

Notes

RAPED ABROAD: EXTRATERRITORIAL APPLICATION OF TITLE IX FOR AMERICAN UNIVERSITY STUDENTS SEXUALLY ASSAULTED WHILE STUDYING ABROAD

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ABSTRACT—Female college students who study abroad are five times more likely to be raped than their counterparts who remain on their domestic campuses. Students raped or sexually assaulted on or around campuses in the United States can seek a remedy under Title IX, which provides administrative and judicial remedies. Very few federal cases have ever addressed whether Title IX applies extraterritorially to allegations of sex discrimination occurring abroad, and courts have reached different results in these cases. Moreover, no federal circuit has ever addressed the issue. This Note explores whether Title IX applies extraterritorially to students raped while studying abroad. After concluding that the text of the statute fails to overcome the presumption against extraterritorial application, this Note analyzes whether Congress should amend Title IX to explicitly overcome this presumption, concluding that it should not. Instead, this Note presents alternative solutions for preventing and responding to sexual violence during study abroad programs, such as federal disclosure legislation and an amendment to the Clery Act that mandates reporting of crimes that occur during study abroad programs.

AUTHOR—Northwestern University School of Law, J.D., 2016; Northwestern University, B.A., 2011. My experience as a rape survivor and the desire to prevent others from experiencing the pain that I have endured inspired me to write this Note. Thank you to Professor Kimberly Yuracko and Professor Deborah Tuerkheimer for feedback on my drafts. Thank you to my friends and loved ones for supporting me mentally, spiritually, and emotionally throughout this journey.

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INTRODUCTION

A Jamaican police report sums up what happened on the last night of Jenee Klotz’s semester abroad her junior year of college: She was robbed, sexually assaulted and stabbed while walking back to her host family’s home. She says she spent nine hours in a Kingston hospital, and the next morning, the program’s academic director dropped her at the airport—still wearing pajama bottoms and with dried blood on her neck and chest.¹

While current public concern and discourse focuses on rape occurring on and around college campuses,² the epidemic of college students raped while studying abroad is absent from the narrative. Over 300,000 students study abroad annually.³ Sexual violence during study abroad programs has

¹ Mary Beth Marklein, *Students Studying Abroad Face Dangers with Little Oversight*, USA TODAY (May 28, 2009, 6:53 PM), http://usatoday30.usatoday.com/news/education/2009-05-27-study-abroad-main_N.htm [https://perma.cc/22PG-QBRA].

² See, e.g., Eliana Dockterman, *The Hunting Ground Reignites the Debate over Campus Rape*, TIME (Mar. 5, 2015), <http://time.com/3722834/the-hunting-ground-provocative-documentary-reignites-campus-rape-debate> [https://perma.cc/P9SX-NR8P]; *Breaking the Silence: Addressing Sexual Assault on Campus*, HUFFINGTON POST, <http://www.huffingtonpost.com/news/breakingthesilence/> [https://perma.cc/5SPE-AYUP] (a blog devoted entirely to articles addressing campus sexual assault).

³ *Open Doors Data: U.S. Study Abroad*, INST. OF INT’L EDUC., <http://www.iie.org/Research-and-Publications/Open-Doors/Data/US-Study-Abroad> [https://perma.cc/XY4W-UAH7].

been anecdotally reported, but not systematically studied.⁴ In 2013, Matthew Kimble, a psychologist at Middlebury College in Vermont, led the first study to explore the rates of sexual violence during study abroad as compared to the on-campus rates.⁵ Kimble concluded that female students who study abroad are five times more likely to be raped than their counterparts who remain on their domestic campuses.⁶ Additionally, Kimble discovered that “[e]ighty-nine percent of the unwanted sexual experiences while abroad were reported to be perpetrated by nonstudent, local residents,” with students from the host country or other American students studying abroad perpetrating the remaining eleven percent.⁷ As Kimble noted, “[t]his differs dramatically from the pattern seen domestically in which the majority of unwanted sexual experiences are student on student.”⁸

⁴ For purposes of this Note, “sexual violence” is an umbrella term used in accordance with the U.S. Department of Education Office for Civil Rights definition, which includes “rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.” U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE I (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/NG3C-KMRX>] [hereinafter 2014 Q&A]. Specifically, sexual violence “refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent (e.g., due to the student’s age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent).” *Id.*

⁵ Matthew Kimble, William F. Flack Jr. & Emily Burbridge, *Study Abroad Increases Risk for Sexual Assault in Female Undergraduates: A Preliminary Report*, 5 PSYCHOL. TRAUMA: THEORY, RES., PRAC., & POL’Y 426, 426 (2013). In the study, “[t]wo hundred and eighteen female undergraduates completed a modified version of the Sexual Experiences Survey . . . about their sexual experiences abroad and on campus.” *Id.* (citing Koss et al., *Revising the SES: A Collaborative Process to Improve Assessment of Sexual Aggression and Victimization*, 31 PSYCHOL. WOMEN Q. 351 (2007)). One section of the study inquired about nonconsensual sexual experiences, such as unwanted touching, attempted sexual assault, and rape. *Id.* at 427. Sixty respondents (27.5%) reported at least one incident of unwanted touching while studying abroad, thirteen (6%) reported attempted oral, anal, or vaginal sexual assault, and ten (4.6%) reported rape. *Id.* Although this is not a huge sample size and the author only surveyed students from one university, there is no reason to conclude that these findings are not representative of universities nationwide.

⁶ *Id.* at 428.

⁷ *Id.*

⁸ *Id.* (first citing BONNIE S. FISHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, U.S. DEP’T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN (2000), <http://www.ncjrs.gov/pdffiles1/nij/182369.pdf> [<https://perma.cc/2WA6-FUVVR>]; then citing Alan Berkowitz, *College Men as Perpetrators of Acquaintance Rape and Sexual Assault: A Review of Recent Research*, 40 J. AM. COLLEGE HEALTH 175 (1992); and then citing William F. Flack et al., *Risk Factors and Consequences of Unwanted Sex Among University Students: Hooking Up, Alcohol, and Stress Response*, 22 J. INTERPERSONAL VIOLENCE 139 (2007)); see also SOFI SINOZICH & LYNN LANGTON, U.S. DEP’T OF JUSTICE, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGED FEMALES, 1995–2013, at 7 (Jill Thomas & Lynne McConnell eds., 2014), <http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> [<https://perma.cc/4BJS-CRC4>] (finding that “[c]ollege-age female victims knew their offender in about 80% of rape and sexual assault victimizations”).

Kimble also concluded that the greatest risk of rape for American students exists in non-English-speaking countries.⁹ Cultural differences in “personality and behavior” and American students’ “lack of familiarity with local culture” may contribute to this increased likelihood of sexual assault in non-English-speaking or non-Western countries.¹⁰ The U.S. Department of Justice asserts, and the scholarly community generally agrees, that domestic campus sexual assault remains largely underreported.¹¹ An international context likely exacerbates this underreporting because rape victims in non-English-speaking countries also face isolation and a lack of knowledge about, or access to, crisis resources or facilities in the host country.¹²

Students raped or sexually assaulted on or around United States campuses can seek administrative or judicial remedies under Title IX. Very few federal cases have addressed whether Title IX applies extraterritorially to allegations of sex discrimination occurring abroad, and courts have reached different results in these cases.¹³ Moreover, no federal circuit has ever addressed the issue.¹⁴ This Note explores whether Title IX applies extraterritorially to students raped while studying abroad. After concluding that the text of the statute fails to overcome the presumption against

⁹ Kimble et al., *supra* note 5, at 428 (“All regions, other than English-speaking Europe and Australia, posed some additional risk for sexual assault relative to staying on campus.”). In particular, Africa and South and Central America had the most significant increases in sexual assault. *Id.*

¹⁰ *Id.* at 428–29.

¹¹ See FISHER, *supra* note 8, at iii (noting that “many women do not characterize their sexual victimizations as a crime for a number of reasons (such as embarrassment, not clearly understanding the legal definition of rape, or not wanting to define someone they know who victimized them as a rapist) or because they blame themselves for their sexual assault”); see also Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 98 (2010) (“[S]exual assault remains one of the most underreported crimes on college campuses.” (citing FISHER, *supra* note 8, at iii)).

¹² See Kimble et al., *supra* note 5, at 428, 429.

¹³ To the best of the author’s knowledge, only three cases address this issue. See *Philips v. St. George’s Univ.*, No. 07-CV-1555 (NGG), 2007 WL 3407728, at *4 (E.D.N.Y. Nov. 15, 2007) (holding that Title IX does *not* have extraterritorial application to an American student alleging sexual harassment while studying in Grenada, West Indies); *Mattingly v. Univ. of Louisville*, No. 3:05-CV-393-H, 2006 WL 2178032, at *1–2 (W.D. Ky. July 28, 2006) (holding that a university is not liable for monetary damages under Title IX where an American university student reported that a Portuguese resident raped her during her school’s study abroad program in Portugal); *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783, 790–91 (E.D. Mich. 2002) (holding that Title IX has extraterritorial application to American university students alleging sexual harassment while studying abroad in South Africa).

¹⁴ *Philips*, 2007 WL 3407728, at *4 (“[N]either this circuit nor any other circuit has decided whether Title IX applies extraterritorially.”).

extraterritoriality,¹⁵ this Note explains that Congress should not amend Title IX to explicitly overcome this presumption for two significant reasons. First, the international context would exacerbate universities' inability to effectively investigate allegations of sexual violence. Second, extraterritorial application could cause unintended clashes between our laws and those of other nations, resulting in international discord.

Part I provides background on the evolution of Title IX interpretation and extraterritoriality jurisprudence. Part II combines these discussions of Title IX and extraterritoriality by using original data to analyze if and when the U.S. Department of Education Office for Civil Rights (OCR) applies Title IX extraterritorially. Because victims of sexual violence can seek administrative and/or judicial remedies, Part III analyzes if and when federal courts apply Title IX extraterritorially. Specifically, Part III applies the Supreme Court's two-step *Morrison* test to *King v. Board of Control of Eastern Michigan University* and *Philips v. St. George's University* to determine American universities' Title IX obligations, if any, to students studying abroad. Because so few federal cases address Title IX's extraterritoriality, Part III also explores extraterritoriality in the context of other federal legislation.

Having concluded that Title IX fails to overcome the presumption against extraterritoriality, Part IV argues that Congress should not explicitly amend Title IX to create extraterritorial jurisdiction because of: (1) problems with meaningful execution and (2) negative foreign policy ramifications. Instead, Part V recommends more viable and targeted alternatives to applying Title IX extraterritorially, including: harnessing the power of the U.S. State Department to maneuver through foreign law enforcement and medical systems; amending Title IX to require limited responsive measures to allegations of sexual violence abroad; empowering students to make informed decisions by passing a disclosure law and amending the Clery Act to increase transparency regarding sexual violence during study abroad; and instituting more robust, mandatory pre-departure orientations to increase awareness about, prevention of, and response to sexual violence.

Although the administrative legal developments of the past several years ignited a firestorm of commentary about Title IX and sexual

¹⁵ For purposes of this Note, the terms "extraterritorial application" and "extraterritoriality" are used interchangeably, with both meaning the subject matter jurisdiction of a United States court to adjudicate conduct committed outside of the United States. The presumption against extraterritoriality is a doctrine that counsels against applying U.S. statutory law abroad unless its extraterritorial application is clear in the statute. *See infra* Part III.

violence,¹⁶ no scholarship has been published addressing whether Title IX applies extraterritorially to American university students raped or sexually assaulted while studying abroad. This Note fills this gap in the existing literature.

I. BACKGROUND: TITLE IX AND SEXUAL VIOLENCE

President Richard Nixon signed the Education Amendments Act of 1972 into law on June 23, 1972.¹⁷ “[A]ctivists seeking primarily to challenge the admissions quotas and sex discrimination in faculty hires” spearheaded Title IX, a “practically unnoticed” part of this omnibus legislation.¹⁸ The relevant portion of Title IX states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹⁹ It is valuable to discuss the evolution of administrative and judicial interpretation of Title IX to contextualize the current Title IX landscape, especially because the text does not explicitly mention sexual violence. Accordingly, this Part first describes the evolution of Title IX interpretation from its passage in 1972 until the present. Second, it presents an overview of the U.S. Supreme Court’s extraterritoriality jurisprudence to frame this Note’s argument against Title IX’s application to students raped while studying abroad.

A. *The Evolution of Title IX Interpretation*

Nothing in the plain text of the statute, legislative history, or first seven years of its existence suggests that Title IX covers claims of sexual

¹⁶ Most editorials either applaud or criticize OCR’s recent sexual harassment guidance and increasingly frequent investigations, and analyze their impact on campus sexual violence. *See, e.g.*, Elizabeth Barthelet et al., *Rethink Harvard’s Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> [https://perma.cc/XP95-KYV4]; Peter Berkowitz, *College Rape Accusations and the Presumption of Male Guilt*, WALL ST. J. (Aug. 20, 2011), <http://online.wsj.com/news/articles/SB10001424053111903596904576516232905230642> [https://perma.cc/SE6Z-F4PU]; Gary Pavela, *In Sexual-Misconduct Cases, Hear the Facts*, CHRON. OF HIGHER EDUC. (Sept. 15 2014), <https://chronicle.com/article/In-Sexual-Misconduct-Cases/148783> [https://perma.cc/R7KZ-KZAF]. Other articles normatively argue for changes to reduce sexual violence and increase reporting. *See, e.g.*, Nancy Chi Cantalupo, “Decriminalizing” *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481 (2012); Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205 (2011).

¹⁷ Erin E. Buzuvis, *Introduction: The Fortieth Anniversary of Title IX*, 35 W. NEW ENG. L. REV. 319, 319 (2013).

¹⁸ *Id.* at 319 & n.3.

