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Combatting Sexual Misconduct: American Higher Education during the #MeToo Era

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COMBATting SEXUAL MISCONDUCT: AMERICAN HIGHER EDUCATION DURING THE #METOO ERA

“Bravery is contagious. Indeed, that’s a driving force behind the #MeToo movement. And you sharing your story is going to have a lasting, positive impact on so many survivors in our country. We owe you a debt of gratitude for that, Doctor.” - Senator Patrick Leahy (D-VT)¹

I. INTRODUCTION

Sexual misconduct occurs throughout the world and affects people in all industries and aspects of life; for instance, in October 2017, *The New Yorker* published Ronan Farrow’s article about the numerous sexual misconduct allegations against Harvey Weinstein, a previously renowned movie producer in Hollywood.² The article details the accounts of several disturbing experiences women had with Weinstein, and how he paid them hush money to prevent anyone from finding out about the abuse.³ Their accounts describe his horrific conduct that ranged from inappropriate and explicit comments to sexual misconduct, which prompted sexual assault and

¹ See Cady Drell, *9 Powerful Quotes from Christine Blasey Ford’s Hearing*, YAHOO (Sept. 27, 2018), <https://www.yahoo.com/lifestyle/9-powerful-quotes-christine-blasey-162500183.html> [<https://perma.cc/SH4H-653X>] (highlighting quotes from Ford’s testimony regarding sexual assault allegations against now-Supreme Court Justice, Brett Kavanaugh). During Kavanaugh’s confirmation hearing, Dr. Christine Blasey Ford testified to the details of when Kavanaugh sexually assaulted her in college. *Id.* Dr. Ford’s testimony highlighted how the country handles and disregards allegations of sexual misconduct even at the height of the #MeToo movement. *Id.* Even in such a national spotlight, Ford was doubted and asked how certain she was that her attacker was indeed Kavanaugh. *Id.*

² See Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017, 10:47 AM), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/H5P4-7GQK>] (exposing Harvey Weinstein’s sexual assault scandal). Farrow underwent a ten-month investigation in which he was told by thirteen women that Weinstein had sexually harassed or assaulted them and that they were all afraid of retaliation by the movie producer. *Id.*

³ See Farrow, *supra* note 2 (detailing accounts of Weinstein’s victims). The women described to Farrow what they had endured, how they were paid by Weinstein in exchange for their silence about the incidents, and that Weinstein’s inappropriate behavior was known throughout Hollywood. *Id.* Victims also expressed fears of losing job opportunities and potentially being involved in legal actions brought by Weinstein. *Id.* “[A] woman who worked with Weinstein, explained her reluctance to be identified. ‘He drags your name through the mud, and he’ll come after you hard with his legal team.’” *Id.*

rape charges to be brought against him, and ultimately led to his subsequent arrest.⁴

The allegations against Weinstein motivated more men and women in Hollywood to come forward about their sexual misconduct experiences, leading several companies to take action against other prominent figures in the entertainment industry.⁵ In an attempt to mitigate the issue, certain companies and legislatures have taken action, and a legal defense fund, Time's Up, has been created; however, there is much more to be done to combat workplace sexual misconduct throughout the country.⁶

The #MeToo movement also seems to have encouraged more victims of sexual misconduct in educational institutions, sports, and politics to come forward.⁷ It has sparked a national conversation about sexual

⁴ See *id.* (recounting actresses Asia Argento's and Mira Sorvino's allegations against Weinstein); see also Benjamin Mueller and Alan Feuer, *Arrested on Rape Charges, Weinstein Posts \$1 Million Bail*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/nyregion/harvey-weinstein-arrested.html?module=inline> [<https://perma.cc/9KHW-6MAG>] (discussing Weinstein's arrest for raping and forcing women to have oral sex with him).

⁵ See Josh Rottenberg and Ryan Faughnder, *One Year After the Harvey Weinstein Scandal Broke, #MeToo Has Become a Battle for Hearts and Minds*, L.A. TIMES (Oct. 4, 2018, 5:00 AM), <http://www.latimes.com/entertainment/movies/la-et-mn-harvey-weinstein-one-year-later-20181004-story.html> [<https://perma.cc/Z6WB-MVUC>] (stating allegations against prominent Hollywood men such as Kevin Spacey, Brett Ratner, and Les Moonves).

⁶ See Rottenberg and Faughnder, *supra* note 5 (noting cultural shift surrounding sexual harassment); see also Vin Gurrieri, *Calif. #MeToo Bills May Help Harassment Suits Reach Juries*, LAW360 (Sept. 17, 2018, 6:41 PM), <https://www.law360.com/articles/1082219> [<https://perma.cc/H2CP-FBNM>] (detailing California workplace harassment legislation); see also S.2203, 190th Leg. (Mass. 2017–2018), available at <https://malegislature.gov/Bills/190/S2203> [<https://perma.cc/5PCW-JRMW>] (illustrating bill's trajectory); Stephanie Murray, *State Senate Passes Sexual Violence Bill Aimed at Protecting Students*, TELEGRAM.COM, <https://www.telegram.com/news/20170725/state-senate-passes-sexual-violence-bill-aimed-at-protecting-students> (last updated July 25, 2017, 5:49 PM) [<https://perma.cc/F8NH-T3KC>] (explaining objectives of proposed Massachusetts bill).

⁷ See *United States v. Nassar*, No. 17-2490, 2018 U.S. App. LEXIS 23808, at *10 (6th Cir. Aug. 22, 2018) (affirming lower court sentence for Michigan State doctor who sexually abused student-athletes for twenty years); Vin Gurrieri, *#MeToo Push May Not Translate To More Harassment Suits*, LAW360 (Jan. 24, 2018, 9:52 PM), <https://www.law360.com/articles/1005257?scroll=1> [<https://perma.cc/H2CP-FBNM>] (highlighting reasons why victims are reluctant to come forward); Paula Lavigne and Nicole Noren, *OTL: Michigan State Secrets Extend Far Beyond Larry Nassar Case*, ESPN (Jan. 25, 2018), http://www.espn.com/espn/story/_/id/22214566/pattern-denial-inaction-information-suppression-suppression-michigan-state-goes-larry-nassar-case-espn [<https://perma.cc/8PCA-FXR6>] (exposing widespread sexual assault cover-ups at Michigan State University); Tim Arango, *5 Women Sue U.S.C., Alleging Sexual Abuse by Campus Doctor*, N.Y. TIMES (May 21, 2018), <https://www.nytimes.com/2018/05/21/us/usc-doctor-abuse-lawsuits.html> [<https://perma.cc/857R-TWCL>] (reporting multiple sexual abuse lawsuits against University of Southern California's former gynecologist); Catie Edmondson, *More Than 100 Former Ohio State Students Allege Sexual Misconduct*, N.Y. TIMES, (July 20, 2018), <https://www.nytimes.com/2018/07/20/us/politics/sexual-misconduct-ohio-state.html> [<https://perma.cc/2THH-KZR4>] (detailing allegations by “[m]ore than 100 former [male] Ohio State University students” against

misconduct in America, specifically shedding light on the fact that it is not just a Hollywood or workplace issue, but is also prevalent in other realms of society, including the current presidency.⁸ Notwithstanding where sexual misconduct occurs, similar barriers exist to discourage people from coming forward such as financial concerns, fear of retaliation or not being believed, and lack of resources and training to deal with claims of misconduct.⁹

Not only are sexual assault and abuse survivors still facing the same challenges of coming forward, others who are aware of the crimes are often hesitant to report it, or try to cover it up entirely.¹⁰ The most publicized examples of such bystander behavior includes the Catholic Church priests' child sex abuse scandals and many outrageous incidents of sexual assault in schools and prominent institutions throughout the country.¹¹

This Note focuses on the recent headlines involving sexual misconduct on college campuses and the ways such claims are handled.¹²

“team doctor and professor at the school”); Maeve Reston, *‘I Will Never Forget:’ Christine Blasey Ford Recounts Her Trauma in Raw Testimony*, CNN (Sept. 27, 2018, 7:06 PM), <https://www.cnn.com/2018/09/27/politics/christine-blasey-ford-raw-testimony/> [<https://perma.cc/LQ9F-6E6L>] (recounting Ford’s testimony detailing sexual assault committed by Supreme Court Justice, Brett Kavanaugh).

⁸ See Meghan Keneally, *List of Trump’s Accusers and Their Allegations of Sexual Misconduct*, ABC NEWS (June 25, 2019, 12:11 PM), <https://abcnews.go.com/Politics/list-trumps-accusers-allegations-sexual-misconduct/story?id=51956410> [<https://perma.cc/VD3N-MZSJ>] (discussing accounts of seventeen women who have accused President Trump of sexual assault); see generally Farrow, *supra* note 2 & sources cited *supra* note 7 (showing prevalence of sexual assault in all sectors of life).

⁹ See Guirrieri, *supra* note 7 (discussing how #MeToo movement brings heightened awareness, but highlighting difficulties victims still face).

