Eyes Wide Shut: Using Accreditation Regulation to Address the "Pass-the-Harasser" Problem in Higher Education

Susan Fortney* and Theresa Morris**

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INTRODUCTION

Nationwide, universities and colleges have long struggled to deal effectively with sexual harassment and misconduct. In the wake of the #MeToo movement schools have been forced to handle increases in the number of sexual harassment and misconduct complaints. For example, Harvard University's Title IX Office and Office for Dispute Resolution reported a 56% increase in

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* Professor of Law, University Professor, and Director of the Program for the Advancement of Legal Ethics at Texas A&M University School of Law. Thanks to National Science Foundation for providing funding to support the authors' ongoing study of sexual harassment in universities. Thanks to the editors of the California Law Review and Professors Michael Green and Angela Morrison for their insightful comments. The authors appreciate the extraordinary research assistance of Tayler Berlin, Johann Rupp, and Miranda Alonzo.

** Professor and Presidential Impact Fellow, Department of Sociology and Coordinator, Women's and Gender Studies Program, Texas A&M University.

disclosures of sexual and gender-based harassment at the university in 2018.[1] Although the attention on sexual harassment in academia has not reached the level it has in other industries, the incidents of reported sexual harassment and misconduct in postsecondary education are still alarming.[2] One meta-study revealed that an average of 58% of employees in the academy reported experiencing sexual harassment.[3] Another multi-institution study found that 41.8% of students indicated that they had experienced at least one type of sexually harassing behavior since enrolling in school and, among those respondents, 5.5% of undergraduate women and 24% of graduate/professional women reported the harasser was a faculty member.[4]

Sexual harassment in universities injures individuals and their institutions, creating high personal and institutional costs.[5] Students who are sexually harassed experience an overall disengagement from the academic environment and higher rates of psychological stress, anxiety, depression, and substance abuse compared to students who are not.[6] Increased psychological distress, in turn, is linked to lower academic satisfaction, greater physical illness, and a higher chance of the development of eating disorders.[7] Cumulatively, these effects contribute to disengagement from the academic environment and subsequent

1. Jamie D. Halper, *In Wake of #MeToo, Harvard Title IX Office Saw 56 Percent Increase in Disclosures in 2018*, *Per Annual Report*, HARV. CRIMSON (Dec. 14, 2018), https://www.thecrimson.com/article/2018/12/14/2018-title-ix-report/.

2. *See* Rose McDermott, *Political Science's #MeToo Moment*, 40 J. WOMEN, POLITICS & POLICY 148, 149 (2019) (noting that sexual harassment is quite prevalent in the academy despite the fact that such harassment has not received as much attention as other sectors).

3. Remus Ilies et al., *Reported Incidence Rates of Work-Related Sexual Harassment in the United States: Using Meta-Analysis to Explain Reported Rate Disparities*, 56 PERSONNEL PSYCH. 607, 616 (2003). A 2018 consensus report referred to the meta-analysis by Ilies and colleagues as the "best analysis of the prevalence of sexual harassment across workplaces and time." NAT'L ACADS. OF SCIS., ENG'G., & MED., SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE 40 (Paula A. Johnson et al. eds., 2018), https://www.nationalacademies.org/our-work/sexual-harassment-in-academia.

4. DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT 47–48 (2020), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf.

5. Institutional costs include the expenses associated with preventing and dealing with sexual harassment concerns. *See* Anemona Hartocollis, *Colleges Spending Millions to Deal with Sexual Misconduct Complaints*, N.Y. TIMES (Mar. 29, 2016), https://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html (referring to the huge expenditures for compliance personnel and efforts, as well as significant payments to cover settlements and judgments). Universities may also face loss of significant grant support. Sara Reardon, *NIH Revoked Funding from 14 Scientists over Sexual Harassment Last Year*, NATURE (Feb. 28, 2019), https://www.nature.com/articles/d41586-019-00753-2/. Intangible costs relate to reputational damage related to sexual harassment claims and the negative impact on the climate and culture at the university.

6. Marisela Huerta et al., *Sex and Power in the Academy: Modeling Sexual Harassment in the Lives of College Women*, 32 PERSONALITY & SOC. PSYCH. BULL. 616, 622-23 (2006).

7. *Id.*

decline in academic performance.[8] An American Association of University Women study found that among female students who were sexually harassed, 48% avoided the person who harassed them, 27% stayed away from particular buildings or places on campus, 16% found it hard to study or to pay attention in class, 16% had trouble sleeping, and 9% skipped a class or dropped a course, indicating a range of negative effects of sexual harassment on students.[9] Other studies find similar negative effects of sexual harassment on students' school activities, academic lives, and overall experiences of the college environment.[10]

Faculty also suffer high personal costs from sexual harassment in academic institutions. Faculty who are sexually harassed are more likely to hold negative views of the institution's norms around respect for others, fairness towards women, and the way in which campus administration operates.[11] Further, female faculty who are sexually harassed are more likely than those who are not to perceive gender-specific bias in the academic environment and in professional advancement.[12] These perceptions negatively affect career satisfaction.[13] Sexual harassment also has a negative impact on psychological health, job attitudes, and work behavior.[14]

Sexual harassment by faculty and administrators is, in part, enabled by the frequency of one-on-one interactions between perpetrators and victims, and the institutional tolerance afforded to such misconduct.[15] Further, faculty perpetrators may claim academic freedom and free speech rights when defending themselves against verbal sexual harassment claims.[16]

Recognizing the costs and consequences of sexual misconduct and their legal obligations, colleges and universities annually devote hundreds of millions of dollars to training and other efforts to prevent sexual misconduct and to handling complaints that are made.[17] Despite these efforts, one problem that

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8. *Id.*

9. CATHERINE HILL & ELENA SILVA, AM. ASSOC. OF UNIV. WOMEN, DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 31 (Susan K. Dyer ed., 2005), https://www.aauw.org/app/uploads/2020/02/AAUW-Drawing-the-line.pdf.

10. Gillian M. Pinchevsky et al., *Sexual Victimization and Sexual Harassment Among College Students: A Comparative Analysis*, 35 J. FAM. VIOLENCE 603, 613 (2019).

11. Eric L. Dey et al., *Betrayed by the Academy: The Sexual Harassment of Women College Faculty*, 67 J. HIGHER EDUC. 149, 165 (2006).

12. Phyllis L. Carr et al., *Faculty Perceptions of Gender Discrimination and Sexual Harassment in Academic Medicine*, 132 ANNALS INTERNAL MED. 889, 893 (2000).

13. *Id.*

14. Kimberly T. Schneider et al., *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. APPLIED PSYCH. 401, 412 (1997).

15. Amir Karami et al., *Unwanted Advances in Higher Education: Uncovering Sexual Harassment Experiences in Academia with Text Mining*, 57 INFO. PROCESSING & MGMT. 1, 3 (2020).

