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ARTICLES

RAPE ON CAMPUS AND IN THE MILITARY: An Agenda for Reform

Deborah L. Rhode*

I. INTRODUCTION

“Sexual violence is more than just a crime against individuals,” declared President Barack Obama in January 2014. “It threatens our families; it threatens our communities. Ultimately, it threatens the entire country. It tears apart the fabric of our communities . . . [W]e have the power to do something about it as a government, as a nation.”¹ This was, by all accounts, the first time an American president had ever used the phrase “sexual violence,” let alone made dealing with it a national priority.²

That recognition of the problem was long overdue. The United States has the world’s second highest rate of reported rape.³ About sixteen to eighteen percent of American women and one to three percent of American men have experienced an attempted or completed rape.⁴ Only about a third of rapes and attempted rapes

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¹ Nina Burleigh, *Confronting Campus Rape*, ROLLING STONE (June 4, 2014), <http://www.rollingstone.com/politics/news/confronting-campus-rape-20140604> (quoting Barack Obama).

² *Id.*

³ U. N. Office on Drugs and Crime, *Rape at the National Level, Number of Police Recorded Offenses* (2011), www.unodc.org/documents/data-and-analysis/statistics/crime/CTS12_Sexual_violence.xls.

⁴ MICHELE C. BLACK ET AL., NAT’L CTR. FOR INJURY PREVENTION AND CONTROL, *THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT* 18, 19 (2011), http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf; see also *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. on Crime and Drugs, 111th Cong. 3* (2010) (statement of Susan B. Carbon, Dir., Office on Violence Against Women).

are reported.⁵ Fewer than ten percent of sexual assaults will result in a conviction.⁶ Of all the major felonies, rape is the least reported, least indicted, and least likely to end in conviction.⁷

Rape has attracted increasing attention in two contexts: college campuses and military institutions. These contexts share two distinctive features: both have disproportionately high rates of sexual assaults and internal procedures that have proven inadequate to deal with them.⁸ This article focuses on the dynamics that have contributed to the problem in those contexts, and the strategies that must be part of the solution.

II. CAMPUS RAPE

A. *The Nature of the Problem*

A major problem in addressing campus rape is the mismatch between popular images of rape—a violent sexual assault by a stranger—and the kinds of sexual coercion common in most college rapes.⁹ Among college women, about four-fifths of rapes and attempted rapes involve acquaintances and almost ninety percent involve no weapon.¹⁰ Women have been drinking or taking drugs in a majority of cases.¹¹

⁵ *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases*, *supra* note 4.

⁶ Donald Dripps, *Rape, Law and American Society*, in *RETHINKING RAPE LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 231 (Clare McGlynn & Vanessa E. Munro, eds., 2010); Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 *COLUM. J. GENDER & L.* 1, 8 (2011).

⁷ Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 *SUFFOLK U. L. REV.* 467, 472 (2005).

⁸ RANA SAMPSON, U.S. DEP'T OF JUSTICE, *ACQUAINTANCE RAPE OF COLLEGE STUDENTS 2* (2003) (noting that women ages sixteen to twenty-four experience rape at rates four times higher than other women, and women in college are more at risk for sexual assault than women of the same age not in college). For military rates see *infra* text accompanying notes 128-29.

⁹ Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 *COLUM. J. GENDER & L.* 437 *passim* (2006).

¹⁰ KATRINA BAUM & PATSY KLAUS, U.S. DEP'T OF JUSTICE, *VIOLENT VICTIMIZATION OF COLLEGE STUDENTS, 1995-2002* (2005), <http://www.bjs.gov/content/pub/pdf/vvcs02.pdf>.

¹¹ Christopher P. Krebs et al., *College Women's Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since Entering College*, 57 *J. AM. C. HEALTH* 639, 639 (2009); see also DEAN G. KILPATRICK ET AL., *DRUG-FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL STUDY* (2007).

Only twelve to thirteen percent of students report the assault to campus or law enforcement authorities.¹² Reasons include self blame, fear of reprisal, not wanting others to find out, not knowing how to report, lack of proof, a belief that the conduct wasn't serious enough to report, and expectations of dismissive treatment.¹³ Those expectations are not unfounded, and the experience of not being believed can increase the trauma.¹⁴ A textbook illustration of the problem surfaced in an Amherst College student's widely-publicized account of her campus rape, in which a sexual assault counselor told her that "[p]ressing charges would be useless, he's about to graduate, there's not much we can do. Are you SURE it was rape? It might have been a bad hookup . . . You should forgive and forget."¹⁵ In a similar case at Occidental College, an administrator reportedly told a complainant not to worry about safety because the administrator had met the rapist and "he didn't seem like the type of person who would do something like that."¹⁶ At the University of Connecticut, a female campus police officer told a complainant that "women have to just stop spreading their legs like peanut butter" or rape will "keep on happening till the cows come

¹² THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 14 (2014), https://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf (twelve percent); WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 7 (2014), <https://notalone.gov/assets/report.pdf> (thirteen percent).

¹³ WHITE HOUSE TASK FORCE, *supra* note 12, at 7-8; *see also* Nancy Chi Canalupo, *Title IX's Civil Rights Approach and the Criminal Justice System, in THE CRISIS OF CAMPUS SEXUAL VIOLENCE: CRITICAL PERSPECTIVES ON PREVENTION AND RESPONSE* 129-130 (Sara Corrigan Wooten & Roland W. Mitchell eds., 2016); *see also* Richard Pérez-Peña, *Rare Survey Examines Sexual Assault at MIT*, N.Y. TIMES, Oct. 28, 2014, at A20 (in an MIT survey that asked students who experienced sexual assault why they did not report it, nearly half thought they were partly at fault).

¹⁴ *See* CAROL BOHMER & ANDREA PARROT, SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION 5, 198 (1993) (the risk of increased trauma is particularly great if the offender is exonerated).

¹⁵ Angie Epifano, *An Account of Sexual Assault at Amherst College*, AMHERST STUDENT (Oct. 17, 2012), <http://amherststudent.amherst.edu/?q=article/2012/10/17/account-sexual-assault-amherst-college>; *see also* Richard Pérez-Peña, *Sexual Assaults Roil Amherst, and College President Welcomes the Controversy*, N.Y. TIMES, Nov. 12, 2012, at A19.

¹⁶ Richard Pérez-Peña & Ian Lovett, *2 More Colleges Accused of Mishandling Assaults*, N.Y. TIMES (Apr. 18, 2013), <http://www.nytimes.com/2013/04/19/education/swarthmore-and-occidental-colleges-are-accused-of-mishandling-sexual-assault-cases.html>.

home.”¹⁷ These cases are not infrequent.¹⁸ Dismissive attitudes by fellow students can be equally problematic. At some institutions, coming out as a rape victim can be a form of “social suicide.”¹⁹ Two University of Virginia students who went public were called “cunt” and “feminazi bitch,” and one was physically assaulted.²⁰ As one rape crisis advocate notes, women who anticipate those reactions “are pretty much saying ‘It’s not worth it . . . I’ll deal with it and move on.’”²¹

Local law enforcement agents can be equally unsupportive. Prosecutors want cases that they can win, and cases involving acquaintances and victims who act irresponsibly are often met with skepticism.²² A recent case study in the flawed law enforcement process involves Jameis Winston, a Florida State University quarterback who led his team to the national championship while accusations of rape were pending against him. The prosecutor handling the case acknowledged a number of problems with the investigation. In fact, an exhaustive examination by the *New York Times* found that there was “virtually no investigation at all, either by the police or the university.”²³ The police did not follow obvious leads that would have quickly identified the suspect as well as witnesses, one of whom videotaped part of the sexual encounter.²⁴ Nor did the police obtain a DNA sample after the complainant identified Winston as her assailant.²⁵ The detective in charge of the case waited two months to write his report, and then prematurely suspended his

¹⁷ Tatiana Schlossberg, *U Conn to Pay \$1.3 Million to End Suit on Rape Cases*, N.Y. TIMES (July 8, 2014), <http://www.nytimes.com/2014/07/19/nyregion/uconn-to-pay-1-3-million-to-end-suit-on-rape-cases.html>.

¹⁸ For other examples, see Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 214-17 (2011).

¹⁹ Sabrina Robin Erdely, *A Rape on Campus*, ROLLING STONE, Dec. 4, 2014, at 73 (describing culture at University of Virginia). For controversy over the piece, see Ravi Somaiya, *Magazine’s Account of Gang Rape on Virginia Campus Comes Under Scrutiny*, N.Y. TIMES (Dec. 2, 2014), <http://www.nytimes.com/2014/12/03/us/magazines-account-of-gang-rape-on-virginia-campus-comes-under-scrutiny.html>.

²⁰ Erdely, *supra* note 19, at 76.

²¹ ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS 79 (2013).

²² *Id.* at 5, 102; see also Robin Wilson, *Why Colleges Are on the Hook for Sexual Assault*, CHRON. HIGHER EDUC. (June 6, 2014), <http://chronicle.com/article/Why-Colleges-Are-on-the-Hook/146943/>.

²³ Walt Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), <http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html>.

