A Title IX Conundrum: Are Campus Visitors Protected from Sexual Assault?

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ABSTRACT: Sexual violence is a significant and longstanding problem on college campuses that has been made even more visible by recent media attention to the #MeToo movement. Title IX of the Education Amendments of 1972 addresses discrimination (including sexual violence) that impedes access to education; the law demands compliance from federally funded schools related to their prevention of and response to this problem. The U.S. Supreme Court has interpreted the law to contain an implied private right of action that can be brought against a school for its deliberate indifference to severe and pervasive sex discrimination about which it has knowledge. However, over the past several years, a handful of courts in the United States have rendered opinions that have defined, and effectively narrowed, the class of individuals who are entitled to protection under Title IX. These cases create two separate classes of individuals with different rights: students and non-students, or put another way, insiders and outsiders. This Article seeks to add to the ongoing and complex Title IX conversation by exposing a novel, yet very real conundrum: To whom does Title IX apply? Should universities extend greater safety protections to those who are officially a part of an institution like students, faculty or staff, as opposed to those who are not? Are non-students and other individuals who temporarily interact within the university context simply left out of the spectrum of Title IX protections? What sort of campus safety dynamic exists if certain classes of victims are denied access to Title IX? After extensive analysis, this Article ultimately concludes that facilitating safer campus communities likely demands an extension of Title IX rights to those individuals who participate in campus life, regardless of their official connection to the university.

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I. INTRODUCTION

Dr. Larry Nassar, an osteopathic physician at Michigan State University ("MSU"), was convicted of sexually abusing numerous young girls, college students, gymnasts and other athletes over the course of his decades-long medical career.[1] The extent and magnitude of the abuse perpetrated by Nassar is unprecedented.[2] As the physician served the first days of a 40–175

1. Carla Correa & Meghan Louttit, *More Than 160 Women Say Larry Nassar Sexually Abused Them. Here Are His Accusers in Their Own Words*, N.Y. TIMES (Jan. 24, 2018), https://www.nytimes.com/interactive/2018/01/24/sports/larry-nassar-victims.html.

2. *Id.*

year sentence,[3] lawyers representing the victims filed civil lawsuits against MSU on a number of grounds, including allegations that the university violated Title IX of the Education Amendments of 1972, the federal civil rights law that addresses sex discrimination in federally funded education programs.[4] The law provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[5] The damages suits brought against MSU alleged that the university had knowledge of, and acted with deliberate indifference to an ongoing pattern of sexual violence perpetrated by the employee doctor.[6]

As a threshold matter in these civil cases, lawyers defending MSU argued that the girls and women who were violated by the physician should be divided into two discrete groups—students and non-students—for purposes of determining who has the right to access the protections of Title IX.[7] At the crux of this argument, which is supported by the holdings in recent, but admittedly limited judicial opinions, is the idea that non-students who experience the same kinds of harm as those who were actually enrolled at the school lack standing to sue the university for money damages under Title IX.[8] It is on these grounds that the MSU lawyers asked the court to dismiss the cases brought by the non-students.[9] The net effect of this motion to dismiss, if granted, would have been to deny access to the civil legal system, at least *vis-a-vis* Title IX, to numerous sexual assault victims. However, months after the filing of these lawsuits, MSU agreed to a five hundred-million-dollar settlement with 332 victims.[10] While a win for the victims, at least insofar as receiving monetary relief for the egregious harms they experienced, and

3. Zach Schonbrun & Christine Hauser, *Larry Nassar, Sentenced in Sexual Abuse Case, Is Back in Court*, N.Y. TIMES (Jan. 31, 2018), https://www.nytimes.com/2018/01/31/sports/larry-nassar-sentencing.html. Nassar was separately convicted on child pornography charges, for which he was sentenced to 60 years in prison. *Id.*

4. *See* First Amended Complaint, John F1 Doe *ex rel.* Jane F1 Doe v. Michigan State Univ., 2017 WL 4679022 (W.D. Mich. Aug. 24, 2017) (No. 1:17-cv-00029-GJQ-ESC), 2017 WL 4679022, at *13.

5. 20 U.S.C. § 1681(a) (2012).

6. *Id.*

7. *See, e.g.*, Brief in Support of Joint Omnibus Motion to Dismiss of Defendants at 22–24, Denhollander v. Mich. State Univ., 2018 WL 580692 (W.D. Mich. 2018) (No. 1:17-cv-00029-GJQ-ESC), 2018 WL 580692 [hereinafter Joint Omnibus Brief].

8. *See* Doe v. Brown Univ., 270 F. Supp. 3d 556, 560 (D.R.I. 2017), *aff'd*, Doe v. Brown Univ., 896 F.3d 127, 128 (1st Cir. 2018); K.T. v. Culver-Stockton Coll., No. 4:16-CV-165, 2016 WL 4243965, at *1, *aff'd*, K.T. v. Culver-Stockton Coll., 865 F.3d 1054 (8th Cir. 2017).

9. Joint Omnibus Brief, *supra* note 7, at 22–24.

10. Mitch Smith & Anemona Hartocollis, *Michigan State's $500 Million for Nassar Victims Dwarfs Other Settlements*, N.Y. TIMES (May 16, 2018), https://www.nytimes.com/2018/05/16/us/larry-nassar-michigan-state-settlement.html. The settlement by Michigan State, a public university that is the state's largest, also sent a loud warning to other colleges about the potentially devastating cost of ignoring misconduct. *Id.*

avoiding lengthy litigation proceedings, the settlement nonetheless precluded the opportunity for a court to weigh in on the non-student standing issue.

Recently, however, two federal district courts have ruled on point and their holdings have begun to refine the definition of the class of individuals entitled to protection from sex discrimination under Title IX.[11] Specifically, *Doe v. Brown University* and *K.T. v. Culver-Stockton College* precluded non-students from bringing successful Title IX claims for money damages under a theory of the schools' deliberate indifference to their allegations of sexual abuse.[12] These decisions, both of which were affirmed by the First and Eighth Circuit Courts, respectively, appear to represent an emerging development in the evolution of Title IX jurisprudence.

Title IX was designed to ensure equal access to education.[13] Subsequent to the passage of this federal law, a series of U.S. Supreme Court cases defined the parameters of institutional liability.[14] These cases complement the Department of Education's Office for Civil Rights' regulations that clarify the requirements Title IX imposes on schools.[15] What remains unclear despite this legislative, judicial, and administrative guidance, however, is whether an individual must be a student or official member of a particular institution where the discrimination takes place to benefit from protection of the statute and ultimately have standing to sue a school for its alleged deliberate indifference under Title IX. At the core of this question is how to determine if someone belongs—are they an insider or outsider—for purposes of securing the protection of this federal law.

At a recent faculty talk, a respected colleague shared a story that illustrates the impact of the status differential at issue in these cases. He recalled a college party that took place at the liberal arts school he attended decades earlier.[16] At the end of a drunken evening, a girl from a neighboring school, known to none of the partygoers before they met that evening, passed out on the couch.[17] Unable to wake her, and afraid she might be at risk of serious harm, the students, for lack of alternatives, called a psychology professor (whose number they happened to have on hand) to help deal with the stranger who they feared was in peril.[18] The professor inquired of the students who this girl was and what they wanted him to do; they reacted

11. *See* 20 U.S.C. § 1681(a).

12. *Doe*, 270 F. Supp. 3d at 564; *K.T.*, 2016 WL 4243965, at *11.

13. *See* 20 U.S.C. § 1681.

14. For a comprehensive overview of Title IX Supreme Court Jurisprudence, see generally Gabrielle Fromer et al., *Sexual Harassment in Education*, 17 GEO. J. GENDER & L. 451 (2016).

15. *See Reading Room*, U.S. DEP'T EDUC., https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/readingroom.html (last visited Aug. 24, 2018).

16. California Western School of Law Cocktail Napkin Research Presentation Series (February 13, 2018) (on file with author).

17. *Id.*

18. *Id.*

detachedly and with indifference, stating "she's not one of us."[19] Fortunately for the young woman, the good professor's opinion differed. He replied to the students, "though that might at one point have been true . . . she belongs now; she is one of you," and then treated her reaction to mixing alcohol and Quaaludes with kind attention before dropping her off at home later that morning.[20]

In this same way, individuals who are non-students at a given university sometimes find themselves in a setting where they may not technically "belong," at least insofar as being officially enrolled at the school. But because of the circumstances in which they find themselves—seeking help from a university physician, visiting a library, attending a performance on campus, delivering a guest lecture, participating in a sport recruiting event—their status inevitably shifts from outsider to insider. When this happens, are these individuals not entitled to the same protections and rights as others who might "belong" more officially to the institution? Is their presence on campus, even temporarily, not enough to trigger protection under Title IX? Because colleges and universities have become less insular and more open in a variety of contexts to a wide-range of individuals—some of whom lack official connection to the school[21]—the question of institutional accountability and liability to this "outsider" class becomes increasingly relevant.

In the most obvious and narrow expression of their purpose, colleges and universities exist to educate their enrolled students. But this education is accomplished by engagement with those both within and outside of the institutions and their mission therefore deserves a more expansive definition. To illustrate, consider Stanford University, which prominently and proudly highlights on its website that it welcomes 150,000 visitors annually onto the campus.[22] Harvard University's Information Center describes itself in this way: "Established in 1962, we meet and greet visitors from all over the world."[23] And the University of Iowa's website, like many other schools, includes "visitors" as a separate section of its website alongside students, faculty/staff, and parents.[24]

If the promotion of safe campus communities is a priority, and the extension of the right to be free from discrimination in accessing the offerings of a university a goal of federal law, it seems irrelevant, discriminatory, and at odds with Title IX to distinguish among the "kind" of victim who is entitled to protection. After all, when sexual violence is allowed to proliferate on campus,

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19. *Id.*

20. *Id.*

21. *See* Hannah Brenner & Kathleen Darcy, *Toward a Civilized System of Justice: Re-conceptualizing the Response to Sexual Violence in Higher Education*, 102 CORNELL L. REV. ONLINE 127, 131 (2017).

22. *About Stanford*, STAN. U., https://www.stanford.edu/about (last visited Aug. 24, 2018).

23. *Visit Harvard*, HARV. U., https://www.harvard.edu/on-campus/visit-harvard (last visited Aug. 24, 2018).

24. *Visitors*, U. IOWA, https://uiowa.edu/visitors (last visited Aug. 24, 2018).

the entire community of students, faculty, and staff is affected.[25] Although the MSU case did not provide a judicially imposed answer to this question of non-student standing, the terms of the settlement apply to all of Dr. Nassar's victims regardless of their enrolled student status. The outcome is consistent with the spirit of Title IX and illustrates the importance of making the federal civil rights law available to all those who engage with campus communities.

This Article seeks to add to the ongoing and complex Title IX conversation by exposing a novel, yet very real conundrum: *To whom* does Title IX apply? Should students who are officially enrolled in an institution be provided different protections than those who are not? Are non-students who interact within the university context simply left out of the spectrum of Title IX protections? And what sort of campus safety dynamic is created if we distinguish between victims when extending protections of the federal law? A Westlaw search of law review articles with "Title IX" as a keyword revealed 3,260 articles,[26] and as a word in the title revealed 1,664 articles.[27] Despite the popularity of the topic, none of these articles address these important questions. The issue of non-student standing is a threshold inquiry that requires resolution before a court can rule on the merits of a claim and is the primary focus of this Article.[28]

Part II of this Article will provide a brief overview of Title IX and its history. Part III will set forth the problem of sexual violence in higher education generally and then will consider how this problem is exacerbated by the context and setting of a quasi-closed institutional system. Part IV will expose the conundrum of who is entitled to protection under Title IX, relying on a framework of incomplete rights. This Part will further explore the relevance of Title IX as a tool for those who experience sex discrimination on campus. Part V will review the lower court cases that have addressed the issue of non-students accessing the protections of Title IX and will also explore the respective circuit court cases that have followed. Part VI will present some theories that support resolution of this Title IX conundrum and will

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25. *See generally* Victoria L. Banyard et al., *Academic Correlates of Unwanted Sexual Contact, Intercourse, Stalking, and Intimate Partner Violence: An Understudied but Important Consequence for College Students*, J. INTERPERSONAL VIOLENCE (forthcoming) (revealing how sexual violence on campus impacts academic performance).

26. *Westlaw*, THOMSON REUTERS, https://1.next.westlaw.com (search for "Title IX" in search bar; then select "Secondary Sources" from left side bar; then narrow selection to "Law Reviews & Journals") (last visited Aug. 24, 2018).

27. *Westlaw*, THOMSON REUTERS, https://1.next.westlaw.com (click "Advanced" to the right of the search bar; in the "Name/Title" box within the "Document Fields" section, type "Title IX" and click the search button; then select "Secondary Sources" from left side bar; then narrow selection to "Law Reviews & Journals") (last visited Aug. 24, 2018).

28. This Article does not seek to opine on the merits of specific cases or whether plaintiffs have or have not satisfied the legal standards required to successfully litigate a Title IX deliberate indifference claim. While beyond the scope of this Article, there is an extensive scholarly literature on these issues. *See, e.g.*, David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 222–26 (2005).

ultimately conclude that creating safer campus communities likely demands an extension of rights to all the individuals who participate in campus life.

II. TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

Congress initially passed Title IX of the Education Amendments of 1972 out of concern for discrimination based on sex in higher education programs in receipt of federal funds.[29] The purpose of the statute was defined by one court in this way: "Title IX's statutory language expressly provides a single avenue for relief from gender discrimination occurring in educational programs in schools: an expansive administrative enforcement process that hinges federal funding on compliance with a nondiscriminatory mandate."[30]

On its face, the Title IX statute reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[31] Analyzing the plain language of the Title IX statute makes obvious many aspects of the law. Breaking it down into its simplest form, Title IX demands that "no person" should be "subjected to discrimination" when they are engaged in an "education program or activity" of an institution of higher education that receives federal funding. However, the statute on its face is silent (as is the accompanying guidance promulgated by the Office for Civil Rights and related Supreme Court jurisprudence) as to the question of whether a non-student who experiences discrimination is entitled to sue a university for sex discrimination perpetuated by a student, faculty, or staff member who is enrolled at or employed by that institution. Further, there is little, if any, guidance on this question found in the legislative history surrounding the statute's passage.

Title IX was originally sponsored by Senator Birch Bayh and Representative Edith Green. According to Senator Bayh, the purpose of the amendment was to address "the continuation of corrosive and unjustified discrimination against women" in "the American educational system."[32] Title IX, as it was originally created, was modeled after notions of equality inherent in Title VII of the Civil Rights Act of 1964; both laws share a common purpose: "to ensure that public funds derived from all the people are not

29. Fromer et al., *supra* note 14, at 452 ("Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit discrimination on the basis of sex, including sexual harassment, in educational programs or activities operated by recipients of federal financial assistance." (footnotes omitted)).

30. Doe v. Brown Univ., 270 F. Supp. 3d 556, 560 (D.R.I. 2017).

31. 20 U.S.C. § 1681(a) (2012).

32. 118 CONG. REC. 5803 (1972) (statement of Senator Bayh).

utilized in ways that encourage, subsidize, permit, or result in prohibited discrimination against some of the people."[33]

In making the case for the new law, Senator Bayh drew connections between the importance of education and the ability of women to thrive and be successful in the world. He reasoned:

> The field of education is just one of many areas where differential treatment has been documented; but because education provides access to jobs and financial security, discrimination here is doubly destructive for women. Therefore, a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.[34]

At the time of its passage, the statute responded to a growing concern about *access* to education for women. To this end, Senator Bayh lamented, "[b]ut the simple, if unpleasant, truth is that we still do not have in law the essential guarantees of equal opportunity in education for men and women."[35] Senator Bayh identified three different ways that discrimination might manifest in an institution of higher education that the Title IX amendment could address. He clarified, "[w]e are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever."[36]

In its original incarnation, the statute was seen as somewhat of a companion to both Title VI,[37] which prohibits racial discrimination by institutions in receipt of federal funding, and Title VII,[38] which prohibits discrimination in the context of employment. Although the language of Title IX did not specifically or explicitly reveal an intention to cover sexual harassment, there was judicial recognition of its extension to these issues as early as 1977.[39] Congress subsequently amended Title IX in 1987 with the

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33. *Title IX Legal Manual: Discriminatory Conduct*, JUSTIA, https://www.justia.com/education/docs/title-ix-legal-manual/discriminatory-conduct (last visited Aug. 24, 2018).

34. 118 CONG. REC. 5804 (1972) (statement of Senator Bayh).

35. *Id.* at 5808.

36. *Id.* at 5812.

37. *See* 42 U.S.C. § 2000a(a) (2012) (prohibiting discrimination based on race, providing that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin").

38. *Id.* § 2000e-2(a)(1) (providing that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

39. *See* Alexander v. Yale Univ., 631 F.2d 178, 184 (2d Cir. 1980) (acknowledging that deprivation of educational benefits resulting from acts "removed from the ordinary educational

passage of the Civil Rights Restoration Act of 1987.[40] The Act, which overturned the Supreme Court's decision in *Grove City College v. Bell*,[41] clarified that the phrase "program or activity" should be broadly construed and in fact encompassed the entirety of an institution: "[T]he term 'program or activity' and 'program' mean all the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education."[42]

Several years after Congress passed the Civil Rights Restoration Act, the Supreme Court held in *Franklin v. Gwinnett County School Board* that the Title IX statute included a private right of action in cases of sexual harassment even though the statute was silent to this effect on its face.[43] The court held "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."[44] The specific impact of *Franklin* is explained by Attorney Emmalena Quesada: "*Franklin* is significant not only because the Court awarded damages in an implied rights [sic] of action, but also because it protects students from sexual harassment within the scope of prohibiting sex discrimination in educational programs that receive federal funding."[45]

In 1997, the Office for Civil Rights published guidelines to further define the parameters of Title IX[46] and later revised those guidelines in 2001.[47] Over the intervening years, the Department of Education ("DoE") created various additional guidance in the form of a series of "Dear Colleague" letters.[48] These guidelines, which have evolved over time, direct schools on how to address sex discrimination on campus including the creation of policies, investigative procedures, and prevention strategies.

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process," such as sexual harassment, can lead to "palpable injuries" redressable by law; the court went on to say that such deprivations require more detailed allegations of injuries).

40. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended at 20 U.S.C. § 1687).

41. Grove City Coll. v. Bell, 465 U.S. 555, 576 (1984).

42. 20 U.S.C. § 1687(2)(A).

43. Franklin v. Gwinnett Cty. Pub. Schs., 503 U.S. 60, 75 (1992) (holding that sexual harassment of a student is discrimination on the basis of sex that is in violation of Title IX).

44. *Id.* at 70–71. Unless Congress has specifically indicated otherwise, "the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Id.*

45. Emmalena K. Quesada, *Innocent Kiss or Potential Legal Nightmare: Peer Sexual Harassment and the Standard for School Liability Under Title IX*, 83 CORNELL L. REV. 1014, 1025 (1998).

46. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13, 1997).

47. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html#Guidance.

48. *See, e.g.*, Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Colleagues (Apr. 4, 2011) [hereinafter 2011 DCL], http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

Under the current administration in the DoE overseen by Education Secretary DeVos, significant changes to these guidelines have occured *vis-à-vis* a rollback of many of the provisions included in the 2011 "Dear Colleague" Letter. These changes, which address issues like evidentiary standards and timelines for investigations, are temporary and will be subject to further clarification at some point in 2018.[49]

III. SEXUAL VIOLENCE IN THE QUASI-CLOSED INSTITUTIONAL SETTING OF HIGHER EDUCATION

Sexual violence[50] occurs across all sectors of society.[51] It reaches into Congress,[52] Hollywood,[53] the legal profession,[54] media,[55] prisons,[56] politics,[57]

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49. *See generally* U.S. DEP'T EDUC., OFFICE FOR CIVIL RIGHTS, Q&A ON CAMPUS SEXUAL MISCONDUCT (2017) [hereinafter Q&A], https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf (addressing questions related to a school's handling of allegations of sexual misconduct). For a full discussion of these Title IX policies and procedures see *infra* Part IV.

50. I choose, with intention, to use the term sexual violence in this Article (and in all of my scholarship) to refer to a continuum of behavior that includes, but is not limited to, sexual harassment and rape. Notably, the recent revisions to Title IX guidelines promulgated under the leadership of Secretary of Education Betsy DeVos include a shift in language used by previous administrations from "sexual violence" to "sexual misconduct." This shift could be interpreted to downplay the seriousness of what is occurring on college campuses. The earlier OCR definition of sexual violence

> refers to 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. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.

2011 DCL, *supra* note 48, at 1–2.

51. Sarah Almukhtar et al., *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. TIMES (Feb. 8, 2018), https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html.

52. *See, e.g.*, Heidi M. Przybyla, *A List: Members of Congress Facing Sexual Misconduct Allegations*, USA TODAY (Dec. 6, 2017, 12:39 PM), https://www.usatoday.com/story/news/politics/2017/12/05/list-members-congress-facing-sexual-misconduct-allegations/923484001.

53. *See, e.g.*, Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 23, 2017), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories.

54. *See, e.g.*, Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html.

55. *See, e.g.*, Ellen Gabler et al., *NBC Fires Matt Lauer, the Face of 'Today,'* N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/business/media/nbc-matt-lauer.html.

56. *See, e.g.*, Allen J. Beck et al., *Sexual Victimization in Prisons and Jails Reported By Inmates, 2011-12-Update*, BUREAU JUST. STAT. (Dec. 9, 2014), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4654.

57. *See, e.g.*, *Politicians Accused of Sexual Harassment or Assault*, N.Y. DAILY NEWS (Jan. 25, 2018, 10:06 PM), http://www.nydailynews.com/news/politicians-accused-sexual-harassment-assault-gallery-1.3637822.

the military,[58] and of course, higher education.[59] Its prevalence results in characterization of the world in which we live as a "rape culture."[60] Perhaps never before have the voices of victims of sexual violence been so loud, powerful, and strong as they are now, against the backdrop of the movement widely known as #MeToo, in which victims have come forward in droves to share their stories publicly.[61]

Some of these settings in which sexual violence occurs bear special characteristics that argue for classification as closed, or quasi-closed systems, which sets them apart from the broader community.[62] This distinction matters because the context shapes the experiences of survivors of sexual violence as it relates to the reporting, investigation, and related adjudication of complaints.

A. PREVALENCE AND DYNAMICS

Research on the prevalence of sexual violence on college campuses reveals that it is a widespread and regularly occurring problem. The National Sexual Violence Sexual Resource Center reports that as many as one in five women and one in 16 men are raped during college.[63] In fact, it is during the college years that a woman in college is more likely to be a victim of rape or attempted rape compared to the time before she enters college.[64] Members of the lesbian, gay, bisexual, and transgender ("LGBT") community are at an even greater risk.[65] These numbers tell only part of the story, as it is well

58. *See, e.g.*, Craig Whitlock, *How the Military Handles Sexual Assault Cases Behind Closed Doors*, WASH. POST (Sept. 30, 2017), https://www.washingtonpost.com/investigations/how-the-military-handles-sexual-assault-cases-behind-closed-doors/2017/09/30/a9df0682-672a-11e7-a1d7-9a32c91c6f40_story.html.

59. *See, e.g.*, Nell Gluckman et al., *Sexual Harassment and Assault in Higher Ed: What's Happened Since Weinstein*, CHRON. HIGHER EDUC. (Jan. 10, 2018, 7:15 PM), https://www.chronicle.com/article/Tracking-Higher-Ed-s-MeToo/241757.

60. For a wide-ranging discussion of rape culture, see generally TRANSFORMING A RAPE CULTURE (Emilie Buchwald et al. eds., 1993).

61. Jessica Bennett, Editorial, *The #MeToo Moment: No Longer Complicit*, N.Y. TIMES (Dec. 7, 2017), https://www.nytimes.com/2017/12/07/us/the-metoo-moment-no-longer-complicit.html.

62. Brenner & Darcy, *supra* note 21, at 129–32.

63. CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 5-1, 5-5 (Oct. 2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf; NAT'L SEXUAL VIOLENCE RES. CTR., STATISTICS ABOUT SEXUAL VIOLENCE (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf.

64. KREBS ET AL., *supra* note 63, at 6-1.

65. *Sexual Assault and the LGBT Community*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/resources/sexual-assault-and-the-lgbt-community (last visited Aug. 24, 2018) ("46 percent of bisexual women have been raped, compared to 17 percent of heterosexual women and 13 percent of lesbians . . . 22 percent of bisexual women have been raped by an intimate partner, compared to 9 percent of heterosexual women . . . 47% of transgender people are sexually assaulted at some point in their lifetime.").

known that sexual violence occurs across all sectors of society and is widely underreported.[66]

Simply reporting the statistics surrounding sexual violence on campuses, however, without more, fails to provide an accurate depiction of the culture and context in which such violence occurs.

Statistics do not describe who the victims are, or they ways in which sexual violence takes place. It is easy to simply dismiss the campus sexual abuse problem as one involving isolated incidents of date rape between students. To combat this tendency, it is imperative to develop a complete picture of the kinds of incidents that occur, including the status of the respective parties involved. As but one example, Professor Nancy Chi Cantalupo and Research Associate William Kidder compellingly provide a comprehensive and novel study of faculty on student (and specifically graduate student) sexual harassment that exposes a nuanced dimension of sexual harassment not previously understood or reported. [67]

Other scholars' research dispels the myth that reported incidents of sexual violence are nothing more than isolated dating situations gone wrong. As but one example, Professor Diane Rosenfeld highlights the phenomenon of intentional and calculated "target rapes" as

> cases where males ally together in sexual pursuit of females not only regardless of the female's sexual desire, but often in deliberate violation of it. Male-only exclusive spaces, such as fraternities or athletic teams, often serve as breeding grounds for the transmission of misogynistic attitudes that contribute to a sexual culture on campus that devalues women.[68]

Rosenfeld's perspective suggests that at least in some contexts, there is a deliberate and intentional dimension to sexual violence.

