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COMMENT

Addressing the High School Sexual Assault Epidemic: Preventive and Responsive Solutions

Carolyn A. Haney*

INTRODUCTION

“Me, too.” With those words, a startling number of men and women shared their stories of sexual assault and harassment.¹ On October 15, 2017, actress Alyssa Milano posted on Twitter: “Suggested by a friend: If all the women who have been sexually harassed or assaulted wrote ‘Me too’ as a status, we might give people a sense of the magnitude of the problem.”² Within a day, #MeToo was used on Twitter more than half a million times.³ On Facebook, 4.7 million users were involved in a conversation about “Me too” within 24 hours “with more than 12 million posts, comments, and reactions.”⁴ Not only has this movement highlighted the voices of survivors, but many successful men have been terminated, suspended, and publicly condemned for harassing or assaulting men and women.⁵ Bill O’Reilly, Roger Ailes, Harvey Weinstein,⁶ Kevin Spacey,⁷ and Louis C.K.⁸ are just a few of the powerful men who have been impacted by allegations of sexual assault and harassment.

While only recently thrust into the public spotlight, the campaign leading to #MeToo began over ten years ago. Activist Tarana Burke sought to create a bond between survivors of sexual assault after hearing a story from a young girl at

* Indiana University Maurer School of Law, J.D. 2019. Thank you to the Indiana Journal of Law and Social Equality for their consideration and efforts during the publication process, and to Gustavo Jimenez for his unwavering encouragement and support.

¹ See, e.g., *About, ME TOO* (last updated 2018), <https://metoomvmt.org/about/>; Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/>.

² Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 2:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976?lang=en.

³ Lisa Respers France, *#MeToo: Social Media Flooded with Personal Stories of Assault*, CNN (Oct. 16, 2017), <http://www.cnn.com/2017/10/15/entertainment/me-too-twitter-alyssa-milano/index.html>.

⁴ Cassandra Santiago & Doug Criss, *An Activist, a Little Girl, and the Heartbreaking Origin of ‘Me Too,’* CNN (Oct. 17, 2017), <http://www.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html>.

⁵ See, e.g., *#MeToo: A Timeline of Events*, CHI. TRIB. (July 19, 2019), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htlstory.html>; Gillian B. White, *America’s Sexual-Assault Epidemic*, THE ATLANTIC (Oct. 21, 2017), <https://www.theatlantic.com/business/archive/2017/10/weinstein-sexual-assault/543582/>.

⁶ See, e.g., White, *supra* note 5.

⁷ E.g., Sandra Gonzalez & Chloe Melas, *‘House of Cards’ Writers Racing Against the Clock to Rewrite Show*, CNN (Nov. 10, 2017), <http://money.cnn.com/2017/11/10/media/house-of-cards-writers/index.html>.

⁸ E.g., *Louis C.K. Responds to Accusations: ‘These Stories Are True’*, N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/2017/11/10/arts/television/louis-ck-statement.html>.

summer camp who was abused by her stepfather.⁹ While the sexual assault awareness movement has recently gained momentum with the #MeToo campaign, the problem of sexual violence has existed for centuries.¹⁰

Survivors of sexual assault experience a number of psychological and mental consequences, including guilt, shame, anger, distrust, confusion, and denial.¹¹ Survivors¹² are also at risk of experiencing major depression, nightmares, flashbacks, anxiety, eating disorders, and low self-esteem.¹³ Additionally, survivors often develop Post Traumatic Stress Disorder (PTSD).¹⁴ One study found that 94% of rape victims will experience PTSD symptoms within two weeks of the assault.¹⁵ The psychological ramifications of sexual assault can be deadly for some victims: 33% of rape victims will contemplate suicide, and 13% will actually attempt to end their lives.¹⁶ Abused teenagers also tend to have problems in school and with their academic performance.¹⁷

Sexual assault has a number of physical consequences. These include an increased risk of substance abuse.¹⁸ Rape victims are more likely to use drugs than the general public—approximately three and a half times more likely to use marijuana, six times more likely to use cocaine, and ten times more likely to use other major drugs.¹⁹ Sexual assault can also lead to changes in eating or sleeping

⁹ See Santiago & Criss, *supra* note 4.

¹⁰ See generally Carolyn A. Conley, *Sexual Violence in Historical Perspective*, in OXFORD HANDBOOK OF GENDER, SEX, AND CRIME (Rosemary Gartner & Bill McCarthy eds., 2014) (providing a historical perspective on sexual assault).

¹¹ See *id.*; *Effects of Sexual Assault and Rape*, JOYFUL HEART FOUNDATION, <http://www.joyfulheartfoundation.org/learn/sexual-assault-rape/effects-sexual-assault-and-rape> (last visited Jan. 9, 2020); *Effects of Sexual Violence*, RAINN, <https://www.rainn.org/effects-sexual-violence> (last visited Jan. 9, 2020).

¹² There is some debate about whether to refer to individuals who have experienced sexual assault or harassment as survivors or as victims. See, e.g., *Key Terms and Phrases*, RAINN, <https://www.rainn.org/articles/key-terms-and-phrases>. (last updated 2019). This Comment takes the stance that both are appropriate terminology and individuals may decide which term to use to identify themselves. This Comment will use them interchangeably.

¹³ E.g., *Impact of Sexual Violence: Fact Sheet*, NAT'L SEXUAL VIOLENCE RESOURCE CTR., http://www.nsvrc.org/sites/default/files/NSVRC_Publication_Factsheet_Impact-of-sexual-violence.pdf (last updated 2010).

¹⁴ *Id.*

¹⁵ *Victims of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/victims-sexual-violence> (last visited Jan. 9, 2020) (citing Barbara Olov Rothbaum, Edna B. Foa, David S. Rigs, Tamera Murdock & William Walsh, *A Prospective Examination of Post-Traumatic Stress Disorder in Rape Victims*, 5 J. Traumatic Stress 455 (1992)).

¹⁶ *Id.* (citing Nat'l Victim Ctr. & Crime Victims Research and Treatment Ctr., *Rape in America: A Report to the Nation* (1992)).

¹⁷ Amy M. Young, Melissa Grey & Carol J. Boyd, *Adolescents' Experience of Sexual Assault by Peers: Prevalence and Nature of Victimization Occurring Within and Outside of School*, 38 J. Youth Adolescence 1072, 1073-74 (2009).

¹⁸ *Impact of Sexual Violence: Fact Sheet*, *supra* note 13.

¹⁹ *Victims of Sexual Violence: Statistics*, *supra* note 15.

patterns, physical injury, pregnancy, and a risk of contracting a sexually transmitted disease.²⁰

Additionally, experiencing sexual assault as a teenager can increase an individual's chances of being victimized again in the future.²¹ The National Council on Crime and Delinquency reports that “[s]tudies have found that the best predictor of future victimization is past victimization—holding true for all types of crimes . . . [including] rape and sexual assault.”²² While reasons for this repeated victimization are unclear, this uncertainty provides even more incentive to prevent the assaults from occurring in the first place.²³

Sexual assault also impacts a survivor's community. Communities may feel fear, disbelief, or anger when a sexual assault occurs.²⁴ Communities may be divided when some individuals support the survivor and other individuals feel as though the perpetrator has been unfairly accused or treated unjustly. Community division was illustrated in an episode of *20/20*, documenting the story of Spanish Fort, Alabama, where the alleged rape of a fifteen-year-old resulted in the arrest of a popular student-athlete.²⁵ The community response was so negative that the family of the alleged victim sold their home and moved away.²⁶

In addition to these negative relational consequences, sexual assault has serious financial costs: medical costs, criminal justice costs, mental health services costs, and lost contributions from victims. The U.S. Department of Justice has estimated that the cost of sexual assault is approximately \$450 billion per year, with rape being the costliest at \$127 billion per year.²⁷

Acknowledging these serious consequences, and formulating solutions, is especially important when viewed in the shadow of just how many individuals will become a victim of sexual violence, as described in Part I.²⁸ Fortunately, both federal and state governments have recently begun addressing the sexual assault epidemic, which is most prevalent on college campuses.²⁹ Though the federal government's response to college campus sexual assault is commendable, it in large

²⁰ *E.g., Impact of Sexual Violence: Fact Sheet, supra* note 13.

²¹ Young et. al., *supra* note 17; *Effects of Child Sexual Abuse on Victims*, NAT'L CTR. FOR VICTIMS OF CRIME, <https://victimsofcrime.org/media/reporting-on-child-sexual-abuse/effects-of-csa-on-the-victim> (last updated 2011); *Sexual Revictimization Research Brief*, NAT'L SEXUAL VIOLENCE RESOURCE CTR. (2012), https://www.nsvrc.org/sites/default/files/publications_NSVRC_ResearchBrief_Sexual-Revictimization.pdf.