²⁴ *Id.*

²⁵ *Id.*

inquiry. By the time the prosecutor got the case, important evidence had vanished, including the video of the assault.²⁶ The university, which knew about the rape accusation, did not even question Winston before allowing him to complete the full championship season.²⁷ Not until almost two years after the assault, in the wake of adverse publicity and a Title IX complaint, did the university open an investigation.²⁸ The Winston case is not unique. In another campus rape case occurring around the same time, the local police were equally unsupportive. An officer suggested that an investigation “would be futile, as this kind of stuff happens all the time here.”²⁹

Taken together, these dynamics prevent the vast majority of rapes from ever resulting in conviction. In one survey of 171 sexual assaults investigated by police at six campuses, only seven percent resulted in arrest and four in conviction.³⁰

These negative law enforcement attitudes are widely shared. Despite decades of reform efforts, it is the victim’s conduct, as well as the assailant’s, that is on trial in rape proceedings. Jurors’ perception of the “moral character” of the complainant has traditionally been the single most important factor affecting outcomes.³¹ Research on public opinion and juror attitudes makes clear that most Americans are reluctant to convict in acquaintance rape cases where victims acted “irresponsibly” by drinking or “leading a man on.”³² As a Maryland Supreme Court justice put it, when an adult woman goes to a man’s room, “[s]he certainly [has] to realize that they [are] not going upstairs to play Scrabble.”³³ When alcohol is involved, victims tend to be blamed more and perpetrators less.³⁴

²⁶ *Id.*

²⁷ *Id.*

²⁸ Eliana Dockterman, *Florida State Investigates Jameis Winston for Alleged Sexual Assault*, TIME (Sept. 4, 2014), <http://time.com/3270898/florida-state-investigates-jameis-winston-for-alleged-sexual-assault/>.

²⁹ Bogdanich, *supra* note 23.

³⁰ Cantalupo, *supra* note 18, at 239.

³¹ GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT (1989); Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEXAS J. WOMEN & L. 41, 42 (1993).

³² Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 971-73 (2008) (citing various sources); see also B. J. Rye, Sarah A. Greatrix & Corinne S. Enright, *The Case of the Guilty Victim: The Effects of Gender of Victim and Gender of Perpetrator on Attributions of Blame and Responsibility*, 54 SEX ROLES 639, 640 (2006) (discussing tendency to hold victims who are drinking partly responsible for an assault).

³³ State v. Rusk, 424 A.2d 720, 734 (Md. 1981) (Cole, J., dissenting).

³⁴ Calvin M. Sims, Nora E. Noel & Stephen A. Maisto, *Rape Blame as a Function of Alcohol Presence and Resistance Type*, 32 ADDICTIVE BEHAV. 2766,

According to Camille Paglia, a “girl who lets herself get dead drunk at a fraternity party is a fool. A girl who goes upstairs alone with a brother at a fraternity party is an idiot. Feminists call this ‘blaming the victim.’ I call it common sense.”³⁵ A Toronto police officer told a group of college women that if they wanted to avoid sexual assault, they should avoid dressing like “sluts.”³⁶ A *New York Times* article recounted the fate of a victim of a rape at a fraternity who was ostracized and vilified after reporting the incident; the take-away was in the title, “Reporting Rape, and Wishing She Hadn’t.”³⁷

The tendency to hold victims accountable is deeply rooted. As psychologist Melvin Lerner famously argued, people want to believe in a just world in which people get what they deserve and deserve what they get.³⁸ In rape cases, the tendency is to discount victims’ injury or blame victims for the assault.³⁹

Another psychological dynamic that complicates acquaintance rape cases involves the inclination to resolve doubts in ways that favor self-interest. Men whose interests lie in having sex are likely to perceive ambiguous or conflicting signals as consent. Women who come to regret the experience are likely to recall making their opposition clear. The issue then becomes who should bear the risk of misunderstandings, and how much responsibility women have for not clearly communicating their preferences. A common view is that overly inclusive definitions of rape give women unreasonable control to define, after the fact, what is or is not acceptable, consensual sex.⁴⁰ In one survey, fifty percent of male athletes believed that almost half of women who report rape are lying.⁴¹ Yet empirical research suggests that the rate of false report-

2773 (2007); Karla J. Stormo, Alan R. Lang & Werner G.K. Stritzke, *Attributions About Acquaintance Rape: The Role of Alcohol and Individual Differences*, 27 J. APPLIED SOC. PSYCHOL. 279, 303 (1997).

³⁵ CAMILLE PAGLIA, *SEX, ART, AND AMERICAN CULTURE: ESSAYS* 51 (1992).

³⁶ Rebecca Traister, *Ladies, We Have a Problem*, N.Y. TIMES MAG., July 24, 2011, at 9.

³⁷ Walt Bogdanich, *Reporting Rape, and Wishing She Hadn’t*, N.Y. TIMES (July 12, 2014), http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html?_r=0.

³⁸ MELVIN J. LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* (1980); Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 1030, 1030 (1978).

³⁹ Yael Idisis et al., *Attribution of Blame to Rape Victims among Therapists and Non-Therapists*, 25 BEHAV. SCI. & L. 103, 104 (2007).

⁴⁰ See Neil Gilbert, *The Phantom Epidemic of Sexual Assault*, 103 PUB. INT. 54 *passim* (1991).

⁴¹ Michelle S. Jacobs, *Invisible Criminality: Male Peer-Support Groups, Alcohol, and the Risk of Aggressive Sexual Behavior*, in RACE TO INJUSTICE:

ing is much lower. Close to half of surveyed women are unwilling to label forced sex between acquaintances rape, even when it meets the statutory definition.⁴²

The common assumption that “nonviolent” acquaintance rapes do not involve serious harm is also inconsistent with the evidence. Data from the National Crime Center and Department of Justice indicate that most rapes do not involve physical injury apart from the assault itself, but that they often produce debilitating and enduring psychological trauma.⁴³ Survivors suffer high rates of depression, drug and alcohol abuse, and post-traumatic stress disorder, which can lead to problems in work and educational performance and heightened college drop out rates.⁴⁴ Acquaintance rape is no less psychologically harmful than other assaults because it calls into question a woman’s behavior, judgment, and sense of trust in ways that acts of strangers do not. As one anonymous letter to the editor of a campus paper explained, “I was raped about a year ago . . . by a very public member of the student body He did not put a gun to my head or threaten my life, but sometimes I have thought that would have been better. Then I would have had a [sic] excuse for ‘letting this happen.’”⁴⁵

A large percentage of campus rapes are committed by a small number of repeat offenders. In one study of 1882 college men who acknowledged committing acts that qualified as rape or attempted rape, sixty-three percent were repeat offenders, with an average of almost six rapes each.⁴⁶ A large percentage of these men belong to all-male organizations and teams that reward male conquests.⁴⁷ One survey of two college campuses found that male athletes, who

LESSONS LEARNED FROM THE DUKE LACROSSE RAPE CASE 103, 108 (Michael L. Seigel ed., 2009).

⁴² See DEBORAH L. RHODE, *SPEAKING OF SEX* 123 (1997) (citing various sources).

⁴³ See sources cited in *id.*

⁴⁴ THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, *RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION*, *supra* note 12, at 14; see also DEAN G. KILPATRICK ET AL., *DRUG-FACILITATED, INCAPACITATED AND FORCIBLE RAPE: A NATIONAL STUDY* 49-50 (2007).

⁴⁵ Letter reprinted in MARTIN D. SCHWARTZ & WALTER S. DEKESEREDY, *SEXUAL ASSAULT ON THE COLLEGE CAMPUS: THE ROLE OF MALE PEER SUPPORT* 127 (1997).

⁴⁶ David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 *VIOLENCE & VICTIMS* 73, 78 (2002).

⁴⁷ See Scot B. Boeringer et al., *Social Contexts and Social Learning in Sexual Coercion and Aggression: Assessing the Contribution of Fraternity Membership*, 40 *FAM. REL.* 58, 58-62 (1991); see also Patricia Yancey Martin & Robert A. Hummer, *Fraternities and Rape on Campus*, 3 *GENDER & SOC’Y* 457 *passim* (1989).

constituted three percent of the male student body, were responsible for twenty percent of rapes.⁴⁸ Another study found that that over a quarter of incapacitated sexual-assault victims reported that their assailant was a fraternity member.⁴⁹ In a case all too emblematic of fraternity views, the Yale chapter of Delta Kappa Epsilon had its pledges chant “[n]o means yes, yes means anal” in front of dorms housing women.⁵⁰

B. *Campus Procedures*

The inadequacy of campus procedures compounds the problem. In one all-too-typical experience, an Occidental student reported a rape to an administrator who did not direct her toward any resources or review her legal options.⁵¹ Although the assailant was ultimately found responsible and expelled, the complainant felt more devastated than vindicated. The college’s administrative procedure entitled her assailant to cross-examine her. “The adjudication board itself was one of the worst things I had to experience outside of the actual assault, and in some ways it was worse.”⁵²

An *Onion* parody captures reasons why. It portrays a rape victim explaining to reporters: “‘I get to go into a room filled with a committee of middle-aged men whose primary concern is upholding the college’s reputation and recount in explicit detail the circumstances of my rape at the hands of another student—I can’t wait,’ said the pleased 19-year-old, who noted that she’s particularly looking forward to describing her choice of clothing the night of the assault, explaining the nature of her relationship with her rapist, and entertaining a variety of questions aimed at determining whether she herself invited the attack with her words and actions, all the while offering a step-by-step account of the most horrific night of her life. ‘Don’t get me wrong, it was great being interviewed by the local and campus police, but this way I get to tell university officials who have a vested interest in minimizing campus rape

⁴⁸ JEFF BENEDICT, PUBLIC HEROES, PRIVATE FELONS: ATHLETES AND CRIMES AGAINST WOMEN 4 (1997); see Jacobs, *supra* note 41 at 105.

