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THIRD-PARTY SEXUAL HARASSMENT: THE CHALLENGE OF TITLE IX OBLIGATIONS FOR LAW SCHOOL CLINICS

Ty Alper*

Abstract: Law faculty who teach and train students in clinical settings regularly expose students to the potential for sexual harassment. Because clinics involve actual cases in real-world contexts, students may encounter sexual harassment from third parties such as clients, witnesses, and judges. Do faculty who tolerate this exposure run afoul of their obligations under Title IX to stop and remedy sexual harassment about which they are, or should be, aware?

This Article is the first to identify and propose a method for addressing a phenomenon that strikes at the intersection of three sets of priorities for clinical faculty: duty to serve the client, duty to educate the student, and duty to protect the student. When a law student may face sexual harassment from a third party in the course of representing a client, the values underlying those priorities are in tension and admit no obvious solution; some remedies that Title IX arguably requires are, in many cases, impossible to square with the duties of loyalty and zealousness owed to a clinical client, not to mention the educational goals of the clinic. And yet, clinicians can and must embrace the fundamental principle of Title IX, which is to ensure that educational opportunities are available to all students, regardless of sex or gender presentation. The dilemma explored here echoes the modern American cultural, educational, and legal shift toward protecting students from speech and conduct deemed harmful, but does so in a non-classroom setting where legal ethics and clinical pedagogy are complicating factors.

* Clinical Professor of Law, UC Berkeley School of Law. I am grateful to Julia Hirata, Janelle Lamb, Yasmine Tager, and Robel Yared for outstanding research assistance. For their helpful comments, many thanks to Abbye Atkinson, Holly Doremus, Catherine Fisk, Kristen Holmquist, Kathryn Miller, Saira Mohamed, Andrea Roth, Pam Samuelson, Jeff Selbin, Abbe Smith, Tirien Steinbach, Karen Tani, Kate Weisburd, and the participants in the 2019 Berkeley Law faculty retreat. Thanks also to Emina Dacic, Beatrice Bremer, Emily Krueger, Molly Gibbons, and their colleagues at the Washington Law Review for their careful editing and attention, even in the middle of a pandemic. Had J.D. King agreed to read the Article, I likely would have been grateful for his thoughtful insights.

INTRODUCTION

Toward the end of my university-mandated online sexual harassment training, at the conclusion of a module called "Protecting Students," the following hypothetical was offered as part of a quiz to assess my understanding of my obligations as a faculty member:

> My student Miranda is working on her degree in psychology. As part of her practicum, Miranda has to counsel Barry, who has an intellectual disability. Recently, she complained to me that Barry tries to grab her in their sessions and follows her to her car. I told her I can't help her. She needs to learn how to handle this kind of misbehavior on her own.[1]

The quiz asked: "Is that an appropriate response?"[2]

From among three options, the correct answer was: "No. Miranda is experiencing sexual harassment, and it needs to be reported to the Title IX Coordinator."[3] The training module goes on to explain:

> Barry's unwelcome sexual touching is probably illegal sexual harassment: The conduct is unwelcome, based on sex, and likely sufficiently severe or pervasive. Regardless of what Miranda might face professionally, federal law protects her from being sexually harassed as a student. So, the school must respond to her complaints and take action to stop Barry's behavior.[4]

I chose the correct answer but was unsettled by the implications for clinical law faculty. What if Barry had been a client of a law school clinic,

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1. Appropriate Responses to Student Complaints about Harassment (graphic), *in* INTERSECTIONS: PREVENTING HARASSMENT & SEXUAL VIOLENCE (EDU-CA), PART II, EVERFI [hereinafter Graphic] (displayed as part of a training conducted in 2020) (on file with author).

2. *Id.*

3. *Id.*

4. *Id.*

one that represented people who were intellectually disabled, indigent, and seeking access to education? Would I have had to report him to the university's Title IX office? Would the clinic have had to withdraw from his case, even if he had no other reasonable options for high-quality representation? How would the school "stop Barry's behavior"?[5] Would we have to call the police?

And what about Miranda? One answer option to the quiz was: "[S]ince it's part of her coursework, Miranda needs to learn how to deal with client misbehavior herself."[6] Well, that is obviously wrong and contrary to our educational mission. The other answer option was: "[I]n order to protect her, the school should immediately drop Miranda from the practicum."[7] That can't be right either. Miranda should not be punished for Barry's behavior. What should clinical faculty do, then, if we want to educate the student (and not leave her to learn how to deal with client misbehavior by herself), ensure that the student is not deprived of an educational opportunity (and not just drop her from the class), while at the same time fulfilling our ethical obligations of loyalty and zealousness to our client (and not reporting him to the authorities)?

Law school clinics place law students in the role of lawyers, giving them as much responsibility as the clinical supervisor believes they can handle, usually on behalf of clients who are indigent. They "learn by doing," a hallmark of the clinical enterprise and experiential education in general. As one law school's clinic website advertises: "Clinic students represent real clients with real legal problems (not in simulations or role-playing exercises)."[8] Because they are in the role of lawyers, students owe the same duty of zealous representation and loyalty to the clients as practicing attorneys.[9] Because they are working on real-life cases, they are subjected to the same bias and harassment that many practicing attorneys experience on a regular basis.

Consider this hypothetical scenario set in a law school clinic: You teach in a criminal defense clinic, and you are supervising a team of two

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5. *Id.*

6. *Id.*

7. *Id.*

8. *Clinical and Experiential Learning*, YALE L. SCH., https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning [https://perma.cc/SDD2-LVNL].

9. *See* Robert L. Jones, Jr., Gerard F. Glynn & John J. Francis, *When Things Go Wrong in the Clinic: How to Prevent and Respond to Serious Student Misconduct*, 41 U. BALT. L. REV. 441, 442 n.8 (2012) ("Clinical professors are required by student practice rules to assume responsibility for the work of the law students they supervise."); *see also* Suellyn Scarnecchia, *The Role of Clinical Programs in Legal Education*, 77 MICH. BAR J. 674, 674 (1998) (explaining that because legal clinics allow law students to take on real clients and real cases, the "responsibility of being a lawyer and the constant burden of making professional judgments come front and center for the first time").

students, one female and one male,[10] who are preparing for the sentencing hearing of the client, whom the court appointed the clinic to represent because the client is indigent. Now imagine that a key witness for this sentencing hearing is the client's brother, who was a witness to, and victim of, much of the physical and emotional abuse to which the client was subjected as a child. You and the students believe that the details of your client's traumatic childhood will move the sentencing judge to apply leniency. Assume, as is often the case, that drawing out the specific information needed for the sentencing presentation requires several hours-long interviews in the brother's home.

After their first visit with the brother, your students report that the witness appeared to possess a wealth of helpful information, including detailed anecdotes about the abuse he and the client suffered at the hands of their parents. He is also willing to sign a release for medical, educational, and social services records and has agreed to review the records with the students as soon as they are obtained. The students assessed him as generally credible and were impressed with his ability to remember details that they hoped could be corroborated with contemporaneous records. It is clear to them that, in this initial meeting, they only scratched the surface of the helpful information they could eventually obtain from him.

The problem? The client's brother virtually ignored the male student during the two-hour long interview and seemed fixated on the female student. The male student began the interview by taking the lead with questioning, but the witness answered his questions only tersely and would then look to the female student as if hoping she would ask the next question. Eventually, the female student began to take over the questioning, and the witness responded with expansive detail to each of her questions. Unfortunately, his responses to her were also peppered with sexual comments about her appearance. Both students did their best to discourage such comments while in the moment, gently but firmly telling the witness that the comments were not appropriate or welcome and that they needed to stick to the reason they had come to interview him. These efforts fell on deaf ears, and the witness continued to make the comments and also to leer suggestively at the female student throughout the interview. At one point, the witness motioned to the male student and said to the female student: "Next time you come see me, maybe leave him at home."

Upon their return to the office, the students were pleased to have found

10. Here, and elsewhere when I do not otherwise state, I am referring to cisgender people who present as female or present as male.

a witness with excellent recall for some of the traumatic experiences that will form the backbone of their sentencing presentation. However, they were quite unsettled by the witness's inappropriate and unwelcome sexual behavior. It is their judgment that the brother, despite the discomfort he caused the students, is nevertheless going to be an important source of information for the client's case and that the female student was able to elicit helpful details from him in a way that the other student was unable to do. The female student, who aspires to a career as a public defender, tells you she is willing to go back and interview the witness, though she is not comfortable returning alone. The male student is also willing to go back to the witness, although, in his judgment, the female student is much more likely to elicit helpful information than he is.

As the professor overseeing their work, lessons from your university's mandatory sexual harassment training are fresh in your mind.[11] That training informed you that federal law defines sexual harassment in the Title IX context as behavior that is "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."[12] You are informed that the university sets an even lower bar and "includes behavior such as unwelcome sexual advances, requests for sexual favors and other conduct of a sexual nature."[13] You are

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11. In response to the #MeToo movement, "many public and private employers have sought to address and curtail harassment issues through a variety of methods, including examining and revising sexual harassment policies and procedures, changing the workplace culture and increasing or revamping sexual harassment training." Miles & Stockbridge P.C., *Sexual Harassment Training After #MeToo*, JD SUPRA (June 25, 2019), https://www.jdsupra.com/legalnews/sexual-harassment-training-after-metoo-20743/ [https://perma.cc/84X4-MVDZ]. For example, California Senate Bill 1343 mandated sexual harassment training for most university employees every two years starting in 2020. S.B. 1343, 2017–2018 Legis. Sess., Reg. Sess. (Cal. 2018). Title IX reporting also increased in the wake of #MeToo. *See* Lena Felton, *How Colleges Foretold the #MeToo Movement*, THE ATL. (Jan. 17, 2018), https://www.theatlantic.com/education/archive/2018/01/how-colleges-foretold-the-metoo-movement/550613/ [https://perma.cc/TK4D-QRAP] (describing an increase in Title IX reporting on college campuses in the #MeToo era, and a wave of university leaders condemning sexual harassment); Jamie D. Halper, *In Wake of #MeToo, Harvard Title IX Office Saw 56 Percent Increase in Disclosures in 2018, Per Annual Report*, HARV. CRIMSON (Dec. 14, 2018), https://www.thecrimson.com/article/2018/12/14/2018-title-ix-report/ [https://perma.cc/ZCU2-2AVB].

12. *See* 34 C.F.R. § 106.30(a) (2020). In addition to the language quoted above, recent regulations promulgated by the Trump administration set forth two additional types of conduct that would constitute "sexual harassment" under Title IX: quid pro quo harassment and sexual assault. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,037 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

13. *See FAQ: Understanding Sexual Violence and Sexual Assault*, U.C.: SEXUAL VIOLENCE PREVENTION & RESPONSE [hereinafter *FAQ: Understanding Sexual Violence and Sexual Assault*], https://sexualviolence.universityofcalifornia.edu/faq/ [https://perma.cc/8VV9-LSQL].

also instructed that "[e]ven when the behavior does not meet the definition of illegal sexual harassment or misconduct, reporting the information provides an opportunity for early intervention to protect students before they are deprived of educational opportunities."[14] You are warned that the consequences for faculty who fail to report can be severe.[15]

What do you do? Even if you are not sure whether the behavior meets the definition of sexual harassment, it was surely unwelcome, of a sexual nature, and, at the very least, made the students feel uncomfortable. Your Title IX training tells you to report the incident to the university and take steps to ensure it does not happen again. Such steps could include withdrawing from the case and/or relieving these students from further contact with the witness. On the other hand, ethical representation of the client, who may not have other access to quality representation, may very well demand both the clinic's continued involvement in the case and further meetings with this key witness. Another factor, of course, is the students' views. How much agency should they have? In this example, presumably the female student's voice should be honored; moving her off the assignment, against her consent, would be a disservice to her educational growth. That said, how do you determine whether a student is exercising her will or acquiescing to doing something her professor seems to want in order to serve the client in a mission-driven, client-centered clinical setting?

At bottom, how do you balance the goal of training students to become zealous, client-centered[16] advocates with your obligation to report sexual harassment when you are aware that it may have occurred, and is likely to occur again, in a school-sponsored course or activity? If it harms the client's interests, are you even permitted to take action when you are aware of "third-party" sexual harassment at the hands of a client or witness (or judge, or opposing counsel) with whom the student is obligated to continue to interact with in order to carry out the aims of the representation? Are you permitted not to? How can clinicians turn these moments into educational opportunities without endangering

14. *See* Reporting vs. Investigating (graphic), *in* INTERSECTIONS: PREVENTING HARASSMENT & SEXUAL VIOLENCE (EDU-CA), PART II, EVERFI (displayed as part of a training conducted in 2020) (on file with author).

15. *See infra* text accompanying note 37.

16. *See* Julie D. Lawton, *Who Is My Client? Client-Centered Lawyering with Multiple Clients*, 22 CLINICAL L. REV. 145, 147 (2015) ("Client-centered lawyering is based on the idea that clients should be the primary decision-maker in determining the direction of their legal case or transaction . . . ."); Monroe H. Freedman, *Client-Centered Lawyering—What It Isn't*, 40 HOFSTRA L. REV. 349, 353–54 (2011) ("Client-centered lawyering is premised on respect for the dignity and autonomy of each member of society . . . . [L]awyers act unprofessionally and immorally in preempting or overriding their clients' desires.").

our students?

Thus arises a special problem in law school clinics that place students in the role of professionals, simultaneously exposing them to unwelcome sexual behavior and imposing on them a professional, ethical obligation to zealously and loyally represent clients who are often indigent and who may not have any other access to representation in the legal system. This is a problem that sits at the intersection of three sets of priorities in the clinical setting: the duty to the client, the duty to educate the student, and the duty to protect the student.[17] A challenge of the clinical enterprise is that the values underlying these priorities are sometimes in tension. This Article addresses one such instance, when a reflexive conception of the duty to protect the student may ultimately disserve both the student and the client.

In the course of representing clients, lawyers encounter clients or witnesses who sexually harass them or subject them to other forms of harassment, bias, or intimidation.[18] Sometimes the conduct rises to the level of legally actionable sexual harassment, requiring intervention, remedies, and possible withdrawal from the representation.[19] Sometimes,

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17. Originally passed to ensure equal educational opportunity for women, Title IX in the sexual harassment context explicitly aims to "protect" students. As the U.S. Department of Education's Office of Civil Rights recently explained,

> The new Title IX regulation . . . marks the end of the false dichotomy of either protecting survivors, while ignoring due process, or protecting the accused, while disregarding sexual misconduct. There is no reason why educators cannot protect all of their students – and under this regulation there will be no excuses for failing to do so.

