleged sexual assault had occurred.⁶⁶ The complementary senate bill similarly required schools to report a sexual assault to local law enforcement within twenty-four hours; it further classified a violation of the requirement as a Class 1 misdemeanor.⁶⁷ Ultimately, however, students—including student survivors—voiced strong objections to mandatory reporting because it would reduce reporting⁶⁸ and deny students a right to confidentiality.⁶⁹ In response, legislators softened the bill, ultimately passing a law that requires a school committee, which must include a law enforcement official, to consider whether campus and public safety requires them to notify criminal authorities of a reported sexual assault.⁷⁰

⁶² Tyler Kingkade, *A Controversial Campus Rape Bill Has Come Back from the Dead*, BUZZFEED NEWS (Mar. 29, 2017, 5:40 PM), https://www.buzzfeed.com/tylerkingkade/georgia-rape-bill-no-longer-dead?utm_term=.jsB1NOd8lO#.yo0LgZed7Z [<https://perma.cc/2UN9-WX7D>].

⁶³ Jenna Portnoy, *Virginia Lawmakers Call for Mandatory Reporting of Campus Sexual Assault*, WASH. POST (Dec. 1, 2014), https://www.washingtonpost.com/local/virginia-politics/virginia-lawmakers-call-for-mandatory-reporting-of-campus-sexual-assault/2014/12/01/993faa12-7992-11e4-9a27-6fdb612bff8_story.html [<https://perma.cc/9NQZ-R66B>].

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See H.B. 1930 (Va. 2015); see also Max Ehrenfreund, *Virginia Wants to Force Universities to Report Every Rape to the Police. That Won’t Address U-Va.’s Real Problem*, WASH. POST WONKBLOG (Dec. 3, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/12/03/virginia-wants-to-force-universities-to-report-every-rape-to-the-police-that-wont-address-uvas-real-problem> [<https://perma.cc/V7EB-VEWP>]; *Del. Rob Bell’s Mandatory Reporting Bill on Sexual Assaults Hits Snag in House Panel*, DAILY PROGRESS (Feb. 4, 2015, 11:02 PM), http://www.dailyprogress.com/news/local/del-rob-bell-s-mandatory-reporting-bill-on-sexual-assaults/article_c8ec3cda-aceb-11e4-a891-a766f5b80f9c.html [<https://perma.cc/2LY3-8KDR>] (describing debate over Va. H.B. 1930, which was modified and eventually enacted).

⁶⁷ *Del. Rob Bell’s Mandatory Reporting Bill on Sexual Assaults Hits Snag in House Panel*, *supra* note 66.

⁶⁸ *Id.*

⁶⁹ *House, Senate Approve Sexual Assault Bills*, RICHMOND TIMES-DISPATCH (Feb. 10, 2015), http://www.richmond.com/news/virginia/article_50bc7d86-9ea8-5b57-93ce-b5106572a103.html [<https://perma.cc/Z98Z-PEB9>].

⁷⁰ See H.B. 1930 (Va. 2015).

Delaware, meanwhile, provides an example of an altogether failed attempt to force police referrals. The state legislature there introduced an Automatic Report mandatory referral bill that would similarly have required that “[a]ny responsible employee of an academic institution . . . [who] becomes aware of an alleged sexual assault upon or by a student . . . shall notify the law enforcement officers . . . within 24 hours.”⁷¹ Sage Carson, a student advocate in the state, described the women legislators pushing for the bill as “mothers . . . looking to protect daughters.” Emphasizing the ways mandatory referral bills strip survivors of agency, she explained, “When we had our meeting it was pretty obvious they saw us as children We are working hard to make it known that we are not children that need protection, but young adults who can make decisions ourselves.”⁷² Ultimately, in the face of widespread survivor criticism, legislators substituted an overhauled bill, and current Delaware law only requires university administrators to offer victims the opportunity to notify law enforcement.⁷³

B. Report-or-Stop

Report-or-Stop bills propose an alternative scheme of mandatory referral. Only federal and Georgia legislators have considered this approach. The Safe Campus Act, a Report-or-Stop bill, is the primary vehicle that federal legislators have used to date to push for mandatory referral.⁷⁴ The bill was introduced by Republican Arizona Congressman Matt Salmon and co-sponsored by Republican Texas Congresswoman Kay Granger and Republican Texas Congressman Pete Sessions⁷⁵ (who has also proposed a federal private right of action for accused students who are “aggrieved” by their school’s decision to impose sanctions for sexual violence).⁷⁶

⁷¹ H.B. 1 § 9002A, 148th Gen. Assemb. (Del. 2015) (emphasis added).

⁷² Dana Bolger, *Paternalistic Delaware Women Lawmakers Fight Campus Rape Survivors on Bill*, FEMINISTING (Oct. 8, 2015), <http://feministing.com/2015/10/08/paternalistic-delaware-women-lawmakers-fight-campus-rape-survivors-on-bill/> [https://perma.cc/J28Z-U6YR]. Student advocates in Georgia faced similarly paternalistic arguments. After state representative Earl Ehrhart called student Grace Starling a “spoiled child” for her opposition to his proposed mandatory referral laws, she wrote, “We are not your children, and we are not your inferiors. We are your constituents. We vote you in, and we can certainly vote you out. Mock us, bully us, and demean us, but we will continue to show up.” Maureen Downey, *Student Survivor of Sexual Assault: Legislators Dismiss and Demean Us. But We Will Be Heard*, ATLANTA J. CONST. GET SCHOOLED (Feb. 27, 2017), <http://getschooled.blog.myajc.com/2017/02/27/student-survivor-of-sexual-assault-legislators-dismiss-and-demean-us-but-we-will-be-heard/> [https://perma.cc/W3FQ-P2TD]; see also Maureen Downey, *Opinion: Senate Listened to student survivors of sexual assault; House mocked them*, ATLANTA J. CONST. GET SCHOOLED (Mar. 26, 2017), <http://getschooled.blog.myajc.com/2017/03/26/opinion-senate-listened-to-student-survivors-of-sexual-assault-house-mocked-them/> [https://perma.cc/AQ56-LS57].

⁷³ H.S. 1 § 9002A, 148th Gen. Assemb. (Del. 2016).

⁷⁴ H.R. 3403 § 163(a)(1), 114th Cong. (2015).

⁷⁵ *Id.*

⁷⁶ H.R. 3408 § 163(c)(1), 114th Cong. (2015). The bill further limits the definition of sexual violence to include federal or state criminal codes. *Id.* § 161(b)(3).

The Safe Campus Act prevents campuses from responding to instances of gender violence until a report to local law enforcement has been made by schools with the victim’s written consent.⁷⁷ Under the Safe Campus Act, unlike an Automatic Report bill, a student could report to a school to access services without triggering a police investigation, but under such a Report-or-Stop bill the school could not legally act on its knowledge of harassment—as required by Title IX—unless or until law enforcement is notified. To put it simply, Automatic Report laws require police notification when a report comes in; Report-or-Stop laws require police notification in order to initiate disciplinary action against an alleged perpetrator.

Georgia is the only state to have considered a Report-or-Stop bill. Before significant amendments, Georgia Representative Earl Ehrhart’s H.B. 51 prohibited schools from taking disciplinary action until after a criminal conviction.⁷⁸ State legislators’ preference for Automatic Report bills may be explained by the shadow of federal preemption of Report-or-Stop legislation. As discussed in greater detail in Part III,⁷⁹ requiring campuses to stall responding to complaints of gender violence until police are contacted may contravene Title IX’s requirements for “prompt and equitable” response following a report,⁸⁰ as only a federal law could permissibly do.

III. THE POLICY CASE AGAINST MANDATORY REFERRALS

Lawmakers’ reflexive turn to mandatory police involvement ignores strong objections to these policies, grounded in the experiences of survivors. For the reasons discussed in this Part, student activists,⁸¹ student affairs professionals,⁸² civil rights organizations,⁸³ victims’ service providers,⁸⁴ and stu-

⁷⁷ H.R. 3403 § 163(b)(1), 114th Cong. (2015) (“During the period in which a law enforcement agency is investigating a covered allegation reported by an institution . . . the institution may not initiate or otherwise carry out any institutional disciplinary proceeding with respect to the allegation, except to the extent that the institution may impose interim sanctions.”) (emphasis added).

⁷⁸ H.B. 51, 2017 Leg., Reg. Sess. (Ga. 2017).

⁷⁹ See *infra* Part III.E.

⁸⁰ E.g., 34 CFR 106.8(b).

⁸¹ *Resisting Mandatory Police Referral Efforts*, KNOW YOUR IX, <http://knowyourix.org/mandatory-referral> [<https://perma.cc/JN8H-A3HW>].

⁸² Open Letter from Kevin Kruger, President, NASPA, et al. to Elected Leaders of the 50 United States (Feb. 19, 2015), http://www.naspa.org/images/uploads/main/Joint_omnibus_bill_statement_letterhead.pdf [<https://perma.cc/R68D-EH6W>].

⁸³ Tyler Kingkade, *28 Groups that Work with Rape Victims Think the Safe Campus Act is Terrible*, HUFFINGTON POST (Sept. 13, 2015), http://www.huffingtonpost.com/entry/rape-victims-safe-campus-act_us_55f300cce4b063ecbfa4150b [<https://perma.cc/7NUK-HH4C>].

⁸⁴ *Id.*; Jill Filipovic, *Making It Harder to Punish Campus Rapists Won’t Help Stop Campus Rape*, WASH. POST (Aug. 10, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/08/10/making-it-harder-to-punish-campus-rapists-wont-help-stop-campus-rape/> [<https://perma.cc/3Y7Z-78XD>] (“The traumatizing nature of sexual assault is that sense of powerlessness that the victim experiences,” says Liz Roberts, deputy chief executive of Safe Horizon, the largest victims’ services organization in the United States. ‘Our work is focused on restoring that sense of power and putting the survivor in the driver’s seat as much as possi-

dent governments⁸⁵ oppose both types of mandatory referral bills. Even some Greek groups have distanced themselves from FratPAC over these bills.⁸⁶ Such bills are bad policy because they will depress survivor reporting, frustrate survivors' access to essential school services, reduce opportunities for accountability, paternalistically force survivors into criminal proceedings counter to their rational interests, and frequently contravene Title IX. Further, mandatory referrals would fail to promote proponents' aims: criminal intervention and fair process for accused students.