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66. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T JUST., EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 33 (2006), https://www.ncjrs.gov/pdffiles1/nij/210346.pdf ("Only 19.1 percent of the women and 12.9 percent of the men who were raped since their 18th birthday said their rape was reported to the police."); Eliza A. Lehner, Note, *Rape Process Templates: A Hidden Cause of the Underreporting of Rape*, 29 YALE J.L. & FEMINISM 207, 209 (2017) ("[F]ewer than a third of [rape] victims—somewhere between 5% and 33%—report their rape to the police."); *see also* Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671, 683–84 (2018) ("[T]hat sexual harassment is a significant and consistently underreported problem, whether on a campus or not, is well-established."); Gina Maisto Smith & Leslie M. Gomez, *The Regional Center for Investigation and Adjudication: A Proposed Solution to the Challenges of Title IX Investigations in Higher Education*, DISPUTE RESOLUTION MAGAZINE, Spring 2016, at 27, 29 ("There is significant underreporting and delayed reporting, both on college campuses and in society at large, and delays in reporting can result in the loss of whatever physical or other forensic evidence may have been available shortly after the incident.").

67. *See generally* Cantalupo & Kidder, *supra* note 66 (analyzing media reports, lawsuits and civil right investigations).

68. Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 HARV. L. REV. F. 359, 372–73 (2015).

It is also evident from recent headlines that incidents of sexual violence sometimes occur in unexpected places on college campuses. As noted earlier, Michigan State University, one of the nation's largest public universities, has been the site of a massive sex abuse scandal involving not a student or faculty perpetrator, but a university physician. Dr. Nassar worked for Michigan State University's Sports Medicine Clinic for decades.[69] He was recently convicted and sentenced to prison for sexually abusing literally hundreds of community members, students, and student athletes under the guise of providing "legitimate" medical treatment.[70]

Research also reveals that the athletic culture on all campuses appears to further increase the risk of sexual violence. "[I]t is not just elite athletes in big-time athletic programs who are at an elevated risk of engaging in sexual misconduct; athletes participating at lower levels of organized college sport[s] are also at higher risk."[71] In a recent study, 54% of male athletes reported they perpetrated sexual coercion, as opposed to 38% of those who were not athletes.[72] Further, one's participation in a school's athletic program can impact the outcome of sexual assault complaints. "Cases currently pending may reveal instances where sexual assailants have been falsely exonerated or insufficiently punished because of their connection to important school sports teams."[73] Sometimes, such incidents are never formally reported.[74]

These limited examples illustrate how the reach of Title IX as it was perhaps initially contemplated is deserving of clarification and revision because sexual violence occurs in a wide range of contexts, many of which are unanticipated. If at the core of this federal law is the goal of addressing the widespread problem of sex discrimination, including all forms of sexual violence on campus, it is imperative to first develop an understanding of

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69. Christine Hauser & Maggie Astor, *The Larry Nassar Case: What Happened and How the Fallout is Spreading*, N.Y. TIMES (Jan. 25, 2018), https://www.nytimes.com/2018/01/25/sports/larry-nassar-gymnastics-abuse.html. Michigan State is not the only university where sexual violence occurred in this type of setting. Allegations against physicians at both Ohio State and USC reveal similar patterns. 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; Harriet Ryan et al., *A USC Doctor Was Accused of Bad Behavior with Young Women for Years. The University Let Him Continue Treating Students*, L.A. TIMES (May 16, 2008), http://www.latimes.com/local/california/la-me-usc-doctor-misconduct-complaints-20180515-story.html.

70. *See* Hauser & Astor, *supra* note 69.

71. Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 109, 119 (2017).

72. Belinda-Rose Young et al., *Sexual Coercion Practices Among Undergraduate Male Recreational Athletes, Intercollegiate Athletes, and Non-Athletes*, 23 VIOLENCE AGAINST WOMEN 795, 804 (2017).

73. Jed Rubenfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, 96 TEX. L. REV. 15, 58 (2017).

74. Samantha Schmidt, *Student Accuses 3 Michigan State Basketball Players of Raping Her in 2015*, WASH. POST (Apr. 10, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/04/10/student-sues-michigan-state-accusing-3-basketball-players-of-raping-her.

institutional context and then refine federal guidelines and related jurisprudence to ensure access to justice for those deserving of the law's protection.

B. THE STATUS OF INSTITUTIONS

The concepts of closed systems or "total institutions" are originally attributed to social scientist Erving Goffman, who used these terms to refer to places where people both live and work and are at the same time isolated from the larger community for a significant length of time; he contemplated places like prisons, military systems, and mental institutions as quintessential examples of such entities.[75] According to Goffman, total institutions include places where "all aspects of life are conducted in the same place and under the same single authority."[76] The truly closed nature of places like the military and immigration detention facilities fosters an environment in which sexual victimization occurs behind closed doors, "often without knowledge of or intervention by those on the outside."[77] The internal processes that exist to address sexual victimization in these settings "allow for sweeping discretion on the part of system actors."[78]

> The unique structure of a closed system means that it lacks the influence and oversight of external actors. It exists much like a silo, isolated from the outside world and other closed systems. This isolation frequently leads to problems within that are compounded by biases or assumptions that shape the system's internal structures and processes. . . . The public often has no idea about the inner workings of such a system.[79]

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75. Erving Goffman, *The Characteristics of Total Institutions*, *in* ORGANIZATION AND SOCIETY 312, 314–15 (1961). Goffman is widely known amongst sociologists as having defined the concept of the total institution. *See* Christie Davies, *Goffman's Concept of the Total Institution: Criticisms and Revisions*, 12 HUM. STUD. 77, 77–78 (1989) (crediting Goffman with the term "total institution" and discussing reliance on the term by other scholars).

76. Goffman, *supra* note 75, at 313–14.

77. Hannah Brenner et al., *Sexual Violence as an Occupational Hazards and Conditions of Confinement in the Closed Institutional Systems of the Military and Detention*, 44 PEPP. L. REV. 881, 886 (2017).

78. *Id.*

79. *Id.* at 890 (footnotes omitted).

> Sexual violence is prevalent in closed systems in part due to . . . the power imbalance inherent in the hierarchy of these systems, and the existence of a tightly knit protective culture. The system will assume a "state-like" role in members' lives where the internal structures and processes are the primary and initial governing body, supplanting civilian law and policy. These systems are self-governing, with a complex and often self-created set of policies and procedures, as well as a detailed and highly constraining set of informal norms that govern appropriate behavior. The informal norms may supersede official policy and procedure; therefore, the system is disincentivized from investigating and punishing perpetrators of sexual violence because doing so would admit its existence within the system.

Id. at 891 (footnotes omitted).

Building on Goffman's characterization of closed systems, my earlier research extensively considers the specific and very different ways in which sexual violence is both perpetrated and subsequently addressed within such systems.[80] I argue specifically that the closed nature of prisons, military, and immigration detention centers creates substantial barriers that impede efforts to address the widespread problem of sexual abuse that occurs inside.[81] There are significant differences related to what happens after a woman is raped in the broader community context, in contrast to when she is raped in a closed institutional system.[82] The differences relate to the "reporting, investigation, and accountability" of perpetrators and system actors.[83] For example, in a closed system like prison, a victim of sexual violence does not have free and open access to the criminal justice system; even choosing whether or if to call 911 is not an available option. Involving law enforcement is a decision that rests in the hands of prison personnel. Further, a victim must also first exhaust the administrative remedies that govern the prison before accessing civil avenues of justice.[84]

Although colleges and universities, as institutions of higher education, bear many of the characteristics of closed systems, they do not quite rise to the level of definition as a total institution or traditional closed system.[85] To be sure, as mentioned earlier, these entities anticipate the presence of "outsiders" (*vis-a-vis* campus visitors) as a regular and expected part of their communities.[86] Therefore, higher education is more accurately described as "quasi-closed," meaning it includes many, but not all, of the hallmarks of a true closed institutional system.[87] This status is important because it reveals some of the special problems inherent in addressing sexual violence that occurs within settings that are separate from the broader society. As a preliminary matter, colleges and universities are not entirely closed off and insular (as is the case with prisons, for example.) They are also not entirely open in the way a community is, and they therefore occupy a more middle

80. *Id.* at 956.

81. *Id.*

> Prison, as a system within the broader community, is a quintessential closed system; it confers a unique identity to individuals, who become inmates, upon entrance. This prisoner identity carries with it certain stereotypes that inform widely-held myths about rape. Prison is governed by specially crafted policies and procedures that intersect with state and federal laws and standards to provide a complex framework governing the reporting, investigation, and civil and criminal litigation surrounding sexual victimization.

Brenner & Darcy, *supra* note 21, at 129.

82. Brenner & Darcy, *supra* note 21, at 129.

83. *Id.*

84. Brenner et al., *supra* note 77, at 902.

85. *See* Brenner & Darcy, *supra* note 21, at 131–32.

86. *See id.*

87. *Id.* at 132.

ground. Although the membership of colleges and universities is perhaps easily defined by enrollment as a student or employment as faculty or staff, non-members routinely find themselves on campuses in a myriad of different capacities.

A closed or quasi-closed institutional setting often impedes the ability of survivors of sexual abuse inside the system to seek justice in ways survivors on the outside do not experience.[88] As Professor Brake relates, "[r]eactions to claims of sexual assault, including victim-blaming and denying harm, are not just the product of societal and cultural beliefs, but are shaped by the institutional cultures in which sexual misconduct occurs."[89] One characteristic element of a system that is closed at least in limited part is a disconnection from general societal norms, laws, and resources surrounding sexual violence. This "closed off" nature often thwarts even the most forward-thinking law and policy changes from being effectively implemented, if at all. Professor Trachtenberg makes the point about the insular nature of Title IX investigations: "If a student is treated unfairly, outside observers will not have the chance to see and object."[90] The lack of transparency is a distinguishing facet of sexual violence that occurs in higher education contexts.

There also exists a strong loyalty among system actors to the institution itself,[91] which often undercuts the fairness of the sexual assault investigation process and can impact a victim's decision to even report what happened in the first place. Professor Francine Banner explores this phenomenon of institutional loyalty across systems like the military and higher education in the context of a broader rights/trust dilemma. "Whether true or false, reporting a rape is viewed as a significant threat to institutional loyalty."[92] The unfairness that flows from system loyalty can impact both parties in a case, depending on the particular dynamics. To this point, Professor Jed Rubenfeld opines: "The truth is that academic institutions are self-interested parties in their own campus rape cases. Their self-interest can bias them in some cases against victims, in others against the accused."[93] The case of sexual abuse perpetrated by Dr. Nassar at Michigan State University is a representative example of this phenomenon. The individuals tasked with responsibility for investigating the reports of sexual abuse by women and girls against Nassar

88. *Id.* at 132–33.

89. Brake, *supra* note 71, at 121.

90. Ben Trachtenberg, *How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students*, 18 NEV. L.J. 107, 141 (2017).

91. Francine Banner, *Institutional Sexual Assault and the Rights/Trust Dilemma*, 13 CARDOZO PUB. L., POL'Y & ETHICS J. 97, 142–43 (2014) ("As it would have been were she enlisted in the armed forces, within the university context, the assertion of rights of the university student is circumscribed by processes geared toward preserving public and member loyalty in the institution.").

92. *Id.* at 148.

93. Rubenfeld, *supra* note 73, at 57–58.

were all members of the same institution.[94] This is not unique to just one school, but instead a phenomenon inherent in the quasi-closed systems of higher education where Title IX offices act as the prosecution and defense, judge, and jury. As Professor Rubenfeld observes, "[o]ne piece of the partiality problem may be the government-mandated creation at every school of a Title IX office vested with training, prosecutorial, investigatory, and adjudicatory authority."[95] Further, often the witnesses relied on in a Title IX investigation are also not disinterested or impartial, but they also possess a certain loyalty to the school. This was the case with the witnesses interviewed as part of the investigation into at least one of the Title IX complaints filed with MSU by a patient of Dr. Nassar; all were friends and colleagues of the doctor and worked for same institution.[96] Nassar was cleared of the allegations against him in part "based on the opinions of four medical experts who all worked for the university and had close ties to Nassar."[97] Title IX is routinely criticized for its utilization of members of the system to carry out its mandate, and its dual accountability to students—both those making allegations and those accused of wrongdoing—as part of the investigatory and judgment process.[98] Impartiality is often elusive in the Title IX process.

IV. EXPOSING THE TITLE IX CONUNDRUM: WHOSE RIGHTS?

Each year, colleges and universities court star high school athletes, vying for their enrollment. Consider the case of K.T., a high school soccer recruit, who was invited to visit the campus of Culver-Stockton College ("College") in Canton, Missouri.[99] Her visit was part of an "athletic activity" that was "sponsored and promoted by the school."[100] While she was on campus, she was taken to a party at the Lambda Chi Alpha fraternity house, where she was sexually assaulted by a student who was enrolled at the college.[101] Other individuals present at the time reported the incident to the school the same weekend the assault took place and K.T.'s family reported the incident to law

94. Matt Mencarini, *MSU Hid Full Conclusions of 2014 Nassar Report from Victim*, LANSING ST. J. (Jan. 26, 2018, 4:23PM), https://www.lansingstatejournal.com/story/news/local/2018/01/26/michigan-state-larry-nassar-title-ix/1069493001; *see also* Hannah Brenner, *Opinion: DeVos' New Guidelines on Handling Campus Sexual Assault Raise Risk of Another MSU*, DETROIT FREE PRESS (Jan. 26, 2018, 12:40 PM), https://www.freep.com/story/opinion/contributors/2018/01/26/msu-title-9/1065913001.

