

2019

Unreported Sexual Assault

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Recommended Citation

Saul Levmore and Martha C. Nussbaum, *Unreported Sexual Assault*, 97 Neb. L. Rev. 607 (2018)

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The 2018 Roscoe Pound Lecture[†]

Saul Levmore & Martha C. Nussbaum*

Unreported Sexual Assault

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I. INTRODUCTION

Unreported criminal behavior is troubling for a variety of reasons, including the likelihood that it reduces the law’s ability to deter wrongdoing. This is especially unfortunate in the case of sexual assault and other wrongs where the wrongdoers are often repeat offenders who will harm others until apprehended.¹ In many cases, these

[†] Roscoe Pound, a native of Lincoln, Nebraska, is widely considered to be one of the early giants of American legal thought. He began his legal career practicing law in his hometown, later joining the faculty at the University of Nebraska College of Law. In 1903, Pound became dean, a role he would fill until 1910. While the dean at Nebraska Law, Pound delivered his famous address to the American Bar Association, “Causes of Popular Dissatisfaction with the Administration of Justice,” a speech that prompted a widespread reexamination of the nature of our legal system. Pound left Nebraska Law in 1910 to teach at Harvard Law, where he became dean in 1916. Scholars claim that Pound is one of the greatest legal minds of his time and still refer to his writings today. In 1949, the Nebraska State Bar Association funded a lectureship in Pound’s honor. “New Paths of Law,” the first Pound Lecture, was delivered in 1950 by Roscoe Pound himself.

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* Thanks to our colleague, Jonathan Masur, for helpful comments and also to faculty members and students at the University of Nebraska College of Law for their gracious hospitality alongside their suggestions and insightful objections to the ideas discussed here and first presented as a Pound Lecture in March 2018.

1. Of course the most familiar cases are those where there was reporting that went unheeded. The best known of these are that of physician Larry Nassar and former Penn State football coach Jerry Sandusky. Accounts which became public

assaults take place over many years so it is especially easy to see why early reporting could prevent many subsequent harms.² One approach to the problem of wrongdoers who are difficult to apprehend, and thus

long after the facts suggest that Nassar molested at least 256 young women while practicing sports medicine for Michigan State University and the USA Gymnastics national team. Neither victims nor parents (who were often in the room where Nassar treated the women) reported the abuse to law enforcement, and we now know it is likely that both the University and USA Gymnastics officials engaged in a cover-up. See Marisa Kwiatkowski et al., *A Blind Eye to Sex Abuse: How USA Gymnastics Failed to Report Cases*, INDYSTAR (Aug. 4, 2016), <https://www.indystar.com/story/news/investigations/2016/08/04/usa-gymnastics-sex-abuse-protected-coaches/85829732/> [<https://perma.unl.edu/XG7Q-SWBR>] (last updated Jan. 31, 2018); Stephanie Saul, *Calls Grow for Michigan State University President to Resign Over Nassar Case*, N.Y. TIMES (Jan. 19, 2018), <https://www.nytimes.com/2018/01/19/us/michigan-state-nassar.html>. Reports indicate that he could have been stopped at many points. Moreover, at least one investigation shows that the university as a whole engaged in suppression of information about sexual violence in several of its sports programs. See Paula Lavigne & Nicole Noren, *OTL: Michigan State Secrets Extend Far Beyond Larry Nassar Case*, ESPN (Feb. 1, 2018), http://www.espn.com/espn/story/_/id/22214566/pattern-denial-inaction-information-suppression-michigan-state-goes-larry-nassar-case-espn [<https://perma.unl.edu/E8X6-X79P>]. Similarly, Jerry Sandusky was found guilty of multiple counts of child sexual assault in 2012, with known instances of abuse occurring between 1998 and 2001. See FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY 13, 19–25 (2012). University officials failed to investigate claims of abuse raised throughout this period, and they concealed Sandusky's offenses from authorities and the public. *Id.* at 14. One of us has her own "MeToo" tale: in 2016, Martha Nussbaum revealed events that happened to her in 1968. Martha C. Nussbaum, *Why Some Men Are Above the Law*, HUFFINGTON POST (Jan. 15, 2016), https://www.huffingtonpost.com/martha-c-nussbaum/why-some-men-are-above-the-law_b_8992754.html [<https://perma.unl.edu/X24V-M5J4>] (last updated Jan. 15, 2017). Meanwhile, the perpetrator went unchallenged and may well have harmed others. Nussbaum discusses the development of law toward greater accountability in her essay *Accountability in an Era of Celebrity*, in IDEAS THAT MATTER: DEMOCRACY, JUSTICE, RIGHTS (Debra Satz & Annabelle Lever eds., Oxford Univ. Press) (forthcoming 2019).

2. Recent claims against an Alabama politician and judge, Roy Moore, suggest repeated sexual assaults over two decades, some twenty to forty years in the past. See Michal Kranz, *All the Women Who Have Accused Roy Moore of Sexual Misconduct*, BUS. INSIDER (Dec. 4, 2017), <http://www.businessinsider.com/women-accused-roy-moore-sexual-misconduct-list-2017-11> [<https://perma.unl.edu/T3NB-5P9F>]; Stephanie McCrummen et al., *Woman Says Roy Moore Initiated Sexual Encounter When She Was 14, He Was 32*, WASH. POST (Nov. 9, 2017), https://www.washingtonpost.com/investigations/woman-says-roy-moore-initiated-sexual-encounter-when-she-was-14-he-was-32/2017/11/09/1f495878-c293-11e7-afe9-4f60b5a6c4a0_story.html [<https://perma.unl.edu/5GRD-GZMM>]. Neither the victims nor their parents reported the abuse at the time. *Id.* The fact that the accusations were so delayed caused credibility problems when these victims came forward in 2017. See, e.g., Michael D. Shear & Alan Blinder, *Trump Defends Roy Moore, Citing Candidate's Denial of Sexual Misconduct*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/us/politics/roy-moore-trump-alabama.html>.

apparently undeterred by tort and criminal law, is to alter the law's approach, perhaps by focusing less on deterrence and more on education, or on separating populations from which offenders and victims are likely to be drawn.³ Another is to double down on deterrence by raising the penalty for those who are caught and convicted.⁴ The deterrence approach is difficult and often counterproductive where there is some doubt about culpability or where the factfinder and adjudicator have limited power, as in the case of wrongs committed on university campuses and in many workplaces. Our focus here is on sexual misdeeds on college campuses, but much of the analysis is easily applied to plagiarism and to various wrongs committed in the workplace. Some of the ideas offered here can be applied to crimes more generally, but it is useful to begin with wrongs that are judged by something less than a beyond-a-reasonable-doubt standard. In the case of sexual assault on campuses, for instance, consent and other defenses may be contestable, and fact-finding as well as remedies are in the hands of private parties and often subject to a more-likely-than-not standard.⁵ Indeed, the terms that are used distinguish the matter from criminal law; the accused may be "held responsible" rather than "convicted," though the matter can also be investigated in the criminal law system. In the workplace, an employer's suspicion about sexual misbehavior or embezzlement may be judged by a standard that is even lower; reporting is surely valuable to these employers as well as to fellow workers. An employer who thinks someone *may* have embezzled is unlikely to promote that person and is disinclined to bring in the police. In all these settings, the traditional tort system is also inadequate or inappropriate; the evidence may be insufficient to meet its standard, it is slow and expensive, and it often demoralizes other employees or students.

