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Why Not Believe Women in Sexual Assault Cases?: An Engagement with Professors Tuerkheimer, Colb, and Many Others

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**WHY NOT BELIEVE WOMEN IN SEXUAL ASSAULT CASES?:
AN ENGAGEMENT WITH PROFESSORS
TUERKHEIMER, COLB, AND MANY OTHERS**

*Dan Subotnik**

[A sexual assault complaint] is an eyewitness account of a credible person. The denial of an accused rapist, by contrast, is entitled to little evidentiary weight as it is fully explained by a desire to avoid conviction.

Professor Sherry Colb¹

* Dan Subotnik is Professor of Law at Touro College, Jacob D. Fuchsberg Law Center. He thanks: Dean Myra Berman, Professor Rena Sepowitz, Margaret Williams, Cecilia Shaw, and, above all, his wife, Professor Rose R. Subotnik, for editorial assistance; his research assistants, Samantha Sbocchi and Casey Gingrich; Touro librarians, Laura Ross, Beth Chamberlain, Irene Crisci, and Michael Tatonetti; and the students who spoke freely to him about subjects that normally stay under wraps even to ourselves. Finally, he thanks Professor Deborah Tuerkheimer for shining her scholarly light on life fundamentals rather than on legal esoterica; Professor Joan Howarth for bravely entering the debate and, however unintentionally, helping to organize this essay; and Editor-in-Chief Michael Morales for helping in every way to put this article to bed.

An earlier draft of this article was submitted to the University of Pennsylvania Law Review as a response to a piece it published that called for police and district attorneys to believe women who file sexual assault complaints.

In a letter to the editor-in-chief expressing my interest in responding, I attached a CV listing a wide range of writings on gender, sexual assault, and American law schools, highlighted by a book published by NYU Press in 2005 to favorable reviews in *The Wall Street Journal* and the *New York Sun*. I explained that I was writing in advance because a rejection would put me in the position of having no back-up; I could hardly expect a law review to publish a response to a piece in an “alien” law journal. The editor-in-chief encouraged me to submit, which I did, but a stock rejection message followed almost two months later. No explanation or editorial suggestions were given. Though happily, my home law review came through, troubling questions remain.

Was the rejection the product of a logically unsound argument? Or did it result from the frequently denounced asphyxiation of academic discourse in such areas as gender? More precisely, was I weighing in on a matter that, on account of gender oppression, is most frequently entrusted to women, an issue that was later at the heart of the Kavanaugh hearings? Was just raising questions about believing women objectionable because it worked to preserve the patriarchal order?

The discursive air, to be sure, is filled with complaints by disgruntled authors who are never the best judges of their own work. So I can do no more at this point than to warmly

I believe women lie just as often as men do. I believe the standard “presumed innocent” must always trump the slogan “Believe Women” if we intend to live in a free and fair society.

N.Y. Times columnist Bret Stephens²

I. INTRODUCTION

Do sexual assault investigations just serve to extend patriarchal reach?

Consider Betty, a college student, who goes to a heady fraternity party and later, after her evening’s date suggests that they “get out of here,” follows him back to his dorm room and then to his bed. She wakes up before dawn the next morning half-undressed remembering almost nothing, whereupon she hastens to report a sexual assault. The police come to interview the accused, but he insists that the sex was consensual. Others at the party can neither support nor refute the claim and nothing further happens as a result of the inquiries.

Is this an injustice? If police and prosecutors are quicker to terminate a sexual assault investigation than one of, say, robbery, would that support a moral and legal claim of sex discrimination and possibly constitute an Equal Protection violation?

In a recent article in the University of Pennsylvania Law Review, entitled “Incredible Women: Sexual Violence and the Credibility Discount,” Northwestern University Law School Professor Deborah Tuerkheimer says yes to both questions.³ Women’s sexual

invite readers to answer these questions for themselves. I can be reached at Dans@tourolaw.edu.

