TITLE IX’S REPRODUCTIVE REMEDIES

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Abstract

Despite the rich public debate surrounding sexual assault at colleges and universities, the problem of pregnancy among survivors has received little attention. At the same time, institutions of higher education continue to resist compliance with federal law mandating insurance coverage of reproductive health care for their students and employees. For students learning and growing in college environments where rape is far too common, access to contraception and emergency contraception is critical. This Note argues that Title IX, the civil rights law prohibiting sex discrimination in federally funded educational programs, requires colleges and universities to make contraception and emergency contraception available on campus to student survivors of sexual assault. When pregnancy resulting from rape is conceptualized as an injury, Title IX obliges schools to remedy that injury and prevent its recurrence by ensuring contraceptive access on campus. In this light, Title IX emerges as a vehicle to address both sexual assault and unwanted pregnancy—dual barriers to the equal educational opportunity envisioned by Title IX. Finally, this reading of Title IX presents an opportunity not only to make common sense health care and education policy reforms, but also to revisit broader doctrinal implications for reproductive justice as an issue of sex equality.

INTRODUCTION

Many voices—administrators, legal scholars, student survivors, and the accused—are participating in the ongoing national conversation about campus sexual assault. Yet little attention has been paid to the occurrence of pregnancy among survivors and their choices with respect to their pregnancies. Colleges and universities are under federal obligation to confront the prevalence of sexual violence on their campuses, to remedy its effects, and to accommodate survivors in various ways. While many schools are taking increasing steps

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to comply with this mandate, others remain under federal oversight for what reformers have identified as an enabling culture of sexual assault. At the same time, many educational institutions in both camps resist compliance with existing federal laws requiring the provision of contraceptive coverage to their students.

Rape can have a number of lasting consequences—among them, an unwanted pregnancy. Despite the interrelatedness of rape and pregnancy, even many campus sexual assault reformers have not emphasized the importance of student survivors’ reproductive autonomy. Likewise, the prevalence of campus rape has not been significantly considered in policymaking debates about the role colleges and universities should perform in meeting their students’ reproductive health needs. Without access to reproductive options—namely, contraception and emergency contraception\(^1\)—student survivors can experience a twofold deprivation of control over their own bodies, all while entrusted to the care of their educational institutions.

Title IX,\(^2\) the federal civil rights statute that prohibits sex discrimination in education, is the legal mechanism for ensuring that schools respond to incidents of sexual assault on campus. Department of Education guidance interprets the statute to require federally funded schools to make accommodations for survivors, remedy the harmful effects of sexual assault, and prevent their recurrence.\(^3\) But the guidance does not expressly require schools to ensure survivors’ access to contraception and emergency contraception, crucial tools in remedying rape’s potential effects. If pregnancy that results from rape is considered an injury—in the same category as bodily harm, emotional trauma, missed semesters, and other injuries for which Title IX can create institutional liability—then Title IX requires schools to help student survivors prevent and remedy that harm.

This Note argues that by requiring federally funded schools to take action to redress and prevent harm that results from a hostile environment of sex discrimination, Title IX guarantees student survivors a right to reproductive health care access on campus—

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\(^1\) This Note uses the term “emergency contraception” to signify a variety of methods of preventing pregnancy following an unprotected sexual encounter, sexual assault, or birth control failure. See Part I.B, infra, and accompanying footnotes.

\(^2\) 20 U.S.C. § 1681(a) (2012) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”).

namely, no-cost access to contraception and emergency contraception. Part I provides background on the campus sexual assault epidemic, discusses research on rape-related pregnancy and the importance of emergency contraception, and explores the scarce attention given to students’ reproductive health on many college and university campuses. Part II presents the Title IX framework, argues for a conceptualization of pregnancy as an injury, and proposes that schools’ obligation to remedy their students’ rape-related injuries includes a duty to provide access to prophylactic and emergency contraception. This Part proposes a number of mechanisms for potential reform, including support for new federal administrative guidance, litigation, and state-level legislative action. Part III addresses potential limitations of the suggested mechanisms, including Title IX’s religious exemption provision, and proceeds to situate this Note’s thesis in a broader legal landscape of equality-based theories of reproductive justice.

I. Reproductive Risks for Survivors at College

A. Sexual Assault on Campus

The nationwide epidemic of sexual assault and harassment on college and university campuses is by now well-documented. A 2015 survey of twenty-seven institutions of higher education prepared for the Association of American Universities (AAU) revealed that about one-fourth of female college seniors participating in the study had experienced “nonconsensual sexual contact involving force or incapacitation” since entering college. As a practical consideration, this Note is necessarily limited in scope to the exploration of a Title IX mandate for only contraception and emergency contraception, setting aside discussion of other remedial choices a pregnant survivor might prefer or require. Rape survivors exposed to potential pregnancy are not constrained (and would not be under this theory of Title IX) to choose emergency contraception. Indeed, a survivor would need to take emergency contraception within days after an assault in order for that particular remedy to have its desired effect, and there are many reasons such timely action may not be realistic for some survivors. I do not intend to exclude those survivors who do not or cannot choose to prevent pregnancy in these ways; on the contrary, I hope that the arguments set forth in this Note might theoretically extend to other remedies, to oblige schools to accommodate survivors whether they choose emergency contraception or birth. However, students are necessarily left on their own with respect to one remedy: Title IX expressly precludes the possibility that its sex equality guarantee could be interpreted to require schools to help pregnant students access abortions. 20 U.S.C. § 1688 (2012) (“Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion.”).

David Cantor et al., Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct 1, 65 tbls. 3–10 (2015) [hereinafter AAU Survey] (finding that 27.2% of female undergraduates reported experiencing “nonconsensual sexual contact” by the time they graduated). The publishers of the study emphasize that students responded at a rate of 19%, and that they found “wide variation across” the twenty-
The results of the survey confirmed and expanded upon the estimates of previous, smaller studies, and marked a step toward ascertaining the true scope of a problem that often goes underreported. Other research has revealed that students raped on campus experience a range of injuries related to their assaults—posttraumatic stress, depression, and economic harm (including lost tuition and medical and psychological health care costs).

Although the problem is not new, media attention to campus sexual assault and activism surrounding the issue have grown in recent years, with a particular focus on the role of colleges and universities in preventing and managing sexual assault on their campuses. The Obama Administration emphasized the campus sexual assault crisis beginning in 2011 and throughout its second term. The Department of Education’s Office for Civil Rights

seven colleges and universities that participated. They caution that the media’s often-repeated characterization that “one in five” women will be sexually assaulted while at college is “oversimplistic” because there is no one standard rate of occurrence across educational institutions. Id. at 28.


7 Indeed, “[a] relatively small percentage (e.g., 25% or less) of even the most serious incidents are [sic] reported to an organization or agency (e.g., Title IX office; law enforcement).” AAU Survey, supra note 5, at 50.


9 Id. (finding that 33% of campus survivors experience depression).

10 See Office of the Vice President & White House Council on Women & Girls, Rape and Sexual Assault: A Renewed Call to Action 2 (2014), https://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf [http://perma.cc/72XY-KXBZ] (noting that several studies have quantified the individual cost of every rape to be somewhere between $87,000 and $240,776); Dana Bolger, Gender Violence Costs: Schools’ Financial Obligations Under Title IX, 125 YALE L.J. 2106 (2016) (proposing reforms that would enhance agency enforcement of schools’ obligation to compensate survivors for financial harm).

11 See e.g., Dear Colleague Letter, supra note 3 (Department of Education guidelines to colleges and universities clarifying their obligations under Title IX and the Clery Act to prevent and address sexual assault on their campuses). See also Office of the Vice President & White House Council on Women & Girls, Not Alone: White House Task Force to protect Students From Sexual Assault (2014); It’s On Us, itsonus.org [https://perma.cc/JE76-XXC7] (last visited Feb. 4, 2017) (White House public awareness campaign partnering with educational institutions, media outlets, not-for-profit organizations, celebrities, tech companies, and other allies to promote understanding of the problem and encourage communication and prevention).
(OCR) is currently investigating over two hundred institutions of higher education for possible violations of their obligations to address sexual assault. But perhaps the most significant participants in the growing activism combating campus sexual assault have been students themselves, such as the young advocates behind Know Your IX, “a survivor- and youth-led organization that aims to empower students to end sexual and dating violence in their schools.” Many student survivors have organized on their campuses in protest against what they see as their schools’ mishandling of their sexual assault complaints, some filing complaints with the Department of Education or taking legal action against their universities.

Legal and academic communities have also engaged in dialogue and debate on the issue. Law professors and students, social scientists and feminist scholars continue to engage in lively conversation about reform and the scope of schools’ responsibility. Scholars, students, and policymakers have published research illuminating a variety of related concerns: the relevance of evolving definitions of rape and consent, schools’ capacity to provide due process for students accused of sexual misconduct and the necessity

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for procedural changes in disciplinary hearings,\(^{16}\) issues of reporting and the role of law enforcement,\(^ {17}\) the wisdom of particular campus codes of conduct and response protocols,\(^ {18}\) and the phenomenon of the activism itself.\(^ {19}\) Yet amidst this growing wealth of literature, there has been an absence of scholarship focusing on survivors’ experiences with pregnancy or their ability to access reproductive health care.

Here, an important clarification is in order: survivors within the scope of this Note are those who might have become pregnant from the unwanted sexual contact they experienced—that is, most often female students who experienced nonconsensual vaginal penetration.\(^ {20}\) The AAU survey found that 10.8% of female undergraduate students


\(^{20}\) Campus sexual assault also affects men, transgender students, and women who cannot or do not become pregnant. In fact, undergraduate students who participated in the AAU Survey who identified as TGQN (transgender, genderqueer, questioning, or non-conforming) experienced the highest rates (12.4%) of forced penetration of all students surveyed. AAU Survey, supra note 5, at ix. This Note does not intend to marginalize these students; its aim is to explore the intersection between campus sexual assault and unintended pregnancy, and to investigate the ways in which a Title IX approach to reproductive health care access at colleges and universities might lead to health policy reforms that could benefit all students.
experienced penetration by force or incapacitation since enrolling in college, while 11.4% of undergraduate females reported contact “involving penetration or oral sex without [their] active, ongoing voluntary agreement,” or affirmative consent. In other words, more than one in ten undergraduate women who participated in the survey had been penetrated without their permission. For those women who experienced unprotected vaginal penetration, pregnancy was one considerable risk.

