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## Campus Sexual Assault Adjudication and Resistance to Reform

**ABSTRACT.** The forty-year history of rape law reform sheds light on current debates around the adjudication of campus sexual assault. Two strands of rape law reform are important. The first, a progressive reform movement, abolished the unique procedural hurdles in rape prosecutions. That movement is now transforming the key elements of the crime: force and nonconsent. The second reform movement, conservative in nature, increased criminal and civil punishments for rape. While there has been a backlash to the reformation of force and nonconsent, there has been little political or scholarly opposition to the imposition of increased punishments for rape. The Office for Civil Rights at the Department of Education recently clarified that Title IX, which outlaws sex discrimination in education, requires colleges and universities to respond promptly and equitably to allegations of campus sexual assault. In addition, colleges and universities are increasingly adopting affirmative consent rules, a standard higher than most state criminal codes, to govern sexual activity on campus. These progressive changes in campus sexual assault adjudication have faced a backlash, mirroring the backlash to progressive rape law reform. Rape law's evolution over time suggests not only that we should support campus adjudication of sexual assault under an affirmative consent standard, but also that we should oppose both unique procedural protections for those accused and mandatory punishments for those found responsible.

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## INTRODUCTION

To understand the current resistance to the application of Title IX to campus sexual assault, one must understand the history of rape law reform and the ensuing backlash. That history clarifies why campus adjudication of sexual assault is a positive development, and why unique procedural protections for those accused of sexual assault in campus disciplinary proceedings and mandatory penalties for those found responsible for sexual assault are both ill-advised.

Over the past forty years, rape law has undergone substantial, positive change. Feminist reformers succeeded in making the crime gender-neutral<sup>1</sup> and in abolishing a number of unique procedural requirements that unfairly burdened rape prosecutions.<sup>2</sup> These discredited rules included requirements that the complainant's credible testimony be corroborated by other evidence, that the victim resist her attacker to the utmost of her physical capacity, that the victim promptly complain to authorities of the attack, that the victim not be married to the attacker, and that the judge caution jurors to weigh the testimony of complainants in rape cases with skepticism.<sup>3</sup> Today, the reform movement is focused on clarifying the contours of consent and abolishing the legal requirement of force.<sup>4</sup>

The reform movement is also taking aim at campus sexual assault. Title IX is the federal law that prohibits gender discrimination in education.<sup>5</sup> The feminist movement facilitated the interpretation of Title IX as mandating that colleges and universities respond equitably to campus sexual assault. Key controversies today about the application of Title IX to campus sexual assault each have analogs in rape law reform discourse over the past few decades.

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1. See Susan B. Carbon, *An Updated Definition of Rape*, U.S. DEP'T JUST. (Jan. 6, 2012), <http://www.justice.gov/opa/blog/updated-definition-rape> [<http://perma.cc/55j4-EV38>] (announcing the FBI's new, gender-neutral definition of rape).
  2. See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 947-50 (2004) (detailing the removal of the prompt complaint requirement, corroboration requirement, and cautionary instructions in rape prosecutions in most jurisdictions).
  3. *Id.* at 947-49, 953-54; see also Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1477-85 (2003) (describing the history of the marital rape exception); Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 962 [hereinafter Anderson, *Reviving Resistance in Rape Law*] (discussing the resistance requirement).
  4. See, e.g., Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1403-07 (2005).
  5. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235, 373-75 (codified at 20 U.S.C. §§ 1681-1686 (2012)).

Some legal scholars have expressed opposition to colleges and universities regulating campus sex, asserting that the U.S. Department of Education's Office for Civil Rights (OCR) has gone too far in enforcing Title IX.<sup>6</sup> Questions have emerged about which system is better equipped to handle allegations of campus sexual assault: the college disciplinary system, or the criminal justice system.<sup>7</sup> Some have criticized the climate that they believe the concern for campus sexual assault itself stimulates. They decry what they see as a neo-Victorianism on colleges nationwide, a moral panic that undergirds concern about transgressive sexual behavior.<sup>8</sup>

Dozens of law professors from Harvard and the University of Pennsylvania recently denounced the codes and procedures their institutions have adopted to address campus sexual assault.<sup>9</sup> These open letters bespeak the charged nature of debates around campus sexual assault, as well as broader institutional anxiety about discovering sex offenders in college.

This Feature describes some of the major developments in rape law over the past forty years and compares them to recent developments in Title IX's application to campus sexual assault. In the context of both the criminal law prohibiting rape and campus codes prohibiting sexual assault, this Feature

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6. See, e.g., Jed Rubenfeld, Opinion, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html> [<http://perma.cc/T5NA-SG2B>].
  7. See Michelle Goldberg, *Why the Campus Rape Crisis Confounds Colleges*, NATION (June 5, 2014), <http://www.thenation.com/article/why-campus-rape-crisis-confounds-colleges> [<http://perma.cc/TE9J-8VZF>] (discussing criticisms of both campus adjudication and the criminal justice system in handling sexual assaults). Compare Samantha Harris, Opinion, *Law Enforcement Must Take the Lead in Campus Sexual Assault Cases*, N.Y. TIMES (Aug. 13, 2014, 12:32 PM), <http://www.nytimes.com/roomfordebate/2014/08/12/doing-enough-to-prevent-rape-on-campus/law-enforcement-must-take-the-lead-in-campus-sexual-assault-cases> [<http://perma.cc/YGF9-AK7D>] (arguing that “[o]nly our criminal justice system can properly protect the accuser and the accused”), with Holly Rider-Milkovich, Opinion, *Campuses Are the Best Places for Sexual Assault Accountability*, N.Y. TIMES (Aug. 12, 2014), <http://www.nytimes.com/roomfordebate/2014/08/12/doing-enough-to-prevent-rape-on-campus/campuses-are-the-best-places-for-sexual-assault-accountability> [<http://perma.cc/AA96-PAX6>] (promoting campus adjudication because “[t]he criminal justice system alone is simply not effective enough to keep young people safe”).
  8. For an early articulation of this argument, see Katie Roiphe, *Date Rape's Other Victim*, N.Y. TIMES MAG. (June 13, 1993), <http://www.nytimes.com/1993/06/13/magazine/date-rape-s-other-victim.html> [<http://perma.cc/2E34-29Y3>].
  9. Elizabeth Bartholet et al., Opinion, *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> [<http://perma.cc/GS43-574K>]; *Open Letter from Members of the Penn Law School Faculty*, PHILLY.COM (Feb. 18, 2015), <http://media.philly.com/documents/OpenLetter.pdf> [<http://perma.cc/E24J-9HRP>].

discusses progressive and conservative<sup>10</sup> reform of procedural and substantive rules, as well as backlashes against these reforms. The central claim is that the application of Title IX to campus sexual assault, and the resistance to that application, parallel the history of rape law reform. From this parallel, this Feature draws insights about how we should view recent developments in how campuses address sexual assault.

Part I describes traditional rape law and the movement for reform, noting two distinct strands. First, a progressive strand of reform eliminated unique procedural hurdles facing prosecution and expanded the definition of the crime to become more consonant with victims' experiences. Second, a conservative, punitive strand of reform ushered in increased criminal punishments and serious collateral consequences to convictions for sex offenses. Part II begins with the continued failure to treat rape equitably despite decades of progressive rape law reform. It then describes a vocal backlash against the progressive strand of reform, and contrasts that with the relative quiet in response to the conservative, punitive strand of reform. Part III turns to the issue of campus sexual assault. It outlines the application of Title IX to campus sexual assault as OCR has interpreted it. It then describes the adoption of affirmative consent rules by colleges and universities. Part IV outlines the key arguments against campus sexual assault adjudication and affirmative consent rules, including challenges based on due process, the merits of substantive standards, and the institutional capacity of colleges and universities to address sexual assault. It traces the similarities of these arguments to those levied against progressive rape law reform. It also notes the alleged harm that campus adjudication portends for impressionable young women as well as young men with otherwise bright futures. Part V explores how the history of rape law reform sheds light on campus sexual assault reform. It concludes that we should support campus adjudication for sexual assault, and oppose both unique procedural protections for those accused of sexual assault and mandated penalties for those found responsible for the misconduct.

## I. RAPE LAW REFORM

To understand institutional reform in response to campus sexual assault, one must begin with traditional rape law, trace progressive reform over the past forty years substantively and procedurally, and then trace the conservative reform of rape punishment over roughly the same period of time.

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10. This Feature uses the term *progressive* broadly and imperfectly to categorize reform that derives from a feminist or socially liberal agenda, and the term *conservative* broadly and imperfectly to categorize reform that derives from a rightist or traditional-values agenda.

### A. Traditional Rape Law

Traditional rape law defined the crime as “the carnal knowledge of a female, forcibly and against her will.”<sup>11</sup> Under this definition, rape required vaginal penetration by a penis (“carnal knowledge of a female”), plus force used by a male attacker (“forcibly”), plus the nonconsent of the female victim (“against her will”).<sup>12</sup> The force element was narrow and specific—a form of physical force that coerced the victim’s compliance.<sup>13</sup> A victim was expected to resist a sexual attack physically so that the attacker would have to use force, and so that the ensuing struggle would create corroborative evidence of the attack.<sup>14</sup> The nonconsent element was also hard to meet because so much behavior could imply consent. Silence or passive acquiescence to sexual penetration was sufficient to imply consent.<sup>15</sup> Moreover, a victim’s lack of chastity or behavior that violated traditional gender-based norms was also sufficient to imply consent.<sup>16</sup>

Independent of the substantive definition, traditional rape law also included at least three unique procedural hurdles that prosecutors had to jump to secure a conviction. First, although victims of other felonies need not promptly complain, a prompt complaint rule in rape law meant that if the victim did not immediately report to authorities, she could not pursue criminal redress.<sup>17</sup> Henry de Bracton, an influential thirteenth-century English legal scholar, described it as a “hue and cry” requirement to prove rape.<sup>18</sup> The Model

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11. 4 WILLIAM BLACKSTONE, COMMENTARIES \*210. The FBI’s Uniform Crime Report used this definition from 1927 through January 1, 2012. See Carbon, *supra* note 1; see also Fed. Bureau of Investigation, *Uniform Crime Report, Crime in the United States, 2009: Forcible Rape*, U.S. DEP’T JUST. (Sept. 2010), <http://www2.fbi.gov/ucr/cius2009/documents/rapemain.pdf> [<http://perma.cc/TCX6-RBVT>] (providing an example of the traditional rape definition in use before this change).

12. Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN’S L. REV. 625, 628 (2005); see also SUSAN ESTRICH, *REAL RAPE* 59-60, 64-65 (1987) (exploring judicial interpretations of the force requirement).

13. Anderson, *supra* note 12, at 628 (“‘Forcibly’ meant that the man used physical force or its threat to obtain sexual penetration.”).

14. See Anderson, *Reviving Resistance in Rape Law*, *supra* note 3, at 962-63.

15. See Anderson, *supra* note 4, at 1408-09.

16. Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 60-69 (2002).

17. See Anderson, *supra* note 2, at 947-48.

18. He explained:

When therefore a virgin has been so deflowered and overpowered against the peace of the lord the king, forthwith and whilst the act is fresh, she ought to repair with hue and cry to the neighboring vills, and there display to honest men

Penal Code in the United States turned the rule into the short statute of limitations for sexual offenses of three months.<sup>19</sup>

Second, although perpetrators of almost all other crimes could be convicted upon the credible testimony of the victim alone, the corroboration requirement required corroborative evidence in a rape case because a victim's words were insufficient to secure a conviction.<sup>20</sup> Bracton suggested, for instance, that a rape victim should be able to "display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress."<sup>21</sup> The Model Penal Code turned this suggestion into a requirement: "No person shall be convicted of any felony under this [sexual offenses] Article upon the uncorroborated testimony of the alleged victim."<sup>22</sup>

Third, although juries sitting in judgment in cases involving other felonies were not warned against believing the complainant, a cautionary instruction in rape law warned jurors to treat the complainant's testimony with skepticism. The seventeenth-century English jurist Matthew Hale believed that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."<sup>23</sup> Many jurisdictions responded to Hale's admonition by requiring courts to issue cautionary instructions warning juries to assess the complainant's testimony in rape cases with extra suspicion. The *Model Penal Code* states:

In any prosecution before a jury for an offense under this Article [for sexual offenses], the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the

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the injury done to her, the blood and her dress stained with blood, and the tearing of her dress, and so she ought to go to the provost of the hundred and to the serjeant of the lord the king, and to the coroners and to the viscount, and make her appeal at the first county court. . . .

2 HENRICI DE BRACTON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 483 (Sir Travers Twiss ed. & trans., London, Longman & Co. 1878).

19. The Code reads: "*Prompt Complaint*. No prosecution may be instituted or maintained under this Article [for sexual offenses] unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence . . ." MODEL PENAL CODE § 213.6(4) (AM. LAW INST. 1962).

20. See Anderson, *supra* note 2, at 948.

21. BRACTON, *supra* note 18, at 483.

22. MODEL PENAL CODE § 213.6(5) (AM. LAW INST. 1962).

23. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (photo. reprint 2003) (London, E. & R. Nutt & R. Gosling 1736).



emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.<sup>24</sup>

These three unique procedural requirements were supported by the societal notion that women have a tendency to lie about rape and sexual assault. Sigmund Freud, for example, argued that women may unconsciously meet sexual attacks with “ready acceptance.”<sup>25</sup> Men were simply obliging women’s innate desire when they ignored tepid resistance and proceeded to penetration.<sup>26</sup>

In his 1940 treatise on evidence, Professor John Henry Wigmore discussed women’s propensity to lie in terms of the mental states of women and girls. He discussed the importance of admitting evidence of a woman’s chastity in cases in which she alleges rape:

There is, however, at least one situation in which chastity may have a direct connection with veracity, viz, when a woman or young girl testifies as complainant against a man charged with a sexual crime—rape, rape under age, seduction, assault. Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex-incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and

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24. MODEL PENAL CODE § 213.6(5) (AM. LAW INST. 1962).

25. SIGMUND FREUD, *PSYCHOPATHOLOGY OF EVERYDAY LIFE* 202 n.1 (A.A. Brill trans., 1901) (“The case [of suicide] is then identical with a sexual attack on a woman, in whom the attack of the man cannot be warded off through the full muscular strength of the woman because a portion of the unconscious feelings of the one attacked meets it with ready acceptance.”); see also 1 H. DEUTSCH, *THE PSYCHOLOGY OF WOMEN* 274 (1944) (proposing the theory that women fantasize rape because of “unconscious masochism” and female attraction to suffering).

26. See, e.g., Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 *YALE L.J.* 55, 66-68 (1952) (explaining how “the behavior [of resistance] will contradict the woman’s self-perceived disposition toward the act” when, for example, “erotic pleasure may be enhanced by, or even depend upon, an accompanying physical struggle”).

sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.<sup>27</sup>

So likely are women to engage in fits of “erotic imagination” and lie about sexual assault, an ABA report quoted by Wigmore concluded, that “the complainant woman in a sex offense should always be examined by competent experts to ascertain whether she suffers from some mental or moral delusion or tendency, frequently found especially in young girls, causing distortion of the imagination in sex cases.”<sup>28</sup>

Given women’s unconscious desires and men’s natural intentions to overcome female modesty, then, traditional rape law viewed women as likely to lie about sexual abuse. Based on this belief, traditional rape law required that an allegation of rape be promptly lodged and corroborated with (male) objective evidence (rather than (female) emotional evidence), and that the word of the complainant be met with skepticism.

### *B. Progressive Rape Law Reform*

The progressive fight against traditional rape law began with reform of the unique procedural requirements that made most rapes impossible to prosecute: the prompt complaint and corroboration requirements, and cautionary instructions. These requirements were inconsistent with how victims experienced rape. In seeking the abolition of the prompt complaint requirement, reformers pointed out that most rape victims do not promptly complain; in fact, most never report the attack to any authorities.<sup>29</sup> In seeking the abolition of the corroboration requirement, reformers pointed out that most victims have no corroborative evidence of an attack because attackers are able to subdue them without extrinsic physical force.<sup>30</sup> In seeking the abolition of the cautionary instruction, reformers pointed out that victims already faced

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27. 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 459 (3d ed. 1940).

28. *Id.* § 924a, at 466 (quoting a report by the ABA’s Committee on the Improvement of the Law of Evidence).

29. See Anderson, *supra* note 2, at 978-79 (discussing the low incidence of reporting by rape victims). A Department of Justice survey of female college students revealed that fewer than five percent of completed or attempted rapes were reported to law enforcement. Bonnie S. Fisher et al., *The Sexual Victimization of College Women*, U.S. DEP’T JUST. 23 (Dec. 2000), <http://www.ncjrs.gov/pdffiles1/nij/182369.pdf> [<http://perma.cc/36QH-NT9V>].

30. See Anderson, *supra* note 2, at 979-80 (discussing the fact that most rapes do not result in injuries or torn clothing, as expected by the corroborative evidence rule); see also Fisher et al., *supra* note 29, at 22 (reporting that victims only reported being injured in one in five rapes or attempted rapes).

social disdain and skepticism when they did come forward to report sexual assault.<sup>31</sup> Second-wave feminists challenged these unique procedural rules as unfair, and this reform effort was successful.<sup>32</sup>

Once the procedural hurdles waned, most rape cases came down to consent and force, so the substantive questions around the definition of the crime became the focus of progressive reform. Second-wave feminists and their insistence on women's sexual and political autonomy influenced the analysis on consent and force. A generation of women matured at a time when they felt they had a right to shape the terms of their sexual relationships. In consciousness-raising groups in the 1970s, women shared personal stories of forced sex, coerced sex, unwanted sex, and the mechanical, deadening sex that Germaine Greer memorably described as "masturbation in the vagina."<sup>33</sup>

Women wanted something better in their sexual lives, and they wanted the law to protect their autonomy to decide with whom to have it. By the mid-1970s, they gathered in "Take Back the Night" marches and rallies across the country, chanting "No Means No!"<sup>34</sup> In so doing, they staked the substantive claim that women's words matter—that once a woman refuses consent to sex, any penetration of her thereafter is rape, regardless of whether force is employed. The "No Means No!" slogan was an argument that force should not be required for the law to recognize nonconsensual sex as rape.

That claim retains salience decades later, not only because colleges and universities are adopting disciplinary rules requiring that no means no,<sup>35</sup> but also because the contours of sexual consent remain contested ground. In 2010, for example, pledges to the Yale University chapter of Delta Kappa Epsilon fraternity marched through campus residential areas at night chanting, "No Means Yes!" and "Yes Means Anal!" to gain admittance to the exclusive, male club.<sup>36</sup> The pledges' reversal of the classic "Take Back the Night" slogan

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31. Anderson, *supra* note 2, at 980-86 (asserting that, rather than mitigating bias in favor of women reporting rape, "cautionary instructions reflect and aggravate substantial societal bias against rape complainants").

32. See, e.g., *id.* at 949-50.

33. Germaine Greer, *The Female Eunuch*, in *FEMINISM IN OUR TIME: THE ESSENTIAL WRITINGS, WORLD WAR II TO THE PRESENT* 343, 349 (Miriam Schneir ed., 1994).

34. See Megan Gibson, *A Brief History of Women's Protests: Take Back the Night*, *TIME* (Aug. 12, 2011), [http://www.time.com/time/specials/packages/article/0,28804,2088114\\_2087975\\_2087967,00.html](http://www.time.com/time/specials/packages/article/0,28804,2088114_2087975_2087967,00.html) [<http://perma.cc/2JA2-WF9C>].

35. See, e.g., Sandy Keenan, *Affirmative Consent: Are Students Really Asking?*, *N.Y. TIMES* (July 28, 2015), <http://www.nytimes.com/2015/08/02/education/edlife/affirmative-consent-are-students-really-asking.html> [<http://perma.cc/4AAA-295T>].