¹ *Readers Respond to the 6.24.18 Issue*, N.Y. TIMES MAG. (July 5, 2018), <https://www.nytimes.com/2018/07/05/magazine/readers-respond-to-the-6-24-18-issue.html> (citing Sherry F. Colb). Colb is Professor of Law and Charles Evans Hughes Scholar at Cornell Law School.

² Bret Stephens, *This I Believe About Blasey v. Kavanaugh*, N.Y. TIMES, (Sept. 21, 2018), <https://www.nytimes.com/2018/09/21/opinion/blasey-kavanaugh-assault-allegations-truth.html>.

³ Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 (2017). “It is a near-religious teaching among many people today that if you are against sexual assault, then you must always believe individuals who say that they have been assaulted.” Jean Suk Gersen, *Shutting Down Conversations about Rape at Harvard Law*, NEW YORKER (Dec. 11, 2015), <https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school>. Gersen opposes this latter view, citing due process concerns. *Id.* Tuerkheimer’s protect-the-complainant rule may, in fact, discriminate against

assault complaints, she argues, are not taken to heart, a point she buttresses with research showing that the “unfounding” rate for “sexual assault” is four times that for other major crimes⁴ and that each year more than 30% of investigated rape claims are deemed unfounded, which is “five times the national average.”⁵ The simple—and for a law professor, surprising—solution to the problem of “incredible women,” of what Turkheimer also calls “credibility discounting” and “testimonial injustice,” is for police and campus administrators to simply accept women’s testimony—to give Betty the benefit of the doubt, in effect to believe Betty, at least until after a real investigation of her charges proves false.⁶

But does this mean that, even provisionally, we should have squelched uneasiness over failure to contemporaneously report alleged assaults to either the authorities or friends and believed Judge Kavanaugh’s accusers Dr. Blasey Ford, Deborah Ramirez, and Julie Swetnick?⁷

Tuerkheimer’s suggestion surely arises out of horror stories told by women on campus and elsewhere. Her article, however, cannot help but fuel a rage that is roiling contemporary gender relations. You don’t have to be a victim of a false rape prosecution to imagine that, in this setting, the charge itself can shatter a man’s life. “Incredible Women,” then, would seem to require strict scrutiny.

No question that women need better listening to these days, especially given #MeToo’s lurid revelations. And let us agree here that *most* women get it right, that sexual assault causes great and sometimes permanent harm and that deterrence requires that guilty

black men who seem disproportionately accused, warns Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103 (2015).

⁴ See Tuerkheimer, *supra* note 3, at 30 n.160.

⁵ See Tuerkheimer, *supra* note 3, at 31 n.167.

⁶ Tuerkheimer undoubtedly wants the presumption in favor of women to continue throughout any proceedings. See *infra* note 107 and accompanying text. Nowhere moreover—except where she talks of false rape charges; see *infra* note 33 and accompanying text—does she acknowledge *any* reason for doubting a woman’s testimony. The Canadian Supreme Court is not persuaded. See *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (S.C.C.) (“While the complainant’s testimony is the only source of direct evidence of her state of mind, credibility must still be assessed by the trial judge, or jury It is open to the accused to claim that the complainant’s words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place.”).

⁷ “I believe [Ford] because she is telling the truth.” Kirsten Gillibrand (@SenGillibrand), TWITTER (Sept. 20, 2018, 12:14 PM), <https://twitter.com/SenGillibrand/status/1042854626717048833>.

men pay the price. But how far is too far for #MeToo? Is Tuerkheimer's deeply-felt call for believing women (as I have presented it to this point) harmfully tendentious? If the man's denial per Colb is entitled to little evidentiary weight because "it is fully explained by a desire to avoid conviction," the notion would seem to apply to all cases against men.

The issue of the extent to which women should be believed is not only academic. After many months of discussion of due process, the U.S. Department of Education is poised to propose a new rule that would *require* colleges and universities to allow the accused a right to cross-examine complainants in sexual assault cases.⁸

That a man—76 years old at that, albeit with a lifetime of academic and other experience in the area⁹—is raising questions about women's credibility in sexual assault cases will put off and even gross out some readers: an old man should no more be sticking his nose in young people's business than a retirement-age boxer should be writing about boxing. But even accepting the proposition, is it yet grosser, than, however provisionally, holding an accused man to be guilty?