The AAU survey asked respondents whether they became pregnant as a result of the experiences they reported. The results of this question were not included in the national report, but participating institutions had the option of reporting their own results. Columbia University (the only school that elected to disclose the results of the question concerning pregnancy) reported that, among female students who confirmed experiencing penetration by force, about 2% became pregnant. Columbia’s figure necessarily excludes students who did not become pregnant because they or their assailants were using contraception at the time of the assault, as well as students who were able to obtain emergency contraception after the assault. Many of the other institutions that have disclosed their own survey results have omitted responses to the question directed at pregnancy. Consequently, it is difficult to compare the incidence of rape-related pregnancy at Columbia—an urban university that offers contraceptive access on campus—with a national average or with other, perhaps more rural or less contraceptive-friendly schools. Furthermore, the definition of rape continues to evolve on college campuses across the country, moving toward a broader reflection

21 AAU Survey, supra note 5, at ix.

22 Id. at xii, 56.

23 The survey defines “penetration” as “when one person puts a penis, finger, or object inside someone else’s vagina or anus” and “when someone’s mouth or tongue makes contact with someone else’s genitals.” Id. at viii. Therefore, not every respondent who reported experiencing penetration would have been exposed to the possibility of an unintended pregnancy. The survey does not inquire more specifically into types of penetration that might result in pregnancy, so these data are currently the most precise available.

24 Id. at A5-41, Question GA14.


26 See, e.g., David Cantor, et al., Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct: University of Texas at Austin (2015); David Cantor, et al., Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct: Iowa State University (2015); David Cantor, et al., Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct: Cornell University (2015); David Cantor et al., Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct: University of Oregon (2015).
of survivors’ experiences. Therefore, there is reason to believe the reported incidence of pregnancy among survivors would increase as the definition of rape expands. At present, though we still know far too little about the reproductive choices campus survivors make or the options available to them, we do know that exposure to pregnancy is a statistically significant risk for women rape survivors of reproductive age.

B. Rape, Pregnancy, and Emergency Contraception

The silence and stigma that so often shroud both sexual violence and unwanted pregnancy present obstacles to assessing accurately the prevalence of pregnancy among rape survivors. They also serve as barriers to informed political conversation and enable myths about rape and pregnancy to endure. These fictions have often emerged in the context of exceptions to abortion-restricting legislation for pregnant survivors of rape, which cast a spotlight on the intersection of rape and pregnancy.27 Elected officials opposed to these so-called rape exceptions, such as former United States Congressman Todd Akin of Missouri, have suggested that rape, according to some biological principle, rarely results in pregnancy.28 Of course, scientific studies as well as women’s lived experiences contradict such assertions.

A study by the American Journal of Obstetrics and Gynecology found that female

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survivors of reproductive age became pregnant as a result of rape at an average rate of about 5%. 29 In other words, unprotected, vaginal rape leads to pregnancy about 5% of the time. (Compare this figure with the likelihood of conception following consensual sex, which varies throughout a menstrual cycle from “negligible” to about 9%. 30) The study’s authors determined that, based on its findings, there are likely over 32,000 “rape-related pregnancies annually among American women older than 18 years.” 31 The Rape, Abuse & Incest National Network (RAINN) further estimated that, in 2012, over 17,000 rape survivors voluntarily reported becoming pregnant as a result of being raped. 32 Because fertility decreases with age, the chances of a college student becoming pregnant as a result of rape are likely even greater than the broader average for all women with reproductive capability. Evidence gathered in response to the AAU Survey’s questions about pregnancy would, if reported, shed further light on the number of rape-related pregnancies specifically among college student populations.

Because pregnancy resulting from rape is such a real risk, the importance of access to emergency contraception for rape survivors cannot be overstated. This Note uses the term “emergency contraception” to signify a variety of methods of preventing pregnancy following an unprotected sexual encounter, sexual assault, or birth control failure. Most often, emergency contraception comes in the form of a pill, such as Plan B One-Step® or ella®, or the insertion of an intrauterine device (IUD) following exposure. Emergency contraception is the only medical treatment capable of preventing pregnancy after an unprotected sexual encounter, making it uniquely suited to helping survivors avoid pregnancy that might otherwise result from rape. Common forms of oral emergency contraception lose efficacy as time passes after exposure, and should be taken within three days after exposure to achieve the greatest chance of pregnancy prevention. 33 It is important to emphasize here

29  Melisa M. Holmes et al., Rape-Related Pregnancy, 175.2 Am. J. Obstetrics & Gynecology 320, 320 (1996). See also Am. Cong. of Obstetricians & Gynecologists, Comm. on Health Care for Underserved Women, Sexual Assault 2 (2014) [hereinafter ACOG Opinion 592] (“The national rape-related pregnancy rate is approximately 5% per rape among women aged 12–45 years.”).
33  See Office on Women’s Health, U.S. Dep’t of Health & Human Servs., Emergency Contraception
that emergency contraception works to prevent pregnancy before it occurs, rather than to terminate existing pregnancy. This Note’s treatment of emergency contraception as a remedy does not suggest that it is a remedy for pregnancy itself; rather, rape exposes women to potential pregnancy—a harm that emergency contraception works to remedy.

Medical professionals agree that emergency contraception is a critical part of comprehensive medical care for sexual assault survivors. The American College of Obstetricians and Gynecologists, in its recommendations for health care providers treating rape survivors, has emphasized that, “[e]mergency contraception should be provided, requiring its immediate availability in hospitals and facilities where victims of sexual assault are treated.” Indeed, because efficacious pregnancy prevention is so time-sensitive, it is critical that emergency contraception be provided to survivors on-site upon request; requiring them to seek it later consumes precious hours during the treatment’s more effective period immediately following exposure.

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35 See, e.g., Access to Emergency Contraception, Am. Med. Ass’n. (2016) (“[I]nformation about emergency contraception is part of the comprehensive information to be provided as part of the emergency treatment of sexual assault victims”); ACOG Opinion 592, supra note 29.

36 ACOG Opinion 592, supra note 29, at 3. See also Am. Coll. of Obstetricians & Gynecologists, Comm. on Health Care for Underserved Women, Access to Emergency Contraception 3 (2012) (recommending “legislation to increase access to emergency contraception by requiring that it be dispensed confidentially by all pharmacies and by requiring provision of emergency contraception for survivors of sexual assault”).

37 See Ensuring Access to Emergency Contraception After Rape, Am. C.L. Union (Feb. 2007), https://www.aclu.org/ensuring-access-emergency-contraception-after-rape [http://perma.cc/R9LP-CMEW] [hereinafter ACLU Statement] (“Time is absolutely critical for a woman who wishes to prevent pregnancy after rape . . . . Therefore it is extremely important that emergency care facilities offer EC to women who have been raped during their initial exam.”).
The value of emergency contraception in treatment of rape survivors has not been lost on lawyers and government officials. Civil rights and reproductive justice organizations have consistently advocated for policy that would make the medical consensus on emergency contraception a legal requirement. The Department of Justice has already taken action, issuing national protocol—binding in military hospitals and federal prisons, voluntary for private and state-run health care providers—that mandates the provision of emergency contraception to rape survivors. At least eighteen states and the District of Columbia have passed “EC in the ER” laws, requiring hospital emergency rooms within their jurisdictions to offer emergency contraception to patients seeking sexual assault care.

C. Reproductive Health on Campus

College and university health centers, which perform a major role in students’ health care, should be obliged to ensure access to emergency contraception for their student survivors just as other facilities are required by law to do. The need for emergency contraception is especially crucial in the college and university setting because of the prevalence of unintended pregnancy among student populations. About half of all pregnancies in the United States are unintended, and the highest rates of unintended

38 See id. (“EC is part of comprehensive care for women who have been raped and should be offered on-site by emergency care facilities.”); Emergency Contraception for Rape Survivors, Ctr. for Reprod. Rts. (Nov. 2007), http://www.reproductiverights.org/document/emergency-contraception-for-rape-survivors [http://perma.cc/36EQ-ESBE] (“Requiring hospital emergency rooms to provide EC to rape survivors who want it can substantially reduce the risk of pregnancy these women face and thereby reduce the overall trauma they are forced to endure as a result of their attacks. Neither the U.S. Constitution nor federal law poses any impediment to States that seek to enact EC in the ER laws.”).


pregnancies occur among teenagers and women in their early twenties.\textsuperscript{42} According to a 2014 study, “women 18 to 24 years old had the highest rates of unintended pregnancy” among any age group.\textsuperscript{43} For women from low-income families and women of color, those numbers are even higher.\textsuperscript{44}

For students, unplanned pregnancy and parenthood tend to correlate with increased dropout rates.\textsuperscript{45} The National Campaign to Prevent Teen and Unplanned Pregnancy emphasizes that both the emotional and financial stress of unplanned pregnancy and parenthood make the demands of college impossible for many women students.\textsuperscript{46} Studies do show a decline in the unintended pregnancy rate for this age group in recent years (attributed to increased contraceptive use, including a rise in the use of long-acting reversible contraceptive methods (LARCs) such as IUDs).\textsuperscript{47} Yet there remain obstacles to further decreases in unintended pregnancies among college women, some created and perpetuated by the educational institutions themselves.

\textsuperscript{42} Lawrence B. Finer & Mia R. Zolna, \textit{Shifts in Intended and Unintended Pregnancies in the United States, 2001-2008}, 104 \textit{Am. J. Pub. Health} S43, S44 (2014). Finer and Zolna also found a decline in the rate of unintended pregnancies that ended in abortion between 2001 and 2008, which the authors attributed to “decreased access to abortion . . . fewer providers and a growing number of state-level restrictions, increased stigmatization of abortion, and increased acceptance of carrying unintended pregnancies to term.” \textit{Id.} at S47.

