Introduction

In 2009 the Center for Public Integrity began an investigation into how colleges handle allegations of peer-to-peer sexual assault. They found that colleges often gave little institutional support to victims even when college investigations found that the students had indeed been assaulted. Punishments often were perceived by victims as little more than a slap on the wrist, and victims did not feel protected from future assaults.

As the issue gained wider attention, other problems surfaced. Many colleges appeared to discourage reporting of such assaults out of fear of bad publicity or liability. It was too often unclear what conduct was against university rules and what the consequences for such conduct were. Complaining students were subjected to clumsy and insensitive questioning. Many victims did not feel heard, respected, or safe. Research indicates that underreporting of college sexual assault remains a serious problem.

Under the Obama administration, the Department of Education's Office of Civil Rights (the OCR) strongly acted on the position that peer-to-peer sexual assault of college students violates Title IX, the federal law barring gender discrimination that inhibits equal access to higher education. There was a significant increase in federal investigations of colleges for failure to properly respond to sexual assault allegations and the targets of such investigations were made public regardless of whether the OCR found any wrongdoing. In 2011, the OCR issued to all colleges a "Dear Colleague" letter giving unusually detailed instructions on how to handle allegations of sexual assault and threatened to withhold federal funding – which would be a virtual death sentence – from any college that did not follow the rules laid down. Even apart from the substance of the letter, it was controversial because the OCR did not follow any of the normal procedures for issuing these sorts of rules, such as allowing a period for

public comment.[1] The letter was rescinded by the Trump administration, but at the time of this writing, only interim instructions have replaced it.

Apart from government pressure, college administrations resolved to respond more aggressively to complaints of peer-to-peer sexual assault. Colleges have developed large and growing bureaucratic apparatuses, often led by former OCR officials, to investigate and punish sexual assault. As described by Harvard law professors Jacob Gersen and Jeannie Suk Gersen:

> The federal bureaucracy interprets federal law to require colleges and universities to have internal bureaucracies that regulate sexual conduct. An effect of this development is the replication of bureaucracy by bureaucracy. Schools must employ Title IX coordinators to oversee their compliance and their processes of responding to individual complaints . . . Former OCR governmental bureaucrats often lead or staff the extra-governmental bureaucracies, which makes sense from the perspective of schools seeking expert knowledge of what OCR wants schools to do . . . the sex bureaucracy has managed to plant seeds of its own replication within the parties it regulates, and the plants are blossoming.[2]

The first argument of this book is that these bureaucratic apparatuses have too often done a poor job of providing fair process to students accused of sexual assault. We will see examples of students denied the most basic information they would need to mount an effective defense; colleges deliberately hiding exculpatory evidence and even discouraging exculpatory witnesses from testifying; colleges failing to inform students of the specific charges against them; and colleges changing the charges mid-process without informing the students among many other denials of fair process. These flawed procedures violate the constitutional rights of public university students and other legal rights of private university students.

This book also argues that many, perhaps most, universities are regulating consensual sexual activity in violation of students' constitutional rights. We will see that "affirmative consent" laws not only violate students' right to sexual autonomy, but also do not offer any extra protection to students against sexual assault.

To be clear, the argument of this book is not that "the pendulum has swung too far," in terms of combatting college sexual assault. In fact, colleges still need to do a better job of protecting victims of sexual assault, especially in terms of eliminating barriers to reporting and implementing empirically tested approaches to lowering rates of sexual assault. This is discussed in the last chapter of the book.

I reject the pendulum metaphor because it wrongly implies that colleges are now somehow doing *too much* to combat sexual assault, which is certainly not

[1] The OCR took the position that despite the detailed nature of the letter it was merely clarifying existing law and was not subject to the procedural requirements for legal rule making by a federal agency.

[2] Jacob Gersen and Jeannie Suk Gersen, "The Sex Bureaucracy," 104 *California Law Review* 881–948, 904–905 (2016) (citations omitted).

the argument of this book. The argument here is that colleges are too often making poor choices in terms of how they respond to allegations of sexual assault. As will be discussed at length, depriving students of due process does nothing to protect victims of sexual assault and is almost undoubtedly counterproductive as well as unconstitutional.

