

Anti-rape Culture

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INTRODUCTION

Anti-rape activism is a cultural juggernaut that has heralded a new era of discipline, in all senses of the word, on campus. This essay is critical of many facets of the phenomenon, and I write it with a sense of trepidation, in a climate where being a good feminist—or anything other than a ranging misogynist—necessitates supporting expansive rape definitions, eschewing due process, and favoring swift punitive action. I hesitate, not only because anti-rape activism has achieved nearly full occupation of the moral high-ground,¹ but also because the political energy of the movement has revitalized a feminism that many, until recently, considered “dead.” Like Susan Brownmiller, who excitedly dubbed the campus anti-rape movement the “fourth wave of feminism,”² my heart leavens at the sight of a coed wearing a “This Is What a Feminist Looks Like” T-shirt and bonding with fellow “womyn” to rewrite “herstory.”³

A feminist political resurgence is normally ground for progressive rejoicing. However, in this case, one might rightfully worry that feminism has reincarnated as a single-issue movement centering on punishment of sex that ranges from violent to ambiguous, and its antecedents. And this feminism might actually be illiberal and possibly regressive. Moreover, the movement’s tendency to eschew limits on punitive power, procedural or substantive, on the ground that it is

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1. Carol Vance’s reflection on the treatment of “sex radical” feminists opposed to the anti-porn agenda of the 1980s is particularly relevant: “Feminists suffered ostracism, lost colleagues, friends and opportunities, and still *carry the weight* of the seemingly distanced and benign euphemism for stigma, ‘too controversial.’” Carol S. Vance, *More Danger, More Pleasure: A Decade After the Barnard Sexuality Conference*, 38 N.Y.L. SCH. L. REV. 289, 298 (1993).

2. Claire Gordon, *When America Started Caring About Rape*, AL JAZEERA AM. (Mar. 20, 2015, 9:00 AM), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/3/20/susan-brownmiller-rape.html> (quoting Susan Brownmiller).

3. See Eleanor Goldberg, *‘Feminist’ T-Shirt Backed by Women’s Group Made in Sweatshop: Report*, HUFFINGTON POST (Nov. 3, 2014, 5:06 PM), http://www.huffingtonpost.com/2014/11/03/feminist-t-shirt-sweatshop_n_6094722.html.

difficult to counter pervasive, mutable “rape culture” is costly.⁴ Experience shows that feminist ideas and proposals can be co-opted by managerial actors with very different values and priorities—managerial actors who should be subject to legal outer limits.⁵

I. RAPE CULTURE

The term rape culture is so discursively prolific as to be banal. The blogosphere is rife with critiques of rape culture, which is said to include everything from brutal sexual assaults to jokes about sex, women’s general inequality, casual sex, catcalling, child beauty contests, and—of course—legal and political critique of campus disciplinary reform.⁶ The term’s expansiveness and slippery nature renders it unhelpful in identifying how law and policy should specifically address violent or otherwise harmful sex.⁷ Critical analysis of rape culture really boils down to the claims that we are part of it, it is terrible, and we need to do something—anything—to eradicate it.⁸ In the past few years, publicity about rape culture and the campus rape crisis have created widespread anxiety over rampant violence committed by college men participating in entrenched norms—anxiety that justifies top-down punitive intervention

4. See Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 114 (2015), <http://harvardlawreview.org/2015/02/trading-the-megaphone-for-the-gavel-in-title-ix-enforcement-2/> [hereinafter *Trading the Megaphone*] (pointing to the existence of a dangerous bias that favors female complainants and suggesting the bias may be motivated by a desire to change a culture in which men have more power than women).

5. See generally ROSE CORRIGAN, *UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS* (2013).

6. See, e.g., Ryan Broderick et al., *What Is Rape Culture?*, BUZZFEED NEWS (Feb. 5, 2014, 5:43 PM), <http://www.buzzfeed.com/ryanhatesthis/what-is-rape-culture#cymVe3Mo>; *Rape Culture*, MARSHALL U. WOMEN’S CTR., <http://www.marshall.edu/wcenter/sexual-assault/rape-culture/> (last visited Mar. 2, 2016 [hereinafter MARSHALL U. WOMEN’S CTR.]); Alana Prochuk, *Rape Culture Is Real—And Yes, We’ve Had Enough*, WOMEN AGAINST VIOLENCE AGAINST WOMEN (Apr. 18, 2013), <http://www.wavaw.ca/rape-culture-is-real-and-yes-weve-had-enough/>; Melissa McEwan, *Rape Culture 101*, SHAKESVILLE (Oct. 9, 2009), <http://www.shakesville.com/2009/10/rape-culture-101.html>; see also Julia Kacmarek & Elizabeth Geffre, *Rape Culture Is: Know It When You See It*, HUFFPOST C. (June 1, 2013, 10:16 PM), http://www.huffingtonpost.com/julia-kacmarek/rape-culture-is_b_3368577.html (discussing various meanings of the phrase *rape culture*).

7. One blogger states: “Rape culture is the myriad ways in which rape is tacitly and overtly abetted and encouraged having saturated every corner of our culture so thoroughly that people can’t easily wrap their heads around what the rape culture actually is.” McEwan, *supra* note 6. The Marshall University Women’s Center, for example, tells students to “combat Rape Culture” by “[d]efin[ing] your own manhood or womanhood.” MARSHALL U. WOMEN’S CTR., *supra* note 6.

8. See, e.g., McEwan, *supra* note 6; Prochuk, *supra* note 6 (“The thing is, rape culture is real and huge and everywhere. It is both a root cause of violence and a devastating form of violence in its own right.”).

and moves women to live in fear, or at least stress.⁹

Rape culture appears in the public discourse as a phenomenon of post-millennial, Generation Z society.¹⁰ However, incidents of rape, including campus rape, have declined over the past twenty years.¹¹ Rape appears to be more common among college-aged nonstudents than students.¹² One-in-five/four-type statistics have been around for decades.¹³ That the landscape has remained largely static underlies reformers' claims that change is "long overdue."¹⁴ It is not rape culture that has emerged in the last couple of years amidst screaming headlines, campus activism, and federal government dictates, but a new movement all together—one that, among other things, has resurrected the apologue of rape culture.¹⁵ The changed circumstances that undergird the surge of

9. See Douglas W. Pryor & Marion R. Hughes, *Fear of Rape Among College Women: A Social Psychological Analysis*, 28 VIOLENCE & VICTIMS 443, 444 (2013) (discussing existing literature indicting that "[f]ear of rape has been found to increase with perceived risk of victimization and the perceived seriousness of rape" and that "[f]ear of rape exerts social control over women, restricting choices about social activities, living arrangements, dress and style, personal associations, and daily movement"); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581 (2009) [hereinafter *Rape, Feminism*] (discussing this fear); cf. Jodi Lane et al., *Fear of Violent Crime Among Men and Women on Campus: The Impact of Perceived Risk and Fear of Sexual Assault*, 24 VIOLENCE & VICTIMS 172 (2009) (finding fear of sexual assault more predictive of women's general fear of crime than perception of actual risk of crime).

10. Lauren Kelley, *America Has a Rape Problem—and Kate Harding Wants to Fix It*, ROLLING STONE (Aug. 24, 2015), <http://www.rollingstone.com/culture/features/america-has-a-rape-problem-and-kate-harding-wants-to-fix-it-20150824#ixzz3xB8NxHqW> (interviewing activist author who describes the term *rape culture* as a contemporary phenomenon).

11. See SOFI SINOZICH & LYNN LANGTON, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013, 3 (2014) [hereinafter *2014 DOJ Study*], <http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> (showing general decline in rapes on and off campus in Figure 2); Michael Planty et al., *Female Victims of Sexual Violence, 1994–2010*, U.S. DEP'T JUST. BUREAU JUST. STAT. 1 (Mar. 2013), <http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf> (showing the same general decline in Figure 1). This decrease probably cannot be attributed to an uptick in non-reporting, given that reporting rates have precipitously increased in the last few years. See Joseph Shapiro, *Campus Rape Reports Are Up, and Assaults Aren't the Only Reason*, NPR NEWS (Apr. 30, 2014, 7:04 PM), <http://www.npr.org/2014/04/30/308276181/campus-rape-reports-are-up-and-there-might-be-some-good-in-that> (stating that campus rape reports increased 49 percent from 2008 to 2012).

12. See *2014 DOJ Study*, *supra* note 11, at 1 (Figure 1).

13. My very first law review article, written in 1996 and published in 1997, cited to such statistics. See 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, 205 n.4 (1997).

14. See, e.g., Tyler Kingkade, *College Sexual Assault Survivors Form Underground Network to Reform Campus Policies*, HUFFINGTON POST (Mar. 21, 2013, 1:35 PM), http://www.huffingtonpost.com/2013/03/21/college-sexual-assault-survivors_n_2918855.html.

15. See Broderick et al., *supra* note 6 (noting that the term "was first used by feminists in the 1970s but has become popular in recent years"). The term *rape culture* has been around for decades. See, e.g., N.Y. RADICAL FEMINISTS, *Rape: The First Sourcebook for Women* 105 (Noreen Connell & Cassandra Wilson eds., 1974).

interest in reform is less an ascendance of rape tolerance than a newfound rape intolerance—the emergence of an “anti-rape culture.”¹⁶ In many ways this is a great thing. We should be rape impermissive. But as with all political energy directed against individual bad behavior, there are grounds for caution.