¹⁰ See Dan Murphy, *Former Michigan State President Charged with Lying to Police in Larry Nassar Investigation*, ESPN (Nov. 20, 2018), http://www.espn.com/college-sports/story/_/id/25333431/lou-anna-k-simon-former-michigan-state-president-charged-lying-police-larry-nassar-investigation [<https://perma.cc/GHR5-ZNER>] (reporting felony and misdemeanor charges against university president for knowingly making false statements to police). Michigan State officials were repeatedly accused of knowing about Nassar’s continuing crimes and not taking proper steps to investigate complaints. *Id.*

¹¹ See sources cited *supra* note 7 and accompanying text (displaying examples of sexual misconduct on college campuses); see also Des Bieler, *Two Former Penn State Officials Plead Guilty to Child Endangerment in Sandusky Case*, WASH. POST (Mar. 13, 2017, 10:14 PM), <https://www.washingtonpost.com/news/early-lead/wp/2017/03/13/two-former-penn-state-officials-plead-guilty-to-child-endangerment-in-sandusky-case/> [<https://perma.cc/Z56Y-7N3B>] (describing former Penn State officials’ child endangerment charges for inaction regarding Sandusky’s child sexual abuse); Michael Rezendes, *Church Allowed Abuse by Priest for Years*, BOSTON GLOBE (Jan. 6, 2002, 5:50 PM), <https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTlRAT25qKGvBuDNM/story.html> [<https://perma.cc/5JSR-XLEA>] (exposing knowledge and cover-ups of child sexual abuse throughout Catholic Church).

¹² See *infra* Parts II & IV (detailing recent sexual misconduct allegations in schools and how to address issue).

This Note will analyze the current standards and policies put in place to help victims of sexual misconduct on college campuses.¹³ Further, this Note provides suggestions on how rules and guidelines can be improved and discusses other measures that should be taken to encourage victims to come forward and to ensure safer campus environments for future generations of students.¹⁴ Although the recent #MeToo movement brings the pervasiveness of sexual misconduct in America to the forefront, much more needs to be done to end this public health epidemic in higher education.¹⁵

II. FACTS

A. Sexual Misconduct Definitions and Statistics

Sexual assault is defined by the Advocates for Human Rights as “nonconsensual sexual contact that is obtained through coercion or the use or threat of force,” and sexual contact is defined as molestation, fondling, attempted rape, rape, and “other sexually abusive acts.”¹⁶ The United States Department of Education also have their own definitions of sexual violence, sexual harassment, and sexual abuse.¹⁷ The defining characteristic of sexual

¹³ See *infra* Parts II & III (discussing current sexual assault policies and legislation, and history of sexual assault reform).

¹⁴ See *infra* Part IV (suggesting multiple ways to address sexual misconduct in colleges and universities).

¹⁵ See Kimberly A. Hamlin, *What Happens When Women Talk to Congress About Sex*, WASH. POST (Sept. 25, 2018, 6:00 AM), <https://www.washingtonpost.com/outlook/2018/09/25/what-happens-when-women-talk-congress-about-sex/?noredirect=on> [<https://perma.cc/QG68-DJE7>] (analyzing Congress’s responses to women’s allegations of sexual misconduct and struggles to get legislation passed); see also Rottenberg and Faughnder, *supra* note 5 (emphasizing need for change throughout country); Sarah Edwards, *The Case in Favor of OCR’s Tougher Title IX Policies: Pushing Back Against the Pushback*, 23 DUKE J. GENDER L. & POL’Y 121, 127 (2015) (suggesting ways to strengthen Title IX policies and improve reporting standards).

¹⁶ See *Types of Sexual Contact*, ADVOCATES FOR HUM. RTS., http://www.stopvaw.org/Types_of_Sexual_Contact (last updated Feb. 1, 2006) [<https://perma.cc/DST4-TEWG>] (stating organization’s definition of sexual contact); *What Is Sexual Assault*, ADVOCATES FOR HUM. RTS., http://www.stopvaw.org/What_is_Sexual_Assault (last updated June 2019) [<https://perma.cc/27YC-4XXY>] (stating organization’s definitions of sexual assault and sexual contact). The Advocates for Human Rights defines sexual assault as a type of sexual violence. *What Is Sexual Assault*, *supra* note 16. There is a distinction between sexual assault and sexual harassment as the latter does not always include misconduct in both forms. *Id.* “The Rape, Abuse & Incest National Network (RAINN) defines sexual violence as ‘an all-encompassing, non-legal term that refers to crimes like sexual assault, rape, and sexual abuse.’” *Id.* Where used in this Note, sexual misconduct refers to all types of sexual assault, sexual harassment, and sexual violence including sexual assault as defined by the Advocates for Human Rights. *Id.*

¹⁷ See Erin O’Neill, Comment, *When Winning Comes First, Students and the Community Lose: Handling Student-Athlete Sexual Assault Scandals*, 25 SPORTS LAW J. 199, 200 (2018) (discussing sexual violence on campuses involving student-athletes).

assault is that its unwanted nature and certain conduct may be unwanted and non-consensual in one instance, but wanted and consensual in another.¹⁸ Sexual assault can be committed by force or by coercion through “intimidation, manipulation, threats of negative treatment, and blackmail.”¹⁹

Sexual assault often occurs in relationships of trust such as in the home by a relative or intimate partner, in a work environment, in the community, and/or in institutional settings by a teacher, doctor, or coach.²⁰ Recent studies show the grave statistics regarding sexual assault in America: one out of every six women and one out of every thirty-three men is or will be a victim of attempted rape or rape in their lifetime.²¹ However, these

“Sexual Violence” is defined by the United States Department of Education Office for Civil Rights (OCR) as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol.” Sexual violence encompasses multiple acts, “including rape, sexual assault, sexual battery, and sexual coercion.”

Id.; see also *Sex-based Harassment*, U.S. DEP’T OF EDUC. <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue01.html> (last visited Dec. 30, 2019) [<https://perma.cc/N2L5-2EGN>] (defining terms related to sexual violence as interpreted by federal government).

¹⁸ See *Types of Sexual Contact*, *supra* note 16 (describing elements of sexual assault).

¹⁹ See *What Is Sexual Assault?*, *supra* note 16 (noting how sexual assault can be committed).

²⁰ See *id.* (stating where and by whom sexual assault usually occurs); see also *Sexual Abuse*, DURSO LAW, <http://dursolaw.com/abuse/> (last visited Nov. 11, 2019) [<https://perma.cc/BPL5-F9CA>] (informing readers about prevalence of sexual abuse in institutional settings). “[T]he average institutional abuser has more victims because he has better access and opportunities.” *Sexual Abuse*, *supra* note 20.

²¹ See *Data Collection: National Crime Victimization Survey (NCVS)*, BUREAU OF JUST. STATISTICS (2018), <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=245> [<https://perma.cc/55ZB-GDE7>] (publishing results from studies); see also *Victims of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/victims-sexual-violence> (last visited Nov. 11, 2019) [<https://perma.cc/93XA-NCJA>] (summarizing statistics from 2017 Bureau of Justice survey); *Conducting Research in the Field of Criminal Justice: Criminal Justice Statistics*, LIU POST, <https://liu.cwp.libguides.com/c.php?g=45782&p=6531063> (last updated Nov. 15, 2019, 1:54 PM) [<https://perma.cc/6BPW-3LXZ>] (describing methodology of National Crime Victimization Survey).

[D]ata . . . are obtained from a nationally representative sample of about 135,000 households, composed of nearly 225,000 persons, on the frequency, characteristics, and consequences of criminal victimization in the United States. The NCVS collects information on nonfatal personal crimes, [such as rape or sexual assault] . . . Survey respondents provide information about themselves (e.g., age, sex, race and Hispanic origin, marital status, education level, and income) and whether they experienced a victimization. For each victimization incident, the NCVS collects information about the offender, . . . characteristics of the crime, . . . whether the crime was reported to police, reasons the crime was or was not reported, and victim experiences with the criminal justice system.

Conducting Research in the Field of Criminal Justice: Criminal Justice Statistics, *supra* note 21.

numbers may be significantly undervalued due to a lack of reporting, which makes the statistics all the more troubling.²²

B. Title IX

Title IX states, “[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”²³ This discrimination includes all forms of sexual assault that occur on-campus or anywhere there is a connection with the educational institution, such as at athletic events or other events represented by the school.²⁴ Any school, from kindergarten to college, that receives federal government funding must adhere to Title IX and must implement “policies prohibiting sexual harassment and assault, prompt and thorough investigations of complaints, training of staff, and the assignment of a person who oversees implementation of the law,” known as a Title IX coordinator.²⁵

²² See *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Nov. 11, 2019) [<https://perma.cc/URV9-KH7J>] (detailing Department of Justice’s reporting on stark statistics of non-reported sexual assaults). “Only 230 out of every 1,000 sexual assaults are reported to police. That means about 3 out of 4 go unreported.” *Id.*

Of the sexual violence crimes not reported to police from 2005-2010, the victim gave the following reasons for not reporting: 20% feared retaliation[;] 13% believed the police would not do anything to help[;] 13% believed it was a personal matter[;] 8% reported to a different official[;] 8% believed it was not important enough to report[;] 7% did not want to get the perpetrator in trouble[;] 2% believed the police could not do anything to help[; and] 30% gave another reason, or did not cite one reason.

Id.

²³ See 20 U.S.C. § 1681(a) (2019) (introducing Title IX components and definitions).

²⁴ See *id.* § 1681(c) (defining educational institution).

For purposes of this title an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

Id.; see *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 644 (1999) (reasoning schools may be liable even if they are not engaged “in harassment directly”).