In fairness to college administrators, preventing sexual assault of college students is something that they cannot be reasonably expected to do alone. As discussed in the first and last chapters, legislators and police departments can and should do more to help colleges. Expecting colleges to run their own investigation, adjudication, and enforcement systems in jurisdictions with poorly drafted sexual assault laws or uncooperative police departments is a great deal to ask.

College Title IX Coordinators are like sailors buffeted by powerful winds and tides pulling their boats in opposite directions. Demands for swift action are not always compatible with the need to be thoughtful and thorough. Imperatives to "believe the women"[3] can conflict with legal obligations to presume innocence. As Brett Sokolow, one of the nation's leading consultants on college sexual assault, writes:

> Caught in the middle of all this is the campus Title IX Coordinator (TIXC) who receives a complaint from a victim who is in pain. The TIXC pursues the complaint with diligent investigation within the requisite +/- 60 days, and then calls us in puzzlement over why they have now found text messages from the complainant both before and after the incident, describing it as consensual. It's easy for media outlets to paint uncaring campuses as the bad guys over and over again, but reality is often far more complex than that. Worse, FERPA – the federal student privacy law – leaves colleges unable to explain and defend the backstory to the cases they process.[4]

Universities[5] are ill-equipped to balance these competing concerns on their own. This area, which deeply impacts the constitutional rights and other rights of college students, is an obvious area for strong judicial involvement. Fair process is at the core of the courts' expertise. As we will see in Chapter 2, courts have been too reluctant to enforce constitutional due process protections for a variety of reasons, although this appears to be changing as more and more egregious cases reach the courts. This book attempts to move the process along by laying out an argument for what procedural protections are required and why the Constitution and other laws require them. This sort of clarity would benefit everybody – victims, accused students, and the higher education system.

[3] See, e.g., Bari Weiss, "The Limits of 'Believe All Women,'" *New York Times* (November 28, 2017), www.nytimes.com/2017/11/28/opinion/metoo-sexual-harassment-believe-women.html.

[4] An Open Letter to Higher Education about Sexual Violence from Brett A. Sokolow, Esq. and The NCHERM Group Partners (May 27, 2014). www.ncherm.org/wordpress/wp-content/uploads/2012/01/An-Open-Letter-from-The-NCHERM-Group.pdf.

[5] This book uses *colleges* and *universities* interchangeably.

WHY THIS BOOK AND WHY NOW?

I have spent the great majority of my academic career pressing for legal reforms that are considered liberal/progressive.[6] My first two books were on same-sex equality issues, and I am proud to say that I was strongly advocating for the constitutional right to same-sex marriage well before that issue was in the public eye. My previous work seeks to make sure that constitutional rights are applied equally to all. This book continues and extends that goal. I know that a great many bright, well-informed, progressive people are concerned that defending the constitutional rights of people accused of sexual assault is a type of "backlash" against the movement to fight sexual violence. I respectfully disagree – legal reform to ensure due process generally brings about positive change. But, I want to directly address the concerns I have heard from some of my friends and colleagues who have been generous enough to share their thoughts with me.

WHY WRITE A BOOK PRIMARILY ABOUT THE RIGHTS OF THE ACCUSED RATHER THAN THE VICTIMS?

This is a question I have been asked a number of times, and it is a very fair question. There are several answers. First and foremost, I have seen absolutely no evidence that the types of severe deprivations of due process I discuss in this book do anything to protect victims of sexual assault. Due process protects the innocent. University administrators and professors should not adopt the rhetoric of self-described "law and order" politicians and paint due process as gauntlet of technicalities favored only by those who are soft on crime.

