

# Campus Misconduct, Sexual Harm and Appropriate Process: The Essential Sexuality of It All

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A Trump Department of Education (“DOE”) is not likely to continue the recent federal push to regulate sexual misconduct on college campuses. This lull in enforcement pressure presents us with an opportunity. Instead of fighting about why and how the federal government is encroaching on university sovereignty, we can focus instead on what colleges and universities should do—not because DOE is forcing them, but because colleges and universities have always policed certain norms of behavior in their student bodies.

The operative question is whether schools should get involved when a student uses coercion or intimidation or willful ignorance to take sex from another student. Abundant evidence exists that this kind of behavior is commonplace on college campuses.<sup>1</sup> In some states, this behavior constitutes criminal sexual assault. For years, feminists argued that such behavior should be treated as rape. The Obama administration treated nonconsensual sex on college campuses as sexual harassment. This interpretation was controversial, in large part because by labeling the act discriminatory, though not necessarily criminal, DOE changed the rules regarding process. Most of the controversy surrounding DOE’s regulations pertained to how much traditional criminal law process schools should afford to alleged perpetrators.

In looking anew at how schools should handle these situations, this article first asks readers to take a break from the sexual nature of these incidents to look at campus misconduct more generally. Almost ten years ago, Professor Janet Halley asked us to take a break from feminism so that we could think about sexuality differently.<sup>2</sup> I am asking that we take a break from the sex in these offenses in order to think about male behavior differently. Thinking

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1. *See infra* text accompanying notes 33-34.

2. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2008).

about male sexual entitlement as a problem akin to racially offensive speech, or academic cheating or drunk driving, helps shed light on the debate surrounding what to do about campus sexual misconduct.

By reasoning from analogies in which there is much more consensus on the harm suffered, the wrong of the act, and the danger involved, we see that the calls for more process on college campuses divert us from a much harder, deeper debate about the nature of the harms that flow from nonconsensual sex. If more people agreed that women are really hurt by what is commonplace on college campuses, far fewer people would be as concerned about the process afforded those who perpetuate harmful practices. But we are still conflicted, in ways that we are not when it comes to race or cheating or drunk driving, about the nature of the injury to women and the wrongness of male sexual behavior. By taking the sex out of the analysis, we see how critical sex is to this problem.

The second part of this article thus brings the sexuality of it all back into the analysis to better explore the nature of the harm suffered by victims and the harms attendant upon affording criminal procedural protections in sex-related incidents. Part II first examines three instances in which women were injured by male sexual entitlement on college campuses. In each, a student took what he wanted sexually without gauging consent. These case studies suggest what other studies of rape victims have found: The harm inflicted by sexual misconduct is mostly internal, subjective, and, to a certain extent, random. Many women are profoundly injured by nonconsensual sex, but others are not, and observers often cannot see the injury, even when women are harmed by the conduct. This makes it difficult to understand what schools are punishing and why.

Women's descriptions of their injury also make clear that the dignitary harms associated with having sex expropriated against one's will are inexorably aggravated by traditional criminal law process. Effective adversarial hearings are designed to make witnesses uncomfortable, uncertain, and, often, ashamed. Shouldering that discomfort is one thing when the subject matter is a contract or a car crash; it is altogether different, and inevitably worse, when the subject is one's own sexual behavior. The process that many people seem to be demanding when campus misconduct is sexual can be as or more damaging to the victims than the original injury. This should not serve as an excuse for dispensing with all procedural protections for the accused, but it should serve as a reminder that the same sex that makes the injury hard to see can make the inquiry into that injury equally damaging.

### **Taking the Sex Out of Campus Misconduct: Some Alternative Analogies**

#### *A. Race*

On Saturday evening, March 7, 2015, on a University of Oklahoma fraternity bus, two men were videotaped singing "a chant laden with antiblack slurs and

at least one reference to lynching.”<sup>3</sup> A student group uploaded the video to YouTube the next day and someone anonymously tipped *The Oklahoma Daily* as to the video’s existence. By late Sunday afternoon, the national office of the fraternity had closed the University of Oklahoma chapter. By Tuesday, the two men who could be seen singing on the tape had been expelled from the university because as President (and former U.S. Senator) David Boren explained, they had “created a hostile learning environment for others.”<sup>4</sup> Everyone seems to agree that the students on the bus had been drinking heavily, that other people on the bus were cheering them on and that there were no African-Americans on the bus. A quick Google news search, including both major and minor news outlets, found 6,480 stories about this incident.<sup>5</sup>

On Wednesday evening, October 13, 2010, in the Old Campus at Yale University, young men pledging Delta Kappa Epsilon fraternity marched around the quadrangle that houses freshmen chanting a song with lyrics including “I fuck dead women, and fill them with my semen.”<sup>6</sup> The chorus of the song, which the pledges were instructed to sing ever more loudly, was “No means yes, yes means anal.”<sup>7</sup>

The Yale Women’s Center immediately publicized the incident. Its posts called the chants “hate speech” and “an active call for sexual violence.”<sup>8</sup> They pointed out that it was “statistically inevitable” that some of the students who heard the chants were rape survivors.<sup>9</sup> By the next day, the campus was well aware of what had happened, but the campus reaction was far from uniform. Some people thought the men meant it as a joke. Others thought the Women’s Center was being too strident. Four days after the incident, the Yale Daily News posted an editorial in which it criticized both the chanters for their chants and the Women’s Center for overreacting.

Five months later, after sixteen students and alumnae filed a complaint with the DOE, the Yale administration finally announced that it was banning the fraternity from campus for five years and that several members of the fraternity had been disciplined, though privacy laws prevented the school from releasing

3. Liam Stack, *University of Oklahoma Fraternity Closed After Racist Video is Posted Online*, N.Y. TIMES, Mar. 9, 2015. According to Calvino Partigiani of the Daily Kos, the actual words were “There will never be a n\*gg\*r in SAE. There will never be a n\*gg\*r in SAE. You can hang him from a tree, but he can never sign with me There will never be a n\*gg\*r in SAE.” Calvino Partigiani, *Origins of the Racist SAE Song Lyrics*, DAILY KOS (Mar. 15, 2015, 12:42 AM), <http://www.dailykos.com/story/2015/3/14/1370985/-Origins-of-the-racist-SAE-chant>.
4. Manny Fernandez & Richard Pérez-Peña, *As Two Oklahoma Students Are Expelled for Racist Chant, Sigma Alpha Epsilon Vows Wider Inquiry*, N.Y. TIMES, Mar. 10, 2015.
5. Data on file with author. (Search conducted July 2016).
6. Nora Caplan-Bricker, *Thinking Aloud*, YALE DAILY NEWS, Apr. 27, 2012.
7. *Id.*
8. *Id.*
9. *Id.*

details about those punishments.<sup>10</sup> The university asked the national Delta Kappa Epsilon organization to suspend the Yale chapter for five years, but the organization refused, saying, “We’ve corrected the situation. We suspended their pledging activities for six weeks so we could review their activities with them. Clearly the chanting was inappropriate and in poor taste, but does it warrant a five-year suspension?”<sup>11</sup> A quick Google news search of major and minor news outlets found 171 stories about the Yale incident.<sup>12</sup>

The difference in the responses to these two incidents is striking. Is it clear to most people, including the 6,300 more news outlets that carried the Oklahoma story, that what happened on the bus there was more offensive than what happened in the quadrangle? Does it matter that the hostile environment the Oklahoma students created was not meant to be shared with their targets, whereas the Yale students deliberately targeted students who were likely to be offended? The national fraternity organization closed the Oklahoma chapter in less than twenty-four hours after learning of the video and the school expelled the students, with no hearing and no opportunity to be heard, within two days. The national organization of the Yale chapter thought a five-year suspension was too much and the school took five months to take any disciplinary action, and that only after some members of the community had filed a complaint with the DOE.<sup>13</sup>

The current controversy regarding sexual assault on college campuses may seem different from the incidents at Yale because most of the current controversy involves what to do in one-on-one (though often more-than-one-on-one)<sup>14</sup> sexual encounters. It is not clear why this should matter. DOE’s justification for regulating one-on-one sexual encounters, which was amply supported in sexual harassment case law,<sup>15</sup> was rooted in the principle that a culture in which sex is routinely coerced out of women creates what the University of Oklahoma President so readily found, “a hostile learning environment.”<sup>16</sup> President Boren did not wait for an investigation into what happened; he did not offer the men opportunities for representation; neither did he nor the national chapter of the Sigma Alpha Epsilon fraternity seem

10. Lisa W. Foderaro, *Yale Restricts a Fraternity for Five Years*, N.Y. TIMES, May 17, 2011.

11. *Id.*

12. Data on file with author. (Search conducted July 2016).

13. Yale may well have been planning to discipline the men regardless of the suit, but when it decided and how long it took the college to decide mark a stark contrast with the Oklahoma University incident.