¹⁹ Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 (2012).

violence at colleges and universities.²⁰ Nonetheless, Catharine MacKinnon published *Sexual Harassment of Working Women: A Case for Sexual Harassment*²¹ in 1979, which scholars credit for blazing a new trail for Title IX interpretation.²² In 1981—just two years after MacKinnon’s watershed publication—OCR²³ issued a memorandum publishing its first venture into sexual harassment law.²⁴ This memorandum defined “sexual harassment”

²⁰ Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 51 (2013).

²¹ CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE FOR SEXUAL HARASSMENT* (1979). In her book, MacKinnon argues that sexual harassment is per se discriminatory in nature because it reinforces the social inequality of women to men. *See id.* at 116–18, 174. MacKinnon distinguishes between two types of sexual harassment: (1) *quid pro quo*, meaning harassment “in which sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity,” and (2) hostile work environment, which “arises when sexual harassment is a persistent *condition of work*.” *Id.* at 32. MacKinnon made this argument in the context of Title VII, but OCR and, later, the U.S. Supreme Court applied the underlying assertion that sexual harassment is a form of sex discrimination to Title IX as well. *See, e.g.*, U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, *SEXUAL HARASSMENT: IT’S NOT ACADEMIC 2* (1988) [hereinafter 1988 PAMPHLET] (identifying sexual harassment as “a violation of Title IX of the 1972 Education Amendments in that it constitutes differential treatment on the basis of sex”); *SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES*, 62 Fed. Reg. 12034, 12038–39 (1997) [hereinafter 1997 GUIDANCE] (identifying “*quid pro quo*” and “hostile environment” as the two types of sexual harassment that violate Title IX); *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992) (expanding Title IX’s private right of action to permit suits for money damages in teacher-on-student harassment actions). Although some scholars still reject MacKinnon’s argument, for example, Michael S. Greve, *Sexual Harassment: Telling the Other Victims’ Story*, 23 N. KY. L. REV. 523, 540 n.45 (1996), the law is now well settled that sexual harassment constitutes discrimination. *See, e.g.*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) (holding that a claim of hostile environment sexual harassment is a form of sex discrimination actionable under Title VII).

²² *See, e.g.*, Henrick, *supra* note 20, at 51.

²³ OCR “enforces several Federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education.” *About OCR*, U.S. DEP’T OF EDUC. (Oct. 15, 2015), <http://www2.ed.gov/about/offices/list/ocr/aboutocr.html> [<https://perma.cc/9ZCD-6QGA>]. Specifically, OCR enforces Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments Act of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Title II of the Americans with Disabilities Act of 1990, and the Boy Scouts of America Equal Access Act. *Id.* OCR’s jurisdiction is thus quite expansive:

These civil rights laws enforced by OCR extend to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums that receive U.S. Department of Education funds. Areas covered may include, but are not limited to: admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing, and employment.

Id.

²⁴ 1988 PAMPHLET, *supra* note 21, at 2 (citing OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981) [hereinafter Califa Memorandum]). Previously, OCR focused Title IX enforcement primarily on

as “verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of the recipient [of federal funding], that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under title IX.”²⁵ Consistent with this memorandum, OCR subsequently published two versions of its “Sexual Harassment: It’s Not Academic” pamphlet (Pamphlet) that also did not extend Title IX to student-on-student sexual harassment claims.²⁶ Title IX policy drastically changed in 1997, however, when OCR published its Revised Pamphlet and Sexual Harassment Guidance.²⁷ In particular, the 1997 Pamphlet and 1997 Guidance explicitly recognized student-on-student sexual harassment as sex discrimination prohibited under Title IX.²⁸

OCR has jurisdiction over all colleges and universities that accept federal financial assistance.²⁹ Nationally, all colleges and universities

ensuring that males and females had equal athletic opportunities and scholarships. See Katie Jo Baumgardner, Note, *Resisting Rulemaking: Challenging the Montana Settlement’s Title IX Sexual Harassment Blueprint*, 89 NOTRE DAME L. REV. 1813, 1814 (2013).

²⁵ *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1015 (5th Cir. 1996) (emphasis in original) (quoting Califa Memorandum, *supra* note 24); see also *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 663 (1999) (Kennedy, J., dissenting) (“For the first 25 years after the passage of Title IX—until 1997—the DOE’s regulations drew the liability line, at its most expansive, to encompass only those to whom the school delegated its official functions.”).

²⁶ *Henrick*, *supra* note 20, at 56–57 (first citing 1988 PAMPHLET, *supra* note 21, at 2; and then citing U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT’S NOT ACADEMIC 2 (1995)). OCR has required schools to publish procedures for handling sexual harassment claims that conform to this pamphlet. *Id.* at 55 n.27 (citing Vatterott College, OCR Complaint No. 07-10-2034 (Aug. 26, 2010)).

²⁷ *Id.* at 57; see 1997 GUIDANCE, *supra* note 21; U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT’S NOT ACADEMIC 10 (1997) [hereinafter 1997 PAMPHLET]. The Guidance was issued via notice-and-comment rulemaking. See 1997 GUIDANCE, *supra* note 21, at 12035. The notice-and-comment process begins when an agency publishes an “Advance Notice of Proposed Rulemaking” in the *Federal Register*. OFFICE OF THE FED. REG., A GUIDE TO THE RULEMAKING PROCESS, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [<https://perma.cc/E66C-JGXX>]. This “Advanced Notice is a formal invitation [to the public] to participate in shaping the proposed rule.” *Id.* Interested individuals and groups “may respond to the Advance Notice by submitting comments aimed at developing and improving the draft proposal or by recommending against issuing a rule. . . . The proposed rule and the public comments received on it form the basis of the final rule.” *Id.* OCR included a summary of the public comments and a discussion of those issues in the Guidance. See 1997 GUIDANCE, *supra* note 21, at 12035–38.

²⁸ 1997 GUIDANCE, *supra* note 21, at 12039 (explaining that “a school will be liable under Title IX if its students sexually harass other students if (i) a hostile environment exists in the school’s programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action”).

²⁹ U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, HOW TO FILE A DISCRIMINATION COMPLAINT WITH THE OFFICE FOR CIVIL RIGHTS (2010), <http://www2.ed.gov/about/offices/list/ocr/docs/howto.pdf> [<https://perma.cc/XDT2-LMJY>]. OCR enforces “federal civil rights laws that prohibit discrimination . . . in programs or activities that receive federal financial assistance from the Department of Education (ED),” which includes “all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state

accept federal financial assistance except three.³⁰ OCR's regulation is therefore impactful and wide-reaching. Notably, this "jurisdiction does not extend to individual students" at schools accepting federal dollars.³¹ As such, OCR cannot award money damages to complainants or punish accused students; sanctions remain the responsibility of colleges and universities.³² Students, however, can pursue damages through federal civil litigation.³³

Nonetheless, OCR possesses the primary responsibility for Title IX enforcement. OCR enforces Title IX proactively by conducting compliance reviews of schools where civil rights violations appear pervasive or systemic,³⁴ and reactively by investigating individual complaints alleging Title IX violations.³⁵ When enforcing Title IX, OCR seeks voluntary compliance from recipient schools.³⁶ If recipient schools do not voluntarily comply and implement corrective measures, OCR is empowered to

vocational rehabilitation agencies, libraries and museums that receive federal financial assistance from ED." *Id.*

³⁰ Only Hillsdale College (Michigan), Grove City College (Pennsylvania), and Patrick Henry College (Virginia) elect to be independent of federal funding, presumably to maintain religious and/or political independence. Baumgardner, *supra* note 24, at 1814 n.3.

³¹ Henrick, *supra* note 20, at 55.

³² *Id.*

³³ "Title IX does not explicitly provide a private remedy; therefore, courts have provided an implied right of action for monetary damages." *Mattingly v. Univ. of Louisville*, No. 3:05-CV-393-H, 2006 WL 2178032, at *2 (W.D. Ky. July 28, 2006) (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280, 284 (1998)). Further, Title IX only covers "education program[s] or activit[ies] receiving Federal financial assistance," which limits accountability under that theory to educational institutions (rather than individuals). 20 U.S.C. § 1681 (2012). See *infra* Part III for an extended discussion of Title IX remedies in federal court. Plaintiffs have also attempted to recover damages under negligence and breach of contract theories, but that is beyond the scope of this Note. See, e.g., *Mattingly*, 2006 WL 2178032, at *5–6 (holding that sovereign immunity bars the plaintiff's negligence and breach of contract claims against her state-run university).

³⁴ See U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, CASE PROCESSING MANUAL 25 (2015), <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> [<https://perma.cc/VJ6L-DBTG>]. "The compliance review regulations afford OCR broad discretion to determine the substantive issues for investigation and the number and frequency of the investigations. To address issues of strategic significance in civil rights areas facing educational institutions, OCR will identify, plan and implement a docket of compliance reviews." *Id.*

³⁵ The purpose of filing a complaint is to trigger an investigation into whether the school's Title IX policies and procedures are adequate and whether the school took "prompt and effective" action in that specific case. See 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 iii (2001), <http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/L6W9-7YA8>] [hereinafter 2001 GUIDANCE]. OCR investigates complaints according to its Case Processing Manual. CASE PROCESSING MANUAL, *supra* note 34, at 2.

³⁶ RUSSELLYN ALI, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 16 (2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/3BUQ-GHRZ>] [hereinafter APRIL 2011 LETTER].

“initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation.”³⁷ Yet, OCR has never acted on the threat of discontinuing funding.³⁸

In 2001, OCR issued the Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001 Guidance)³⁹ in response to two Supreme Court decisions that discussed sexual harassment in schools: *Gebser v. Lago Vista Independent School District*⁴⁰ and *Davis v. Monroe County Board of Education*.⁴¹ In 1998, the Supreme Court held in *Gebser* that a school can be liable for money damages under Title IX where a teacher sexually harasses a student and “an official [with] authority to address the alleged discrimination and to institute corrective measures . . . has actual knowledge of discrimination . . . and fails adequately to respond.”⁴² The school official’s response “must amount to deliberate indifference to discrimination.”⁴³ Additionally, the Court explicitly noted that “sexual harassment can constitute discrimination on the basis of sex under Title IX,”⁴⁴ which judicially recognized OCR’s long-held definition of sexual harassment as a form of sex discrimination.

The following year, in *Davis*, the Supreme Court held that a school may also be liable for monetary damages under Title IX for student-on-student sexual harassment in a school program or activity where the actual

³⁷ *Id.*

³⁸ Henrick, *supra* note 20, at 55. The potentially more compelling threat is having the school’s name bandied about on OCR’s infamous list of schools undergoing investigation. See Nick Anderson, *55 Colleges Under Title IX Probe for Handling of Sexual Violence and Harassment Claims*, WASH. POST (May 1, 2014), http://www.washingtonpost.com/local/education/federal-government-releases-list-of-55-colleges-universities-under-title-ix-investigations-over-handling-of-sexual-violence/2014/05/01/e0a74810-d13b-11e3-937f-d3026234b51c_story.html [https://perma.cc/ZQQ9-3G4C] (listing the 55 colleges and universities that as of May 1, 2014 were under investigation for Title IX violations). “When the Education Department first unveiled the list of schools under investigation on May 1, 2014, it was reviewing 55 colleges. By October, the tally grew to 85, and reached 94 in early January.” Tyler Kingkade, *106 Colleges Are Under Federal Investigation for Sexual Assault Cases*, HUFFINGTON POST (Apr. 6, 2015, 3:03 PM), http://www.huffingtonpost.com/2015/04/06/colleges-federal-investigation-title-ix-106_n_7011422.html [https://perma.cc/39YS-R3XT]. On April 1, 2015, the Department had 113 open sexual assault cases at 106 institutions. *Id.* Perhaps the power of negative publicity possesses an inverse relationship with the number of schools on the list; thus, when the number of schools under OCR investigation rises to triple digits, the threat of investigation might lose deterrent effect.

³⁹ 2001 GUIDANCE, *supra* note 35, at i.

⁴⁰ 524 U.S. 274 (1998).

⁴¹ 526 U.S. 629 (1999).

⁴² *Gebser*, 524 U.S. at 290; see also 2001 GUIDANCE, *supra* note 35, at i–ii. Thus, *Gebser* created a clear standard for teacher-on-student sexual harassment liability requiring (1) sexual harassment, (2) actual knowledge, and (3) deliberate indifference. *Id.*

⁴³ *Gebser*, 524 U.S. at 290.

⁴⁴ *Id.* at 283 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998)).

notice and deliberate indifference requirements (as expressed in *Gebser*) are satisfied.⁴⁵ Notably, the Court extended *Gebser* to student-on-student sexual harassment, which OCR had recently recognized for the first time in its 1997 Guidance.

Importantly, *Gebser* and *Davis* clarified the distinction between OCR's administrative enforcement and private litigation for money damages.⁴⁶ Specifically, the Court emphasized that the deliberate indifference liability standard utilized in *Gebser* and *Davis* applies exclusively to private actions for money damages.⁴⁷ In contrast, the Court recognized OCR's administrative power to “promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate,” even in circumstances that would not give rise to a claim for money damages.⁴⁸ As such, OCR maintains a lower threshold for proving that a school violated Title IX:

(1) the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's education program, *i.e.* creates a hostile environment; and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual [harassment], eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.⁴⁹

OCR considers the conduct in question from both an objective (“reasonable person in the alleged victim's position”) and subjective perspective when determining whether a hostile environment has been created.⁵⁰ The 2001 Guidance “remain[s] in full force” today.⁵¹

After a decade under the 2001 Guidance, OCR promulgated an unprecedented expansion of Title IX's purview by recognizing sexual violence as an extreme form of sexual harassment.⁵² On April 4, 2011, OCR released a “Dear Colleague” Letter (2011 Letter) specifically addressing sexual violence in educational programs and activities.⁵³ The 2011 Letter is a form of agency guidance that purportedly “supplements the 2001 Guidance by providing additional guidance and practical examples

⁴⁵ *Davis*, 526 U.S. at 633.