Press Release, U.S. Dept. of Educ., Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students (May 6, 2020), https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students [https://perma.cc/XU6U-VQJA] (quoting Assistant Secretary Kenneth L. Marcus of the U.S. Department of Education, Office for Civil Rights).

18. Although there does not appear to be good data on harassment of attorneys by clients, a number of surveys have established that it is a prevalent problem in the profession. *See, e.g.*, Caroline Spiezio, *Law Firms Failing to Protect Women from Sexual Harassment by Clients*, LAW.COM (Dec. 18, 2018, 12:00 AM), https://www.law.com/international-edition/2018/12/18/harassment-from-clients-can-stunt-womens-careers-but-few-firms-are-trying-to-stop-it-378-94744/ [https://perma.cc/5727-6NUA] ("[S]exual harassment by clients is not uncommon in the legal industry, with stories ranging from uncomfortable comments to repeated unwanted propositions and even sexual assault."); Debra Cassens Weiss, *Bullying and Sexual Harassment 'Are Rife in the Legal Profession,' Global Survey Finds*, A.B.A. J. (May 16, 2019, 7:00 AM), https://www.abajournal.com/news/article/bullying-is-rife-in-the-legal-profession-while-sexual-harassment-is-common-global-survey-finds [https://perma.cc/D5TH-65J6] (reporting that one in three female lawyers have been sexually harassed in a work context according to a recently released global survey of nearly 7,000 lawyers in 135 countries).

19. *See* Peter Jan Honigsberg, Marilynn Tham & Gary Alexander, *When the Client Harasses the Attorney—Recognizing Third-Party Sexual Harassment in the Legal Profession*, 28 U. S.F. L. REV. 715, 737 (1994) ("We need law firms to send out a convincing message that they will effectively implement forceful policies against sexual harassment of employees from clients.").

though, including when the kind or scope of the behavior does not rise to the level of legally actionable sexual harassment,[20] the twin duties of zealous representation and confidentiality may actually serve to *prohibit* the lawyers from taking otherwise appropriate or required steps to stop and/or report the behavior, lest they violate an ethical responsibility to the client.

The clinical setting adds a layer of further complexity. For one thing, universities' definitions of sexual harassment are often more expansive than federal law. For example, the University of Pennsylvania defines "sexual harassment," among other things, as "any unwanted conduct" based on sex or gender that "[h]as the purpose or effect of interfering with the individual's academic or work performance" or "[c]reates an intimidating or offensive academic, living or work environment."[21] Moreover, sometimes the behavior to which a student is subjected makes the student deeply uncomfortable, even if it does not meet a formal definition of harassment.[22]

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20. To be legally actionable under Title VII, sexual harassment must take the form of either quid pro quo harassment or hostile work environment harassment. 42 U.S.C. § 2000e. Quid pro quo sexual harassment exists where the perpetrator takes a "tangible" action against the victim as part of the harassment. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998). A hostile work environment exists where the sexual harassment is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). In the Title IX context, one notable change in the definition of sexual harassment in the 2020 regulations is that they explicitly exclude hostile work environment from the definition of sexual harassment under Title IX. *See* KRISTEN HARRELL & JESSICA WHITE, ASS'N FOR STUDENT CONDUCT ADMIN., TITLE IX OF THE AMENDMENTS OF 1972: 2020 REGULATION 6 (2020), https://www.theasca.org/files/Publications/WhitePaper-TitleIXRegs2020.pdf [https://perma.cc/LA4M-Z3YJ] ("Another important note is that this definition does not include reference to prohibitions on creating a hostile environment, which can be found in Title VII definitions and in prior guidance from [the Office for Civil Rights].").

21. UNIV. OF PA., PENNBOOK 130 (2019–2020), https://catalog.upenn.edu/pdf/2019-20-pennbook.pdf [https://perma.cc/8C7U-KJKG]; *see also* YALE UNIV., YALE SEXUAL MISCONDUCT POLICIES AND RELATED DEFINITIONS 1 (2020), http://catalog.yale.edu/dus/university-policy-statements/sexual-misconduct-policies-related-definitions/sexual-misconduct-policies-related-definitions.pdf [https://perma.cc/25HE-ZYQG] (defining sexual harassment, among other things, as "conduct of a sexual nature on or off campus" that "has the purpose or effect of unreasonably interfering with an individual's work or academic performance").

22. It is true that there is a growing popular literature about the role of discomfort in personal growth. For example, Brené Brown argues that, over the last decade, political, economic, and social scarcity has led to a loss of tolerance for discomfort and vulnerability, which she suggests is "where the juice happens" in terms of education and growth. *See* Brené Brown, *If You Want Progress Create an Uncomfortable Environment*, YOUTUBE (May 9, 2014), https://www.youtube.com/watch?v=hmwMiWRT8z0 [https://perma.cc/QD68-NBUZ]; *see also* Thomas Oppong, *Embrace Discomfort. Your Long-Term Personal Growth Depends on It*, MEDIUM: THE STARTUP (Dec. 6, 2017), https://medium.com/swlh/embrace-discomfort-your-long-term-personal-growth-depends-on-it-eb5abe5ccd16 [https://perma.cc/D6QS-KP4C] (noting that growth requires discomfort and that to a growth-committed person, comfort is just a place to retreat to momentarily while you get ready to

In the course of supervising law students, clinical law faculty train students how to be lawyers in the real world by placing them in the role of attorney, meaning that, like real lawyers, these student-attorneys also encounter unwelcome behavior from clients or witnesses (or other third parties connected in some way to the representation). The same ethical obligations to the client that are present in the non-clinical setting may tie the lawyer/supervisor's hands. However, the consequences of not reporting or even stopping the behavior may be quite different, and more dire, when a school's Title IX policies require clinical faculty to shield students from sexual harassment and report it so it can be stopped and remedied. After all, the mandate of Title IX to protect students (from kindergarten through graduate school) is clear: "[The school] is required to take corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the student that could reasonably have been prevented had the [school] responded promptly and effectively."[23] Of course, there is a point at which harassment puts a student at risk and/or precludes any meaningful education, and no defensible purpose is served by keeping the student in that situation. But there is a lot of grey area before that point is reached.

Consider a few additional possible scenarios facing law students and their supervisors in law school clinical programs:

- A cisgender female clinical student in a prisoners' rights clinic is working on a class-action lawsuit challenging conditions at a juvenile justice facility for teenage boys. The case requires the student to go on multiple tours of the facility to gather evidence, during which each time she is subjected to cat-calling from several of the incarcerated youth, all of whom are the student's clients.
- A transgender male[24] clinical student in an eviction defense clinic is interviewing a witness in the witness's home. The witness possesses critical information necessary to the client's case but is not particularly eager to help. Over the course of an hour-long interview, the witness makes a number of

push again). That said, nobody would advocate that law students seek out the discomfort experienced as a result of unwelcome sexual conduct.

23. Amended Letter of Findings from Letisha Morgan, Team Leader, Off. for C.R., U.S. Dep't of Educ., to Dr. Carol L. Folt, C., Univ. of N.C. at Chapel Hill 4 (June 28, 2018), https://www.unc.edu/wp-content/uploads/2018/07/FINAL-AMENDED-R-LOF-UNC-Chapel-Hill-11132051-PDF_Redacted.pdf [https://perma.cc/WG7L-Q7YV].

24. Title IX protects transgender students from sex discrimination. *See* Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1305 (11th Cir. 2020) ("[W]e conclude that Title IX . . . prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex.").

inappropriate comments about the student's appearance and repeatedly asks him to explain his gender. Upon returning to the clinical office, it is clear to both the student and his supervisor that follow-up interviews of the witness will be required in order to zealously represent the client.

- A cisgender female student in a criminal defense clinic is assigned to a case set for trial in front of a notoriously sexist male judge, who insists that female attorneys in his courtroom wear skirt suits and who tends to respond more favorably to female attorneys who wear makeup.

Federal law requires schools, including law schools, to refrain from knowingly putting students in situations in which they are likely to be subjected to unwelcome sexual behavior. The federal government has told schools that they must "encourage students to report sexual harassment early, before such conduct becomes severe or pervasive, so that it can take steps to prevent the harassment from creating a hostile environment."[25] Law schools, as a critical component of their increasingly-recognized duty to provide experiential learning opportunities that prepare students to enter the legal profession,[26] regularly place students in clinical programs that expose students to, at least, the risk of such behavior. Is doing so consistent with law schools' Title IX obligations?[27] If not, how can we effectively train students to navigate challenges they will surely face in practice?

Colleges and universities are taking an increasingly proactive approach to address sexual harassment. Although the #MeToo movement put a very public spotlight on the problem of pervasive sexual harassment in the workplace,[28] it was the Obama Administration's aggressive oversight of

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25. *See* Letter from Anurima Bhargava, Chief, C.R. Div., U.S. Dep't of Just., & Gary Jackson, Reg'l Dir., Off. for C.R., U.S. Dep't of Educ., to Royce Engstrom, President, Univ. of Mont., & Lucy France, Univ. Couns., Univ. of Mont. 8–9 (May 9, 2013), https://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf [https://perma.cc/2BS4-LXDN].

26. *See* Ian Holloway & Steven I. Friedland, *The Double Life of Law Schools*, 68 CASE W. RSRV. L. REV. 397, 413 (2017) (explaining that while law schools have long offered clinics and externships, this area of learning is expanding, both in terms of students who are given experiential opportunities outside of the classroom, and even inside doctrinal courses).

27. Such programs also expose students to other forms of harassment, such as racial harassment and anti-Semitism. This Article is focused primarily on sexual harassment, because it addresses the obligations of educational institutions under Title IX. But schools have obligations to protect students from other harassment as well, and many of the same considerations apply. Part III, for example, discusses the analogy in medical residency programs in which residents are confronted with the dilemma of treating racist patients.

28. *See* Alix Langone, *#MeToo and Time's Up Founders Explain the Differences Between the 2 Movements—And How They're Alike*, TIME (Mar. 22, 2018, 5:21 PM), http://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/ [https://perma.cc/D5Z2-5CGS].

sexual harassment policies and practices in higher education (and some K-12 school districts) that appears to have had a lasting effect on the responsiveness of colleges and universities to claims of sexual harassment.[29] The guidance and directives from the Office of Civil Rights (OCR) in the Obama Administration's Department of Education have also led colleges and universities to provide greater and more specific guidance to students, and mandates to staff and faculty, in terms of reporting instances of possible sexual harassment.[30] As one commentator explained, "While the Supreme Court held that harassment must be 'severe, pervasive, and objectively offensive' to trigger Title IX, the Obama OCR pushed schools to address harassment before it 'becomes severe or pervasive' in order to prevent the creation of 'a hostile environment.'"[31]

Notably, in 2020, the Trump Administration's OCR rescinded some of the office's previous directives, including the inclusion of "hostile environment" in the definition of sexual harassment.[32] It is possible that the 2020 revised regulations, as OCR begins to interpreted them in practice, will no longer require some of the aggressively proactive approaches colleges instituted during the Obama administration. However, many colleges and universities are taking no chances and are proceeding with overhauls of their policies and practices regarding the prevention of and response to instances of sexual harassment.[33] According

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29. *See* Sarah Brown, *What Does the End of Obama's Title IX Guidance Mean for Colleges?*, CHRON. OF HIGHER EDUC. (Sept. 22, 2017), https://www.chronicle.com/article/What-Does-the-End-of-Obama-s/241281 [https://perma.cc/S4KE-MPLE] (noting that guidance from the Obama administration "made clear that the federal government would aggressively police [colleges' obligation to respond promptly and equitably to reports of sexual violence], and marked a new era of strict enforcement").

30. *See* Brittany K. Bull, *Raped Abroad: Extraterritorial Application of Title IX for American University Students Sexually Assaulted While Studying Abroad*, 111 NW. U. L. REV. 439, 447 (2017) ("OCR possesses the primary responsibility for Title IX enforcement."). For example, at UC Berkeley, where I teach, the University reached a settlement in 2018 with OCR that was designed to remedy past violations of Title IX. Sakura Cannestra, *4-Year Federal Investigation Finds that UC Berkeley Violated Title IX Policies, Offers Recommendations*, DAILY CALIFORNIAN (Feb. 28, 2018), http://www.dailycal.org/2018/02/28/4-years-later-federal-investigation-uc-berkeleys-alleged-mishandling-sexual-misconduct-cases-ends-recommendations/ [https://perma.cc/9XG9-XE4W]; *Berkeley Compliance Response*, U.C. BERKELEY, http://complianceresponse.berkeley.edu/ [https://perma.cc/LZ89-PB7G].

31. R. Shep Melnick, *Analyzing the Department of Education's Final Title IX Rules on Sexual Misconduct*, BROOKINGS INST. (June 11, 2020), https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/ [https://perma.cc/75J9-NS2Y].

32. *See* HARRELL & WHITE, *supra* note 20, at 6; Melnick, *supra* note 31.

33. Melnick, *supra* note 31 ("The most immediate question is how colleges and universities will respond to the new rules. Despite the fact that many schools initially opposed the Obama-era policies, few are eager to go through another round of revision."); *see also* Robin Wilson, *Trump Administration May Back Away from Title IX, But Campuses Won't*, CHRON. OF HIGHER EDUC. (Nov.

to one account, "[c]ampus Title IX officers [report that they] remain committed to sexual-assault prevention and response," despite the Trump administration's somewhat more relaxed approach.[34] This may be in part because they believe they have settled on best practices and in part because they know that regulations can change with a new administration.[35]

In any event, faculty members and college administrators generally know by now that they cannot knowingly place students in positions where they are likely to be sexually harassed, and they must report instances of sexual harassment to the school's "Title IX Office" as soon as they learn of them. Failure to do so may result in forced remedial measures, loss of federal funding, and/or steep financial settlements with aggrieved students.[36] Individual faculty members who fail in their reporting duties face serious consequences, including termination.[37]

Faculty obligations are also relatively clear when it comes to most forms of what is called "third-party" harassment. For example, if a school sends a student to an internship and the student is sexually harassed by her internship supervisor, the school is liable if it "knows or should know" of the harassment.[38] Likewise, if a school contracts with someone to provide

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11, 2016), https://www.chronicle.com/article/Trump-Administration-May-Back/238382 [https://perma.cc/6V82-43R3]; Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, THE ATL. (Sept. 6, 2017), https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/ [https://perma.cc/9B3V-3K8R].