95. Rubenfeld, *supra* note 73, at 59.

96. Mencarini, *supra* note 94.

97. *Id.*

98. *See id.*

99. K.T. v. Culver-Stockton Coll., No. 4:16-CV-165, 2016 WL 4243965, at *1 (E.D. Mo. Aug. 11, 2016).

100. *Id.*

101. *Id.*

enforcement a week later.[102] The College did not commence an investigation and did not respond or attempt to take corrective action other than to cancel a meeting with K.T. and her parents once they learned of the nature of the requested meeting.[103] K.T. filed a lawsuit against the school under Title IX relying on a theory of the school's deliberate indifference, but the case was dismissed based on her non-student status.[104]

It is not a stretch to imagine a similar hypothetical, inspired by several judicial opinions that have grappled with these very issues. Imagine two childhood best friends, A and B, who are now away at college in different states. One friend, A, visits the other, B, at her college, a state school, for spring break, and the two attend a university student affairs' sponsored spring break concert. At the concert at the student union, the friends meet several male students who eventually drug and rape the two young women in the basement of the student union. When the friends return to the dorm where they are staying, they report what happened to B's Resident Advisor, and both file a complaint under the university's Title IX policy on sexual misconduct.[105] The university fails to adequately investigate their complaints and ultimately concludes in its official report there was no violation of university policy. In addition to the university's failure to obtain testimony from available witnesses who observed the events of the night in question, officials were on notice at least five other rapes were perpetrated by members of the same fraternity over the past semester. The women each hire an attorney to sue the university for damages for what they allege is its deliberate indifference to their assault. The district court allows B's case to proceed, but dismisses A's case, concluding A, as a non-student, lacks standing to sue the university under Title IX. Here, two similarly situated victims of rape are treated differently under the law, similar to the Michigan State victims and the victim in *K.T. v. Culver-Stockton College*, discussed above, based on their respective status as a member or non-member of the university community.

The outcome of this hypothetical is consistent with the reality that victims who are non-students at an institution where the sex discrimination took place

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102. *Id.* Schools are required to promulgate grievance policies under Title IX. "The Department's Title IX regulations require a recipient to adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee complaints under Title IX." U.S. DEP'T EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX RESOURCE GUIDE (Apr. 2015) [hereinafter RESOURCE GUIDE], https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf.

103. K.T. v. Culver-Stockton Coll., 865 F.3d 1054, 1056 (8th Cir. 2017).

104. K.T v. Culver-Stockton Coll., No. 4:16-CV-165, 2016 WL 4243965, at *11 (E.D. Mo. Aug. 11, 2016), *aff'd*, K.T. v. Culver-Stockton Coll., 865 F.3d 1054 (8th Cir. 2017). "The Court concludes that plaintiff, as a non-student, cannot bring a Title IX claim against the College." *Id.* The court also dismissed the case for failure to state a claim upon which relief can be granted, but even if this was not the case, her non-student status precludes resolution of the complaint in her favor.

105. *See* RESOURCE GUIDE, *supra* note 102.

are being denied the right to access the protections of Title IX, illustrating a trend playing out in what may well become an expanding group of cases across the United States. Admittedly, it is hard to know with certainty just how many cases align with these facts especially in light of notoriously low reporting rates for sexual violence.[106] The National Institute of Justice finds that "[t]he majority of sexual assaults are not reported to the authorities."[107] Further exacerbating the problem of low reporting is a lack of consistent messaging about the available rights for victims generally, and specifically for those who occupy this slightly different status as non-students. The pool of potential claimants may well be quite low[108] but this should not be construed as a reason not to resolve the very real question of whether those individuals who are not enrolled as students at an institution where they are subject to sex discrimination, but are engaged in campus activities, should be afforded protection by Title IX.

To address the problem of sex discrimination in federally-funded education institutions, Title IX has evolved to specifically cover sexual violence and harassment (as a form of sex discrimination) on campuses.[109] The law has been subject to Congressional action,[110] and judicial interpretation,[111] including several landmark cases decided by the United States Supreme Court.[112]

The reach of the law has also been defined by guidelines promulgated by the Department of Education's Office of Civil Rights, which outline specific requirements that are tied to receipt of schools' federal funds.[113] A shift in presidential administrations often results in sweeping changes in the guidelines supporting federal laws.[114] The expansion of Title IX occurred

106. Office of Justice Programs, *Reporting of Sexual Violence Incidents*, NAT'L. INST. OF JUSTICE, https://www.nij.gov/topics/crime/rape-sexual-violence/pages/rape-notification.aspx (last visited Aug. 24, 2018).

107. *Id.* Between 1992–2000, "[o]nly 36 percent of rapes, 34 percent of attempted rapes, and 26 percent of sexual assaults were reported." *Id.*

108. Further, "[l]itigation of Title IX complaints is even further behind with few cases having advanced beyond initial motions." Corey Rayburn Yung, *Is Relying on Title IX A Mistake?*, 64 KAN. L. REV. 891, 912 (2016).

109. *See* Wes R. McCart, Simpson v. University of Colorado*: Title IX Crashes the Party in College Athletic Recruiting*, 58 DEPAUL L. REV. 153, 154 (2008). In the past, plaintiffs most commonly invoked Title IX to ensure equal representation and funding for female students in interscholastic athletics. *Id.* at 155.

110. *See, e.g.*, 20 U.S.C. § 1687 (2012).

111. "The elaboration of the specific iterations of a statutory ban on discrimination through judicial construction is a common feature of U.S. civil rights law." Brake, *supra* note 71, at 125.

112. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (holding that students may bring private causes of action against schools if they experience sexual harassment by teachers).

113. *See, e.g.*, RESOURCE GUIDE, *supra* note 102.

114. "Like many laws, Title IX's power stems from a new administration coming to Washington and deciding an issue was worth prioritizing." Diana Moskovitz, *Why Title IX Has*

largely from agency guidelines influenced by various presidential regimes. As Professor Karen Tani explains, "[m]odern American history is rife with examples of administrative agencies creating new rights, or at least playing significant roles in their generation, elaboration, and legitimization."[115] Therefore, Title IX is not the only such statute that has evolved in this way.

Indeed, this very phenomenon occurred recently with the transition in the Department of Education's leadership following President Trump's appointment of Betsy DeVos.[116] In her early months occupying the new role as Secretary of Education, DeVos openly criticized the Title IX statute and expressed concerns about denial of due process rights for those accused of sexual assault on college campuses.[117] She swiftly rescinded the arguably more victim-centered Obama-era provisions expressed in the 2011 Dear Colleague Letter[118] and in its place issued temporary guidelines, which effectively extend significant deference to schools to create their own processes to address sexual violence.[119] Among the changes include giving schools discretion to choose which of two evidentiary standards to use to resolve complaints (preponderance of evidence or clear and convincing evidence); eliminating the recommended timeframe in which investigations should proceed; downplaying the seriousness of complaints by changing the language describing the proscribed behavior from "sexual violence" to "sexual misconduct;" allowing schools the option to decide whether to provide a right of appeal, if at all, and whether to extend this right solely to alleged perpetrators.[120] Despite the vast departure from the previous guidelines outlined by the 2011 Dear Colleague letter, most schools are awaiting anticipated final guidelines designed to supplant these temporary measures before making significant changes to their policies and practices.[121]

Failed Everyone on Campus Rape, DEADSPIN (July 7, 2016, 2:58 PM), https://deadspin.com/why-title-ix-has-failed-everyone-on-campus-rape-1765565925.

115. 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, 1879 (2017) (describing how various agencies like the NLRB and FTC created early anti-discrimination policies that pre-dated both the passage of Title VII and related Supreme Court jurisprudence).

116. Betsy DeVos, Secretary of Education, Prepared Remarks on Title IX Enforcement at George Mason University (Sept. 7, 2017), https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement.

117. *Id.*; Stephanie Saul & Dana Goldstein, *Betsy DeVos Says She Will Rewrite Rules on Campus Sex Assault*, N.Y. TIMES (Sept. 7, 2017), https://www.nytimes.com/2017/09/07/us/devos-campus-rape.html.

118. 2011 DCL, *supra* note 48. "When the 2011 Dear Colleague letter came out, what mattered most was the message it sent: Take campus rape seriously, or there will be significant consequences, including losing federal funds." Moskovitz, *supra* note 114.

119. *See generally* Q&A, *supra* note 49 (addressing questions related to a school's handling of allegations of sexual misconduct).

120. *Id.*

121. *See, e.g.*, Todd Spangler, *Michigan Universities Take a Wait-and-See Approach to Betsy DeVos Sexual Assault Plan*, DETROIT FREE PRESS (Sept. 7, 2017, 9:07 PM), https://www.freep.com/story/news/local/michigan/2017/09/07/mich-universities-devos-titleix/644012001.

Even before the DeVos-initiated changes, Title IX was subject to critique by legal scholars and others for a myriad of reasons: concerns surrounding due process for the accused;[122] ineffective investigations by universities once complaints are filed;[123] the efficiency with which investigations are handled through the Office for Civil Rights;[124] the means by which the Department of Education promulgated its guidelines;[125] and perhaps most controversially, the identification of appropriate evidentiary standards for school investigations.[126] To this latter point, before DeVos' sweeping reforms, schools were required to apply a "preponderance of the evidence"[127] standard to Title IX sex discrimination claims, evaluating their legitimacy based on whether the allegations were more likely than not to be true.[128] DeVos has now given schools discretion to choose to implement a higher standard of proof, the "clear and convincing"[129] evidentiary standard, which is more consistent with

122. *See, e.g.*, Nancy Gertner, *Complicated Process*, 125 YALE L.J.F. 442, 442–43 (2016); *see also* Tamara Rice Lave, *A Critical Look at How Top Colleges and Universities Are Adjudicating Sexual Assault*, 71 U. MIAMI L. REV. 377, 415 (2017) (reporting on empirical research findings regarding Title IX investigations at the 20 most highly ranked institutions of higher education in the United States that illustrate problems with due process rights of the accused); Cory J. Schoonmaker, *An "F" In Due Process: How Colleges Fail When Handling Sexual Assault*, 66 SYRACUSE L. REV. 213, 214 (2016) (arguing that the 2011 Dear Colleague Letter thwarts due process rights afforded to those accused of sexual violence).

123. *See* Smith & Gomez, *supra* note 66, at 31 ("While the federal government's goal is noble, and we wholeheartedly endorse the requirements of education, training, and rigor in investigations, both the national dialogue on these issues and the federal enforcement efforts fail to take into account the tremendous complexity of the issues, the context of educational institutions, privacy considerations, and other impediments to effective implementation of Title IX on college campuses. Indeed, the current enforcement framework and evolving expectations of the courts seem to be requiring educational institutions to subsume a criminal justice function without the resources to do so effectively.").

124. Alyssa Peterson & Olivia Ortiz, *A Better Balance: Providing Survivors of Sexual Violence with "Effective Protection" Against Sex Discrimination Through Title IX Complaints*, 125 YALE L.J. 2132, 2132 (2016).

125. Sheridan Caldwell, Note, *OCR's Bind: Administrative Rulemaking and Campus Sexual Assault Protections*, 112 NW. U. L. REV. 453, 454–55 (2017).

126. In response to the questions following DeVos' changes to Title IX, a group of law professors with wide-ranging perspectives presented a Hot Topics Panel at the 2018 AALS Annual Meeting. The panel, *Rethinking Campus Response to Sexual Violence: Betsy DeVos, Title IX, and the Continuing Search for Access to Justice*, which I co-organized with Professor Meg Penrose, considered varying viewpoints on whether and how Title IX should continue to address sexual violence on campuses.

127. *See Preponderance of the Evidence*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.").

128. 2011 DCL, *supra* note 48.

129. "Evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials." *Evidence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

the criminal law.[130] Prior to DeVos altering the evidentiary playing field, however, there was a longstanding and deep divide among those interested in these issues about the appropriateness of relying on such a low standard of proof to determine culpability given the potentially extreme consequences for the accused.[131]

Despite this widespread critique, the question of Title IX's extension to non-students has largely gone unnoticed by scholars and policymakers with only limited exception.[132] Professor Tani identifies this gap in protection as one reflecting the characteristic incompleteness of agency rights.[133] Tani writes, "[p]erhaps the most important aspect of administratively created rights is their incompleteness, owing to the incompleteness of agencies' jurisdictions."[134] Tani's acknowledgment of this problem, however, appears only as an afterthought in her article outlining the administrative rights conferred on victims of sexual violence by Title IX.[135] "In this case, it means

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130. Q&A, *supra* note 49, at 5. This change in evidentiary standard has been criticized for its similarity to the criminal law. "[T]he Title IX movement must remain vigilant against pushes to 'criminalize' Title IX." Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J.F. 281, 283 (2016).

