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# Campus Sexual Misconduct As Sexual Harassment: A Defense Of The DOE

Katharine K. Baker

## CAMPUS SEXUAL MISCONDUCT AS SEXUAL HARASSMENT: A DEFENSE OF THE DOE

Katharine K. Baker\*

### INTRODUCTION

The Department of Education's (DOE) campaign to regulate sexual misconduct on college campuses has captured the attention of both university administrators and the popular press.<sup>1</sup> Acting under the threat that DOE will withhold federal educational funds, universities are making changes to both their substantive definition of sexual misconduct and the procedural rules pursuant to which students who violate those substantive standards are disciplined.<sup>2</sup> Many people, in and outside the academy, have criticized these changes.<sup>3</sup>

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1. Since the beginning of 2014, the New York Times has published over 300 articles on sexual assault on college campuses. N.Y. TIMES, <http://query.nytimes.com/search/sitesearch/?action=click&contentCollection&region=TopBar&WT.nav=searchWidget&module=SearchSubmit&pgtype=Homepage#/campus+sexual+assault/from20140101to20160229/> (last visited Feb. 29, 2016) (listing 311 stories about sexual assault on college campuses). Many of the stories followed DOE's release of what has come to be known as the "Dear Colleague Letter," the document in which DOE outlined its plans to regulate sexual misconduct as sexual harassment. See U.S. DEP'T. OF EDUC., OFFICE OF CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE BACKGROUND, SUMMARY AND FAST FACTS (2011) [hereinafter DEAR COLLEAGUE LETTER], [https://www.whitehouse.gov/sites/default/files/fact\\_sheet\\_sexual\\_violence.pdf](https://www.whitehouse.gov/sites/default/files/fact_sheet_sexual_violence.pdf) (summarizing the points of the Dear Colleague Letter in a separate document).

2. See U.S. DEP'T. OF EDUC., *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations* (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>; see also CNN Staff, *Colleges, Universities Respond to Sexual Violence Investigation*, CNN (last updated May 1, 2014, 9:39 PM), <http://www.cnn.com/2014/05/01/us/colleges-sex-complaint-reactions/> (listing colleges and universities responding to DOE regulations).

3. See, e.g., Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html> (arguing sexual assault on campus should mean what it means in the criminal law); Caroline Kitchens, *Overreaching on Campus Rape*, THE NATIONAL REVIEW (May 13, 2014), <http://www.nationalreview.com/article/377878/overreaching-campus-rape-caroline-kitchens> ("If President Obama really wants to take rape seriously, he will take the power away from campus

This essay explains and defends DOE's campaign against sexual misconduct on university campuses. It does so because, despite all the publicity, DOE has done an inexplicably poor job of explaining the theory under which it is compelling universities to act. DOE is not mandating that schools adopt a particular definition of rape. Nor is it demanding that universities do what the criminal law has not done in policing rape. DOE is demanding that universities do something different. My understanding of DOE's theory is this:

The common expropriation of sex from people who do not want their bodies used sexually creates a disorienting and discouraging atmosphere for those who feel used. It is an atmosphere that inhibits an equal sense of belonging and respect in an educational community. It is sexual harassment.

Once one understands the regulation of sexual conduct as a problem of discrimination—a problem outside, even if also partially inside, the criminal law—much of the criticism of the DOE falls away.

Critics are fond of pointing out that universities are not well-equipped to adjudicate criminal matters.<sup>4</sup> This is true but beside the point because universities routinely regulate and adjudicate non-criminal student conduct. Universities demand civility, honesty and norms of respect from their student body. Schools regularly punish students who engage in unruly behavior, even if those students are not pursued criminally.<sup>5</sup> Schools punish cheaters *and* those who fail to report cheaters.<sup>6</sup> They punish students who engage in racially offensive speech

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kangaroo courts and place such criminal investigations where they belong: in the hands of trained law enforcement.”).

4. Rubinfeld, *supra* note 3; Kitchens, *supra* note 3. See also Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, THE BOSTON GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> (op-ed written by Harvard Law School faculty members criticizing Harvard's proposed rules because they did not provide adequate criminal law safeguards for the accused).

5. See Jake New, *Expulsions After Riots*, INSIDE HIGHER ED (Oct. 24, 2014), <https://www.insidehighered.com/news/2014/10/24/try-clean-image-west-virginia-u-expels-three-students-after-riots> (describing West Virginia University's expulsion of students for burning their own furniture in a celebration for the football team). The school acted independently of the police and justified its actions because behaving in such a raucous manner “is not how Mountaineers behave.” *Id.*

6. For examples of honor codes that require students to report others, see *The Haverford College Honor Code*, HAVERFORD COLLEGE, <http://honorcouncil.haverford.edu/the-code/> (“[U]nless it is indisputable that an academic violation did not occur, the confronted student must report the situation to Honor Council.”); *Drake University College of Pharmacy and Health Sciences Honor Code*, DRAKE UNIVERSITY <http://www.drake.edu/cphs/handbookspolicies/honorcode/> (“All members of the College community have a duty to report violations of the Honor Code.”); *The*

even though that speech has the full protection of the First Amendment behind it.<sup>7</sup> In short, universities prohibit all sorts of conduct that cannot be punished criminally.

This essay explains why policing sexual misconduct can and should be seen as a problem outside of the criminal law, but it also highlights two significant issues, one procedural and one substantive, that remain even once the problem is viewed as one of sex discrimination. There are hard questions that need to be asked about the standards of proof that are appropriate and the degree of injury that should be necessary when schools regulate sexual harassment. Those questions should be the focus of the discussion—what to do about harassment—not what to do about campus rape.

Part I of this essay summarizes some of my previous work explaining why the criminal law is particularly ill-suited to regulate sexual misconduct, particularly sexual misconduct between acquaintances. If sexual expropriation is to be regulated and if norms of male sexual entitlement are to be upended, it may be necessary to look at regulatory mechanisms outside of the criminal law.

The need to look beyond the criminal law is bolstered by a variety of different reports from college campuses, all of which show that sexual expropriation is commonplace.<sup>8</sup> As Part IIA shows, nonconsensual sex—regardless of whether one calls it “rape”—is prevalent on college campuses, and it disproportionately—wildly disproportionately—affects women and sexual minorities.<sup>9</sup> The fact that women and sexual minorities are so much more likely than men and non-minorities to have sex expropriated from them helps illuminate the problem as one of sex discrimination. Sexual harassment law polices unwelcome sexual conduct that unreasonably interferes with an individual’s educational experience or creates an intimidating and offensive environment. Part IIB explicates sexual harassment case law to demonstrate just how well the regulation of college sexual misconduct fits into a sex discrimination paradigm.

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*Honor System*, VANDERBILT UNIVERSITY, [http://www.vanderbilt.edu/student\\_handbook/the-honor-system/](http://www.vanderbilt.edu/student_handbook/the-honor-system/) (“Failure to report a known or suspected violation of the Code in the manner prescribed” is an honor code violation.).

7. The most well-known recent example involved members of a University of Oklahoma fraternity who were taped singing a racist song, but there have been numerous other incidents as well. See Jake New, *Punishment, Post-Oklahoma*, INSIDE HIGHER ED (Apr. 1, 2015), <https://www.insidehighered.com/news/2015/04/01/some-college-leaders-are-responding-quickly-racist-and-sexist-incidents>.

8. See *infra* Part IIA.

9. See *infra* Part IIA.

Part III evaluates how the courts that have recently reviewed university disciplinary processes have missed the essence of the discrimination claim. Courts treat university tribunals as semi-criminal adjudicatory bodies, but because the regulation of sexual harassment is not a criminal matter, the substantive definition of unacceptable conduct and the process used to evaluate that conduct need not conform to criminal law safeguards. No one's liberty is at stake. Universities are simply demanding that their citizens' sexual behavior comport with what the university defines as basic standards of decency. Most courts do not seem to understand this.

Having cleared away the detritus created by the common but inapt comparisons to criminal law, Part IV turns to what I see as the two most difficult issues raised by DOE's plan to regulate sexual misconduct as sexual harassment. One problem is procedural, the other substantive. The procedural issue involves the right to confrontation and how it pertains to the burden of proof. In any proceeding in which credibility is crucial, the accused's need to confront a complainant is at its apex. But the process of being confronted, by a stranger, in front of strangers, and questioned about intimate details involving one's sexual behavior is incredibly difficult on victims. Most victims of sexual misconduct do not want to put themselves through that ordeal. This is one of the main reasons why the criminal law has failed to regulate sexual misconduct effectively.

On procedural matters, like a right to confrontation, the criminal law has always drawn a line that overprotects the accused at the expense of a victim. Discrimination law has drawn that line differently; it has overprotected a class that has been traditionally discriminated against at the expense of potentially innocent defendants.<sup>10</sup> Reasonable minds may differ on the appropriate place to draw that line when it comes to the regulation of sexual misconduct on college campuses, but reasonable minds should agree that criminal and civil processes have drawn the line in different places. Whether schools draw more of a civil than criminal law line with regard to who they overprotect will have a tremendous effect on their ability to punish sexual misconduct.