16. 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, 676 (2018) [hereinafter *Systematic Look at a Serial Problem*].

17. *See* Hartocollis, *supra* note 5 (describing how colleges nationwide are spending millions to hire lawyers and a wide array of officials necessary to deal with the increasing number of sexual misconduct complaints).

largely goes unaddressed is the relative ease with which harassers may move from school to school with limited or no scrutiny related to past misconduct. The institutional role in this phenomenon is referred to as "pass the harasser" or, more pejoratively, "pass the trash."[18]

Universities that do not disclose sexual harassment findings to prospective employers effectively facilitate employees' moving to another institution without having to answer questions related to their past conduct. This may contribute to a lack of accountability and increase the likelihood of future harassment at the new institution if harassers believe that they can escape scrutiny and consequences for harassing others. The failure to disclose information on past misconduct also results in information asymmetry that limits the hiring institution's efforts to screen candidates.

Following their own experiences with hiring faculty and administrators who had engaged in misconduct at other schools, two university systems have recognized the importance of reforming their policies and practices to better screen candidates and directly address issues related to past misconduct.[19] In 2019, the University of California Davis (UC Davis) and the University of Wisconsin system implemented policies covering personnel inquiries and hiring procedures related to sexual misconduct. Their experience exploring and implementing these changes provides guidance to other institutions and governing bodies that make decisions related to university hiring practices. Such changes will improve the status quo, but as discussed below, an effective and sustainable approach requires a more extensive regulatory system that applies to institutions across the country.

Although it is commendable that a few university systems are taking steps to better screen candidates, the pass-the-harasser problem is national in scope, and, thus, a solution requires collective action by institutions across the country. Rather than keeping their eyes wide shut and ignoring a problem in plain view, other institutions should follow the lead of UC Davis and the University of Wisconsin system. To promote such action, we propose a comprehensive strategy tied to something all institutions need: accreditation by an agency recognized by the U.S. Department of Education.

To provide background on the importance of tackling issues related to hiring faculty and administrators, Part I discusses how and why the pass-the-

18. *See* Sarah Brown & Katherine Mangan, *'Pass the Harasser' Is Higher Ed's Worst-Kept Secret. How Can Colleges Stop Doing It?*, CHRON. HIGHER EDUC. (June 27, 2019), https://www.chronicle.com/article/pass-the-harasser-is-higher-eds-worst-kept-secret-how-can-colleges-stop-doing-it/?cid2=gen_login_refresh&cid=gen_sign_in (describing how colleges play roles in facilitating the mobility of persons who have committed harassment).

19. *See id.* (quoting a senior campus counsel at the University of California at Davis, who stated that the university was inspired to crack down after "bitter experience in really short succession hiring two faculty members from prestigious peer institutions who had engaged in egregious misconduct"). *See also infra* notes 51-72 and accompanying text (discussing background information related to the University of Wisconsin system).

harasser problem arises and persists. This part identifies the common scenarios that arise when employees dealing with sexual misconduct findings or investigations seek new employment at another institution. This section further considers how university hiring practices contribute to persons being able to leave one institution for another without the new institution learning about misconduct findings or pending investigations at another school. In an attempt to change these hiring practices, schools are increasingly exploring changes in their hiring policies and procedures. To understand the perspective of those who support the status quo, Part II considers the principal objections of those who oppose inquiries related to past misconduct of candidates for positions in higher education. Part III reviews recent progress two university systems and one state have made to address the pass-the-harasser problem. Recognizing the value of such initiatives, Part IV examines why efforts by individual systems and states fall short and why concerted action is necessary to effectively address the problem. Part V proposes that accreditation agencies take a leadership role in enacting change by adopting accreditation standards covering the institutional responsibility to exercise hiring due diligence related to prior sexual misconduct. The conclusion explains the role that such standards can play in providing students and faculty a safe and secure environment where they can learn and thrive.

I.
WHAT "PASS THE HARASSER" MEANS AND HOW IT OCCURS IN HIGHER EDUCATION

Critics use the phrase "pass the harasser" to concisely capture the role that institutions play in allowing individuals to change employers without the new employer learning about sexual harassment or misconduct baggage that the employees may carry.[20] In higher education, the pass-the-harasser phenomenon is not a recent concern. Dating back to 1996, the *Chronicle of Higher Education*, a major news service covering academic affairs, published an article cautioning that versions of "passing the harasser" are "constantly played out on campuses."[21] Fast-forward to 2019, the same publication ran an article referring to the "pass-the-harasser" problem as higher education's "worst-kept secret."[22]

Although commentators may describe the phenomenon somewhat differently, "pass the harasser" narrowly refers to the "practice of keeping private

20. *E.g.*, Nell Gluckman, *How One College Has Set Out to Fix "a Culture of Blatant Sexual Harassment*," CHRON. HIGHER EDUC., Dec. 2017, at 18, 18, https://chronicle.brightspotcdn.com/48/17/11a19ec8ba9afe8777dc4d02ec29/chronfocus-sexualboundaries-v2-i.pdf. "Pass the harasser" concerns arise in other sectors including private industry and K-12 education settings. This essay focuses on the occurrence in higher education.

21. Courtney Leatherman, *Some Colleges Hush Up Charges to Get Rid of Problem Professors*, CHRON. HIGHER EDUC. (Dec. 6, 1996), https://www.chronicle.com/article/some-colleges-hush-up-charges-to-get-rid-of-problem-professors/.

22. Brown & Mangan, *supra* note 18.

the names of people investigated or fired for sexual misconduct."[23] More generally, it covers situations when a harasser moves to another institution without the hiring institution's knowledge of the prior misconduct. A related concern relates to the failure of hiring institutions to exercise due diligence when faced with credible information that a candidate was subject to prior sexual harassment complaints.

A federal court controversy reveals how faculty members can move to another university without the new employer investigating their prior misconduct. Nenad M. Kostic, a chemistry professor, resigned from his position at Iowa State University after two graduate students filed sexual harassment complaints against him.[24] A faculty review board at Iowa State found that Kostic "engaged in serious and repeated misconduct" and recommended that the university proceed with major sanctions against him.[25] Subsequently, Texas A&M University at Commerce (TAMUC) hired Kostic to serve as chair of the chemistry department.[26] After receiving allegations of sexual misconduct and other complaints, TAMUC terminated Kostic, and Kostic sued.[27] Although Kostic prevailed on grounds unrelated to the sexual harassment complaints, the court observed that because "information about Kostic's past at Iowa State was publicly available on the Internet, obtainable through a simple Google search. TAMUC cannot claim it had no knowledge of Kostic's past, nor that Kostic hid his wrongdoing from TAMUC during the hiring process."[28]

Along with the court's observation in the *Kostic* case, many other reported incidents involving harasser mobility raise concerns about university hiring practices and the lack of communication between and among postsecondary schools.[29] Given the heightened awareness related to sexual harassment, and the clear legal and regulatory requirements to address sexual misconduct on campuses,[30] the question is why universities and colleges continue to hire faculty and administrators without screening for prior sexual misconduct.