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3. Many universities have taken this approach, choosing to ban contact between the accused and the accuser in cases of sexual misconduct allegations. *See, e.g.*, U. of Chi., *No Contact Directives*, UMATTER (2018), <https://umatter.uchicago.edu/navigate-the-process/no-contact-directives/> [<https://perma.unl.edu/YL4K-MKDM>] (stating that the "University may . . . require a respondent to leave a place where a complainant is present").
 4. Gary S. Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 1–54 (Gary S. Becker & William M. Landes eds., 1974).
 5. *See* HEATHER M. KARJANE ET AL., *CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND* 120 (2002); *see also generally* U.S. DEP'T EDUC. OFFICE FOR CIVIL RIGHTS, *DEAR COLLEAGUE LETTER 11* (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.unl.edu/SS3E-WVHQ>] ("[P]reponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence."), *rescinded* by U.S. DEP'T EDUC. OFFICE FOR CIVIL RIGHTS, *Q&A ON CAMPUS SEXUAL MISCONDUCT* 5 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [<https://perma.unl.edu/2UV8-4738>].

The danger of upsetting the lives of victims and accused persons may of course be offset by the gains that are available only from encouraging victims to report assaults and other injuries, not to mention identifying the wrongdoers who caused them. When the tort system comes into play, it often does so because victims are motivated to bring suit by the monetary damages they can expect. This is less so for victims of sexual misconduct because they are unlikely to be able to show the sort of losses that the law compensates; emotional loss standing alone is traditionally uncompensated.⁶ The exceptions to this observation are noteworthy but do not detract from the proposal offered here. Many of the exceptional cases involve celebrities who have reason to offer substantial monetary settlements or who are pursued in court to the bitter end. For example, one of Bill Cosby's accusers received a sizable settlement.⁷ At times, even universities pay out. The accuser of football star Jameis Winston received close to one million dollars from Florida State University.⁸ Cases with such payouts appear to be exceptional, but they can be used to taint the complaints of women who accuse celebrities of wrongdoing. Indeed, in Cosby's second trial, the defense sought (unsuccessfully) to portray the accuser as a greedy extortionist.⁹ In any event, when a case is settled, the settlement is likely to include a nondisclosure provision, and the obliviousness of the authorities eliminates a chance to take steps that will prevent future harms.¹⁰ In almost all these cases, whether in the criminal law process, in university settings, or in the workplace, victims have little to gain and much to lose when they set an inquiry in motion. One who reports a wrong committed within a community risks ostracism and retaliation and surely faces months of distraction and pain, beginning with expressions of disbelief by some of those who learn of the accusation. This is especially so in a university community and where sexual misconduct is concerned. What ought to be regarded as heroism is

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6. RESTATEMENT (SECOND) OF TORTS § 903 (AM. LAW INST. 1979); Margaret J. Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 70 (1993) (noting that the "traditional legal position on pain and suffering" in tort law is "committed to incommensurability").
 7. Graham Bowley & Jon Hurdle, *Bill Cosby Paid His Sex Assault Accuser \$3.38 Million in Settlement*, N.Y. TIMES (Apr. 9, 2018), <https://www.nytimes.com/2018/04/09/arts/cosby-trial-juror-protest.html> (describing Cosby's initial settlement payment to accuser Andrea Constand, who was ultimately successful in a second suit against the entertainer).
 8. See Marc Tracy, *Florida State Settles Suit Over Jameis Winston Rape Inquiry*, N.Y. TIMES (Jan. 25, 2016), <https://www.nytimes.com/2016/01/26/sports/football/florida-state-to-pay-jameis-winstons-accuser-950000-in-settlement.html>.
 9. See, e.g., Defendant's Opposition to Commonwealth's Motion in Limine to Admit Evidence of Settlement Negotiations from *Constand v. Cosby* at 7, Pennsylvania v. William H. Cosby, Jr., No. CP-46-CR-0003932-2016 (Pa. Ct. C.P., Montgomery Cty., Crim. Div., filed Mar. 3, 2018).
 10. See Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 326-27 (2018).

often treated as contemptible behavior, as if the victim is nothing more than a snitch who has violated the informal rules of partying, social drinking, collegiality, or dating. In the workplace, a victim who reports an assault or other wrongdoing often escapes unwanted attention by moving to another place of employment and, in any event, is unlikely to be rewarded by her employer and co-workers. In this Article we suggest, or at least explore, a means of encouraging reports. The primary goal is to prevent wrongdoing in the first place.

Alongside the aim of preventing wrongs lie other goals. The first is to offer justice to both victim and accuser. The victim of sexual misconduct will normally want to see the perpetrator identified and held accountable, and she may simply wish to be heard. Accountability will also serve to deter future offenders, to express evolving social norms, and to educate society (or students and employees when the case is on a university campus) about these norms. The victim is entitled not simply to be heard but also to be respected and believed when the claim is credible and there is no contrary evidence or credible defense. Unless there is good reason for an exception, the victim is also entitled to privacy; there is rarely a need to inquire about past sexual behavior or to make public the current claim. Privacy is not only fair to the victim (unless she wishes to go public), but it also makes future reports by other victims more likely, and thus serves to deter wrongdoing. Any proposal for reform in this area needs to account for the values of privacy and dignity, and more generally to ask whether a proposed change will encourage or discourage reports of wrongdoing.

It must be emphasized that one victim's courageous complaint helps multiple future and potential victims. It may do so because the accused is a serial perpetrator or because it encourages other women to report and to seek justice. Even as we respect the inclination of some women to get on with their lives and to avoid entanglement with factfinders and hearings, we must think of the benefits of their coming forward. It is here that our proposal makes a novel contribution.