²⁵ See *Davis*, 526 U.S. at 646 (explaining student-on-student sexual misconduct occurring during school hours, on school grounds, and in classrooms). Title IX is treated as legislation enacted pursuant to Congress’s spending power. *Id.* at 640. “When Congress acts pursuant to its spending power, it generates legislation ‘much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.’” *Id.* (quoting *Pennhurst State*

The Title IX compliance standards represent a professional standard of care for schools and educational environments, and the requirements set forth are the minimum requirements for schools.²⁶ Furthermore, regardless of whether a school receives federal funding, students can initiate an investigation through the Department of Education's Office for Civil Rights ("OCR"), a federal agency tasked with enforcing Title IX.²⁷ In order to

Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). See O'Neill, *supra* note 17, at 202 (explaining Title IX's objective to prevent sexual violence at school-sponsored events on or off campus).

A school violates Title IX's sexual violence provisions when two conditions are met:

(1) the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational program, i.e. creates a hostile environment; and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.

Id.; see also Edward F. Dragan, *Private School Sexual Abuse and Harassment: Professional Standard of Care*, EDUC. EXPERT (Oct. 11, 2017), <http://education-expert.com/2017/10/sexual-abuse-and-harassment-in-private-schools-professional-standard-of-care/> [https://perma.cc/52Y3-FFHJ] (explaining requirements for any school receiving federal funding to comply with Title IX).

²⁶ See Dragan, *supra* note 25 (pointing out that any schools receiving federal funding are held to same standard); see also Jane Abelson et al., *Private Schools, Painful Secrets*, BOSTON GLOBE (May 6, 2016, 9:12 PM), <https://www.bostonglobe.com/metro/2016/05/06/private-schools-painful-secrets/OaRI9PFpRnCTJx Czko5hkN/story.html> [https://perma.cc/V8RA-CLGX] (mentioning applicability of Title IX to private schools receiving federal funding).

²⁷ See *Know Your Rights and Your College's Responsibilities: Title IX and Sexual Assault*, ACLU, <https://www.aclu.org/files/pdfs/womensrights/titleixandsexualassaultknowyourrightsandyourcollege%27sresponsibilities.pdf> (last visited Dec. 30, 2019) [https://perma.cc/JT9R-KJP3] (describing OCR complaint process in detail).

OCR mandates that schools take "prompt and effective action to end harassment and prevent its recurrence." Similarly, federal regulations require schools that discriminate on the basis of sex—including ignoring sexual harassment—to "take remedial action" to correct the effects of that discrimination.

Students may file a complaint with OCR about harassment. OCR may facilitate a meeting between the students and administration to reach a resolution; it may investigate the claim and issue a letter finding for or against the school; or it may dismiss the complaint.

If OCR finds against the school, it may facilitate a session to reach a resolution and may monitor the school's compliance with its commitments under the agreement. Victims cannot win money through the OCR complaint process. In theory, OCR can strip a school of its federal funding, although no school has ever lost its federal funding as a result of ignoring sexual harassment.

Id. (emphasis omitted); see Jennifer James, Comment, *We Are Not Done: A Federally Codified Evidentiary Standard Is Necessary for College Sexual Assault Adjudication*, 65 DEPAUL L. REV. 1321, 1328 (2016) (discussing OCR "Dear Colleague Letters"). OCR publishes official regulations and guidelines to provide clarity and interpretation of statutes, but this is not positive or binding law. James, *supra* note 27, at 1328–29; see Edwards, *supra* note 15, at 127–28 (detailing OCR claim and investigation process). An OCR Title IX investigation is conducted to find out if a school is compliant with federal law. Edwards, *supra* note 15, at 127. If they are not, and they do not

provide a better understanding of how to comply with Title IX, OCR published Dear Colleague Letters, which provided guidance and suggestions for schools on complying with Title IX.²⁸ The letter released in April 2011 was the most influential advice regarding Title IX in years.²⁹ Despite the Department of Education unfortunately rescinding this letter in 2017, it has since announced new rules regarding the legal standard for proving sexual assault allegations.³⁰

In 1999, the Supreme Court defined the standards for an individual to bring a private cause of action under Title IX for student-to-student or peer harassment.³¹ For a school receiving Title IX funding to be held responsible for sexual misconduct, the school must have had proper notice that they

address any problems that are found, the school “can lose federal funding or be referred to the U.S. Department of Justice for further action.” *Id.*

²⁸ See James, *supra* note 27, at 1328–29 (explaining use for Dear Colleague Letters). The Dear Colleague Letters are published by the Department of Education’s Office for Civil Rights (OCR), which is the office assigned to regulate and enforce universities’ handling of sexual assault. *Id.*

²⁹ See *id.* (discussing how letter guided schools and suggested preponderance of evidence standard). The letters are to be used as guidance by schools that must comply with Title IX. *Id.*

³⁰ See O’Neill, *supra* note 17, at 202 (illustrating positive aspects of Dear Colleague Letter and mentioning currently proposed guidelines); see also Lorelei Laird, *Education Department Announces New Rules on Handling Campus Sexual Assault*, ABA J. (Nov. 16, 2018, 2:51 PM) www.abajournal.com/news/article/education_department_announces_new_rules_on_handling_campus_sexual_assault [<https://perma.cc/XQZ4-7T6A>] (announcing new standard of proof guidelines for sexual assault allegations). The current Department of Education has proposed rules replacing Obama-era regulations that would “expand the rights of accused students and narrow the types of cases that universities are required to investigate.” Laird, *supra* note 30; see Simone C. Chu and Iris M. Lewis, *What Happens Next with Title IX: DeVos’s Proposed Rule, Explained*, HARV. CRIMSON (Feb. 27, 2019), <https://www.thecrimson.com/article/2019/2/27/title-ix-explainer/> [<https://perma.cc/89H2-WV4D>] (explaining current status of proposed changes to Title IX rule). In November 2018, Betsy DeVos, the United States Secretary of Education, proposed the Title IX rule changes, which incited questions and confusion. Chu, *supra* note 30. After the proposal, there is a 60-day notice-and-comment period, which allows the public to provide feedback. *Id.* This period has since closed, which now legally requires the Department of Education to review these comments, which could take up to a year. *Id.* The final rule will be published after reviewing the 100,000 comments, so there will be a delay before the proposed rules are actually instated. *Id.*; see Jeannie Suk Gersen, *Assessing Betsy DeVos’s Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), <https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault> [<https://perma.cc/B84Q-BU7C>] (analyzing proposed rules that would put in place new guidelines and procedures for Title IX); see also John Pardun, *Title IX and the Lessons Learned in Higher Education*, AM. LAW (Sept. 2019), <https://www.jamsadr.com/files/uploads/documents/articles/pardun-theamerican-lawyer-title-ix-and-the-lessons-learned-in-higher-education-2019-09.pdf> [<https://perma.cc/U5RD-WCNE>] (explaining confusion schools face in approaching sexual misconduct allegations). Schools face challenges in choosing whether to adopt a single investigator model or hearing model, and these challenges are exacerbated by the lack of guidance from the Trump administration rescinding Obama administration directives and guidance. Pardun, *supra* note 30.

³¹ See *Davis*, 526 U.S. at 651 (discussing harassment standard for bringing claim). The harassment must be so “severe, pervasive, and objectively offensive” that it effectively bars the victim’s access to an educational benefit or activity. *Id.* at 650–51.

could be held liable, must act with deliberate indifference to acts of harassment, and must exercise substantial control over the harasser and the situation in which the harassment occurs.³² The deliberate indifference requirement is shown if a school receives notice of the claim of sexual misconduct, and the school's subsequent response is "clearly unreasonable in light of the known circumstances."³³

III. HISTORY

A. *Sexual Assault Reform in the United States*

In the 1970's, sexual assault reform advocates sparked a wave of change in the United States.³⁴ For the first time, studies were conducted on how sexual assault affects survivors, prompting reform to laws and procedures regarding sexual assault.³⁵ Nevertheless, these preliminary laws

³² See *id.* at 649 (stating standard for school's institutional liability).

³³ See *id.* (explaining standard of response requirement to prove Title IX institution acted with deliberate indifference).

[T]he recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable. This is not a mere "reasonableness" standard . . . A university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy, . . . and it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims.

Id. It was decided that the petitioner in the case could show that the school "subjected" her "to discrimination by failing to respond in any way over a period of five months to complaints of . . . in-school misconduct from [multiple] students." *Id.*

³⁴ See *Sexual Assault in the United States*, ADVOCATES FOR HUM. RTS., www.stopvaw.org/national_sexual_assault_laws_united_states (last updated Oct. 17, 2018) [<https://perma.cc/2TU2-GTN3>] (detailing advancements made in sexual assault reform). During the 1970's, women established the first rape crisis centers, new procedures to collect medical evidence of sexual assault arose, and the criminal justice system scrutinized and reformed the existing laws and procedures. *Id.* Psychologists also conducted the first comprehensive study on rape trauma. *Id.*

³⁵ See *id.* (highlighting sexual assault criminal justice reform). This was the first time underreporting of sexual assault was addressed as new laws were created in an effort to encourage reporting, and in turn, increase conviction rates. *Id.* The legislative changes also increased penalties for sexual assault perpetrators and lengthened the statutes of limitation for sexual assault claims. *Id.* See MODEL PENAL CODE § 213.1 (AM. LAW INST. 2007) (defining rape, gross sexual imposition, and deviate sexual intercourse by force or imposition).