By the term anti-rape culture, I mean a set of empirical conclusions of rape’s prevalence, causes, and effects and a set of normative ideas about sex, gender, and institutional authority. Anti-rape culture weighs in decisively on the most pressing and controversial questions regarding campus sexual assault. What constitutes rape? Many forms of sex. How prevalent is it on campus? Ubiquitous, epidemic-level. What causes it? Bad men and bad culture. How do or should victims feel? Traumatized. How should institutions respond? Through swift and decisive discipline. Because many others have thoughtfully analyzed the procedural aspects of campus reform,¹⁷ my remarks focus on the way the discourse of anti-rape culture describes the actual world in which legal reform should intervene. In short, it is a world in which a quarter of women in college will fall victim to a sexual predator who brutalizes her—leaving her traumatized and scarred, possibly for life.¹⁸

Hyperbole has always played an important role in political activism.¹⁹ However, critical commentators warn of the dangers of publicizing stories of horrific criminality, even in an effort to pursue justice for members of subordinated groups.²⁰ Indeed, hyperbole

16. The meaning of *culture* is contested among sociologists and anthropologists, but I will draw on Ann Swidler’s definition of culture as the “set of symbolic vehicles [rituals, stories, sayings] through which [social] sharing and learning take place.” ANN SWIDLER, *TALK OF LOVE: HOW CULTURE MATTERS* 12 (2001).

17. See, e.g., *Trading the Megaphone*, *supra* note 4.

18. *Sexual Assault: Myths and Facts*, ROGER WILLIAMS U. COUNSELING CTR., <http://www.rwu.edu/campus-life/health-counseling/counseling-center/sexual-assault/rape-myths-and-fac> (last visited Feb. 5, 2016) (reciting “facts” including one in five women have been “sexually assaulted while in college,” “[p]erpetrators often prey on incapacitated women,” and “sexual assault victims often suffer from a wide range of physical and mental health problems that can follow them for life—including depression, anxiety, chronic pain, diabetes, sexually transmitted diseases, eating disorders, and post-traumatic stress disorder”).

19. See Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 *BUFF. L. REV.* 1275, 1276, 1316 (1999) (“Anecdote, when well deployed, may be an effective tool in challenging the authority or universality of the conventional narrative.”).

20. See, e.g., Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 *J. CRIM. L. & CRIMINOLOGY* 829, 841 (2001) (“[T]he war on crime is fueled by images of [vengeful victims] of horrific crimes.”); Lynne Henderson, Commentary, *Co-opting Compassion: The Federal Victim’s Rights Amendment*, 10 *ST. THOMAS L. REV.* 579, 584 (1998) [hereinafter *Co-opting Compassion*] (observing that “[v]ictims’ are ‘blameless,’ innocent, usually attractive, middle class, and white” persons subjected to “particularly brutal homicides”); Alice

regarding criminally deviant sex should be regarded with particular skepticism. Criminal theorists have ample experience with moral panics over sex and the troubling legal policies they create.²¹ Moreover, anti-rape culture emphasizes harm constituted by post-event mental trauma, which is difficult to quantify and is produced, in part, by internal, cultural, and social conditions.²² There is accordingly a danger that the discourse of damage used to push through positive reform will create the very dystopia reformers fear. To put it plainly, anti-rape culture establishes sex as a site of fear, shame, and lasting distress, particularly for women, during a highly-sexualized and sex-permissive era, not likely to become chaste any time soon.²³

II. ANTI-RAPE CULTURE

A. *The Ubiquity of Campus Rape*

One of the most forceful messages of anti-rape culture is that campus rape is ubiquitous and brutal—the conduct is both widespread and

Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 575 (2011) (“[W]e are presently ill-equipped to disentangle understandable concern for bodily safety from irrational fear, prejudice, or thoughtless punitiveness.”).

21. See Vance, *supra* note 1, at 295 n.12 (“Sex panics, characteristic of English-speaking countries in the past 150 years, mobilize fears of social pollution in an attempt to draw firm boundaries between legitimate and deviant individuals and forms of sexuality.”). Catherine L. Carpenter explains:

When the official reaction to a person, groups of persons or series of events is out of all proportion to the actual threat offered, when experts, in the form of police chiefs, the judiciary, politicians and editors perceive the threat in all but identical terms, and appear to talk with one voice of rates, diagnoses, prognoses and solutions, when the media representations universally stress sudden and dramatic increases . . . then we believe it is appropriate to speak of a moral panic.

Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1, 37 (2010) (citing Philip Jenkins, *Failure to Launch: Why Do Some Social Issues Fail to Detonate Moral Panics?*, 49 BRIT. J. CRIMINOLOGY 35, 35 (2009) (quoting STUART HALL ET AL., *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* 16 (1978))). Authors have traced the effects of “moral epidemiology” on public sexual health policy. See Roger Davidson, *The Price of the Permissive Society: The Epidemiology and Control of VD and STDs in Late-Twentieth-Century Scotland*, in *SEX, SIN AND SUFFERING: VENEREAL DISEASE AND EUROPEAN SOCIETY SINCE 1870* (Davidson & Hall eds., 2001).

22. See *infra* notes 72–78 and accompanying text.

23. One study has linked the sex permissiveness of the United States to higher rates of unwanted sex, hypothesizing that “U.S. women no longer possess the traditional ‘excuses’ for avoiding premarital sex and have not yet developed the interpersonal skills required to assert themselves.” 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, 130 (1994).

nightmarish.²⁴ Like other tough-on-crime movements, the campus anti-rape movement utilizes the language of “crisis” and “epidemic” to push through rapid, broad, and contestable policy changes.²⁵ However, experience shows that, in contrast to the many heated messages about pervasive criminal menaces, ubiquity and abject brutality do not often go hand-in-hand.²⁶ For example, moral panic over child sex offenses spurred some of the most regressive criminal law policies—policies universally rejected by progressive commentators, including feminist rape reformers.²⁷ That panic rested on images of brutal child rape or murders committed by strangers, combined with statistics about the likelihood of child sexual assault.²⁸ But, in fact, the publicized brutal crimes are exceedingly rare, and the more common crimes involve

24. See, e.g., Sabrina Rubin Erdely, *A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE, Nov. 19, 2014 (describing a violent campus rape and the university’s “culture of hidden sexual violence” before the article was discredited); Vanessa Grigoriadis, *Campus Rape, Still a Nightmare*, N.Y. MAG. (Dec. 22, 2014, 1:35 PM), <http://nymag.com/thecut/2014/12/campus-rape-still-a-nightmare.html>; Sally Williams, *Campus Nightmare: Female Students on the Rise of Sexual Harassment*, GUARDIAN (Oct. 11, 2014, 4:00 PM), <http://www.theguardian.com/education/2014/oct/11/campus-nightmare-female-students-rise-sexual-harassment>; see also *infra* note 35.

25. See *infra* note 37. See also, e.g., Tara Culp-Ressler, *New Study Finds ‘Epidemic Level’ of Rape on College Campus*, THINKPROGRESS (May 20, 2015, 2:02 PM), <http://thinkprogress.org/health/2015/05/20/3661010/campus-rape-surveys/>; Alex Morris, *‘The Hunting Ground’: Inside a Crucial Look at the Campus-Rape Crisis*, ROLLING STONE (Mar. 3, 2015), <http://www.rollingstone.com/movies/features/the-hunting-ground-inside-a-crucial-look-at-the-campus-rape-crisis-20150303#ixzz3xFnXaarg> (noting that the film “tackles not just the epidemic of rape on campus—the film notes that more than 100,000 college students will be sexually assaulted in the coming year—but also the way in which universities cover it up”); Anya Jaremko-Greenwald, *Kirby Dick and Amy Ziering on Exposing the Horrifying Campus Rape Epidemic in ‘The Hunting Ground’*, INDIWIRE (Feb. 26, 2015, 10:39 AM), <http://www.indiewire.com/article/kirby-dick-and-amy-ziering-on-exposing-the-horrifying-campus-rape-epidemic-in-the-hunting-ground-20150226>.

26. Crisis-speak is one of the hallmarks of a moral panic. See STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS xxvi–xxvii* (1972) (observing that moral panic, in addition to “moral outrage towards the actors (folk devils) who embody the problem,” involves “an exaggeration of the number or strength of the cases, in terms of the damage caused, moral offensiveness, potential risk if ignored”).

27. See Carpenter, *supra* note 21, at 36–37; Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1605–21 (2014); Bela August Walker, *Essay: Deciphering Risk: Sex Offender Statutes and Moral Panic in a Risk Society*, 40 U. BALT. L. REV. 183, 212–13 (2010); Heather Ellis Cucolo & Michael L. Perlin, *‘They’re Planting Stories in the Press’: The Impact of Media Distortions on Sex Offender Law and Policy*, 3 U. DENV. CRIM. L. REV. 185, 186–88 (2013); Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 154 n.116 (2001).

28. See, e.g., 148 CONG. REC. H916 (daily ed. Mar. 14, 2002) (statement of Rep. Mark Green) (“[T]his [Two Strikes and You’re Out Child Protection Act] is simply about taking these sick monsters off the streets, . . . to try to end the cycle of horrific violence that is every parent’s nightmare.”).

lower-level sexual touchings perpetrated by familiars and often other children.²⁹ It is thus important to interrogate zero-tolerance policy based on a purported epidemic of brutal crimes and determine exactly *what* is ubiquitous and whether *that* is brutal.

Ubiquitous is the tendency for anyone talking about campus rape to start with a claim that one in four or five women on campus will be raped, as if it speaks for itself.³⁰ The one-in-five statistic unremittingly broadcasted by the federal government comes from the 2007 Campus Sexual Assault survey (CSA),³¹ a survey declared by the White House as the gold standard to be replicated in universities across the nation.³² The study has been lauded for avoiding the “undercounting” problem, that is, a problem linked to respondents’ unwillingness to classify unambiguously violent sexual victimization as “rape.”³³ While this labeling problem merits methodological accommodation, the same

29. See Mona Lynch, *Pedophiles and Cyber-Predators As Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529, 545 (2002) (noting that in political discourse, the “male predator was never described as a family member, neighbor, or friend of potential victims” and that “only about 3% of sexual abuse against children is committed by strangers”); McLeod, *supra* note 27, at 1556–73; see also David Finkelhor et al., *Juveniles Who Commit Sex Offenses Against Minors*, U.S. DEP’T JUST. JUV. JUST. BULL. 1–2 (Dec. 2009), <https://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf> (“Juveniles account for more than one-third (35.6 percent) of those known to police to have committed sex offenses against minors.”).