36. Tracy Clark-Flory, *Yale Fraternity Pledges Chant About Rape*, *SALON* (Oct. 15, 2010), [http://www.salon.com/2010/10/15/yale\\_fraternity\\_pledges\\_chant\\_about\\_rape](http://www.salon.com/2010/10/15/yale_fraternity_pledges_chant_about_rape) [<http://perma.cc>

sounded a call for male entitlement to sexual access – and against female sexual autonomy. The chant was also a cogent encapsulation of the incentive structure under the substantive norms of traditional rape law. “No Means Yes” because “no” is of little legal consequence when a rape conviction requires force. “Yes Means Anal” because, once a woman agrees to some kind of sexual act, and is therefore unchaste, she is considered fair game for other kinds of sex.<sup>37</sup>

Unlike the Yale pledges, most scholars came to agree with second-wave feminists. They advanced the position that laws around sexuality generally, and rape law specifically, should be designed to protect sexual autonomy.<sup>38</sup> Substantively, they decried the force requirement in rape law and sought its abolition.<sup>39</sup> They posited that when someone says “no” – when she or he does not consent – sexual penetration thereafter is rape.<sup>40</sup>

As a result of social agitation, the law started to shift. In 1992, for example, the New Jersey Supreme Court discussed the purposes of rape law in the modern era:

Today [rape law] . . . is indispensable to a system of legal rules that assures each of us the right to decide who may touch our bodies, when, and under what circumstances. The decision to engage in sexual relations with another person is one of the most private and intimate decisions a person can make. Each person has the right not only to decide whether to engage in sexual contact with another, but also to control the circumstances and character of that contact.<sup>41</sup>

The court also redefined the statutory force required as the inherent force necessary to penetrate someone without consent.<sup>42</sup> The law did not require extrinsic force – that is, force beyond that necessary to effectuate penetration:

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/6XH6-GDU5]. They also chanted, “Fucking Sluts!” Anna North, *Yale Frat Boys Are Not Worthy of Your Outrage*, JEZEBEL (Oct. 15, 2010), <http://jezebel.com/5664883/yale-frat-boys-are-not-worthy-of-your-outrage> [<http://perma.cc/UF77-FX9C>].

37. Traditionally, the victim’s prior sexual history was central in the adjudication of rape reports. If a female victim was deemed “indiscriminate” in her sexual behavior, she was presumed to consent to whatever happened on the instance in question. Anderson, *supra* note 16, at 54.

38. See, e.g., STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 99-113 (1998); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1093-94 (1986).

39. ESTRICH, *supra* note 12, at 103-04; Stephen J. Schulhofer, *Rape in the Twilight Zone: When Sex Is Unwanted but Not Illegal*, 38 SUFFOLK U. L. REV. 415, 416-20 (2005).

40. ESTRICH, *supra* note 12, at 102.

41. State *ex rel.* M.T.S., 609 A.2d 1266, 1278 (N.J. 1992).

42. *Id.* at 1277.

[A]ny act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault. Therefore, physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful.<sup>43</sup>

Although other states did not rush to embrace New Jersey's reformulation of the crime, the *M.T.S.* case marked an important shift.

In 2012, the U.S. Attorney General announced a new definition of rape for the Uniform Crime Reports. The federal government changed the definition of rape from its very traditional formulation—"the carnal knowledge of a female, forcibly and against her will"—to a gender-neutral definition containing no force requirement: "the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."<sup>44</sup>

The principle of sexual autonomy animated these changes and emerged with constitutional import in the same-sex equality cases. For example, in 2003, the Supreme Court in *Lawrence v. Texas* struck down a criminal sodomy statute and declared, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."<sup>45</sup> In *Obergefell v. Hodges*, the Court, in declaring that same-sex couples had a constitutional right to marry, underscored that the liberty protected by the Due Process Clause of the Fourteenth Amendment "extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."<sup>46</sup>

To be sure, many states still require force before nonconsensual penetration is recognized as rape.<sup>47</sup> The criminal code in California, for example, does not explicitly criminalize nonconsensual sexual penetration.<sup>48</sup> When a recent effort to change the state law to criminalize nonconsensual sex failed in the

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43. *Id.*

44. Press Release, U.S. Dep't of Justice, Attorney General Eric Holder Announces Revision to the Uniform Crime Report's Definition of Rape: Data Reported on Rape Will Better Reflect State Criminal Codes, Victim Experiences (Jan. 6, 2012), <http://www.justice.gov/opa/pr/attorney-general-eric-holder-announces-revisions-uniform-crime-report-s-definition-rape> [<http://perma.cc/CN59-ECAE>].

45. 539 U.S. 558, 562 (2003).

46. 135 S. Ct. 2584, 2597 (2015).

47. John F. Decker & Peter G. Baroni, "No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1102-06 (2011).

48. CAL. PENAL CODE § 261 (West 2015).

legislature, reformers moved to require California colleges and universities to prohibit sexual penetration without consent.<sup>49</sup>

Despite some continued resistance to the criminalization of nonconsensual sex, the tide on the question appears to be shifting. One indication of that shift is that the American Law Institute is revising its more than fifty-year-old model provisions on sexual offenses.<sup>50</sup> The final form of the revision has not yet emerged from the debates, but the current draft criminalizes sexual penetration without consent and without extrinsic force.<sup>51</sup>

The move to abolish the force requirement is now the central substantive challenge of progressive rape law reform. Once again, the movement is trying to make the criminal law reflect the experience of victims of sexual assault. Most victims do not experience the kind of physical force that rape law traditionally recognized. For example, in random sample surveys, almost eighty-five percent of rape and sexual assault victims report that no weapon was used during the commission of the offense.<sup>52</sup> Although forty percent of these victims suffer some kind of injury, only five percent suffer a major injury, such as severe lacerations, fractures, or internal injuries.<sup>53</sup> Most rapists do not need to deploy physical force to get their victims to submit.<sup>54</sup> Assailants ignore victims' tears and pleas to stop, coercing and pinning down their victims to achieve penetration.<sup>55</sup> The requirement that an assailant use traditional physical force prevents criminal convictions in most of these cases. Progressive reform has therefore tried to open the courthouse doors to victims of the most common experiences of rape, where the assault occurs without the victim's consent but also without extrinsic bodily violence.

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49. Act of Sept. 28, 2014, ch. 748, 2014 Cal. Legis. Serv. 748 (West) (codified at CAL. EDUC. CODE § 67386 (West 2015)).

50. Ian Urbina, *The Challenge of Defining Rape*, N.Y. TIMES (Oct. 11, 2014), <http://www.nytimes.com/2014/10/12/sunday-review/being-clear-about-rape.html> [<http://perma.cc/X7VA-YVKW>].

51. See MODEL PENAL CODE § 213.4 (AM. LAW INST., Tentative Draft No. 1, 2014), [http://jpp.whs.mil/Public/docs/03\\_Topic-Areas/02-Article\\_120/20140807/03\\_ProposedRevision\\_MP\\_C213\\_Excerpt\\_201405.pdf](http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/03_ProposedRevision_MP_C213_Excerpt_201405.pdf) [<http://perma.cc/53YW-9ZCX>].

52. Lawrence A. Greenfield, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault*, U.S. DEP'T JUST. 8 (1997), <http://www.mincava.umn.edu/documents/sexoff/sexoff.pdf> [<http://perma.cc/ZG4B-D9ZP>].

53. *Id.* at 21.

54. Charlene L. Muehlenhard & Jennifer L. Schrag, *Nonviolent Sexual Coercion*, in *ACQUAINTANCE RAPE: THE HIDDEN CRIME* 115, 125 (Andrea Parrot & Laurie Bechhofer eds., 1991).

55. *Id.* at 124-26.

### C. Conservative Rape Law Reform

Over the past two decades, as the law was beginning to recognize nonconsensual sex as rape, the law surrounding sexual offenses also changed in a very different way. These changes were conservative and punitive. They were fueled not by the feminist movement, but by politicians reacting to notorious and rare cases of child abduction, rape, and murder.

A key component of the feminist movement for legal reform was to highlight the frequency of instances of rape committed by acquaintances and intimates.<sup>56</sup> Antifeminists and political conservatives, by contrast, emphasized the narrative of the predator stranger rapist to reinforce the exceptionality of rape, and they used this narrative as a basis for extreme penalties.<sup>57</sup> The rhetoric surrounding punitive reform of rape law in the form of increased criminal punishments and collateral consequences did not focus on the most common form of rape—acquaintance rape—nor did it focus on the most common form of sexual abuse of minors—predation by family members. In this way, the narrative of rape as exceptional behavior committed by aberrant loners worked in opposition to the progressive reform of rape law, which was based on the revelation of the more routine nature of sexual violence by those who are not a stranger to the victim.

In the 1990s, as a result of a series of high-profile cases involving the rape and murder of children by strangers,<sup>58</sup> the conservative, tough-on-crime movement that had focused on the drug war began to shift its focus to sex offenders.<sup>59</sup> Lawmakers in numerous states and at the federal level passed laws to increase dramatically the criminal punishments that attach to sexual offense convictions.<sup>60</sup> Politicians approached these issues with zeal, given the political gain they anticipated and the fact that sex offenders enjoyed little public

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56. See Anderson, *supra* note 12, at 626-28.

57. See ERIC JANUS, FAILURE TO PROTECT 3 (2006) (“[B]ecause of the intense focus of the media and these new [sex offender] laws, predators have become archetypical. In the headlines, and in these laws, sexual predators have come to symbolize the essence of the problem of sexual violence.”); Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 453-54 (2010) (discussing the role of the “stranger danger myth” in the development of harsher laws for sex offenders).

58. Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. LEGIS. 369, 372-73 (2009) (discussing the enactment of New Jersey’s “Megan’s Law” following the rape and murder of Megan Kanka in 1994).

59. Yung, *supra* note 57, at 436 (comparing the War on Drugs to a new “criminal war against sex offenders”).

60. *Id.* at 447-53.

support.<sup>61</sup> At least eighteen states increased their terms of incarceration applicable to rape.<sup>62</sup> Others lifted punishment ceilings and even built higher floors. For example, the share of federal sexual offenders subject to mandatory minimum sentences rose from five percent in 2001 to fifty-one percent in 2010.<sup>63</sup>

Georgia provides an illustrative example of reform at the state level. In 2004, Georgia changed its mandatory minimum punishment for rape from one year to ten years.<sup>64</sup> The Georgia code also required that “no portion” of that mandatory minimum for rape “shall be suspended, stayed, probated, deferred,

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61. In Washington in 2006, for instance, state Republicans mailed twenty-five thousand postcards to voters in swing districts. The cards featured a mug shot and text that read, “This violent predator lives in your community.” Andrew Garber, *GOP Postcards Fuel Fracas*, SEATTLE TIMES (Jan. 24, 2006), <http://community.seattletimes.nwsources.com/archive/?date=20060124&slug=sexoffend24m> [<http://perma.cc/G28B-XKXM>]. The text then accused a Democratic legislator of “refus[ing] to impose life sentences for violent sex predators.” *Id.* The threat of these postcards has apparently spread. As one Iowa Democratic lawmaker puts it, “No one wants a postcard to come out two weeks before the election saying they are lax on sex offenders.” Lee Rood, *New Data Shows Twice as Many Sex Offenders Missing*, DES MOINES REG. (Jan. 23, 2006).

62. See, e.g., ALASKA STAT. ANN. § 12.55.125(i) (West 2015) (changes in 2003, 2005, 2006); ARIZ. REV. STAT. ANN. § 13-1406 (2015) (changes in 1994); COLO. REV. STAT. ANN. § 18-1.3-401 (West 2015) (changes in 1993); CONN. GEN. STAT. ANN. §§ 53a-35a, -70 (West 2015) (changes in 2002, 2015); DEL. CODE ANN. tit. 11, §§ 770-773 (West 2015) (changes in 1998); GA. CODE ANN. § 16-6-1 (West 2015) (changes in 2004, 2006); IND. CODE ANN. § 35-42-4-1 (West 2015) (changes in 1998); LA. STAT. ANN. §§ 14:42, :43 (2015) (changes in 1995, 2001); MASS. GEN. LAWS ANN. ch. 265, §§ 22-23B (West 2015) (changes in 1998, 2008); MO. ANN. STAT. §§ 558.011, 566.030 (West 2015) (changes in 1995); MONT. CODE ANN. § 45-5-503 (2004) (changes in 1995, 2007); NEV. REV. STAT. ANN. § 200.366 (West 2015) (changes in 1995, 2005); N.H. REV. STAT. ANN. §§ 632-A:2, :10-a(I)(b) (LexisNexis 2015) (changes in 1992, 2006); N.D. CENT. CODE ANN. §§ 12.1-20-07, 12.1-32-01 (West 2015) (changes in 1997); OKLA. STAT. ANN. tit. 21 § 1116 (West 2015) (changes in 2002); S.D. CODIFIED LAWS § 22-6-1 (2015) (changes in 2005); UTAH CODE ANN. § 76-5-405 (LexisNexis 2015) (changes in 2007, 2009); WIS. STAT. ANN. § 939.50 (West 2015) (changes in 1994, 1998, 2002).

Only two states have decreased punishments for rape offenses. In 2004, Maine instituted an across-the-board reduction in the maximum sentence for all Class A felonies, which rape (“gross sexual assault”) could constitute, from forty to thirty years. Act of 2004, ch. 657, 2004 Me. Legis. Serv. 657 (West) (codified as amended at ME. REV. STAT. ANN. tit. 17-A § 1252(2)(A) (2015)). In 1994, Ohio punished rape with an indefinite minimum term of four, five, six, or seven years and a maximum term of twenty-five years, whereas today, Ohio punishes rape (except in certain circumstances, see OHIO REV. CODE ANN. § 2971.03 (West 2015)) with a definite term of three to eleven years. Compare OHIO REV. CODE ANN. § 2929.11(B)(4) (West 1994), with OHIO REV. CODE ANN. § 2929.14(A)(1) (West 2015).

63. See Jacob Sullum, *20 Years Later, Mandatory Minimum Sentences Are Still Mindlessly Draconian*, REASON (Nov. 18, 2011), <http://reason.com/blog/2011/11/18/20-years-later-mandatory-minimum-sentenc> [<http://perma.cc/Q29H-SSN4>].

64. GA. CODE ANN. § 16-6-1(b) (2004).



or withheld by the sentencing court and shall not be reduced by any form.”<sup>65</sup> In 2010, the state changed its mandatory minimum punishment for rape from ten years to twenty-five years.<sup>66</sup> Although its punishment is harsher than most, Georgia’s imposition of an irreducible twenty-five-year mandatory minimum reflects the general trend in rape sentencing.

Independent of the criminal sentencing of sex offenders, both federal and state jurisdictions began to impose much more severe civil consequences on sex offenders who had already served their time. Megan’s Laws, which require convicted sex offenders to register and then require community notification of those offenders’ identities and addresses, emerged in all fifty states.<sup>67</sup> Laws in several states began to require juvenile sex offenders to register as well.<sup>68</sup>

Proposed shaming sanctions would go even further than registration and community-notification laws.<sup>69</sup> The Ohio legislature, for example, proposed that sex offenders be required to use neon green license plates to identify themselves more consistently in public, subjecting them to ridicule and ostracism.<sup>70</sup> (This measure advanced only after representatives of Mary Kay Cosmetics and advocates for breast cancer research objected to an identical bill that would have mandated pink license plates for sex offenders.)<sup>71</sup>

Many states and municipalities also passed residency restrictions and created exclusionary zones to bar convicted sex offenders.<sup>72</sup> Stringent residency requirements left sex offenders with few viable housing options upon release,

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65. *Id.* § 17-10-6.1(b).

66. GA. CODE ANN. § 16-6-1(b) (2010).

67. *No Easy Answers: Sex Offender Laws in the U.S.*, HUM. RTS. WATCH 1, 35-42 (Sept. 2007), <http://www.hrw.org/sites/default/files/reports/uso907webwcover.pdf> [<http://perma.cc/FT5P-GS4A>] (analyzing sex offender registration laws in all fifty states).

68. See Nicole Pittman & Alison Parker, *Raised on the Registry*, HUM. RTS. WATCH (May 1, 2013), <http://www.hrw.org/report/2013/05/01/raised-registry/irreparable-harm-placing-children-sex-offender-registries-us> [<http://perma.cc/5P3C-S2N8>]; see also Dylan Walsh, *The Crimes of Children*, ATLANTIC (Aug. 10, 2015), <http://www.theatlantic.com/politics/archive/2015/08/the-crimes-of-children/398543> [<http://perma.cc/VF3P-HS7V>].

69. Ben Jones, *States May Require Sex Offenders To Use Special License Plates*, USA TODAY (May 1, 2007), [http://usatoday30.usatoday.com/news/nation/2007-05-01-sex-offender-tags\\_N.htm](http://usatoday30.usatoday.com/news/nation/2007-05-01-sex-offender-tags_N.htm) [<http://perma.cc/KV27-RYB3>] (discussing bills in Wisconsin, Ohio, and Alabama).

70. Bob Driehaus, *Green License Plates Proposed To Identify Ohio Sex Offenders*, N.Y. TIMES (Mar. 7, 2007), <http://www.nytimes.com/2007/03/07/us/07license.html> [<http://perma.cc/8NQL-HSPN>].

71. *Id.*

72. HUM. RTS. WATCH, *supra* note 67, at 100-14 (discussing state and local ordinances restricting residency for sex offenders); *id.* at 139-41 (listing residency restrictions by state).

forcing many into isolation and homelessness.<sup>73</sup> Many states also prohibited sex offenders from engaging in a wide array of jobs and industries.<sup>74</sup> Once local restrictions began, many cities and counties joined a race to the bottom. Punitive laws in one area produced a domino effect for punitive legal change in nearby communities that feared becoming safe havens for sex offenders.<sup>75</sup>

Some states even developed so-called “Sexually Violent Predator” statutes, civil-commitment laws to keep offenders incarcerated even after they had served the criminal penalty to which they were sentenced.<sup>76</sup> Approximately five thousand sex offenders reside in high-security civil-commitment facilities, where they may be detained indefinitely based on assessments of their likelihood of reoffending.<sup>77</sup>

The progressive, grassroots anti-rape movement not only did not initiate increased criminal punishments or harsh collateral consequences, it opposed them. For example, the director of a sexual assault resource center in Seattle said, “I worry that when you make penalties more severe, it doesn’t lead to more convictions, it leads to fewer.”<sup>78</sup> Victim advocates were concerned that longer sentences might keep victims assaulted by someone they knew from testifying against them.<sup>79</sup> Concerns like these and others led the National Alliance To End Sexual Violence (NAESV), which represents fifty-six state and territorial sexual assault coalitions and 1,300 rape crisis centers nationwide, to issue position papers opposing longer criminal sentences for rape convictions and mandatory minimums, blanket registration and community notification,

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73. See, e.g., Greg Allen, *Sex Offenders Forced To Live Under Miami Bridge*, NPR (July 14, 2009), <http://www.npr.org/templates/story/story.php?storyId=104150499> [<http://perma.cc/YH2K-VZLB>].

74. See Matt Mellema, *Not Wanted: Sex Offenders*, SLATE (Aug. 14, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/08/several\\_states\\_ban\\_people\\_in\\_the\\_sex\\_offender\\_registry\\_from\\_a\\_bizarre\\_list.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/several_states_ban_people_in_the_sex_offender_registry_from_a_bizarre_list.html) [<http://perma.cc/ZW3W-5WZU>].

75. Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 148-49 (2007).

76. See, e.g., Jeslyn A. Miller, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CALIF. L. REV. 2093, 2094 (2010).

77. Editorial, *Sex Offenders Locked Up on a Hunch*, N.Y. TIMES (Aug. 15, 2015), <http://www.nytimes.com/2015/08/16/opinion/sunday/sex-offenders-locked-up-on-a-hunch.html> [<http://perma.cc/38P9-6RSW>].

78. Jason McBride, *Tougher Sex Offender Laws Could Backfire, Advocates Say*, SEATTLE POST-INTELLIGENCER (Jan. 8, 2006), <http://www.seattlepi.com/local/article/Tougher-sex-offender-laws-could-backfire-1192090.php> [<http://perma.cc/MHG6-QZ9Q>].