\textsuperscript{43} \textit{Id.} at S44.

\textsuperscript{44} \textit{Id.} at S47 (“Rates of unintended pregnancy and unintended birth among minority women were more than twice the rates for White women.”); \textit{Disparities in Health Care, supra note 40} (noting that “[l]ow-income Latinas are nearly twice as likely as low-income white women to have an unintended pregnancy” and “African American women . . . are three times as likely as white women to experience an unintended pregnancy”); \textit{New Health Disparities Report: More Context for Higher Unintended Pregnancy and Abortion Rates Among Women of Color}, \textit{Guttmacher Inst.} (June 11, 2009) (attributing the disparately high rates of unwanted pregnancy among women of color to inadequate quality of gynecological care as well as financial and geographical obstacles to accessing care).

\textsuperscript{45} \textit{See} \textit{Nat’l Campaign To Prevent Teen & Unplanned Pregnancy, Unplanned Pregnancy Among College Students and Strategies to Address It} 1 (2015), http://thenationalcampaign.org/sites/default/files/resource-primary-download/briefly_unplanned_pregnancy_college.pdf [http://perma.cc/MKL5-CYL3] (“61 percent of community college students who have children after enrolling do not finish their education, which is 65 percent higher than for women who do not have children while in college.”).

\textsuperscript{46} \textit{Id.}

Many colleges and universities prioritize their students’ reproductive health care. For instance, The College of New Jersey sells Plan B One-Step®, a common emergency contraception pill, over-the-counter on campus to students over the age of seventeen, including friends or partners of the student seeking the medication.48 The College also collaborates with a local Planned Parenthood clinic which “operates an on-site office within Student Health Services.”49 Some schools’ health centers even offer more targeted services, such as reproductive health care and referrals, to survivors of sexual violence. A useful example is the health center at the University of Oregon, offering Plan B® free of charge “if a student needs it as a result of sexual assault.”50

Other schools deliberately deny their students access to all forms of contraception and other reproductive care. The websites of several university women’s health services across the country make abundantly clear their refusal to provide contraception, including condoms, to students who seek it.51 Emergency contraception is often even more difficult to obtain at many college health centers than are condoms and birth control. A study conducted in 2001, before emergency contraception became available over-the-counter, found that almost one-third of college health centers surveyed did not prescribe emergency contraception pills.52

Even now that FDA-approved brands of emergency contraception are available without a prescription, schools continue to place hurdles between the pills and their students.  


Some colleges require students seeking Plan B® to make appointments with medical personnel, sometimes subjecting them to personal questions and lectures about sex, and sometimes requiring them to wait up to seventy-two hours to be seen (a wait that drastically decreases the efficacy of the drug).\textsuperscript{53} The Virginia and Wisconsin state legislatures have even attempted to ban emergency contraception at their public universities, though neither measure became law.\textsuperscript{54} For many student survivors—those on rural campuses or those who lack transportation and other resources necessary to purchase Plan B® at a local pharmacy—the unavailability of emergency contraception at a school health center could make inevitable an otherwise avoidable pregnancy.\textsuperscript{55}

In the context of emergency sexual assault care, few colleges have directly emphasized reproductive health consequences for survivors. Some schools’ Title IX policies and resource guides direct survivors to campus health clinics that offer contraceptive services,\textsuperscript{56} but many policies leave out reference to pregnancy and contraception entirely.\textsuperscript{57} In direct conflict with the recommendations of the medical community and the Department of Justice, many colleges and universities continue to exclude emergency contraception as

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  \item \textsuperscript{53} North, supra note 48.
  \item \textsuperscript{54} See Catherine D. Spitz, Sex, Drugs and Federalism’s Role: Regulation of the Morning After Pill on Public College and University Campuses, 33 J.C. & U.L. 191, 191 (2006).
  \item \textsuperscript{55} As explored further in Part III, infra, religious objection is often the reason cited by schools for treating reproductive care differently from other categories of health care. The 2001 study discovered that schools “that were small, private and did have a religious affiliation were least likely to have health centers that offered [emergency contraception pills] to their students.” Brening et al., supra note 52, at 454. Indeed, among the most common reasons provided by college health providers for declining to prescribe emergency contraception were “moral conviction” and “administration uncomfortable.” Id.
\end{itemize}
part of their comprehensive medical care services for sexual assault survivors.\footnote{58} Therefore, in addition to the dearth of data on the use of emergency contraception among college students or their reproductive choices more broadly,\footnote{59} it remains unclear how helpful school health centers and administrations are in ensuring students’ access to options, even for rape survivors. This Note argues for a nationalized standard, interpreting Title IX to address the spotty access to contraception for survivors on campus. Such a standard not only advances a common sense health care policy (though it also does that), but also represents a matter of equal rights.

II. Harm and Healing

A. The School’s Remedial Role under Title IX

Much of the activism of students, lawyers, and academics surrounding campus sexual assault reform has focused on one legal tool: Title IX of the 1972 Education Amendments. An important federal civil rights legislation, Title IX prohibits sex discrimination in educational institutions that receive federal funding, and it continues to serve a crucial role in maintaining sex equality in education.\footnote{60} According to a 2011 Dear Colleague Letter from the Department of Education, a “significant guidance document” that clarified the obligations of colleges and universities under Title IX, sexual harassment and sexual violence are forms of sex discrimination and can rise to the level of a hostile environment when they interfere with a student’s education.\footnote{61} “If a school knows or reasonably should know about student-on-student harassment [including sexual assault] that creates a

\footnote{58} See ACOG Opinion 592, supra note 29; DOJ Protocol, supra note 39.


\footnote{60} 20 U.S.C. § 1681(a) (2012) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”).

\footnote{61} Dear Colleague Letter, supra note 3, at 1, 3 (“[W]hen a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program”). The Department of Education’s authority in issuing the Dear Colleague Letter has been contested. Significant guidance documents are not formal agency rules or regulations and do not undergo public notice and comment as provided for in the Administrative Procedure Act. Under the Obama Administration, OCR nevertheless carried out the Dear Colleague Letter’s vision of school responsibility by pursuing students’ sexual assault complaints and conducting investigations. See discussion in Part II.C, infra, and accompanying footnotes.
hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.”62 Failure to comply can result in an administrative complaint, an investigation of the school by OCR, or private litigation.63

The Dear Colleague Letter requires federally funded schools to address campus sexual violence that creates a hostile environment for their students. A hostile environment exists when “the conduct is sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school program.”64 Even one incident, if serious enough (“a single instance of rape,” for example), may constitute a hostile environment.65 Therefore, when a student rapes another student, and the school “knows or reasonably should know” about it, “Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects,” regardless of whether a student has filed a complaint with the school or whether the incident is the subject of a criminal investigation.66

A critical thrust of Title IX relevant to campus sexual assault is the accommodations mandate of the Dear Colleague Letter. According to the Department of Education, Title IX requires schools to resolve complaints of sexual violence and make accommodations for complainants; schools must proactively take “steps to prevent sexual harassment and sexual violence and correct [their] discriminatory effects on the complainant and others.”67 Remedies for the complainant might include trauma counseling, accommodations to her housing or academic schedule, or disciplinary action against the harasser.68 OCR may also


64  Dear Colleague Letter, supra note 3, at 3.


66  Dear Colleague Letter, supra note 3, at 4.

67  Id. at 14.

68  Id. at 15.
require schools to implement policy changes or new services as more broadly effective “corrective action.”  

A school’s duty to correct the discriminatory effects of sexual assault and prevent their recurrence is broad. If a sexual harassment or assault complaint is filed with the school, the school’s remedial duty includes an investigation by a Title IX coordinator, a notice of nondiscrimination, a no-contact order, and other relevant grievance and disciplinary procedures as outlined in the Dear Colleague Letter. OCR may require interim remedial measures for survivors during an investigation as well as ongoing remedies and “compensatory and other individual remedies as appropriate.” Indeed, “[r]emedies are fact- and case-specific and, upon implementation, are determined [by OCR] to ensure compliance with the law.” Ultimately, the school is required to make accommodations tailored to the survivor’s needs.

Two mechanisms are available to students seeking to enforce Title IX’s guarantees. A student may file a complaint with OCR, which will then investigate for possible violations of Title IX and seek to reach a resolution. If a school fails to implement the changes set forth in a resolution with OCR, the Department of Justice may bring suit against the school to enforce the specific terms of the agreement or OCR may withdraw federal funding from the school or a particular program. (However, the Department of Education has never completely withheld funding from a school for a Title IX violation. Between 2009 and April 2015, OCR received 241 Title IX complaints from college and university students.

69 Id.
70 Id. at 5–14.
71 Letter from Catherine E. Lhamon, supra note 63, at 3.
72 Id.
74 Letter from Catherine E. Lhamon, supra note 63, at 4.
75 See Meredith Clark, Official to Colleges: Fix Sexual Assault or Lose Funding, MSNBC (July 15, 2014), http://www.msnbc.com/msnbc/campus-sexual-assault-conference-dartmouth-college [https://perma.cc/XEU6-LGKW] (“Assistant Secretary for Civil Rights at the Department of Education Catherine Lhamon said that despite the fact it has never been done before, she is prepared to cut off federal funding to schools that violate Title IX”).
76 Letter from Catherine E. Lhamon, supra note 63.
and the agency has opened investigations into at least 200 institutions of higher education for violations of Title IX related to the mishandling of sexual assault.\textsuperscript{77} Because of the increase in complaints and the insufficiency of resources, investigations can take years to resolve, sometimes concluding after a complainant has graduated.\textsuperscript{78}

Students may also bring civil lawsuits against their educational institutions under Title IX.\textsuperscript{79} The standard for liability, however, is almost impossibly high: a student must prove her school had “actual knowledge” of the hostile environment and acted with “deliberate indifference.”\textsuperscript{80} Compare this to the more forgiving administrative standard—“knows or reasonably should know”—provided for in the Dear Colleague Letter.\textsuperscript{81} Private litigation is the more individually driven of the two enforcement mechanisms, but perhaps, given the obstacle of the judicially created standard of proof, it is less likely to result in relief for individual plaintiffs outside of settlement. But even in the absence of individual relief, litigation can cast a public spotlight on a particular school’s weaknesses with respect to Title IX. Publicity surrounding litigation can encourage schools—ever concerned with their reputations among prospective students and their parents—to change their policies.

