

# IN A CLASS OF ITS OWN: A STATUTORY SOLUTION FOR THE GENDERED SENTENCING DISPARITY IN TEACHER–STUDENT SEXUAL ASSAULT

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*In recent years, the #MeToo movement has started a powerful cultural dialogue about the pervasiveness and severity of sexual assault in our society. Despite those inroads, certain victims remain invisible. This Note explores the commission of sexual assault in one such context: female teachers who have sex with male students. It specifically examines the existence of a gendered sentencing disparity and proposes a three-part statutory solution that will reduce the incidence of the crime.*

*The first part of the law would entail a prison sentence for perpetrators of the crime. The second part of the law would require psychological counseling for purposes of rehabilitation. The third part of the law would consist of a public apology issued by the teacher, serving as a clear denouncement of this misconduct. Each aspect of the law is analyzed in detail through a synthesis of various fields of literature.*

*In making such a proposal, the Note discusses the prevalence of female-perpetrated sexual assault in educational settings as well as the adverse (but often overlooked) developmental effects on male victims. It also challenges existing norms that sensationalize and minimize these crimes. Ultimately, the Note asks us to reconsider our conceptions of gender and criminality, challenging our existing legal framework to adapt and evolve in response to an existing problem.*

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### INTRODUCTION

In recent years, the #MeToo movement has shed light on the prevalence of sexual assault in our society.<sup>1</sup> Activist Tarana Burke first used the phrase in 2006,<sup>2</sup> but it gained traction in 2017 when actress Alyssa Milano tweeted, “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.”<sup>3</sup> Allegations against Harvey Weinstein immediately surfaced, and headlines about Larry Nassar, Bill Cosby, and Jeffrey Epstein soon followed.<sup>4</sup> Since Milano’s tweet, the #MeToo movement has primarily focused on telling the stories of female survivors.<sup>5</sup>

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1. Lesley Wexler et al., *#MeToo, Time’s Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 49–50 (2019) (describing how allegations of sexual misconduct in sports, entertainment, and politics have prompted a cultural reckoning). I begin with this reference to the #MeToo movement because it is a powerful dialogue about the gravity and incidence of sexual assault in our society. Despite promising inroads, I argue that our cultural discourse must also recognize male victims in the context of teacher–student sexual assault. This is especially true because children are a vulnerable segment of our population, and sexual trauma can have pronounced developmental effects, even compared to adult victims. *See, e.g.*, Caron Zlotnick et al., *Childhood Trauma, Trauma in Adulthood, and Psychiatric Diagnoses: Results from a Community Sample*, 49 COMPREHENSIVE PSYCHIATRY 163, 164 (2008) (citing a study that found “those who are sexually assaulted in childhood were more likely than those first assaulted in adulthood to report subsequent major depression, drug and alcohol use disorders, and phobias”).

2. *History and Inception*, ME TOO., <https://metoomvmt.org/get-to-know-us/history-inception/> [<https://perma.cc/U7MU-XQF3>] (last visited Oct. 24, 2020) (explaining that “me too” originated as a grassroots phrase that connected survivors of sexual violence).

3. Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), [https://twitter.com/Alyssa\\_Milano/status/919659438700670976](https://twitter.com/Alyssa_Milano/status/919659438700670976) [<https://perma.cc/5BXS-2XZE>] (receiving nearly 50,000 likes and 21,000 retweets).

4. Margo Kaplan, *Symposium: Reconciling #MeToo and Criminal Justice*, 17 OHIO ST. J. CRIM. L. 361, 363–64 (2020) (contrasting the effectiveness of the #MeToo movement with police inaction after formal reports).

5. *See, e.g.*, Stephanie Zacharek et al., *Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18, 2017), <https://time.com/time-person-of-the-year-2017-silence-breakers/> [<https://perma.cc/RBK7-F2D3>] (“[W]omen everywhere have begun to speak out about the inappropriate, abusive, and in some cases illegal behavior they’ve faced.”). As part of a separate project to honor historic women, Time Magazine recognized the silence breakers as the 2017 Women of the Year, seemingly excluding male victims who broke their silence.

Given the statistics, this emphasis makes sense. Women are nearly twice as likely as men to experience physical sexual violence and approximately nine times more likely to be raped.<sup>6</sup> Furthermore, only a third of these incidents are reported to police.<sup>7</sup> This issue of underreporting, along with methodological differences in surveys, creates some ambiguity regarding the scope of sexual assault.<sup>8</sup> Regardless, considering the disproportionate rates at which women face sexual harm, the #MeToo movement appropriately focuses on female survivors.

Despite this, it is important to recognize male victims too. Some men, such as Terry Crews<sup>9</sup> and Brendan Fraser,<sup>10</sup> received recognition and support from the #MeToo movement. Others did not, including Jimmy Bennett, an actor who accused Asia Argento of sexual battery when he was a minor.<sup>11</sup> Argento, a vocal leader of the #MeToo movement, quietly paid Bennett \$380,000 and continued using her platform as “a powerful voice for women who have been mistreated by men.”<sup>12</sup> Meanwhile, fellow actress Rose McGowan tweeted support for Argento and

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*100 Women of the Year*, TIME, <https://time.com/100-women-of-the-year/> [<https://perma.cc/AGF8-H2WD>] (last visited Oct. 24, 2020).

6. SHARON G. SMITH ET AL., CTRES. FOR DISEASE CONTROL & PREVENTION, NAT’L CTR. FOR INJURY PREVENTION & CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF – UPDATED RELEASE 2–3 (2018), <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf> [<https://perma.cc/TXY3-GNZW>] (stating that 43.6% of women and 24.8% of men experience contact sexual violence; rape affects 21.3% of women and 2.6% of men).

7. RACHEL E. MORGAN & JENNIFER L. TRUMAN, U.S. DEP’T OF JUST., BUREAU OF JUST. STATS., NCJ 255113, CRIMINAL VICTIMIZATION, 2019, at 8 (2020), <https://www.bjs.gov/content/pub/pdf/cv19.pdf> [<https://perma.cc/2P6N-EGHP>] (showing a 33.9% reporting rate in 2019, which falls between the 24.9% in 2018 and the 40.4% in 2017).

8. See *Statistics*, NAT’L SEXUAL VIOLENCE RES. CTR., <https://www.nsvrc.org/statistics> [<https://perma.cc/3EPG-72BP>] (last visited Oct. 24, 2020) (explaining that the results of studies may differ based on sample size, question type, and sexual assault definitions).

9. Michel Martin, *Terry Crews on His Sexual Assault Lawsuit: This is About Accountability*, NPR (Dec. 10, 2017, 6:43 PM), <https://www.npr.org/2017/12/10/569682236/terry-crews-on-his-sexual-assault-lawsuit-this-is-about-accountability> [<https://perma.cc/W4LV-KR4D>]. It is worth noting, however, that Crews did not receive unanimous support in this context. See, e.g., ET Canada, *50 Cent Mocks Terry Crews’ Assault*, YOUTUBE (June 27, 2018), <https://www.youtube.com/watch?v=EQ7s-u-Alu8> [<https://perma.cc/6EZV-XTSH>] (describing 50 Cent’s skepticism about the sexual-assault allegations); David Dennis, Jr., *Terry Crews Is the Worst Kind of Black Man*, NEWSONE (Jan. 28, 2020), <https://newsone.com/3900608/terry-crews-worst-kind-of-black-man/> [<https://perma.cc/Q4XB-AFWQ>] (criticizing the actor for failing to support Gabrielle Union after she was fired from *America’s Got Talent*).

10. Good Morning America, *Brendan Fraser Says #MeToo*, YOUTUBE (Feb. 23, 2018), [https://www.youtube.com/watch?v=epKgfe8dJDM&ab\\_channel=GoodMorningAmerica](https://www.youtube.com/watch?v=epKgfe8dJDM&ab_channel=GoodMorningAmerica) [<https://perma.cc/R5VP-LMMV>].

11. *Asia Argento: #MeToo Figurehead ‘Accused of Sexual Assault,’* BBC (Aug. 21, 2018), <https://www.bbc.com/news/entertainment-arts-45253993> [<https://perma.cc/2RW6-L6KY>].

12. Kim Severson, *Asia Argento, a #MeToo Leader, Made a Deal with Her Own Accuser*, N.Y. TIMES (Aug. 19, 2018), <https://www.nytimes.com/2018/08/19/us/asia-argento-assault-jimmy-bennett.html> [<https://perma.cc/2WXR-Y76H>].

questioned Bennett's allegations, ignoring her own advice about believing survivors.<sup>13</sup>

The Bennett example reveals that male victims are often less visible in our conversations about sexual assault, particularly when the crime involves a female perpetrator. While some scholarship has directed attention to marginalized female communities,<sup>14</sup> male victims in vulnerable power dynamics remain largely overlooked.<sup>15</sup> This Note will examine one such context: female teachers who have sex with male students.<sup>16</sup> I argue that our society minimizes and mischaracterizes these relationships, resulting in gendered sentencing disparities for sexually criminal teachers. Part I describes the prevalence of teacher–student sexual assault as well as the social and psychological forces that influence this crime. Part II then explores existing statutory schemes that address this problem. Finally, Part III proposes a baseline law that would require one year in prison, mandatory counseling, and a public apology by the teacher. Accordingly, this statutory solution will advance both deterrence and rehabilitation goals.

## I. IDENTIFYING THE HARM

### A. *Estimating the Frequency of Teacher–Student Sexual Assault*

Statistics vary,<sup>17</sup> but female-perpetrated sex crimes occur in educational settings at disproportionate rates. A recent meta-analysis found that females committed 2–12% of total sexual offenses, depending on police reports or victimization surveys.<sup>18</sup> By contrast, a national case study examining sexual misconduct by K–12 employees found that 32% of offenders were female.<sup>19</sup> This

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13. Lisa Respers France, *Rose McGowan Facing Backlash for Urging 'Be Gentle' with Argento*, CNN (Aug. 21, 2018, 2:49 PM), <https://www.cnn.com/2018/08/21/entertainment/rose-mcgowan-asia-argento/index.html> [<https://perma.cc/J35H-CLKH>].

14. Kaplan, *supra* note 4, at 362–63, 390–91 (noting that the #MeToo movement considers “the experiences and needs of Black women and girls, along with queer, trans, and disabled individuals,” and discussing how rape reforms affect communities of color).

15. See Samuel Vincent Jones, *The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking*, 2010 UTAH L. REV. 1143, 1145–46 (2010).

16. I specifically consider this phenomenon in K–12 settings, where the victims are almost always minors. This Note does not discuss teacher–student sexual relationships at the university level.

17. The fact that statistics vary suggests that our framework for teacher–student sexual assault is underdeveloped. In many cases, victims must recognize the severity of the misconduct and engage in help-seeking behavior; to an extent, these processes depend on individual definitions of sexual violation. See Martina Delle Donne, *Barriers to and Facilitators of Help-Seeking Behavior Among Men Who Experience Sexual Violence*, 12 AM. J. MEN'S HEALTH 189, 198 (2018) (noting that conceptualizations of sexual violence varied across participants, and in many cases, self-identification as a victim required seeking help or advice from friends).