131. Legal scholars are divided on the appropriateness of the preponderance of the evidence standard. For a discussion of the merits of utilizing a preponderance standard, see Katharine K. Baker et al., *Title IX & the Preponderance of the Evidence: A White Paper*, FEMINIST L. PROFESSORS BLOG, http://www.feministlawprofessors.com/wp-content/uploads/2016/11/Title-IX-Preponderance-White-Paper-signed-11.29.16.pdf; *see also* Brake, *supra* note 71, at 131 ("While the substantive difference between the two proof standards, in itself, is unlikely to be outcome-determinative, the clear and convincing standard permits greater room for decision-makers to hold complainants to unrealistic proof expectations."). Other legal scholars take alternative positions out of concern for due process rights of the accused. *See* ELIZABETH BARTHOLET ET AL., FAIRNESS FOR ALL STUDENTS UNDER TITLE IX (Aug. 21, 2017), *available at* https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf; *see also* Gaines West et al., *Title IX: The Difficulties in Protecting an Accused's Rights*, 80 TEX. B.J. 510, 510 (2017), https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/ContentDisplay.cfm&ContentID=37755. There are also some who have identified common ground between the two perspectives. *See, e.g.*, Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 828 (2017) ("Apart from common ethical commitments, both advocates for accused students and advocates for student victims of gender violence benefit strategically from fair, equitable procedures."). And other scholars do not see a significant difference between the two. *See* Brake, *supra* note 71, at 130.

> For all the controversy over the POE standard, it is far from clear what the distance is, substantively, between the POE standard and its main competitor, the clear and convincing evidence standard . . . . It is even more difficult to tell how often the choice of proof standards would be outcome-determinative in campus disciplinary proceedings involving sexual misconduct. Accused students have been cleared of sexual assault charges under the POE standard despite substantial evidentiary support for the allegations.

Id.

132. As but one example, a comprehensive law review article outlining with extensive detail the history and reach of Title IX fails to acknowledge this distinction. Fromer et al., *supra* note 14, at 470.

133. Tani, *supra* note 115, at 1898.

134. *Id.*

135. *Id.*

that individuals who are no longer, or have never been, part of educational communities have no access to the administratively created right."[136] As central to her incompleteness critique, Tani is concerned with the lack of universality of agency rights as contemplated specifically by Title IX.[137]

At first glance, the significance of this inquiry might be overlooked. After all, some of the same rights protected by Title IX can arguably be reached *vis-a-vis* tort law, criminal law, or by filing a grievance with the Office of Civil Rights ("OCR").[138] Individuals who are sexually victimized and lack an official connection to the education institution where the abuse occurred do in fact have other avenues of legal recourse, but these alternate avenues serve different goals and interests[139] and have not always been entirely useful or productive for victims. Tani argues this point, "[t]o the extent that such individuals want to assert a right to be free from sexual violence, they must do so in spaces (state courts) and through systems (state and local law enforcement) that have been notoriously unreceptive to such claims."[140] It is widely understood, for example, that victims of sexual violence often choose not to file criminal complaints;[141] the reasons for these choices vary, but often relate to a fear of not being believed or being retaliated against, or from an expectation that the process will not result in a productive, or positive, outcome.[142] Recent evidence emerging from the MSU sex abuse scandal

136. *Id.*

137. *Id.* Tani contends that the incompleteness of agency rights conferred by Title IX is evidenced also in the fact that the statute only reaches educational institutions that are in receipt of federal funds. While she concedes this includes a lot of individuals, it is nonetheless not "universal." *Id.* at 1897–98.

138. Despite some of the limitations and challenges, there is growing interest among some scholars to utilize tort law as a way to address sexual violence. *See, e.g.*, Sarah L. Swan, *Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate*, 64 KAN. L. REV. 963, 965 (2016) [hereinafter Swan, *Tort Law*] ("In addition to being a crime, and a civil rights violation, campus sexual assault is also a private, tortious wrong, and thus potentially subject to adjudication in civil court, using the usual rules of civil procedure."); *see also* Sarah Swan, Article, *Triangulating Rape,* 37 N.Y.U. REV. L. & SOC. CHANGE 403, 443 (2013) (discussing obstacles for rape victims to bring civil claims).

139. It is well understood that one of the foremost goals of tort law is to make whole a victim who suffers harm. Pam A. Mueller, *Victimhood & Agency: How Taking Charge Takes Its Toll*, 44 PEPP. L. REV. 691, 694 (2017) ("Most scholars—regardless of the underlying theory of tort they support—agree that making the victim whole is a fundamental goal of tort law.").

140. Tani, *supra* note 115, at 1898. Some activists who oppose progressive reforms actually work to deny access to both criminal law and campus processes. "[M]any are attempting to close the courthouse doors to victims of acquaintance rape without extrinsic force, and then close the doors to campus tribunals to those same victims as well." Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1995 (2016).

141. TJADEN & THOENNES, *supra* note 66, at 33 (reporting that only 19.1% of adult women and 12.9% of adult men reported the crime to police).

142. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 28 (2017); *see also* Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, 206 (2017) (arguing through empirical evidence the reality that police are the largest obstacle to

involving Dr. Nassar illustrates the un-receptiveness of law enforcement Tani describes, and reinforces the legitimacy of victims' fears.[143] An FBI investigation into allegations that Nassar continued abusing his patients went on over the course of an entire year before investigators even contacted two of the three primary victims.[144] Throughout the investigation, Dr. Nassar continued to see patients, and it is believed he abused at least 40 additional women and girls while the FBI dragged its feet in pursuing the investigation.[145] Further, according to Title IX expert Professor Cantalupo, "the criminal law is not concerned with establishing equality, and it gives few, if any, rights to violence victims."[146] Recent efforts on the part of some universities to mandate reporting to law enforcement, while perhaps well-intentioned, are rife with problems.[147]

The tort law system also presents an avenue for victims of campus sexual violence to seek redress for the harms perpetrated against them by allowing for the pursuit of money damages from educational institutions and individual assailants; a tort-based approach is recommended by some scholars,[148] but it can nonetheless prove challenging for a myriad of reasons, including limits on liability imposed by the intentional nature of torts and governmental immunity.[149] And while there is also a Title IX grievance procedure available through the OCR, its focus is largely on compliance and eliminating future harms at the institution. This option by itself does not provide a sufficient remedy; while one outcome might be for the OCR to require a school to review its handling of a particular case, it is largely focused on institutional compliance with the mandates of Title IX. To be sure, "such a process does not provide the same deterrent effect that a civil suit for money damages provides."[150] Therefore, Title IX and its private right of action remains a valuable tool that serves multiple ends: compensating victims when a school responds with deliberate indifference to acts sexual violence, and cultivating safer campus communities.

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the prosecution and conviction of rapists in the United States because police disbelieve rape victims far more often than the public and other agents involved in rape investigations).

143. *See* Dan Barry et al., *As F.B.I. Took a Year to Pursue the Nassar Case, Dozens Say They Were Molested*, N.Y. TIMES (Feb. 3, 2018), https://www.nytimes.com/2018/02/03/sports/nassar-fbi.html.

144. *Id.*

145. *Id.*

146. Cantalupo, *supra* note 130, at 284.

147. *See, e.g.*, Alexandra Brodsky, *Against Taking Rape "Seriously": The Case Against Mandatory Referral Laws for Campus Gender Violence*, 53 HARV. C.R.-C.L. L. Rev. 131, 131–33 (2018) (discussing why mandatory referral rules for on-campus gender violence may actually discourage victims from reporting, leaving them without access to crucial help and services).

148. *See, e.g.*, Swan, *Tort Law, supra* note 138, at 986.

149. Andrea A. Curcio, *Institutional Failure, Campus Sexual Assault and Danger in the Dorms: Regulatory Limits and the Promise of Tort Law*, 78 MONT. L. REV. 31, 34 (2017) (arguing that tort law offers promise for campus sexual assault survivors, subject to certain revisions).

150. Brief of Amici Curiae Equal Means Equal et al., Doe v. Brown Univ., 896 F.3d 127 (1st Cir. 2018) (No. 17-1941), 2018 WL 1210618, at *12 [hereinafter Equal Means Equal Brief].

V. THE EXCLUSION OF CAMPUS VISITORS FROM THE PROTECTION OF TITLE IX

The Supreme Court has interpreted Title IX to contain an implied private right of action against a school for its failure to comply with the federal law;[151] although this right is not embedded in the statute itself, the Court has refined the requirements necessary to bring a claim.[152] This Part outlines the requisite legal standard, and then reviews the limited case law in which non-students have sought redress *vis-a-vis* a private right of action under the statute for schools' failure to adequately respond to the harms perpetrated by those who are an official part of an institution. This question of non-student standing is a critical threshold inquiry that requires resolution before a court can rule on the merits of a claim.

A. EXPLORING THE STANDARD

When Title IX was initially passed, it did not explicitly provide for a private cause of action. The early Title IX cases, therefore, were regularly dismissed for failure to state a claim upon which relief could be granted. This landscape changed in 1979, however, with the Supreme Court's ruling in *Cannon v. University of Chicago.*[153] In *Cannon*, the Court compared Title IX to Title VI of the Civil Rights Act of 1964.[154] Conceding it would have been preferable for Congress to explicitly have embedded language in the statute showing its intention to provide for a private cause of action, the Court nonetheless found that the legislative history evidenced a connection to Title VI, which did include such a provision, and, therefore there was sufficient evidence to find the existence of an implied remedy.[155] The *Cannon* opinion, however, only provided for injunctive or equitable relief, and not money damages.[156] The Court held in a subsequent opinion, *Franklin v. Gwinnett County Schools*, that money damages are available upon a showing of an intentional Title IX violation.[157] This holding has since been refined to create the current standard, which allows for a private right of action when the institution is deliberately indifferent to sexual harassment. "This private cause of action has evolved to allow for the recovery of monetary damages when the

151. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 684–85 (1979); *see also* Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 75 (1992).

152. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290–91 (1998); *see also* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 642–43 (1999).

153. *Cannon*, 441 U.S. at 684–85.

154. *Id.*

155. *Id.*

156. *Id.* at 685.

157. Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 76 (1992).

institution manifests a deliberate indifference to the harassment of a student after being notified of previous harassment."[158]

The Supreme Court further evolved the standard for pursuing a private cause of action through its decisions in *Gebser v. Lago Vista Independent School District*, which held that a school can be liable when an official "has actual notice of, and is deliberately indifferent to, the teacher's misconduct,"[159] and *Davis v. Monroe County Board of Education*, which extended the *Gebser* holding from teacher-student to peer-based harassment.[160] The Court in *Gebser* "rejected the applicability of *respondeat superior* or vicarious liability principles to Title IX claims of sexual harassment perpetrated by an institution's employee. An institution is not responsible for discrimination or harassment perpetrated by its employee; it is liable only for its own deliberate indifference to such discrimination or harassment."[161] Finally in *Davis*, the Court extended the private right of action to student on student harassment, finding "the funding recipient is deliberately indifferent to sexual harassment, of which the recipient has actual knowledge, and that harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[162] This standard still applies in Title IX cases today.

Clarification of the various aspects of the deliberate indifference requirement, however, is ongoing. There is a split among circuit courts "regarding whether a private cause of action can exist against an institution when there is no post-notice harassment of the student."[163] Attorney Zach Cormier explores the ways the various courts have addressed the question of whether simply leaving a student vulnerable to harassment, but without accompanying evidence of ongoing harassment, is enough to support a private cause of action under the deliberate indifference standard.[164]

> However, courts have divided over whether a student may recover such damages if the institution's deliberate indifference does not actually *result* in post-notice harassment. More specifically, it remains unclear whether a student may recover damages under Title IX simply because the student remained *vulnerable* to potential harassment as a result of the institution's deliberate indifference.[165]

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158. Zachary Cormier, *Is Vulnerability Enough? Analyzing the Jurisdictional Divide on the Requirement for Post-Notice Harassment in Title IX Litigation*, 29 YALE J.L. & FEMINISM 1, 3 (2017).

159. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 275 (1998).

160. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 643–44, 648 (1999).

161. Cormier, *supra* note 158, at 8–9 (citing *Gebser*, 524 U.S. at 285–91).

162. *Davis*, 526 U.S. at 629.

163. Cormier, *supra* note 158, at 3.

164. *Id.* (arguing that there should be a requirement of a showing of "post-notice harassment" to trigger liability).

165. *Id.*

Among the circuits, some (First and Eleventh) find "that a private cause of action exists based on vulnerability alone"[166] and others (Ninth and Tenth Circuits, and federal district courts) "have held that the *Davis* Court's definition of 'subjected' still requires that vulnerability result in further harassment in order to be actionable."[167] This wide jurisdictional split will likely at some point be resolved by the Supreme Court. The Court has previously defined the statutory language "subjected to discrimination" to mean that to be actionable, a plaintiff must demonstrate a school acted with deliberate indifference to the harassment of a student after receiving notice of this harassment.[168] "If a recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment, i.e., at a minimum, causes students to undergo harassment or makes them liable or vulnerable to it."[169] Substantial disagreement exists regarding the interpretation of whether a school in fact subjected an individual to discrimination by its inaction. Cormier identifies the jurisdictional split that has occurred "regarding whether a private cause of action can exist against an institution when there is no post-notice harassment of the student."[170] He is critical of how some courts have been willing to find deliberate indifference only if it "left the student *vulnerable* to harassment, even if that vulnerability did not *result* in further harassment."[171]

Taken together, the *Gebser* and *Davis* cases suggest that individuals in educational settings do have a right to be free from sexual imposition, but also that colleges and universities have little to fear if they fail to take protection of that right seriously. "Indeed, the cases arguably incentivize[] 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."[172] Ignorance is essentially rewarded.