⁴⁶ 2001 GUIDANCE, *supra* note 35, at ii (first citing *Gebser*, 524 U.S. at 283, 292; and then citing *Davis*, 526 U.S. at 639).

⁴⁷ *Id.*

⁴⁸ *Id.* (quoting *Gebser*, 524 U.S. at 292).

⁴⁹ 2014 Q&A, *supra* note 4, at 1.

⁵⁰ *Id.*

⁵¹ *Id.* at ii.

⁵² See APRIL 2011 LETTER, *supra* note 36.

⁵³ *Id.*

regarding the Title IX requirements as they relate to sexual violence.”⁵⁴ Although its content⁵⁵ and legitimacy⁵⁶ remain controversial, consensus exists among academics and commentators that this 2011 Letter “is one of the most significant developments in the current body of law governing claims of sexual violence on college campuses.”⁵⁷ Principally, the 2011 Letter is the first OCR guidance focusing predominantly on student-on-student sexual violence in the school setting.⁵⁸ As outlined in Title IX’s implementing regulations and described in the 2001 Guidance, schools receiving federal financial assistance must: (1) make a notification that “it does not discriminate on the basis of sex in the educational program or activity which it operates”⁵⁹; (2) “designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under” Title IX⁶⁰; and (3) “adopt and publish grievance procedures providing for prompt and equitable resolution of [student and employee] sex discrimination complaints.”⁶¹ The 2011 Letter applies these procedural

⁵⁴ *Id.* at 2.

⁵⁵ *Compare* Press Release, Nat’l Ctr. for Higher Educ. Risk Mgmt., NCHERM Reaction to the April 4th, 2011 OCR Dear Colleague Title IX Guidance on Sexual Assault, <http://www.ncherm.org/documents/NCHERMReactiontotheDearColleagueLetter4.6.11.pdf> [<https://perma.cc/B7G7-VALW>] (“applaud[ing] the release . . . of [the] Dear Colleague letter”), with Letter from Will Creeley, Director of Legal and Public Advocacy, Foundation for Individual Rights in Education, to Russlyn Ali, Assistant Secretary for Civil Rights, U.S. Dep’t of Educ., Office for Civil Rights (May 5, 2011), <http://thefire.org/article/13142.html> [<https://perma.cc/29B8-Z9KJ>] (arguing that, among other things, the 2011 Letter eviscerates the due process rights of accused students).

⁵⁶ Unlike the 1997 and 2001 Guidance, OCR did not use notice-and-comment rulemaking when promulgating the 2011 “Dear Colleague” Letter. Henrick, *supra* note 20, at 60. Federal agencies such as OCR must utilize notice-and-comment rulemaking to establish new substantive rules. *Id.* at 60 n.52 (citing *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997)). Cornell Law Professor Cynthia Bowman argues that OCR’s 2011 Letter “is not an administrative regulation, has not been subjected to notice-and-comment, and thus does not have the status of law.” *Id.* at 60 n.51 (quoting Michael Linhorst, *Rights Advocates Spar over Policy on Sexual Assault*, CORNELL DAILY SUN, Apr. 4, 2012, at 1, 5). OCR justifies its refusal to use notice-and-comment rulemaking by asserting that “the Letter ‘does not add requirements to applicable law.’” *Id.* at 60 (quoting APRIL 2011 LETTER, *supra* note 36, at 1 n.1). From the author’s experience as an OCR intern, regardless of whether the 2011 Letter is technically legally binding, OCR proceeds in practice as though it is legally binding.

⁵⁷ *Id.* at 50.

⁵⁸ *Id.*

⁵⁹ 34 C.F.R. § 106.9(a) (2016). This requirement includes prominently publishing the nondiscrimination statement in both electronic and print form and distributing to “all students, parents of elementary and secondary school students, employees, applicants for admission and employment, and other relevant persons.” APRIL 2011 LETTER, *supra* note 36, at 6.

⁶⁰ § 106.8(a). Institutions must “notify all students and employees of the name or title and contact information” of this Title IX Coordinator. APRIL 2011 LETTER, *supra* note 36, at 7.

⁶¹ § 106.8(b). Although OCR acknowledges that procedures will vary by school, it highlights elements that determine whether the procedures provide “prompt and equitable resolution,” including: “[n]otice to students, parents . . . and employees of the grievance procedures”; “[a]pplication of the procedures to complaints alleging [sexual] harassment”; “[a]dequate, reliable, and impartial

requirements to allegations of sexual violence and instructs schools how to do so.⁶²

Though OCR claims the 2011 Letter “does not add requirements to applicable law,” the content suggests that it imposes new legal obligations on schools.⁶³ For example, “the Supreme Court and OCR have previously held that schools have no obligation to investigate or respond to harassment that takes place off-campus and outside of an educational program or activity.”⁶⁴ In contrast, the 2011 Letter states that “[i]f a student files a complaint with the school, *regardless of where the conduct occurred*, the school must process the complaint in accordance with its established procedures” and “[t]he school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.”⁶⁵ Although not explicitly addressed, this language further raises the question of whether Title IX has extraterritorial application for American university students raped or sexually assaulted while studying abroad.

Most recently, in April 2014, OCR published Questions and Answers on Title IX and Sexual Violence (2014 Q&A), which purported to “further clarify the legal requirements and guidance articulated in the [2011 Letter] and the *2001 Guidance*.”⁶⁶ The 2014 Q&A is especially important to this analysis because it portends OCR’s approach to allegations of sexual

investigation of complaints”; “[d]esignated and reasonably prompt time frames for the major stages of the complaint process”; “[n]otice to parties of the outcome of the complaint”; and, as appropriate, “[a]n assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others.” APRIL 2011 LETTER, *supra* note 36, at 9.

⁶² See APRIL 2011 LETTER, *supra* note 36, at 6–9.

⁶³ Henrick, *supra* note 20, at 60 (quoting APRIL 2011 LETTER, *supra* note 36, at 1 n.1).

⁶⁴ *Id.* at 60–61. Henrick cites to several sources to support his assertion. See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 645 (1999) (“[B]ecause the harassment must occur ‘under the operations of’ a funding recipient . . . the harassment must take place in a context subject to the school district’s control . . .” (internal citations omitted)); *Lam v. Curators of the Univ. of Mo.*, 122 F.3d 654, 657 (8th Cir. 1997) (holding that a student cannot bring a claim under Title IX for an assault that was not “connected to an ‘education program or activity’”); Letter from Dawn R. Mathias, Team Leader, U.S. Dep’t of Educ., Office for Civil Rights, to Dr. John D. Wiley, Chancellor, University of Wisconsin-Madison (Aug. 6, 2009) (on file with the *Northwestern University Law Review*); Letter from Sandra W. Stephens, Team Leader, U.S. Dep’t of Educ., Office for Civil Rights, to Dr. David Schmidly, President, Oklahoma State University, at 2 (June 10, 2004) (on file with the *Northwestern University Law Review*) (“A University does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient.”).

⁶⁵ Henrick, *supra* note 20, at 61 (emphasis added) (quoting APRIL 2011 LETTER, *supra* note 36, at 4).

⁶⁶ 2014 Q&A, *supra* note 4, at ii. Like the 2011 Letter, the 2014 Q&A did not undergo notice-and-comment rulemaking. See *supra* note 56 for further explanation of the legal ramifications of failing to use notice-and-comment rulemaking.

violence during study abroad.⁶⁷ This Note discusses the 2014 Q&A in more depth in Part II.

B. *Extraterritoriality*

For over two hundred years, U.S. courts have faced the issue of whether federal law applies extraterritorially—that is, whether national law extends outside of national borders.⁶⁸ Because this Note addresses whether Title IX applies to students raped or sexually assaulted while studying abroad, this Section provides an overview of extraterritoriality. Part III then links these discussions of sexual violence and extraterritoriality by analyzing the limited cases where courts or OCR have addressed whether Title IX applies extraterritorially.

Courts utilize well-established canons of statutory construction to resolve questions of extraterritoriality.⁶⁹ In particular, courts look to the statutory language for manifestations of congressional intent for extraterritorial application.⁷⁰ Where the statutory language is ambiguous as to extraterritoriality, courts apply the presumption against extraterritoriality, which has become the dominant canon of construction.⁷¹ This canon interprets the absence of express extraterritoriality as an indication that Congress only intended the statute to apply domestically.⁷²

1. *Origins and Historical Approaches to Extraterritoriality.*—The Supreme Court’s 1909 decision in *American Banana Co. v. United Fruit Co.*⁷³ initiated the line of cases establishing modern jurisprudence on the presumption against extraterritoriality.⁷⁴ In *American Banana*—an antitrust dispute between two American banana companies running Central American plantations—the Court sought to determine whether the presumption against extraterritoriality applies to the Sherman Antitrust Act.⁷⁵ Here, Justice Holmes advocated applying the presumption “whenever the relevant conduct occurred outside U.S. borders.”⁷⁶ The

⁶⁷ See *infra* Section I.A.

⁶⁸ S. Nathan Williams, Note, *The Sometimes “Craven Watchdog”: The Disparate Criminal-Civil Application of the Presumption Against Extraterritoriality*, 63 DUKE L.J. 1381, 1382 (2014).

⁶⁹ *Id.* at 1381.

⁷⁰ *Id.* at 1383.

⁷¹ *Id.* at 1381, 1383.

⁷² *Id.* at 1383.

⁷³ 213 U.S. 347 (1909).

⁷⁴ Williams, *supra* note 68, at 1390.

⁷⁵ 213 U.S. at 354–57.

⁷⁶ Williams, *supra* note 68, at 1392; see *Am. Banana*, 213 U.S. at 356 (“[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”).

Second Circuit later formalized this approach as the conduct test.⁷⁷ In *American Banana*, United Fruit allegedly conspired with Costa Rican officials and soldiers to seize American Banana's plantation and cargo and halt their operations.⁷⁸ Thus, the Court noted the "improbability of the United States attempting to make acts done in Panama or Costa Rica [unlawful]" and held that it is "entirely plain that what the defendant did . . . is not within the scope of the statute."⁷⁹

In 1968, in *Schoenbaum v. Firstbrook*,⁸⁰ the Second Circuit replaced *American Banana*'s "conduct test" with what it later formalized as the "effects test."⁸¹ This test suspends the presumption against extraterritoriality when "the wrongful conduct had a substantial effect in the United States or upon United States citizens"—regardless of the location of wrongful conduct.⁸² In *Schoenbaum*, the court addressed whether § 10(b) of the Securities Exchange Act of 1934 (SEA) "applied to misrepresentations by a Canadian company whose foreign conduct had the ultimate effects of reducing its share value on a domestic exchange and, in turn, harming [U.S.] investors."⁸³ Focusing on the effect of the defendant company's misrepresentations, the court applied the SEA extraterritorially "to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities."⁸⁴

In 1983, the Second Circuit combined the conduct test and effects test into the "conduct-and-effects test,"⁸⁵ which "provided for extraterritorial application of domestic law when *either* the conduct or effect was territorial."⁸⁶ This drastically liberalized extraterritoriality because it permitted courts "to find sufficient territoriality to avoid invocation of the presumption [where] the territorial connection would not have been sufficient under either the conduct test or the effects test independently."⁸⁷

⁷⁷ *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 257 (2010). The conduct test is "whether the wrongful conduct occurred in the United States." *Id.* (quoting *SEC v. Berger*, 322 F.3d 187, 192–93 (2d Cir. 2003)).

⁷⁸ 213 U.S. at 354–55.

⁷⁹ *Id.* at 357.

⁸⁰ 405 F.2d 200 (2d Cir. 1968), *abrogated by Morrison*, 561 U.S. 247.

⁸¹ *Morrison*, 561 U.S. at 257.

⁸² *Id.* (quoting *Berger*, 322 F.3d at 192–93).

⁸³ Williams, *supra* note 68, at 1392 n.75 (citing *Schoenbaum*, 405 F.2d at 208–09).

⁸⁴ *Schoenbaum*, 405 F.2d at 206 (emphasis added).

⁸⁵ Williams, *supra* note 68, at 1393 (citing *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983), *abrogated by Morrison*, 561 U.S. 247)).

⁸⁶ *Id.*

⁸⁷ *Id.*

2. *The Modern Approach to Extraterritoriality.*—The Supreme Court’s 2010 decision in *Morrison v. National Australian Bank*⁸⁸ rejected the effects test and the conduct-and-effects test, abrogated *Schoenbaum* and its progeny, and reaffirmed the presumption against extraterritorial application.⁸⁹ In *Morrison*, Australian investors brought a class action against an Australian banking corporation, alleging that it deceived investors about the value of an American subsidiary’s assets in violation of the SEA.⁹⁰ The Supreme Court granted certiorari to address whether antifraud provisions of U.S. securities laws have extraterritorial application where plaintiffs purchased stock on foreign securities exchanges.⁹¹ The Supreme Court held 8–0⁹² that whenever a party seeks territorial application of federal legislation, the presumption that federal law is not meant to have extraterritorial jurisdiction is applicable in *all* cases.⁹³ The Supreme Court affirmed dismissal, holding that the SEA does not have extraterritorial application to overseas transactions.⁹⁴ Although *Morrison* is not a Title IX case, the Supreme Court framed its holding in broad terms that apply to *all* federal legislation.