Rape. A male who has sexual intercourse with a female not his wife is guilty of rape if:

(a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

erroneously focused on the victim's behavior, which prompted the states and Congress to enact rape shield laws.³⁶ Further, in 1978, the Federal Rules of Evidence incorporated a rape shield provision, which currently states:

The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: (1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim's sexual predisposition.³⁷

In 1994, Congress passed the Violence Against Women Act ("VAWA") "[i]n recognition of the severity of the crimes associated with domestic violence, sexual assault and stalking," defining sexual violence as a violation of one's civil rights and providing a federal civil rights remedy for sexual assault claims.³⁸ However, the Supreme Court decided in *United States v. Morrison* that Congress did not have the power to create a federal civil rights remedy by way of the VAWA because that power did not fall within the bounds of Congress's spending power.³⁹ The Court did decide,

(b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or
 (c) the female is unconscious; or
 (d) the female is less than 10 years old.

Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree.

Id. This was one of the first "rape laws" developed, and it is still considered good law. *Id.*; see MODEL PENAL CODE § 231.1 explanatory note for Sections 213.1–213.6 (applying law only to unmarried intercourse with focus on victim's previous sexual relations with perpetrator). While this was forward thinking for its time, the statute is clearly in desperate need of revision today, and states have adopted changes to build upon the Model Penal Code (MPC). See *Sexual Assault in the United States*, *supra* note 34 (outlining American Law Institute's (ALI) proposed amendments to MPC definition of rape). The definition was proposed in 2014, but has not been agreed upon by the ALI. *Id.* It would eliminate the specification about spousal rape, include gender neutral language, and "provide a more comprehensive understanding of force and consent." *Id.*

³⁶ See *Sexual Assault in the United States*, *supra* note 34 (discussing development of rape shield laws). In 1975, states began passing rape shield laws, which prohibited looking into a victim's past sexual history, and shifted the focus to the perpetrator's actions. *Id.*

³⁷ See FED. R. EVID. 412 (defining current form of federal evidentiary rape shield law).

³⁸ See 34 U.S.C. § 12361 (2019) (formerly 42 U.S.C. § 13981) (providing federal remedy for sexual assault victims at time of enactment). The VAWA includes, among other things, language providing for safe streets and public spaces for women, civil rights for women, and protection from stalking. *Id.*

³⁹ See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (finding spending power "does not extend to the enactment of § 13981"). The Supreme Court determined in *Morrison* that Congress

however, that the states have general police power to implement this remedy and that the VAWA was allowed to continue serving its many other purposes, such as services, education, and training for victims of sexual and domestic violence.⁴⁰ Unfortunately, the VAWA expired in December of 2018 during a government shutdown, and has since been subject to reauthorization from the time the shutdown ended.⁴¹ The House of

was without power to provide a civil rights remedy under the VAWA because sexual violence crimes are not economic in nature, and therefore, do not fall under Congress's spending clause. *Id.* at 613; *see* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States").

⁴⁰ *See Morrison*, 529 U.S. at 623 (allowing states to enact VAWA-like remedies for victims). The VAWA also created a task force that became the National Task Force to End Sexual and Domestic Violence, which helped to "draft and pass each VAWA reauthorization." *See History of VAWA*, LEGAL MOMENTUM, <https://www.legalmomentum.org/history-vawa> (last visited Nov. 11, 2019) [<https://perma.cc/G4M7-YZUG>] (providing impact and achievements of VAWA).

Despite elimination of the civil rights remedy, VAWA and its subsequent reauthorizations have vastly improved services for victims of sexual and domestic violence and stalking, as well as education and training about violence against women for victim advocates, health professionals, law enforcement, prosecutors and judges. The numerous new legislative provisions include a ban on states charging rape victims for forensic sexual assault examinations and the criminalization of stalking by electronic surveillance.

Id.; *see What Is the Violence Against Women Act*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/resources/vawa/> (last visited Nov. 11, 2019) [<https://perma.cc/FH5T-JS8N>] (identifying VAWA services such as domestic violence hotline); *Sexual Assault in the United States*, *supra* note 34 (noting more than dozens of states' civil rights remedies available for gender-based harm); *Know Your Rights and Your College's Responsibilities: Title IX and Sexual Assault*, *supra* note 27 (illustrating ways states have addressed sexual assault and sexual harassment). For example, "[i]n 2007 the New Jersey Supreme Court, applying the New Jersey Law Against Discrimination, ruled that a school will be liable when it 'knew or should have known' about student sexual harassment, but 'failed to take action reasonably calculated to end the harassment.'" *Know Your Rights and Your College's Responsibilities: Title IX and Sexual Assault*, *supra* note 27.

⁴¹ *See* Jenny Gathright, *Violence Against Women Act Expires Because of Government Shutdown*, NPR (Dec. 24, 2018, 3:21 PM), <https://www.npr.org/2018/12/24/679838115/violence-against-women-act-expires-because-of-government-shutdown> [<https://perma.cc/DA78-HDHS>] (explaining how government shutdown led to expiration of VAWA). The VAWA is linked to budgets that were subject to debate during the shutdown, so Congressional efforts to extend the Act through February 8, 2019, were ineffective, and it was not reauthorized. *Id.*; *see* Kate Thayer, *The Violence Against Women Act Has Expired. Advocates Say That Sends a Dangerous Message and Are Pushing for Permanent Protections.*, CHI. TRIB. (Feb. 21, 2019, 11:05 AM), <https://www.chicagotribune.com/lifestyles/ct-life-violence-against-women-act-expired-20190220-story.html> [<https://perma.cc/YMG9-42LZ>] (highlighting responses to expiration of VAWA). Congress failed to reauthorize the VAWA in February 2019, which seemed to show their lack of prioritization, and also led to confusion as to why these protections have not been made permanent. Thayer, *supra* note 41.

Representatives has approved a new version of the VAWA, but it has yet to pass through the Senate.⁴²

A few other examples of advancements towards ending sexual assault in recent years have come in the form of creating non-profits and enacting federal legislation.⁴³ In 2017, eight congressmen resigned from office after being accused of sexual misconduct.⁴⁴ That same year, Congress passed sexual assault legislation, originally introduced in 2014, which otherwise might not have been enacted without the #MeToo movement.⁴⁵ In

⁴² See Susan Davis, *House Passes Bill Protecting Domestic Abuse Victims; GOP Split Over Gun Restrictions*, NPR, <https://www.npr.org/2019/04/04/707685268/violence-against-women-act-gets-tangled-up-in-gun-rights-debate> (last updated Apr. 4, 2019, 12:49 PM) [<https://perma.cc/2RKY-WF9T>] (explaining new additions to VAWA including gun restrictions for abusers and protection for transgender individuals); see also *Violence Against Women Reauthorization Act of 2019*, H.R. 1585, 116th Cong. (2019–20) (outlining changes and additions to VAWA).

⁴³ See Zachary Zagger, *SafeSport 'Overwhelmed' With Sex Abuse Claims, Sens. Hear*, LAW360 (Oct. 3, 2018, 9:39 PM) <https://www.law360.com/articles/1088595/safesport-overwhelmed-with-sex-abuse-claims-sens-hear> [<https://perma.cc/ELC7-YPH2>] (providing information about SafeSport's goals, but also its limits); see also *H.R. 4924 – Congressional Accountability Act of 1995 Reform Act*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/4924> (last visited Nov. 19, 2019) [<https://perma.cc/P7BB-AMM5>] (establishing requirements for handling workplace sexual harassment claims).

⁴⁴ See Hamlin, *supra* note 15 (detailing allegations against multiple powerful men, such as judges and politicians). “Last year, prompted by mounting accusations against members of Congress and the resulting resignation of eight congressmen, Rep. Jackie Speier (D-Calif.) testified before her colleagues on the House Administration Committee about the sexual harassment she endured while a congressional staffer in the 1970s.” *Id.* In 1991, years before Speier’s testimony, Anita Hill testified against current Supreme Court Justice Clarence Thomas, alleging he sexually assaulted her. *Id.* Although she did not convince the Judiciary Committee to disapprove him, she helped bring awareness to the widespread sexual misconduct in politics during that time and “forced corporate and mainstream America to recognize sexual harassment as a crime.” *Id.* Anita Hill most likely motivated the over 20 other women who worked on Capitol Hill to come forward regarding Senator Bob Packwood’s sexual misconduct. *Id.*

⁴⁵ See *H.R. 4924 – Congressional Accountability Act of 1995 Reform Act*, *supra* note 43 (amending Congressional Accountability Act of 1995).

The bill eliminates the requirement that an employee participate in counseling and mediation before filing a claim with the Office of Compliance (OOC) alleging a violation. The OOC must investigate claims. If the OOC finds reasonable cause to believe there was a violation or is unable to make a determination, the OOC must conduct a hearing to consider the claim and render a decision.