34. Brown, *supra* note 29.

35. *See* Melnick, *supra* note 31 ("[I]f Joe Biden is elected president in November, his administration will undoubtedly seek to change many parts of these regulations.").

36. *See* Sara Lipka, *How 46 Title IX Cases Were Resolved*, CHRON. OF HIGHER EDUC. (Jan. 15, 2016), https://www.chronicle.com/article/How-46-Title-IX-Cases-Were/234912 [https://perma.cc/U373-VKYT]; Anita Wadhwani, *Settling Sex Assault Lawsuits Costs Universities Millions*, TENNESSEAN (July 6, 2016, 4:32 PM), https://www.tennessean.com/story/news/2016/07/06/settling-sex-assault-lawsuits-costs-universities-millions/86756078/ [https://perma.cc/S6ZL-GF6V]; Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847, 1851 (2017) (noting that violations of Title IX may "trigger[] a loss of federal funds").

37. *See* Letter from Kathleen Salvaty, Systemwide Title IX Coordinator, Systemwide Title IX Off., U.C., to U.C. Cs. (Apr. 4, 2017) [hereinafter Letter from Kathleen Salvaty] (on file with author). It is just as clear that an educational institution is not liable if no official in the institution had knowledge of the discrimination—or the likelihood of discrimination—and failed to act. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (finding that damages cannot be recovered under Title IX for a teacher's sexual harassment of a student unless a school district official has actual notice of, and is deliberately indifferent to, the teacher's misconduct).

38. *See* OFF. FOR C.R., U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 12 (2001) [hereinafter REVISED SEXUAL HARASSMENT GUIDANCE], https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [https://perma.cc/D8VL-LDLL] (formally rescinded); Cynthia Grant Bowman & MaryBeth Lipp, *Legal Limbo of the Student Intern: The Responsibility of Colleges*

some kind of service or experience to students, those contracted parties are treated as employees for Title IX purposes, and the school may be liable if it knew or should have known about the contractor sexually harassing a student.[39] These rules make sense and provide incentives for educational institutions to take proactive steps to ensure that their students do not experience sexual harassment in school-related courses or activities.[40]

But when the harassing third parties are clients, key witnesses, or presiding judges, the traditional proactive steps that Title IX arguably demands may very likely harm the client's interests. Clinics place students in role as practicing attorneys, requiring them—to effectively represent the client—to talk and interact with a wide range of people, some of whom act inappropriately. Often, it is not an ethically-acceptable option to avoid talking to a particular person. Practicing attorneys face these challenges every day, and a law school program that allows students to practice as attorneys means that the students will face them too. In the context of mission-driven, public interest law school clinics, they are also often representing clients who are indigent and have no other options for legal representation.[41] After all, "[c]linical legal education has been focusing on legal services for the underserved and on the justice mission of law schools for years."[42]

But that does mean law schools knowingly send students into situations—for academic credit—in which they may be sexually harassed. Sometimes, faculty *know* the students will likely be sexually harassed or at least face unwelcome behavior that causes great discomfort. Other times, faculty find out after the fact, but professional obligations to clients renders reporting the behavior as they "should" fraught with ethical, legal, and moral complications.

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and Universities to Protect Student Interns Against Sexual Harassment, 23 HARV. WOMEN'S L.J. 95, 113–114 (2000) (arguing that colleges could be liable for damages under Title IX if a student experiences sexual harassment during her off-campus internship).

39. UNIV. OF CAL.: SYSTEMWIDE TITLE IX OFF., SEXUAL VIOLENCE AND SEXUAL HARASSMENT 8 (2019), https://sa.berkeley.edu/sites/default/files/RevisedSVSHPolicy.pdf [https://perma.cc/6GRU-4Y25].

40. These rules are also similar to an employer's obligations under Title VII to remedy instances of actionable sexual harassment it knows or should have known about. *See* Honigsberg et al., *supra* note 19.

41. Law school clinical programs have long served to address unmet legal needs. Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1475, 1505 (1998); *see also* Douglas A. Blaze, *Déjà Vu All over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 950 (1997) ("[T]he earliest clinical programs were an outgrowth of the legal aid movement.").

42. Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 997 (2004).

This issue arises in many other experiential education contexts, including in other fields such as journalism, social work, and medicine. This Article focuses on law school clinics, in which faculty and school administrators place law students, in order to conduct their work on behalf of clients, in situations that they are aware may expose the students to harassing conduct. The Article proceeds in three parts.

Part One provides an overview of the obligations Title IX appears to impose on educational institutions to prevent exposure to sexual harassment, particularly as it relates to harassment by "third parties."

Part Two first describes how law school clinics at times place students in situations that may very well expose them to sexual harassment. It then explores the ways in which the standard template for addressing sexual harassment concerns under Title IX—prevent it when possible, and remedy when it occurs—does not neatly fit in the clinical context. This Part discusses the ethical concerns when the problematic behavior involves a client to whom the clinic owes a duty of confidentiality and loyalty, as well as when it involves a witness or other relevant player in the case whose cooperation or information is confidential and integral to the client's case. It also discusses why some of the possible solutions—such as assigning certain roles to certain students in order to minimize exposure to harassment—are likely to disproportionately disadvantage and limit the educational opportunities for female students, non-binary students, and transgender students. Such a remedy may itself run afoul of Title IX.

Part Three offers suggestions for addressing this challenge, presenting two kinds of approaches. First, we must take seriously Title IX's focus on the denial of educational opportunities, as well as the Supreme Court's direction to consider the context of the educational setting in which the harassment occurs. Harassment by a witness in the clinical law school setting is as different from harassment by an internship supervisor as a hug from a kindergarten teacher is different from a hug from a high school teacher. Context matters, and it should guide the faculty member's interpretation of what is mandatory to report under Title IX. Second, apart from formal reporting requirements, clinical faculty should use such situations as opportunities to teach students about the constraints that duty to a client places on them. Clinicians should not necessarily report harassment to the police or campus authorities (and in many situations, their ethical obligations to the clients prohibits them from doing so), but neither should they ignore it or fail to address it. Instead, they should protect the student to the greatest extent possible while providing options that account for the students' preferences, and they should explicitly teach students how to address harassment they may experience as a practicing

attorney. To help navigate these complex interests, this Part introduces a matrix of variables that can serve as a starting point for assessing the appropriate response in a given situation.

The Conclusion notes how this conundrum may arise in other contexts and generate further topics for discussion. The duty to the client sometimes precludes the remedies that a university may impose under the purported mandate of Title IX. Placing students in the role of attorneys means teaching them how to navigate a world in which their interests may be subsumed in favor of their obligation to clients. Law school faculty, especially clinical faculty, should not shield students from what they are going to face as lawyers—but we must support students and provide space for them to learn and grow as professionals. Our role is to expose them to what they will face as lawyers and teach them how to navigate and thrive in the profession. In this way, my argument is in conversation with a larger literature about the obligation of universities to create "safe spaces" for students,[43] but in the very different non-classroom context of a law school clinic serving clients who are indigent, in which legal ethics and clinical pedagogy inject significant complexity. Although it does not directly take sides in that debate, it does challenge the assumption that the duty to protect the student is the value that, in all instances, rises above the duties to educate the student and serve the client.

I. THIRD-PARTY SEXUAL HARASSMENT OF CLINICAL LAW STUDENTS

In role as aspiring professionals, clinical law students, depending on the particular setting, interact with a wide range of third parties whom the university does not control: clients, witnesses, opposing counsel, judges, consulting attorneys, court clerks, and even bystanders or other people without a direct connection to a clinic case (but whom the students may have to face repeatedly). Any of these third parties may sexually harass a clinical law student, raising the question of how the law addresses harassment by someone other than a fellow student or a direct supervisor. This Part reviews that law, revealing a dearth of both precedent

43. *See, e.g.*, Michael S. Roth, Opinion, *Don't Dismiss 'Safe Spaces'*, N.Y. TIMES (Aug. 29, 2019), https://www.nytimes.com/2019/08/29/opinion/safe-spaces-campus.html [https://perma.cc/W7JG-4N42] ("Calling for such spaces is to call for schools to promote a basic sense of inclusion and respect that enables all students to thrive—to be open to ideas and perspectives so that the differences they encounter are educative and not destructive."); Jonathan Zimmerman, *College Campuses Should Not Be Safe Spaces*, CHRON. OF HIGHER EDUC. (Jan. 17, 2019), https://www.chronicle.com/article/College-Campuses-Should-Not-Be/245505 [https://perma.cc/MQ63-XRGC] (arguing that "the safe-space doctrine . . . creates huge barriers to dialogue, by declaring any discomfort as out of bounds").

and commentary.

A. Third-Party Sexual Harassment Under Title VII

Before turning to liability for third-party harassment under Title IX, it is worth briefly reviewing the general rule that employers can be held liable for the actions of third parties, including customers, patients, and people who are incarcerated. While Title VII law is not currently directly applicable to the Title IX setting,[44] the doctrine's allowance for more relaxed rules in certain employment contexts is instructive for the clinical setting discussed in the next Part.

Although employers are not expected to eradicate harassment by parties over whom they do not have direct control, they must take immediate, corrective actions when they know—or should know—of the conduct. For example, in *Folkerson v. Circus Circus Enterprises, Inc.*,[45] the Ninth Circuit held that "an employer may be held liable for sexual harassment on the part of a private individual . . . where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct."[46] Similarly, in *Lockard v. Pizza Hut, Inc.*,[47] the Tenth Circuit found that "harassing conduct by . . . two male customers was sufficiently severe to create an abusive environment."[48] That court found that "the same standard of liability applies to both co-worker and customer harassment."[49] This means that "employers may be held liable in these circumstances if they fail to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known."[50]

This general rule is applicable even in situations where employees assume some risk given the nature of the work. For example, in *Crist v. Focus Homes, Inc.*,[51] the Eighth Circuit found that "a residential program

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44. The Trump administration recently made clear its view that Title VII was no longer an appropriate touchstone for a Title IX analysis: "The Department does not wish to apply the same definition of actionable sexual harassment under Title VII to Title IX because such an application would equate workplaces with educational environments . . . ." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,037 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

45. 107 F.3d 754 (9th Cir. 1997).

46. *Id.* at 756.

47. 162 F.3d 1062 (10th Cir. 1998).

48. *Id.* at 1072.

49. *Id.* at 1074.

50. *Id.*

51. 122 F.3d 1107 (8th Cir. 1997).

for developmentally disabled individuals [can] be found liable [under Title VII] for sexual harassment due to its failure to respond appropriately to the conduct of a mentally incapacitated resident toward program employees."[52] In that case, the resident was significantly developmentally disabled and had both physically and sexually assaulted various staff members.[53] The court recognized that the defendant had a very limited ability to control the actions of the resident at issue, but that it "clearly controlled the environment . . . and it had the ability to alter those conditions to a substantial degree."[54] Thus, it still had a responsibility to implement corrective measures where feasible.[55]

Similarly, in *Turnbull v. Topeka State Hospital*,[56] the Tenth Circuit found that a mental hospital could be held liable under Title VII after a patient violently sexually assaulted a female doctor.[57] As in *Crist*, the court noted that it is the employers' ability to control the environment—not the third party—that matters to a Title VII analysis in this context. The *Turnbull* court explained:

> It is not always possible for an employer to completely eliminate offensive behavior, and thus the effectiveness inquiry looks not to whether offensive behavior actually ceased but to whether the remedial and preventative action was reasonably calculated to end the harassment. We also consider the appellants' expectations given their choice of employment. In an environment like [a state mental hospital] it would be impossible to eliminate all potential risk; instead, we ask whether the hospital took reasonable measures to alleviate known or obvious risks.[58]

Case law in the prison setting tends to follow the same guidelines. In *Freitag v. Ayers*,[59] the Ninth Circuit found that a state department of correction can "be held liable for prison officials' failure to correct a hostile work environment that is the result of male prisoners' sexual harassment of female guards."[60] It explained that prisons are not exempt from Title VII and that "[n]othing in the law suggests that prison officials may ignore sexually hostile conduct and refrain from taking corrective actions that would safeguard the rights of the victims, whether they be

52. *Id.* at 1108.
53. *Id.*
54. *Id.* at 1111–12.
55. *Id.*
56. 255 F.3d 1238 (10th Cir. 2001).
57. *Id.* at 1245
58. *Id.* at 1245 (citation omitted).
59. 468 F.3d 528 (9th Cir. 2006).
60. *Id.* at 532.

guards or inmates."[61]

Title VII thus establishes a baseline for the responsibility of employers to protect employees from third-party harassment of which they are, or should be, aware, and provides a useful, if not legally binding, analogy to the clinical law context. What the typical Title VII context does not account for, however, is the added protections that exist in the educational setting, and the ethical duties of attorneys in a law school clinic serving clients who are indigent—both of which complicate the responsibilities of the clinical supervisor who is, or should be, aware of third-party harassment of a clinical law student.

B. Third-Party Sexual Harassment Under Title IX

Title IX prohibits sex discrimination in any educational setting that receives federal funding.[62] Specifically, Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[63] The Education Amendments of 1972 define "program or activity" to include "all of the operations" of private or public postsecondary institutions that receive federal funds.[64] Thus, Title IX applies to virtually all colleges and universities in the United States. Over the years, Title IX expanded to cover sexual harassment, ultimately protecting students from experiencing harassment in school settings. In *Franklin v. Gwinnett County Public Schools*,[65] the Supreme Court explicitly included sexual harassment as one of the forms of sex discrimination prohibited by Title IX.[66]

Supreme Court case law has eroded some of the potential teeth of Title IX. In *Gebser v. Lago Vista Independent School District*,[67] the Supreme Court considered an educational institution's liability for money damages for a faculty member's harassment of a student. The Supreme Court rejected the student's claim and concluded that the school district was not liable for damages because it neither had actual notice of the harassment nor could it be said to have been deliberately indifferent to

61. *Id.* at 539.

62. REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 38, at 2.

63. 20 U.S.C. § 1681(a).