79. *Id.*

residency requirements, and exclusionary zones for convicted sex offenders.<sup>80</sup> The NAESV opposed mandatory minimum sentences because:

Long mandatory minimum sentences can have a number of negative consequences that serve to decrease, rather than increase, public safety. For example, lengthy mandatory minimum sentences sometimes result in prosecutors not filing charges or filing charges for a lesser crime than a sex offense, as well as increased plea bargains down to a lesser crime. Similarly, judges or juries may be less inclined to convict a defendant on a sex offense because of the mandatory minimum sentence. Long mandatory minimum sentences can also keep victims who were assaulted by someone they know from reporting the crime.<sup>81</sup>

The NAESV also opposed blanket sex offender registration and argued that “internet disclosure and community notification should be limited to those offenders who pose the highest risk of re-offense,” because “over-inclusive public notification can actually be harmful to public safety by diluting the ability to identify the most dangerous offenders and by disrupting the stability of low-risk offenders in ways that may increase their risk of re-offense.”<sup>82</sup> Finally, residency restrictions, the NAESV argued, diminish social support for offenders and contribute to domestic instability and homelessness, “which may increase the risk of re-offense.”<sup>83</sup>

The history of rape law reform is therefore a mixed one. The progressive reform movement in rape law began by focusing on its unique procedural hurdles. Once those were abolished, it moved to the substantive definition of the crime itself, intent on abolishing the force requirement to vindicate sexual autonomy. This substantive reform worked to make rape law more consistent with victims’ lived experiences, a strategy that had already been effective in terms of reforming rape law’s procedural requirements.

By contrast, a punitive reform movement in rape law sought to increase dramatically the punishments, both criminal and civil, for a conviction for a sexual offense. This draconian movement, developed and steered by non-feminists, increased the criminal punishments and collateral consequences of convictions for sexual offenses. It happened during a similar time frame as

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80. *Community Management of Sex Offenders*, NAT’L ALLIANCE TO END SEXUAL VIOLENCE, <http://endsexualviolence.org/where-we-stand/community-management-of-sex-offenders> [http://perma.cc/WV3R-HXEH] (advocating instead for community management of sex offenders and “comprehensive, evidence-driven strategies to reduce sex offense recidivism”).

81. *Id.*

82. *Id.*

83. *Id.*

feminist reform efforts to identify the crime of nonconsensual sex without additional force as rape. But these two ships of reform sailed from different ports and flew different flags.

## II. RESPONSE TO RAPE LAW REFORM

Whenever there is progressive movement in the law, one might predict a backlash designed to secure the privilege that the law is in the process of disrupting.<sup>84</sup> Unsurprisingly, there has been a backlash against the progressive reform movement in rape law. By contrast, there has been little response to the conservative reform of rape law that increased criminal and civil punishments. Examining the cultural and legal response to criminal rape law reform sets the stage for an understanding of current resistance to the application of Title IX to campus sexual assault.

### A. Continued Failure To Treat Rape Equitably

Despite substantial progressive reform of rape law, the criminal justice system continues to fail to address the most common form of rape: non-stranger rape without traditional physical force.<sup>85</sup> Even today, there is little chance of obtaining a conviction in an acquaintance rape case without extrinsic physical injury. Disbelief and disregard are common.

For example, over the past couple of decades in cities across the country, police have refused to take complaints, recoded rape complaints as noncrimes, and labeled legitimate complaints as unfounded. From Philadelphia—where

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84. See Reva B. Siegel, *“The Rule of Love”*: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2119 (1996) (“[E]fforts to reform a status regime do bring about change—but not always the kind of change advocates seek. When the legitimacy of a status regime is successfully contested, lawmakers and jurists will both cede and defend status privileges—gradually relinquishing the original rules and justificatory rhetoric of the contested regime and finding new rules and reasons to protect such status privileges as they choose to defend.”). As Siegel goes on to explain, “civil rights reform can [thus] breathe new life into a body of status law, by pressuring legal elites to translate it into a more contemporary, and less controversial, social idiom. I call this kind of change in the rules and rhetoric of a status regime ‘preservation through transformation.’” *Id.* (footnote omitted); see also Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *HARV. L. REV.* 947, 1009 (2002) (noting that “moments of major social reform precipitate diverse forms of containment and backlash”). The backlash is also a historical trend, generally recurring when it appears that women have made substantial gains in their efforts to obtain equal rights. SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN*, at xviii-xx (1991).

85. David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 *J. CRIM. L. & CRIMINOLOGY* 1194, 1196 (1997).

police demoted one-third of reported sex crimes to non-crimes that they did not investigate—to Cleveland, Baltimore, New York, St. Louis, and Milwaukee, law enforcement officers disbelieved victims, blamed them for their assaults, and refused to act on complaints.<sup>86</sup> The U.S. Department of Justice's Civil Rights Division has found discriminatory law enforcement responses to sexual violence in places as diverse as New Orleans, Louisiana; Missoula, Montana; and Maricopa County, Arizona.<sup>87</sup>

Even a completed rape kit does not ensure that police will take a report seriously. Law enforcement have failed to process hundreds of thousands of medical forensic sexual assault examination kits, left untested in police storage rooms, crime labs, and hospitals across the country. Despite the fact that over the last several years Congress has repeatedly appropriated hundreds of millions of dollars to test these kits,<sup>88</sup> the Obama Administration estimates that there are still more than four hundred thousand untested kits.<sup>89</sup>

Information from cities large and small paints an appalling picture. According to Human Rights Watch, Los Angeles County had the largest backlog in 2009, with at least 12,500 untested kits.<sup>90</sup> In 2015, Houston had 6,600 untested kits; Cleveland had about 4,000 untested kits; and there were substantial backlogs in cities as diverse as Muncie, Indiana; Reno, Nevada; and Green Bay, Wisconsin.<sup>91</sup> In 2014, an inspector general found that a group of

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86. See *Rape in the United States: The Chronic Failure To Report and Investigate Rape Cases: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 246-49 (2010) [hereinafter *Rape in the United States*] (statement of Carol E. Tracy, Executive Director, Women's Law Project).

87. See Civil Rights Div., *Investigation of the New Orleans Police Department*, U.S. DEP'T JUST. 43-51 (Mar. 2011), [http://www.justice.gov/crt/about/spl/nopd\\_report.pdf](http://www.justice.gov/crt/about/spl/nopd_report.pdf) [<http://perma.cc/VR2X-X85W>]; Letter from Thomas E. Perez, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Bill Montgomery, Cty. Att'y, Maricopa Cty., Ariz. 16 (Dec. 15, 2011), [http://www.justice.gov/crt/about/spl/documents/mcso\\_findletter\\_12-15-11.pdf](http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf) [<http://perma.cc/SS8A-FNF5>]; Letter from Thomas E. Perez, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, & Michael W. Cotter, U.S. Att'y, Dist. of Mont., to John Engen, Mayor, Missoula, Mont. (May 15, 2013), [http://www.justice.gov/crt/about/spl/documents/missoulapdfind\\_5-15-13.pdf](http://www.justice.gov/crt/about/spl/documents/missoulapdfind_5-15-13.pdf) [<http://perma.cc/P86U-X5FZ>].

88. 42 U.S.C. § 14135 (2012) (authorizing the Attorney General to grant funds for this purpose).

89. Press Release, Office of the Press Sec'y, White House, Fact Sheet: Investments To Reduce the National Rape Kit Backlog and Combat Violence Against Women (Mar. 16, 2015), <http://www.whitehouse.gov/the-press-office/2015/03/16/fact-sheet-investments-reduce-national-rape-kit-backlog-and-combat-viole> [<http://perma.cc/GL8B-5357>].

90. *Testing Justice: The Rape Kit Backlog in Los Angeles City and County*, HUM. RTS. WATCH 1 (2009), <http://www.hrw.org/sites/default/files/reports/rapekit0309web.pdf> [<http://perma.cc/87A8-YDFM>].

91. Steve Reilly, *Tens of Thousands of Rape Kits Go Untested Across USA*, USA TODAY (July 16, 2015), <http://www.usatoday.com/story/news/2015/07/16/untested-rape-kits-evidence-across>

New Orleans detectives buried more than a thousand rape cases in three years, ignored or misrepresented DNA findings, and covered up their actions by backdating reports.<sup>92</sup> After more than ten thousand untested kits were discovered in Detroit, a Justice Department study identified victim-blaming attitudes as the reason the kits were not tested, noting, “Rape survivors were often assumed to be prostitutes and therefore what happened to them was considered their fault.”<sup>93</sup>

Law enforcement’s failure to test rape kits has been harmful both to individual victims and to the safety of the larger community. Belatedly tested kits have provided leads to hundreds of serial rapists whose subsequent predations might have been prevented had the kits been tested in a timely fashion.<sup>94</sup> For example, when Detroit tested 1,595 backlogged kits, it identified 127 serial sexual assaults.<sup>95</sup> Belated kit testing in Cleveland identified more than 200 serial sexual assaults.<sup>96</sup>

In short, the criminal justice system has a two-hundred-year history of bias against victims of sexual assault, which continues today.<sup>97</sup> Sexual offenses rank among the least reported of serious crimes, and, once reported, they experience

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-usa/29902199 [http://perma.cc/VW5A-GT4E]; *Reporting on Rape Kit Backlog Leads to New Law and Arrests in Ohio*, NPR (May 19, 2015), <http://www.npr.org/2015/05/19/407766821/reporting-on-rape-kit-backlog-leads-to-new-law-and-arrests-in-ohio> [http://perma.cc/8ZE5-JFUB].

92. Frances Burns, *Report: New Orleans Detectives Buried Hundreds of Rape Cases*, UNITED PRESS INT’L (Nov. 13, 2014), [http://www.upi.com/Top\\_News/US/2014/11/13/Report-New-Orleans-detectives-buried-hundreds-of-rape-cases/5621415907481](http://www.upi.com/Top_News/US/2014/11/13/Report-New-Orleans-detectives-buried-hundreds-of-rape-cases/5621415907481) [http://perma.cc/ZTF9-UH85].

93. Reilly, *supra* note 91.

94. See *Rape in the United States*, *supra* note 86, at 64-65 (statement of Susan B. Carbon, Director, Office on Violence Against Women, U.S. Department of J.).

95. Nat’l Inst. of Justice, *Untested Evidence in Sexual Assault Cases*, U.S. DEP’T JUST. (Jan. 25, 2016), <http://www.nij.gov/topics/law-enforcement/investigations/sexual-assault/Pages/untested-sexual-assault.aspx> [http://perma.cc/SBU2-NE2F].

96. Reilly, *supra* note 91.

97. Akin to the victim-blaming attitudes of some modern-day law enforcement officials, courts in the 1800s in England linked a woman’s lack of chastity to a lack of credibility in rape proceedings. See Anderson, *supra* note 16, at 66-67. Sir William Blackstone also made this connection between a woman’s reputation and her believability in court. 4 BLACKSTONE, *supra* note 11, at \*213-14 (“[I]f the [complainant] be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had the opportunity to complain; if the place, where the fact was alleged to be committed was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive presumption that her testimony is false or feigned.”).

a high attrition rate.<sup>98</sup> One reason why ninety-five percent of campus sexual assault victims never report to police<sup>99</sup> is that they fear that the criminal justice system will not deliver them justice.<sup>100</sup> The failure of law enforcement to properly investigate sexual violence and refer cases for prosecution is so widespread and grave that in July 2015, eighty-eight national advocacy groups and ninety-eight state and local organizations delivered a joint letter to Attorney General Loretta Lynch urging the Department of Justice to issue guidance regarding police responses to sexual assault,<sup>101</sup> which the Department did just months later.<sup>102</sup>

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98. See JODY RAPHAEL, RAPE IS RAPE: HOW DENIAL, DISTORTION, AND VICTIM BLAMING ARE FUELING A HIDDEN ACQUAINTANCE RAPE CRISIS 138-39 (2013); Megan A. Alderden & Sarah E. Ullman, *Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases*, 18 VIOLENCE AGAINST WOMEN 525, 540 (2012) (replicating findings from earlier studies that a high attrition rate persists in sexual assault cases); M. Claire Harwell & David Lisak, *Why Rapists Run Free*, 5 FAM. & INTIMATE PARTNER VIOLENCE Q. 175, 177-78 (2012) (discussing the filtering of rapes out of the criminal justice system, with few making it to trial or conviction); Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 149-157 (2012) (estimating that declining arrest rates and low prosecution and conviction rates result in an estimated 0.2-2.8 incarcerations for every one hundred rapes committed); Cassia Spohn & Katharine Tellis, *Policing and Prosecuting Sexual Assault in Los Angeles City and County: A Collaborative Study in Partnership with the Los Angeles Police Department, the Los Angeles County Sheriff's Department, and the Los Angeles County District Attorney's Office*, U.S. DEP'T JUST. 404 (Feb. 2012), [www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf) [<http://perma.cc/UWV7-UMLY>] (finding substantial attrition in sexual-assault cases reported to the Los Angeles Police Department and the Los Angeles County Sheriff's Department).

99. Fisher et al., *supra* note 29, at 23.

100. In one example from 2014, a college student reported having been raped to the New York City police department. The officer scoffed: "You invited him into your [dorm] room. That's not the legal definition of rape." Another officer chimed in, "For every single rape I've had, I've had 20 [reports] that are total bullshit." Claire Gordon, *Why College Rape Victims Don't Go to the Police*, AL-JAZEERA (May 19, 2014), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/5/19/why-college-rapevictimsdonatgotothepolice.html> [<http://perma.cc/C5F8-ZVUC>].

101. Letter from 9to5, Nat'l Ass'n of Working Women, et al. to Loretta Lynch, Att'y Gen., U.S. (July 6, 2015), [http://lulac.org/Policing-Coalition\\_Letter\\_to\\_AG\\_Lynch-DOJ-re\\_Guidance\\_on\\_Gender-Biased\\_Policing-FINAL-7-6-15.pdf](http://lulac.org/Policing-Coalition_Letter_to_AG_Lynch-DOJ-re_Guidance_on_Gender-Biased_Policing-FINAL-7-6-15.pdf) [<http://perma.cc/D3GJ-DWK2>].

102. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Issues Guidance on Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence (Dec. 15, 2015), <http://www.justice.gov/opa/pr/justice-department-issues-guidance-identifying-and-preventing-gender-bias-law-enforcement> [<http://perma.cc/9SN3-VJBX>].

*B. Backlash Against Progressive Rape Law Reform*

The continued failure of police to process rape complaints in a fair and impartial fashion suggests the limitations of progressive reform efforts so far. But more than inertia was at work. Opposition to progressive rape law reform at times has taken the form of conservative political backlash. For example, in 2011, House Republican leaders attempted to introduce a force requirement for rape into the Medicaid law.<sup>103</sup> In addition, various right-wing politicians have also invoked force as the talisman of “legitimate rape.”<sup>104</sup> However, the most detailed scholarly objections to the progressive project of reforming rape law have come from the self-identified left. To demonstrate this proposition, this Feature refers to cultural critics Camille Paglia and Katie Roiphe and law professors Janet Halley and Jed Rubenfeld as examples of how a larger group of commentators have assessed rape law reform and the application of Title IX to campus sexual assault.<sup>105</sup>

Cultural critic Camille Paglia rejected what she saw as “pie-in-the-sky fantasies” about equal sexual relationships between women and men.<sup>106</sup> She criticized attempts to “legislate relationships” between the sexes.<sup>107</sup> The prohibition on sexually hostile environments at work, for example, was “reactionary and totalitarian.”<sup>108</sup> While she acknowledged that feminist concerns about rape engendered “useful sensitization of police officers, prosecutors and judges to the claims of authentic rape victims,” she rejected the abolition of the force requirement as a “hallucinatory overextension of

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103. Nick Baumann, *The House GOP’s Plan To Redefine Rape*, MOTHER JONES (Jan. 28, 2011), <http://www.motherjones.com/politics/2011/01/republican-plan-redefine-rape-abortion> [<http://perma.cc/6LJ8-F86T>] (describing attempts to limit the pregnancies eligible for federally funded abortions from instances of “rape” to those involving “forcible rape”).

104. For example, Congressman Todd Akin used the term “legitimate rape,” by which he meant forcible rape. John Eligon & Michael Schwirtz, *Senate Candidate Provokes Ire with ‘Legitimate Rape’ Comment*, N.Y. TIMES (Aug. 19, 2012), <http://www.nytimes.com/2012/08/20/us/politics/todd-akin-provokes-ire-with-legitimate-rape-comment.html> [<http://perma.cc/23QF-K9J8>].

105. These four are not the only commentators on these matters, to be sure, and they would not always agree with one another. They are each, in their own way, more strident than most, but they have articulated emblematic critiques of feminist reform that have influenced popular discourse on the matter.

106. CAMILLE PAGLIA, *Rape and Modern Sex War*, reprinted in *SEX, ART, AND AMERICAN CULTURE* 49, 50 (1992).

107. *Id.* at 68.

108. CAMILLE PAGLIA, *VAMPS AND TRAMPS* 49 (1994).



the definition . . . [to] cover every unpleasant or embarrassing sexual encounter.”<sup>109</sup>

Katie Roiphe chimed in shortly thereafter, arguing that many complaints of rape are just instances of sexual regret the morning after.<sup>110</sup> Concerned that feminist reform efforts were expanding the definition of rape too far, Roiphe stood up for the force requirement: “If we are going to maintain an idea of rape, then we need to reserve it for instances of physical violence, or the threat of physical violence.”<sup>111</sup>

Perhaps, as Paglia argued, rape is natural;<sup>112</sup> perhaps, as Roiphe believed, most allegations of rape are just sexual regret. Whatever the situation, Harvard Law professor Janet Halley argued that contemporary feminism should no longer be the lens through which we analyze the question. She advocated that we “take a break from feminism” in examining rape—or anything else.<sup>113</sup> She

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109. *Id.* at 24; see also CAMILLE PAGLIA, *The Rape Debate, Continued*, in *SEX, ART, AND AMERICAN CULTURE*, *supra* note 106, at 58–59 (“*Is it rape if you don’t say no?* Absolutely not. . . . If she’s drunk, she’s complicitous.”).

110. Roiphe, *supra* note 8.

111. *Id.*

112. Paglia argued that we must accept a harsh but necessary reality: “Women will always be in sexual danger.” PAGLIA, *supra* note 106, at 50. Men are sexual brutes, only a thin veneer of civilization curbs sexual violence, and women need to learn to deal with it. “Society is woman’s protection against rape,” Paglia argued. *Id.* at 51. “[M]en must be educated, refined, and ethically persuaded away from their tendency toward anarchy and brutishness.” *Id.* at 51.

113. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2008). Halley cautioned that she wished to “[n]ot kill it, supersede it, abandon it; immure, immolate, or bury it—merely spend some time outside it exploring theories of sexuality, inhabiting realities, and imagining political goals that do not fall within its terms.” *Id.* at 10. Nevertheless, she advanced a totalizing claim about “the particular place that feminism occupies at the moment in left-of-center U.S. sexual politics” and the commitment it “always” has. *Id.* at 4. She argued that

feminism today . . . is persistently a subordination theory set by default to seek the social welfare of women, femininity, and/or female or feminine gender by undoing some part or all of their subordination to men, masculinity, and/or male or masculine gender. That is, there are three parts to this first part: a distinction between something m and something f; a commitment to be a theory about, and a practice about, the subordination of f to m; and a commitment to work against that subordination on behalf of f. In my shorthand throughout this book, these three parts are m/f, m>f, and carrying a brief for f. It’s not necessary for feminism to hold these three points, but my experience is that so far, in the United States, it always does.