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23. Gluckman, *supra* note 20. "It is referred to as 'pass the harasser' because bad actors were allowed to jump from job to job." *Id.*

24. Adam Graaf, *Students Accuse Iowa State of Violating Civil Rights*, IOWA STATE DAILY (Aug. 23, 2005), https://www.iowastatedaily.com/news/article_d6e8d192-6b3e-50dc-8cda-d3298b3aaeaf.html. One student alleged that Kostic sexually harassed her and the second student claimed that Kostic impregnated her and "[engaged] in an unrelenting campaign of harassment, stalking and intimation designed to force her to get an abortion." *Id.*

25. *Id.*

26. *Kostic v. Tex. A&M Univ. at Commerce*, 11 F. Supp. 3d 699, 709 (N.D. Tex. 2014).

27. *Id.* at 731.

28. *Kostic v. Tex. A&M Univ. at Commerce*, No. 3:10-cv-2265-M, 2015 WL 4775398, at *3 (N.D. Tex. Aug. 13, 2015).

29. *See infra* notes 36-46 and accompanying text.

30. Most notably higher education institutions must comply with Title IX of the Higher Education Act and related regulations. Title IX 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 subject to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2021).

Understanding common hiring practices and approaches used in higher education provides answers. Both the prior institution and the new employer bear responsibility when the hiring institution is unaware of the prior harassment.

Often, critics of university hiring practices point to the responsibility of the institution that did not disclose the misconduct, attributing nondisclosure to the institution's own self-interest.[31] An employer may limit how much information is shared based on an interpretation of applicable privacy and labor laws.[32] Employers also face liability concerns arising from disclosure of negative information to prospective employers.[33] In particular, risk-averse employers may believe that providing any information on sexual misconduct allegations exposes them to defamation actions.[34] Finally, nondisclosure provisions in a settlement agreement with an employee may limit what an employer may reveal about the employee's record, as the agreement may spell out what an employer may disclose, or it may limit disclosure to name, position, and dates of employment.[35]

The atomistic nature of faculty hiring also contributes to a hiring institution's not learning about candidates' past misconduct. Faculty hiring in higher education tends to be handled by the individual department conducting the search and screening candidates. This decentralized approach means that reference checking is largely left to members of the search committee.[36] Without a university directive instructing search committee members to ask references about possible misconduct by candidates, it is doubtful that such questions will be asked.[37] A school may even dissuade committee members from seeking

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31. *See* Gluckman, *supra* note 20 (explaining how not disclosing misconduct to a prospective employer "effectively gives faculty members who have been fired for sexual harassment a better chance of finding work elsewhere").

32. Jeffrey Mervis, *NSF Unwittingly Hired a Professor Guilty of Bullying, Highlighting the 'Pass the Harasser' Problem*, SCIENCE (Nov. 18, 2019, 10:30 AM), https://www.sciencemag.org/news/2019/11/nsf-unwittingly-hired-professor-guilty-bullying-highlighting-pass-harasser-problem.

33. *See* Matthew L. Mac Kelly, *Employer Liability for Employment References*, WIS. LAW., Apr. 1, 2008, at 8 (discussing potential sources of liability arising from employment references).

34. For an examination of defamation liability and reference checks in university settings, see Neal Schlavensky, Comment, *Sexual Misconduct, Employment References, and Hiring in Higher Education: Is it Time for the Duty of Care to Evolve?*, 2019 WIS. L. REVIEW FORWARD 1, 7-9 (2019). Although truth is a strong defense to defamation claims, a lawyer representing universities notes that liability for reference checks is a "myth we cannot break open." Colleen Flaherty, *No More Passing the Harasser*, INSIDE HIGHER ED (Sept. 25, 2018), https://www.insidehighered.com/news/2018/09/25/u-wisconsin-system-proceeds-plan-disclose-misconduct-findings-against-employees#:~:text=U%20of%20Wisconsin%20moves%20forward,expect%20the%20policy%20to%20spread [hereinafter *No More Passing the Harasser*].

35. *Id*.

36. Nancy Chi Cantalupo & William C. Kidder, *Systematic Prevention of a Serial Problem: Sexual Harassment and Bridging Core Concepts of* Bakke *in the #MeToo Era*, 52 U. CAL. DAVIS 2349, 2389 (2019) (referring to the often-decentralized faculty search/hiring processes in universities) [hereinafter *Prevention of a Serial Problem*].

37. University administration may provide guidance on the types of questions to ask. *See, e.g.*, Univ. of Nev. at Las Vegas, Human Resources, *Questions for References*,

information from persons not included on the reference list provided by candidates. Such a narrow directive effectively limits the sources of information and likelihood of learning about misconduct, especially if on-list references are not specifically asked about misconduct.

Experts on sexual harassment in the academy use an iceberg metaphor to communicate that the percentage of documented sexual harassment complaints likely represents a small percentage of the actual occurrences that remain under the water line.[38] Using the same analogy, the reported cases and news reports involving harasser mobility likely do not capture the number of faculty members and administrators who have moved to new institutions without the hiring institution being aware of their sexual misconduct background.[39]

Situations where harassers have changed employers generally come to light through news articles, academic magazines, and news blogs that highlight cases that spark public attention or in which there have been substantiated findings of harassment. One study of media reports regarding faculty sexual harassment of students found that 10 of the 219 reports explicitly covered situations in which either a school hired an accused harasser from another school where harassment allegations had been investigated or a school was investigating sexual harassment allegations against a faculty member who then moved to another school.[40] The authors of this study, Professor Nancy Chi Cantalupo and William C. Kidder, suggest that the actual number of pass-the-harasser cases likely exceed those covered in news reports because of the high percentage of serial harassers as well as the significant percentage of faculty members who resign prior to discipline.[41]

Professor Cantalupo and Mr. Kidder have identified three common pass-the-harasser scenarios.[42] The first category refers to "bad hire" situations in which there have been findings of misconduct, but the hiring institution simply fails to discover readily available information.[43] Other times, persons involved in the search learn about the misconduct findings but dismiss them without serious investigation or consideration.[44] In those situations, persons making hiring decisions may be dazzled by the star status of the candidate, ignoring concerns that might get in the way of hiring them, often in hopes of acquiring large research grants that such professors may attract.

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https://www.unlv.edu/hr/search/reference-questions (providing a list of proposed questions that include one asking whether the reference would rehire the candidate).

38. Nancy Chi Cantalupo & William C. Kidder, *Mapping the Title IX Iceberg: Sexual Harassment (Mostly) in Graduate School by College Faculty*, 66 J. LEGAL EDUC. 850, 855 (2016) [hereinafter *Title IX Iceberg*].

39. *Systematic Look at a Serial Problem*, *supra* note 16, at 714-15.

40. *Id.* at 703, 714-15.

41. *Id.* at 715.