I have also been asked whether this is really the right time to write this book. My answer is that it is always a good time to write a book defending due process. When the public is afraid or angry, due process is often portrayed as an unaffordable impediment to justice and public safety. As explained in "Without Due Process: Lynching in North Carolina 1880–1890," lynchings were justified as necessary responses to the state's insufficiently conviction-oriented legal systems.[7] In the 1940s, the majority of the Supreme Court rejected Justice Frank Murphy's call for due process for Japanese Americans accused of disloyalty. In the 1980s, Attorney General Ed Meese argued against Miranda rights for criminal suspects because: "Suspects who are innocent of a crime should [get due process]. But the thing is, you don't have many suspects who are innocent of a crime. That's contradictory. If a person is innocent of a

[6] I utilize the first person only for the introduction where it seems appropriate for my goals. The remainder of the book is written in the traditional academic third person.

[7] Sarah Burke, Elias Carr Paper (#160), East Carolina Manuscript Collection, J. Y. Joyner Library, East Carolina University, Greenville, North Carolina, https://uncw.edu/csurf/Explorations/documents/withoutdueprocess.pdf.

crime, then he is not a suspect."[8] At the turn of the twenty-first century, our government argued that normal protections of due process were not always possible. As the Editorial Board of the *New York Times* put it after the 9/11 attacks:

> Mr. Bush argued that the attacks changed everything: Due process and privacy were luxuries the country could no longer afford. Far too many members of Congress bought this argument. Others, afraid of being painted as soft on terror, refused to push back.[9]

In our zeal to combat sexual assault, we should not make the same mistake yet again and conflate concern for due process with being tolerant of sexual violence. The idea that due process is an impediment to public safety or that support for due process conflicts with protecting victims is an old trope and is without empirical support. In *Hamdi v. Rumsfeld*, "[T]he Government also argued at some length that its interests in reducing the process available to alleged enemy combatants are heightened by the practical difficulties that would accompany a system of trial-like process."[10] In fact, it turned out the civilian courts, even with all their supposedly impractical due process protections, were far more effective at convicting terrorists than President George W. Bush's military tribunals, which had far fewer due process protections for the accused.[11]

Quite the opposite, lack of due process can harm the victim as well as the accused. In the next two chapters we will see cases in which victims were denied justice by college sexual assault panels that gave them insufficient opportunity to produce and review evidence and to pose questions to the accused students about their shifting stories, and that fell short in various other ways.

More generally, victims are unlikely to be helped by a process in which people lack confidence. A process that violates peoples' rights and lacks peoples' trust leads to lawsuits, and fear of lawsuits scares people away. According to the *New York Times*:

> School officials are being named in individual lawsuits, so fewer agree to serve on Title IX panels; self-identified victims increasingly need lawyers of their own, because they risk being sued. Advocates on both sides suspect that schools are hedging their bets as they adjudicate, fearing both lawsuits and Office for Civil Rights sanctions.[12]

[8] Howard Kurtz, "Meese Says Few Suspects Are Innocent of Crime," *Washington Post* (October 11, 1985), www.washingtonpost.com/archive/politics/1985/10/11/meese-says-few-suspects-are-innocent-of-crime/272c4d16-f627-4ce4-896e-7faf8632a526/?utm_term=.32470d486886.

[9] Editorial Board, "We Can't Tell You," *New York Times* (April 3, 2010), www.nytimes.com/2010/04/04/opinion/04sun1.html.

[10] 542 U.S. 507 (2004).

[11] Dashiell Bennett, "Civilian Courts Are Way Better Than Military Courts at Convicting Terrorists," *The Atlantic* (April 23, 2013), www.theatlantic.com/politics/archive/2013/04/civilians-courts-vs-military-courts-terrorism/315994/</ac.

[12] Kathryn Joyce, "The Takedown of Title IX," *New York Times* (December 5, 2017).

It is also always important to be careful with the facts. The progressive left often accuses the political right of playing fast and loose with the facts. On issues such as global warming, evolution, and the prevalence of voter fraud, I tend to agree. But we all have feet of clay, and this is an area where I believe that too many progressives have been careless with the facts. The media is inundated with the claim that "1 in 4" or "1 in 5" women are sexually assaulted in campus. As is discussed in Chapter 8, these studies are rife with extremely serious methodological shortcomings. They do not sample representative populations. They have low response rates and are therefore highly vulnerable to "response bias," meaning that they are getting responses from an unrepresentative subset of an already unrepresentative sample. They have significant time-frame problems. Perhaps most importantly, they frame their questions using very broad language that calls for highly subjective responses that likely exaggerate the number of alleged sexual assaults on campuses. Several of the authors of these studies have publically stated that they are uncomfortable with the ways their studies are being used by politicians and the way they are being discussed in the media.