At the same time, society has its familiar interest in preventing innocent people from being damaged. A large and well-known debate has arisen about the correct standard of proof in university tribunals conducted under Title IX.¹¹ A beyond-a-reasonable-doubt standard is one familiar means of protecting the accused, but a preponderance-of-the-evidence standard has been pushed into use in university cases in the interest of safety, and in part because the accused may be threatened with expulsion from a university but not with prison or

11. See, e.g., Brett A. Sokolow, *ATIXA Guide to Choosing Between Preponderance of the Evidence v. Clear and Convincing Evidence*, ATIXA: ASS'N OF TITLE IX ADMINISTRATORS (Sept. 22, 2017), <https://atixa.org/wordpress/wp-content/uploads/2017/09/ATIXA-Guide-to-Choosing-Between-Preponderance-of-the-Evidence-v.-Clear-and-Convincing-Evidence-9.22.17.pdf> [<https://perma.unl.edu/2XPK-6VCM>].

anything of that kind. We do not comment on this debate here. It is not clear what the standard is in cases such as plagiarism or accusations of unwarranted damage to university property, though it is arguable that each university should simply choose the standard it finds appropriate.¹²

II. REWARDING POTENTIAL ACCUSERS: A PROPOSED MEANS OF REDUCING SEXUAL ASSAULTS ON CAMPUS

This Article's focus is on first-party reporting, but much of the analysis can be applied to second and third-party reporting. The first party is the person who suffers directly from an assault or other wrongful behavior. In some cases, the first party is unable to make a credible report because she (and here, for the sake of clarity, we continue to choose language that depicts the most common case, which is that of a woman assaulted by a man, although there are of course other configurations) has been disabled or threatened with further harm—or may be under the influence of drugs (whether voluntarily or involuntarily consumed) or alcohol and unable to recollect events precisely. But the first party may also prefer to put the event behind her; she may fear disapproval or may be pained by repeated recollection or questioning. For this and many other reasons,¹³ it is important to value reporting by a second party—a term that describes someone

12. Violations of academic integrity policies are evaluated under a range of standards of proof. *See, e.g., Student Discipline Procedures*, BYU LAW, <https://law.byu.edu/policies-and-procedures/general-policies/student-discipline-procedures/> [<https://perma.unl.edu/B75Q-K69X>] (noting that the occurrence of plagiarism and the student's actual intent should be evaluated under different standards of proof); Office of Student Rights and Responsibilities, *Responding to Academic Dishonesty: A Guide for Faculty*, PURDUE U., https://www.purdue.edu/odos/osrr/resources/documents/responding_to_academic_dishonesty.html [<https://perma.unl.edu/SQ68-RZBK>] (last updated Jan. 2014) (setting a standard of “preponderance of the evidence” for findings of academic dishonesty); *Code of Academic Integrity*, CORNELL U., <https://cuinfo.cornell.edu/aic.cfm> [<https://perma.unl.edu/7PW7-JKU T>] (setting a standard of “clear and convincing evidence” for findings of academic dishonesty); *Guidelines Addressing Cheating and Plagiarism*, COLL. OF SAN MATEO, <http://collegeofsanmateo.edu/academicpolicies/cheatingandplagiarism.asp> [<https://perma.unl.edu/5KWV-D5WT>] (setting a standard of “beyond a reasonable doubt” for findings of academic dishonesty).

13. The first party may fear shame and disbelief or may worry that she will be perceived as putting herself in a position to be assaulted. She may fear that disclosure will limit or impede relationships or opportunities with others. Similarly, she may fear that she will be perceived as a victim, liar, or extortionist. *See, e.g.,* Kate B. Wolitzky-Taylor et al., *Is Reporting of Rape on the Rise? A Comparison of Women with Reported Versus Unreported Rape Experiences in the National Women's Study-Replication*, 26(4) J. INTERPERSONAL VIOLENCE 807, 809, 817 (2011).

who witnesses the event in question.¹⁴ Finally, reporting by a third party may occur; this may be someone who heard from the victim in the immediate aftermath of an assault or other wrongdoing, or it may be a person who heard from the wrongdoer himself, perhaps as a boast or as a malicious report. A report from the first kind of third party, often referred to as an “outcry witness”—and in some cases one who has a legal obligation to report observations¹⁵—may not be enough to convict or penalize the wrongdoer, but it may provide sufficient evidence to bring about precautions or a search for information from a first or second-hand party, or from a surveillance camera.

Here, as in several other areas of law, an obvious question is why law does not simply pay victims or second-hand observers to report wrongdoing. The law pays non-victims to report tax cheats; the whistle-blower may receive a share of the government’s gain (so the reporting must be successful).¹⁶ Other areas where law encourages reporting include criminal law quite generally, where jailhouse informers and conspirators often enjoy rewards, including reductions in their sentences or promises of immunity from prosecution, but are nevertheless often believed by prosecutors and juries.¹⁷ The major problem with rewards, beyond any actual provable costs as offered in some tort and contract cases, is that they can make reports less believable because of the danger of false reporting, and even of moral hazard where the government actually pays for information. It is noteworthy that in most cases where law allows rewards to second and third-party witnesses, further investigation and concrete evidence are readily available.¹⁸ In the case of sexual assault, and in only some of these

14. For example, a graduate assistant, Michael McQueary, witnessed Jerry Sandusky engaging in sexual activity with a young boy in university showers. McQueary informed head coach Joe Paterno, and his information was later matched by victim reports. See FREEH SPORKIN & SULLIVAN, LLP, *supra* note 1, at 62.

15. Typically, legal obligations of this sort arise in cases of sexual abuse of minors, elderly persons, or otherwise vulnerable adults. Some states, including California, have extended mandatory reporting to competent adults. See, e.g., CAL. PENAL CODE § 11160 (2018); MASS. GEN. LAWS ch. 112, § 12A ½ (2018); 11 R.I. GEN. LAWS § 11-37-13.3 (2018); see also generally Nat’l Ctr. Prosecution of Violence Against Women, *Reporting Requirements Related to Rape of Competent Adult Victims*, NAT’L DIST. ATTORNEY ASS’N (June 2016), http://ndaa.org/wp-content/uploads/Rape-Reporting-Requirement-for-Competent-Adult-Victims_Compilation.pdf [<https://perma.unl.edu/69DB-43NQ>] (describing the state-by-state reporting requirements associated with rape or sexual assault of competent adult victims).

16. 26 U.S.C. § 7623(b) (2012).

17. FED. R. CIV. P. 35(b); see generally Kylie N. Key et al., *Beliefs About Secondary Confession Evidence: A Survey of Laypeople and Defense Attorneys*, 24 PSYCHOL., CRIME & L. 1 (2018) (finding that laypeople underestimate the persuasive effect of secondary confessions on juror perceptions).

18. See, e.g., U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL 9–27.430 (2018) (noting that “strong corroboration for the cooperating defendant’s testimony” may be

other contexts, rewards to claimants may likely encourage the friends of one party or the other to express skepticism about the facts contained in allegations of wrongdoing. Still, the suggestion in this Article is that the problem of non-reporting is so great that some experimentation with rewards is appropriate. False claims and other potential problems are addressed in Part IV.