42. *Prevention of a Serial Problem*, *supra* note 36, at 2388-95.

43. *Id*. at 2388.

44. *Id.* at 2390.

The second scenario occurs when the person accused of sexual harassment leaves the institution and takes a position at another institution before an investigation is complete. The accused may not disclose the investigation and the hiring institution may not ask about pending disciplinary proceedings. This is an "end run" and the move terminates the investigation.[45]

The third scenario involves situations where investigations are completed and the accused is found culpable. Following findings, a professor may resign or be quietly terminated by the employer. However, the faculty member may be able to move to another university without the misconduct findings being revealed because a nondisclosure agreement covers the information.[46] An institution may also resist disclosing harassment findings to future employers seeking references for fear of defamation suits and also to rid themselves of the offending employee.

Universities' roles in allowing these situations to occur raises questions on how seriously the institutions take their responsibilities to perform due diligence in hiring faculty and administrators. It also points to institutions' narrow self-interest in facilitating employees' moving to other institutions.

II.
WHAT ARE THE PRINCIPAL OBJECTIONS TO INITIATIVES DESIGNED TO ADDRESS THE "PASS-THE-HARASSER" PHENOMENON?

Those advocating for institutions to proactively deal with the "pass-the-harasser" problem should be prepared to respond to arguments made in opposition to more screening of candidates for positions in postsecondary education. Critics may question whether the risks of serial harassment justify additional review and regulation of the hiring process. A response to this argument can be found in the results of the Cantalupo-Kidder study that revealed that approximately five percent of the media reports explicitly covered pass-the-harasser situations, suggesting that the number of actual pass-the-harasser cases is likely more than those captured in media reports.[47] This is clearly a significant percentage. Moreover, from the perspective of victims, one case of harassment is too many if screening procedures could have prevented it.

Persons who object to more hiring inquiries may maintain that requiring disclosure of past misconduct will impact the ability to recruit top talent. It is true that superstars may not apply for a position at a school that seeks information related to past misconduct. Proponents of more screening may respond to this position by noting that it is not a loss if candidates pursue employment elsewhere if the candidates do not want to respond to concerns related to past misconduct. Also, a school should not be at a competitive disadvantage for making inquiries

45. *Id.* at 2388.
46. *Id.*
47. *Systematic Look at a Serial Problem*, *supra* note 16, at 703, 714-15.

related to past misconduct if institutions nationwide adopt hiring guidelines pursuant to the regulatory regime proposed below.

Those who oppose screening measures may assert that requiring candidates provide information on sexual harassment complaints can unfairly tarnish the reputation and job prospects of candidates.[48] Policies can deal with this concern by only limiting disclosure to substantiated findings of past misconduct or employee departures during sexual misconduct investigations.

Requiring that candidates sign releases and limiting disclosure to substantiated findings of misconduct also responds to privacy objections. If the disclosure of information occurs while an investigation is pending, the hiring institution and the candidate may agree to abate the hiring decision and enter a confidentiality agreement to protect information related to the pending investigation.

Some may challenge more regulation of faculty hiring, asserting that seeking and providing information related to past misconduct may impact due process rights or academic freedom.[49] Once again, limiting the inquiry to disclosure of substantiated findings may address such challenges because candidates likely had the opportunity to raise such defenses when the underlying complaint was adjudicated. In addition, when information is disclosed, individuals subject to the findings should be invited to provide their account of the circumstances and explanation as to why the hiring institution should not be concerned about the risk of future misconduct.

Understanding the objections and opposition to more screening helps policymakers develop approaches that will withstand scrutiny. The discussion in Part III describes how two university systems have formulated narrowly tailored policies.

III.
HOW HIGHER EDUCATION EMPLOYERS AND STATE LEGISLATURES ARE STARTING TO TACKLE THE PASS-THE-HARASSER PHENOMENON

A. The Response from Higher Education Employers

A number of universities have landed in the limelight when news reports reveal the hiring of a person who previously was found to have engaged in sexual

48. As explained by Anita Levy, a senior officer at the American Association of University Professors, "[a]ll you have are allegations without a formal investigation and some type of conclusion." Tyler Kingkade, *Universities are Facing a "Passing the Trash" Scandal People are Comparing to the Catholic Church*, BUZZFEED NEWS (June 28, 2017, 12:38 PM), https://www.buzzfeednews.com/article/tylerkingkade/professors-change-jobs-sexual-assault-allegations#:~:text=%22Passing%20the%20harasser%20has%20got,parish%20rather%20than%20face%20discipline.

49. *E.g.*, Greg Piper, *Washington Bill Would Further Empower Title IX Kangaroo Courts Against Professors*, THE COLLEGE FIX (Jan. 2, 2020), https://www.thecollegefix.com/washington-bill-would-further-empower-title-ix-kangaroo-courts-against-professors/.

harassment or misconduct in a position with a previous employer.[50] Some university administrators and leaders may attempt to deflect and effectively blame another employer for not being forthcoming about the candidate's past transgressions or record. Others may attempt to learn from the experience and seriously examine personnel policies and practices that allowed a person to be hired without consideration of a past record of misconduct.

Leaders within the University of Wisconsin system took the second path in addressing hiring issues after negative publicity related to employment of an assistant dean and deputy Title IX coordinator.[51] According to news reports, the employee was first accused of misconduct while working at University of Wisconsin (UW) Stevens Point.[52] The employee resigned during an investigation that would eventually find that he had likely repeatedly asked another employee to go home with him and made sexual innuendos.[53] The employee was subsequently hired by a liberal arts college in Illinois.[54] During a reference check, the Illinois college reportedly was not informed of the findings made at UW Stevens Point.[55] In a year, the employee left the Illinois college, and UW Eau Claire hired him as assistant dean and deputy Title IX coordinator. UW Eau Claire representatives indicate that they were unaware of the previous findings at UW Stevens Point.[56] Reportedly, two different UW Stevens Point officials neglected to disclose the harassment incidents when representatives from the Illinois college and UW Eau Clair made reference checks.[57] Although an education journal describes these events as "extraordinary" in that the employee was supervising harassment investigations and that two institutions within the same university system failed to share pertinent personnel information with one another, the author warns that the general scenario of quietly terminating a harasser or letting the person resign and move to another institution "without raising a red flag" is not unusual.[58]

The hiring debacle between UW sister schools and the surrounding media attention captured the attention of then Wisconsin Governor Scott Walker.[59] He called for action, and the University of Wisconsin System Board of Regents

50. *Kingkade*, *supra* note 48 (reporting on a number of incidents involving professors changing universities after findings or investigations of sexual harassment).