To be fair, these studies have their defenders, and reasonable people can disagree on the numbers. However, politicians and the media very rarely discuss these numbers in a fair or clear way and are prone to use these studies to promote panic and sensationalism rather than reason. To take one of many possible examples, in 2017, *The Dallas Morning News* ran a headline that read: "15 Percent of Female Undergraduates at the UT [University of Texas] Have Been Raped, Survey Says."[13] Many other news outlets ran the same or a very similar headline. However, one would have to read all the way down to the tenth paragraph of the article to find that "rape" included "the use of verbal pressure." One would have to find the survey instrument and read down to page 121 of the 124-page report to find that "rape" included procuring oral sex by "[s]howing displeasure, criticizing your sexuality or attractiveness, getting angry but not using physical force, after you said you didn't want to."[14]

There was no information provided about how many of the positive respondents were referring to verbal pressure such as "showing displeasure," but assuming that many more people would show displeasure at being turned down for sex than would resort to physical violence, it is likely that including verbal pressure in the question significantly affected the responses.

Especially in this time of "#MeToo" and "Times Up" there is an important conversation to be had about when verbal pressure to engage in sex crosses the line, either legally or ethically. But it is irresponsible to write headlines that simply conflate showing displeasure at being turned down for sexual activity with rape this way.

[13] www.dallasnews.com/news/higher-education/2017/03/23/survey-15-percent-female-undergraduatesat-ut-raped.
[14] www.utsystem.edu/sites/default/files/sites/clase/files/2017–10/health-aggregate-R11-V4.pdf.

Sensationalistic headlines that scream of huge numbers of sexual assault at colleges also have a negative impact beyond the issues discussed in this book. Public faith in institutions of higher education is failing badly. As *the New York Times*'s Frank Bruni writes:

> A Gallup poll found that only 44 percent of all Americans had a "great deal" or "quite a lot" of confidence in the country's colleges and universities, while 56 percent had only "some" or "very little." College – once a great aspiration – was now a polarizing question mark. That's not so surprising, given Americans' intensifying resentment of anything that smacks of elitism and given Republicans' attacks on science and intellectuals. As Ron Daniels, the president of Johns Hopkins University, recently told me, "Even if we were completely unblemished in the way in which we pursued our mission, it would be hard to imagine that in Trump's America, we wouldn't be targets for scorn."[15]

Uncritically publicizing questionable numbers that paint colleges as dens of sexual iniquity feeds into anti-intellectual narratives and the view of liberal institutions as promoting moral laxity. As we will see, the evidence indicates that today's college students are no more sexually active than their parents were. The progressive left should not be helping anti-intellectual forces undermine confidence in our nation's universities.

The political left has just as much obligation as the political right to stay away from "alternative facts," and there has been too little fidelity to the facts in this debate. As we will see in Chapter 2, it has been commonplace to claim that it has been shown that only 2 percent of rape claims are false. But when one looks at the footnotes supporting this claim, they invariably lead to other articles whose footnotes lead to yet more articles, none of which ever cite an empirical study, or they cite a study that makes no such claim. When skeptical academics chased down the original citation, it appeared that the 2 percent figure originated in a speech given a long time ago by a police official. No record remains to tell how that statistic was derived or whether it was anything more than an offhand, subjective estimate.

Similarly, as we will see in Chapter 8, it is oft-claimed that sexual assault is more prevalent on campus than off campus. But there do not appear to be *any* supporting studies that come to this conclusion by administering the same survey to students and nonstudents. In fact, the only study I have seen that asked the same questions to both populations concluded that students are in *less* danger of being sexually assaulted than equivalently aged nonstudents. As it turns out, nonstudents of college age living in rural areas are the population that, by a significant margin, are most at risk of being sexually assaulted. Yet this population has drawn only a tiny fraction of the attention that has been devoted to college students.