14. UNITED EDUCATORS, CONFRONTING CAMPUS SEXUAL ASSAULT: AN EXAMINATION OF HIGHER EDUCATION CLAIMS 3 [hereinafter CONFRONTING CAMPUS SEXUAL ASSAULT] (“Ten percent of all sexual assault claims involved a single victim and two or more perpetrators.”).

15. See Katharine K. Baker, *Campus Sexual Misconduct as Sexual Harassment: A Defense of DOE*, 64 KAN. L. REV. 861, 874-76 (2016) (discussing requirements for sexual harassment under Title IX).

16. See Fernandez & Pérez-Peña, *supra* note 4.

to fret about whether they were qualified to determine the existence of a hostile learning environment. All of these issues, proper investigation, fair representation and impartial determination of injury are routinely cited as problems with college sexual harassment policies.<sup>17</sup> Yale did finally discipline the “No means yes” chanters, but given that there was so little consensus that verbal chants targeted at freshmen, making light of the very idea of sexual coercion, creates an impermissibly hostile environment, it is hardly surprising that attempts to regulate the coercion itself are controversial.

Some people may resist the chanting incident analogies because they think there is something more obviously wrong with chanting insulting things in public, so that all women within earshot are demeaned, than disrespecting an individual woman in a private setting—particularly if that disrespect might really stem from a misunderstanding. After all, there is no question that in both the Oklahoma and Yale incidents the chanters were purposefully demeaning those about whom they were singing, whereas many men accused of sexual assault insist that they were not intending any disrespect. But it is hard to imagine that a community would be forgiving of an individual white person who repeatedly asked an African-American roommate or acquaintance to pick up the trash on the floor or clear the dishes to the sink or clean the bathroom because—well—that is what the white person thought African-American people did.<sup>18</sup> Indeed, many people might think it more offensive and frightening to have to endure the individualized insult, even if indirect, than the diffuse broadside against one’s whole race.

My hypothesis is that punishing racist acts is less controversial and “requires” less process because people think they know what racism is (insulting someone because of his or her race), how it is demeaning (purposefully making someone feel inferior), and where it comes from (centuries of treating people of color as lesser human beings). Sex is different. Taking sex from someone who does not want to give it is not necessarily seen as demeaning if the taker is motivated more by his own gratification than any desire to demean. He is not necessarily trying to insult her. Having sex taken may also not be seen as demeaning as long as the victim just goes along with it—gives in. Then has she even been demeaned? And taking the sex one wants doesn’t necessarily come from centuries of treating women like lesser human beings; it arguably comes from sexual desire that all humans share. So when the Yale Women’s Center suggested that the fraternity chants were an “active call for sexual violence,”

17. See *infra* notes 40-48 and text accompanying (discussing criticisms of DOE policy from different groups of law professors).

18. Professor Joan Howarth argues in this volume that such mistakes must be understood in the context of sexual interactions, where communication is often nonverbal and complicated. Accordingly, she argues for the creation of a new offense, “sexual mistake.” See Joan W. Howarth, *Shame Agent*, 66 J. LEGAL ED. 717 (2017). Professor Howarth limits her sexual-mistake offense to kissing, however. Because “unconsented-to intercourse, disrobing, or other similarly serious sexual contact” are more intimate than kissing, and because “it typically takes more time to get there,” Howarth suggests that a perpetrator’s “mistake” in those contexts should not excuse his behavior. *Id.* at 734.

the female editor-in-chief of the Yale Daily News called that suggestion an “overreaction” and went on to say, “Feminists at Yale should remember that, on a campus as progressive as ours, most of their battles are already won: All of us agree on gender equality.”<sup>19</sup>

Can we imagine an African-American editor of *The Oklahoma Daily* saying the same thing about a chant that was not even meant for African-American ears? Isn’t the predominant reaction to the lynching chant a recognition that the battle has (obviously) not been won, whatever “all of us” might say we agree on? Why can sexism still be a joke when racism is so very serious? Perhaps because many people believe that racism causes real harm, but taking sex from women who do not want to give it does not.

Universities feel the need to respond to race-based incidents. They understand those incidents to be harmful to their communities, regardless of whether the acts themselves were legal. That same understanding does not seem to attach to sex-based incidents.

### *B. Academic Integrity*

In August of 2012, Harvard University revealed that up to 125 students were being investigated for cheating on an exam the previous May.<sup>20</sup> Harvard President Drew Faust announced that “[t]he scope of the allegations suggests that there is work to be done to ensure that every student at Harvard understands and embraces the values that are fundamental to its community of scholars.”<sup>21</sup> The college’s administrative board proceeded to review each of the 125 cases case individually.<sup>22</sup> Though the exact process was never made public, the administrative board website stated that the board would not issue a punishment unless it was “sufficiently persuaded” of a student’s malfeasance.<sup>23</sup> Extra (nonexpert) staff were hired to review the exams. Though a full report of the individual incidents was never issued, the administration originally reported that malfeasance ranged from “inappropriate collaboration to outright plagiarism.”<sup>24</sup>

When the disciplinary investigation was announced, some students complained that the school was trying to punish what had been accepted practices.<sup>25</sup> Those in authority gave contradictory signals about what was

19. Caplan-Bricker, *supra* note 7.

20. Richard Pérez-Peña & Jess Bidgood, *Harvard Says 125 Students May Have Cheated on a Final Exam*, N.Y. TIMES, Aug. 30, 2012.

21. *Id.*

22. Rebecca D. Robbins, *Cheating Scandal to Be Reviewed Case-by-Case*, THE HARV. CRIMSON, Sept. 11, 2012.

23. *Id.*

24. Jay Harris, *Letter from Harvard Dean to Students on Cheating Investigation*, THE BOS. GLOBE (Aug. 2012), <http://www.bostonglobe.com/metro/2012/08/30/letter-from-harvard-dean-students-cheating-investigation/pwD3dPYPwDODyFk3ZvBXJJ/story.html>.

25. Richard Pérez-Peña, *Harvard Students in Cheating Scandal Say Collaboration Was Accepted*, N.Y.

permissible, and it was hard for students to know whether they were breaking any rules. Teaching assistants “varied widely in how tough they were in grading, how helpful they were, and which terms and references to sources they expected to see in answers.”<sup>26</sup> Some students were alarmed that the school would “threaten[] people’s futures” and consider action that could affect a student’s postgraduate opportunity.<sup>27</sup>

Those students who expressed concern that the school was randomly enforcing vague rules did not find any discernible support in the faculty or the broader community. The Harvard Administrative Board continued its review, and eight months after the test was administered, Harvard announced that approximately seventy students had been suspended. Another thirty-five students received a disciplinary probation.<sup>28</sup> While some faculty and alumni protested the slow pace of the proceedings and the vagueness of the ethical standards, the public outcry about the process was minimal.<sup>29</sup> On campus, the reaction seems to have been more one of embarrassment that the cheating happened at all.<sup>30</sup> Indeed, the incident prompted Harvard to hasten a “cultural shift” with regard to “academic integrity” on campus.<sup>31</sup> Within three years, Harvard adopted a new honor code that all students now have to acknowledge before course enrollments and final exams.<sup>32</sup>

Compare how the Harvard community responded when the cheating scandal came to light with how much of the community responded when sexual misconduct on campus came to light. In 2015, Harvard published the results of an internal investigation regarding sexual misconduct: One in three female undergraduate respondents at Harvard reported having sex expropriated from them without their consent.<sup>33</sup> These results are in accord with results from other studies, all made public in the decade spanning from

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TIMES, Aug. 21, 2012 (students “said that some of the conduct now being condemned was taken for granted in the course, on previous tests and in previous years”).

26. *Id.*

27. *Id.* It is worth noting that these kinds of complaints—deviations from accepted practice, ambiguous messages about appropriate conduct, and the dire consequences of administrative punishments—seem to gather more traction in the sexual than academic context. See letter criticizing sexual harassment policies *infra* notes 37 and 47.

28. Richard Pérez-Peña, *Students Disciplined in Harvard Scandal*, N.Y. TIMES, Feb. 1, 2013.

29. See the *Bits and Pieces* blog of computer science professor Harry Lewis at <http://harry-lewis.blogspot.com/2013/02/lingering-questions-about-cheating.html> (last visited Apr. 6, 2017).

30. Pérez-Peña, *Students Disciplined*, *supra* note 28 (“The episode has given a black eye to one of the world’s great educational institutions . . .”).