51. *No More Passing the Harasser*, *supra* note 34.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Karen Herzog & Alan Hovorka, *UW-Stevens Point Sexual Harassment Case Spurs UW System to Review Hiring Policies*, MILWAUKEE J. SENTINEL (May 31, 2018, 11:06 AM), https://www.jsonline.com/story/news/2018/05/31/uw-stevens-point-sexual-harassment-spurs-uw-system-review-hiring/658084002/. The spokesperson for the UW Stevens Point reported that two representatives of the school "answered the questions they were asked. Neither voluntarily disclosed information about the sexual harassment complaint." *Id.*

58. *No More Passing the Harasser*, *supra* note 34.

59. *Id.*

responded by adopting a resolution that directed UW institutions to develop policies to address the sharing of personnel files with other UW institutions and Wisconsin agencies, as well as documenting in personnel files all sexual harassment allegations and investigations.[60] The resolution also directed the UW institutions to establish appropriate reference check procedures regarding allegations or investigations of sexual harassment.[61]

The policies adopted by UW institutions address the pass-the-harasser problem on two fronts. First, the policies deal with situations when the UW institution is in the hiring mode and considering final candidates. The second front addresses how UW responds when a current or former UW employee is seeking a position with another employer.

When involved in hiring, the UW policies recognize the importance of performing thorough reference checks for final candidates seeking any UW System institution position. The policies specifically require that the reference checks, at a minimum, ask the following questions:

> (1) Was the candidate ever found to have engaged in any sexual violence or sexual harassment?
>
> (2) Is the candidate currently under investigation or ever left employment during an active investigation in which the person was accused of sexual violence or sexual harassment?[62]

The policies and related procedures also require that the final candidate be asked the same questions.[63] This move provides another avenue for obtaining information on past misconduct and pending investigations in the event that another employer fails to respond to the specific reference check questions. By requiring that these questions be posed, UW broke ground in becoming the first university system to adopt system-wide policies requiring that all reference checks affirmatively cover concerns related to sexual misconduct.

To address reluctance of other employers to disclose information on a current or former employee, especially findings of prior misconduct, the UW

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60. *UW System Board of Regents Resolution 11038: Employee Personnel Files and Reference Checks*, U. WIS. SYS. (June 7, 2018), https://www.wisconsin.edu/ohrwd/admin/download/Board-of-Regents-Resolution-11038.pdf.

61. *Id.*

62. The reference checks must include the candidate's most recent employer and any previous UW System institutions or state agencies where the candidate was employed in the past seven years. *UW System Administrative Policy 1275: Recruitment Policies, (B) Required Questions*, U. WIS. SYS. (July 1, 2015), https://www.wisconsin.edu/uw-policies/uw-system-administrative-policies/recruitment-policies/ (policy applicable to all UW institutions except UW-Madison) [hereinafter *UW Policy 1275*]. The policy directs reference checkers to contact current and former supervisors even if the finalist did not provide supervisory references. *Id.* at app. 2. For the comparable policies at UW-Madison, see *Recruitment, Assessment, and Selection of Academic Faculty, Limited and University Staff Employees*, U. WIS.–MADISON POL'Y LIBR. (June 24, 2015), https://kb.wisc.edu/ohr/policies/page.php?id=53208.

63. *UW Policy 1275*, *supra* note 62. Candidates for positions at UW system schools should not be blindsided by the questions that will be included in reference checks and that they will be expected to answer. All vacancy announcements must include a statement noting that the candidate and references will be required to answer questions regarding sexual violence and sexual harassment. *Id*. at app. 4.

procedures ask prospective hires to sign a release authorizing former and current employers and references to release employee information to UW institutions.[64] The authorization expressly states that the signor "knowingly and voluntarily release[s] all former and current employers, references, and the University of Wisconsin from any and all liability arising from their giving or receiving information about [the signor's] employment history, academic credentials or qualifications, and . . . suitability for employment with the University of Wisconsin."[65]

Covering the sexual harassment-related questions in the reference checks (facilitated by a signed release) and requiring the prospective hire to personally answer specific questions clearly improves the likelihood that UW will learn about findings of misconduct as well as pending investigations. When UW does discover that a candidate violated a sexual violence or sexual harassment policy of another employer, UW personnel will consult with their internal human resources and legal departments before making a final determination on hiring.[66] The hiring personnel will consider a number of factors, including the amount of time that has elapsed since the violation(s) and the severity of the violation(s).[67] From the perspective of the candidate, past misconduct is not an "automatic disqualifier."[68] Rather, it is pertinent information for the hiring personnel to consider, along with any response that the candidate provides. In short, the reference checking procedures advance open and informed decision making.

In the same spirit of advancing informed decision-making across institutions, the UW policies also address the responsibilities of UW personnel when a current or former UW employee is seeking a position with another employer. Rather than taking a minimalist approach and relying on a "no comment" version of a reference, the UW policy requires that UW personnel contacted for a reference check refer the potential employer to the appropriate UW System institution human resources expert for questions regarding past employee misconduct (including any violation sexual harassment policies).[69] The UW approach alerts the reference checker of possible concerns by informing

64. *Id.* at app. 6.

65. *Id.* The waiver and release signed by the candidate provides a defense to the former employer who relies on the release to provide information. The outcome of the dispute over disclosure would depend on a number of factors including whether the confidentiality provisions were mutual or unilateral, whether the employee breaches some term of the severance agreement, the termination or duration provisions that may apply to the confidentiality provisions, and applicable law, such as employment reference statutes. Although the determination is fact specific, generally speaking the release and waiver protects employers in disclosing information pursuant to a former employer's request and release. For a discussion of the legal framework for reference checks, see Schlavensky, *supra* note 34, at 7-11.

66. *Id.* at app. 5.

67. *Id.*

68. *UW Policy 1275*, *supra* note 62.

69. The UW policy also requires this notification even if the potential employer does not specifically ask about misconduct. *Id.*

them of the avenue for obtaining responses from a human resources expert responsible for handling such inquiries. This approach to information sharing provides a model for other institutions. As discussed in Part IV below, risks associated with harassers can only be effectively addressed if post-secondary institutions across the country follow procedures for seeking and providing information related to misconduct findings.

Finally, the UW procedures include safeguards to prevent employees from resigning to avoid a finding of misconduct. When an employee is accused of misconduct, the campus continues its investigation, regardless of the accused employee's resignation, and provides the ex-employee the opportunity to participate in the investigation.[70]

In developing these policies, the UW system working group conducted research and discovered that most universities did not have policies requiring reference checks regarding allegations/investigations of sexual harassment or documenting within personnel files allegations and investigations related to sexual harassment.[71] The working group did learn that various universities were grappling with the pass-the-harasser problem as a "significant employee and student safety issue."[72]

Around the same time that the UW system was developing its policies, the University of California's Davis (UC Davis) campus was testing a pilot program dealing with faculty reference checks that seek information related to misconduct.[73] The UC Davis program requires that all applicants for tenured and continuing lecturer positions sign a release form authorizing UC Davis to contact any former employers to request information about substantiated findings of misconduct related to teaching, research, and service.[74] The release allows the applicant's current and previous institutions to share information when the applicant has been found to have violated that institution's policies governing

70. *Id.* at app. 5. Upon completion of the investigation, any findings of misconduct are documented in the personnel file. *Id.*

71. Kelly Meyerhofer, *UW Schools to Share Personnel Files with Each Other, State Agencies as Soon as January 2019*, WIS. ST. J. (Aug. 22, 2018), https://madison.com/wsj/news/local/education/university/uw-schools-to-share-personnel-files-with-each-other-state-agencies-as-soon-as-january/article_f06ff37b-06c5-5dc2-a911-26e3ed2f6987.html.