²² MADELINE WORDES & MICHELL NUNEZ, NAT'L COUNCIL ON CRIME & DELINQ., *OUR VULNERABLE TEENAGERS: THEIR VICTIMIZATION, ITS CONSEQUENCES, AND DIRECTIONS FOR PREVENTION AND INTERVENTION* 1, 11 (May 2002), https://victimsofcrime.org/docs/Documents/teen_victim_report.pdf?sfvrsn=0.

²³ *Id.*

²⁴ *Impact of Sexual Violence: Fact Sheet supra* note 13.

²⁵ *20/20: Behind the Closed Door* (ABC television broadcast June 2, 2017).

²⁶ Joseph Diaz, Keturah Gray & Alexa Valiente, *Teen's Accusation of Rape Against High School Football Star Divides Alabama Town*, ABC NEWS (June 2, 2017), <http://abcnews.go.com/US/teens-accusation-rape-high-school-football-star-divides/story?id=47770337>.

²⁷ *Impact of Sexual Violence: Fact Sheet, supra* note 13.

²⁸ *See infra*, Part I.

²⁹ *See, e.g., Protecting Students from Sexual Assault*, U.S. DEP'T. OF JUST., <https://www.justice.gov/ovw/protecting-students-sexual-assault> (last updated Nov. 5, 2018).

part overlooks sexual violence that occurs in other settings.³⁰ Therefore, the focus of this Comment is the importance of addressing high school sexual violence.

Waiting until college to address sexual assault makes it less likely that interventions will be effective.³¹ Students' attitudes and sexual behaviors are formed during adolescence, and high schools can serve as a training ground for sexual predators.³² The call for earlier response comes from people with an array of different disciplines and backgrounds, including law enforcement officials, parents, educators, and activists.³³ In the words of Annie Clark, co-founder and executive director of End Rape on Campus: "The topic of sexual violence on campus has gotten a lot of attention, but college perpetrators come in as perp[etrators]. If the first time we're talking about consent and healthy relationships is age 18, that's too late."³⁴ This view is echoed by Professor Paul Schewe, who noted that "college is just way too late," and by recent high school graduate Otto Zaccardo, who stated that sexual violence "starts to be part of your culture . . . by the time you get to college, it's second nature, it's already hardwired into our brain."³⁵

This Comment acknowledges that there are differing opinions regarding what the right method for sexual assault prevention or response is, as well as what constitutes consent. For instance, President Trump's administration, through Secretary of Education Betsy DeVos, rescinded some of the Obama administration's guidance on how colleges should address sexual assault.³⁶ This difference in administrative guidance illustrates the complexity surrounding the issue and the tricky balance between protecting victims while also treating alleged perpetrators justly.³⁷ While acknowledging that there are differing views on the matter, this Comment asserts that the problem of sexual assault on high school campuses should be addressed and makes recommendations as to possible solutions.³⁸

By way of background, Part I will give more information on the issue of sexual assault among high school students, revealing how prevalent the problem is and highlighting media attention that the issue has received. Part II will explore

³⁰ See, e.g., Elizabeth Zwerling, *Lawmakers Shift Campus Rape Conversation to High Schools*, WOMEN'S ENEWS (Dec. 7, 2015), <http://womensenews.org/2015/12/lawmakers-shift-campus-rape-conversation-to-high-schools/>.

³¹ See Cindy Long, *The Secret of Sexual Assault in Schools*, NEA TODAY (Dec. 4, 2017), <http://neatoday.org/2017/12/04/sexual-assault-in-schools/>; Tovia Smith, *To Prevent Sexual Assault, Schools and Parents Start Lessons Early*, NPR (Aug. 9, 2016), <http://www.npr.org/2016/08/09/487497208/to-prevent-sexual-assault-schools-and-parents-start-lessons-early>.

³² Jane Meredith Adams, *Experts Say Schools Must Do More to Address Early Signs of Sexual Harassment*, EDSOURCE (July 24, 2016), <https://edsource.org/2016/experts-say-schools-must-do-more-to-address-early-signs-of-sexual-harassment/565945>.

³³ Smith, *supra* note 31.

³⁴ Zwerling, *supra* note 30.

³⁵ Smith, *supra* note 31.

³⁶ Valerie Strauss, *DeVos Withdraws Obama-era Guidance on Campus Sexual Assault. Read the Letter.*, WASH. POST (Sept. 22, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/09/22/devos-withdraws-obama-era-guidance-on-campus-sexual-assault-read-the-letter/?utm_term=.cecbf27fec9a.

³⁷ *Id.*

³⁸ See *infra* Parts III, IV.

some of the barriers that arise when thinking of possible solutions to the issue of high school assault, including the dismissal of sexual assault as bullying or hazing, the inadequate response by school administrators, differentiation between public and private high schools, privacy concerns relating to minors, and social pressure from varying viewpoints. Part III will identify preventive solutions, including mandatory consent education and information regarding sexual violence in high schools, better monitoring of those students who perpetrate sexual assaults, and mandated bystander intervention programs. Part IV will discuss responsive solutions, including mandatory reporting, mandatory school policy, and the possible use of technology to better report and address sexual assaults.

I. A BACKGROUND OF SEXUAL ASSAULT IN HIGH SCHOOLS

At the outset, it is worth noting that accurate statistics about sexual assault can be difficult to acquire. There is reason to believe that sexual assault is an underreported crime,³⁹ in part because of the stigma surrounding sexual assault and the survivor's fear of retaliation by the perpetrator. This stigma and fear often cause sexual assault victims to not report their experience.⁴⁰ Furthermore, when sexual violence is reported, some incidents are categorized as physical violence or bullying instead of sexual assault, and these misclassified instances have an adverse impact on accurate data.⁴¹ There is also no public mandatory reporting of sexual assaults in high schools, and therefore, accurately tracking the number of sexual assaults that occur in high schools is difficult.⁴²

Based on the statistics that have been reported, however, it is clear that sexual assault is prevalent among high school students. According to the Center for Disease Control ("CDC"), nearly 20% of women and 2.6% of men will be sexually assaulted in their lifetime.⁴³ Of the female victims, approximately one-third will be first assaulted between the ages of eleven and seventeen.⁴⁴ Examining high school sexual assault in particular, another study found that approximately half of high school girls and a quarter of high school boys had been sexually assaulted.⁴⁵ This study's definition of sexual assault included forcible kissing, touching, and rape.⁴⁶

³⁹ See WORDES & NUNEZ, *supra* note 22; Cynthia McCormick, *Advocates: Sexual Assaults Underreported in Schools*, CAPE COD TIMES (Mar. 5, 2017), <http://www.capecodtimes.com/news/20170305/advocates-sexual-assaults-underreported-in-schools>.

⁴⁰ McCormick, *supra* note 39.

⁴¹ Nan Stein, *A Rising Pandemic of Sexual Violence in Elementary and Secondary Schools: Locating a Secret Problem*, 12 DUKE J. GENDER L. & POL'Y 33, 33 (2005).

⁴² Reese Dunklin, Emily Schmall & Michael Siroly, *Student Sex Assault Reports and How They Vary by State*, ASSOCIATED PRESS: SCHOOLHOUSE SEX ASSAULT (May 1, 2017), <https://www.ap.org/explore/schoolhouse-sex-assault/student-sex-assault-reports-and-how-they-vary-by-state.html>.

⁴³ CTR. FOR DISEASE CONTROL, PREVENTING SEXUAL VIOLENCE (2019), <https://www.cdc.gov/violenceprevention/pdf/SV-Factsheet.pdf>.

⁴⁴ *Id.*

⁴⁵ Young et al., *supra* note 17, at 1072.

⁴⁶ *Id.* at 1077.

An Associated Press study found that more than 800 police agencies reported at least one sexual assault (defined as rape, sodomy, penetration with an object, or unwanted fondling) during 2013 and 2014 that had occurred either at an elementary or a secondary school.⁴⁷ In that same two-year period, there were more than 2,800 reported cases of sexual assault involving more than 3,300 elementary and secondary school students.⁴⁸ Additionally, in 2016, the Department of Education received eighty-three civil rights complaints related to the handling of sexual assault cases in K-12 schools—compared to the twenty-one complaints filed in 2014 and the eleven complaints filed in 2010.⁴⁹ These statistics show that sexual assault is clearly occurring in high schools. It is important to note again that these numbers do not include sexual assaults that are mischaracterized or not reported. This statistical evidence is bolstered by the number of anecdotal examples discussed in the media, which illustrate the widespread nature of sexual assault amongst high school students.

