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Rape Law Revisited

Aya Gruber*

Sexual Assault is everywhere.

Have you heard this statement recently? Perhaps it was part of a federal government public awareness campaign urging that because of the ubiquity of sexual assault, "it's on us" to stop it.[1] Maybe the statement (or its equivalent) appeared during a news report on the military[2] or was part of a freshman orientation inspired by Title IX—the federal antidiscrimination-in-education law that was once associated with women's sports programs but now is synonymous with student sexual harassment[3]—where students were led to chant "an enthusiastic yes."[4] Certainly, the sentiment underlies in part the effort to "modernize" the Model Penal Code's sexual assault provisions.[5] Indeed, the claim that rape is a widespread and worsening problem that affects all women and reflects deep gender inequality is no longer just a feminist mantra, but an increasingly accepted, uncontroversial, and even undebatable claim.

But this is not what I mean by saying that sexual assault is everywhere. There is a distinct lack of evidence that rape or campus rape has become *more* frequent in the last decades.[6] It is also exceedingly difficult to pinpoint just how "widespread"

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* Professor of Law, University of Colorado Law School. Heartfelt thanks to Joshua Dressler for asking me to organize and guest-edit this symposium. I also express my deepest gratitude to the authors in the symposium for their excellent work.

[1] *See* Tonya Somanader, *President Obama Launches the "It's On Us" Campaign to End Sexual Assault on Campus*, WHITE HOUSE (Sept. 19, 2014), https://www.whitehouse.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus.

[2] *See* Patricia Kime, *Incidents of rape in military much higher than previously reported*, MILITARY TIMES (Dec. 5, 2014), http://www.militarytimes.com/story/military/pentagon/2014/12/04/pentagon-rand-sexual-assault-reports/19883155/.

[3] 20 U.S.C. §§ 1681–1688 (2002).

[4] Cheryl Corley, *HBCUs Move To Address Campus Sexual Assaults, But Is It Enough?*, NPR (Sept. 29, 2014), http://www.npr.org/2014/09/29/351534164/hbcus-move-to-address-campus-sexual-assaults-but-is-it-enough (describing a Title IX orientation session for freshmen at Howard University where the administrator stated, "Repeat after me—an enthusiastic yes").

[5] See, e.g., Delineating "Yes": Stephen Schulhofer and Erin Murphy are revising the Model Penal Code on sexual assault, NYU LAW (May 26, 2015), http://www.law.nyu.edu/news/ideas/ali-penal-code-sexual-assault.

[6] *See* Nick Gillespie, *BJS: Rate of Sexual Assault Shows Sharp Decline, Lower Among College-Age Women*, REASON (Dec. 11, 2014), https://reason.com/blog/2014/12/11/bjs-rate-of-sexual-assault-shows-sharp-d.

rape is. Despite the popularly accepted "one-in-five" statistic,[7] the claim of rape's omnipresence ultimately begs the questions of how to define rape, and widespread compared to what.[8] However, one thing has clearly changed in recent times: the volume of public discussion about rape. *That* certainly is widespread, ever increasing, and affecting law and policy at a rapid pace. Sexual assault is everywhere—in newspapers, on blogs, in the preoccupied minds of students, on the agendas of university executives, in the meeting rooms of the American Law Institute. Today, the only thing sports-like about Title IX is university risk managers' sprint to reconfigure sexual assault policies to "meet and exceed" federal agency dictates.[9] One can rarely pass a day without seeing a report on a brutal college rape incident, an untrue college rape incident, a new Title IX procedure, or a case declaring such procedure to violate constitutional rights.[10] Everyone seems to be revisiting the rape issue. This introduction offers a brief critical description of the current preoccupation with sexual assault and maps the discursive terrain—the dogmas, empirical assumptions, and theoretical commitments, which are at once familiar and novel—as a preface to the articles in this symposium.

On September 10, 2015, *The New York Times Magazine* published an article on campus rape reform entitled "The Return of the Sex Wars."[11] For the uninitiated, the term "sex wars," not to be confused with "war of the sexes," describes a rift between feminists in the 1970s and 1980s over pornography. Theorists and activists, most famously Andrea Dworkin and Catharine Mackinnon, argued that pornography is the very embodiment of women's sexual subordination, and they worked with conservative policy-makers, concerned citizens, and the faith community to implement, mostly unsuccessfully, anti-pornography ordinances.[12] This drew the ire of both liberal feminists, who had concerns about overriding female sex workers' choices and free speech, and "pro-sex" radical feminists, who

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[7] *See* Somanader, *supra* note 1.

[8] *See* Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html (problematizing the numbers).

[9] *See, e.g.*, *CU-Boulder Chancellor's statement on Title IX review*, UNIV. OF COLORADO BOULDER (Jan. 24, 2014), http://www.colorado.edu/news/releases/2014/01/24/title-ix-review-report-finds-cu-boulder-meeting-legal-requirements.

[10] For these "reverse Title IX" cases, *see, e.g.*, Mock v. Univ. of Tennessee, no. 14-1687-II (Tenn. 20th Dist., Part II) (Aug. 4, 2015); Doe v. Washington and Lee Univ., No. 6:14-cv-00052 (W.D. Va. 2015).

[11] Emily Bazelon, *The Return of the Sex Wars*, NY TIMES MAGAZINE (Sept. 10, 2015), http://www.nytimes.com/2015/09/13/magazine/the-return-of-the-sex-wars.html?_r=0.

[12] *See* Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) (for a discussion of the "sex wars").

saw the effort less as anti-subordination and more as anti-sexuality.[13] By the 1990s, it was clear that MacKinnon and dominance feminism had lost the sex wars, and the issue of pornography faded in the face of less divisive feminists concerns (i.e. domestic violence).[14]

The *Times* article implies that the current campus rape discussion has merely resurrected the old feminist rifts and riffs. Featured under the byline is a large photo of Catharine MacKinnon, whose view that sex is the key to pervasive male dominance is juxtaposed with that of Harvard Law Professor and famed sex-positive critic of feminism, Janet Halley.[15] Indeed, one celebrated ivy-league criminal law teacher and rape scholar recently confided to me his belief that the current rape conversation merely rehashes the same old arguments and their counters. It is true that students tend to get heated over similar issues year after year, and teachers of rape can experience it like a broken record: Do women ever lie about rape?; Is requiring "yes" unsexy?; Does "no" sometimes mean "yes"?