The substantive dilemma involved with regulating sexual harassment on college campuses goes to the nature of the harm to the victim. Sexual harassment law suggests that an atmosphere in which unwelcome sexual conduct is prevalent can constitute a hostile environment because women should not have to accept a culture in which they feel routinely used and

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10. See *infra* text accompanying notes 83–87.

disrespected by their peers.<sup>11</sup> When men repeatedly bully and badger women into non-consensual sex and when men take the sex they want regardless of whether a woman demonstrates consent, women feel offended. But it is not altogether clear that the injury that flows from being bullied into sex is that much worse than the injury that flows from being a willing participant in a sexual encounter that did not go well. One can feel used and disrespected after a sexual encounter that one actively embraced at the outset. The real difference between the two events is likely not the magnitude of the harm to the victim; it is instead the justification of the man's behavior. Is it appropriate to regulate boorish, entitled sexual behavior not because it does irreparable damage to its targets, but just because it cannot be justified in its own right? Those are the questions that Part IV raises, even if it does not fully answer.

## I. THE INADEQUACY OF THE CRIMINAL LAW

If the criminal law could regulate non-consensual sex effectively, the problem of repeated sexual misconduct on college campuses might never have surfaced. Rape reformers in the 1970s and 80s successfully modified most states' criminal law statutes in the hope that states could prosecute men who proceeded to have sex with women who had said or otherwise indicated "no." The impetus for much of this rape reform movement came from a recognition that men routinely helped themselves to sex that they wanted, regardless of women's desires. Entrenched norms of male entitlement and female responsibility,<sup>12</sup> status games involving sexual conquest,<sup>13</sup> and cultural scripts proscribing verbal communication but encouraging women's passivity<sup>14</sup> all led to a

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11. For an explication of what kind of environment constitutes sexual harassment, see *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) and *infra* Part II.B.

12. See Lynne Henderson, *Rape and Responsibility*, 11 L. & PHIL. 127, 132–44 (1992) (exploring the ubiquitous stories of male innocence and female guilt that pervade religious, philosophical and scientific thought).

13. For a famous example of boys using a point system to keep track of their sexual conquests, see Jennifer Allen & Brian Smale, *Boys: Hanging with the Spur Posse*, Rolling Stone (July 8—22, 1993) (explaining the point system used by a group of teenage boys in California). For a more recent example of boys keeping score of their sexual conquests at an elite New Hampshire prep school, see Jess Bidgood, *In Girl's Account, Rite at St. Paul's Boarding School Turned into Rape*, N.Y. TIMES (Aug. 19, 2015), [http://www.nytimes.com/2015/08/20/us/in-st-pauls-rape-trial-girl-vividly-recounts-night-of-school-ritual.html?\\_r=0](http://www.nytimes.com/2015/08/20/us/in-st-pauls-rape-trial-girl-vividly-recounts-night-of-school-ritual.html?_r=0).

14. For a general account of male assertiveness and female passivity, see ROBIN WARSHAW & ANDREA PARROT, *The Contribution of Sex-Role Socialization to Acquaintance Rape*, Acquaintance Rape: The Hidden Crime 73, 75 (Andrea Parrot & Laurie Bechhofer eds., 1991) ("From their socialization in childhood and adolescence, [men and women] develop[] different goals related to

strong likelihood that men would be minimally interested in discerning whether a partner actually wanted to have sex. This willful ignorance on men's part was both the norm and the problem. It was why women were so routinely used sexually.

Rape reformers succeeded in changing much of the law. Many state courts and legislatures now allow fact finders to convict someone who has proceeded to have sex in a situation in which the question of consent is ambiguous, with no clear sign of no or yes.<sup>15</sup> However, the norms surrounding sexual entitlement have not changed nearly as much. Rape convictions are still rare.<sup>16</sup> Police and prosecutors regularly drop cases and victims often choose not to go forward or even report in the first instance.<sup>17</sup> Because so few cases get reported and prosecuted, entitled male behavior rarely gets punished. Thus, the criminal law has not eroded the norm of male entitlement effectively; when targeted behavior is not punished, norms about that behavior's legitimacy can stay stuck.<sup>18</sup>

Three important impediments help explain why the criminal law could not do the job that rape reformers wanted it to do: the criminal standard of proof, competing social constructions of rapists, and the denial of women's agency that is an inherent part of any criminal proceeding.<sup>19</sup>

The vast majority of sexual encounters, whether consensual or coerced or forced, take place in private, with no witnesses and with no demonstrable evidence of what happened. Because it is so common for two people who know each other—even if they just met—to consent to a casual sexual encounter, it is exceedingly difficult to prove, beyond a reasonable doubt, that what happened was non-consensual. The only evidence the prosecution usually has is the victim's story and that is likely to be imperfect and impeachable.

For many young people, particularly on college campuses, drinking precedes sexual activity. Alcohol impairs victims' ability to remember

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sexuality . . . . [M]en are supposed to single-mindedly go after sexual intercourse with a female, regardless of how they do it. . . . [W]omen should passively acquiesce.”).

15. For a discussion of different state approaches, see MODEL PENAL CODE § 213.2 cmt. at 41–42 (Am. Law Inst., Tentative Draft No. 1, 2014) [hereinafter *ALI Draft*] (discussing different state approaches to the consent requirement).

16. See generally Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J. L. & FEMINISM 1, 42–43 (2015).

17. *Id.*

18. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. Chi. L. Rev. 607, 607 (2000) (describing problem of “the prevalence of a social norm mak[ing] decisionmakers reluctant to carry out a law intended to change that norm”).

19. I explore all of these impediments in more detail in Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 Minn. L. Rev. 221 (2015).

what happened clearly. Even if a victim has not been drinking, her memory of a rape tends to be less clear than victims recounting other traumatic experiences.<sup>20</sup> This makes sense given the subject matter. How good is anyone at describing their last sexual encounter, consensual or not, to strangers, over and over again? Most of us simply do not have the vocabulary to convincingly describe the feelings, sensations and actions surrounding sexual encounters.<sup>21</sup> We have very little practice doing so.<sup>22</sup>

The accused does not have to testify. His story, his demeanor, his history of truth-telling is never questioned. Juries often believe a woman's story mostly, but not enough to find her story true beyond a reasonable doubt. Evidence suggests that given the different levels of scrutiny the parties receive, the burden of proof makes a huge difference in rape trials.<sup>23</sup> The criminal law cannot punish what it cannot prove beyond a reasonable doubt, so much—probably most—nonconsensual sex goes unpunished.<sup>24</sup>

The second major impediment to criminal rape convictions stems from competing cultural narratives of what it means to be a rapist. It is exceedingly difficult for the criminal law to punish behavior that is perceived as normal.<sup>25</sup> Many prominent rape reformers recognized this quandary. They knew juries were unlikely to hold an individual man

20. Arthur H. Garrison, *Rape Trauma Syndrome: A Review of a Behavioral Science Theory and Its Admissibility in Criminal Trials*, 23 Am. J. Trial Advocacy 591, 625 (2000) (citing studies).

21. For discussions of complainants who have struggled trying to explain what happened, see Richard Pérez-Péna & Kate Taylor, *Fight Against Sexual Assaults Holds Colleges to Account*, N.Y. TIMES (May 3, 2014), <http://www.nytimes.com/2014/05/04/us/fight-against-sex-crimes-holds-colleges-to-account.html> (Columbia University student described her testimony to college tribunal as requiring that she “tell an embarrassing story and then teach them an embarrassing subject [which felt] really gross.”); Walt Bogdanich, *Reporting Rape, and Wishing She Hadn't: How One College Handled a Sexual Assault Complaint*, N.Y. TIMES (July 12, 2014), <http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html> (“It was one of the hardest things I have ever gone through . . . I felt like I was talking to someone who knew nothing of any sort of social interaction; what happens at parties; what happens in sex.”).

22. Katharine K. Baker, *Text, Context, and the Problem with Rape*, 28 Sw. U. L. Rev. 297, 306–07 (1999) (discussing how people's reluctance to talk about sex makes it very difficult to assess the difference between rape and sex).

23. See Baker, *supra* note 19, at 239–43 (discussing numerous cases which fell apart because of victim credibility, including the U.S. Army's case against Brigadier General Jeffery A. Sinclair, the well-reported incident involving two Columbia University students in which the standard of proof was not met, a California juvenile case in which the judge admitted that if the case had been tried to a jury there never would have been a conviction, and cases in which jurors admitted that the prosecution met a civil but not a criminal standard of proof with regard to non-consent).

24. This seems to be the case on college campuses. Surveys indicated that the majority of women do not report incidents of nonconsensual sex, even if it was accomplished by force or severe incapacitation. See discussion of studies, *infra* Part II.A.