⁴⁹ Eliza Gray, *Crisis on Fraternity Row*, TIME, Dec. 15, 2014, at 44.

⁵⁰ Nicole Allan, *Confusion and Silence*, YALE ALUMNI MAG. (July/Aug., 2011), <http://www.yalealumnimagazine.com/articles/3235>; see also Michael Kimmel, *The Men, And Women, of Yale*, MS. MAG. MS. BLOG (Oct. 17, 2010), <http://msmagazine.com/blog/blog/2010/10/17/the-men-and-women-of-yale/> (describing a similar incident that occurred four years earlier).

⁵¹ Michelle Goldberg, *Why the College Campus Rape Crisis Confounds Colleges*, NATION (June 4, 2014), <http://www.thenation.com/article/why-campus-rape-crisis-confounds-colleges/>.

⁵² *Id.*

statistics . . . what exactly I was drinking and why I could have misremembered events.”⁵³

Those accused of sexual assault also fault campus adjudicative processes for the lack of procedural protections. Many have sued their institution, claiming that it scapegoated them in an effort to show the effectiveness of its policies.⁵⁴ In some institutions, including Harvard, the Title IX enforcement office acts as investigator, prosecutor, judge, and jury; it even hears appeals, which raises obvious due process issues.⁵⁵ Insensitivity to the rights of alleged perpetrators has also been apparent in the media. A celebrated recent case is the *Rolling Stone* article in which the reporter failed to interview alleged perpetrators of a gang rape, and ignored discrepancies in the account of the victim.⁵⁶ According to the founder of Families Advocating For Campus Equality, “[i]n their rush to judgment, colleges are now substituting one class of victims for another.”⁵⁷

A related issue is the lack of concern among anti-rape activists for the due process rights of alleged perpetrators. *Guardian* columnist Jessica Valenti describes the debate over campus adjudication reform this way: “On the one side, there are the 20 percent of college women who can expect to be victimized by rapists and

⁵³ *College Rape Victim Pretty Thrilled She Gets to Recount Assault to Faculty Committee*, THE ONION (May 27, 2014), <http://www.theonion.com/article/college-rape-victim-pretty-thrilled-she-gets-to-re-36129>.

⁵⁴ Robin Wilson, *Presumed Guilty*, 61 CHRON. HIGHER EDUC. A38, 39 (2014); Vanessa Grigoriadis, *A Very Different Kind of Sexual Revolution on Campus*, N.Y. MAG., Oct. 5, 2014, at 116; Ariel Kaminer, *A New Factor in Campus Assault Cases*, N.Y. TIMES, Nov. 20, 2014, at A22; Goldberg, *supra* note 51; Judith Shulevitz, *Accused College Rapists Have Rights, Too*, NEW REPUBLIC (Oct. 11, 2014), <http://www.newrepublic.com/article/119778/college-sexual-assault-rules-trample-rights-accused-campus-rapists>.

⁵⁵ Shulevitz, *supra* note 54; Eliza Gray, *Harvard in Hot Water Over Sexual-Assault Policy*, TIME (Oct. 23, 2014), <http://time.com/3533574/harvard-sexual-assault-policy/>; see also Katherine Mangan, *Colleges' New Sex-Assault Policies Draw Fire From All Sides*, CHRON. HIGHER EDUC., Jan. 16, 2015, at A6; *Database: Lawsuits Against Colleges and Universities Alleging Due Process and Other Violations in Adjudicating Sexual Assault*, BOYS & MEN IN EDUC., <http://boysmeneducation.com/list-of-lawsuits-against-colleges-and-universities-alleging-due-process-violations-in-adjudicating-sexual-assault> (last updated Oct. 19, 2015) (listing 95 cases by men who claim to have been wrongfully accused).

⁵⁶ Richard Pérez-Peña & Ravi Somaiya, *Report of Rape at a Fraternity Begins to Fray*, N.Y. TIMES, Dec. 6, 2014, at A1; T. Rees Shapiro, *Key Elements of Rolling Stone's U-Va. Gang Rape Allegations in Doubt*, WASH. POST (Dec. 5, 2014), https://www.washingtonpost.com/local/education/u-va-fraternity-to-rebut-claims-of-gang-rape-in-rolling-stone/2014/12/05/5fa5f7d2-7c91-11e4-84d4-7c896b90abdc_story.html; Greg Toppo, *Rolling Stone Retraction Roils U.Va. Case*, USA TODAY, Dec. 8, 2014, at A1.

⁵⁷ Wilson, *supra* note 54, at A38 (quoting Judith E. Grossman).

would-be rapists; on the other side is a bunch of adult men (and a few women) worrying themselves to death that a few college-aged men might have to find a new college to attend.”⁵⁸ This characterization of the debate trivializes the stigma of being labeled a rapist and forced to apply to another institution with such a record.

It is impossible to know how often institutions have failed to be sufficiently sensitive to alleged victims or alleged perpetrators. What is clear is that even the best-intentioned members of adjudicative boards are often ill-prepared for the role. Senator Claire McCaskill’s survey of 440 institutions found that a third failed to provide basic training to the people adjudicating claims.⁵⁹ Almost a quarter gave athletic departments oversight of cases involving student athletes.⁶⁰ Forty-one percent of schools had not conducted a single investigation of sexual violence in the past five years. More than a fifth conducted fewer investigations than the number of incidents that they reported to the Department of Education.⁶¹ Many institutions lack formal cooperative understandings or good relations with local law enforcement agencies, which impedes criminal proceedings when campus responses fall short.⁶² Some institutions actively discourage complainants from going to the police.⁶³ As one commentator summarized the situation, colleges bring to the task of responding to assault a “toxic mix of unqualified investigators, underdeveloped judiciary processes, and conflicts of interest that undermine both their effectiveness and their legitimacy.”⁶⁴ Although experts agree that annual confidential surveys of students are one of the best ways to get an accurate sense of campus sexual assaults, only sixteen percent of institutions conducted such surveys.⁶⁵ The limited evidence available also casts doubt on the

⁵⁸ Zoë Heller, *Rape on the Campus*, N.Y. REV. BOOKS (Feb. 5, 2015), <http://www.nybooks.com/articles/archives/2015/feb/05/rape-campus/> (quoting Valenti).

⁵⁹ Claire McCaskill, *Colleges Still Failing Rape Victims*, USA TODAY, July 10, 2014, at A8.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Danielle Elizabeth DeBold, *The Decriminalization of Rape on America's College Campuses*, 99 WOMEN LAWS. J. 10, 12-14 (2014), <http://www.nawl.org/d/do/255>.

⁶³ Richard Pérez-Peña, *Bob Jones University Blamed Victims of Sexual Assault, Not Abusers, Report Says*, N.Y. TIMES, Dec. 12, 2014, at A20 (at Bob Jones University, about half the students and employees who identified themselves as victims of assault said the university discouraged them from going to police).

⁶⁴ Philip N. Cohen, *College Sex-Assault Trials Belong in Court, Not on Campus*, CHRON. HIGHER EDUC., Jan. 9, 2013, at A28.

⁶⁵ DeBold, *supra* note 62.

adequacy of the brief rape awareness programs that are common in campus outreach efforts.⁶⁶

A related problem involves the leniency of sanctions. A report by the Center for Public Integrity showed that only ten to twenty-five percent of students found responsible for campus sexual assault are expelled.⁶⁷ At the University of Virginia, no one has been expelled for sexual assault in the last seven years; the University has punished students more harshly for cheating than for rape.⁶⁸ In its entire history, Stanford has expelled only one student for rape.⁶⁹ Sanctions at many institutions can be as minimal as probation, suspension during a summer term, requiring the offender to write a letter of apology, or watching a brief educational video on sexual violence and preparing a two-page reflection paper.⁷⁰ When asked to grade their school on handling sexual assault cases, less than ten percent of students gave their school an A. Half gave their school a C or lower.⁷¹

C. *Legal Standards*

Part of the reason for the inadequacy of campus rape procedures is the inadequacy of legal enforcement structures. Title IX of the Education Amendments of 1972 requires schools that receive federal financial assistance to take necessary steps to prevent sexual assaults and to respond promptly and effectively when an assault is reported.⁷² The Clery Act requires schools that participate in federal financial aid programs to report annual statistics on crime, including sexual assault and rape, on or near their campuses,

⁶⁶ See research summarized in Deborah L. Rhode, *Social Research and Social Change: Meeting the Challenge of Gender Inequality and Sexual Abuse*, 30 HARV. J. L. & GENDER 11, 16-17 (2007).

⁶⁷ Caroline Heldman & Danielle Dirks, *Blowing the Whistle on Campus Rape*, Ms., Winter/Spring 2014, at 34; Kristen Lombardi, *A Lack of Consequences for Sexual Assault: Students Found “Responsible” Face Modest Penalties, While Victims are Traumatized*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010), http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1945/.