In any event, to allay the discomfort at the outset, I hasten to report that virtually all the commentators cited below will be women, some being my contemporaries and all of us being younger than Dr. Ruth. Indeed, although the burden of Tuerkheimer's proposal would fall almost entirely on men, few male voices will be heard here.¹⁰

I begin with a discussion featuring the work of four thoughtful women whom I allow, wherever possible, to speak in their own words.

⁸ Michelle Hackman, *New Education Department Rules to Change Procedures for Campus Sexual-Assault Cases*, WALL STREET J. (Oct. 31, 2018, 6:37 PM), <https://www.wsj.com/articles/new-education-department-rules-to-change-procedures-for-campus-sexual-assault-cases-1541025460>.

⁹ See Dan Subotnik, *Measuring Sexual Assault on Campus: The Clery Report Challenge*, 31 ACAD. QUESTIONS 339 (2018); Dan Subotnik, *Sexual Assault and the Benefit of the Doubt*, 31 ACAD. QUESTIONS 198 (2018); Dan Subotnik, *Assaulting the Facts*, 30 ACAD. QUESTIONS 225 (2017) (dealing with sexual assault statistics); Dan Subotnik, *The Duke Rape Case Five Years Later: Lessons for the Academy, the Media, and the Criminal Justice System*, 45 AKRON L. REV. 883 (2012); Dan Subotnik, *Copulemus in Pace: A Meditation on Rape, Affirmative Consent to Sex, and Sexual Autonomy*, 41 AKRON L. REV. 847 (2008); Dan Subotnik, "Hands Off": *Sex, Feminism, Affirmative Consent, and the Law of Foreplay*, 16 S. CAL. REV. L. & SOC. JUST. 249 (2007). For a more general account of how gender plays out on campus, see DAN SUBOTNIK, *TOXIC DIVERSITY: RACE, GENDER, AND LAW TALK IN AMERICA* (2005).

¹⁰ Many men may have been scared off by the "standing" argument. Does diversity require that men be explicitly encouraged to speak up on sexual assault? Yes says Emily Yoffe. *The Problem with #BelieveSurvivors*, ATLANTIC (Oct. 3, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/brett-kavanaugh-and-problem-believesurvivors/572083>. If the best ideas are forged in the crucible of hot debate, what can be expected without it?

1) For Professor Janet Halley, a writer on sex and sexuality, bias in favor of men is not so easy to discern in campus sexual assault cases. There is, she writes, “pressure on schools to hold [male] students responsible for serious harm when . . . there is no certainty about who is to blame for it.”¹¹ At Harvard, more specifically, the training program for sexual assault investigators is “100% aimed to convince them to believe complainants, precisely *when* they seem unreliable and incoherent.”¹²

2) As for the robbery analogy, we should be able to agree that an element of sexual assault is sexual touching and, though Turkheimer’s 58-page analysis admits to no role for women’s libido, or for any seductive behavior on their part—as if men are just an attractive *nuisance* and women have to be dragged kicking and screaming into the sexual playground, as if the murky morning memories might not have been influenced by the night’s fever—in fact, as many have learned through experience, women can come to bed with hot blood.

By contrast, presumably no one ever yearns to be mugged. Can anything useful on sexual assault emerge from such a cramped perspective on female sexuality? Would it not be remarkable if complainants’ accounts in sexual assault and robbery cases were theorized the same way?

Enter Colorado Detective Stacy Galbraith. Interviewed about a sexual assault case that received national attention,¹³ she acknowledged that rapes are unlike most other crimes in that the credibility of the victim is often on trial as much as the guilt of the accused. Galbraith’s operating principle is, “listen and verify.” This is hard because there are usually no witnesses in these settings. “A lot of times people say, ‘Believe your victim, believe your victim.’ But I don’t think that that’s the right standpoint. I think it’s listen to your victim. And then corroborate or refute based on how things go.”¹⁴

¹¹ Halley, *supra* note 3, at 106.