30. Here, I do not analyze methodology but rather interrogate the substantive labels and normative commitments of the studies and popular interpretations of them. So, for example, I need not emphasize that the American Association of Universities (one-in-four) survey may be deeply influenced by selection bias. DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT (Sept. 21, 2015) [hereinafter AAU Study], https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf. The authors note that there is a low response rate overall (19.3%), and across the twenty-seven schools, the high response-rate schools fairly consistently had the highest rates of sexual assault. *Id.* at vi–vii. The authors therefore caution that “the survey estimates related to victimization and selected attitude items may be biased upwards (i.e., somewhat too high).” *Id.* at vii. The CSA study has less an issue of selection bias and more an issue of limited scope. See Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 11:53 PM), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html (quoting lead author Christopher Krebs as stating that the “one in five is a nationally representative statistic” because the study only sampled two schools).

31. CHRISTOPHER KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY (Dec. 2007) [hereinafter CSA], <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (containing final report prepared for the National Institute of Justice).

32. See *Climate Surveys: Useful Tools to Help Colleges and Universities in Their Efforts to Reduce and Prevent Sexual Assault*, NOT ALONE, <https://www.notalone.gov/assets/ovw-climate-survey.pdf> (last visited Feb. 5, 2016).

33. See *id.* at 16.

concern is not extended to labeling practices that may overcount rape. A study could ask people to describe recent disturbing sexual incidents and simply categorize them by type (i.e. sex involving mild drinking, vomiting, violence, fear without violence, “no,” unexpressed nonconsent, deception, regret, etc.), without labeling such incidents as sexual assault. Instead, the CSA imposes its own broad substantive definitions of sexual assault. “Sexual assault” includes unwanted sex when “someone [was] holding you down with his or her body weight” or when “unable to provide consent or stop what was happening” because of “voluntarily consumed alcohol or drugs.”³⁴ Thus, the study categorizes as rape drunken, but not debilitated, sex and sex when one is on top of an ambivalent partner.³⁵

Similarly, reformers and lawmakers have seized on the 2014 American Association of Universities (AAU) survey,³⁶ which purports to demonstrate that one in four female college students has been raped, as proof positive of the crisis.³⁷ In the survey, “sexual assault” includes both “penetration” and “contact,” which, in turn, encompasses “kissing” and “grabbing, groping or rubbing against the other in a sexual way, even if the touching is over the other’s clothes.”³⁸ The AAU study incorporates the same broad language regarding coercion and intoxication as the CSA,³⁹ and also measures “sexual misconduct,”

34. CSA, *supra* note 31, at A-1 to A-2. The study makes the deliberate choice of labeling such sexual incidents as “sexual assault,” while refusing to do so for sex procured through verbal or emotional pressure. *Id.* at 1–3.

35. *See id.* at viii–ix. Campus rape reformers widely use the term “sexual assault” instead of “rape,” I believe because it is understood as a more gender neutral term fitting with other assaultive crimes. However, there is no reason to believe that lawmakers, experts, or others use the term “sexual assault” to signify that conduct is *less serious* than rape. Indeed, in discussing studies of harms to victims, the CSA uses the terms “rape” and “sexual assault” interchangeably. *Id.*

36. *See* AAU Study, *supra* note 30. For a discussion of methodological concerns with this study, see discussion *supra* note 30.

37. *See, e.g.,* Morgan Baskin, *Controversial 1-in-5 Sexual Assault Statistic Validated in New National Survey*, USA TODAY (Sept. 21, 2015, 10:36 AM), <http://college.usatoday.com/2015/09/21/controversial-1-in-5-sexual-assault-statistic-validated-in-new-national-survey/>; Theodore R. Delwiche & Mariel A. Klein, *Survey Reveals ‘Troubling’ Sexual Assault Climate at Harvard*, *Faust Says*, HARV. CRIMSON (Sept. 21, 2015), <http://www.thecrimson.com/article/2015/9/21/sexual-assault-climate-results/> (declaring “crisis at the college”); *infra* note 50 (discussing Harvard President’s reaction to study); *see also* Lizzie Crocker, *Why the New ‘One in Four’ Campus Rape Statistic Is Misleading*, DAILY BEAST (Sept. 21, 2015, 9:10 PM), <http://www.thedailybeast.com/articles/2015/09/21/how-misleading-is-the-new-one-in-four-campus-rape-statistic.html> (stating that the statistic prompted congressional response).

38. AAU Study, *supra* note 30, at 12.

39. *See id.* at 11–12. Unlike non-students, who disproportionately suffered from forced completed penetration, the majority of student victims reported either attempted penetration or unwanted sex. *Id.*

which, incredibly, includes sex because of “promis[ed] rewards.”⁴⁰ Activists, popular media, and the government tout the study’s one-in-four claim as justification for immediate and decisive action.⁴¹ What the average listener might not immediately grasp is that these surveys regard as sexual assault everything from violent penetration to drunk, vigorous, or even casually commodified kissing. It should therefore come as no surprise that these studies stand in stark contrast to the less frequently mentioned 2014 Department of Justice (DOJ) sexual assault victimization survey, which reports assault rates from 1997–2013 in the eighteen to twenty-four-year-old bracket both on and off campus.⁴² That study recounts detailed interviews with the study respondents, with the main question being, “[H]ave you been forced or coerced to engage in unwanted sexual activity . . . ?”⁴³ and puts the student rape and sexual assault rate at about 6 in 1000.⁴⁴

The point is not that these surveys are right or wrong, and I am not claiming in any way that the DOJ study is somehow methodologically superior to the other two.⁴⁵ I leave it to others to wield their weapons in the battle of statistics.⁴⁶ My simple point is that the CSA and AAU soundbites that one in five or four college women are raped constitute an important part of the larger cultural discourse.⁴⁷ They helped initiate the

40. *Id.* at 19. But, to be fair, very few respondents (0.4% of female undergraduates) reported such contact. *Id.*

41. See discussion *supra* note 37 and accompanying text.

42. See 2014 DOJ Study, *supra* note 11, at 3.

43. *Id.* at 15. Notably, “the survey does not specifically ask about incidents in which the victim was unable to provide consent because of drug or alcohol consumption.” *Id.* at 14.

44. *Id.* at 4. The study further states: “2 in 5 nonstudent (40%) female victims experienced completed rape (figure 3). The majority of student (56%) and nonstudent (52%) victims experienced attempted rape or other sexual assault.” *Id.* Of course, there are many who write off this study as undercounting. See, e.g., *National Crime Victimization Survey Is Likely Undercounting Rape and Sexual Assault; Justice Department Should Create New, Separate Survey*, NAT’L ACADS. SCI. ENGINEERING, & MED. (Nov. 19, 2013), <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=18605>. However, this statement, as well as others, call for a “public health” approach to “understanding the context and frequency” of the problem, and not the counting *crime* approach that the DOJ study self-consciously adopts. See 2014 DOJ Study, *supra* note 11, at 3, 11–16 (discussing the different foci and methodologies).

45. See discussion *supra* note 30 (discussing methodological issues).

46. See *supra* note 30 and *infra* note 67. Debunking attempts can also create a hyperbolic discourse. See, e.g., Jennifer Baker, *Campus Rape Skepticism: How Not to ‘Debunk’ Research*, PSYCHOL. TODAY (Mar. 6, 2015), <https://www.psychologytoday.com/blog/the-love-wisdom/201503/campus-rape-skepticism>.

47. Buried in the AAU Study is this statement:

Overall, these comparisons illustrate that estimates such as “1 in 5” or “1 in 4” as a global rate, across all IHEs is at least over simplistic, if not misleading. None of the studies which generate estimates for specific IHEs are nationally representative. The above

race between campus administrators to enact the most sweeping and disciplinarian reforms, creating a massive and hard-to-dismantle campus “sex bureaucracy.”⁴⁸ This presumably would not have occurred if the revelation was that one in five students has drunk sex, or that one in four students has been assertively kissed.⁴⁹ The reformist push is in response to a *rape* crisis—a crisis involving sex that is not just disconcerting, gendered or suboptimal, but intolerable, inherently violent, and traumatic.⁵⁰ The production of politically-labeled statistical knowledge, according to one expert, “crystalizes a new commonsense about the way to approach women’s rights: through criminal law and even through war.”⁵¹ As such, “the heavily contested feminist terrain of how to actually address [violence against women] gives way to one strand of [punitive] feminism.”⁵²

VOX media founder Ezra Klein’s somewhat bizarre praise of affirmative consent shows the power of labeling variously bad college sex as sexual assault.⁵³ Klein parts ways with the many reformers who characterize affirmative consent or yes-means-yes policy as merely codifying existing practice and no great departure from the norm.⁵⁴ By contrast, Klein regards the policy as a massive upheaval that will “settle like a cold winter on college campuses . . . creating a haze of fear and confusion over what counts as consent.”⁵⁵ Nevertheless, invoking a

results show that the rates vary greatly across institutions.

AAU Study, *supra* note 30, at xv.

48. See generally Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. (forthcoming Aug. 2016) (on file with author) (discussing campus bureaucracy and sexual assault).

49. See CSA, *supra* note 31, at 6–3 (“[T]he majority of sexual assaults occur when women are incapacitated due to their use of substances, primarily alcohol.”).

50. See Drew Faust, *Statement on the Results of the Sexual Conduct Survey*, HARV. U. (Sept. 21, 2015), <http://www.harvard.edu/president/news/2015/statement-on-results-sexual-conduct-survey> (“These deeply disturbing survey results must spur us to an even more intent focus on the problem of sexual assault. . . . Sexual assault is intolerable, and we owe it to one another to confront it openly, purposefully, and effectively. This is *our* problem.”).

51. See Aziza Ahmed, *Women Who Punish: Feminist Technocracy and Violence Against Women*, NE. U. SCH. L. (Working Paper 2014) (unpublished manuscript on file with author).

52. *Id.* See also Aziza Ahmed, *Trafficked? AIDS, Criminal Law and the Politics of Measurement*, 70 U. MIAMI L. REV. 96, 100 (2015) (explaining the “abolitionist” agenda that “seek[s] to rescue women [by] criminaliz[ing] the purchase of sex”).