Id.; see Hamlin, *supra* note 15 (explaining progress made in 2017). In 2017, Representative Jackie Speier testified about the sexual harassment she endured as a congressional staffer in the 1970’s, which helped expose both the large number of harassment charges that have been filed against members of Congress and the amount of tax money used for settlements. Hamlin, *supra* note 15. Speier’s bill that was introduced in 2014 was then passed in 2017. *Id.* The bill holds U.S. politicians responsible for their actions by no longer subjecting victims to mandatory dispute resolution and only allows non-disclosure agreements if the victim agrees to one. See Press Release, Congresswoman Jackie Speier, *Rep. Speier Applauds Passage of Anti-Sexual Harassment Bill* (Dec. 13, 2018) (on file with author), available at <https://speier.house.gov/media-center/press->

2017, Congress launched a nonprofit organization called SafeSport in response to allegations of sexual abuse among U.S. Olympic teams.⁴⁶ The organization was launched to provide expertise and assistance to these sexual assault survivors in an attempt to help them bring complaints.⁴⁷ It is also utilized to assist in investigating and resolving reports of misconduct and for developing safeguards to prevent such crimes from occurring.⁴⁸ Unfortunately, SafeSport is currently being “overwhelmed” with allegations, and more resources are needed to continue to protect victims.⁴⁹

B. *Sexual Misconduct Lawsuits Involving Universities in America*

Sexual assault on college campuses is a serious and ongoing problem that has persisted for decades.⁵⁰ This epidemic has received national attention in recent years due to countless headlines and lawsuits concerning reports of sexual assault involving student-athletes and the schools’ subsequent mishandling of such reports.⁵¹ Moreover, in 2014, the

releases/rep-speier-applauds-passage-anti-sexual-harassment-bill [https://perma.cc/8HGR-TQDA] (announcing unanimous passage of Congressional Accountability Act of 1995 Reform Act). “Congress finally joined together today to say, ‘Time’s Up!’ and sent a message to all members and staff that we will no longer tolerate sexual misconduct that denigrates employees and debases the institution[.]” *Id.*

⁴⁶ See Zagger, *supra* note 43 (illustrating purposes of SafeSport).

⁴⁷ See *id.* (describing SafeSport as organization designed to help victims).

⁴⁸ See *id.* (emphasizing importance of SafeSport).

⁴⁹ See *id.* (discussing extensive number of claims being brought).

⁵⁰ See Eilene Zimmerman, *Campus Sexual Assault: A Timeline of Major Events*, N.Y. TIMES (June 22, 2016), <https://www.nytimes.com/2016/06/23/education/campus-sexual-assault-a-timeline-of-major-events.html> [https://perma.cc/49MM-RG8C] (summarizing timeline of campus sexual assault developments and incidents over last fifty-plus years). “One of the first published studies about campus sexual assault” was released in 1957. *Id.* In 1985, one of the largest studies of undergraduate date rape revealed that one in four female college students had been a victim of rape or attempted rape. *Id.* Further, in 2011, “60 Minutes” featured a story about a woman named Beckett Brennan who was raped in 2008 by three basketball players on the school’s men’s basketball team. *Id.*

⁵¹ See *id.* (highlighting multitude of mishandled sexual assault claims throughout American college campuses in recent years). In 2014, twenty-three Columbia University students filed claims asserting that the university mistreated them and mishandled their claims of sexual assault. *Id.* In 2015, a Florida State University student filed a lawsuit for rape that occurred in 2012 against the football team’s quarterback, Jameis Winston. *Id.* Winston, however, was never questioned by the police, and the school subsequently cleared his name of any wrongdoing. *Id.* See O’Neill, *supra* note 17, at 203–07 (detailing Baylor University sexual assault scandal). Since 2014, Baylor University has faced allegations of mishandled sexual assault claims and failure to comply with Title IX. *Id.* at 203. This scandal stemmed from claims that over thirty Baylor football players had committed rape, including gang rapes, and that the university responded inadequately to these claims. *Id.* at 206. Also, in 2016, an investigation into Baylor University’s handling of sexual assault allegations against football players concluded that the university did, in fact, mishandle accusations. *Id.* at 204–07. Moreover, in “January 2016, ESPN’s *Outside the Lines* reported

White House Task Force to Protect Students From Sexual Assault was formed, and it released a report on sexual assault in American colleges and universities, containing startling statistics about campus sexual assault and sexual violence.⁵² The following year, a documentary, *The Hunting Ground*, was released, which incited a response of shock in many people due to the exposure of widespread occurrence of sexual assault on college campuses.⁵³

Many cases have been brought under Title IX to prove schools' indifference to sexual harassment claims, despite the high evidentiary standard that plaintiffs have to meet to satisfy the indifference standard.⁵⁴ These cases involved situations of harassment and assault between students, students and teachers, students and coaches, and students and school or team doctors.⁵⁵ The most recent college sexual assault scandals that have come to light during the #MeToo era have initiated a call to closely investigate how

multiple incidents where Baylor failed to comply with Title IX regarding allegations of sexual violence through failure to investigate, inadequate investigations, and failing to hire a Title IX coordinator until 2014, despite being directed to do so in 2011" *Id.* at 204.

⁵² See *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault*, WHITE HOUSE (Apr. 2014), <https://www.justice.gov/archives/ovw/page/file/905942/download> [<https://perma.cc/6WSR-CHWJ>] (highlighting sexual assault statistics and ways to address it on college campuses). The report stated that "[o]ne in five women is sexually assaulted while in college." *Id.* at 2. Further, the Presidential Task Force detailed four steps planned to be done which are: (1) identify the scope of the problem on college campuses; (2) help prevent campus sexual assault; (3) help schools respond effectively when a student is assaulted; and (4) improve, and make more transparent, the federal government's enforcement efforts. *Id.* at 2-4.

⁵³ See *THE HUNTING GROUND* (Weinstein Company 2015) (exposing sexual assault epidemic on American college campuses). The documentary exposed the frequency with which sexual misconduct crimes occur on American college campuses and the cover-ups by these institutions. *Id.* In an ironic twist of fate, Harvey Weinstein's production company distributed the film. *Id.*; see Manohla Dargis, *Review: 'The Hunting Ground' Documentary, a Searing Look at Campus Rape*, N.Y. TIMES (Feb. 26, 2015), <https://www.nytimes.com/2015/02/27/movies/review-the-hunting-ground-documentary-a-searing-look-at-campus-rape.html> [<https://perma.cc/BF27-3VAZ>] (describing documentary as "a documentary shocker about rape on American college campuses, goes right for the gut").

⁵⁴ See James, *supra* note 27, at 1326-27 (discussing burden of proof for many Title IX investigations and cases). Proving indifference is such a high burden because it must be shown that the school knew of the sexual harassment, and it must be proven that their response was unreasonable. *Id.* at 1327. At a minimum, a plaintiff must substantially show a school's indifference in their response to sexual assault claims. *Id.* at 1352.

⁵⁵ See *Doe v. Baylor Univ.*, 336 F. Supp. 3d 763, 789 (W.D. Tex. 2018) (denying, in part, Baylor's motion to dismiss regarding inaction in dealing with sexual assault claims); see also *Williams v. Bd. of Regents*, 477 F.3d 1282, 1289-90 (11th Cir. 2007) (involving gang rape by basketball players and Title IX claim against University and athletic association); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 701 (4th Cir. 2007) (claiming University's failure to act allowed sexual harassment by coach to continue). These are merely a handful of the recent Title IX cases brought against schools in recent years - in 2014, the White House Task Force to Protect Students From Sexual Assault released a report that revealed the 55 schools that were under investigation by the Department of Education at that time. *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault*, *supra* note 52.

schools have addressed these scandals – the results of which, have been disturbing.⁵⁶ Investigations into the sexual assault allegations committed by prominent school athletes, coaches, and other school employees in positions of power have unearthed just how necessary it is for both legislative action and a change in the way schools address such claims.⁵⁷

One of the most recently publicized and upsetting instances of a college mishandling and covering up sexual misconduct allegations occurred at Michigan State University.⁵⁸ The allegations, pattern of denial, and suppression of information that marks these claims dated back to 1997.⁵⁹ Although athletes reported the abuse sustained under the guise of medical treatment and procedures from Larry Nassar (“Nassar”), an athletic physician for many of the on-campus sports, for decades he was not charged of a crime, and Michigan State’s misconduct was not exposed until recently.⁶⁰ In 2015, a former sexual assault counselor even left Michigan State because she believed reports of sexual assault involving athletes, coaches, or anyone related to the athletic department were being mishandled

⁵⁶ See Arango, *supra* note 7 (blaming university for “actively and deliberately” covering up claims); see also Edmondson, *supra* note 7 (accusing university officials of knowing of abuse and doing nothing to stop it); Murphy, *supra* note 10 (charging former Michigan State University president with lying to school police regarding Nassar’s conduct).

⁵⁷ See, e.g., *Baylor*, 336 F. Supp. 3d at 768–70 (detailing inaction by school to sexual misconduct allegations); *Williams*, 477 F.3d at 1297 (outlining University’s deliberate indifference towards victim’s claims); *Jennings*, 482 F.3d at 701 (showing schools’ mishandling of sexual assault claims); see also Jane Cutler Greenspan, *Recognizing the Benefits of Experienced Mediators on College Campuses*, AM. LAW, https://www.law.com/americanlawyer/native/?mvi=3af5934fd4246bdbbb454885b0d1bef&mvpf=0c7da51a457a43ca85b5a83060fb1c4d&mvplabel=&utm_source=email&utm_medium=enl&utm_campaign=dailypaid&utm_content=20191105&utm_term=ta1 (last visited Nov. 11, 2019) [<https://perma.cc/TLF3-MKL9>] (suggesting mediation for campus Title IX claims to help guide students).