31. Noah J. Delwiche & Ivan B.K. Levingston, *With Honor Code, College Looks to Turn a New Page*, THE HARV. CRIMSON, Sept. 2, 2015.

32. *Id.*

33. See Drew Faust, *Statement on the Results of the Sexual Conduct Survey*, HARVARD U. (Sept. 21, 2015), <http://www.harvard.edu/president/news/2015/statement-on-results-sexual-conduct-survey> (31% of Harvard senior women reported nonconsensual sexual contact).

2005-2015, which indicate that between seventeen-percent and thirty-three percent of women on college campuses report having sex expropriated from them without their consent.<sup>34</sup> Given these numbers, one might expect a call for a “cultural shift,” an acknowledgment that Harvard has “work to [do] to ensure that every student at Harvard understands and embraces the values [of respect, dignity, and sexual autonomy] that are fundamental to its community . . . .”<sup>35</sup> One might even think that the routine disregard for women’s sexual self-determination was a kind of “black eye” for the campus.<sup>36</sup>

To its credit, the Harvard administration does seem to have responded in this manner, though in doing so it was accused of caving in to pressure from DOE.<sup>37</sup> The administration expressed deep dissatisfaction with the status quo of male entitlement<sup>38</sup> and acted fairly quickly to usher in new rules for sexual misconduct.<sup>39</sup> Not so the Harvard faculty—particularly the law school faculty. In a well-publicized letter to *The Boston Globe*, twenty-eight members of the Harvard Law School faculty criticized Harvard’s new sexual misconduct policy as “lack[ing] the most basic elements of fairness and due process.”<sup>40</sup> In particular, the letter criticized “lodging [] the functions of investigation, prosecution, fact-finding and appellate review in one office . . . that could [not] be considered structurally impartial,” “[in]adequate opportunity to discover the facts charged . . . and present a defense at an adversary hearing,” and “the failure to ensure adequate representation for the accused, particularly for students unable to afford representation.”<sup>41</sup>

The administrative proceedings that resolved the cheating scandal included none of these safeguards demanded by the law professors when sexual misconduct is involved. The administrative board took sole responsibility for

34. For a description of the major studies of sexual misconduct on university campuses, see Baker, *supra* note 15, at 871-74.

35. See *supra* note 20 (noting Harvard President’s comments on the cheating scandal).

36. See *supra* note 28.

37. Michael Fein, *Rethink Harvard’s Sexual Harassment Policy*, THE BOS. GLOBE, OCT. 15, 2014 (containing an open letter to The Boston Globe signed by twenty-eight Harvard Law School professors), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>. The article suggested that Harvard may have adopted its policy under pressure from the government because large sums of research money were at stake. *Id.*

38. See Steven Hyman, *Letter to Harvard President Drew Faust on behalf of the Task Force on the Prevention of Sexual Assault*, HARVARD U. (Sept. 21, 2015), [http://sexualassaulttaskforce.harvard.edu/files/taskforce/files/hyman\\_letter\\_final\\_9.21.2015.pdf?m=1442844014](http://sexualassaulttaskforce.harvard.edu/files/taskforce/files/hyman_letter_final_9.21.2015.pdf?m=1442844014). The report described the results at Harvard as part of a “widespread and pervasive . . . problem across universities” and suggesting that Harvard “must plan and put in place interventions potent enough to meet the serious challenges documented by the survey.” *Id.* at 14.

39. Travis Andersen, *Harvard Accepts Sexual Assault Recommendations*, THE BOS. GLOBE, May 15, 2014.

40. Fein, *supra* note 37.

41. *Id.*



the cheating incident. It was charged with investigating, fact-finding, appellate review and punishing.<sup>42</sup> This list of responsibilities means it could not “be considered structurally impartial.”<sup>43</sup> The students accused of cheating had the right to present evidence to the administrative board, but there is no indication that they were given “adequate opportunity to discover the facts charged” or that the hearing was “adversarial.”<sup>44</sup> Harvard did not provide counsel—or at least did not make public that it provided counsel—for low-income students, though it is clear that some students were paying for counsel.<sup>45</sup>

The Harvard law faculty also criticized the sexual harassment policy for “go[ing] significantly beyond Title IX and Title VII law.”<sup>46</sup> Another open letter from law professors—this one from faculty from many different law schools—criticized the DOE guidelines for lowering the standard of proof in sexual misconduct hearings “even though the Supreme Court has recognized that a low standard of proof is inappropriate in situations involving damages to one’s reputation.”<sup>47</sup>

42. At least that is the best guess as to what happened as the process was never fully explained. Despite some requests, Harvard never gave a full accounting of what the administrative board’s substantive standards or adjudicatory processes were. When the administrative board announced its final determinations, a professor at Harvard’s Graduate School of Education commented that eventually the school should “give a much more complete account of exactly what happened and why it happened.” Pérez-Peña, *Students Disciplined*, *supra* note 28. There is no record that Harvard ever did so.
43. Fein, *supra* note 37.
44. *Id.*
45. Pérez-Peña, *Students Disciplined*, *supra* note 28 (indicating that at least some students had outside representation).
46. Fein, *supra* note 37.
47. *Law Professors’ Open Letter Regarding Campus Free Speech and Sexual Assault 2*, SEN. JAMES LANKFORD, (May 16, 2016), <https://www.lankford.senate.gov/imo/media/doc/Law-Professor-Open-Letter-May-16-2016.pdf>. This letter also criticized universities that fail to find conduct “pervasive” before finding it actionable. *Id.* This latter criticism not only suggests that schools are not free to demand more civility from their students than can an employer, it misstates the law of sexual harassment, which requires that pervasiveness be weighed against severity. The more severe the conduct, the less pervasive it need be to be actionable. *See Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1067 (9th Cir.) (en banc) (“Title VII forbids severe or pervasive . . . sexual touching” (emphasis added)); *Jones v. Clinton*, 990 F. Supp. 657, 675 (E.D. Ark. 1998) (dismissing case because even if one incident was “boorish and offensive” it did not have a demonstrable effect on plaintiff’s job performance and therefore was not actionable.). If the injury required is merely “effect on academic performance,” many of the women who do not have criminal claims could still have harassment claims. *See infra* Part IIA.

Moreover, no group of law professors wrote an open letter criticizing the University of Oklahoma for punishing the men on the bus, who engaged in one nonpervasive, constitutionally protected (as speech) incident of racial harassment. *See supra* text accompanying notes 3-5. Nor were their concerns voiced about the lack of pervasiveness or process when Bucknell University took less than a week to expel students who used racist speech on one 2 a.m. college radio broadcast. *See Jake New, Punishment, Post-Oklahoma: College Leaders Have Gotten Speedier and More Severe in Taking Action Against Students Linked to Racist*

These are curious criticisms given schools' well-recognized authority to regulate the conduct of its students. Harvard's ability and responsibility to define ethical standards for and discipline its students operates almost completely outside the law. While private schools are probably bound by some notion of due process in student disciplinary proceedings,<sup>48</sup> no one has suggested that the old or new rules regarding academic misconduct violate due-process principles, even though the proscribed acts are defined very broadly and the administrative board process has very few criminal-law safeguards. No educational institution is bound by the limits of *legal* fraud or *criminal* misrepresentation when regulating academic conduct. Indeed, every school that has an honor code requiring students to report on their peers goes well beyond what the law even could require.<sup>49</sup>

The idea that a higher standard of proof is necessary if reputational damages are at stake suggests that (a) Harvard was required to use a higher standard of proof than whichever one it used in the cheating scandal<sup>50</sup> and (b) that all sexual harassment claims must use a higher standard of proof. Don't all disciplinary actions recorded on college transcripts cause reputational damage, particularly those going to deceit and fraudulent representation? If sexual harassment carries some sort of unique reputational harm, then presumably Baker and McKenzie,<sup>51</sup> Forklift Systems,<sup>52</sup> and all the other companies that have been successfully sued for sexual harassment should have been entitled to a higher standard of proof, as would the individuals who worked at those companies if they were terminated for harassing conduct. To my knowledge, these burden-of-proof arguments have never been made by anyone, much less

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*Incidents. Critics Fear Due Process is Being Eroded.*, INSIDE HIGHER ED (Apr. 1, 2015), <https://www.insidehighered.com/news/2015/04/01/some-college-leaders-are-responding-quickly-racist-and-sexist-incidents> (reporting that Bucknell University took less than a week to expel students who used racist speech on the college radio station). Another example is when the University of South Carolina immediately suspended a woman who wrote a racial epithet on a whiteboard in a public area. Peter Holley, *University of South Carolina Student Suspended after Racist Photo Goes Viral*, WASH. POST, Apr. 5, 2015, [https://www.washingtonpost.com/news/morning-mix/wp/2015/04/05/university-of-south-carolina-student-suspended-after-racist-photo-goes-viral/?utm\\_term=.ee76fef45f92](https://www.washingtonpost.com/news/morning-mix/wp/2015/04/05/university-of-south-carolina-student-suspended-after-racist-photo-goes-viral/?utm_term=.ee76fef45f92).