A. *Mandatory referral laws discourage survivor reporting.*

Survivor-advocates have long warned that if survivors knew their school reports would be forwarded to the police, they would be less likely to report to *anyone*.⁸⁷ A 2015 online survey by advocacy groups Know Your IX and the National Alliance to End Sexual Violence (NAESV) confirmed that these views were widespread, at least within the organizations' audiences.⁸⁸ (This author co-founded and was previously co-director of Know Your IX.)

Given the current rates at which survivors report gender violence to the police, it should be unsurprising that mandatory referral regimes would decrease reporting to schools. Very few survivors, students and non-students alike, choose to contact law enforcement. One National Institute of Justice study found that "fewer than 5 percent of completed and attempted rapes [of college women] were reported to law enforcement officials."⁸⁹ The Department of Justice found that nonstudent victims ages 18 to 24 were more than 150% as likely to report a rape or sexual assault as their student counter-

ble. Any policy that takes away choice and options from victims has the potential to do real harm."').

⁸⁵ See, e.g., Nashwa Bawab, *SG Introduces Legislation Opposing Safe Campus Act*, DAILY TEXAN (Oct. 28, 2015), <http://www.dailytexanonline.com/2015/10/28/sg-introduces-legislation-opposing-safe-campus-act> [https://perma.cc/LS22-447S].

⁸⁶ Tyler Bishop, *Forcing Colleges to Involve Police in Sexual-Assault Investigations?*, ATLANTIC (Nov. 19, 2015), <http://www.theatlantic.com/education/archive/2015/11/forcing-colleges-to-involve-police-in-sexual-assault-investigations/416736/> [https://perma.cc/N8JV-GX2U].

⁸⁷ E.g., Dana Bolger & Alexandra Brodsky, *Victim's Choice, Not Police Involvement, Should Be Lawmakers' Priority*, MSNBC (Feb. 12, 2015), <http://www.msnbc.com/msnbc/campus-rape-victims-choice-should-be-lawmakers-priority> [https://perma.cc/7QCT-WN46] ("In the face of survivors' widespread reluctance to involve law enforcement officials in their lives, instituting provisions that require survivors' cases be sent to police—without their consent—discourages reporting to anyone. Indeed, time and again campus survivors tell us that, had their schools been empowered to turn their reports over to the police without their permission, they would have reported to no one at all."); Zoe Ridolfi-Starr, *The 'Safe' Campus Act Is Anything But*, REWIRE (Oct. 1, 2015, 1:37 PM), <https://rewire.news/article/2015/10/01/safe-campus-act-anything/> [https://perma.cc/49L3-87DP] ("As deputy director of Know Your IX, I hear every day from student survivors who say that, were the police further enmeshed in the campus process, they'd report to no one at all.").

⁸⁸ *Resisting Mandatory Police Referral Efforts*, *supra* note 81.

⁸⁹ BONNIE S. FISHER ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NCJ 182369, *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* 23 (2000).

parts.⁹⁰ As law professor Nancy Chi Cantalupo has observed, these low rates reflect a reasoned cost-benefit analysis on the part of victims.⁹¹ Reporting gender violence to the police carries with it the risk of sexual harassment,⁹² cruel skepticism,⁹³ violence,⁹⁴ and even arrest.⁹⁵ According to a 2015 study by the National Domestic Violence Hotline, one in three women who reported domestic violence to the police felt *less safe* after calling, and only twenty percent felt safer.⁹⁶ Among surveyed women who had previously reported assaults to the police, two in three feared reporting again, in large part because they thought the police would not believe them or might arrest them instead of or in addition to their abusive partner.⁹⁷ Women of color, undocumented students, and LGBTQ survivors are particularly at risk for police abuse and skepticism.⁹⁸ The risks are compounded by victims’ lack of control

⁹⁰ SOFI SINOZICH & LYNN LANGSTON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 248471, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995-2013 1 (2014), <http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> [<https://perma.cc/34G3-AXKT>] (“Among student victims, 20% of rape and sexual assault victimizations were reported to police, compared to 32% reported among nonstudent victims ages 18 to 24.”).

⁹¹ Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 281, 293 (2016), <http://www.yalelawjournal.org/forum/for-the-title-ix-civil-rights-movement-congratulations-and-cautions> [<https://perma.cc/7MTY-YPAM>].

⁹² See, e.g., Katie McDonough, *Florida Cop Fired After He Sexually Harassed a Rape Victim While Investigating Her Assault*, SALON (Nov. 5, 2013, 3:55 PM), https://www.salon.com/2013/11/05/florida_cop_fired_after_he_sexually_harassed_a_rape_victim_while_investigating_her_assault/ [<https://perma.cc/JJ46-ZHD2>].

⁹³ See, e.g., Claire Gordon, *Why College Rape Victims Don’t Go to the Police*, AL JAZEERA AM. (May 19, 2014), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/5/19/why-college-rapevictimsdonatgotothepolice.html> [<https://perma.cc/W7Q3-S7EE>] (“For every single rape I’ve had, I’ve had 20 that are total bull—”) (quoting a New York Police Department officer); Amanda Litman, *Woman Pays for Reporting a Rape*, MS. BLOG (Apr. 15, 2011), <http://msmagazine.com/blog/2011/04/15/woman-pays-for-reporting-a-rape/> [<https://perma.cc/KVM2-RTWK>].

⁹⁴ See, e.g., *Andrews v. Fowler*, 98 F.3d 1069, 1073–74 (8th Cir. 1996); Michael Martinez & Jethro Mullen, *Victims Describe Assaults by Convicted Ex-Oklahoma City Cop Daniel Holtzclaw*, CNN (Dec. 11, 2015), <http://www.cnn.com/2015/12/11/us/oklahoma-daniel-holtzclaw-verdict/index.html> [<https://perma.cc/B6EE-XNPQ>].

⁹⁵ *Who Will Help Me? Domestic Violence Survivors Speak Out About Law Enforcement Responses*, NAT’L DOMESTIC VIOLENCE HOTLINE 8 (2015), <http://www.thehotline.org/wp-content/uploads/sites/3/2015/09/NDVH-2015-Law-Enforcement-Survey-Report.pdf> [<https://perma.cc/A92T-D7UT>] (documenting that twenty-four percent of surveyed women who had reported a partner abuse or sexual assault incident to the police were arrested or threatened with arrest).

⁹⁶ *Id.* at 6.

⁹⁷ *Id.* at 8.

⁹⁸ *Id.* at 7; Sarah Childress, *Undocumented Sexual Assault Victims Face Backlog and Backlash*, PBS FRONTLINE (June 23, 2015), <http://www.pbs.org/wgbh/frontline/article/undocumented-sexual-assault-victims-face-backlash-and-backlog/> [<https://perma.cc/4Q2P-CQST>]; Jayme Fraser, *Former HPD Cop Guilty of Raping Cantina Waitress*, HOUS. CHRON., (Oct. 4, 2012), <http://www.chron.com/news/houston-texas/article/Former-HPD-cop-guilty-of-raping-cantina-waitress-3919396.php> [<https://perma.cc/E8WG-ZUSX>] (“‘He told me that if we said anything he would sic immigration on us,’ said one of the women.”); Christy Mallory et al., *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community*, WILLIAMS INST. 9–11 (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf> [

within the context of the criminal justice system, where decisions about whether and how to proceed are made by prosecutors and police rather than complainants.⁹⁹ Finally, a survivor knows that bearing these risks and costs could be for naught, given the remarkably small chance of arrest, prosecution, or conviction of the abuser (which may or may not be desired by the victim).¹⁰⁰

B. Most mandatory referral laws block students' access to essential school services.

Questions of student discipline—both procedure and substance—have dominated the conversation about campus gender violence.¹⁰¹ Yet, as discussed in Part I, punishment is only one part of schools' responsibilities under Title IX to ensure equal access to education, and only one part of what victims seek. In addition to punitive remedies, colleges and universities must also provide an array of services and accommodations for survivors of gender violence ranging from dorm changes to mental health counseling.¹⁰²

Victim services are essential for individual students. In the wake of violence, survivors may suffer academically¹⁰³ and skip educational and social opportunities to avoid their assailants.¹⁰⁴ Victims face disproportionate

VSKJ] (recounting reports of discrimination and sexual abuse of LGBT people by police officers); Brandon E. Patterson, *Oklahoma Cop Convicted of Raping Four Black Women and Assaulting Others*, MOTHER JONES (Dec. 11, 2015), <http://www.motherjones.com/politics/2015/12/12-white-people-decide-case-white-ex-cop-acussed-raping-12-black-women> [<https://perma.cc/B3WF-GVL4>] (“Prosecutors argued Holtzclaw deliberately selected his victims. They were almost all poor and black. . . . Some were suspected or convicted of drug possession or prostitution, and others had active warrants. Holtzclaw thought they would be too afraid to report him or no one would believe them if they did, prosecutors argued in court. The officer often threatened victims with arrest and violence if they did not cooperate.”).

⁹⁹ Cantalupo, *supra* note 91, at 287.

¹⁰⁰ *The Criminal Justice System: Statistics, RAPE, ABUSE, & INCEST NATIONAL NETWORK*, <https://rainn.org/statistics/criminal-justice-system> [<https://perma.cc/TXQ9-EXGA>] (aggregating data from U.S. Dep’t of Justice, Bureau of Justice Statistics, National Crime Victimization Surveys from 2008-2012, Fed. Bureau of Investigation, Uniform Crime Reports from 2006-2010; and U.S. Dep’t of Justice, Felony Defendants in Large Urban Counties from 2002-2006).

¹⁰¹ See Peterson & Ortiz, *supra* note 33, at 2138.

¹⁰² See *supra* note 27 and accompanying text.

¹⁰³ E.g., Carol E. Jordan et al., *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 15 TRAUMA, VIOLENCE & ABUSE 191, 195–96 (2014); Rebecca Marie Loya, *Economic Consequences of Sexual Violence for Survivors: Implications for Social Policy and Social Change* (June 2012) (unpublished Ph.D. dissertation, Brandeis University) (on file with author) at 93–94; Cari Simon, *On Top of Everything Else, Sexual Assault Hurts the Survivors' Grades*, WASH. POST: POSTEVERYTHING, (Aug. 6, 2014), https://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think/?utm_term=.3d1ee792c3b5 [<https://perma.cc/3ZZE-EEUU>] (“I’ve worked with more than a dozen campus sexual violence survivors All of my clients saw their grades suffer, sometimes dramatically. . . . [M]y colleagues report similar findings.”).