The media attention that high school sexual assault has recently received further demonstrates how many individuals are affected by sexual assault in high schools. High school sexual assault has gained acknowledgement across the media landscape, including film, newspaper, television, and social media. For example, the recent documentary *Audrie and Daisy* highlighted two alleged sexual assaults and sought to begin a conversation about the consequences that these assaults have on those who endure them.⁵⁰ The film premiered at the 2016 Sundance Film Festival and won a 2016 Peabody Award.⁵¹ The film tells the story of Audrie Pott, who was a high school sophomore when she was allegedly sexually assaulted at a house party by her classmates in 2012. Audrie awoke to lewd messages written on her body, and pictures of the assault were shared on social media.⁵² Audrie committed suicide eight days after the assault occurred.⁵³ The film also tells the story of Daisy Coleman, who was fourteen when she was allegedly sexually assaulted by a seventeen-year-old classmate in 2012.⁵⁴ The alleged rapist then dropped Daisy off in

⁴⁷ *By the Numbers: Stats Revealed by AP Investigation of Student Sex Assaults*, ASSOCIATED PRESS: SCHOOLHOUSE SEX ASSAULT (May 1, 2017), <https://www.ap.org/explore/schoolhouse-sex-assault/stats-revealed-by-ap-investigation-of-student-sex-assaults.html>.

⁴⁸ *Id.*

⁴⁹ U.S. DEPT. OF EDUC., OFF. FOR CIV. RIGHTS, *ACHIEVING SIMPLE JUSTICE: HIGHLIGHTS OF ACTIVITIES*, OFFICE OF CIVIL RIGHTS 2009-2016 10 (2016), <https://www2.ed.gov/about/reports/annual/ocr/achieving-simple-justice.pdf>.

⁵⁰ *About the Film*, AUDRIE & DAISY, <http://www.audrieanddaisy.com/about/> (last visited Sept. 3, 2019).

⁵¹ *Audrie Pott Foundation*, AUDRIE & DAISY, <https://audriepottfoundation.com/netflix-documentary> (last visited Sept. 3, 2019).

⁵² Randy Myers, *Audrie Pott's Tragic Story in Sundance Documentary*, MERCURY NEWS (Sept. 21, 2016), <http://www.mercurynews.com/2016/01/24/saratoga-audrie-potts-tragic-story-in-sundance-documentary>.

⁵³ *Id.*

⁵⁴ Joseph Diaz & Lauren Efron, *Newly Released Documents, Tapes from Maryville Teen Alleged Rape Case Reveal New Details*, ABC NEWS (Apr. 3, 2014) <http://abcnews.go.com/US/newly-released-documents-tapes-maryville-teen-alleged-rape/story?id=23164717>.

front of her house in freezing temperatures.⁵⁵ Following the assault, Daisy was bullied at school and harassed on social media, and eventually the family decided they needed to move away.⁵⁶ Daisy has attempted suicide three times since the incident.⁵⁷ This documentary highlighted the problem of high school sexual assault in a powerful, narrative way.

Newspapers have also played a role in uncovering the problem of high school sexual assault. The *Boston Globe* published a widely-discussed article on the decades-long prevalence of sexual abuse at private schools in New England.⁵⁸ This article not only discusses the incredible number of alleged victims, but also how long this problem has been occurring, with stories dating back to the 1950s.⁵⁹ This report was strikingly similar to one published in the *New York Times*, in which an elite prep school in New Hampshire admitted to two decades of sexual abuse involving high school students.⁶⁰

In addition to these well-known newspapers that have written about the issue, a student newspaper out of Kansas, *The Harbinger Online*, has responded to the problem of sexual assault in its own high school.⁶¹ The student newspaper published an article that reported statistics, gave a platform for students who had been sexually assaulted to share their stories, and shared information and resources about what different organizations at the school were doing to address the problem.⁶²

Television and social media have also played a role in illustrating the prevalence of high school sexual assault. As mentioned in the preceding section, *20/20* aired an episode on June 2, 2017, which discussed a teenager at an Alabama high school who alleged that she was sexually assaulted by a popular football player.⁶³ The ABC drama *American Crime* focused its second season on a sexual assault occurring at an Indianapolis high school, which was strikingly similar to an incident that occurred in central Indiana at Carmel High School in 2010.⁶⁴

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Diana Reese, *Daisy Coleman, Alleged Rape Victim, Attempts Suicide Again*, WASH. POST (Jan. 7, 2014), https://www.washingtonpost.com/blogs/she-the-people/wp/2014/01/07/daisy-coleman-alleged-rape-victim-attempts-suicide-again/?utm_term=.1d1d49af3142.

⁵⁸ Jenn Abelson, Bella English, Jonathan Saltzman & Todd Wallack, *Private Schools, Painful Secrets*, BOSTON GLOBE, <https://www.bostonglobe.com/metro/2016/05/06/private-schools-painful-secrets/OaRI9PFpRnCTJxCzko5hkN/story.html> (last visited Sept. 3, 2019).

⁵⁹ *Id.*

⁶⁰ Jess Bidgood, *St. Paul's School Acknowledges Decades of Sexual Misconduct*, N.Y. TIMES (May 22, 2017), <https://www.nytimes.com/2017/05/22/us/st-pauls-school-acknowledges-decades-of-sexual-misconduct.html>.

⁶¹ Celia Hack, Ellie Cook, Caroline Heitmann & Morgan Browning, *Facing the Problem*, THE HARBINGER, <http://smeharbinger.net/facing-the-problem/> (last visited Sept. 3, 2019).

⁶² *Id.*

⁶³ Howard Koplowitz, *Alleged Spanish Fort High School Rape Victim Speaks out on '20/20'*, ALA. LOCAL (Mar. 6, 2019), https://www.al.com/news/2017/06/alleged_spanish_fort_high_scho.html.

⁶⁴ Todd Connor, *ABC Shows Storyline Similar to Incident in Carmel*, INDY CHANNEL (Jan. 7, 2016), <http://www.theindychannel.com/news/local-news/american-crime-season-two-storyline-similar-to-hazing-incident-at-carmel-high-school-in-2010>.

The Steubenville Rape Case, which captured the nation's attention in 2013, illustrates how social media has contributed to exposing the problem alongside more traditional forms of media.⁶⁵ The case involved a then-sixteen-year-old who was allegedly sexually assaulted by two classmates who were popular student-athletes.⁶⁶ Social media was integral to the way the case unfolded, providing evidence of the assault as well as the response to the assault by individuals online.⁶⁷ The evidence in this case included an Instagram post of the victim seemingly passed out and being carried by her assaulters,⁶⁸ as well as videos of partygoers joking about the individual's state of intoxication and her assault.⁶⁹ Additionally, the response to the case resulted in a "WikiLeaks-style site" that leaked information about the alleged assaulters, the town sheriff, and the football program the assaulters participated in.⁷⁰

Media attention, including accounts of assaults on social media and in films, newspapers, and television, has highlighted the problem of high school sexual assault. The media attention has also provided powerful narrative examples illustrating those affected by these crimes.

II. THE DIFFICULTY OF ADDRESSING SEXUAL ASSAULT IN HIGH SCHOOLS

Sexual assault in high schools is a difficult problem to solve. Instances of sexual violence have been dismissed as hazing or bullying, and the overall response by school administrators has been inadequate. Additionally, there are distinctions between private and public schools, there are privacy concerns unique to minors, and there is long-standing social pressure and controversy surrounding sexual education.

A. Sexual Assault Dismissed as Hazing or Bullying

Unfortunately, numerous reports illustrate incidents of sexual assault that have been mislabeled as hazing or bullying.⁷¹ Assaults that are mislabeled as

⁶⁵ See, e.g., Alexander Abad-Santos & Matt Sullivan, *Enter the Trial in Steubenville, Where the Cast Is Not Merely Football Players*, ATLANTIC (Mar. 13, 2013), <https://www.theatlantic.com/national/archive/2013/03/steubenville-rape-trial-players/317443/>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Anna North, *5 Years Ago, A Girl Was Raped in Steubenville. Now Her Rapist's Father Shot a Judge*, VOX (Aug. 22, 2017), <https://www.vox.com/identities/2017/8/22/16185174/steubenville-shooting-judge-nathaniel-richmond>.

⁷⁰ Alexander Abad-Santos, *Inside the Anonymous Hacking File on the Steubenville 'Rape Crew'*, ATLANTIC (Jan. 2, 2013) <https://www.theatlantic.com/national/archive/2013/01/inside-anonymous-hacking-file-steubenville-rape-crew/317301/>.