We largely have answers, unsatisfying as they may be, to these questions. Women rarely make up stories of brutal rape out of whole cloth, but deliberate lying does occur, not to mention the risks, attendant to any witness, of embellishing, misremembering, or reinterpreting events.[16] Pre-intercourse dialogue is sexy to some and unsexy to others. Even the most strident rape activists concede that much "ordinary" sex occurs without dialogue, while civil libertarians widely acknowledge such dialogue is a worthy aspiration. To make matters more confusing, "no," depending on context, sometimes means no, sometimes means yes, and often means something in between.[17] Thus, the debates go round and

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[13] See Bridget J. Crawford, Toward A Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure, 14 MICH. J. GENDER & L. 99, 104 (2007).

[14] *See* Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 795 (2007) (discussing feminism and domestic violence).

[15] Bazelon, *supra* note 11.

[16] *See* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 597–98 & nn.85–86 (2009) [hereinafter Gruber, *Rape, Feminism*] (parsing the false reporting statistics); *cf.* Megan McArdle, *How Many Rape Reports Are False?*, BLOOMBERG VIEW (Sept. 19, 2014), http://www.bloombergview.com/articles/2014-09-19/how-many-rape-reports-are-false (calling the false report rate a "dark number").

[17] The study cited frequently in criminal law casebooks is quite outdated: Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women's Token Resistance to Sex*, 54 J. PERSONALITY & SOC. PSYCHOL. 872 (1988) (study of college students finding that 39 percent of women said "no" when they meant "yes"). *See also* Susan Sprecher et al., *Token Resistance to Sexual Intercourse and Consent to Unwanted Sexual Intercourse: College Students' Dating Experiences in Three Countries*, 31 J. SEX RES. 125, 125 (1994) (finding that women and men engage in token resistance); Kristen N. Jozkowski & Zoë D. Peterson, *College Students and Sexual Consent: Unique Insights*, 50 J. SEX RES. 517, 523 (2013) (finding that college students continue to conceive of men as sexual initiators and women as sexual gatekeeper); *cf.* Lucia F. O'Sullivan & Elizabeth Rice Allgeier, *Feigning Sexual Desire: Consenting to Unwanted Sexual Activity in Heterosexual Dating Relationships*, 35 J. SEX

round. There is also a familiar set of academic discussions over which rape reforms are retributively desirable, utile, and fair, whether sex is more appropriately theorized as danger or pleasure, and if punitive law should be used to foment cultural change.

However, current anti-rape activism—activism so impressive to feminist icon Susan Brownmiller that she dubbed it the "fourth wave of feminism"[18]—also feels distinctly post-millennial. Scroll down a little in the *New York Times* article (post-millennials read on computers) to see the other pictures.[19] The stylish blonde Yale law student spearheading the "know your Title IX" campaign appears more corporate lawyer than second-wave bra-burner, and although she invokes MacKinnon's conception of rape reform as a Left project to protect "classes of marginalized people," her message is practical and sounds in victims' rights: Title IX sexual assault reforms are necessary to prevent victims from "failing out of school because you have to share a library with your rapist."[20]

Anti-rape student activists, drawing on radical feminism, claim the mantle of the oppressed, even as they accrue power to the penal state and university disciplinarians, leaving the skeptical fearful of being cast into an ignoble lot with rape apologists. In contrast to the student anti-rape activists proudly photographed for the *Times* article, the female law student who was wary of Mackinnon (and Halley's) position asked to remain anonymous "because she feared professional repercussions."[21] Similarly, many of the women against national sororities' decision to ban sisters from attending rush week parties at the University of Virginia elected anonymity.[22] The power dynamics have certainly shifted, as self-labeled survivors seize media publicity and those who question activists' claims risk, not only derision, but being labeled a "second rapist," responsible for triggering trauma.[23]

The post-millennial sex war differs from the old sex wars in other ways. Student activists, unlike dominance feminists, rarely describe the problem with sexual assault as sex generally being the key to pervasive patriarchy and male

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RES. 234, 234 (1998) (finding that 38 percent of study participants had consented to unwanted sex for various reasons and that "most participants reported positive outcomes" from it).

[18] *See* Claire Gordon, *When America started caring about rape*, AL JAZEERA AMERICA (Mar. 20, 2015), http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/3/20/susan-brownmiller-rape.html.

[19] Bazelon, *supra* note 11.

[20] *Id.*

[21] *Id.*

[22] *See* Elisha Fieldstadt & Katie Wall, *UVA Sorority Members Plan to Skip Parties But Still Don't Agree With Policy*, NBC NEWS (Jan. 31, 2015), http://www.nbcnews.com/news/us-news/uva-sorority-members-plan-skip-parties-still-dont-agree-policy-n297651.

[23] *See* Jeannie Suk, *The Trouble with Teaching Rape Law*, THE NEW YORKER (Dec. 15, 2014), http://www.newyorker.com/news/news-desk/trouble-teaching-rape-law.

dominance.[24] Rather, rape causes a particular problem that "ordinary" sex does not cause. That problem is, in a word, trauma—the type of trauma that makes one fail out of school.[25] A positive aspect of the trauma dialogue's decoupling of rape and patriarchy is that it has the potential to make reform efforts more inclusive: women, men, straights, gays, cisgender, and transgender people can be traumatized by sexual crime.[26] However, conceptual platforms of current anti-rape activism appear to make sexual trauma a function of (female) gender, not just physical harm. Reformers disaggregate the trauma of rape from bodily injury, threat, or violence. "Sexual violence" or "violence against women" has come to describe any number of things from genocidal brutality to sexual innuendo on the web. Recently, I gave several public lectures that, as one might guess, problematized rape reform efforts, and I noticed a phenomenon. Those who lined up to challenge my views were often male students who "got it" and protested that I "don't take rape seriously enough." One such student admonished that we simply cannot afford to be so reflective given the current "epidemic of sexual violence against women" exemplified by, of all things, the I-cloud hacking of nude female celebrity photos.[27]