The Court introduced a two-part extraterritoriality test: (1) whether Congress intended the SEA to apply extraterritorially and (2) whether the specific facts could be characterized as extraterritorial.⁹⁵ When tackling the first part, the Supreme Court reaffirmed the presumption against extraterritoriality by reiterating the “longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”⁹⁶ This presumption recognizes that Congress usually legislates regarding domestic matters,⁹⁷ but does not limit Congress’s power to legislate regarding foreign matters.⁹⁸ This “presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law.”⁹⁹ Justice Scalia,

⁸⁸ 561 U.S. 247.

⁸⁹ See Williams, *supra* note 68, at 1396.

⁹⁰ *Morrison*, 561 U.S. at 252.

⁹¹ *Id.* at 253.

⁹² Justice Sotomayor took no part in the consideration or decision of the case. *Id.* at 249.

⁹³ *Id.* at 261 (“Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.”).

⁹⁴ *Id.* at 273.

⁹⁵ Williams, *supra* note 68, at 1397 (citing *Morrison*, 561 U.S. at 266–67, 267 n.9).

⁹⁶ *Morrison*, 561 U.S. at 255 (quoting *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (internal quotation marks omitted)).

⁹⁷ *Id.* (citing *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)).

⁹⁸ *Id.* (citing *Blackmer v. United States*, 284 U.S. 421, 437 (1932)).

⁹⁹ *Id.* (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173–74 (1993)).

writing for the Court, summarized the presumption as follows: “[w]hen a statute gives no clear indication of extraterritorial application, it has none.”¹⁰⁰

In *Morrison*, the Supreme Court began its analysis with the statutory language,¹⁰¹ concluding that, “[o]n its face, § 10(b) [of the SEA] contains nothing to suggest that it applies abroad.”¹⁰² When analyzing the plain meaning, the Court remarked that “[t]he general reference to foreign commerce in the definition of ‘interstate commerce’ does not defeat the presumption against extraterritoriality.”¹⁰³ Having found no affirmative indication that Congress intended the SEA to apply extraterritorially, the Court applied the presumption.¹⁰⁴

Moving to the second part, the Court analyzed whether the specific facts could be characterized as domestic, and thus not extraterritorial, occurrences. If so, the presumption against extraterritoriality is moot. To answer this question, the Court identified the statutory “focus” of § 10(b), which is “purchases and sales of securities in the United States.”¹⁰⁵ The purchases in *Morrison* occurred outside the United States, meaning the relevant conduct cannot be considered domestic occurrences.¹⁰⁶ Unable to moot the presumption, the Court held that the SEA does not have extraterritorial application.¹⁰⁷

In 2013, the Supreme Court went one step further in *Kiobel v. Royal Dutch Petroleum*¹⁰⁸ in reaffirming the presumption against extraterritoriality and restricting the circumstances in which plaintiffs can overcome it. In *Kiobel*, Nigerian nationals residing in the United States

¹⁰⁰ *Id.*

¹⁰¹ See 15 U.S.C. § 78j(b) (2012).

It shall be unlawful for any person . . . by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility or of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange . . . any manipulative or deceptive device.

Id.

¹⁰² *Morrison*, 561 U.S. at 262.

¹⁰³ *Id.* at 263. See § 78c(a)(17) (2012) for the definition of interstate commerce.

¹⁰⁴ *Morrison*, 561 U.S. at 261.

¹⁰⁵ *Id.* at 266; see also *id.* at 267–78 (“The primacy of the domestic exchange is suggested by the very prologue of the Exchange Act . . . The Act’s registration requirements apply only to securities listed on national securities exchanges. With regard to securities *not* registered on domestic exchanges, the exclusive focus on *domestic* purchases and sales is strongly confirmed by § 30(a) and (b) . . .” (internal citation omitted)).

¹⁰⁶ *Id.* at 273.

¹⁰⁷ *Id.* at 265.

¹⁰⁸ 133 S. Ct. 1659 (2013).

filed suit under the Alien Tort Statute (ATS),¹⁰⁹ alleging that foreign corporations aided and abetted the Nigerian government in violating the law of nations in Nigeria.¹¹⁰ The Supreme Court granted certiorari to address “whether and under what circumstances courts may recognize a cause of action under the ATS, for violations of the law of nations occurring within the territory of a sovereign other than the United States.”¹¹¹

The Court applied *Morrison*’s two-part test. After determining that nothing in “the text, history, [or] purposes of the ATS” rebuts the presumption against extraterritorial application, the Court applied the presumption.¹¹² Next, the Court inquired as to whether the specific facts of the case could rebut this presumption.¹¹³ Chief Justice Roberts, writing for the majority, concluded that “all the relevant conduct”—the alleged human rights violations—occurred outside the United States.¹¹⁴ The Court ultimately held that “the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute [or specific facts of the case] rebuts that presumption.”¹¹⁵

II. EXTRATERRITORIALITY AND TITLE IX: ADMINISTRATIVE INTERPRETATION

Because the Supreme Court has not ruled on the extraterritoriality of Title IX, this Note turns to OCR and lower federal courts for their interpretation of schools’ Title IX obligations. This Part analyzes: (1) OCR’s guidance; (2) OCR’s sexual violence “blueprint”; and (3) relevant cases to determine if and when OCR applies Title IX extraterritorially, and whether this is the appropriate interpretation.

A. OCR’s Guidance

OCR has not formally addressed in any of its guidance whether Title IX has extraterritorial application. However, the 2014 Q&A intimates OCR’s approach to allegations of sexual violence during study abroad. According to the 2014 Q&A, “[u]nder Title IX, a school *must* process *all* complaints of sexual violence, *regardless of where the conduct occurred*,

¹⁰⁹ “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (2012).

¹¹⁰ *Kiobel*, 133 S. Ct. at 1662.

¹¹¹ *Id.*

¹¹² *Id.* at 1665.

¹¹³ *Id.* at 1669.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

to determine whether the conduct occurred in the context of an education program or activity.”¹¹⁶ OCR would be hard-pressed to describe a school’s Title IX obligations in broader and more compulsory terms than “must process all complaints of sexual violence.” Moreover, the language “regardless of where the conduct occurred” suggests that OCR would require schools to investigate claims of international sexual violence. OCR also provides an illustrative list of covered “[o]ff-campus education programs and activities,” which includes “activities that take place at houses of fraternities or sororities recognized by the school; school-sponsored field trips, including athletic team travel; and events for school clubs that occur off-campus (*e.g.*, a debate team trip to another school or to a weekend competition).”¹¹⁷ Notably, none of these examples explicitly involves an international education program or activity, but it is not unheard of for classes, athletic teams, or student organizations to travel abroad.¹¹⁸

Additionally, the Q&A provides information regarding how a school should “respond to sexual violence when the alleged perpetrator is not affiliated with the school.”¹¹⁹ Although this hypothetical does not resolve the jurisdictional issue, it is particularly relevant because, as one study found, “[e]ighty-nine percent of the unwanted sexual experiences while abroad were reported to be perpetrated by nonstudent, local residents.”¹²⁰

OCR states that “[t]he appropriate response will differ *depending on the level of control* the school has over the alleged perpetrator.”¹²¹ In the case of “an athlete or band member from a visiting school sexually assault[ing] a student at the home school,” OCR acknowledges that the “school’s ability to take direct action against a particular perpetrator may be limited.”¹²² Nonetheless, OCR demands that “the school *must* still take steps to provide appropriate remedies for the complainant and, where

¹¹⁶ 2014 Q&A, *supra* note 4, at 29 (emphasis added).

¹¹⁷ *Id.*

¹¹⁸ *See, e.g., infra* Section II.C and accompanying text (describing high school teachers organizing trips to Europe); *Notre Dame Band Travel*, BAND OF THE FIGHTING IRISH, <http://www.ndband.com/travel.cfm> [perma.cc/ZTQ3-F9MB] (describing the band’s recent trips to Australia, Europe, South America, and Asia); *International Team Projects*, NORTHWESTERN PRITZKER SCHOOL OF LAW, <http://www.law.northwestern.edu/academics/curricular-offerings/international/itp/> [perma.cc/7HYU-MP72] (describing a comparative law course that includes international field research).

¹¹⁹ 2014 Q&A, *supra* note 4, at 9.

¹²⁰ Kimble, *supra* note 5, at 428.

¹²¹ 2014 Q&A, *supra* note 4, at 9 (emphasis added).

¹²² *Id.*

appropriate, the broader school population.”¹²³ For example, OCR recommends the school conduct an investigation, report the alleged sexual violence to the visiting school, and “encourage the visiting school to take appropriate action to prevent further sexual violence.”¹²⁴ Additionally, OCR directs schools to “notify the student of any right to file a complaint with the alleged perpetrator’s school or local law enforcement” and “provid[e] support services for the complainant.”¹²⁵ If the alleged perpetrator was a foreign student or non-student, presumably, the complainant’s school would have even less control than the school in OCR’s hypothetical. Assuming this decreased level of control, under Title IX, what would OCR require of an American university when receiving a complaint of sexual violence that occurred abroad?

B. *The Montana Agreement “Blueprint”*

The 2013 Montana Agreement, OCR’s “blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault,” fails to conclusively answer this question.¹²⁶ Under the Montana Agreement, “[t]he University has an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds when students experience the continuing effects of off-campus sexual harassment in the educational setting.”¹²⁷ The Montana Agreement does not define “off-campus,” thus permitting eager OCR attorneys to claim jurisdiction over allegations of international sexual violence.

OCR goes one step further by asserting jurisdiction over allegations of off-campus sexual violence *that did not occur during an education program or activity*.¹²⁸ OCR demands that “[e]ven if the misconduct did not occur in the context of an education program or activity, a school must consider the effects of the off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity.”¹²⁹ Thus, if a student raped a fellow student while

¹²³ *Id.* (emphasis added).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Letter from Anurima Bhargava, Chief, U.S. Dep’t of Justice, Civil Rights Division & Gary Jackson, Regional Director, U.S. Dep’t of Educ., Office for Civil Rights, to Royce Engstrom, President, Univ. of Mont. & Lucy France, University Counsel, Univ. of Mont. 1 (May 9, 2013), <http://www.justice.gov/crt/about/edu/documents/montanaletter.pdf> [<https://perma.cc/5LQA-WLNG>] [hereinafter Montana Letter].

¹²⁷ *Id.* at 18.

¹²⁸ 2014 Q&A, *supra* note 4, at 29.

¹²⁹ *Id.*

backpacking through Europe over the summer, OCR’s guidance suggests it would hold the students’ school accountable under Title IX if the victim experiences “continuing effects” of the rape by, for example, seeing her alleged rapist on campus. This guidance completely defies Title IX’s plain text, which limits jurisdiction to “person[s] in the United States” participating in “education programs and activities.”¹³⁰

Moreover, OCR’s focus on the continuing effects of off-campus sexual harassment is reminiscent of the effects test that the Supreme Court explicitly rejected three years prior to the Montana Agreement.¹³¹ In *Morrison*, the Court clearly repudiated the effects test and conduct-and-effects test and gave no indication that federal agencies were excepted from the new rule reestablishing the conduct test.¹³² Thus, OCR’s focus on the *effects* of sexual harassment rather than the location of the conduct may not survive the more restrictive *Morrison* and *Kiobel* standards for overcoming the presumption. OCR’s use of the effects test and inappropriately broad assertion of jurisdiction under Title IX remains unchallenged because OCR has not rendered a finding holding a school accountable for sexual harassment occurring extraterritorially.

C. OCR Cases

The author’s request under the Freedom of Information Act (FOIA)¹³³ for all complaints filed with OCR since 2011 alleging sexual violence occurring outside the United States yielded two cases, both investigated by OCR’s Boston office.¹³⁴ Although OCR dismissed both complaints prior to making a finding, the facts suggest under what circumstances OCR would be willing to assert extraterritorial jurisdiction.

In the first case, a student filed a complaint against Archbishop Williams High School (AWHS) in Braintree, Massachusetts.¹³⁵ AWHS

¹³⁰ See *infra* Part III for further discussion of how the “continuing effects” legal theory is incompatible with the text of Title IX.

¹³¹ *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 261 (2010).

¹³² *Id.*

¹³³ 5 U.S.C. § 552 (2012).

¹³⁴ See Letter from FOIA Manager, U.S. Dep’t of Educ., to author (Jan. 21, 2015) (on file with the *Northwestern University Law Review*) (referencing FOIA Request No. 15-00706-F). The 2015 inquiry was cabined from March 2011 to 2015 because prior to release of its April 2011 Letter, OCR did not explicitly recognize sexual violence as actionable under Title IX. OCR has twelve regional offices, and eleven of those offices did not have any responsive documents. Only the Region I Office in Boston, Massachusetts had documents meeting the requested criteria.

¹³⁵ Archbishop Williams High School, OCR Complaint No. 01-14-1264 (Aug. 18, 2014) [hereinafter AWHS Complaint 1] (on file with the *Northwestern University Law Review*). According to FOIA privacy provisions, names of the complainant, alleged rapist, teacher chaperones, program location, etc. have been redacted.

organizes annual ten-day European exchange programs and sightseeing trips, and AWHs teachers accompany students abroad.¹³⁶ The complaint alleged that while abroad, teachers provided the complainant and other minors with alcohol, and the complainant was subsequently raped.¹³⁷ Further, the complaint asserted that after reporting the rape to AWHs, it failed to respond “promptly and effectively” and retaliated against the complainant,¹³⁸ including revoking her academic scholarship and sending threatening emails, which necessitated hospital treatment for mental distress.¹³⁹ Two months after opening the investigation, OCR dismissed the complaint after discovering it lacked “authority to assert jurisdiction” under Title IX because AWHs does not receive federal financial assistance and is not a public entity.¹⁴⁰

In the second case, at least four female students¹⁴¹ filed an OCR complaint against the University of Connecticut (UConn)¹⁴² and five filed a concurrent lawsuit alleging discriminatory acts in violation of Title IX.¹⁴³ Only one student, Carolyn Luby, alleged international sexual violence.¹⁴⁴ In 2012, Luby studied abroad in Granada, Spain on a UConn-managed program.¹⁴⁵ The Resident Director (RD), a UConn employee, accompanied

¹³⁶ ARCHBISHOP WILLIAMS HIGH SCHOOL, FOREIGN EXCHANGE PROGRAM (2013) [hereinafter AWHs Brochure] (on file with the *Northwestern University Law Review*); Jessica Bartlett, *Archbishop Williams High School to Offer Exchange Program for Students*, BOSTON.COM (Feb. 7, 2012, 2:52 PM), http://archive.boston.com/yourtown/news/braintree/2012/02/archbishop_williams_high_school_4.html [<https://perma.cc/MS39-XDYS>].