¹⁰⁴ E.g., Bolger, *supra* note 27; Loya, *supra* note 103, at 94 (“Participants cited many reasons for decreased performance, including missing classes to avoid seeing the perpetrator on campus”); Anonymous: *On Assault Narratives*, YALE DAILY NEWS (Feb. 1, 2012), <http://yaledailynews.com/blog/2012/02/01/anonymous-on-assault-narratives/> [<https://perma.cc/>

rates of post-traumatic stress disorder, depression, and substance abuse.¹⁰⁵ As a result, student survivors—who are disproportionately women and disproportionately trans¹⁰⁶—may face diminished professional prospects,¹⁰⁷ amass crippling debt,¹⁰⁸ and even drop out of school.¹⁰⁹ Victim services seek to ameliorate these effects so gender violence does not pose an insurmountable obstacle to education.¹¹⁰ On an individual level, services can help a survivor stay in school and perform near the level he or she would have without the assault.¹¹¹ In the aggregate, services fight inequality by ensuring a large percentage of college women and other disproportionately targeted student populations do not fall behind their peers.

Automatic Report mandatory referral laws block victims’ access to services by discouraging them from reporting to their colleges and universities. The availability of resources and accommodations is often contingent on a school’s knowledge of the events. A victim may desperately need a dorm change to avoid seeing her abusive ex-partner, or may greatly benefit from mental health counseling—but may nonetheless decide reporting to the school to access these services is not worth the costs of the resulting law enforcement involvement. Given the particular vulnerabilities of women of color, undocumented students, and LGBTQ survivors to abuse by law enforcement, services will remain furthest from reach for marginalized student

NU26-3STUJ] (“The dizzying nausea of running into my assailant at parties, avoiding classes I thought he might shop and losing mutual friends has unfairly deprived me of a full Yale experience.”).

¹⁰⁵ MICHELE C. BLACK ET AL., CTRES. FOR DISEASE CONTROL & PREVENTION, NAT’L CENTER FOR INJURY PREVENTION & CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1–3 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [<https://perma.cc/HGY9-BWXXZ>]; DEAN G. KILPATRICK ET AL., MED. UNIV. OF S.C., NAT’L CRIME VICTIMS RESEARCH & TREATMENT CTR., DRUG-FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL STUDY 50–55 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf> [<https://perma.cc/XP7R-6328>].

¹⁰⁶ 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, 210 (2011); CHRISTOPHER KREBS, ET AL., U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAMPUS CLIMATE SURVEY VALIDITY STUDY FINAL TECHNICAL REPORT (2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf> [<https://perma.cc/UVA3-YX29>].

¹⁰⁷ Simon, *supra* note 103 (“These deflated GPAs have a rippling negative impact on survivor’s graduate school options and access to professional opportunities.”).

¹⁰⁸ Bolger, *supra* note 32.

¹⁰⁹ Daniel Eisenberg et al., *Mental Health and Academic Success in College*, 9 J. ECON. ANALYSIS & POL’Y 1, 20 (2009) (demonstrating mental health struggles lead to higher drop-out rates); Amelia M. Arria et al., *Drug Use Patterns and Continuous Enrollment in College: Results from a Longitudinal Study*, 74 J. STUD. ON ALCOHOL & DRUGS 71, 76 (2013) (demonstrating substance abuse is associated with an increased risk for discontinuous enrollment).

¹¹⁰ See Loya, *supra* note 103, at 14 (“[T]rauma theorists suggest that supportive responses can mitigate the impact of the traumatic event . . . Beyond interpersonal interactions within the survivor’s social network, this external response can encompass such things as responses from law enforcement or medical personnel, accommodation by employers or schools, and access to free and confidential crisis services. Thus, this external response represents a crucial moment for policy intervention.”); *id.* at 176–77 (“Survivors similarly named counseling, medical care, and a creative outlet as services valuable to their recovery.”).

¹¹¹ *E.g.*, Loya, *supra* note 103, at 178.

populations.¹¹² Without access to Title IX-mandated accommodations, these survivors will likely face higher risks of mental health problems, substance abuse, diminished academic performance, and dropping out of school. Mandatory reporting laws thus ignore victims' needs and directly aggravate the problem Title IX seeks to address: unequal access to education. The effects of such policies will be felt both by individuals and systemically. On the individual level, services are essential to keep students in school; in the aggregate, services combat sex inequality by ensuring a large percentage of college women, who are more likely than their male peers to be assaulted,¹¹³ do not fall behind their peers.

Of course, police do not have a monopoly on mistreating victims; many schools mishandle reports as well, and in doing so may discourage survivors from reporting to administrators and seeking services.¹¹⁴ Yet the fact that two institutions mistreat survivors is not an argument for forcing students to choose between reporting to both or to neither. Further, the calculus of whether to report to the police stands in sharp contrast to the analogous cost-benefit analysis of whether to report gender violence to a college or university. Under Title IX, colleges provide survivors services while (almost) fully vesting decisions about whether to seek disciplinary action with the complaining student.¹¹⁵ "It is thus riskier for a survivor to report through the criminal justice system than through a Title IX process," Cantalupo argues, "because Title IX empowers victims, not police and prosecutors, to make fundamental decisions regarding the handling of their reports."¹¹⁶ By that same logic, it is riskier for a survivor to report to a school under a mandatory regime than without. Right now, a student who reports to the school to seek services will in almost all cases retain control over whether to pursue a disciplinary complaint, criminal report, both, or neither, but he or she will lose control over whether to pursue a criminal report if police referral is man-

¹¹² See, e.g., Callie Beusman, *How the "Safe Campus Act" Would Protect Rapists*, VICE (Sept. 14, 2015, 6:25 PM), https://broadly.vice.com/en_us/article/how-the-safe-campus-act-would-protect-rapists [<https://perma.cc/SMN8-4XZX>] ("Mandatory reporting [to the police], for any survivor, is the wrong thing to do. Mandatory reporting for LGBTQ survivors and women of color is a disaster.") (quoting Lisa Maatz, policy advisor for the American Association of University Women).

¹¹³ Krebs, *supra* note 106.

¹¹⁴ MacKinnon, *supra* note 30, at 2058–61 (summarizing media and legal accounts of schools' failures to address sexual harassment).

¹¹⁵ OCR has made clear that, to protect the student body, colleges and universities may, in rare instances, need to take disciplinary action against an accused student despite a victim's wishes, especially if multiple students have reported the same wrongdoer. See Carmel DeAmicis, *Which Matters More: Reporting Assault or Respecting a Victim's Wishes?*, ATLANTIC (May 20, 2013), <http://www.theatlantic.com/national/archive/2013/05/which-matters-more-reporting-assault-or-respecting-a-victims-wishes/276042/> [<https://perma.cc/VR6E-QZDG>] ("[I]f the Title IX coordinator has information indicating that the alleged perpetrator has previously sexually assaulted other students on campus, it may be necessary to override this student's request for confidentiality in order to pursue disciplinary action against the alleged perpetrator.") (quoting Office for Civil Rights Attorney Rachel Gettler).

¹¹⁶ Cantalupo, *supra* note 91.

dated. Reporting to the school is thus a far riskier venture under a mandatory referral scheme even if the survivor trusts neither the school nor the criminal system to handle the case well. Policymakers should address colleges’ deficiencies directly, as feminists have suggested,¹¹⁷ rather than force survivors into a different dysfunctional system.

C. Mandatory referral laws reduce opportunities for accountability and prevention.

With fewer reports, and thus fewer opportunities to discipline offenders, schools leave their student populations at risk. Automatic Report bills discourage survivors from reporting to schools at all, while Report-or-Stop bills limit the population of wrongdoers schools can discipline to those who have been reported by their victims to the police—and thus leave other students vulnerable to the same perpetrators. The percentage of campus sexual assaults committed by so-called repeat offenders is hotly contested as a matter of both empirical methods and ideology.¹¹⁸ Yet even conservative estimates suggest a meaningful subset of college rapes are committed by students who have raped before.¹¹⁹ Consequently, suspensions, expulsions, and other sanctions are essential tools for schools to reduce the risk of a wrongdoer harming another student. Even apart from the clear effect of removing a perpetrator from campus, school disciplinary action plays a powerful role in norm creation by establishing which behaviors will not be tolerated within the university community. Further, criminal prosecutions are unlikely to meaningfully increase as a result of mandatory referral, as discussed below, suggesting that even if one believes criminal interventions are significantly more effective at stopping repeat offenders, mandatory referral bills are still bad policy.¹²⁰

D. Mandatory referral laws paternalistically push survivors into investigations against their interests.

Even as mandatory referral laws discourage survivors from reporting to schools, they may result in some cases making their way to the police that otherwise would not have. Perhaps some victims will report not knowing that a mandatory referral law is in place, or will ultimately decide their preferences to avoid police involvement do not outweigh their strong preference

¹¹⁷ See *infra* notes 214–216 and accompanying text.

¹¹⁸ See MacKinnon, *supra* note 30, at 2053–55 (citing Leah E. Daigle et al., *The Violent and Sexual Victimization of College Women: Is Repeat Victimization a Problem?*, 23 J. INTERPERSONAL VIOLENCE 1296, 1301 (2008); David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 80 (2002)).

¹¹⁹ See Kevin M. Swartout et al., *Trajectory Analysis of the Campus Serial Rapist Assumption*, 169 JAMA PEDIATRICS 1148, 1150–51 (2015).

¹²⁰ See *infra* notes 134–42 and accompanying text.

for school involvement. For some victims, that criminal law intervention may ultimately be welcome. Yet, without a mandatory referral scheme in place, many others would have rationally chosen not to report to the police.