64. *Id.* § 1687.

65. 503 U.S. 60 (1992).

66. *Id.* at 75.

67. 524 U.S. 274 (1998).

it.[68] The Court held that

> students may not recover damages from a school district under Title IX for teacher-student sexual harassment "unless an official [of the district] who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [district's] behalf has actual knowledge of discrimination . . . and fails adequately to respond."[69]

In other words, the university's response must amount to "deliberate indifference to discrimination."[70] And in *Davis v. Monroe County Board of Education*,[71] the Supreme Court addressed an educational institution's liability for peer sexual harassment and essentially extended *Gebser*'s holding to the peer-to-peer situation.[72]

As Karen Tani has observed,

> [t]aken together, these cases suggested that women in educational settings did have a right to be free from sexual imposition, but also that colleges and universities had little to fear if they failed to take that right seriously. Indeed, the cases arguably incentivized institutions to "bury their heads in the sand" rather than actively prevent rights violations, lest they accrue the kind of knowledge that might trigger liability.[73]

As Tani explains, the Supreme Court's failure to embrace the promise of Title IX and the Violence Against Women Act[74] caused people concerned with sexual harassment and violence in educational settings to shift their attention to the Department of Education's Office of Civil Rights (OCR), which can investigate and issue mandates, usually in the form of a stipulated resolution.[75] In its 2001 guidance,[76] OCR reminded recipients of federal aid that *Gebser* and *Davis* established the standards for private actions for money damages; administrative enforcement of

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68. *Id.* at 277.

69. William A. Kaplin, *A Typology and Critique of Title IX Sexual Harassment Law After* Gebser *and* Davis, 26 J. COLL. & UNIV. L. 615, 620 (2000) (citing *Gebser*, 524 U.S. at 290).

70. *Id.* at 620 (citing *Gebser*, 524 U.S. at 290–91).

71. 526 U.S. 629 (1999).

72. *Id.* at 653–54. In *Davis*, the Supreme Court remanded the student's claim to the district court for trial, holding that the allegations, if proven, would subject the school district to money damages liability. *Id.* The Court's holding paralleled the "actual notice and deliberate indifference standard" used under *Gebser*. Kaplin, *supra* note 69, at 625 (citing *Davis*, 526 U.S. at 643).

73. Tani, *supra* note 36, at 1861–62.

74. *See* United States v. Morrison, 529 U.S. 598, 602 (2000) (holding that Congress did not have Constitutional authority to enact a federal civil remedy under the Violence Against Women Act for victims of gender-related violence); Tani, *supra* note 36, at 1862.

75. Tani, *supra* note 36, at 1863.

76. REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 38.

Title IX could, and does, rely on a broader set of standards that hold schools to account on the basis of "potential Title IX violations" that might not meet the Supreme Court's test for monetary liability.[77]

Indeed, guidance materials from the U.S. Department of Education clearly delineate schools' obligations both before and after a complaint of sexual misconduct is made by a student.[78] Where the school is on "notice" of possible sexual harassment of students, the school must take steps to understand what occurred and to respond appropriately.[79] They have to stop the behavior and remedy the harm to the student. Ultimately, these steps must constitute a "reasonable response," evaluated under the circumstances.[80] The school also must adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints of sex discrimination, including sexual misconduct.[81]

The OCR guidelines concerning "[e]ducation programs or activities" covered by Title IX refer to "any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient."[82] Thus, the agency guidelines also outline universities' obligations in programs not wholly operated by the school, such as when a student must interact with outside organizations or clients as part of an education program or activity. According to these guidelines, schools facilitating educational programs not operated by the school must develop procedures to ensure that the actual operators of the program do not subject students to prohibited behavior.[83]

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77. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,037 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

78. *Id.* at 30,041.

79. *Id.*

80. *Id.* at 30,029. Schools are expected to take tailored steps that, among other factors, take into account "the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school." *Id.* at 30,047 (quoting OFF. FOR C.R., U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 15 (2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [https://perma.cc/D8VL-LDLL]).

81. *Id.* at 30,054.

82. 34 C.F.R. § 106.31(a) (2020).

83. *Id.* § 106.31(d)(1)–(2). OCR has recently enforced these very guidelines regarding third-party harassment at my university, UC Berkeley. One of its findings was that UC Berkeley had failed to make it clear in its Sexual Violence and Sexual Harassment policies that "its coverage applies to complaints of sexual harassment and sexual violence against third parties, such as individuals in the University community whose conduct may create a hostile environment for students, faculty, or staff in the University's programs or activities." Letter from Laura Faer, Reg'l Dir., Region IX, Off. for C.R., U.S. Dep't of Educ., to Carol T. Christ, C., U.C. Berkeley 10 (Feb. 26, 2018), https://complianceresponse.berkeley.edu/pdf/09142232ltr.pdf

While the OCR notes that third parties cannot be said to engage in quid pro quo harassment (that is, where a teacher or employee "conditions an educational decision or benefit on the student's submission to unwelcome sexual conduct") because they do not have direct responsibility over other students, any unwelcome sexual conduct on their part is evaluated under a hostile environment framework.[84]

Within this framework, schools are responsible for taking action in response to a third party's inappropriate conduct if it "knows or should know" of the harassment.[85] The guidelines put forth a "totality of the circumstances" test, whereby the harassing conduct's limiting impact on a student's educational experience is determined by: (1) the degree to which the conduct affected one or more students' education; (2) the type, frequency, and duration of the conduct; (3) the identity of and relationship between the alleged harasser and the subject(s) of the harassment; (4) the number of individuals involved; (5) the age and sex of the alleged harasser and the subject(s) of the harassment; (6) the size of the school, location of the incidents, and context in which they occurred; (7) other incidents at the school; and (8) other incidents of gender-based, but nonsexual harassment.[86]

In sum, schools' responsibilities under Title IX regarding third parties and employees work to ensure that students' educational experiences are not impeded by sexual harassment or the threat of sexual harassment by anyone over whom the school has a certain degree of (but not direct) control. Moreover, law school clinics are not exempt from these rules. Indeed, because they provide "occupational training," and they also fall under the guidance's definition of either "third parties" or "employees," they are unmistakably subject to the guidance and to Title IX's clear requirements regarding "third party" and employee harassment.[87]

[https://perma.cc/S9K8-6QT4] (documenting a summary of her Title IX investigations for case numbers 09-14-2232, 09-15-2392, and 09-16-2399).

84. OFF. FOR C.R., U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC 5 (2008), https://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf [https://perma.cc/J9DX-8K8L]; REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 38, at 2, 5.

85. REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 38, at 12.

86. For example, in *EEOC v. National Education Ass'n* the court found that a male supervisor's "rude, overbearing, obnoxious, loud, vulgar, and generally unpleasant" comments and physically aggressive (but non-sexual) actions toward female subordinate employees may constitute sexual harassment if the supervisor's male subordinates were treated differently. 422 F.3d 840, 845 (9th Cir. 2005); *see also* REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 38, at 10–12.

87. REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 38, at 12–13.

C. Existing Literature and Case Law on Third-Party Harassment

There is some literature on harassment of students engaged in programs not wholly operated by the school, such as when a student must interact with outside organizations or clients as part of an education program or activity. However, this literature focuses on student-to-student harassment or on supervisor-to-student harassment. In such cases, there is no need to balance the duty to protect the student from harassment with the obligations inherent in the professional representation of a client. Thus, the existing literature leaves a gap in understanding schools' responsibilities in the case of harassment by clients or witnesses or other players involved in the substantive work of an internship or other external educational experience.[88]

For example, in their 2000 article, Cynthia Grant Bowman and MaryBeth Lipp address the issue of Title IX in the context of university internships.[89] Specifically, the article asks what steps a university should take to protect the students it has placed in internships from sexual harassment (and what it should do to protect itself from potential liability).[90] In the course of examining the issue, the authors describe a number of different internship arrangements that result in different levels of Title IX protections for students who are harassed by faculty or

88. There is also some legal precedent in the medical context regarding harassment of interns by supervisors. In *Doe v. Mercy Catholic Medical Center*, Doe, a radiology resident at Mercy Catholic Center, alleged that (1) the director of the residency program at the Center sexually harassed her; and (2) she was later dismissed from the residency program after she complained about his conduct. 850 F.3d 545 (3d Cir. 2017). Doe brought suit for sexual harassment and retaliation under Title IX. *Id.* at 549. The Third Circuit held that the discrimination and harassment prohibitions of Title IX apply to a private hospital's medical residency program. *Id.* at 545. In *O'Connor v. Davis*, O'Connor, a college student, sued the state and the hospital in which she was a volunteer intern through her school, claiming that a doctor subjected her to sexual harassment in violation of Title VII and Title IX. 126 F.3d 112 (2d Cir. 1997). The Second Circuit affirmed the District Court and held that: (1) O'Connor was not an employee under Title VII, and (2) the hospital was not transformed into an administrator of an education program or activity under Title IX by permitting the student to perform volunteer field work at its facility. *Id.* at 116, 119. As such, O'Connor did not have a remedy under Title VII or Title IX. *Id.* at 118–19. The Court nevertheless noted that it was not "unsympathetic to O'Connor's situation." *Id.* at 119. It stated

> We recognize, for example, that from her perspective, her success at Marymount was dependent to some degree on successfully completing her internship with Rockland, and that her dependency on Rockland made her vulnerable to continued harassment much as an employee dependent on a regular wage can be vulnerable to ongoing misconduct. In a similar vein, we recognize that O'Connor was not in quite the same position to simply walk away from the alleged harassment as are many other volunteers.

Id. Note, however, that neither of these cases involve the more complicated scenario of a medical intern who is harassed by a patient.

89. Bowman & Lipp, *supra* note 38, at 96–97.

90. *Id.* at 128.

employers in an internship setting.[91] Bowman and Lipp make a compelling case that workplace sexual harassment in the university internship setting is both pervasive and highly destructive, and the effects are disproportionately borne by women.[92] But the article does not touch on harassment by clients or other non-supervisors in internship, field placement, or clinical settings.

David Yamada's 2002 article focuses on the legal and policy implications of student internships with regards to employment rights.[93] The article concludes that student interns have fallen into "a legal void . . . between the cracks of legal protections for workers and legal protections for students," i.e., between Title VII and Title IX protections.[94] Yamada suggests that a legislative amendment explicitly covering interns would remedy this void and protect them from discrimination and sexual harassment.[95]

Nancy Maurer's and Robert Seibel's 2010 article focuses on a slightly different issue relating to faculty members' responsibilities and obligations in the context of field placements.[96] The article examines the ways in which faculty members can identify, address, and remedy the power issues that arise in these placements.[97] While the authors highlight the supervisor/supervisee relationship, the article's recommendations could hypothetically be applied more largely to faculty members' responsibilities under Title IX in the context of law school clinics. For example, the article sets out various ways of addressing power dynamics including "program planning and materials, meetings, orientations, classes, shared experiences, and targeted training."[98] But the authors do not specifically address problematic dynamics between students and non-supervisors.

William Kaplin's 2000 article considers various types of conceivable claims post-*Gebser* and post-*Davis*.[99] Notably, the article poses the following hypothetical:

A student sues an educational institution for acts of a third party

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91. *Id.* at 105–11.

92. *Id.* at 96.

93. David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 216 (2002).

94. *Id.* at 217.

95. *Id.* at 256–57.

96. Nancy M. Maurer & Robert F. Seibel, *Addressing Problems of Power and Supervision in Field Placements*, 17 CLINICAL L. REV. 145, 146–48 (2010).

97. *Id.*

98. *Id.* at 166–87.

99. Kaplin, *supra* note 69, at 640–42.

> who has allegedly harassed the student. The third party might be a staff member at a clinical or field placement, a student from another school who is in an externship program with the alleged victim, a patient in a clinic to which the student is assigned, a visitor to the campus, or even a stranger who comes onto the campus.[100]

The article suggests that, under *Gebser* and *Davis*, the court would assess the school's liability by determining what type of relationship exists between the school and the alleged harasser.[101] By re-characterizing the harasser's relationship to the school as that of either a teacher's to the school or a student's to the school, the harasser's conduct can more neatly fall within the Supreme Court's established frameworks.[102] But the article does not address the obligations of faculty with respect to preventing or remedying harassment by third parties where there might be an independent ethical obligation (say, of loyalty or zealous representation) that is owed to the harasser, or to a client whose case is in some way dependent on the participation of the harasser (as in the example with which this Article begins).

Finally, Brittany Bull's 2017 article raises the issue of whether Title IX applies extraterritorially to allegations of sex discrimination occurring abroad.[103] While this question is not directly on point, the author concludes that courts are not likely to find extraterritorial jurisdiction under Title IX, and suggests instead that "universities should proactively implement and publicize preventative programming and responsive services for students studying abroad."[104] Bull's recommendations parallel potentially relevant suggestions in the realm of law school clinics (e.g., increasing transparency regarding the safety of individual programs and/or requiring universities to institute comprehensive mandatory pre-departure orientations) that Part III discusses.[105]

Section I.A describes the state of the law with respect to Title VII liability for employers whose employees experience harassment at the hands of third parties. But there is no case law addressing federal liability of law schools in the context of student harassment by third parties in a law school clinic.[106]

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100. *Id.* at 633–34.

101. *Id.* at 634.

102. *Id.*

103. Bull, *supra* note 30, at 456–69.

104. *Id.* at 481–82.

105. *Id.* at 476, 481.

106. In the wake of *Gebser* and *Davis*, some courts have made it difficult for students to obtain

Scholars have explored the application of Title IX to "third parties" in various contexts: study-abroad programs, student internships, field placements, and even medical school clinics. These relatively new applications undoubtedly raise relevant questions and recommendations in the context of clinical education in law schools. However, neither the existing literature nor the case law have yet to specifically suggest the extent of a school's responsibilities in the case of third-party sexual harassment of students participating in a law school's clinical program.