Perhaps not surprisingly, the deliberate indifference standard created by the Court has not been without its critics. Citing its limitations, Professor Catharine MacKinnon recently advocated for the standard's replacement with a human rights framework, relying instead on an evaluation of "due diligence" to evaluate institutional liability.[173] MacKinnon argues that since its creation and repeated judicial "application, the deliberate indifference standard has repeatedly and disproportionately been deployed against survivors'

166. *Id.* at 4.

167. *Id.*

168. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999).

169. *Id.* at 630.

170. Cormier, *supra* note 158, at 3.

171. *Id.* at 4.

172. Tani, *supra* note 115, at 1861–62 (quoting Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 205 (2011)).

173. Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2041 (2016).

cases, including when administrative handling of their situations is concededly callous, incompetent, unresponsive, inept, and inapt."[174] MacKinnon criticizes the standard in part because the prevalence of sexual violence has not decreased on campuses.[175] "The standard permits a wide margin of tolerance for sexual abuse, appearing predicated on a belief in its inevitability, especially in the helplessness of officials and authorities to prevent or eliminate it among young people."[176] However problematic and imperfect this standard might indeed be, "outsiders" who are raped on campus may never get the opportunity to even make the argument for its applicability to their case if they are denied standing to bring a lawsuit in the first place.

B. CASES INVOLVING CAMPUS VISITORS

As of the date of the publication of this Article, only two district courts have definitively ruled on the issue of a non-student suing a federally funded education institution for violations of Title IX.[177] The following section outlines these two cases—*K.T. v. Culver-Stockton College* and *Doe v. Brown University*—involving non-students who were sexually assaulted on campuses. The district courts addressed specifically the question of the ability of non-students to bring causes of action against federally funded institutions where the assaults took place. Plaintiffs in both cases appealed the decisions that came out against them to the Eighth and First Federal Circuit Courts, respectively, and a discussion of those cases subsequently follows.

1. *K.T. v. Culver-Stockton College*

In *K.T. v. Culver-Stockton College*, a high school soccer recruit was invited to visit the school's campus as part of an "athletic activity" that was "sponsored and promoted by Culver-Stockton College."[178] While she was on campus, K.T. was sexually assaulted at the Lambda Chi Alpha fraternity house by a student enrolled at the college.[179] Although K.T. was not herself yet a student at the university, she reported the incident to law enforcement and attempted to file a complaint under the school's Title IX policy, but Culver-Stockton College never commenced an investigation.[180] K.T. ultimately initiated a lawsuit against the school in "response to the alleged assault" and the school's "failure to investigate and provide guidance, counseling, and treatment" under a theory of deliberate indifference under Title IX of the Education

174. *Id.* at 2040–41.

175. *Id.* at 2041.

176. *Id.* at 2041.

177. *See supra* notes 11–12 and accompanying text.

178. K.T. v. Culver–Stockton Coll., No. 4:16-CV-165, 2016 WL 4243965, at *1 (E.D. Mo. Aug. 11, 2016).

179. *Id.*

180. *Id.* at *1–2.

Amendments of 1972.[181] The district court dismissed her complaint for failure to state a claim upon which relief can be granted.[182] The court's dismissal hinged on several grounds relevant to the questions addressed in this Article, first surrounding the plaintiff's status as a non-student of the institution where the assault took place and second surrounding her failure to state a claim under Title IX on which relief could be granted.

As relates to the first grounds for dismissal, the court held that that the plaintiff lacked standing to sue the school because she was never actually a student at that institution.[183] The court found K.T.'s non-student status precluded her from asserting a claim for "student-on-student" harassment established by the Supreme Court in *Davis*.[184] The court was not persuaded by the plaintiff's argument that because "she was invited by the College to visit [the] campus as a potential student-athlete recruit, she is protected by Title IX's underlying policy of protecting against sexual violence, and should have all of the protection afforded to women athletes on the campus."[185] The defendant College argued, "there is no basis under either th[e] text of Title IX or precedent interpreting the statute for the imposition of liability against the College in the context of Plaintiff's claims of peer harassment."[186] The court agreed with defendant's position, explaining, "[t]he Court in independent research has been unable to find any cases that directly address the issue whether a non-student can assert a claim for student-on-student harassment under Title IX."[187] In reaching this conclusion, the court was unwilling to expand the reach of Title IX in this issue of first impression before it.

In analyzing the issue of standing, the court looked directly to the statutory language of Title IX.[188] Finding nothing in the plain language of the statute itself and refusing to interpret the "any person" language as inclusive of non-students, the court relied on the Supreme Court's decision in *Davis* to arrive at its "conclu[sion] that Title IX's protections in the context of student-on-student harassment are limited to students."[189] Interestingly, however, *Davis* was not a case involving non-students, and it is difficult know whether the Supreme Court's language really meant to confer the protections of Title IX only to students and explicitly deny to non-students those same rights. The *Culver-Stockton* court also disagreed with the "plaintiff's argument [that] any person invited to visit a college campus would have standing to sue for

181. *Id.* at *2.
182. *Id.* at *11.
183. *Id.* at *4–6.
184. *Id.* at *4–5.
185. *Id.* at *5.
186. *Id.* at *4.
187. *Id.* at *5.
188. *Id.* at *6.
189. *Id.*

student-on-student harassment under Title IX."[190] The basis for its position was that it "would impermissibly expand the law's scope beyond the limited right of action recognized by the Supreme Court that requires a 'systemic effect on educational programs or activities.'"[191] The court was unwilling to provide a broad definition to this phrase. The court continued: "[E]ven assuming that Title IX's protection against student-on-student harassment could extend to persons other than enrolled students, plaintiff has failed to allege facts to show that she was excluded from participation, denied the benefits of, or subjected to discrimination under any education program or activity offered by the College."[192] In arriving at this conclusion, the court effectively conflates two related but also explicitly distinct issues: (1) standing to sue in the first place, and (2) satisfaction of the relevant legal standards required for a positive determination of a school's deliberate indifference.

Regarding the second grounds for dismissal, the court found that allegations surrounding a single incident of discrimination, even if true, do not rise to a level of having a "systemic effect on educational programs or activities."[193] Further, the court did not find that Culver-Stockton was deliberately indifferent to the sex discrimination alleged, stating, "[t]he College contends that while plaintiff may claim she suffered some harm by its alleged inaction, she does not and cannot allege that she was subjected to any sexual harassment or gender discrimination after it received actual notice."[194] The court ultimately concluded that "[b]ased on Supreme Court precedent . . . Title IX's protection against student-on-student harassment does not extend to permit a private action for damages by a non-student invited to visit the College for student-athlete recruiting purposes."[195] This decision appears to be the first to make a distinction among the kinds of victims who are entitled to protection under Title IX.

2. *Jane Doe v. Brown University*

A subsequent district court case decided in Rhode Island involving a Brown University student and a non-student had a similar outcome.[196] In *Jane Doe v. Brown University*, the plaintiff met three Brown University student football players at a local bar, off campus, in downtown Providence.[197] The students allegedly drugged the plaintiff, who was a student a different school, and later sexually assaulted her at a Brown University dorm.[198] Months

190. *Id.*
191. *Id.* (quoting Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 653 (1999)).
192. *Id.* at *7.
193. *Id.* at *6.
194. *Id.* at *9.
195. *Id.* at *5.
196. Doe v. Brown Univ., 270 F. Supp. 3d 556, 556 (D.R.I. 2017).
197. *Id.* at 558.
198. *Id.*

following the assault, Jane Doe contacted both Brown University and Providence law enforcement,[199] and she also attempted to file a complaint under the university's Title IX policy on sex discrimination.[200] Brown initially agreed to pursue an investigation into her complaint under the student code, but refused to do so under Title IX.[201] Ultimately, "Brown informed her that it never completed the inquiry concerning her assault and abandoned any disciplinary action against the three Brown students."[202]

In this case, the court explained the conundrum surrounding Doe's complaint: "Plaintiff Jane Doe seeks to expand the scope of Title IX protection to include persons experiencing gender discrimination who are not students or staff at the offending school."[203] The court relied on *Culver-Stockton* as precedent, referring to it as the "only . . . published opinion that the Court or the parties could find,"[204] and took this case as persuasive evidence that the non-student plaintiff in this case had no right to sue Brown University given her status as an outsider to the school.[205] In its analysis, the court found only that "[t]he developing case law has designated only two categories of protected individuals: enrolled students and school employees."[206]

Because of the limited case law and the fact that this non-student standing question was an issue of first impression before it, the Rhode Island District Court looked to the legislative history of Title IX for further guidance on how to resolve the question of whether a school is liable to an individual who is not enrolled as a student at the institution.[207] In doing so, the court found persuasive a statement made by the sponsor and author of Title IX, Senator Birch E. Bayh, who identified three different kinds of discrimination considered under the statute: "We are dealing with discrimination in admission to an institution, *discrimination of available services or studies within an institution once students are admitted* and discrimination in employment within an institution, as a member of a faculty or whatever."[208] The *Doe* court found these distinctions from the Congressional discussion surrounding the passage

199. *Id.* The police subsequently commenced an investigation, which resulted in the production of significant evidence. Medical tests revealed the existence of several date rape drugs in Doe's system. And the police also confiscated cell phones belonging to the alleged perpetrators. "The cell phones revealed communications that referenced rape and contained explicit photographs of Ms. Doe taken at the time of the sexual assault." *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 562.

205. *Id.*

206. *Id.* at 560.

207. *Id.* at 561.

208. *Id.* (quoting N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535–38 (1982) (quoting 118 CONG. REC. 5812 (1972)) (emphasis added)).

of Title IX make a compelling argument that "Congress intended Title IX to protect against discrimination of students admitted to the offending school."[209]

In the court's view, because the plaintiff was not actually enrolled at Brown, the school exercised no "control or influence" over her educational programs, and therefore the discrimination and sexual violence she alleged did not occur within such a context.[210] The court's interpretation of who is protected by Title IX is very narrow in that it does not extend the protections of the law to anyone beyond actual enrolled students: "Ms. Doe was not a student at Brown University and therefore Brown's acts or failures to act could not have prevented her from getting an education at Providence College, where Brown does not have any control or influence over the educational programs in which Ms. Doe was enrolled."[211] This perspective effectively denies the protections of Title IX to a significant number of individuals who interact with the university in a myriad of contexts.

In contemplating future application of the *Doe* opinion, it appears that the non-student status of a complainant is determinative. "Finding that Ms. Doe's status as a non-student . . . removes her from Title IX's private-cause-of-action umbrella of protection . . . ."[212] However, it is worth highlighting the court's finding that "[t]he case law specifies that the discrimination must occur in the school's educational programs or activities."[213] Although the *Doe* court did not interpret the facts of the case as sufficiently intersecting with Brown's programs or activities, is it possible that under a different set of facts involving a closer nexus between the non-student and the university, the outcome *might* be favorable to such a complainant or at minimum provide a basis for making such an argument?

3. Appeals to the Federal Courts

Plaintiffs in both the aforementioned district court cases appealed their decisions to their respective federal circuit courts. *K.T. v. Culver–Stockton College* was ultimately dismissed by the Eight Circuit Court of Appeals for failure to state a claim upon which relief can be granted; the court ruled without addressing the question of standing,[214] which was disappointing to many who are eagerly anticipating higher court review of this important issue. The First Circuit Court of Appeals similarly considered an appeal in *Doe v. Brown University* and rendered its decision in July, 2018, affirming the district

209. *Id.* (emphasis omitted) (relying on the Supreme Court's opinion in *North Haven Board of Education v. Bell* that conceded that while one Senator's remarks might not be controlling, they nonetheless can be indicative of legislative intent, especially when coming from the bill's author).

210. *Id.* at 562.

211. *Id.*

212. *Id.* at 563.

213. *Id.*

214. K.T. v. Culver–Stockton Coll., 865 F.3d 1054, 1059 (8th Cir. 2017).

court's decision.[215] Although decided in slightly different ways, the net effect of these appellate decisions forecloses outsiders from accessing the protections of Title IX.