25. See Kahan, *supra* note 18, at 608.



criminally responsible for conforming to a status quo which the law had long accepted.<sup>26</sup> In an effort to make convictions more palatable to juries, most rape statutes introduced degrees of sexual assault, allowing lesser penalties for those crimes that involved less physical coercion.<sup>27</sup> By acknowledging that some forms of rape were less heinous than others, reformers hoped the law would be able to punish more conduct.

It is possible that the introduction of gradations of sexual assault could have made convictions palatable enough to upend entrenched norms of male sexual entitlement, but the job was made significantly harder by a competing, seemingly sympathetic, effort to take rape more seriously by punishing it more comprehensively. A series of federal initiatives in the 1990s required states to develop registration and notification systems for sex offenders.<sup>28</sup> Congress amended the Federal Rules of Evidence for rape trials, based on the belief that there is something uniquely pathological about rapists' character.<sup>29</sup> These "tough-on-crime" measures completely undermine an insight at the heart of rape reform—that rape is commonplace because it is the natural outgrowth of accepted norms of male sexual entitlement. Rape reformers wanted to change the gendered scripts of entitlement more than they wanted to punish the individual men who conformed to them, but the tough-on-crime measures located the problem in individual men.

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26. Catharine MacKinnon phrased the problem this way: "when so many rapes involve honest men and violated women . . . is the woman raped, but not by a rapist?" CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 183 (1989); Susan Estrich observed "it is easier to condemn date rape than it is to punish date rapists." Susan Estrich, *Palm Beach Stories*, 11 L. & PHIL. 5, 32–33 (1992).

27. See Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS 119, 122–24 (1999) (suggesting that introducing gradations of sexual offenses was one of the three main pillars of rape reform in the 1970s and 80s). For a list of the various different kinds of "non-violent" acts that are criminalized, see Patricia J. Falk, *Not Logic, But Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape-By-Fraud*, 123 YALE L.J. ONLINE 353 (2013).

28. See Baker, *supra* note 19, at 248–49 (describing registration and notification program). Registration requirements affect men who are convicted of offenses considered far worse than traditional rape. The young man convicted of statutory rape at an elite prep school, even though the jury concluded that the victim consented, had to register as a sex offender. See Jess Bidgood, *Owen Labrie Gets Year in Jail for St. Paul's School Assault*, N.Y. TIMES (Oct. 29, 2015), [http://www.nytimes.com/2015/10/30/us/owen-labrie-st-pauls-school-sentencing.html?\\_r=0](http://www.nytimes.com/2015/10/30/us/owen-labrie-st-pauls-school-sentencing.html?_r=0). See also *supra* note 13, in which a young man who taped his friends engaging in sex with an exceedingly drunk woman had to register as a sex offender, even though the men accused of rape were not convicted. See Baker, *supra* note 19, at 241–42; Art Bamum, *Guilty Plea in Taped-Assault Case*, CHI. TRIBUNE (Jan. 14, 2005), [http://articles.chicagotribune.com/2005-01-14/news/0501140222\\_1\\_sexual-assault-boot-camp-brookfield](http://articles.chicagotribune.com/2005-01-14/news/0501140222_1_sexual-assault-boot-camp-brookfield).

29. See Katharine K. Baker, *Once A Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 576–78 (1997) (citing legislative history suggesting that rapists were "a small class of depraved criminals").

According to the tough-on-crime advocates, once we cordoned the pathological people off, by prosecuting them under separate rules, forcing them into civil commitment facilities, and permanently branding them, we would be safer.

There is no evidence that rapists, particularly date rapists, are uniquely deviant, or psychologically impaired, or necessarily prone to recidivism.<sup>30</sup> Many men commit rape without even knowing that they have done so.<sup>31</sup> Men, particularly young men, continue to engage in status games for sex;<sup>32</sup> they continue to treat sex as a good for the taking;<sup>33</sup> they continue to pay little attention to whether their partners want to continue.<sup>34</sup> Because so many “regular” men continue to do this, it is hard to see them as the rapists that the tough-on-crime measures were designed to control.

The third problem with expecting the criminal law to prosecute nonconsensual sex effectively stems from the inevitable subordination of the victim’s agency in a criminal proceeding. Most scholars and commentators perceive the essence of rape’s injury as an injury to sexual autonomy and one’s sense of self.<sup>35</sup> What makes nonconsensual sex so

30. Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 158 n.135 (2001) (citing studies, none of which suggest a higher recidivism rate for rapists). One study that found a high recidivism rate, David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73 (2002), has been very widely criticized. See Robby Soave, *Campus Rape Expert Who Misrepresented His Work Faces Powerful New Criticism*, REASON.COM (Aug. 11, 2015), <https://reason.com/blog/2015/08/11/campus-rape-expert-who-misrepresented-hi>.

31. Men regularly confuse women’s fear with acquiescence. Men interpret women’s non-verbal behavior as consent when women do not mean them to, and men and women generally disagree about what might have constituted force in a sexual encounter. For a discussion, see Baker *supra* note 19, at 230–31.

32. For a description of the senior salute, see Bidgood *supra* note 13.

33. Rashawn Ray & Jason A. Rosow, *Getting Off and Getting Intimate: How Normative Institutional Arrangements Structure Black and White Fraternity Men’s Approaches Toward Women*, 12 MEN & MASCULINITIES 523, 530–31 (2010) (“[Y]ou do not need to do all that wine and dine them and all that. You can skip all that and just bring them back to the house and do what’s important to you. . . . If they [women] [are] decent or just okay, I’ll just mess around with them . . . Get head.”).

34. See Paula England, Emily F. Shafer & Alison Fogarty, *Hooking Up and Forming Romantic Relationships on Today’s College Campuses* in *The Gendered Society Reader* 532, 538 (M.S. Kimmel & A. Aronson, eds., 2008) (describing men saying “if it’s just a hook-up . . . it’s more of a selfish thing.” “If it’s a one night thing, I don’t think [the woman’s experience] is going to matter to [men] much”); Elizabeth L. Paul & Kristen A. Hayes, *The Casualties of ‘Casual’ Sex: A Qualitative Exploration of the Phenomenology of College Students’ Hookups*, 19 J. OF SOCIAL & PERSONAL REL. 639, 653 (2002) (“I got oral sex without putting much effort forth.”).

35. For a full explication of rape as a violation of sexual autonomy, see Stephen J. Schulhofer, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 274 (1998) (concluding chapter entitled “Taking Sexual Autonomy Seriously”). The Supreme Court has written that “[s]hort of homicide, [rape] is the ‘ultimate violation of self.’” *Coker v. Georgia*, 433 U.S. 584,

injurious to one's autonomy stems from the "social valence" of sex<sup>36</sup> and the parts of the body that are invaded and touched. Being non-consensually touched on one's elbow does not involve the same injury as being groped because contact with the elbow is not perceived by the person who touches or the person who is touched as remotely comparable to being touched sexually. It is not understood as the same kind of affront to dignity or autonomy.

Asking the criminal law to vindicate that injury to autonomy by prosecuting sexual crimes requires the victim to go through a process that inevitably causes more injury to her sense of her own autonomy.<sup>37</sup> First, a victim must report this touching or invasion of what is uniformly acknowledged to be a particularly personal and intimate part of the body to medical authorities, who scrutinize her story for possible health ramifications.<sup>38</sup> Then she must tell her story to police, who scrutinize her story to ensure it makes sense to proceed to the next level of prosecution. This scrutiny is completely appropriate, but almost always traumatic. The police have to decide whether the case is worthy of prosecution, and the only way it will be worthy of prosecution is if the victim's story is credible enough.

If the case goes further, the woman moves on to the prosecutor, whose responsibility it is to take her narrative and re-tell it for her, in a way that is most conducive to conviction. The prosecutor represents the state, not the victim. And the state's interest is in securing a conviction, not protecting the integrity or well-being of the victim. If the prosecutor proceeds to trial, the victim is subject to even more severe—and perfectly appropriate—attacks on her credibility by the defense team. These attacks come in front of a panel of strangers, whose job it is to assess the victim's story.

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597 (1977). Recently, Professor Jed Rubenfeld has argued that this view of rape as an injury to autonomy is misguided. See Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2013). Rubenfeld's view is controversial. See Baker, *supra* note 19, at 232 n.42, 234 n.51 (citing many of the numerous critiques of Rubenfeld's position).

36. Gowri Ramachandran describes rape's injury as necessarily tied to the "social valence" of sex. Gowri Ramachandran, *Delineating the Heinous: Rape, Sex, and Self-Possession*, 123 YALE L.J. ONLINE 371, 372 (2013).

37. For a more complete account of the way in which the criminal process itself undermines women's agency, see Baker, *supra* note 19, at 251–63.

38. Many people do not even like talking to their personal physician, whom they often know, about the details of their consensual sex lives, which can have medical implications. Rape victims are required to answer questions from total strangers, about what they just did and had done to them sexually, at a time in which they are stressed and usually embarrassed at "what they let happen" to them. See generally Baker, *supra* note 19, at 258 (many rape victims blame themselves for what they let happen to them).