48. How much process must be afforded by either public or private universities is the topic of considerable debate, but there is some consensus that some process is due from any university. For the discussion, see Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 270 nn. 228-29 (2015).
49. For a sampling of schools that require students to report on others, see Baker, *supra* note 15 at 862 n.6. Presumably, the law could not require individuals to report on others without running afoul of the Fifth Amendment.
50. See Robbins, *supra* note 22 (describing Harvard Administrative Board's vague description of its standard of proof).
51. Weeks v. Baker and McKenzie, 74 Cal. Rptr. 2d 510 (1998) (holding firm liable for sexual harassment damages under Title VII).
52. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (defining hostile environment as that which "would reasonably be perceived and is perceived as hostile or abusive," but not requiring that that behavior be proved by clear and convincing evidence).

law professors, in other sexual harassment contexts. Why do so many legal “experts” seem to insist on a higher standard of proof here?<sup>53</sup>

Critics who maintain that more process is necessary because universities are not equipped to handle incidents as serious as rape and sexual assault<sup>54</sup> have missed the critical principle that underlay DOE’s enforcement effort: Colleges are policing sexual harassment, not rape. As educational institutions, colleges do not have primary responsibility for adjudicating criminal misconduct, but they do have primary responsibility for adjudicating unwelcome, inappropriate, and harassing conduct, just as they have responsibility for policing academic misconduct. Sometimes that harassing sexual conduct crosses the criminal line and becomes rape; this makes the investigatory process more complicated, but the fact that the conduct might be criminal should not absolve the college from determining what happened and whether it was appropriate student conduct. Sometimes racially charged incidents cross the line and become hate crimes; sometimes cheating can become criminal fraud. The existence of criminal hate crime and fraud statutes hardly relieves colleges of their responsibility to police the conduct that falls short of criminal, but nonetheless constitutes behavior deemed harmful to the academic community and inconsistent with a college’s values.<sup>55</sup>

The protests of new sexual harassment policies suggest that faculty afford their universities more freedom to define and police academic misconduct than sexual misconduct. Perhaps those faculty think that schools should be afforded that freedom when it comes to academic misconduct because schools have academic expertise. Schools know more about what should be proscribed as a matter of academic morality than what should be proscribed as matter of sexual morality. A closer look at the honor code Harvard adopted after the cheating scandal suggests that what that expertise gives universities is mostly the discretion not to define what it will punish. The new Harvard honor code defines prohibited academic misconduct in two sentences, apparently expecting students to understand what are the “scholarly and intellectual

53. Alexandra Brodsky suggests, in this volume, that the answer to this question is “rape exceptionalism.” Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 20, 66 J. LEGAL EDUC. 822 (2017). I agree mostly, but suggest that rape exceptionalism is really sexual harm exceptionalism: Because we cannot see and do not feel as if we understand the harm caused by sexual wrongdoing, we treat cases involving sexual harm differently.
54. Robin Wilson, *Why Colleges Are on the Hook for Sexual Assault*, CHRON. OF HIGHER EDUC., June 6, 2014 (“[M]any question why colleges—not the police or courts—seem to have the primary responsibility for dealing with a crime as serious as rape.”).
55. Indeed, if colleges do not police this behavior and if the criminal law cannot police it—as is true for most cases of racial harassment and cheating and sexual misconduct—then it is not clear anything other than social norms can regulate this conduct on college campuses. See Baker, *supra* note 48, at 235-45 (arguing that criminal standards of proof effectively prevent many if not most instances of nonviolent, nonconsensual sex between acquaintances from being prosecuted effectively).

standards of accurate attribution of sources,” as well as what is the “transparent acknowledgement of the contribution of others to our ideas.”<sup>56</sup>

In adopting standards this vague, schools must be expecting students to internalize a morality that keeps them from cheating in the face of indeterminacy. Schools cannot define cheating with specificity, so they expect students to err on the side of not collaborating and not sharing. Students are supposed to know that they should not expropriate information in a problem set or on an exam that another student left exposed.

Harvard’s sexual harassment policy assumes a much less refined internalized morality when it comes to sexual misconduct. The Harvard community apparently does not expect students to internalize a sexual morality comparable to the one they assume appropriate for academic misconduct. Students are not necessarily supposed to know that if a woman leaves herself exposed, silenced by fear or alcohol or naiveté, that they should not expropriate sex from her. This explains why the new Harvard policy on sexual harassment takes almost two full pages of explicit examples (as opposed to the two sentences in the honor code) to define prohibited conduct. The elaborate definition of sexual harassment is necessary precisely because students have not internalized a norm of respect and caution in the sexual context. Not everyone knows that taking sex without asking is all that wrong.

### *C. Drunk Driving*

My final analogy to help shed light on how distinctly we treat sexual misconduct does not involve campus behavior necessarily, but it does often involve the demographic and kind of behavior likely to be involved in campus sexual misconduct. As virtually everyone with even a passing knowledge of campus sexual culture knows, student use and abuse of alcohol is integrally related to sexual misconduct. All studies confirm that alcohol misuse on campus is rampant. Approximately seventy-eight percent of all sexual misconduct incidents involve either one or both parties drinking.<sup>57</sup> Yet, as one prominent

56. This is the Harvard honor code in its entirety:

Members of the Harvard College community commit themselves to producing academic work of integrity—that is, work that adheres to the scholarly and intellectual standards of accurate attribution of sources, appropriate collection and use of data, and transparent acknowledgement of the contribution of others to their ideas, discoveries, interpretations, and conclusions. Cheating on exams or problem sets, plagiarizing or misrepresenting the ideas or language of someone else as one’s own, falsifying data, or any other instance of academic dishonesty violates the standards of our community, as well as the standards of the wider world of learning and affairs.

*The Honor Code*, Harvard U., <http://honor.fas.harvard.edu/honor-code> (last visited Apr. 11, 2017).

57. CONFRONTING CAMPUS SEXUAL ASSAULT, *supra* note 14, at 6 (“More than three-fourths (78 percent) of sexual assaults involved the perpetrator, victim or both consuming alcohol.”).

researcher suggested, “[t]he discussion of alcohol and sexual violence is the third rail of discourse . . . It’s something no one wants to go near.”<sup>58</sup>

The main reason people are wary of viewing this issue as one involving both alcohol and sex is fear of victim-blaming. Studies indicate that thirty-three percent of all alleged incidents of sexual assault involved victims who were drunk, passed out, or asleep.<sup>59</sup> Those women must not be blamed for the reckless, entitled behavior of the men who took advantage of their condition. The Department of Justice reinforces the view that alcohol must not be treated as a cause of sexual assault by making programs that “focus primarily on alcohol or substance abuse” as “out of scope” of grants meant to promote sexual assault prevention on college campuses.<sup>60</sup>

If one sees sexual assault prevention as a public health problem, though, it seems counterproductive to ignore the role that alcohol plays. Moreover, the analogies that become relevant once one recognizes the role of alcohol suggest that accepting alcohol consumption as a potential problem does not necessarily lead to victim-blaming. When a drunk person gets in the passenger seat of a car driven by a drunk driver, we do not excuse the driver for injuring the passenger.

Since the early 1980s, drunk-driving fatalities and self-reported incidents of driving while intoxicated have fallen dramatically.<sup>61</sup> Driving while intoxicated had been a crime for decades, but the more recent public health campaign to stop—or drastically reduce—the prevalence of drunk driving did not focus primarily on criminal sanctions or the criminal law. The fact that the behavior could be regulated criminally did not keep Mothers Against Drunk Driving and numerous other public educational programs from focusing their efforts on other means of changing behavior.<sup>62</sup> The campaign tried to change the norms around drinking and driving, leading people to become much, much more conscious that having a third beer or that extra glass of wine, if one was driving home, was putting oneself and others at risk. The idea was not to get people to abstain from drinking or driving, but from combining the two. This

58. Robin Wilson, *Why Campuses Can't Talk About Alcohol When it comes to Sexual Assault*, CHRON. OF HIGHER EDUC., Sept. 4, 2014, <http://www.chronicle.com/article/Why-Campuses-Cant-Talk/148615/> (quoting Christopher P. Krebs, the lead author on one of the most-cited surveys on sexual assault on college campuses).