18. Franca Cortoni et al., *The Proportion of Sexual Offenders Who Are Female Is Higher than Thought: A Meta-Analysis*, 44 CRIM. JUST. & BEHAV. 145, 154 (2017).

19. BILLIE JO GRANT ET AL., MAGNOLIA CONSULTING, A CASE STUDY OF K-12 SCHOOL EMPLOYEE MISCONDUCT 50 (Sept. 15, 2017), <https://www.ncjrs.gov/pdffiles1/nij/grants/252484.pdf> [<https://perma.cc/UE2P-8GYV>]. These statistics are derived from

statistical disparity suggests that the educational setting warrants special consideration in our sexual-assault laws and policies.

Research counters the stereotype that these female perpetrators are naively coerced into a sexual relationship with a student.<sup>20</sup> Some feminist scholars have criticized this particular narrative, arguing that assumptions of male-initiated sexual aggression reflect outmoded views of masculinity and hierarchy.<sup>21</sup> Meanwhile, studies suggest that female perpetrators offend due to situational convenience and sexual gratification.<sup>22</sup> Aggravating factors include unhealthy relationships, unstable emotions, and unbalanced lifestyles.<sup>23</sup>

Statistics inform our understanding of the victims too. Studies suggest that 7–14% of students experience educator sexual misconduct.<sup>24</sup> These numbers are

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prosecuted offenses; the issue of underreporting limits the precision of this data. Additionally, this disproportionality is less pronounced when considering that 76% of K–12 teachers are female. See Alia Wong, *The U.S. Teaching Population Is Getting Bigger, and More Female*, ATLANTIC (Feb. 20, 2019), <https://www.theatlantic.com/education/archive/2019/02/the-explosion-of-women-teachers/582622/> [<https://perma.cc/NQV2-TCXE>].

20. Larissa S. Christensen & Andrea J. Darling, *Sexual Abuse by Educators: A Comparison Between Male and Female Teachers Who Sexually Abuse Students*, 26 J. SEXUAL AGGRESSION 23, 25 (2019). The Christensen article assumes that such a stereotype exists, but few sources address this. Regardless, anecdotal examples are instructive. See, e.g., Tamar Lapin, *Mary Kay Letourneau Claims She Didn't Know Sex with 12-Year-Old Was Illegal*, N.Y. POST (Sept. 24, 2018, 12:01 PM), <https://nypost.com/2018/09/24/mary-kay-letourneau-claims-she-didnt-know-sex-with-12-year-old-was-illegal/> [<https://perma.cc/NQV2-TCXE>] (involving teacher's claim that the victim "aggressively pursued her" and that nobody told her "this would count as a crime").

21. See, e.g., Lara Stemple & Ilan H. Meyer, *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*, 104 AM. J. PUB. HEALTH 19, 19–20 (2014) (arguing that the sexual victimization paradigm "relies heavily on the idea that men use sexual aggression to subordinate women"; normative assumptions that view women as disempowered victims contribute to the idea that women are passive or ignorant; and gender stereotypes about sexually insatiable men reinforce notions of masculinity while contributing to dismissive attitudes about victimization).

22. Christensen & Darling, *supra* note 20, at 25.

23. *Id.*

24. Charol Shakeshaft, *Identifying Misconduct*, STOP EDUCATOR SEXUAL ABUSE MISCONDUCT & EXPLOITATION (SESAME), <https://www.sesamenet.org/identifying-misconduct> [<https://perma.cc/E6BD-ELBT>] (last visited Oct. 27, 2020) (citing a study estimating that 7% of students have physical sexual contact with an adult at school); James Knoll, *Teacher Sexual Misconduct: Grooming Patterns and Female Offenders*, 19 J. CHILD SEXUAL ABUSE 371, 372 (2010) (citing a study that showed 9.6% of students report educator sexual abuse); GRANT ET AL., *supra* note 19, at 1 (citing a report estimating that 10% of students experience educator sexual misconduct); Lindon Ratliff & Joshua Watson, *A Descriptive Analysis of Public School Educators Arrested for Sex Offenses*, 23 J. CHILD SEXUAL ABUSE 217, 217 (2014) (citing a study that showed 14% of high-school students had sexual intercourse with a teacher).

underinclusive because students<sup>25</sup> and schools<sup>26</sup> often do not report. Of known victims though, 45% are male,<sup>27</sup> a percentage much higher than in non-educational settings.<sup>28</sup> This disproportionate rate of victimization among a vulnerable segment of our population would appear to warrant mention in the #MeToo dialogue, but the movement's website is silent on the matter.<sup>29</sup> To address this exclusion and recognize the validity of survivors, the law must hold teachers accountable regardless of their gender.

***B. Analyzing the Psychological Implications of Teacher–Student Sexual Assault***

In recognizing the importance of education, our society has entrusted teachers to form special relationships with students. This connection between the teacher and the student can facilitate the realization of full academic potential.<sup>30</sup> However, the inherent power imbalance can also create opportunity for abuse and manipulation.<sup>31</sup> In order to understand how the law regulates teacher–student sexual assault, we must consider the psychological factors that influence these situations.

Over time, a sexually motivated teacher will take advantage of the power imbalance by “grooming” the student.<sup>32</sup> This process entails praising the student, providing extra attention, and gradually introducing sexual topics.<sup>33</sup> It is not uncommon for parents to know about this close relationship, but an assumption of trust insulates the teacher from suspicion.<sup>34</sup> Eventually, the sexual assault operates as a dual betrayal, because the parent trusted the teacher as a professional educator and the student trusted the teacher as a personal friend.

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25. GRANT ET AL., *supra* note 19, at 24–25 (explaining that students are reluctant to report because they may not realize they are victims, they may perceive the situation as a sincere relationship with the teacher, or they may hesitate to cooperate with authorities and develop a reputation as a snitch).

26. *Id.* at 5 (stating that only 5% of cases are reported in situations where a school employee knows about another employee's sexual misconduct).

27. *Id.* at 50.

28. HOWARD N. SNYDER, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ182990, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 4 (2000), <https://bjs.ojp.gov/content/pub/pdf/saycrle.pdf> [<https://perma.cc/VMZ7-2XAR>] (showing that among sexual-assault victims aged 0–5, 6–11, and 12–17, females constituted 69.4%, 74.9%, and 90.9%, respectively).

29. *History and Inception*, ME TOO., *supra* note 2 (referring broadly to survivors as “young people, queer, trans, the disabled, Black women and girls, and all communities of color,” but failing to specifically mention males).

30. Knoll, *supra* note 24, at 371.

31. *Id.*

32. *Id.* at 374–76.

33. *Id.* at 376.

34. *Id.* (noting that parents are often “appreciative of the extra attention from the teacher, who they perceive as a positive authority figure and role model to their child”).

Psychological studies confirm that students suffer from adverse developmental effects after sexual victimization by a teacher.<sup>35</sup> These effects include depression, damaged self-esteem, recurring trust issues, suicidal ideation, and future challenges with sexual intimacy.<sup>36</sup> Specifically, these students may lose trust in adults and suffer from feelings of shame or betrayal in future relationships.<sup>37</sup> Given such negative consequences, the law should recognize the severity of teacher–student sex crimes and punish perpetrators accordingly.

### *C. Assessing the Social Attitudes Surrounding Teacher–Student Sexual Assault*

Cultural norms influence public attitudes regarding sexual assault, resulting in different perceptions based on the gender of the perpetrator and victim.<sup>38</sup> This often involves minimization of female perpetrators and male victims,<sup>39</sup> especially in the educational context.<sup>40</sup> Anecdotal accounts and psychological studies both suggest that our society is mischaracterizing the severity of teacher–student sexual assault. The law must adapt in response.

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35. Such psychological studies are cited in the subsequent footnotes, but this anecdotal account is illustrative:

[Fifteen]-year-old Jason Eickmeyer was a rural New Jersey football player and star wrestler who desperately needed an athletic scholarship to afford college. Everything changed for the popular student after he was singled out by 26-year-old gym teacher Traci Tapp. She flirted with Eickmeyer, touched him, urged him to phone her, and made him think they were soul mates. He read his poetry to her, and told her about helping take care of his father, bedridden with multiple sclerosis. They finally had sex at her house. He soon learned that he had a sexual rival, an assistant football coach. Eickmeyer’s world began to fall apart as he lost them both as mentors. When his mother learned of the affair and notified police, things got worse. Students thought he had ratted out the teacher, and friends refused to talk to him. He became glum and angry, picked fights, and quit the wrestling team, ending any hopes of college. He swore at a teacher and was suspended. Finally, he began cutting himself and one day at home, he became hysterical and vomited blood. After high school he tried community college, but lasted just half a semester. He grew depressed, lived out of his car, worked nights as a stripper, and had [a 34-year-old] girlfriend with two kids.

REBECCA MORRIS, *BAD APPLES: INSIDE THE TEACHER/STUDENT SEX SCANDAL EPIDEMIC* loc. 261–70 (2012) (ebook) (citing Sabrina Rubin Erderly, *Sex, Lies and Phys Ed*, ROLLING STONE (Jan. 22, 2009) (noting that the teacher ultimately pled guilty to a single count of “offensive touching,” which required forfeiture of her public teaching license and a \$225 fine but no jail time or probation)).

36. Rebecca A. Geddes et al., *Gender Bias in the Education System: Perceptions of Teacher-Student Sexual Relationships*, 20 *PSYCHIATRY PSYCH. & L.* 608, 609 (2013).

37. Knoll, *supra* note 24, at 377.

38. Stemple & Meyer, *supra* note 21, at 20, 25.

39. Lara Stemple, Andrew Flores & Ilan H. Meyer, *Sexual Victimization Perpetrated by Women: Federal Data Reveal Surprising Prevalence*, 34 *AGGRESSION & VIOLENT BEHAV.* 302, 303–04 (2017).

40. Jennifer L. Howell et al., *The Reverse Double Standard in Perceptions of Student-Teacher Sexual Relationships: The Role of Gender, Initiation, and Power*, 151 *J. SOC. PSYCH.* 180, 195 (2011); Geddes et al., *supra* note 36, at 615.

Numerous contexts show that young males in female-perpetrated sexual assaults are not always viewed as victims.<sup>41</sup> For example, one young man told his brother that he was raped by two women when he was nine years old.<sup>42</sup> In response, the brother laughed and called him “a lucky bastard.”<sup>43</sup> Here, a reaction by a family member showed total disregard for the severity of the crime. It’s difficult to imagine the same reaction for a girl who had been raped by two men.