⁷¹ Kimberly Lawson, *New Report Exposes how Schools Dismiss Rape as 'Hazing' or 'Bullying'*, VICE (May 8, 2017), https://broadly.vice.com/en_us/article/qvdky7/new-report-exposes-how-schools-dismiss-rape-as-hazing-or-bullying.

hazing frequently occur on sports teams, involving male perpetrators and victims.⁷² The vocabulary surrounding these assaults tends to minimize the problem, foster ambiguity about what happened to the students, and affect how administrators and off-campus authority respond to an assault.⁷³

There are a number of cases that serve as examples of these assaults. In Idaho, a football player was hospitalized with injuries after he was allegedly sodomized with a coat hanger in 2015.⁷⁴ In North Carolina, a teenager was bruised when he was allegedly assaulted through his clothes with a broomstick against his rectum.⁷⁵ In Georgia, members of a high school baseball team allegedly assaulted younger classmates on an overnight trip by shoving fingers into a player's rectum and by punching a player's testicles.⁷⁶ Following the incident, the school district issued statements describing "inappropriate physical contact" and "hazing," rather than vocabulary describing sexual assault.⁷⁷ In Texas, a high school was found to have a history of sexual assault on the football, basketball, and baseball teams that had been dismissed as hazing for years, including alleged sodomy of younger players with baseball bats and carbon-dioxide tanks.⁷⁸ After players finally came forward, thirteen players were arrested and are currently facing criminal charges in connection with the assaults.⁷⁹

These incidents illustrate the prevalence of sexual assault in high schools, often mislabeled as hazing or bullying. Understanding these instances as sexual assault, as opposed to bullying or hazing, helps demonstrate the insidious reach that sexual assault has on students. Additionally, these assaults will not be addressed as what they are—sexual violence.

B. Lack of Adequate Response by High School Administrators

Despite being required under Title IX to respond appropriately to sexual violence, many school districts are inadequately addressing the problem. Title IX is a law that prohibits schools—including public colleges as well as primary and secondary schools—from discriminating against individuals based on their sex.⁸⁰

⁷² Reese Dunklin, *Sexual Assaults in High School Sports Minimized as 'Hazing'*, ASSOCIATED PRESS: SCHOOLHOUSE SEX ASSAULT (May 8, 2017), <https://www.ap.org/explore/schoolhouse-sex-assault/sex-assaults-in-high-school-sports-minimized-as-hazing.html>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Oliva Messer, *'This is Not Hazing. This is Rape': Inside a Texas Town's Football Nightmare*, DAILY BEAST (Aug. 23, 2017), <https://www.thedailybeast.com/this-is-not-hazing-this-is-rape-a-texas-towns-football-nightmare>.

⁷⁹ *Id.*

⁸⁰ *Know Your Rights: Sex Discrimination*, ACLU, <https://www.aclu.org/know-your-rights/title-ix-and-sexual-assault> (last visited Sept. 3, 2019).

This discrimination can include “sexual harassment, rape, and sexual assault.”⁸¹ Under Title IX, schools are required to appoint a Title IX Coordinator and to investigate appropriately and respond to any complaints of sexual misconduct, including by providing adequate accommodations for student survivors.⁸²

However, enforcement of this law in K-12 schools is poor, with the Executive Director of the Association of Title IX Administrators estimating that 85% of school districts are not in compliance.⁸³ Schools are failing to address sexual violence that occurs, and this can result in a hostile environment that renders victims unable to learn.⁸⁴ A number of schools have been or are being investigated for the way they responded to a sexual assault under their Title IX responsibilities.⁸⁵

One of these Title IX investigations involves the wealthy school district Mountain View-Los Altos in California.⁸⁶ A student, who was seventeen at the time of the incident, was allegedly sexually assaulted by another student at a high school party.⁸⁷ The survivor claimed that the school failed to protect her from her assaulter, which left her in fear for the rest of the school year.⁸⁸ While the school provided counseling, the student alleged the school failed to inform her about her Title IX rights, did not investigate the allegations, and did not provide adequate accommodations.⁸⁹ At least eight experts found fault with the school district’s handling of the assault.⁹⁰

Countless other similar lawsuits have been filed, demonstrating the lack of appropriate response to sexual assault.⁹¹ For example, Chaz Wing has filed a lawsuit against his school district alleging that they failed to investigate his complaints of sexual harassment and bullying. He was subsequently allegedly sexually assaulted, which he claims the school also failed to investigate or properly address.⁹² The school district’s attorney responded by saying that “the little boys

⁸¹ *Id.*

⁸² U.S. DEP’T OF EDUC. OFF. FOR CIV. RIGHTS, Q&A ON CAMPUS SEXUAL MISCONDUCT (2017) <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

⁸³ Adams, *supra* note 32.

⁸⁴ *Id.*

⁸⁵ See *Sexual Assault Investigations in K-12 Schools*, WASH. POST, <https://www.washingtonpost.com/apps/g/page/local/sexual-assault-investigations-in-k-12-schools/1935/> (last visited Sept. 3, 2019).

⁸⁶ Cynthia Dizikes, Joaquin Palomino & Karen de Sá, *Wild Parties, An Alleged Rape, and a High School’s Troubling Response*, S.F. CHRON. (Feb. 3, 2017), <http://www.sfchronicle.com/crime/article/Wild-parties-an-alleged-rape-and-a-high-10906945.php>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *Doe v. Bibb Cty. Sch. Dist.*, 688 F. App’x 791 (11th Cir. 2017); *Hill v. Cundiff*, 797 F.3d 948 (11th Cir. 2015); *Lockhart v. Willingboro High Sch.*, 170 F. Supp. 3d 722 (D.N.J. 2015).

⁹² Robin McDowell, Reese Dunklin, Emily Schmall & Justin Pritchard, *Hidden Horror of School Sex Assaults Revealed by AP*, ASSOCIATED PRESS: SCHOOLHOUSE SEX ASSAULT (May 1, 2017), <https://www.ap.org/explore/schoolhouse-sex-assault/hidden-horror-of-school-sex-assaults-revealed-by-ap.html>.

who were accused . . . are the real victims in this case and they deserve to be protected.”⁹³

Some students have even asserted that upon reporting a sexual assault to their school, the school retaliated and punished them.⁹⁴ A sixteen-year-old student at a Georgia high school was waiting to be picked up after school and was approached by a male classmate.⁹⁵ He then led the student into a classroom and allegedly forced her to have oral sex.⁹⁶ The next day, the student went to her first period teacher and informed the teacher that she had been assaulted.⁹⁷ Both students were suspended while the school performed a joint disciplinary investigation.⁹⁸ She was informed that if she could not prove that what happened to her was assault, she would be suspended along with her alleged assaulter for engaging in sexual conduct on school grounds.⁹⁹

Similarly, three federal complaints were filed in New York regarding schools’ retaliatory responses to reported sexual assault.¹⁰⁰ One complaint centers on a student who was allegedly assaulted while waiting for a bus. Her alleged attacker filmed the incident and the video began circulating throughout the school.¹⁰¹ Rather than conducting an investigation, the school allegedly deleted the video off students’ phones and instructed the student to stay home until the situation had diffused.¹⁰² A second complaint alleges that a fifteen-year-old student was forced to perform oral sex on a number of boys on school grounds and was later accused of consensually engaging in sexual activity on school premises and subsequently suspended for six days.¹⁰³ The student was punished despite the fact that the police were pursuing criminal charges in response to the attack.¹⁰⁴ A third complaint alleges that a school failed to accommodate a student after an assault by not allowing her to transfer schools and by threatening to file a neglect complaint against her mother if she was not brought back to school.¹⁰⁵

⁹³ *Id.*

⁹⁴ Nora Caplan-Bricker, *My School Punished Me*, SLATE (Sept. 19, 2016), http://www.slate.com/articles/double_x/doublex/2016/09/title_ix_sexual_assault_allegations_in_k_12_schools.html.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Aviva Stahl, *‘This Is an Epidemic’: How NYC Public Schools Punish Girls for Being Raped*, VICE (June 8, 2016), https://broadly.vice.com/en_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

When schools fail to address sexual assaults appropriately, a student perpetrator can assault a number of victims.¹⁰⁶ One such student was Marques Mondy, a basketball star who was allegedly responsible for a number of assaults throughout his time in school.¹⁰⁷ Complaints of Mondy's predatory behavior involve disciplinary records from eight law enforcement agencies and four colleges.¹⁰⁸ The police reports show that in fourth grade, Mondy was accused, along with three other boys, of assaulting two girls.¹⁰⁹ As a junior in high school, Mondy allegedly assaulted a fellow student in the band room of their school, resulting in injuries that a nurse testified were consistent with penetration.¹¹⁰ Two weeks after the assault in the band room, another student accused Mondy of sexual assault in the school parking lot, and Mondy was subsequently criminally charged in connection with the latter two assaults.¹¹¹ An investigation by the Department of Education found that the school district failed to protect one of the students from retaliation after her assault.¹¹²

There is no single answer for why so many high schools are out of Title IX compliance. One possibility is that there is little federal and state oversight for local schools to craft policies and procedures.¹¹³ Schools then struggle to determine which policies are appropriate or necessary.¹¹⁴ Another possibility is that many schools underestimate the problem of sexual assault in their own districts, as many individuals do not recognize the prevalence in K-12 institutions.¹¹⁵ Finally, schools may feel as though there is little incentive to prioritize Title IX compliance. While the loss of federal funds is a possible consequence for Title IX violations, no K-12 school, public college, or university has ever had this funding taken away.¹¹⁶

C. Other Factors Adding Difficulty

There are a number of additional factors that can complicate finding solutions to high school sexual assault. These factors include, but are not limited to: differentiating between public and private high schools, privacy concerns relating to minors, and social pressure from varying viewpoints.

