
UNCOMFORTABLE CONVERSATIONS: CONFRONTING THE REALITY OF TARGET RAPE ON CAMPUS

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Approximately 20% of women in college are sexually assaulted during their time at school.¹ This longstanding epidemic of campus sexual assault has finally reached a flashpoint, igniting a national dialogue. Having taught courses on Title IX's application to campus sexual assault over the past seven years and having done extensive case work in the field, I propose that the most effective way to stop campus sexual assault is to confront the reality of its perpetration, identify the cultural components that enable its normalization, and build the institutional capacity of schools to prevent and address it. This Commentary contributes to this crucial discourse by dispelling unrealistic ideas of how campus rape is perpetrated and of its attendant effects on the educational opportunities of so many survivors, and by detailing how schools must respond to this ongoing crisis.²

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¹ Press Release, White House Office of the Press Sec'y, Fact Sheet: Not Alone — Protecting Students from Sexual Assault (Apr. 29, 2014), <http://www.whitehouse.gov/the-press-office/2014/04/29/fact-sheet-not-alone-protecting-students-sexual-assault> [<https://perma.cc/MN7Z-BNDX>]. Studies upon which this assertion is based include BONNIE S. FISHER ET AL., BUREAU OF JUSTICE STATISTICS, NCJ NO. 182369, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 15 (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf> [<https://perma.cc/6BVR-CW89>] (“15.5 percent of the college women [surveyed] were sexually victimized during the current academic year.”). In a 2007 survey conducted for the National Institute of Justice (a part of the U.S. Department of Justice), 28.5% of the 5446 undergraduate women surveyed reported that they had experienced attempted or completed sexual assault either before or since entering college. CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT, at xii (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> [<https://perma.cc/ABJ5-R949>] [hereinafter CSA STUDY]. Moreover, 19% percent of the women surveyed reported experiencing completed or attempted sexual assault since starting college. *Id.* at 5-3; *see also id.* (reporting that the figure rises to 26.3% when the data are limited to responses from women in their final year of college).

² A note on language: I use the terms “victim” and “survivor” somewhat interchangeably, recognizing what Dana Bolger regards as the inadequacy of language to describe the experience of being sexually assaulted. *See* Dana Bolger, “*Hurry Up and Heal*”: Pain, Productivity, and the Inadequacy of “Victim vs. Survivor,” FEMINISTING (Dec. 10, 2014), <http://feministing.com/2014/12/10/hurry-up-and-heal-pain-productivity-and-the-inadequacy-of-victim-vs-survivor> [<http://perma.cc/T6FD-8RNE>].

This Commentary first describes schools' responsibilities under Title IX³ to address the pervasive problem of campus sexual assault. Second, it offers an overview of representative cases that provide a sense of the problem from the perspective of the survivors with whom I have worked. Third, it proposes a theory of "target rape" to capture the reality of the vast majority of campus rapes, and to distinguish these cases from genuine misunderstandings about consent.⁴ Finally, it suggests that schools use campus climate surveys that measure specifically the level of male dominance on campus. Based on that information, the school will be in the optimal position to create the most effective interventions on prevention, response, and resolution of sexual misconduct cases.

I. TITLE IX AND SEX DISCRIMINATION IN EDUCATION

Recent activities at Princeton University illustrate many aspects of the problem of sex discrimination on campus. In November 2014, officers of the Tiger Inn eating club were forced to resign after they circulated two troubling emails among club members. One asked, "Ever wonder who we have to thank (blame) for gender equality[?] . . . Looking for someone to blame for the influx of girls? Come tomorrow and help boo Sally Frank."⁵ Frank, then at Princeton to give a speech,⁶ had successfully sued the eating clubs at Princeton over their exclusion of women.⁷ The other email included a photograph of a freshman "Asian chick" performing a sex act on a senior male in a public space of the club.⁸ The following month, the words "Rape Haven" were spraypainted on the fence in front of the club's building.⁹

³ Patsy Takemoto Mink Equal Opportunity in Education Act, Pub. L. No. 92-318, 86 Stat. 235, 373-75 (1972) (codified as amended at 20 U.S.C. §§ 1681-1688).

⁴ References to sexual assault in this article should be interpreted as referring to male-against-female assault. This is not to deny the reality of same-sex assaults, or female-against-male sexual assaults, but is rather a shorthand way to describe the vast majority of rapes.

⁵ Ariel Kaminer, *Princeton Eating Club Ousts 2 Officers over Emails Ridiculing Women*, N.Y. TIMES (Dec. 1, 2014), <http://www.nytimes.com/2014/12/02/nyregion/princeton-eating-club-ousts-2-officers-over-emails-ridiculing-women.html> (internal quotation marks omitted).

⁶ Natalie Kitroeff, *Princeton Has a Shadow Fraternity System Nobody Controls*, BLOOMBERG BUS. (Dec. 4, 2014, 5:00 AM), <http://www.bloomberg.com/news/articles/2014-12-04/princeton-has-a-shadow-fraternity-system-nobody-controls> [<http://perma.cc/P4SG-S86D>].

⁷ Ms. Frank filed suit in 1979 while she attended Princeton, but a final judgment was not rendered by the New Jersey Supreme Court until 1990. See Alessandra Stanley, *Court Tells Princeton Clubs They Must Admit Women*, N.Y. TIMES (July 4, 1990), <http://www.nytimes.com/1990/07/04/nyregion/court-tells-princeton-clubs-they-must-admit-women.html>. The U.S. Supreme Court denied certiorari in 1991. See Kaminer, *supra* note 5.

⁸ Kaminer, *supra* note 5 (internal quotation marks omitted); Anne Levin, *Princeton Eating Club Removes Two Officers*, TOWN TOPICS (Dec. 3, 2014), <http://www.towntopics.com/wordpress/2014/12/03/princeton-eating-club-removes-two-officers> [<http://www.perma.cc/JG6H-FKT7>].

⁹ Kaminer, *supra* note 5 (internal quotation marks omitted).

The same month, the Office for Civil Rights (OCR) of the U.S. Department of Education had reached a resolution agreement with Princeton after determining that the university had violated Title IX in its handling of three separate sexual assault cases. The University had, among other things, failed to provide a “prompt and equitable response” to sexual harassment and assault, applied an inappropriate “clear and persuasive” evidence standard in its investigation, and failed to correct the hostile environment thereby created.¹⁰

Title IX is a civil rights statute that was enacted to prevent sex discrimination at school, particularly in relation to the admission of women to colleges whose doors had previously been closed to them.¹¹ Even once admitted, moreover, women are entitled to equal access to educational opportunities. Sexual harassment that creates a hostile environment interferes with that right to educational access, and thus schools are obligated to prevent and address it.¹² Viewed within the appropriate civil rights framework of Title IX, the obligation of

¹⁰ Letter from Timothy C.J. Blanchard, Dir., N.Y. Office, Office of Civil Rights, U.S. Dep’t of Educ., to Christopher L. Eisgruber, President, Princeton Univ. 2, 15, 19 (Nov. 5, 2014), <http://www2.ed.gov/documents/press-releases/princeton-letter.pdf> [<https://perma.cc/LG3S-MZ4A?type=pdf>] [hereinafter Princeton OCR Resolution Letter]; see also Resolution Agreement, Princeton Univ., Case No. 02-11-2025 (U.S. Dep’t of Educ. Oct. 12, 2014), <http://www2.ed.gov/documents/press-releases/princeton-agreement.pdf> [<https://perma.cc/CRX5-VA2V?type=pdf>]. The case consolidated three complaints. I represented one of the complainants.

¹¹ See 20 U.S.C. § 1681 (2012).

¹² The resolution letter that accompanied the agreement with Princeton sets forth the relevant law on Title IX’s applicability to campus sexual assault:

The regulation implementing Title IX, at 34 C.F.R. § 106.31(a), provides that no person 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 operated by a recipient [of federal funding]. Sexual harassment that creates a hostile environment is a form of sex discrimination prohibited by Title IX. Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances; requests for sexual favors; and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence. Sexual harassment of a student creates a hostile environment if the conduct is sufficiently serious that it denies or limits a student’s ability to participate in or benefit from the recipient’s program.