In another example, Mary Kay Letourneau received social approval after having a sexual relationship with her sixth-grade student.<sup>44</sup> The teacher initially served a reduced sentence of three months for second-degree rape, but she returned to prison after violating multiple court orders to stay away from the victim.<sup>45</sup> Instead of widespread condemnation, Letourneau generated public fascination: newspaper accounts described her as a star-crossed lover who had a tryst with her student.<sup>46</sup> Even as she grew older—and as her victim suffered from adverse psychological effects<sup>47</sup>—Letourneau used the sexual assault to her reputational advantage, “granting the occasional interview and hosting ‘Hot for Teacher’ night at a local bar.”<sup>48</sup> Here, the social reactions communicated widespread social approval to the perpetrator. Once again, it seems improbable that a male teacher would receive such sensational publicity for sexual assault of a student.

Unfortunately, media coverage communicates not only to the perpetrators but to the victims as well. Every year, Barstool Sports releases a “starting lineup” of

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41. See Saturday Night Live, *Teacher Trial with Ronda Rousey – SNL*, YOUTUBE (Jan. 24, 2016), [https://www.youtube.com/watch?v=m6uvv1aS5\\_1](https://www.youtube.com/watch?v=m6uvv1aS5_1) [<https://perma.cc/UBW2-M9WR>] (presenting a skit of a male victim’s testimony in court, in which he joyfully recounts sexual activity with a female teacher and receives congratulatory approval from other males, including friends, family members, and the judge; top comments include, “I’d react the same way . . .” (1,500 likes) and another, “as I and any other human would” (5,700 likes)).

42. Geddes at al., *supra* note 36, at 610.

43. *Id.* This source does not specify whether the assault occurred in the K–12 context. Regardless, reactions of disbelief and derision highlight the minimization of male victimhood in sexual-assault dialogues.

44. EJ Dickson, *How the Media Turned Child Rape Into a ‘Tryst’ for Mary Kay Letourneau*, ROLLING STONE (July 8, 2020, 3:28 PM), <https://www.rollingstone.com/culture/culture-features/mary-kay-letourneau-vili-fualaau-relationship-media-child-rape-tryst-1025466/> [<https://perma.cc/BB9D-QAZ4>].

45. *Id.*

46. *Id.*

47. See Nicole Brodeur, *Vili Fualaau’s Story Is a Sad One*, SEATTLE TIMES (Apr. 8, 2001), <https://archive.seattletimes.com/archive/?date=20010408&slug=brodeur08m1> [<https://perma.cc/M453-FLKU>] (describing the teenager’s drinking problems, gang activity, drug experimentation, attempted suicide, recent arrest, and recurring nightmares about a praying mantis, in which “the female would rip the male’s head off” after sex); Tierney McAfee, *Mary Kay Letourneau Reveals Her First Sexual Encounter with Former Student Vili Fualaau*, PEOPLE (Apr. 10, 2015, 5:10 PM), <https://people.com/tv/mary-kay-letourneau-reveals-first-sexual-encounter-with-vili-fualaau/> [<https://perma.cc/CA7X-WSBN>] (offering a more recent update, with the victim admitting to depression and stating, “I’m surprised I’m still alive today”). This anecdotal example offers a glimpse into the adverse developmental effects of female-perpetrated sexual assault in academic environments. However, there is a dearth of psychological literature on this topic.

48. Dickson, *supra* note 44.



the most attractive women in teacher–student sex scandals.<sup>49</sup> The lineup ranks the teachers according to their physical traits and the salacious details of their sexual misconduct.<sup>50</sup> Without any qualifying language about the severity of these crimes, Barstool Sports graphically describes these illicit solicitations as “the sweet words every growing boy longs to hear.”<sup>51</sup> Given their target audience of young men, the website conveys public attitudes to potential victims, not perpetrators. Males who read the article must navigate cultural norms that minimize their victimization—somehow the rape myth that “the victim wanted it” still exists in this gendered context.

While anecdotal examples are useful, psychological studies also confirm the existence of gendered perspectives in teacher–student sexual assault. In one study, researchers found that participants expressed greater anger towards male teachers who commit sexual misconduct.<sup>52</sup> Participants read brief fact patterns about a teacher who had sex with a fifteen-year-old student.<sup>53</sup> Some fact patterns described the teacher–student dyad as male–female, others as female–male.<sup>54</sup> Afterwards, the participants rated the perceived seriousness of the behavior, their degree of sympathy for the student, and their degree of anger towards the teacher.<sup>55</sup> The results did not reveal an absolute gender bias, but participants did indicate a willingness to inflict greater punishment on the male perpetrators.<sup>56</sup> Authors of the study hypothesized that these outcomes reflect stereotypical perceptions of women as nurturers and men as aggressors.<sup>57</sup>

Similarly, the authors of another study determined that a reverse double standard exists in teacher–student relationships, wherein “women in positions of power are not perceived to be exploiting male subordinates.”<sup>58</sup> Like the previous study, participants read fact patterns about a teacher having sex with a high-school student.<sup>59</sup> Modifications in the fact patterns tested two variables: the teacher–student gender dyad and the party who initiated the sexual interaction.<sup>60</sup> The study revealed that participants viewed female perpetrators as less manipulative than male perpetrators, particularly when the teacher initiated the sex.<sup>61</sup> In addition, the participants indicated that male victims were more likely to receive social benefits from the sexual conduct.<sup>62</sup> To explain these results, the researchers cited “the belief

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49. Jerry Thornton, *The 2019 Sex Scandal Teacher Starting Lineup*, BARSTOOL SPORTS (Jan. 3, 2020, 11:36 AM), <https://www.barstoolsports.com/blog/1622149/the-2019-sex-scandal-teacher-starting-lineup> [<https://perma.cc/JT7X-PGKP>].

50. *Id.*

51. *Id.*

52. Geddes et al., *supra* note 36, at 613.

53. *Id.* at 611.

54. *Id.*

55. *Id.*

56. *Id.* at 613.

57. *Id.* at 609.

58. Howell et al., *supra* note 40, at 183.

59. *Id.* at 187–88.

60. *Id.* at 188.

61. *Id.* at 189.

62. *Id.* at 195 (“[P]articipants used words such as *lucky*, *cool*, and *confident* to describe male students . . .”).

that men are involved in relationships for physical reasons, whereas women are involved in relationships for emotional reasons.”<sup>63</sup> This cultural assumption may harm men in two ways: as perpetrators, male teachers are viewed as sexually motivated predators who exploit emotionally vulnerable female students, thus justifying greater punishment;<sup>64</sup> and as victims, male students manage to satisfy their sexual needs with a female teacher seeking an emotional bond, thus mitigating the severity of the crime.<sup>65</sup>

These various examples show a gendered disparity in the way we treat teacher–student sexual assault. As family members, media channels, and even perpetrators endorse inappropriate cultural attitudes—and as psychological research indicates the existence of implicit biases—the law must send a clear message that denounces teacher–student sexual assault, irrespective of gender.

## II. EXAMINING THE EXISTING LEGAL FRAMEWORK

### A. Surveying the Statutory Language

Until recently, many laws and agencies did not recognize the possibility of male rape victims. For example, the FBI used to define forcible rape as “the carnal knowledge of a *female* forcibly and against her will.”<sup>66</sup> Only in 2012 did it revise the definition to a gender-neutral variant.<sup>67</sup> Such gender neutrality reflects our growing understanding of male victimization and advances the underlying goals of rape law—to protect sexual autonomy and prevent nonconsensual penetrative acts.<sup>68</sup>

In furtherance of these objectives, most state legislatures have updated their statutes to implement gender neutrality. In fact, only Georgia retains the gender-limited definition of rape.<sup>69</sup>

Others have modified the statutory language to include “he or she”<sup>70</sup> or “male or female.”<sup>71</sup> Additionally, many states have replaced “rape” with broader terms that lack a gendered connotation, such as “sexual assault,”<sup>72</sup> “sexual abuse,”<sup>73</sup> “criminal sexual penetration,”<sup>74</sup> and “criminal sexual conduct.”<sup>75</sup>

Despite this, some statutes revert to gendered language in subsequent provisions. For example, the Utah code for sex offenses against a child says, “the defendant admits the offense of which *he* has been committed.”<sup>76</sup> Remnants of

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63. *Id.*

64. *Id.*

65. *Id.*

66. Stemple & Meyer, *supra* note 21, at 21 (emphasis added).

67. *Id.*

68. Philip N.S. Rumney, *Response Piece: In Defence of Gender Neutrality Within Rape*, 6 SEATTLE J. SOC. JUST. 481, 483–85 (2007).

69. GA. CODE ANN. § 16-6-1(a) (2022).

70. ARK. CODE ANN. § 5-14-103(a) (2022).

71. LA. STAT. ANN. § 14:41(A) (2022).

72. NEB. REV. STAT. § 28-319 (2022).

73. IOWA CODE § 709.1 (2022).

74. N.M. STAT. ANN. § 30-9-11 (2022).

75. MICH. COMP. LAWS § 750.520b (2022).

76. UTAH CODE ANN. § 76-5-406.5(1)(h) (2022) (emphasis added).

gendered language also appear in the sexual-assault codes of Virginia,<sup>77</sup> Wyoming,<sup>78</sup> and South Carolina.<sup>79</sup> These statutes immediately return to neutral language, suggesting that the gendered pronouns are forgotten relics of a since-revised code. Regardless, their presence serves as a reminder of the gendered presumption historically attached to sexual criminality.

***B. Evaluating Laws that Specifically Address Teacher–Student Sexual Assault***

Some state legislatures have directly confronted the issue of educator sexual misconduct in their statutory schemes. They either do this through: (1) a provision that supplements the general sexual-assault statute; (2) a broad statute that proscribes sexual misconduct by actors in positions of authority; or (3) a precise law for sex crimes in schools. A brief exploration of each reveals that they vary in form but not function. Because state legislatures continue to punish teacher–student sexual assault in the framework of existing felony degrees, judges retain discretion and the gendered sentencing gap persists.

For example, Arkansas has a law that resembles the first option, addressing educator misconduct in a general sexual-assault statute.<sup>80</sup> The language begins broadly, prohibiting any sexual intercourse with a minor.<sup>81</sup> The scope then narrows, proscribing sexual misconduct by “[a]n employee in the victim’s school or school district.”<sup>82</sup> Finally, the statute becomes quite specific and prohibits sexual activity between “a teacher, principal, athletic coach, or counselor” and “[a] student enrolled in the public or private school employing the actor.”<sup>83</sup> These sections all constitute first-degree sexual assault,<sup>84</sup> a Class A felony that is punishable by 6–30 years in prison.<sup>85</sup> Thus, despite the clear legislative denouncement of teacher–student sexual assault, judges still have immense discretion in sentencing these offenders.