53. See Ezra Klein, “*Yes Means Yes*” Is a Terrible Law, and I Completely Support It, VOX (Oct. 13, 2014, 10:30 AM), <http://www.vox.com/2014/10/13/6966847/yes-means-yes-is-a-terrible-bill-and-i-completely-support-it>.

54. See, e.g., Callie Beusman, ‘*Yes Means Yes*’ Laws Will Not Ruin Sex Forever, Despite Idiotic Fears, JEZEBEL.COM (Sept. 8, 2014, 5:00 PM), <http://jezebel.com/yes-means-yes-laws-will-not-ruin-sex-forever-despite-i-1630704944>.

55. Klein, *supra* note 53.

desperate-times-call-for-desperate-measures logic, he asserts that the rape epidemic necessitates radical and disquieting sex regulation. He states: “[F]or one in five women to report . . . sexual assault means that everyday sexual practices . . . need to be upended, and men need to feel a cold spike of fear when they begin a sexual encounter.”⁵⁶ Collapsing the continuum between suboptimal sex and rape⁵⁷ and engaging in crisis speak risks expanding illiberal institutions and policies. Those on the left who are otherwise critical of police authority, incarceration, and sexual repression, may feel pressure to “switch sides” in order to be better supporters of feminism.⁵⁸

There is also an incoherence and internal contradiction in the ubiquity argument. Anti-rape culture favors affirmative consent or yes-means-yes standards, and to show that they are not radical regulations of sex, reformers assert that students already perform consent affirmatively. The September 2015 draft of the Model Penal Code sexual assault provisions, for example, cites to an opinion poll in which a majority of students called affirmative consent “realistic,” although there was apparently confusion about exactly what affirmative consent means.⁵⁹ Others assert that students currently verbally and clearly express consent or lack thereof to sex.⁶⁰ Of course, this account of campus rape is totally

56. *Id.*

57. Janet Halley coined the phrase “collapsed continuum” in her book. See JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2008).

58. To illustrate through anecdote, I often give speeches critical of the carceral nature of feminist criminal law discourse, and some of these touch upon rape reform. Many who line up after to challenge me are male students who “get it” and seem disconcerted by the possibility that throwing the book at men-who-don’t is not an optimally enlightened position. One such male student told me that he generally agreed with my concerns over police power and discipline, but nonetheless felt that we cannot afford the luxury of theoretically sound or narrowly tailored law and policy given the current “epidemic of sexual violence against women,” exemplified by, of all things, the iCloud hacking of nude female celebrity photos. See, e.g., Jessica Roy, *The Celebrity Nude Photo Leak Is Just Another Form of Online Harassment of Women*, N.Y. MAG. (Sept. 1, 2014, 3:55 PM), <http://nymag.com/daily/intelligencer/2014/09/nude-celeb-leak-online-harassment-of-women.html#>. Of course, those opposing anti-rape culture from the left also find themselves in the company of strange bedfellows. For more on this point, see *Rape, Feminism, supra* note 9, at 618–26, and Aya Gruber, *Anti-Rape Culture*, JOTWELL (Sept. 28, 2015), <http://crim.jotwell.com/anti-rape-culture/>.

59. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 64 (AM. LAW INST., Preliminary Draft No. 5) (Sept. 8, 2015) (citing *Washington Post-Kaiser Family Foundation Survey of College Students on Sexual Assault*, WASH. POST, <http://apps.washingtonpost.com/g/page/national/washington-post-kaiser-family-foundation-survey-of-college-students-on-sexual-assault/1726/> (last visited Jan. 24, 2016)). The draft notes that the respondents did not really know the difference between yes-means-yes and no-means-no. *Id.*

60. Michelle Anderson has relied on a study where respondents in sexual relationships reported talking to their partners about sex to argue that “negotiation” is the norm. Michelle J. Anderson,

at odds with the claim that rape culture practices are widespread.⁶¹ Moreover, upon closer examination, the studies cited by these affirmative consent proponents, while they might provide a sense of what students find ideal, say little about how students actually negotiate consent in a given sexual situation. There is ample social science research on sexual consent performance, and it attests that open and affirmative consent negotiation is the exception, not the norm.⁶² Recent studies designed specifically to measure how students mediate sexual agreement confirm that students' preferred method of expression is nonverbal, often consisting of passively accepting the partner's advances,⁶³ and that students' sexual negotiations tend to reflect traditional gender roles.⁶⁴

In any case, anti-rape discourse's slippery fluctuation between characterizing the student sexual world as one of rampant abuse and one of enlightened communication creates a Gordian knot. To escape, some reformers assert that what accounts for the one-in-four statistic is not widespread typical practice—ordinary college boys in fact stop and get a “yes”—but the existence of deviant “serial rapists” masquerading as ordinary students.⁶⁵ These repeat criminals intentionally impose sex on

Negotiating Sex, 78 S. CAL. L. REV. 1401, 1420 (2005).

61. See discussion *supra* notes 24–44 and accompanying text.

62. See, e.g., Terry P. Humphreys & Mélanie M. Brousseau, *The Sexual Consent Scale—Revised: Development, Reliability, and Preliminary Validity*, 47 J. SEX RES. 420, 421 (2010); see also Terry P. Humphreys, *Understanding Sexual Consent: An Empirical Investigation of the Normative Script for Young Heterosexual Adults* in MAKING SENSE OF SEXUAL CONSENT 209 (Mark Cowling & Paul Reynolds eds., 2004); David S. Hall, *Consent for Sexual Behavior in a College Student Population*, ELECTRONIC J. HUM. SEXUALITY (Aug. 10, 1998), <http://www.ejhs.org/volume1/consent1.htm>; Lucia F. O'Sullivan & E. Sandra Byers, *College Students' Incorporation of Initiator and Restrictor Roles in Sexual Dating Interactions*, 29 J. SEX RES. 435 (1992); Annika M. Johnson & Stephanie M. Hoover, *The Potential of Sexual Consent Interventions on College Campuses: A Literature Review on the Barriers to Establishing Affirmative Sexual Consent*, 4 PURE INSIGHTS (2015), <http://digitalcommons.wou.edu/cgi/viewcontent.cgi?article=1050&context=pure>; Susan E. Hickman & Charlene L. Muehlenhard, “By the Semi-Mystical Appearance of a Condom”: *How Young Women and Men Communicate Sexual Consent in Heterosexual Situations*, 36 J. SEX RES. 258 (1999); 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).

63. See Humphreys & Brousseau, *supra* note 62, at 420–21, 426–27 (citing studies).

64. See Michael W. Weiderman, *The Gendered Nature of Sexual Scripts*, 13 FAM. J.: COUNSELING & THERAPY FOR COUPLES & FAMS. 496, 498–500 (2005); O'Sullivan & Byers, *supra* note 62, at 435–36, 444–45; Muehlenhard & Hollabaugh, *supra* note 62, at 872–73, 877–78.

65. See, e.g., Kirsten Gillibrand, *Kirsten Gillibrand: 'We Will Not Allow These Crimes to Be Swept Under the Rug Any Longer'*, TIME (May 15, 2014), <http://time.com/100144/kirsten-gillibrand-campus-sexual-assault/> (“These are not dates gone bad, or a good guy who had too much to drink. This is a crime largely perpetrated by repeat offenders, who instead of facing a prosecutor and a jail cell, remain on campus after a short-term suspension, if punished at all.”); Amanda Marcotte, *Rape*

unwilling people, often through administering intoxicants, and are able to hide behind lax disciplinary policies and reporting reluctance.⁶⁶ Nevertheless, the contradiction remains.⁶⁷ If aberrant offenders who use force and/or clandestinely drug victims are the real problem, then there is little justification for requiring everyone to stop and get a “yes.” Second, the most up-to-date analysis militates in favor of the conclusion that the young men most likely to engage in rape-like behavior are not profligate repeat offenders, but rather the sexually inexperienced, who tend to evolve away from such behavior once initiated into prevailing sexual culture.⁶⁸ This sheds light on why freshman year is the so-called “red zone.”⁶⁹

B. *The Trauma of Campus Rape*

Within anti-rape culture, there is some vacillation on the who-and-what of rape; however, the discourse is resolute on one point: Campus rape is deeply traumatic.⁷⁰ Increasingly, trauma has become a—if not *the*—basis for feminist political activism.⁷¹ Indeed, the claim that certain

Victims Are Common. Rapists Are Not., SLATE (May 1, 2014, 11:58 AM), http://www.slate.com/blogs/xx_factor/2014/05/01/campus_sexual_assault_statistics_so_many_victims_but_not_as_many_predators.html.

66. See *Sexual Assault: Myths and Facts*, *supra* note 18; see also Dave Gustafson, *Serial Rapists Commit 9 of 10 Campus Sexual Assaults, Research Finds*, AL JAZEERA AM. (Oct. 28, 2013, 12:00 PM), <http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/10/28/serial-rapists-commit9of10campussexualassaultsresearchfinds.html>; Jennifer Peebles & Kristen Lombardi, *‘Undetected Rapists’ on Campus: A Troubling Plague of Repeat Offenders*, CTR. PUB. INTEGRITY (Feb. 26, 2010 12:00 PM), <http://www.publicintegrity.org/2010/02/26/4404/undetected-rapists-campus-troubling-plague-repeat-offenders>.

67. Most of these claims invoke a 2002 study. See generally David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73 (2002). That study has been heavily criticized, if not totally “debunked.” See Kevin M. Swartout et al., *Trajectory Analysis of the Campus Serial Rapist Assumption*, 169 JAMA PEDIATRICS 1148, 1149 (2015), <http://archpedi.jamanetwork.com/article.aspx?articleid=2375127> (discussing problematic aspects on the Lisak study); see also Lizzie Crocker, *Is Sex Assault Coverage Really Sexist?*, DAILY BEAST (Dec. 18, 2015, 12:00 AM), <http://www.thedailybeast.com/articles/2015/12/18/is-sex-assault-coverage-really-sexist.html>.