Title IX’s prohibition on sex discrimination does extend to discrimination on the basis of parental status and pregnancy.\textsuperscript{82} Notably, this protection expressly includes students who terminate a pregnancy: Title IX requires that funding recipients “treat pregnancy, childbirth, false pregnancy, termination of a pregnancy and recovery therefrom in the same manner

\begin{itemize}
\item \textsuperscript{77} OCR Investigations, \textit{supra} note 12.
\item \textsuperscript{79} See \textit{Cannon v. Univ. of Chi.}, 441 U.S. 677, 717 (1979) (inferring a private right of action under Title IX); \textit{Davis v. Monroe Cnty Bd. of Educ.}, 526 U.S. 633 (1999) (expanding Title IX’s private right of action to include suits against schools for failing to address student-on-student harassment).
\item \textsuperscript{80} \textit{Monroe Cnty. Bd. of Educ.}, 526 U.S. at 652. For a critique of this standard of liability, see Catherine A. MacKinnon, \textit{In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education}, 125 \textit{Yale L.J.} 2038 (2016).
\item \textsuperscript{81} \textit{Dear Colleague Letter, supra} note 3, at 4.
\item \textsuperscript{82} See 34 C.F.R. § 106.40(b) (2012). \textit{See also} Pfieffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 784 (3d Cir. 1990) (“[R]egulations promulgated pursuant to Title IX specifically apply its prohibition against gender discrimination to discrimination on the basis of pregnancy”).
\end{itemize}
and under the same policies as any other temporary disability.”\textsuperscript{83} Furthermore, the law obliges federally funded schools that offer health services to include “gynecological care” among those services.\textsuperscript{84} The Dear Colleague Letter includes “providing medical services” in its list of possible remedies for the complainant,\textsuperscript{85} and for other students, it lists, “offering . . . health . . . or other holistic and comprehensive victim services to all students affected by sexual harassment or sexual violence, and notifying students of campus and community . . . health . . . services.”\textsuperscript{86} Yet no federally issued Title IX guidance currently addresses pregnancy as a type of harm experienced by student survivors of sexual assault, nor has any court interpreted the Dear Colleague Letter to do so.

\textbf{B. Pregnancy as Injury: A Framework}

Title IX protects student survivors by requiring their schools to remedy the harmful effects of sexual assault and prevent their recurrence. This Section argues for a conceptualization of pregnancy as one form of harm that may result from rape. As such, pregnancy should be treated as other injuries caused by sex discrimination are treated under the Dear Colleague Letter. The treatment of pregnancy as an injury has a long history in legal thought in the United States, particularly when the pregnancy results from rape. This view, that pregnancy is a harm when it occurs without a woman’s consent, has solidly developed among legal scholars, feminists, and civil rights and abortion advocates, serving to contrast the traditionalist view that pregnancy is a blissful, natural part of life, always to be welcomed by those who experience it.

For instance, Professor Khiara Bridges traces the endurance of pregnancy-as-injury in criminal law and its disappearance from abortion rights advocacy.\textsuperscript{87} She emphasizes several state criminal codes that treat pregnancy as an aggravating circumstance in crimes of sexual violence, resulting in higher penalties for the offender. In those jurisdictions, an offender whose victim becomes pregnant “will be subjected to a longer prison sentence relative to his counterpart whose victim does not become pregnant.”\textsuperscript{88} These criminal codes categorize

\begin{itemize}
\item \textsuperscript{83} 34 C.F.R. § 106.40(b)(4) (2015).
\item \textsuperscript{84} 34 C.F.R. § 106.39 (2016).
\item \textsuperscript{85} \textit{Dear Colleague Letter, supra} note 3, at 16.
\item \textsuperscript{86} \textit{Id.} at 17.
\item \textsuperscript{87} Khiara M. Bridges, \textit{When Pregnancy Is an Injury: Rape, Law, and Culture}, 65 STAN. L. REV. 457, 459 (2013).
\item \textsuperscript{88} \textit{Id.} at 457–58.
\end{itemize}
pregnancy as a “substantial bodily injury” and attach to it the same increased penalties as they would to an assault that results in other physical harm.\footnote{Id. at 467 n.29, 469 n.38 (citing Wis. Stat. § 940.225(1)(a) (2015) (defining “first-degree sexual assault” as requiring that the nonconsensual sexual contact “[cause] pregnancy or great bodily harm”); Neb. Rev. Stat. § 28-318(4) (2015) (defining “serious bodily injury” to include pregnancy itself)).} As Professor Bridges argues, these criminal statutes “construct pregnancy and injury as equivalents and, in so doing, create possibilities for reimagining pregnancy.”\footnote{Id. at 470.} Because these states “recognize that a woman has been injured more severely if she becomes pregnant subsequent to rape than if she does not,” the laws “establish that normal [healthy] pregnancy is an injury when it occurs without a woman’s consent.”\footnote{Eileen McDonagh, Breaking the Abortion Deadlock: From Choice to Consent 86 (1996).}

The law treats pregnancy as an injury in civil contexts as well. In several states, women may recover damages in tort for their unwanted pregnancies.\footnote{Id. at 85. But see Sabrina Bonanno, Pregnancy as a Result of Unlawful but Non-Forcible Sexual Conduct is Not a Form of Great Bodily Injury, New Eng. L. Rev. 193, 204 (2009) (commenting that, “[i]n the civil context . . . an unwanted pregnancy that results in the birth of a healthy child does not give rise to any form of liability,” because “[a] matter of public policy, the birth of a healthy child, even if unwanted, does not constitute injury to the child’s parents”). Bonanno cites for this proposition, \textit{inter alia}, Stephen K. v. Roni L., 164 Cal. Rptr. 618 (Ct. App. 1980). In that case, the California court declined to impose tort liability on a woman for allegedly misrepresenting to her sexual partner that she was using contraception, causing a pregnancy that was unwanted by the biological father. \textit{Id.} at 619. Unwanted pregnancy presents a unique injury to the pregnant woman, so it is not unsurprising that a father was not able to recover for a pregnancy unwanted by him. The examples provided in this section illustrate the justified treatment of pregnancy as injury in other contexts in the civil system.} “Wrongful pregnancy, also known as wrongful conception, is a legal term that refers to a private party’s imposition of a pregnant condition on a woman, or even the risk of a pregnant condition, against her will.”\footnote{Id. at 85. McDonagh cites, \textit{inter alia}, Marciniak v. Lundborg, 450 N.W.2d 243 (Wisc. 1990) (ruling that “costs of raising the child to the age of majority may be recovered by the parents for damages caused by a negligently performed sterilization operation”). See also Michael P. Penick, \textit{Wrongful Pregnancy}, Tex. Prac. Series, Med. Malpractice (3d ed. 2016) (Texas medical malpractice guidance allowing for suits for}
restraints on contraceptive sabotage (the surreptitious interference with a contraceptive method for the purpose of achieving conception without a partner’s knowledge or consent) and remedies for those who experience nonconsensual pregnancy as a result.95

The idea that nonconsensual pregnancies resulting from rape are injuries to the survivor—no matter how healthy the pregnancy—is also present in the context of abortion restrictions. The ban on Medicaid funding for abortion does not apply to cases of rape,96 and many state laws that restrict funding for or access to abortion likewise contain rape exceptions.97 Though likely belying assumptions about varying degrees of women’s blameworthiness for desiring abortion, rape exceptions nevertheless illuminate the potential for the pregnancy-injury analogy in reproductive rights reform. In this light, abortion becomes the cure for the injury, as the survivor “justifiably heal[s] herself of her injury by terminating the pregnancy.”98 Just as abortion may heal a rape-related pregnancy, so might emergency contraception remedy a rape survivor’s potential pregnancy immediately after exposure. Similarly, prophylactic contraception—traditional forms of birth control like the pill and the ring—can be understood as an injury-prevention method in the context of rape.99


96 Hyde Amendment, supra note 27.

97 See State Policies, supra note 27. See also Bridges, supra note 87, at 476.

98 Bridges, supra note 87, at 476. See also Camp, supra note 95, at 310 (“If a pregnancy is a harm resulting from something other than a woman’s full and informed choice, then, for at least part of that pregnancy, a woman could arguably mitigate the harm with an abortion.”).

C. Title IX’s Contraceptive Mandate

Equating pregnancy with injury fits neatly in the existing structure of Title IX, where schools have an obligation to redress students’ injuries that result from a hostile environment of sex discrimination. Indeed, colleges and universities are not unfamiliar with the pregnancy-injury analogy in the context of rape. The AAU survey itself asked respondents whether, as a result of the experiences they reported, they became “[p]hysically injured, [c]ontracted a sexually transmitted disease” or “became pregnant”—three permutations of harm grouped together in the same question. Because Title IX’s sexual assault requirements are similarly harm- and remedy-focused, this reasoning can be applied successfully in the Title IX context. Just as in many rape statutes in which “[p]regnancy and great bodily harm are posited as analogous entities, sharing some fundamental similarity,” we can read Title IX as requiring federally funded schools to accommodate for and prevent survivors’ pregnancies in the same way that they are liable to students for other physical, emotional, or financial injuries.