All of this is inevitable and inevitably humiliating. For many women, the problem gets even worse if media pick up the story. When stories get reported in local or national press, the victim is under even greater scrutiny, making her feel more pressure to be perfect and less free to talk, walk, dress or behave as she wants, much less of her own person. It is hard to imagine how anyone could emerge from such a process with her sense of self intact. It is not hard to see why so many women choose not to report or prosecute.

Thus, despite the comprehensive efforts of rape reformers in the 1970s and 80s, despite the success they had in changing the definition of rape and highlighting the prevalence of rape between acquaintances, very little rape gets punished. It is too hard for prosecutors to prove, too hard for jurors to punish, and too hard for victims to endure the criminal process for redress. Rape reformers asked the criminal law to dislodge the norm of male entitlement to sex, but because of the protections built into the criminal process, the criminal law did not succeed.

## II. SEXUAL HARASSMENT ON COLLEGE CAMPUSES

### A. *Sexual Behavior on College Campuses*

The failure of the criminal law to upend the norm of male sexual entitlement may explain why men expropriate so much nonconsensual sex on college campuses. The graph below shows the results of three different recent attempts to discern the extent of sexual misconduct on college campuses.<sup>39</sup> The Campus Sexual Assault Study (CSA)<sup>40</sup> was a web-based survey of undergraduate students attending two large public universities in 2005. It had a response rate of 42% and reported that 19.8% (one in five) women on university campuses experience some form of sexual misconduct or assault.<sup>41</sup> This is the study relied on by the DOE and the White House when the DOE launched its current campaign against college sexual assault.<sup>42</sup> The Community Attitudes on Sexual

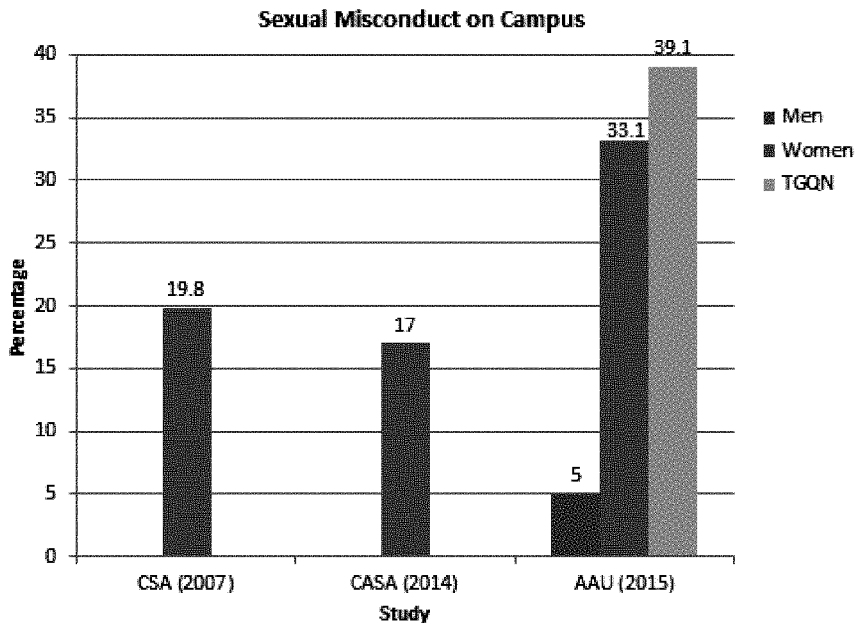
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39. All of these studies are cited and described in American Association of Universities, *Executive Summary: Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, xiii–xv (2015) [hereinafter *AAU Executive Summary*], <https://www.aau.edu/Climate-Survey.aspx?id=16525>.

40. CHRISTOPHER P. KREBS ET AL., *THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT* xiii (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

41. *Id.* at x.

42. See Caitlin Emma, *W.H. Cracks Down on Campus Sexual Assault*, Politico (last updated Apr. 29, 2014, 1:09 PM), <http://www.politico.com/story/2014/04/white-house-continues-crackdown-on-campus-sexual-assault-106129>.



Assault (CASA) survey was a web-based survey conducted by the Massachusetts Institute of Technology; it had a response rate of 35% and found that 17% of women experience sexual misconduct on MIT's campus.<sup>43</sup> The Association of American Universities (AAU) survey was a web-based survey conducted in 2015 by a research firm engaged by twenty-seven colleges and universities.<sup>44</sup> The response rate was 19.3% and it found a higher incidence of sexual misconduct, 33.1% (one in three).<sup>45</sup> The AAU survey is one of only a few to include several different kinds of educational institutions (large, small, rural, urban), but its results did not indicate significant differences based on kind of institution.<sup>46</sup> It also attempted to unearth data about sexual misconduct in non-heterosexual populations.<sup>47</sup> The incidence of sexual misconduct among those who identify as Trans, Gay, Queer, or Nonconforming was 39.1% (two in five), the highest of all.<sup>48</sup>

43. See AAU Executive Summary, *supra* note 39, at xv.

44. *Id.* at iii.

45. *Id.* at vi, 23.

46. *Id.* at iii.

47. *Id.* at xiv.

48. *Id.*

These studies are controversial in large part because of their low response rates and their inconsistency with two other studies done on the population as a whole. There is no doubt that the response rates for these studies are low. Most experts believe that those individuals who do not respond to a web-based survey are less likely to have been victimized than those who do respond.<sup>49</sup> Accurate incidence rate figures are thus likely less than one in five or one in three or two in five. Even if one assumes an incidence rate half as large for the population that did not respond, however, the reports still indicate that there is a substantial amount of nonconsensual sex on college campuses. Few people would argue that schools or victims should be content with an incidence rate of 10%, for instance. University administrators seem to understand this. Official responses to these surveys routinely admit that even if the reports indicate incident rates that are artificially high, the data show a likely degree of sexual misconduct that is unacceptable.<sup>50</sup>

The studies with which the campus surveys are sometimes compared, the National College Women's Sexual Violence Survey (NCWSV) and the 2014 Bureau of Justice Statistics Report (BJSR), both had significantly higher response rates,<sup>51</sup> but they both asked significantly more limited questions.<sup>52</sup> They did not screen for acts involving incapacitation (due to drugs or alcohol); they did not ask behavioral based questions aimed to capture behavior that the victim may not have recognized as rape or sexual assault,<sup>53</sup> and they did not even

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49. *Id.* at vi–vii.

50. See Eric Isaacs, *Message About Sexual Misconduct from Provost Eric D. Isaacs* (Sept. 24, 2015), <https://cs1.uchicago.edu/get-involved/climate-survey-project/spring-2015-climate-survey-materials/message-on-sexual-misconduct> (describing results from the University of Chicago's survey of its own population as "similar to the results of . . . peer institutions . . . [and] deeply troubling."); Steven Hyman, *Letter to Harvard President Drew Faust on Behalf of the Task Force on the Prevention of Sexual Assault* (Sept. 21, 2015), [http://sexualassaulttaskforce.harvard.edu/files/taskforce/files/hyman\\_letter\\_final\\_9.21.2015.pdf?m=1442844014](http://sexualassaulttaskforce.harvard.edu/files/taskforce/files/hyman_letter_final_9.21.2015.pdf?m=1442844014) (describing the results at Harvard as part of a "widespread and pervasive . . . problem across universities" and suggesting that Harvard "must plan and put in place interventions potent enough to meet the serious challenges documented by the survey").

51. BONNIE S. FISHER ET AL., *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN*, 4 (2000) [hereinafter NCWSV], <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf> (response rate 85.6%); SOFI SINOZICH & LYNN LANGTON, *RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES 1995–2013*, 3 (2014) [hereinafter BJSR], <http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> (response rate 74%).

52. NCWSV asked about "completed, attempted, and threatened" forced penetration. See NCWSV, *supra* note 51, at 9. The BJSR collected data about acknowledged "crimes." It specifically described itself as a survey about crime, "while [others] are presented as surveys about public health." BJSR, *supra* note 51, at 2.

53. Numerous studies indicate that women often do not describe what happened to them as rape, even if the act involved force and especially if the act involved non-physical coercion. For a

attempt to capture forcible fondling, kissing, groping, or nonphysical pressure to engage in sex. They reported victimization rates of 2.8%<sup>54</sup> and 6.1%<sup>55</sup> respectively.