68. See Swartout et al., *supra* note 67, at 1152–53.

69. See Associated Press, *As Freshmen Enter ‘Red Zone,’ Colleges Re-Think Sexual Assault Policies*, USA TODAY (Sept. 7, 2014, 9:36 AM), <http://college.usatoday.com/2014/09/07/a-freshmen-enter-red-zone-colleges-re-think-sexual-assault-policies/>. The CSA and AAU study also support this idea.

70. See *Sexual Assault: Myths and Facts*, *supra* note 18.

71. See Brenda Cossman et al., *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 COLUM. J. GENDER & L. 601, 613 (2003) (remarks of Janet Halley) (noting that “feminisms have turned to the vocabulary of trauma for describing what structural MacKinnonite feminism would call domination”).

actions or words cause trauma is compelling, and laws and policies created in an effort to reduce such trauma can radically alter existing power arrangements, for better or worse.⁷² When it comes to criminal law, various commentators have argued in favor of premising liability, punishment, or other court intervention on the post-incident feelings of victims. Such advocates range from conservative victims' rights supporters to left-leaning restorative justice reformers. Whether the penal system should be structured primarily to address the mental health of victims by, for example, promoting "closure" through inflicting pain on or alternatively communing with the offender, is a tricky question that has generated substantial debate.⁷³ Prosecutors and defense attorneys can attest to frustration over victims' rights reforms that tailor criminal processes to the vehemence of the victim.⁷⁴ Victim tenacity is often a function of variables very different from crime severity, strength of evidence, or defendant culpability—variables such as race, socioeconomic status, to whom the victim spoke, or the parties' relationship.⁷⁵

Let us, however, put the victim's rights and restorative justice debates aside for the moment and focus on the particular features of the campus rape trauma narrative. Even if victim trauma is validly an organizing principle of punitive policy, there is reason to examine critically trauma culture in the campus sexual assault context. The trauma narrative is not just being set forth in the detached context of clinical study—it plays a prominent role in campus advocacy and politics. Thus, it is important to bear in mind that that anti-rape culture's trauma talk has a different inflection and ultimate meaning than trauma conversations in areas like social work and psychology. This counsels in

72. See generally Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193 (2010) (discussing the salience of women's trauma in anti-abortion efforts).

73. Compare Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 289–92 (1999), and Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1375–76 (1994), with Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 998 (1985) [hereinafter *Victim's Rights*], and *Co-opting Compassion*, *supra* note 20, at 590.

74. See generally *Victim's Rights*, *supra* note 73.

75. See *Booth v. Maryland*, 482 U.S. 496, 503–10 (1987), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991) (holding that victim impact statements lead to arbitrary impositions of capital punishment). Trauma is similarly indeterminate both in origin and in what policies may be adopted in its name. See Suk, *supra* note 72, at 1213–14; cf. Avlana K. Eisenberg, *Criminal Infliction of Emotional Distress*, 113 MICH. L. REV. 607 (2015) (critiquing laws that define criminal liability in terms of the victim's emotions).

favor of critical examination of activists' empirical trauma assertions. In addition, we should take stock of the world the trauma narrative produces, for men and women on campus.

Turning to the first issue, one familiar claim is that campus rape survivors, in the words of the director of Harvard's sexual assault prevention center, "suffer PTSD on the level of veteran soldiers."⁷⁶ Post-traumatic stress (PTS) is a complex phenomenon, and this modest essay does not purport to resolve controversies over measuring trauma, the relationship between psychopathology and the severity of a traumatic event, pre- and post-event conditions that foster trauma, re-triggered trauma, the efficacy of cognitive behavioral therapy, etc.⁷⁷ Nevertheless, even a surface perusal of studies on rape and PTS should create doubt about the claim that one in four college women has been severely traumatized by a sexual incident. A notable percentage of rape survivors do suffer from diagnosed long-term PTS,⁷⁸ and their experiences are truly terrible and merit serious consideration by law and policy makers. That said, the majority of victims of even forcible rape (thankfully) are

76. Statement of Alicia Oeser, Campus Sexual Assault "Teach-In," Harvard Law School (Sept. 2014) (quoted material comes from author's memory); see Suk, *supra* note 72, at 1204–05 (discussing history of "rape trauma syndrome"); see also, e.g., Andrea Pino, *The Second Rape: Battling PTSD and Betrayal*, HUFFINGTON POST (Sept. 9, 2013, 1:10 PM), http://www.huffingtonpost.com/andrea-pino/the-second-rape_b_3655062.html. The CSA study also begins with a discussion of the psychological harms of rape. CSA, *supra* note 31.

77. One very interesting discussion of trauma and feminism is found in Emma Jane Tseris, *Trauma Theory Without Feminism? Evaluating Contemporary Understandings of Traumatized Women*, 28 J. WOMEN & SOC. WORK 153 (2013). Questioning the feminist-trauma frame, Tseris states:

It is evident that even when the term *trauma* is used to describe a woman's experience, hidden assumptions can constrain the possibilities for how a woman's identity can be constructed and understood. Some of the assumptions that have clustered around the trauma paradigm for women, such as a presumption of lifelong difficulties, have diluted its social justice stance significantly and have in many ways divorced the concept of trauma from its original meaning and the feminist values underpinning this meaning.

Id. at 159. See also Suk, *supra* note 72, at 1207–15; Katrina A. Vickerman & Gayla Margolin, *Rape Treatment Outcome Research: Empirical Findings and State of the Literature*, 29 CLINICAL PSYCHOL. REV. 431, 431 (2009) (metadata analysis of rape PTS treatment highlighting "the paucity of research in this area"); Ron Acierno et al., *Risk Factors for Rape, Physical Assault, and Posttraumatic Stress Disorder in Women: Examination of Differential Multivariate Relationships*, 13 J. ANXIETY DISORDERS 541, 543 (1999) ("The temporal relationship between psychopathology and victimization remains understudied, with each serving as a potential risk factor for the other.").

78. Some studies say that they suffer more than veteran soldiers. But this is not very helpful given that the suffering of veteran soldiers is highly variable and not necessarily dependent on the seriousness of injury or the severity of the traumatic event. For an interesting layperson perspective on soldiers and PTSD, see Sebastian Junger, *How PTSD Became a Problem Far Beyond the Battlefield*, VANITY FAIR (May 7, 2015, 12:00 AM), <http://www.vanityfair.com/news/2015/05/ptsd-war-home-sebastian-junger>.

not eternally debilitated.⁷⁹ Moreover, some studies correlate victims' experiences of PTSD with intuitive culpability factors like life-threat, weapons, and injury, which are rare in the college context.⁸⁰ At the same time, there are studies indicating that particularly brutal incidents produce less trauma because the victim is less likely to engage in self-blame.⁸¹ Thus, trauma might in some circumstances be unrelated or inversely related to the perpetrator's culpability. This seems particularly apparent given that trauma can be a function of circumstances wholly separate from the character of the sex, such as the complainant's support system, psychological profile, and material conditions.⁸²

There is also evidence that many college women who experience

79. See generally Barbara Olasov Rothbaum et al., *A Prospective Examination of Post-Traumatic Stress Disorder in Rape Victims*, 5 J. TRAUMATIC STRESS 455 (1992) (summarizing a study of rape victims recruited from "inner city" hospital and reporting that 47% suffered from PTSD three months after incident); NAT'L VICTIM CTR. & CRIME VICTIMS RES. & TREATMENT CTR., *RAPE IN AMERICA: A REPORT TO THE NATION* 7 (Apr. 23, 1992), <https://www.victimsofcrime.org/docs/Reports%20and%20Studies/rape-in-america.pdf?sfvrsn=0> (putting the lifetime PTSD rate at 31%). To be sure, the diagnosis of PTSD versus non-PTSD is a contested area, and public health minded researchers tend to be more concerned with describing the overall psychological profile of survivors rather than a PTSD rate, per se. The result is that the question of how traumatized a given rape victim is or isn't is extremely complicated. After a thorough literature review, Patricia Resick summed up the state of the science as follows:

An overall pattern has emerged with reasonable consistency in all of these studies. Most rape victims experience a strong acute reaction that lasts for several months. By 3 months postcrime, much of the initial turmoil has decreased and stabilized. Some victims continue to experience chronic problems for an indefinite period of time.

Patricia A. Resick, *The Psychological Impact of Rape*, 8 J. INTERPERSONAL VIOLENCE 223, 225 (1993).

80. Acierno et al., *supra* note 77, at 560; Sarah E. Ullman et al., *Psychosocial Correlates of PTSD Symptom Severity in Sexual Assault Survivors*, 20 J. TRAUMATIC STRESS 821, 822 (2007) (discussing multiple studies that "consistently" correlate PTSD with "assault-related factors," such as "perceived life threat, more violent assaults, and completed rapes"); Dean G. Kilpatrick et al., *Victim and Crime Factors Associated with the Development of Crime-Related Post-Traumatic Stress Disorder*, 20 BEHAVIORAL THERAPY 199 (1989). The CSA and AAU surveys bear out that these types of factors are rare in the campus sexual assault situation.

81. Ullman et al., *supra* note 80, at 822 (citing Patricia A. Frazier et al., *Perceived Control and Distress Following Sexual Assault: A Longitudinal Test of a New Model*, 84 J. PERSONALITY & SOC. PSYCHOL. 1257 (2003)); Mary P. Koss et al., *Cognitive Mediation of Rape's Mental, Physical, and Social Health Impact: Tests of Four Models in Cross-Sectional Data*, 70 J. CONSULTING & CLINICAL PSYCHOL. 926 (2002) ("[S]everal studies suggest that postassault social cognitions such as attributions of self-blame, basic beliefs about self and others, and perceptions of control are related to the impact of sexual assault.").

82. See generally Acierno et al., *supra* note 77; Sarah E. Ullman & Henrietta H. Filipas, *Predictors of PTSD Symptom Severity and Social Reactions in Sexual Assault Victims*, 14 J. TRAUMATIC STRESS 369 (2001), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3583013/pdf/nihms-46630.pdf>; Resick, *supra* note 79, at 246 ("[R]eactions to sexual assault are multifaceted."); Christine A. Gidycz & Mary P. Koss, *Predictors of Long-Term Sexual Assault Trauma Among a National Sample of Victimized College Women*, 6 VIOLENCE & VICTIMS 175 (1991).