The Dear Colleague Letter already lists “providing medical services” among the remedies a school should provide to students who experience sexual assault. In order to effectively counteract the possibility of pregnancy resulting from sexual assault, schools must ensure student survivors access to emergency contraception on campus and at no cost to them. The language of Title IX and the Dear Colleague Letter as they stand provide support for this argument through the pregnancy-injury analogy. Just as a school must take immediate action to redress its students’ physical and emotional rape-related harms, so, too, must a school take action to address its students’ rape-related exposure to pregnancy. For many survivors, this will require the availability of emergency contraception. The

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100 AAU Survey, supra note 5, at A5-41, Question GA14.
101 Bridges, supra note 87, at 470.
102 Dear Colleague Letter, supra note 3, at 16.
103 For other students, this might require prenatal care, parenthood-related counseling, presentation of literature regarding birthing and childcare options, and other pregnancy- and birth-related accommodations as already provided for in Title IX’s pregnancy discrimination provisions and guidance. Again, although the arguments in this Note extend to alternative reproductive remedies, the scope of inquiry here is limited to contraception and emergency contraception. See note 5, supra. Students for whom information about abortion services and transportation to local abortion clinics would be appropriate remedies likely fall in a gap in Title
immediate availability of emergency contraception pills like Plan B® and ella® would serve to remedy the effects of an unprotected sexual assault that could otherwise lead to an unwanted pregnancy.

Under this view, a student’s arrival at her campus health center seeking sexual assault care services would be enough to trigger Title IX’s accommodations mandate. The student’s notification of her circumstances to the campus health care providers on site would satisfy the Dear Colleague Letter’s requirement that the school “know or reasonably should know” about an assault and would consequently require remedial action. Importantly, therefore, a survivor’s immediate access to emergency contraception would not depend on formal reporting of the incident; rather, merely disclosing her assault to her health provider, who would be bound by confidentiality, would trigger the school’s responsibility to provide her with remedial contraceptive options.

Title IX obligations include not only remedial action, but also preventive.104 The Dear Colleague Letter requires schools to “proactively consider” remedies for both the complainant and the “broader student population” that might be affected by the hostile environment.105 That duty specifically encompasses “health, mental health, or other holistic and comprehensive victim services to all students affected by sexual harassment or sexual violence.”106 Many schools have, in response, begun to enhance their sexual assault awareness and education programs in order to comply with the Dear Colleague Letter’s prevention mandate, implementing training programs on concepts like consent and bystander intervention.107 In the contraceptive context, emergency contraception methods

104 See Dear Colleague Letter, supra note 3, at 3 (“Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects”). See also U.S. Dep’t of Educ., Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence 38 (2014) (“Training for employees should include practical information about how to prevent and identify sexual violence, including same-sex sexual violence; the behaviors that may lead to and result in sexual violence; the attitudes of bystanders that may allow conduct to continue; the potential for re-victimization by responders and its effect on students; appropriate methods for responding to a student who may have experienced sexual violence, including the use of nonjudgmental language; the impact of trauma on victims; and, as applicable, the person(s) to whom such misconduct must be reported”).

105 Dear Colleague Letter, supra note 3, at 15–16.

106 Id. at 17.

107 See Dear Colleague Letter, supra note 3, at 14–15 (recommending a number of such “preventive education programs” and “comprehensive victim services” as part of schools’ education and prevention obligation); Jessica Bennett, Campus Sex . . . With a Syllabus, N.Y. Times (Jan. 9, 2016), https://www.
serve as a post-exposure remedy for the harmful effects of rape; prophylactic contraception aids in prevention of those effects in the future, for survivors and for the broader student population that might be affected by the hostile environment. Schools should therefore be responsible for ensuring students’ access to pre-exposure contraception as part of that same obligation to keep students safe from harm—before a sexual assault occurs.

Through the pregnancy-injury analogy, the finding of a contraceptive requirement follows from the existing Dear Colleague Letter’s language explaining schools’ remedial and preventive role under Title IX. The Department of Education should nevertheless recognize rape-related pregnancy as a problem of sex discrimination in education and release new guidance that adequately reflects the reproductive health concerns of student survivors. Specifically, new guidance is needed clarifying the duty of schools to ensure the on-site, no-cost provision of contraception and emergency contraception as part of their obligation to student survivors and “the broader student population.” Such guidance would supplement efforts by the Obama Administration both to address campus sexual assault and to expand no-cost contraceptive access.

Yet there are considerable drawbacks to seeking new guidance from the Department of Education. The Dear Colleague Letter is precisely that—guidance—which is not preceded by a notice-and-comment period or other procedures that protect the legitimacy of administrative rulemaking under the Administrative Procedure Act (APA).108 It has therefore been criticized as a unilateral executive act without support from Congress, public participation, or administrative safeguards.109 In a number of federal lawsuits, plaintiffs who


108 Addressing the complex administrative law implications of Dear Colleague Letters and other agency guidance documents is beyond the scope of this Note. For a discussion of the administrative law controversy surrounding the 2011 Dear Colleague Letter, see Jacob Gerson & Jeannie Suk, The Sex Bureaucracy, 104 Cal. L. Rev. 881, 908–11 (2016).

109 See id. at 908 (“A straightforward political objection is that an administrative agency leveraged the threat of denying federal funds to push institutions to adopt policies and procedures that the agency prefers, but that are not required by statute or binding regulation.”); Letter from Sen. James Lankford, Chairman, Subcomm. on Regulatory Affairs & Fed. Mgmt., to Hon. John B. King, Jr., Acting Sec’y, U.S. Dep’t of Educ. (Mar. 4, 2016), https://www.lankford.senate.gov/news/press-releases/senator-lankford-continues-regulatory-oversight-of-department-of-education [http://perma.cc/J34P-XXZ9] (expressing Senator Lankford’s “concerns that OCR has issued guidance documents, including the 2010 and 2011 letters, which purport to merely interpret Title IX . . . but in fact advance policies not found within the pages of its statutory and regulatory texts”).
had been disciplined by their schools for sexual misconduct as students have challenged the measure’s validity under the APA;[110] those cases are still pending. Recently, courts have grappled with a 2014 Department of Education Dear Colleague Letter defining Title IX’s ban on sex discrimination to encompass gender identity discrimination and have come to conflicting conclusions.[111] The Supreme Court has granted certiorari on the question of the guidance’s validity and weight,[112] and its determination could indicate the future of the 2011 Letter’s sexual assault policies as well.

In light of the active controversy and litigation surrounding the Department’s interpretation of Title IX and the protections its guidance letters afford to survivors, reliance on the Dear Colleague Letter for no-cost contraceptive access is risky. For the same reasons those measures are being challenged, they are also vulnerable to swift revision with changes in administration. Unlike regulations, which require agencies to undergo additional rulemaking processes in order to be rescinded, guidance documents may be repealed by the agency’s issuing a new guidance document. The Department of Education’s existing Dear Colleague Letters concerning sexual assault and gender identity (even setting aside any contraceptive guarantees in future revisions) are likely to be disfavored by the next administration and could therefore be promptly repealed with new guidance or simply unenforced.[113]


In the absence of secure federal protections, this remains an area in which state legislatures can become active. Both California and New York have enacted measures requiring schools in their jurisdictions to adopt particular definitions of consent and other policies related to campus sexual assault. As a result, schools in these states typically afford survivors a more robust set of rights than schools elsewhere. But even these progressive policies fall short in the area of reproductive health care. For example, the University of California’s policy references neither unwanted pregnancy nor the availability of emergency contraception on campus. The State University of New York system does require all participating universities to include in their policies information about where emergency contraception is locally available. Pointing students to external contraceptive resources is a start, and schools across the country should incorporate such information into their policies. However, states seeking to further increase protections for student survivors in advance of federal action should consider not just providing information about contraception, but affirmatively offering it to students on campus and at no cost. As discussed in Part I.B, states have required emergency rooms to offer emergency contraception to patients who have experienced sexual assault; requiring the same of college and university student health centers represents the logical and urgent next step.


114 See N.Y. Educ. Law § 6441 (McKinney 2015) (requiring every institution to adopt a definition of affirmative consent); Cal. Educ. Code § 67386 (West 2016) (setting forth policies to be adopted by all state-funded institutions with respect to sexual assault, including an affirmative consent standard, and procedures for disciplinary adjudication, such as a preponderance of the evidence standard). New York’s momentum in this area has been in part a result of the administration’s readiness to collaborate with student activists. See Student Advocates Join Governor Cuomo’s Enough Is Enough Campaign to Combat Sexual Assault on College Campuses, Governor’s Press Office (Mar. 16, 2015), http://www.governor.ny.gov/news/student-advocates-join-governor-cuomo-s-enough-enough-campaign-combat-sexual-assault-college [http://perma.cc/G7LL-Q34V]; Allie Rickard, Response to Governor Cuomo’s Proposed Legislation on Sexual and Dating Violence, Carry That Weight (2015).

115 Univ. of Cal., Sexual Violence and Sexual Harassment (2016).

116 State Univ. of N.Y., Sexual Violence Response Policy (2016) (“Testing for STIs and emergency contraception is available [provide contact information for one or multiple on or off-campus locations where students can obtain tests for STIs and describe whether such testing is free or at a cost].”).

117 See Emergency Contraception Policies, supra note 40.
III. Scope of the Solution

A. Addressing Potential Limitations

One potential critique of this proposal might be that it risks excluding non-survivors, or survivors who do not wish to label themselves as such in order to receive care. Yet the arguments in this Note enable the possibility that Title IX guarantees reproductive health care access to even those students who do not identify as survivors. As discussed in Part II.C, the very fact of a school’s implementing a policy of access to contraception will positively affect all students. The Dear Colleague Letter itself requires that schools address the effects that an environment of sex discrimination has on the “broader student population.”\footnote{Dear Colleague Letter, supra note 3, at 17.} Like preventive education training programs and counseling services, the availability of contraception to students who are exposed to the risks of a hostile environment of discrimination follows as part of that duty to the broader population.

Once contraception is available at health centers that had previously declined to provide it, students of all kinds may benefit from that access. The various forms of contraception, when used effectively, prevent pregnancy without discriminating between consensual sex and rape. Therefore, its availability will enhance students’ reproductive options, regardless of whether they seek it in order to ensure prevention of pregnancy from sexual assault (the injury requiring the school to change its policy) or prevention of pregnancy from consensual sex (a third-party beneficiary of that requirement).\footnote{Arguments emphasizing third-party beneficiaries of accommodations have been developed elsewhere in civil rights law. For a discussion of the ways in which ADA-compliant accommodations similarly benefit third parties (e.g., a wheelchair-accessible ramp benefits those it is designed to serve, but also parents with strollers), see Elizabeth F. Emens, Integrating Accommodation, 156 U. Pa. L. Rev. 839 (2008).} The benefits of contraception for students who obtain it as a result of new school policies will extend to any sexual activity that might result in pregnancy.