⁶⁸ Jennifer Steinhauer & Richard Pérez-Peña, *University’s Image Suffers After Campus Rape Report*, N.Y. TIMES, Nov. 25, 2014, at A15, A17.

⁶⁹ Michele Landis Dauber, *Transparency and Sensitivity Work Together to Stop Campus Rape*, N.Y. TIMES (Dec. 12, 2014), <http://www.nytimes.com/roomfordebate/2014/12/12/justice-and-fairness-in-campus-rape-cases/transparency-and-sensitivity-work-together-to-stop-campus-rape>.

⁷⁰ Heldman & Dirks, *supra* note 67, at 32; Lombardi, *supra* note 67; *see also Untangling the Knot*, STANFORD MAGAZINE, Jan./Feb. 2015, at 53 (noting that Miami University required a student responsible for sexual assault to be placed on probation and to write an essay).

⁷¹ Lombardi, *supra* note 67.

⁷² 20 U.S.C. §§ 1681-82 (2011).

and to develop prevention policies.⁷³ The Campus Sexual Violence Elimination Act amended the Clery Act to require procedural protections for those reporting an assault, to establish standards for disciplinary procedures governing assault, and to require prevention and awareness programming for students and employees.⁷⁴ In 2014, the Department of Education promulgated new rules under the Clery Act that require colleges to provide training for faculty, staff, and students concerning policies on sexual misconduct, and allow alleged perpetrators and victims to have advisors with them throughout disciplinary proceedings.⁷⁵

The Department of Education's Office for Civil Rights is charged with enforcing Title IX. It may initiate an investigation either proactively or in response to a formal complaint. If OCR finds a Title IX violation, it can, in theory, withdraw federal funds. In practice, that penalty has never been invoked.⁷⁶ Rather, schools that are found in violation enter into agreements requiring them to take specified actions to remedy the problem.⁷⁷ The Department of Education's Federal Student Aid Office is responsible for enforcing the Clery Act, and conducts on-site reviews to ensure compliance.⁷⁸ Violations of the Act can result in fines and orders to comply.⁷⁹

By the spring of 2015, 106 colleges and universities were under investigation for Title IX violations in handling sexual assault claims.⁸⁰ If history is any guide, most of these investigations will not result in federally mandated reforms. In one survey of complaints between 1998 and 2008, the Department of Education ruled against just five universities out of only twenty-four resolved complaints.⁸¹

⁷³ 20 U.S.C. § 1092 (2011).

⁷⁴ 20 U.S.C. § 1092(f) (2011).

⁷⁵ Violence Against Women Act, 79 Fed. Reg. 62,751 (Oct. 20, 2014) (to be codified at 34 C.F.R. 668.46); see also Max Lewontin, *Final Federal Rules on Sexual Violence Emphasize Training*, CHRON. HIGHER EDUC., Oct. 31, 2014, at A4.

⁷⁶ Mary Beth Marklein, *Colleges Put on Notice over Rape*, USA TODAY, July 31, 2014, at 3A; Burleigh, *supra* note 1.

⁷⁷ See, e.g., *U.S. Department of Education Finds Tufts University in Massachusetts in Violation of Title IX for Its Handling of Sexual Assault and Harassment Complaints*, U.S. DEP'T OF EDUC. (Apr. 28, 2014), <http://www.ed.gov/news/press-releases/us-department-education-finds-tufts-university-massachusetts-violation-title-ix> (describing Tufts University's revocation of an agreement to remedy Title IX violations with the Department of Education).

⁷⁸ 20 U.S.C. § 1092(f)(15) (2011).

⁷⁹ See, e.g., 20 U.S.C. § 1092(f)(13) (allowing for civil penalties).

⁸⁰ Tyler Kingkade, *106 Colleges Are Under Federal Investigation for Sexual Assault Cases*, HUFFINGTON POST (Apr. 6, 2015), http://www.huffingtonpost.com/2015/04/06/colleges-feder-investigation-tiitle-ix-106_n_7011422.html.

⁸¹ Burleigh, *supra* note 1.

In a *Chronicle of Higher Education* survey of 801 complaints between 2003 and 2013, only ten percent ended with an agreement to change and only four percent resulted in a finding that the institution was out of compliance with Title IX.⁸² Part of the reason for the low success rate may be resource constraints preventing full investigations. Compared to twenty years ago, the OCR has twenty-seven percent fewer staff members yet handles three times as many complaints.⁸³ A related problem is the lack of realistic sanctions. Because institutions know that funding cutoffs are implausible, OCR has limited leverage in negotiating compliance. As one Title IX complainant noted, “[c]ulture changes when there’s a cost to wrongdoing.”⁸⁴ A petition to the Department of Education maintains that the resolutions negotiated with campuses lack teeth. The Department is “all carrot and no stick.”⁸⁵

D. *Reform Strategies*

The first and most obvious strategy for combating campus rape is to hold schools accountable for their failures. A step in that direction is the proposed Campus Accountability and Safety Act, which would require colleges and universities to

- designate confidential advisers to coordinate survivor services;
- train campus personnel involved in sexual assault-related services and procedures;
- no longer allow athletic departments or subgroups of students to handle complaints of sexual violence;
- coordinate efforts with local law enforcement agencies.

The bill would also fine schools up to one percent of their operating budget if they fail to investigate reports of sexual assault, and increase penalties under the Clery Act to up to \$150,000 per violation, up from the current level of \$35,000.⁸⁶ Even without federal legislation, institutions should make such investigations a priority, as a growing number are.⁸⁷

⁸² Jonah Newman & Libby Sander, *A Promise Unfulfilled*, CHRON. HIGHER EDUC. (Apr. 30, 2014), <http://chronicle.com/article/Promise-Unfulfilled-/146299/>.

⁸³ *Id.*

⁸⁴ Libby Sander, *Quiet No Longer: Rape Survivors Put Pressure on Colleges*, CHRON. HIGHER EDUC., Aug. 12, 2013, at A22 (quoting Laura Dunn).

⁸⁵ *Id.* at A21.

⁸⁶ See Marklein, *supra* note 76; Jennifer Steinhauer, *Senators Offer Bill to Curb Campus Sexual Assault*, N.Y. TIMES (July 30, 2014), <http://www.nytimes.com/2014/07/31/us/college-sexual-assault-bill-in-senate.html>.

⁸⁷ See Nanette Asimov, *UC Pledges to Overhaul Response to Sex Assaults*, S.F. CHRON., Sept. 18, 2014, at D1 (describing reforms such as comprehensive training for faculty and staff and independent confidential advocacy office for

Other proposals have been made to increase accountability for campus rape. One would require the Department of Education to conduct random reviews of colleges and universities to determine their compliance with Title IX mandates.⁸⁸ To make that possible, Congress needs to authorize additional funding for the Office of Civil Rights. Schools could also be required to conduct and publish annual surveys to assess the prevalence of sexual assault, the number and results of disciplinary hearings, and the effectiveness of remedial strategies. Such transparency would give schools a greater incentive to address rape than the current regime, in which schools that discourage rape reports appear to have a lower incidence of problems. Providing independent advocates for victims of sexual assault, as do California universities, is another way to empower individuals to report rape and ensure an adequate institutional response.⁸⁹ Federal policy could also require schools to involve local law enforcement in the investigation of sexual assaults, while leaving victims with the choice of whether or not to pursue criminal charges.⁹⁰ Such a requirement, by ensuring an adequate inquiry, would increase the likelihood that survivors will press charges.⁹¹

Schools should also provide more extensive education for staff and students, including bystander intervention training, which preliminary studies suggest is the most promising prevention approach.⁹² Giving individuals concrete strategies to help individuals in high-risk situations increases the likelihood of productive interventions. Enlisting male campus leaders in prevention efforts can also enhance their credibility.⁹³ So too, institutions should also invest more resources in program evaluation. We know far too little about what works to reduce sexual assaults.⁹⁴ More sophisticated

victims).

⁸⁸ Sander, *supra* note 84.

⁸⁹ *Help for Victims of Campus Attacks*, S.F. CHRON., Sept. 24, 2014, at A15.

⁹⁰ DeBold, *supra* note 62, at 20-21.

⁹¹ *Id.* at 22.

⁹² Victoria L. Banyard, Mary M. Moynihan & Elizabeth G. Plante, *Sexual Violence Prevention Through Bystander Education: An Experimental Evaluation*, 35 J. COMMUNITY PSYCHOL. 463 (2007); Jennifer Katz & Jessica Moore, *Bystander Education Training for Campus Sexual Assault Prevention: An Initial Meta-Analysis*, 28 VIOLENCE & VICTIMS 1054 (2013). For an account of evidence, see Caitlin B. Henriksen, Kelsey L. Mattick & Bonnie S. Fisher, *Mandatory Bystander Intervention Training: Is the SaVE Act Requirement the "Right" Program to Reduce Violence Among College Students?*, in THE CRISIS OF CAMPUS SEXUAL VIOLENCE, *supra* note 13, at 176, 180.

⁹³ Olga Khazan, *The Bro Whisperer*, ATLANTIC, Jan./Feb. 2015, at 21.