59. CONFRONTING CAMPUS SEXUAL ASSAULT, *supra* note 14, at 7. See also THE WASHINGTON POST/KAISER FAMILY FOUNDATION SURVEY OF CURRENT AND RECENT COLLEGE STUDENTS ON SEXUAL ASSAULT 22 (June 2015).

60. Wilson, *supra* note 58.

61. DALE E. BERGER & WILLIAM D. MARELICH, LEGAL AND SOCIAL CONTROL OF ALCOHOL-IMPAIRED DRIVING IN CALIFORNIA 1983-94, AT 518 (1997).

62. Harold G. Grasmick, Robert J. Bursick, Jr. & Bruce J. Arneklev, *Reduction in Drunk Driving as a Response to Increased Threats of Shame, Embarrassment, and Legal Sanctions*, 31 CRIMINOLOGY 41 (1993).

campaign was accompanied by a more uniform background rule of criminal proscription: One may not drive a car if one's alcohol level is more than .08%.<sup>63</sup>

Attempts to change comparable norms surrounding drinking and sex are often met with ridicule.<sup>64</sup> The fear seems to be that if we treat drinking and having sex the way we treat drinking and driving we will make either celibates or rapists of us all. Given how incredibly common it is for alcohol consumption to precede fully consensual sex, how can we possibly determine some sort of uniform background rule of criminal or even noncriminal proscription?

Perhaps surprisingly, it is not very hard to come up with perfectly sensible responses to the ridicule. Admittedly, just as the .08% blood alcohol limit probably overregulates drunk driving, because many people can drive safely with a .08% blood alcohol level (even if they can't drive as safely as they could with no alcohol in their bloodstream), any presumption about how much is too much alcohol when it comes to sex is likely to be over inclusive. That overinclusivity hardly stands as a reason not to regulate, though.

First, regulations on drinking and sex manifest themselves as definitions of consent, so it is only if consent is questioned that one may be found responsible for sexual misconduct. For instance, in a letter to parents, Kenyon College spells out what kinds of behavior might justify a presumption against consent: "vomiting, staggering, slurring."<sup>65</sup> My university's code states that "[i]f there is any doubt as to another person's capacity to give consent, one should assume that the other person does not have the capacity to give consent."<sup>66</sup> This does not mean one is necessarily punished if one has sex with someone who is vomiting, staggering or slurring, but it does mean that one is assuming the risk that the person with whom one is having sex will subsequently make an allegation of sexual misconduct. The rule creates a slight disincentive to have sex, but it does not overpolice sex as much as the .08% blood alcohol level overpolices drunk driving.<sup>67</sup> The state can punish those who drive with too much alcohol in their bloodstream regardless of anyone else claiming injury.

63. The federal government put federal funds behind motivating states to adopt a .08% legal alcohol limit in 1998. See TEA-21, THE TRANSPORTATION EQUITY ACT FOR THE 21ST CENTURY, SUMMARY (May 29, 1998), <http://www.fhwa.dot.gov/TEA21/summary.htm>.

64. See Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1442 (2013) (suggesting that California's attempt to criminalize sex in situations where one of the parties was incapable of exercising a "reasonable judgment" would result in "a significant fraction of the state's college-age population" being guilty). Professor Howarth suggests that transformative norm change is at the heart of DOE's efforts to restrict sexual harassment on campuses. Howarth, *supra* note 18, at 718-19.

65. KENYON COLLEGE, TITLE IX TALKING POINTS FOR FAMILIES § 3, <http://www.kenyon.edu/directories/offices-services/oct/title-ix-vawa/additional-resources/talking-points-for-families/> (last visited Apr. 13, 2017).

66. ILLINOIS INSTITUTE OF TECHNOLOGY, STUDENT HANDBOOK, SECTION N, SEXUAL MISCONDUCT, § 6A <https://web.iit.edu/student-affairs/vawa-save-acts> (last visited Apr. 13, 2017).

67. It is also possible to protect oneself from such a charge by simply asking the participant if she wants to have sex and being sober enough to remember the conversation.

Second, if the ridicule is based on an assumption that it is unreasonable to expect drunk people to be able to stop themselves from having sex, why is it that we expect drunk people to stop themselves from getting into a car? We—now—have no problem expecting someone to find another way home if he or she has drunk too much. An argument such as “he was too drunk to know that he shouldn’t be driving” is laughably weak. Why is that an acceptable argument for young men and sex?<sup>68</sup> The ability to discern whether one’s partner is capable of consenting is dependent on one’s being sober oneself, and if one is not sober oneself, one needs to take responsibility for keeping one’s hands off (or clothes on), just as one takes responsibility for keeping one’s car keys out of reach.

Decisions about driving are not the only ones we expect young men to be able to make while intoxicated; we presume them capable of making decisions about sex. The law holds men responsible for putting on a condom no matter how drunk they are. If two drunk people have unprotected sex and a pregnancy results, that man must face consequences just as weighty as a college disciplinary proceeding. One hockey player at Union College recently warned his teammates, “a drunk girl holds your life in her hands.”<sup>69</sup> The DOE campaign has made men more aware of this now, but a girl with whom a man has unprotected sex has always held the man’s life in her hands. If she gets pregnant and wants to keep the child, she is assigning him a life of fatherhood of which he might want no part, but he has no say in whether to terminate the pregnancy.<sup>70</sup> Once the child is born, she has a lien on approximately twenty percent of his income in child support for the next eighteen years of his life, and no claim of “I was too drunk to understand” will get that claim reduced.<sup>71</sup> My suspicion is that most college-going men would much rather incur the consequences of a college tribunal’s finding of no consent than the consequences of involuntary parental status. The only way they can reliably avoid the latter is by putting on a condom. If they are never too drunk for the law to hold them responsible for doing that, why can they be too drunk to determine consent or abstain? If there is no condom available, abstaining is precisely what the law requires.

68. As one lawyer representing men accused of sexual assault on college campuses commented, “[i]n every one of these situations, the male is in no better shape, physically, emotionally, or maturity-wise, to make any of these decisions than the girl is.” Robin Wilson, *Presumed Guilty*, CHRON. OF HIGHER EDUC., Sept. 1, 2014, <http://www.chronicle.com/article/Presumed-Guilty/148529>.
69. Robin Wilson, *Protecting the Party*, CHRON. OF HIGHER EDUC., Dec. 3, 2014, [http://www.chronicle.com/interactives/alcohol\\_sex](http://www.chronicle.com/interactives/alcohol_sex).
70. See Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037 (2016) (discussing genetic father’s powerlessness if he does not wish to be a father).
71. *Id.* at 2065 (discussing standard child support obligation, which attaches to any man sued in paternity).

Those who ridicule must believe that it is somehow more reasonable to force drunk men to make decisions about driving and decisions about condoms than decisions about whether to ask for consent. Why? Perhaps it is the perceived absence of any real victim. When we think of the potential injuries that result from driving while intoxicated—death, serious bodily harm, property damage—our sympathies for the young drunk person fall away. When we think of a needy infant, whatever sympathies we have for the drunk man who couldn't fix his condom evaporate. But when it is just sex, when the only injuries are what she claims from the nonconsensual nature of the interaction, many people's sympathies switch to the drunken man. When so many people have so much drunken sex without any discernible harm, and when the injury of those claimed is so subjective and ephemeral, and when those who claim injury are usually just as drunk if not more drunk than the person causing injury, what's the harm?

The next part starts to unpack the “what's the harm” question. Doing so requires acknowledging what the analogies to other kinds of misconduct have helped establish: The sexual nature of the conduct is critical to how people evaluate both perpetrator culpability and victim injury. By taking the sex out of the analysis we see how central sex is to people's apprehensions about the process schools must afford. Demands for better procedures and clearer rules and more reasonable expectations do not resonate when the issue is something other than sex.

### **Putting the Sex Back In: Unique Injury and Injury from Process**

To answer the question “where's the harm?” one must acknowledge how central sex is to the injury. At the risk of sounding tautological, what makes sexual misconduct so different from racial or academic misconduct and drunk driving is sex. In particular, no one quite knows what sexual harm is or how it hurts or where it comes from. Because we do not fully understand when and why and what the injury is, we have trouble punishing the activity that causes it. Compounding this problem is what appears to be, at best, an indirect, orthogonal relationship between what we can recognize as perpetrator culpability and victim harm. Making matters worse, the sexual nature of the original injury makes any process afforded those accused of perpetrating it even more damaging to the victim.