We see the same thing with the oft-made claim that most college sexual assault is committed by repeat "predators," the same term that was used to

[15] Frank Bruni, "Higher Ed's Low Moment," *New York Times* (December 30, 2017), www.nytimes.com/2017/12/30/opinion/sunday/higher-eds-low-moment.html.

vilify young African American men in the 1990s. These claims are based on a single study of a single campus that utilized highly questionable methodology such as "convenience sampling" rather than random sampling.

Also, the discussion about sexual assault overwhelmingly assumes female victims and male perpetrators. In fact, the empirical evidence points to far higher numbers of male victims and female perpetrators than the prevailing public discourse would suggest. This issue produced perhaps the most interesting conversations with my friends and colleagues regardless of whether they are progressive or conservative. Although I cited research on this point from perfectly reputable sources, most of the people with whom I spoke simply refused to believe that this could be true. Readers can judge the evidence for themselves after reading Chapter 3. The pull of the female victim/male perpetrator narrative is very strong, and, especially because our language makes writing in gender-neutral terms awkward, I generally use female pronouns in describing victims throughout this book. (This is also partially due to the fact that – despite the fact that this might not accurately reflect the gender balance of offenses – the vast majority of complainants in college are female and virtually all the accused students are male.)

Another reason that I felt compelled to write this book is that this country has a history of dealing poorly with sexual offenses once those offenses achieve a high level of political salience, and politicians become eager to show that they are tough and uncompromising. As I was finishing this book, Senator Kirsten Gillibrand, who spearheaded the successful effort to pressure Al Franken into resigning from the US Senate, was asked about the fact that the accusations against Franken were significantly less serious than the accusations against Roy Moore, an alleged child molester who was running for the Senate at the time with the support of his party. Senator Gillibrand argued that any line drawing was inappropriate:

> I think when we start having to talk about the differences between sexual assault and sexual harassment and unwanted groping, you are having the wrong conversation. You need to draw a line in the sand and say none of it is O.K. None of it is acceptable.[16]

But there are heavy costs to refusing to draw lines, even in the area of sexual offenses. Sarah Stillman has written a chilling piece in *the New Yorker* about children who end up on sex-offender registration lists. One of the young people whose story she tells is Charla Roberts:

> In Charla Roberts's living room, not far from Paris, Texas, I learned how, at the age of ten, Roberts had pulled down the pants of a male classmate at her public elementary school. She was prosecuted for "indecency with a child," and added to the state's online offender database for the next ten years. The terms of her probation barred her from leaving her mother's house after six in the evening, leaving the county, or living in

[16] Bret Stephens, "When #MeToo Goes Too Far," *New York Times* (December 20, 2017), www.nytimes.com/2017/12/20/opinion/metoo-damon-too-far.html.

proximity to "minor children," which ruled out most apartments. When I spoke to the victim, he was shocked to learn of Roberts's fate. He described the playground offense as an act of "public humiliation, instead of a sexual act" – a hurtful prank, but hardly a sex crime. Roberts can still be found on a commercial database online, her photo featured below a banner that reads, "*protect your child from sex offenders*."[17]

In researching this book, I have seen too many examples of school officials refusing to draw lines that should have been drawn. Writing in the *Harvard Law Review Forum*, law professor Janet Halley tells of a student she represented who lost his student housing and campus job just because he *reminded* another student of the man who assaulted her:

> I recently assisted a young man who was subjected by administrators at his small liberal arts university in Oregon to a month-long investigation into all his campus relationships, seeking information about his possible sexual misconduct in them (an immense invasion of his and his friends' privacy), and who was ordered to stay away from a fellow student (cutting him off from his housing, his campus job, and educational opportunity) – all because he *reminded her* of the man who had raped her months before and thousands of miles away. He was found to be completely innocent of any sexual misconduct and was informed of the basis of the complaint against him only by accident and off-hand. But the stay-away order remained in place, and was so broadly drawn up that he was at constant risk of violating it and coming under discipline for *that*.[18]