¹⁰⁶ See Justin Pritchard & Reese Dunklin, *Schools Face Vexing Test: Which Kids Will Sexually Attack?*, ASSOCIATED PRESS: SCHOOLHOUSE SEX ASSAULT (May 16, 2017), <https://www.ap.org/explore/schoolhouse-sex-assault/schools-face-vexing-test-which-kids-will-sexually-attack.html>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See Mark Keierleber, *The Younger Victims of Sexual Violence in Schools*, ATLANTIC (Aug. 10, 2017), <https://www.theatlantic.com/education/archive/2017/08/the-younger-victims-of-sexual-violence-in-school/536418/>.

¹¹⁴ *See id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

The first complication comes from the private and public school distinction. Because federal mandates from the Department of Education must be tied to federal funding, private schools can elect not to receive the funding and therefore not comply with the federal program.¹¹⁷ Therefore, private schools who do not rely on federal funding would be outside the scope of any federal program addressing sexual assault. However, only ten percent of K-12 students attend private school,¹¹⁸ and a number of private schools accept public funding.¹¹⁹ Additionally, if solutions are implemented by state law, they may be able to regulate private schools as well as public.¹²⁰ Finally, schools may voluntarily agree to proposed solutions (even if not legally required to do so) for the sake of their students and to avoid public pressure.

The second complication comes from the nature of working with minors. As required by federal law, all fifty states, and all U.S. territories, currently have laws requiring school employees and administrators (among a number of other individuals) to report any suspected or known child maltreatment to the appropriate authorities.¹²¹ All policies and procedures would need to view the sensitive nature of sexual assault in the shadow of these laws mandating that sexual assaults are reported to the authorities. Schools can address this complication by incorporating the mandatory reporting statutes into their policies, and by integrating law enforcement and child protection professionals into the creation of these solutions.

Another complication can be the social and cultural pressure from parents surrounding sexual education. Since at least the 1940s, parents and politicians have disagreed on what should be taught in schools concerning sexual behavior.¹²² These disagreements have created “decades of controversy,” and have resulted in programs and laws that differ in all fifty states.¹²³ One possible solution to this complication could be to present sexual assault education as a civil rights issue.¹²⁴ This would frame sexual assault as a crime similar to racially-motivated assaults, perpetrated against an entire group of protected people.¹²⁵

¹¹⁷ *10 Facts About K-12 Education Funding*, U.S. DEP’T OF EDUC.: ABOUT ED, <https://www2.ed.gov/about/overview/fed/10facts/index.html> (last updated Sept. 19, 2014).

¹¹⁸ *Private School Enrollment*, NAT’L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/coe/indicator_cgc.asp (last updated Jan. 2018).

¹¹⁹ *Should Public Money Be Used for Private Schools?*, PBS: NEWS HOUR (Apr. 1, 2013, 6:34 PM), <https://www.pbs.org/newshour/show/should-public-money-be-used-for-private-schools>.

¹²⁰ For a state-by-state analysis, see generally U.S. DEP’T OF EDUC., *STATE REGULATION OF PRIVATE SCHOOLS* (2009), <https://www2.ed.gov/admins/comm/choice/regprivschl/regprivschl.pdf>.

¹²¹ 42 U.S.C.A. § 5106a(b)(2)(B) (West 2019); see also CHILDREN’S BUREAU, *MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT* (2019) <https://www.childwelfare.gov/pubPDFs/manda.pdf> (providing details on state statutes for mandatory reporting current through April 2019).

¹²² *Parents, Schools Divided as Sex Ed Controversy Erupts*, CBS NEWS (Jan. 19, 2016, 4:21 PM), <https://www.cbsnews.com/news/sex-education-controversy-erupts-in-omaha/>.

¹²³ *Id.*

¹²⁴ Wendy J. Murphy, *Bystander Intervention Policies for Campus Sexual Assault Should Be Framed As Civil Rights Programs, and Made Broadly Applicable to All Protected Class Offenses*, 2017 UTAH L. REV. 801, 801.

¹²⁵ *Id.* at 802.

Despite these complications, there are still a number of possible solutions that could be implemented to address this epidemic, both by preventing future harm and by better addressing assaults that do occur. The following sections will focus on preventive measures, which can reduce the number of victims, and responsive measures, which can ensure that individuals receive the help that they need and can prevent others from assault in the future.

III. POSSIBLE PREVENTIVE SOLUTIONS

There are several possible preventive solutions which aim to lower the number of sexual assault victims. These solutions include mandatory consent education and information regarding sexual violence in high schools, better monitoring of those students who perpetrate sexual assaults, and mandated bystander intervention programs.

A. Mandatory Education Regarding Sexual Violence and Consent

California has been a leader in the fight to prevent sexual violence among primary and secondary school students and became the first state to mandate sexual consent education in high schools.¹²⁶ This California law requires all public high schools in the state to “develop [a] curriculum that addresses sexual violence prevention and healthy peer relationships based on the affirmative consent standard.”¹²⁷ The California Education Code reads that students should be given “information on different forms of sexual harassment and violence, including instances that occur among peers and in a dating relationship,” and that there should be “discussion of the affirmative consent standard . . . and skills pupils use to establish boundaries in peer and dating relationships.”¹²⁸

“Affirmative consent” as used in the California law requires that an individual said “yes” to sexual contact, rather than inquiring whether an individual said “no” to the contact.¹²⁹ This concept of affirmative consent has been implemented by the Department of Education and colleges and universities to combat sexual violence.¹³⁰ However, this concept can easily be applied statutorily to high schools, as California has done.¹³¹ Most high schools already have a framework in place to provide education about consent and sexual violence.¹³² Consent and sexual violence information can easily be incorporated into the school’s curriculum and can be added to the education code.¹³³ This education will “enable young people

¹²⁶ Zwerling, *supra* note 29.

¹²⁷ *Id.*

¹²⁸ CAL. EDUC. CODE § 33544 (West, Westlaw through Ch. 257 of 2019 Reg. Sess.).

¹²⁹ Wendy Adele Humphrey, “Let’s Talk About Sex”: *Legislating and Educating on the Affirmative Consent Standard*, 50 U.S.F. L. REV. 35, 39–40 (2016).

¹³⁰ *Id.* at 50–53.

¹³¹ *Id.* at 70.

¹³² *Id.* at 71.

¹³³ *Id.* at 71–72.

to more fully understand their responsibilities during a sexual encounter” and is a step in the right direction to preventing sexual assault.¹³⁴

Other legislation has been proposed that shows the support that this concept of mandated education is gaining. A Michigan senator is working to develop a plan that would require schools to teach affirmative consent in sexual education.¹³⁵ Sexual education programs would “have to instruct students about sexual assault and dating violence and prevention of sexual assault and dating violence.”¹³⁶ The bill proposes an affirmative consent standard, noting that lack of protest or silence are not sufficient to establish consent.¹³⁷

Texas has enacted a similar law, mandating that each school have a dating violence policy, and also providing an example that could be used for sexual violence policies. The law requires that each district’s policy include “a definition of dating violence that includes the intentional use of physical, sexual, verbal, or emotional abuse by a person,” and “address safety planning, enforcement of protective orders, school-based alternatives to protective orders, training for teachers and administrators, counseling for affected students, and awareness education for students and parents.”¹³⁸ Rhode Island has enacted a similar law, requiring a published policy stating that dating violence will not be tolerated.¹³⁹ Additionally, this Rhode Island law requires that all administrators, teachers, nurses, and mental health staff in middle and high schools be trained as to the basic principles of dating violence, as well as warnings and signs of dating violence, to ensure that those in positions of power respond appropriately to these instances.¹⁴⁰ These laws, meant to prevent dating violence, could easily be used as an example to legislators and applied in the context of sexual violence.