The Eighth Circuit Court of Appeals considered an appeal in the *K.T. v. Culver–Stockton College* case, but declined to rule on the specific question of non-student standing, an issue of first impression before the court, and instead dismissed the case under Federal Rule of Civil Procedure 12(b)(6) for plaintiff's failure to state a claim.[216] As to the central issue in this case regarding standing, the parties disagreed whether the plaintiff was entitled to sue as a non-student of that university; nonetheless, to the disappointment of many who were watching this case carefully for clarification, the Eighth Circuit chose not to address this question, instead focusing on the substance of the deliberate indifference claim.[217] The court stated simply: "The parties dispute whether K.T.'s status as a non-student precludes her from asserting a Title IX harassment claim. Assuming arguendo that it does not, we find no merit in K.T.'s appeal because her complaint failed to state a plausible claim to survive dismissal under Rule 12(b)(6)."[218]

In its analysis of the merits of the claim itself, the Eighth Circuit evaluated three elements of the relevant legal standard to determine liability: (1) the school's actual knowledge of the discrimination; (2) the severity and pervasiveness of the discrimination; (3) and the school's deliberate indifference to the discrimination.[219]

First, the court found that K.T. asserted no facts

> that the College was aware of invited high-school aged recruits, visitors or College students being assaulted in similar circumstances, or that the College was aware of any prior allegations of sexual assault by [the same alleged perpetrator]' . . . K.T. failed to plausibly allege that Culver-Stockton had actual knowledge of discrimination within the meaning of a Title IX peer harassment claim.[220]

Second, the court did not agree that the discrimination experienced by K.T. was sufficiently severe since it involved only one instance of sexual assault. Relying on Davis' requirement that one instance alone is insufficient, the court was unconvinced. "Although we are sympathetic to K.T.'s circumstances and agree that she has alleged opprobrious misconduct on the part of the fraternity member, K.T.'s singular grievance on its own does not plausibly

215. Doe v. Brown Univ., 896 F.3d 127, 133 (1st Cir. 2018).
216. *K.T.*, 865 F.3d at 1059.
217. *See id.*
218. *Id.* at 1057.
219. *Id.*
220. *Id.* at 1059.

allege pervasive discrimination as required to state a peer harassment claim."[221]

Finally, the court did not find that the university acted with deliberate indifference toward sexual harassment on campus.[222] As a starting place, K.T. argued the university failed "take reasonable protective measures such as supervising K.T. during her visit" and second, the university did not "investigate and provide treatment for K.T. once the College received reports of the alleged incident."[223] The court did not find that the complaint illustrated the existence of a connection between the inaction of the university and the harassment experienced by K.T.[224] "[W]hile K.T. was dissatisfied with Culver-Stockton's response, based on the allegations in the complaint the response cannot be characterized as deliberate indifference *that caused the assault*."[225] The court's position represents one side of a jurisdictional split regarding deliberate indifference and the requirement of post-notice harassment.[226]

In the fall of 2017, plaintiffs in *Doe v. Brown University* filed an appeal of the Rhode Island District Court's decision to the First Circuit Court of Appeals.[227] The Plaintiff's brief sought resolution of the Title IX conundrum by asking one central question: "Does a victim of sex discrimination have a private right of action under Title IX against the school where the discrimination occurred, and where the perpetrators of discrimination were enrolled, even though the victim was enrolled at a different school?"[228] This threshold inquiry about whether one's outsider status matters in the context of Title IX formed the basis of Jane Doe's entire appeal.

Doe's appeal was developed around two major arguments. First, she relied on the Supreme Court's decision in *Cannon v. University of Chicago*, in which the Court created a four-part test to determine if a party had a private cause of action under Title IX.[229] Applying that test to the facts in the case, she articulated the following: (1) she was in fact a member of the class of people Title IX intended to protect; (2) legislative history supports a private cause of action for third parties who are participating in a school's programs or activities; (3) a private cause of action for third parties aligns with the

221. *Id.*

222. *Id.* at 1057.

223. *Id.* at 1056.

224. *Id.* at 1058.

225. *Id.*

226. *See* Cormier, *supra* note 158, at 1–2.

227. Brief of Plaintiff—Appellant Jane Doe, Doe v. Brown Univ., 896 F.3d 127 (1st Cir. 2018) (No. 17-1941), 2018 WL 509533, at *1 [hereinafter Doe Appeal].

228. *Id.* at *2.

229. Cannon v. Univ. of Chi., 441 U.S. 677 (1979).

legislative purpose of Title IX; and (4) the subject matter of the case "involves an area traditionally regulated by the federal courts."[230]

Doe's second argument took issue with the district court's interpretation of the meaning of "control."[231] The district court found it was outside of Brown University's reach to control Doe's education at Providence College, the institution where she was enrolled.[232] However, Doe argued that the focus should not be on the control as relates to a victim's educational context but instead whether a school has control over a perpetrator and the context in which the perpetration of sexual violence occurs.[233] In making this argument, she relied on the *Davis* decision, in which the Supreme Court held schools can be liable to third parties.[234] "The Court noted schools are traditionally held responsible under state law for their failure to protect students from the tortious acts of third parties, and similarly, may be held liable under Title IX when they are deliberately indifferent to harassment 'where the funding recipient has some control over the alleged harassment.'"[235]

Brown University's appellate brief, by contrast, was almost exclusively focused on the merits of the case, with only brief attention paid to the issue of non-student standing.[236]

Additionally, an amicus brief was filed by four organizations—Equal Means Equal, National Coalition Against Violent Athletes, Allies Reaching for Equality, and Faculty Against Rape—arguing in support of Jane Doe's standing to sue Brown University for its alleged deliberate indifference to the sexual assault perpetrated against her by enrolled students at that university.[237] According to the Amici, "[t]he lower court's holding threatens the public interest because every member of the public who sets foot on the property of an institution covered by Title IX will be exposed to a greater risk of harm, despite being protected 'persons,' according to the plain language of Title IX."[238] They argued for a reversal of the lower court's opinion "to protect all covered class members equally from discrimination and to protect the integrity of civil rights laws."[239]

In its 2018 opinion, the First Circuit affirmed the district court's decision, holding that because Jane Doe was not excluded from participation in the programs or activities of Brown University, she could not satisfy the necessary

230. Doe Appeal, *supra* note 227, at *17.

231. *Id.* at *18–29.

232. *See id.* at *2–3.

233. *Id.* at *18–21.

234. *Id.* at *20 (citing Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 644–45 (1999)).

235. *Id.*

236. Brief of Defendants—Appellees, Doe v. Brown Univ., 896 F.3d 127 (1st Cir. 2018) (No. 17-1941), 2018 WL 1378381, at *38–41.

237. *See generally* Equal Means Equal Brief, *supra* note 150 (explaining why Jane Doe and other similarly situated students do have standing to sue).

238. *Id.* at *5.

239. *Id.*

requirements to bring a claim under Title IX.[240] From the court's perspective, Doe failed to establish that she had "be[en] subjected to discrimination under [Brown's] education program or activity."[241] The court acknowledged Doe's argument that liability attaches under Title IX when an institution has control over the perpetrator and the context where sexual violence occurs, but was not compelled to address the issue because it found her complaint failed on its face. The First Circuit's opinion seems to suggest that a non-student cannot sue an educational institution for its deliberate indifference to allegations of sexual assault under Title IX. However, the relatively short opinion leaves unanswered the question of what exactly constitutes a "program or activity" of a university sufficient to satisfy Title IX and further, whether a non-student who is found to have participated in such a "program or activity" would be able to succeed in a Title IX complaint.

VI. RESOLVING THE TITLE IX CONUNDRUM

The conundrum of who exactly is entitled to protection under Title IX deserves serious consideration and demands clarification in law and policy, especially given the widespread prevalence and incidence of sexual violence on college campuses and the existence of Title IX as a viable tool to address this problem. It is an important threshold inquiry that must be resolved before courts can consider whether a school indeed acted with deliberate indifference to reports of sexual violence. There is little if any disagreement with the idea that the statute was designed to address discrimination on the basis of sex and thereby preserve access to education for those who are participating in the programs and activities of a university. Questions arise, however, related to the extent of Title IX's reach and the ways in which it applies. In this current inquiry, a very real conundrum exists as to exactly how far the statute extends and exactly who is entitled to its protections. Resolving this conundrum in the face of limited case law and legislative history proves challenging, especially given the incredible newness and novelty of even the question itself. The following section offers a few theories both for and against inclusivity in the application of Title IX. To be sure, this is merely a beginning, not end, of the inquiry and I invite other scholars to take up these questions and propose additional solutions.

A. TOWARD AN INCLUSIVE RESOLUTION

It seems inherently reasonable and within the letter of the Title IX statute to extend the federal law's protections to those who participate in a school's programs and activities, even if that participation is temporary. There are a number of theories that support such a conclusion: (1) statutory interpretation of Title IX; (2) analogous judicial opinions in other related

240. Doe v. Brown Univ., 896 F.3d 127, 133 (1st Cir. 2018).

241. *Id.*

contexts; and (3) constitutional equal protection concerns that arise from creating separate classes of victims. This section explores these preliminary theories, but does so with the caveat that it is only a starting place for this important and ongoing conversation.

1. Statutory Language

As discussed earlier, the statutory language of Title IX is extraordinarily vague.[242] Certainly, Congress could have defined the statute's terms in its original or subsequent incarnation much more narrowly to guarantee application to only certain classes of individuals—like enrolled students—but it did not do so.[243] In this way, an expansive reading of Title IX that allows application of the statute to non-students does not necessarily conflict with the statute's plain language and as the following section will discuss, is also consistent with its intention. The reach of Title IX has extended well beyond what was likely intended by the original drafters, giving way to the possibility of further refinement. Title IX's evolution to address campus sexual assault reveals an extension from its original conception, which focused almost exclusively on *access* to education.[244] This contemporary ambiguity begs resolution by the Office of Civil Rights, Congress, or the courts. A finding that the statute applies to campus visitors would confer standing onto this class of individuals, allowing them to make the argument that a school acted with deliberate indifference and proceed with a private cause of action.

If a victim of sexual violence has evidence to suggest that an institution acted with deliberate indifference to her report of sexual violence, and she desires to try and hold the institution accountable for its indifference, she must make the case that she has standing to file a lawsuit; this requirement is a critical threshold matter. The judicially defined standard for imposing Title IX liability has been created almost exclusively from cases involving parties who are all members of an educational community, as either students, staff, or faculty. As a result, it appears that an assumption has been made that only actual members of an institution have access to protection under the federal law, but this assumption has not been subject to significant judicial scrutiny. The case law has involved these specific facts, but courts have not been called on to address the question beyond the few lower courts discussed in the preceding sections of this Article.

There are two specific areas of focus included in the statutory language of Title IX that may be interpreted to permit protection of non-students or campus visitors: (1) "no person;" (2) "program or activity." The following

242. *See supra* Part II.

243. There is support for this position in case law. *See* Fox v. Pittsburg State Univ., 257 F. Supp. 3d 1112, 1125 (D. Kan. 2017).

244. For a comprehensive overview of Title IX from inception through its 40 years as a federal civil rights law see Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 326 (2012).

sections will discuss this language and how it could be interpreted to apply to non-students.

i. "No Person"

The language of Title IX is vague and does not affirmatively reflect who is entitled to protection beyond reference 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."[245] The law does not explicitly or implicitly address the question whether one who is *not* a student or member of a university community is entitled to bring a claim but instead appears to encompass anyone who interacts with a federally funded education institution. Contemplation of the specific rights of non-students to sue an institution was likely not on the minds of legislators when Title IX was passed. Nonetheless, to this point, in an amicus brief submitted on behalf of Jane Doe in her appeal to the First Circuit Court of Appeals, the authors argue: "It is clear . . . that the architects of Title IX intended it to protect *all* persons, not just students enrolled at a particular institution."[246]

Arguably, a strict statutory reading allows for interpretation that non-students are protected by Title IX, especially absent any actual language embedded in the statute or its accompanying guidelines that speaks directly to this issue. "Excluding such persons from civil rights protections when they suffer sex-based discrimination on the grounds of an entity that receives federal funds effectively permits federal money to be used to discriminate: the exact opposite of what Congress intended when it enacted Title IX almost 50 years ago."[247]

The guiding documents promulgated by the Department of Education designed to interpret Title IX are voluminous, yet they do not explicitly address whether non-students are protected by the statute, and instead tend to mirror the statutory language by adopting language that encompasses obvious individuals like students but also extending its reach to include "other persons." The 2015 Title IX Resource Guide produced by the Department of Education Office for Civil Rights illustrates this breadth in defining who is protected by the federal law.

> Title IX protects students, employees, applicants for admission and employment, and other persons from all forms of sex discrimination, including discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity. All students (as well as other persons) at recipient institutions are protected by Title IX—regardless of their sex, sexual

245. *See* 20 U.S.C. § 1681(a) (2012).

246. Equal Means Equal Brief, *supra* note 150, at *7 (emphasis in original).

247. *Id.* at *15.

> orientation, gender identity, part- or full-time status, disability, race, or national origin—in all aspects of a recipient's educational programs and activities.[248]

This language suggests that it was contemplated Title IX apply to students—both those admitted and those who have applied for admission—employees, and also to "other persons" who do not easily fit into those categories. The Resource Guide references twice, but does not define or expand upon, specifically who it envisions to be encompassed by its broad phrase, "other persons."[249]

The Office for Civil Rights also promulgated another document, the *Questions and Answers on Title IX and Sexual Violence*, in 2014.[250] This comprehensive guide anticipates numerous questions that schools may have related to Title IX's implementation and provides answers to these questions. The document "further clarif[ies] the legal requirements and guidance articulated in the DCL and the *2001 Guidance* and include examples of proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects."[251] Within the almost 50 pages of clarifying material, there is not one reference to whether non-students or non-affiliated university staff/faculty are subject to the protections of a school's Title IX policy.[252]

The *Questions and Answers on Title IX and Sexual Violence* does, however, address non-student status *vis-à-vis* the liability related to a perpetrator of sexual violence who does not attend the school where a sexual assault has taken place.[253] This is the closest analogy to the question this Article seeks to address. The document reads: "Even though a school's ability to take direct action against a particular perpetrator may be limited, the school must still take steps to provide appropriate remedies for the complainant and, where appropriate, the broader school population."[254] The *Questions and Answers on Title IX and Sexual Violence* concedes that while a school may not have much control over an alleged perpetrator in this context, efforts should be taken to investigate and notify the school where the alleged assailant is enrolled.[255] Here, the document also seems to express concern about the safety of the "broader school population."[256]

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248. RESOURCE GUIDE, *supra* note 102, at 1.