Another potential criticism relates to concerns about school behavior. It is certainly foreseeable that schools that object to emergency contraception would be reluctant to provide it to any student not federally entitled to it and might attempt to distinguish those students in complicated or painful ways. How would a distinction between rape survivors and other students work in practice? Should we be concerned that schools would engage in some sort of hearing before administering health care to survivors (thus, in addition to traumatizing the survivor, negating the effectiveness of any emergency contraception measure)?
Answers to these questions are already apparent elsewhere in the law. The Department of Justice protocol for treatment of rape survivors seems to take as given that physicians would simply trust their patients’ accounts of their assaults, addressing elsewhere solutions for providers that object to emergency contraception.\textsuperscript{120} Many states that prohibit state funding for abortions except in the cases of rape require only a doctor’s note that a sexual assault occurred.\textsuperscript{121} Here, the doctor and the contraception provider would be one and the same. Moreover, Title IX’s existing framework obliges schools to correct the harmful effects of sexual assault as soon as it “reasonably should know” about a hostile environment.\textsuperscript{122} Students need not endure a formal hearing in order to request a change in housing or other tailored accommodations. Indeed, nothing in the Title IX guidance requires formal “verification” of a complainant’s allegations before accommodations are made. Student health centers attempting to distinguish between survivors and non-survivors would therefore not only face an unworkable and time-sensitive evaluation, but would likely be in violation of Title IX.\textsuperscript{123}

One final observation broadens the potential impact of this approach: Title IX applies to all educational institutions that receive federal funding, including graduate schools,

\begin{itemize}
\item \textsuperscript{120} DOJ Protocol, supra note 39, at 40.
\item \textsuperscript{121} See, e.g., Alabama Medicaid Manual 28, 50 (2017) (“[T]he documentation required is a letter from the recipient or provider certifying that the pregnancy resulted from rape or incest.”).
\item \textsuperscript{122} See Dear Colleague Letter, supra note 3, at 4 (requiring only that a school “reasonably should know” about an assault before triggering its duties to accommodate survivors).
\item \textsuperscript{123} Professor Bridges’ injury analogy altogether rejects a distinction between unwanted pregnancies that result from rape and those that result from consensual sex. In her framework, it is not the forced sex or absence of consent that makes rape-related pregnancy an injury, but rather the pregnancy’s “unwantedness.” Because of the way women experience unwanted pregnancy, Professor Bridges concludes, “pregnancy is an injury whenever it is unwanted.” Bridges, \textit{supra} note 87, at 476–77. Other commentators have noted, similarly, that any pregnancy is an injury when a woman has not consented to it. See, e.g., McDonagh, \textit{supra} note 91, at 86–91 (noting that a woman who consents to sex does not necessarily consent to pregnancy, and that, “[i]f a woman does not consent to be pregnant, it seriously injures her”); Camp, \textit{supra} note 95, at 307 (arguing against the “conflation of consent for sex with consent for pregnancy” through the lens of birth control sabotage). This radical move enables emergency contraception as a form of healing for any potential “pregnancy-qua-injury,” not only for rape survivors. Indeed, Professor Bridges notes that to give injured status only to pregnant rape survivors “privileges men’s acts over women’s experiences,” “give[s] determinative significance to the man who forced, compelled, or coerced [the survivor] into sex,” and “den[ies] significance to the woman who experiences her [unwanted] pregnancy” as injury, even if it resulted from consensual sex. Bridges, \textit{supra} note 87, at 478. However, because the hostile environment created by sexual assault—and not an unwanted pregnancy per se—is what triggers Title IX’s obligations, unwanted pregnancy that results from consensual sex is an injury, but not one that a school would be required to remedy under this framework.
\end{itemize}
high schools, middle schools and elementary schools. Teenagers experience unwanted pregnancy at some of the highest rates nationally compared with women in other age groups, and sexual violence is no less prevalent among teens as among college students. The recent sociological and legal research surrounding sexual assault at institutions of higher education has facilitated this Note’s argumentation regarding solutions for college students, but its conclusions apply with equal force to other federally funded schools and to younger students.

B. The Problem of Religious Exemption

Advocates for expanded reproductive health care at colleges and universities and elsewhere around the country have consistently faced a significant obstacle: religious objection to contraception and abortion. Religious objection is often the reason cited by schools for treating reproductive care differently from other categories of health care. A 2001 study found that colleges “that were small, private and did have a religious affiliation were least likely to have health centers that offered [emergency contraception pills] to their students.” These objections have surfaced most prominently in lawsuits brought by colleges and universities seeking exemption from federal regulations requiring health insurance providers to cover contraception. Religious exemption from both health care law and civil rights law like Title IX presents a significant barrier to reproductive control for student survivors, but it is a barrier worth surmounting.

The 2010 Patient Protection and Affordable Care Act (ACA) and its guidelines supplied by the Department of Health and Human Services (HHS) require that health insurance providers cover all FDA-approved women’s preventive care. The FDA-approved list includes emergency contraception as well as LARCs and IUDs, which many religious employers believe to act as abortifacients, or abortion-inducing drugs, and therefore find

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124 See Finer & Zolna, supra note 42, at S45 (finding that, in 2008, 91% of pregnancies of women ages fifteen to seventeen were unintended).

125 About one in five female public high school students (grades nine through twelve) experience physical and/or sexual abuse by a dating partner. See Jay G. Silverman et al., Dating Violence Against Adolescent Girls and Associated Substance Abuse, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality, 286(5) JAMA 572 (2001).

126 Brening et al., supra note 52, at 454.

objectionable.\textsuperscript{128} Shortly after the ACA’s enactment, HHS began allowing churches and certain eligible religious non-profit organizations to seek exemption from the contraceptive mandate.\textsuperscript{129} In \textit{Burwell v. Hobby Lobby Stores, Inc.}, a privately owned craft store (that is, not among the types of organizations originally eligible for an exemption) challenged the contraceptive mandate under the federal Religious Freedom Restoration Act (RFRA).\textsuperscript{130} The Supreme Court, with a majority of five, held that the contraceptive mandate substantially burdened the plaintiffs’ exercise of religion and did not constitute the least restrictive means of achieving the government’s interest—a holding that effectively expanded the availability of the religious exemption to closely held for-profit corporations.\textsuperscript{131}

HHS’s original accommodation procedure—the procedure a religious organization must follow to opt out of contraceptive coverage—is fairly straightforward. All the organization must do is notify the Secretary of HHS of its eligibility for an exemption. Once the government has been notified, the organization’s group health insurance issuer is required to provide payments for contraceptive services without imposing cost-sharing requirements on the organization or the insurance plan’s beneficiaries.\textsuperscript{132} Essentially, all a religious organization must do to remove itself from the contraceptive-providing equation is inform the government or its insurer of its sincerely held objection by submitting a short form.\textsuperscript{133}

\footnotesize{\textsuperscript{128} See \textit{Burwell v. Hobby Lobby Stores, Inc.}, 134 S. Ct. 2751, 2759 (2014) (“The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients.”). \textit{But see Am. Cong. of Obstetricians & Gynecologists, Facts Are Important: Emergency Contraception (EC) and Intrauterine Devices (IUDs) Are Not Abortifacients} (2014) (“There is no scientific evidence that FDA-approved emergency contraceptives affect an existing pregnancy; no EC is classified as an abortifacient . . . Because Cu-IUDs prevent rather than disrupt pregnancy, they too are properly classified as contraceptives, not abortifacients.”).

\textsuperscript{129} The Health Resources and Services Administration (HRSA) has authority to exempt a non-profit organization that “(1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; [and] (3) primarily serves persons who share its religious tenets.” \textit{Group Health Plans and Health Insurance Issues Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act}, 76 Fed. Reg. 46,621, 46,626 (proposed Aug. 1, 2011).

\textsuperscript{130} \textit{Hobby Lobby}, 134 S. Ct. at 2752.

\textsuperscript{131} \textit{Id. at 2759} (“[W]e must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do.”).

\textsuperscript{132} See 45 C.F.R. § 147.131(c).

\textsuperscript{133} EBSA Form 700—Certification. See 45 C.F.R. § 147.131(b)(3).}
Wheaton College, a Christian liberal arts college in Illinois, and the University of Notre Dame, a Catholic university in Indiana, were two of several religiously affiliated schools to seek to enjoin the enforcement of the contraceptive mandate, including its accommodation procedure. Unlike Hobby Lobby, Wheaton and Notre Dame are religious organizations eligible for the ACA’s original religious accommodation. Their objection, therefore, was not to the provision of contraceptive coverage itself (from which they are exempt), but to the very accommodation procedure that exempts them from it. Wheaton argued that the accommodation’s one-page form requirement forces the College “to play a central role in the government’s scheme, because [the school] must designate an agent to pay for the objectionable services on Wheaton’s behalf, and it has to take steps to trigger and facilitate that coverage.” Notre Dame similarly asserted that “its contractual relationship” with the insurance companies that would cover the contraception made “the university a conduit between the suppliers of the coverage and the university’s students and employees.” The Seventh Circuit, in two opinions by Judge Richard Posner, rejected the “trigger” theory and denied both injunctions. Several other circuits considered similar RFRA challenges by religious organizations to the accommodation procedure, and all but one rejected their claims.

These cases reached the Supreme Court in its 2016 Term under the consolidated name Zubik v. Burwell. After oral argument, the eight-member Court—evenly split between

134 Wheaton Coll. v. Burwell, 791 F.3d 792 (7th Cir. 2014); Univ. of Notre Dame v. Burwell, 786 F.3d 606 (7th Cir. 2015).