⁹⁴ For example, research on bystander intervention establishes a change in attitudes but studies have yet to demonstrate a decline in sexual assaults. See Richard Pérez-Peña & Ian Lovett, *California Law on Sex Consent Pleases*

assessment of multipronged preventive approaches should be a priority.⁹⁵

Prevention of alcohol abuse must also assume higher priority. Every year, close to 100,000 students experience a sexual assault while under the influence of alcohol.⁹⁶ Traditionally, schools have been reluctant to incorporate issues of alcohol abuse in rape prevention programs out of concern that victims will be blamed, and blame themselves, for the assault.⁹⁷ That needs to change. Warning women that intoxication increases their risk of sexual assault does not imply that they are responsible for it. Schools need to do a better job of social messaging, cracking down on underage drinking, and creating attractive alcohol-free housing and recreational options.⁹⁸ As one Student Council president noted, “[t]oo many people are too drunk too often.”⁹⁹ Schools have a responsibility to alter the culture that encourages the problem.

Another way to make institutions more accountable for their response to sexual assault is through private lawsuits. Widely publicized litigation by students and alumni has led to significant reforms.¹⁰⁰ For example, a lawsuit forced the University of Colorado at Boulder to take responsibility for a football recruiting program

Many but Leaves Some Doubters, N.Y. TIMES (Sept. 29, 2014), http://www.nytimes.com/2014/09/30/us/california-law-on-sex-consent-pleases-many-but-leaves-some-doubters.html?_r=0.

⁹⁵ Victoria L. Banyard, *Improving College Campus-Based Prevention of Violence Against Women: A Strategic Plan for Research Built on Multipronged Practices and Policies*, 15 TRAUMA, VIOLENCE & ABUSE 339 (2014).

⁹⁶ David Skorton & Glenn Altschuler, *A Sober Assessment of High-Risk Drinking on College Campuses*, FORBES (Dec. 17, 2012), <http://www.forbes.com/sites/collegeprose/2012/12/17/a-sober-assessment-of-high-risk-drinking-on-college-campuses/>.

⁹⁷ Robin Wilson, *Why Campuses Can't Talk About Alcohol When It Comes to Sexual Assault*, CHRON. HIGHER EDUC. (Sept. 4, 2014), <http://chronicle.com/article/Why-Campuses-Can-t-Talk/148615/>.

⁹⁸ *Id.*; Lisa C. Johnson, *Using a Public Health and Quality Improvement Approach to Address High-Risk Drinking with 32 Colleges and Universities*, NAT'L COLL. HEALTH IMPROVEMENT PROGRAM LEARNING COLLABORATIVE ON HIGH RISK DRINKING 36-48 (Mar. 2014); Jenna Johnson, *Schools Try New Strategies to Battle College Drinking*, WASH. POST (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; see also Jennifer Steinhauer, *Fraternity at Center of Inquiry is Reinstated*, N.Y. TIMES, Jan. 13, 2015, at A14 (describing more stringent alcohol policy at the University of Virginia).

⁹⁹ Rebecca Koenig, *Amid Partying at UVA, a Painful Note of Caution Intrudes*, CHRON. HIGHER EDUC., Oct. 7, 2014, at A7 (quoting student).

¹⁰⁰ Nicole Allan, *Confusion and Silence*, YALE ALUMNI MAG., Jul./Aug. 2011; Pérez-Peña & Lovett, *supra* note 16.

that encouraged sexual assault of female “[a]mbassadors” who were expected to show recruits “a good time” while on campus.¹⁰¹ Other lawsuits have resulted in large settlements against universities that admitted athletes with a history of misconduct who went on to rape women students.¹⁰² Gloria Allred has filed successful claims on behalf of women students at Occidental and the University of Connecticut, and has reached confidential settlements at other schools without even filing lawsuits.¹⁰³ Litigation would be an even more effective strategy if courts or Congress were to revisit the standard for holding institutions liable. Currently, plaintiffs must show that the school was “deliberately indifferent” to known risks of violence.¹⁰⁴ A preferable approach would be to hold schools accountable for negligent responses to student violence.¹⁰⁵ Schools should also be liable for failing to provide adequate procedural protections to students accused of sexual misconduct. Such protections should include notice, an opportunity to be heard, to cross-examine accusers and witnesses, although not necessarily directly, and to have counsel or an advisor present at the proceedings.¹⁰⁶

Another, more controversial strategy for change involves broadening the definition of what constitutes an offense. Some commentators believe that the law should require affirmative consent to sexual activity, as is currently required in the criminal codes of three states, although they recognize assent through conduct as well as through words.¹⁰⁷ One possible approach would be to follow Canada’s example, which requires “the voluntary agreement of the complainant to engage in the sexual activity in question.” Consent

¹⁰¹ *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1173 (10th Cir. 2007).

¹⁰² Cantalupo, *supra* note 18, at 218.

¹⁰³ Claire Suddath, *Making Rape Expensive*, BLOOMBERG BUS. WK., Apr. 7, 2014.

¹⁰⁴ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). For more discussion, see Cantalupo, *supra* note 18, at 227-28, 253.

¹⁰⁵ See Deborah L. Rhode, *Sex in Schools: Who's Minding the Adults*, in DIRECTIONS IN SEXUAL HARASSMENT LAW (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

¹⁰⁶ See Hailyn J. Chen & Emily R.D. Murphy, *Sexual Misconduct and Due Process*, S.F. DAILY J. (Oct. 28, 2014), reprinted in U. OF CAL., IRVINE SCH. OF LAW, IN THE NEWS, <http://www.law.uci.edu/news/in-the-news/2014/djournal-mto-conley-102814.pdf>.

¹⁰⁷ See, e.g., JOAN MCGREGOR, IS IT RAPE? ON ACQUAINTANCE RAPE AND TAKING WOMEN'S CONSENT SERIOUSLY 190-93 (2005); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998). For discussion of the three states and a proposal to require affirmative consent, see SUSAN CARINGELLA, ADDRESSING RAPE REFORM IN LAW AND PRACTICE 76-78 (2009).

is not present if “the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority.” Nor does an accused have a defense of consent if the belief involved “recklessness or wilful [sic] blindness,” or the accused did not take “reasonable steps . . . to ascertain that the complainant was consenting.”¹⁰⁸ California has adopted a similar approach. A 2014 “yes means yes” law requires all schools that receive state funds for student financial assistance to set an “affirmative consent standard” for adjudicating campus sexual assaults. That standard would define consent to sexual relations as an “affirmative, conscious, and voluntary agreement” between the parties to engage in sexual activity.¹⁰⁹ Silence or lack of resistance would not constitute consent. Nor would acquiescence by someone who is unconscious or incapacitated by drugs or alcohol to the point where he or she “could not understand the fact, nature, or extent of the sexual activity.”¹¹⁰ Consent must be ongoing and may be revoked at any time.¹¹¹ New York has recently changed its policies for the state university to define consent as an affirmative act that requires “clear, knowing and voluntary” participation.¹¹²

Critics of this approach raise several concerns.¹¹³ As Yale law professor Jed Rubenfeld notes, “[p]eople can and frequently do

¹⁰⁸ Canada Criminal Code, R.S.C. 1985, c. C-46 §§ 273.1-2.

¹⁰⁹ CAL. EDUC. CODE § 67386(a)(1) (West 2015); *see also* Michael Kimmel & Gloria Steinem, Editorial, ‘Yes’ is Better than ‘No,’ N.Y. TIMES (Sept. 4, 2014), http://www.nytimes.com/2014/09/05/opinion/michael-kimmel-and-gloria-steinem-on-consensual-sex-on-campus.html?_r=0; Pérez-Peña & Lovett, *supra* note 16; Julie Watson, *California Debates ‘Yes Means Yes’ Sex Assault Law*, SAN JOSE MERCURY NEWS (Aug. 10, 2014), http://www.mercurynews.com/california/ci_26310929/news/?source=infinite-up.

¹¹⁰ CAL. EDUC. CODE § 67386(a)(4)(B); *see also* Fenit Nirappil, *Assembly Passes Campus Sexual-Assault Bill*, WASH. EXAMINER (Aug. 25, 2014), <http://www.washingtonexaminer.com/assembly-passes-campus-sexual-assault-bill/article/feed/2159620> (outlining S.B. 967 prior to its passage).

¹¹¹ CAL. EDUC. CODE § 67386(a)(1); Gregory Rolen, *Demystifying the ‘Yes Means Yes’ Bill*, S.F. DAILY J. (Oct. 22, 2014), <http://www.hbblaw.com/files/Publication/29e6dc55-e789-4635-88bc-85f9d9fd7369/Presentation/PublicationAttachment/a2287717-34a0-4ded-98d2-0001f2c32118/Demystifying%20Yes%20Means%20Yes%20Senate%20Bill%20967%20-%20The%20Affirmative%20Consent%20Law.pdf>.

¹¹² Ian Urbina, *The Challenge of Defining Rape*, N.Y. TIMES (Oct. 11, 2014), http://www.nytimes.com/2014/10/12/sunday-review/being-clear-about-rape.html?_r=0.