*Id.* at 4–5.

criticized what she called “governance feminism,”<sup>114</sup> which she defined as the “quite noticeable installation of feminists and feminist ideas in actual legal-institutional power” that often “emphasizes criminal enforcement.”<sup>115</sup> Halley believed that contemporary feminism had become “blind” and “dangerous,”<sup>116</sup> too rigidly vested in feminine injury, particularly sexual injury, and too reticent to acknowledge women’s ability to harm men.<sup>117</sup>

Yale Law professor Jed Rubenfeld then stepped forward to explain “*why* rape requires force,” and to offer “a justification to states that choose to stick to the force requirement.”<sup>118</sup> His rationale for the argument was to clarify why rape law does not criminalize sex obtained by fraud.<sup>119</sup> Arguing that “the supposed right of sexual autonomy is a myth and should be rejected,”<sup>120</sup> he emphasized that “*Sexual autonomy is irrelevant to rape law.*”<sup>121</sup>

Rubenfeld argued instead that sexual penetration should only be labeled as rape if it is perpetrated through bodily violence, or the threat of bodily violence.<sup>122</sup> Rubenfeld argued that rape is a violation of one’s self-possession, “very close to both slavery and torture,”<sup>123</sup> and “should be thought about . . . the way we think about those two crimes.”<sup>124</sup> With slavery as a template, for example, he explained: “sex is rape whenever exacted through the

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114. Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 340-47, 377-85 (2006); see also HALLEY, *supra* note 113, at 20-22, 32-34.

115. Halley, *supra* note 114, at 340-41.

116. HALLEY, *supra* note 113, at 343.

117. *Id.* at 4-5, 341-47.

118. Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1378, 1434 (2013) (emphasis added).

119. *Id.* at 1372 (“This Article argues against the idea of sexual autonomy and against the understanding of rape as unconsented-to sex. A better understanding, it is argued, can be arrived at by comparing rape to slavery and torture, which are violations of a person’s fundamental right to self-possession. This view of rape can explain the rejection of rape-by-deception, which current thinking cannot, but it will also suggest that rape law’s much-maligned force requirement may not be so malign after all.”).

120. *Id.* at 1413. Sexual autonomy, Rubenfeld argues, is “unattainable” because one person’s desires for sexual fulfillment invariably clash with another person’s desires. *Id.* at 1417-21. It is “undesirable” because “[i]ndividual autonomy is the last thing sexuality wants. From autonomy’s point of view, sexuality is undesirable. From sexuality’s, autonomy is.” *Id.* at 1422.

121. *Id.* at 1425 (emphasis added).

122. *Id.* at 1436.

123. *Id.* at 1427.

124. *Id.* at 1380.

kind of force that turns labor into slavery: roughly speaking, physical incapacitation, whether through restraint or imprisonment, or serious physical assault (or the threat of either).<sup>125</sup> With torture as a template, he argued that sexual penetration is rape when it is accomplished through “excruciating pain, suffering, and terror.”<sup>126</sup>

In Rubinfeld’s framework, rape “is poised halfway between slavery and torture, sometimes more like the one, sometimes more like the other, always sharing core elements with each. In particular, rape shares with slavery and torture the same fundamental violation. The victim’s body is utterly wrested from her control, mastered, possessed by another.”<sup>127</sup> Rubinfeld underscored the requirement: “Only sex coerced through bodily violence wrests from the victim her fundamental bodily self-possession – and is therefore rape.”<sup>128</sup>

Although it has traditionally counted as force, kidnapping to coerce sexual penetration would not likely meet Rubinfeld’s bodily-violence model of rape.<sup>129</sup> A punch to the face to coerce sexual penetration also would not likely meet the bodily violence model.<sup>130</sup> An attack would have to cause “severe physical or mental pain or suffering” before the sexual penetration it coerced would count as rape.<sup>131</sup> Rubinfeld did not, therefore, appear to defend the traditional force requirement in rape law. Requiring torturous or enslaving bodily violence for rape would heighten the force requirement,<sup>132</sup> and

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125. *Id.* at 1436. Rubinfeld described the kind of bodily force that “turns labor into slavery”:

[I]f the master makes his employees continue at their labor by chaining and whipping them, they are no longer employees. They are slaves, and the reason is that no self-possession now remains open to them. Their bodies are no longer their own. If they don’t “voluntarily” submit to bodily servitude, they will be physically incapacitated and beaten until they do submit (or until they’re dead).

*Id.* at 1433.

126. *Id.* at 1427.

127. *Id.*

128. *Id.* at 1436.

129. Kidnapping, he noted, sits “more toward the periphery of the concept” of bodily violence he was articulating. *Id.* at 1427 n.208.

130. As Rubinfeld emphasized, “You lose self-possession *not when another person merely wounds, embarrasses or constrains you*, but when the other actually takes over your body . . . .” *Id.* at 1426 (emphasis added).

131. *Id.* at 1433 (citing 18 U.S.C. § 2340(1) (2006)).

132. See Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335, 349 (2013) (noting that “it seems entirely plausible that the right of self-possession ratchets up the force requirement”).

potentially decriminalize the majority of rapes.<sup>133</sup> In response to critics, though, Rubinfeld has asserted, “force can include not only an assault of any kind, but physical restraint of any kind.”<sup>134</sup>

C. *Embrace of Conservative Rape Law Reform*

In contrast to the vocal backlash against progressive rape law reform, there has been relatively little pushback against the punitive reform to rape law that increased punishments and imposed harsh collateral consequences on convicted sex offenders. Proposals for scaling back the conservative “war on sex offenders”<sup>135</sup> have gained little traction. On the contrary, public opinion has strongly favored both harsh criminal and civil penalties for convicted sex offenders: “Measures against [sex offenders] usually pass with little opposition.”<sup>136</sup> Some want even more penalties levied against sex offenders.<sup>137</sup> The public so reviles sex offenders that it sometimes targets them for extrajudicial violence and vigilantism.<sup>138</sup> Legislators have little reason to advocate for legal change that would benefit such a despised group.<sup>139</sup> Even those in favor of rolling back punitive reform measures describe the meager potential for change in this area of the law as a “quagmire”<sup>140</sup> and the

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133. See Cory Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1, 3 (2015) (arguing that Rubinfeld’s theory “would likely decriminalize over ninety percent of rapes in America”).

134. See Jed Rubinfeld, *Rape-by-Deception—A Response*, 123 YALE L.J. ONLINE 389, 398 (2013).

135. Yung, *supra* note 57, at 472, 475-77.

136. Yung, *supra* note 75, at 158.

137. *Sexual Offender Management Policy in the States*, COUNCIL ST. GOV’TS 1 (2010), <http://www.csg.org/policy/documents/SOMFinalReport-FINAL.pdf> [<http://perma.cc/ASM5-7FTW>] (noting that many constituents continue to call “for longer sentences and tighter controls for sex offenders in order to increase safety in their communities”).

138. See, e.g., Lexi Pandell, *The Vigilante of Clallam County*, ATLANTIC (Dec. 3, 2013), <http://www.theatlantic.com/national/archive/2013/12/the-vigilante-of-clallam-county/281968> [<http://perma.cc/55V4-WSGH>].

139. See Yung, *supra* note 75, at 158-60; Wayne A. Logan, *Megan’s Laws as a Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 400 (2011); see also Steven J. Wernick, *In Accordance with a Public Outcry: Zoning Out Sex Offenders Through Residence Restrictions in Florida*, 58 FLA. L. REV. 1147 (2006) (discussing the uptick in municipalities passing residence restrictions for sex offenders). See generally Chanakya Sethi, *Reforming the Registry*, SLATE (Aug. 15, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/08/sex\\_offender\\_registries\\_the\\_best\\_ideas\\_for\\_reforming\\_the\\_law.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/sex_offender_registries_the_best_ideas_for_reforming_the_law.html) [<http://perma.cc/8VSP-95SZ>].

140. Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES (Mar. 4, 2007), <http://www.nytimes.com/2007/03/04/us/04civil.html> [<http://perma.cc/QUN8-AXL4>].

consequence for politicians who seek to reform sex offender punishment as “political suicide.”<sup>141</sup>

The scholarly response to draconian, punitive reform has been tepid. There is little scholarship, for instance, on the increase in criminal punishments meted out to those convicted of sex offenses. New mandatory minimums and the movement both at the state and federal level to increase the range of years to which a convicted sex offender may be sentenced have received little attention in the legal academy.

In terms of civil collateral consequences, many scholars have objected to “Sexually Violent Predator” statutes, which incarcerate offenders after they have served their criminal sentences.<sup>142</sup> Scholars have also argued that registration and community notification laws are inefficacious and harsh.<sup>143</sup> In both these areas, however, the scholarship has tended to focus on nonviolent offenders<sup>144</sup> and juveniles.<sup>145</sup> For example, registration and community

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141. Mark Donald, *Hello, My Name Is Pervert*, DALL. OBSERVER (Jan. 11, 2011), <http://www.dallasobserver.com/news/hello-my-name-is-pervert-6393225> [<http://perma.cc/VSN8-WFGG>].

142. See, e.g., John A. Fennel, *Punishment by Another Name: The Inherent Overreaching in Sexually Dangerous Person Commitments*, 35 NEW ENG. J. CRIM. & CIV. CONFINEMENT 37 (2009); David J. Gottlieb, *Preventive Detention of Sex Offenders*, 50 U. KAN. L. REV. 1031 (2002) (arguing that statutes that employ civil commitment of sex offenders raise significant constitutional problems); Stephen J. Morse, *Preventive Confinement of Dangerous Offenders*, 32 J. L. MED. & ETHICS 56 (2004) (discussing the criminal-law theory implications of detaining dangerous offenders); Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69 (1996) (analyzing the propriety of civil commitment for sex offenders); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 (2003) (analyzing preventive detention of dangerous sex offenders).

143. See, e.g., Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & ECON. 207, 208 (2011); Koresh A. Avrahamian, *A Critical Perspective: Do “Megan’s Laws” Really Shield Children from Sex-Predators?*, 19 J. JUV. L. 301, 302 (1998); Philip Cherner, *Felony Sex Offender Sentencing*, 33 COLO. LAW. 11, 18 (2004); Wayne A. Logan, *Database Infamia: Exit from the Sex Offender Registries*, 2015 WIS. L. REV. 219, 221-23; Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651 *passim* (2008); Molly J. Walker Wilson, *The Expansion of Criminal Registries and the Illusion of Control*, 73 LA. L. REV. 509, 522-24 (2013); Elizabeth Reiner Platt, Note, *Gangsters to Greyhounds: The Past, Present and Future of Offender Registration*, 37 N.Y.U. REV. L. & SOC. CHANGE 727, 749-50 (2013); Rachel J. Rodriguez, Note, *The Sex Offender Under the Bridge: Has Megan’s Law Run Amok?*, 62 RUTGERS L. REV. 1023, 1052-56 (2010); Meghan Sile Towers, Note, *Protectionism, Punishment and Pariahs: Sex Offenders and Residence Restrictions*, 15 J.L. & POL’Y 291, 292-94 (2007).

144. See, e.g., Kelsey Meeks Duncan, Note, *A Crime Against Common Sense: How Louisiana’s Implementation of the Adam Walsh Act Exposes the Law’s Most Significant Flaw*, 84 TUL. L. REV. 429 (2009); Lara Geer Farley, Note, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L.J. 471 (2008).

notification laws have been critiqued for branding minors<sup>146</sup> as “pariahs,”<sup>147</sup> forcing them to serve an “impermissible life sentence”<sup>148</sup> of public disgrace. The argument applies to adult offenders as well.

In short, while some cultural critics and legal scholars have vocally opposed progressive rape law reform, they have been relatively subdued in response to conservative rape law reform. Progressive reform has suffered political backlash. Regressive reform has been politically embraced. The punitive reform effort was wildly successful and appears politically immovable. The progressive reform effort, by contrast, is contingent and contested. This history sheds important light on the application of Title IX to campus sexual assault.

### III. CAMPUS SEXUAL ASSAULT REFORM

An increasing awareness of the widespread nature of campus sexual assault facilitated legal change at the state and federal level to address it. No matter to which study one refers, campus sexual assault is a large problem. In 1985, Mary Koss published a survey of 6,000 students at thirty-two college campuses, finding that one in four college women had experienced rape or attempted rape.<sup>149</sup> In 2006, a National Institute of Justice survey found that 19% of undergraduate women were victims of attempted or completed sexual assault since entering college.<sup>150</sup>

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145. See, e.g., Amy E. Halbrook, *Juvenile Pariahs*, 65 HASTINGS L.J. 1 (2013); Shannon C. Parker, *Branded for Life: The Unconstitutionality of Mandatory and Lifetime Juvenile Sex Offender Registration and Notification*, 21 VA. J. SOC. POL’Y & L. 167 (2014); Robin Walker Sterling, *Juvenile-Sex-Offender Registration: An Impermissible Life Sentence*, 82 U. CHI. L. REV. 295 (2015). Juveniles account for approximately thirty-five percent of sex offenses against minors. David Finkelhor et al., *Juveniles Who Commit Sex Offenses Against Minors*, JUV. JUST. BULL., Dec. 2009 at 1-2, <http://www.ncjrs.gov/pdffiles1/ojdp/227763.pdf> [<http://perma.cc/3D7G-W5D3>].

146. Parker, *supra* note 145.

147. Halbrook, *supra* note 145, at 1.

148. Sterling, *supra* note 145, at 295.

149. Amelia Thomson-DeVeaux, *A New Form of Justice for Rape Survivors*, NAT’L J. (May 1, 2015), <http://www.nationaljournal.com/magazine/2015/05/01/New-Form-Justice-Rape-Survivors> [<http://perma.cc/BK75-8RNR>].

150. Christopher P. Krebs et al., *The Campus Sexual Assault (CSA) Study*, U.S. DEP’T JUST. 5-1 (Oct. 2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> [<http://perma.cc/6QD8-RB4C>]. The CSA Study was conducted at two large, public universities. *Id.* at x. The rate of sexual assault among college-age men was considerably lower, with 6% of men reporting experiencing attempted or completed sexual assault since entering college. *Id.* at 5-5. The rate was higher (26%) among senior women. *Id.* at 5-3.

In 2014, President Barack Obama established a White House Task Force To Protect Students from Sexual Assault, which called for campuses across the country to conduct climate surveys to measure the incidence of sexual victimization on campuses.<sup>151</sup> In 2015, under the auspices of the Association of American Universities (AAU), twenty-seven colleges and universities distributed campus climate surveys to their students and found that 23% of female undergraduates and more than 5% of male undergraduates experienced nonconsensual penetration or sexual contact involving physical force or incapacitation.<sup>152</sup> In 2016, the Bureau of Justice Statistics published a campus climate survey of twenty-three thousand students, finding that the prevalence rate for completed sexual assault since entering college among female undergraduates was 21% and among male undergraduates was 7%.<sup>153</sup>

The key reforms in response to the problem of campus sexual assault each have analogies in the rape law reform movement. Pushing to make colleges and universities respond equitably to campus sexual assault is analogous to progressive efforts to abolish the unequal procedural hurdles in rape law. The idea of affirmative consent, which has recently taken hold in many colleges and universities, is a standard designed to maximize sexual autonomy, which rape law reformers have advocated for in the criminal law as well.

#### A. OCR Requires Equitable Resolution of Campus Sexual Assault

The second wave of the feminist movement in the late 1960s and early 1970s reinvigorated an effort to pass the Equal Rights Amendment to the U.S. Constitution and to push for other legal change for equality at the state and federal level. A range of progressive advocacy organizations, including the National Women's Law Center, the ACLU Women's Rights Project, and the NOW Legal Defense and Education Fund, engaged in intensive advocacy, litigation, and policy work to ensure equality in educational settings. They worked for the passage of Title IX, and then worked behind the scenes advocating for progressive agency interpretations of the law.

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151. *Not Alone: The First Report of the White House Task Force To Protect Students from Sexual Assault*, WHITE HOUSE 6-8 (Apr. 2014), <http://www.notalone.gov/assets/report.pdf> [<http://perma.cc/542G-CPQ3>].

152. David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASS'N AM. U., at iii, 57 tbl.3-2, 59 tbl.3-4 (2015), [http://www.aau.edu/uploadedFiles/AAU\\_Publications/AAU\\_Reports/Sexual\\_Assault\\_Campus\\_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf](http://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf) [<http://perma.cc/B3YV-CVLQ>].

153. Christopher P. Krebs et al., *Campus Climate Survey Validation Study*, U.S. DEP'T JUST. 73-74 (2016), <http://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf> [<http://perma.cc/HK8Y-3SD4>].

Congress enacted Title IX in the 1972 Education Amendments.<sup>154</sup> It states: “No 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 . . . .”<sup>155</sup>

Advocacy organizations successfully brought cases across the country to make explicit universities’ legal obligations to protect students. For example, in *Davis v. Monroe County Board of Education*, brought by the National Women’s Law Center, the Court held that peer-on-peer sexual harassment could violate a student’s right to an equal education.<sup>156</sup> Students themselves were also part of the team pushing for change, albeit at least initially at a more local level. In 1990, for example, Brown University students approached campus administration about a number of instances of sexual misconduct committed by their peers and requested that the Brown disciplinary code of conduct explicitly identify sexual misconduct as a violation.<sup>157</sup> Administrators discussed the students’ concerns, but took no action.<sup>158</sup> Frustrated, student activists began listing the names of students accused of sexual misconduct on library bathroom walls.<sup>159</sup> The University removed or painted over the names, and students reproduced the list again. The list of students’ names in bathrooms at Brown attracted national media attention, which placed great pressure on administrators; by 1991, Brown identified sexual misconduct as a violation in its disciplinary code.<sup>160</sup>

Student activists’ work to get colleges and universities to respond equitably to campus sexual assault derived from the same impulse behind progressive opposition to the unique procedural hurdles for rape prosecutions. It also coincided with legal advocacy that was changing the scope and impact of Title IX. For example, the Brown activism happened at the same time that the Supreme Court reviewed a case involving sexual harassment of a high-school

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154. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-07, 86 Stat. 235, 373-75 (codified at 20 U.S.C. §§ 1681-1686 (2012)).

155. 20 U.S.C. § 1681(a).

156. 526 U.S. 629, 649-51 (1999). For this reason, educational institutions have a duty to respond to and address complaints of student-on-student sexual harassment.

157. Sara Erkal & Paula Martinez Gutierrez, *Assault She Wrote*, BROWN POL. REV. (May 20, 2014), <http://www.brownpoliticalreview.org/2014/05/assault-she-wrote> [<http://perma.cc/869L-9R44>].

158. *Id.*

159. William Celis, *Date Rape and a List at Brown*, N.Y. TIMES (Nov. 18, 1990), <http://www.nytimes.com/1990/11/18/us/date-rape-and-a-list-at-brown.html> [<http://perma.cc/7SMR-9SMF>].

160. Erkal & Martinez Gutierrez, *supra* note 157.



student and held that students could sue under Title IX for money damages.<sup>161</sup> At about the same time, the New Jersey Supreme Court issued the *M.T.S.* decision, which moved rape law away from the force requirement and toward the idea that rape law is designed to vindicate sexual autonomy.<sup>162</sup>

Congress authorized OCR to enforce Title IX's prohibition on sex discrimination "by issuing rules, regulations, or orders of general applicability."<sup>163</sup> Congress also directed OCR to achieve compliance "by the termination of or refusal to grant or to continue assistance under such program or activity . . . or . . . by any other means authorized by law."<sup>164</sup>

OCR has issued considerable guidance over time about how it interprets and enforces Title IX. In 1997, for instance, OCR issued guidance on disciplinary procedures,<sup>165</sup> which required notice, "[a]dequate, reliable and impartial investigation of complaints, including the opportunity to present witnesses and other evidence," reasonably prompt time frames, notice of the outcome to the parties, and an "assurance that the school will take steps to prevent reoccurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate."<sup>166</sup>

At the same time, OCR underscored the constitutional rights of the accused: "The rights established under Title IX must be interpreted consistently with any federally guaranteed rights involved in a complaint proceeding."<sup>167</sup> The agency also recognized that states and universities may grant respondents additional rights.<sup>168</sup> OCR emphasized the procedural interests of both parties:

Indeed, procedures that ensure the Title IX rights of the complainant while at the same time according due process to both parties involved will lead to sound and supportable decisions. Schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.<sup>169</sup>

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<sup>161.</sup> *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60 (1992).

<sup>162.</sup> *State ex rel. M.T.S.*, 609 A.2d 1266, 1278 (N.J. 1992).

<sup>163.</sup> 20 U.S.C. § 1682.

<sup>164.</sup> *Id.*

<sup>165.</sup> Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13, 1997).