Before turning to financial incentives, it is useful to think about other means of encouraging and appreciating those who report wrongdoing. Someone who provides a social benefit by reporting a sexual assault might be publicly celebrated. The analysis resembles that associated with a "duty to rescue."¹⁹ A university, or the state, could announce a date on which such heroes are celebrated, much as athletic heroes and those who serve in the military during wartime are often glorified, rather than given additional payments for their extraordinary efforts. But this sort of public message and encouragement runs the same risk of exacerbating the problem of disbelief: heroism might be discounted if observers think that the actor was motivated by the prospect of receiving any reward at all. In addition, the large number of assaults means that celebration and thanks will be impersonal. Public acknowledgement also draws attention to those who have reported wrongdoing, and these people may seek anonymity. Indeed, the failure to report wrongdoing may be motivated by a desire for anonymity. In contrast, the side effects of monetary payments are likely to be positive. Moreover, these payments require a source of funding, and thus are apt to impose costs on universities, employers, and states—or on other parties who will be encouraged to develop systems that minimize assaults and other wrongs in the first place. Monetary payment can therefore discourage wrongdoers, who will have a greater fear that they will be reported, even as it preserves anonymity for injured parties and encourages safer places of work and study. All three of these ends are unlikely to be advanced by speeches and other methods that strive to change social norms.

III. IMPLEMENTING A REWARD SYSTEM

Monetary rewards can come in a variety of forms and styles. We propose an experiment which, if successful, might lead to a widely adopted practice, in which universities promise to pay students who report sexual misconduct, so long as the law or a third party then

essential in ensuring the testimony cannot be impeached by a favorable plea agreement); *Id.* at 9-27.620 (noting that prosecutors should decide whether to offer a non-prosecution agreement in return for cooperation only after weighing the strength of corroborating evidence, among other factors).

19. See generally Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986).

finds the report credible, and the university or the criminal law system did not previously know of this wrong. Each university would pay for qualifying reports on its own campus.

A university might contract with a third party, such as a law firm or professional investigator, to manage the reward system. This outside party is able to develop a reputation for impartiality, and might at the outset be selected in the manner that mediators and arbitrators are chosen. The parties select the outsider by agreement and if they cannot do so, they appoint representatives or arbitrators who then essentially choose a third party as a potential tiebreaker or as a means of reaching a majority decision. We imagine a system in which the outsider is, or over time acts as, an insurance company, and is itself subject to review.

With a third party in place, a university could offer or require that every woman, or every entering student, be given a kind of insurance policy. The insurer promises to pay a specified sum if the insured is assaulted on campus and brings a claim, or otherwise informs a designated authority, within one month of the occurrence. The claim must be accepted, or largely found true, in order for the victim to collect the promised payment.²⁰ With this plan in place, the insurer has the incentive to investigate claims and build a history that identifies dangerous people and searches for other indicators, such as particular fraternities, that can be watched or avoided. It might recommend avoidance strategies to the university or to the police. Through competition, insurers will increase or decrease the cost of insurance depending on the university's experience and its willingness to undertake suggested precautions. The insurer might offer discounts for various policies even before it has experience with the particular insured campus. The process is familiar with respect to automobiles: different model cars, and their accessories, are associated with different prices for auto insurance, and consumers can learn of these price differentials before purchasing a vehicle. In the case of assaults on a university campus, the insurer or the university might at times declare that there is an exclusion (which is to say no coverage) if a named person or

20. Although the majority of campus sexual misconduct involves assailants who are known to their victims, current Title IX guidelines do not require victims to identify their assailant. *See, e.g.*, U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 19 (2001); Nancy Chi Cantalupo, "Decriminalizing" Campus Institutional Responses to Peer Sexual Violence, 38 J.C. & U.L. 481, 482-83 (2012). In cases where the reporter does not remember, or wishes not to disclose, the identity of the assailant, institutions may fear a higher instance of strategic false reporting. One way to combat these false reports would be to offer a reporter a higher reward when she identifies the wrongdoer. The university could still respond to a report with an unidentified assailant by interviewing third parties or reviewing security camera footage, while nevertheless encouraging identification.

entity is unsupervised. It might, for example, require a fraternity to reveal the fact that it is under this sort of exclusion and is under constant observation or is simply regarded as unsafe. The shame factor alone could deter misbehavior.

Precautionary policies are not limited to student behavior. The insurer can encourage the university to remove or not hire a given faculty member, coach, or other individual whose history of unwanted behavior has brought about prior credible claims. (Tenure can usually, and sensibly, be removed only for severe misconduct, but sexual harassment and sexual assault have sometimes been found to meet that standard.) In this manner, universities might choose employees as it chooses automobiles: quality matters but so does cost. In the case where the offender is a temporary employee or a graduate student planning to seek employment, the scheme could suggest remedies specific to the wrongdoer; faculty could be told not to recommend the wrongdoer for a job for a period of time during which some counseling or rehabilitation is required. The scheme would also encourage the insurer as well as the university to learn more about available precautions, including therapies, surveillance devices, restrictions on alcohol usage, and mandatory police oversight at parties. Title IX remedies already include alcohol counseling and other therapeutic interventions, especially for cases where rehabilitation is anticipated.²¹

The payments suggested here have been fashioned in terms of insurance, but in no way are they meant as compensation for the harms suffered by victims. A payment is surely not a bounty, but rather, a reward meant to encourage early reporting in the interest of other women who might suffer in the future. A victim can protect against future suffering by others if she reports the wrong she experienced, and especially so if she identifies the wrongdoer. Note that if the victim fears that a payment amounts to a form of restitution for something that cannot be reduced to money, or she fears that she will be doubted or diminished, she can decline to accept payment. Unfortunately, it is hard for her to advertise that she declined payment, but at least the committee that adjudicates her claim will know that she asked not to

21. Title IX guidelines only require that sanctions “enforce the school’s code of student conduct while considering the impact of separating a student from her or his education,” and that they remain “proportionate . . . to the violation.” See U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 5, at 6. Department of Justice data on campus sexual assault cases indicate that less than one-third of students found responsible for assault are expelled, with schools demonstrating willingness to pursue alternative outcomes such as reprimand, community service, counseling, or suspension in many cases. See Tyler Kingkade, *Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFINGTON POST (Sept. 29, 2014), https://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html [<https://perma.unl.edu/LEV2-2QR3>] (last updated Dec. 6, 2017).

be rewarded for her testimony. Alternatively, she can ask that payment be made not to her but to a charitable entity or to a fund that increases the payments made to other victims who choose to accept payment. A decision by the victim (or second-hand party) to decline payment—like anonymity regarding her identity—preserves the incentive effect on the university as well as the likelihood that it takes steps to prevent misdeeds. The system can be designed to record such uncompensated reports, and it can do so with or without identifying the claimant. We suspect that most victims will prefer privacy, but the argument for public celebration, though discussed and rejected above,²² might call for less privacy rather than more.