Princeton OCR Resolution Letter, *supra* note 10, at 2–3; see also OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 1–5 (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/26YP-X7V3?type=pdf>]; OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) [hereinafter REVISED SEXUAL HARASSMENT GUIDANCE], <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/6T4W-CXH5?type=pdf>]; Russlynn Ali, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Harassment and Bullying (Oct. 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> [<https://perma.cc/MF4S-ETD7?type=pdf>]; Russlynn Ali, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Sexual Violence 3–4 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/AU2G-GGSH?type=pdf>] [hereinafter Ali, Dear Colleague Letter: Sexual Violence].

schools to prevent and address campus sexual assault is more easily understood.

A. The Feedback Loop: Prevention, Response, and Resolution

The three main responsibilities of a school are best described as prevention, response, and resolution of matters involving sexual misconduct. I view this obligation as a three-legged stool, meaning that if one leg is missing, the stool (here, the sexual misconduct policy) will not stand. For example, if a school has good preventive education programs, and support services for survivors, but fails to impose consequences on students responsible for sexual misconduct, the overall policy will fail. Students know how seriously their schools take sexual assault and they conform their behavior accordingly. Proper resolution of cases thus feeds into preventive education. Additionally, students know how well their schools respond to allegations of sexual assault, and this knowledge will affect their willingness to report either witnessing or experiencing such behavior. Students are particularly attuned to threats of retaliation by peers, and need to know that the school is obligated to protect them. Thus, one can see how this tripartite obligation gives rise to an informational feedback loop among students. Schools should focus their programmatic response accordingly.

The first component of preventive education is that students must be informed of their rights under Title IX. Students who do not know their rights cannot assert them. Alexandra Brodsky and Dana Bolger, the cofounders of Know Your IX, a student campaign seeking to increase Title IX awareness, assert that their entire college experiences would have been different if they had known their rights to be free from a hostile environment in the wake of their assaults.¹³ With any civil rights struggle, informing people of their rights and giving them information on how to actualize them is crucial.

¹³ See generally KNOW YOUR IX, <http://knowyourix.org> (last visited Feb. 11, 2015) [<http://perma.cc/CWM4-26PM>].

This organization has been highly effective at connecting students across the country in their efforts to combat campus sexual assault. It is the catalyst, along with other groups such as End Rape on Campus (founded by Andrea Pino and Annie Clark at University of North Carolina), see generally END RAPE ON CAMPUS, <http://endrapeoncampus.org> (last visited Apr. 11, 2015) [<http://perma.cc/QWD3-UVGV>], for much of the current activity by the White House and the Department of Education. “Ed Act Now” is a campaign initiated by Know Your IX that collected over 100,000 petition signatures to prompt the department to increase activity and transparency. See *Ed Act Now*, KNOW YOUR IX, <http://knowyourix.org/i-want-to/take-national-action> (last visited Apr. 11, 2015) [<http://perma.cc/94J8-BHS9>]. In the interest of full disclosure, I had represented Alexandra Brodsky when she was a lead complainant in the OCR complaint against Yale University. See generally Press Release, U.S. Dep’t of Educ., U.S. Department of Education Announces Resolution of Yale University Civil Rights Investigation (June 15, 2012), <http://www.ed.gov/news/press-releases/us-department-education-announces-resolution-yale-university-civil-rights-investigation> [<http://perma.cc/G9AN-8GKJ>].

Preventive education also involves teaching students what I call the “rules of the road.” These rules are different at various schools, but all schools must teach students about standards of conduct and how they will be enforced. The more that student input is reflected in an educational prevention program, the more likely it will be successful.

This positive feedback loop can only take effect if a school has laid out a clear standard for sexual misconduct that it is prepared to communicate and enforce. What should the standard be? Debate on this issue is intense. Governing legal standards attempt to establish an objective, rather than subjective, inquiry into whether a woman wanted sex — in fact, rape law, by requiring a woman to demonstrate utmost resistance, to report immediately, and so on, treats women as always wanting sex unless otherwise clearly and unmistakably indicated. My own view is that the most sensible approach is the “affirmative consent” principle that is being adopted by a growing set of schools.¹⁴ Notably, California recently amended its Education Code to require that all postsecondary institutions receiving state funds implement an affirmative consent standard,¹⁵ explicitly stating that “[l]ack of protest or resistance does not mean consent, nor does silence mean consent.”¹⁶ The law, as with many other affirmative consent policies, recognizes that a person who is “incapacitated due to the influence of drugs, alcohol, or medication” cannot give consent.¹⁷ Affirmative consent standards signify progress insofar as they counter the sexist presumptions currently applied. Better still would be a standard of *wanted* sex in the context of a world in which the threat of male sexual violence does not constrain women’s sexual choices.¹⁸

Nonetheless, affirmative consent standards are a positive step in that direction. Listening and being responsive to students speaking out on the issue is of utmost importance for any school. Students overwhelmingly support affirmative consent standards, and are activating across the country to have these standards adopted at their schools.¹⁹

¹⁴ See Jake New, *The “Yes Means Yes” World*, INSIDE HIGHER ED (Oct. 17, 2014), <http://www.insidehighered.com/news/2014/10/17/colleges-across-country-adopting-affirmative-consent-sexual-assault-policies> [<http://perma.cc/HLP7-A8JR>].

¹⁵ See Act of Sept. 28, 2014, 2014 Cal. Legis. Serv. ch. 748 (West) (codified at CAL. EDUC. CODE § 67386 (West 2015)).

¹⁶ CAL. EDUC. CODE § 67386(a)(1).

¹⁷ *Id.* § 67386(a)(4)(B); see also, e.g., *Sex, Alcohol and Clear Consent*, CORNELL UNIV., <http://share.cornell.edu/policies-laws/sex-alcohol-and-clear-consent> (last visited Apr. 11, 2015) [<http://perma.cc/UHT7-Z4TX>] (“Inability to consent due to intoxication means ‘no.’”).

¹⁸ See generally CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 240–48 (2005).

¹⁹ According to the National Center for Higher Education Risk Management, more than 800 colleges and universities now use some type of affirmative consent standard in their sexual assault policies. See *The NCHERM Group Continues to Advocate for Affirmative Consent Policies in*

The particular consent standard that a school selects is at least as important as the implementation of an effective campaign to educate students about it. The education campaign should include a clear explanation of the sexual misconduct policy and a discussion about what does and does not constitute consensual sexual activity, how to report a violation of the policy and obtain support, and what the consequences will be if the policy is violated.

Second, in regard to a school's response to a report of sexual misconduct, the most critical point is that schools must prevent a "second rape" through an informed response that does not cause additional trauma to the affected student.²⁰ Schools can play the crucial role in setting the trajectory for a student's possible recovery through a coordinated and intelligent response. On the other hand, they can — and often do — exacerbate a victim's trauma by making her fend for herself, not investigating properly, saying victim-blaming things or asking victim-blaming questions, or just overall not taking the assault seriously.

Third, in resolving a claim of campus sexual assault, schools are obligated to investigate and remediate a hostile environment in a "prompt and equitable" manner.²¹ Investigations should be initiated

Colleges and Schools Across the Nation, PRNEWswire (Oct. 10, 2014, 8:45 AM), <http://www.prnewswire.com/news-releases/the-nchem-group-continues-to-advocate-for-affirmative-consent-policies-in-colleges-and-schools-across-the-nation-278778841.html> [<http://perma.cc/8AV6-NQD7>]. Harvard remains the only Ivy League institution that has not adopted some sort of affirmative consent standard. New, *supra* note 14. Our Harvard Can Do Better, an undergraduate student organization, has been actively promoting the adoption of an affirmative consent standard, along with a coalition of other student groups. Eighty-five percent of Harvard undergraduate students expressed support for an affirmative consent standard in a 2012 referendum. *A Renewed Call for Affirmative Consent*, OUR HARVARD CAN DO BETTER (Oct. 11, 2014), <http://www.ourharvardcandobetter.com/our-harvard-can-do-better/2014/10/11/a-renewed-call-for-affirmative-consent> [<http://perma.cc/UY6P-V854>]. Affirmative consent policies at other institutions have seen similar student support. In November 2014, for example, more than seventy-five students at Yale Law School signed a letter defending Yale's affirmative consent policy against a faculty member's public criticism. Tyler Kingkade, *Yale Law Students: Professor's Campus Rape Op-Ed Gets It Wrong*, HUFFINGTON POST (Nov. 17, 2014, 2:59 PM), http://www.huffingtonpost.com/2014/11/17/yale-law-students-campus-rape_n_6172410.html [<http://perma.cc/9SS3-2EYN>].