“sexual assault,” as understood within anti-rape discourse, do not see themselves as traumatized victims. In the CSA and AAU studies, where sexual assault is defined broadly, the most common explanation for why the respondent did not report the incident was that he or she did not regard the incident as serious enough to take action.⁸³ In the studies, an upwards of 55 to 75% of nonreporters (varying by the type of assault) offered this explanation.⁸⁴ Compare this to the 6-in-1000 DOJ survey that narrowly defined sexual assault as coerced sex. There, only 5% of nonstudents and twelve percent of students who failed to report stated that the incident was not serious enough.⁸⁵ Interestingly, in the DOJ study, the lack-of-seriousness explanation was surpassed by the desire to keep the offender out of legal trouble,⁸⁶ which might cast some doubt on activists’ assumption of a linear relationship between swift punishment and reporting. In the end, students, even victims, see much more ambiguity, complexity, and shades of gray in the question of sexual assault than activists’ unyielding political rhetoric can acknowledge. Indeed, online commenters regard the very term “gray rape” to be a problematic part of rape culture.⁸⁷

What should we make of women students’ belief that “sexual assault” is something unworthy of reporting? I worry that some activists write off such perspective as what dominance feminists term “false consciousness.”⁸⁸ They accordingly regard women who hold this perspective as participants in rape culture and complicit in their own subordination.⁸⁹ I worry that campus reform has spawned a trauma

83. See AAU Study, *supra* note 30, at xxi. When asked why the incident was not reported, the dominant reason was it was not considered serious enough. Even for penetration involving physical force, over half (58.6%) of students gave this reason. This reason is highest for harassment (78.6%) and sexual touching due to physical force or incapacitation (75.6%, 74.1%, respectively). *Id.*; see also CSA, *supra* note 31, at 5-25 (“The most commonly reported response by both types of victims was that they did not think it was serious enough to report (reported by 56% of physically forced sexual assault victims and 67% of incapacitated sexual assault victims).”).

84. See CSA, *supra* note 31, at 5-25; AAU Study, *supra* note 30, at xxi.

85. 2014 DOJ Study, *supra* note 11, at 1.

86. *Id.* at 9.

87. See Broderick et al., *supra* note 6.

88. See Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 527 n.23 (1982).

89. See, e.g., *What the “System” Will Do For You If You Are a Victim*, UAB POLICE, <https://uab.edu/police/programs-and-services/victim-awareness-assistance-program/what-the-qsystemq-will-do-for-you> (last visited Mar. 3, 2016) (“‘To be or not to be . . .’ should not be the question when it comes to being a victim. Be proactive and aware and join us in minimizing crime.”); *Frequently Asked Questions About Sex Discrimination, Sexual Misconduct, Sexual Harassment, and Sexual Violence*, FLA. ST. U., <https://smr.fsu.edu/documents/Sexual-Harassment-FAQ.pdf> (last visited Mar. 3, 2016) (“When in doubt, err on the side of reporting any incident of

technocracy that contextualizes women's sexual experiences for them.⁹⁰ Should we be contended or concerned when women students, months after an incident, decide to file a report because they talked to a counselor, professor, administrator, or activist who help them determine an ambiguous or barely remembered sexual situation was actually a traumatic rape?⁹¹ Is it a good thing when a victim "discovers" she is traumatized and in need of intense psychological intervention, when she might otherwise have moved on? In a moment of rampant mandatory reporting, we can expect more and more troubled but ambivalent students to meet with politically resolute campus personnel.⁹²

In a very laudable effort to help sexual assault survivors, a recent University of Colorado law graduate collaborated with the Title IX office to launch a program offering peer counseling and advice to law student sexual assault victims.⁹³ In 2015, one of my first-year law students, who had volunteered to be a counselor, explained the effort to me. The program aimed to give students a "confidential sounding board" and "point them in the right direction." The student further stated that the program would be "good for professors" because the peer counselors would deal with contextualizing rape classes. "You all shouldn't have to do that," she opined, "you should be able to just teach." So I asked, "What are you going to tell students who have concerns about class material being traumatizing?" "I'm not sure yet," she said, "we are going to receive trauma training from an expert." "An expert on what?"

sexually inappropriate conduct."); *Title IX Coordinators Team for Sexual Harassment Education*, U. COLO. (Jan. 30, 2015), <https://connections.cu.edu/stories/title-ix-coordinators-team-sexual-harassment-education>; see also Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014), <http://time.com/2905637/campus-rape-assault-prosecution/> (quoting victim advocates attributing lack of reporting to "shame" and a "sense of denial"); *infra* note 112.

90. See *infra* notes 94–95 and accompanying text.

91. Anti-rape culture counsels women that they can also be part of the problem and should avoid the appearance of being a "rape enabler." See Amy Chozick, *'90s Scandals Threaten to Erode Hillary Clinton's Strength with Women*, N.Y. TIMES (Jan. 20, 2016), http://www.nytimes.com/2016/01/21/us/politics/90s-scandals-threaten-to-erode-hillary-clintons-strength-with-women.html?_r=0.

92. See *infra* notes 99–100 and accompanying text. Anecdotally, I have found some of the most resolute voices to be those of men who "get it" because they had a friend or girlfriend who, to them, was destroyed from rape. See *supra* note 58; see also Jessica Bennett, *Campus Sex . . . With a Syllabus*, N.Y. TIMES (Jan. 9, 2016), http://www.nytimes.com/2016/01/10/fashion/sexual-consent-assault-college-campuses.html?_r=0 (profiling 24-year-old male who leads Freshman Title IX training, who came to the issue through "finding out in college that a woman he knew had been sexually assaulted" and being involved as an undergraduate in "Male Athletes Against Violence" when he was captain of the basketball team). Indeed, many of the most hyper-masculine men I have known see it as their highest duty to protect women from rape.

93. She is also my former research assistant.

I asked. “I guess trauma,” she replied. Indeed, rape trauma expertise consisting primarily of bureaucratic folk knowledge is proliferating at a rapid pace.⁹⁴

This new sex-traumatology fits uncomfortably with college women’s embrace of sexual liberation and sex positivity. It tightens the strangling sexual double bind that women have long experienced. Commentators, including myself, have noted that rape can act like a tax on women’s sexual freedom.⁹⁵ A woman can gain psychic boosts, status, and various other benefits from being sexy and having sex, but with the downside that in the event of forced sex, she will be prevented from obtaining justice because of her sexiness and the phenomenon of “slut-shaming.”⁹⁶ This rape tax, however, does not outweigh the benefits of being sexy, so women’s sexiness and sexuality persists, granting men a virtual license to rape “promiscuous” women and generally cementing male supremacy.⁹⁷

There is, however, reason to question whether the male supremacist rape-tax theory is applicable to the college discipline context. It seems unlikely that Title IX administrators will reject a case of rape because the woman dressed sexily and partied.⁹⁸ To be sure, far from being prejudiced *against* complainants, today’s campus factfinders regard questioning a victim’s credibility because of memory problems,

94. See Katie J.M. Baker, *Rape Victims Don’t Trust the Fixers Colleges Hire To Help Them*, BUZZFEED NEWS (Apr. 25, 2014, 11:35 AM), <http://www.buzzfeed.com/katiejmbaker/rape-victims-dont-trust-the-fixers-colleges-hire-to-help-the#r.qljLk1Zx>. This in turn has spawned a robust for-profit industry including professional association, training consultants, and certifications. See, e.g., *About ATIXA and Title IX*, ASS’N TITLE IX ADMINS., <https://atixa.org/about/> (last visited Mar. 4, 2016); *Title IX Coordinator Training*, NAT’L ASS’N COLL. & U. ATT’YS, http://www.nacua.org/onlinecourses/title_ix_coordinator_training_2014/index.asp (last visited Mar. 4, 2016); *Who We Are*, D. STAFFORD & ASSOCIATES, <http://www.dstaffordandassociates.com/> (last visited Mar. 4, 2016); *Title IX Training*, THOMSON REUTERS, <https://risk.thomsonreuters.com/compliance-training-courses/title-ix-training> (last visited Mar. 4, 2016).

95. See *Rape, Feminism*, *supra* note 9, at 632–35; see also Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309, 1323–24 (1992).

96. See *Rape, Feminism*, *supra* note 9, at 634–35; Leora Tanenbaum, *Slut-Shaming Undermines Women*, BOSTON GLOBE (Feb. 20, 2015), <https://www.bostonglobe.com/opinion/2015/02/20/slut-shaming-undermines-women/4dUdzDODYT2pNnldPS9pWM/story.html>.

97. Tanenbaum, *supra* note 96; *Rape, Feminism*, *supra* note 9, at 635.

98. Such investigators are largely women’s rights advocates, former civil rights enforcers, and others deeply concerned with student safety and gender equality. See, e.g., *Meet Valerie Simons, Director of Institutional Equity and Compliance, Title IX Coordinator*, U. COLO. (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.”).

inconsistent statements, biases, or contradictions with physical evidence as victim-blaming.⁹⁹ Nevertheless, it remains reasonable to surmise that college women's residual fear of shaming is enough to disincentivize reporting.¹⁰⁰ That said, some interesting new social science adds complexity to the conclusion that "slut-shaming" is solely an instrument of male dominance used to preserve rape licenses. In a recent study, investigators provided a more "complicated" account, discovering that women frequently slut-shame other women and that such shaming can have an *inverse* relationship to actual engagement in casual sex.¹⁰¹ That is, higher social status women (sorority sisters) shame lower status women (poor or minority students) to cement these women's low status, regardless of sexual behavior.¹⁰² The higher status women, by contrast, have freedom to engage in sexual experimentation without reputational damage.¹⁰³ Thus, a survivor's inability to pursue justice may be a function, not just of gender and sexiness, but of class status that is policed by other women and men. As an aside, if sexual deviance correlates to student's low status and not to actual sexual practices, one is left to wonder which male students are likely to be branded campus rapists under broad definitions.¹⁰⁴

Returning to the double bind, in the classic account, the tax for sexiness or engagement in frequent casual sex is that, in the event of a rape, justice will not be available. Within current anti-rape culture, the tax is not prosecutorial failure, but something far worse: life-destroying trauma. Being sexy is great; hook-ups are fine; drunkenness is fun. However, a drunken hook-up or sex in the absence of affirmative consent, according to the technicians of trauma, is devastating.¹⁰⁵ The

99. See, e.g., Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. to Title IX coordinators 12 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (explaining that cross-examination limitations are necessary because "[a]llowing an alleged perpetrator to question an alleged victim directly may be traumatic"); *Trading the Megaphone*, *supra* note 4 (discussing the Title IX philosophy counseling to "believe complainants, precisely when they seem unreliable and incoherent").