A further advantage of this reward system is that early reporting might prevent the unusual but important phenomenon of “mass hysteria” reporting.²³ This is a phenomenon best known in the area of child abuse, where therapies purporting to uncover buried memories sometimes generate false accusations. It has also been identified in the case of claims against priests about wrongs (allegedly) committed many years earlier, in the complainant’s childhood.²⁴ While we have every reason to believe complainants who come forward even years after they were assaulted by priests (particularly when many such claimants allege wrongdoing by a particular priest), there is also reason to be concerned about imagined harms. One or more complaints can lead others to re-imagine the past, especially when details are suggested by other complainants or by interviewers. Numerous allegations are more believable when they are truly independent, not when subsequent complaints match those already heard and broadcast. Quick reporting will necessarily lower the opportunity for mass hysteria.²⁵

22. See *supra* text accompanying note 13.

23. See generally Sivasankaran Balaratnasingam & Aleksandar Janca, *Mass Hysteria Revisited*, 19(2) CURRENT OPINION PSYCHIATRY 171, 171–74 (2006).

24. See, e.g., David Foster, ‘Sexual-Abuse Hysteria’ Cited for Climate of Fear, L.A. TIMES (Mar. 20, 1994), http://articles.latimes.com/1994-03-20/news/mn-36262_1_sexual-abuse-priests-chicago-cardinal-joseph-bernardin [<https://perma.unl.edu/GE38-ZCA3>] (describing false accusations against Cardinal Joseph Bernardin in the 1990s). Other examples of modern mass hysteria reporting among adults include the prevalence of UFO abduction claims, which have been shown to increase dramatically following allegations of abduction in popular media. Leonard S. Newman & Roy F. Baumeister, *Toward an Explanation of the UFO Abduction Phenomenon: Hypnotic Elaboration, Extraterrestrial Sadomasochism, and Spurious Memories*, 7 PSYCHOL. INQUIRY 99, 102 (1996). Another well-known example is the McCarthyism of the 1950s, in which public hysteria about the rise of communism led to mass accusations and political oppression. Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CALIF. L. REV. 1387, 1404 (2005).

25. See generally Newman & Baumeister, *supra* note 24; see also Michael Salter, *Organised Child Sexual Abuse in the Media*, in OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 1 (Henry N. Pontell ed., 2017) (discussing

Why not go further? It is easy to imagine a system where those who fail to report owe a payment. The risk of liability would be low, as it would normally be associated with some other observer coming forward, but even a low risk of liability can encourage behavior of one sort or another. This idea borrows from the doctrine of comparative negligence in tort law, under which the injured victim has her recovery reduced in proportion to her own fault and its contribution to an avoidable loss.²⁶ Comparative negligence displaced contributory negligence, which entirely eliminated a faulty victim's recovery.²⁷ Thus, one who is injured because of a speeding driver has her claim reduced if she was not wearing a seat belt and the factfinder concludes that the injury would have been less serious had the victim herself behaved optimally. In the case of sexual misconduct, for example, imagine that X assaults A, B, C, and D over a period of months. X is apprehended after the assault on D—perhaps because it is quickly reported by D, who is motivated by the reward system suggested here. X is then discovered to have previously assaulted A, B, and C. These earlier victims would owe something to the victims who followed them in time; A, for instance, has in a sense wronged B, C, and D.²⁸ The idea does not quite fit tort law because it would be unusual to be able to demonstrate that A was more-likely-than-not the cause of B, C, or D's injury. Nevertheless, if the nonreporting is found to be wrongful, then it is more conventional to find A responsible, though far less so than X. Among the problems with this version of punishing the victim who did not report, is the fact that D may choose not to report because she senses or knows that X is not a first-time offender. D may not want to see a penalty inflicted on A and B, and she knows that X, most importantly, will be penalized. This is especially true for campus cases because D is likely to know A. Moreover, in some cases it is easier to find X responsible for the assault on D precisely because earlier victims come forward. Penalizing them would discourage their coming forward in support of D's claim. A, B, and C's evidence will be found admissible, even though it detracts from the usual requirement that a claim against X for the harm done to D not be polluted by extrinsic evidence, if there is reason to think that the testimony of earlier vic-

the risks of mass-media reporting of sexual assault, and their impact on victim credibility).

26. *Comparative-Negligence Doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014).

27. See William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 919–20 (1981); *Contributory-Negligence Doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014).

28. We expect some experiments with the age of non-reporting victims. Our focus has been on university campuses, but if the idea is extended to assaults more generally, it is hard to imagine any penalty for children who do not report wrongs done to them. Presumably, law would need to decide on an age of maturity in this regard.

tims shows a pattern.²⁹ We leave for another day, or for the judgment of universities, the interesting question of how to allocate damages (as law must do when comparative negligence applies).

Given the interest in privacy and the reality of some victims' disinclination to discuss or broadcast a bad experience, a penalty for non-reporting might be limited to witnesses. If it is applied to outcry witnesses, the victim may be disinclined to talk about her experience with anyone, and may thus be harmed rather than helped. But it quickly becomes clear that reporting is best motivated with carrots rather than sticks. Title IX takes a step in the direction of mandatory reporting by obligating certain faculty and administrators who hear of an assault to take further steps; it does not require anything of the victim herself.³⁰ Nor does it directly impose a penalty on one who is obliged to report but fails to do so.³¹ A noncomplying administrator might expect to be disciplined by his or her employer, but it is unclear whether a faculty member, motivated perhaps by the victim's request for total anonymity, would be penalized at all for valuing this request over Title IX's instruction. A Title IX coordinator who learns the name of a victim is free to promise confidentiality.³² The coordinator will normally communicate with the victim and ask her whether she wants to pursue a complaint. If she does not wish to pursue a complaint, she may avail herself of a counselor,³³ but her identity will be protected and no claim will be brought without her consent (unless

29. FED. R. EVID. 404(a).

30. See WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, INTERSECTION OF TITLE IX AND THE CLERY ACT (Apr. 2014), <https://www.justice.gov/ovw/page/file/910306/download> [<https://perma.unl.edu/Z439-23BW>]; see also, e.g., *Title IX Compliance Guide for Mandatory Reporters*, PURDUE U., <https://www.purdue.edu/titleix/complianceGuide/index.html> [<https://perma.unl.edu/Q8K5-N4H3>] (describing the responsibilities of a mandated reporter under Title IX); *Title IX Mandated Reporting*, U. MO. ST. LOUIS, <https://www.umsl.edu/~safetyinitiatives/compliance/titleix.html> [<https://perma.unl.edu/6VN3-CDQM>] (describing what information must be reported to the Title IX Coordinator by a mandated reporter).

31. Title IX, 20 U.S.C. § 1681 (2018).

32. See U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 20, at 17; see also U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 18–19 (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.unl.edu/CBL3-PANG>] (stating that OCR “strongly supports a student’s interest in confidentiality”), *re-scinded* by U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 5.