II. THE CONUNDRUM OF LAW SCHOOL CLINICS: WHY TRADITIONAL TITLE IX REMEDIES ARE NOT ALWAYS FEASIBLE

As a professor at a university that receives federal funding, my reporting obligations under Title IX appear to be unequivocal. In 2017, the Systemwide Title IX Coordinator for the University of California wrote an open letter to the system's chancellors, asking them to share with their respective campuses a reminder that "[a]ll employees . . . must inform the Title IX officer when, in the course of their work, they become aware that a student has experienced sexual harassment or sexual violence."[107] Faculty members "have a broader obligation"; they "must inform the Title IX officer when they get a report of sexual harassment or sexual violence from a colleague, a subordinate or anyone else affiliated

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relief under Title IX, making the prerequisite that an institution have notice of any misconduct before it can be held liable exceedingly stringent. *See* Mattingly v. Univ. of Louisville, No. 3:05CV-393-H, 2006 WL 2178032, at *1 (W.D. Ky. July 28, 2006). *Mattingly* confronted whether a student studying abroad at the University of Portugal had a private remedy under Title IX against her home university in Louisville after she was raped abroad. *Id.* The court concluded that the University of Louisville could not be liable for monetary damages under Title IX because it did not receive actual notice of the harassment nor did it respond to it with "deliberate indifference." *Id.* at *4 (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292–93 (1998)). Similarly, students in the medical field have found it difficult to establish that their schools were sufficiently notified of a third party's misconduct in order to obtain any relief under Title IX. The Second Circuit, for example, held that the dental school at New York University (NYU) could not be held liable under Title IX for discriminatory sexual harassment of a dental student by her clinical patient because neither her supervisors nor NYU were on notice of the sexual harassment. Murray v. N.Y. Univ. Coll. of Dentistry, 57 F.3d 243, 249–51 (2d Cir. 1995). Similarly, the Ninth Circuit recently found that the University of California could not be held liable under Title IX for ending an investigation into a student's sexual harassment claim concerning a third-party instructor at a program that was unaffiliated with the university. Karasek v. Regents of the Univ. of Cal., 948 F.3d 1150, 1168 (9th Cir. 2020). In that case, a University of California (UC) student had been conducting paid research at a nonprofit in Alaska for a UC graduate student. *Id.* at 1159. She was harassed and assaulted by a part-time instructor who was not employed by the university. *Id.* The Ninth Circuit found that the university was not acting with deliberate indifference by ending the investigation after determining that the university's policies did not apply to the unaffiliated program at issue. *Id.* at 1168.

107. Letter from Kathleen Salvaty, *supra* note 37.

with the University."[108]

Both the Title IX Coordinator's letter and the University of California's Frequently Asked Questions webpage go on to explain that a report to the Title IX office must include "whatever information you have, including the names of any individuals involved, their contact information, and any details of the incident you have."[109] The consequences of failure to comply are stark: "An employee who does not comply with the Responsible Employee requirement may be subject to consequences for failing to report, which may include corrective actions, up to and including termination."[110]

But these mandates for addressing sexual harassment—prevent it when possible, and remedy it when it occurs—cannot always apply in the clinical context. This Part discusses the ethical concerns that arise when the problematic behavior involves a client to whom the clinic owes a duty of confidentiality and loyalty, as well as when it involves a witness or other relevant player in the case whose cooperation or information is integral to the client's case. It also discusses why some of the possible solutions—such as assigning certain roles to certain students in order to minimize exposure to harassment—are likely to disproportionately disadvantage female students and cause Title IX problems of their own.

Consider the hypothetical presented in the Introduction. The female student whose interview of the key sentencing witness was both successful and deeply uncomfortable likely experienced sexual harassment under at least some university definitions. It may not yet have risen to a level that was so "severe, pervasive, and objectively offensive"[111] as to establish liability under Title IX, but it surely met the definition of sexual harassment articulated on the UC Berkeley faculty resources website:

> Behavior such as unwelcome sexual advances, requests for sexual favors and other conduct of a sexual nature . . . [or] conduct that affects a person's employment or education or interferes with a person's work or educational performance or creates an environment that a reasonable person would find intimidating,

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108. *Id.*

109. *FAQ: Important Facts About Professors, Supervisors and Other "Responsible Employees" Who Are Required to Report*, U.C.: SEXUAL VIOLENCE PREVENTION & RESPONSE, https://sexualviolence.universityofcalifornia.edu/faq/responsible-employee.html [https://perma.cc/PAU2-PDPH].

110. Letter from Kathleen Salvaty, *supra* note 37.

111. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999).

hostile or offensive.[112]

But what about the indigent client whose case depends on someone returning to the witness to obtain the favorable information? The clinic's ethical obligation to the client is to advance the client's interests within the bounds of the law and rules of professional responsibility; that is what it means to be a zealous advocate.[113] Consistent with that ethical obligation, the best approach for the client may be for the female student to return to the witness to obtain the additional information.[114] Certainly, the idea of reporting the name of the witness and details of the conduct to the campus Title IX office would be, as discussed below, an unthinkable breach of ethics.

More than twenty-five years ago, Peter Jan Honigsberg, Marilynn Tham, and Gary Alexander surfaced the issue of harassment of attorneys by clients, highlighting both its pervasiveness and its disproportionate impact on female attorneys.[115] The authors pointed out, as noted in section I.A, that the law protects attorneys from sexual harassment by clients—at least in those cases in which the employer knew or should have known of the misconduct and failed to take corrective action.[116] As they explained, existing regulations and case law establishes that "[a]n attorney who is sexually harassed by a client could seek to hold the law firm, her

112. *FAQ: Understanding Sexual Violence and Sexual Assault*, *supra* note 13 (drawn from but broader than EEOC definition).

113. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2020) ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1173 (2006) ("The experience of zeal resembles how you feel when you have a stake in an outcome, when a member of your family is involved in a matter, when you know something material and central in a dispute, or when you have worked in the area and have been through its battles.").

114. It is of course possible that the witness's offensive behavior raises a red flag about his reliability, credibility, or fitness as a witness, all of which must be explored with the student attorneys. Perhaps a strategic approach would be to submit an affidavit from him to avoid having to present him in court. Perhaps he would not testify in any form but would still provide valuable leads for follow-up investigation. Perhaps he would end up being utterly unhelpful. But a hypothetical suggesting that his problematic behavior does not preclude his usefulness to the case seems entirely realistic. We take our cases as we find them, and witnesses that may support our client's cause are often flawed in ways that we have to either accept or strategize around.

115. *See* Honigsberg et al., *supra* note 19, at 719; *see also* Lea B. Vaughn, *The Customer Is Always Right . . . Not! Employer Liability for Third Party Sexual Harassment*, 9 MICH. J. GENDER & L. 1, 6–7 (2002) (noting that female attorneys have reported client-instigated sexual harassment as early as 1989, and that in a survey, 61.5% of 553 female litigators reported being sexually harassed by a client in the last five years).

116. Honigsberg et al., *supra* note 19, at 720.

employer, responsible."[117] The authors make the case that "if the employer knows about the third party's harassing conduct and takes no corrective measures, the employer impliedly supports the behavior,"[118] and that "the law requires firms to prevent sexual harassment against employees from whatever source: employer, employee or outside third party."[119] The bar for taking corrective action in the law school clinical setting appears to be even lower than in the law firm setting, at least where Title IX guidelines require action even when Title VII does not.[120]

Honigsberg, Tham, and Alexander, however, do not discuss harassing witnesses, and allude only briefly to the potential difficulty of withdrawing from the representation of a harassing client.[121] Even then, they do not address confidentiality or loyalty requirements of the governing ethical standards. They appear to assume that if actionable sexual harassment occurs, an employer must step in and remedy the situation—an approach that seems appropriate at first blush. When considered alongside the lawyer's ethical obligations to a client, however, this assumption, while appropriate in many settings (especially with corporate clients), is unsatisfying as a generalization. It is particularly unsatisfying in the context of a law school clinic engaged in the pro bono representation of clients who are indigent and typically do not have other options for high-quality representation.

Particularly in cases that do not rise to the level of actionable harassment, it is far from clear that the steps a university's Title IX office may require are consistent with clinical faculty members' duty to their clients *or* their students. After all, clinics send people out into the field to conduct investigations and interview witnesses necessary to effectively and ethically represent the client. It would often do the client a disservice to avoid talking to a particular person, or to avoid going back to a witness or client who said something inappropriate, or to cease all visits to a specific jail or prison.

Recall the examples noted in the Introduction, and consider the

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117. *Id.*

118. *Id.* at 731–32.

119. *Id.* at 734 (citing 29 C.F.R. § 1604.11(f) (1993)).

120. *See, e.g.*, *FAQ: Understanding Sexual Violence and Sexual Assault*, *supra* note 13; *Sexual and Gender-Based Harassment Policy*, HARV. UNIV. POLICE DEP'T, https://www.hupd.harvard.edu/sexual-and-gender-based-harassment-policy [https://perma.cc/A336-QZHN] (describing university employee Title IX requirements); *Overview of Stanford Policies*, STAN. UNIV.: SEXUAL HARASSMENT/ASSAULT RESPONSE & EDUC.-TITLE IX OFF., https://harass.stanford.edu/be-informed/overview-stanford-policies [https://perma.cc/THH4-DC8K] (describing school-wide policies that apply to all students, faculty, and staff who participate in Stanford's programs and activities).

121. Honigsberg et al., *supra* note 19, at 735 n.109.

response that Title IX arguably mandates.

Addressed exclusively through a traditional Title IX lens, each of these scenarios appears to demand an intervention that, at the very least, ensures that the offending behavior stop, and that the student is not knowingly exposed to more of it. For example, the student getting cat-called at the juvenile prison would not be sent on any more tours of the prison, at least not until the incarcerated clients doing the cat-calling were reported and somehow prevented from engaging in further offensive behavior. The transgender student exposed to the critical witness who repeatedly makes inappropriate comments would either be taken off the case, or the clinic would have to withdraw from representation. And the student who would otherwise appear in front of the sexist judge would perhaps be assigned to a different case, if reporting the judge to his superiors was not feasible or did not address the misconduct.

Now, though, consider the scenarios discussed above not only in the context of Title IX's requirement that schools take necessary steps to halt harassment when they become aware of it, but also in the context of the lawyer's duty to the client, and the clinical faculty member's duty to the student. The student who is harassed while visiting the juvenile facility cannot simply stop visiting the facility, because an investigation into the conditions there is vital to the representation of her class action clients (who include people doing the cat-calling). Reporting the juvenile clients to authorities could land those clients in all sorts of legal and non-legal trouble. Similarly, the transgender student who had to endure inappropriate and probing questions about his gender identity may have established a rapport with a key witness that cannot be easily replicated by another student. Nor would it be fair to the student to replace him on the case with another student whose gender presentation does not provoke comments from an ignorant witness, thereby denying him the educational opportunity to work with a critical witness in the case. And with respect to the student who is set to appear in front of the sexist judge, simply transferring her case to a male student may deprive the female student of an educational opportunity. It would also do little to prepare her for practice, where she may very well appear in front of judges who expect women to dress in a certain way.[122] It is also possible that seeking transfer

122. The question of how and whether to conform to courtroom norms can be particularly fraught. *See* Bea Bischoff, *I Dress 'Straight' to Protect My Clients*, RACKED (July 5, 2017, 11:03 AM), https://www.racked.com/2017/7/5/15874342/queer-lawyer-straightness-performance [https://perma.cc/T5FA-BDJL]; *see also* Amanda Hess, *Female Lawyers Who Dress Too "Sexy" Are Apparently a "Huge Problem" in the Courtroom*, SLATE (Mar. 21, 2014, 9:38 AM), https://slate.com/human-interest/2014/03/female-lawyers-still-must-dress-conservatively-to-impress-judges.html [https://perma.cc/3YZX-AVJY] (noting "a long legal tradition of professors,

of the case to a different judge may result in a worse outcome for the client (if, say, the sexist judge also happens to be a more lenient sentencer).

The next sections take a closer look at the implications of the three most readily apparent remedies that might be appropriate in these cases under Title IX were it not for the unique clinical context: (1) report the offending behavior; (2) withdraw from the case; and (3) switch out the students.

A. Report the Offending Behavior

Reporting the misconduct, required by most Title IX offices, is fraught in the clinical context. For example, at UC Berkeley, recently-revised university policy requires that all "responsible employees" (i.e., mandated reporters) give the Title IX office the name of complainants as well as the name of the perpetrators of harassment.[123] If a student came to the office of a clinical supervisor and told the supervisor that another clinical faculty member had been making inappropriate, sexually suggestive remarks, the supervisor's Title IX obligations are clear: The behavior, including the names of both the student and the other faculty member, must be reported to the Title IX office.

But the student who reports the client's cat-calling to her clinical supervisor, for example, poses a more difficult problem. As the sexual harassment training recounted at the outset of this Article suggests, Title IX suggests that the supervisor should report the incident (including the client's name) to the school's Title IX office, as well as to officials at the juvenile facility in an attempt to remedy the misconduct and ensure it does not happen again. Yet while the Title IX obligations are relatively straightforward, no competent lawyer in that situation would report their own client in this manner, as it is hard, if not impossible, to square providing harmful information about your client's behavior that could be used against him at sentencing or trial with the duty of "zeal in advocacy" that lawyers owe their clients.[124]

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judges, and fellow attorneys schooling female lawyers on just how to dress"). Bischoff discusses in this thoughtful essay how failing to recreate oneself in the midst of inequities faced by marginalized groups in the legal world reflects unfairly on one's abilities and "impacts the incredibly high-stakes judicial proceedings in which . . . clients are caught up." Bischoff, *supra*. She notes that "a client's greatest chance at success rests on [one's] ability to not only know the law, but also to understand and navigate extensive professional and social norms of the court system." *Id.* These abilities, derived from choices in between, disproportionately impact those furthest from opportunity.

123. Outside of certain limited enumerated employees, university employees cannot promise confidentiality to students if students disclose sexual harassment and/or sexual violence. *See* UNIV. OF CAL.: SYSTEMWIDE TITLE IX OFF., INTERIM POLICY: SEXUAL VIOLENCE AND SEXUAL HARASSMENT 6, 8, 10–11 (2020), https://policy.ucop.edu/doc/4000385/SVSH (last visited Jan. 20, 2021).

124. MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2020).

The harassing witness presents no less of a dilemma. In the hypothetical described in the Introduction, the witness is the client's brother, a key source of information needed for the upcoming sentencing hearing. Alienating this witness by reporting his name to a university's Title IX office—thus triggering an investigation that the witness may find out about—will surely damage the relationship with him and work a real detriment to the client's case.[125] Even reprimanding him too harshly in the moment may inhibit rapport-building and adversely affect the case.