¹³⁷ Archbishop Williams High School, OCR Complaint No. 01-14-1287 (Sept. 19, 2014) [hereinafter AWHs Complaint 2] (on file with the *Northwestern University Law Review*).

¹³⁸ Letter from Allen Kropp, Attorney, U.S. Dep’t of Educ., Office for Civil Rights, to Dennis M. Duggan Jr., President, Archbishop Williams High Sch. (Dec. 17, 2014) (on file with the *Northwestern University Law Review*).

¹³⁹ AWHs Complaint 1, *supra* note 135, at 3; AWHs Complaint 2, *supra* note 137, at 2.

¹⁴⁰ Letter from Allen Kropp, Attorney, U.S. Dep’t of Educ., Office for Civil Rights, to Dennis M. Duggan Jr., President, Archbishop Williams High Sch. (Feb. 11, 2015) (on file with the *Northwestern University Law Review*).

¹⁴¹ The complainants’ names are redacted in all OCR documents, but the identities of four of the complainants are publicly available in a settlement released during the parallel federal court case. Settlement Agreement and Release between Carolyn Luby et al. and University of Connecticut 3 (July 8, 2014), <http://today.uconn.edu/wp-content/uploads/2014/07/LitigationSettlementRelease.pdf> [<https://perma.cc/VR6X-WK7Z>] [hereinafter Settlement Agreement].

¹⁴² Univ. of Conn., OCR Complaint No. 01-14-2005, at 4 [hereinafter UConn. Complaint] (on file with the *Northwestern University Law Review*).

¹⁴³ See Second Amended Complaint at 1, *Luby v. Univ. of Conn.*, No. 3:13-cv-1605, 2014 WL 1669474 (D. Conn. Apr. 25, 2014). Although OCR redacted personal details in the complaint to comply with FOIA, all details are publicly available in the court complaint.

¹⁴⁴ *Id.* at 4.

¹⁴⁵ *Id.*

the students to Granada.¹⁴⁶ The complaint alleged that two Spanish men sexually assaulted Luby on the street and in an elevator by lifting her dress and groping her privates.¹⁴⁷ Furthermore, Luby asserted that other female UConn students reported sexual violence to the RD, but she failed to take action.¹⁴⁸

After publishing an open letter to UConn's President criticizing UConn's failure to "meaningfully respond" to allegations of sexual violence, Luby alleged that she received threats of violence—including threats of rape and assault—and felt unsafe on campus.¹⁴⁹ Although Luby reported this to the campus police, the Title IX Coordinator, and Director of Community Standards, she contended that they failed to take remedial action.¹⁵⁰ Therefore, Luby filed complaints with OCR and in federal court alleging Title IX violations.¹⁵¹ The parties eventually settled, and the agreement required immediate withdrawal of the OCR complaint.¹⁵² Thus, after fourteen months of investigation, OCR dismissed the complaint against UConn.¹⁵³

Although OCR did not render a finding against AWHs or UConn, OCR's willingness to assert jurisdiction over allegations of sexual violence during international school programs suggests an expansive interpretation of Title IX's extraterritoriality. Both the AWHs student and Luby experienced what OCR would likely consider "continuing effects of off-campus sexual violence."¹⁵⁴ Specifically, they were subjected to retaliation in response to their reports of international sexual violence and experienced further trauma from this retaliation.¹⁵⁵ These cases suggest that OCR interprets "off-campus" to mean off-campus grounds *anywhere in the world*, thus empowering OCR to assert jurisdiction.

These cases also reinforce the correlation between the school's level of control and level of responsibility under Title IX. Both AWHs and

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 4–5.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 6–7.

¹⁵⁰ *Id.* at 11–13.

¹⁵¹ Complaint, Luby et al. v. Univ. of Conn., No 3:13-cv-1605, 2013 WL 5978030 (D. Conn. Nov. 1, 2013) [hereinafter Luby Complaint]; UConn. Complaint, *supra* note 142, at 4.

¹⁵² Settlement Agreement, *supra* note 141, at 3.

¹⁵³ Letter from Anthony Cruthird, Attorney, U.S. Dep't of Educ., Office for Civil Rights, to Susan Herbst, President, Univ. of Conn. 1 (Feb. 17, 2015) (on file with the *Northwestern University Law Review*).

¹⁵⁴ 2014 Q&A, *supra* note 4, at 29.

¹⁵⁵ Luby Complaint, *supra* note 151, at 5–9; AWHs Complaint 1, *supra* note 135; AWHs Complaint 2, *supra* note 137.

UConn organized and operated the programs and sent employees abroad with students.¹⁵⁶ It seems that OCR holds the schools to a higher level of responsibility under Title IX because of this increased control. A close reading of OCR's guidance, however, reveals that it is the level of control over the *alleged perpetrator* that influences responsibility.¹⁵⁷ In the case against AWHs, their level of control of the perpetrator remains unknown because his identity has been redacted. Luby, however, alleged that non-student locals sexually assaulted her and other female students in Granada, making UConn's level of control over the perpetrators virtually nonexistent. OCR nonetheless asserted jurisdiction, suggesting that, contrary to its own guidance, OCR considers multiple variables when determining a school's level of control, including whether the American university managed the program. Ultimately, OCR seems to interpret Title IX as having extraterritorial application, especially when the victim suffers "continuing effects" and American schools possess what OCR deems to be a high level of control.

III. EXTRATERRITORIALITY AND TITLE IX: JUDICIAL INTERPRETATION

In addition to administrative enforcement, Title IX empowers sexual violence survivors to seek private enforcement.¹⁵⁸ Although numerous students, like Luby, have filed Title IX lawsuits against universities alleging sex discrimination, most settle, leaving few opportunities for federal courts to decide whether Title IX applies extraterritorially where American university students allege sex discrimination during study abroad.¹⁵⁹ Notably, the *King* and *Phillips* courts rendered their decisions in the pre-*Morrison* and *Kiobel* landscape, which was significantly more hospitable to broad readings of extraterritoriality and accepting of the more lenient conduct-and-effects test. This Section applies *Morrison*'s two-step test¹⁶⁰ and the reasoning in *King* and *Phillips*¹⁶¹ to determine whether Title

¹⁵⁶ Luby Complaint, *supra* note 151, at 3; AWHs Brochure, *supra* note 136.

¹⁵⁷ See 2014 Q&A, *supra* note 4, at 9.

¹⁵⁸ See *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992).

¹⁵⁹ See *Phillips v. St. George's Univ.*, No. 07-CV-1555 (NGG), 2007 WL 3407728 (E.D.N.Y. Nov. 15, 2007); *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783 (E.D. Mich. 2002).

¹⁶⁰ See *Williams*, *supra* note 68, at 1397.

¹⁶¹ This Note focuses on *King* and *Phillips* rather than *Mattingly*, another Title IX case, because the *Mattingly* court did not analyze the language of Title IX like the other two district courts. See *Mattingly v. Univ. of Louisville*, No. 3:05-CV-393-H, 2006 WL 2178032 (W.D. Ky. July 28, 2006). Rather than focusing on whether the student-victim qualified as a "person[] in the United States" and whether the study abroad program constituted "any education program or activity," 20 U.S.C. § 1681(a) (2012), the court focused on the identity of the alleged rapist and whether the university had control over him. See *id.* at *4 ("The alleged harasser in this case, Pedro, was not a student at U of L or an employee. He was a resident of Portugal whose only connection to the school was that he ate dinner at a restaurant near U

IX applies extraterritorially under the current jurisprudence. Because so few federal courts have ruled on Title IX's extraterritoriality, the following Sections also draw analogies from courts' extraterritoriality jurisprudence in the context of other federal statutes.

A. Morrison Test Step One: Ascertaining Congressional Intent

When applying the two-step test to determine whether a statute overcomes the presumption against extraterritoriality, a court must first inquire as to whether Congress intended Title IX to apply extraterritorially. If the statutory language is clear, this inquiry should begin and end with the text.¹⁶² Title IX states that, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹⁶³ The interpretation of two key phrases proves essential to determining whether Congress intended Title IX to have extraterritorial application: Courts first define who qualifies as a “person in the United States,” and second, what constitutes “any education program or activity.”¹⁶⁴ This Part analyzes both key phrases in turn.

1. Defining “Persons in the United States.”—According to its own text, Title IX applies only to “person[s] in the United States.”¹⁶⁵ Federal courts that have addressed extraterritorial application of Title IX reached different conclusions regarding the definition of “person[s] in the United States.”¹⁶⁶ In *King*, sixteen American university students¹⁶⁷ participated in Eastern Michigan University’s (EMU) five-week study abroad program in South Africa.¹⁶⁸ Two EMU professors administered the program, and one accompanied the students to South Africa.¹⁶⁹ Six female EMU students—the plaintiffs in *King*—left the program early, citing unaddressed and

of L’s dormitory. He was not subject to the university’s rules or disciplinary procedures; and therefore, unlike the university’s own students, Pedro could not be disciplined by U of L in any way. Based on the Supreme Court’s guidance in *Davis*, this Court concludes that in these circumstances U of L cannot be liable for monetary damages under Title IX.” (internal citations omitted).

¹⁶² See *supra* notes 96–100 and accompanying text.

¹⁶³ Title IX of the Education Amendments Act of 1972, Pub. L. No. 92-318, § 901(a), 86 Stat. 235, 373 (codified at 20 U.S.C. § 1681(a) (2012)); see also 34 C.F.R. § 106.31 (2016).

¹⁶⁴ See *King*, 221 F. Supp. 2d at 788–91; *Phillips*, 2007 WL 3407728, at *4–5.

¹⁶⁵ See 20 U.S.C. § 1681(a).

¹⁶⁶ Compare *King*, 221 F. Supp. 2d at 791 (finding that “person[s]” includes American students studying abroad), with *Phillips*, 2007 WL 3407728, at *4 (finding that “person[s]” includes only persons physically located in the United States).

¹⁶⁷ Three of these students attended an American university other than EMU. *King*, 221 F. Supp. 2d at 784.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

escalating sexual harassment from three male EMU students, culminating in “a violent physical altercation.”¹⁷⁰ Although the alleged sexual harassment occurred in South Africa, the court concluded that the plaintiff-students were “persons in the United States.”¹⁷¹ The court reasoned that, “[a]s continuing students at EMU, Plaintiffs were ‘persons in the United States’ when a denial of equal access to EMU’s resources . . . happened.”¹⁷² Furthermore, the court emphasized that, “the programs were always under the control of [EMU] in every respect, rather than under the control of any foreign educational facility.”¹⁷³ As such, the court rejected “persons in the United States” as a jurisdictional limitation on extraterritoriality in this case.¹⁷⁴

Five years later, another federal court addressed the extraterritoriality issue and interpreted “person in the United States” more narrowly.¹⁷⁵ In *Phillips*, plaintiff Erika Phillips, a U.S. citizen,¹⁷⁶ directly enrolled at St. George’s University (SGU) Veterinary School in Grenada, West Indies, where an SGU employee subjected her to repeated sexual assault.¹⁷⁷ The court found that Title IX’s plain language suggests that it “applies only to persons located in the United States.”¹⁷⁸ Even if the language “in the United States” is not dispositive, the court concluded “there is no contrary language—much less ‘clear evidence’—in the statute suggesting Congress intended Title IX to apply extraterritorially,”¹⁷⁹ so it fails to overcome the presumption.

In *Phillips*, the plaintiff attended SGU, a foreign-based university, whereas in *King*, the students attended a program sponsored and run by their American university. Moreover, a foreign individual allegedly sexually harassed Phillips, whereas EMU students allegedly sexually harassed fellow American students. These distinctions account for the

¹⁷⁰ *Id.* at 784–85.

¹⁷¹ *Id.* at 791.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Phillips v. St. George’s Univ.*, No. 07-CV-1555 (NGG), 2007 WL 3407728, at *4 (E.D.N.Y. Nov. 15, 2007).

¹⁷⁶ Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion to Dismiss at 5, *Phillips*, 2007 WL 3407728.

¹⁷⁷ *Phillips*, 2007 WL 3407728, at *1.

¹⁷⁸ *Id.* at *4.

¹⁷⁹ *Id.* In contrast, the Logan Act applies to “[a]ny citizen . . . wherever he may be.” *Aramco*, 499 U.S. 244, 258 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1071, 1077 (codified as amended at 42 U.S.C. §§ 2000e(f), 12111(4) (2012)).

divergent holdings.¹⁸⁰ Nonetheless, even if Phillips had attended an international campus of an American-based university, the court's strict textualist reading of Title IX's plain language would likely generate the same conclusion. This narrower reading of the text in *Phillips* better aligns with *Morrison* and *Kiobel*. Conversely, it is unlikely that the court's rationale in *King* would withstand the more restrictive and demanding requirements, outlined in *Morrison* and reaffirmed in *Kiobel*, to prove Congress intended to rebut the presumption.