²⁰ See Diane L. Rosenfeld, *Schools Must Prevent the "Second Rape,"* HARVARD CRIMSON (Apr. 4, 2014), <http://www.thecrimson.com/article/2014/4/4/Harvard-sexual-assault> [<http://perma.cc/AT9Q-KZSF>]. I wrote this piece in the *Harvard Crimson* in response to a heartwrenching editorial by a student, entitled *Dear Harvard: You Win*, HARVARD CRIMSON (Mar. 31, 2014), <http://www.thecrimson.com/article/2014/3/31/Harvard-sexual-assault> [<http://perma.cc/QL5K-3J3G>]. See also Thomas G. Fiffer, *Dear John Harvard: A Plea to Stop the "Second Rape" that Follows Campus Sexual Assaults*, GOOD MEN PROJECT (Apr. 10, 2014), <http://goodmenproject.com/ethics-values/call-stop-second-rape-follows-campus-sexual-assaults-fiff> [<http://perma.cc/TPQ3-359R>] (arguing, because of the trauma caused by "second rape," in favor of an affirmative consent standard that shifts the presumption of consent such that the initiator must show that any sexual contact was affirmatively wanted, rather than assuming it was if the victim did not demonstrably resist).

²¹ See Ali, *Dear Colleague Letter: Sexual Violence*, *supra* note 12, at 8.

promptly and competently, meaning by a trained factfinder who understands how to gather evidence by interviewing witnesses, examining social media, and following up on incriminating statements.

As part of a civil statute, Title IX's substantive standard of proof for violations is whether a preponderance of the evidence indicates a discriminatory act occurred.²² As Baine Kerr, a nationally prominent Title IX attorney, states:

[A preponderance of the evidence standard] is the only standard that complies with Title IX because it does not favor one student over another and asks only, in the context of a rape allegation, which student's account is more likely. In weighing which account is more likely, customary evidentiary principles apply, including credibility, bias, consistency and inconsistency, adverse inferences from refusals to answer questions, corroboration by physical evidence and other witnesses, post-incident behavior and demeanor, and whether the student had a motive not to tell the truth.²³

Of course, while rape is an act of sex discrimination that violates one's rights on campus, it is also a criminal act. But even though there is overlap between the responsibilities of schools and those of law enforcement, it is crucial to remember that the civil rights/criminal justice system distinction creates a different legal standard for school adjudications as compared to criminal cases.²⁴

For a long time, schools — and the federal government — did little to effectively address the systemic problem of sexual assault, instead

²² Amy Chmielewski, Note, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 144. Title IX jurisprudence and interpretation has developed to be consistent with Title VII, which prevents sex discrimination in employment. See REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 12, at v-vi (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)). Further, preponderance of the evidence was always the standard in Title IX sexual assault cases and was not challenged or questioned until recently, when schools were required to take seriously their obligations to prevent and address campus rape. See, e.g., *Brzonkala v. Va. Polytechnic & State Univ.*, 935 F. Supp. 779, 785 (W.D. Va. 1996) (“Whether Brzonkala can prove the allegations in her complaint by a preponderance of the evidence is not currently an issue before the Court.”).

²³ Complainant's Post-Hearing Memorandum in Support of Proposed Order at 2, Florida State University Investigative Hearing in the Matter of Erica Kinsman and Jameis Winston (Dec. 12, 2014) (on file with author and Harvard Law Review) [hereinafter Post-Hearing Memorandum] (citation omitted).

²⁴ Given the increased capacity and commitment of schools to effectively prevent rape, I expect to see a correlative improvement in the criminal justice system's efforts to address the problem. The White House Task Force to Protect Students from Sexual Assault is currently developing models for memoranda of understanding between schools and law enforcement agencies to promote coordination in rape prevention and prosecution. See generally WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, BUILDING PARTNERSHIPS AMONG LAW ENFORCEMENT AGENCIES, COLLEGES AND UNIVERSITIES: DEVELOPING A MEMORANDUM OF UNDERSTANDING TO PREVENT AND RESPOND EFFECTIVELY TO SEXUAL ASSAULTS AT COLLEGES AND UNIVERSITIES (2015), http://www.whitehouse.gov/sites/default/files/docs/white_house_task_force_law_enforcement_mou.pdf [<http://perma.cc/A4TL-YT42>].

denying in various ways that rape happened on their campuses. But the Obama Administration has recently made an unprecedented effort to address campus rape, and over 100 schools were under investigation as of April 2015.²⁵ An uptick in enforcement activity by the OCR has created pressure on schools to comply with new laws and guidance or risk the loss of federal funding.²⁶ Accordingly, this increased enforcement activity has caused serious and improved discourse at schools, as they undertake to synthesize new federal guidance into their own policies and procedures.

The cases underlying the investigations are most often complaints by students who were sexually assaulted by other students and then left to fend for themselves in the face of retaliation by other students for reporting the assault, falling grades, intense depression, and the school's failure to provide a "prompt and equitable" response to their case.

B. Protecting the Rights of Victims in a College Campus Setting

Critics fear that, under a preponderance of the evidence standard, students accused of sexual assault can be easily expelled from school.²⁷ Critics of the OCR standard assert that (a) the relevant evidence will be murky because the key question in determining responsibility will likely be the presence or absence of consent or coercion; (b) school adjudicators will favor the victim to avoid possible consequences from OCR; and (c) false conclusions that the accused did indeed commit sexual assault under the standard will result in terrible injuries to him.

Critics are correct that we must not take lightly the significance of the potential harms to a student found responsible for sexual misconduct — harms that may include having to transfer to another school; having the finding on his transcript and having to explain it for the rest of his life; having problems gaining employment; and experiencing reputational harm.

²⁵ Tyler Kingkade, *106 Colleges Are Under Federal Investigation for Sexual Assault Cases*, HUFFINGTON POST (Apr. 6, 2015, 3:59 PM), http://www.huffingtonpost.com/2015/04/06/colleges-federal-investigation-title-ix-106_n_7011422.html [<http://perma.cc/B3JU-ZUGZ>].

²⁶ The role of OCR is to induce compliance by working with schools to improve their policies. OCR is not a punitive enforcement agency. See 34 C.F.R. § 106.3 (2014) (providing for enforcement through "[r]emedial and affirmative action and self-evaluation" on the part of the funds recipient).

²⁷ Yet, even under a preponderance of the evidence standard, schools can resist holding accused students responsible. For example, in the case of "Anna" at Hobart and William Smith Colleges, the school cleared the three accused football players of all charges stemming from the horrific event, 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>, where even critic Professor Janet Halley acknowledges that it was clear that Anna had been sexually assaulted, see Janet Halley, *Trading the Megaphone for the Gavel in Title IX Cases*, 128 HARV. L. REV. F. 103, 104–06 (2015).

However, we must weigh these potentialities against the harms to the student reporting that she had been raped — and the consequent costs of systematic underenforcement. First is the experience of the violation itself, and the attendant feelings of loss of control. As one survivor put it: “there’s a person before you get raped, and there’s a person after you get raped, and that person after you get raped is always longing to be that person before.”²⁸ There is the trauma of getting a rape kit done and having to describe what happened to complete strangers in a hospital setting. Following an unwanted sexual experience, students most often experience inability to work or to complete assignments, inability to eat, loss of interest in intimacy and sex, and falling grades.²⁹ Most victims attempt to avoid the perpetrators,³⁰ but the campus setting generally makes traumatizing encounters unavoidable.

Then there is the stress of deciding whether to report the rape to anyone, whether friends, family, or school. Roughly one-third of students who experience unwanted sex do not report the incident to *anyone*, including friends or family.³¹ No more than 10% report their experiences to a school official.³² Many reasons are offered for the failure to report sexual assault, including fear of not being believed or taken seriously, not knowing it was sexual assault, not wanting others to know about the experience, belief that nothing will be done, insufficient proof, and fear of retaliation from the offender or his friends.³³

²⁸ RAPE IS . . . at 27:39 (Cambridge Documentary Films 2003) (statement of Salamishah Tillet).