72. *No More Passing the Harasser*, *supra* note 34.

73. Colleen Flaherty, *UC Davis is Latest Institution to Adopt a Reference Check Policy to Stem Faculty Misconduct*, INSIDE HIGHER ED (June 27, 2019), https://www.insidehighered.com/news/2019/06/27/uc-davis-latest-institution-adopt-reference-check-policy-stem-faculty-misconduct (hereinafter *UC Davis Adopts Reference Checks*).

74. *Pilot Program - Reference Checks for Academic Senate Ladder Rank Faculty Hires with Tenure or Lecturers/Senior Lecturers/Senior Lecturers with Security of Employment*, U.C. DAVIS (Dec. 19, 2019), https://academicaffairs.ucdavis.edu/reference-checks. The release form states that UC Davis will not request the information authorized by the release unless the applicant is a finalist for an academic appointment with tenure or security of employment. *Id.* at app. A.

faculty conduct, including policies prohibiting sexual harassment.[75] In addition to authorizing the release of information, the form also includes a provision releasing UC Davis, its agents, and representatives, and any person furnishing information to the university, from liability arising out of the furnishing and inspection of information.[76]

By requiring reference check inquiries related to misconduct findings, UC Davis communicates to prospective hires that the institution intends to learn about any misconduct findings at an applicant's current or previous institution.[77] The liability release signed by the applicant should improve the likelihood of other institutions' providing information related to misconduct findings. The reference check provides transparency and information to help UC Davis from "hiring faculty without the ability to evaluate such historic infractions."[78]

In addition to empowering UC Davis to obtain information on misconduct at another institution, the reference check requirement may dissuade potential applicants from applying when they have been disciplined at another institution.[79] The experience at UC Davis suggests that persons with disciplinary records may effectively self-select out of applying for positions at schools utilizing this reference check system.[80]

UC Davis also recognizes the importance of disclosing information to other institutions considering a current or former UC Davis employee. UC Davis will share substantiated findings of misconduct with another institution provided that the candidate signs a waiver consenting to the reference check and disclosure.[81]

Very slowly, other schools appear to be following the lead of UC Davis and the UW system in adopting policies and practices to obtain information related to past misconduct of applicants for positions.[82] As discussed in the next section, state legislatures may also take action to require screening measures for applicants seeking positions in postsecondary institutions.

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75. The authorization expressly states that it extends to a release of information of a confidential or privileged nature, as well as data or material which have been sealed or agreed to be withheld pursuant to any prior agreement or court proceeding involving disciplinary matters. *Id.* at app. A.

76. *Id.*

77. Applicants who decline to consent do not move forward as candidates. *UC Davis Adopts Reference Checks*, *supra* note 73.

78. *Id.* (quoting a UC Davis vice provost for academic affairs).

79. *See id.* (reporting on the congressional testimony of the UC Davis vice provost for academic affairs).

80. Of the 23 institutions that provided responses pursuant to the new UC Davis procedure, none included information about candidates receiving discipline. *Id.*

81. *Id.*

82. For example, the University of California at Irvine has launched a pilot program similar to the UC Davis policy. *See Pilot Program – Reference Checks*, UCI OFF. ACAD. PERSONNEL (July 1, 2020), https://ap.uci.edu/programs/pilotprogram_refchecks/. *See also Pilot Program Description: Institutional Reference Checks for Appointments Conferring Tenure or Security of Employment*, U.C.SAN DIEGO , https://senate.ucsd.edu/media/357674/inst-reference-checks-review-docs-3-2019.pdf (last visited Feb. 13, 2021) (describing the pilot program at the University of California at San Diego).

B. The Response from the Washington State Legislature

Washington state legislators determined that they would not wait for colleges and universities to address the problems related to confidential settlements, sexual misconduct, and harassers changing employment without disclosure of past misconduct. Following news reports of a former administrator moving to another college without disclosure of credible allegations of sexual misconduct, Washington became the first state to enact legislation to combat the pass-the-harasser problem in higher education.

The new Washington law incorporates a number of procedural requirements postsecondary schools must adhere to when hiring prospective employees or responding to inquiries from other employers. The first requirement is that all applicants sign statements disclosing information related to sexual misconduct findings and investigations.[83] Beginning July 1, 2021, the law additionally requires that postsecondary institutions request, in writing, that an applicant's current and past postsecondary-educational employers provide information related to substantiated sexual misconduct findings.[84] Further, postsecondary employers in Washington must disclose to other employers information about substantiated findings of a current or former employee's misconduct.[85]

The Washington law goes beyond providing for reference checking procedures used by institutions in other states. To address the concern that an employee may escape accountability by resigning during an investigation, the law requires that postsecondary educational institutions complete investigations, even if the accused employee resigns, and make written findings of whether the complaint or allegation is substantiated, unless the victim requests otherwise.[86]

Most notably, the Washington law addresses nondisclosure agreements. The law states that a provision in a settlement agreement executed subsequent to June 11, 2020, between a postsecondary educational institution and an employee, is against public policy and void and unenforceable if the provision prohibits the employee, the institution, a survivor, or any other person from disclosing that the employee has either been the subject of substantiated findings of sexual

83. Beginning October 1, 2020, the law provides that postsecondary education institutions request that applicants sign a statement (a) declaring whether the applicant is the subject of any substantiated findings of sexual misconduct or is currently being investigated for, or (b) has left a position during the investigation into, a sexual misconduct violation. WASH. REV. CODE ANN. § 28B.112.080(1) (West 2020). The signed statement both authorizes the applicant's current and past employers to disclose any sexual misconduct committed by the applicant and releases the other employers from liability for providing information. *Id.*

84. *Id.*

85. The law also states that employees and their institutions will be immune from civil and criminal liability if they disclose information. *Id.*

86. WASH. REV. CODE ANN. § 28B.112.070(1) (West 2020). "A postsecondary educational institution shall include in the employee's personnel file or employment records any substantiated findings of sexual misconduct committed by the employee while the employee was employed with the postsecondary education institution." WASH. REV. CODE ANN. §28B.112.70(2)(a) (West 2020).

misconduct or is the subject of an incomplete sexual misconduct investigation.[87] This provision in the law lifts the cone of silence that facilitates harassers' changing positions without the new employer learning about a prospective hire's past misconduct.