Activists have consistently blurred the line between forcible intercourse, which is universally distressing, and sex that is ambivalent, internally unwanted, or regretted, which I think it is fair to say many men would not experience as traumatic.[28] Rape reform accordingly reflects and reinforces a status quo in which at least some sex has a different meaning for women and men, and sex is more harmful to women than other ambivalent or regretted, but nonsexual, events[29]—a phenomenon I have elsewhere called "sex exceptionalism."[30] This may please feminists who believe law and policy should reflect a woman-centric view of the world (putting aside the issue of whether the grand trauma narrative does describe

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[24] *See* Megan Gibson, *Will SlutWalks Change the Meaning of the Word Slut?*, TIME (Aug. 12, 2011), http://content.time.com/time/nation/article/0,8599,2088234-2,00.html.

[25] *See* Bazelon, *supra* note 11.

[26] *See* Zenen Jaimes Pérez & Hannah Hussey, *A Hidden Crisis: Including the LGBT Community When Addressing Sexual Violence on College Campuses*, CTR. FOR AM. PROGRESS (Sept. 19, 2014), https://www.americanprogress.org/issues/lgbt/report/2014/09/19/97504/a-hidden-crisis/.

[27] *See also, e.g.*, Jessica Roy, *The Celebrity Nude Photo Leak Is Just Another Form of Online Harassment of Women*, NEW YORK MAGAZINE (Sept. 1, 2014), http://nymag.com/daily/intelligencer/2014/09/nude-celeb-leak-online-harassment-of-women.html#.

[28] *See* Amanda Hess, *How Drunk Is Too Drunk to Have Sex?*, SLATE (Feb. 11, 2015), http://www.slate.com/articles/double_x/doublex/2015/02/drunk_sex_on_campus_universities_are_struggling_to_determine_when_intoxicated.single.html (discussing a rape case where the complainant did not "remember how she felt as the events unfolded—just how she felt before and after").

[29] *See id.*; *see also* Galperin et al., *Sexual Regret: Evidence for Evolved Sex Differences*, 42 ARCHIVES OF SEXUAL BEHAV. 1145, 1146 (2013) (finding gender differences in regret over casual sex and attributing the difference to evolution).

[30] Aya Gruber et al., *An Experiment in Penal Welfare: The New Human Trafficking Intervention Courts*, FLA. L. REV. (forthcoming 2016).

a universal woman's view of such sex). Even so, it is not entirely consistent with student activists' ambition to speak for rape victims of all genders and sexual orientations. To be sure, campus rape reform discourse often seems like an exercise regulating the mating behavior of middle-class hetero college students.

Rape reform theory and policy often conceive of drunken, causal, messy, or ambivalent sex as psychologically devastating and socially stigmatizing, if not potentially life-ruining, for women.[31] In this sense, current reformers adopt, not the radical dominance feminist sex-as-patriarchy position, but an older, distinctly unfeminist view about women who have casual, risky, or otherwise imperfect sex. Can this be squared with post-millennials' embrace of sexy? Perhaps it cannot. The dual standards of sexiness as a source of college women's status and empowerment and bad sex as utter trauma and ruination (the double-bind) sit together like kindling and matches, and they necessitate some mechanism by which women can avoid crossing the ephemeral line between good drunken sexiness and "life-destroying" drunken sex. Incredible as it seems, activists expect this all-important and intensely cryptic line to be policed by drunken prospective male hook-ups and random bystanders.[32] Reform campaigns often put the onus of rape prevention on boys, who must proceed from partying to sex only at their grave peril,[33] or third parties admonished simply to prevent sexual encounters (for example, frat bothers designated to physically block stairs to bedrooms).[34]

These prevention methods are individual, not structural, and require little engagement in the thornier questions of how and whether universities should control student sexual culture and uncomfortable conversations about how much and what type of intercourse these young people, often teenagers, are having on or near campus. Activists and administrators often focus on male self-control and bystander intervention, rather than on regulations directed at students' sex precipitative behavior like drinking, partying, and co-habiting in mixed gender

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[31] *See, e.g.*, Anonymous, *Dear Harvard: You Win*, THE HARVARD CRIMSON (Mar. 31, 2014), http://www.thecrimson.com/article/2014/3/31/Harvard-sexual-assault/.

[32] *See* Somanader, *supra* note 1; Campus SaVE Act, 20 U.S.C. § 1092(f)(8)(B)(i)(I)(dd) (2013) (requiring federal fund recipients to create policies delineating "options for bystander intervention that may be carried out by an individual to prevent harm or intervene when there is a risk of . . . sexual assault"); *It's On Us: Bystander PSA*, YOUTUBE (Nov. 13, 2014), https://www.youtube.com/watch?v=jQbymKIyJns.

[33] *See infra* notes 44–63 and accompanying text. The cultural message is that "real men" help (rather than have sex with) drunk women. Indeed, the first Peabody Award ever given to a viral video went to "A Needed Response," a YouTube upload portraying a teen boy taking care of a passed-out teen girl and stating "Real men treat women with respect." *See A Needed Response (YouTube/Samantha Stendal)* PEABODY (Winner 2013), http://www.peabodyawards.com/award-profile/a-needed-response-youtube-samantha-stendal.