Moreover, ethical rules in almost every jurisdiction preclude lawyers from disclosing any information "related to the representation" of a client. (Clinical law students are no less responsible for complying with the ethical rules governing practice in the jurisdiction.[126]) Forty-six states adopted ABA Model Rule of Professional Conduct 1.6 virtually verbatim.[127] The rule states: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation . . . ."[128] The provision goes on to include exceptions allowing (or in some states mandating) disclosure of information in relatively rare situations, such as when disclosure may prevent the client from committing a crime or to establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.[129] A client's harassment during a legal visit to the prison, for example, certainly relates to the representation if it happened during the course of the representation and if disclosure would affect the representation. Indeed, if privileged

125. Even where lack of control over a third party limits a university's remedial options with respect to that third party, the university can seek to impose remedial measures that tie the hands of university employees. So, although a university's Title IX office may not be able to sanction a third-party witness without police intervention, if it seeks to restrict further contact between clinic personnel and that witness, the damage may be done.

126. In general, law students are expected to comply with the same ethical obligations that govern practicing attorneys. *See* MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS'N 2020) (providing that a "lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer" and can be held responsible for any non-compliant conduct by the non-lawyer); *see also* U.S. DEP'T OF JUST., LAW STUDENT INTERN/EXTERN ETHICAL OBLIGATIONS AGREEMENT 1 (2019), https://www.justice.gov/file/1147781/download [https://perma.cc/Q6CA-L85K] (instructing legal externs that they "generally will be expected to conform [their] conduct to the applicable rules of professional conduct governing attorneys, as well as other laws and regulations").

127. *See* Ty Alper, *Criminal Defense Attorney Confidentiality in the Age of Social Media*, 31 CRIM. JUST., no. 3, 2016, at 4–5, 7, 9 (discussing the nuances of Rule 1.6 in the context of disclosures on social media of information "related to the representation of the client").

128. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2020).

129. *Id.*; *see also id.* cmt. 4 ("This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.").

information is requested by another governing body, lawyers actually have the duty to fight disclosure.[130]

B. Withdraw from the Case

Can the clinic simply withdraw from the case, perhaps without reporting the client or witness? After all, one solution to sexual harassment is to remove the perpetrator from the situation that has provided the opportunity for harassment.[131] It is a tempting solution but one that, depending on the kind of clinic, in reality is very unlikely to be consistent with the clinical mission or the duties owed to the client.

An attorney's right to withdraw from a case is not automatic and is often contingent on the court's agreement.[132]

> Courts consider several factors when considering a motion for withdrawal, including (1) the reasons counsel seeks to withdraw; (2) the possible prejudice that withdrawal may cause to other litigants; (3) the harm that withdrawal might cause to the administration of justice; and (4) the extent to which withdrawal will delay resolution of the case.[133]

Ethical rules generally permit withdrawal when the client's conduct leaves the attorney with no other choice. For example, ABA Model Rule of Professional Conduct 1.16(b)(6) allows for withdrawal if representation has been "rendered unreasonably difficult by the client."[134] State Bar of California Rule 1.16(b)(4) states that a lawyer may withdraw

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130. A comment to ABA Model Rule 1.6 states that

> [a] lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.

MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 15 (AM. BAR ASS'N 2020).

131. *See* Elizabeth M. Viglianti, Andrea L. Oliverio & Lisa M. Meeks, *Sexual Harassment and Abuse: When the Patient Is the Perpetrator*, 392 LANCET 368, 369 (2018) (suggesting that in certain circumstances, patients who harass physicians should be transferred to other care providers).

132. *See, e.g.*, United States v. Carter, 560 F.3d 1107, 1113 (9th Cir. 2009) (finding that the district court did not abuse its discretion by denying defense counsel's motion to withdraw because the circumstances motivating the withdrawal were not "egregious" and the motion was made on the third day of trial); Garcia v. Zavala, No. 17-CV-06253-TSH, 2019 WL 2088478, at *3 (N.D. Cal. May 13, 2019) (granting counsel's motion to withdraw where the client had made it "unreasonably difficult to carry out his representation"), *order set aside in part*, No. C 17-6253 MMC, 2020 WL 999779 (N.D. Cal. Mar. 2, 2020).

133. Atkins v. Bank of Am., No. 15-cv-00051-MEJ, 2015 WL 4150744, at *1 (N.D. Cal. July 9, 2015) (citing Deal v. Countrywide Home Loans, No. C 09-01643 SBA, 2010 WL 3702459, at *2 (N.D. Cal. Sept. 15, 2010)).

134. MODEL RULES OF PRO. CONDUCT r. 1.16 (AM. BAR ASS'N 2020).

if "the client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively."[135]

In California, before withdrawal is permitted, counsel must take steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving sufficient notice to the client to allow time for employment of other counsel.[136] Further,

> [w]hen withdrawal by an attorney from an action is not accompanied by simultaneous appearance of substitute counsel or agreement of the party to appear pro se, leave to withdraw may be subject to the condition that papers may continue to be served on counsel for forwarding purposes, unless and until the client appears by other counsel or pro se.[137]

In other words, contact and communication with the client may continue even after a successful withdrawal.

Depending on the nature of the practice, it can be difficult for a lawyer to minimize prejudice to their client. Many law school clinics provide representation that is otherwise unavailable to clients who are indigent.[138] What if the client is unable to find another lawyer who will provide free representation? What if representation that is available is of much poorer quality than that which the law school clinic can provide? What if successfully moving to withdraw from a case requires the disclosure of client confidences that paint the client in an unsympathetic light before a judge who will have to impose a sentence, or rule on liability?[139]

It seems clear that the ethical and court rules, to the extent they are permissive, are more likely to allow withdrawal when it is the client—as opposed to a witness or some other actor over whom the client has no control—who renders the representation unreasonably difficult. But even

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135. CAL. RULES OF PRO. CONDUCT r 1.16 (CAL. BAR ASS'N 2018). In *Atkins v. Bank of America*, the court found that withdrawal was appropriate because the relationship between the firm and the client had completely broken down, to the point where the firm was no longer able to communicate with the client. No. 15-cv-00051-MEJ, 2015 WL 4150744, at *2 (N.D. Cal. July 9, 2015).

136. *See* El Hage v. U.S. Sec. Assocs., Inc., No. C06-7828 TEH, 2007 WL 4328809, at *1 (N.D. Cal. Dec. 10, 2007) (citing CAL. RULES OF PRO. CONDUCT r. 3-700(A)(2)).

137. N.D. CAL. CIV. R. 11-5(b) (2018); *see also Zavala*, 2019 WL 2088478, at *3 (granting counsel's motion to withdraw and finding that she had taken "reasonable steps to avoid foreseeable prejudice" to her client).

138. *See, e.g.*, David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 236 (2003) (quoting estimates that law school clinics provide millions of hours each year of free student legal work for needy clients).

139. At least one court took the word of the lawyer without requiring disclosure of client confidences: "We conclude the public defender's disclosure was sufficient to permit withdrawal, and the trial court should have granted the motion instead of placing the attorney in the untenable position of asserting the client's constitutional right to effective assistance only by sacrificing client confidences." Aceves v. Superior Ct., 59 Cal. Rptr. 2d 280, 281 (Cal. 1996).

if the applicable ethical and legal rules permit withdrawal, such action may be antithetical to the mission of the clinic or just utterly impractical given the nature of the representation. If the client is the harasser, a supervising attorney might consider withdrawing from the case. But in the context of a mission-driven clinic, the decision to withdraw is not at all straightforward. For example, many law school clinics with public interest and/or social justice missions take on cases of clients who otherwise cannot obtain representation, perhaps because of indigency but also perhaps because they are "challenging" clients.[140] As one experienced clinician who taught for many years in a community-based economic and racial justice law clinic told me: "We represent clients who fail out of representation. We don't abandon our clients, even the ones that cause us discomfort. We run towards the discomfort and do our best to prepare our students for it."[141]

If the litigation is complex and spans many years, a clinic is highly unlikely to withdraw from the case even if a client or witness poses significant problems. For example, some clinics are engaged in multi-year class action litigation to which a great deal of time and resources have been expended.[142] In the clinic I teach in, we represent the same death-sentenced clients for years and even decades in jurisdictions that do not otherwise provide counsel to such individuals.[143] It is difficult to imagine a scenario in which we would be inclined to withdraw from one of our client's cases, or be able to do so without causing tremendous

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140. *See* Wizner & Aiken, *supra* note 42, at 997 ("[L]aw schools do have some obligation to contribute to the solution of the crisis in access to justice, and it seems obvious that the obligation is best accomplished by law school clinics assisting low-income individuals and communities that are underserved or have particular difficulty obtaining lawyers because of the nature of their legal problems.").

141. Interview with Tirien Steinbach, former Exec. Dir., E. Bay Cmty. L. Ctr., in Berkeley, Cal. (Aug. 18, 2018).

142. *See* Stephanie Ashe, *Stanford Law School Immigrants' Rights Clinic Files Class Action Lawsuit on Behalf of Immigrant Detainees*, STAN. L. SCH. (Dec. 17, 2018), https://law.stanford.edu/press/stanford-law-school-immigrants-rights-clinic-files-class-action-lawsuit-on-behalf-of-immigrant-detainees/ [https://perma.cc/FQQ3-Y2H3]. Certainly, withdrawal in some practice settings is more feasible than others. In some misdemeanor clinics, for example, it may be easier for a clinic to withdraw from a case where a local public defender's office is equipped to provide high-quality representation to the clinic's client.

143. *See* Erica Wright, *Family of Alabama Death Row Inmate Seeks Just Mercy*, BIRMINGHAM TIMES (Feb. 19, 2020), https://www.birminghamtimes.com/2020/02/family-alabama-death-row-inmate-seeks-justice-mercy/ [https://perma.cc/HNN9-D3NR] (noting that the Berkeley Law Death Penalty Clinic has been representing an Alabama death-sentenced client for almost two decades); Scott Michels, *Death Penalty Appeal Without a Lawyer*, ABC NEWS (Feb. 10, 2009, 1:28 PM), https://abcnews.go.com/TheLaw/story?id=3259389&page=1 [https://perma.cc/92TN-XUKN] (noting that "Alabama is one of only two states in the country that does not provide poor death row inmates with lawyers for post-conviction review of their cases").

damage to the client's interests.[144]

C. Switch Out the Students

Short of reporting the client or withdrawing from the representation, clinical faculty may consider removing the student from the problematic situation.

To be clear, no student should be forced to endure harassment or abuse of any kind, and students who are not comfortable meeting with a particular client or witness should not be required to do so. Student choice matters here. And it is incumbent on the clinician to take pains to ensure that students feel safe expressing their true feelings, and are not feeling pressured to be "okay" with what their clinical supervisors—who may grade them and/or provide letters of reference—think is in the best interest of the clients.

Reflexively switching out students when there is a real potential for harassment is not, however, a generally acceptable solution for at least two reasons. First, students need to continue to develop approaches to navigating such situations. The #MeToo movement has accelerated what we can envision as the end of gender-based violence and harassment, but the world we live in will remain a sexist one long after our students graduate.[145] A fundamental purpose of the clinic is to allow students to practice as attorneys in a context where they are closely supervised by professors who are also practicing attorneys so that they can be educated in the context of real work practice.[146] Clinical education is precisely for

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144. I do acknowledge that there is at least some evidence that lawyers overestimate their capabilities and importance. *See* Jeffrey Selbin, Jeanne Charn, Anthony Alfieri & Stephen Wizner, *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45 (2012), http://yalelawjournal.org/forum/service-delivery-resource-allocation-and-access-to-justice-greiner-and-pattanayak-and-the-research-imperative [https://perma.cc/7LD2-HBXM]; Jane Goodman-Delahunty, Pär Anders Granhag, Maria Hartwig & Elizabeth F. Loftus, *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCH. PUB. POL'Y & L. 133, 151, 153 (2010) (finding in a national study that lawyers are overconfident in their litigation-outcome predictions, even in the face of debiasing techniques).

145. Jamillah Bowman Williams, Lisa Singh & Naomi Mezey, *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 2019 U. CHI. LEGAL F. 371, 372–73 (explaining that the #MeToo movement is a social movement against sexual violence and sexual assault that advocates for survivors to speak out about their experience).

146. *See, e.g.*, *Clinics*, GEORGETOWN L., https://www.law.georgetown.edu/experiential-learning/clinics/ [https://perma.cc/H4BQ-7QAG] ("Through this program, students learn the practical art of lawyering while providing quality legal representation to under-represented individuals and organizations."); *Clinical Programs*, STURM COLL. OF L., https://www.law.du.edu/academics/practical-experience/clinical-programs [https://perma.cc/E4JK-MFWR] ("Each of these programs provides legal assistance and representation to populations that don't often have access to representation, all while giving students specialized, hands-on experience that will help them make

teaching how to help students identify, confront, and solve the complex ethical and strategic problems they will face in practice.[147] To navigate is not to tolerate or ignore, but neither is it to sidestep. It is to use the challenges of practice as teaching opportunities in service both of the client and the student's education.

Second, prophylactically taking certain experiences away from students who may be subjected to sexual harassment would almost surely affect female students (and probably gender non-binary and transgender students as well) disproportionately, thereby denying an equal educational opportunity and thwarting the very purpose of Title IX.[148] It would both provide these students with fewer experiential opportunities and less preparation for dealing with such situations when they enter practice, which is one of the primary goals of the clinical enterprise in the first place. This may be a practical solution in some medical contexts, where trainees can be reassigned to other patients who could ostensibly provide the student with an equivalent learning opportunity.[149] The same cannot be said in the context of clinical legal education (particularly low-volume clinics serving clients who are indigent), where there may very well not be another legal case available that provides the same educational opportunities.

Consider, again, the hypothetical in the Introduction. A female student

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an immediate, valuable impact in their chosen fields."); *Clinics*, N.Y. UNIV. L., https://www.law.nyu.edu/academics/clinics [https://perma.cc/8G49-VZWR] ("Clinics advance the instruction to which students already have been exposed, diversify the skill sets available for effective legal problem solving, and deepen an increasingly coherent sense of how lawyers might best do their work. At the same time, clinics exhort students to appreciate just how much they must grow over the course of their careers. Problems evolve, and so must problem solvers if they are to become and remain expert in the practice of law."); Wizner & Aiken, *supra* note 42, at 998 ("[C]linics began at many law schools primarily as programs to enable law students to provide free legal services to the poor or to bring important impact litigation, under the supervision of practicing attorneys. . . . Clinics were about skills training, providing service, influencing policy, and developing future legal aid and civil rights lawyers.").