²⁹ See MASS. INST. OF TECH., SURVEY RESULTS: 2014 COMMUNITY ATTITUDES ON SEXUAL ASSAULT 6 (2014), <http://web.mit.edu/surveys/health/MIT-CASA-Survey-Summary.pdf> [<http://perma.cc/Q2DY-SBAS>] [hereinafter MIT STUDY]; see also Cari Simon, *On Top of Everything Else, Sexual Assault Hurts the Survivors' Grades*, WASH. POST (Aug. 6, 2014), <http://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think/> [<http://perma.cc/K7BM-AWNY>]. In instances of rape, these consequences are of course in addition to the risks of sexually transmitted disease or pregnancy, long-term physical or psychological impact, and suicide that are not unique to the campus setting. See CSA STUDY, *supra* note 1, at viii.

³⁰ See CSA STUDY, *supra* note 1, at 5-26.

³¹ See FISHER ET AL., *supra* note 1, at 23 (“In about two-thirds of the rape incidents, . . . the victim did tell another person Most often, this person was a friend, not a family member or college official.”); see also MIT STUDY, *supra* note 29, at 6 (finding that 63% of victims “told someone else about the incident(s)”).

³² FISHER ET AL., *supra* note 1, at 23 (reporting that fewer than 5% of respondents reported their sexual victimization to the police); see also JENNIFER J. FREYD ET AL., PRELIMINARY RESULTS FROM THE UO SEXUAL VIOLENCE AND INSTITUTIONAL BEHAVIOR CAMPUS SURVEY 19 (2014), <http://dynamic.uoregon.edu/jjf/campus/UO-campus-results-30Sept14.pdf> [<http://perma.cc/D5ZR-LEK3>] (reporting that 90% of respondents who had a nonconsensual sexual experience did not report the experience to a university source); MIT STUDY, *supra* note 29, at 6 (“[F]ewer than 5% [of victims] reported the [unwanted sexual] experience(s) to someone in an official capacity.”).

³³ See FISHER ET AL., *supra* note 1, at 23.

Additional motivations discourage reporting by racial and sexual minority survivors, such as fear of betraying the minority community³⁴ or, in the case of LGBTQ survivors, fear of being outed.³⁵ Last but not least, school administrators concerned about the reputation of their institutions are often disinclined to encourage victims to come forward.³⁶

If the victim does decide to report, she faces possible retaliation from her social group, especially, it seems, if she is a member of an athletic team or a sorority where a reported sexual assault might damage the group's social currency. The reaction of one's school, too, can be re-traumatizing. In fact, Dr. Jennifer Freyd, a researcher at University of Oregon, has developed the term "institutional betrayal trauma" to describe frequently reported effects experienced by victims who report sexual assault to their schools.³⁷

The PTSD and emotional fallout after a sexual assault should not be minimized by critics afraid that women will "cry rape" and men will be unfairly punished. Lizzy Seeberg from St. Mary's College and Trey Malone from Amherst each committed suicide in the wake of their sexual assaults. Lizzy was threatened with retaliation by members of the Notre Dame football team for accusing one of their fellow players.³⁸ Trey cited Amherst's callous reaction to his reported assault in his suicide note.³⁹

We can consider the externalities, then, of false positives or false negatives on either side. On one hand, rigorous efforts to combat sexual assault might chill some spontaneous sexual activity. Students might be more unwilling to "hook up" because of fear of miscommunication or fear of being accused of sexual assault. Critics additionally

³⁴ See, e.g., Shaquita Tillman et al., *Shattering Silence: Exploring Barriers to Disclosure for African American Sexual Assault Survivors*, 11 TRAUMA VIOLENCE & ABUSE 59, 66 (2010) (describing "culture-specific barriers to disclosure" such as a "potential cultural mandate to protect African American male offenders").

³⁵ See NAT'L CTR. FOR VICTIMS OF CRIME & NAT'L COAL. OF ANTI-VIOLENCE, WHY IT MATTERS: RETHINKING VICTIM ASSISTANCE FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER VICTIMS OF HATE VIOLENCE & INTIMATE PARTNER VIOLENCE 7 (2010), http://www.victimsofcrime.org/docs/Reports%20and%20Studies/WhyItMatters_LGBTQreport_press.pdf [<http://perma.cc/4W3Q-BKGD>].

³⁶ See, e.g., Jennifer J. Freyd, *Official Campus Statistics for Sexual Violence Mislead*, AL JAZEERA AM. (July 14, 2014, 6:00 AM), <http://america.aljazeera.com/opinions/2014/7/college-campus-sexualassaultsafetydatawhitehousegender.html> [<http://perma.cc/28DF-52TC>].

³⁷ See Jennifer J. Freyd, *Institutional Betrayal and Betrayal Blindness*, UNIV. OR., <http://dynamic.uoregon.edu/jjf/institutionalbetrayal> (last updated Mar. 18, 2015) [<http://perma.cc/M3TF-FAFT>].

³⁸ See Todd Lighty & Rich Campbell, *Ex-Notre Dame Player's Remarks Reopen Wound*, CHI. TRIB. (Feb. 26, 2014), http://articles.chicagotribune.com/2014-02-26/news/ct-seeberg-interview-met-20140226_1_lizzy-seeberg-tom-seeberg-seeberg-case [<http://perma.cc/MB6U-JPZP>].

³⁹ See *Lead a Good Life, Everyone: Trey Malone's Suicide Note*, GOOD MEN PROJECT (Nov. 5, 2012), <http://goodmenproject.com/ethics-values/lead-a-good-life-everyone-trey-malones-suicide-note> [<http://perma.cc/U2FY-A3ZR>].

cite potential chilling effects on speech by making professors and students afraid to talk about these important issues for fear of liability. And as discussed above, accusations and investigations can adversely affect the accused student as well.

But these potential harms are overblown: despite the fact that campus sexual assaults almost always impair the victims' educational experience, often severely, the vast majority of perpetrators receive no disciplinary action whatsoever from their university.⁴⁰ Of the small minority of assailants who are found to have committed sexual assaults, less than one-third are expelled from their universities.⁴¹ By contrast, the costs to the community of not effectively addressing sexual assault include all the harms associated with a hostile environment. These include loss of life through suicide and lifetime negative impacts on performance and mental health. Females might forego an academic opportunity because they fear being raped and not having any recourse if they are.⁴² Considered in this light, if the private and public costs of false negatives are at least as high as the private and public costs of false positives, then a set of procedures that is at least as protective of the complainant as it is of the accused is justified.

But schools cannot focus their efforts exclusively on *responding* to sexual assault — by the time a school is responding, the harms to the victim have already begun to be inflicted. Rather, schools must work to prevent sexual assault in the first place. Although adequate response is essential, schools cannot prevent a hostile environment without first recognizing how sexual assault operates. Critics argue that alleged instances of sexual assault are often mere miscommunications, in which an alleged perpetrator believes that consent has been given when in fact it has not. But is that characterization accurate? We must look to the facts on the ground to make that determination.

II. THE FACTS ON THE GROUND: SOME CASE EXAMPLES FROM MY FILES

Here are descriptions of several cases on which I have worked over the past decade, to give you a sense of the reality of sexual assaults on

⁴⁰ See CSA STUDY, *supra* note 1, at 5-26, 5-27 ex. 5-9.

⁴¹ Tyler Kingkade, *Fewer than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFINGTON POST (Sept. 29, 2014, 8:59 PM), http://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html [<http://perma.cc/92FX-X8JQ>].

⁴² See Caitlin Flanagan, *Shutter Fraternities for Young Women's Good*, WALL ST. J. (Apr. 23, 2011, 12:01 AM), <http://www.wsj.com/news/articles/SB10001424052748704658704576275152354071470>, in which the author describes how she left the University of Virginia, her dream school, over fear of being raped at a fraternity, given how common it was.

campus.⁴³ In 2002, the Coalition Against Sexual Violence at Harvard asked for my help in getting the administration to take sexual assault cases more seriously. One member, for example, reported that she had been sexually assaulted by another Harvard student after a party. Because she was incapacitated by alcohol, she was not clear on the details. When she reported that the assailant had had sexual intercourse with her while she was practically unconscious, she was asked why she did not push him away. No action was taken against him.