<sup>166.</sup> *Id.* at 12,044.

<sup>167.</sup> *Id.* at 12,045.

<sup>168.</sup> *Id.*

<sup>169.</sup> *Id.*

Throughout the history of Title IX, OCR has underscored that the law is not designed to advantage complainants over respondents, but to require colleges and universities to respond equitably to allegations of sexual assault. In 2001, OCR issued guidance focused on the due process rights of the accused.<sup>170</sup> It noted, “[T]he Family Rights and Privacy Act (FERPA) does not override federally protected due process rights of persons accused of sexual harassment.”<sup>171</sup> It underscored, “Schools should be aware of these rights and their legal responsibilities to individuals accused of harassment.”<sup>172</sup>

In 2011, OCR issued substantial, additional guidance. In this “Dear Colleague Letter,” OCR reaffirmed that “sexual violence . . . interferes with students’ right to receive an education free from discrimination.”<sup>173</sup> OCR required that schools “take immediate and effective steps to end . . . sexual violence” in order to protect students’ civil rights.<sup>174</sup> OCR again stressed the need for equal treatment of both the accuser and accused. It demanded “[a]dequate, reliable, and impartial investigation of complaints.”<sup>175</sup> Schools were required to disseminate a notice of nondiscrimination and designate a Title IX coordinator on campus to receive and process complaints and to implement Title IX.<sup>176</sup> The Dear Colleague Letter also affirmed that Title IX regulations require schools to adopt and publish grievance procedures, including specific timeframes, which “must meet the Title IX requirement of affording a complainant a prompt and equitable resolution.”<sup>177</sup>

OCR also reaffirmed explicitly its practice of requiring that schools use a preponderance of the evidence standard—a “more likely than not” standard—in adjudicating campus sexual assault, which it had imposed on schools in

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170. Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP’T EDUC. (Jan. 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<http://perma.cc/4SRY-AGPZ>] [hereinafter *Revised Sexual Harassment Guidance*].

171. *Id.* at 22.

172. *Id.*

173. Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP’T EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<http://perma.cc/DB7V-5UBD>] [hereinafter *Dear Colleague Letter*]. This Feature sets aside administrative law objections to how, and by what authority under the Administrative Procedure Act, OCR has issued its guidance in the form of Dear Colleague letters. See Jacob E. Gersen, *How the Feds Use Title IX To Bully Universities*, WALL STREET J. (Jan. 24, 2016), <http://www.wsj.com/articles/how-the-feds-use-title-ix-to-bully-universities-1453669725> [<http://perma.cc/X459-K2LF>] (discussing these objections).

174. *Dear Colleague Letter*, *supra* note 173, at 2.

175. *Id.* at 9.

176. *Id.* at 6-7.

177. *Id.* at 8.

previous investigations.<sup>178</sup> OCR based this requirement on the standard for other proceedings involving discrimination under Title VI and Title VII.<sup>179</sup> The Dear Colleague Letter also noted that disciplinary procedures using a clear and convincing evidence standard were not fair and impartial under Title IX.<sup>180</sup>

OCR reaffirmed the necessary procedures to ensure fairness for both the accuser and the accused. Schools must treat procedures equitably as between the parties, including “not allow[ing] the alleged perpetrator to review the complainant’s statement without also allowing the complainant to review the alleged perpetrator’s statement.”<sup>181</sup> Both parties must have an “equal opportunity to present relevant witnesses and other evidence,” and both parties should have “similar and timely access” to relevant information.<sup>182</sup> Schools are not required to allow or provide lawyers in sexual violence proceedings; however, if lawyers are allowed, then they must be allowed for both parties.<sup>183</sup> Similarly, any appeals process (which OCR recommended) must be available to both the accuser and the accused.<sup>184</sup> To protect the impartiality of the proceedings, “any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed.”<sup>185</sup>

OCR also established steps that schools should take to protect the complainant. When a complaint is made, a school should inform the complainant of options for avoiding the alleged perpetrator.<sup>186</sup> For example, schools can facilitate changes in living situations or classes as necessary, or prohibit an alleged perpetrator from contacting the complainant.<sup>187</sup> OCR clarified that schools should not allow the respondent personally to cross-examine the complainant during a disciplinary hearing: “Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile

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178. *Id.* at 11.

179. *Id.* at 11 nn.26 & 28.

180. *Id.* at 11.

181. *Id.* at 11-12.

182. *Id.* at 11.

183. *Id.* at 12.

184. *Id.*

185. *Id.* Factfinders and decisionmakers in sexual violence cases must also have “adequate training or knowledge regarding sexual violence.” *Id.*

186. *Id.* at 15.

187. *Id.* The Dear Colleague letter specifies that schools “should minimize the burden on the complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain.” *Id.* at 15-16.

environment.”<sup>188</sup> Schools should also have procedures in place to handle potential retaliatory harassment against the accuser.<sup>189</sup> Additionally, OCR stated that schools should notify complainants of their right to file a criminal complaint, and should not discourage students from reporting sexual misconduct to the police.<sup>190</sup>

In 2014, OCR published additional clarifications of the requirements set out in 2011.<sup>191</sup> This 2014 Questions & Answers document specified that a school’s written grievance procedures must include, among other things, reporting policies and protocols, notice of the measures schools can take to protect complainants, remedies and sanctions available, and the evidentiary standard to be used in proceedings.<sup>192</sup>

OCR reiterated the procedural requirements from the 2011 Dear Colleague Letter, and provided additional guidance on how to conduct disciplinary hearings. For example, schools should not require that a complainant and the accused be in the same room at the same time if the accuser requests otherwise; and schools must be able to provide arrangements (such as closed circuit television) to allow the parties to avoid one another, if needed.<sup>193</sup> A complainant’s sexual history with anyone other than the accused should not be the subject of questioning in a disciplinary hearing.<sup>194</sup> OCR specified that schools should also “ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant.”<sup>195</sup>

OCR also provided more information about interim measures available to schools during an investigation.<sup>196</sup> Schools should take interim steps once a sexual violence allegation is made.<sup>197</sup> When a complaint is made, the school should notify the complainant of options for avoiding contact with the alleged perpetrator, including changes to “academic and extracurricular activities . . . living, transportation, dining, and working situation[s].”<sup>198</sup> Additionally, the

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188. *Id.* at 12.

189. *Id.* at 16.

190. *Id.* at 10.

191. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP’T EDUC. (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<http://perma.cc/XD5P-RRTJ>].

192. *Id.* at 13.

193. *Id.* at 30.

194. *Id.* at 31.

195. *Id.*

196. *Id.* at 32-33.

197. *Id.*

198. *Id.* at 32.

school should inform the complainant about available resources (such as mental health care or legal assistance) and the right to report a crime to the police in order to begin a criminal investigation.<sup>199</sup>

Shortly after OCR issued its 2011 Dear Colleague Letter, one of the first complaints addressed by OCR was against Yale University for failing to respond promptly and equitably to incidents of sexual harassment and rape.<sup>200</sup> The complaint alleged a sexually hostile environment in which fraternity pledges held up a sign reading “We Love Yale Sluts!” in front of the Women’s Center and, as described above, chanted “No Means Yes!” as they marched through the campus at night.<sup>201</sup>

The sexually hostile behavior that Yale fraternity pledges expressed was not unique. A 2015 video from the University of Central Florida showed fraternity pledges chanting, “Rape, rape, rape!” and “Let’s rape some sluts!”<sup>202</sup> The University received a complaint, opened an investigation, and suspended the fraternity.<sup>203</sup>

In recent years, OCR oversaw a tenfold increase in sexual assault complaints against colleges and universities.<sup>204</sup> In 2009, there were nine complaints to OCR regarding sexual violence; in 2014, there were 102.<sup>205</sup> But it was not just the number of complaints that increased. OCR also stepped up enforcement. It has opened Title IX sexual violence investigations against more

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199. *Id.*

200. See Letter from Office for Civil Rights, U.S. Dep’t of Educ., to Yale University 1 (June 15, 2012), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/01112027-a.pdf> [<http://perma.cc/2D39-WZ3J>] (Letter of Findings).

201. Lisa W. Foderaro, *At Yale, Sharper Look at Treatment of Women*, N.Y. TIMES (Apr. 7, 2011), <http://www.nytimes.com/2011/04/08/nyregion/08yale.html> [<http://perma.cc/2JWN-US2K>]; Sam Greenberg, *DKE Chants on Old Campus Spark Controversy*, YALE DAILY NEWS (Oct. 14, 2010), <http://yaledailynews.com/blog/2010/10/14/dke-chants-on-old-campus-spark-controversy> [<http://perma.cc/TL6G-BE5R>].

202. Gabrielle Russon, *UCF’s Sigma Nu Suspended After Video Shows Frat Member Chanting ‘Rape,’* ORLANDO SENTINEL (Aug. 14, 2015), <http://www.orlandosentinel.com/news/breaking-news/os-ucf-sigma-nu-frat-rape-chant-video-20150814-story.html> [<http://perma.cc/8ZSV-456R>].

203. *Id.* However, a disciplinary panel ruled that the fraternity did not violate university policy, finding there was “insufficient information to suggest that Sigma Nu as a fraternity is responsible for the remarks made by [the chanting] individual.” Gabrielle Russon, *Panel Finds Frat Cited for UCF Rape-Chant Video Broke No Rules*, ORLANDO SENTINEL (Aug. 20, 2015), <http://www.orlandosentinel.com/features/education/os-sigma-nu-hearing-decision-20150820-story.html> [<http://perma.cc/74Z3-Z5T9>].

204. Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to Senator Barbara Boxer 2 (Apr. 28, 2015), <http://www.boxer.senate.gov/press/related/150428EducationDepartmentReponsetoLetter.pdf> [<http://perma.cc/569X-3JCJ>].

205. *Id.*

than 120 colleges and universities<sup>206</sup> across a wide range of types of institutions, such as Southern Methodist University,<sup>207</sup> Virginia Military Institute,<sup>208</sup> Harvard Law School,<sup>209</sup> Michigan State University,<sup>210</sup> Hobart and William Smith Colleges,<sup>211</sup> and the University of Virginia.<sup>212</sup>

OCR now posts a list of campuses under investigation as well as settlement agreements online. These settlement agreements often contain requirements for nondiscrimination notices; university grievance procedures; training for school officials, faculty, and students; and campus climate surveys.<sup>213</sup> For example, an OCR investigation of the University of Virginia (UVA) found that the school had a “mixed record” of responses to sexual harassment and sexual

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206. As of July 22, 2015, there were 140 sexual violence cases under investigation involving 124 colleges and universities. Tyler Kingkade, *124 Colleges, 40 School Districts Under Investigation for Handling of Sexual Assault*, HUFFINGTON POST (July 24, 2014), [http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault\\_55b19b43e4b0074ba5a40b77](http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault_55b19b43e4b0074ba5a40b77) [<http://perma.cc/CMT9-LG2A>]. During the fiscal year 2013-2014, OCR resolved ninety sexual violence investigations at K-12 and post-secondary institutions. Office for Civil Rights, *Protecting Civil Rights, Advancing Equity: Report to the President and Secretary of Education*, U.S. DEP'T EDUC. 11 (2015), <http://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf> [<http://perma.cc/G5ZW-YZH5>].
207. Press Release, Office for Civil Rights, U.S. Dep't of Educ., Southern Methodist University Found in Violation of Title IX, Commits to Remedy Harassment, Sexual Assault of Students (Dec. 11, 2014), <http://www.ed.gov/news/press-releases/southern-methodist-university-found-violation-title-ix-commits-remedy-harassment-sexual-assault-students> [<http://perma.cc/BA7S-CKDH>].
208. *Voluntary Resolution Agreement, No. 11-08-2079*, VA MIL. INST. (Apr. 30, 2014), [www2.ed.gov/documents/press-releases/vmi-agreement.doc](http://www2.ed.gov/documents/press-releases/vmi-agreement.doc) [<http://perma.cc/J47F-RJD2>].
209. *Voluntary Resolution Agreement, No. 01-11-2002*, HARV. L. SCH. (Dec. 23, 2014), <http://www2.ed.gov/documents/press-releases/harvard-law-agreement.pdf> [<http://perma.cc/D48M-6HQS>].
210. *Voluntary Resolution Agreement, Nos. 15-11-2098 & 15-14-2113*, MICH. ST. U. (Aug. 28, 2015), <http://www2.ed.gov/documents/press-releases/michigan-state-agreement.pdf> [<http://perma.cc/YY28-L96A>].
211. *Questions and Answers*, HOBART & WILLIAM SMITH CS., <http://www.hws.edu/about/respect/questions.aspx> [<http://perma.cc/G3XR-BWDL>]. Hobart and William Smith was also the subject of a 2014 *New York Times* article about a student's sexual assault complaint. Walt Bogdanich, *Reporting Rape, And Wishing She Hadn't*, N.Y. TIMES (July 12, 2014), <http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html> [<http://perma.cc/7HGY-J5BU>].
212. *Voluntary Resolution Agreement, No. 11-11-6001*, U. VA. (Sept. 17, 2015), <http://www2.ed.gov/documents/press-releases/university-virginia-agreement.pdf> [<http://perma.cc/2NDQ-RRTP>] [hereinafter *University of Virginia Resolution Agreement*].
213. See, e.g., *Voluntary Resolution Agreement, Nos. 06112126, 06132081 & 06132088*, SMU (Nov. 16, 2014), <http://www2.ed.gov/documents/press-releases/southern-methodist-university-agreement.pdf> [<http://perma.cc/DK49-HVT7>].

violence reports.<sup>214</sup> UVA updated its policies during the OCR investigation. A press release announcing UVA's Resolution Agreement stated that the revised policy "is the first university policy OCR has found to be fully compliant with Title IX" since OCR published its 2014 Questions & Answers document.<sup>215</sup>

Equitable assessment and resolution of complaints of sexual assault on campus is the centerpiece of OCR guidance on Title IX. Prompt and equitable responses to complaints of sexual abuse are exactly what progressive reformers had previously sought in rape law.

*B. States Adopt Affirmative Consent Rules for Campuses*

OCR has so far declined to enter the substantive conversations about how to define sexual assault on college campuses. However, at the same time that OCR was stepping up enforcement of Title IX against sexually hostile environments at colleges and universities, many campuses adopted affirmative consent standards to govern sexual behavior.

In light of the "alarming frequency with which sex occurs on college campuses without a meeting of the minds on the question of consent, forcing people to focus on what consent means is not only appropriate, it is essential."<sup>216</sup> Affirmative consent is the notion that mere passivity or acquiescence to the will of another does not constitute meaningful permission to engage in sexual penetration. Meaningful consent must be active, and a person should have to communicate positive, verbal or nonverbal agreement to engage in penetration before someone else should be allowed to penetrate them. Affirmative consent rules provide "greater clarity for both partners."<sup>217</sup>

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214. Press Release, Office for Civil Rights, U.S. Dep't of Educ., U.S. Education Department Reaches Agreement with the University of Virginia to Address and Prevent Sexual Violence and Sexual Harassment (Sept. 21, 2015), <http://www.ed.gov/news/press-releases/us-education-department-reaches-agreement-university-virginia-address-and-prevent-sexual-violence-and-sexual-harassment> [<http://perma.cc/YZ2W-L4KF>].

215. *Id.* The Agreement identified the responsibilities and training for Title IX coordinators and disciplinary panel members. *University of Virginia Resolution Agreement*, *supra* note 212, at 2, 5, 8. UVA must conduct annual climate assessments and student focus groups to gather information on students' attitudes and experiences with sexual harassment and sexual violence. *Id.* at 14-16.

216. Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 688 (1999).

217. Janet Napolitano, "Only Yes Means Yes": *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL'Y REV. 387, 389 (2015).

Affirmative consent derives from the notion that bodies are not generally available for sexual penetration.<sup>218</sup> If people's bodies are generally available to be sexually penetrated, then one should be able to penetrate someone else at any time, unless that person communicates an objection to being penetrated. If, by contrast, people's bodies are not generally available to be sexually penetrated, one should not be able to penetrate someone else without that person's affirmative permission. Affirmative consent thus rejects the argument that mere submission or acquiescence is sufficient for consent.<sup>219</sup> It is a mechanism to maximize sexual autonomy.

The notion of agreement between the parties as consent is not new in the criminal law. A plurality of U.S. jurisdictions that define consent use the word "agreement" or something stronger: for example, "positive cooperation in act or attitude."<sup>220</sup> Affirmative consent has been the criminal law standard for decades in Wisconsin, Vermont, and New Jersey.<sup>221</sup> Many colleges and universities have adopted affirmative consent rules in their disciplinary codes. Where colleges and universities have not, states have begun to impose them on campuses within their jurisdictions. California was first.

The California Coalition Against Sexual Assault developed and advanced an affirmative consent law for California campuses after trying and failing to

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218. See generally Michelle Madden Dempsey & Jonathan Herring, *Why Sexual Penetration Requires Justification*, 27 OXFORD J. LEGAL STUD. 467, 467 (2007) (arguing that sexual penetration is a prima facie wrong that requires justification).

219. Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 486 (2005).

220. CAL. PENAL CODE § 261.6 (West 2015); see also 10 U.S.C. § 920(g)(8) (2012) ("freely given agreement"); COLO. REV. STAT. ANN. § 18-3-401 (West 2015) ("cooperation in act or attitude"); D.C. CODE ANN. § 22-3001 (West 2016) ("freely given agreement"); MINN. STAT. ANN. § 609.341 (West 2015) ("freely given present agreement"); VT. STAT. ANN. tit. 13, § 3251 (West 2015) ("voluntary agreement"); WIS. STAT. ANN. § 940.225 (West 2015) ("freely given agreement"); State v. Adams, 880 P.2d 226 (Haw. Ct. App. 1994) ("voluntary agreement"); State v. Blount, 770 P.2d 852 (Kan. Ct. App. 1989) ("voluntary agreement"); State *ex rel.* M.T.S., 609 A.2d 1266 (N.J. 1992) ("affirmative and freely-given permission").

221. In Wisconsin, consent means "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact." WIS. STAT. ANN. § 940.225(4). Sexual intercourse without consent is a felony. *Id.* § 940.225(1). In Vermont, consent "means words or actions by a person indicating a voluntary agreement to engage in a sexual act." VT. STAT. ANN. tit. 13, § 3251(3). A person who engages in a sexual act without consent is guilty of a felony. *Id.* § 3252(f). New Jersey requires "permission to engage in sexual penetration [that] must be affirmative and it must be given freely." *M.T.S.*, 609 A.2d at 1277.



reform the California criminal code to outlaw nonconsensual sex by statute.<sup>222</sup> The new law for California colleges and universities states:

“Affirmative consent” means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.<sup>223</sup>

New York followed suit with a campus mandate shortly thereafter. Its law defined affirmative consent for New York colleges and universities in this way:

Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant’s sex, sexual orientation, gender identity, or gender expression.<sup>224</sup>

About 1,400 colleges and universities now use affirmative consent rules for sexual misconduct.<sup>225</sup> Disciplinary codes of university campuses “seem to be converging on a standard that requires an affirmative expression.”<sup>226</sup> About a dozen states, including New Jersey, Connecticut, and New Hampshire, have bills pending to mandate that colleges in their states enact affirmative consent

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222. 2014 *Legislative Priorities*, CAL. COALITION AGAINST SEXUAL ASSAULT, <http://www.calcasa.org/what-we-do/public-policy/legislation> [<http://perma.cc/T6AK-JYXD>]; see also S. 991, 2013-2014 Leg. (Cal. 2013), [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB991](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB991) [<http://perma.cc/D9UY-J788>].

223. 2014 Cal. Legis. Serv. 93 (West) (codified at CAL. EDUC. CODE § 67386 (West 2015)).

224. N.Y. EDUC. LAW § 6441 (McKinney 2015); see also Susanne Craig & Jesse McKinley, *New York’s Lawmakers Agree on Campus Sexual Assault Laws*, N.Y. TIMES (June 16, 2015), <http://www.nytimes.com/2015/06/17/nyregion/new-yorks-lawmakers-agree-on-campus-sexual-assault-laws.html> [<http://perma.cc/C79S-TLLY>].