By contrast, Colorado has a law that resembles the second option, relying on inclusive language about actors in a position of trust.<sup>86</sup> The statute does not mention sexual misconduct in a school setting, and the legislative definition of “position of trust” only briefly mentions an actor’s responsibility for the education of a child.<sup>87</sup> However, jurisdictional case law establishes that a teacher occupies a

77. VA. CODE ANN. § 18.2-67.4(A) (2022) (“An accused is guilty of sexual battery if *he* sexually abuses . . . the complaining witness against the will of the complaining witness . . .”) (emphasis added).

78. WYO. STAT. ANN. § 6-2-303(b)(i) (2022) (“A person is guilty of sexual assault in the second degree if *he* subjects another person to sexual contact or sexual intrusion . . .”) (emphasis added).

79. S.C. CODE ANN. § 16-3-655(B)(2) (2022) (“If the person has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for first degree criminal sexual conduct with a minor . . . *he* must be punished by death or by imprisonment for life.”) (emphasis added).

80. ARK. CODE ANN. § 5-14-124 (2022).

81. *Id.* § 5-14-124(a)(1).

82. *Id.* § 5-14-124(a)(1)(D).

83. *Id.* § 5-14-124(2), (2)(A)(ii).

84. *Id.* § 5-14-124(d).

85. *Id.* § 5-4-401(a)(2).

86. COLO. REV. STAT. § 18-3-405.3 (2022).

87. *Id.* § 18-3-401(3.5).

position of trust over a student.<sup>88</sup> Like the supplemental provisions discussed above, the Colorado statute still provides broad sentencing discretion to the judge. Depending on the age of the victim, the defendant may face 2–12 years in prison.<sup>89</sup>

Finally, Alabama has a law that resembles the third option: an independent statute codifies the crime of a school employee engaging in a sex act with a student.<sup>90</sup> This statute is gender neutral in construction, and it also specifies that consent is not a defense to the crime.<sup>91</sup> Despite these strengths, the offense is punished under the usual sentencing rubric as a Class B felony.<sup>92</sup> Like other states, Alabama’s felony classifications give judges considerable discretion in punishment, and a defendant who violates this statute faces 2–20 years in prison.<sup>93</sup> Thus, even existing statutes that address teacher–student sexual assault permit the perpetuation of a gendered sentencing disparity.

Of the three statutory formats—supplemental provisions, inclusive language, and specific educator laws—the third option is the least common. Only six states have such versions.<sup>94</sup> This is interesting, because many more states have statutes that specifically prohibit sexual misconduct by custodians and psychotherapists.<sup>95</sup> Legislators should signal their disapproval of educator sexual misconduct with the same level of clarity. Students in schools are just as vulnerable—if not more so—than victims in detention and therapy settings.<sup>96</sup>

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88. Pellman v. People, 252 P.3d 1122, 1126 (Colo. 2011) (finding that a defendant charged under § 18-3-405.3 had an ongoing supervisory role when he “taught Sunday school at the church and [the victim] was a student of his”).

89. COLO. REV. STAT. § 18-1.3-401(1)(a)(V)(A.1).

90. ALA. CODE § 13A-6-81(a) (2022).

91. *Id.*

92. *Id.* § 13A-6-81(b) (2022).

93. *Id.* § 13A-5-6(a)(2) (2022).

94. *Id.* § 13A-6-81 (2022); MO. REV. STAT. § 566.086 (2022); NEB. REV. STAT. § 28-316.01 (2022); NEV. REV. STAT. § 201.540 (2022); TEX. PENAL CODE ANN. § 21.12 (2022); WIS. STAT. ANN. § 948.095 (2022).

95. *See, e.g.*, ALASKA STAT. § 11.41.425 (2022); ARIZ. REV. STAT. ANN. §§ 13-1418 to -1419 (2022); IDAHO CODE § 18-6110 (2022); 720 ILL. COMP. STAT. ANN. 5/11-9.2 (2022); LA. STAT. ANN. § 41.1 (2022); MD. CODE ANN., CRIM. LAW. § 3-314 (2022); MISS. CODE ANN. § 97-3-104 (2022); N.D. CENT. CODE § 12.1-20-06.1 (2022); OR. REV. STAT. § 163.452 (2022); S.D. CODIFIED LAWS §§ 22-22-7.6, 22-22-29 (2022); UTAH CODE ANN. § 76-5-412 (2022); VT. STAT. ANN. tit. 13, § 3257 (2022); VA. CODE ANN. § 18.2-64.2 (2022).

96. The law governing sexual relationships in these two settings leads to a relevant point. In some states, the age of majority is sixteen or seventeen years old. This creates a real possibility that a teacher has sex with a student who is no longer a minor. Consistent with most statutory schemes, this Note argues that such sexual relationships are still criminal because of the power imbalance between the parties. Such reasoning is also supported by statutes that prohibit sexual relationships in therapy and detention settings, where age is rarely a factor. In teacher–student sexual assault, age is quite relevant, and I propose that a judge considers this in the sentencing scheme. That is, if a teacher has sex with a student who has reached the age of majority, this should warrant a less severe punishment near the lower end of the mandatory minimum. *See infra* Section III.A.

Sentencing discretion not only results from felony-degree schemes but also from suspended or substituted punishments.<sup>97</sup> These may include probation, house arrest, or the imposition of fines.<sup>98</sup> Some evidence also suggests that the charges brought by a prosecutor influence the judge’s ultimate disposition.<sup>99</sup> Because prosecutors and judges are members of our culture, and because our culture has a gendered perception regarding teacher–student sexual assault,<sup>100</sup> existing sentencing discretion legitimizes mere cultural biases into disparate legal effects.

Side-by-side comparisons support the idea that gendered preconceptions influence judges in teacher–student sex cases. In one case, a 43-year-old female teacher had a sexual relationship with a 13-year-old male student, which qualified as statutory rape under the existing statute.<sup>101</sup> The judge declined to impose the statutorily recommended 5–10 years in prison and instead sentenced the teacher to 5 years on probation.<sup>102</sup> As justification, the judge said, “I really don’t see the harm that was done here . . . and certainly society doesn’t need to be worried.”<sup>103</sup> He further opined that the student was satisfying his sexual needs, failing to identify any psychological damage to the male victim.<sup>104</sup>

By contrast, a 36-year-old male teacher had a sexual relationship with a 13-year-old female student in the same state.<sup>105</sup> This teacher was sentenced to 8.5 years in prison, lifetime parole, sex offender registration, revocation of his teaching license, and a prohibition on working in public sectors.<sup>106</sup> In explaining this case, the judge said, “You realize what you have done to this child? You made her a woman well before her time in a very inappropriate way.”<sup>107</sup> The disparate outcomes in these two cases—cases which are otherwise similar both factually and legally—suggest that punishment of teacher–student sex offenders tracks along gendered lines.<sup>108</sup>

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97. U.S. SENTENCING COMM’N, FEDERAL SENTENCING: THE BASICS 8–10 (2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201811\\_fed-sentencing-basics.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201811_fed-sentencing-basics.pdf) [<https://perma.cc/XKT7-QRE3>].

98. *Id.*

99. See Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1475 (1993) (noting that prosecutors choose which charges to bring, thus limiting the sentencing options before the judge even sees the case).

100. See *supra* Section I.C.

101. Howell et al., *supra* note 40, at 180.

102. *Id.*

103. *Id.* at 181.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. See also Stephen Hunt, *No Jail for Teacher Who Had Sex with Student*, SALT LAKE TRIB. (Sept. 19, 2006, 12:33 AM), [https://archive.sltrib.com/story.php?ref=ci\\_4360182](https://archive.sltrib.com/story.php?ref=ci_4360182) [<https://perma.cc/DZ39-HJA4>] (describing a judge who said, “If this were a 29-year-old male and a 17-year-old female, I would be inclined to order some incarceration,” ultimately sentencing the female teacher to a fine, counseling, and probation); cf. Zachary Edmonds Oswald, “*Off with His \_\_\_\_\_*”: *Analyzing the Sex Disparity in Chemical Castration Sentences*,

### III. PROPOSING A STATUTORY SOLUTION

State legislatures should enact a mandatory baseline law for teachers who commit sex crimes against students. As an initial framework, I propose a one-year-minimum prison sentence, mandatory counseling, and a public apology by the teacher. The following Sections explain how such a law would function as well as its predicted impact on the current sentencing disparity.

#### *A. Addressing Misconduct in the Past: One-Year Prison Sentence*

The first part of the law would entail a mandatory year in prison. This sentence should act as a floor, not a ceiling. Judges may increase the sentence based on aggravating factors, such as the use of violence, the duration of the sexual misconduct, the age of the victim, and other relevant criteria. However, the judge will not be able to reduce the sentence in either length (e.g., suspension) or form (e.g., probation).

In a simplified sense, this part of the law operates as a “mandatory minimum.” I hesitate to use that term because of the negative connotation associated with three-strike drug laws,<sup>109</sup> but a mandatory minimum would address the gendered sentencing disparity in educator sex crimes by ensuring a certain level of consistency in punishment. This Note doesn’t attempt to capture the full scope of the policy arguments for and against mandatory minimums. However, highlighting the difference between three-strike drug laws and teacher–student sex crimes allows us to reconceptualize the efficacy of mandatory minimums in our statutory codes.

Ideally, a mandatory minimum should operate as a baseline law that imposes an appropriate punishment for a deterrable offense.<sup>110</sup> In so doing, it

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19 MICH. J. GENDER & L. 471, 485–91 (2013) (arguing that judicial discretion and implicit sexual biases have resulted in more vigorous punishment of male sex offenders, particularly in regards to chemical castration).

109. See *Sentencing and Mandatory Minimums*, LEADERSHIP CONF. ON CIV. & HUM. RIGHTS (Mar. 28, 2018), <https://civilrights.org/resource/sentencing-and-mandatory-minimums/> [<https://perma.cc/8VDD-HUTA>] (“[Mandatory minimums] disproportionately impact people of color, have caused our prison populations to soar, and have led to overcrowding and exorbitant costs to taxpayers.”); James Cullen, *Sentencing Laws and How They Contribute to Mass Incarceration*, BRENNAN CTR. FOR JUST. (Oct. 5, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/sentencing-laws-and-how-they-contribute-mass-incarceration> [<https://perma.cc/X5FJ-JQ22>] (“[Three-strike drug laws] are inhumane and nonsensical . . . [I]t’s unclear whether these laws even have the desired effect.”); Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 129 (2018) (“[Mandatory minimums] have led to the large-scale problem of life- and long-term imprisonment imposed on federal offenders, with drug offenders getting particularly harsh sentences. Scores of federal judges have spoken out about the injustices produced by these policies, and criminological research makes clear that there are diminishing returns for public safety of these policies.”).

110. See Jalila Jefferson-Bullock, *How Much Punishment Is Enough?: Embracing Uncertainty in Modern Sentencing Reform*, 24 J.L. & POL’Y 345, 350–51 (2016) (arguing that the proliferation of lengthy sentences has resulted in “an overly punitive sentencing scheme,” and proposing shorter sentences with flexibility for uncertainty).

advances both retributive and utilitarian goals.<sup>111</sup> However, not all mandatory minimums fit this ideal. To predict the impact of a proposed law, we must consider the crime, the punishment, and the prospective offenders. An evaluation of all three reveals considerable differences between three-strike drug laws and the proposed educator statute.