As detailed above, many survivors choose not to contact law enforcement because they will face mistreatment and no payoff from involving police.¹²¹ A mandatory referral bill may, then, force a victim to undergo aggressive interviews, police harassment, and a public trial, among other costs that he or she may have decided were not worth a potential conviction. Indeed, as Dana Bolger notes, “For many survivors (particularly of dating violence and stalking) reporting to the police, to then have their cases inevitably dismissed, will mean violent—even fatal—retaliation from their perpetrators.”¹²²

In denying survivors their agency to choose the best path forward, mandatory referral laws infantilize victims. Nancy Chi Cantalupo writes that though mandatory referral proponents treat college students like legal dependents, incapable of making their own decisions about whether or not to report a crime, they are in fact adults with full capacities to decide their own course.¹²³ Recall the Delaware activist who said, of her meetings with legislators, “[i]t was pretty obvious they saw us as children, [But] [w]e are working hard to make it known that we are not children that need protection, but young adults who can make decisions *ourselves*.”¹²⁴ Consider, too, Georgia student Grace Starling’s warning to legislators pushing mandatory referral: “We are not your children, and we are not your inferiors. We are your constituents.”¹²⁵

In the process of infantilizing survivors, mandatory referral laws perpetuate stereotypes about “helpless” women and victims, contravening the very purpose of Title IX: to ensure narrow ideas about gender never pose an obstacle to students’ educations.¹²⁶ Mandatory referral bills thus replicate the problems of laws that mandate arrest after a report of domestic violence, which some feminists argue deprive victims of autonomy and dignity.¹²⁷

¹²¹ See *supra* notes 91–100 and accompanying text.

¹²² Dana Bolger, *Frats Lobby Congress to Make it Harder to Report Campus Sexual Assault*, FEMINISTING (Mar. 25, 2016), <http://feministing.com/2015/03/25/frats-lobby-congress-to-make-it-harder-to-report-campus-sexual-assault/> [<https://perma.cc/5HTL-WMMS>]; see also Dana Harrington Conner, *To Protect or to Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 877, 885 n.22, 887 (2006) (discussing the risks to abused partners when they attempt to leave).

¹²³ Cantalupo, *supra* note 91, at 292.

¹²⁴ Bolger, *supra* note 72 (quoting Delaware student activist Sage Carson).

¹²⁵ Downey, *supra* note 72.

¹²⁶ Cantalupo, *supra* note 91, at 292. See also 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh) (noting that Title IX was intended to combat “stereotyped notions” of women).

¹²⁷ See Claire Houston, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases*, 21 MICH. J. GENDER & L. 217, 244 (2014). See *infra* Part V for further discussion of parallels between mandatory referral and mandatory arrests.

This affront to the autonomy of survivors can exacerbate the denial of agency many feel during abuse. As Liz Roberts of Safe Horizon, the country’s largest victims’ services organization, told the *Washington Post*:

The traumatizing nature of sexual assault is that sense of powerlessness that the victim experiences. . . . Our work is focused on restoring that sense of power and putting the survivor in the driver’s seat as much as possible. Any policy that takes away choice and options from victims has the potential to do real harm.¹²⁸

Similarly, Jasmine Lester, the founder of Sun Devils Against Sexual Assault at Arizona State University, told the *Huffington Post*, “Sexual violence robs victims of power over their bodies, their minds, and their futures[.] Survivors need to feel like they have choices. The option not to report to police but still have schools investigate is imperative.”¹²⁹ In disregarding victims’ feedback in policy design, mandatory referral proponents double their disregard for survivor autonomy.

E. Some mandatory referral laws require schools to contravene Title IX.

Imagine this scenario: a college has overwhelming evidence that one student raped another student, yet fails to take any action in response. Maybe the wrongdoer continues to rape other students with continued impunity. Without a doubt, that school violates Title IX by refusing to act despite actual knowledge of sexual violence. Yet it is exactly this scenario that Report-or-Stop mandatory referral laws require.

Under the Safe Campus Act, a school would be *prohibited* from pursuing disciplinary action against a wrongdoer unless the victim reported to the police.¹³⁰ If passed, the proposed statute would presumably modify Title IX, which was signed into law earlier. In doing so, the Safe Campus Act would gut the heart of Title IX’s mandate: requiring schools to remedy known sex discrimination, including gender violence. Equivalent state law, would directly contradict the civil rights law. The argument is simple: Title IX requires schools to respond to reports of sexual harassment, including sexual assault, promptly and equitably,¹³¹ but a state Report-or-Stop law would *prohibit* the school from fulfilling this legal responsibility if the victim were unwilling to report to the police. (Under current law, merely referring a complaint to law enforcement does not satisfy a school’s obligations under Title IX.¹³²) Of course, federal law trumps a contradictory state law,¹³³ and schools

¹²⁸ Filipovic, *supra* note 84.

¹²⁹ Kingkade, *supra* note 83.

¹³⁰ See Safe Campus Act, H.R. 3403, 114th Cong. (2015).

¹³¹ See *Davis*, 526 U.S. at 633; 34 C.F.R. 106.8(b).

¹³² Revised Guidance, *supra* note 25, at 21. See also DCL, *supra* note 25, at 10.

¹³³ See, e.g., *Altria Grp. v. Good*, 555 U.S. 70, 76 (2008).

would be required to follow Title IX rather than the state statute. Yet even an ineffectual state Report-or-Stop law would be dangerous, risking confusing schools and survivors about their responsibilities and available options.

Report-or-Stop mandatory referral laws thus directly undermine schools' responsibilities under Title IX and contravene the antidiscrimination aims of the regime. These Report-or-Stop laws demonstrate how reduced school responsibility for responding to gender violence—and thus restoring educational access—can directly conflict with the reasons schools are obligated to deal with gender violence in the first place.

i. Mandatory referral laws do not achieve proponents' ends.

As discussed in Part II, proponents of mandatory referral bills claim the laws are necessary for two reasons: they would stop violence and enhance procedural protections for the accused. While both aims are admirable, the proposed bills would achieve neither.

ii. Prevention

As mentioned in Part II, many proponents of mandatory referral bills claim that criminal law enforcement is the obviously preferable way to stop wrongdoers from reoffending.¹³⁴ These proponents might contend that the tradeoff between fewer suspensions or expulsions is worth any possible gain in successful prosecutions.¹³⁵ However, even if one accepts the premise that

¹³⁴ See, e.g., Cohn, *supra* note 43 (“[A]llegations of sexual assault should be investigated by impartial, trained law enforcement officers with . . . the punitive power to hold those convicted accountable to the victim and society.”); Tyler Kingkade, *Activists, College Officials Protest Controversial Campus Rape Bill*, HUFFINGTON POST (Sept. 10, 2015, 5:31 PM), http://www.huffingtonpost.com/entry/safe-campus-act-opposition_us_55f1d303e4b03784e2787013 [<https://perma.cc/Q364-TRH3>] (noting that in a Congressional hearing for the Safe Campus Act in September 2015, sponsors and their supporters predicted that mandatory referral would result in higher prosecution and arrest rates); Ashe Schow, *Congressman's Office Has Perfect Response to Anti-Due Process Advocates*, WASH. EXAMINER (Nov. 3, 2015), <http://www.washingtonexaminer.com/congressmans-office-has-perfect-response-to-anti-due-process-advocates/article/2575571> [<https://perma.cc/5GBN-GEXF>] (“Rep. Salmon believes offenders who commit rape should be punished to the fullest extent of the law, not only so that justice is done on behalf of the victim, but also so that the predator is taken off the streets and unable to perpetrate additional sexual assaults in the future Allowing rapists to roam our streets because they happen to commit their crime in a dorm room on campus instead of in an alleyway downtown only perpetuates the culture of turning a blind eye to serious crimes against women.”) (quoting Tristan Daedalus, Rep. Salmon’s spokesman); Shibley, *supra* note 44 (arguing that because “serial predators commit around 90% of campus rapes, with an average of nearly six rapes per perpetrator . . . each rape not reported to law enforcement is a missed opportunity to protect future victims from harm”); Letter from Scott Berkovitz, President, & Rebecca O’Connor, Vice President for Pub. Policy, Rape, Abuse, & Incest Nat’l Network, to the White House Task Force to Protect Students from Sexual Assault 9 (Feb. 28, 2014), <https://rainn.org/images/03-2014/WH-Task-Force-RAINN-Recommendations.pdf> [<https://perma.cc/H67Z-Q9VF>] (calling on the Obama administration to “de-emphasize internal judicial boards” because “serial criminals are left unpunished and free to strike again”).

¹³⁵ There is no evidence that mandatory referral bills will, in fact, result in more criminal reports.

incarceration is the best way to respond to gender violence, too few police reports result in prison time for any potential tradeoff to be worthwhile. General population statistics paint a grim picture: out of the thirty-one percent of rapes reported to the police, only eighteen percent lead to an arrest, less than four percent are referred to prosecutors, and just over two percent lead to a felony conviction.¹³⁶ That means for every one hundred rapes, fewer than two result in a prison sentence. These numbers are likely even lower for college students.¹³⁷ A 2014 investigation by the *Orlando Sentinel* found that “[n]o one gets convicted of campus rape at Florida’s public universities.”¹³⁸ Of the fifty-five rapes reported to campus police departments at Florida’s public universities in 2012 and 2013, only five led to arrests and none resulted in convictions.¹³⁹

These statistics suggest that, to increase successful prosecutions by even one percent of total rapes, mandatory reporting schemes would need to increase reporting to police by at least 150%—unlikely given that *eighty-eight percent of student survivors* surveyed by Know Your IX and NAESV said that, “were campuses required to turn rape reports over to the police (without survivors’ consent), they believe fewer victims would report to anyone at all.”¹⁴⁰ General population statistics also likely understate the challenge, given that college victims are both less likely to report than peers off campus¹⁴¹ and prosecutors hesitate to bring campus cases, which they believe juries will doubt.¹⁴²

iii. Procedural protections

Some advocates for mandatory referrals have looked to the bills to protect the rights of students accused of gender violence through the enhanced procedural protections of criminal investigation and adjudication.¹⁴³ The aim, if taken on face value, is certainly admirable.¹⁴⁴ However, it is difficult to

¹³⁶ See *The Criminal Justice System: Statistics*, *supra* note 100.

¹³⁷ See, e.g., Jeff Schweers, *Campus Sex Assault Cases Rarely Prosecuted*, GAINESVILLE SUN (Oct. 9, 2014), <http://www.gainesville.com/article/20141009/ARTICLES/141009625> [<https://perma.cc/53DE-KE23>].

¹³⁸ Scott Powers & Denise-Marie Ordway, *On Florida Campuses, Rape Allegations Don’t Bring Convictions*, ORLANDO SENTINEL (Aug. 17, 2014), http://articles.orlandosentinel.com/2014-08-17/news/os-campus-crime-rape-20140817_1_florida-atlantic-central-florida [<https://perma.cc/8VYU-UKJA>].