[34] Nick Anderson, *New safety rules announced for University of Virginia fraternity parties*, THE WASHINGTON POST (Jan. 6, 2015), https://www.washingtonpost.com/local/education/new-safety-rules-announced-for-fraternities-at-u-va-a-response-to-rolling-stone-uproar/2015/01/06/5ae2188a-95e0-11e4-927a-4fa2638cd1b0_story.html.

dorms. This focus avoids stirring up opposition from students concerned with autonomy and university managers concerned with the financial bottom line,[35] while allowing the university to claim a robust program of cultural intervention.[36]

Traditional criminal law-like deterrence and banishment are also key components of current rape prevention efforts. But that is nothing new. Even during the old sex wars, feminists debated the role of criminal law in preventing sexual assault and changing perceptions about sex and sexual victimhood and whether reforms should make it easier to prosecute rape cases, given widespread rape tolerance and low reporting rates.[37] Feminist "legal realist" reforms like rape shield laws have frequently been the target of civil libertarian concern.[38] There has been a long-running dispute between those who believe that rape trials should be more prosecution-centric to increase reporting levels and those unwilling to tinker with procedure and risk the conviction of an innocent.[39] This debate is echoed today in scholarly and judicial push-back against the more complainant-friendly aspects of Title IX procedure, such as the lack of cross-examination and preponderance-of-the-evidence standard, which critics say deny respondents' due process.[40]

However, there is something unique about the current massive upheaval to adjudicative procedure in the name of protecting and serving rape complainants. The second-wave feminist reforms (rape shield laws and changes to substantive rape definitions) reflected, at least in part, the goal of enhancing the truth-seeking function of the rape trial process. The idea was that jurors, internalizing widespread biases against rape complainants, were prone to make inferential errors, such as reasoning that having a lot of consensual sex with men in the past raises the probability that the sex with the defendant on the disputed occasion was consensual, or setting aside the issue of consent in favor of determining whether the "slutty" complainant deserved what she got.[41] Rape shield laws, one can therefore argue, actually enhance the reliability of the trial by preventing jurors

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[35] *See* Fieldstadt & Wall, *supra* note 22.

[36] *See* University of Colorado Boulder, *supra* note 9.

[37] *See* Gruber, *supra* note 16, at Part I.B.

[38] *See id.* at 614–15.

[39] See *id*.

[40] *See* Mock v. Univ. of Tennessee, no. 14-1687-II (Tenn. 20th Dist., Part II) (Aug. 4, 2015); Doe v. Washington and Lee Univ., Case No. 6:14-cv-00052 (W.D. Va. 2015); Janet Halley, Trading the Megaphone for the Gavel in Title IX Enforcement, 128 HARV. L. REV. F. 103 (2015).

[41] *See generally* Aya Gruber, *Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape*, 4 WM. & MARY J. WOMEN & L. 203 (1997) (discussing the problems of inferential error and prejudice) [hereinafter Gruber, *Pink Elephants*]; *see* Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1599 (2007) (describing rape shield laws as a counter to prejudice); Lani Anne Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1104 (1993) (discussing the inferential error problem).

from indulging incorrect inferences about the probability that sex was consensual or acquitting because of judgments about the propriety of the victim's precipitating behavior.[42] The same can be said of the affirmative consent standard (requiring a "yes"), which focuses the trial on the "neutral" and administrable question of language versus the contested, messy, and potentially prejudicial question of internal agreement.[43] We will return to affirmative consent a little later.

Today's spate of reforms have far less to do with truth-seeking and are quite openly touted as vindicating other values. Most investigators in college Title IX offices are not sexist lay persons whose prejudices against "loose" women must be strictly policed by unique evidentiary and substantive rules. Rather, they are self-selecting women's rights advocates, former civil rights enforcers, and others deeply concerned with student safety and gender equality.[44] These are hardly the people who would hold a complainant's past and present sexual conduct against her. So why does the university process include shield laws,[45] bans on cross-examining complainants,[46] and increasingly affirmative consent standards?[47] The answer is that such procedures are designed to prevent trauma (the "second rape") and encourage reporting (because adjudication is not an ordeal and produces "justice" for victims).[48] Indeed, the official administrative interpretation of Title

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[42] *See* Orenstein, *supra* note 41, at 1598–99.

[43] *See In re* M.T.S., 609 A.2d 1266, 1274 (N.J. 1992) (judicially creating affirmative consent to move law away from archaic force and resistance standard).

[44] *See, e.g.*, *Meet Valerie Simons, Director of Institutional Equity and Compliance, Title IX coordinator*, UNIV. OF COLORADO (Sept. 12, 2014), http://www.colorado.edu/news/features/meet-valerie-simons-director-institutional-equity-and-compliance-title-ix-coordinator ("I served as a trial attorney for the U.S. Department of Justice, where I enforced civil rights laws, including Title IX. I have also represented numerous students in private practice in Title IX matters, including filing complaints on their behalf with the Office for Civil Rights.").

[45] *See* CATHERINE E. LHAMON, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 31 (2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf ("Questioning about the complainant's sexual history with anyone other than the alleged perpetrator should not be permitted. Further, a school should recognize that the mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence.").

[46] *See* Russlynn Ali, U.S. Dep't of Educ., Dear Colleague Letter 3 (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf ("OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing.").

[47] *See* Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 442 (2016) (noting that "an estimated 1400 institutions of higher education have adopted disciplinary standards that codify an affirmative definition of sexual consent").

[48] *See* Ali, *supra* note 46, at 12 (explaining that cross-examination limitations are necessary because "allowing an alleged perpetrator to question an alleged victim directly may be traumatic"); Lhamon, *supra* note 45, at 31 (noting that procedures are designed to "ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant").

IX tells universities to grant respondents due process, but only if it "do[es] not restrict or unnecessarily delay the Title IX protections for the complainant."[49]

Processes designed to prevent trauma and increase reporting, in a sense, make truth irrelevant. One assumes from the beginning that complainants (or at least a large enough number of them) have been raped and traumatized, such that their need to be protected from re-traumatization trumps the few (or nonexistent) innocent respondents' interests in rigorous truth-seeking. This assumption is apparent in the feminist argument against careful adversarial testing on the ground that complainants are inherently trustworthy because no woman would put herself through the ordeal of a rape case unless she was telling the truth.[50] But then, reforms designed to protect and favor complainants, if successful, eliminate the ordeal-like quality of rape reporting and processing. What then serves as the pre-adjudication check against fabrication that should make us comfortable with truncated and inquisitorial judicial procedures? Stigma? But reforms are targeting that, too. . .