⁵⁸ See Lavigne and Noren, *supra* note 7 (explaining how Michigan State committed wrongdoings in responses to sexual assault claims). Michigan State insisted they complied with the standards for handling such complaints despite trying to withhold athletes’ names and redacted incident reports. *Id.*

⁵⁹ See *id.* (revealing Michigan State’s misconduct). Since 1997, there were claims of sexual assault by Michigan State doctor, Larry Nassar, who was allowed to continue working for the University athletic department despite these complaints. *Id.* Multiple football players were accused of sexual assault or violence in 2007, and there was little to no follow up, nor were there any repercussions for the players. *Id.* Also, in 2010, the men’s basketball team’s assistant coach and two of its players were accused of raping a student. *Id.* Rather than formulating a response, the athletic department, school officials, and campus police failed to act and even suppressed the information they received. *Id.* The assistant coach’s victim spoke to counselors about the rape and filed a report with the athletic department, but nothing was ever reported to police. *Id.* Further, the allegations were never investigated by anyone outside of the athletic department, and the victim was told “there’s not much that can be done to the players.” *Id.* These are merely a portion of the number of Title IX claims that were mishandled by Michigan State. *Id.*

⁶⁰ See *id.* (reporting on allegations of crimes committed by Michigan State).

as it was the athletic director and coaches who were controlling the investigations of these reports.⁶¹

In 2014, there was finally a Title IX investigation into Nassar, but despite a brief suspension, Nassar continued to be employed at Michigan State until 2016 because multiple experts agreed that the medical procedures Nassar conducted did not amount to assault.⁶² For two years, Nassar remained employed at Michigan State while under both criminal and OCR investigation, until a gymnast filed a criminal complaint against him in 2016.⁶³ In addition to other disturbing findings, the investigations discovered that dozens of assault complaints were never reported to federal officials as was required.⁶⁴

In response to OCR's findings, Michigan State committed to reevaluating and changing Title IX staffing, resources, education, and training, and agreed to revisit previous cases.⁶⁵ In addition, for Nassar's admission of guilt to ten counts of first-degree criminal sexual conduct in lawsuits from more than 150 women, including not only Michigan State

⁶¹ See *id.* (recounting counselor's experiences at Michigan State). The counselor spoke with ESPN about the non-transparent reporting and about how students were actually discouraged from seeking resources outside the athletic department to "protect the integrity of the [athletic] programs." *Id.* In addition to the above claims, in 2010, two basketball recruits were accused of raping a student, and though it was reported to campus police, no charges were filed. *Id.* The victim was told that because of the accused's NBA status and previous interviews, her testimony likely would not be strong enough. *Id.* This resulted in protests and an OCR investigation, which revealed that the school had not completed the federally required Title IX investigation into the matter. *Id.* In 2015, OCR released the findings of its formal investigation, which found that Michigan State was in violation of several Title IX procedures, had inadequate policies, and kept incomplete files. *Id.* The report concluded that the school "failed to provide a prompt and equitable response" to the rape victim of the two basketball recruits as mentioned above. *Id.* OCR also released a report summarizing its investigation of the University as a whole, where 150 reports of sexual misconduct made from 2011 to 2014 were examined. *Id.* OCR concluded that there were "significant concerns" regarding the mishandling of approximately twenty percent of these reports. *Id.*

⁶² See *id.* (describing interpretation of Title IX ruling to mean Nassar "cleared of all charges").

⁶³ See Lavigne and Noren, *supra* note 7 (outlining years of abuse and subsequent 'investigations' into Nassar's behavior).

⁶⁴ See *id.* (detailing OCR findings). The OCR investigation found that Michigan State University violated Title IX procedures by "having inadequate policies and keeping incomplete records." *Id.* Michigan State also failed to "promptly investigate" complaints and "operated noncompliant grievance procedures." See *Michigan State University Agrees to Change Its Response to Complaints of Sexual Harassment, Sexual Violence*, U.S. DEP'T OF EDUC. (Sept. 1, 2015), <https://www.ed.gov/news/press-releases/michigan-state-university-agrees-change-its-response-complaints-sexual-harassment-sexual-violence> [https://perma.cc/GAE2-RVAN] (highlighting university's failure to address complaints promptly and equitably allowed "sexually hostile environment" to exist).

⁶⁵ See *Michigan State University Agrees to Change Its Response to Complaints of Sexual Harassment, Sexual Violence*, *supra* note 64 (describing agreement by Michigan State with U.S. Department of Education to make changes).

students, but women on the United States Olympic gymnastics team, Larry Nassar was sentenced to up to 175 years in prison.⁶⁶ The former Michigan State president, Lou Anna Simon (“Simon”), insisted there was never an attempt to cover up these allegations in order to protect the reputation of the school.⁶⁷ Simon also said she resigned because she felt obligated to take the blame due to the incidents being ‘politicized,’ but nevertheless, she was formally charged for lying to police.⁶⁸ Michigan State was also fined \$4.5 million for failing to address the sexual abuse committed by Larry Nassar.⁶⁹ Also, the former Dean of Osteopathic Medicine, William Strampel, was sentenced to a year in jail for his role in the abuse scandal stemming from his conviction of two counts of willful neglect of duty and one count of felony misconduct.⁷⁰

IV. ANALYSIS

“How we deal with survivors who come forward right now is unacceptable, and the way we deal with this unfortunately allows for the continued darkness of this culture to exist[.]”⁷¹ Aside from the actual occurrence of sexual misconduct, the biggest issues regarding schools and sexual assault, as evidenced by the aforementioned cases and incidents, are the mishandling or complete dismissal of claims by colleges and

⁶⁶ See *id.* (discussing Nassar’s sentencing for crimes committed against Michigan State students and Olympic gymnasts).

⁶⁷ See Murphy, *supra* note 10 (describing Michigan State’s president’s resignation).

⁶⁸ See *id.* (reporting on formal charges against Simon). If convicted, Simon faces a maximum of four years in prison. *Id.*; see *Ex-Michigan State President Lou Anna Simon Ordered to Stand Trial*, ESPN (Oct. 28, 2019), https://www.espn.com/college-sports/story/_/id/27952310/ex-michigan-state-president-lou-anna-simon-ordered-stand-trial [<https://perma.cc/GV4V-QYQX>] (stating judge’s finding of probable cause to send Simon to trial). Three school officials have been ordered to stand trial, and Michigan State was ordered to pay a “\$4.5 million fine for failing to adequately respond to complaints against Nassar.” ESPN, *supra* note 68.

⁶⁹ See Colin Dwyer, *Michigan State University to Pay \$4.5 Million Fine Over Larry Nassar Scandal*, NPR (Sept. 5, 2019), <https://www.npr.org/2019/09/05/757909245/michigan-state-university-to-pay-4-5-million-fine-over-larry-nassar-scandal> [<https://perma.cc/99BY-DMNL>] (illustrating reasoning for fine).

⁷⁰ See Elizabeth Joseph and Jason Hanna, *Larry Nassar’s Former Boss at MSU Gets a Year in Jail for Misconduct and Neglect of Duty*, CNN, <https://www.cnn.com/2019/08/07/us/msu-strampel-sentence-nassar/index.html> (last updated Aug. 7, 2019, 2:49 PM) [<https://perma.cc/6KGG-7EK7>] (detailing Strampel’s conviction for sexually assaulting female students and soliciting nude photos from them).

⁷¹ See Reston, *supra* note 7 (highlighting Senator Corey Booker’s response at Senate Judiciary Committee hearing to confirm Brett Kavanaugh).

universities.⁷² School enactment and enforcement of Title IX policies should be required on a state and federal level with penalties and stakes raised to mitigate such mishandling of reports.⁷³ Enacting policies for reporting and investigating sexual misconduct claims should also be required for both public and private schools, regardless of whether Title IX applies to them.⁷⁴ In particular, private schools should develop policies which clearly state that the “school does not tolerate sex discrimination or harassment in any form by anyone” which should include sexual misconduct of any kind.⁷⁵ These policies should be published and distributed to all students, parents, staff, and anyone else associated with the school or who may come into contact with students.⁷⁶

Although the threat of losing funding or portions thereof should be a motivating factor for schools to comply with Title IX, no school has ever lost federal funding due to a Title IX claim.⁷⁷ This further demonstrates the dire need for change and puts into perspective the necessity for reform.⁷⁸ Additionally, action is necessary to address the obstacles inhibiting sexual assault survivors’ willingness or ability to file sexual harassment claims, which contribute to their reluctance to come forward.⁷⁹

“[S]exual assault is a multifaceted issue shaped by broader cultural norms, and tackling sexual assault requires a comprehensive and

⁷² See, e.g., Lavigne and Noren, *supra* note 7 (detailing sexual assault scandal at Michigan State); Edwards, *supra* note 15 (encouraging improvement of reporting standards); O’Neill, *supra* note 17 and accompanying text (describing occurrence of sexual assault on college campuses).

⁷³ See Lavigne and Noren, *supra* note 7 (discussing changes Michigan State agreed to make in response to its wrongdoings); see also Murray, *supra* note 6 (reporting goals of proposed Massachusetts legislation).

⁷⁴ See Dragan, *supra* note 25 (providing guidance and suggested requirements of both public and private schools, regardless of Title IX). In particular, private schools should develop policies which clearly state that the “school does not tolerate sex discrimination or harassment in any form by anyone[,]” which should include sexual misconduct of any kind. *Id.* These policies should be published and distributed to all students, parents, staff, and anyone else associated with the school or who may come into contact with students. *Id.*

⁷⁵ See *id.* (pointing to sexual misconduct policies that schools should adopt).