Unlike the individual policies adopted by individual universities, the Washington statute provides that postsecondary schools take measures to address issues related to employee screening and disclosure of information. The statutory provisions also communicate to postsecondary employers statewide that they should not use nondisclosure agreements in the circumstances described in the statute. Although the reach and scope of the Washington statute encompasses more than the UC Davis and UW system policies and procedures, the statute is limited to postsecondary institutions in Washington.

IV.
WHY COLLECTIVE ACTION IS NECESSARY

Other states may pattern legislation on the Washington statute to require universities to disclose information related to substantiated sexual misconduct findings. Even with increased institutional information sharing and solicitation related to past misconduct, experts emphasize the importance of collective action.[88] This section outlines the principal reasons why the pass-the-harasser problem can only effectively be addressed through an approach that engages institutions across the country.

By its nature, the "pass-the-harasser" personnel concern cuts across all postsecondary institutions, large and small alike. First, the problem stems from the manner in which an employing institution handles harassment complaints and misconduct findings. Does the employer complete investigations or take action that appears to facilitate the passing of the alleged perpetrator to another institution? When the employee is on the job market, how does the employer handle reference checks from hiring institutions? Is there a defined procedure for handling reference checks, such as one requiring that inquiries related to misconduct be directed to a centralized office staffed by human resources experts? Second, the problem relates to the lack of diligence exercised by hiring institutions in checking references and seeking specific information on candidates' records relating to misconduct. Does the hiring institution specifically request information related to past misconduct? And, if such information is provided, does the hiring institution take this information into account when making hiring decisions, particularly when the potential employee is a highly acclaimed academic?

87. WASH. REV. CODE ANN. § 28B.112.060(1) (West 2020).

88. *See, e.g.*, The Nat'l Acads., *Working Collectively to Tackle the "Pass the Harasser" Problem*, VIMEO (Nov. 25, 2019, 5:27 PM), https://vimeo.com/375527880 (University of Wisconsin System's General Counsel, Quinn Williams, commenting on the importance of collective action).

These reciprocal roles and responsibilities of employers and hiring institutions point to the fact that effective change requires that all institutions take steps to address the problem. Unless schools nationwide take action to deal with hiring inquiries and reports, employees can avoid having to address questions about their past misconduct by seeking employment at schools that do not require reference checks covering misconduct findings. As reported by representatives of UC Davis, candidates may be self-selecting out of searches when institutions require that past misconduct be addressed.[89] This suggests that perpetrators will seek employment with employers that conduct no or minimal gatekeeping. Failure to exercise diligence in hiring inquiries in turn contributes to the increased risk of sexual harassment for students and employees at those institutions. Therefore, the problem requires that all schools change their policies and practices, both as employers and as hiring institutions.

Without a national push for change, most institutions likely will not tackle the problem. Even though the *Chronicle of Higher Education* highlighted the "pass-the-harasser" phenomenon in 1996, it took over twenty years for even a small number of schools to implement new hiring practices. The two university systems that made changes in 2019 did so after incidents related to their hiring. Although a few other institutions are following suit, the vast majority of schools likely will not overcome the inertia of the status quo.[90]

Even with the #MeToo movement casting a spotlight on harassment, universities may not buck the current practice of quietly dealing with alleged misconduct rather than completing investigations.[91] First, in the short term, it may appear to be the course of least resistance to encourage or facilitate the employee's move to another institution by entering into quiet settlements. Some institutions have learned that attempting to impose sanctions such as termination may embroil them in years of internal proceedings, even litigation, with a person accused of misconduct.[92] Second, institutional representatives may elect not to report misconduct to hiring institutions because they fear the employee's asserting defamation and other claims.[93] Third, both employers and hiring

89. *See No More Passing the Harasser*, *supra* note 34.

90. As explained by an organizational designer, "Organizations tend to remain static unless there is a force greater than the inertia of the status quo." John Latham, *Overcoming the Inertia of the Status Quo*, JOHN LATHAM, https://www.drjohnlatham.com/overcoming-inertia-status-quo/ (last visited Feb. 13, 2021).

91. Jeffrey Mervis, *Universities Move to Stop Passing the Harasser*, 366 SCIENCE 1057, 1057 (2019) (referring to the "ugly tradition" in higher education of allowing faculty members found guilty of bullying or sexual harassment to move to a new job without telling their new employer about the past conduct).

92. *See Title IX Iceberg*, *supra* note 38, at 874 (explaining that it is "likely much quicker and cheaper to get rid of faculty harassers" by passing them off to another institution rather than dealing with years of litigation).

93. *See No More Passing the Harasser*, *supra* note 34 (noting that often institutions do not share harassment findings because they fear retaliation by employees who lost jobs over disclosures). This concern may influence decisionmakers even though the Wisconsin working group found "little evidence

institutions may encounter opposition from faculty. Although many faculty members recognize the need for schools to improve how they deal with issues of harasser mobility, faculty bodies or associations may question such initiatives.[94] Administrators would be better positioned to deal with faculty opposition on a particular campus if campus misconduct inquiries became a national norm.

Finally, the adoption of better screening and reporting measures at schools throughout the country could deter misconduct.[95] Perpetrators who understand that sexual harassment investigations will be completed, inquiries made, and findings reported may be less inclined to harass others. Although past findings of misconduct would not disqualify a person from changing institutions, the employee would be required to address the issue when seeking new employment. Persons who understand this should be less inclined to engage in harassing behavior that could result in misconduct findings and future scrutiny when seeking employment at a new institution.

V.
HOW ACCREDITATION STANDARDS ENLIST INSTITUTIONS IN ADDRESSING THE PERVASIVE PROBLEM

To prevent harassers from avoiding scrutiny and accountability by changing employers, schools across the country should be conducting reference checks and sharing information related to misconduct findings and investigations at their own institutions. Attorneys and university officials involved in addressing the pass-the-harasser problem point to the role that professional bodies can play in institutionalizing such hiring practices.[96]

In higher education in the United States, private agencies that accredit postsecondary schools function as powerful professional bodies. Any postsecondary school that seeks to participate in federal assistance programs must meet a number of requirements, including being accredited by an agency

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of successful defamation claims when the disclosed misconduct findings were based on sound investigations." *Id.*

94. Although the American Association of University Professors (AAUP) has not taken a position on how campus misconduct inquiries are handled, an official with the AAUP notes that the AAUP would be concerned "if administrations reported findings of misconduct and impositions of sanctions in which they did not provide adequate academic due process." Brown & Mangan, *supra* note 18. The AAUP has questioned blanket criminal background checks as a "disproportionate invasion of privacy." *Id.*

95. *See Prevention of a Serial Problem*, *supra* note 36, at 2378 (explaining how "serious sanctions for sexual harassment serve the function of deterrence, both in terms of preventing future victims by the same harasser and lessening the likelihood of other faculty crossing the line into transgressive behavior").