100. See sources cited *supra* note 89.

101. Elizabeth A. Armstrong et al., "Good Girls": Gender, Social Class, and Slut Discourse on Campus, 77 SOC. PSYCHOL. Q. 100 (2014). The authors found that "[s]lut discourse was ubiquitous among the women we studied." *Id.* at 117.

102. See *id.* at 101. Low-status women also shame higher status women (i.e., "slutty" sorority girls), but because high status women's "definitions prevail in the dominant social scene," low status women are the ones "vulnerable to public shaming." *Id.*

103. *Id.* at 117-18 ("Slut discourse, rather than constraining their sexual options [of high status women], ensured that they could safely enjoy the sexual opportunities of the party scene.").

104. See *Trading the Megaphone*, *supra* note 4.

105. See Jessica Ringrose & Emma Renold, *Slut-Shaming, Girl Power and 'Sexualisation'*:

dual standards of sex as status and botched sex as utter ruination necessitate some mechanism by which women can avoid crossing the line between good sexiness and traumatizing sex. Incredibly, the divide is to be policed by drunken prospective male hook-ups and random bystanders directed to thwart sex—for example, the University of Virginia frat brothers who are required to physically block stairs to bedrooms.¹⁰⁶ Any assertion that women should prevent or refuse potentially traumatizing sex is victim-blaming, leaving college men and randoms to assume full responsibility for actualizing feminist sexual norms. Non-bystander women simply are not part of the “us” that “it’s on” to prevent sexual assault.¹⁰⁷

Perhaps reform targeted toward revealing the dark side of sex for women—and increasingly within activist discourse men—will lead to safer, better, or at least more infrequent sex. But perhaps not. Young people are fairly tenacious in finding ways to drink and have the type of casual sex that their future selves might regard as repellant, disturbingly funny, or at least unfortunate. I heard something stunning in my 2014 criminal law seminar. A student informed the class that her undergraduate girlfriends informally referred to one of University of Colorado’s fraternities as the “rapey frat,” but despite this dishonorable distinction, women *liked* to attend the wild parties there. Tenacity! Preventing hedonic student behavior might well call for drastic regulatory measures. Banning campus drinking or partying may simply have the effect of moving fêtes off campus, away from the university’s administrative gaze.¹⁰⁸ What then? Should rape prevention efforts include breathalyzing students or encouraging heavy police regulation of their off-campus leisure activities—regulation with actual carceral

Thinking Through the Politics of the International SlutWalks with Teen Girls, 24 GENDER & EDUC. 333, 339 (2012) (noting “the contradictory schizoid entanglement of protection versus empowerment and the limits of the political re-signification that ‘slut’ can bear in the context of . . . the sexual regulation of sanitised school cultures and . . . parental anxiety”).

106. Nick Anderson, *New Safety Rules Announced for University of Virginia Fraternity Parties*, WASH. POST (Jan. 6, 2015), https://www.washingtonpost.com/local/education/new-safety-rules-announced-for-fraternities-at-u-v-a-a-response-to-rolling-stone-uproar/2015/01/06/5ae2188a-95e0-11e4-927a-4fa2638cd1b0_story.html.

107. See Tanya Somanader, *President Obama Launches the “It’s On Us” Campaign to End Sexual Assault on Campus*, WHITE HOUSE (Sept. 19, 2014, 2:40 PM), <https://www.whitehouse.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus>.

108. See Jenna Johnson, *Schools Try New Strategies to Battle College Drinking*, WASH. POST MAG. (Aug. 30, 2013), https://www.washingtonpost.com/lifestyle/magazine/schools-try-new-strategies-to-battle-college-drinking/2013/08/29/44919708-e011-11e2-b2d4-ea6d8f477a01_story.html.

consequences?¹⁰⁹

Indeed, the rape trauma narrative can undergird a range of punitive and liberty-restricting policies—policies that range from alcohol restrictions to sex-segregation and abstinence.¹¹⁰ And it is interesting to observe how willing students are to enlist in their own discipline.¹¹¹ Despite the various regulatory efforts, however, it seems unlikely that college sex will significantly abate. College sex will persist and will include everything from clearly consensual activity to ambiguous, intoxicated, and unequivocally coerced intercourse. Within anti-rape culture, women must regard the ambiguous or drunk sex as traumatizing and reportable to be part of the solution rather than the rape-permissive problem.¹¹² The traumatology ethos may correspondingly create a world in which the sex that women will inevitably have is a minefield of potential mental distress.

The trauma narrative is rife with other risks, including bureaucratic management of students stripped of their subjectivity and speech restrictions. It construes sexual assault complainants as devastated (or self-deluding) and female students as incapable of self-management, in order to presage a trauma-informed infrastructure involving caution,

109. See *Student Rights and Responsibilities: Notes and Definitions*, GETTYSBURG C., http://www.gettysburg.edu/about/offices/college_life/srr/points_system/notes/index.dot (last visited Feb. 29, 2016); see also Neelesh Moorthy, *Community Members Upset About Disruptive Off-Campus Parties*, DUKE CHRON. (Nov. 30, 2015), <http://www.dukechronicle.com/article/2015/11/community-members-upset-about-disruptive-off-campus-parties>; cf. Akane Otani, *Banning Drinking Won't Stop Campus Rape*, BLOOMBERG (Dec. 4, 2014, 1:59 PM), <http://www.bloomberg.com/news/articles/2014-12-04/banning-drinking-wont-stop-campus-rape> (noting studies that cutting off access to alcohol may have the effect of causing students “to drink more, longer, and harder”).

110. See, e.g., Donald Eastman, “*An Open Letter to Students*”: *President Eastman Emails Eckerd Community About Sexual Assault and Harassment on Campus*, CURRENT (Nov. 23, 2014), <http://theonlinecurrent.com/an-open-letter-to-students-president-eastman-emails-eckerd-community-about-sexual-assault-and-harassment-on-campus>; *Rethinking Privacy: Harvard Does Not Need Gender-Neutral Bathrooms*, HARV. CRIMSON (Feb. 11, 2011), <http://www.thecrimson.com/article/2011/2/11/bathrooms-gendernneutral-harvard-harassment/> [hereinafter *Rethinking Privacy*].

111. See *Rethinking Privacy*, *supra* note 110. I recently served on a panel in which the undergraduate student representative of “Know Your Title IX”—an anti-rape activist group, see KNOW YOUR IX, <http://knowyourix.org/> (last visited Mar. 1, 2016)—devoted her time to arguing that students had no constitutional right of due process. Cathy Young, *A Real Dialogue for a Change: Which May Be a First on the Issue of Campus Rape Hysteria*, WKLY. STANDARD (Jan. 25, 2016), <http://www.weeklystandard.com/a-real-dialogue-for-a-change/article/2000597> (describing the American Association of Law Schools Annual Meeting held in January 2016).

112. See *supra* notes 89–92 and accompanying text. Cf. Raina Lipsitz, *Society Has an Ethical Obligation to Report Rape*, AL JAZEERA AM. (Nov. 22, 2014, 2:00 AM), <http://america.aljazeera.com/opinions/2014/11/reporting-rape-cosby.html>.

widespread to trauma technicians, and intervention.¹¹³ One danger is that anti-rape culture repackages feminist energy and female empowerment as sexual victimhood.¹¹⁴ Another is that the objectified victim no longer has autonomy over her case, or life. Title IX processes can be initiated and proceed against victims' wishes.¹¹⁵ There is even talk of complainants' obligations under student codes of conduct to participate in bureaucratic processes that are time consuming, stressful, and likely to undermine their personal educational achievement.¹¹⁶

Finally, the anti-rape culture's trauma tenet counsels for restrictions on communication. Teachers of rape law are to assume that a significant percentage of students are traumatized and thus avoid, warn against, and otherwise police "triggers."¹¹⁷ For sure, triggered re-traumatization is a real psychological phenomenon. Some people under the influence of PTS have acute reactions to sounds, smells, images, stories, etc., that conjure the traumatic event.¹¹⁸ When a student suffers PTS, whether or not due to sexual assault, it is difficult for even that student to know in advance what will cause a physiological response. It is impossible for a professor to predict in some abstract manner the types of conversations that trigger trauma in a general population.¹¹⁹ Moreover, no science

113. See sources cited *supra* note 89.

114. This type of self-awareness may increase the risk of trauma and debilitating fear. See Pryor & Hughes, *supra* note 9, at 446 ("Fear of rape is . . . partly shaped by women's perceptions about their own self-efficacy and ability to defend themselves from sexual attack."); see also Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 791–800 (2007) (discussing criminal law's takeover of the feminist movement).

115. One victims' rights organization warns: "Before you disclose to campus administrators, faculty, or individuals affiliated with your school, it is ok to ask them whether they are required to provide any information about your report to the Title IX Coordinator." *Know Your Rights: Understanding Title IX for Campus Sexual Violence Victims*, VICTIM RTS. L. CTR. (2014), <https://victimrights.org/sites/default/files/VRLC%20Know%20Your%20Rights-%20Title%20IX%20.pdf>; see also *What You Need to Know About Title IX*, TITLE IX ON CAMPUS, <http://title9.us/overview/#.VqBrxfkrKM8> (last visited Mar. 1, 2016).