Perhaps the clearest evidence that reform is more about protecting complainants from trauma and encouraging reporting than truth-seeking lies in Title IX's requirement that college disciplinary hearings adopt a preponderance-of-the-evidence standard.[51] This operatively allows findings of guilt without too much (trauma inducing) evidentiary testing and when there is a 49% chance that the rape did not occur, which in turn encourages reporting. Feminists have long justified pro-prosecution reforms in the criminal arena on the ground that the pervasive influence of rape myths, rape-permissive culture, and sexism makes it particularly difficult to achieve rape convictions under ordinary rules, even in clear cases.[52] If fact-finders are really influenced by such cultural beliefs and capitalize on high proof standards to exonerate clearly guilty defendants or nullify rape definitions they disagree with, perhaps a preponderance-of-the-evidence standard strikes a fair distributional balance between conviction of innocents and exoneration of the guilty.[53] Again, however, there is little reason to believe that Title IX investigators are biased *against* rape complainants.

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[49] Ali, *supra* note 46, at 12.

[50] *See, e.g.*, Cary Gee, *The right not to be raped*, TRIBUNE MAGAZINE (July 2, 2015), http://www.tribunemagazine.org/2015/07/the-right-not-to-be-raped/ (asserting that it's "blindingly obvious that no woman (or man) would voluntarily put themselves through such a tortuous process, if there was the slightest chance that they would be proved a liar at the end"); DAWN RAE FLOOD, RAPE IN CHICAGO: RACE, MYTH, AND THE COURTS 148 (2012) (noting the feminist argument that because of "the ordeal of the 'second rape' . . . no woman would willingly go through that unless she were telling the truth").

[51] *See* Lhamon, *supra* note 45, at 13.

[52] *See supra* notes 37–43 and accompanying text.

[53] *See* Gruber, *Pink Elephants*, *supra* note 41, at 206–09 (noting this possibility in the criminal context).

Consider this 2014 University Title IX report that led to the male respondent's expulsion. Investigators concluded, "This is a close call. There is information that tends to support both [complainant's] and [respondent's] version of events. However, we find by a preponderance the evidence that the events likely occurred as [complainant] describes."[54] In the report, the investigators acknowledge that the complainant, who said that between black-outs she recalled respondent pressuring her into sex, had alcohol-related memory issues and that her statements were vague and riddled with inconsistencies.[55] The respondent subsequently gave an interview stating that he was blacked-out during the entire incident, and he provided investigators with physical evidence in the form of pictures of hickeys on his neck the morning after.[56] Investigators proceeded to re-interview the complainant and have her reconcile the inconsistency between her initial story (she "did not touch [respondent] at all") and the photographic evidence, which the complainant accordingly did, explaining "I was trying to make sure nothing would escalate so I may have kissed his neck."[57]

Why do the investigators ultimately credit this complainant? In part, because she "appeared credible," and the "detract[ions] from [her] credibility" could be rationalized because complainant was "retelling the facts of an alleged sexual assault and traumatic events can instill different reactions in different individuals."[58] As Janet Halley points out, certain schools' Title IX procedures are "100% aimed to convince [investigators] to believe complainants, precisely when they seem unreliable and incoherent."[59] In addition to the probability that Title IX investigators will make credibility findings in favor of complainants because of normative priors or structural arguments that render rape complainants credible almost no matter what, administrators may interpret substantive definitions of rape broadly (even to the point of nullifying the definitions) in order to find guilt. In that same Title IX report, investigators appear to credit the respondent's claim that he was blacked-out during the incident, but here's what they say: "With [respondent] in his described 'blackout' state, it is possible that he did become aggressive with [complainant] and forceful with her, resulting in non-consensual sexual contact."[60]

The preponderance-of-the-evidence standard, accordingly, produces disproportionately frequent findings of guilt (in relation to other types of disciplinary allegations) when decision-makers are predisposed toward finding

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[54] Confidential Investigative Report 15 (2014) (on file with author). I obtained this report in my capacity as an expert witness for the respondent.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] Halley, *supra* note 40 (discussing Harvard's Title IX training manual).

[60] Confidential Investigative Report, *supra* note 54.

rape occurred, just as the beyond-a-reasonable-doubt standard arguably permitted disproportionate acquittals, when criminal jurors were predisposed toward disbelieving or disliking rape complainants.[61] This is all to say that the justification of feminist rape reforms as necessary to counter the anti-rape-victim bent of criminal law actors in the 1980s and 1990s does not easily translate to the Title IX reform context, where fact-finders are more likely to lean the opposite direction.

The last thoroughly modern part of the rape reform resurgence is affirmative consent. But wait, you may be thinking, affirmative consent has been around for decades. Indeed, when I was a first-year student in Alan Dershowitz's criminal law class in 1995, we heatedly debated the *In re M.T.S.* case[62] and whether the criminal law should require a "yes" (or its functional equivalent) before intercourse, although to be honest, the debate was primarily between women students who applauded the case and one recalcitrant sex-positive feminist who found the standard entirely unsexy and vanilla. The men said very little. What is different today is the rapid proliferation of affirmative consent standards and how the notion that sex requires a yes, much like the notion that rape is gender subordination, has come to *govern*.[63] Until the last couple of years, affirmative consent was, for the most part, a failed radical reform idea. Championed by theorists as a basic liberal requirement, often through analogy (would a surgeon operate without affirmative consent?),[64] affirmative consent was nonetheless infrequently adopted and even when it was adopted, it was done so in a way that collapsed it with general verbal and nonverbal manifestations of consent.[65] It fared even worse on the cultural front. When Antioch College adopted a rule requiring an expression of consent to each progressive act in a sexual encounter in 1993, the effort made headlines, not because it heralded enlightened changes to come, but because it seemed so utterly outrageous and out of touch.[66] Like anti-pornography ordinances, affirmative consent just seemed to fade away, becoming akin to the

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[61] *See supra* notes 41–42 and accompanying text; *cf.* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 165 (1966) (asserting that factfinders who disagree with the law will conduct their "revolt from the law within the etiquette of resolving issues of fact").

[62] *See In re* M.T.S. 609 A.2d 1266, 1274 (N.J. 1992).