Additionally, a federal law called the Teach Safe Relationships Act of 2015 has been introduced in the Senate.¹⁴¹ This law would provide competitive grants to schools that provide “professional development to school administrators, teachers, and staff in safe relationship behavior education,” and “educational . . . curricula . . . for students regarding safe relationship behavior.”¹⁴² This program would teach students how to recognize and prevent coercion, violence, or abuse, including physical and emotional abuse.¹⁴³ If passed, the bill would explicitly include

¹³⁴ *Id.* at 72–73.

¹³⁵ Michael Gerstein, *Hertel Pushes ‘Affirmative Consent’ Sex Education*, DET. NEWS (Oct. 10, 2017), <http://www.detroitnews.com/story/news/politics/2017/10/10/hertel-affirmative-consent-sex-ed/106500438/>.

¹³⁶ *Id.* (internal quotation marks omitted).

¹³⁷ *Id.*

¹³⁸ TEX. EDUC. CODE ANN. § 37.0831 (West, Westlaw through 2019 Reg. Sess.).

¹³⁹ 16 R.I. GEN. LAWS § 16-21-30 (2019).

¹⁴⁰ *Id.*

¹⁴¹ Teach Safe Relationships Act of 2015, S. 355, 114th Cong. (2015).

¹⁴² *Id.* § 5625(a) (1)-(2).

¹⁴³ *Id.* § 5624(B) (i)-(ii).

education about consent.¹⁴⁴ This incentive-based bill could provide an alternative to laws that make the education mandatory.

B. Monitoring Potential Problem Behavior

Another possible solution for preventing sexual assaults can include monitoring students who may be a threat to their classmates. Two school districts in Oregon have taken an approach similar to one used to identify potential school shooters.¹⁴⁵ This system is based on observations from students and staff, and includes parents as well as faculty, who keep an eye on students that may be sexually aggressive.¹⁴⁶

This system, which has been enacted in Forest Grove, Oregon, requires school officials to learn the difference between normal, age-appropriate sexual experimentation and potentially dangerous behavior.¹⁴⁷ The school then discuss potentially dangerous behavior in regular meetings, which include law enforcement officials, social workers, child protection officials, and a psychologist.¹⁴⁸ These meetings seek to develop interdisciplinary plans that address a student's problem behavior, not only preventing them from assaulting a fellow student, but counseling the student in hopes of reforming them.¹⁴⁹ A similar program was developed in Salem-Keizer School District, also in Oregon, in 2009.¹⁵⁰ Their program, called the "sexual incident response committee," was based on their own system for identifying potential school shooters.¹⁵¹

This system aims to create a "retaliation-free atmosphere" that encourages students to come forward if they witness sexually aggressive behavior or assault. These students are then closely monitored, and problems can be addressed before they escalate.¹⁵² Programs encouraging students to intervene when they notice problems can similarly be addressed through bystander intervention trainings, which will be further explored in the next section.

C. Bystander Intervention Programs

Bystander intervention programs have been gaining traction when addressing sexual assaults. These campaigns urge students to speak up when they

¹⁴⁴ *Id.* § 5624(C).

¹⁴⁵ Justin Pritchard, Gillian Flaccus & Reese Dunklin, *Students, Some Schools Take On Sexual Assault*, ASSOCIATED PRESS: SCHOOLHOUSE SEX ASSAULT (May 22, 2017), <https://www.ap.org/explore/schoolhouse-sex-assault/students-some-schools-take-on-sexual-assault.html>.

¹⁴⁶ *See id.*

¹⁴⁷ *See id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *The Salem-Keizer Sexual Incident Response Committee System (SIRC)*, STUDENT THREAT ASSESSMENT, <http://www.studentthreatassessment.org/sirc> (last visited Jan. 14, 2020).

¹⁵¹ *Id.*

¹⁵² *See Pritchard, supra* note 145.

witness behavior that could be dangerous and to intervene if they witness a student in need.¹⁵³ Bystander approaches seek to engage all members of the community, “not as potential victims or perpetrators, but as potential allies.”¹⁵⁴

One campaign, introduced by the Obama administration in 2014, is called “It’s On Us.”¹⁵⁵ This program works to “educate, engage, and empower students and communities across the country to do something, big or small, to end sexual assault. This campaign has three core pillars: implementing consent education, increasing bystander intervention, and creating an environment that supports survivors.”¹⁵⁶ The website describes the program as “a cultural movement aimed at fundamentally shifting the way we think and talk about sexual assault.”¹⁵⁷ The program has guides that offer students tips and resources for stepping up when they witness problematic behavior, offers consent discussion guides, and has hosted events on over 550 college campuses to train and encourage individuals to prevent sexual assault.¹⁵⁸ While “It’s On Us” focuses on preventing sexual assault on college campuses, the concept has been shown to be effective in high schools as well.

A program in Kentucky called Green Dot was the focus of the largest bystander intervention study centered on sexual violence prevention in high schools.¹⁵⁹ The study followed twenty-six Kentucky high schools over five years. Half of the schools received the bystander intervention training, and the other half served as the control group.¹⁶⁰ The intervention took place in two phases: the first, educating the students about sexual violence; and the second, teaching them how to intervene in problematic situations.¹⁶¹ The program teaches students “to identify situations that could lead to an act of violence . . . and shows them how to intervene safely and effectively.”¹⁶² The study found that rates of sexual violence were twelve

¹⁵³ See *id.* Similar programs have also been adopted in Portland and Willamette. See Alex Kahl, *Sexual Incident Response Committee (SIRC)*, PORTLAND PUB. SCH. (Jan. 2019), <https://www.pps.net/Page/13435>; *Threat Assessment & Sexual Incident Response*, WILLAMETTE EDUC. DIST., <https://www.wesd.org/Page/758> (last visited Jan. 14, 2020).

¹⁵⁴ Ann L. Coker, Heather M. Bush, Patricia G. Cook-Craig, Sarah A. DeGue, Emily R. Clear, Candace J. Brancato, Bonnie S. Fisher & Eileen A. Recktenwald, *RCT Testing Bystander Effectiveness to Reduce Violence*, 52 AM. J. PREV. MED. 566, 567 (2017).

¹⁵⁵ *The Story of Our Movement*, IT’S ON US, <http://www.itsonus.org/history/> (last visited Sept. 22, 2019).

¹⁵⁶ Press Release, The White House: Office of the Press Secretary, Fact Sheet: Final It’s On Us Summit and Report of the White House Task Force to Protect Students from Sexual Assault (Jan. 5, 2017), <https://obamawhitehouse.archives.gov/the-press-office/2017/01/05/fact-sheet-final-its-us-summit-and-report-white-house-task-force-protect>.

¹⁵⁷ *Campus Organizing Tools: Fall 2016*, IT’S ON US, https://www.itsonus.org/wp-content/uploads/2017/04/IOU-Toolkit_Fall2016.pdf (last visited Sept. 22, 2019).

¹⁵⁸ See IT’S ON US, *supra* note 155.

¹⁵⁹ Jenny Wells, *UK Researchers Observe Reduction in Sexual Violence Among High School Students After Implementing Bystander Intervention Program*, U. KY. (Mar. 10, 2017), <https://uknow.uky.edu/research/uk-researchers-observe-reduction-sexual-violence-among-high-school-students-after>.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

to thirteen percent lower in the intervention versus control schools.¹⁶³ The program “decreased not only sexual violence perpetration” but also other forms of interpersonal violence perpetration and victimization.¹⁶⁴

Other programs similar to Green Dot have been started in an effort to prevent high school sexual assault. “SafeBAE” is one of these organizations and was founded in part by three survivors of high school sexual assault, including Daisy Coleman (who was featured in the *Audrie and Daisy* documentary), Jada Smith (who was the center of the #JusticeforJada campaign after allegedly being drugged and assaulted at a high school party), and Ella Fairon (who was forced to move after allegedly being beaten, drugged, and raped by a peer at age fourteen).¹⁶⁵ Their program seeks to provide education to students about sexual assault and consent, engage all students to step up and be a part of the solution, and reach out to school districts to encourage them to enact policies to prevent assault and fully understand their obligations under Title IX.¹⁶⁶ SafeBAE also seeks to promote consent education legislation nationwide.¹⁶⁷

The Department of Education, through the American Institutes for Research, has released resources for schools called Safe Place to Learn.¹⁶⁸ These resources provide information to school districts about how to educate staff to prevent and eliminate sexual violence in K-12 schools, as well as how to comply with their Title IX duties.¹⁶⁹ These resources include information about bystander intervention for staff and information on how to discuss these concepts in the classroom to encourage students to get involved.¹⁷⁰

Preventive strategies can come in various forms: laws mandating consent education, tracking programs to observe problem students, or bystander intervention training. These programs all seek to address sexual assault “on the front end,” by preventing the violence from occurring, rather than responding to the assault once it has happened.¹⁷¹ While prevention of sexual violence is ideal, there also need to be appropriate responsive strategies in place for violence that does occur.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Co-Founders*, SAFEBAE.ORG, <http://www.safebae.org/cofounders> (last updated 2016).