¹³⁹ *Id.*

¹⁴⁰ Know Your IX, *supra* note 81. Around 150 self-identified survivors responded to the online survey distributed by the National Alliance to End Sexual Violence and Know Your IX. See Letter from Terri Fromson (Aug. 2017) (on file with author).

¹⁴¹ Sinozich & Langston, *supra* note 90.

¹⁴² Tyler Kingkade, *Prosecutors Rarely Bring Charges in Campus Rape Cases*, HUFFINGTON POST (June 17, 2014, 7:31 AM), http://www.huffingtonpost.com/2014/06/17/college-rape-prosecutors-press-charges_n_5500432.html [<https://perma.cc/E8FP-D74A>].

¹⁴³ E.g., Cohn, *supra* note 43.

¹⁴⁴ See Brodsky, *supra* note 28 (“We recognize that the same principle that leads us to fight for students’ rights to an education that is free of violence and harassment—that the opportunity to learn is central to individual dignity and social progress—also requires us to take

imagine how a concurrent criminal investigation would enhance procedural protections in campus discipline. While any public police findings might eventually be introduced as evidence in a campus investigation, a criminal investigation will likely conclude well after the school discipline process,¹⁴⁵ which will rely on its own internal findings of fact.¹⁴⁶ In such a case, mandatory referral would not change the accused student's procedural protections at the campus level. Rather, concurrent criminal investigations change school process only insofar as colleges *may* set up additional protections against self-incrimination, akin to those available in a civil trial during a concurrent criminal investigation,¹⁴⁷ which some schools have already done in the absence of mandatory referral laws.¹⁴⁸ In total, mandatory referral laws do not address the procedural protections in campus adjudication. On the other hand, mandatory referral will so massively depress reporting that accused wrongdoers will never need to face the purportedly deficient campus procedures. Ultimately, though, that is not a case for better process; it is a case for no campus procedures at all.

The assertion that criminal proceedings are necessary to protect the procedural rights of students facing disciplinary sanctions for criminal conduct is particularly puzzling because almost all mandatory referral bills only apply to reports of gender-based violence.¹⁴⁹ Under an Automatic Report law, for example, a school would be required to refer a report of sexual assault but not a report of simple assault. The most generous read of the bills' narrowness is that legislators respond to the hot topics of the day, and right now

seriously potential suspensions or expulsions of accused students. The effects of an interruption in education can be devastating, whether a student is forced off campus by a rare false allegation of rape against him or (more commonly) because she has been assaulted and doesn't feel safe staying.”)

¹⁴⁵ DCL, *supra* note 25, at 12 (“Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint.”)

¹⁴⁶ *Id.* at 10. It may be interesting to some readers that in situations in which there are concurrent civil and criminal cases, civil attorneys generally will wait until the conclusions of the criminal case. However, the Department of Education has made clear that schools should *not* delay disciplinary action until the conclusion of a criminal investigation in order to ensure student survivors' access to education in the interim.

¹⁴⁷ See generally 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE CIVIL § 2018 (3d ed. 2017).

¹⁴⁸ E.g., Harvard Law Sch., *HLS Sexual Harassment Resources and Procedures for Students* 8 (Dec. 18, 2014), <https://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf> [<https://perma.cc/V7PC-27NG>] (“It is understood that respondents may be advised not to provide information in circumstances that could prejudice their rights in external proceedings, and a respondent may choose not to do so, although HLS may be obligated to conduct an investigation. HLS will not draw any adverse inferences from silence in such circumstances, but may impose interim measures, reach findings and implement any or all of the remedies available.”).

¹⁴⁹ H.B. 51, 154th Gen. Assemb., Reg. Sess. (Ga. 2017). Perhaps in response to criticisms of previous legislative efforts, its scope was expanded to include non-sexual felonies, but the bill's champion's campaign was so focused on sexual assault that the proposal came to be known as the “campus rape bill.” Rhonda Cook, ‘Campus rape’ bill resurrected as legislative deadline looms, ATLANTA J. CONST. (Mar. 29, 2017), <http://www.myajc.com/news/local/campus-rape-bill-resurrected-legislative-deadline-looms/MW5mnfxedGbRWBQ2omzSGM/> [<https://perma.cc/6Q2R-F9V6>].

that is campus sexual assault. A less generous take is that mandatory referral advocates doubt students who report gender violence more than those who report other crimes. “It’s clear that what’s animating the [Safe Campus Act] authors’ concern here isn’t the violence per se but the people who typically experience it—women—and the special skepticism our society reserves for them,” advocate Dana Bolger told *Broadly* in 2015. “It drives home that we don’t believe rape survivors. Why else would we be okay with schools punishing students who commit physical assault but not students who commit sexual assault?”¹⁵⁰

In other contexts, advocates for accused students have argued that those facing disciplinary proceedings related to sexual harms deserve special protections because of the stigma attached to such accusations.¹⁵¹ This argument fails for two primary reasons. First, it underestimates the significant reputational damage attached to other conduct contrary to school codes, including physical assaults, stealing, sex work, drug sales, and academic dishonesty directly relevant to professional trustworthiness. Second, there is no basis in U.S. law to establish such special care for stigmatized offenses: criminal and civil defendants do not receive additional procedural protections in court when they are accused of rape, even though the reputational risks are far greater in open court than in a private campus proceeding.¹⁵² Ultimately, though, the question of special rights for students accused of gender violence is irrelevant to mandatory referral policies because these proposals will not enhance procedural protections.

In sum, then, mandatory referral bills suffer from fatal flaws: they would reduce survivor reporting, reduce accountability for wrongdoers, frustrate victims’ access to essential services, and force survivors into criminal prosecutions against their interests—all without promoting the proposals’ proponents aims.

IV. DISINGENUOUS CHAMPIONS

Given the grave failures of mandatory referral policies, their popularity may be surprising. If, as experts from civil rights groups, victims’ services organizations, student affairs professional associations, anti-crime groups, and this Article have all pointed out, the bills fail as a matter of policy, why do legislators continue to push these laws?¹⁵³ The popularity of these efforts is driven less by reasoned policy arguments than by “seriousness” rhetoric:

¹⁵⁰ Beusman, *supra* note 112.

¹⁵¹ *E.g.*, Open Letter from Joseph Cohn et al., FIRE Coalition, *supra* note 43.

¹⁵² Alexandra Brodsky, *A Rising Tide: Learning About Fair Process from Title IX*, 66 J. LEGAL EDUC. 822, 826–30 (2017).

¹⁵³ *E.g.*, Nat’l All. to End Sexual Violence, *NAESV Opposes Mandatory Referral Legislation*, 1 (Mar. 10, 2015), <http://endsexualviolence.org/files/NAESVMandatoryReferralPositionStatement.pdf> [<https://perma.cc/GV56-SSRE>]; Jake New, *First, Do No Harm*, INSIDE HIGHER ED (Feb. 19, 2015), <https://www.insidehighered.com/news/2015/02/19/open-letter-calls-legislators-reconsider-campus-sexual-assault-bills> [<https://perma.cc/8VZG-87FZ>].

an appealing insistence that rape is just too serious to leave to anyone but the police. A few organizations and individuals objecting to campus responses to gender violence complaints, like RAINN, are genuinely aimed at protecting survivors.¹⁵⁴ And Democratic legislators, including Senator Sanders, have similarly shared a first gut reaction that, to attend sufficiently to the seriousness of sexual assault, responses should necessarily include police involvement.¹⁵⁵ But the legislative and monetary support for mandatory referral legislation has instead come from organizations—like Koch-funded FIRE¹⁵⁶ and “FratPAC”—that oppose campus discipline for gender violence altogether and find among their supporters men’s rights activists,¹⁵⁷ whose other projects include targeting outspoken women for mass sex-based harassment.¹⁵⁸ These actors are co-opting the language of “seriousness” to advance aims in clear opposition to feminist activists past and present.

Advocates for mandatory referral bills often argue, with little explanation, that the necessity of police involvement follows directly from the gravity of the harm. However, society widely accepts non-criminal responses to gender violence in the workplace and civil law.¹⁵⁹ For example, Title VII of the Civil Rights Act of 1965 requires employers to intervene in workplace sexual harassment, including rape;¹⁶⁰ and tort laws¹⁶¹ and gender violence civil remedies¹⁶² offer private rights of action to take abusers to court. Yet to

¹⁵⁴ Most notably, the Rape Abuse & Incest National Network (RAINN) has taken a position that campuses are ill-equipped to handle complaints of gender violence. See Berkovitz, *supra* note 134.

¹⁵⁵ Ben Kamisar, *Sanders: Law Enforcement Should Handle Campus Rape*, THE HILL (Jan. 11, 2016, 11:01 PM), <http://thehill.com/blogs/ballot-box/dem-primaries/265515-sanders-law-enforcement-should-handle-campus-rape> [<https://perma.cc/H484-4WPG>].

¹⁵⁶ Arnsdorf, *supra* note 8.

¹⁵⁷ See Caroline Heldman & Bailee Brown, *The Second Wave of Backlash Against Anti-Rape Activism*, MS. BLOG (Aug. 19, 2014), <http://msmagazine.com/blog/2014/08/19/the-second-wave-of-backlash-against-anti-rape-activism> [<https://perma.cc/MR3T-CJBY>]; Bluedude14, REDDIT (July 7, 2015, 6:08 PM), https://www.reddit.com/r/MensRights/comments/2a3d4p/the_foundation_for_individual_rights_in_education [<https://perma.cc/U4TQ-X9WQ>] (“The Foundation for Individual Rights in Education has intervened at Boise State University after the college charged a student group hundreds of dollars in unconstitutional security fees for hosting a speech by a gun rights activist. More than relevant to MRAs considering feminist campus protests.”).

¹⁵⁸ Mariah Blake, *Mad Men: Inside the Men’s Rights Movement—and the Army of Misogynists and Trolls It Spawned*, MOTHER JONES (Jan./Feb. 2015), <http://www.motherjones.com/politics/2015/01/warren-farrell-mens-rights-movement-feminism-misogyny-trolls/> [<https://perma.cc/D2KF-YAA8>].

¹⁵⁹ E.g., Alexandra Brodsky & Elizabeth Deutsch, *The Promise of Title IX: Sexual Violence and the Law*, DISSENT (Fall 2015), <https://www.dissentmagazine.org/article/title-ix-activism-sexual-violence-law> [<https://perma.cc/N743-879C>]; Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down but Not Ruled Out*, 39 FAM. L.Q. 157, 165 (2005).