[63] *See* Tuerkheimer, *supra* note 47 at 442.

[64] *See, e.g.*, STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 270 (1998).

[65] *See* Tuerkheimer, *supra* note 47 at 450–
51 (cataloguing "pure" and "diluted" affirmative consent laws).

[66] *See* Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 687 (1999) (describing "vitriolic" reaction to the policy); Bethany Saltman, *We Started the Crusade for Affirmative Consent Way Back in the '90s*, N.Y. MAGAZINE (October 22, 2014), http://nymag.com/thecut/2014/10/we-fought-for-affirmative-consent-in-the-90s.html (noting the policy "became a stand-in for Ridiculous PC Bullshit, mercilessly mocked by pundits, reporters, family members, and even Saturday Night Live").

infamous "cultural defense": a law academics and students enjoy heatedly debating but with little impact in the real world.

Today, affirmative consent is back, and with a vengeance.[67] Affirmative consent has been adopted in hundreds of campus sexual assault codes, championed by prominent legislators and indeed entire state legislatures, and incorporated into drafts of reforms to the Model Penal Code.[68] Perhaps more significantly, affirmative consent is a buzz-word, synonymous with the forward thinking way to deal with legal disputes over sexual assault, if not with sex itself.[69] What is less clear is *why* adherents tout the standard. Is proceeding with sex without a "yes" retributively wrongful? Is affirmative consent, while not morally required, necessary to strike the correct distributional balance between conviction and acquittal of "real rapists"? Proponents and opponents of the standard often start with different empirical and moral presumptions and proceed to just talk past each other. Currently, I am working on a project to structurally map the affirmative consent debate and catalogue the arguments in the hopes of moving the discussion forward in a productive and logical manner.[70] Nevertheless, the current insurgence of affirmative consent often proceeds as if the matter has been resolved, or at least fully vetted, when this is far from the case.

The foregoing has sought to delineate some of the idiosyncrasies of the current conversation about rape. This "new" sex war is a combination of old dialogues and modern concerns, and it is spearheaded by both second-wave dominance feminists like Catharine MacKinnon and undergraduate activists like Emma Sulkowicz.[71] I ultimately part ways with my unimpressed ivy-league colleague because I believe that the today's rape reform redux is not just a banal rehashing of tired arguments. It boasts many new features. To recap, current rape activism occurs in a moment when feminist ideas about coerced sex no longer exist at the margins—they govern and enjoy cultural acceptance, if not hegemony. Current rape activism presumes that to condemn rape is to fight patriarchy itself, even as it elides other questions of sex, patriarchy, and the relationship between the two. Current rape activism wants to grapple with unsettled gender categories and be inclusive, even as it seeks to address harms to women in particular. Current rape activism purports to intervene in student sexual "culture," but when faced with the vagueness and vagaries of student sex, embraces neoliberal, individualistic programs to prevent rape. This new conversation needs fresh, or at least reformulated, perspectives and responses, and this is why I am absolutely delighted with the contributions to this symposium. Each of these articles has

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[67] *See* Saltman, *supra* note 66 (noting the policy's day has come).

[68] *See* Schulhofer, *supra* note 5.

[69] *See* Saltman, *supra* note 66 (observing the internalization of the affirmative consent standard).

[70] *See* Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. (forthcoming 2016).

[71] *See* Bazelon, *supra* note 11.

something new to say about rape and addresses the current conversation, with all its intricacies and novelties.

Deborah Tuerkheimer's *Affirmative Consent* and Kimberly Ferzan's *Consent and Culpability* deepen the understanding of and clarify affirmative consent, something in desperate need of more profound study and theorizing.[72] Although Tuerkheimer's article is a defense of the standard and Ferzan's is most certainly a critique, the articles interestingly do not, at first blush, appear to engage in a direct debate. True of much of the affirmative consent conversation, these articles focus on different things: One on affirmative consent law "in action" and the other on the law's inherent morality (or immorality).[73] Nevertheless, the articles ultimately overlap in interesting ways.

Professor Tuerkheimer looks at whether affirmative consent strikes the right distributional balance between conviction and acquittal of "real" rapists.[74] This is not the philosophical issue of whether proceeding with sex without a "yes" is wrongful. It is not the reliance question of whether the law can impose a standard of conduct that few have notice of. Rather, this articles falls within a legal realist tradition—it seeks to figure out exactly what affirmative consent *does*. Specifically, Tuerkheimer wishes to respond to the argument touted by some affirmative-consent opponents that the effect of the standard is to jail those who believe, even reasonably, that they have consent but do not obtain the "magic words," what Tuerkheimer calls "miscommunication cases."[75]

Tuerkheimer seeks to subject this claim to some testing. Noting that affirmative consent, or something like it, has been part of certain state's legal systems for years, the author looks to published appellate cases to get a sense of just what jurisprudential work affirmative consent is doing.[76] Her findings are instructive, albeit unsurprising: there are very few cases where the defendant plausibly claims a reasonable belief in consent, but the affirmative consent standard compels the jury to convict. Instead, the affirmative consent standard tends to crop up in appellate cases having little to do with whether or not the complainant said "yes," but rather in cases involving sleep, intoxication, and force. Certainly, if the prosecution's case is about the defendant having sex with an unconscious or incapacitated person or using violence, then it is not a miscommunication case. The prosecution is not saying, "well, he might have though there was consent, but there was no 'affirmative consent' so you must convict."

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[72] *See generally* Tuerkheimer, *supra* note 47; Kimberly Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397 (2016).

[73] *See* Tuerkheimer, *supra* note 47; Ferzan, *supra* note 72.

[74] Tuerkheimer, *supra* note 447.

[75] *Id.* at 444–47.

[76] *Id.* at 451–464.