33. Confidential counseling is typically available to victims at all stages, regardless of reporting status. See, e.g., *Confidential Counseling Resources*, STAN. U., <https://titleix.stanford.edu/confidential-counseling-university-resources> [<https://perma.unl.edu/89D9-R2X9>] (describing available sources of counseling); *Confidential Support*, NW. U. OFF. EQUITY, <https://www.northwestern.edu/sexual-misconduct/get-help/confidential-support.html> [<https://perma.unl.edu/QB5Q-BBJR>] (listing resources for confidential counseling and clarifying that use of counseling is not equivalent to a formal report).

disclosure and investigation are the only ways to ensure compliance with Title IX generally).³⁴ Still, it is unavoidable that any stick for non-reporting by the victim or second-party observer may discourage each from approaching a coordinator, faculty member, or other person who could provide useful counsel. Every imaginable rule has costs as well as benefits.

IV. DEALING WITH OBJECTIONS TO THE PLAN

A serious problem with the incentive scheme proposed here is that it might be understood as suggesting that a sexual assault can be monetized, when money cannot possibly make a victim truly whole. On the other hand, this kind of objection is rarely made to discourage or forbid life insurance or payments under tort law, even when a murder or other wrongful death is at hand. In these settings, money is not understood as a substitute for a life, but simply as compensation for part of what is lost. In tort cases, it is also a deterrent regarding negligent behavior and often a means of discouraging or raising the cost of certain activities. In any event, the idea presented here does not require an insurance company; the incentive to report and to reduce wrongdoing in the first place can be structured as a reward.³⁵ It is a reward paid by the university or another party, and it offers an incentive to gather information and identify repeat offenders. The reward to victims who report can be understood as payment to persons who bear a huge cost when they bring claims or report misbehavior. The idea is easily extended to areas where there is substantial under-reporting and where it gives no grounds for offense, including academic dishonesty, shoplifting, and misbehavior in the workplace. If the incentive scheme were in place in these areas, it would seem offensive to reward these reports, but not the reports of sexual misconduct—a greater harm that also suffers from under-reporting.

One obvious problem is that an accused party will often claim that a procedure is unfairly biased because the accuser or other witness has been promised an incentive to give (even false) testimony. This is one of the reasons that conventional criminal law does not permit monetary payments to witnesses for the prosecution or for the defendant.³⁶ Somewhat mysteriously, or uneasily, the government is allowed to give other kinds of rewards to helpful witnesses, including promises of immunity, so long as these are revealed to the defendant and to the factfinder.³⁷ Following the lead of criminal law, our sugges-

34. See U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 20, at 17.

35. We shy away from suggesting a system in which individuals purchase insurance because this offers no direct incentive for the universities.

36. 18 U.S.C. § 201 (2012).

37. See generally Saul Levmore & Ariel Porat, *Asymmetries and Incentives in Plea Bargaining and Evidence Production*, 122 YALE L.J. 690 (2012).

tion here is that any payment received by the accuser or a second-party witness must be revealed to the factfinder.³⁸ It may be that a reward reduces the conviction rate or even increases the number of questionable claims, but inasmuch as the rate of reporting is presently low, it is almost surely the case that rewards will do more good than harm. Indeed, the benefit of a reward system can be increased by introducing some complexity to the proposal: a reward can be earned only if the (professed) wrongdoing is reported within one month of its occurrence or discovery. Such a timetable can be seen as a kind of statute of limitations, as it aims to give the factfinder access to fresher evidence. The more important aim is to increase the expected benefit of reducing the number or likelihood of further infractions by the accused. If the goal of the system is to reduce assaults, then the system ought to encourage early reporting.

There is, unfortunately, the danger that a university will be less likely to investigate a claim properly and find an accused responsible if the same university must then pay the accuser or other witness. It might, for example, appoint persons who are less inclined to believe claims of wrongdoing to membership on its adjudicatory committees. Similarly, it might devote insufficient resources to fact-finding. More optimistically, the prospect of making payments might cause it to monitor parties and invest in cameras in order to reduce assaults or other wrongs in the first place, which would also increase the accuracy of fact-finding if a claim is filed.

Still, a university that must pay for a creditable report of wrongdoing is in a sense penalized for its own good behavior. If the reward proposal succeeds, it will do so because it encourages reports, and thus imposes costs on the very party that is often in the best position to prevent harms (i.e., the university), but is now asked to adopt a kind of strict liability system against its own interest. We do not expect other private entities to adopt such systems, and governments give themselves immunity against claims of negligence and rarely subject themselves to strict liability simply because they are the least cost avoiders. Nor do we often see payments as encouragement where the activity in question imposes a substantial cost on another party. Thus, it is hard to imagine a democratic country's legal system tolerating payments to its judges based on the number or percentage of convictions they turn out. When there are incentive payments to government officials, based for example on revenue extracted from citizens or apprehensions of criminals or dangerous drivers, the accused are pro-

38. The Supreme Court has held that prosecutors must typically disclose incentives given to a witness. See Christopher T. Robertson & D. Alex Winkelman, *Incentives, Lies and Disclosure*, 20 U. PA. J. CONST. L. 33, 43–44 (2017) (citing *Giglio v. United States*, 405 U.S. 150, 153–55 (1972); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (parentheticals omitted)).

tected by the legal system and able to appeal unfavorable findings. These protections are rarely available to students who are found responsible for sexual misbehavior and other wrongs in university settings. It may, therefore, be sensible to improve our proposal by employing a third-party factfinder for each university that subscribes to the plan.

It might seem that third parties, perhaps in the form of actual insurance companies, will regularly disbelieve or simply deny claims in order to avoid the obligation to pay victims who report wrongdoing. But, as with fire, auto, and other familiar kinds of insurance coverage, the insurer does *not* have a strong incentive to turn down deserving claimants because it profits in the long run by attracting more customers and earning a reputation as an honest investigator and reliable payer.³⁹ Following a learning period, some universities can be expected to advertise their relatively low (size-adjusted) insurance rates, as these will indicate a safe environment that will attract applicants and their parents. Moreover, and perhaps more controversially, if the insurer and the university take steps to discover the identity of wrongdoers and pay victims whose claims are verified or otherwise accepted, students who see themselves as potential victims or as accused parties may use their smart phones to record interactions. Some fraternities already use cameras to record parties in order to discourage misbehavior and defend against unfair claims; students are accustomed to allowable taping in stores (albeit typically with no sound recording, given the lack of consent and restrictions imposed by state laws⁴⁰). These recordings could help prove cases where payment is due, and they would deter misbehavior in the first place, even as they discourage false claims.