To substantiate this claim, this part first examines three different stories of campus sexual misconduct. The first account is widely recognized as, and was successfully prosecuted as, criminal rape. The second account was not thought egregious enough to warrant a university disciplinary proceeding. The self-reported injuries from these two different incidents are remarkably similar in scope and degree. The third account comes from a judicial opinion in which the alleged perpetrator was cleared of wrongdoing on appeal from a campus tribunal that had found him responsible. In this last account, it is exceedingly difficult to determine what happened, and therefore difficult to feel comfortable disciplining the alleged perpetrator; but the nature of the



harm the victim suffered is quite possibly identical to that suffered in the first case, in which most people have no problem criminally punishing the alleged perpetrator. Sexual harm is almost entirely subjective and it is exceedingly difficult to predict, but it is also indisputably present in many victims.

The campus misconduct incident that was prosecuted criminally reveals a further complication that flows from the sexuality of it all. Not only is the harm hard to see because it is sexual; because it is sexual harm, the injury is compounded when alleged perpetrators are afforded traditional criminal-process protections. The victim's voice at the criminal trial makes this point more eloquently than I ever could. This part thus concludes with more complete excerpts from her victim impact statement.

#### *A. Three Cases of Sexual Harm*

Last year, largely as a result of CNN anchor Ashleigh Banfield's decision to read large portions of a rape victim's personal impact statement aloud, on television,<sup>72</sup> many people listened to what it might feel like—why it hurts and how it hurts—to be raped. Yale has its sexual harassers and Harvard has its cheaters, but anyone paying attention to the news last year knows that Stanford has at least one student who was convicted—criminally—of rape.

On January 17, 2015, a young woman decided to go out with her sister to a party on the Stanford University campus.<sup>73</sup> By her own admission, she drank way too much, too quickly. She remembers very little from that evening, though she does remember starting to drink. While drunk, she left garbled phone messages for her boyfriend, though she does not remember calling him. What she mostly remembers is waking up in the hospital, to which police had taken her after they were called by two men who saw a man behind a dumpster doing something odd with a possibly comatose woman. The man, whom we now know to be Stanford swimmer Brock Turner, ran away; the passers-by tackled him and called the police. Forensic reports indicate that the victim (whom I will call “Jane”) had been penetrated digitally and groped all over her body, her dress pulled up above her head, her underwear stripped off and thrown to her side. When the assailant ran, she was left naked from her waist down to her boots, curled up in a fetal position.

Before reading Jane's description of how she was injured by her rape, consider another account of sexual misconduct, this one submitted not to a court, but to *The Harvard Crimson* by a Harvard student after all attempts to get the school to take action had failed.<sup>74</sup> This is how that victim, whom I will call “Mary,” described what happened to her:

72. Available for viewing at CNN, *Ashleigh Banfield Reads Letter From Stanford Rape Survivor*, YOUTUBE (June 6, 2016), <https://www.youtube.com/watch?v=8G1bNbKRfBo>.

73. All of the facts presented here come from the victim's statement, first published by BuzzFeed News. Katie J.M. Baker, *Here is the Powerful Letter the Stanford Victim Read Aloud to her Attacker*, BUZZFEED NEWS (June 3, 2016), [https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm\\_term=.dhzMoMABO#.ibaLaLpE6](https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm_term=.dhzMoMABO#.ibaLaLpE6).

74. All of the facts below come from an anonymous letter published by *The Harvard Crimson*.

He was a friend of mine and I trusted him. It was a freezing Friday night when I stumbled into his dorm room after too many drinks. He took my shirt off and started biting the skin on my neck and breast. I pushed back on his chest and asked him to stop kissing me aggressively. He laughed. He said that I should “just wear a scarf” to cover the marks. He continued to abuse my body, hurting my breast and vagina. He asked me to use my mouth. I said no. I was intoxicated, I was in pain, I was trapped between him and the wall, and I was scared to death that he would continue to ignore what I said. I stopped everything and turned my back to him, praying he would leave me alone. He started getting impatient. “Are you only going to make me hard, or are you going to make me come?” he said in a demanding tone. It did not sound like a question. I obeyed.

Now, compare how Jane and Mary describe their injuries.

Jane wrote:

My damage was internal, unseen, I carry it with me. You took away my worth, my privacy, my energy, my time, my safety, my intimacy, my confidence, my own voice . . . . My independence, natural joy, gentleness, and steady lifestyle I had been enjoying become distorted beyond recognition. I became closed off, angry, self-deprecating, tired, irritable, empty. The isolation at times was unbearable. You cannot give me back the life I had before that night . . . . I can't sleep alone at night without having a light on, like a five year old, because I have nightmares of being touched where I cannot wake up . . . . I am afraid to go on walks in the evening, to attend social events with drinking among friends . . . . I have become a little barnacle always needing to be at someone's side . . . .<sup>75</sup>

Mary wrote:

Several weeks ago...my psychiatrist officially diagnosed me with depression . . . . I developed an anxiety disorder shortly after moving back to my House [dorm] this fall and running into my assailant up to five times a day certainly did not help my recovery . . . . I am weeks behind in the three classes I'm taking. I have to take sleeping pills every night to fall and stay asleep, and I routinely get nightmares in which I am sexually assaulted in public. I cannot drink alcohol without starting to cry hysterically. I dropped my favorite extracurriculars because I cannot find the energy to drag myself out of bed. I do not care about my future anymore, because I don't know who I am or what I care about or whether I will still be alive in a few years. I spend most of my time outside of class curled up in bed, crying, sleeping, or staring at the ceiling, occasionally wondering if I just heard my assailant's voice in the staircase. Often, the cough syrup sitting in my drawer or the pavement several floors down from my window seem like reasonable options.<sup>76</sup>

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Anonymous, *Dear Harvard: You Win*, THE HARV. CRIMSON, Mar. 31, 2014, <https://www.thecrimson.com/article/2014/3/31/Harvard-sexual-assault/>.

75. *Here is the Powerful Letter*, *supra* note 73.

76. *Dear Harvard*, *supra* note 74.

Harvard denied Mary's request that the perpetrator be required to change dorms. The administration maintained that his actions were not clearly forbidden by the existing sexual harassment policy.<sup>77</sup> Regardless of whether that was true, one should recognize that unlike Jane's case, the Harvard incident would likely never be prosecuted criminally. After all, Mary could have just kept her back turned, or tried to walk away, or said "no" again. He didn't force her physically; he was not in any position of authority over her.<sup>78</sup> She was the one who decided to "obey," which will almost always be read as consent.

These two parallel stories of being sexually used, one of which constitutes criminal rape because the jury found that the victim was incapable of consent, and the other of which is exceedingly unlikely to constitute rape because the victim voluntarily "obeyed," entail almost identical injuries. Both women were tormented internally. They were petrified, sleepless, depressed, hopeless, desperately in need of friends, and scared of being social at the same time. They both lost focus, had to stop working and studying, did not recognize themselves in the person the incidents made them become. One of them remembered the incident vividly; one of them didn't remember it at all.

Now compare these two stories to a third, this one the underlying incident in a case that has received some attention, *Mock v. University of Tennessee at Chattanooga* (UTC).<sup>79</sup> In *Mock*, both parties had been drinking, but not necessarily enough to be considered legally incapacitated (and therefore incapable of consent). They knew each other, but had not had sex before. The complainant, whom I will call "Sally," willingly entered a bedroom—from a bathroom, where the accused had found her on the floor.<sup>80</sup> She remembered removing her bra but claimed to remember very little else from the evening. The day after the incident the parties exchanged these text messages:

Him: "Well I don't remember much from last night. Did you throw up in bed? If you did it's totally cool."

Her: "I have no clue. I remember next to nothing about last night." "Did we sleep together?" "I definitely woke up with no clothes on."

77. This was the same Harvard Administrative Board that found seventy students violated academic misconduct rules, rules that the students said were blurred and often ignored by their teaching assistants. See *supra* text accompanying notes 20-32.

78. To paraphrase the Yale Daily News, she is his equal in every way, especially on a campus as progressive as Harvard. Caplan-Bricker, *supra* note 6.

79. Memorandum and Order, *Mock v. Univ. of Tenn. at Chattanooga*, No. 14-1687-II (Tenn. Ch. Ct. Aug. 10, 2015) (order reinstating the first initial order of the administrative law judge).

80. *Id.* at 4-5.