96. *E.g.*, *UC Davis Adopts Reference Checks, supra* note 73 (quoting a UC Davis administrator who stated that reference checks will inevitably become institutionalized if universities talk to each other through professional organizations. Rep. Gerry Pollet, the Seattle legislator who proposed the Washington bill, suggested that interstate higher-education consortia agree on common standards for reporting sexual misconduct. Brown & Mangan, *supra* note 18.

recognized by the U.S. Department of Education.[97] Once recognized, accreditation agencies help the government ensure that postsecondary institutions and programs receiving federal funds meet a minimum quality level.[98] To discharge this responsibility, the agencies develop and maintain education standards for schools seeking accreditation.[99] The agencies develop these standards in collaboration with educational institutions.[100]

Regional agencies accredit institutions that generally fall within specific geographic regions of the country.[101] Standards vary among the regional accreditors because the accreditors are largely free to set their own standards.[102]

Although current agency standards do not directly address issues related to faculty screening for prior misconduct, various existing standards include guidelines related to general safety, ethics, and the climate of the institution. For example, the standards for one regional agency states, "The institution takes reasonable steps to provide a healthy, safe, and secure environment for all members of the campus community."[103] Other accreditation standards address faculty hiring, generally focusing on qualifications and publication standards.[104]

A new accreditation provision dealing with hiring inquiries relating to misconduct could logically fit under existing standards related to safety, ethics, and faculty hiring. The following depicts the type of due diligence standard that an accreditor could adopt: "The institution implements and publicizes policies and procedures to screen final candidates to determine if they have been subject to misconduct findings."

The actual framing of the standard would depend on the content and the format of existing standards. An agency, in consultation with the institutions it accredits, could develop a standard that addresses hiring issues related to

97. ALEXANDRA HEGJI, CONG. RESEARCH SERV., AN OVERVIEW OF ACCREDITATION OF HIGHER EDUCATION IN THE UNITED STATES 6 (2020), https://fas.org/sgp/crs/misc/R43826.pdf (noting that accreditation is "essential for financial survival of some if not most institutions and programs") [hereinafter *Overview of Accreditation*].

98. *Id.*

99. The U.S. Department of Health, Education, and Welfare in 1970 described accreditors as "the primary agents in the development and maintenance of educational standards in the United States." Judith S. Eaton, *Accreditation and the Federal Future of Higher Education*, ACADEME,Sept.–Oct. 2010, at 21, 22, https://www.aaup.org/article/accreditation-and-federal-future-higher-education#.YCDiEbBKjIV.

100. *Accreditation in the United States*, U.S. DEP'T. EDUC., https://www2.ed.gov/admins/finaid/accred/accreditation.html#:~:text=The%20goal%20of%20accreditation%20is,federal%20and%20state%20government%20agencies (last modified Feb. 4, 2021).

101. *Overview of Accreditation*, *supra* note 97.

102. Sarah Molinero, *Reexamining the Examiners: The Need for Increased Government Regulation of Accreditation in Higher Education*, 51 DUQ. L. REV. 833, 839 (2013).

103. THE S. ASSOC. OF COLLS. & SCHS. COMM'N ON COLLS., THE PRINCIPLES OF ACCREDITATION: FOUNDATIONS FOR QUALITY ENHANCEMENT (6th ed., 1st prtg. 2017), https://sacscoc.org/app/uploads/2019/08/2018PrinciplesOfAcreditation.pdf.

104. *E.g.*, NEW ENG. COMM'N OF HIGHER EDUC., STANDARDS FOR ACCREDITATION, STANDARD 6.4 (2021), https://www.neche.org/resources/standards-for-accreditation#standard_six (stating "The institution employs an open and orderly process for recruiting and appointing its faculty.").

screening final candidates and misconduct findings. A narrower approach would be to limit the standard to address "sexual misconduct" findings. As proposed, the standard is general. Such an approach leaves it to the institution to develop policy and procedures tailored to the school's needs, resources, and culture.

In formulating their own policies and procedures, schools can learn from the experience of university systems that have already implemented policies and procedures to address the pass-the-harasser phenomenon. The institution also benefits from considering the personnel issues in connection with the self-study and peer review process required by accreditation.[105] By adopting standards providing for screening inquiries, accrediting bodies transform a collective action problem to a collective opportunity for schools to cooperate with one another in promoting safe learning and work environments.[106]

CONCLUSION

In a speech delivered in the U.S. House of Representatives, Rep. Jackie Speier (California) focused on sexual harassment in universities by stating, "Universities are supposed to be in the business of illumination, but as we have seen . . . that is not always the case."[107] With such legislative attention and media coverage exposing sexual harassment in colleges and universities, the time is right for institutions to address concerns related to harassers switching institutions without scrutiny related to their prior harassment.

Although a few schools and one state have taken steps to require inquiries related to misconduct findings, the pass-the-harasser phenomenon is a shared concern involving institutions nationwide. Most fundamentally, the problem comes down to hiring schools failing to inquire and other employer schools failing to disclose information related to prior misconduct.

To deal effectively with the collective problem, institutions across the country should change their personnel practices. Due to institutional inertia and the lack of incentives to alter the status quo, change is more likely to occur on a national scale if accreditation agencies adopt standards that require due diligence related to faculty hiring.[108]

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105. "Following the self-study, a team composed primarily of peer faculty and administrators conducts a multi-day visit to the school." Judith Areen, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471, 1481 (2011).

106. Professor Nancy Chi Cantalupo and William Kidder warn that pass-the-harasser scenarios raise thorny "collective action" problems in the academy. *Prevention of a Serial Problem, supra* note 36, at 2387. "Namely, campus officials might reasonably conclude that a confidential separation agreement is the quickest way to protect their students and staff from the risk of additional sexual harassment, but making such a choice can increase the risk of future sexual harassment to students at other campuses." *Id.*

107. Mike Henry, *Rep. Jackie Speier Introduces Bill to Tackle Sexual Harassment in the Sciences*, AM. INST. PHYSICS (Oct. 26, 2016), https://www.aip.org/fyi/2016/rep-jackie-speier-introduces-bill-tackle-sexual-harassment-sciences.

108. *See* Celeste J. Lay, *Policy Learning and Transformational Change: University Policies on Sexual Harassment*, 40 J. WOMEN, POLS. & POL'Y 156 (2019) (suggesting universities lack incentives

Adopting such an accreditation standard helps institutions fulfill their missions of providing a safe and healthy environment for students, faculty, and staff. The standard would communicate that creating a safe environment goes beyond the bricks and mortar and extends to establishing personnel policies and procedures to advance safe, respectful, and productive educational relationships and interactions free of sexual harassment. At the same time, an accreditation standard would impress on institutions their roles and responsibilities as members of the larger academic community, committed to preventing and addressing the serious problem of sexual harassment. Quite simply, faculty, administrators, and staff owe to it to our students and to one another to ask and answer questions related to prior misconduct.

when it comes to changing sexual harassment policies or practices because existing policies are designed and defined by interest groups who benefit from current policies).