39. See, e.g., PAUL FRANCIS & SARAH BUTLER, CUTTING THE COST OF INSURANCE CLAIMS & TAKING CONTROL OF THE PROCESS (Strategy& 2010), https://www.strategyand.pwc.com/media/file/Strategyand_Cutting-the-cost-of-insurance-claims.pdf [<https://perma.unl.edu/QZ48-GCUH>]. Health insurance may be an exception to this general rule. The high rate of employer-sponsored health insurance enrollment, relatively low number of possible insurers, and tendency of employers to prefer incumbent insurer relationships leads to an imperfectly competitive market for health insurance. See generally Leemore S. Dafny, *Are Health Insurance Markets Competitive?*, 100 AM. ECON. REV. 1399 (2010); see also Bryan Caplan, *Health Insurance and Reputation*, LIBR. ECON. LIBERTY ECONLOG (July 27, 2009), http://www.econlib.org/archives/2009/07/health_insuranc_7.html [<https://perma.unl.edu/7KGN-6AY4>] (noting that “insurance companies that shirk their responsibilities hurt their reputation”).

40. Federal law requires that at least one party to a conversation consent to its recording. See 18 U.S.C. § 2511(2)(d) (2012); see also generally 18 U.S.C. §§ 2510–2522 (2012) (prohibiting intentional interception of “wire, oral, or electronic communications,” including “any aural transfer made in whole or in part through . . . wire, cable, or other like connection,” as well as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation”).

V. FALSE CLAIMS AND PROTECTION FOR THE ACCUSED

It is easy to imagine a second, symmetrical kind of insurance against false claims. It has been estimated that approximately 5% of claims of sexual assault are false,⁴¹ and it is reasonable for a university to insure individuals and fraternities against this risk. This insurance has more elements of restitution than does the insurance suggested for victims, and yet it provides the university with an incentive to be aware of the danger of false claims and guard against them with cameras, instructional sessions for new students, and by attaching conditions to parties, various organizations, and campus activities. It has the further advantage of encouraging fraternities and individuals themselves to welcome, rather than resist, monitoring. Nor is this false claim insurance necessarily against the interest of the abused. For one thing, if an insurance claim by an accused person or institution is denied, it will help show that a woman's claim was indeed meritorious. For example, evidence that a fraternity normally records activity in its public places, but suddenly claims that its cameras were not functioning on the night cited in an allegation of misbehavior will be held against the accused fraternity or member. Recordation, or other steps taken to lower the cost of this insurance, will also send a signal to members that misbehavior will be discovered. As far as we know, there are not yet police departments or municipalities that fine officers whose phones or cameras are found to have been disarmed, but a university could impose such a rule on party organizers or individuals and certainly on those who are under probation because of previous misbehavior.⁴²

While there is no reason to think that false claims are a significant problem in the case of sexual assault on college campuses, it is prudent to think about the issue once one contemplates the idea of rewarding reporters. It is dangerous to penalize claims that are unproven or even that are thought to be wrongfully brought because fact-finding is imperfect, as are recollections. There is the danger that a penalty for a false or unsubstantiated claim will discourage the reporting of claims that are true and at the center of our concern here. By way of contrast, the government may reward whistle-blowers who turn in tax cheats, but there is no great social cost to being falsely accused of tax fraud. The Internal Revenue Service may find a claim credible (even if some are motivated by personal animus), but if it inspects the claim and finds no wrongdoing, there is no public information and no great cost to the accused other than the cost of defending against an accusation; the government is simply directed to a target it

41. André De Zutter et al., *The Prevalence of False Allegations of Rape in the United States from 2006-2010*, 2 J. FORENSIC PSYCHOL., Apr. 2010, at 1, 4.

42. This and other ideas suggested here, including taping and recording, might require statutory changes.

might have inspected in the ordinary course of auditing. As far as we know, no university actually penalizes students or employees who bring claims of academic or sexual misbehavior that prove to be unwarranted. It is common to have a general rule against lying, and perhaps the threat of disciplinary action does some good.⁴³ Universities have reason to fear that any such penalty will cause an even lower rate of reporting than is presently experienced.

If a fear of false claims is an obstacle to the introduction of rewarding early reporting of wrongdoing, a novel means of discouraging wrongful reporting might be implemented. Instead of being asked whether sexual misbehavior occurred beyond a reasonable doubt, by the preponderance of the evidence, or by a more-likely-than-not standard, a hearing committee might be asked to assign the claim to one of three categories. For example, the committee might be asked whether there is a greater than 50% chance that the accused violated the standard of behavior in place,⁴⁴ whether the behavior was more than 25% (but less than 50%) likely to have been in violation of this standard, or whether it was quite unlikely (less than 25%) to be in violation. Only if it finds the last of these three characterizations to be the case, would the accuser be found to have wronged the accused party. And, of course, we expect hearing committees to be very careful about finding a claim to fall into this third category because they will then need to impose some penalty on the complainant. It is obvious that even a mild penalty⁴⁵ might deter other reports, and many hearing officers and committee members are likely to have volunteered or come to the

43. See, e.g., *Standards and Discipline: Student Conduct and Community Standards*, COLUM. U. (Aug. 31, 2016, revised Nov. 1, 2016), <http://www.columbia.edu/cu/studentconduct/documents/SandDFall2016.pdf> [<https://perma.unl.edu/7ELX-8PDN>]; *Chapter 11: Student Discipline and Conduct*, U. TEX. AUSTIN (2017–2018), <http://catalog.utexas.edu/general-information/appendices/appendix-c/student-discipline-and-conduct/> [<https://perma.unl.edu/V3GJ-STYZI>]; UCI Office of Academic Integrity & Student Conduct, *Grounds for Discipline*, U. CA., IRVINE (2018), <https://aisc.uci.edu/policies/pacaos/grounds-for-discipline.php> [<https://perma.unl.edu/7KKF-GSG7>]. Occasionally a university will announce a rule against lying in Title IX investigations or note that its general rule applies to Title IX matters. Office of Diversity, Equity and Inclusion, *Title IX FAQs*, U. MO. SYS. (Apr. 27, 2018), <https://www.umsystem.edu/ums/dei/titleix/faqs#43> [<https://perma.unl.edu/US2T-SNH9>]; *About Title IX UConn*, U. CONN., <https://titleix.uconn.edu/title-ix-at-uconn/about-title-ix-uconn/> [<https://perma.unl.edu/Z4AM-B5QS>]; *Sexual Misconduct Policy and Procedures*, MISS. U. FOR WOMEN, <http://www.muw.edu/titleix/sexualmisconductpolicy> [<https://perma.unl.edu/7SUP-MQVZ>].