116. This is from a discussion I had with campus sexual assault reformers. See also sources cited *supra* note 89.

117. See Jeannie Suk, *The Trouble with Teaching Rape Law*, NEW YORKER (Dec. 15, 2014), <http://www.newyorker.com/news/news-desk/trouble-teaching-rape-law> [hereinafter *Teaching Rape Law*]; Jenny Jarvie, *Trigger Happy*, NEW REPUBLIC (Mar. 3, 2014), <https://newrepublic.com/article/116842/trigger-warnings-have-spread-blogs-college-classes-thats-bad>.

118. See Anke Ehlers et al., *Intrusive Re-Experiencing in Post-Traumatic Stress Disorder: Phenomenology, Theory, and Therapy*, 12 MEMORY 403, 404 (2004); Ann Hackmann et al., *Characteristics and Content of Intrusive Memories in PTSD and Their Changes with Treatment*, 17 J. TRAUMATIC STRESS 231, 231 (2004).

119. See Ehlers et al., *supra* note 118, at 407; Hackmann et al., *supra* note 118, at 231–32; see also Alishia D. Williams & Michelle L. Moulds, *An Investigation of the Cognitive and Experiential Features of Intrusive Memories in Depression*, 15 MEMORY 912, 913 (2007) (noting that "intrusive memories typically consists of stimuli that were present before the moments of the trauma with the

substantiates that there is an ameliorative effect of trigger warnings, much less than the phrase, “trigger warning.”¹²⁰ That being said, the more that students expect warnings as a matter of safe classroom practice, the more they will earnestly feel disserved and unjustly treated if one is not given. Today, trigger warnings are culturally meaningful.

In 2015, right before I started the rape section of my course, the administration emailed the entire 1L class an anonymous letter from a 2L. The letter admonished 1Ls that many people in their criminal law classes are sexual assault victims suffering severe emotional distress and directed students as follows: “When discussing sexual assault, avoid being graphic if at all possible. If you feel it is absolutely necessary to go into some detail to make your point, say ‘trigger warning’ beforehand Similarly, if the reading was on a different topic (homicide, for example) and you feel like you need to . . . use sexual assault in an example, say ‘trigger warning.’”¹²¹ The dean also sent the criminal law faculty the student’s recommendations for teaching rape, which included telling students that their classmates have been sexually assaulted—a greater number than they think because of underreporting—and allowing students to be excused from classes they find too personal without notice or explanation.¹²²

The day 1Ls received the letter, several concerned students, mostly male but some female, rushed my podium to express utter anxiety and query whether the letter represented the official law school position. One female student who had experienced sexual assault came to my office crying and stated that she had not been concerned about the rape law section, but the letter terrified her. “Now I’m wondering what horrible things are going to happen during class,” she lamented. It seems the letter, sent with the administration’s official imprimatur, well-intended as it may have been, caused some “trauma.”¹²³ I assured that distraught student—and spent much class time reassuring all my students—that our

largest emotional impact, rather than the worst (i.e., most traumatic) aspect of the trauma per se”).

120. See Lorna Veraldi & Donna M. Veraldi, *Is There a Research Basis for Requiring Trigger Warnings?*, FORENSIC PSYCHOL. 1, 5–7 (Mar. 26, 2015), <http://www.forensicpsychology.org/VeraldiVeraldiTriggerWarningsHandout.pdf>.

121. Open Letter to 1Ls Regarding Sexual Assault (Feb. 2015) (on file with author); see also Katie J.M. Baker, *Teaching Rape Law in the Age of the Trigger Warning*, BUZZFEED NEWS (Apr. 3, 2015, 11:11 AM), <http://www.buzzfeed.com/katiejmbaker/teaching-rape-law-in-the-age-of-the-trigger-warning#jmPmBeA18> (discussing the incident).

122. Email from Dean of Students (Feb. 2015) (on file with author).

123. Of course, this distress was not triggered trauma in the clinical sense of “intrusive memory,” see *supra* note 118 and accompanying text, but rather a sense of acute anxiety over what was to come.

discussions of rape would be no different from other class discussions. Nevertheless, as trigger warnings become an entrenched part of classroom culture, criminal law teachers will have to be increasingly exceptionalist about rape teaching.¹²⁴

So what explains all this trigger-unhappiness? One possibility is that some anti-rape activists embrace a lay notion of trauma over a scientific one. It seems reasonable that a person who has been psychologically devastated by rape will suffer at the mention of any sexual assault. The trigger regimen may just be a well-meaning, albeit mistaken, effort to help vulnerable students. As one expert opined: “[R]equiring trigger warnings in university course syllabi seems a well-intentioned exercise in symbolic politics, in which the terminology of psychology has been enlisted, but its meaning lost.”¹²⁵

There may, however, be a more objectionable side to the regime. Because “triggers” are undefined and undefinable, what is deemed a trigger may map on to what is politically rather than illustratively provocative. I have been at numerous gatherings where rape reformers, prosecutors, and advocates graphically describe sexual assaults in order to demonstrate their brutality and traumatizing nature. Indeed, rape reform scholarship has a tendency to meticulously depict the details of deviant sexual practices, their injuries, etc.¹²⁶ But anti-rape activists and scholars, no matter how extensive their descriptive flourishes, are not often accused of being trauma triggerers. By contrast, men who make uninformed, insensitive, or illiberal remarks (i.e., women are liars; rape is a biological imperative, rape law is anti-men) have reason to fear an accusation of inflicting psychological harm.¹²⁷

124. See *Teaching Rape Law*, *supra* note 117.

125. Veraldi & Veraldi, *supra* note 120, at 6.

126. See Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. COLO. L. REV. 129, 145–49 (2014) (discussing feminists’ criminal law reformers’ use of spectacular narrative).

127. A shocking version of this phenomenon is currently (January 2016) playing out on the public stage. A group of Harvard Law Professors released a letter critical of the portrayal of a sexual assault case that occurred at the law school in the anti-rape activist film, *The Hunting Ground*. See Elizabeth Bartholet et al., *19 Harvard Law Professors Defend Law Student Brandon Winston, Denouncing His Portrayal in “The Hunting Ground”*, HARV. L. REC. (Nov. 11, 2015), <http://hlrecord.org/2015/11/19-harvard-law-professors-defend-law-student-brandon-winston-denouncing-his-portrayal-in-the-hunting-ground/>. In response, the filmmakers, Kirby Dick and Amy Ziering, have stated that the letter itself created a “hostile climate” at the law school and constituted “retaliation” against a sexual assault complainant. See Andrew M. Duehren, *Website Continues Challenge of ‘The Hunting Ground’ Film*, HARV. CRIMSON, <http://www.thecrimson.com/article/2015/12/3/website-challenges-hunting-ground> (last updated Dec. 4, 2015, 6:21 PM); Kirby Dick & Amy Ziering, *How Harvard Law Professors Retaliated Against an Assault Survivor*, HUFFINGTON POST (Jan. 6, 2016), <http://www.huffingtonpost.com/kirby-dick/how-harvard-law->

Accordingly, anti-rape culture may aid respectful discussion by controlling thoughtless, belittling, and sexist remarks. It also shuts down reasoned debate. Triggered trauma is inherently unpredictable, but one risks nonetheless serious sanction for “causing” it.¹²⁸ Anti-rape culture directs professors to teach rape in some vaguely-defined trauma-informed manner, at the risk of severely damaging students and their careers if they misapprehend the propriety of their chosen methodology.¹²⁹ For many, the risk is not worth it, and some great criminal law professors now simply do not teach the subject.¹³⁰ Others of us will continue to teach this important and contemporary topic, but we will do so with “a cold spike of fear.”¹³¹

III. CONCLUSION

Like any culture, anti-rape culture is a mixed-bag. We *should* recognize that women still disproportionately suffer when there is rampant casual, ambiguous, and inebriated sex. We *should* acknowledge that women currently bear more burdens of sexual liberation than men. We *should* be vigilant about issues like student comfort, gender equality, and public health. However, as much as we want anti-rape discourse to be feminist, we should be careful lest it create a culture in which ambiguous, drunken sex is ruinous to women. As much as we want anti-rape policy to punish brutal serial rapists, we must be careful lest the newfound administrative power distributes in less salubrious ways—to poor minorities, or more likely, somewhat randomly. As much as we want anti-rape culture to generate enlightened discussions, we must be careful lest it produce silence in an area where more communication is needed. Campus sexual assault reform is still nascent, and now is the

professor_b_8916026.html. These activists argue that the letter’s *substantive content*, which is critical of their film, violates federal antidiscrimination law (which is ground for termination) because it is harmful to students.

128. See *supra* notes 117–21 and accompanying text (on triggers); *supra* notes 88–92 and accompanying text (on widespread reporting to Title IX officers).

129. One of the stranger responses I have heard to my analysis of the trigger culture is that it simply does not exist. See, e.g., Tyler Kingkade, *Despite Fears About Trigger Warnings, Survey Suggests Few Faculty Are Forced to Use Them*, HUFFINGTON POST (June 23, 2015, 2:46 PM), http://www.huffingtonpost.com/2015/06/23/faculty-trigger-warnings-survey_n_7639376.html. I do not doubt that professors in many disciplines are outside of the trigger warning regime, but for those of us who teach rape, homicide, racial profiling, gay panic, and other “sensitive” topics, it is all too real.

130. See *Teaching Rape Law*, *supra* note 117.

131. See *supra* notes 55–56 and accompanying text.

time to be self-reflective rather than unyielding and to take stock of what is going on before well-intentioned feminist strategies turn into authoritarian institutions.¹³² For as criminal law theorists well know, institutions built on a foundation of repulsion and disdain for deviant sexuality—no matter how illiberal, misguided, or counterproductive they may be in retrospect—are nearly impossible to dismantle.

132. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 605 (1990) (quoting CYNTHIA OZICK, *Literature and the Politics of Sex: A Dissent*, in ART & ARDOR 287, 287 (1983)).