If one accepts the notion that universities have the authority to regulate student behavior that falls short of criminal behavior, then the exact definition of the target conduct makes much less difference. If one accepts the notion that universities can and should be concerned that a substantial portion of their female and sexual minority community feels like they have been used and disrespected sexually by their peers while in school, then the fight over whether what happens is “sexual assault” becomes irrelevant. It does not matter whether what victims experienced is criminal. It matters that so many students feel demeaned and insulted based on the way they were treated sexually by other members of their community.<sup>56</sup>

### *B. Sexual Harassment Law*

DOE is suggesting that universities must regulate nonconsensual sex on the theory that being cajoled, conned and bullied—even if not forced or threatened—into having sex that one does not want lessens one’s educational experience. Title IX affords a woman the same protection in school that Title VII affords her in the workplace.<sup>57</sup> The Supreme Court has made clear that schools can be liable for peer-on-peer sexual harassment if they are “deliberate[ly] indifferen[t] to known acts of harassment.”<sup>58</sup> DOE’s “Dear Colleague”<sup>59</sup> letter encourages schools not to remain ignorant of behavior, the existence of which might constitute a hostile environment.<sup>60</sup> It requires schools to develop adequate

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review of the studies, see Baker, *supra* note 19, at 255–56.

54. NCWSV, *supra* note 51, at 10.

55. BJSR, *supra* note 51, at 4.

56. See *Harris v. Forklift Sys.*, 510 U.S. 17, 22 (1993) (defines a harassing environment as an “environment [that] would reasonably be perceived, and is perceived, as hostile or abusive”).

57. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1290 (N.D. Cal. 1993). Sexual harassment law also protects against same-sex harassment. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (finding sexual harassment when a group of men harassed another man).

58. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

59. The “Dear Colleague” letter is the letter in which DOE articulated many of the standards it was going to use to determine if schools were protecting women from harassing conduct. See DEAR COLLEAGUE LETTER, *supra* note 1.

60. Some commentators have criticized the *Davis* standard for encouraging schools to stay ignorant of students’ behavior. See Deborah L. Rhode, *Sex in Schools: Who’s Minding the Adults?*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 290, 298 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

procedures for reporting, investigating and penalizing sexual misconduct.<sup>61</sup>

The EEOC sexual harassment guidelines, drafted for use in employment cases, but applicable to educational settings as well, define harassment as “conduct [that] has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”<sup>62</sup> Being badgered into sex that one does not want can unreasonably interfere with an individual’s school performance. Women who have been bullied into sex may be reasonably offended at the prospect of having to go to class, or debate practice, or sit at lunch with men who took advantage of them at a party, or did not respect them enough to ask if they wanted to keep going, or just hovered over them, pawing, pursuing their own sexual desires without any regard for the women’s disinterest or discontent. All of that kind of behavior can create an intimidating and offensive environment, one that it is not conducive to learning or advancement.

Whether behavior is offensive enough to constitute sexual harassment is a question that has been developed much more in the workplace context than the educational context, but generally, discrimination law “comes into play before the harassing conduct leads to a nervous breakdown.”<sup>63</sup> While conduct that is “merely offensive” is not actionable as harassment, neither need a plaintiff demonstrate “tangible psychological injury.”<sup>64</sup> The question of whether sexual conduct is offensive is not even a question of whether it is consensual; it is a question of whether it is “unwelcome.”<sup>65</sup>

To be actionable, the conduct must be either “severe” or “pervasive.”<sup>66</sup> Any act that constitutes criminal rape would presumably be considered severe enough to constitute sexual harassment even if it was an isolated incident. An act that stops short of criminal rape, even if “boorish and offensive,” may not itself be sufficient to qualify as sexual harassment, but repeated pervasive, boorish and offensive behavior may

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61. DEAR COLLEAGUE LETTER, *supra* note 1, at 2.

62. 29 C.F.R. § 1604.11(a)(3) (2015).

63. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

64. *Id.* at 21.

65. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986). In announcing the “welcomeness” standard, the Supreme Court was judging sexual conduct initiated by a superior in the workplace. *Id.* at 59. It is not clear that in an educational setting, between peers, that it would be appropriate to use a welcome standard instead of a consent standard. Nonetheless, it is worth noting that sexual harassment law has always used a standard other than the criminal law’s consent standard to evaluate whether sexual conduct is acceptable.

66. *Id.* at 67.



create a hostile environment.<sup>67</sup> Presumably, if a group of people continually conducted themselves in a boorish and offensive manner, even if with a series of different women, such that the boorish behavior pervaded the work or educational atmosphere, the targets of the offensive behavior would have a cause of action under Title IX.

If one in three, or one in five, or one in ten women on college campuses today experience nonconsensual sexual contact because men do not bother to figure out or do not care whether the woman with whom they are having sex is consenting, it is likely that there is a pervasive atmosphere that “detracts” from many women’s educational performance, “discourages” women from participating in activities, and “keeps them” from advancing in ways that they otherwise would.<sup>68</sup> DOE is using its funding power to address that problem. To put this somewhat differently, DOE is trying to overcome the collective action problem that prevents many women who feel abused and disrespected, some badly and some not so badly, from bonding together to bring a hostile environment sexual harassment claim. What schools do at DOE’s insistence, they will avoid having to do later, if, as the evidence suggests they could, women were to bring a claim showing that that schools’ failure to police aggressive sexual behavior detracts and discourages women from getting the educational experience to which they are entitled.

### III. JUDICIAL REVIEW

Courts reviewing school disciplinary proceedings often fail to understand the substantive and procedural implications of treating the problem of sexual assault as one of sex discrimination, not criminal sexual assault. In *Doe v. Washington and Lee University*,<sup>69</sup> the federal district court for the Western District of Virginia found that Washington and Lee University had itself violated Title IX by conducting a hearing

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67. *Jones v. Clinton*, 990 F. Supp. 657, 675 (E.D. Ark. 1998). Paula Jones alleged that then Governor Bill Clinton invited her to his room, stroked her leg, exposed himself and asked if she wanted to perform oral sex. *Id.* at 664. Jones offered no evidence of any adverse job consequences and very weak evidence of any emotional injury. *Id.* at 674. The court found the one incident of touching boorish but the offending behavior was not in and of itself severe enough and there was no evidence it was frequent enough to constitute a hostile environment. *Id.* at 675.

68. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (“A discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.”).

69. *Doe v. Wash. and Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015).

that showed signs of gender bias. The bias was evident, according to the Court, in an article that a member of the tribunal had previously circulated entitled *Is it Possible That There is Something In Between Consensual Sex and Rape . . . And That It Happens to Almost Every Girl Out There?*<sup>70</sup> The accused man contended that this article “posits that sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations that she did not outwardly express.”<sup>71</sup> This is not what the article suggests. Indeed, what the article suggests is problematic is exactly what a sexual harassment theory of campus sexual assault suggests is problematic. It is worth quoting from the article more completely:

But no one talks about it. Talking about it makes it a big deal. It makes us feel like we’re whining. It makes us feel like we’re being dramatic. And we don’t want it to be dramatic. We don’t feel entirely violated. It doesn’t affect us forever. We just feel like we got the short end of the stick, and that sometimes, we have to do something we don’t want to do, out of politeness or social obligation. So why bring it up? Why risk wrongfully tagging a guy with a serious, heavy label he doesn’t deserve? And more importantly, why risk being wrongfully tagged as “the girl who cried rape,” when we’re not trying to say it was rape at all? We’re saying we don’t know what it was. We just didn’t like it. But by refusing to acknowledge the existence of these rape-*ish* situations, we’re continuing to subject ourselves to them indefinitely.<sup>72</sup>

DOE is not saying that what routinely happens on college campuses is rape; it is saying that what routinely happens on college campuses is something many women are hurt by, that makes them feel violated if not “entirely violated.” Many women, because they are women, feel pressured to give men the sex those men feel entitled to. Unless that issue is addressed more comprehensively, women are likely to have to continue suffering the consequences.

That a federal district court thought that this pamphlet itself was indication of gender bias says something rather disturbing about the court’s views of gender neutrality. Does gender neutrality require accepting a status quo of male entitlement to sex? Does it mean presuming that women are only discriminated against if they feel “entirely violated?” Does it mean assuming that women should just

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70. *Id.* at \*10.