¹⁶⁰ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65–72 (1986).

¹⁶¹ See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 18, 19 (AM. LAW INST. 1965); RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 101 (AM. LAW INST., Discussion Draft 2014); CAL. CIV. CODE § 1708.5 (West 1998).

¹⁶² See, e.g., CAL. CIV. CODE § 52.4 (West 2016); 740 ILL. COMP. STAT. ANN. 82/1–20 (West 2013); N.Y.C., N.Y. ADMIN. CODE § 8-904 (2014). Before the Supreme Court partially

many mandatory referral proponents, a lack of police involvement per se trivializes the harm. To take rape seriously, one *must* call the cops—even if the victim begs you not to do so. These critics further confuse the possibility of parallel proceedings on a campus and through local law enforcement for a wholesale displacement of the criminal justice system; that is, their critiques assume that the status quo somehow prevents the “serious” response.

FIRE regularly goes out of its way to express deep concern for victims. The organization’s head, Joseph Cohn, has marshaled “seriousness” rhetoric specifically in support of the Safe Campus Act, writing, “FIRE has repeatedly expressed our reservations about entrusting universities to adjudicate allegations of *serious* felonies like sexual assault. . . . Sexual assault is a *serious* crime.”¹⁶³ On the same note, FratPAC lobbyists framed the movement for mandatory referrals as centrally concerned with victims due to the seriousness of sexual violence:

When a perpetrator has been found guilty by the school, the most serious punishment available is expulsion. But those who commit sexual violence should be prosecuted to the fullest extent of the law. . . . We need to do everything possible to ensure our nation’s campuses provide safe environments for learning and growth.¹⁶⁴

As part of a FratPAC lobbying push in April 2015, Michael Greenberg, the head of Sigma Chi, a 241-chapter fraternity, told *Bloomberg News*, “If people commit criminal acts, they should be prosecuted and they should go to jail.”¹⁶⁵ Similarly, Jean Mrasek, the chairman of frequent FratPAC ally National Panhellenic Conference, told the *Washington Post*:

The police involvement sends a strong message that sexual assault must be treated as the heinous crime that it is. . . . I think everyone will acknowledge that sexual assault is a crime, is a felony, and really, if you step back and think about it, what other felony do we allow a victim to evade police investigation by using the college conduct process?¹⁶⁶

struck down the original Violence Against Women Act, *United States v. Morrison*, 529 U.S. 598, 627 (2000), victims were able to sue perpetrators of gender violence in federal courts under the statute’s civil remedy, 42 U.S.C. § 13981.

¹⁶³ Cohn, *supra* note 43 (emphasis added).

¹⁶⁴ Cleta Mitchell & Trent Lott, *Safe Campus Act Sends Campus Sexual Assaults to the Police*, COLUM. DAILY TRIB. (last updated Oct. 6, 2015, 1:00 PM), http://www.columbiatribune.com/opinion/oped/safe-campus-act-sends-campus-sex-assaults-to-police/article_4afb0c21-7fa5-58f2-b65f-e4cfc733114c.html [<https://perma.cc/5JJ5-8ZAQ>].

¹⁶⁵ Glovin, *supra* note 42.

¹⁶⁶ Filipovic, *supra* note 84.

(The answer, of course, is many felonies, including simple assault.)¹⁶⁷ The National Panhellenic Conference has since withdrawn its support for the Safe Campus Act.¹⁶⁸

Using a similar tactic, the *Washington Examiner*, a conservative outlet that has followed the campus movement against gender violence with dismay and supported mandatory referral bills,¹⁶⁹ used “seriousness” rhetoric to turn students’ demands for action against rape into a case against school involvement:

Now, at least on college campuses, rape and sexual assault are considered mere disciplinary matters, no different than plagiarism or theft from a dorm. To non-college students, they are considered crimes.

You would think the issue was being taken seriously But according to the activists, the solution to this problem . . . is not to send serious crimes to the police, but to campus courts where the worst an accused student can face is expulsion.¹⁷⁰

These arguments even made their way into the Republican National Committee (RNC)’s 2016 platform. As the drafters explained:

Sexual assault is a terrible crime. We commend the good-faith efforts by law enforcement, educational institutions, and their partners to address that crime responsibly. Whenever reported, it must be promptly investigated by civil authorities and prosecuted in a courtroom, not a faculty lounge. . . . The Administration’s distortion of Title IX to micromanage the way colleges and universities deal with allegations of abuse . . . must be halted before it further muddles this complex issue and prevents the proper authorities from investigating and prosecuting sexual assault effectively with due process.¹⁷¹

While the RNC includes this discussion in a section on Title IX otherwise dedicated to decrying the advance of rights for LGBT students, nowhere does it acknowledge the civil rights law that requires the “faculty lounge” intervention—and which legally designates schools as one of the “proper authorities” to investigate. In doing so, the RNC adopted the tactics of FIRE

¹⁶⁷ *Id.* (“In fact, campuses adjudicate all kinds of crimes where victims may not go to the police: physical assaults at fraternities, for example, or a student swiping another’s laptop.”).

¹⁶⁸ See Bishop, *supra* note 86.

¹⁶⁹ See, e.g., Schow, *supra* note 134.

¹⁷⁰ Ashe Schow, *Why Aren’t We Taking Rape Seriously?*, WASH. EXAMINER (Apr. 2, 2015), <http://www.washingtonexaminer.com/why-arent-we-taking-rape-seriously/article/2562427> [<https://perma.cc/CT37-BLEJ>].

¹⁷¹ REPUBLICAN NAT’L COMM., 2016 REPUBLICAN PLATFORM 35 (2016), [https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL\[1\]-ben_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf) [<https://perma.cc/Z2CM-95LM>].

and FratPAC: justifying limiting remedies for victims because of the severity of the violation.

RAINN, the only major victims’ rights organization that supports mandatory referrals, lends credibility to organizations like FIRE and FratPAC by using a similar seriousness rhetoric. In its letter to the White House, RAINN argued that because murder—a first-order violent crime under the FBI hierarchy—would never be adjudicated by the university, neither should rape, a second-order violent crime.¹⁷² (In fact, schools have investigated homicide.¹⁷³) RAINN’s support for bad policy is certainly a confusing error, but it also underscores the intuitive appeal of mandatory referral proposals and the “seriousness” frame (which, as the next Part charts, has long roots in victims’ rights movements).

Seriousness rhetoric—along with the allegiance of a handful of survivor-focused or left-wing figures like RAINN and Senator Sanders—suggests the chief mandatory referral champions, FIRE and FratPAC, are great friends to survivors. Yet, FIRE and FratPAC consistently take positions contrary to the needs of victims that frustrate schools’ efforts to hold wrongdoers accountable—suggesting they promote mandatory referrals not *in spite* of their policy failings but instead, perhaps, *because* of them. Perhaps these proponents merely misunderstand victims’ needs, but it is hard to give them the benefit of the doubt when they consistently oppose legal efforts to support survivors. As discussed in Part II above, FIRE, FratPAC, and similar allies have worked to resist expanded Title IX enforcement to ensure victims’ access to education and expressed doubt that sexual assault is, in fact, a prevalent problem on campus.¹⁷⁴ A 2011 article by a FIRE writer for Reason, reposted in part on FIRE’s website, declared that “Washington’s push to force colleges into taking a more aggressive stance is based on a highly inflated notion of an ‘epidemic’ of campus rape.”¹⁷⁵ FratPAC, which in 2015 hired Trent Lott to lobby on its behalf,¹⁷⁶ originally advocated for an even more extreme mandatory referral scheme under which schools could take no action until the end of a criminal adjudication¹⁷⁷—even though victims’ advocates noted such trials often take years, by which point both students would

¹⁷² Berkovitz, *supra* note 134.

¹⁷³ Michelle J. Anderson, *I’m a College President. Betsy DeVos Should Help Me Deal with Campus Sexual Assault*, WASH. POST (July 13, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/07/13/im-a-college-president-devos-shouldnt-stop-me-from-dealing-with-sexual-assault/?utm_term=.0cb88a3d96b6 [http://perma.cc/XSP2-6PXV].

¹⁷⁴ See *supra* notes 38–42 and accompanying text.

¹⁷⁵ Cathy Young, *The Politics of Campus Sexual Assault*, FIRE (Nov. 6, 2011), <https://www.thefire.org/media-coverage/the-politics-of-campus-sexual-assault/> [https://perma.cc/6EWC-H7HP]. FIRE’s position makes one wonder how much rape is necessary to justify government concern.

¹⁷⁶ Tyler Kingkade, *Fraternities Hire Trent Lott to Lobby for Limiting Campus Sexual Assault Investigations*, HUFFINGTON POST (Oct. 14, 2015, 6:04 PM), http://www.huffingtonpost.com/entry/fraternities-trent-lott-campus-sexual-assault_us_561d63e4e4b028dd7ea57c9a [https://perma.cc/8HGG-DY6E].

¹⁷⁷ See Glovin, *supra* note 42.

likely have graduated or dropped out.¹⁷⁸ Michael Greenberg of Sigma Chi and other fraternity leaders may think rapists should go to jail,¹⁷⁹ but they seem to think few such wrongdoers are on campus, and they would accept these wrongdoers remaining in school for years, attending class with those they hurt as they await the conclusion of a criminal adjudication. FIRE and FratPAC find common ground with one particularly vocal mandatory referral proponent, Representative Earl Ehrhart of Georgia. According to one student advocate, Ehrhart encouraged student survivors to “trigger elsewhere” during a hearing, called her a “snowflake” and “spoiled child,” and accused her of “utilizing a victim’s status.”¹⁸⁰

Based on the public record alone, there is no way to know with certainty the true and disparate aims of mandatory referral proponents, an ideologically heterogeneous group. Yet from the outside, particularly vocal supporters like FIRE and FratPAC appear to express concern for rape victims in order to protect wrongdoers and justify policies detrimental to victims’ interests. FIRE and FratPAC’s other policy positions are inconsistent with their averred concern for survivors in the context of mandatory referral. By contrast, the organizations are entirely consistent in supporting policies that harm survivors. For a long time, it was acceptable for commentators, policy-makers, and judges to doubt all rape reports.¹⁸¹ Now, in what Professor Reva Siegel calls “preservation through transformation,”¹⁸² skeptics cloak their old opposition to rape reform under politically palatable seriousness rhetoric.