225. Keenan, *supra* note 35.

226. Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 3 (2015).

standards for campus discipline.<sup>227</sup> California now additionally requires that high school health education classes teach students about affirmative consent in sexual relations.<sup>228</sup>

In sum, colleges and universities have evolved both procedurally and substantively in how they address campus sexual assault. Procedurally, OCR imposed a set of new and progressive requirements for campuses to resolve allegations of campus sexual assault promptly and equitably. Substantively, many campuses have adopted affirmative consent standards for sexual relations, which enhance sexual autonomy. These steps mirror the history of progressive attempts to reform rape law. Demands to respond equitably to campus rape are analogous to demands that rape law no longer harbor unique procedural hurdles for rape victims. Affirmative consent for sexual penetration is a rule to protect the kind of sexual autonomy that many progressives have worked to implement in the criminal rape law for decades, and in fact only emerged as a mandate for colleges and universities in California when attempts to criminalize nonconsensual sex in that state failed.<sup>229</sup>

#### IV. RESISTANCE TO CAMPUS SEXUAL ASSAULT REFORM

Resistance to progressive reform of campus sexual assault, including the application of Title IX and the adoption of affirmative consent rules, has followed a somewhat predictable trajectory, given the history of rape law reform. For example, Title IX's application to campus sexual assault has suffered political backlash from Senator James Lankford, Chair of the Subcommittee on Regulatory Affairs, who has expressed "alarm" at what he sees as heavy-handed OCR guidance.<sup>230</sup> In general, the resistance to progressive reform of campus sexual assault has mirrored the backlash to the progressive reform of rape law, in that it favors unique procedures to benefit

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227. *State by State Affirmative Consent Legislation and Policy*, AFFIRMATIVE CONSENT PROJECT, <http://affirmativeconsent.com/affirmative-consent-laws-state-by-state/?hvid=3aRofN> [<http://perma.cc/2RAA-CQ4K>].

228. Jennifer Medina, *Sex Ed Lesson: 'Yes Means Yes,' but It's Tricky*, N.Y. TIMES (Oct. 14, 2015), <http://www.nytimes.com/2015/10/15/us/california-high-schools-sexual-consent-classes.html> [<http://perma.cc/RH9P-7FDT>].

229. See *supra* notes 222-223 and accompanying text. On advocacy efforts related to affirmative consent, see *Governor Brown Signs Important Campus Legislation!*, CAL. COALITION AGAINST SEXUAL ASSAULT (Sept. 29, 2014), <http://www.calcasa.org/2014/09/governor-brown-signs-important-campus-legislation> [<http://perma.cc/3AHG-N6U9>].

230. Letter from Senator James Lankford, Chair, Senate Subcomm. on Regulatory Affairs & Fed. Mgmt., Comm. on Homeland Sec. & Gov't Affairs, to John B. King, Acting Sec'y, U.S. Dept. of Educ. 1 (Jan. 7, 2016) (on file with author).

the accused as well as the force requirement. Nevertheless, the reaction to students accused of or found responsible for sexual assault on campus has been quite different from the reaction to criminal sex offenders.

*A. Argument that Campus Sexual Assault Adjudication Requires Unique Procedural Hurdles*

Before OCR began robustly enforcing Title IX against sexual assault, some campuses responded to student activism around the issue by adopting the discredited procedural requirements from criminal rape law.<sup>231</sup> Harvard provides a prime example.

In 1993, the Faculty of Arts and Sciences at Harvard College adopted a strong statement against sexual misconduct on campus.<sup>232</sup> However, after a “spike in accusations of date rape” at Harvard, the Faculty of Arts and Sciences in 2002 adopted a new set of procedures for sexual assault complaints.<sup>233</sup> Officials indicated that Harvard’s disciplinary system had not achieved satisfactory results in recent cases.<sup>234</sup> During the 2001 academic year, the Harvard Administrative Board handled seven student complaints of sexual assault.<sup>235</sup> In six of them, it decided no wrongdoing had occurred or determined that it could not substantiate the complaints. In the final case, the Board found the accuser and the accused equally responsible and required

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231. For a more complete description of this issue, see Anderson, *supra* note 2, at 987-1015 (reviewing campus policies at Harvard, Amherst, Georgia Institute of Technology, Columbia, Duke, Northwestern, Stanford, the Air Force Academy, and Boston University, among others). For a discussion of procedural hurdles in traditional rape law, see *supra* Section I.A.

232. The current version of this statement is available at Faculty of Arts & Scis., *Standards of Conduct in the Harvard Community*, HARV. U., [http://static.fas.harvard.edu/registrar/ugrad\\_handbook/current/chapters/standards\\_conduct.html](http://static.fas.harvard.edu/registrar/ugrad_handbook/current/chapters/standards_conduct.html) [<http://perma.cc/QEV4-37EC>]. It was the first time the school implemented such a policy. Comm. to Address Sexual Assault at Harvard, *Public Report*, HARV. U. 12 (Apr. 2003), [http://osapr.harvard.edu/files/osapr/files/leaning\\_committee\\_report.pdf](http://osapr.harvard.edu/files/osapr/files/leaning_committee_report.pdf) [<http://perma.cc/U4UT-U3EH>].

233. Kate Zernike, *Campus Court at Harvard Alters Policy on Evidence*, N.Y. TIMES (May 9, 2002), <http://www.nytimes.com/2002/05/09/education/09HARV.html> [<http://perma.cc/W4XC-MDGX>]; see also *Adjudicating Sexual-Assault Cases*, HARV. MAG., July-Aug. 2002, <http://harvardmagazine.com/2002/07/adjudicating-sexual-assa.html> [<http://perma.cc/NNX5-PQ5S>].

234. Nancy Traver, *A Harvard Policy Under Fire: School Seeks “Evidence” for Assaults: Move Raises Question of Gender Bias*, CHI. TRIB. (Oct. 23, 2002), [http://articles.chicagotribune.com/2002-10-23/features/0210230015\\_1\\_policy-complaint-federal-investigation](http://articles.chicagotribune.com/2002-10-23/features/0210230015_1_policy-complaint-federal-investigation) [<http://perma.cc/B22P-93S2>].

235. Zernike, *supra* note 233.

them both to withdraw from the college.<sup>236</sup> Because the accused did not appeal the Board's decision, he was allowed to reapply to Harvard, was readmitted, and was awarded his degree retroactively. Because the complainant retained her right to appeal, however, her degree remained "in limbo."<sup>237</sup>

When he recommended new procedures, the Dean of Harvard College said that the school was not equipped to deal with "he-said-she-said" rape complaints.<sup>238</sup> Harvard administrators suggested that victims had unrealistic expectations of relief in reporting to the college that they had been sexually assaulted.<sup>239</sup>

The new 2002 Procedures stated:

Complaints must ordinarily be brought to the College in a timely manner. The Board typically cannot resolve peer dispute cases in which there is little evidence except the conflicting statements of the principals. Therefore, the Board ordinarily will not consider a case unless the allegations presented by the complaining party are supported by independent corroborating evidence. Based on the information provided at the time of the complaint, the Board will decide whether or not there appears to be sufficient corroborating evidence to pursue the complaint.<sup>240</sup>

These procedures implemented three specific procedural hurdles that harken back to prereform rape law. First, a prompt complaint requirement: complaints needed to be "timely." Second, a corroboration requirement: allegations needed to be "supported by independent corroborating evidence." And third, a cautionary rule: Harvard cautioned the Board against pursuing

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236. Marie Szaniszlo, *Colleges Caught in Sex-Assault Dilemma*, BOS. HERALD (Oct. 13, 2002). In one of the six cases in which the Board took no action, a sophomore complained of having been raped in the fall of her first year at Harvard by a male student. Anne K. Kofol, *Burden of Proof*, HARV. CRIMSON (June 5, 2003), <http://www.thecrimson.com/article.aspx> [<http://perma.cc/PK8Y-H56V>]. According to the complainant, he sexually assaulted her twice as she lapsed in and out of consciousness due to heavy intoxication. *Id.*

237. Szaniszlo, *supra* note 236.

238. Jessica E. Vascellaro, *Faculty To Revisit Assault Policy*, HARV. CRIMSON (Apr. 25, 2003), <http://www.thecrimson.com/article/2003/4/25/faculty-to-revisit-assault-policy-a> [<http://perma.cc/FT7Y-9CCA>].

239. *Id.*; see also Zernike, *supra* note 233 ("Officials feared that the existing procedures had raised expectations [among students.]").

240. See Anderson, *supra* note 2, at 991-92.

cases in which the victim had “little evidence except the conflicting statements of the principals.”<sup>241</sup>

Following student complaints to OCR for Title IX violations, Harvard has changed its sexual assault policies and procedures a number of times since 2002. But the importation of prompt complaint and corroboration rules and cautionary language from the criminal law into the disciplinary code for sexual assault makes clear that these hurdles were designed to facilitate the disposal of campus sexual assault cases, in the same way that the same hurdles were designed to facilitate the disposal of rape cases in the criminal law.

### *B. Argument that Campus Sexual Assault Adjudication Violates Due Process*

Independent of imposing the exact hurdles discredited in rape law on campus sexual assault procedures, opponents of progressive reform argue that disciplinary proceedings for sexual assault may violate due process. Rubinfeld, for instance, has argued that the process of campus adjudication mandated by OCR under Title IX is “inherently unreliable and error-prone.”<sup>242</sup>

Some are calling for new, enhanced procedural protections for students accused of sexual misconduct.<sup>243</sup> They make two arguments. First, OCR mandates and campuses grant students accused of sexual assault insufficient process in campus disciplinary proceedings.<sup>244</sup> Second, the preponderance of the evidence standard of proof OCR requires creates an intolerable risk of false positives, so campuses should be allowed to adopt higher standards of proof for those accused of sexual assault.<sup>245</sup>

In terms of the first argument, Halley has argued that campus sexual assault adjudications “are taking us back to pre-Magna Carta, pre-due-process procedures.”<sup>246</sup> She and a group of other Harvard Law faculty submitted a

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241. *Id.*; see also Stephanie Schmid, *A Perfunctory Change?—Harvard University’s New Sexual Misconduct Complaint Procedure: Lessons from the Frontlines of Campus Adjudication Systems*, 18 BERKELEY WOMEN’S L.J. 265, 266-67 (2003) (discussing the “corroborating evidence requirement”).

242. Rubinfeld, *supra* note 6.

243. See, e.g., Joseph Cohn, *Campus Is a Poor Court for Students Facing Sexual Misconduct Charges*, CHRON. HIGHER EDUC. (Oct. 1, 2012), <http://chronicle.com/article/Campus-Is-a-Poor-Court-for/134770> [<http://perma.cc/W6GQ-898E>].

244. *Id.*; Nancy Gertner, *Sex, Lies and Justice*, AM. PROSPECT, Winter 2015, <http://prospect.org/article/sex-lies-and-justice> [<http://perma.cc/H4VQ-F3CW>].

245. Gertner, *supra* note 244; see also Rubinfeld, *supra* note 6.

246. David Savage & Timothy Phelps, *How a Little-Known Education Office Has Forced Far-Reaching Changes to Campus Sex Assault Investigations*, L.A. TIMES (Aug. 17, 2015), <http://>

collective open letter objecting to the college's revised procedures and policies on sexual assault, arguing that they "lack the most basic elements of fairness and due process."<sup>247</sup> In "cases of alleged sexual misconduct," the group argued for the "opportunity to discover the facts charged and to confront witnesses and present a defense at an adversary hearing."<sup>248</sup> They also argued in favor of granting accused students a right to representation, "particularly for students unable to afford representation."<sup>249</sup>

Although not required by OCR, the Harvard Law professors' position would not be inconsistent with OCR's guidance. OCR requires "[a]dequate, reliable, and impartial investigation of complaints,"<sup>250</sup> which is consistent with "an opportunity to discover the facts charged." Although OCR "strongly discourages" the respondent himself or herself from personally cross-examining the complaining witness,<sup>251</sup> a respondent can ask questions through a third party in a disciplinary hearing. Although OCR does not require a full adversary hearing for students accused of misconduct, it does require that each side have "similar and timely access" to relevant information and an "equal opportunity to present relevant witnesses and other evidence."<sup>252</sup> OCR does not require that schools provide respondents with lawyers in sexual violence cases; however, if lawyers are allowed, they must be allowed for both parties.<sup>253</sup> So the Harvard Law professors' preferences are not inconsistent with OCR's interpretation of the law.

However, the Harvard Law professors' objections to the limited process rights of those accused of misconduct are nonunique; that is, they could be lodged against the same kinds of procedures associated with allegations of campus cheating, hazing, nonsexual assault, arson, or discrimination on the basis of race. Students who engage in nonsexual assault on campus, for instance, have no right to an attorney provided for them. Affording the right to an attorney only to those accused of campus sexual assault would mirror the

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[www.latimes.com/nation/la-na-campus-sexual-assault-20150817-story.html](http://www.latimes.com/nation/la-na-campus-sexual-assault-20150817-story.html) [<http://perma.cc/6XMH-F57E>].

247. Bartholet et al., *supra* note 9; see also Emily Bazelon, *Return of the Sex Wars*, N.Y. TIMES (Sept. 10, 2015), <http://www.nytimes.com/2015/09/13/magazine/the-return-of-the-sex-wars.html> [<http://perma.cc/55YW-B5UW>] (describing this letter); Andrew Duehren, *A Call to Arms*, HARV. CRIMSON (May 28, 2015), <http://www.thecrimson.com/article/2015/5/28/janet-halley-title-ix> [<http://perma.cc/66N2-M4JJ>] (same).

248. Bartholet et al., *supra* note 9.

249. *Id.*

250. *Dear Colleague Letter*, *supra* note 173, at 9.

251. *Id.* at 12.

252. *Id.* at 11.

253. *Id.* at 12.

traditional special burdens placed on rape prosecutions in the criminal law. To win their process argument, opponents must make the case for why respondents in campus sexual assault cases should enjoy uniquely favorable rights—or make the case for increased process rights for all students accused of misconduct—neither of which, so far, they have done.

That opponents to campus adjudication have asserted an enthusiasm for respondents' due process rights only in cases of campus sexual assault is troubling. It suggests a stronger interest in protecting those accused of sexual assault than those accused of other campus misconduct who face the same limited process rights and potential consequences of campus adjudication gone wrong.

In terms of the second argument on the standard of proof, opponents argue that the preponderance of the evidence standard fails to protect students who are accused of sexual assault from false accusations.<sup>254</sup> Again, these arguments are not unique to campus sexual misconduct. They could be lodged against applying the same standard of proof in campus adjudication of other misconduct, such as theft, fraud, embezzlement, or negligent homicide. That opponents have asserted an enthusiasm for a robust standard of proof only in cases of campus sexual assault is troubling. Again, it bespeaks a concern, not for due process on campus, but for those accused of sexual assault over those accused of other misconduct.

Civil rights cases that go to formal courts of law are assessed based on a preponderance of the evidence standard. Since at least 1995, and during multiple presidential administrations, OCR has required that campuses use a preponderance of the evidence standard in sexual misconduct hearings in order to adjudicate cases “equitably.”<sup>255</sup> It reaffirmed that position in 2003.<sup>256</sup>

Historically, only one in five colleges and universities identified any standard of proof in their codes, and among those that did, eighty percent used

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254. See, e.g., Rubinfeld, *supra* note 6 (“Mistaken findings of guilt are a real possibility because the federal government is forcing schools to use a lowered evidentiary standard—the ‘more likely than not’ standard, which is much less exacting than criminal law’s ‘proof beyond a reasonable doubt’ requirement—at their rape trials.”).

255. Letter from Office for Civil Rights, U.S. Dep’t of Educ., to Evergreen State Coll. 8-9 (Apr. 4, 1995) [http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed\\_ehd\\_1995.pdf](http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf) [<http://perma.cc/CW58-A4N8>] (Letter of Findings).

256. Letter from Office for Civil Rights, U.S. Dep’t of Educ., to Georgetown Univ. (Oct. 16, 2003), [http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed\\_ehd\\_1995.pdf](http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf) [<http://perma.cc/CW58-A4N8>] (Letter of Findings); see also Letter from Office for Civil Rights, U.S. Dep’t of Educ., to Georgetown Univ. (May 5, 2004), <http://www.ncherm.org/documents/199-GeorgetownUniversity--11032017DeGeoia.pdf> [<http://perma.cc/3KA5-WMTE>] (Letter of Findings).

a preponderance of the evidence standard.<sup>257</sup> The exception to the preponderance standard in colleges appears to have been in the Ivy League, which used the clear and convincing evidence standard<sup>258</sup> for all kinds of campus misconduct to protect students (and perhaps the alumni parents who are often donors to elite institutions). So when a group of University of Pennsylvania law professors protested their campus procedures applicable to sexual assault complaints, they objected to a “retreat from the clear-and-convincing standard of proof” because their campus continues to use this higher standard in all other adjudication.<sup>259</sup> These professors objected to the uniquely *easier* standard of proof for sexual assault complaints. Other than at the University of Pennsylvania and the few other campuses that already use a higher standard of proof, however, opponents of preponderance of the evidence are requesting a standard of proof that is uniquely *harder* to meet.

Preponderance of the evidence is the standard used throughout the justice system, except when life or liberty is at stake. Standard cases in civil court, including sexual harassment cases, are evaluated by a preponderance of the evidence standard. If the victim of a sexual assault sues the perpetrator for damages, a court of law will apply a preponderance standard. There is nothing anomalous or inappropriate in using the preponderance standard to decide the facts in a campus disciplinary system. It is not clear why the standard would be different in disciplinary proceedings for sexual assault, where no criminal punishments or civil collateral consequences accompany a finding of responsibility.

One could claim that heightened procedural protections or a heightened standard of proof are necessary in cases of campus sexual assault because OCR is exerting too much pressure on colleges and universities.<sup>260</sup> To be sure, OCR’s pressure is real and powerful: as it does with finding of violations of other civil rights statutes, the agency has threatened to remove federal funding

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257. Heather M. Karjane et al., *Campus Sexual Assault: How America’s Institutions of Higher Education Respond*, U.S. DEP’T JUST. 120 (2002), <http://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf> [<http://perma.cc/N2BH-F7GT>].

258. Jake New, *The Wrong Standard*, INSIDE HIGHER EDUC. (Nov. 6, 2014), <http://www.insidehighered.com/news/2014/11/06/princeton-title-ix-agreement-higher-standard-proof-sexual-assault-cases-last-legs> [<http://perma.cc/NW7Y-P8EE>].

259. Eugene Volokh, *Open Letter from 16 Penn Law School Professors About Title IX and Sexual Assault Complaints*, WASH. POST (Feb. 19, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/19/open-letter-from-16-penn-law-school-professors-about-title-ix-and-sexual-assault-complaints> [<http://perma.cc/9H94-W876>].

260. Savage & Phelps, *supra* note 246.



from campuses unless they conform to the requirements of the law.<sup>261</sup> But there is little evidence that OCR is exerting unusual or undue pressure in sexual assault cases. On the contrary, OCR demands equitable procedures as between the complainant and the respondent;<sup>262</sup> it has not found a violation of Title IX in every investigation;<sup>263</sup> it has found some campuses are in compliance with Title IX when they rule in favor of respondents in sexual assault cases;<sup>264</sup> and it has never removed federal funding from a campus on the basis of its failure to comply with the Dear Colleague Letter.<sup>265</sup>

To be sure, colleges and universities do not always adjudicate allegations of sexual assault well. They have not been adjudicating these kinds of claims for very long. Since 2011, under the guidance of the Dear Colleague Letter, campuses have begun to tackle these issues in earnest. Many colleges are working to implement Title IX in a strong, fair, and equitable way. Some colleges, however, are failing: denying victims a safe, equitable environment, as Title IX requires, or denying accused students fairness in disciplinary adjudication, in ways that Title IX does not require and the Constitution will not stand.

In the latter cases, however, accused students are suing their colleges and universities in court and winning.<sup>266</sup> Where colleges have gone wrong, accused students are even lodging Title IX complaints for gender discrimination.<sup>267</sup> And campuses are responding—as they must—when accused students prevail. So campuses face powerful legal incentives on both sides to address campus sexual assault, and to do so fairly and impartially.