2. *Defining "Under any education program or activity."*—Title IX precludes sex discrimination “under any education program or activity receiving Federal financial assistance.”¹⁸¹ As such, courts can derive congressional intent regarding Title IX's extraterritoriality by interpreting what constitutes “any education program or activity.” The *King* court interpreted the word “any” as congressional intent that Title IX “sweeps within its scope every single university education program,” including study abroad.¹⁸² Additionally, the court noted that study abroad programs are “operations of the University,” making them education programs under Title IX.¹⁸³ In *Phillips*, the court did not interpret the scope of “any education program or activity” because it already concluded that the plain meaning of “person in the United States” in Title IX “affirmatively indicates Congress's intent that the statute not apply extraterritorially.”¹⁸⁴

Although not Title IX cases, other federal court decisions indicate that Title IX's “any education program or activity” phrase is merely boilerplate language that does not determine jurisdictional reach. The Supreme Court decided *Aramco* prior to *Morrison* and *Kiobel*, but the Court's interpretation of whether Title VII applies extraterritorially is particularly relevant to Title IX analysis because of the parallels between the antidiscrimination statutes. In *Aramco*, a U.S. citizen working abroad brought a Title VII suit against his U.S. employer, alleging discrimination based on race, religion, and national origin.¹⁸⁵ The Court addressed whether Title VII applies extraterritorially to discriminatory conduct that allegedly occurred in Saudi Arabia.¹⁸⁶

¹⁸⁰ *Phillips*, 2007 WL 3407728, at *5 (explaining that “this case is clearly distinguishable” from *King*).

¹⁸¹ 20 U.S.C. § 1681(a) (2012) (emphasis added).

¹⁸² *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783, 788 (E.D. Mich. 2002).

¹⁸³ *Id.*

¹⁸⁴ *Phillips*, 2007 WL 3407728, at *4.

¹⁸⁵ 499 U.S. 244, 258 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1071, 1077 (codified as amended at 42 U.S.C. §§ 2000e(f), 12111(4) (2012)).

¹⁸⁶ *Id.*

The Court began its analysis with the language of Title VII to ascertain congressional intent. At the time of this case, Title VII provided that “[a]n employer is subject to Title VII if it has employed 15 or more employees . . . and is ‘engaged in an industry affecting commerce.’”¹⁸⁷ The Court noted that Title VII broadly defines “an industry affecting commerce” to include “any activity, business, or industry in commerce.”¹⁸⁸ The Court then noted that Title VII defined “commerce” as “trade, traffic, commerce, transportation, transmission, or communication among the several States; *or between a State and any place outside thereof.*”¹⁸⁹ The Court concluded that words like “any” combined with references to places outside the United States constitute boilerplate language similar to the broad jurisdictional language Congress has used in other statutes.¹⁹⁰ The Court found that congressional intent of extraterritorial application requires more than boilerplate language.¹⁹¹

Kiobel, which represents the Court’s current extraterritoriality jurisprudence, is also valuable to determine Title IX’s jurisdictional reach. At issue in *Kiobel* was “whether and under what circumstances” ATS applies extraterritorially to “violations of the law of nations” occurring outside the United States.¹⁹² In *Kiobel*, the Court emphasized that “the fact that the text reaches ‘any civil action’ [does not] suggest application to torts committed abroad; it is well established that generic terms like ‘any’ or ‘every’ do not rebut the presumption against extraterritoriality.”¹⁹³ The Court’s analysis in *Aramco*, *Morrison*, and *Kiobel* suggests the *King* court erred in concluding that Title IX’s coverage of “any education program or activity” means it “sweeps within its scope every single university education program.”¹⁹⁴ Title VII’s “any activity, business, or industry in commerce”¹⁹⁵ language, the SEA’s “any security registered on a national securities exchange”¹⁹⁶ language, and the ATS’s “any civil action”¹⁹⁷

¹⁸⁷ *Id.* at 249 (quoting 42 U.S.C. § 2000e(b) (1988)).

¹⁸⁸ *Id.* (quoting 42 U.S.C. § 2000e(h) (1988)).

¹⁸⁹ *Id.* (emphasis added) (quoting 42 U.S.C. § 2000e(g) (1988)).

¹⁹⁰ *Id.* at 250–52.

¹⁹¹ *Id.* at 252–53 (“Title VII’s more limited, boilerplate ‘commerce’ language does not support such an expansive construction of congressional intent.”).

¹⁹² *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1662 (2013).

¹⁹³ *Id.* at 1665.

¹⁹⁴ *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783, 788 (E.D. Mich. 2002) (emphasis added).

¹⁹⁵ 42 U.S.C. § 2000e(h) (2012) (emphasis added).

¹⁹⁶ 15 U.S.C. § 78j(b) (2012) (emphasis added).

¹⁹⁷ 28 U.S.C. § 1350 (2012) (emphasis added).

language parallel Title IX's "any education program or activity"¹⁹⁸ language. The Court unequivocally rejects this broad, boilerplate language as clear evidence that Congress intended extraterritorial application.¹⁹⁹ Going further, the Court has "repeatedly held that even statutes that contain broad language . . . [that] expressly refer to 'foreign commerce' do not apply abroad."²⁰⁰ Title IX does not make any similarly explicit references to education programs or activities occurring in "foreign" locations or otherwise convey a clear intent for extraterritorial application.

The Supreme Court recognizes that where Congress intends for its statutes to have extraterritorial application, it knows how to clearly codify this intent.²⁰¹ For example, after multiple courts of appeals held that the Age Discrimination Employment Act of 1967 (ADEA) did not have extraterritorial application,²⁰² Congress expressly amended the ADEA in 1984 to create limited extraterritorial application.²⁰³ When doing so, Congress addressed potential conflicts with foreign laws and procedures.²⁰⁴ Similarly, following the Supreme Court's *Aramco* decision in 1991, Congress amended Title VII and the Americans with Disabilities Act (ADA) to expressly provide for extraterritorial application in some circumstances.²⁰⁵ In contrast, Congress never amended Title IX to apply extraterritorially under any circumstances, nor does Title IX address potential conflicts with foreign laws and procedures. This inaction with regard to amending Title IX juxtaposed with Congress's decisive

¹⁹⁸ 20 U.S.C. § 1681(a) (2012) (emphasis added).

¹⁹⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013).

²⁰⁰ *Aramco*, 499 U.S. 244, 251 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1071, 1077 (codified as amended at 42 U.S.C. §§ 2000e(f), 12111(4) (2012)).

²⁰¹ *Id.* at 258; *cf. Asplundh Tree Expert Co. v. NLRB*, 365 F.3d 168, 180 (3d Cir. 2004) ("Congress knows how to provide for extraterritorial application of its enactments when it intends them to operate outside of the United States.").

²⁰² *See, e.g., Cleary v. U.S. Lines, Inc.*, 728 F.2d 607, 610 (3d Cir. 1984), *superseded by statute*, Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 98 Stat. 1767, 1792 (codified at 29 U.S.C. §§ 623, 630 (2012)), *as recognized in Denty v. SmithKline Beecham Corp.*, 109 F.3d 147, 149–50 (3d Cir. 1997).

²⁰³ Older Americans Act Amendments of 1984, § 802; *see also Denty*, 109 F.3d at 149–50 (recognizing Congress's explicit amendment of the ADEA to rebut the presumption against extraterritoriality).

²⁰⁴ 29 U.S.C. § 623(f) ("It shall not be unlawful for an employer, employment agency, or labor organization . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where . . . such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located.").

²⁰⁵ Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077 (codified as amended at 42 U.S.C. §§ 2000e(f), 2000e-1, 12111(4), 12112 (2012)); *Torrico v. Int'l Bus. Machs. Corp.*, 213 F. Supp. 2d 390, 399 (S.D.N.Y. 2002).

amendments of other antidiscrimination statutes reveals congressional intent that Title IX only apply within U.S. territory.

B. Morrison Test Step Two: Whether Specific Facts Overcome the Presumption Against Extraterritoriality

After concluding that Congress did not intend Title IX to apply extraterritorially, courts should proceed to the second step of the *Morrison* test and inquire whether the facts of the specific case rebut the presumption against extraterritoriality.²⁰⁶ In *Morrison*, the Supreme Court acknowledged that “it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States.”²⁰⁷ Thus, to moot the presumption, “relevant conduct” or relevant aspects of the dispute must be domestic occurrences.²⁰⁸ To isolate relevant conduct, the Court identified the “focus” of the statute in question.²⁰⁹ For example, § 10(b) of the SEA focuses on purchases and sales of securities, so those transactions constituted relevant conduct in *Morrison*.²¹⁰ Although the deception in *Morrison* originated domestically, the actual transactions occurred abroad, meaning the relevant conduct could not be considered domestic and thus could not rebut the presumption.²¹¹

In *Kiobel*, the focus of the relevant statute, ATS, is law of nations violations.²¹² The petitioners alleged that respondents violated the law of nations by enlisting the Nigerian government to beat, rape, and kill villagers in Nigeria.²¹³ “On these facts,” the Court concluded that, “all the relevant conduct took place outside the United States.”²¹⁴ The Court thus refused to rebut the presumption against extraterritorial application and held that ATS does not apply extraterritorially.²¹⁵

Title IX focuses on acts of sex discrimination, so sexual violence, like that alleged in *Kiobel*, constitutes relevant conduct. As such, factual scenarios where the sexual violence occurred abroad would likely fail the

²⁰⁶ See, e.g., *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 266–70 (2010).

²⁰⁷ *Id.* at 266. The Court also noted that the presumption against extraterritoriality “would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.” *Id.*

²⁰⁸ See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (citing *Morrison*, 561 U.S. at 266–73).

²⁰⁹ *Morrison*, 561 U.S. at 266.

²¹⁰ See *id.* at 266–67.

²¹¹ See *id.* at 273.

²¹² *Kiobel*, 133 S. Ct. at 1663.

²¹³ *Id.* at 1662–63.

²¹⁴ *Id.* at 1669.

²¹⁵ *Id.*

second part of the *Morrison* test and thus fail to rebut the presumption. Ultimately, the precedent that the *King* court established prior to *Morrison* and *Kiobel* is unlikely to survive the Supreme Court's more restrictive inquiry. It is improbable that courts, applying *Morrison* and *Kiobel*, would hold that Congress intended Title IX to apply extraterritorially or that the specific facts effectively rebut the presumption against such application.

IV. WHETHER CONGRESS SHOULD EXPLICITLY EXPAND TITLE IX TO INCLUDE EXTRATERRITORIAL JURISDICTION

Courts “are confronted with an issue of statutory construction rather than policy” when determining whether a statute applies extraterritorially.²¹⁶ Nonetheless, important policy considerations may compel amendments codifying extraterritoriality. The legislature, as the policymaking branch, is the appropriate venue for these policy discussions. If, like Title VII, the ADA, and the ADEA, Congress believes that policy considerations warrant extraterritorial application of Title IX, it must expressly amend the statute. Congress, however, should not amend Title IX to apply extraterritorially because of: (1) problems with meaningful execution; (2) negative foreign policy ramifications; and (3) more viable and targeted alternatives. This Part discusses the first and second reasons, and Part V proposes more viable and targeted alternatives.

A. Problems with Meaningful Execution

The greatest problem with applying Title IX extraterritorially is the inability of American schools to effectively investigate allegations of sexual violence abroad. Institutions already suffer from an inability—or unwillingness—to properly investigate allegations of sexual violence on campus,²¹⁷ and the international context would exacerbate those issues. Sexual assault researcher David Lisak bluntly noted that “[u]niversities are stuck handling very, very serious criminal conduct and there is an absurdity there. We don’t ask universities to handle homicide cases.”²¹⁸ Lisak leveled

²¹⁶ *Asplundh Tree Expert Co. v. NLRB*, 365 F.3d 168, 176 (3d Cir. 2004).

²¹⁷ “More than 40% of schools in the national sample have not conducted a single [sexual violence] investigation in the past five years . . . with some institutions reporting as many as seven times more incidents of sexual violence than they have investigated.” U.S. S. SUBCOMM. ON FINANCIAL & CONTRACTING OVERSIGHT, SEXUAL VIOLENCE ON CAMPUS 1 (2014), <http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf> [<https://perma.cc/DA8B-J33Z>]. Additionally, “[l]aw enforcement officials at 30% of institutions in the national sample receive no training on how to respond to reports of sexual violence.” *Id.* at 2.

²¹⁸ Katie Van Syckle, *The Tiny Police Department in Southern Oregon That Plans to End Campus Rape*, N.Y. MAG.: THE CUT (Nov. 9, 2014, 8:00 PM), <http://nymag.com/thecut/2014/11/can-this-police-department-help-end-campus-rape.html> [<https://perma.cc/NR2M-YPH5>].

this criticism about schools investigating *domestic* reports of sexual violence; imagine if the scope of schools' investigatory responsibilities expanded *internationally*. Some schools, such as Harvard, recently created pseudo-law enforcement investigation units.²¹⁹ Even if these investigation units prove effective and desirable, it would be impossible to hold a small liberal arts college with significantly fewer resources to the same standard.

In addition to schools' inability to investigate allegations of sexual violence, schools may not know when they have a duty to investigate. It is tempting to assume that universal applicability of Title IX would create predictability because schools would know they must investigate all complaints of sexual violence—even those occurring abroad. But, even if Congress explicitly rebutted the presumption against extraterritoriality, in many scenarios it could remain unclear which school or schools have Title IX obligations. In cases of domestic campus sexual violence, 85–90% of complainants know their attacker, suggesting a high likelihood that they attend the same school.²²⁰ The international context greatly complicates the many permutations of complainant–perpetrator relationships, which also complicates accountability.