¹¹³ *See, e.g.*, CARINGELLA, *supra* note 107, at 78-79. For criticism of the California proposal, *see* Marjory Kaptanoglu, Letter to the Editor, *Poor Measure*, S.F. GATE (Sept. 14, 2014), <http://www.sfgate.com/opinion/letterstoeditor/article/Letters-to-the-editor-Sept-15-5755429.php>; Debra J. Saunders, Opinion, *Bad Law on Campus Rape Deserves Governor’s Veto*, S.F. GATE (Sept. 11, 2014),

have fully voluntary sex without communicating unambiguously; under the new consent standards, that can be deemed rape if one party later feels aggrieved.”¹¹⁴ And even under those standards, parties would still engage in “he said, she said” battles over whether consent was freely given. Critics also object that an affirmative consent standard is “very unlikely to deter predators or protect victims. Instead, its effect will be to codify vague and capricious rules governing student conduct, to shift the burden of proof to (usually male) students accused of sexual offenses, and to create a disturbing precedent for government regulation of consensual sex.”¹¹⁵ At Harvard Law School, after the introduction of an affirmative consent standard, dozens of professors came out against the policy.¹¹⁶ The professors claimed the policy “is skewed against the accused,” and lacks core procedural protections.¹¹⁷ Echoing the professors’ fear, one student noted “[i]t’s life-changing to have the label of rapist put on you.”¹¹⁸

Some of these concerns may be overstated. Consent can include nonverbal cues such as body language or a passionate response to sexual overtures. And if the meaning of those cues is ambiguous, there is reason to discourage sex. That is the best way to change a culture in which non-consent is too often disregarded. A yes means yes standard has the advantage of focusing parties’ attention on whether they both want the sexual experience they are having.¹¹⁹ More than 800 campuses already operate with an affirmative consent requirement and no research suggests that the standard has proven unjust or unworkable.¹²⁰ At the very least, as the outside general counsel of Pomona College put it, the requirement

<http://www.sfgate.com/opinion/saunders/article/Bad-law-on-campus-rape-deserves-governor-s-veto-5746930.php>.

¹¹⁴ Jed Rubenfeld, Opinion, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html>.

¹¹⁵ Cathy Young, *Campus Rape: The Problem with Yes Means Yes*, Opinion, TIME (Aug. 29, 2014), <http://time.com/3222176/campus-rape-the-problem-with-yes-means-yes/>.

¹¹⁶ Jess Bidgood & Tamar Lewin, *Some Harvard Professors Oppose Policy on Assaults*, N.Y. TIMES (Oct. 15, 2014), <http://www.nytimes.com/2014/10/16/education/harvard-law-professors-back-away-from-sexual-misconduct-policy.html>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *But see* Young, *supra* note 115 (criticizing an affirmative consent standard as a prescription for overthinking).

¹²⁰ Heller, *supra* note 58 (citing statistics from National Center for Higher Education Risk Management); Robin Wilson, *How ‘Yes Means Yes’ Already Works on One Campus*, CHRON. HIGHER EDUC., Oct. 10, 2014, at A4.

is “going to allow for greater discussion, understanding and clarity on college campuses.”¹²¹

Yet proponents should not overestimate the extent to which changing formal rules will solve the problems in sexual practices. The wave of rape law reform that occurred in the late 1970s and 1980s, which was partly designed to make rape easier to prove in court, did not in fact increase reporting, arrest, or conviction rates.¹²² Doctrinal change in the absence of shifts in cultural attitudes has limited impact. But changing the legal standard is one way to affect cultural norms. We need more experience and evaluation of “yes means yes” on campuses to determine whether it can reduce the risks of nonconsensual sexual conduct without posing undue risks for innocent parties.

Equally critical are more media efforts to publicize the problem and encourage responsibility for the solution. The Obama administration has made major strides in this direction through an advertising campaign titled “1 is 2 Many,” which emphasizes zero tolerance for assault, and another titled “It’s on Us,” which urges bystanders to do more to prevent sexual violence.¹²³

To make all these changes possible, continued student activism is critical. The current wave of attention to campus rape has been largely driven by survivors. Activists responded to the Toronto police chief’s comment about not dressing as sluts by staging “slutwalks” in more than seventy cities around the world, with women dressed in bras, halter tops, and garter belts. Students at the University of North Carolina, Yale, and Amherst were among the early organizers of protests, a Facebook page, and groups like Know Your IX and End Rape on Campus. They wrote articles, lobbied on Capitol Hill, filed Title IX complaints, and assisted others in doing the same.¹²⁴ As a result of such efforts, the number of Title IX complaints involving sexual violence has more than tripled since 2009.¹²⁵ The adverse publicity following students’ exposé of rape cases has often prompted review and reform of campus sexual

¹²¹ Alison Frost, ‘Yes Means Yes’ a Focal Point for Campus General Counsel, S.F. DAILY J., Oct. 28, 2014 (quoting Glen Kraemer).

¹²² See CARINGELLA, *supra* note 107, at 78-79.

¹²³ Michael D. Shear & Elena Schneider, *Obama Unveils Push for Young People to Do More Against Campus Assaults*, N.Y. TIMES, Sept. 20, 2014, at A12.

¹²⁴ Burleigh, *supra* note 1, at 15; Newman & Sander, *supra* note 82.

¹²⁵ Newman & Sander, *supra* note 82.

assault policy.¹²⁶ As one student noted, “[w]e’ve hit them where it hurts: their reputations.”¹²⁷

III. RAPE IN THE MILITARY

The frequency of rape in the military has also attracted increased attention. Over the last quarter century, more than half a million uniformed men and women have experienced rape or attempted rape.¹²⁸ Reports of sexual assault and rape were up fifty percent in 2013, and another eight percent in 2014.¹²⁹ Only one in four cases of sexual assault in 2014 was reported.¹³⁰ Of the 5061 cases in 2013, only 484—less than one in ten—went to trial, and only 376 resulted in convictions.¹³¹ In 2012, fewer than thirteen percent of some 26,000 assaults were reported and only 238 resulted in convictions.¹³² An armed service member who sexually assaulted a fellow service member had a ninety-two percent chance of avoiding a court martial.¹³³ As an army nurse told the co-chair of a new bipartisan caucus on military sexual assault, “I’m more afraid of my own soldiers than I am of the enemy.”¹³⁴ Her fears are well founded. At hearings before the House Committee on Oversight and Reform, Representative Jane Harman noted that “women serving in the U.S. military are more likely to be raped by a fellow soldier than killed by enemy fire in Iraq.”¹³⁵

¹²⁶ Richard Pérez-Peña & Kate Taylor, *Fight Against Sexual Assaults Holds Colleges to Account*, N.Y. TIMES, May 4, 2014, at A1; Richard Pérez-Peña, *Student's Account Has Rape in Spotlight*, N.Y. TIMES, Oct. 27, 2012, at A15; Suddath, *supra* note 103. For the politicization of rape complaints at Columbia, and the university's response, *see also* Grigoriadis, *supra* note 54, at 115-16.

¹²⁷ Pérez-Peña & Taylor, *supra* note 126 (quoting Dana Bolger, Amherst College graduate).

¹²⁸ Kirby Dick, Opinion, *Don't Trust the Pentagon to End Rape*, N.Y. TIMES, June 4, 2013, at A25.

¹²⁹ Helene Cooper, *Pentagon Study Finds 50% Increase in Reports of Military Sexual Assaults*, N.Y. TIMES, May 2, 2014, at A14 [hereinafter *Pentagon Study*]; Helene Cooper, *Reports of Sexual Assaults in Military on Rise*, N.Y. TIMES, Dec. 4, 2014, at A19; U.S. DEP'T OF DEF., REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE 15 (2014); Jennifer Steinhauer, *Reports of Military Sexual Assault Rise Sharply*, N.Y. TIMES, Nov. 7, 2013, at A24.

¹³⁰ U.S. DEP'T OF DEF., *supra* note 129.

¹³¹ Cooper, *Pentagon Study*, *supra* note 129.

¹³² Maureen Dowd, Opinion, *America's Military Injustice*, N.Y. TIMES, May 8, 2013, at A27.

¹³³ Jackie Speier, *Why Rapists in Military Get Away With It*, CNN (June 21, 2012), <http://www.cnn.com/2012/06/21/opinion/speier-military-rape>.

¹³⁴ Sabrina Rubin Erdely, *The Rape of Petty Officer Blumer*, ROLLING STONE, Feb. 14, 2013, at 59.

¹³⁵ Helen Benedict, *The Scandal of Military Rape*, MS. MAG., Fall 2008

The problem is not confined to women. Of the estimated 26,000 cases of assaults in 2012, fifty-four percent were targeted at men. Yet only 380 men reported their assault, and only 247 asked for an investigation.¹³⁶ Just twenty-eight percent of those cases proceeded to court martial.¹³⁷ Male victims not only fear retaliation, they also worry about being perceived or exposed as gay.¹³⁸

A. *The Victimization of Victims*

In principle, the military has long proclaimed “zero tolerance” for sexual assault. In practice, it has often displayed zero tolerance for the reporting of sexual assault. The re-victimization of victims that is common in campus rape cases is also common in the military. Service members who have been drinking before being assaulted have been charged with drunk and disorderly conduct and conduct unbecoming an officer, while their assailants escape sanctions.¹³⁹ A textbook case involved Stacey Thompson, a Marine corporal stationed in Japan who reported that her sergeant laced her drinks with drugs and raped her. He was later allowed to leave the Marine Corps, and she was given an “other-than-honorable” discharge stemming from drug use that night. As a consequence, she lost veteran’s benefits.¹⁴⁰ In a similar scandal involving the Naval Academy, a complainant who reported a gang rape faced disciplinary action for underage drinking; her alleged assailants, three Navy football players, were permitted to complete their last season.¹⁴¹ In another scandal involving the Naval Academy, a friend of a rape complainant noted, “[a]ny girl at our school who turns in a guy is gonna be crucified.”¹⁴² The experience of a pilot in a recent sexual

(quoting Jane Harman).