71. *Id.*

72. Veronica Ruckh, *Is It Possible That There Is Something In Between Consensual Sex and Rape . . . And That It Happens To Almost Every Girl Out There?*, TOTAL SORORITY MOVE, <http://totalsororitymove.com/is-it-possible-that-there-is-something-in-between-consensual-sex-and-rape-and-that-it-happens-to-almost-every-girl-out-there/> (last visited Feb. 21, 2015).

accept that they will get “the short end of the stick?”<sup>73</sup>

As with many of these cases, it is not clear that the defendant in *Doe* should have been found responsible. Based on the evidence presented, a finder of fact might well have been convinced that the complainant did indicate sufficient willingness to keep going. The real problem in this case is that the credibility finding was so crucial and so close. That is going to be a recurring and significant problem, but it is not a problem of gender bias. Nor is it a violation of Title IX to allow tribunals to find for the complainant in close cases. The disciplined will far more likely be men than women, but that is because women are far more likely to feel violated. Indeed, the fact women are so much more likely to be hurt indicates that schools must act or they will be discriminating against women; “Title IX, like other anti-discrimination schemes, permits an inference that a significant gender-based statistical disparity may indicate the existence of discrimination.”<sup>74</sup>

The more common problem for courts reviewing university tribunals in this context goes to courts’ misplaced assumption that the accused is entitled to criminal law safeguards. In *Doe v. Regents of University of California San Diego* (UCSD),<sup>75</sup> the Superior Court of California overturned UCSD’s finding of liability against a man in part because the university tribunal did not warn fact finders that they were not allowed to draw negative inferences from the accused’s refusal to testify.<sup>76</sup> The accused in this case testified that he did not penetrate the complainant digitally and then invoked his Fifth Amendment privilege against self-incrimination.<sup>77</sup> The Superior Court’s citation to a criminal case<sup>78</sup> in support of its conclusion that UCSD should have instructed the fact finders not to draw negative inferences from the accused’s invocation of the Fifth Amendment suggests that it did not understand the civil nature of the proceedings. As a matter of established civil procedure, fact finders in civil proceedings are allowed to draw negative inferences from

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73. Acting as an employer, a University would be well within its right passing a rule that forbade professors from asking their assistants to fetch them coffee. This prohibition would not be necessary because fetching coffee is so injurious to assistants, but because the act of asking perpetuates an anachronistic notion of a subservient female role that is inconsistent with gender equality. Why can’t a school demand that its students abandon anachronistic assumptions about women’s subservience and the female role in sexual encounters?

74. *Cohen v. Brown Univ.*, 101 F.3d 155, 170–71 (1st Cir. 1996).

75. *Doe v. Regents of the Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL, 2015 WL 4394597 (Cal. Super. Ct. July 10, 2015).

76. *Id.* at \*3.

77. *Id.* The tribunal’s finding of liability stated that it “would have liked to hear more information from [the accused].” *Id.*

78. The Court cited to *People v. Doolin*, 198 P.3d 11 (Cal. 2009), a criminal case.

a witness' refusal to testify.<sup>79</sup> The Superior Court's finding in this regard is just wrong.

In fairness to the court, what to do when an accused refuses to testify is likely to be an important and persistent issue, but judges are not looking in the right places for answers or analysis. In the vast majority of these cases, a complainant is going to allege that the accused proceeded to have sex without her giving adequate indication of consent. To combat that narrative, the accused is going to have to produce evidence that there was sufficient evidence of consent. Even then, as discussed above, fact finders have the difficult task of finding facts based on nothing other than the relative credibility of two competing stories. If the accused testifies only to distinct exculpatory facts and then nothing else, then the bulk of the defendant's case will not be telling a story of consent, it will be destroying the victim's story of non-consent. This is usually what happens in criminal rape trials and it is precisely why those trials are so arduous on victims. She is likely to have had too much to drink, to not remember clearly, to have difficulty finding the words to describe what happened, to tell slightly inconsistent stories. She is likely to be a bad witness. So is he, but if he does not have to testify, fact finders are left only to assess her. This dynamic highlights why it is important to find civil law alternatives to criminal rape trials.

A comparable problem arose in *Mock v. University of Tennessee at Chattanooga* (UTC).<sup>80</sup> Again, this is a hard and likely stereotypical case. Both parties had been drinking, but not necessarily enough to be considered legally incapacitated (and therefore incapable of consent). The complainant willingly entered a bedroom—from a bathroom, where the accused had found her on the floor.<sup>81</sup> She remembered removing her bra but claimed to remember very little else from the evening. Subsequent text messages suggest that neither party remembered very much.<sup>82</sup> The day after the incident they exchanged these messages:

Him: "Well I don't remember much from last night. Did you throw up in bed? If you did it's totally cool."

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79. See *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (stating that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them").

80. Memorandum and Order, *Mock v. Univ. of Tenn. at Chattanooga*, No. 14-1687-II (Tenn. Ch. Ct. Aug. 10, 2015) [hereinafter *Mock*] (order reinstating the first Initial Order of the administrative law judge).

81. *Id.* at 4-5.

82. *Id.* at 5.

Her: "I have no clue. I remember next to nothing about last night."  
"Did we sleep together?" "I definitely woke up with no clothes on."

Him: "I mean I assume we slept together because we woke up together  
and we were both naked."<sup>83</sup>

At the hearing, the complainant testified that she remembered the accused trying to sit her up in the bathroom; she also recalled lying on a bed, feeling pain, screaming out and having the accused try to cover her mouth.<sup>84</sup> The accused testified that he remembered the complainant on the floor of the bathroom; he remembered her walking by herself into the bedroom, him removing her pants and performing oral sex on her, her removing her bra and her repositioning him as he penetrated her.<sup>85</sup> He denied trying to cover her mouth.<sup>86</sup>

In front of an Administrative Law Judge, the UTC first argued that the complainant was too incapacitated to consent and that the defendant should have realized that. The ALJ found that the complainant was not too intoxicated to consent.<sup>87</sup> On a petition for reconsideration, the university changed its claim and argued instead that a preponderance of the evidence indicated that the complainant had not consented.<sup>88</sup> On reconsideration, the ALJ found for the UTC under its second theory of

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83. *Id.*

84. *Id.*

85. *Id.* at 4–5, 18.

86. *Id.* at 18.

87. Contrary to what the reviewing court indicated, the ALJ's findings were very murky with regard to the extent of the complainant's incapacity, despite the fact that the University asked the ALJ to clarify this critical issue. *Id.* at 15. The ALJ found that the UTC did not meet its burden of showing that the complainant was intoxicated to the point of being incapable of consenting to sexual activity. *Id.* The ALJ also wrote that the complainant "did not convince [me] that she was intoxicated." *Id.* at 15 n.3. It is very hard to believe that the ALJ did not believe the complainant was at all impaired by the alcohol she drank. The accused testified that he thought the complainant was "tipsy." *Id.* at 4. Both parties' text messages acknowledge that they did not remember very much from the night before. The texts were not disputed and clearly suggest that they had been drinking enough to be impaired. If she was not impaired by the alcohol she drank—as the reviewing court seemed to assume—then why was she on the floor in the bathroom, and more curiously, why did the accused follow her into the bathroom? If she was not visibly inebriated or ill, wouldn't it be odd for a man to follow a woman into the bathroom? The ALJ found that the complainant exercised poor judgment by engaging in underage drinking. *Id.* at 17–18. Why would her judgment have been poor if she did not drink enough to impair her ability to act? Recognizing that the complainant was somewhat incapacitated—even if not incapacitated enough to render her incapable of consent—is crucial because it suggests that her actions should be viewed in light of her drunkenness. The act of voluntarily lying down on a bed has a different meaning when one feels sick, as does the "act" of letting someone else partially undress you. If she felt awful, as many people do after drinking too much too quickly, she may well have just been letting a relative stranger try to make her feel better. This is not necessarily consenting to sex.

88. *Id.* at 14–15.

liability, insufficient indication of consent.<sup>89</sup>

In overturning the ALJ's decision, the Tennessee court focused on the burden of proof. The UTC's position was that it "satisfie[d] its burden of proof by requiring the accused to affirmatively prove consent."<sup>90</sup> Without citing to any case, the court found this to be an "untenable" denial of due process because it was unfair to make the accused bear the burden of overcoming "the presumption inherent in the [complainant's] charge."<sup>91</sup> As a matter of criminal law, the court would probably have been correct. In a criminal case, the prosecution maintains the responsibility to prove beyond a reasonable doubt all necessary elements of a crime.<sup>92</sup> Non-consent is a necessary element of this "crime" because in the absence of non-consent, the act is not criminal.

Analyzing these facts within a discrimination law paradigm may render a different result. As a matter of discrimination law, there is a well-established burden-shifting protocol that requires a defendant to produce evidence that refutes the presumption inherent in the plaintiff's prima facie case. The court in *Mock* did not mention the *McDonnell-Douglas/Burdine/Hicks* trilogy.<sup>93</sup> Under that trilogy, the burden shifts to a defendant to offer a non-discriminatory reason for adverse employment action once the plaintiff introduces evidence of a prima facie case.<sup>94</sup> What that would mean in this context is that given "the presumption [of nonconsent] inherent in the charge,"<sup>95</sup> it is appropriate for the defendant

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89. See *id.* at 15.

90. *Id.* at 11.

91. *Id.* at 11–12.

92. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 54 (2d ed. 1986) (legislature would not be free to take non-consent, and make it an affirmative defense which the defendant must prove by a preponderance of the evidence unless that which the prosecution has to prove before the burden is switched to the defendant could itself be a criminal offense); *ALI Draft*, *supra* note 15, § 213.4 at 70 ("[A] prosecutor's burden is to prove beyond a reasonable doubt that no affirmative words or conduct by the complainant constituted, in light of the totality of the circumstances, positive agreement to engage in the specific conduct at issue").

93. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (once plaintiff establishes a prima facie case of discrimination—by showing that he was a member of a protected class (under Title VII) and was rejected for a position for which he was qualified—the burden shifts to the employer to offer non-discriminatory reasons for the rejection.); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254–56 (1981) (plaintiff maintains the burden of persuasion once the defendant has met the burden to produce evidence of non-discriminatory motive); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 514 (1993) (plaintiff must convince jury that reason for adverse action was discrimination, not just that defendant's proffered reason for action was pretext).

94. It is permissible to shift the burden of production to defendant, though the plaintiff always retains the burden of persuasion. See generally Steven L. Wilborn et al., EMPLOYMENT LAW: CASES AND MATERIALS, 395–400 (5th ed. 2012).

95. *Mock*, *supra* note 80 at 12.

to then have to offer evidence of consent to rebut that presumption. The school should retain the ultimate burden of proving, by a preponderance of the evidence, that the sexual contact was non-consensual.

If that is the appropriate paradigm, it appears that both the UTC and the court got it wrong. UTC could not shift the burden of persuasion to the defendant to prove consent, but it could shift the burden of production to him to show consent. His evidence of consent in this case was exceedingly weak. The evidence showed that the complainant removed her own bra and the accused, but not the complainant, testified that she re-positioned him as he penetrated her. This *could* be sufficient to prove consent, but a fact finder could also very easily conclude that her behavior was not sufficient for a reasonable person to conclude that she was consenting. After all, the accused found the complainant on the floor of the bathroom, knew she was nauseous,<sup>96</sup> and knew that she had not said anything to indicate that she wanted to keep going. She testified that she cried out in pain. He did not remember that.

If, under UTC's code, it was her responsibility to make her "no" obvious, then the accused should not have been found responsible. If it was his responsibility to make sure she was consenting, he should have been found responsible. The UTC's code, like many school codes, does not allocate responsibility so clearly. Under the UTC code, it is permissible to go forward if there is clear non-verbal indication of consent.<sup>97</sup> She does not have to say no for him to be found liable, nor does he have to make sure that she is saying yes. On this evidence, a fact finder could go either way.

In reversing instead of remanding, the Tennessee court seemed astonished that all the defendant would have needed to do to meet his burden was testify that the complainant had said "Yes."<sup>98</sup> The Court suggested that this realization showed the weakness of the school's case. Because she testified that she could not remember what happened, she would not have been able to rebut his statement of affirmative assent. Instead of showing how weak the UTC's case was, though, this observation shows why an affirmative consent policy may make sense. All a defendant has to do to fully protect himself and garner exculpatory evidence against a subsequent charge of sexual misconduct is ask the

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96. He testified that he thought she had been throwing up and in his text the next day he asked her if she threw up in the bed. He clearly knew that she was either drunk or ill. *Id.* at 4–5.

97. UTC Rule § 1702-02-05-04(7) allows consent to be established through "acts that are unmistakable in their meaning." *Id.* at 20.

98. "If Mr. Mock had testified that Ms. Morris said 'Yes,' according to her recollection, she was not in a condition to rebut that statement." *Id.*

woman he is about to have sex with whether she wants to do it, and be sufficiently sober to remember that he did so. Admittedly, many people do not communicate so explicitly when having sex, but part of DOE's goal may be to change that behavior so that sexual partners demonstrate more concern for each other's well-being.

#### IV. THE REAL ISSUES

##### A. *Procedural Safeguards?*

All three of the cases just examined are typical and hard. Parties are often too drunk to remember clearly, but not drunk enough to be incapable of consent. Non-verbal communication is notoriously inaccurate.<sup>99</sup> Women often engage in some sexual contact without wanting, or indicating that they want, to go further. In none of the cases just discussed could a reasonable juror find *beyond a reasonable doubt* that these men proceeded to have sex without signs of consent. But a reasonable juror could readily find as much by a preponderance of the evidence.

That is the fundamental problem in these cases. Many people find it disconcerting to punish a man for something they think, but are not sure, that he did. When an accused is restricted in his ability to poke holes in the complainant's story or impugn her overall credibility there is less reason for the fact finder to dismiss her story as inaccurate. When she is not confronted repeatedly, in person, it is easier to believe she is telling a more likely version of the truth than he is. Criminal law safeguards do not make it easier to determine the truth, they just make fact finders more comfortable dismissing a complainant's story as not necessarily true. In an effort to encourage complainants to come forward, college tribunals have made it harder to dismiss complainants' stories. In doing so, they inevitably increase the risk of false positive findings of liability.

In *Doe v. UCSD*, the college tribunal used alternatives to the traditional right of confrontation, including having the victim testify out of sight of the accused and having the accused submit questions to a hearing officer who screened some of them out and then presented them to the complainant. The court found the procedures insufficiently protective of the accused's rights.<sup>100</sup> If the court had understood that it

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99. See Baker, *supra* note 19 at 303–07 (women's non-verbal acts are often interpreted by men as indicating a sexual desire when they are not intended that way).

100. See *Doe v. Regents of Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL, 2015 WL 4394597 at \*2–3 (Super. Ct. Cal. July 10, 2015).



was reviewing a civil rather than criminal process, it might have been more accepting of these procedures, but there is little doubt that adoption of these less confrontational methods makes it harder for an accused to impugn the complainant's story.

There are other ways to afford the accused adequate protection and still restrict his right to confront the alleged victim. For instance, schools could create a sliding scale of penalty, with more moderate penalties assessed for cases in which the fact finders believe the evidence is especially close. Would people be so uncomfortable finding an accused responsible for nonconsensual sex if the penalty for being found so responsible was having to switch dorms or enroll in a different class or not participate in the Debate Club?

The men in all of the court cases described above were expelled initially. If they had not been expelled—if they had been forced to switch dorms or classes because their behavior had been found to be inconsistent with the norms of civility and respect that the school required—would the courts have found it as necessary to overturn the schools' decisions? Switching dorms and re-arranging class schedules is not costless for the person forced to switch or for the university. It is costly enough for the person being moved that he is likely entitled to some process from the university. But there is no reason to think that he is entitled to full criminal safeguards just because the school found his behavior offensive enough to justify switching dorms.<sup>101</sup> A sliding scale based on the persuasiveness of the evidence would produce more false positives than the criminal system—some men will be unjustly punished—but false positives will matter less because the ramifications are not as great.

As every school child knows, criminal law safeguards embody a belief that it is better for many guilty people to go free than one innocent person to be punished. False positives are supposed to be an anathema in criminal law. Discrimination law has taken a different approach. In an

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101. In doing so, a university would be treating him much more leniently than it treats students whom they have found to violate school codes with regard to racial tolerance. See the University of Oklahoma incident discussed in *supra* note 7. See also Jake New, *Punishment, Post-Oklahoma: College Leaders Have Gotten Speedier and More Severe in Taking Action Against Students Linked to Racist Incidents. Critics Fear Due Process is Being Eroded.*, INSIDE HIGHER ED (Apr. 1, 2015), <https://www.insidehighered.com/news/2015/04/01/some-college-leaders-are-responding-quickly-racist-and-sexist-incidents> (reporting that Bucknell University took less than a week to expel students who used racist speech on the college radio station); Lee Baines, *University of South Carolina Suspends Student After Racial Whiteboard Slurs Appear Online*, MODVIVE.COM (Apr. 5, 2015), <http://www.modvive.com/2015/04/05/university-of-south-carolina-suspends-student-after-racial-whiteboard-slurs-appear-online/> (reporting that the University of South Carolina suspended a student who wrote the word "nigger" on a white board).

effort to bring more discrimination cases to the fore, to make employers and schools responsible for discrimination perpetrated within environments that they control, Title VII and Title IX allow juries to draw inferences of discrimination without any direct evidence of discrimination. Discrimination law allows close cases to be decided in favor of plaintiffs.<sup>102</sup> It acknowledges the inevitability of false positives.

The critical question for policy makers and college tribunals is whether it is appropriate to accept a real risk of false positives. The acceptability of that risk becomes more palatable if the punishment imposed is relatively slight, but the risk remains.

### *B. Substantive Harm?*

In Part II.B of this essay I offered what I take to be DOE's theory—that sexual harassment manifests itself in the common expropriation of sex from people who do not want their bodies used so routinely by others for others' sexual pleasure. I suggested that the pervasive expropriation of sex creates a demeaning and disorienting atmosphere for people who are regularly used in this way. This atmosphere can “detract” and “discourage” women from proceeding in ways they otherwise would.<sup>103</sup> But maybe it doesn't.

By women's own admission, they “let” men take sex—without saying no or yes—in part just to get it over with, to not make a scene.<sup>104</sup> They blame themselves for not saying no.<sup>105</sup> They feel violated but not “entirely violated.”<sup>106</sup> They do not think it will affect them forever.<sup>107</sup> According to the AAU study, the main reason victims did not report incidents of sexual misconduct was they did not believe the behavior was serious enough.<sup>108</sup> Over half of the victims of forced penetration—

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102. See *supra* note 93 and accompanying text (discussion of burden-shifting approach).