First, a mandatory minimum assumes that certain conduct necessarily constitutes a crime. Some opponents of three-strike mandatory minimums argue that drug possession should not be considered criminal.<sup>112</sup> Others argue that individuals may be convicted of drug charges without knowledge of or involvement in the crime.<sup>113</sup> These examples call into question whether a mandatory-minimum drug law actually addresses criminal conduct. By contrast, our society generally agrees that teachers should not have sex with minor students.<sup>114</sup> It is also difficult to imagine a circumstance where a teacher unknowingly begins to engage in sexual misconduct with a student. These differences regarding the nature of the crime suggest that the proposed educator law would operate differently than a three-strike drug law.

Second, a mandatory minimum should establish an appropriate punishment. This punishment should be unobjectionable because the mandatory minimum is maximally inclusive. That is, every set of facts that constitutes this crime should warrant *at least* this level of punishment. In the drug context, opponents argue that multi-year sentences are excessive for low-level possession

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111. *See id.* at 351 (“The goals of federal punishment . . . rely on both utilitarian and retributivist principles that profess to punish offenders for both a larger societal benefit and to properly penalize moral blameworthiness.”); *see also* Darley et al., *infra* note 120.

112. Jag Davies, *Four Reasons Why the U.S. Needs to Decriminalize Drugs – And Why We’re Closer Than You Think*, DRUG POL’Y ALL. (July 9, 2017), <https://drugpolicy.org/blog/4-reasons-why-us-needs-decriminalize-drugs-and-why-were-closer-you-think> [https://perma.cc/S733-RSNL] (arguing that decriminalization would combat mass incarceration, institutionalized racism, and economic inequality); Ethan Nadelmann, *The U.S. Needs to Decriminalize Drug Possession Now*, ROLLING STONE (Nov. 26, 2018, 1:30 PM), <https://www.rollingstone.com/politics/politics-features/united-states-decriminalize-drug-possession-nadelmann-760001/> [https://perma.cc/6W5U-VAG9] (citing decriminalization movements in other countries and proposing a similar move in the U.S. for purposes of improving public health and reducing the cost of mass incarceration); Amy Braunschweiger & Tess Borden, *Interview: Why the U.S. Should Decriminalize Drug Use*, HUM. RIGHTS WATCH (Oct. 12, 2016, 12:01 AM), <https://www.hrw.org/news/2016/10/12/interview-why-us-should-decriminalize-drug-use#> [https://perma.cc/9WYP-PQ2N] (noting that aggressive drug laws have failed to reduce rates of drug use while continuing to impose social stigma and legal consequences).

113. *Mandatory Sentencing Was Once America’s Law-and-Order Panacea. Here’s Why It’s Not Working.*, FAMILIES AGAINST MANDATORY MINIMUMS, <https://www.prisonpolicy.org/scans/famm/Primer.pdf> [https://perma.cc/63PU-9SHT] (last visited Dec. 4, 2020) (providing numerous examples of people who unknowingly became involved in drug conspiracies or who were wrongfully convicted based on testimony from informants).

114. Research for this Note has not unearthed any arguments that such sexual relationships should be legalized.

offenses.<sup>115</sup> These critics also point to the economic irrationality of spending \$500,000 on a prisoner for three \$500 crimes.<sup>116</sup> At the very least, these examples reveal considerable objection to a punishment that by its nature should be unobjectionable. By contrast, the proposed educator law would impose a one-year baseline sentence. Based on existing statutory schemes,<sup>117</sup> prison is on the table whenever teachers sexually exploit students. Incarceration may be generally controversial, but a single year in prison is relatively unobjectionable because it punishes the teacher for misconduct while maintaining a reasonable cost of imprisonment.<sup>118</sup> Although many people reasonably believe that such teachers deserve more than one year in prison, exceptional cases warranting no more than a one-year sentence will occur.<sup>119</sup> Thus, a one-year mandatory minimum will act as a

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115. *Human Rights Violations in the United States: Cruel and Usual – Disproportionate Sentences for New York Drug Offenders*, HUM. RIGHTS WATCH (Mar. 1997), <https://www.hrw.org/reports/1997/usny/> [<https://perma.cc/BE5E-9EAL>] (“Severe sanctions such as years in prison should be reserved for serious criminals, not minor nonviolent drug law offenders.”).

116. Cullen, *supra* note 109.

117. The following statutes come from states that explicitly criminalize educator sexual misconduct. For states that impose mandatory imprisonment, see ALA. CODE § 13A-6-81 (2022) (identifying this crime as a Class B felony, punishable by 2–20 years in prison); NEV. REV. STAT. § 201.540 (2022) (identifying this crime as a Category C felony, punishable by 1–5 years in prison); TEX. PENAL CODE ANN. § 21.12 (2022) (identifying this crime as a second-degree felony, punishable by 2–20 years in prison). For states that permit the imposition of fines, see MO. REV. STAT. § 566.086 (2022) (identifying this crime as a Class E felony, punishable by 1–4 years in prison or a fine up to \$10,000); NEB. REV. STAT. § 28-316.01 (2022) (identifying different felony levels based on the nature of the crime, all of which include potential incarceration but two of which allow fines); WIS. STAT. ANN. § 948.095 (2022) (identifying this crime as a Class H felony, punishable by 1–6 years in prison or a fine up to \$10,000).

118. Cost of incarceration has a dual meaning here. The government bears an obvious cost in terms of spending money on prisoners, but the teacher bears a cost in lost time. *See, e.g.*, Terry-Ann Craigie et al., *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, BRENNAN CTR. FOR JUST. (Sept. 15, 2020), <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal> [<https://perma.cc/F6N9-ASAF>] (estimating that incarceration causes a 50% decrease in lifetime earning potential, as the result of missed employment opportunities, insufficient reentry services, and the perpetuation of social stigma); Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> [<https://perma.cc/8PKM-BECA>] (noting that 27% of formerly incarcerated people are currently unemployed, exceeding the national unemployment rate during any historical period, including the Great Depression); PEW CHARITABLE TRS., COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 18–21 (2010), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2010/collateralcosts1pdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf) [<https://perma.cc/7NLQ-YCFF>] (focusing on the intergenerational impacts of incarceration, including financial hardship, fractured homes, and impaired educational outcomes).

119. In one recent case, a student testified that she manipulated her teacher into a sexual relationship by using his cancer diagnosis as leverage. “I convinced him he was going to die,” she said. “It was more manipulation than anything. On my part. I took advantage of



maximally inclusive floor. These differences regarding the scope of the punishment further outline the distinction between three-strike drug laws and the proposed educator law.

Third, a mandatory minimum should target probable offenders and deter misconduct. In so doing, it not only punishes past behavior but also discourages future crime.<sup>120</sup> Three-strike drug laws arguably fail to accomplish deterrence objectives because offenders often face issues of addiction or dependence.<sup>121</sup> Strict drug laws for repeat offenses do not account for these factors and thus disregard the likelihood of altering future conduct. By contrast, the mandatory minimum in the proposed educator law will likely affect low-level, first-time offenders. Teachers with more serious sexual pathologies will be subject to more severe punishment, either through other statutes<sup>122</sup> or the rubric of aggravating factors.<sup>123</sup> It is difficult to measure the deterrent effect of a law—how do you quantify the causation of a crime that doesn't occur? However, given the differences between prospective offenders, it seems likely that a mandatory minimum would be more effective at deterring educator sexual misconduct than repeat drug possession.

Thus, although mandatory minimums may elicit negative reactions, the unique situational factors surrounding educator sexual misconduct warrant a reconsideration of these baseline laws. In fact, mandatory minimums already exist

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what I knew.” The student claimed that she pursued the teacher after her father kicked her out of the house and she needed a place to live. The teacher faces a maximum sentence of 74 years. Gina Tron, ‘I Convinced Him,’ *Student Claims She Manipulated Her Teacher with Cancer into Sex*, OXYGEN (Feb. 1, 2019, 11:22 AM), <https://www.oxygen.com/crime-time/illinois-student-claims-she-manipulated-high-school-student-scott-brady-into-sex> [https://perma.cc/XKL3-ER9Z].

120. John M. Darley et al., *Incapacitation and Just Deserts as Motives for Punishment*, 24 L. & HUM. BEHAV. 659, 660 (2000) (recognizing plural justifications for punishment, including: (1) the retributive notion that a perpetrator deserves punishment for inflicting past harm; and (2) the utilitarian principle that laws should deter criminals and reduce future harm).

121. Cf. Benjamin J. Lambiotte, *Retribution or Rehabilitation – The Addict Exception and Mandatory Sentencing After Grant v. United States and the District of Columbia Controlled Substances Amendment Act of 1986*, 37 CATH. U. L. REV. 733, 736 (1988) (“Although mandatory minimum sentencing seeks to punish and deter drug traffickers willing to accept the risk of incarceration for the certainty of profits, its harshness may be inappropriate for certain offenders. Recognizing this fact, the District of Columbia sentencing initiative provided an ‘addict exemption,’ which granted judges discretion to waive prison terms for offenders who were addicts at the time of the offense, had no prior distribution convictions, and sold drugs primarily to support their addiction.”).

122. For example, many states have a separate law for sex with any minor under a certain age. See, e.g., N.C. GEN. STAT. § 14-27.24(a) (2022) (first-degree statutory rape for sexual intercourse with a person younger than 13); 18 PA. CONS. STAT. § 3121(c) (2022) (first-degree rape of a child for sexual intercourse with a person younger than 13); VA. CODE ANN. § 18.2-61(A) (2022) (rape punishable by mandatory lifetime imprisonment for sexual intercourse with a child under 13).

123. As mentioned earlier, these aggravating factors may include the use of violence, the duration of the sexual misconduct, the age of the victim, and any other relevant considerations.

for certain sex offenses, including sexual abuse and child pornography.<sup>124</sup> On average, sentences for these offenses are much longer than one year in prison.<sup>125</sup> However, this proposal advances a one-year baseline because it is maximally inclusive and it maintains a low cost of incarceration. Additionally, it is not uncommon for teachers to receive sub-one-year prison sentences in existing statutory schemes.<sup>126</sup> This suggests that the standard for what constitutes “appropriate” punishment starts at a lower threshold than assumed. For these reasons, the first part of the proposed law contains a one-year minimum prison sentence.

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124. U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES FOR SEX OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 8 (Jan. 2019), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190102\\_Sex-Offense-Mand-Min.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190102_Sex-Offense-Mand-Min.pdf) [<https://perma.cc/4HHZ-S62N>].

125. *Id.* at 5 (showing an average sentence of 252 months for offenders convicted of sexual abuse under a mandatory minimum law and an average sentence of 123 months for offenders convicted of child pornography under a mandatory minimum law, depending on the charge).