¹⁶⁶ *Missions & Goals*, SAFEBAE.ORG, <http://www.safebae.org/mission-goals> (last updated 2016).

¹⁶⁷ *Id.*

¹⁶⁸ *See Safe Place to Learn*, NAT'L CTR. ON SAFE SUPPORTIVE LEARNING ENV'TS, <https://safesupportivelearning.ed.gov/safe-place-to-learn-k12> (last updated 2017).

¹⁶⁹ *See id.*

¹⁷⁰ *See id.*

¹⁷¹ Pritchard et al., *supra* note 145.

IV. POSSIBLE RESPONSIVE SOLUTIONS

While the ultimate goal should be to prevent sexual assaults from occurring, in the event that they do happen (and, as statistics show, they will), appropriate responsive solutions need to be in place. These responsive solutions should include mandatory tracking and dissemination of data, mandatory school policy, and the possible use of technology to better report and address sexual assaults.

A. Mandatory Tracking and Dissemination of Data

As noted above, part of the reason compiling data on high school sexual assault is so difficult is because there is no mandatory requirement for K-12 schools to track sexual assaults that occur on school grounds or that involve current students.¹⁷² This lack of mandated tracking is different than federally-funded colleges and universities, which are required under the Clery Act to track and report instances of sexual assaults (and other crimes) to staff and students yearly.¹⁷³ For the reasons outlined below, the requirements of the Clery Act should be expanded to K-12 schools in order to better track instances and ensure that the assaults are responded to appropriately.

First, it is necessary to understand why the Clery Act was enacted and what the Act requires colleges and universities to do. The Clery Act was created in response to the 1986 rape and murder of Jeanne Clery in her college dorm room.¹⁷⁴ Her parents were not aware of the danger that she was in on the campus and, therefore, sought to introduce legislation requiring colleges and universities to be more transparent about violent incidents on campus and student safety.¹⁷⁵ In 1990, the Clery Act was passed as a part of the Student Right-to-Know and Campus Security Act.¹⁷⁶ The Act has since been amended a number of times, most recently by the Campus SaVE Act, which expanded the law to include mandatory training as well as reporting and tracking.¹⁷⁷

The Clery Act requires federally-funded colleges and universities to distribute an Annual Security Reporting to students and staff every October.¹⁷⁸ This report must include “statistics of campus crime for the preceding three calendar

¹⁷² See Stein, *supra* note 41, at 35.

¹⁷³ Clery Act, Pub L. No. 101-542, 104 Stat. 2381 (codified as amended at 20 U.S.C. § 1092(f)); Institutional Security Policies and Crime Statistics, 34 C.F.R. § 668.46 (2014); see also *Summary of the Jeanne Clery Act*, CLERY CTR., <https://clerycenter.org/policy-resources/the-clery-act/> (last updated 2020).

¹⁷⁴ *About*, CLERY CTR., <https://clerycenter.org/about-page/> (last updated 2020).

¹⁷⁵ *Id.*

¹⁷⁶ Alison Kiss & Abigail Boyer, *2013 VAMA Amendments to Clery: What You Need to Know*, CLERY CTR., <https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/CampusSafety/2013%20VAWA%20Amendments%20to%20Clery%20Webinar%20Slides.pdf> (last modified 2013).

¹⁷⁷ The Campus SaVE Act passed as part of the Violence Against Women Act Reauthorization of 2013, Pub. L. No. 113-4, 127 Stat. 54. See *Frequently Asked Questions*, CAMPUS SAVE ACT, <http://thecampussaveact.com/faq/> (last visited Jan. 9, 2020).

¹⁷⁸ CLERY CTR., *Summary*, *supra* note 173.

years, plus details about efforts taken to improve campus safety.”¹⁷⁹ These reports must also include policy statements related to sexual assault, domestic or dating violence, and stalking.¹⁸⁰

As K-12 schools are not uniformly required under the Clery Act to track or report such statistics, states differ greatly in how they require tracking or reporting. Eighteen states require no reporting or tracking whatsoever.¹⁸¹ Of the thirty-two states that do require some form of tracking, the requirements that trigger reporting can range from any assault occurring on school grounds or at school-sponsored events to only the assaults that result in the expulsion of a student.¹⁸² This can result in misleading reports; for example, a school district in Michigan reported no sexual assaults because none led to expulsion, despite the fact that a student was criminally prosecuted and suspended for sexual misconduct.¹⁸³ Educational officials from a half-dozen states reported to the Associated Press that their school district’s reported assaults did not reflect the full extent of their sexual assault problem, and a number of school districts reported no sexual assaults when the Associated Press was able to identify cases through public records or news sources.¹⁸⁴

The current state of unregulated reporting¹⁸⁵ and tracking of sexual assaults in K-12 schools results in a lack of complete, consistent, and reliable information.¹⁸⁶ This can lead to both parents and school districts underestimating the magnitude of the problem and the risk that the students face.¹⁸⁷ Additionally, it absolves the schools of being held accountable for improving student safety and having effective sexual assault policies in place. For these reasons, a law similar to the Clery Act should be passed, requiring schools to not only accurately report and track sexual assaults, but to report policies in place to respond to this violence.

B. Mandatory Sexual Assault Training and Policies

As noted above, the Clery Act was amended in 2013 in the “most dramatic expansion to sexual violence reporting and policy since 1992.”¹⁸⁸ This amendment, called the Campus SaVE Act, required that all federally-funded postsecondary

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See Dunklin et al., *supra* note 42.

¹⁸² See *id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Schools are required to report to either the police or child protective services instances of sexual misconduct involving minors. See Tierney Sneed, *High Schools and Middle Schools Are Failing Victims of Sexual Assault*, U.S. NEWS (Mar. 5, 2015, 12:01 AM), <https://www.usnews.com/news/articles/2015/03/05/high-schools-and-middle-schools-are-failing-victims-of-sexual-assault>. However, here I am talking about reporting publicly to students and staff.

¹⁸⁶ See Dunklin et al., *supra* note 42.

¹⁸⁷ See *id.*

¹⁸⁸ Kiss & Boyer, *supra* note 176.

institutions provide sexual assault training for students, faculty, and staff.¹⁸⁹ This training includes preventive measures, similar to what was discussed in the previous section, including bystander intervention, and alerting students to high-risk situations and how to avoid them.¹⁹⁰ This training also includes several responsive measures. Schools are required to include legal definitions of consent, domestic violence, dating violence, sexual assault, stalking, and victim protection measures.¹⁹¹ Schools are required to train students, staff, and faculty about the school's policy regarding sexual misconduct and the sanctions that follow should those policies be violated.¹⁹² Procedures include disciplinary process that provide fair and impartial investigation and resolution, policies ensuring fairness for the accuser and the accused, and a written decision distributed to the parties that includes information about the appeal process.¹⁹³

The Campus SaVE Act provides that the school inform students that a victim's confidentiality will be protected, and the training should be customized to include both on- and off-campus resources for victims, including the right to seek assistance from campus authorities as well as judicial restraining and no-contact orders.¹⁹⁴ Finally, the Campus SaVE Act provides for ongoing prevention and awareness campaigns for students and faculty of the colleges and universities.¹⁹⁵

There is no such law requiring training and response policy from K-12 schools—instead, the policies are decentralized and “vary state by state and even school district by school district.”¹⁹⁶ The policies, and who is responsible for executing them should an assault be reported, can even vary from school to school.¹⁹⁷ Despite this variation, “[w]hat is constant is that, in many places, the guidelines regarding sexual violence are not sufficient. For instance . . . more than 80 percent of high school guidance counselors say they feel ill-equipped to deal with reports of abuse on their campuses.”¹⁹⁸

Having a federal law mandating that policies are in place would ensure that high schools are prepared to address reports of sexual violence when they occur, both by disciplining students who perpetrate sexual violence and providing support and resources for students who are victim to it.¹⁹⁹ In the absence of any federal law, an advocate named Erin Merryn is working to encourage state legislatures to pass

¹⁸⁹ *Campus SaVE Act*, END RAPE ON CAMPUS, <https://endrapeoncampus.org/the-campus-save-act> (last visited Aug. 17, 2019).