103. See *supra* Part II.B.

104. See Ruckh, *supra* note 72; Baker, *supra* note 19 at 256–59 (discussing women's desire to see themselves as exercising agency, even if they repeatedly fail to do so).

105. See Arnold S. Kahn et al., *Calling it Rape: Differences in Experiences of Women Who Do or Do Not Label Their Sexual Assault as Rape*, 27 *Psychol. of Women Q.* 233, 240 (2003) (“[w]omen . . . attribute[] their undesired sex not to the man's pressure or force but to their own lack of ability to think clearly or resist . . . . These women seem to have presumed that men are going to have sex with a woman unless the woman forcefully resists, and her inability to resist meant . . . that what happened was not rape.”); Laina Y. Bay-Cheng & Rebecca Eliseo-Arras, *The Making of Unwanted Sex: Gendered and Neoliberal Norms on College Women's Unwanted Sexual Experiences*, 45 *J. OF SEX RES.* 386, 388 (2008) (ideals of “self-determination and personal responsibility . . . lead[] women to blame themselves for” unwanted sex).

106. See Ruckh, *supra* note 72.

107. *Id.*

108. *AAU Executive Summary*, *supra* note 39 at xxi (“When asked why the incident was not

criminal rape—felt that the incident was not serious enough.<sup>109</sup>

Much of the original motivation for rape reform stemmed from the feminist claim that rape was like “death,”<sup>110</sup> it was “spiritual murder.”<sup>111</sup> The Supreme Court has intoned that “[s]hort of homicide, [rape] is the ‘ultimate violation of self.’”<sup>112</sup> Much of what happens on college campuses does not appear to be that, at least for many women. It is unpleasant and it hurts. It is demeaning. It makes people feel used. But fully consensual sex can leave one with the same feelings. Why make men responsible for women’s failure to act when her failure to act often results in a harm no more severe than a bad, consensual sexual experience?

There are two answers to that question, and reasonable minds may differ on whether they are sufficient to justify the regulation of sexual entitlement. The first is that even if being bullied into sex only hurts women a little, it hurts women much, much more regularly than men. The indignity suffered by women is not grave, but it is commonplace and deeply gendered. As a matter of discrimination law, schools should try to eradicate a practice that forces women and sexual minorities, but only very rarely heterosexual men, to suffer these indignities at the hands of their peers.

The second reason why schools may be justified in regulating nonconsensual sex is that there is no reason to accept the status quo of male entitlement. What is gained by allowing men to proceed in the face of ambiguous consent? Sexual freedom? Perhaps. Queer theorists and sex positivists suggest that any restriction of sexual liberty should be suspect because freedom of sexual expression is so important.<sup>113</sup> Critics of rape reform suggest that the potential harms from nonconsensual sex

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reported, the dominant reason was it was not considered serious enough.”).

109. *Id.*

110. See Lynne N. Henderson, *What Makes Rape a Crime*, 3 BERKELEY WOMEN’S L. J. 193, 227 (1987) (rape involves the “phenomenological harm of thinking you are experiencing your own death”).

111. Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1448 (1993) (rape is “spiritual murder”).

112. *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (quoting LISA BRODYAGA, ET AL., RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FACILITIES, AND CRIMINAL JUSTICE AGENCIES 1 (Wash. Dept. of Justice et al., 1975)).

113. As Robin West writes, “the queer theoretic critique, like the [radical] feminist, also obscures the distinction between consensual and nonconsensual sex . . . . The difference between radical feminism and queer theory is that queer theorists do this *not* toward the end of asserting the wrongness . . . of oppressively sexualized power . . . but rather toward asserting and then valorizing the ubiquitous transgressiveness of sexualized power.” Robin West, *Sex, Law, and Consent* in THE ETHICS OF CONSENT: THEORY AND PRACTICE 221, 231–32 (F.G. Miller & A. Wertheimer eds. 2009).

are the necessary flip side of the excitement and danger that draw us to sex in the first place.<sup>114</sup> For some theorists, making sex safe is robbing sex of most of its transformative potential. If sexual liberty is a (mostly) unqualified good and if sexual regulation is a (mostly) unqualified bad, then regulating campus sexual misconduct as sexual harassment is bad policy because it facilitates more regulation of sexual behavior.

One's views on the dangers of sexual regulation probably hinge on one's views on the benefits of sexual freedom in general, and on college campuses, in particular. Studies suggest that a great deal of what college students participate in is rushed, anonymous, not particularly pleasant, and alienating sex.<sup>115</sup> As such, it usually fails to afford its participants the benefits that sex positivists celebrate in sex. Both men and women report alarmingly high rates of unwanted, even if consensual, sex.<sup>116</sup> If men are taking sex that they do not even care that much about simply because they think that is what they are supposed to do, or they are being pressured to take it by their male peers, or they just assume (often wrongly) that their evening will feel incrementally more complete if they have an orgasm, then what will be deterred by curtailing men's sense of sexual entitlement is probably not worth saving.

Restricting freedom of sexual expression, like curtailing freedom of political and racial expression, may be an important part of cultivating a respectful educational community. As suggested above, universities routinely regulate racist speech without demanding any proof that it was offensive to those who heard it. Indeed, universities expel students who engage in racist speech without any investigation into the harms it might cause.<sup>117</sup> Racist speech is assumed to be damaging to the community, notwithstanding a constitutional principle that protects its right to be proclaimed. Much of what is happening sexually on college campuses

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114. "[D]esire [necessarily] risks bumping up against danger. Feminist legal theory often dismisses this . . . . But to evacuate women's sexuality of any risk of a confrontation with shame, loss of control, or objectification strikes me as selling women a sanitized, meager simulacrum of sex not worth getting riled up about . . . . It is precisely the proximity to danger, the lure of prohibition, the seamy side of shame that creates the heat that draws us toward our desires . . . ." Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 206–07 (2001). For more on the tension between feminism and queer theory as it applies to rape, see generally Katharine K. Baker & Michelle Oberman, *Women's Sexual Agency and the Law of Rape in the 21<sup>st</sup> Century*, 69 STUD. IN L., POL. & SOC'Y 63 (2015), <http://www.emeraldinsight.com/doi/pdfplus/10.1108/S1059-433720160000069003>.

115. See Baker & Oberman, *supra* note 114 at 25–31 (relating college women's sexual experiences).

116. During one two-week period, 50% of college women and 26% of college men in the study said they engaged in unwanted coitus. See Bang-Cheng and Eliseo-Arras, *supra* note 105 at 386.

117. See *supra* note 101.

may be comparably insulting, demeaning, and inconsistent with the norms of equality that Title IX requires educational institutions to foster. The need to restrict such conduct is rooted not so much in the gravity of the injury it inflicts on individual victims, but in the harm to the communal norms of respect, civility, and equality on college campuses.

## V. CONCLUSION

Despite all of the publicity that DOE's enforcement effort has received, few people are addressing the hard questions that need to be addressed pertaining to sexual misconduct on college campuses. And courts are failing to understand the nature of the cases in front of them. DOE is not requiring universities to re-codify or enforce criminal law. It is requiring schools to police harassing conduct. Criminal safeguards need not apply, but questions about discrimination law remain.

Answering those questions requires thinking hard about whether it is appropriate for universities to penalize individuals, as the civil law does, without overwhelming proof that those individuals have done something wrong. Discrimination law allows fact finders to choose sides in credibility contexts even though it would be perfectly reasonable to choose either side. Is that an appropriate approach to sexual misconduct on college campuses? That is a question that should be taking up more of our time.

Comparably, more people need to be discussing whether there is something wrong with men's sense of sexual entitlement. One cannot assess the propriety of DOE's policies without being willing to articulate standards for acceptable sexual behavior. Many women do not like or appreciate or want to accept the way many men treat them sexually, but only a few women's lives are being shattered by men's sexual treatment of them.<sup>118</sup> Many women just endure this treatment because they understand there is a norm of male sexual entitlement and they do not want to be seen as complainers. Should the burden be on women to stop the male behavior that they find offensive, or should schools be allowed,

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118. Some women are profoundly affected by men's callous treatment. In an incident reported in the Harvard Crimson, one victim recounted a story that almost certainly did not involve criminal rape, but did severely impact her ability to pursue her education. See Anonymous, *Dear Harvard: You Win*, THE HARVARD CRIMSON (Mar. 31, 2014), <http://www.thecrimson.com/article/2014/3/31/Harvard-sexual-assault/>. All the victim was asking for was that Harvard force the accused to switch dorms. *Id.* Harvard did not. *Id.* One of the things that makes this issue so difficult is that it is not easy to tell how different women may be affected by the same kind of aggressive male sexual behavior. Again, criminal and civil law tend to treat this issue differently. In the civil context, at least with torts, a tortfeasor has to take his victim as he finds her.

perhaps even required under Title IX, to come to women's aid?