126. *See* MORRIS, *supra* note 35. Two recent examples are also illustrative.

Alyssa Gustafson worked as a teacher’s assistant at a school for pupils with behavioral challenges. She had sex with a male student in her special-needs class at least five times and sent sexually explicit material to the boy’s phone. Guilty of repeated misconduct, Gustafson struck a plea deal for a single charge of aggravated criminal sexual abuse, punishable by three to seven years in prison. The judge instead sentenced Gustafson to four years of probation. As justification, he said that Gustafson was not a danger to the public, and he referred to the incident as “the modern-day equivalent of the scarlet letter.” Many news articles about Gustafson include pictures that depict her attractiveness, including sexually suggestive photos of her in swimwear or lingerie. In addition, the comments on these articles reveal the cultural minimization of male victims, often referring to the student as a “lucky lad,” a “legend,” and a “hero.” Debbie White, *Teacher, 24, Who Had Sex with Student 14, and Sent Him Lingerie Pics Is Spared Jail*, SUN (Oct. 31, 2020), <https://www.thesun.co.uk/news/13071262/teacher-sex-student-14-lingerie-pics-spared-jail/> [<https://perma.cc/VEJ3-YMJ3>]; 720 ILL. COMP. STAT. ANN. 5/11-1.60(g) (2022) (specifying that aggravated criminal sexual abuse is a Class 2 felony); 730 ILL. COMP. STAT. ANN. 5/5-4.5-35(a) (2022) (stating that a Class 2 felony conviction should result in a 3–7 year prison sentence).

Lyndsey Sherrod Bates worked as a special education teacher in Alabama, one of the few states with a specific law that prohibits teacher–student sexual assault. Bates had sex with one male student and sent nude photos to another. She was charged under the educator law for distributing obscene materials to and having sex with the male students. These charges resulted in a potential 20-year sentence, but Bates struck a plea deal for 3 years on probation. This example does not include the same cultural attitudes about the perpetrator’s attractiveness or the victims’ luck. However, it does reveal the limited utility of existing statutes for teacher–student sexual assault. Even in a state that categorically prohibits these sex crimes through a separate statutory scheme, prosecutorial and judicial discretion permit the minimization of male victims. Steve Helling, *Ala. Special Ed Teacher Who Had Sex with Student Avoids Jail*, PEOPLE (Jan. 9, 2020, 2:15 PM), <https://people.com/crime/ala-special-ed-teacher-who-had-sex-with-student-avoids-jail/> [<https://perma.cc/MFM3-KPR6>]; ALA. CODE §§ 13A-6-80 to -82.1 (2022) (prohibiting educator sexual misconduct through an independent part of Alabama’s criminal code, Article 4A Sexual Offenses by School Employees Involving a Student).

*B. Achieving Rehabilitation in the Present: Mandatory Counseling*

The second part of the law would require mandatory counseling for perpetrators. State legislatures would have discretion in the logistics, but they must first recognize the value of this treatment. As such, this Section will begin by arguing that psychological counseling is a worthwhile part of the statutory scheme. It will then contemplate the details of implementation.

Historically, discussions of sexual-assault counseling focused on the victim, not the perpetrator.<sup>127</sup> To an extent, this is still true: an online search for sexual-assault therapy yields ten times as many results for victims as perpetrators.<sup>128</sup> Given the severity of these crimes, this concern for the victim’s rehabilitation is appropriate.

However, the U.S. has recently experienced a cultural shift that recognizes the value of perpetrator counseling.<sup>129</sup> The impetus? Most sex offenders now return to society,<sup>130</sup> and their rehabilitation advances a public-safety interest.<sup>131</sup> In light of this, counseling for perpetrators focuses on accepting responsibility, improving social skills, and restructuring cognitive distortions.<sup>132</sup> It also accounts for individual factors such as disorders, addictions, and previous abuse.<sup>133</sup> This holistic approach to mental health treatment advances the ultimate goal of preventing relapse and achieving rehabilitation.<sup>134</sup>

Research suggests that counseling for perpetrators is effective, particularly as study designs have improved. Statistics vary, but multiple meta-analyses have

127. See, e.g., Vicky Veitch Wolfe, *Sexual Abuse of Children*, in INTERNATIONAL HANDBOOK OF BEHAVIOR MODIFICATION AND THERAPY 707, 721–22 (Alan S. Bellack et al. eds., 2d ed. 1990) (failing to mention treatment for perpetrators while describing a comprehensive therapy program, which includes individual counseling for the child, mother, and father, as well as group counseling for the mother–daughter, the father–daughter, the mother–father, and the rest of the family).

128. Internet Search: “Sexual Assault Therapy for Victims,” GOOGLE, <http://www.google.com> (last visited Feb. 8, 2021) (providing 31,000,000 results for victim counseling); Internet Search: “Sexual Assault Therapy for Perpetrators,” GOOGLE, <http://www.google.com> (last visited Feb. 8, 2021) (providing 3,020,000 results for perpetrator counseling).

129. See Eliana Dockterman, *Can Bad Men Change? What It’s Like Inside Sex Offender Therapy*, TIME (May 14, 2018, 4:14 PM), <https://time.com/5272337/sex-offenders-therapy-treatment/> [<https://perma.cc/7L5S-BY7J>] (“In 2006, the Department of Justice endorsed more progressive methods [of treatment] such as the Good Lives Model, which aims to teach people how to fulfill their emotional and physical needs without hurting others.”).

130. Courtney T. Evans & Courtney Ward, *Counseling Sex Offenders and the Importance of Counselor Self-Care*, 5 COGENT SOC. SCI., no. 1, 2019, at 1, 3. *But see* Vice News, *Washington State’s Sex Offenders Are Sent to This Island (HBO)*, YOUTUBE (Jan. 8, 2018), [https://www.youtube.com/watch?v=oBUJREw\\_aqE&ab\\_channel=VICENews](https://www.youtube.com/watch?v=oBUJREw_aqE&ab_channel=VICENews) [<https://perma.cc/3BY4-MJLD>] (detailing the civil commitment of violent sex offenders, some of whom remain on the island until they die).

131. See Evans & Ward, *supra* note 130, at 1 (explaining that sex offender counseling advances public interests of reducing recidivism).

132. *Id.* at 4.

133. *Id.*

134. *Id.*

found that perpetrators “who dropped out of treatment had consistently higher sexual recidivism rates than those who completed treatment.”<sup>135</sup> Unfortunately, these studies do not specifically address teacher–student sexual assault,<sup>136</sup> and so a discussion of mandatory counseling cannot entirely rely on existing statistics. Instead, the need for such treatment must also be supported by social, economic, and scientific reasons. In addressing these three categories, this Section will establish the utility of a counseling provision in the proposed law.

First, psychological treatment is warranted because our current social values suggest that these teachers are redeemable. Our society tends to stigmatize sex offenders, casting them as the “lowest of the low.”<sup>137</sup> Examples of pariah treatment appear in community networks,<sup>138</sup> academic circles,<sup>139</sup> and even among criminals.<sup>140</sup> This moral reaction to sexual criminality creates a controversy around counseling—perhaps resources should not be spent on trying to rescue the irretrievable. However, female teachers who sexually assault their students do not receive this same denouncement.<sup>141</sup> Existing public attitudes, which include leniency and sometimes approval, indicate relative optimism about the redeemability of these teachers. This is especially true for perpetrators who interact with the proposed mandatory minimum because they are less likely to suffer from

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135. Jennifer L. Harrison et al., *Sexual Offender Treatment Effectiveness Within Cognitive-Behavioral Programs: A Meta-Analytic Investigation of General, Sexual, and Violent Recidivism*, 27 *PSYCHIATRY, PSYCH. & L.* 1, 5 (2020) (conducting a meta-analysis of multiple studies and finding that mental health treatment consistently reduces recidivism rates by 5–10%); see also Evans & Ward, *supra* note 130, at 3 (citing a different meta-analysis that found a lower recidivism rate for sex offenders who were treated (9.9%) than those who were not (17.3%)).

136. In fact, they often focus on serious offenders who commit violent offenses or have severe sexual pathologies. See, e.g., Evans & Ward, *supra* note 130, at 3 (discussing two studies that examined the commission of violent crime as indicators of recidivism); Harrison et al., *supra* note 135, at 5 (mentioning a study that considered recidivism rates for sexual psychopaths).

137. Michael P. Griffin & Desirée A. West, *The Lowest of the Low? Addressing the Disparity Between Community View, Public Policy, and Treatment Effectiveness for Sex Offenders*, 30 *L. & PSYCH. REV.* 143, 143 (2006).

138. *Id.* at 155–57 (describing a study in which participants expressed greater anger over a child molester in the neighborhood than a murderer; also explaining that sex offenders can lower the value of nearby homes).

139. *Id.* at 152–55 (questioning the objectivity of the academic field by providing examples of sensational titles in professional journals, including “Managing the Monstrous: Sex Offenders and the New Penology,” and “Releasing Sex Offenders into the Community Through ‘Circles of Support’—A Means of Reintegrating the ‘Worst of the Worst’”).

140. *Id.* at 167 (noting that stigmatized views of child molesters are held by other criminals and offering an example of a sex offender who expressed his desire to beat up a “baby banger” after three weeks of therapy); see also MLive, *Steven Sandison Confesses to Murdering Child Molester in Prison*, YOUTUBE (Apr. 22, 2015), [https://www.youtube.com/watch?v=YawI85U7QtA&ab\\_channel=MLive](https://www.youtube.com/watch?v=YawI85U7QtA&ab_channel=MLive) [<https://perma.cc/4APZ-LP9Q>] (showing a convicted murderer confess to killing his pedophilic cellmate and claiming that he got what he deserved; popular comments on the video include “Some people call it murder, others a public service” (4,000 likes) and “They put the child molester in a cell with a murderer for a reason” (14,000 likes)).

141. See *supra* Section I.C.

dangerous sexual pathologies. By helping teachers become better members of society, counseling would correct public misconceptions about the incorrigibility of sex offenders.

Second, the law should include mandatory counseling because it would advance goals of economic efficiency. To illustrate this, it is helpful to compare counseling with a familiar feature of our sexual-assault laws: sex offender registries and their attendant administrative costs.<sup>142</sup> Setting aside issues of constitutionality,<sup>143</sup> the primary question is whether these existing provisions are effective. Unfortunately, the scope of a registration law is limited because police rarely know all of the sex offenders who live in a community.<sup>144</sup> Consequently, “over eighty percent of mental health workers do not believe sex offender notification will decrease the rates of sexual abuse of children.”<sup>145</sup> By comparison, studies suggest that psychological counseling decreases the recidivism rates of sexual misconduct.<sup>146</sup> Thus, by decreasing future litigation costs of recommitted crimes, investment into mental health treatment has the potential to pay for itself. Counseling may also promote individual restoration such that former teachers can reenter the workforce and contribute to economic production.<sup>147</sup>

Third, mandatory counseling would benefit the scientific community through improved research and analysis. This is particularly important because teacher–student sexual assault remains a relatively unexplored field, particularly in the context of female offenders. Some literature does exist, but treatment would contribute to the development of new theories and the expansion of existing typologies.<sup>148</sup> In turn, these findings could have impacts at multiple institutional levels, including student safety in the educational context, hiring decisions in the employment realm, and legal outcomes in our judicial system. Given the current treatment of teacher–student sexual assault, psychological research would offer a dose of objectivity to a dialogue that is rife with emotion.