Federal courts have held that public colleges and universities must afford accused students certain minimum protections in campus disciplinary proceedings. In the 2005 *Gomes v. University of Maine System* case, for instance,

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261. *Id.* (quoting Professor Stephanos Bibas as stating, “All the universities are being stampeded to go along. They’re afraid. There is a lot of money on the line, and they fear being investigated”).

262. *Dear Colleague Letter*, *supra* note 173.

263. *Campus Sexual Assault Under Investigation*, CHRON. HIGHER EDUC., <http://projects.chronicle.com/titleix/cases> [<http://perma.cc/YHM6-657V>].

264. *Id.*

265. Savage & Phelps, *supra* note 246 (asserting that voluntary compliance is working).

266. See New, *supra* note 258; see also Tovia Smith, *For Students Accused of Campus Rape, Legal Victories Win Back Rights*, NPR (Oct. 15, 2015), <http://www.npr.org/2015/10/15/446083439/for-students-accused-of-campus-rape-legal-victories-win-back-rights> [<http://perma.cc/2CWZ-DUFQ>].

267. Teresa Watanabe, *More College Men Are Fighting Back Against Sexual Misconduct Cases*, L.A. TIMES (June 7, 2014), <http://www.latimes.com/local/la-me-sexual-assault-legal-20140608-story.html> [<http://perma.cc/FVS7-3S4K>].

a student challenged the process the University of Maine offered in a student disciplinary proceeding.<sup>268</sup> The federal district court reviewed prior decisions and held that, in a public university student disciplinary hearing, due process requires that the student: (1) “be advised of the charges against him”; (2) “be informed of the nature of the evidence against him”; (3) “be given an opportunity to be heard in his own defense”; (4) “not be punished except on the basis of substantial evidence”; (5) “be permitted assistance of a lawyer, at least in major disciplinary proceedings”; (6) “be permitted to confront and to cross-examine witnesses against him”; and (7) be adjudicated by an impartial tribunal, “which must make written findings.”<sup>269</sup> These due process requirements are consistent with OCR guidance.

These are important rights that both private and public school students accused of any kind of misconduct should have. However, to go much further than these basic procedural rights, which should apply in any adjudicatory process on campus, and single out respondents in sexual assault cases for special protection, would be unwise.

However, where a college or university requires a respondent to cooperate with an investigation and testify in disciplinary proceedings, there is a serious Fifth Amendment concern, because testimony may be used against the accused in a later criminal proceeding.<sup>270</sup> Of course, this concern again is nonunique to sexual assault, but it is one that campuses should address for all students accused of misconduct that also potentially violates state or federal criminal codes. To protect the Fifth Amendment rights of students who are subject to campus disciplinary proceedings and may be later prosecuted for criminal actions, colleges and universities could provide students a right to remain silent in campus proceedings with no adverse inference drawn. Alternatively, courts or legislatures could provide accused students with use immunity for statements made in disciplinary proceedings, barring those statements (and the fruits thereof) from being admitted in subsequent criminal proceedings. Crafting these or other possible solutions is an important area for further research. Colleges and universities should protect accused students’ due process rights, whether they are charged with sexual assault or any other criminal behavior on campus.

Efforts to provide those accused of sexual assault with heightened process rights in campus disciplinary proceedings (without affording those rights to students facing other disciplinary allegations) mirrors the heightened procedural hurdles that rape victims faced in the criminal law. In the criminal

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<sup>268</sup>. 365 F. Supp. 2d 15 (D. Me. 2005).

<sup>269</sup>. *Id.* at 16 (citations omitted).

<sup>270</sup>. Gertner, *supra* note 244.

law context, procedural hurdles deterred rape victims from coming forward and placed them in an unequal position relative to victims of other crimes. Likewise, in the campus context, heightened process rights for those accused of sexual assault would deter victims from coming forward and place them in an unequal position relative to victims of other campus misconduct.

*C. Argument that Campus Sexual Assault Adjudication Harms Impressionable Young Women*

It may come as no surprise that the same people who scoffed at the progressive reform of rape law have also criticized the changes in how campuses handle sexual assault. Always colorful, Paglia, for instance, has alleged, “Despite hysterical propaganda about our ‘rape culture,’ the majority of campus incidents being carelessly described as sexual assault are not felonious rape (involving force or drugs) but oafish hookup melodramas, arising from mixed signals and imprudence on both sides.”<sup>271</sup>

Critics have developed a fascinating argument about the damage a concern for campus sexual assault itself causes. The argument is that feminist concern for sexual assault and campus adjudication of allegations of sexual assault actually harms women. This theory begins as a denial of the problem of sexual assault on campus, but then it evolves into the notion that feminists, not those who commit sexual assault, are creating the victims. Roiphe, for instance, asserted that an overblown feminist narrative about sexual assault on campus turns “perfectly stable women into hysterical, sobbing victims.”<sup>272</sup>

Paglia belittled victims’ attempts to seek redress through college adjudicatory systems: “Running to Mommy and Daddy on the campus grievance committee is unworthy of strong women.”<sup>273</sup> Halley extended the child analogy. She asserted that the “feminist line” about rape “might well have a shaping contribution to make to women’s suffering when, for instance, it insists that a raped woman has suffered an injury from which she is unlikely ever to recover.”<sup>274</sup> She explained:

Could feminism be like adults on the playground? Imagine: the little girl stumbles, falls, scrapes her knee. She is silent, still, composed,

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271. Camille Paglia, *The Modern Campus Cannot Comprehend Evil*, TIME (Sept. 29, 2014), <http://time.com/3444749/camille-paglia-the-modern-campus-cannot-comprehend-evil> [<http://perma.cc/798W-SRPS>].

272. KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* 112 (1993).

273. PAGLIA, *supra* note 106, at 53.

274. HALLEY, *supra* note 113, at 345.

waiting for the kaleidoscope of dizziness, surprise, and pain to subside. Up rush the adults, ululating in sympathy, urgently concerned—has she broken her leg? Is she bleeding? How did this happen? We must not let it happen again! Poor thing. The little girl’s silence breaks—for the first time afraid, she cries.<sup>275</sup>

Feminist interpretations of rape may thereby “intensify” its injury.<sup>276</sup> Halley even speculated that feminism’s focus may guide men to rape: “What if some men are ‘guided’ by this bull’s-eye to target women for rape rather than fomenting other aggressions, perhaps more manageable, perhaps directed elsewhere?”<sup>277</sup>

Not just feminist perspectives on rape are at fault. New survey instruments and revised disciplinary codes are themselves part of the problem. To some, climate surveys manage “how students think about and understand their sexual experiences” and help “transform some sexual conduct into misconduct, under the guise of simply measuring how much sexual violence exists.”<sup>278</sup>

Rubinfeld turned to the rules of the disciplinary code itself to lodge a similar complaint. He asserted that campus rejections of the force requirement and use of affirmative consent rules create rape victims out of whole cloth: “It encourages people to think of themselves as sexual assault victims when there was no assault.”<sup>279</sup>

The specter of the lying female undergirds this argument, but she has changed. She is no longer the Freudian fantasizer who meets sexual aggression with “ready acceptance” because she secretly desires it.<sup>280</sup> Now, she is a crying child on a playground, spurred to suffering by feminist reactions, and, we are warned, “her wails may have something in them of a (possibly successful) wish for revenge.”<sup>281</sup> As the old cautionary instruction insisted, we should evaluate her story of sexual abuse with special care, given her “emotional involvement.”<sup>282</sup> She is still Wigmore’s lass, with an “unchaste (let us call it)

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275. *Id.* at 346.

276. *Id.*

277. *Id.* at 345.

278. Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. (forthcoming 2016) (manuscript at 32) (on file with author).

279. Rubinfeld, *supra* note 6.

280. *See supra* notes 25-26 and accompanying text.

281. HALLEY, *supra* note 113, at 346.

282. MODEL PENAL CODE § 213.6(5) (AM. LAW. INST. 1962).

mentality [that] finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim.”<sup>283</sup>

We must be extra skeptical. Today’s lying female is confused, misled after the fact into believing that she was victimized by sex when she never previously considered the sex bad, nor herself a victim. In a fit of “erotic imagination,” she has been duped – by feminists – and is now a fool who fools others.<sup>284</sup> She was doing just fine, thank you – until she took a climate survey, read a pamphlet about campus sexual assault, or attended a Title IX educational workshop. Post-sex regret morphs into an allegation of rape after a pat down by the P.C. police.

The story of manipulative feminists making victims out of otherwise well-adjusted undergraduates fits into a broader popular narrative that campuses have become bastions of “sexual paranoia,” filled with trigger-warning-happy activists trying to herd coeds from psychological harm.<sup>285</sup> It coincides with the position that this generation of students is coddled and unprepared for the real world, and that the safe spaces they seek are “infantilizing and anti-intellectual” and “may be teaching students to think pathologically.”<sup>286</sup>

*D. Argument that Campus Sexual Assault Adjudication Harms Young Men with Bright Futures*

Resistance to progressive reform of the way campuses address sexual assault has developed another new deflection of blame for those accused of sexual assault: the “he had such a bright future” argument. Opponents of applying Title IX to campus sexual assault tend to humanize the accused in ways that sex offenders have rarely been humanized in the popular media, and they tend to highlight the negative consequences if one is found responsible under a campus disciplinary system.<sup>287</sup> The sympathy many express for those accused of sexual assault in campus proceedings, which have extremely limited consequences relative to the criminal justice system, contrasts sharply with the disdain society has expressed for sex offenders outside of the campus setting.

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<sup>283</sup>. 3 WIGMORE, *supra* note 27, at 466.

<sup>284</sup>. See, e.g., ROIPHE, *supra* note 272, at 39-44.

<sup>285</sup>. Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC, Sept. 2015, <http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356> [<http://perma.cc/7H5E-89XX>].

<sup>286</sup>. *Id.*

<sup>287</sup>. See, e.g., James Taranto, *Taranto: An Education in College Justice*, WALL ST. J. (Dec. 6, 2013), <http://www.wsj.com/articles/SB10001424052702303615304579157900127017212> [<http://perma.cc/6F47-JLKV>].

Examples abound. In the 2013 Steubenville rape case, high school athletes repeatedly sexually assaulted a girl incapacitated by alcohol and then documented and bragged about the acts on social media.<sup>288</sup> A CNN correspondent called the convicted defendants “two young men that had such promising futures, star football players, very good students.”<sup>289</sup> The *Los Angeles Times* reported that three college students suing their campuses for finding them responsible for sexual assault “were headed toward bright futures at prestigious colleges and universities when each got involved in one-night sexual encounters.”<sup>290</sup> A firm specializing in campus sexual assault noted, “A campus disciplinary hearing can quickly dim a bright future.”<sup>291</sup> A news reporter described a “Stanford University swimmer” charged with five felony counts of raping an unconscious woman on campus as having lost “a bright future.”<sup>292</sup>

Note that the “bright future” argument is not an expression of greater sympathy for those who have been accused as opposed to those who have been found responsible in a disciplinary proceeding, nor is it an expression of greater sympathy for those who have been found responsible under a preponderance of the evidence standard on campus as opposed to those who have been found guilty under a beyond a reasonable doubt standard in court. For instance, many of the above examples of young men with “bright futures” involved those who were convicted in a criminal court beyond a reasonable doubt.

Students are sympathetic, to be sure. But the “bright future” argument is not only an oblique reference to the advantages of attending college. It is, more importantly, a way of framing culpability. The notion that these were potential or actual college kids, good upstanding citizens, is a description coded for class (and race) privilege and dignity, so as to relieve the accused of responsibility, or at least lessen it. Whereas potential or actual sex offenders are branded as

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288. Richard A. Oppel, Jr., *Ohio Teenagers Guilty in Rape that Social Media Brought to Light*, N.Y. TIMES (Mar. 17, 2013), <http://www.nytimes.com/2013/03/18/us/teenagers-found-guilty-in-rape-in-steubenville-ohio.html> [<http://perma.cc/A6TN-ZBSM>].

289. Mallory Ortberg, *CNN Reports on the ‘Promising Future’ of the Steubenville Rapists, Who Are ‘Very Good Students,’* GAWKER (Mar. 17, 2013), <http://gawker.com/5991003/cnn-reports-on-the-promising-future-of-the-steubenville-rapists-who-are-very-good-students> [<http://perma.cc/W2UN-WQV7>].

290. Watanabe, *supra* note 267.

291. Matthew G. Kaiser & Justin Dillon, *Campus Sexual Assault Defense*, FAMS. ADVOCATING FOR CAMPUS EQUALITY, <http://www.facecampusequality.org/advice-from-an-attorney.html> [<http://perma.cc/R8GD-L7KD>].

292. Lilian Kim, *Stanford Student Accused of Rape Withdraws from University*, ABC NEWS (Jan. 27, 2015), <http://abc7news.com/news/stanford-student-accused-of-rape-withdraws-from-university/494034> [<http://perma.cc/SSX7-A8FW>].

subhuman, worthy of banishment and community shame by the conservative rape reform movement, potential or actual campus sexual assailants are often described in ways that suggest they are merely error-prone humans, worthy of redemption.

It is ironic that many have touted the “bright future” argument and the gravity of the loss of a college education when few have expressed serious concerns about the more punitive and draconian terms of incarceration, lifetime collateral consequences, and lifelong stigma of convictions for sex offenses under the criminal law. We must seek to extend that sympathy, and its implicit potential for recovery and societal reintegration, to those convicted of sexual offenses outside of the educational setting, even if they did not have academically “bright futures” awaiting them. They, too, are error-prone humans, worthy of redemption. They often face extreme consequences, criminal and civil, when found guilty, consequences that reduce or eliminate their potential for reintegration and redemption.

*E. Argument that Disciplinary Proceedings Are the Wrong Forum and Affirmative Consent Is the Wrong Standard for Campus Sexual Assault*

Despite a long and continued history of bias against victims of sexual assault,<sup>293</sup> oft-repeated arguments by opponents of Title IX tend to idealize the criminal law and disparage the campus disciplinary system. Campuses are ill equipped to handle complaints of sexual assault, we are told; these complaints should be directed to the criminal justice system where real justice resides. Paglia, for instance, argued that campuses should not adjudicate sexual assault: “College administrations are not a branch of the judiciary. They are not equipped or trained for legal inquiry . . . . [C]olleges must stand back and get out of the sex game.”<sup>294</sup>

When Harvard adopted the prompt complaint and corroboration requirements, its deputy general counsel likewise directed campus sexual assault victims to the criminal justice system, arguing, “The courts, or at least the police, are in a better position to conduct an investigation. . . . They have access to investigative tools that we don’t have.”<sup>295</sup> The Dean of Harvard College agreed: “I want to encourage women to take cases to the criminal justice system where something can be done . . . . We don’t have forensic laboratories, we don’t have subpoenas.”<sup>296</sup> The point, however, is not whether

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293. See *supra* Section II.A.

294. PAGLIA, *supra* note 106, at 54.

295. Zernike, *supra* note 233.

296. Vascellaro, *supra* note 238.

campuses have all the resources at their disposal that police and prosecutors do. They do not. The point is that campuses must use their resources to provide students with equal access to education.

A recent House Republican bill would have prohibited campuses from investigating a sexual assault unless the victim reported the assault to the police.<sup>297</sup> Fraternities heavily promoted the bill, which received near universal opposition from groups that work with sexual assault victims, as well as opposition from many groups that represent colleges and universities, such as the Association of American Universities.<sup>298</sup> The American Council on Education, for example, expressed “grave reservations about any legislation that would limit our ability to ensure a safe campus.”<sup>299</sup>

Nonetheless, the argument against campus involvement is framed as if this is a choice between two forums, one competent to handle these cases (the criminal justice system) and one incompetent to handle them (the campus disciplinary system). It is as if the criminal justice system’s history of ignoring the vast majority of rapes does not exist. Or, to the extent that the criminal justice system is a problem, it is characterized as a relatively minor one that can and should be fixed, as if the task of fixing it is more modest than making colleges and universities competent to adjudicate campus sexual assault.

The notion that there is a simple choice between campuses adjudicating responsibility for sexual assault or courts prosecuting sexual assault as a crime misses a key point. Opponents of Title IX sexual assault adjudications are not working hard to help the criminal justice system address acquaintance rape without extrinsic violence. They do not simply conclude that, on balance, it is better for sexual assault victims to pursue their claims in courts rather than in campus disciplinary tribunals. Rather, many are attempting to close the courthouse doors to victims of acquaintance rape without extrinsic force, and then close the doors to campus tribunals to those same victims as well.

Paglia, for instance, has argued that abolishing the criminal force requirement would be a “hallucinatory overextension of the definition” of rape.<sup>300</sup> She then argued that campus sexual assault “should be reported to the

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297. Safe Campus Act, H.R. 3403, 114th Cong. (2015); see also Tyler Kingkade, *28 Groups that Work with Rape Victims Think the Safe Campus Act Is Terrible*, HUFFINGTON POST (Sept. 17, 2015), [http://www.huffingtonpost.com/entry/rape-victims-safe-campus-act\\_us\\_55f300ce4b063ecbfa4150b](http://www.huffingtonpost.com/entry/rape-victims-safe-campus-act_us_55f300ce4b063ecbfa4150b) [<http://perma.cc/PM7B-T89R>].

298. Tyler Kingkade, *Fraternity Groups Push Bills to Limit College Rape Investigations*, HUFFINGTON POST (Aug. 4, 2015), [http://www.huffingtonpost.com/entry/fraternity-groups-college-rape\\_us\\_55c10396e4b0e716be074a7f](http://www.huffingtonpost.com/entry/fraternity-groups-college-rape_us_55c10396e4b0e716be074a7f) [<http://perma.cc/72XJ-5793>].

299. *Id.*

300. PAGLIA, *supra* note 108, at 24.



police, not to haphazard and ill-trained campus grievance committees.”<sup>301</sup> Roiphe agreed that rape should be limited to “instances of physical violence, or the threat of physical violence.”<sup>302</sup> If the definition is so limited, though, a victim of rape without extrinsic force would not find redress in either the courts or campus disciplinary proceedings.

Halley has objected to the way that some feminists seek to reframe the criminal law’s nonconsent and force requirements and argued that affirmative consent rules on campus “will foster a new, randomly applied moral order that will often be intensely repressive and sex-negative.”<sup>303</sup> Rubinfeld has argued that criminal rape requires extrinsic bodily violence, which acquaintance rape rarely entails.<sup>304</sup> He then argued against affirmative consent rules on campus: “colleges are expanding the concept of sexual assault to change its basic meaning . . . . [S]exual assault on campus should mean what it means in the outside world and in courts of law.”<sup>305</sup> If Rubinfeld had his way, sexual assault would be limited to instances of extrinsic bodily violence in both the criminal law and campus disciplinary codes. The vast majority of acquaintance rape victims would be left in the cold.

Many opponents of the progressive reform of campus sexual assault rules also oppose the progressive reform of rape law. They oppose both the abolition of the force requirement in state laws and the imposition of affirmative consent rules in campus codes. The unacknowledged but real choice they pose is between offering most victims of sexual assault legal or disciplinary redress in some forum, or none at all, and their arguments tend to support the latter camp.

Campus acquaintance rape victims deserve redress, and they do not have much hope of it in the criminal justice system.<sup>306</sup> But even if the criminal justice system harbored no bias, colleges and universities would still have to address sexual assault cases because courts and campuses have different interests and offer different remedies. In order to generate and transmit knowledge, colleges and universities must provide a safe learning environment

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301. Paglia, *supra* note 271.

302. Roiphe, *supra* note 8.

303. Janet Halley, *The Move To Affirmative Consent*, 42 SIGNS (forthcoming 2016), <http://signsjournal.org/currents-affirmative-consent/halley> [<http://perma.cc/UAZ4-K3Z5>].