This distributional analysis of the law is extremely helpful and advances the debate immensely, but lingering questions remain. Here's how affirmative consent appears to works in the cases Professor Tuerkheimer discusses: The prosecution says the victim was asleep/incapacitated/deathly afraid. The defendant says that the victim was not and in fact consented. The court upholds the conviction because the jury could find that the victim was asleep/incapacitated/deathly afraid and therefore did not affirmatively consent. So clearly these are not miscommunication cases, and as the author notes, it should give comfort to those worried that good people who do not get the "yes" will be prosecuted.[77] Fair enough. But then one is left to wonder—exactly what *is* the affirmative consent standard doing that existing unconsciousness, incapacitation, and force standards cannot do? If the answer is that it gives prosecutors an avenue to gain convictions in close cases involving weak evidence that the complainant was sleeping/incapacitated/threatened, the question becomes: do we want that? If affirmative consent is essentially a trump card to the prosecution in charging, plea bargaining, and trying cases, one might seek another distributional analysis—one that determines whether this trump will affect just "real" rapists who manipulate the system or whether it will distribute to those (poor minorities) who traditionally bear the brunt of police and prosecutorial power.

Professor Ferzan's article, although about affirmative consent, could not be more different. Far from looking at the practical effects of the law, Ferzan seeks to illuminate whether affirmative consent can be squared with retributive morality.[78] Ferzan makes the case that the notion of consent that best comports with common moral understanding is "willed acquiescence,"[79] that is, a state of *internal* agreement, regardless of external communication. A defendant is thus culpable when she knowingly or recklessly imposes sex on a person who has not willingly acquiesced. A person who knowingly has sex without a "yes," although he may be heedless or disrespectful, has not acted immorally. With these premises, the author asserts that affirmative consent is in essence a form of strict liability—without a "yes," the defendant is liable for unconsensual sex even if she reasonably believed that the victim internally acquiesced.[80] Ferzan also considers the possibilities that affirmative consent acts like a form of "rule-like" negligence (acting in the absence of a "yes" reflects unreasonableness) or negligence per se (the law declares that the absence of a "yes" is unreasonable).[81]

Consent and Culpability is ultimately a critique of affirmative consent because Ferzan rejects both strict liability and negligence as sufficiently culpable

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[77] *Id.* at 467–68.

[78] Ferzan, *supra* note 72, at 397–98.

[79] *Id*.

[80] *Id.* at 417–18.

[81] *Id.* 424–27.

mental states for criminal liability.[82] Many would agree that strict liability is anathema to just criminal law, especially for serious felonies. Defenders of the affirmative consent rule, however, argue that is not strict liability because defendants must have mens rea regarding whether or not the victim said "yes." I agree with Ferzan that this argument is unsatisfying from a penal theoretical perspective because it avoids the issue of whether sex without a yes is substantively wrongful. But then Ferzan does not take the position that one can never outlaw non-wrongful conduct (i.e. possession of burglary tools) in an effort to get at wrongful conduct (burglary). Rather, the permissibility of the rule outlawing "innocent" conduct turns on whether "the rule matches its background justification," that is, "if the rule is too over inclusive, we can rightly complain about whether the rule is justly punishing."

Fascinatingly, this inquiry converts the abstract moral question of the retributive validity of affirmative consent into a practical *distributional* question of whether the standard deters rape and punishes the guilty without preventing too much good sex and punishing too many innocents. In Ferzan's view, the sheer breadth of the standard risks preventing and punishing a lot of ordinary sex and ordinary people.[83] But what if, as Professor Tuerkheimer indicates, affirmative consent does not operate this way? What if, because of honest complainants, good prosecutors, etc., affirmative consent ends up striking the right balance and primarily punishing "real rapists," without discouraging ordinary sex? Ultimately then, affirmative consent's moral character might simply be a function of status quo facts like whether people generally say (or act) "yes" and if prosecutors and juries use the law only to convict in clear cases of rape. Thus, we might all think more about the kind of empirical information necessary to render the standard philosophically palatable.

Let us shift gears away from affirmative consent and consider other features of the current rape conversation. One of the more salient aspects of today's anti-rape movement is widespread acknowledgement that rape reflects patriarchy.[84] Although part of the dialogue is about protecting victims of all sexes from perpetrators of all sexes, anti-rape activism nonetheless appears distinctively feminist. Rape reform is often conceived of as part of a larger effort to dismantle sexist culture on campus. Both David Bryden's article, *Is Patriarchy a Cause of Rape?*, and Erin Collins' article, *The Criminalization of Title IX*, intervene in this conversation. Professor Bryden's article problematizes the assumption that rape frequency bears a directly proportional relationship to the degree to which a society is patriarchal.[85] Comparing Puritan communities in the 18th Century and

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[82] *Id.* at 427.

[83] *Id.* at 433–35.

[84] *See supra* notes and accompanying text.

[85] *See generally* David Bryden, *Is Patriarchy a Cause of Rape?*, 13 OHIO ST. J. CRIM. L. 299 (2016); Erin Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365 (2016).

modern American society, Bryden disrupts the common wisdom that rape and patriarchy necessarily go hand-in-hand and uncovers the ways in which rape is connected to sex-permissiveness, co-habitation, and co-education—politically liberal phenomena associated, not with women's repression, but with women's liberation.[86] The article thus demonstrates that the relentless focus on the costs of rape-permissive legal and cultural arrangements may obscure the very serious costs of structuring law and culture around rape prevention.

In *The Criminalization of Title IX*, Erin Collins also examines the connection between rape and patriarchy. However, she criticizes current rape discourse, not by delinking rape and patriarchy, but by arguing that campus rape reforms do not actually address patriarchal structures and cultures within the University.[87] The author begins by noting that Title IX was originally about controlling institutional bias.[88] As such, Title IX served as a check on universities' authority over students, at least when it came to actions that created gender disparities.[89] Over the years, as Title IX extended outside of the sports funding arena to cover sexual harassment and sexual assault, it spawned a regime of *individual* student responsibility to be managed and enforced through the authority of the university.[90] In this sense, Title IX is less a check on than an amplification of institutional power. Collins criticizes what she sees as the importation of the criminal law model of gender crime enforcement into the Title IX regulation on the ground that the preoccupation with individual student discipline has high administrative and human costs and deflects from how university institutions, themselves, contribute to rape.[91] The author attributes this "myopic" focus on punishment to the influence of "carceral feminists," who emphasize the role of criminal law in achieving gender justice, and university financial managers, who over-discipline respondents in order to "take rape seriously" without having to reconfigure profitable institutional structures.[92]

Collins argues that the current criminal law-like structure of Title IX enforcement undermines the legislation's "transformative potential."[93] Accordingly, the article calls for de-emphasizing the individualist and punitive aspects of Title IX in favor of robust enforcement against universities in which "the institution, its agents, and its practices promote and perpetuate sexual violence."[94] It envisions university liability that is tied, not to lax enforcement

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[86] Bryden, *supra* note 85, at 302.