These social, economic, and scientific arguments are not independent of each other; to a considerable extent, they overlap. As research progresses, our

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142. See Griffin & West, *supra* note 137, at 160, 165–66 (stating that sex offender registration laws may require notifications from the police, advertisements in newspapers, and potentially even bumper stickers). This Note does not argue for or against sex offender registration. It merely draws comparisons between the proposed counseling provision and this accepted part of statutory schemes.

143. *Id.* at 160–65 (surveying the various constitutional arguments against sex offender registration laws).

144. *Id.* at 146, 166 (citing various factors for this lack of police knowledge, including frequent relocation of sex offenders, the likelihood of abuse committed by a family member, and recurring issues of underreporting).

145. *Id.* at 166.

146. See sources cited *supra* note 135.

147. For clarification, this social capital will be produced in nonteaching contexts. This Note does not argue that convicted teachers should be rehired in a classroom. Rather, they will have to find appropriate careers in alternative fields.

148. Christensen & Darling, *supra* note 20, at 28 (introducing preliminary typologies for sexually criminal teachers: (1) minimizing and denying; (2) poor mental health or stressors; (3) young, early career; and (4, unique to females) claims of being overpowered).

understanding of sex offenders will dispel public stereotypes. This shift in social attitudes will facilitate a teacher's reintegration into society, which will increase earning potential and economic contribution. Such prospective outcomes may seem expansive, but that is precisely the point. Through self-reflection and reconciliation, mental health treatment allows former teachers to become better versions of themselves.<sup>149</sup> Accordingly, the proposed statutory law should include mandatory counseling.

Upon deciding to include counseling in the statute, legislatures should have flexibility in the details. If a state prison system has adequate resources, the teacher may complete the counseling while incarcerated. However, as a default rule, this Note proposes that teachers receive their treatment after their time in prison.

Multiple reasons support this recommendation. First, prisons rarely have specific counseling for sex offenders. For example, the website for the Federal Bureau of Prisons only lists nine facilities with such programs.<sup>150</sup> Similarly, a national survey found that fewer than 480 therapists work with the 300,000 sex offenders in state and federal prisons.<sup>151</sup> By contrast, more than 2,300 therapists provide court-ordered treatment to sex offenders after they leave prison.<sup>152</sup> This issue of accessibility suggests that practically, most counseling will have to occur after incarceration. Second, spending time in prison may allow teachers to reflect on their misconduct. This will allow them to recover from the initial shock of conviction and approach therapy with a healthier perspective. However, this is not to suggest that counseling during incarceration would be ineffective. In fact, it could

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149. This rehabilitative function is a valuable counterbalance to existing statutory schemes. While sex offender registries are restrictive (in that they limit an individual's privacy), mental health treatment is restorative (in that it fosters opportunities for growth and transformation). The proposed statute thus recognizes the community's interests in safety as well as the perpetrator's interest in reintegration.

150. *Sex Offenders*, FED. BUREAU OF PRISONS, [https://www.bop.gov/inmates/custody\\_and\\_care/sex\\_offenders.jsp](https://www.bop.gov/inmates/custody_and_care/sex_offenders.jsp) (last visited Feb. 8, 2021).

151. PEGGY HEIL & KIM ENGLISH, CAL. DEP'T OF CORR. & REHAB., PRISON SEX OFFENDER TREATMENT: RECOMMENDATIONS FOR PROGRAM IMPLEMENTATION 4 (2007), [http://casomb.org/docs/PSOT\\_CDCR\\_Report.pdf](http://casomb.org/docs/PSOT_CDCR_Report.pdf) [<https://perma.cc/H63R-4D9G>]. With recent technological advances, the possibility of virtual therapy could be promising. See ECRI INST. EVIDENCE-BASED PRAC. CTR., CER No. 121, INTERVENTIONS FOR ADULT OFFENDERS WITH SERIOUS MENTAL ILLNESS 65 (2013), [https://www.ncbi.nlm.nih.gov/books/NBK158915/pdf/Bookshelf\\_NBK158915.pdf](https://www.ncbi.nlm.nih.gov/books/NBK158915/pdf/Bookshelf_NBK158915.pdf) [<https://perma.cc/57BX-SAHL>] (citing a study that found "videoconferencing appears to be an effective treatment in incarceration settings"). However, it's unclear if this medium is maximally effective. *Id.* (noting a lack of comparative studies between in-person and virtual psychiatric care); cf. Lilah Burke, *Blackboard Behind Bars*, INSIDE HIGHER ED (Dec. 10, 2019), <https://www.insidehighered.com/digital-learning/article/2019/12/10/online-education-comes-prisons> [<https://perma.cc/JB5C-BLA5>] (referring to inmates' access to online schooling: "[Prisoners need] people to connect with, people who are aspirational role models, people who treat them with respect, who see their humanity and dignity. Online programs can't provide that. And if anything, they reinforce the isolation and separation").

152. Dockterman, *supra* note 129.

be particularly useful to begin therapy in prison and continue upon release.<sup>153</sup> These details will likely evolve over time, especially as studies reveal the best practices in such a nascent field.<sup>154</sup> Thus, a default provision of mandatory post-incarceration counseling is the second part of the proposed law.

### *C. Altering Social Norms in the Future: Public Apology*

The third and final part of the law would require a public apology issued by the teacher.<sup>155</sup> Much like the provision for mandatory counseling, legislatures would have flexibility in implementing the details. However, it is crucial to recognize how a public apology advances the goals of the statutory scheme. Consequently, this Section begins by addressing the constitutionality of such a provision. It then highlights the benefits of a formal apology. Lastly, it considers the logistics, particularly at the institutional level of the school.

At first glance, a public apology may appear to constitute compelled speech. A teacher may not want to voluntarily issue an apology, and a statutory mandate to do so could raise questions of First Amendment infringement.<sup>156</sup> However, Ninth Circuit precedent has upheld the constitutionality of forced public apologies as a condition of release.<sup>157</sup> To meet constitutional muster, the public apology must be “designed to affect the rehabilitation of the probationer or insure

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153. Some scholars have highlighted the dangers of a disjointed transition from imprisonment to release. *See, e.g.,* G. Hopkin et al., *Interventions at the Transition from Prison to the Community for Prisoners with Mental Illness: A Systematic Review*, 45 ADMIN. & POL’Y MENTAL HEALTH & MENTAL HEALTH SERVS. RES. 623, 623–24 (2018) (noting that this period can be particularly stressful for prisoners with mental health problems, resulting in higher rates of recidivism and suicidality).

154. Unfortunately, there is not much research on the efficacy of therapy during and after incarceration, and the analyses that exist are relatively inconclusive. *See* ECRI INST. EVIDENCE-BASED PRAC. CTR., *supra* note 151, at 8–9, 66 (comparing the effectiveness of interventions applied across different settings and finding low-strength evidence for therapy treatment, leading to an ultimate conclusion that “we cannot determine if increased [mental health] service use led to improved patient outcomes”).

155. Readers would be correct to note that this part of the statutory scheme includes some degree of moralism. That aspect is intentional, because criminal statutes inherently reflect social judgments about the morality of certain conduct. However, the apology is not designed to embarrass the teacher. It instead serves the purpose of denouncing educator sexual assault straight from the source. This advances the goal of modifying current social norms.

156. *See generally* Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355 (2018).

157. *United States v. Clark*, 918 F.2d 843, 848 (9th Cir. 1990), *overruled on other grounds* by *United States v. Keys*, 95 F.3d 874 (9th Cir. 1998).

the protection of the public.”<sup>158</sup> Since that case, the Ninth Circuit has affirmed that standard,<sup>159</sup> and at least one other court has adopted this test.<sup>160</sup>

Here, the proposed statute satisfies this constitutional standard. As detailed below, the apology will comprise a major part of the teacher’s rehabilitation. After completing psychological counseling, issuing this public statement will allow the perpetrator to convey her perspectives, her regret, and her commitment to keep growing. Additionally, the apology will promote public safety by expressing a clear denunciation of educator sexual assault. This message will have socializing effects on the audience, resulting in decreased approval—and eventually lower incidence—of the crime. For these reasons, the mandated apology reasonably relates to the government’s compelling interests, and the proposed statutory solution is constitutionally permissible.

As mentioned above, many benefits attach to the issuance of a public apology. The act of apologizing, while simple, can have powerful effects on the parties involved.<sup>161</sup> Yet predicting these outcomes requires a balanced consideration of costs and benefits. That is to say, not all transgressions warrant apologies. In particular, some apologies can backfire when they are clearly motivated by self-interest.<sup>162</sup> Others may appear disingenuous if the apologizing party was not involved in the offense.<sup>163</sup> However, given the severity of teacher–student sexual assault, a public apology for all such violations would provide individual, institutional, and interpersonal benefits.

The first aspect of a public apology is the opportunity for individual growth.<sup>164</sup> Although the nature of an apology requires less-than-ideal circumstances,

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158. *Id.*

159. *United States v. Gementera*, 379 F.3d 596, 603–04 (9th Cir. 2004) (affirming a required public apology because it was “reasonably related to the permissible end of rehabilitation,” and noting the value of publicly acknowledging an offense even after a guilty outcome in the courtroom).

160. *State v. K.H.-H.*, 353 P.3d 661, 665–66 (Wash. Ct. App. 2015) (holding in a sexual-assault case that an apology letter did not violate the perpetrator’s First Amendment rights because it served a rehabilitative purpose and decreased the probability of future crime, thus promoting “compelling” public interests).

161. Karina Schumann, *The Psychology of Offering an Apology: Understanding the Barriers to Apologizing and How to Overcome Them*, 27(2) CURRENT DIRECTIONS PSYCH. SCI. 74, 74 (2018) (“Research on conflict management suggests that an apology is one of the most powerful tools that transgressors can use to resolve an offense . . . . [A]pologies help victims feel validated, improve victims’ evaluations of their transgressors, decrease victims’ aggression toward their transgressors, and increase victims’ empathy and willingness to forgive . . . .”).

162. Barbara Kellerman, *When Should a Leader Apologize—and When Not?*, HARV. BUS. REV., Apr. 2006, at 73, 74 (stating that self-interest is an ordinary and acceptable motive for apologizing but cautioning against a statement that is “too transparently tactical”).