304. See *infra* notes 123-129 and accompanying text.

305. Rubinfeld, *supra* note 6.

306. See *supra* notes 97-100 and accompanying text.

for all students.<sup>307</sup> They can take immediate measures to protect one student from another that the criminal justice system cannot.<sup>308</sup>

Moreover, colleges and universities have disciplined students since the early part of the nineteenth century, independent of courts.<sup>309</sup> Students have been disciplined for many kinds of misconduct, from plagiarism to nonsexual assault or rioting, regardless of whether the misconduct is a crime.<sup>310</sup> One should be wary of arguments that campuses cannot handle these cases, since they have been adjudicating other misconduct claims for hundreds of years.

Moreover, campuses have occasionally had to adjudicate cases that are more serious than felonious rape. In 2013, for example, a college fraternity hazing ritual in Pennsylvania ended in the death of a pledge by blunt force trauma to the head.<sup>311</sup> The coroner ruled the death a homicide,<sup>312</sup> but the prosecutor did not file charges until two years later.<sup>313</sup> The college, however, had an independent interest in the case, and pursued disciplinary charges against the fraternity members who killed the student.<sup>314</sup> Fraternity hazing and homicide are both serious crimes, but no one in that case said that the campus is incompetent to adjudicate the case, the court should be the only one to handle it, and the college should get out of the way. People recognized the

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307. *Revised Sexual Harassment Guidance*, *supra* note 170, at ii (“Preventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn.”).

308. *Dear Colleague Letter*, *supra* note 173; *see also* Alexandra Brodsky & Elizabeth Deutsch, *No, We Can’t Just Leave College Sexual Assault to the Police*, POLITICO (Dec. 3, 2014), <http://www.politico.com/magazine/story/2014/12/uva-sexual-assault-campus-113294> [<http://perma.cc/B6A9-YLMA>] (“While some victims might take comfort in their assailants’ incarceration, criminal courts cannot provide the range of nimble solutions at schools’ disposal, such as having an accused assailant moved from the victim’s dorm or seminar.”).

309. *See* Rodney Hessinger, “*The Most Powerful Instrument of College Discipline*”: *Student Disorder and the Growth of Meritocracy in the Colleges of the Early Republic*, 39 HIST. EDUC. Q. 237, 241 (1999) (discussing the development of university discipline systems at Harvard and the University of Virginia in the early 1800s).

310. *See, e.g., id.* at 239 n.7 (listing literature “describing student riots and disorder in the early republic”).

311. Rick Rojas, *5 from Baruch College Face Murder Charges in 2013 Fraternity Hazing*, N.Y. TIMES (Sept. 14, 2015), <http://www.nytimes.com/2015/09/15/nyregion/5-from-baruch-college-face-murder-charges-in-2013-fraternity-hazing.html> [<http://perma.cc/F587-VWRC>].

312. *See* Randi Iaboni, *Baruch College Fraternity ‘Ritual’ Death Ruled a Homicide, Coroner Says*, CNN (Feb. 14, 2014, 7:37 PM), <http://www.cnn.com/2014/02/14/justice/new-york-college-fraternity-death> [<http://perma.cc/4J6V-9HCS>].

313. *Id.*

314. *See* Mitchel B. Wallerstein, *Baruch Response to Criminal Charges in Pi Delta Psi Hazing Investigation*, BAURCH C. (Sept. 15, 2015), [http://www.baruch.cuny.edu/president/messages/September\\_15\\_2015.htm](http://www.baruch.cuny.edu/president/messages/September_15_2015.htm) [<http://perma.cc/33HY-EN4Q>].

obvious: campuses have different interests in the case and different reasons to be involved. They have to work to protect their students from harm.

Colleges do not have the penological interest of the state. Their interest is educational opportunity, and Title IX requires them to provide it to students equally. Title IX is about institutional accountability, a civil rights mechanism to hold institutions accountable for providing equal education. The criminal justice system, by contrast, is about the individual accountability of a person accused of a crime. Title IX focuses on colleges and universities' institutional accountability for equal educational opportunities. The criminal justice system focuses on finding individual offenders and punishing them. Whether or not criminal charges ever emerge, colleges must address campus sexual assault to maintain a safe and equal learning environment.

Moreover, given the history of rape law reform, procedural exceptionalism for campus sexual assault suggests that something is amiss. It would be unfair to single out sexual assault cases among all crimes committed on campus and push them to the criminal courts. It would harm the learning environment, deprive victims of equal educational opportunities, and violate students' civil rights under Title IX.

#### **V. SOME LESSONS LEARNED FROM THE HISTORY OF RAPE LAW REFORM**

The arguments that opponents make to the progressive reform of campus adjudication of sexual assault often seem reasonable, but they tend to neglect the specific lessons gleaned from the history of rape law reform. A robust standard of proof for campus sexual assault (e.g., clear and convincing evidence), and specific procedures to protect respondents from unjust findings of responsibility (e.g., the right to an attorney) in disciplinary proceedings are hard to argue with until one understands the history of how the criminal law stacked the deck against rape victims. Unique procedural hurdles in rape cases (e.g., prompt complaint and corroboration requirements and the cautionary rule) prohibited cases from going forward and functioned as a heightened standard of proof at trial. We should be wary of new calls to provide campus sexual assault respondents with special procedural protections just as we have eliminated them from the criminal law.

The history of rape law sheds light on where we should put our energy and how we should anticipate and respond to arguments around campus sexual assault. Those working to apply Title IX to campus sexual assault can learn from that history. The following lessons emerge.

*A. We Should Support Campus Adjudication of Sexual Assault*

For starters, we should support campus adjudication of sexual assault because the criminal justice system has inadequately addressed the very kind of rape most common on (and off) campus: acquaintance rape without extrinsic violence. Even after extensive, progressive reform of rape law, the criminal justice system still often fails to take rape seriously. The history of a societal embrace of conservative reforms meant to overpunish convicted offenders and the powerful resistance to progressive reforms to make the law conform to the experience of rape victims should give us pause. We should support new forums in which sexual assault victims may receive some opportunity to tell their stories with dignity and the possibility of redress, including campus disciplinary systems.

Moreover, although colleges and universities are just learning about how to address the issue of sexual assault and do not always adjudicate it well, they are used to adjudicating disputes between students. Some of those disputes cover criminal behavior and some do not. Sexual assault is a relatively new area for campus adjudication, but only because schools have ignored it or swept it under the rug for so long. Colleges and universities can and will learn to address sexual assault equitably.

Finally, we should support campus disciplinary proceedings because sexual assault makes victims unequal and impedes their ability to attend and complete college. Title IX is about what it means to have equal access to education when one student harms another. The primary responsibility of colleges and universities is education, and they must provide all their students with an equal opportunity to it. The only way to protect students' civil right to equal education is to encourage campuses to act to stop sexual assault and protect student safety.

The differences between the criminal justice system and Title IX are important. The criminal justice system is focused on the punishment of criminals. It is focused on retribution and incapacitation. Title IX, by contrast, is a civil rights statute. Like other civil rights statutes, it is focused on equality—in this case, educational equality. The criminal justice system cannot ensure equality, and cannot remedy inequality. Colleges and universities have to be able to address campus sexual assault and act to protect the learning environment.

*B. We Should Oppose Unique Procedural Protections for Those Accused of Campus Sexual Assault Because They Are Rape Law's Unique Procedural Hurdles in Sheep's Clothing*

Historically, providing defendants accused of rape unique procedural protections heightened the standard of proof in rape cases.<sup>315</sup> We should learn from that history and oppose efforts to provide respondents accused of sexual misconduct on campus with special procedural protections that would not be provided to them if they were accused of plagiarism, nonsexual assault, burglary, or even, occasionally, homicide on campus.

Legal scholars and others committed to a free society should support the due process rights for the accused. Although we should be strong defenders of process, we should not support more process than what is due, and we should oppose unique procedural protections offered only to those accused of sexual misconduct.

As a matter of the equities, we should oppose any unique procedural protections offered to those accused of sexual offenses on campus when they are not also provided to those accused of nonsexual offenses. Unique hurdles for sexual assault victims and special process protections for those accused of sexual misconduct are unfair and harken back to a time when rape victims faced unique hurdles in criminal prosecution.

We should be on the side of an even playing field as between sexual misconduct and nonsexual misconduct in both the criminal law and campus disciplinary codes. That even playing field could provide more or less process for accused students in campus proceedings of all kinds, as long as the process afforded was the same whether the accused was facing charges of sexual or nonsexual misconduct. In general, we should be skeptical of rape or sexual assault exceptionalism. The history of attempting to deter legitimate complaints of rape by imposing unique procedural hurdles is too clear to ignore.

*C. We Should Oppose Administrative Mandatory Minimums and Other Efforts To Increase Direct or Collateral Penalties in the Context of Campus Sexual Assault*

The history of feminist opposition to draconian criminal and civil punishments to convictions for rape should influence our response to recent calls for mandatory penalties on campus. We should oppose any moves to increase the penalties for campus sexual assault across the board or to impose

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315. See *supra* Section I.A.

mandatory minimum penalties upon those found responsible for sexual assault. Notwithstanding many universities' histories of ignoring sexual assault, we need to understand that mandatory penalties are counterproductive in advancing recognition of the problem of sexual assault. Harsh penalties will deter reporting of routine sexual assaults, deter pursuit of such claims by administrators responsible for deciding when to pursue or close cases, and deter finding respondents responsible.

The California legislature recently passed the nation's first law requiring campuses to impose a mandatory minimum punishment for campus sexual assaults.<sup>316</sup> The bill would have required a minimum two-year suspension for anyone found responsible in a disciplinary proceeding for sexual assault.<sup>317</sup> California Governor Jerry Brown vetoed the bill.<sup>318</sup> We should avoid advocating for increased penalties or other punitive reform.

Likewise, we should be wary of "demeaning sanctions" involving "public display" in response to campus sexual assault.<sup>319</sup> Katharine Baker has suggested that a college should force a student found responsible for sexual assault to "wear a bright orange armband or badge" for a period of time to identify himself or herself as a perpetrator, and that campus newspapers should regularly publish the names and pictures of perpetrators of sexual assault.<sup>320</sup> Such a strategy mimics registration and community-notification laws for criminal sex offenders, and is the campus equivalent of a green license plate. It sets students up for public scorn that can be inhumane. As the NAESV warned about draconian criminal sanctions, public shaming sanctions on campus may deter disciplinary bodies from finding responsibility in cases of sexual assault. We should oppose any required sanctions on campus and should be concerned about overreach that is both counterproductive to victims and unfair to those who are accused.

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316. Assemb. B. 967, 2015-2016 Reg. Sess. (Cal. 2015); see also Tyler Kingkade, *California Considers Nation's First Mandatory Minimums for Campus Rape Punishments*, HUFFINGTON POST (Apr. 14, 2015), [http://www.huffingtonpost.com/2015/04/14/california-campus-rape-punishments\\_n\\_7056554.html](http://www.huffingtonpost.com/2015/04/14/california-campus-rape-punishments_n_7056554.html) [<http://perma.cc/EQ8G-EZKC>].

317. Assemb. B. 967.

318. Tyler Kingkade, *California Governor Vetoes Bill Calling for Minimum Punishments in College Sexual Assault Cases*, HUFFINGTON POST (Oct. 12, 2015), [http://www.huffingtonpost.com/entry/california-college-sexual-assault-punishment\\_561b184de4bodbb8000fo2of](http://www.huffingtonpost.com/entry/california-college-sexual-assault-punishment_561b184de4bodbb8000fo2of) [<http://perma.cc/J3L3-L343>].

319. Baker, *supra* note 216, at 701.

320. *Id.* at 698.

*D. We Should Follow Campus Adjudication of Sexual Assault To Learn Its Lessons for the Criminal Law*

As the history of rape law reform sheds interesting light on the process of reforming how campuses address sexual assault, the changes in campus sexual assault codes may in turn shed instructive light on rape law. For example, disciplinary codes requiring affirmative consent for campus sexual activity will provide a laboratory for the usefulness and effectiveness of affirmative consent as a way of demarcating illegitimate from legitimate sexual penetration. If affirmative consent makes a meaningful, positive difference in campus climates and in the incidence of sexual assault on campus, states may learn from that work and move to adopt affirmative consent standards in the criminal law. If it turns out that affirmative consent rules do not enhance campus climates, adoption of more rigorous affirmative consent standards in the criminal law context may be unhelpful.

Additionally, greater remedial flexibility in the campus context may provide insight for feminists and other progressives who work to reform the criminal justice system's draconian punishments for convicted sex offenders. The experiences of campus sexual assault victims who do not want extreme sanctions against their assailants may provide support for those who want to scale back severe criminal sentences, mandatory minimums, and harsh collateral consequences. If victims of campus sexual assault are satisfied with discipline short of suspension or expulsion, their experiences may lend credence to efforts to provide alternatives to incarceration or to use restorative justice in response to rape.

*E. We Should Attend to Sexual Assault Victims Who Do Not Attend College*

Attending college or university is a privilege. It does give students a "bright future." Higher education grants them more earning power, more employment options, and a stronger ability to weather economic downturns,<sup>321</sup> as well as greater overall wellbeing and even longer lives.<sup>322</sup> Those who do not attend

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321. See Econ. Mobility Project, *How Much Protection Does a College Degree Afford? The Impact of the Recession on Recent College Graduates*, PEW CHARITABLE TR. (Jan. 2013), <http://www.pewtrusts.org/en/research-and-analysis/reports/0001/01/01/how-much-protection-does-a-college-degree-afford> [<http://perma.cc/NY5S-792S>].

322. See Philip Moeller, *Why Learning Leads to Happiness*, U.S. NEWS & WORLD REP.: MONEY (Apr. 10, 2012), <http://money.usnews.com/money/personal-finance/articles/2012/04/10/why-learning-leads-to-happiness> [<http://perma.cc/73ER-QLWX>].

college, therefore, are at risk for less satisfaction in life and worse life outcomes. They are also at greater risk for rape.<sup>323</sup>

These facts must matter. Sexual assault dims the bright futures of students. Campuses must provide equal educational opportunities to those whose education would be cut short by sexual assault. But we should not just work to advance the interests of students with bright futures.

We should not fixate on the college setting in our work against rape and sexual assault. Racial minorities and the poor are underrepresented in colleges and universities across the United States.<sup>324</sup> Latinos and blacks are less likely to finish high school and attend college, and less likely to graduate once they get there.<sup>325</sup> Victims of sexual assault who are potential or actual college students have class privilege and, often, race privilege.

We must work to prevent and redress sexual assault not just for relatively privileged people, but also for the least privileged. Those without privilege deserve our highest attention. We must focus on those who are disadvantaged by poverty, race, immigration status, sexual identity, and involvement in the criminal justice system. We need definitions of and procedures for adjudicating sexual assault that help not only university students, but also homeless teens and prisoners.<sup>326</sup>

When campuses impose affirmative consent rules on sexual behavior, as many are doing now, college students enjoy a level of protection withheld from those outside of college.<sup>327</sup> It is unfair for noncollege students to be

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323. Sofi Sinozich & Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, U.S. DEP'T JUST. 4 (Dec. 2014), <http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> [<http://perma.cc/3H4P-V4RX>] (finding that “females ages 18 to 24 not enrolled in a post-secondary school were 1.2 times more likely to experience rape and sexual assault victimization . . . compared to students in the same age range”).

324. See Ben Casselman, *Race Gap Narrows in College Enrollment, But Not in Graduation*, FIVETHIRTYEIGHT (Apr. 30, 2014, 6:00 AM), <http://fivethirtyeight.com/features/race-gap-narrows-in-college-enrollment-but-not-in-graduation> [<http://perma.cc/XK5B-ZQXR>].

325. *Id.* (“Indeed, blacks and Latinos lose ground at every step of the educational process. They are less likely to finish high school, less likely to attend college and less likely to graduate when they get there. All of that adds up to a big gap in the number that ultimately matters most: ‘educational attainment,’ or the amount of school a person completes.”).

326. See generally *No Escape: Male Rape in Prison*, HUM. RTS. WATCH (2001), <http://www.hrw.org/legacy/reports/2001/prison/report.html> [<http://perma.cc/ZD9D-4F6Z>]; Deborah LaBelle et al., *Women in Detention in the United States, in Violence Against Women in the United States and the State’s Obligation To Protect*, CTR. FOR REPROD. RTS. 149 (2011), <http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/vaw.pdf> [<http://perma.cc/3MHJ-LKSR>].

327. Tuerkheimer, *supra* note 226, at 3.



underprotected relative to college students, especially when those who are not in college face a higher risk of sexual assault.<sup>328</sup>

It is valuable to consider the institutions that govern peoples' lives—colleges and universities, prisons, hospitals, corporations, and other employment settings—and how we can prevent and redress sexual abuse within them. And it is valuable to consider the actors outside institutions—some of whom, such as police, are charged with protecting us—and how we can prevent and redress sexual abuse by those actors and by others.

One method—imperfect though it may be—is the criminal law.

As we have seen, despite substantial efforts over decades, we have achieved only imperfect success in changing the way the criminal justice system treats allegations of rape and sexual assault. The criminal law does much better on stranger rape cases than it did historically. Acquaintance rape victims, however, continue to face challenges. The force requirement in rape law continues to operate in many states, preventing many victims who do not experience extrinsic force from obtaining redress in the criminal justice system. Scholarly or political efforts to shore up the force requirement will further decrease justice for victims.

As a result, if we care about people not in college who face sexual violence—and we should—we must continue to reform rape law and the way police, prosecutors, judges, and juries address it. The criminal justice system has to respond promptly and equitably to the experiences of victims of sexual abuse, too.

## CONCLUSION

Traditional rape law included unique procedural requirements that made rape difficult to prosecute. It also included a definition of consent that was met by passivity, and a definition of force that was rarely present. These elements of traditional rape law derived from a commitment to the idea that women have a tendency to lie about sexual abuse.

Reform of traditional rape law came in two different guises. Progressive reform of rape law abolished the unfair procedural hurdles and sought to redefine force and consent to protect sexual autonomy. Conservative reform of

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328. See Sinozich & Langton, *supra* note 323, at 4. One reason people outside of college are at higher risk for rape is that nearly half of female rape victims in the United States report experiencing their first rape before turning eighteen. See Michele C. Black et al., *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report*, CTR. FOR DISEASE CONTROL & PREVENTION 25 (Nov. 2011), [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf) [<http://perma.cc/35ZN-WS6C>].

rape law, by contrast, imposed harsh criminal and civil punishments on convictions for sexual offenses. Progressive reform of the definitions of force and consent continues to be hotly challenged, while the conservative imposition of draconian punishments has elicited a collective yawn.

Because colleges and universities largely ignored it, campus sexual assault was historically a nonissue. Of late, however, OCR has engaged in a more robust application of Title IX to campuses accused of failing to respond promptly and equitably to sexual assault. Additionally, colleges and universities are increasingly imposing affirmative consent rules to cover sexual behavior on campus. These progressive changes have elicited calls for special procedural protections for those accused of sexual misconduct, and for the repeal of revised consent rules. At the same time, there are new calls for mandatory penalties for those found responsible for sexual misconduct on campus.

Due process is crucial to the fairness of any adjudicatory system. Enhanced due process rights for respondents in sexual misconduct cases on campus sounds like a good idea until it is placed in historical context. It harkens back to the unequal past treatment of rape in the criminal law, as a special class of crime that required exceptional protection for those accused of it, primarily due to “the unchaste (let us call it) mentality” of females, which “finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim.”<sup>329</sup> If one rejects the notion that females have a particular propensity to lie about sexual abuse, and one rejects the notion that the female psyche is more easily duped into imagining victimization, then exceptional protections for those accused of sexual misconduct are less compelling.

At the same time, no matter how frustrating it may be for campuses to respond halfheartedly to findings of responsibility for sexual misconduct, calls for the mandatory imposition of campus penalties are misguided. They mirror the conservative reform movement that imposed draconian punishments on sex offenses, and that has ended up being counterproductive and unfair to both victims and offenders.

Colleges and universities will no doubt provide imperfect forums for the resolution of claims of campus sexual assault, but they have institutional capacity to resolve these claims reasonably well, and must do so to protect students’ equal access to education under the law.

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329. 3 WIGMORE, *supra* note 27, at 459.