44. A higher standard will do as well.

45. Penalties like those typically applied to code of conduct violations may seem most appropriate here, as they would allow the university to escalate penalties for repeated false reports without unduly punishing innocent, but mistaken, reporters. Examples include written warnings, temporary probation, or community service, with the option to ban repeat offenders from campus residences or to mark their transcripts with a conduct or honor code violation.

business of these investigations and hearings with greater than average concern for the victims of sexual assault. In theory, most universities have a rule against lying to the factfinders in these cases, but in practice no claim is brought against one thought to have provided false testimony. Our own experience is that when claims are judged not to meet the more-likely-than-not standard, it is nevertheless the case that the claim was filed in good faith. The accuser genuinely believed that she did not give consent to a physical action or that she was emotionally mistreated. If a claim is falsified by evidence derived from cameras or mobile devices, the witness (or accuser) is generally regarded as having faulty recall owing in part to alcohol or selective memory brought on by various influences. These cases often lead to a hearing and an instruction that the accused and accusing parties maintain distance from one another, but they do not lead to any claim against witnesses who are not believed after a review of the available evidence. Still, the prospect of a reward to claimants, as proposed here, might increase the number of misguided accusations, and might lead to knowingly false claims against someone whom the accuser resents. The accused might have misbehaved, but not in a way that can be regarded as an assault or other serious wrongdoing. For example, a factfinder might see evidence from camera surveillance that completely contradicts the accusation, and might therefore find that the accusation is without merit. It is in such a case that a penalty might be imposed on the claimant because the committee hearing the case would find the claim only 0%–25% likely to be true. We do not think this possibility will discourage anyone from reporting sexual assaults or other wrongs, especially if a complaint can be withdrawn after the accuser is shown the available evidence before a hearing takes place. In short, it might be worth experimenting with modest penalties for claims that are very likely to be false; however, this sort of experiment is appropriate only if a system of rewards for meritorious claims is in place.

Much of the discussion here can be understood as part of law's grappling with the choice between, or combined effectiveness of, carrots and sticks.⁴⁶ It is often the case that carrots and sticks, or rewards and penalties, can be substitutes. Rather than rewarding those who report sexual misconduct (or tax fraud or police misbehavior), law could penalize those who do not report misbehavior. In the case of sexual assault, this is unlikely to work well because all the involved parties will gain from not reporting.⁴⁷ In principle, one who observes A

46. See, e.g., Saul Levmore, *Carrots and Torts*, in *CHICAGO LECTURES IN LAW AND ECONOMICS 203* (Eric A. Posner ed., 2000).

47. Senator Dianne Feinstein has introduced legislation establishing mandatory reporting, but it is not yet clear what the penalty would be for failure. See Press Release, U.S. Senator for Cal. Dianne Feinstein, *Senators Introduce Bill Require-*

assaulting B might report the assault—motivated perhaps by the reward suggested here—and also trigger a penalty against B, unless B also reported the assault. B would presumably not be penalized if B had been inebriated or otherwise unable to make a credible claim against A. The idea seems unproductive inasmuch as the observer might choose not to report the assault precisely because he or she will know that the victim, B, is likely to be penalized for failing to report. B will suffer the horror of an assault and the additional penalty for declining to report. Law does not, for example, penalize store owners who fail to report an attempted robbery, and the few jurisdictions that have threatened to penalize victims of kidnapping threats if they proceed to deal with kidnapers directly without turning the case over to the police have been unsuccessful.⁴⁸ It is politically and morally unattractive to charge someone who suffered at the hands of another for subsequently failing to report. Moreover, the line between socially disapproved “snitching” and serving others by reporting wrongdoing is difficult to draw.

What about anonymous reporting? Many universities offer students a means of anonymously reporting assault, and a well-known website, *Callisto*, offers anonymous reporting as well.⁴⁹ One idea of *Callisto*-style systems is that a victim might be more inclined to report the wrong done to her if she sees that the perpetrator has previously been accused of misbehavior.

Anonymity presents grave problems. Thus, anonymity on the Internet appears to encourage bad behavior, and often in a form that

ing U.S. Amateur Athletic Organizations, Members to Report Sexual Abuse (Mar. 6, 2017), <https://www.feinstein.senate.gov/public/index.cfm/2017/3/senators-introduce-bill-requiring-u-s-amateur-athletic-organizations-members-to-report-sexual-abuse> [https://perma.unl.edu/KFY2-5DV8]. Title IX establishes mandatory reporting, but with no sanctions it is best understood as aspirational. See WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, *supra* note 30 (describing sexual harassment and sexual violence as incidents which “must be reported to school officials”).

48. Italy, for example, banned recipients of kidnapping threats from paying ransom or negotiating with kidnapers, going so far as to freeze available assets in the wake of a kidnapping. Despite these measures, ransom payments continued. See Celestine Bohlen, *Italian Ban on Paying Kidnappers Stirs Anger*, N.Y. TIMES (Feb. 1, 1998), <https://www.nytimes.com/1998/02/01/world/italian-ban-on-paying-kidnappers-stirs-anger.html>.

49. Callisto’s most recent impact report indicates that victims of sexual assault who visited the Callisto site were five times more likely to report their assault to the authorities, and even those Callisto users who do not report often enter into “matching”—a system by which Callisto reaches out individually to suggest reporting when multiple users report the same assailant. See CALLISTO, YEAR 2 OF COMBATING SEXUAL ASSAULT, EMPOWERING SURVIVORS, AND ADVANCING JUSTICE, 2016–2017 SCHOOL YEAR REPORT (2017), https://www.projectcallisto.org/Callisto_Year_2_highres.pdf [https://perma.unl.edu/3UPG-6GBY].

targets women.⁵⁰ In general, anonymity encourages impulsive and at times irresponsible behavior on the Internet, on bathroom walls, and in various other settings. Anonymous reporting is the enemy of valuable accountability even as it is likely to encourage useful reporting. The familiar compromise is probably the right place to start: a third party, like a Title IX officer, must know the identity of the reporter. It is plain that accusations made on *Callisto* or on bathroom walls have lower credibility than those made openly or to officials who can monitor false accusations. Entirely anonymous accusations should not be rewarded. The criminal law system has long worked with this compromise: victims of sexual assault are shielded from media publicity, while their identity is known to those who take part in investigations and in any trial.

VI. CONCLUSION

Wrongdoing is often unreported, and it is hard to imagine a world in which all wrongdoing is reported because of carrots, sticks, or cultural norms. In such a world, one would never want to offer a ride, invite a guest to dine, or choose to employ a human when a machine could do the job. But some wrongs are sufficiently serious (and likely to become a habit if not penalized) that the legal system should encourage reporting. This is likely to be the case where the victim gains little from reporting because the wrong to her has already been done. A storekeeper has more reason to report an armed robbery than does the victim of a sexual assault. This Article examined the possibility of encouraging reports with rewards and penalties and explained why rewards are superior to penalties. Where the current practice is to offer neither a carrot nor a stick, a reward system is worth trying. The problems introduced by a reward system can probably be offset with other rules. The plan suggested here involves a kind of insurance policy for both victims and falsely accused persons. It is time to experiment with these ideas for reducing sexual assaults on campus and perhaps for reducing other wrongs as well.

50. See Saul Levmore & Martha C. Nussbaum, *Introduction*, in *THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION 1* (Saul Levmore & Martha C. Nussbaum eds., Harvard Univ. Press, 2010); see also Saul Levmore, *The Internet's Anonymity Problem*, in *THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION*, *supra*, at 50 (discussing anonymity in both sections).