Another motivation for writing this book is that I am concerned about the frequent invocation of terms such as *epidemic* and *crisis* to describe sexual assault in America. They imply a problem that has suddenly come upon us and that is worsening, justifying emergency responses. It is the language of fear and alarmism. In fact, the overwhelming trend for sexual violence is that it is down sharply. As the *Washington Post* reported in 2006: "The number of rapes per capita in the United States has plunged by more than 85 percent since the 1970s."[19]

As with so many of the statistical issues discussed in this book, reasonable people can differ about how to properly interpret data, and this is an especially tricky issue because sexual violence is likely underreported. But it seems doubtful that these statistics are completely illusory. The then-president of the National Organization of Women said: "Overall, there has clearly been a decline over the last 10 to 20 years. It's very liberating for women, in terms of now being able to be more free and more safe." The president of the Rape, Abuse and Incest National Network (RAINN) said: "The decline has been steady and consistent, which gives us a lot of confidence that it's a real occurrence, not a statistical anomaly."[20]

[17] Sarah Stillman, "The List," *New Yorker* (March 14, 2016).
[18] Janet Halley, *Trading the Gavel for Megaphone in Title IX Enforcement*, 128 Harvard Law Review Forum 103 (February 18, 2015).
[19] David A. Fahrenthold, "Statistics Show a Drop in U.S. Rape Cases," *Washington Post* (2006), www.washingtonpost.com/wp-dyn/content/article/2006/06/18/AR2006061800610.html.
[20] Id.

Similarly, there is good evidence that incidents of workplace sexual harassment are also more likely significantly down than up. In 2017, *the New York Times* reported:

> Workplace sexual harassment may be decreasing. In surveys of federal government employees the percentage of women who said they had experienced one of eight harassing behaviors in the last two years was 18 percent, less than half of the percentage it was in 1994.[21]

The point here is not, of course, that 18 percent, or any nonzero number, is acceptable. Half of a big number can still be a pretty big number. The point is that we should avoid the rhetoric of crisis, which has so often been used to promote panic rather than reason and to erode constitutional protections. Interestingly, in the same piece *the Times* reported that "women were only somewhat less likely than men to admit to harassing behavior, even though men, in polls and in formal complaints, are far less likely to say they've been sexually harassed."

WHAT'S WRONG WITH AFFIRMATIVE CONSENT?

Several states and a great many individual colleges have adopted legislation or policies implementing affirmative consent. (I refer to these states and schools as implementing "affirmative consent regimes.") In these regimes any sexual touching without clear, overt, contemporaneous consent for each specific act of sexual touching is sexual assault. What's wrong with that? This issue is covered in Chapters 6 through 8. While affirmative consent is well intentioned, it is a far more sweeping regime of sexual regulation than its proponents acknowledge. First, we will see that it does not reflect the way that most college students behave (and there is also the question of why adults in power are applying it only to college students and not to themselves as well). This means that vast numbers of college students are now defined as sex offenders. Defenders of affirmative consent often argue that it will change norms and that affirmative consent won't punish innocent students because it only matters when someone files a complaint. We will see that these responses are not as reassuring as they might initially seem to some.

We will also see that affirmative consent is a major deviation from how the law usually looks at consent. The general rule is that the law asks whether a reasonable person would have believed that they had been given consent. The reasonable person test is ubiquitous in the law. You can kill a person if a reasonable person in your position would have believed that they were acting in self-defense. No one who meets the "reasonable person" standard in their belief that they had been given consent should be considered a sex offender. And, as we will see, there is no empirical evidence to indicate that affirmative consent

[21] Jugal K. Patel et al., "The Upshot: We Asked 615 Men How They Conduct Themselves at Work," *New York Times* (December 28, 2017), www.nytimes.com/interactive/2017/12/28/upshot/sexual-harassment-survey-600-men.html.