147. *See* Lawrence C. Marshall, David Mills & Stephanie Mills, *The Need for Clinical Education*, STAN. LAW., Spring 2012, https://law.stanford.edu/stanford-lawyer/articles/the-need-%E2%80%A8for-clinical-education/ [https://perma.cc/J6AP-MQDR] ("Law students need to develop expertise in problem solving, not just issue spotting. They need to cultivate their ethical constitutions and learn how a lawyer effectively deals with clients, adversaries, agencies, courts, and others.").

148. Bowman & Lipp, *supra* note 38, at 96 (noting that workplace sexual harassment in the university internship setting disproportionately affects women); Honigsberg et al., *supra* note 19, at 719 (highlighting that client harassment of attorneys disproportionately impacts women).

149. *See* Viglianti et al., *supra* note 131, at 369 (suggesting that in certain circumstances, patients who harass physicians should be transferred to other care providers); *see also* Susan Phillips, *Sexual Harassment of Female Physicians by Patients: What Is to Be Done?*, 42 CANADIAN FAM. PHYSICIAN 73, 74 (1996) (finding that 31% of the surveyed female physicians who reported being harassed subsequently refused to treat the patient who harassed them).

is harassed by a key witness during an interview. She was deeply unsettled by the experience, but says she is willing to return if it will help the client. If the supervisor responds by sending only the male student back to the witness (perhaps with a male partner), the client may suffer because, recalling the facts of the hypothetical, the male student is unlikely to obtain as much helpful information. But it also may be true that this "remedy" denies the female student the opportunity to interview that critical witness. Because there is no guarantee that there will be other witnesses who could provide an equivalent interviewing or witness preparation experience, the female student is deprived of the opportunity to learn both how to interview and prepare a witness, and how to navigate a situation in which a witness is offensive but also helpful to the case of a client who is indigent and has no other options for legal representation.

Removing the female student from the case thus may even raise a Title IX concern itself because it could effectively deny or limit female students' ability to fully participate or benefit from this specific educational program, or be viewed as punishing the student for reporting misconduct.[150] Recall that one of the wrong answers to my sexual harassment training quiz was to drop the student from the psychology practicum after she complained about the conduct of one of the intellectually-disabled individuals she was assigned to counsel. The training explains that this is the wrong answer because "[d]ropping [the student] from the counseling duties without consulting her first could be seen as retaliation for her complaint."[151] Surely, addressing a claim of sexual harassment by denying a female student an equal opportunity to learn in an experiential setting is not the answer.

III. EMBRACING THE TITLE IX CHALLENGE

This is not an article about evading Title IX in order to protect clinical clients at the expense of student well-being. We all have an obligation to eliminate and address sexual harassment at every possible opportunity. Indeed, the primary purpose of Title IX is to "protect[] people from discrimination based on sex in education programs or activities that

150. Of course, it is true that both students may still participate in the key lawyering task of strategic deliberation about who should handle which parts of a case, and a good clinician would involve the students in the decision-making about how to proceed. And most live client clinics do not necessarily guarantee students any particular experience. All that said, removing a student from the opportunity to engage in a core lawyering competency, if it is contrary to her expressed wishes, because of a broad edict from a university's Title IX office is not the kind of decision that is generally made in the world of real-life practice.

151. *See* Graphic, *supra* note 1.

receive Federal financial assistance."[152] When the educational program is one that aims to teach students by placing them in the role of professionals, Title IX requires, rather than precludes, a clinical setting in which all students have the opportunity to learn how to navigate the challenges that come along with that professional role. Title IX is not the obstacle here; it is the guiding principle and requires that clinical faculty both protect students from third-party harassment, and embrace the teaching opportunity that it can, at times, present.

OCR warns in its 2001 Revised Sexual Harassment Guidance: "If harassment has occurred, doing nothing is always the wrong response."[153] I agree. But I also agree with the next sentence: "However, depending on the circumstances, there may be more than one right way to respond."[154] And the reasonableness of the response must take into account the specific educational context in which the harassment occurred. As the Supreme Court explained in *Davis*, the Title IX standard is "sufficiently flexible" to account for different educational settings: "A university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy . . . ."[155] As the Ninth Circuit recently put it, "the reasonableness of the response depends on the educational setting involved."[156]

There may very well be extreme cases in which behavior of a third party is so egregious or violent that the remedies a traditional Title IX analysis might suggest—withdrawal from the case, reporting to the Title IX office—are appropriate and trump the ethical and practical considerations that would normally counsel against such a response. But, as explained in Part II, in the vast majority of cases involving clients who are indigent, exposure of students to third-party harassment cannot lead to withdrawal, reporting of the third party, or removal of students. Instead, the reality that students will—and do—face third-party harassment (as they will when they become lawyers) presents the obligation, and opportunity, for clinicians to teach students how to provide high-quality representation to clients without other options while minimizing the damage that can be done by exposure to unwelcome conduct.

Recall the Title VII prison cases discussed above, in which prison employees sued after being subjected to harassment from people who are incarcerated. As one court explained,

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152. *Title IX and Sex Discrimination*, OFF. FOR C.R., U.S. DEP'T OF EDUC.: https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [https://perma.cc/B4ST-FY3L].

153. REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 38.

154. *Id.*

155. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 649 (1999).

156. Karasek v. Regents of the Univ. of Cal., 948 F.3d 1150, 1162 (9th Cir. 2020).

> The propensity of courts to decline imposing liability for prisoner acts is based on solid logical and practical foundations: anyone who works at a prison, particularly in a position with frequent inmate contact, must expect some off-color interactions. Prison employees inherently assume the risk of some rude inmates.[157]

However, even this court went on to nevertheless require prisons to "implement and enforce policies reasonably calculated to minimize such harassment and protect the safety of its employees."[158]

What can clinicians do to "implement and enforce policies reasonably calculated to minimize . . . harassment and protect the safety"[159] of its students? After all, it is not enough to say that Title IX should be read narrowly in these circumstances to absolve clinics of any responsibility for keeping students safe. Not only would a failure to do so run afoul of Title IX in some circumstances, it would also represent a failure of the clinical mission, which is to teach students how to excel in a professional setting in which they will soon find themselves. The behavior to which students are occasionally subjected in the clinical setting is indeed akin to what they will face in practice, and it is critical that they develop strategies and approaches for eliminating (where possible) and mitigating (when necessary) harassing behavior while at the same time maintaining client confidences and providing zealous representation. In this Part, I offer suggestions for doing so.

A. Introduction to the Sacrifice Inherent in Representing Clients

The Title IX conundrum presented here offers clinical law students a tangible lesson in the constraints that duty to a client—especially a client who is indigent—places on them.

The constraints are not all-encompassing, to be sure. Lawyers do not have to put up with anything a client or witness does, and the setting matters. No lawyer or student need tolerate a client's threats of violence or sexual assault, for example, and such behavior may be grounds for withdrawal from the case in either a clinical or non-clinical setting. And female associates in law firms, for instance, should not have to tolerate sexual harassment at the hands of corporate clients, simply because they have better "rapport" with the client than some of the male attorneys. As Honigsberg, Tham, and Alexander argued as early as 1994, and as the Title VII discussion in section I.A above makes clear, law firms have an obligation to protect employees from harassment and abuse by clients that

157. Powell v. Morris, 37 F. Supp. 2d 1011, 1017 (S.D. Ohio 1999).

158. *Id.*

159. *Id.*

they know or should know about.[160] To say that lawyers, especially women, experience harassment on the job is not to suggest that it should not be arrested and remedied whenever possible. This is true even if it means employing one of the remedies discussed above—particularly withdrawal from the case or switching out personnel on a case. In the private law setting, where clients have more options and Title IX does not govern, the obligation of employers under Title VII to protect employees from harassment may take on a greater importance and may simply be easier to do within the bounds of the ethical rules.

At the same time, the clinical law setting is different, both because of the educational mission and because many law school clinics serve clients who have no other realistic options for legal representation. In this setting, lawyers "put up with" harassment of all kinds. Not all harassment, to be sure, and not all the time. But a critical component of clinical education is teaching students how to practice; this is unfortunately a part of practicing that they will have to negotiate. Students should have to learn and understand their ethical obligations as well as how best to protect themselves in different legal settings without violating their duty to their clients. If we fail to teach them this, we are failing them.

B. The Usefulness and Limits of the Medical School Analogy

Clinicians should equip law students with both the awareness of what they are likely to face and the tools to navigate those inevitable situations. The pedagogy of other disciplines is instructive, at least to a point. The field of medicine is an obvious place to look, as health care providers face harassment from third parties at least as often as those in the legal profession.[161] According to the director of the Mayo Clinic's Office of Diversity and Inclusion: "This has been one of medicine's dirty little secrets since women began practicing medicine . . . . Victims are

160. *See* Honigsberg et al., *supra* note 19, at 734 (describing the phenomenon of client-initiated sexual harassment in the legal sector and arguing that firms are legally required to protect their employees from sexual harassment regardless of whether the harasser is an employer, employee, or third party).

161. A 2014 meta-study found that 59.4% of medical trainees experienced harassment or discrimination during their training. Naif Fnais, Charlene Soobiah, Maggie Hong Chen, Erin Lillie, Laure Perrier, Mariam Tashkhandi, Sharon E. Straus, Muhammad Mamdani, Mohammed Al-Omran & Andrea C. Tricco, *Harassment and Discrimination in Medical Training: A Systematic Review and Meta-Analysis*, 89 ACAD. MED. 817, 817 (2014). Although consultants were the most frequent perpetrators at 34.4%, patients and their families constituted 21.9% of the harassers. *Id.* An earlier study in 1993 found that three quarters of female residents were sexually harassed by physicians. Miriam Komaromy, Andrew B. Bindman, Richard J. Haber & Merle A. Sande, *Sexual Harassment in Medical Training*, 328 NEW ENG. J. MED. 322, 322–23 (1993).

predominantly young women."[162]

On one hand, the options appear limited in some of the same ways they are limited in law.[163] U.S. medical associations often do not investigate claims of sexual harassment when the perpetrators are patients; investigations tend only to be conducted into claims against peers and supervisors.[164] National governing institutions for medical training, both in the United States and abroad, provide sexual harassment guidance only when the perpetrator is a peer or supervisor.[165] As one commentator has lamented: "There is no clear guidance on how to respond to patient-initiated sexual harassment and abuse when the physician is tasked with caring for the health of the patient, while at the same time potentially diminishing her own health or safety."[166]

Yet some medical schools and teaching hospitals have begun to implement proactive approaches to third-party harassment, typically by patients. Yale Medical School, for example, recently implemented a new framework for faculty managing patient mistreatment of trainees called ERASE.[167] ERASE stands for Expect (expect patient misbehavior to occur), Recognize (develop a sense for whether a patient has crossed a line), Address (have a script prepared to address and hopefully stop the behavior), Support (seek support from colleagues and provide it to them as well), and Establish/Encourage (advocate for institutions to proactively address patient harassment).[168] Thus, using the ERASE framework, "supervising physicians should expect that mistreatment will happen, recognize when mistreatment occurs, address the situation in real time, support the trainee after the event, and establish a positive culture."[169]

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162. Amy Paturel, *When the Perpetrators Are Patients*, AAMC: NEWS & INSIGHTS (Oct. 23, 2018), https://www.aamc.org/news-insights/when-perpetrators-are-patients [https://perma.cc/D8VY-H4YD].

163. *See id.* (explaining that one of the reasons that harassment is so common in the medical context is because physicians are "professionally obligated to prioritize their patients' needs above their own"); Viglianti et al., *supra* note 131, at 369 (rejecting the traditional view that patient-initiated harassment was simply a hazard of the physician's job and arguing that the medical establishment needs to address this issue).

164. Naveed Saleh, *What to Do if You're Sexually Harassed by a Patient*, MDLINX (Feb. 4, 2019), https://www.mdlinx.com/internal-medicine/article/3370 [https://perma.cc/4C2U-T3X7] (explaining how national medical associations fail to address patient-perpetrated acts of sexual harassment and arguing that these acts should not be tolerated by the medical establishment).

165. Viglianti et al., *supra* note 131, at 369 (proposing a "[d]ecision-guiding algorithm for physicians who experience patient-initiated" harassment).

166. *Id.*

167. Matthew N. Goldenberg, Kali D. Cyrus & Kirsten M. Wilkins, *ERASE: A New Framework for Faculty to Manage Patient Mistreatment of Trainees*, 43 ACAD. PSYCHIATRY 396, 396–97 (2019).

168. *Id.* at 396–98.

169. *Id.* at 396 (emphasis omitted).

The ERASE action framework identifies the problem, an example, the recommended intervention, and sample language for providers to use when they are subjected to harassment.[170] The approach focuses on the ability of supervisors to recognize harassment and mistreatment when it has occurred, intervening in real-time when the harassment occurs, and providing support to the trainee.[171] To implement the ERASE framework, supervisors arrange training sessions that involve first discussing the problem of sexual harassment, including both statistics and personal narratives, and then practicing applying the framework to specific situations.[172]

Georgetown University's School of Medicine has introduced what it calls a "Stop, Talk, Roll" campaign. Designed to address sexual harassment, racism, and bullying, the campaign described a three-step process: (1) Stop the conversation and immediately consult with a supervisor; (2) Talk through a tough patient encounter with that supervisor; and (3) "Roll on out" and get support from a variety of listed services, after the shift is over.[173] The approach provides a script with sample language for each of these steps.[174]

There is also academic literature from the medical context. For example, Elizabeth Viglianti, a clinical lecturer at the University of Michigan, has called for "clear guidelines and policies" that both support the physician and guarantee "that the patient continues to receive appropriate medical care."[175] Viglianti extrapolated from literature on working with racist patients to develop a decision-making algorithm for dealing with patient-initiated harassment.[176] The algorithm first asks

170. *Id.* at 397.

171. *Id.*

172. *Id.* at 398.

173. Susan Cheng, *Stop, Talk, Roll: How to Deal with Tough Communication Exchanges in the Medical Workplace*, GEORGETOWN UNIV. SCH. OF MED. (May 10, 2017), https://som.georgetown.edu/diversityandinclusion/studentorganizations/stoptalkroll/ [https://perma.cc/J42M-J8TC].