[87] Collins, *supra* note 85, at 365–68.

[88] *Id.* at 373.

[89] *Id*.

[90] *Id.* at 374.

[91] *Id.* at 376.

[92] *Id.* at 392.

[93] *Id.* at 368.

[94] *Id.* at 392.

against individual accused students, but to laxity policing student culture.[95] However, as I note above, the questions of if and how universities should prospectively control rape-permissive student behavior are thorny and implicate issues of liberty—including that of female students. Collins suggests, for example, that schools ban fraternities or at least their bacchanalian parties.[96] I am sympathetic to this notion, never myself having been a fan of the Greek system, its sexist and racist parties, elitism, neoliberalism, production of hierarchical culture, violence, preservation of privilege and other fraught characteristics. In fact, party-induced sex may be the least of the problems. But one can question whether a frat ban will materially curb student partying and, if it does not, how far a university should go in controlling student's hedonic behavior. As Professor Bryden suggests, there is a complex balance to be maintained between rape prevention and the progressive of co-education, intemperance, and sexual liberation.[97]

A discussion of fraternities naturally transitions to the final issue in this introduction—the very gendered and heteronormative nature of current rape dialogue, despite reformers' ambitions to be inclusive and gender neutral. Professor Bennet Capers is one of the most well-known and respected critics of the gender exclusivity of rape reform dialogue and laws. He has argued forcefully that the notion of rape as something that men do to women in particular, cements sex stereotypes and differences and renders invisible male victims of sexual violence. Whether the rape issue should be gendered or gender neutral is indeed a persistent conundrum. Second-wave feminists fought to demonstrate that rape reflects, not just individual deviance, but male supremacy. Thus, making the discussion neutral can feel like a step backward. However, as Capers and others have pointed out, assuming that rape is simply a matter of what men do to women both hides how destructive norms of masculinity transcend individual gender and how sexual assault can be a product of other inequities (i.e. prison dynamics, homophobia, etc.).

Capers dives once again into this conundrum in his essay, *On "Violence Against Women*."[98] Here, he interrogates the discourse of current rape reform, particularly the timeworn phrase "violence against women."[99] The primary critique is that the terms violence and women are underinclusive.[100] The discourse of violence undercounts the many types of harms that one individual might exact upon another, such as psychological damage, and "women," obviously excludes many victims.[101]

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[95] *Id.* at 391.

[96] *Id*.

[97] Bryden, *supra* note 85, at 313.

[98] Bennet Capers, *On "Violence Against Women"*, 13 OHIO ST. J. CRIM. L. 347 (2016).

[99] *Id.* at 348.

[100] *Id.*

[101] *Id.* at 352.

Capers goes on to consider one popular approach that appears to provide a way out of the conundrum: Martha Fineman's vulnerability theory.[102] Vulnerability theory is an effort to liberate progressive law reform from confining anti-discrimination categories, such as race, gender, disability, etc., and re-envision it as an effort to eliminate the "shared vulnerability" of the human condition.[103] Fineman thus asks theorists and lawmakers to be responsive to "the goal of eliminating material, social, and political inequalities that exist across groups."[104] Vulnerability theory, according to Capers, initially appears like a "welcome intervention" in the rape/gender neutrality discussion because, like feminism, it views rape as a product of larger inequality rather than individual deviance, but it does not confine such inequality to women.[105] "In short," Capers notes, "it could protect everyone."[106] Professor Capers, however, questions whether vulnerability theory undermines the subjectivity of marginalized people and presages too much top-down government intervention.[107] Ultimately, he calls for a theory of rape that is more attuned to the agency of those who suffer sexual harms.

In conclusion, this symposium aspires to, at once, clarify and complicate the current conversation on rape reform. It clarifies that millennial rape activism is not just a resurrection of second-wave feminism and that current debates have their own features, which are new, idiosyncratic, and multifaceted. The rape issue is complex in its nature, and not necessarily best addressed through expansive punitive reform spurred on by spectacular rhetoric. Yet one of the features of the new conversation is that reformers have gained a near-full occupation of the moral high ground. Those who care deeply about gender equality no doubt feel pressure to join the anti-rape juggernaut and applaud university administrators' and lawmakers' efforts to rapidly push through change that is popularly characterized as "long overdue."

I believe, however, that we should not give into this temptation so readily. We need to think hard about the implications of both increasing state carceral power and university disciplinary authority. We need to consider the cultural messages about sex and gender that are being generated in this moment of intense activism. We need to be precise in our tracing of the distributional effects of law reforms, not just immediately, but over time. All of this takes patience and effort and is much less psychically gratifying than beating a political drum in the name of gender justice. Nevertheless, thirty years of experience with wars on crime and mass incarceration should demonstrate that laws passed hastily in the wake of

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[102] Martha Alberton Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1 (2008).

[103] *Id.* at 12.

[104] *Id.* at 4.

[105] Capers, *supra* note 98, at 356.

[106] *Id.*

[107] *Id.* at 359–61.

spectacular stories of violence, fears of immoral sexuality, or panics over sexual violence rarely produce results satisfactory to those who care about justice for marginalized individuals. Moreover, we should be cautious given the history of prosecutors and legislators publicizing crime victims' unquestionable veracity, special access to information, and emotional fragility to push through tough-on-crime policy and shut down critical debate. Let us slow it down, calm it down, and revisit rape reform in a way that reflects the varied and heterodox lessons we have learned in the last several decades about gender, sexuality, and criminal law.