The next major case I worked on involved a young woman who was gang raped by three football players at Notre Dame. In that case, the school had turned over her statement to the players in advance of police questioning, which enabled them to collaborate on a story. The campus police officers who gave them the information, thereby violating the school's written policy and assurances of confidentiality, also worked parking cars at football games on weekends and knew the men. The fourth assailant who did not complete the rape was found guilty on lesser charges in court, but the others saw no criminal sanction for a brutal and premeditated gang rape.⁴⁴

Another case involved a young female student who was out with friends drinking. When her friends wanted to go elsewhere for the night, they dropped her off at a male friend's room, who said he would take care of her until the effects of the alcohol wore off. Instead, he and another male friend raped her. One of the accused men then bragged to a third friend about what the two men had done, who in turn then circulated the story in an email to his living group. The email corroborated the young woman's account, including particular sounds she remembered hearing. She brought a complaint against the men through her school. They were held responsible and suspended, but then hired an attorney who prevailed upon the school to overturn the decision.⁴⁵

⁴³ All cases and notes on file with author. These cases have gone through various levels of adjudication ranging from no school investigation to criminal prosecution. In each case, the victim reported the case to her school. The first three went through the adjudication process at the school; the fourth was not even investigated by the school.

⁴⁴ See Caitlin Johnson, *Sexual Assault: Campus Problem*, CBS NEWS (Nov. 2, 2006, 10:27 AM), <http://www.cbsnews.com/news/sexual-assault-campus-problem> [<http://perma.cc/3648-BGV7>]. All four men were dismissed from Notre Dame as a result of the assault. See *id.*

⁴⁵ As I was researching this case for any public record to supplement this case description, I instead found a recent case from the same university in which a freshman student alleged that being raped at a fraternity party. According to the police reports, the victim remembered being given a drink of "hot chocolate," which she . . . thought was safe to drink because she did not taste alcohol." Rachel Chason, *Investigation into Alleged Sexual Assault at Duke Expands*, USA TODAY (Feb. 4, 2015, 4:53 PM), <http://college.usatoday.com/2015/02/04/investigation-into-alleged-sexual-assault-at-duke-expands> [<http://perma.cc/BZ42-2GLU>]. The last thing she remembered was dancing with her friends before waking up the next day with "a t-shirt she did not recognize,

Finally, a case on which I am currently working involves a young woman who was at a college bar with friends and was given a drink that rendered her unable to feel her legs.⁴⁶ She remembers being put in a cab with another male student whom she barely knew; he took her to his dorm and violently raped her over the course of the night, causing her medical, physical, emotional, and psychological trauma that has been sufficiently debilitating such that she is no longer in school. The school chose not to investigate the case or inform her of her student rights.

Other cases, too many to name here, involved a single perpetrator who knew or barely knew the victim, incapacitated her, often raped her, and impaired or destroyed her educational trajectory. These cases, a mere sample from my personal experience, illustrate the reality of much campus sexual assault: not miscommunication, but deliberate targeting.

III. A THEORY OF TARGET RAPE

David Gallagher was a member of the Sigma Chi fraternity at Arizona State University when he and his fraternity brothers allegedly sexually assaulted Anna Babler.⁴⁷ Babler, a freshman at the time, filed a civil suit against him and other fraternity brothers, alleging a scheme in which the fraternity men threw a toga-themed party for her sorority⁴⁸: They had arranged buses to take the young women to a restaurant that they had rented for the night, where they served alcohol to underage women, including the victim, and where one of the fraternity members drugged her drink.⁴⁹ The fraternity men took the women's purses that were left on the bus in order to lure them back to their house after the dinner.⁵⁰ Babler awoke the next morning in the frat house "missing her purse and some of her clothes and in severe rectal pain."⁵¹ The night of the rape, Gallagher had posted a picture on his Facebook page of a young, thin, white woman with long hair lying on the floor with her wrists and ankles bound with computer cord.⁵²

no bra and no underwear" with the leggings she had been wearing lying "torn on the ground next to her bed." *Id.*

⁴⁶ I have changed some factual descriptions to protect the confidentiality of this victim.

⁴⁷ Order Denying Motion to Dismiss at 2, 10 n.26, *Babler v. Ariz. Bd. of Regents*, No. 2:10-cv-01459 (D. Ariz. Feb. 15, 2011), ECF No. 15. The case has settled out of court for a significant amount of money.

⁴⁸ See Complaint at 4, *Babler*, No. 2:10-cv-01459 (D. Ariz. July 12, 2010), ECF No. 1.

⁴⁹ *Id.* at 5.

⁵⁰ Complaint at 4, *Babler v. Gallagher*, No. CV2010-003278 (Ariz. Super. Ct. Feb. 1, 2010).

⁵¹ Order Denying Motion to Dismiss, *supra* note 47, at 2.

⁵² Photograph supplied by Baine Kerr to author. It had been obtained pursuant to discovery in *Babler v. Gallagher*, *supra* note 50, and is on file with author.

When discussing this case with the woman's attorney, Baine Kerr, the term "target rape" occurred to me as a more accurate description of the perpetrators' behavior than the commonly used phrases "acquaintance rape" or "date rape." In target rape, the acquaintance is made for the distinct purpose of accomplishing the rape. It is critical to understand that target rape is not the product of misunderstandings between two equally situated students, but rather a patterned behavior that is premeditated, intentional, and often repeated. The term shifts attention to the behavior of the perpetrator rather than focusing on the relationship between the victim and offender. It applies to multi-perpetrator sexual assaults as well as single-perpetrator ones that are facilitated by cooperation among male members of some exclusive social group. Within this concept, the target does not have to be specifically identified at the outset. When an individual declares his intention to "go out and get laid tonight, no matter what," this may be a precursor to target rape. His victim may not be a date, or even an acquaintance, but more likely someone he meets that night. He might incapacitate her through drugs or alcohol (or both) to make her more vulnerable.⁵³ The concept of target rape builds on the work of Dr. David Lisak, whose research into "undetected rapists" indicates that students who commit campus rape act in intentional, premeditated, and predatory ways.⁵⁴

Target rape describes cases where males ally together in sexual pursuit of females not only regardless of the female's sexual desire, but often in deliberate violation of it. Male-only exclusive spaces, such as fraternities or athletic teams, often serve as breeding grounds for the transmission of misogynistic attitudes that contribute to a sexual cul-

⁵³ "Incapacitated assault" refers to sexual abuse while "drugged, drunk, passed out, or otherwise incapacitated." NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 6 (2014) (citing CSA STUDY, *supra* note 1), <https://www.notalone.gov/assets/report.pdf> [<https://perma.cc/SJT4-75UA>] [hereinafter TASK FORCE REPORT]; see also DEAN G. KILPATRICK ET AL., NAT'L CRIME VICTIMS RESEARCH & TREATMENT CTR., MED. UNIV. OF S.C., DRUG-FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL STUDY 2 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf> [<https://perma.cc/PRU5-EK29>]. Deliberate administration of drugs in order to facilitate sexual assault is of course not limited to college campuses. For example, more than a dozen women have now reported that they were drugged and then raped by Bill Cosby. Peter Holley, *Colleges Cut Ties with Bill Cosby as the List of Women Accusing Him of Sexual Assault Hits 20*, WASH. POST (Dec. 1, 2014), <http://www.washingtonpost.com/blogs/style-blog/wp/2014/11/28/colleges-cut-ties-with-bill-cosby-as-the-list-of-women-accusing-him-of-sexual-assault-hits-20> [<http://perma.cc/4PV6-RGYG>].