⁷⁶ See *id.* (explaining how policies should be distributed and circulated among important parties).

⁷⁷ See *Know Your Rights and Your College’s Responsibilities: Title IX and Sexual Assault*, *supra* note 27 (finding no school has lost funding due to violation of Title IX).

⁷⁸ See Edwards, *supra* note 15 (suggesting OCR and Title IX reform); see also James, *supra* note 27 (arguing for “federally codified evidentiary standard for college sexual assault adjudication”).

⁷⁹ See O’Neill, *supra* note 17, at 201 (citing reasons for victims not coming forward, such as fear of retaliation). These reasons include victims being concerned about potential embarrassment, economic concerns, their claims being ignored, and their credibility potentially being questioned. *Id.*; see also *The Criminal Justice System: Statistics*, *supra* note 22 (publishing survey results regarding sexual assault victims not reporting crimes committed against them).

multipronged approach.”⁸⁰ To attempt to solve the current issues of the volume of sexual assault allegations in schools, as well as encourage and increase reporting, action is required from both schools and the government.⁸¹ With the recent expiration of the VAWA and the rescission of Obama-era regulations on sexual assault, the need to address the problems surrounding reporting and handling of claims is more important than ever.⁸² Indeed, the cultural shift around sexual assault and sexual harassment due to the #MeToo movement has pushed the issue even further into the spotlight.⁸³

A. *A ‘Systems Failure’ and How Educational Institutions Must Respond*

The first step toward remedying issues with sexual assault reporting is ensuring that schools are in compliance with Title IX.⁸⁴ Despite many institutions recently creating new roles and policies to address sexual

⁸⁰ See *Sexual Assault in the United States*, *supra* note 34 (emphasizing need for reform through multiple organizations and groups).

⁸¹ See O’Neill *supra* note 17, at 203 (arguing for stricter Title IX policies enforced through schools).

Title IX also has an anti-retaliation provision, which makes it unlawful to retaliate against students who file complaints or “participate in a Title IX investigation, hearing, or proceeding.” Schools must not only take steps to prevent retaliation from occurring in the first place but also respond effectively if retaliation does in fact occur.

Id.; see James, *supra* note 27, at 1341 (reasoning that universal federal standard of evidence is necessary through government action).

⁸² See Thayer, *supra* note 41 (emphasizing need for permanent protections for women from sexual assault due to VAWA expiration); see also Gersen, *supra* note 30 (assessing proposed rules to replace Obama administration guidelines). The Obama administration’s Department of Education threatened to take away federal funding from schools that did not take “measures to prevent and remedy sexual violence among students.” Gersen, *supra* note 30. The Trump administration has rescinded as many as “twenty Obama-era policy guidelines on anti-discrimination laws,” and their currently proposed rules aim to protect the accused rather than victims. *Id.*

⁸³ See Rottenberg and Faughnder, *supra* note 5 (emphasizing evolving culture surrounding sexual misconduct and push towards change throughout United States); see also Pardun, *supra* note 30 (pointing to #MeToo movement as motivating factor to remedy confusion surrounding investigative and evidentiary models).

⁸⁴ See James, *supra* note 27, at 1337–38 (stating surveys’ results of schools’ compliance with Title IX).

[S]urveys have shown that universities failed to properly follow this law. Results from a 2014 study that surveyed 236 universities showed that “41% [of the universities] surveyed had not conducted a single sexual-assault investigation in the past five years” and 21% of the schools investigated fewer incidents than were actually reported.

Id. (second alteration in original).

misconduct, unfortunately many modifications were made in response to Title IX lawsuits and investigations.⁸⁵ For example, Baylor University and Michigan State University were charged with multiple Title IX violations, and only after OCR investigations and court rulings did the schools implement or agree to implement policy changes.⁸⁶ Educational institutions must take a proactive approach to ensure proper reporting standards and enforcement of such are in place.⁸⁷

Higher educational institutions should encourage survivors to speak up, and schools should communicate and proactively educate students of their resources and rights.⁸⁸ The #MeToo movement is a great example of discussing shared experiences, and in turn, motivating others to come forward.⁸⁹ Institutions should also implement a zero-tolerance policy towards sexual misconduct, and schools need to make all students, staff, and parents aware of this policy.⁹⁰ Further, appointed Title IX coordinators must be disinterested, neutral parties, so that there is no bias or efforts to protect schools' reputations or images by covering up or neglecting sexual misconduct claims.⁹¹ Title IX coordinators should likewise oversee athletic recruitment to ensure prospective athletes are not being 'passed' from one

⁸⁵ See *Doe v. Baylor Univ.*, 336 F. Supp. 3d 763, 779 (W.D. Tex. 2018) (stating details of school's Title IX violations); see also Edwards, *supra* note 15, at 127–29 (discussing multiple schools' Title IX investigations and their responses). Harvard Law School and Duke University also only agreed to begin implementing new policies and procedures after a Title IX investigation. Edwards, *supra* note 15, at 127–29; see Lavigne and Noren, *supra* note 7 (noting Michigan State's noncompliance with Title IX and subsequent promise to improve Title IX procedures).

⁸⁶ See *Baylor*, 336 F. Supp. 3d at 779 (highlighting how schools only acted after OCR investigations began).

⁸⁷ See Edwards, *supra* note 15, at 127 (providing examples of schools addressing sexual misconduct without being found in violation of Title IX).

⁸⁸ See O'Neill, *supra* note 17, at 211–12 (discussing what schools can do to better protect students).

⁸⁹ See *id.* (highlighting sharing and talking about instances of sexual misconduct to foster compassion).

⁹⁰ See Dragan, *supra* note 25 (emphasizing need for more student awareness of procedures and policies in private schools). Policies need to be distributed to all students, parents, staff, and anyone associated with the school, and clear supervisory policies should be put into place. *Id.* Private schools should also “identify a person in the school to oversee the prevention, identification, and remediation of sexual [misconduct],” and this person should be knowledgeable about Title IX requirements for public schools. *Id.* This would be a sort of Title IX coordinator, but for private schools. *Id.*

⁹¹ See O'Neill, *supra* note 17, at 210–14 (citing cases where athletes accused of sexual misconduct were investigated by bias Title IX coordinators). “Athletic departments cannot be involved in sexual assault cases involving student-athletes. Bias from athletic departments trying to protect their student-athletes creeps in and goes against best practices on how to handle reports of sexual violence.” *Id.* at 212.

school to another due to sexual misconduct.⁹² For example, regarding the Baylor scandal, multiple football players committed similar sexual violence offenses prior to joining the team, and Baylor allegedly was aware of these allegations and ignored the claims.⁹³

Although Title IX claims are not a possibility for students at private schools that do not receive federal funding, private schools should inform students of how they can pursue a claim through OCR or sue through a breach of contract or negligence suit.⁹⁴ Due to widespread noncompliance with Title IX, state and federal governments should also take initiative in criminalizing failure to comply with certain standards regardless of the institution receiving federal funding or not.⁹⁵

B. Federal Legislation Necessary

As mentioned above, in September 2017, the Trump administration revoked the OCR Dear Colleague Letter that governed and clarified Title IX requirements to ensure student safety, and the VAWA has not been reauthorized since its expiration.⁹⁶ Due to these aforementioned changes by the federal government and interim guidelines by the Department of Education, students are less protected, and these changes indicate a decline in progress for ensuring student safety.⁹⁷

⁹² See O'Neill, *supra* note 17, at 213 (providing examples of schools that did not thoroughly investigate prior allegations of athletic recruits). Schools should investigate whether potential recruits have been accused or charged with prior crimes before accepting a transfer student, and should take appropriate action if they have. *Id.*

⁹³ See *id.* (pointing to how Baylor was aware of previous allegations).

⁹⁴ See Dragan, *supra* note 25 (discussing ways students at schools not receiving federal funding may bring claims against school). A student may sue for breach of contract "if the contract between the private school and parents specifically states or implies that the school will protect students from harm, adequately supervise students, or otherwise assure their protection . . ." *Id.* They may bring a negligence action if the school failed to implement their policies used to address sexual assault. *Id.*

⁹⁵ See Murray, *supra* note 6 (reasoning Massachusetts bill would protect state from changes in federal policies); see also Thayer, *supra* note 41 (emphasizing importance of VAWA reauthorization).

⁹⁶ See O'Neill, *supra* note 17, at 202 (detailing rescission of 2011 OCR Dear Colleague Letter). Before the 2011 letter revocation, "any complaint filed with the school had to be resolved under the preponderance of the evidence standard—any higher standard of proof was not allowed." *Id.* Now, interim guidelines have been issued which allow schools to choose whether to use "the preponderance of the evidence standard or clear and convincing evidence." *Id.*; see Laird, *supra* note 30 (discussing proposed rules which expand rights of accused and narrow which cases must be investigated); Gathright, *supra* note 41 (describing reasons for expiration of VAWA and potential for its reauthorization).