163. *Id.* at 74–75 (implying a bit of virtue signaling (“breast beating”) when current CEOs apologize for their company’s former involvement in historic atrocities, such as the Holocaust and slavery).

164. An individual benefit should not be mistaken for a selfish motive. By signaling that a mistake will be viewed as a learning opportunity, the teacher can advance a sincere message while also acknowledging her chance to grow.



there is often potential for a productive outcome.<sup>165</sup> Teachers convicted of sexually assaulting students should use the public apology to express their remorse and seek forgiveness. In many cases, this might be a key step in full rehabilitation. Additionally, a public apology may improve a teacher's prospects of future employment in a different career. By admitting their mistakes and vowing to improve, former teachers improve their chances of regaining trust in society.<sup>166</sup> Thus, a public apology provides both moral and economic benefits at the individual level.

The second component of an apology is the institutional benefit. Although misconduct is often committed by a single actor, it is crucial that leaders restore internal cohesion and external reputation.<sup>167</sup> In the context of educator sexual assault, the teacher occupies a dual role as both employee and leader. Under one lens, her actions reflect individual misjudgment; under another, if we analogize students as constituents, the teacher occupies a representative role in which she acts on behalf of the school.<sup>168</sup> As such, the public apology advances a clear institutional stance against educator sexual misconduct. Additionally, the message communicates both internally and externally. A public apology not only speaks to other members of the school but also conveys broad normative values about the safety of our children's learning environments.

Lastly, a public apology offers the benefit of interpersonal restoration. This process entails repairing the relationship between the transgressor and the aggrieved.<sup>169</sup> Many cases of educator sexual assault already include this

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165. Kellerman, *supra* note 162, at 76. It should be noted that Kellerman frames the individual benefit as two distinct categories. According to her, achieving forgiveness from others is an individual benefit, and the process of personal restoration is a moral one. I have combined these two classifications because both benefit the individual.

166. Emphasis should be placed on the *chance* of this happening. By no means is earning trust a guarantee. This may be especially true because the apology is mandatory, which raises some questions about the perpetrator's sincerity. To mitigate this perception, the proposed statute requires that the teacher issue the apology after counseling, at a time when genuine remorse is likely. There will still be situations in which the apology is a pretense, but even then, the message conveys a clear normative stance on educator sexual misconduct. Ultimately, as in other settings, the public will conclude whether a given apology is believable. Cf. Amber Lee, *14 Least Apologetic People in Sports*, BLEACHER REP. (Jan. 21, 2015), <https://bleacherreport.com/articles/2335932-15-least-apologetic-people-in-sports> [<https://web.archive.org/web/20150122054221/http://m.bleacherreport.com/articles/2335932-15-least-apologetic-people-in-sports>] ("Sincere apologies are precious commodities, but the mere formality of apologizing, regardless of the true motivation behind it, is one essential ingredient in the glue that keeps civilization from descending into chaos.").

167. *Id.*

168. To complete this analogy, a mayor is not the highest political figure in government, but her influence over a constituency undoubtedly places her in a leadership position.

169. Kellerman, *supra* note 162, at 76 (adopting different phraseology but otherwise recognizing an interpersonal dimension to apologizing).

reconciliation, but victim blaming still occurs.<sup>170</sup> A public apology would therefore provide a consistent means of promoting healing for the victim. In addition, parents may struggle to trust teachers after experiencing such a betrayal. The formal apology may facilitate the recovery process for these family members, particularly in future interactions with other instructors.<sup>171</sup> To an extent, these arguments require speculation, and such intangible gains will be difficult to quantify even when an apology requirement is implemented. However, given the potential benefits, the proposed statute should include a public apology by the teacher.

In evaluating the individual, institutional, and interpersonal benefits of a public apology, we must also recognize potential barriers to efficacy. Some scholars have identified recurring issues in apologies, including low concern for the victim, potential threat to self-image, and perceived apology ineffectiveness.<sup>172</sup> These may occur on a case-by-case basis, but most instances of educator sexual misconduct should overcome these obstacles. Here, it should be noted that perpetrators will have received counseling by the time they issue a full apology.

First, teaching as a profession requires extraordinary investment in the welfare of the students. Given initial interest in the profession, it seems unlikely that a perpetrator would entirely disregard the interests of the victim.<sup>173</sup> Second, threats to self-image are mitigated by the counseling that teachers will have received. The apology may remind perpetrators of guilt and shame, but this opportunity for self-reconciliation is a crucial part of rehabilitation. Lastly, teachers should recognize that the apology can be effective in unexpected ways. Although an individual victim or family may reject the teacher's message, it still accomplishes meaningful change at institutional and social levels.

After analyzing these benefits and barriers, legislatures should conclude that a public apology advances the goals of the proposed educator law. In determining the details, lawmakers and school districts will have flexibility. However, this Note recommends certain guidelines regarding substance, timing, and method of distribution. Each will be briefly discussed below.

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170. One recent case in Arizona exemplifies this. When teacher Brittany Zamora was found guilty of having sex with a thirteen-year-old student, her attorney scheduled a press conference. Instead of allowing reporters to ask questions, the attorney read from a script, stating, "Brittany is not a predator, and this was not between a young child and Brittany. This was a teenager . . . who had boundary issues and was obsessed with Brittany. The teenage boy was very aggressive. He even was very persistent in asking Brittany [for personal information]." 12 News, *Brittany Zamora's Attorney Deflects Blame to 13-Year-Old Victim*, YOUTUBE (July 12, 2019), [https://www.youtube.com/watch?v=F23GYhugRQ4&ab\\_channel=12News](https://www.youtube.com/watch?v=F23GYhugRQ4&ab_channel=12News) [<https://perma.cc/XNS9-JAWB>].

171. I make this distinction because it seems unlikely that parents will ever trust the transgressor again.

172. Schumann, *supra* note 161, at 75–76.

173. To be clear, the teacher undoubtedly disregarded the interests of the victim when sexually violating a student. This Note does not seek to minimize the severity of that transgression. However, the proposed statute includes a counseling provision for precisely this reason. Mental health treatment will eventually allow the teacher to recognize the harm that she inflicted on her victim.

In the wake of a teacher–student sex scandal, victims may receive informal apologies from the teacher, principal, or other involved parties. Such expressions can be incomplete or impromptu, rendering them less effective. By contrast, a formal public apology should be thorough and comprehensive. This requires four distinct parts: an acknowledgement of the transgression, an acceptance of responsibility, an expression of regret, and a promise to learn from the mistake.<sup>174</sup> At the same time, teachers should avoid defense and deflection, such as rationalizing their actions or blaming the victim.<sup>175</sup> These substantive guidelines will ensure that perpetrators issue high-quality apologies.

As for the timing of the apology, research suggests that serious delay can undermine the impact of the message.<sup>176</sup> However, educator sexual assault presents a unique challenge because the nature of the crime involves covert activity. This can result in the gradual emergence of information, making it difficult to issue a quick yet comprehensive apology. Additionally, an early apology may essentially concede guilt, thereby interfering with the right to a fair trial.<sup>177</sup> Lastly, if the teacher issues an apology before completing therapy, there may be questions about the likelihood of rehabilitation and remorse. For these reasons, the public apology should occur after incarceration and counseling.<sup>178</sup> In this sense, the public apology signifies a period of transition for all involved parties—the student acquires some sense of closure, while the teacher begins anew.

Of all the logistics, legislatures should exercise the most discretion with method of distribution. Options include press releases, statements in court, or written apologies on behalf of the school. This Note recommends the final option, perhaps through a letter published in a school bulletin.<sup>179</sup> Such a statement would reach a broad audience, including students, faculty, and parents.<sup>180</sup> It would also convey organizational responsibility on the part of the school.<sup>181</sup> This written apology may

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174. Kellerman, *supra* note 162, at 76–77.

175. Schumann, *supra* note 161, at 75.

176. Kellerman, *supra* note 162, at 77 (providing an example of significant financial consequences and widespread public dissatisfaction after Exxon took a long time to apologize, concluding that “promptness and appropriate timing are important components of a good apology”).

177. See U.S. CONST. amend. VI.

178. Nothing in the proposed law precludes a teacher from issuing an earlier statement if voluntarily chosen. However, this will depend on case-by-case factors such as the teacher’s individualized level of regret. For maximum efficacy, the mandated public apology should occur after the teacher has completed detention and therapy.

179. As a matter of best practice, the public apology should not be the first time that the school acknowledges the sexual-assault controversy. At an early stage of the proceedings, the principal should express her commitment to investigate the allegations. All efforts should be made to convey the seriousness of the situation.

180. See Maurice E. Schweitzer et al., *The Organizational Apology: A Step-by-Step Guide*, HARV. BUS. REV., Sept. 2015, at 44, 51 (“Organizations often default to written statements that reach a broad audience, especially when they’re published in newspapers.”).

181. *Id.* at 50 (“The best apologies show *candor*. They leave no room for equivocation or misinterpretation, and they make absolutely clear that the organization acknowledges both the harm that was caused and its own responsibility.”) (emphasis in original).

be paired with a live statement, especially because the serious nature of teacher–student sexual assault elicits emotional reactions.<sup>182</sup> However, the live apology should supplement—not replace—the written message. This is because live speeches can seem rehearsed, press conferences can resemble publicity stunts, and court statements can appear forced.<sup>183</sup> With these considerations in mind, the proposed law should require a written public apology by the teacher.

### CONCLUSION

A dialogue about sexual assault sparks considerable intrigue, especially when it implicates the welfare of our children. One might expect universal outrage at the commission of such a crime, but in the context of educator sexual misconduct, our reaction depends on gender. This Note has accordingly proposed a statutory solution for the disparate treatment of sexually criminal teachers.<sup>184</sup> It has not discussed this issue in other legal contexts, such as Title IX regulations<sup>185</sup> or constitutional guarantees.<sup>186</sup> Rather, it has advanced commonsense proposals that seek to modify our cultural perceptions and reduce teacher–student sexual assault. Perhaps this approach is idealistic and ineffective. Or perhaps we solve these classroom problems by reminding ourselves of the lessons we learned there: expect a timeout when you hurt someone, be willing to ask for help, and a simple sorry goes a long way.

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182. *See id.* at 51 (arguing that a live statement increases the impact of the apology).

183. *See id.* (recognizing that in-person apologies present unique risks because they occur in uncontrolled environments).

184. Specifically, the mandatory-minimum sentence is designed to achieve more equitable outcomes for perpetrators, irrespective of gender. The counseling provision, which helps individuals with rehabilitation, also seeks to improve scholarly understanding of female-perpetrated sex crimes. Lastly, the public apology offers restorative benefits to both the victim and perpetrator, while conveying societal disapproval toward the commission of previously romanticized crimes.

185. *See* GRANT ET AL., *supra* note 19, at 39.

186. *See* Knoll, *supra* note 24, at 381–82 (“In cases of teacher sexual misconduct, the abuse may be argued as amounting to a deprivation of the student’s constitutional right to bodily security.”).