¹⁹⁰ *See id.*

¹⁹¹ *See New Requirements Imposed by the Violence Against Women Reauthorization Act*, AM. COUNCIL ON EDUC. (Apr. 1, 2014), <https://www.acenet.edu/news-room/Documents/VAWA-Summary.pdf>.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Sneed, *supra* note 185.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

Erin's Law.²⁰⁰ Erin's Law would require that all public schools implement a sexual abuse program that imposes three requirements on preK-12 schools. First, students are taught age-appropriate techniques to identify and report sexual abuse. Second, school personnel are trained in responding to sexual abuse. Third, parents and guardians are taught warning signs of sexual abuse, plus referral and resource information.²⁰¹ What is taught in these trainings, and how they are implemented, will depend on the exact language of the law that each state legislature chooses to enact.²⁰²

While Erin's Law is certainly a step towards identifying and addressing sexual abuse, it is centered on identifying sexual abuse in younger children,²⁰³ which requires different policy and procedure than a sexual assault on a high school student may warrant. Michelle Rodriguez, president and CEO of the Sexuality Information and Education Council of the United States, has said that "[i]f a student told a teacher her father was raping her, they would know what to do . . . [w]hen a student discloses something happened on a date, or with someone they're interested in, for teachers that gets a little murkier."²⁰⁴ While Erin's Law could be used as a model, training should be specific to identifying sexual assault as it occurs between peers or when the victim is an older student. These warning signs may be different than those of sexual abuse in children.

A model for a more age-appropriate sexual assault response law can be found in New York's "Enough is Enough" law. This legislation "requires all colleges to adopt a set of comprehensive procedures and guidelines, including a uniform definition of affirmative consent, a statewide amnesty policy, and expanded access to law enforcement."²⁰⁵ This affirmative consent policy requires that schools adopt a uniform definition of consent, defined as "knowing, voluntary, and mutual decision among all participants to engage in sexual activity."²⁰⁶ Implemented in high schools, this could serve as a rule for students that would remove some of the ambiguity that currently surrounds the idea of consent. This Comment acknowledges that this definition of consent may differ from the state's legal definition of consent. State definitions of sexual assault and consent vary widely; some states do not have a definition for consent on the books but have other criteria for sexual assault.²⁰⁷ While not uncontroversial, this affirmative consent standard can set boundaries for

²⁰⁰ *What is Erin's Law?*, ERIN'S LAW, <http://www.erinslaw.org/erins-law/> (last visited Sept. 22, 2019).

²⁰¹ *Id.*

²⁰² *FAQs*, ERIN'S LAW, <http://www.erinslaw.org/faqs/> (last visited 2019).

²⁰³ *What is Erin's Law?*, *supra* note 200.

²⁰⁴ Sneed, *supra* note 185.

²⁰⁵ Press Release, N.Y. State, Governor Cuomo Signs "Enough Is Enough" Legis. to Combat Sexual Assault on Coll. & Univ. Campuses (July 7, 2015), <https://www.governor.ny.gov/news/governor-cuomo-signs-enough-enough-legislation-combat-sexual-assault-college-and-university>.

²⁰⁶ *Id.*

²⁰⁷ *How Does Your State Define Consent?*, RAINN (Mar. 27, 2016), <https://www.rainn.org/news/how-does-your-state-define-consent>. For a state-by-state comparison tool of consent and other sexual assault laws, see also *State Law Report Generator*, RAINN, <https://apps.rainn.org/policy/> (last updated 2019).

students by requiring that those individuals engaging in sexual activity be held responsible for confirming that their partner is a willing participant.²⁰⁸

An amnesty policy (similar to the one included in New York's law) would require that students reporting sexual assault be exempt from certain disciplinary action for violating drug and alcohol policies.²⁰⁹ This could prevent students from feeling as though their high school retaliated against them when reporting an assault that occurred while drinking.²¹⁰ Finally, the requirement that colleges work with state police, who have been specially trained in dealing with sexual assault victims, when applied to high schools, could potentially address the problem of underreporting that currently exists surrounding high school sexual assault.²¹¹

Enacting a federal law that requires training for students, staff, and faculty, could provide a better system for supporting student victims of sexual assault. Additionally, such policies would ensure that students who may perpetrate sexual violence are appropriately aware of the sanctions and are disciplined if necessary.

C. Utilizing Technology in Reporting

When it comes to addressing sexual violence, it is necessary that students report assaults when they occur. There are two technology companies that have created resources meant to encourage student reporting.²¹² As the Associated Press reports, “[t]he same technology that keeps kids glued to their smart phones [can be used by] schools as protection against sexual assaults.”²¹³ The policies and trainings could potentially utilize one or more of these technologies to engage students and streamline reports to administration, who can then respond to events immediately as they occur, instead of having to wait for word of mouth.²¹⁴

The first technology is an app called “STOPit,” created after the suicide of fifteen-year-old Amanda Todd, who was harassed after a topless photograph of her was shared with classmates.²¹⁵ This app allows for anonymous reporting and messaging, so students who do not feel comfortable identifying themselves or going to the administration can still report incidents when they occur.²¹⁶ Students can send reports consisting of text, images, and videos to administrators. Administrators are then equipped with “STOPit Admin,” which is a

²⁰⁸ See Jaclyn Friedman, *Adults Hate 'Yes Means Yes' Laws. The College Students I Meet Love Them.*, WASH. POST (Oct. 14, 2015, 6:00 AM), https://www.washingtonpost.com/posteverything/wp/2015/10/14/adults-hate-affirmative-consent-laws-the-college-students-i-meet-love-them/?utm_term=.50463be4fed7.

²⁰⁹ Press Release, N. Y. State, *supra* note 205.

²¹⁰ See Stahl, *supra* note 100.

²¹¹ See Press Release, N.Y. State, *supra* note 205; see Sneed, *supra* note 185.

²¹² See Robin McDowell, *Schools Using Smart Phone Technology Against Sex Assaults*, ASSOCIATED PRESS: SCHOOLHOUSE SEX ASSAULT (May 22, 2017), <https://www.ap.org/explore/schoolhouse-sex-assault/schools-using-smart-phone-technology-against-sex-assaults.html>.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ McDowell, *supra* note 212.

²¹⁶ *STOPit FAQs*, STOPIT, <http://stopitsolutions.com/about-stopit/> (last updated 2019).

“comprehensive, streamlined, cloud-based incident management system that also helps organizations mitigate risk and maintain compliance.”²¹⁷ A second app called “Anonymous Alerts” acts similarly to “STOPit.”²¹⁸ The app seeks to remove the social pressure that comes with reporting instances of misconduct by allowing anonymous one- or two-way communication with school administration or officials.²¹⁹

While these apps should not be the school’s only way to receive reports of sexual assault,²²⁰ legislators should keep in mind technological advances and opportunities when drafting policies and procedures surrounding sexual assault. As the world becomes more technology-focused, and as young people especially embrace these advances, apps can be a practical way of ensuring reporting is accessible and encouraged.²²¹

CONCLUSION

The magnitude of high school sexual assault is apparent from the facts and statistics illustrating the problem and the number of narratives in the media. These numerous assaults lead to a number of both short- and long-term consequences for survivors and their communities. When confronting this widespread problem, a number of complications arise, including the framing of assault as bullying or hazing, the current inadequate response from schools, the limitations of private high schools, the statutes mandating reporting to law enforcement, and controversial attitudes about sexual education in schools.

However, there are a number of possible solutions, both preventive and responsive. To prevent sexual assault, state and federal governments can enact laws mandating consent education, the tracking of problem behavior, and bystander intervention training in high schools. When sexual assault does occur, state and federal governments can respond to the problem by mandating the tracking and publishing of sexual assaults, by mandating responsive policies and procedures, and by utilizing technology to encourage reporting.

While this Comment has discussed a number of possible solutions, there may not be a one-size-fits-all response to this epidemic. It would be impractical, if not impossible, to enact laws that perfectly prevent or respond to assaults. However, there are a number of solutions that could reduce the magnitude of the problem and can better respond to and support survivors in the process. This Comment does not suggest that legislators implement all proposed solutions, but that they critically examine the problem and enact thoughtful legislation to address this serious problem. High school should be a time for students to encounter challenging and novel experiences—sexual assault should not be one of them.

²¹⁷ *Id.*

²¹⁸ See *Anonymous Safety and Bullying Reporting System*, ANONYMOUS ALERTS, <http://www.anonymousalerts.com/webcorp/> (last updated 2019).

²¹⁹ *Id.*

²²⁰ McDowell, *supra* note 212.

²²¹ See *id.*