Him: "I mean I assume we slept together because we woke up together and we were both naked."<sup>81</sup>

At the hearing, the complainant testified that she remembered the accused trying to sit her up in the bathroom; she also recalled lying on a bed, feeling pain, screaming out and having the accused try to cover her mouth.<sup>82</sup> The accused testified that he remembered the complainant looking like she was "tipsy,"<sup>83</sup> and finding her on the floor of the bathroom; he remembered her walking by herself into the bedroom, him removing her pants and performing oral sex on her, her removing her bra and her repositioning him as he penetrated her.<sup>84</sup> He denied trying to cover her mouth.<sup>85</sup>

The administrative law judge in *Mock* found that Sally had not been too intoxicated to consent<sup>86</sup> and found, more generally, that Sally "did not convince [me] that she was intoxicated."<sup>87</sup> This is a very odd finding. The accused testified that he thought the complainant looked drunk.<sup>88</sup> He found her on the floor of a bathroom, where, he testified, he thought she had been throwing up. Both parties' text messages suggest that they drank too much to remember what happened. The defendant in *Mock* was much more willing than the ALJ to acknowledge that Sally was drunk.

This means that Sally might well have been used just as Jane was. No hospital staff put Sally through a litany of forensic tests to see what happened to her physically, but she woke up naked and, though not behind a dumpster, she had to find her clothes, strewn to the side, most of which she did not remember removing. Mr. Mock testified as to what he did, though, like Turner, he acknowledged that he did not remember much from that night. There were no passers-by to verify or undermine his account.

There are numerous reasons to believe that what Mr. Mock did with Sally is not nearly so insulting and demeaning as what Brock Turner did with Jane. Mock and Sally had known each other before that evening. Whatever they did took place on a bed, in a situation in which it was plausible that Sally consented to the activity. Mock did not run away or act like a guilty man the next day. It is possible that Sally did give clear signs of consent to the activity, even if she doesn't remember. It is incredibly difficult for anyone ever to know what happened when the only people who were there do not remember.

81. *Id.* at 5.

82. *Id.*

83. *Id.* at 4.

84. *Id.* at 4-5, 18.

85. *Id.* at 18.

86. *Id.* at 15.

87. *Id.* at 15, n.3.

88. *Id.* at 4.

The important point for a discussion of sexual injury, though, is that the collateral facts making it much easier to believe that Sally consented have nothing to do with what makes rape, rape, or sexual misconduct wrongful. They knew each other; they were on a bed; he texted her the next day. But neither being a stranger nor taking Jane behind a dumpster is what turned Brock Turner's actions into rape. Nor did his running away. If Mr. Mock lay on top of Sally and digitally penetrated her and rubbed his erect penis against her naked body after throwing her clothes off to the side, right before she fell into a drunken sleep, Mr. Mock should be exactly as guilty as Mr. Turner. The offending action would be identical. But it is hard to believe that Sally would garner anything like the sympathy that Jane did.

Jane's explication of her injury captivated the country. As she so vividly described, it was the pine needles in her hair, the abrasions from her body rubbing against the ground, the fact that she did not know him, and the filth of the dumpster that made the attack such a horrific insult to her dignity. Those collateral dignitary harms make it relatively easy to empathize with Jane's injury; but what makes the act wrongful has nothing to do with where it happened, or who did it, or whether the sheets were clean. These collateral, irrelevant harms make it easy to see Jane's sexual injury, and the absence of them makes it difficult to see Sally's.

Sally has never described her injury publicly. Perhaps she did not feel at all as Jane and Mary did, but that seems unlikely given her decision to prosecute.<sup>89</sup> She must have felt injured somehow. All of these women probably felt used, violated, and offended, and those feelings made them scared, vulnerable, and angry to the point that they felt fundamentally changed, for the worse.

Low reporting rates and definitional differences about what constitutes misconduct make it difficult to determine with any accuracy how many Janes and Marys and Sallys there are. We do not know how many people have been injured by campus sexual misconduct, nor what their injuries are. We do know, as Jane's and Mary's accounts suggest, that victims of sexual assault struggle, and often fail, academically;<sup>90</sup> they are at increased risk for alcohol and substance abuse,<sup>91</sup> at significantly increased risk for depression,<sup>92</sup> and

89. Professor Howarth argues that women may feel injured because they carry too much sexual shame. Howarth, *supra* note 18, at 728-29. This shame is unfortunate, but it is not clear that the just response requires denying that women are injured by behavior that is experienced as particularly harmful because of unnecessary shame. True equality may demand that we change the norms surrounding entitled male sexual behavior and the norms surrounding women's sexual shame, but the desire to do the latter does not obviate the need to do the former.

90. Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L.J. 2106, 2110 (2016).

91. Rebecca Marie Loya, *Economic Consequences of Sexual Violence for Survivors: Implications for Social Policy and Social Change*, 27-8 (June 2012) (unpublished PhD dissertation, Brandeis University), <http://pqdopen.proquest.com/doc/110271055.html?FMT=AI>.

92. Rebecca Campbell et al., *An Ecological Model of the Impact of Sexual Assault on Women's Mental Health*, 10 TRAUMA VIOLENCE & ABUSE 225, 225-26 (2009) (citing multiple studies).

susceptible to risky sexual behavior<sup>93</sup> and post-traumatic stress syndrome.<sup>94</sup> These injuries do not present uniformly in all victims. The degree of force used does not necessarily correlate with psychological distress in the victim, nor does the relationship of the perpetrator to the victim.<sup>95</sup> The fact that Brock Turner did not know Jane makes it easier to believe that Jane did not consent, but that does not mean that Jane was more hurt than either Mary or Sally.

Even more confounding is the recognition that some women endure incidents like Mary's and Sally's without experiencing them as devastating. Not all women who have sex expropriated from them, or just "obey" as Mary did, or let themselves be mauled in their drunken stupor, suffer in the way that Jane and Mary describe.<sup>96</sup> The primary reason respondents in the Association of American Universities study gave for not reporting incidents of nonconsensual sex was that they did not consider the incident serious enough.<sup>97</sup> More than fifty percent of victims of forced sexual penetration—criminal rape—felt the same way.<sup>98</sup> Because some women do not experience nonconsensual sex as deeply injurious and because, for those who are injured, the harm is so internal and dependent on factors other than the assault itself,<sup>99</sup> it is easy to dismiss the harms as inconsequential.

Imagine these injuries manifesting themselves differently. Imagine that instead of the subjective demons that haunt (some) victims of sexual misconduct, the combination of anger, disgust, shame and fear caused an immune system response that made a victim's right arm go limp. As is true of women from whom sex is expropriated today in the real world, not everyone who has been used by a man sexually would suffer limp arms—the injury wouldn't work that way.<sup>100</sup>

93. Jay G. Silverman et al., *Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*, 286 JAMA 572 (2001).
94. Campbell, *supra* note 92, at 225 ("Between 17% and 65% of women with a lifetime history of sexual assault develop posttraumatic stress disorder.").
95. See Baker *supra* note 48, at 254 (discussing studies).
96. *Id.* at 256-60 (detailing women's accounts of "bad hook-ups," many of which would constitute criminal sexual assault, and most of which would constitute violations of recent university sexual harassment codes. These women do not necessarily see the experience as assault or harassment.).
97. AMERICAN ASSOCIATION OF UNIVERSITIES & WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, EXECUTIVE SUMMARY xxi (2015), [https://www.aau.edu/uploadedFiles/AAU\\_Publications/AAU\\_Reports/Sexual\\_Assault\\_Campus\\_Survey/AAU\\_Campus\\_Climate\\_Survey\\_12\\_14\\_15.pdf](https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/AAU_Campus_Climate_Survey_12_14_15.pdf) ("When asked why the incident was not reported, the dominant reason was it was not considered serious enough.").
98. *Id.* ("Even for penetration involving physical force, over half (58.6%) of students gave this reason.").
99. The "mental health consequences of rape are caused by multiple factors beyond characteristics of . . . the assault." Campbell, *supra* note 92, at 238.
100. Baker, *supra* note 48, at 253-56 (discussing studies showing variation in the extent to which women are traumatized by rape, if at all).

In this imaginary world it would be unclear, as it currently is, why some women are vulnerable and others do not seem to be.<sup>101</sup> Still, wouldn't there be much more sympathy if their injuries were so discernible? In this world, there would be many, many women walking around college campuses with limp arms. These women would be unable to play sports, unable to take notes in class, diminished in their ability to keep up the constant texting of friends, hindered in their ability to take part in any activity in which the use of two arms or two hands is routine. These women would likely spend a great deal of time on their own, feeling understandably sorry for themselves. It would be hard for others whose arms were not limp to help them.

If it were Mary's limp arm that imperiled her academic path, caused her exhaustion, limited her extracurricular activities, made her embarrassed when with her friends and afraid to be in public by herself, might we not expect Harvard to require the man who caused her injury to switch dorms because his behavior so obviously betrayed "the values that are fundamental to its community of scholars"?<sup>102</sup> If Sally's arm were limp and she had to forgo most of the life she had just begun to establish for herself as a freshman at college, wouldn't we be far less accepting of a man who found her vomiting in a bathroom, led her to an adjacent bedroom and, even if he didn't put his hand over her mouth, proceeded to have sex with her before she promptly passed out?<sup>103</sup>

If we really believed that these women were hurt, as would be so much easier if their arms were limp, would we care so very much about protecting these men's rights to do what they want to do? What they are doing is sex. Because it is sex, a great many people vigilantly protect men's right to partake, and minimize whatever harm women experience from having it extracted without their consent.