249. *Id.*

250. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

251. *Id.* at ii.

252. *See generally id.* (referring only to students and affiliated university faculty and staff).

253. *Id.* at 9.

254. *Id.*

255. *Id.*

256. *Id.*

Case law outside the instant context may provide limited guidance relative to who is actually covered by the statute. In *Fox v. Pittsburgh State*, a case involving a janitor employed at the university who was sexually harassed in her employment context, the U.S. District Court held that the Title IX statute is not just limited to students.[257] "Instead, Title IX broadly covers any 'person,' not just students, alleging discrimination."[258] The court reasoned further that a reading of Title IX that excludes non-students from its reach simply does not comport with the plain language of the statute —"*[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."[259] The court found further support for its position by looking to Supreme Court jurisprudence. The Supreme Court has read "no person" broadly as *North Haven* puts it so aptly, "[b]ecause § [1681(a)] neither expressly nor impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these 'persons' unless other considerations counsel to the contrary. After all, Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict the scope of § [1681(a)]."[260]

ii. "Program or Activity"

The standing issue is not unrelated to the express Title IX provision that it prohibits discrimination in a school's "program or activity."[261] The question as to what exactly this means has proved to be a source of confusion. Earlier guidelines promulgated in 1997 by the Department of Education do appear to define, at least generally, what is meant by this phrase. The guidelines read:

> The "education program or activity" of a school includes all of the school's operations. This means that Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.[262]

257. Fox v. Pittsburg State Univ., 257 F.Supp.3d 1112, 1112 (D. Kan. 2017).

258. *Id.* at 1123.

259. *Id.* at 1124 (alteration in original) (emphasis added) (quotation marks omitted) (quoting 20 U.S.C. § 1681(a) (2012)).

260. *Id.* at 1125 (alterations in original) (quoting N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982)).

261. 20 U.S.C. § 1681 (2012).

262. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE 1997 (citation omitted), https://www2.ed.gov/about/offices/list/ocr/docs/sexharo1.html (last visited Aug. 24, 2018).

This description, taken literally, would appear to extend the protections of Title IX fairly broadly to the far corners of a school's endeavors, and certainly beyond just the classroom or dormitories. However, the guidelines also include language specifically about protecting "students,"[263] which may perhaps reflect an assumption, or intention, that those entitled to receive the protective benefit of the law are those enrolled at a particular institution.

Congress also attempted to further clarify the meaning of the "programs or activities" phrase in passage of the Civil Rights Restoration Act in 1987.[264] According to the Act, the term "program or activity" refers to "all of the operations" in a given "college, university, or other postsecondary institution, or a public system of higher education."[265] One of the objectives of the Act was to clarify that if any part of a school received federal funds, this triggered Title IX liability across the entire institution. "Indeed, the Senate Report addressing the Civil Rights Restoration Act of 1987 ("CRRA") clarified that discrimination is 'prohibited throughout *entire* agencies or institutions if any part receives Federal financial assistance,' and that 'all of the operations of' an educational institution or system would include, but is not limited to: 'traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities.'"[266]

The purpose of the CRAA was discussed by the court in *Fox v. Pittsburg State University*. "Overall, the amendment's purpose was to reaffirm pre-*Grove City College* judicial and executive branch interpretations and enforcement practices which provided for 'broad coverage' of the anti-discrimination provisions of these civil rights statutes. . . . Indeed, the word 'broad' is used 35 times in the legislative history of the 1987 amendment alone."[267] In *Fox*, the court rejected the defendant's argument that the 1987 amendment to Title IX only decided the issue of whether the institution as a whole is covered, and that a plaintiff would still need to establish a "nexus" to educational programs or activities.[268]

2. Judicial Opinions

Beyond the two central cases discussed in this Article, *Jane Doe v. Brown University* and *K.T. v. Culver-Stockton College*, other courts have, in different but analogous contexts, made useful references that support extension of Title IX beyond a narrow subset of enrolled students. This section highlights one of these cases.

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263. *Id.*
264. 20 U.S.C. § 1687.
265. *Id.*
266. Fox v. Pittsburg State Univ., 257 F. Supp. 3d 1112, 1124–25 (D. Kan. 2017).
267. *Id.* at 1125.
268. *Id.*

Fox, as discussed in the previous section, involved a similar set of circumstances as the instant context.[269] The case involved a Title IX claim brought against a school for its deliberate indifference to allegations of sexual harassment perpetrated against a woman who was employed as a janitor.[270] As part of its defense strategy, the university argued that its groundskeepers or maintenance workers should be treated differently than its faculty members for purposes of Title IX protections.[271] The court rejected the defendant-school's reasoning, and instead allowed for a broad interpretation of which university employees are protected by Title IX, ultimately refusing to differentiate between "types" of employees.[272] "Nothing Defendant cites persuades this Court that Title IX is meant to allow claims by some of these employees but not all. Title IX must be given 'a sweep as broad as its language.'"[273] This argument for statutory breadth is at odds with the First Circuit's opinion in Jane Doe's appeal, which appears to restrict the protections of Title IX to students who are enrolled at the institution where sexual violence occurs. Nonetheless, the perspective of the *Fox* court is a powerful one that logically could extend to non-students or other campus visitors.

3. Equal Protection

In the context of students and non-students being treated differently by federally funded institutions of higher education, an equal protection question almost inevitably arises. Is there a legitimate government interest in treating these two classes of victims differently? Amici who wrote in support of Jane DOE's case against Brown University made the argument that, "It is not rational to provide full remedies to students who visit museums, but not students who visit other schools . . . . Title IX's protections must be applied and enforced uniformly among all members of a protected class and in all places where federal funding prohibits discrimination."[274]

In general, there has not been much written about the intersection of Title IX and the Equal Protection Clause.[275] However, as Attorney David Cohen explains, "The relationship between Title IX and the Equal Protection Clause is relevant to many areas of sex discrimination law. First and foremost, the issue has arisen when courts have attempted to determine the scope of

269. *Id.* at 1126.

270. *Id.* at 1118–19, 1131.

271. *Id.* at 1126.

272. *Id.*

273. *Id.*

274. Equal Means Equal Brief, *supra* note 237, at *14.

275. *See* David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 240 (2005) ("[T]here is no single or even dominant view about the relationship between Title IX and the Equal Protection Clause.").

Title IX's prohibition of sex discrimination."[276] Cohen continues, "In most areas of sex discrimination jurisprudence, and especially under the Equal Protection Clause, the concept of formal equality—treating similarly situated individuals alike—has guided the courts."[277] The equal protection dimension of the Title IX conundrum deserves further exploration.

B. ARGUMENTS FOR EXCLUSION

A number of arguments can also be made for *excluding* non-students from the protections of Title IX. Some of these arguments are grounded in the same exact context as those for inclusion as highlighted in the previous section: existing case law and the Title IX statute itself. The most persuasive arguments for excluding non-students rest squarely on the paucity of cases, statutory vagueness, and lack of contemporary Department of Education guidance on point.

Almost every case brought against a university under Title IX on the basis of the school's alleged deliberate indifference involves victims who were enrolled students at that university. To be sure, student on student sexual violence is likely the most common to occur in a campus context. The dearth of case law involving non-student victims may stem from this reality as well as the fact that, as outsiders, non-students may not be aware of Title IX policies or the opportunity to file a complaint with the school.

1. Judicial Opinions

There are no cases that have been decided to date that extend Title IX protections to campus visitors. And while it may be easy to disagree with the outcome of the lower courts and federal appellate review in both *K.T. v. Culver Stockton College* and *Doe v. Brown University*, this small collection of cases is unanimous in their holdings regarding non-student access to Title IX. The recent MSU cases filed by the victims of Dr. Nassar against that university might have resulted in more extensive judicial interpretation of this question had they not been settled.[278]

In a different yet related context, the Tenth Circuit included an offhanded reference to non-students in *Simpson v. Univ. of Colorado Boulder*. This case resulted in a novel approach to interpret the deliberate indifference standard[279] and has been the subject of scholarly scrutiny.[280] In *Simpson*, the court reversed the district court's granting of summary judgment for the University of Colorado involving the perpetuation of systemic sexual abuse in the school's athletic recruiting program.[281] While the holding itself does not

276. *Id.* at 218.
277. *Id.* at 221.
278. *See* Smith & Hartocollis, *supra* note 10.
279. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1178 (10th Cir. 2007).
280. *See, e.g.*, McCart, *supra* note 109, at 154.
281. *Simpson*, 500 F.3d at 1173.

inform the discussion here, a part of its opinion is nonetheless relevant. The court casually referenced the non-student standing issue when discussing a sport recruiting program at the university.[282] In addressing the central issue in the case, which hinged on whether the occurrence of sexual assaults during recruiting was obvious and a regular part of the athletic recruiting context, the court referenced numerous instances where sexual assaults occurred.[283] One of the court's examples, which it interpreted as evidence of this institutional culture of violence, involved a non-student victim.[284] The court reasoned: "As the IIC Report detailed, on December 6 a group of high-school girls attended a party at an off-campus hotel hosted by a CU football player for two visiting recruits. One of the girls alleged that she had been sexually assaulted by recruits at the party."[285] The evidence of sexual violence was used to support the argument that there existed a culture of violence at the university. The court emphasized how the victim's status as a non-student of that university made her unable to access the protections of Title IX.[286] "Although the victim was not a CU student protected by Title IX, that circumstance is irrelevant to evaluation of the risk to CU women."[287] The court found that the violence this particular victim experienced was relevant to describing the culture of the athletic recruiting practices, and the dicta in this Tenth Circuit case is a most explicit statement about the extension of Title IX to non-students. The court provided no citation or other explanation for its conclusory statement; taken at face value, it argues against Title IX's application to campus visitors.

2. Statutory Language and Related Guidelines

As argued in the preceding section, the vague language of the Title IX statute allows, on the one hand, for an expansive interpretation of its application to cover all those who interact with the university. However, the absence of such explicit references to non-students may also well justify their exclusion. If it intended and expansive interpretation, Congress could certainly have clarified its "no person" language to more readily make obvious the individuals to whom it was referring.

Further, in the voluminous guidance promulgated over the years by the Department of Education, there is not one reference to the rights of non-student victims to be protected by Title IX, even when attention is directed to non-student perpetrators.[288] Considering the breadth of topics addressed by the various Dear Colleague Letters and other guiding documents, it is

282. *Id.* at 1181.
283. *Id.* at 1181–85.
284. *Id.* at 1181.
285. *Id.*
286. *Id.*
287. *Id.*
288. *See supra* notes 248–52 and accompanying text.

surprising that the DoE would not have included affirmative recognition of non-students if that was indeed their intention.

VII. CONCLUSION

Assuming a victim of sexual violence believes that an institution acted with deliberate indifference in its response to her Title IX complaint, making the case that she has standing to file a lawsuit against the school becomes a critical threshold matter. The judicially defined standard for imposing liability in Title IX cases has largely been created from cases involving parties who are all members of a university community, as students, teachers, and staff. Therefore, it seems that a legal assumption has been made that only official members of a school have a right of action under the federal law and this assumption has not been subject to significant judicial scrutiny. The existing case law almost exclusively involves enrolled student or employees, and courts have not specifically been called on to address the rights of outsiders beyond the two cases discussed throughout this Article.

Colleges and universities may not be entirely "total institutions" in the way that Goffman and others might contemplate.[289] That is, they are not so completely isolated as to label them entirely closed, and they in fact thrive on the constant influx of participants from the outside; thus, they are better conceptualized as quasi-closed systems.[290] One of the features of a university that distinguishes it from other more traditional closed settings like prison is the practice of having non-system members regularly participate in its programs and activities. High school students routinely make campus visits as they decide which school to attend; community members attend lectures, book signings, and other cultural and sporting events; patients visit doctor's offices and medical treatment centers; and summer camps hold sessions on campuses where participants become an integral part of the community. This is but a narrow list of ways non-university members interface with members of the university community officially, albeit temporarily, on a daily basis.

Colleges and universities anticipate that those from the "outside" will inevitably, and necessarily, make their way in. Perhaps for this reason alone it makes good sense to resist the temptation to create different theories of liability for students and non-students and make available the protections of Title IX to those who participate in the programs and activities, broadly defined, of institutions of higher education. Notably, the settlement between MSU and the hundreds of victims of Dr. Nassar, rightfully does not distinguish between students and non-students. A different approach that denied relief to Nassar's non-student victims would have been inherently unfair, unjust, and at odds with the spirit of Title IX.

289. *See* Goffman, *supra* note 75, at 314–15.

290. Brenner & Darcy, *supra* note 21, at 132.

One of the problems with relying exclusively on administrative law is the potential for policy changes to occur with the whims of a given administration. The interpretive ping pong that has characterized the last few decades of Title IX regulations is illustrative of this dynamic. The approach taken by MSU in its settlement should inform future judicial decision making, and Congress should intervene to support a broader reading of Title IX in order to ensure that campuses are free from sexual violence and able to effectively guarantee access to education.