135 Complaint at 2–3, Wheaton Coll. v. Burwell, 50 F. Supp. 3d 939 (N.D. Ill. 2014) (No. 1:13-cv-08910). Wheaton also maintained that “requiring [it] to ask for an exemption and to provide the government with the name of its insurer violates its First Amendment rights by compelling it to say something that it does not want to say,” though this argument, too, failed to convince the Seventh Circuit. Wheaton Coll., 791 F.3d at 800.

136 Notre Dame, 786 F.3d at 611–12.

137 Wheaton Coll., 791 F.3d at 800; Notre Dame, 786 F.3d at 612.

138 See Priests for Life v. U.S. Dep’t. of Health & Human Servs., 772 F.3d 229, 252 (D. C. Cir. 2014) (rejecting the “trigger” theory and noting that, “contrary to Plaintiffs’ characterization, what the self-certification or alternative notice actually triggers is a series of steps designed to ensure that eligible organizations such as Plaintiffs do not contract, arrange, pay, or refer for access to contraceptive services”); Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 794 F.3d 1151 (10th Cir. 2015) (rejecting plaintiffs’ RFRA and First Amendment claims); Geneva Coll. v. Burwell, 778 F.3d 422 (3d Cir. 2015) (same); Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 217 (2d Cir. 2015) (same); E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449 (5th Cir. 2015) (rejecting RFRA claim). Cf Sharpe Holdings, Inc. v. U.S. Dep’t of Health and Human Services, 801 F.3d 927 (8th Cir. 2015) (upholding plaintiffs’ RFRA challenge to the accommodation).

Hobby Lobby’s majority and dissenters\textsuperscript{140}—requested supplemental briefing by the parties addressing whether the government could achieve its interest in seamless contraceptive coverage for the objecting organizations’ employees without any notice from the organizations themselves.\textsuperscript{141} The Court ultimately remanded the cases to their respective circuits for further consideration of any plausible less restrictive alternatives to the current notice procedure.\textsuperscript{142} In the characterization of Linda Greenhouse, the “short-handed court threw up its hands and put the best minimalist face it could on a dispute evidently beyond its institutional capacity to resolve.”\textsuperscript{143}

Putting aside the future of this particular religious accommodation within potentially differing circuits on remand, the Zubik cases demonstrate the unrelenting objection of religious institutions to participation in the provision of contraception. The plaintiffs themselves include several religious colleges and universities,\textsuperscript{144} and the Council for Christian Colleges and Universities filed an amicus brief on their behalf.\textsuperscript{145} They exemplify both the challenges advocates of contraceptive access face as well as the lengths to which colleges and universities will go to refuse their students and employees access to basic reproductive health care. If courts are willing to stretch RFRA to cover such attenuated burdens on religion as Form 700, how else can a seamless contraceptive access for survivors be achieved?

As has been demonstrated, Title IX, through the pregnancy-as-injury lens, provides an alternative to the ACA for requiring schools to ensure students’ access to contraception. However, Title IX presents a similar and perhaps more significant hurdle: the statute

\textsuperscript{140} Justice Scalia’s replacement yet unconfirmed, the remaining four Justices of the Hobby Lobby majority (Justices Alito, Kennedy, Roberts, and Thomas) and the four of its dissent (Justices Breyer, Ginsburg, Kagan, and Sotomayor) reviewed Zubik as a Court of eight.

\textsuperscript{141} Zubik, 136 S. Ct. at 1559–60.

\textsuperscript{142} Id. at 1560.


\textsuperscript{144} Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 794 F.3d 1151 (10th Cir. 2015) (including co-plaintiffs Southern Nazarene University, Oklahoma Wesleyan University, Oklahoma Baptist University, and Mid-America Christian University); Geneva Coll. v. Burwell, 778 F.3d 422 (3d Cir. 2015); E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449 (5th Cir. 2015) (including co-plaintiff Houston Baptist University).

itself contains its own religious exemption provision.\footnote{See 34 C.F.R. § 106.12(a) (2016) (“This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.”).} RFRA—a generalized religious exemption statute under which plaintiffs may seek accommodations to other federal policies—permits an exemption only where a law “substantially burden[s] a person’s exercise of religion” and when that law is not the “least restrictive means of furthering [a] compelling government interest.”\footnote{42 U.S.C.A. § 2000bb-1(b). See also Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 (2014).} Title IX’s internal exemption provision, by contrast, is significantly broader: it exempts schools from any part of the statute that “would not be consistent with the religious tenets” of those schools.\footnote{34 C.F.R. § 106.12(a) (2016). For a discussion of the interaction between the \textit{Hobby Lobby} decision and the religious exemption provisions of federal anti-discrimination laws such as Title IX, see Alex J. Luchenitser, \textit{A New Era of Inequality? \textit{Hobby Lobby} and Religious Exemptions from Anti-Discrimination Laws}, 9 Harv. L. & Pol’y Rev. 63 (2015).} Unlike RFRA, Title IX does not inquire into burdens and government interests; rather, mere conflict with religious belief suffices, and the Department of Education regularly grants requests for exemptions without much scrutiny.\footnote{See 134 Cong. Rec. S205-02 (1998) (“An educational institution need only make application to the Department of Education for such an exemption. To date, no institution that has completed an application has been denied an exemption.”); \textit{Religious Exemption}, U.S. Dep’t of Educ., http://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/rel-exempt-pr.html [http://perma.cc/62C8-L2GU] (last visited Jan. 23, 2016) (“An educational institution that wishes to claim the exemption may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the religious organization that controls the educational institution and specifying the provisions of Title IX or its regulations that conflict with the tenets of the religious organization.”).} At least 245 colleges and universities have been granted religious accommodations to Title IX since the 1980s.\footnote{Institutions Currently Holding Religious Exemption, U.S. Dep’t of Educ., Office for Civil Rights (2016), http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/rel-exempt-approved-and-pending.xlsx [http://perma.cc/6CCS-HYST].} The far-reaching exemption opens the
door for religiously affiliated schools to engage in discrimination on the basis of sex and pregnancy\textsuperscript{151} as well as sexuality and gender identity.\textsuperscript{152}

Because Congress is unlikely to take action against Title IX’s religious exemption in the foreseeable future, it presents a major hurdle for reformers in this area. Yet there are several limitations to the scope of the exemption, and there remain ways to expand contraceptive access at even those schools that could be exempt from a potential Title IX contraceptive mandate. As an initial matter, secular schools that oppose contraception but could not point to a particular religious affiliation or conflicting religious tenet would not be granted exemptions by the Department of Education. Some nonreligious colleges, such as Texas A&M University, explicitly do not provide contraception in their student health centers,\textsuperscript{153} so the significance of the limitation of the exemption’s scope to truly religious (and not merely socially conservative) objection is therefore worthy of emphasis.\textsuperscript{154}

\textsuperscript{151} See S. Rep. No. 100-64, 9 (1989) (among the “most frequently cited reasons for requiring requests for religious exemptions involved tenets calling for . . . differential treatment of pregnant students and employees, particularly if unmarried”). The Senate Report cites language in exemption requests from religious schools invoking, \textit{inter alia}, the importance of enforcing codes of “modest attire” for women, tenets condemning extramarital sex such that pregnant students “could no longer be allowed to remain with other unmarried women,” and the impossibility of employing a married woman because of the belief that she “would be expected to be in submission to her husband.” \textit{Id.} at 22–23.

\textsuperscript{152} See, \textit{e.g.}, \textsc{Human Rights Campaign}, \textsc{Hidden Discrimination: Title IX Religious Exemptions Putting LGBT Students at Risk} 11 (2015) (finding an uptick in requests for religious exemptions—the majority of which were granted—following an expansion in the covered discrimination to include sexual orientation); Amanda Bryk, \textsc{Title IX Giveth and the Religious Exemption Taketh Away: How the Religious Exemption Eviscerates the Protection Afforded Transgender Students under Title IX}, 37 \textsc{Cardozo L. Rev.} 751 (2015) (citing exemption requests after OCR issued guidance including gender identity discrimination within the purview of Title IX); Liam Stack, \textsc{Religious Colleges Obtain Waivers to Law that Protects Transgender Students}, \textsc{N.Y. Times} (Dec. 10, 2015), https://www.nytimes.com/2015/12/11/us/religious-colleges-obtain-waivers-to-anti-discrimination-law.html?smid=pl-share [http://perma.cc/S8TH-TUWC].

\textsuperscript{153} \textsc{Texas A&M Univ., Student Health Services, Women’s Clinic}, http://shs.tamu.edu/services/ [http://perma.cc/Q57P-C7JW] (last visited Dec. 2, 2016) (“The Women’s Clinic does not manage pregnancy, but can diagnose pregnancy and refer for prenatal care.”).

\textsuperscript{154} One district court extended the ACA religious accommodation to a nonreligious anti-abortion organization on Equal Protection grounds. \textsc{See March for Life v. Burwell}, 128 F.Supp.3d 116 (D.D.C. 2015); Adam Liptak, \textsc{Judge Allows Moral, Not Religious, Contraception Exemptions}, \textsc{N.Y. Times} (Aug. 31, 2015), https://www.nytimes.com/2015/09/01/us/politics/judge-allows-moral-not-just-religious-contraception-exemptions.html?smid=pl-share [http://perma.cc/A8UV-RHYU]. This case, which is being appealed to the D.C. Circuit, was an extension of the \textit{Hobby Lobby} reasoning to nonreligious moral objection to contraception. Its minimal significance in the RFRA and ACA contexts would hardly be binding on courts reviewing secular schools’ requests for accommodation under Title IX.
Second, schools invoking the religious exemption may be excused from only those provisions of Title IX that violate the tenets of the school’s religion. “Religious schools are not exempted from the entirety of Title IX. Rather, a school must identify which portions of Title IX and its accompanying regulations are inconsistent with the tenets of its religion that provide the basis for the exemption.”\footnote{155} Given that OCR is currently investigating over a dozen religiously affiliated schools for compliance with Title IX’s sexual harassment and assault guidance, religious affiliation does not categorically release a school from its obligation to protect its students from rape and address its consequences.\footnote{156} If these religious schools were exempt from a potential contraceptive mandate, such an exemption would leave the schools’ statutory duties to their student survivors unfulfilled.