### B. Process

The procedural protection that most critics believe these men deserve—the protection that the law knows best how to provide—is criminal due process. As Jane's personal impact statement makes clear, this process often aggravates the victim's injury. The publicity around Jane's statement tended to focus on the relatively lenient sentence the judge imposed. Unfortunately, that controversy may have deflected attention away from something that should have jumped out from Jane's account: A majority of the harm she describes in her victim impact statement stems not from what happened on the night of the attack, but from the criminal process that followed.

101. *Id.* See also Baker, *supra* note 15, at 885-88 (suggesting that some women, particularly those from whom nonconsensual sex is expropriated on college campuses, may not be as deeply injured as others).

102. Pérez-Peña & Bidgood, *supra* note 20 (comments of President Faust).

103. The only part of this account that was contested at trial was whether he put his hand over her mouth. Memorandum and Order, Mock, *supra* note 85.

It starts, according to Jane's statement, at the very beginning, when hospital staff responded the way they have to in order to gather evidence for a potential criminal trial:

My clothes were confiscated and I stood naked while the nurses held a ruler to various abrasion on my body and photographed them . . . . I had multiple swabs inserted into my vagina and anus, needles for shots, pills, had a Nikon pointed right into my spread legs. I had long, pointed beaks inside me and had my vagina smeared with cold, blue paint to check for abrasions.<sup>104</sup>

No one did anything wrong in the hospital. Everyone was professional and considerate and tried to be helpful. The hospital staff was collecting evidence that might be critical in any court proceeding where chains of custody and accuracy of evidence are essential. But the evidence-gathering process after a sexual attack is inherently demeaning, and it is demeaning in a way that distinguishes sexual crimes. It is not nearly as humiliating, if at all, to have pictures taken of one's broken arm or gunshot wounds or even one's bruised face. If someone like Sally were to read Jane's statement when she got home and tried to determine whether she had been raped, and she realized what she would have to go through if she charged rape, might she decide to try to just forget it? If you were her friend or her parent, might you not advise her to try to just do so?

Jane's statement goes on in much more detail. She found out what had happened to her by reading the local news, and when reading the story she read something she said she would "never forgive." "I read that according to him, I liked it. I liked it. Again, I do not have words for these feelings."<sup>105</sup>

Every accused college student is extremely likely to say exactly what Jane could not forgive: She liked it. The most obvious and complete defense to a charge of sexual misconduct is that she liked it or wanted it or consented to it. To hear that, when one fervently believes that one did not like or consent or want "it" is at once an invasion of privacy ("how dare he assume to know what I like?") and an assault on one's autonomy ("I would NOT have consented to that or with him or then"). The consequences of having to listen, repeatedly, as the accused, in front of strangers, tells a story about what you like and what you did, sexually, may be just as injurious as his not caring what you liked and doing it without your consent in the first place.

Jane's disgust with the process goes on:

I thought there's no way this is going to trial . . . . He's going to settle, formally apologize, and we will both move on. Instead, I was told he hired a powerful attorney, expert witnesses, private investigators who were going to try and find details about my personal life to use against me, find loopholes in my story to invalidate me and my sister, in order to show that this sexual assault

104. *Here is the Powerful Letter*, *supra* note 73

105. *Id.*



was in fact a misunderstanding. That he was going to go to any length to convince the world that he had simply been confused.

I was not only told that I was assaulted, I was told that because I couldn't remember, I technically could not prove it was unwanted. And that distorted me, damaged me, almost broke me . . . .

I was told to be prepared in case we didn't win . . . . I was warned, because he now knows you don't remember, he is going to get to write the script . . . . I had no power, I had no voice, I was defenseless. My memory loss would be used against me. My testimony was weak was incomplete, and I was made to believe that perhaps, I am not enough to win this. His attorney constantly reminded the jury, the only one we can believe is Brock, because she doesn't remember. That helplessness was traumatizing.

Instead of taking the time to heal, I was taking time to recall the night in excruciating detail . . . .

I was pummeled with narrowed, pointed questions that dissected my personal life, love life, past life, my family life, inane questions accumulating trivial details to try and find an excuse . . . . [For effect, Jane's statement provides a sample of 42 questions that she was asked.] . . . . After a physical assault, I was assaulted with questions designed to attack me . . . .

And then it came time for him to testify and I learned what it meant to be revictimized . . . .

To sit under oath and inform all of us, that yes I wanted it, yes I permitted it and that you are the true victim . . . is appalling, is demented, is selfish, is damaging. It is enough to be suffering. It is another thing to have someone ruthlessly working to diminish the gravity of validity of this suffering.

He has done irreversible damage to me and my family during the trial . . . .

You have dragged me through hell with you, dipped me back into that night again and again.

My life has been on hold for over a year, a year of anger, anguish and uncertainty . . . . Had Brock admitted guilt and remorse and offered to settle early on, I would have considered a lighter sentence, respecting his honesty, grateful to be able to move our lives forward . . . . [H]e added insult to injury and forced me to relive the hurt as details about my personal life and sexual assault were brutally dissected before the public. He pushed me and my family through a year of inexplicable, unnecessary suffering . . . .

[H]e has revictimized me continually, relentlessly.”<sup>106</sup>

While Jane is clearly critical of what Turner’s attorney did at trial, every law student and lawyer should recognize that Turner’s attorney was just providing the process that the defendant deserved. Defense counsel is supposed to undermine her credibility and diminish the gravity of her suffering. Cross-examination of an alleged victim is supposed to be narrow, pointed questions about intimate details so that the defense can poke holes in the state’s story. It was the defendant’s lawyer’s job to emphasize how little Jane remembered. Jane said that the “helplessness” that stemmed from realizing the defendant would be able to control the narrative because she could not remember was “traumatizing.” Imagine how helpless and traumatized Sally must have felt when her accuser not only attempted to control the narrative but succeeded in doing so, with the judge deciding that there was no “gravity to her suffering.”

Jane suggests that Turner’s attempt to say that she liked it was “appalling, demented, selfish and damaging,”<sup>107</sup> but Jane’s complaint is really that the criminal process is appalling, demented, and damaging (to a rape victim). Turner was not doing anything other than what every alleged perpetrator will do if afforded criminal process.

Jane was also saying what critics of rape prosecutions have been saying for years: The intimate, personal nature of sexual injuries makes process itself exceedingly costly for victims.<sup>108</sup> If colleges and universities provide criminal law safeguards, they should realize that in doing so they are not only protecting alleged perpetrators, they are, to paraphrase Jane, re-victimizing the complainant and dipping her back into her injury, again and again. Schools’ attempts to adopt alternative, noncriminal safeguards thus cannot be dismissed as attempts to railroad defendants so as to realize quick results; they are attempts to save victims from “unnecessary suffering.” Perhaps schools have gone too far, but it is not at all clear that the best way to adequately protect both alleged perpetrator and alleged victim is with the safeguards the criminal law knows best.

### Conclusion

What to do about sexual misconduct is now a question that likely rests solely in the hands of schools themselves. Without a bold federal enforcement mechanism, no school is likely to feel compelled to change the practices that have traditionally governed sexual misconduct on campuses. Some schools will no doubt be relieved that they need not fear federal authorities and will do nothing. Others may choose to keep the changes they have already made. Many schools have yet to decide what to do.

106. *Id.*

107. *Id.*

108. *See generally*, ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS (2013) (discussing failure of rape reform movement to deliver a process in which victims are taken seriously and not re-victimized).

As they decide, schools should be mindful that much of the criticism of the reform attempts, while sounding in process, have more to do with skepticism about the existence of the injury. If we believe that at least some women are substantially injured when sex is taken from them without their consent, we must be prepared to accept the subjective, psychological, and random nature of the injury. The fact that not all women are harmed or not all harmed in the same way does not necessarily mean that men should be excused from responsibility when they do cause harm. Once we accept that women are harmed and that they are harmed by college students because those students transgress reasonable norms of appropriate and respectful conduct, calls for criminal-process protections should dissipate. In nonsexual contexts, no controversy is attached to schools that discipline students without affording them traditional criminal process. Moreover, schools must take heed of the messages sent by Jane and the countless rape victims before her who were brave enough to come forward: Affording traditional criminal-process protection in cases of sexual misconduct may cause as much trauma as the original injury itself.