⁹⁷ See Laird, *supra* note 30 (noting problems posed by proposed Department of Education rule); see also Gersen, *supra* note 30 (describing how new rules would protect accused and not

The proposed rules by the Department of Education would not include a universally mandated standard of proof for sexual misconduct claims, thereby making it more likely that a victim may not meet the standard if a higher standard is chosen.⁹⁸ If the rules are put into place, schools would be able to choose a higher standard of proof to use in investigating sexual misconduct, which expands the rights of the accused.⁹⁹ This may discourage survivors from reporting or filing a claim because meeting a higher evidentiary standard adds to the stress of bringing a claim, which could dissuade them from coming forward if they think they do not have enough ‘proof’ and will not be believed.¹⁰⁰

The Trump administration is opposed to the preponderance of the evidence standard because they believe it poses a due process issue as it increases the likelihood of wrongful convictions.¹⁰¹ However, it lessens protection for victims, and if implemented, the rule could then be changed in the future to an even lower standard such as “substantial evidence,” which would be much more likely to violate the due process rights of the accused than the preponderance of the evidence standard.¹⁰²

The standard of proof is not the only colossal change contained in the proposed rules—the Department of Education (“DOE”) has also suggested regressive changes such as: narrowing the types of cases schools

survivors); Thayer, *supra* note 41 (explaining how VAWA reauthorization would protect victims of sexual assault).

⁹⁸ See James, *supra* note 27, at 1353 (highlighting uncertainty that would result from not mandating a universal standard). “Although due process rights advocates argue that a federally codified preponderance of the evidence standard would take away from accused students [sic] rights, the alternative could pose more harm. Uncertainty of a standard that would be universally used on campuses provides inconsistent due process.” *Id.*; see Laird, *supra* note 30 (demonstrating issues with proposed regulations allowing schools to choose standard of proof). Victims are better protected at schools with the preponderance of the evidence standard because this threshold of evidence is lower for victims to prove as opposed to a “clear and convincing evidence” or “beyond a reasonable doubt” standard. Laird, *supra* note 30. A preponderance of the evidence standard requires a finding of “more likely than not” that a sexual assault occurred. *Id.* “The American Association of University Women said the new rules were ‘completely at odds’ with Title IX. ‘Any action that limits recourse for students who experience sexual harassment or assault in schools is flat-out wrong’” *Id.*

⁹⁹ See Laird, *supra* note 30 (discussing results of implementing new rules).

¹⁰⁰ See James, *supra* note 27, at 1336 (advocating for preponderance of evidence standard). “[P]reponderance of the evidence provides a better safeguard for an equitable implementation of rights between the victim and the accused.” *Id.* “Clear and convincing evidence” and “beyond a reasonable doubt” are standards that are reserved for when “grave liberties” or “criminal consequences are at risk.” *Id.* The preponderance of the evidence standard is more appropriate because it is “used in the majority of civil cases and campus sexual assault adjudication is most similar to a civil remedy.” *Id.*

¹⁰¹ See *id.* at 1351 (pointing to reason for Trump administration’s opposition to preponderance of evidence standard).

¹⁰² See *id.* (explaining why preponderance of evidence standard is preferred standard).

must investigate; lessening the standard of specific time limits on investigations to a merely ‘reasonably prompt’ manner; changing the DOE definition of sexual harassment; and allowing for cross-examination of survivors.¹⁰³ These changes would not encourage survivors to come forward and would provide for standards that lessen their rights.¹⁰⁴ Therefore, schools should not be able to choose the standard of proof to use, and the federal government should mandate a preponderance of the evidence standard for all schools, whether or not they receive Title IX funding.¹⁰⁵ The Dear Colleague Letter from 2011 should also be reinstated as its rescission removed the guidance and standards schools once used.¹⁰⁶ The Letter suggested mandating the preponderance of the evidence standard, and should the Letter not be reinstated, a federally mandated standard is necessary.¹⁰⁷

C. State Legislation Essential

Due to the seemingly regressive changes and uncertainty in federal rules concerning sexual misconduct in higher educational institutions, it is essential that states take initiative and implement laws to protect their residents.¹⁰⁸ Currently, in Massachusetts, the fine for mandated reporters’ failing to report sexual misconduct is a seemingly low maximum of \$1,000.¹⁰⁹ Massachusetts and other states should enact a higher fine to incentivize and encourage mandatory reporters to file reports when they are required to.¹¹⁰ Creating financial incentives for institutions that accurately

¹⁰³ See Laird, *supra* note 30 (explaining how narrowed definition of sexual harassment decreases number of cases that schools must investigate). The sexual harassment definition would be contracted from “unwelcome conduct of a sexual nature” to “unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it denies a person access to the school’s educational program or activity.” *Id.* This proposed definition would decrease the scope of conduct covered by the rules and provide for a stricter standard, which the conduct must reach. *Id.* This would cause less reporting and discourage victims from reporting misconduct if they are uncertain whether it meets that standard. *Id.*

¹⁰⁴ See *id.* (explaining proposed rules’ restrictions on victims). For example, “only allegations reported to designated administrators” would be “required to be investigated.” *Id.*

¹⁰⁵ See James, *supra* note 27, at 1336 (encouraging federally codified preponderance of evidence standard). Sexual assault will persist, and new consequences will arise without a codified evidentiary standard. *Id.* at 1323.

¹⁰⁶ See *id.* at 1329 (showing repercussions of 2011 OCR letter rescission).

¹⁰⁷ See *id.* (explaining how OCR letter recommendations should be reinstated or incorporated into federal legislation).

¹⁰⁸ See Murray, *supra* note 6 (explaining need for new Massachusetts legislation in event of federal policy changes).

¹⁰⁹ See Warkov, *supra* note 26 (emphasizing maximum fine in Massachusetts when mandated reporters fail to report).

¹¹⁰ See *id.* (highlighting monetary incentive).

report and imposing serious penalties for non-reporting institutions will help mitigate the underreporting problem surrounding sexual assault.¹¹¹

A proposed Massachusetts bill, S. 2203, required public and private institutions to have procedures in place for reporting sexual misconduct, domestic violence, and other forms of misconduct, regardless of their government funding.¹¹² The bill's objective was to ensure higher education institutions adopt sexual misconduct policies in coordination with Title IX and to "require schools to provide students with information on the number of allegations of sexual violence on campus, their rights, and where to receive emergency assistance and support services."¹¹³ Although the bill passed in the bipartisan Senate, it was referred to the House Ways and Means Committee, and no action was subsequently taken.¹¹⁴ The proposed bill was a preemptive attempt to protect the state from proposed federal policy changes that lessen protections and resources for survivors and is an exemplary model of important factors to consider in drafting sexual assault legislation applicable to higher educational institutions.¹¹⁵ Fortunately, many states have taken successful steps to ensure fair Title IX investigations and adjudication, but many more need to take action.¹¹⁶

¹¹¹ See Durso Law, *supra* note 19 (highlighting need for serious penalties for non-reporting of sexual misconduct).

¹¹² See S.2203, 190th Leg. (Mass. 2017–2018) (reciting language of proposed bill); see also Murray, *supra* note 6 (outlining requirements of Massachusetts bill proposed by State Senator, Michael Moore).

¹¹³ See Murray, *supra* note 6 (discussing goals of legislation). The bill would have influenced students to take legal actions, rather than schools merely handling the claims administratively, and it would have also required training and educational programs at schools. *Id.*

¹¹⁴ See S.2203, 190th Leg. (Mass. 2017–2018) (displaying legislature trajectory). The bill unanimously passed in a roll call vote in the Senate; however, no further action was taken by the House. *Id.*

¹¹⁵ See Murray, *supra* note 6 (highlighting purpose of bill); see also *Other Legal Issues in Sexual Assault Cases*, UN WOMEN, <https://www.endvawnow.org/en/articles/23-other-legal-issues-in-sexual-assault-cases.html> (last updated Oct. 29, 2010) [<https://perma.cc/CR4X-4QLP>] (suggesting how to draft legislature that will implement laws on sexual assault). It is encouraged, among many other suggestions, that sexual assault legislation should contain core elements such as a clear definition of sexual assault, "prohibition of mitigating factors," and a "provision for mandatory investigation of sexual assault." *Other Legal Issues in Sexual Assault Cases*, *supra* note 115.

¹¹⁶ See *Know Your Rights and Your College's Responsibilities: Title IX and Sexual Assault*, *supra* note 27 (highlighting states that have enacted legislation protecting victims of sexual assault).

In 2007 the New Jersey Supreme Court, applying the New Jersey Law Against Discrimination, ruled that a school will be liable when it "knew or should have known" about student sexual harassment, but "failed to take action reasonably calculated to end the harassment." Other states have similar laws, including the Florida Education Equity Act, the Rhode Island Civil Rights Act of 1990, the Maine Human Rights Act, the Minnesota Human Rights Act, and the Washington Law Against Discrimination.

Id.

V. CONCLUSION

Advocacy for sexual assault reform has been brought to the forefront in recent years, in part due to the #MeToo movement and regressive policy changes by the Trump administration. Currently, the support on college campuses surrounding sexual assault and the #MeToo movement signifies a clear need for legislative and institutional action. The victims of sexual misconduct on college campuses need to be protected by their schools and the United States' state and federal governments.

With the #MeToo movement bringing light to the sexual assault epidemic in the United States, there has been a shift in cultural norms surrounding the issue, and this change is a major step forward. However, school policies must change, and state and federal legislators must take action to address this public health issue. All states should be protecting their residents, especially students, through human rights, civil rights, and anti-discrimination legislation, and also in adjudicating state law cases. There has never been a better time than now to advocate for this reform, and there is hope that one day the sexual assault epidemic in America, specifically in educational institutions, will be a thing of the past. With the proper mandatory policies in place for colleges and strict federal and state legislation, this can happen.

Aubrey Trudeau