V. AGAINST TAKING RAPE “SERIOUSLY”

For feminists concerned with rape reform, mandatory referrals pose an immediate challenge and also serve as a useful lesson in backlash and co-optation. In particular, co-optation has produced a rhetoric shared by both those seeking to undermine Title IX¹⁸³ and those organizing against gender

¹⁷⁸ See Jenny Kutner, *Fraternities Plan to Lobby Congress to Prevent Campus Rape Investigations*, SALON (Mar. 25, 2015, 2:54 PM), http://www.salon.com/2015/03/25/fraternities_plan_to_lobby_congress_to_prevent_campus_rape_investigations/ [<https://perma.cc/XL39-2CVN>] (“During last month’s conference call, leaders of national Greek organizations said lobbying efforts will escalate this year. Buddy Cote, chairman of the North-American Interfraternity Conference, said colleges should defer punishment of a student accused of sexual assault “until the completion of the criminal investigation and any subsequent trial.” Victim advocates noted that could take years and may not happen until after the victim and offender graduate, if at all.”).

¹⁷⁹ See Glovin, *supra* note 42.

¹⁸⁰ See Downey, *supra* note 72. See also Jim Galloway, *A Georgia Tech fraternity fight spills into the state Capitol*, Atlanta Journal Constitution (Jan. 27, 2016), <http://politics.blog.ajc.com/2016/01/23/a-georgia-tech-fraternity-fight-spills-into-the-state-capitol/> [<https://perma.cc/NU6C-AKNJ>].

¹⁸¹ See generally Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013 (1991).

¹⁸² Reva B. Siegel, “*The Rule of Love*”: *Wife Beating As Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

¹⁸³ See *supra* notes 163–69 and accompanying text.

violence.¹⁸⁴ This rhetoric is particularly malleable and, as a result, the current backlash counsels against feminists using “seriousness” rhetoric to call for rape law reform.

Mandatory referral proponents’ “seriousness” rhetoric is powerful in part because it tracks so closely the language historically and contemporarily used by victims’ advocates. Feminists often call on policymakers to take gender violence “seriously” by adopting their policy proposals. In 2010, the New York City chapter of the National Organization for Women and Service Fund launched a “Take Rape Seriously” campaign in response to high-profile rape trials in which the harm was, in their view, unjustly trivialized through short sentences and acquittals.¹⁸⁵ In the wake of Emma Sulkowicz’s “Mattress Performance,”¹⁸⁶ Ultraviolet, a digital feminist nonprofit, started a petition to demand Columbia University “take rape seriously” by “[u]pdat[ing] [school] policies with student input to guarantee accommodations for survivors, mandat[ing] better training for staff who interact with survivors, and establish[ing] clear sanctioning guidelines—including expulsion of rapists.”¹⁸⁷ This same rhetoric is common in protests: in 2017, for example, a coalition of women’s groups rallied against a police commander’s trivializing comments about rape with signs reading “take rape seriously” and “rape is always a crime.”¹⁸⁸ The progressive blog *ThinkProgress*, an arm of the Center for American Progress, regularly labels rape law reform efforts—from testing more rape kits to fining schools for Title IX violations—as efforts to “take rape seriously.”¹⁸⁹

Seriousness rhetoric is appealing, and in some cases genuinely seeks to correct true trivialization of the harm of sexual violence. Second-wave rape law reformers implored police officers to take rape seriously rather than treat it as simply a minor domestic spat.¹⁹⁰ In 1994, commenting on a proposed mandatory arrest law, Joan Zorza, an attorney then running the National

¹⁸⁴ See *supra* notes 153–54 and accompanying text.

¹⁸⁵ *NOW-NYC and The Service Fund’s Take Rape Seriously Campaign*, Take Rape Seriously, <http://takerapeseriously.weebly.com/> [https://perma.cc/6T7C-6DLG].

¹⁸⁶ Sulkowicz carried a mattress around Columbia University for her senior year to symbolize the emotional weight of her rape and her alleged assailant’s continued presence on campus. Diane Heckman, *The Role of Title IX in Combatting Sexual Violence on College Campuses*, 325 Ed. L. Rep. 1, 32 n.5 (2016).

¹⁸⁷ *Tell Columbia University: Take Rape Seriously*, ULTRAVIOLET, http://act.weareultraviolet.net/sign/Columbia_University/? [https://perma.cc/2A88-653Y].

¹⁸⁸ Laura Dimon and Leonard Greene, *Women rally to demand NYPD precinct boss ‘take rape seriously’ after he suggests some sex assaults are worse than others*, N.Y. DAILY NEWS (Jan. 10, 2017), <http://www.nydailynews.com/new-york/brooklyn/women-group-big-rips-nypd-insensitive-rape-remarks-article-1.2943015> [https://perma.cc/9VPS-NEAV].

¹⁸⁹ E.g., Tara Culp-Ressler, *One Simple Solution to Make Sure Colleges Start Taking Rape Seriously*, THINKPROGRESS (July 28, 2014, 6:53 PM), <http://thinkprogress.org/health/2014/07/28/3464886/title-ix-reform/> [https://perma.cc/G9W8-VT57]; Tara Culp-Ressler, *Taking Sexual Assault Seriously Involves Testing Thousands of Rape Kits First*, THINKPROGRESS (Dec. 10, 2013, 3:30 PM), <http://thinkprogress.org/health/2013/12/10/3040811/rape-kit-backlog-joyful-heart/> [https://perma.cc/9C8P-5PVL].

¹⁹⁰ E.g., LENORA M. LAPIDUS ET AL., *THE RIGHTS OF WOMEN: THE AUTHORITATIVE ACLU GUIDE TO WOMEN’S RIGHTS* 158–59 (2009); SUSAN SCHECHTER, *WOMEN AND MALE VIO-*

Center on Women and Family Law, told *The New York Times*, “It is really going to mean that police for the first time will be forced by state law to take domestic violence seriously.”¹⁹¹ That same year, Zorza testified before Congress that mandatory arrests “convey[ed] the message to the abuser, [the] victim, their children, and to all of society that domestic violence [was] a crime which society [would] not tolerate.”¹⁹² The original 1992 Violence Against Women Act included funding to support mandatory arrest programs, which, the law’s text explained, was meant to encourage states to “treat domestic violence as a serious violation of criminal law.”¹⁹³

Yet the use of seriousness rhetoric to legitimize mandatory referral bills illustrates the danger of this language. The use of seriousness rhetoric promotes criminal intervention and, more broadly, creates a demand for action without substantive commitments that invites both misinformed allies like Sanders and RAINN¹⁹⁴ and disingenuous opponents like FIRE and FratPAC¹⁹⁵ to rely on intuitions and ideologies rather than survivors’ actual needs to build policy solutions.

As apparent from the mandatory referral landscape, seriousness rhetoric is easily used to promote criminal intervention. It does so even in the context of civil remedies like Title IX, which aims to promote gender-violence victims’ equal access to education rather than vindicate society’s interests in response to violence writ large. On its face, the rhetorical strategy prioritizes the performance¹⁹⁶ of anger on the part of authorities—the (usually male) person or institution implored to “take rape seriously”—over the wellbeing of the (usually female) survivor, who is entirely absent from the mantra. When asked to take gender violence seriously, a policymaker is asked to demonstrate indignation publicly and loudly, which often does not require consideration of what policy change would actually best serve victims’ needs or prevent future violence.¹⁹⁷ Indeed, when it comes to violence, thoughtful,

LENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN’S MOVEMENT 11–16, 24–26 (1982).

¹⁹¹ James Dao, *Albany Set to Require Arrest in Domestic Violence Cases*, N.Y. TIMES (June 2, 1994), <http://www.nytimes.com/1994/06/22/nyregion/albany-set-to-require-arrest-in-domestic-violence-cases.html> [<https://perma.cc/Y44W-B6Q4>].

¹⁹² Houston, *supra* note 127, at 268 (quoting *Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime & Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. 35 (1994) (statement of Joan Zorza, Senior Attorney, National Center on Women and Family Law)).

¹⁹³ 42 U.S.C.A. § 13981 (Westlaw through Pub. L. 113–45); see Houston, *supra* note 127, at 267–68 (briefly tracing the history of pro-mandatory arrest VAWA grants).

¹⁹⁴ See *supra* notes 153–54 and accompanying text.

¹⁹⁵ See *supra* notes 163–69 and accompanying text.

¹⁹⁶ For evidence of mandatory referral proponents’ lack of commitment to victims’ wellbeing, see *supra* notes 39–43 and accompanying text.

¹⁹⁷ See, e.g., Ahmad R. Smith, *Tough on Crime vs. Smart on Crime: What’s the Difference?*, 6 THE CRIT: CRITICAL STUD. J. 78, 81 (2013) (“‘[T]ough on crime’ policies give the perception of being an effective approach to crime prevention, but in truth, they are mostly helpful to politicians who seek to convey that they are doing something to keep certain people in line.”); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 618–23 (2009).

nuanced policy proposals may too easily read on the public stage as a *lack* of grave concern.¹⁹⁸ What better way to demonstrate personal outrage than calling for harsher punishments? After all, the criminal law is the method by which the state expresses its official, sanctioned outrage,¹⁹⁹ sidelining the victim as no more than a special witness.²⁰⁰ She is not a party to the case. The sanction does not seek to compensate her for the harm. It is the state that brings charges. If a rare conviction results, it is the state that triumphs.

The history of feminist seriousness rhetoric reemphasizes the invitation. Some feminist reformers marshaled this language during early efforts to transform the state’s approach to rape and domestic violence, including campaigns for mandatory arrest. As a result, contemporary advocates for criminal intervention can reasonably say—whether they are well-intentioned or not—that they are picking up a long feminist tradition in which “serious” means “criminal.” When, for example, mandatory referral proponent Jed Rubinfeld writes that “the concept of sexual assault is trivialized” when such harms are adjudicated by school disciplinarians,²⁰¹ he seems to champion Zorza’s logic that police action is necessary to communicate the magnitude of the harm.²⁰²

Yet the aims and contexts of contemporary mandatory referral efforts and second-wave mandatory arrest reforms are very different. First, campaigns for mandatory arrests through the 1970s, ‘80s, and ‘90s arose at a time when police were, even more so than today, systematically inclined to dismiss gender-based violence as nothing more than a private dispute, so reformers called on law enforcement to protect victims *who called for help*.²⁰³ In Susan Schechter’s seminal *Women and Male Violence: The Visions and Struggles of the Battered Women’s Movement*, a victim of domestic violence recounts law enforcement’s response to her report when they arrived at the scene:

¹⁹⁸ See, e.g., H. Lee Sarokin, *Tough on Crime/Soft on Crime: Redefining the Labels*, 29 HUM. RTS. 7, 7 (2002).