⁵⁴ David Lisak, *Understanding the Predatory Nature of Sexual Violence*, 14 SEXUAL ASSAULT REP. 49, 49–50 (2011). In *The Undetected Rapist*, Lisak describes how men select potential targets for vulnerability and innocence, groom them through feigned emotional or social interest, gain their trust, and then incapacitate them through drugs or alcohol and rape them. DAVID LISAK, THE UNDETECTED RAPIST (2002), http://www.usfk.mil/usfk/Uploads/SAPR/SAPRMod17_UndetectedRapist.pdf.

ture on campus that devalues women. Humor and “fun, drunken, irresponsible” college behavior cloaks — or tries to — the sexual dominance men are asserting, creating an environment of rape-supportive attitudes.⁵⁵ Party themes, for example, that constantly assign women to the role of prostitute to serve the sexual pleasure of men, indicate male dominance.⁵⁶

These attitudes are easy to find, and in fact often permeate male-dominated campus institutions. For example, many assaults are perpetrated by members of male athletic teams.⁵⁷ Football seems to foster this behavior particularly often.⁵⁸ Such assaults often appear to reflect alliances among many players — generally implicit (but sometimes explicit) agreements to commit the assault, to cover it up, or to keep it from hurting the season.⁵⁹ Coaches, college administrators, and even prosecutors sometimes participate in these alliances.⁶⁰ A recent example is the rape case at Florida State University (FSU), in which a female student, Erica Kinsman, reported being raped after being given a drink at a bar that rendered her incapacitated.⁶¹ She did not know her assailant’s name when she went to the hospital for a rape kit just

⁵⁵ Alexandra Scheeler, a former member of Princeton’s Tiger Inn, wrote about how she had objected to t-shirts that referred to women as “stuck-up c***s.” She was dismissed as taking the “joke” too seriously, but maintains that “when jokes repeatedly and consistently mark women as second-class members, they are no longer funny.” Alexandra Scheeler, *At Tiger Inn, Women Are the Punch Line*, DAILY PRINCETONIAN (Dec. 3, 2014), <http://dailyprincetonian.com/opinion/2014/12/at-ti-women-are-the-punch-line> [<http://perma.cc/4LC4-QXRG>].

⁵⁶ *Id.* Scheeler cites Tiger Inn’s sexist party themes such as “Suits and Sluts, Cowboys and Sluts, Fifteenth-Century A.D. Ottoman Aristocrats and Sluts” as “tired and lame as well as sexist.” It is worth noting that Tiger Inn had been sanctioned in 2006 for alcohol violations and two reported sexual assaults. Jennifer Epstein, *A Reformed Tiger Inn Opens Its Doors Again*, DAILY PRINCETONIAN (Apr. 13, 2006), <http://dailyprincetonian.com/news/2006/04/a-reformed-tiger-inn-opens-its-doors-again> [<http://perma.cc/US7S-2SB3>].

⁵⁷ See Craig Stevens, *A Review of Literature: Violence by Male Athletes* (2012), <http://www.northeastern.edu/sportinsociety/wp-content/uploads/2012/10/ViolenceByMaleAthletes.pdf> [<http://perma.cc/58HM-WH7E>] (surveying literature).

⁵⁸ For a noncomprehensive listing of major college football sexual assault cases in the last four decades, see Jessica W. Luther, *A List of College Football Rape Cases*, POWER FORWARD (Sept. 26, 2013, 12:06 PM), <http://pwr fwd.net/2013/09/26/a-list-of-college-football-rape-cases> [<http://perma.cc/B2YY-KBRD>].

⁵⁹ See Kimberly M. Trebon, Note, *There Is No “I” in Team: The Commission of Group Sexual Assault by Collegiate and Professional Athletes*, 4 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 65, 72–73 (2007) (citing group loyalty, absence of moral self-scrutiny, sex segregation, and feelings of entitlement as contributing to sexual assault committed by college and professional athletes).

⁶⁰ For a more extensive discussion of this phenomenon, see Diane L. Rosenfeld, Concluding Remarks, *Changing Social Norms? Title IX and Legal Activism*, 31 HARV. J.L. & GENDER 407 (2008).

⁶¹ See Walt Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), <http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html>; Marc Tracy, *Jameis Winston Being Sued by Woman Who Accused Him of Rape in 2012*, N.Y. TIMES (Apr. 16, 2015), <http://www.nytimes.com/2015/04/17/sports/football/jameis-winston-being-sued-by-accuser-in-alleged-rape-in-2012.html>.

hours after the assault, but did recall an encounter with an FSU football player at the bar prior to the assault.⁶² Kinsman alleges that even though she reported the name of the suspect — Jameis Winston — when she learned of it a few weeks later, FSU failed to even question him until after the football season had ended and he had led the team to win the college football national championship.⁶³ The male prosecutor who dropped the criminal charges actually laughed during a press conference about the case.⁶⁴ Another example involved three basketball players recently suspended from the University of Oregon for gang rape.⁶⁵ One of the players, Brandon Austin, had previously been suspended from the Providence College basketball team for sexually assaulting a female student with another player, who had also been suspended.⁶⁶ Austin had transferred to University of Oregon while on suspension.⁶⁷ One of the biggest Title IX football cases involved University of Colorado-Boulder (CU) players and recruits accused of raping two young women. Lisa Simpson alleged that football players arranged for recruits to gang rape her and her roommate after

⁶² See Bogdanich, *supra* note 61.

⁶³ See *id.* (“[T]he university did nothing about it, allowing Mr. Winston to play the full season without having to answer any questions.”).

⁶⁴ Cindy Boren, *Laughter at Jameis Winston Press Conference Struck Wrong Note (Video)*, WASH. POST (Dec. 5, 2013), <http://www.washingtonpost.com/blogs/early-lead/wp/2013/12/05/laughter-at-jameis-winston-press-conference-struck-wrong-note-video> [<http://perma.cc/Q42Q-HYLU>]. Winston’s case is remarkable for several reasons: The allegations involved three football players who are accused of collaborating in the rape of a young woman who believes she was drugged at a bar and then taken to Winston’s apartment where he raped her first in the bedroom with the door open so that one of his teammates could join in if he wanted to, then in the bathroom. Post-Hearing Memorandum, *supra* note 23, at 5, 15; Bogdanich, *supra* note 61. After the assaults, the woman tweeted “SOMEONE PLEASE HELP” and was taken to the hospital where she had a rape kit done. Post-Hearing Memorandum, *supra* note 23, at 7. While Winston was under investigation, he and another teammate performed a pro-rape rap song on video. Mike McIntire & Walt Bogdanich, *At Florida State, Football Clouds Justice*, N.Y. TIMES (Oct. 10, 2014), <http://www.nytimes.com/2014/10/12/us/florida-state-football-casts-shadow-over-tallahassee-justice.html>. FSU has shown a pattern of failure to investigate rapes and other irregular activity indicating cover-ups of illegal behavior by football players. See *id.* For an in-depth coverage of this case, see THE HUNTING GROUND (Radius-TWC 2015).

⁶⁵ See Jill Martin, *Student Sues University of Oregon, Coach over Alleged Gang-Rape*, CNN (Jan. 9, 2015, 9:33 PM), <http://www.cnn.com/2015/01/09/justice/university-of-oregon-title-ix-lawsuit> [<http://perma.cc/65MM-JVZ7>].

⁶⁶ Jeff Goodman & Andy Katz, *Ducks Ban 3 from Team Activities*, ESPN (May 7, 2014), http://espn.go.com/mens-college-basketball/story/_id/10885689/oregon-ducks-keeping-dominic-artis-brandon-austin-damyean-dotson-participating-team-activities [<http://perma.cc/729N-NNYW>]; see also Tyler Kingkade, *Oregon Finds 3 Basketball Players Guilty of Sexual Assault, Will Remove Them from Campus*, HUFFINGTON POST (June 23, 2014, 8:59 PM), http://www.huffingtonpost.com/2014/06/23/oregon-sexual-assault-basketball-players_n_5522915.html [<http://perma.cc/3WYM-UNFY>].

⁶⁷ Kingkade, *supra* note 66. Austin, remarkably, was permitted to transfer to a third institution, where he continued to play basketball. Martin, *supra* note 65.

they had gone to bed after a party.⁶⁸ The university settled the case for \$2.85 million.⁶⁹ A number of officials from CU resigned or were fired amidst the controversy, including the college president and the football coach.⁷⁰

We know from reading the news how often fraternities are implicated in target rapes. And a look into fraternity social culture reveals attitudes that treat women as sexual objects for conquest rather than human beings.⁷¹ For example, a fraternity brother at the University of Southern California published a weekly “Gullet Report” in which he described different names for different targets, explaining his reference to females *as targets*: “[t]hey aren’t actual people like us men.”⁷² While gang rape may be one of a woman’s greatest fears, some fraternity members act as though it is a harmless bonding activity. Studies on masculinity indicate that gang rape, from the perspective of perpetrators, typically has more to do with cementing a bond between men than with the (often incapacitated) woman being raped.⁷³ The voyeurism evident in these cases is an important dimension of the assertion of male dominance in a gang rape, yet it is underanalyzed in the literature.⁷⁴ Cases of a single fraternity member raping an incapacitated woman often occur in rooms where other brothers can watch, and frat houses and other exclusive male clubs designate rooms for this purpose.⁷⁵

⁶⁸ *Simpson v. Univ. of Colo.*, 372 F. Supp. 2d 1229, 1231–32 (D. Colo. 2005) (reporting plaintiffs’ claims that football recruits raped plaintiff and her roommate while the players cheered them on), *rev’d*, *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170 (10th Cir. 2007).