¹³⁶ Steve Friess, *The Military Has a Rape Problem—and It’s Not Just Women Who Suffer*, TAKE PART (Feb. 12, 2014), <http://www.takepart.com/feature/2014/02/12/military-rape-not-just-women>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Erdely, *supra* note 134; Karisa King, *How Military Makes Target of Rape Victims*, S.F. GATE (May 19, 2013), <http://www.sfgate.com/nation/article/How-military-makes-target-of-rape-victims-4529920.php>.

¹⁴⁰ Julie Watson, *Stacey Thompson, Military Rape Victim, Says Retaliation Prevalent For Those Who Speak Out*, HUFFINGTON POST (May 31, 2013), http://www.huffingtonpost.com/2013/05/31/stacey-thompson-military-rape_n_3365107.html.

¹⁴¹ See James Risen, *Naval Academy Is Shaken by Student’s Report of Rape by Athletes*, N.Y. TIMES, June 1, 2013, at A9.

¹⁴² Ray Rivera, *Pressure on Academy Rape Victims Cited*, WASH. POST (Mar. 10, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/09/AR2006030902338.html> (quoting Elizabeth Burnett, Naval Academy midshipman).

assault case bears that out. In the year following the conviction of her assailant, she was passed over for promotion, professionally “put on a shelf,” and socially isolated.¹⁴³ In Department of Defense studies, sixty-two percent of victims who reported sexual assault experienced retaliation, and that number has not been falling.¹⁴⁴ The risks of retaliation are especially great in military contexts because survivors can't exit the situation. Unlike most civilians, members of the armed forces cannot simply quit their jobs to escape the abuse.

Other problems involve dismissive responses to complaints or invasive questioning of rape victims, which is permitted in military but not civilian proceedings.¹⁴⁵ A Marine Lieutenant who reported a rape was told that charges would not be pressed and was chastised, “you're tough. You need to pick yourself up and dust yourself off . . . I can't babysit you all of the time.”¹⁴⁶ Another Marine who was violently raped in a bathroom was told, “[d]on't come bitching to me because you had sex and changed your mind.”¹⁴⁷ Victims are also typically encouraged by prosecutors to submit to pretrial interviews with defense counsel, a practice uncommon in civilian contexts.¹⁴⁸ Such questioning can be extremely intrusive and focus on matters of sexual history that bear little or no relevance to the case.¹⁴⁹

¹⁴³ Robert Draper, *The Military's Rough Justice on Sexual Assault*, N.Y. TIMES MAG. (Nov. 26, 2014), <http://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html>.

¹⁴⁴ See Craig Whitlock, *Number of U.S. Troops Filing Reports of Sexual Assault Rises 8 % in Past Year*, WASH. POST (Dec. 3, 2014), https://www.washingtonpost.com/world/national-security/number-of-us-troops-filing-reports-of-sexual-assault-rises-8percent-in-past-year/2014/12/03/414fb770-7b45-11e4-9a27-6fdb612bfff8_story.html; see also Soraya Chemaly, *Why #passMJIA? 50 Facts About Sexual Assault in the U.S. Military*, HUFFINGTON POST (Jan. 23, 2014), http://www.huffingtonpost.com/soraya-chemaly/military-sexual-assault-facts_b_4281704.html; Felicia Schwartz, *Military Sexual-Assault Reports Rise*, WALL ST. J. (Dec. 4, 2014), <http://www.wsj.com/articles/military-sexual-assault-reports-rise-1417717956>.

¹⁴⁵ See Jennifer Steinhauer, *Navy Hearing in Rape Case Raises Alarm*, N.Y. TIMES, Sept. 21, 2013, at A1.

¹⁴⁶ Speier, *supra* note 133.

¹⁴⁷ Matthew Fleischer, *Top Air Force General: Sexual Assault Numbers are 'Appalling'*, TAKE PART (Jan. 25, 2013), <http://www.takepart.com/article/2013/01/25/sexual-assault-still-epidemic-military>.

¹⁴⁸ Major Greg J. Thompson, *Victims' Rights in the Military: Empowering Sexual Assault Victims with a Meaningful DOD Victims' Bill of Rights*, 21 VA. J. SOC. POL'Y & L. 423, 448-49 (2014).

¹⁴⁹ *Id.* at 447-49; see John Cornyn, *Someone to Speak for and Protect Sexual Assault Victims*, SAN ANTONIO EXPRESS NEWS (Aug. 2, 2013), <http://www.mysanantonio.com/opinion/commentary/article/Someone-to-speak-for-and-protect-sexual-assault-4701234.php>.

The problem is compounded in the military by a structure that gives commanding officers the power to determine whether to press charges and what sanctions to impose. All too often, that discretion has been skewed by favoritism toward the accused.¹⁵⁰ According to statistics provided to Congress, commanders reduced as many as a third of sexual abuse punishments.¹⁵¹ In two recent cases, Air Force generals set aside jury convictions for sexual assault, in one instance reasoning that the defendant could not be guilty because he was a “doting father and husband.”¹⁵² Sex offenders are also given the option of resignation in lieu of court-martial; if they admit guilt and leave the military, all charges are dropped.¹⁵³

A number of recent incidents speak volumes about attitudes at the upper levels of the military. In 2013, the officer in charge of sexual assault prevention programs for the Air Force was arrested in a Virginia parking lot and charged with sexual battery.¹⁵⁴ In 2014, the Army’s top sex-crimes prosecutor was reprimanded for molesting a female officer at a sexual assault prevention conference.¹⁵⁵ The Air Force’s sexual-assault prevention officer was also reprimanded for fondling a woman in a bar against her will.¹⁵⁶ That same year, the Alaska Air National Guard’s commander was forced to resign after a federal investigation issued a scathing report of treatment of sexual assault victims. It found that complaints were not properly documented, that victims were not referred to victim advocates, that their confidentiality was breached, and that they were ostracized by leaders and peers.¹⁵⁷

Victims of military rapes also lack certain protections guaranteed to victims in civilian proceedings such as the right to submit a statement in sentencing proceedings, or appear at a post-trial release hearing.¹⁵⁸ The absence of such rights undermines the fact and appearance of fairness in military justice.

¹⁵⁰ See Draper, *supra* note 143.

¹⁵¹ See Tom Vanden Brook & Gregg Zoroya, *Why the Military Hasn’t Stopped Sexual Abuse*, USA TODAY (May 15, 2013), <http://www.usatoday.com/story/news/2013/05/15/why-the-military-hasnt-stopped-sexual-abuse-/2162399/>.

¹⁵² *Id.*

¹⁵³ Erdely, *supra* note 134, at 62.

¹⁵⁴ N.Y. Times Editorial Bd., *The Military’s Sexual Assault Crisis*, N.Y. TIMES, May 8, 2013, at A26.

¹⁵⁵ Draper, *supra* note 143.

¹⁵⁶ *Id.*

¹⁵⁷ Maria L. LaGanga, *Alaska National Guard Chief Ousted*, L.A. TIMES, Sept. 6, 2014, at A7.

¹⁵⁸ Thompson, *supra* note 148, at 457-58, 463-64.

B. Reform Strategies

In 2013, while commenting on the rising rate of assault complaints in the military, President Obama told reporters, “[t]he bottom line is, I have no tolerance for this. If we find out somebody’s engaging in this stuff, they’ve got to be held accountable, prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged – period.”¹⁵⁹ “Obama said he had instructed Defense Secretary Chuck Hagel ‘to step up our game exponentially.’”¹⁶⁰

Recent reforms attempt to do just that. They include providing attorneys to victims, removing the authority of commanders to overturn convictions, criminalizing retaliation against victims, and requiring a dishonorable discharge for anyone convicted of sexual assault.¹⁶¹ Yet many believe that these changes are insufficient to correct the core problem—the lack of impartiality and trust in the process. As a Yale military law expert put it, the reforms are like “piling Band-Aids on a badly broken 18th-century museum piece.”¹⁶²

The proposal that activists believe is most promising, creating an independent prosecutor to handle sex abuse cases, has been blocked from coming to a floor vote despite having a majority of Senators’ support.¹⁶³ The military opposes the proposed legislation.¹⁶⁴ According to General Raymond T. Odierno, Chief of Staff of the Army, removing responsibility for sexual assault from commanders would “undermine the readiness of the force. It will inhibit our commanders’ ability to shape the climate and discipline of our units. Most importantly, it will hamper the timely delivery of

¹⁵⁹ Craig Whitlock, *Obama Delivers Blunt Message on Sexual Assaults in Military*, WASH. POST (May 7, 2013), https://www.washingtonpost.com/world/national-security/possible-military-sexual-assaults-up-by-33-percent-in-last-2-years/2013/05/07/8e33be68-b72b-11e2-bd07-b6e0e6152528_story.html.