¹⁹⁹ E.g., *Gregg v. Georgia*, 428 U.S. 153, 183 (1976); *Roper v. Simmons*, 543 U.S. 551, 571 (2005); *Panetti v. Quarterman*, 551 U.S. 930, 960 (2007); Susan A. Bandes, *Child Rape, Moral Outrage, and the Death Penalty*, 103 NW. U.L. REV. COLLOQUY 17, 22 (2008); John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 KY. L.J. 1, 10 (2009).

²⁰⁰ Patricia Yancy Martin & R. Marlene Powell, *Accounting for the “Second Assault”*: *Legal Organizations’ Framing of Rape Victims*, 19 L. & SOC. INQUIRY 853, 888 (1994).

²⁰¹ Jed Rubinfeld, Opinion, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <https://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html> [<https://perma.cc/V8JJ-K5MW>].

²⁰² See *supra* notes 191–92 and accompanying text.

²⁰³ See, e.g., SCHECHTER, *supra* note 190 (describing the police attitudes toward domestic violence that second-wave advocates sought to address); Dana Harrington Conner, *To Protect or to Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 877, 887 (2006) (“Historically, police have been slow to react to domestic calls, refusing to arrest perpetrators and leaving the victim to fend for herself. The message has been loud and clear: ‘Your safety is not a priority.’”).

I knew he was going to kill me The police arrived and said, “Did anything happen?” The house was in pieces; chairs were broken everywhere, and my hair was out of my head, hanging on my shoulders, and the cop said, “It looks like nothing happened.”²⁰⁴

When domestic violence advocates demanded that police take gender violence seriously, then, they asked for recognition that *something* had happened—that domestic violence was not *nothing*. Given police refusal to respond to victims who voluntarily requested help, mandatory arrests could be read, in light of cases like the one above, as a way to support survivors’ agency. Mandatory arrest bills imposed responsibilities on law enforcement when victims reported, but contemporary mandatory referral bills require victims to report.

Of course, sometimes victims who called the police did not want the abuser arrested, and for this reason some feminists have critiqued mandatory arrests as an attack on victim autonomy in the name of saving abused women from their false consciousness.²⁰⁵ These critiques point to a second important difference between the contexts in which mandatory arrest and mandatory referral bills arise: we know more now about effects of depriving gender violence survivors of full decision-making regarding whether and when to seek criminal intervention. Policymakers and advocates debating mandatory referral bills now can—and *must*—benefit from knowledge of the unintended consequences of mandatory arrest regimes, which warn against kneejerk criminal intervention. Academics, policymakers, and victim advocates have condemned mandatory arrest regimes for adding to the mass incarceration crisis, and many who once promoted such policies now signal their regret.²⁰⁶ However well-intentioned, forced police action exacerbates victims’ mistrust in law enforcement, denies women’s autonomy by denying their ability to make their own decisions,²⁰⁷ discourages reporting,²⁰⁸ feeds

²⁰⁴ Schechter, *supra* note 190, at 13.

²⁰⁵ E.g., EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* 162 (2d ed. 1996); Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U.L. REV. 1, 5 (2009); Houston, *supra* note 127, at 244; Amy M. Zelcer, *Battling Domestic Violence: Replacing Mandatory Arrest Laws with A Trifecta of Preferential Arrest, Officer Education, and Batterer Treatment Programs*, 51 AM. CRIM. L. REV. 541, 548–49 (2014).

²⁰⁶ E.g., G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women’s Movement*, 42 Hous. L. REV. 237, 247 (2005) (“The issue of mandatory intervention has a personal dimension for me because I was one of the authors of New York’s mandatory arrest law . . . I am one of the women whose work is being deconstructed by other scholars and by my own work.”).

²⁰⁷ E.g., Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1867 (2002) (“By failing to honor a victim’s individual preferences, mandatory policies patronize her and may undermine her efforts to exert control over her life by disrupting her intimate relationship, economic security, and family stability.”); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 554–55 (1999) (“[I]ronically, the very state interventions designed to eradicate the intimate abuse in battered women’s lives all too often reproduce the

racist policing,²⁰⁹ and leads to more arrests of survivors.²¹⁰ These effects hit women of color, low-income women, and immigrant women the hardest.²¹¹ Nor is it clear that mandatory arrest policies keep victims safe. In fact, “[t]he number of murders committed by intimate partners is now significantly higher in states with mandatory arrest laws than it is in other states.”²¹²

For those without faith that criminal intervention is wise as a policy matter, these concerns alone should be enough to warn against seriousness rhetoric. But even those less worried about the effects of criminalization should nonetheless be wary of the value vacuum that seriousness rhetoric creates. What does it mean to take rape seriously? Seriousness rhetoric demands volume and emphasis, not a particular policy. This makes the rhetoric particularly malleable for bad faith actors, like FratPAC, and particularly distracting from the needs of victims. Seriousness rhetoric is license to put any idea into action so long as the solution is dramatic enough, loud enough, and clear enough to demonstrate that the actor understands that gender violence is indeed very, very bad.

CONCLUSION

Proposals on the state and federal level purport to improve responses to complaints of campus gender violence by involving local law enforcement. Yet these bills would instead chill reporting, reduce accountability, and stand in the way of survivors’ access to essential services. If successful, these efforts would frustrate the fundamental purposes of Title IX and undermine

emotional abuse of the battering relationship. In these instances, state policies have the inadvertent effect of rendering battered women less, rather than more, safe from violence. . . . [M]andatory state interventions rob the battered woman of an important opportunity to acknowledge and reject patterns of abuse and to partner with state actors (law enforcement officers, prosecutors, and medical professionals) in imagining the possibility of a life without violence.”).

²⁰⁸ E.g., Alexandra Pavlidakis, *Mandatory Arrest: Past Its Prime*, 49 SANTA CLARA L. REV. 1201, 1204 (2009) (citing Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws* (Nat’l Bureau of Econ. Research, Working Paper No. 13186, 2007)); Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 CARDOZO WOMEN’S L.J. 303, 315 (2005).

²⁰⁹ Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U.J. GENDER & L. 171, 182 (1994).

²¹⁰ E.g., Zelcer, *supra* note 205, at 550; Pavlidakis, *supra* note 208, at 1204.

²¹¹ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991); Epstein, *supra* note 207, at 1867–68 (citing INST. ON VIOLENCE, INC., *VIOLENCE IN THE LIVES OF AFRICAN AMERICAN WOMEN: A FOCUS GROUP STUDY* 18–19 (Beth E. Richie ed., 1996); Susan L. Miller, *Unintended Side Effects of Pro-Arrest Policies and Their Race and Class Implications for Battered Women: A Cautionary Note*, 3 CRIM. JUST. POL’Y REV. 299, 306-07 (1989); Ruttenberg, *supra* note 209, at 185–86; Tien-Li Loke, *Trapped in Domestic Violence: The Impact of United States Immigration Laws on Battered Immigrant Women*, 6 B.U. PUB. INT. L.J. 589, 592 (1997)).

²¹² Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws*, 93 J. PUB. ECON. 85 (2009).

schools' ability to alleviate the barriers to education that survivors often face in the wake of violence. An effective way to focus energy on more useful efforts is to re-center on victims' needs. Following that lead, feminists may want to reframe their own rhetorical strategy from calling for others to "take rape seriously" to calling for others to take the needs of survivors seriously. In resisting rhetorical co-optation, feminists would shift focus from politicians' performances of their personal commitments to the actual needs of actual people at actual risk. This call draws on decades of feminist emphasis of the importance of basing advocacy in not only politics but also services.²¹³ Service-based advocacy requires movements to remember, at all times, the concrete needs of survivors.

Victims and their close allies have proposed a number of legislative ideas that would directly address real obstacles. Many have called for congressional correction to Supreme Court precedent that predicates schools' liability on actual knowledge of severe and pervasive harassment, a heavy burden on plaintiffs and departure from case law in other contexts.²¹⁴ Some have called on state legislators to require of schools more robust, accessible, and affordable accommodations for survivors.²¹⁵ During the Obama presidency, Representative Jackie Speier from California, at the bequest of student organizers, called on federal officials to forgive student debt accumulated as a result of schools' Title IX violations.²¹⁶ And under the new Trump administration, which has embarked on a campaign to roll back Title IX protections for survivors,²¹⁷ state efforts to fill in the gap left by federal inaction will be crucial for students' civil rights.

All of these solutions respond to the real needs of real people as they are really experienced, not as they are imagined by others. Tellingly, student activist group Know Your IX originally titled its publication of survey results reflecting student victims' opinions on mandatory referral bills "Ask Survivors."²¹⁸ Too often, no one "serious" bothers to do so.

²¹³ E.g., SCHECHTER, *supra* note 190, at 242; Julie Goldscheid, *Gender Neutrality and the "Violence Against Women" Frame*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 307, 322 (2015).

²¹⁴ See generally FATIMA GOSS GRAVES, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, RESTORING EFFECTIVE PROTECTIONS FOR STUDENTS AGAINST SEXUAL HARASSMENT IN SCHOOLS: MOVING BEYOND THE *Gebser* and *Davis* Standards 2 (Jan. 2008), <https://www.acslaw.org/files/Goss%20Graves%20-%20%20Moving%20Beyond%20Gebser%20and%20Davis%20Final.pdf> [<https://perma.cc/X34N-5Y6B>].

²¹⁵ Know Your IX, *supra* note 81.

²¹⁶ Letter from Representative Jackie Speier to Catherine Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. 1 (Sept. 13, 2016), <https://www.knowyourix.org/wp-content/uploads/2017/01/9-13-16-Speier-Letter-to-OCR-re-Sexual-Assault-Student-Loan-Debt.pdf> [<https://perma.cc/23U7-JJTV>].

²¹⁷ See, e.g., Jackson, *supra* note 26.

²¹⁸ Testimony of Dana Bolger, Senate Health, Education, Labor, and Pensions Committee 5 n.12 (July 29, 2015), <https://www.help.senate.gov/imo/media/doc/Bolger.pdf> [<https://perma.cc/49D3-V8E5>].