⁶⁹ See Allison Sherry, *CU Settles Case Stemming from Recruit Scandal*, DENVER POST (Dec. 6, 2007, 1:00 AM), http://www.denverpost.com/wintersports/ci_7645722 [<http://perma.cc/H9ZA-WNGS>] (reporting that the University settled with Simpson for \$2.5 million and with the second victim for \$350,000).

⁷⁰ See *id.*

⁷¹ See, e.g., W.R. BOLEN, *TOTAL FRAT MOVE* (2013) (describing fraternity culture, regarding women in sororities as “sorostitutes,” *id.* at 165). A chapter called “Sorostitute Stories” details the author’s sexual exploitation of women, admitting that he was “a rookie in the game of sexual dominance, and the learning had only just begun.” *Id.* at 169. “Campus was basically a sex commune [T]he odds of getting a girl in bed improved dramatically for even the most unsightly scholars. This was even truer for those of us fortunate enough to be members of upstanding Greek organizations with tilted moral compasses and a never-ending supply of alcohol.” *Id.* at 165.

⁷² Diane L. Rosenfeld, *Who Are You Calling a “Ho”?: Challenging the Porn Culture on Campus*, in *BIG PORN INC* 41, 42 (Melinda Tankard Reist & Abigail Bray eds., 2011) (internal quotation marks omitted).

⁷³ See, e.g., PEGGY REEVES SANDAY, *FRATERNITY GANG RAPE* 148 (2d ed. 2007).

⁷⁴ Some postulate that gang rapes are committed in highly homosocial groups of men, perhaps to allay homophobic fears and to demonstrate a violent, heteronormative sexuality. See, e.g., JEFF BENEDICT, *OUT OF BOUNDS: INSIDE THE NBA’S CULTURE OF RAPE, VIOLENCE, AND CRIME* (2004); SANDAY, *supra* note 73, at 136–37.

⁷⁵ *Leading Expert on Campus Rape, Sexual Assault Speaks at Clark*, CLARK UNIV. (Nov. 19, 2010), <http://news.clarku.edu/news/2010/11/19/leading-expert-on-campus-rape-sexual-assault>

The Supreme Court has recognized that exactly this type of target rape is evidence of gender-based animus. In *United States v. Morrison*,⁷⁶ the late Chief Justice Rehnquist wrote for the Court that if plaintiff Christy Brzonkala's allegations of rape were true, "no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison."⁷⁷ In that case, the Court struck down the civil rights remedy of the Violence Against Women Act, but implied there should have been a remedy for the assault claimed in the case.⁷⁸ Brzonkala's case has enormous significance here, as it is a clear example of target rape and of the male alliances between football players that insulated the players from being held responsible.⁷⁹ In brief, she alleged that she was raped by two football players, Antonio Morrison and James Crawford, within half an hour of meeting them.⁸⁰ She alleged that the rapes were committed early in her freshman year at Virginia Polytechnic Institute.⁸¹ She also claimed that immediately following the rape, Morrison stated, "You better not have any . . . diseases."⁸² Several months later, Morrison was overheard in the cafeteria making "boasting, debased remarks about what [he] would do to women."⁸³ All courts that heard the case considered this to be evidence of gender-based animus.⁸⁴

The school initially suspended Morrison for a year after a hearing.⁸⁵ Crawford was not held responsible, at least in part because another football player, Cornell Brown, testified that Crawford was with him at the time of the rape.⁸⁶ However, Brown was also added to Brzonkala's complaint for aiding and abetting the other two players,

-speaks-at-clark [<http://perma.cc/MY68-MGYA>] (reporting on a lecture by researcher David Lisak, in which he described one fraternity's "designated rooms" for isolating victims (internal quotation marks omitted)).

⁷⁶ 529 U.S. 598 (2000).

⁷⁷ *Id.* at 627.

⁷⁸ *See id.*

⁷⁹ *See id.* at 602; *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949, 953–56 (4th Cir. 1997), *vacated*, 169 F.3d 820 (4th Cir. 1999) (en banc).

⁸⁰ *Morrison*, 529 U.S. at 602.

⁸¹ *Id.*

⁸² *Id.* (omission in original) (internal quotation marks omitted); *Brzonkala*, 132 F.3d at 953.

⁸³ *Morrison*, 529 U.S. at 602.

⁸⁴ *Brzonkala*, 169 F.3d at 830 (holding that Morrison's actions provided sufficient evidence of gender-based animus "to defeat Morrison's motion to dismiss"); *Brzonkala*, 132 F.3d at 964 ("Virtually all of the earmarks of 'hate crimes' are asserted here . . ."); *Brzonkala v. Va. Polytechnic & State Univ.*, 935 F. Supp. 779, 785 (W.D. Va. 1996) ("Morrison's actions outwardly evidence gender animus more than many, if not most, situations of rape . . .").

⁸⁵ *Morrison*, 529 U.S. at 603.

⁸⁶ *Brzonkala*, 169 F.3d at 907 (Motz, J., dissenting); David Teel, *Lawsuit Charges Tech Standout*, DAILY PRESS (Mar. 2, 1996), http://articles.dailypress.com/1996-03-02/sports/9603020075_1_sexual-assault-christy-brzonkala-cornell-brown [<http://perma.cc/F5Q5-76V2>].

by guarding the door of her dorm room.⁸⁷ Unbelievably, Virginia Tech overturned Morrison's sanction in an appeal of which Brzonkala was not informed, and suspended his suspension until he graduated.⁸⁸ Brzonkala alleged that the football coach, Frank Beamer, inappropriately intervened in the process to protect the player's ability to stay on the team.⁸⁹ Morrison returned to Virginia Tech on a full athletic scholarship.⁹⁰ Brzonkala was unable to continue her education at Virginia Tech and withdrew.⁹¹

This problem is cultural, in that these men are not taught that targeting women is not an acceptable social practice and can be a precursor to rape. Schools must recognize that language such as that used in the "Gullet Report" is not merely bantering between friends, but rather that it evinces a sexually hostile environment and publicly warns of potential rapes. Such language and behavior signal that problematic norms exist either within a particular group or on campus more broadly, and should prompt the school to address this targeting, rape-supportive behavior immediately.

The courage of a growing number of victims to disclose their sexual assaults, combined with the recent increase in the pressure brought to bear on colleges by the Department of Education,⁹² has prompted many college administrators to initiate reforms of their institutions' sexual assault policies. Unfortunately, too often those reforms have been limited to adjustment of the rules governing the initiation and

⁸⁷ Teel, *supra* note 86.

⁸⁸ *Morrison*, 529 U.S. at 603; *Brzonkala*, 132 F.3d at 955.

⁸⁹ "Brzonkala . . . alleges that the procedural irregularities in, as well as the ultimate outcome of, the second hearing were the result of the involvement of Head Football Coach Frank Beamer, as part of a coordinated university plan to allow Morrison to play football in 1995." *Brzonkala*, 132 F.3d at 956.

⁹⁰ *Id.* at 955.

⁹¹ *Morrison*, 529 U.S. at 604.

⁹² In January 2014, President Obama created the White House Task Force on Protecting Students from Sexual Assault to provide leadership and support to make campuses safer and more equal. Press Release, White House Office of the Press Sec'y, Memorandum — Establishing a White House Task Force to Protect Students from Sexual Assault (Jan. 22, 2014), <http://www.whitehouse.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a> [<https://perma.cc/C7CV-NFE3>]. Significant developments from OCR, the enforcement agency responsible for Title IX, include the publication of "Dear Colleague Letters" (DCLs) and subsequent guidance documents to schools. These publications include a DCL on bullying, sexual orientation, and FAQs regarding implementation of the Revised Sexual Harassment Guidance from 2001. See sources cited *supra* note 12. The agency has also become transparent in publishing its decisions and revealing the list of schools currently under investigation. See Kingkade, *supra* note 25. The Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified in scattered sections of the U.S. Code), included the Campus Sexual Violence Elimination Act, *id.* § 304, 127 Stat. at 89-92 (codified at 20 U.S.C. § 1092 (2012)), ("Campus SaVE") that sets forth detailed requirements of what schools must report to the government in terms of their compliance with Title IX and the Clery Act, see 20 U.S.C. § 1092(f).

resolution of complaints. Those rules matter, of course. But transformation of the environments that stunt the education of so many women requires much more.