174. *Id.* The Mayo Clinic has also developed training modules, facilitated discussions, and role-playing exercises to address and better prepare doctors for dealing with patient harassment. *See HR at Your FingerTIPS: Patient Conduc*t, MAYO CLINIC, https://connect.employees.mayo.edu/page/hratyourfingertips/tab/misconduct/ [https://perma.cc/8L6K-WERX]; *see also* Jacquelyn Corley, *It's Not Just Bosses Who Harass Health Workers: Hospitals Start Addressing Patients' 'Egregious' Behavior*, STAT NEWS (Sept. 12, 2019), https://www.statnews.com/2019/09/12/sexual-harassment-hospitals-start-addressing-patient-behavior/ [https://perma.cc/S9ZX-4SBT] (describing the Mayo Clinic's new reporting process and protocol for dealing with patients who sexually harass staff members).

175. Viglianti et al., *supra* note 131, at 369.

176. *Id.*

whether the physician feels safe.[177] If she does, the physician is first advised to ask the patient to stop.[178] If she does not, the physician is advised to exit the situation and seek help from a colleague or supervisor.[179] The ultimate step in this algorithm is to consider transferring the patient to another provider, a proposed resolution that highlights the limits of the medical analogy for the law school clinic.[180]

Some of the training developed by medical schools can surely be adapted for use in the clinical law context, and much of it is sound, common-sense advice. The innovation of these programs is in the proactive recognition that patient harassment is likely to occur, and that the goal is to provide high-quality patient care while still protecting the healthcare provider. The problem is that these trainings tend to teach young doctors how to extricate themselves gracefully in the moment, and then seek alternative providers for the harassing patient. The desire to ensure quality patient care in spite of the harassment is laudable, but the alacrity with which these trainings tend to suggest that the harassed provider will not continue with the care is problematic in the legal context for the reasons discussed in Part II.

For example, the Georgetown training provides the following script for how to respond when a patient says something offensive or harassing: "I am not comfortable with your comments. I am going to consult with the supervising physician to ensure you receive the appropriate care by the right people."[181] The first sentence is a good example of a firm, respectful response to a patient (or client, or witness, or judge) who says something inappropriate, and it is similar to what we teach our students to say when they encounter offensive comments in their clinical work. But the second sentence is unsettling, as it appears to imply that someone else will likely continue the patient's care. In this way, it teaches the medical resident that

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* There is also a growing literature discussing racist patients. For example, *Courteous Containment Is Not Enough* features a series of commentaries from health professionals recounting interactions with racist patients, and explaining that this is a common and difficult issue within the profession. Pippa Gough, *Commentary: Courteous Containment Is Not Enough*, 318 BRIT. MED. J. 1131, 1131 (1999). Pippa Gough writes that remaining courteous is often an untenable response because it could be interpreted as tacit acceptance of racism. *Id.* at 1131. She suggests that the withdrawal of service may be appropriate where abuse is "persistent and intentional." *Id.*; *see also* Pauline W. Chen, *When the Patient Is Racist*, N.Y. TIMES: WELL (July 25, 2013, 3:56 PM), https://well.blogs.nytimes.com/2013/07/25/when-the-patient-is-racist/ [https://perma.cc/N4GN-RZ4E] (arguing that "much more needs to be done to foster open and nuanced discussions of the profession's attitude toward race and ethnicity and to assess the profession's at times overly exuberant interpretations of 'putting the patient first'").

181. Cheng, *supra* note 173.

"withdrawal from the case" is acceptable not as a last resort, but as an acceptable tool to employ at the first instance of offensive behavior. I am not equipped to comment on the ethical propriety of switching care providers in the medical field in response to patient harassment (although in the context of a medical residency, Title IX would seem to caution against the reflexive removal of female residents from the care of harassing patients). In any event, for the reasons discussed in Part II, removal of the student from the case is not a useful model in the context of a law school clinic serving clients who are indigent.

C. Teaching Law Students How to Navigate Third-Party Sexual Harassment

The job of law school clinicians is to allow law students not only to imagine themselves as professionals, but to act in role as professionals, with the "safety net" of experienced clinical supervisors at the ready when they encounter the challenges inherent in legal representation. As Jane Aiken and Steve Wizner noted in 2004,

> Unless we design our clinics to immerse students in the delivery of legal services to clients, we teach them too little about legal services work [and] underexpose them to the real world of low-income clients . . . and thus fail to meet the law school's obligation to make a meaningful contribution to addressing the access to justice problem.[182]

Certainly, clinicians should be proactively preparing students, especially female students, for harassment and sexism they are likely to experience in the practice of law. That proactive preparation, if it does not already, should borrow from other fields such as medicine and journalism where educators have developed trainings, like the ones described above, that equip students with language to use when uncomfortable and/or dangerous situations arise. But the proactive training is only a part of a comprehensive approach.

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182. *See* Wizner & Aiken, *supra* note 42, at 1006; *see also* Ibijoke Patricia Byron, *The Relationship Between Social Justice and Clinical Legal Education: A Case Study of the Women's Law Clinic, Faculty of Law, University of Ibadan, Nigeria*, 20 INT'L J. CLINICAL LEGAL EDUC. 563, 568 (2014) ("Clinical legal education gives a window of opportunity to students by getting them out of the classroom into the real world of law, from which they return to a deeper understanding of how legal doctrine and legal theory actually works -or does not work and therefore, instilling in them the value and duty of public service."); Kathleen J. Sullivan, *From Heartbreak to Hope: Stanford Law Students Help a Child with Emotional Disabilities Find a New School*, STAN. NEWS SERV. (July 20, 2011), https://news.stanford.edu/pr/2011/pr-mills-legal-clinic-072011.html [https://perma.cc/S6W4-QJG9] (quoting clinical Professor William Koski describing problems clinical students face as "[n]ot the kind of problems students learn about in law classes, but the kind of real-life problems they'll be dealing with every day as lawyers").

How exactly should the clinician respond to a specific instance of third-party harassment when it occurs despite proactive training? I have argued in Part II that the "go to" remedies of reporting the behavior, withdrawing from the case, and/or switching out the students are not always appropriate, and are not advisable without careful consideration of alternative, less drastic options that are less likely to diminish the quality of either the representation or the student's educational experience.

One way to consider those alternatives is to imagine a matrix of variables that can serve as a starting point for assessing the appropriate response in a given situation. After all, my aim is not to suggest that the solutions here are obvious, or uniform. Instead, they require a recognition of the complexity inherent in any clinical law setting where the duties of serving the client, teaching the student, and protecting the student collide.

For example, one could imagine one axis in a decision-making matrix to be the identity of the harasser. Is the person who has engaged in the offensive conduct the client? A key witness? An unimportant witness? A random bystander? A powerful third party such as the presiding judge? A powerless third party such as an incarcerated person in the jail?

A second axis could be the degree of harassment or abuse to which the student has been subjected, as experienced by the student. Was it one sexist comment? Name-calling? Was it "severe and pervasive"? Was it sexual assault? Is the student indifferent to the harassment and eager to return? Is the student unsettled but reluctantly willing to return? Or is the student traumatized and simply unwilling or unable to return to face further harassment? (And, critically, is the clinical supervisor confident that the student is comfortable relaying their true feelings, or are they telling the supervisor what they think the supervisor wants to hear?)

A third axis could be the degree to which the student will likely be subjected to the harassment in the future. Was the witness one that needs not be visited ever again? Or were they one who, as in the opening hypothetical, may be a critical part of the case going forward? If the harasser is the client, is the client likely to continue acting offensively? Or does the team believe the client has been effectively directed not to repeat the behavior?

A final axis could be the nature of the representation in which the clinic is engaged. Is this a high-volume practice involving similar cases, in a jurisdiction with other service providers, such that a case could be transferred to another attorney without any prejudice to the client? Or is it a complex, unique, resource-intensive case that would prejudice the client or wreak havoc on the clinic's operation were the clinic to withdraw? Are there other cases that can provide the student with similar opportunities for learning and professional growth, or not?

The constellation of those variables should then inform the clinician's response, based on the clinician's competing duties to zealously represent the clinic's clients, and to provide the student access to equal education under Title IX, from among a menu of possible responses, such as: a firm request (or demand) for a cessation of the conduct; pairing the student with another student or supervisor for support; counseling the student in how to continue with the representation and navigate the offending conduct (including altering the setting of future possible encounters in an attempt to minimize the exposure of further harassment); threat of withdrawal; actual withdrawal; threat of report to the Title IX office; actual report to the Title IX office; and other possible responses that may be idiosyncratic depending on the situation.[183]

Applying the above-described matrix of variables to the hypothetical that opened the Article provides one example of how a clinician might address a situation in practice. In the hypothetical, the harasser is a key witness. The case hinges on the cooperation of the witness whose critical information appears to come, inextricably, with sexually harassing comments to the female student. The degree of harassment is enough to make the student very uncomfortable, at the least. In terms of likelihood of exposure to further harassment, the students both believe that the witness will continue to harass the student on future visits to his home. The female student who wants to become a public defender expresses a willingness to return to the witness, but not by herself. Finally, although the setting may be a criminal defense clinic with a high volume of similar cases, removing the female student from the case would likely deprive her of the opportunity to prepare a challenging witness for a sentencing hearing, which is one of the skills students seek to develop in this particular clinic.

This application of the matrix of variables does not necessarily mechanistically produce a perfect solution, but it does allow the clinician to begin ruling out some possible remedies, including those that a traditional Title IX approach may counsel. For example, reporting the harassment to the law school's Title IX office seems out of the question. The client is blameless, and reporting his brother, a key witness, would violate the ethical obligation not to reveal information "related to the

183. Different axes on the matrix carry more weight for different questions. For example, the degree of the harassment as experienced by the student may end up being dispositive both with respect to Title IX reporting obligations and with respect to how the clinician should handle the situation "in house." For example, most clinicians would agree that where a student feels deeply uncomfortable returning to a particular witness, they should not be required to do so, and they should be re-assigned equally fulfilling, educational clinical work if at all possible.

representation,"[184] and would almost certainly result in a loss of the witness's cooperation at sentencing. Removing the female student from the case would, as noted above, deprive her of the educational opportunity and would do so against her will. And withdrawing from the case is fraught for a number of reasons, not the least of which is that it may be impossible to do without revealing confidences and would probably prejudice the client, whose lawyers would be abandoning him on the eve of sentencing.

Ruling out some of the "go to" remedies eventually allows the clinician to narrow in on what might be a productive path forward. Now that the students know what to expect, can they be provided with a script, like the ones discussed above in the medical context, which is designed to cease the offending comments and redirect the witness? Can the students role-play the return visit with their clinical supervisor or other students? Could the supervisor accompany the student in the next interview? Can the clinical class as a whole use the opportunity to discuss the ethical issues raised by the situation, and brainstorm approaches for the students to get the information they need while staying safe and minimizing exposure to further harassment? Might it be possible to have the follow-up interview in the clinic office as opposed to the witness's home? Would that, or some other setting, lessen the chances of additional harassment and still produce the same outcome for the client? What is the client's relationship with the brother? Could the client impress on the brother the importance of cooperating respectfully with the student attorneys in a way that others might not be able to?

The point here is not to suggest one stock answer for any particular hypothetical. Rather, by recognizing the many variables that influence what response best effectuates the clinician's competing obligations, it becomes possible to envision solutions that protect the student and serve the client, while at the same time enriching, rather than detracting from, the student's educational experience. That is the promise of both Title IX and the enterprise of clinical education.

CONCLUSION

My sexual harassment training quiz did not leave me with any satisfactory answer. A student engaged in a counseling session with a patient as part of a psychology practicum experiences unwanted sexual conduct at the hands of the patient, who is intellectually-disabled. The training suggests that the student should not be unilaterally dropped from

184. *See* Alper, *supra* note 127, at 4–5, 7, 9 (discussing the nuances of ABA Model Rule 1.6 in the context of disclosures on social media of information "related to the representation of the client").

the course, nor should her complaint go ignored and unaddressed. Fair enough. But the "correct" response—report the incident to the campus Title IX office and take steps to stop the behavior—is too simplistic, and risks both depriving the student of an educational opportunity and harming the patient's interests. At the same time, it cannot be that the student must continue to subject herself to unwanted sexual conduct in service of the greater educational or client-driven mission of the clinical enterprise.

The university's preferred response raises a number of thorny issues that this Article attempts to unpack. The introduction of the matrix for addressing instances of sexual harassment that clinical students face is meant to animate a point that the recently revised Title IX regulations noted, namely the "unique differences of educational environments from workplaces and the importance of respecting the unique nature and purpose of educational environments."[185]

Federal law interpreting Title IX tends to fluctuate with the Administration in power, and as discussed above, many colleges and universities have ramped up Title IX reporting requirements in the wake of the aggressive enforcement policies of the Obama Administration. Where federal law does require inflexible adherence to traditional remedial measures, it is in tension with the educational and service mission of most law school clinics. To the extent the Title IX mandates of colleges and universities surpass what federal law requires, this Article should warrant some pause, at least in the kind of instances I discuss here.

I noted in the Introduction that this Article is in conversation with the debate about "safe spaces" on campus. But it is not about the classroom. It is about the real world of legal practice on behalf of clients who are indigent, in a law school clinic, where the rules of professional responsibility and the mission of clinical education in some ways cabin (and in other ways expand) the range of acceptable responses to unwelcome sexual behavior.

It raises questions about the choices we make, and the way in which we define our role as educators. In one sense, it is a false dichotomy to suggest that law faculty must choose between keeping their students safe and preparing them for the "real world." Certainly, law faculty, and medical school faculty, and journalism school faculty, can do both. And, in the context of clinical legal education, faculty can do both while also serving the clients and provide high-quality representation that comports with the high ethical standards of the profession.

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185. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,037 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

But it is also true that navigating the competing values discussed in this Article can come with a price. If, in all instances, we elevate the protection of the student above the duty to educate the student and serve the client, we are both failing in our obligation to provide the zealous representation that clinical clients deserve, and we are denying our students an equal educational opportunity. Instead, the duty of loyalty to the client combined with the educational mandate of a law school clinic (and the fundamental principle of Title IX) demands that we teach students how to be *both* safe and zealous in their representation of clients.