This creates room for a third party—the government, or perhaps an independent pharmacy or clinic—to take on that duty. Title IX’s contraceptive mandate could be modeled after that of the ACA, allowing for the state or federal government to step in where a religious school objects and to ensure that its students’ contraceptive needs are met. A school opting out would effectuate its replacement by one of a variety of possible third-party providers: the state’s health department could take on the role or the school could contract with a local family planning clinic to which survivors would be transported. In addition, the Department of Education—being the agency imposing the obligation—could fashion its own federal mechanism to assume the duty.

The infrastructure exists to make such a procedure possible, as it is already in effect elsewhere. The Department of Justice emergency sexual assault care protocol addresses the issue of moral objection to emergency contraception, requiring facilities not willing to provide it on site or write prescriptions for it to instead refer patients to local medical facilities “that can immediately assist with alternative treatment.”\footnote{157} Similarly, state “EC in the ER” laws requiring hospitals to provide emergency contraception to rape survivors have provided for alternative mechanisms where a provider objects on religious grounds. For example, under Pennsylvania’s law, hospitals objecting to onsite emergency contraception provision must, “[u]pon request of the victim, arrange for immediate transportation for

\footnote{155} Human Rights Campaign, supra note 152, at 10, citing Religious Exemption, supra note 149.

\footnote{156} See OCR Investigations, supra note 12 (including ongoing investigations of, inter alia, Boston College, Brigham Young University, College of St. Scholastica, Catholic University of America, Grace College and Seminary, Mount St. Mary’s University, Saint Mary’s College of California, Santa Clara University, Southern Methodist University, St. John’s University, St. Thomas Aquinas College, University of Notre Dame, and Valparaiso University).

\footnote{157} DOJ Protocol, supra note 39, at 116 (emphasis in original).
the victim, at no cost to the victim, to the closest hospital where a victim could obtain emergency contraception.”

A Title IX contraceptive mandate could model exemptions after these state laws, and could thereby successfully ensure student survivors’ access to contraception and emergency contraception even at the most religious colleges.

One benefit of pursuing contraceptive access for campus survivors through state-level policy (as an alternative to Title IX) is that states could craft new legislation including tailored religious accommodation mechanisms that do not interfere with students’ access (like Pennsylvania’s) or choose not to include an exemption provision at all. A state law requiring schools to provide contraception and emergency contraception as part of their sexual assault response policies, could, without a religious exemption provision, be more effective than Title IX at reaching the kinds of institutions that are most likely to deny students contraception in the first place. Moreover, only the federal government is subject to RFRA challenges, so religious schools seeking accommodations from state laws would have to sue under the First Amendment, which applies a much more forgiving standard to “neutral law[s] of general applicability,” and such suits would therefore be less likely to result in exemptions.

C. On Reproductive Justice and Sex Equality

_Hobby Lobby_ and _Zubik_, the cases considering religious exemptions to the ACA contraceptive guarantee, do not emphasize that the primary burden of such exemptions falls on women as a class. As Professor Elizabeth Sepper has noted, “[w]omen’s decisions and earning of benefits were erased from consideration” in the _Hobby Lobby_ decision, and “[a]ny burdens on their rights were immaterial. Sex equality disappeared as a government interest in the contraceptive mandate.”

The interests of women employees emerged as primary considerations only in Justice Ginsburg’s dissent, which invoked the principle of sex equality. _

158 28 Pa. Code § 117.57 (2016) (“If the victim’s medical condition does not require further inpatient hospital services, the hospital may arrange to transport the victim to a rural health clinic, Federally-qualified health center, pharmacy or other similar location where a victim could obtain emergency contraception.”).

159 See _City of Boerne v. Flores_, 521 U.S. 507 (1997) (finding RFRA to be an invalid abrogation of state sovereign immunity).

160 Emp’t Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872 (1990) (rejecting the application of a compelling interest test for Free Exercise claims to “neutral law[s] of general applicability”). See also CTR. FOR REPROD. RIGHTS, EMERGENCY CONTRACEPTION FOR RAPE SURVIVORS (2007) (arguing that state “EC in the ER” laws are valid as applied to religious institutions under both federal law and the United States Constitution).

from the Court’s abortion rights doctrine that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”162

That “sex equality disappeared as a government interest” in Hobby Lobby is perhaps unsurprising: American law has not traditionally embraced equality-based arguments for women’s access to reproductive options. Constitutionally protected rights to contraception and abortion are grounded in a fundamental right to privacy rather than in the Constitution’s guarantee of equal protection.163 Discrimination on the basis of pregnancy does not equal sex discrimination.164 Despite the intuitive appeal of an equal rights theory, it has not cemented itself in the reproductive rights doctrine. As Professor Reva Siegel notes, “today, as several decades ago, courts and the nation often do not grasp the relationships” between women’s reproductive control and sex equality.165

A skeptic might therefore argue that a push for access to contraception rooted in an equality-based anti-discrimination model like that of Title IX is inherently doomed. There remains, of course, a long history of feminist legal scholarship conceptualizing reproductive justice as an issue of sex equality. The equality theory maintains that laws that limit women’s control over whether and when to bear children deprive them of equal

162 134 S. Ct. at 2787 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992)). Justice Ginsburg emphasized that the exemption “would deny legions of women who do not hold their employers’ beliefs access to contraceptive coverage that the ACA would otherwise secure.” Id. at 2790.


165 Siegel, Equality and Choice, supra note 163, at 80.
citizenship in violation of federal and constitutional law. Championed by Justice Ginsburg and further developed by Professors Siegel, Catharine MacKinnon, and others, the argument’s thrust is that laws that limit access to abortion and contraception (and those that single out pregnant women for different treatment) employ and reinforce impermissibly gendered assumptions and are therefore inconsistent with the Equal Protection Clause. In other words, “laws imposing gender-specific burdens on women’s sexual and parenting relations are constitutionally suspect” as a form of sex discrimination.

The arguments set forth in this Note position Title IX as a unique tool for revisiting the association between reproductive justice and sex equality. Title IX requires schools to remedy the harm suffered by sexual assault survivors in order to ensure their equal access to education and to prevent discrimination on the basis of sex. In addressing students’ pregnancies that could result from rape (i.e., from a hostile environment of sex discrimination), schools’ provision of services like emergency contraception would directly further the equality mandate of Title IX. These arguments build upon the important scholarship that forms the foundation of the sex equality approach, engaging the theory without relying on a sex-stereotyping framework. The conceptualization of rape-related pregnancy as harm—rather than stereotypes about women as mothers—anchors the argument to the harm-based liability regime of the equal rights law. It represents a


169 Siegel, Sex Equality, supra note 167, at 816.

170 Some pre-ACA scholarship relies on sex stereotyping to suggest that Title IX’s very prohibition on sex discrimination (unrelated to sexual assault and harm) requires school health insurance policies to cover contraception. See Kathleen A. Bergin, Contraceptive Coverage under Student Health Insurance Plans: Title IX as a Remedy for Sex Discrimination, 54 U. Miami L. Rev. 157 (2000).
new angle, a new doctrinal hook with the potential to be considered freshly and uniquely. Therefore, this reproductive justice theory of Title IX not only opens up the possibility for real practical change on college campuses, but it also carries with it significant doctrinal implications.

CONCLUSION

Forty-four years after Roe v. Wade, women’s access to reproductive health care in the United States continues to dwindle.171 With increasing persistence, state legislatures have developed a variety of ways to limit the constitutional right to an abortion in their jurisdictions: constricting the gestational window of abortion availability,172 using targeted regulation of abortion providers (TRAP laws) to force clinics to close,173 placing obstacles between patients and abortion procedures,174 and endeavoring relentlessly and in conjunction with Congress to defund and cripple Planned Parenthood.175 Decreasing access to abortion


effectively eliminates that option for many women, including rape survivors, and makes timely access to emergency contraception all the more critical. In spite of this crucial need, abortion opponents, in setting women’s health providers like Planned Parenthood in their crosshairs, have succeeded in shrinking women’s access not only to abortion but also to contraception and emergency contraception, particularly for women in low-income or rural communities and women of color.

This national health care failure forms the backdrop to the experiences of college women whose schools deny them contraceptive access. Students exposed to unwanted pregnancy, particularly at schools in rural areas or socially conservative states, must navigate a health care landscape that has been systematically constructed to limit their options. Because of the negative toll that unwanted pregnancy often takes on students’ educational aspirations, access to contraception and emergency contraception should be at the forefront of any policy of sex equality in education. In passing Title IX, Congress indicated that the responsibility to ensure such educational equality falls on schools. This responsibility becomes even more obvious in the context of campus sexual assault. Schools that foster rape culture or fail to address the consequences of sexual assault on their campuses heighten students’ exposure to unwanted pregnancy. These same schools’


176 See Am. Cong. of Obstetricians & Gynecologists, Comm. on Health Care for Underserved Women, Access to Contraception (2015), http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Access-to-Contraception [http://perma.cc/AN5B-M3NB] (recommending increased “funding for the federal Title X family planning program [which funds Planned Parenthood] and Medicaid family planning services to ensure contraceptive availability for low-income women”).

simultaneous denial of the means with which to prevent an unwanted pregnancy resulting from rape adds insult to injury and represents a twofold violation of Title IX.

Looking ahead, advocates, scholars, and government actors confronting the national epidemic of campus sexual assault must not overlook the critical relationship between rape and unwanted pregnancy. The Department of Education should issue new guidance expressing the view that meaningful educational equality requires schools to ensure students’ access to contraception and emergency contraception as part of their obligation to remedy the harms associated with sexual assault. In the absence of new guidance, student survivors deprived of reproductive options at their schools should litigate these issues and encourage courts to interpret Title IX as requiring comprehensive reproductive care for survivors. Finally, states seeking to lead the charge should take legislative action in this area.

Unwanted pregnancy is a barrier to sex equality in education. Rape is a barrier to sex equality in education. True achievement of sex equality in education—Title IX’s ambition—therefore requires schools to address these two obstacles to students’ ability to thrive.