For example, many students enroll in study abroad programs hosted by other American universities where participating students hail from myriad schools. If a student from School A rapes a student from School B while on a study abroad program hosted by School C at a foreign university in a foreign country, to whom should Student B report the sexual violence? Her school? The perpetrator's school (if known)? The study abroad program host school? The foreign university? And even if Student B does report to one of these four institutions, it remains unclear whether that institution has a duty under Title IX to investigate. This confusion could lead to wasteful, duplicative investigations by multiple universities attempting to avoid OCR investigations for Title IX violations, or, even

²¹⁹ Harvard established the Office for Sexual and Gender-Based Dispute Resolution (ODR) “to investigate sexual misconduct complaints against students, ranging from persistent or pervasive harassment in a lab environment, for instance, to a rape.” *Q&A with Harvard's Title IX Officer*, HARV. GAZETTE (July 2, 2014), <http://news.harvard.edu/gazette/story/2014/07/qa-with-harvards-title-ix-officer/> [<https://perma.cc/TZ4J-MHKF>]. The ODR serves all of Harvard, and “will be staffed by expert investigators” who will “interview witnesses, review the evidence, make findings of fact using the ‘preponderance of the evidence’ standard, determine whether there has been a violation of the policy, and turn their reports over to the individual School disciplinary panels.” *Id.* “In determining discipline, the School must accept as final and non-reviewable the ODR’s findings of fact and its conclusion as to whether a violation of the University Policy has occurred.” OFFICE FOR SEXUAL AND GENDER-BASED DISPUTE RESOLUTION (ODR), HARV. UNIV., <http://odr.harvard.edu> [<https://perma.cc/Q5ZN-WXJQ>].

²²⁰ See *Most Victims Know Their Attacker*, NAT'L INST. OF JUSTICE (Oct. 1, 2008), <http://www.nij.gov/topics/crime/rape-sexual-violence/campus/Pages/know-attacker.aspx> [<https://perma.cc/8ZSV-3LLR>].

worse, under-investigation because institutions deny accountability. Amending Title IX to explicitly overcome the presumption against extraterritorial application may not create more predictability because it is unclear who is responsible under Title IX, and it is unrealistic to anticipate and regulate every factual scenario.

Not only would applying Title IX extraterritorially according to OCR's current interpretation require American universities to be international sleuths investigating allegations, it would also demand they become international bodyguards for victims. The 2014 Q&A requires schools to "take steps to protect a student who alleges off-campus sexual violence from further harassment by the alleged perpetrator or his or her friends, and a school may have to take steps to protect other students from possible assault by the alleged perpetrator."²²¹ OCR demands that schools implement these unspecified protective steps "in the same way it would had the sexual violence occurred on campus."²²² It already seems unrealistic to demand that schools "protect other students from possible assault" domestically, let alone protect students studying abroad in a foreign country. The international context highlights the absurdity of applying Title IX extraterritorially.

Furthermore, explicitly amending Title IX to apply extraterritorially could foster structural changes in the market for study abroad programs, which may negatively impact victims of sexual violence. In particular, because these programs are lucrative, American universities are unlikely to stop offering them to avoid Title IX liability.²²³ Instead, schools might contract with foreign universities to independently run the programs. American universities could become "middle men" responsible for advertising these programs to their students (for a finder's fee) and recognizing the credits, but allow students to contract directly with foreign-run study abroad programs. Arguably, these programs would not be "operations of the [American] University" or "under the[ir] control," allowing them to evade Title IX responsibility.²²⁴ These foreign-run programs could be significantly less safe, unaccountable, and insufficiently supported. If a student is raped or sexually assaulted while studying abroad on a foreign-run program with scant domestic ties, it could exacerbate the student's feelings of isolation, thus further decreasing the likelihood that he or she reports the incident.

²²¹ 2014 Q&A, *supra* note 4, at 30.

²²² *Id.*

²²³ See *infra* notes 247–50 and accompanying text.

²²⁴ See *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783, 788, 791 (E.D. Mich. 2002).

B. Negative Foreign Policy Ramifications

In addition to the domestic effects outlined above, applying Title IX extraterritorially would have global ramifications. Critically, it would likely engender or intensify tension with other countries. As the Supreme Court stated in *Aramco*, the presumption against extraterritoriality “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”²²⁵

OCR’s 2014 Q&A instructs schools to investigate—even when the alleged perpetrator attends a different school—and “encourage[s]” that school “to take appropriate action” as well.²²⁶ Foreign universities, many of which are state-run, could easily interpret this encouragement as an overreaching ultimatum and an insult to their ability to handle allegations of sexual violence within their own countries. As Chief Justice Roberts noted in *Kiobel*, “far from avoiding diplomatic strife,” extraterritorial application of ATS “could have generated it.”²²⁷ In support, he cited *Doe v. Exxon Mobil Corp.*, where Judge Kavanaugh listed recent objections to extraterritorial application of ATS from the United Kingdom, Germany, Canada, Switzerland, South Africa, Indonesia, and Papua New Guinea.²²⁸ Nothing suggests that these or other countries would be more willing to recognize the extraterritorial reach of Title IX and cooperate in investigations. This groundswell of resistance from countries with whom the United States has longstanding, positive relationships suggests that countries generally less hospitable to the United States may react more vehemently, thus potentially threatening tenuous diplomatic relationships.

In the end, applying Title IX extraterritorially would create more problems than it would solve due to: (1) American universities’ inability to effectively investigate alleged sexual assaults in other countries and protect alleged victims and (2) the serious risk of “international discord.”²²⁹

V. BEYOND TITLE IX AND EXTRATERRITORIALITY: RECOMMENDATIONS

Because Title IX does not—and should not—apply extraterritorially, this Part provides alternative recommendations. Section A provides recommendations for responding to sexual violence abroad, and Section B provides recommendations for preventing its occurrence.

²²⁵ 499 U.S. 244, 258 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1071, 1077 (codified as amended at 42 U.S.C. §§ 2000e(f), 12111(4) (2012)).

²²⁶ 2014 Q&A, *supra* note 4, at 9.

²²⁷ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

²²⁸ *Id.*; *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 77–78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part)).

²²⁹ *Aramco*, 499 U.S. at 258.

A. Responding to Sexual Violence Abroad

Instead of applying Title IX extraterritorially and potentially undermining diplomatic relations, maintaining and strengthening relationships with countries where American students study abroad could offer more effective relief for victims of sexual violence. Specifically, the U.S. State Department is much better equipped than American universities to address allegations of sexual violence in other countries. According to the State Department, “U.S. embassies and consulates assist nearly 200,000 Americans each year who are victims of crime, accident or illness, or whose family and friends need to contact them in an emergency.”²³⁰ If an American student is raped or sexually assaulted while studying abroad, the State Department can assist both internationally and domestically.

Internationally, the State Department maintains consular offices at over 260 Foreign Service posts, as well as “consular officers in 46 foreign cities without U.S. embassies or consulates.”²³¹ Americans abroad can contact consular officers twenty-four hours a day, seven days a week for emergency assistance.²³² The overseas consulate officers, agents, and staff at the nearest U.S. Embassy or Consulate can help sexual violence victims navigate local law enforcement and medical systems.²³³ Specifically, their knowledge of local systems, agencies, and resources empowers them to: (1) address emergencies that result from the sexual violence; (2) help victims find proper medical care; (3) explain the local criminal justice system to victims; (4) provide victims with contact information for local English-speaking lawyers; (5) obtain information about victims’ cases; and (6) connect victims to local and U.S.-based resources for sexual violence survivors.²³⁴ Domestically, the Office of Overseas Citizens Services maintains communication with family members in the United States, and provides domestic resources for victims where possible.²³⁵

²³⁰ *Emergencies*, U.S. DEP’T OF STATE, <http://travel.state.gov/content/studentsabroad/en/emergencies.html> [<https://perma.cc/F5AU-SWCR>].

²³¹ *Id.*

²³² *Help for U.S. Citizen Victims of Crime Overseas*, U.S. DEP’T OF STATE, <http://travel.state.gov/content/passports/english/emergencies/victims.html> [<https://perma.cc/E9DL-2J28>].

²³³ *See id.*

²³⁴ *Id.* Unlike domestic police departments and campus police, the author has not encountered reports finding that State Department personnel have inappropriately responded to allegations of sexual violence. Considering this lack of information, it is important to ensure that embassy personnel receive proper training to handle sexual violence allegations, including a victim-centered response that: increases comfort, builds trust, honors confidentiality, avoids “re-victimizing” the victim by blaming him or her for the assault, and takes action at a pace dictated by the victim’s comfort level.

²³⁵ *Id.*

Admittedly, there are limits to the assistance consular officers can provide. In particular, they are not permitted to investigate crimes in lieu of local law enforcement; offer legal advice or represent victims in legal proceedings; act as official translators or interpreters; or pay a victim's legal, medical, or other expenses.²³⁶ Additionally, the State Department emphasizes that it provides assistance to U.S. citizens, which seems to exclude noncitizens attending American universities and studying abroad.²³⁷

Nonetheless, the more significant problem is students' lack of awareness regarding these emergency resources.²³⁸ OCR requires institutions to widely publish grievance procedures for reporting sexual violence and contact information for Title IX Coordinators.²³⁹ In contrast, OCR has not promulgated guidance explaining schools' Title IX obligations—if any—to publish notice of contact information and grievance procedures for reporting sexual violence occurring during study abroad. Regardless, all students should complete pre-departure orientation.²⁴⁰ It is vital for schools to raise awareness pre-departure because victims reeling from sexual violence may temporarily lose the ability to think logically or advocate for themselves. Even if traumatic shock prevents a victim from immediately harnessing the orientation resources, fellow students studying abroad would be empowered to guide the victim to appropriate resources.

Even if consular offices help students navigate local law enforcement systems, critics may deem it unsatisfactory to leave investigation in the

²³⁶ *Id.*

²³⁷ See *Help for U.S. Citizen Victims of Crime Overseas*, *supra* note 232 (explaining that “[t]he State Department is committed to assisting U.S. citizens who become victims of crime while abroad” without any mention of assistance for noncitizens); *What We Do*, U.S. DEP’T OF STATE, <https://careers.state.gov/learn/what-we-do> [<https://perma.cc/E383-3VA7>] (explaining that “[t]he U.S. Department of State provides information and services for U.S. citizens traveling abroad” without any mention of services for noncitizens); *What the Department of State Can and Can’t Do in a Crisis*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/passports/en/emergencies/crisis-support.html> [<https://perma.cc/CHN8-WNL6>] (“During a crisis, our priority is assisting U.S. citizens. You should not expect to bring friends or relatives who are not U.S. citizens on U.S. government chartered or non-commercial transportation.”). Even if the U.S. Embassy cannot provide assistance, non-U.S. citizens are not without recourse; they can still appeal to the embassy of their country of citizenship for assistance with sexual violence. In contrast, “Title IX protects all students at recipient institutions in the United States regardless of national origin, immigration status, or citizenship status.” 2014 Q&A, *supra* note 4, at 7.

²³⁸ For example, the author was unaware that the U.S. State Department provides these resources to women who, like her, were raped while studying abroad. She felt generally ill-equipped to handle the traumatic event.

²³⁹ APRIL 2011 LETTER, *supra* note 36, at 6–9.

²⁴⁰ See *infra* Section I.B for a detailed description of the proposed pre-departure orientation.

(capable or not so capable) hands of local law enforcement in host countries. Host countries devote varying levels of resources to sex crime investigations, and few—if any—countries approach the \$100 billion the United States spends annually on police.²⁴¹ More importantly, host countries have diverse cultural norms and attitudes about relationships and gender power dynamics. This could affect the fervor with which they investigate allegations of sexual violence and whether American students even feel comfortable reporting these crimes to local law enforcement.²⁴² Is it fair for some student-victims to have fewer local avenues of recourse simply because of the country in which they were raped? No. But, this fairness-based framework ignores students' freedom to assume the risks of studying abroad wherever they choose.

The salient issue is whether schools have a duty to ensure their students make *informed* decisions about where to study abroad and the accompanying risks of doing so. Nothing in Title IX's text or OCR's guidance even remotely indicates such a duty. Perhaps schools have a moral obligation to ensure their students make informed decisions, but that is not legally enforceable. Nonetheless, Section B introduces a proposal for legislation that encourages informed decisionmaking.

Although it would be improvident to apply Title IX extraterritorially for the reasons discussed,²⁴³ universities could still implement many of Title IX's responsive measures when receiving reports of sexual violence abroad. Regardless of their level of control over the alleged perpetrator, the victim's school could still provide support services and counseling—even while the victim remains abroad. Additionally, the victim's school could provide information regarding filing a complaint with the alleged perpetrator's school, although this becomes more complicated—if not impossible—if the alleged perpetrator attends a foreign university or is not a student. Moreover, the victim's school could issue new policy statements condemning sexual violence and raising awareness about resources for student victims domestically and abroad. Although the procedure and expectations would differ depending on whether the home school or a third party runs the study abroad program, schools could assist victims in obtaining the equivalent of certain “interim measures” to ensure safety,

²⁴¹ JUSTICE POLICY INST., *RETHINKING THE BLUES: HOW WE POLICE IN THE U.S. AND AT WHAT COST* (2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/rethinkingtheblues_executive_summary.pdf [<https://perma.cc/N2C6-YKBV>].

²⁴² The author, for example, felt uncomfortable reporting her rape to local law enforcement while studying abroad because police officers frequently sexually harassed her, making her feel as though they would not take her complaint seriously.

²⁴³ See *supra* Part IV.

such as moving to a different homestay or apartment or changing classes.²⁴⁴ In an international context, however, it would be unreasonable and unwise to demand—as Title IX does, according to OCR—that the victim’s school investigate the incident.²⁴⁵

If Congress fears that schools will not voluntarily provide this support, Congress could amend Title IX to hold schools accountable for specific, limited components when the “education program or activity”²⁴⁶ during which the sexual violence occurred was outside the United States. If pursued, this amendment should narrow schools’ Title IX obligations, making it more reasonable to implement as well as avoiding the negative foreign relations complications of applying Title IX (as written and interpreted) extraterritorially.