¹⁶⁰ *Id.*

¹⁶¹ Halimah Abdullah, *Survivors of Military Sex Assaults Frustrated With Legislation*, CNN (Mar. 10, 2014), <http://www.cnn.com/2014/03/10/politics/military-sex-assault-survivors-speak-out/>; see also Thom Shanker, *Pentagon Finishing Rules to Curb Sexual Assaults*, N.Y. TIMES, Aug. 8, 2013, at A15.

¹⁶² N.Y. Times Editorial Bd., *A Broken Military Justice System*, N.Y. TIMES, Mar. 18, 2014, at A22 (quoting Eugene Fidell).

¹⁶³ Helene Cooper, *Senate Rejects Blocking Military Commanders From Sex Assault Cases*, N.Y. TIMES, Mar. 7, 2014, at A11; see Lauren R. S. Mendonsa & Lynne Bernabei, *Battling Military Sexual Assault*, NAT’L L.J., July 15, 2013, at 30 (describing the Military Justice Improvement Act); Julian E. Barnes, *Pentagon Pushes Military-Justice Overhaul*, WALL ST. J. (Apr. 8, 2013), <http://www.wsj.com/articles/SB10001424127887324050304578410964136939302>.

¹⁶⁴ U.S. DEP’T OF DEF., *supra* note 129, at 23 (nothing that removing prosecutorial discretion from commanders would “likely not only degrade mission readiness, but also diminish commanders’ effectiveness in the fight against sexual assault in the military”).

justice to the very people we wish to help, the victims and survivors of these horrific crimes.”¹⁶⁵ However, supporters of the legislation point out that commanders have repeatedly proven themselves incapable of creating trust among victims that would encourage the reporting and prosecution of sexual assault. As Senator Rand Paul put it, “[t]he definition of insanity is doing the same thing over and over again and expecting a different result.”¹⁶⁶ Senator Kristen Gillibrand pointed out that allies such as Israel, the United Kingdom, Germany, and Australia had all taken sexual assault cases out of the chain of command, and in Israel, reporting had increased eighty percent.¹⁶⁷ Supporters of such reforms in this country are exploring other tactics to force passage.¹⁶⁸

Another promising proposal was the Furthering Accountability and Individual Rights within the Military Act (“The Fair Military Act”).¹⁶⁹ It would have limited the use of the “good soldier” defense, which allows defendants to cite unrelated factors during trial, such as their prior military record, as a defense against sexual assault charges.¹⁷⁰ In addition, the legislation would have required assessments of commanders concerning sexual assault prevention. They would be evaluated on their ability to handle reports of sexual assault, and to create a climate where victims can report without fear of retaliation.¹⁷¹ The bill would have also extended sexual assault prevention measures to military service academies. The Fair Military Act died in committee before making it through the House.¹⁷² A similar bill, the Victim’s Protection Act of 2014, passed

¹⁶⁵ *Pending Legislation Regarding Sexual Assaults in the Military: Hearing Before the S. Comm. on Armed Servs.*, 113th Cong. 320, at 13 (2014) [hereinafter *Oversight Hearings*].

¹⁶⁶ Cooper, *supra* note 163.

¹⁶⁷ *Oversight Hearings*, *supra* note 165, at 91.

¹⁶⁸ See Jeremy W. Peters & Emmarie Huettelman, *Gillibrand Seeks Another Vote on Military’s Handling of Sexual Assault Cases*, N.Y. TIMES, Dec. 3, 2014, at A23 (describing efforts to include such reforms as part of the National Defense Authorization Act).

¹⁶⁹ The Fair Military Act, H.R. 4485, 113th Cong. (2014).

¹⁷⁰ See Niki Tsongas & Mike Turner, *What it Will Take to End Sexual Assault in the Military*, CHRISTIAN SCI. MONITOR (June 16, 2014), <http://www.csmonitor.com/Commentary/Opinion/2014/0616/What-it-will-take-to-end-sexual-assault-in-the-military>.

¹⁷¹ *Id.*

¹⁷² *H.R. 4485: Fair Military Act*, GovTRACK (Apr. 10, 2014), <https://www.govtrack.us/congress/bills/113/hr4485>.

the Senate in a rare unanimous vote,¹⁷³ but it too failed to make it through the House.¹⁷⁴

One other possible reform would be to allow victims of sexual assault to sue under the Federal Tort Claims Act and the Civil Rights Act. Civilians can now sue under these statutes for employers' failure to exercise reasonable care to prevent assault or retaliation against those who report it; members of the armed forces have no such right.¹⁷⁵ The American Civil Liberties Union and the Service Women's Action Network have proposed extending this right to military personnel as a way to increase pressure for cultural change.¹⁷⁶ The publicity accompanying such lawsuits could provide a powerful incentive for reform.

A strategy for moving such reforms forward is the continued work of activist groups such as Protect our Defenders and Service Women's Action Network in publicizing abuses and lobbying for change. The media has been a crucial ally in that endeavor. "The Invisible War," a documentary about sexual assault in the military, helped galvanize support for reforms and raise consciousness within the military.¹⁷⁷ Two days after seeing the film, former Secretary of Defense Leon Panetta announced that more senior officers would handle sexual assault complaints.¹⁷⁸ Additional publicity could provide needed leverage for change. Such efforts can attract attention

¹⁷³ Victims Protection Act of 2014, S. 1917, 113th Cong. (2014); Ed O'Keefe, *Senate Easily Passes McCaskill's Military Sexual Assault Bill*, WASH. POST (Mar. 10, 2014), <https://www.washingtonpost.com/news/post-politics/wp/2014/03/10/senate-easily-passes-mccaskill-military-sexual-assault-bill/>.

¹⁷⁴ *S. 1917: Victims Protection Act of 2014*, GOVTRACK (June 20, 2014), <https://www.govtrack.us/congress/bills/113/s1917>.

¹⁷⁵ See *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (barring constitutional claims by enlisted military personnel against a superior officer); *Feres v. United States*, 340 U.S. 135, 146 (1950) (barring claims "under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service"). Lower courts have dismissed constitutional lawsuits by service members who were sexually assaulted. See, e.g., *Klay v. Panetta*, 924 F. Supp. 2d 8 (D.D.C. Feb. 7, 2013), *aff'd*, 758 F.3d 369 (D.C. Cir. 2014); *Cioca v. Rumsfeld*, No. 1:11-cv-00151 (E.D. Va. Dec. 9, 2011), *aff'd*, 720 F.3d 505 (4th Cir. 2013).

¹⁷⁶ See *Testimony on Sexual Assaults in the Military: Hearing Before the S. Subcomm. on Personnel of the S. Comm. on Armed Servs.*, 113th Cong. 303, at 11 (statement of Anu Bhagwati, Executive Director, Service Women's Action Network); *id.* at 168 (statement of the American Civil Liberties Union).

¹⁷⁷ Commanders have frequently testified to having watched the film and used it to spark productive dialogue. See *Oversight Hearings*, *supra* note 165, at 146-47 (testimony of Colonel Leavitt); *id.* at 140 (testimony of Colonel Martin).

¹⁷⁸ Stephen Saito, *Waging 'Invisible War' Onscreen and Off Against Rape in the U.S. Military*, TAKE PART (June 25, 2012), <http://www.takepart.com/article/2012/06/25/waging-invisible-war-onscreen-and-against-rape-military>.

for other necessary strategies, such as building more robust protection for victims and guaranteeing their right to be heard in proceedings arising from their assault.¹⁷⁹ More attention also should be paid to male victims of sexual violence, who are frequently neglected in prevention and support services.¹⁸⁰ “For the past 25 years,” noted Senator Gillibrand, “we’ve had the military telling us that there’s zero tolerance for sexual assault. And all we’ve seen is zero accountability.”¹⁸¹ This has to change.

IV. CONCLUSION

Rape on campus and in military institutions reflects broader cultural dynamics requiring broader cultural change. It is critical to challenge the messages that eroticize male violence and perpetuate sexual double standards, as well as marginalize male victims. Sexual assault is normalized in movies, on television, and in video games.¹⁸² The labeling of boys as “studs” and girls as “sluts” begins at early ages and fosters sexual miscommunication. When women feel pressure to fake resistance in order to avoid seeming promiscuous, men will feel entitled to disregard it, and the dangers of unjust accusations and coercive sex will persist. We urgently need to challenge these cultural dynamics through educational and media strategies. The stakes in this agenda are substantial, not only for the appalling number of individuals who experience rape, but also for the still far greater number of individuals who fear it and limit their lives to avoid it.

¹⁷⁹ See Thompson, *supra* note 148.

¹⁸⁰ *Testimony on Sexual Assaults in the Military*, *supra* note 176, at 22 (statement of Brian Lewis, Advocacy Board Member, Protect our Defenders).

¹⁸¹ Draper, *supra* note 143 (quoting Senator Gillibrand).

¹⁸² Jennifer Steinhauer, *Widening Spotlight on Assault of Women*, N.Y. TIMES, Dec. 5, 2014, at A14 (quoting Erin Buzuvis, Director, Center for Gender and Sexuality Studies at the Western New England University School of Law).