IV. MEASURING MALE DOMINANCE ON CAMPUS THROUGH CLIMATE SURVEYS

I recommend that schools conduct campus climate surveys that focus not only on occurrence and prevalence of sexual assault, but also critically measure the level of male dominance on campus. This is what Title IX was designed to remedy: hostile environments created by sex discrimination. For the most effective intervention, schools must honestly confront the level of male privilege and supremacy on campus and work to make their campuses more equal.

Campus climate surveys enable a school to collect data about its own students and campus environment. Such surveys are now recommended by the White House Task Force to Protect Students from Sexual Assault and may be required by 2016.⁹³ Given the number of schools under investigation by the U.S. Department of Education, and the amount of substantive guidance from the White House Task Force available on how best to conduct such a survey, schools have both incentive and ability to confront honestly how sexual assault is being perpetrated at their institutions.

The surveys should measure the level of male dominance on campus. The key indicia include: the number and character of all-male, exclusive spaces, such as fraternities, social clubs, and athletic teams; male social capital and social currency; party themes; and control of social spaces. These four factors, which facilitate a disproportionate number of assaults, are present to different degrees in different schools. An administration or faculty seriously interested in purging their institution of the scourge of sexual assault must find out what causes it and where it happens. To that end, a well-designed survey is essential.

These areas reveal an overall indication of male status, which is important because of the association between high or inflated male privilege on campus and the commission of sexual assault. Interestingly, some women are starting to fight back about the unequal rules governing alcohol and fraternities. For example, the rules that govern the Greek system often allow fraternities to serve alcohol but forbid sororities from doing the same.⁹⁴ As a result, the party scene on campus takes place at fraternities where men have control over who is admit-

⁹³ See TASK FORCE REPORT, *supra* note 53, at 7–8.

⁹⁴ Alan Schwarz, *Sorority Anti-Rape Idea: Drinking on Own Turf*, N.Y. TIMES (Jan. 19, 2015), <http://www.nytimes.com/2015/01/20/us/sorority-anti-rape-idea-drinking-on-own-turf.html>.

ted to the parties, the alcohol, and the physical spaces in which the parties take place.⁹⁵

Investigating a school's cultural climate around sexual assault involves identifying high-risk social environments, which are male-only clubs that hold high social currency and/or control over social spaces. Party themes that consistently degrade women as "hos," sexually explicit fraternity theme songs, and misogynistic rap videos by football players⁹⁶ are cultural clues that speak to what goes on in the campus sexual culture. When the Yale fraternity pledges chanted loudly at night outside the freshman girls' dorm that "No means yes! Yes means anal!"⁹⁷ that said something significant about the level of male sexual entitlement at the school.

As schools have different characteristics, including distinct social and cultural hierarchies and structures, they need to identify the particular environmental factors that contribute to the commission of sexual assault on their campus. With this information, they will be able to create effective policies tailored to disrupt the social climate that enables predatory sexual behavior.⁹⁸

V. CONCLUSION

From an *educational* standpoint, awareness programs should engage all students as members of a community to examine attitudes and

⁹⁵ See Amanda Hess, *Sorority Girls Fight for Their Right to Party*, SLATE: XXFACTOR (Jan. 20, 2015, 12:15 PM), http://www.slate.com/blogs/xx_factor/2015/01/20/campus_rape_sororities_want_to_fight_sexual_assault_by_throwing_their_own.html [<http://perma.cc/H4H3-ZN26>] ("Fraternity members feel so entitled to women's bodies, because women have no ownership of the social scene," [said one sorority member.] "You can't kick a guy out of his own house.").

⁹⁶ The 7th Floor Crew song is a prime example of the toleration — even celebration — of the culture in which football players participate in gang rape of any woman who happens to come to the seventh floor of the athletic dorm where they lived. *7th Floor Crew Music Video — Miami Football Team Rap*, YOUTUBE (Feb. 26, 2009), <http://www.youtube.com/watch?v=9ujKxpAvLKG>. The violent misogyny in the lyrics is akin to evidence relevant to prove a hate crime. There were no disciplinary consequences for this rape proclamation, and some of the men went on to play for the NFL. See, e.g., John Mullin, *Olsen: Bad Rap Shouldn't Give Me a Bad Rep*, CHI. TRIB. (May 1, 2007), http://articles.chicagotribune.com/2007-05-01/sports/0704300646_1_bears-rap-notre-dame [<http://perma.cc/Z7BP-LPKS>]. Interestingly, one of the lines from the song reads: "You came as a good girl, but you leavin' a ho." *7th Floor Crew Music Video, supra*, at 4:56.

⁹⁷ Christina Huffington, *Yale Students File Title IX Complaint Against University*, YALE HERALD (Mar. 31, 2011), <http://www.yaleherald.com/homepage-lead-image/cover-stories/breaking-news-yale-students-file-title-ix-suit-against-school> [<http://perma.cc/P6RN-XJEB>] (internal quotation marks omitted). This led to an OCR complaint against Yale, in which I assisted sixteen students. See *id.*

⁹⁸ An excellent recent example of a college survey was conducted by MIT. Models of these surveys can be adapted by schools to capture data particular to that school's environment. The factors needing assessment include prevalence of sexual assault, details about the commission of sexual assaults, whether assaults were reported, what students understand the policies to be, and whether they think their schools are serious about stopping rape on campus. See generally MIT STUDY, *supra* note 29.

beliefs that may lead to assaultive behavior. Media literacy around pornography, consent, and popular culture expands the discourse on critical issues of gender equality.⁹⁹ I have found that, far from chilling speech, students are hungry for the opportunity to speak openly about how messages from pornography and popular culture affect their sexuality, their self-image, and their relationships.¹⁰⁰ I have found this to be quite effective in developing peer-to-peer educational initiatives around sexual respect. Bystander intervention and risk reduction programs are now mandated under the Campus SaVE Act, and schools should be quite focused on their preventive education efforts.

In a school's *response*, an understanding of traumatic effects on memory, the brain, and learning is essential, not only in providing accommodations that would best enable the victim to continue her education with minimal disruption, but also in the investigation and resolution of the case. It matters in assessing credibility and evidence that a trauma victim might not be able to recall facts in a linear way, as the administrators may expect her to. Gaps in an account of rape do not necessarily imply a lack of credibility. Rather, the victim's account and its traumatic effects should be considered in the wider context of the case.

Finally, schools should *resolve* cases with a clear understanding of the hostile environment criteria under Title IX. These include a credible allegation of sexual assault, evidence of trauma induced by the event, the trauma's interference with the claimant's education, and evidence of gender-based animus. As David Lisak says, given low reporting levels, schools are given a precious opportunity to act for the safety of all their students when someone has the courage and ability to come forward.¹⁰¹

Educating people about and preventing target rape should be the focus of schools' efforts to address campus sexual assault. If it is, the school will have the best chance of changing its internal social and sexual culture.

⁹⁹ Laura Jarrett & Stefani Johnson, *Standing Up for Sexual Respect*, AAUW OUTLOOK, Spring–Summer 2009, at 16, 17.

¹⁰⁰ To engage students in discussions around consent, I often show clips from documentaries or popular culture that generate productive conversations. Recommended documentaries for this purpose include: TOUGH GUISE: VIOLENCE, MEDIA, AND THE CRISIS IN MASCULINITY (Media Education Foundation 1999) (discussing masculinity); HIP-HOP: BEYOND BEATS & RHYMES (Media Education Foundation 2006) (examining misogyny and racism in hip-hop); *see also* THE PRICE OF PLEASURE: PORNOGRAPHY, SEXUALITY & RELATIONSHIPS (Media Education Foundation 2008) (analyzing the most common themes and messages of mainstream pornography.)

¹⁰¹ IT HAPPENED HERE (Pivot TV 2015) (documenting on-campus sexual assault).