B. Preventing Sexual Violence Abroad

Rather than myopically focusing on remediation, a viable plan addressing sexual violence abroad should include preventative measures. This Section proposes two prevention strategies: first, implementing legislative reforms to increase awareness about the risks of studying abroad in different countries with different program providers, and second, instituting mandatory pre-departure orientations for students who knowingly accept those risks.

Increasing transparency regarding the safety of individual programs would likely decrease sexual violence perpetrated upon students abroad because students could avoid unsafe programs. Congress could pass legislation compelling schools to disclose study abroad program crime rates and costs, as well as special relationships with third-party program providers, because schools have two strong incentives to keep that information confidential. First, even when universities do not directly control study abroad programs, they promote and typically profit from them.²⁴⁷ Schools engage in “tuition arbitrage”²⁴⁸: students studying abroad

²⁴⁴ See 2014 Q&A, *supra* note 4, at 32–33. Although not all measures would be feasible in the international context, interim measures may include: “providing support services to the complainant; changing living arrangements or course schedules, assignments, or tests; and providing increased monitoring, supervision or security at locations or activities where the misconduct occurred.” *Id.*

²⁴⁵ See *id.* at 29 (affirming that schools have an “obligation to investigate” and “must process *all* complaints of sexual violence, regardless of where the conduct occurred” (emphasis added)); see also *supra* Section I.A for a discussion about the difficulty of mandating that American universities conduct international investigations.

²⁴⁶ 20 U.S.C. § 1681(a) (2012).

²⁴⁷ See Rick Karlin, *N.Y. Lawmakers Seek Regs for College Study Abroad Programs*, TIMES UNION (May 6, 2014, 10:21 PM), <http://www.timesunion.com/local/article/N-Y-lawmakers-seek-regs-for-college-study-abroad-5458469.php> [<https://perma.cc/B35L-HLHN>].

pay tuition to their home university, which pays a foreign host school a lower tuition rate and keeps the difference—all while shifting the cost of teaching that student for the semester or year.²⁴⁹ Second, government officials suspect that study abroad program providers—especially for-profit providers—offer cash incentives and other perks to universities for enrolling students in their programs.²⁵⁰

The opportunity to capitalize upon tuition arbitrage and incentive programs raises concerns regarding whether universities prioritize programs that yield the greatest profit over programs with the strongest records of safety, support services, educational value, and positive student experiences. Because study abroad providers' safety ratings are not publicly available, short of an internal whistleblower, universities will not be held accountable for decisions to increase profits at the expense of student safety. Perhaps universities have engaged in cost-benefit analysis and can justify such decisions, but students should be aware of the price universities have assigned to their safety.

These concerns prompted New York state legislators to introduce a bipartisan disclosure bill mandating that “[e]ach college/university located in this state shall disclose any perquisites that it receives from all study abroad programs that its students participate in.”²⁵¹ It aimed to “encourage transparency by informing students about the nature of a particular institution’s relationship with a study abroad program.”²⁵² Additionally, to address tuition arbitrage, the bill required schools to fully disclose all program costs.²⁵³ This bill passed the New York Senate, but for an

²⁴⁸ *Id.* Arbitrage means profiting from price differentials. “Many overseas schools are heavily subsidized by their governments and therefore offer lower tuition prices than those found in the U.S.” *Id.*

²⁴⁹ Rebecca Schuman, *The Study-Abroad Scam*, SLATE (May 29, 2014, 3:25 PM), http://www.slate.com/articles/life/education/2014/05/finding_the_right_study_abroad_program_ratings_and_reviews_for_foreign_college.html [<https://perma.cc/2KW3-G3PS>] (“These days, a number of college study-abroad programs are less about cultural enrichment, and more about enriching the for-profit companies that run them—or, . . . the universities themselves, which often get foreign tuition for a steal, and then pass none of the savings along to students.”).

²⁵⁰ *See id.*

²⁵¹ S01566, 2013–14 Reg. Sess. (N.Y. 2013).

²⁵² Karlin, *supra* note 247.

²⁵³ *See* N.Y. S01566 (“In instances where a student pays the usual costs of attending a particular college/university for a semester, and such college/university in turn pays for such student’s participation in a particular study abroad program, such college/university shall disclose the actual costs of the study abroad program paid by such college/university in writing to anyone who requests it.”).

unknown reason languished in the Assembly's Higher Education Committee for over two years.²⁵⁴

Congress could model federal legislation after New York's disclosure bill. It should mandate that all American colleges and universities receiving federal financial assistance disclose all perquisites that they receive from all study abroad programs in which their students participate. Like the New York bill, it should also require schools to disclose all program costs where students must pay their home institutions, which in turn pay the study abroad program provider.²⁵⁵ These requirements would reveal important information about the value of each study abroad program and a school's potential motive for advocating for certain programs. Moreover, the law could refocus study abroad offices to prioritize students' safety and education over personal or institutional benefits.²⁵⁶

To create additional transparency, Congress could also amend the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) to broaden reporting requirements regarding off-campus sexual violence.²⁵⁷ The Clery Act's primary purpose was to increase transparency around campus crime to empower prospective students and their parents to make informed decisions about which school to attend.²⁵⁸ To accomplish this goal, the Clery Act requires schools to collect, retain, and report data regarding specific categories of crime—including sexual violence—that occurs in geographic areas associated with the school.²⁵⁹ One essential component is the requirement that schools "[p]ublish an annual security report containing safety- and security-related

²⁵⁴ *S01566 Summary*, N.Y. STATE ASSEMB., http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S01566&term=2013&Summary=Y&Actions=Y [<https://perma.cc/SBJ4-XWNU>] (indicating that the bill passed the Senate on June 19, 2014 and was referred to the Assembly Higher Education Committee that same day).

²⁵⁵ Congress could require schools to publicize this disclosure requirement on their study abroad office websites and post an easily visible notice in campus study abroad offices. To create uniformity and minimize costs, legislators could include the specific notice language in the law, allowing schools to merely copy and paste to remain compliant. For example, this notice could state that the school must provide all requested information regarding perquisites and program costs in writing within a certain time period. Disseminating information by request only provides interested parties access to the information without foisting substantial costs or burdens onto schools.

²⁵⁶ Additionally, this transparency may deter tuition arbitrage, which could decrease artificially high costs for some programs, making them more accessible for students of all socioeconomic backgrounds.

²⁵⁷ 20 U.S.C. § 1092(f) (2012).

²⁵⁸ See 136 CONG. REC. H11499 (daily ed. Oct. 22, 1990) (statement of Rep. Williams).

²⁵⁹ U.S. DEP'T OF EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 1-1 (2016), <http://www2.ed.gov/admins/lead/safety/handbook.pdf> [<https://perma.cc/22LT-A4S4>] [hereinafter CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK]; Cantalupo, *supra* note 16, at 511.

policy statements and crime statistics and distribute it to all current students and employees.”²⁶⁰ Additionally, schools “must inform prospective students and employees about the availability of the report.”²⁶¹

The Clery Act limits reporting to crimes that allegedly occurred at the following locations: “on campus” (i.e., buildings housing classrooms, administrative offices, or dormitories); “in or on a noncampus building or property” that the institution owns or controls (i.e., fraternity or sorority house, university-owned hospital, research facility, or publicly-owned football stadium leased by the school for games); or “on public property within or immediately adjacent to and accessible from the campus” (i.e., streets, sidewalks, and parking facilities).²⁶² Importantly, the Clery Act excludes reporting of crimes that occur during school-sponsored overnight trips unless the institution sponsors the same trip “every year and the students stay in the same hotel each year.”²⁶³ Although the Clery Act requires schools with international branches to file separate reports for each branch,²⁶⁴ schools are not required to report crimes perpetrated upon its students during study abroad programs or at institutions that the school does not “own or control.”²⁶⁵ These exclusions are problematic because they create a false picture about the risks of crime for students participating in study abroad or off-campus trips. More accurate information would empower students to make informed decisions regarding study abroad and school leaders to improve preventative and responsive programming.

To fill these misleading informational gaps Congress could amend the Clery Act, expanding reporting requirements to include crimes reported to have occurred during international, for-credit internships; study abroad programs run by an entity other than the reporting school; exchange

²⁶⁰ CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK, *supra* note 259, at 1-7. “The Clery Act requires institutions to disclose statistics for reported crimes based on where the crimes occurred, to whom the crimes were reported, the types of crimes that were reported, and the year in which the crimes were reported.” *Id.* at 2-1. The annual report must include disclosures for the previous three years. *Id.* at 1-10.

²⁶¹ *Id.* at 1-7.

²⁶² U.S. DEP’T OF EDUC., THE HANDBOOK FOR CAMPUS CRIME REPORTING 11–17 (2005), <http://files.eric.ed.gov/fulltext/ED485714.pdf> [<https://perma.cc/67NH-LYSG>] [hereinafter CAMPUS CRIME REPORTING HANDBOOK].

²⁶³ CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK, *supra* note 259, at 2-25.

²⁶⁴ *Id.* at 2-6–2-7. Northwestern University, for example, must file a separate report for its Qatar branch.

²⁶⁵ *Id.* at 2-26 (“If your institution sends students to study abroad at a location or facility that you don’t own or control, you don’t have to include statistics for crimes that occur in those facilities. However, if your institution rents or leases space for your students in a hotel or student housing facility, you are in control of that space for the time period covered by your agreement. Host family situations do not normally qualify as noncampus locations unless your written agreement with the family gives your school some significant control over space in the family home.”).

programs; athletic team or student organization trips or tours; class enrichment trips; and international, for-credit research. For crimes reported to have occurred during study abroad programs, schools should report the study abroad program provider in addition to the standard reporting categories (type of crime, location, to whom the crime was reported, and year). This data is important for identifying regions or programs that are correlated with increased levels of crimes perpetrated against students.²⁶⁶ In addition to publishing an annual crime report, the Clery Act mandates that schools submit these crime statistics to the U.S. Department of Education annually through an online data collection system.²⁶⁷ Thus, a national data set will increase the accuracy and usefulness of data regarding sexual violence during study abroad.

Even this amended version of the Clery Act would not provide total transparency; it does not bind private study abroad program providers unaffiliated with any educational institution.²⁶⁸ Lawmakers could mandate that study abroad program providers disclose their safety records. Alternatively, lawmakers could indirectly force them to do so by prohibiting universities from partnering with or recognizing credits from third-party program providers refusing to disclose their crime statistics. Neither of these proposals, however, seems viable or desirable due to the cost and difficulty of monitoring compliance and the excessive government entanglement with private business.

Instead, colleges and universities should take more ownership over student safety and demand that study abroad program providers with whom they partner disclose their safety records. Some schools have already taken this important step.²⁶⁹ Legal studies professor and study abroad safety expert Robert Aalberts posits that, over time, a “national effort” of this sort could provide important information about whether prevention efforts have been successful, enabling other schools to replicate the most successful ones.²⁷⁰

More immediately, the proposed disclosure law and amended Clery Act would provide students, parents, and school administrations

²⁶⁶ To prevent duplicative reporting that would decrease accuracy of national statistics, lawmakers could create a rule regarding which institution reports the crime that occurred during study abroad. For example, the rule could be that only the student’s home institution reports the crime in its annual report.

²⁶⁷ CAMPUS CRIME REPORTING HANDBOOK, *supra* note 262, at 5.

²⁶⁸ The Clery Act only applies to “postsecondary institutions participating in [the Higher Education Act’s] Title IV student financial assistance programs.” CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK, *supra* note 259, at 1-1.

²⁶⁹ Marklein, *supra* note 1.

²⁷⁰ *Id.*

unprecedented access to information regarding the safety of study abroad programs and regions. As a result, it would allow students to knowingly assume the risks of studying abroad through a certain program. The market would likely squeeze out programs with the worst safety records because many students would be unwilling to assume such great risk, causing enrollment to plummet.

Once students have knowingly accepted the risks of study abroad, schools should equip them with information regarding preventing and responding to sexual violence. If OCR amended Title IX as discussed,²⁷¹ OCR could use notice-and-comment rulemaking to require universities to institute comprehensive mandatory pre-departure orientations for students studying abroad. Schools should condition registration and receipt of credit for study abroad on attending pre-departure orientation and completing specific follow-up tasks.²⁷² This programing should include both preventative and responsive information, including: the higher incidence of sexual violence for students studying abroad as compared to their domestic peers; precautionary measures to reduce the likelihood of becoming a victim of sexual violence; specific steps to take if raped or sexually assaulted; U.S. State Department and local embassy contact information; and twenty-four-hour crisis resource hotlines.

Although none of these recommendations represent a magic bullet capable of preventing all sexual violence abroad or ensuring the ideal response when it inevitably occurs, in combination they have the potential to drastically decrease occurrence and improve response.

CONCLUSION

In light of *Aramco*, *Morrison*, and *Kiobel*, the precedent established by *King* is unlikely to withstand scrutiny under the Supreme Court's more rigorous standard and courts will not find extraterritorial jurisdiction under Title IX. The question of whether Title IX should be expanded to cover conduct in foreign countries will become increasingly important as more students study abroad annually and the national conversation about campus rape expands. Until Congress contemplates whether to amend Title IX to expressly rebut the presumption against territorial application or take other legislative action, American universities should proactively implement and

²⁷¹ See *supra* Part IV.

²⁷² Tasks could include completing a personal data sheet with emergency contact information, reading and answering questions about their host country's U.S. Department of State fact sheet, inputting relevant embassy contact information and twenty-four-hour hotlines into a program that creates a personalized emergency resource sheet, and taking an online quiz that tests their understanding of preventative measures and appropriate steps to take in the event of a crime.

publicize preventative programming and responsive services for students studying abroad. Preventing more students from becoming rape victims and better supporting survivors are too important for us to wait.