¹² Halley, *supra* note 3, at 110 (emphasis in original). See also Eugene Volokh, 28 *Harvard Law Professors Condemn Harvard’s New Sexual Harassment Policy and Procedures*, WASH. POST: VOLOKH CONSPIRACY (Oct. 15, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/15/28-harvard-law-professors-condemn-harvards-new-sexual-harassment-policy-and-procedures/?noredirect=on&utm_term=.bd48d819e857.

¹³ T. Christian Miller et al., *An Unbelievable Story of Rape*, PROPUBLICA: MARSHALL PROJECT (Dec. 15, 2015), <https://www.propublica.org/article/false-rape-accusations-an-unbelievable-story>.

¹⁴ *Id.* (quoting Galbraith).

It seems inconceivable that Galbraith would have expressed the same need for balance about a robbery victim's claim. Being mugged may seem a tactical failing—strolling through New York's Central Park at 3 a.m.—but, in contrast to engaging in sex, it will not be seen as a moral one. Admitting to sexual activity, moreover, will undercut a claim of sexual assault. In short, some sexual behavior may need to be covered up.

3) In “My Secret Garden,” her 1973 best-selling, 400-plus page compilation of women's sexual fantasies, Nancy Friday begins an explanation of the need for heightened scrutiny of sexual assault claims.¹⁵ Insisting that women have imaginative lives that are no less rich than men's, she joyfully reports women's unladylike fantasies. While a seemingly decorous correspondent of hers does not want to be “hurt or humiliated,” Friday writes, in the throes of desire she may well fantasize about rape. The imagined rapist, the “effective battering ram, neatly ‘makes’ her relax sufficiently to enjoy orgasm, and then allows her to return to earth, her Nice Girl, Good Daughter, self intact.”¹⁶ Scores of similar stories fill her encyclopedic book, using imagery that, if repeated here, would not likely survive editorial review. I cite only two tempered ones, hoping that they will make the cut.

Speaking of her girlfriend's brutish boyfriend, interlocutor Gail reports that he tried to rape her and stopped only when, after what seemed a long time, she started “crying uncontrollably”; since then, at times, “even though I know this is crazy, I have fantasies that he is trying to rape me—either in his car, my home, or even in his own gas station. I become awfully excited at these thoughts.”¹⁷

Julie elaborates on the fantastic “crime” scene. “While I enjoy going to bed with some guy I dig almost any time, I especially like it if [I can think that] I'm doing it against my will,” that while she is wearing a mask, “I'm being forced by the man's overwhelming physical strength” of men who, naked and waiting their turn, “are so hot with desire for me that they can barely control themselves.”¹⁸

¹⁵ See generally NANCY FRIDAY, MY SECRET GARDEN (1973).

¹⁶ *Id.* at xix.

¹⁷ *Id.* at 151-52.

¹⁸ *Id.* at 110-11. Are Friday's findings to be dismissed as anecdotal? Or for not being representative of women? To be sure, Friday sent out a general call to women for testimonials; she did not ask random subjects *whether* they had fantasies. Thus, she could not measure the extent of the fantasies, but only report that a healthy number have them. But Friday is not claiming that all or even most women have such fantasies.

Friday, who died last year, would surely have wanted to make something clear at this point: nothing she wrote should be taken to mean that there is no real rape or that men can rape with impunity.

The swirl of Friday's rape and related fantasies, as recounted by Gail, Julie, and others, should suggest caution in accepting reports of sexual assault at face value. After all, if indeed, "sex is in the head," is it not just possible that a woman's vivid and lubricious fantasies—fueled, Friday suggests, by sexual guilt—will jump a neural pathway and lead to baseless and spurious complaints? Writing long before #MeToo, Friday does not explore the legal ramifications, i.e., the issue of fairness to men.

One might imagine that Friday was inviting victim stories before the full flowering of the sexual revolution and that things are different. It is, however, not easy to believe that women's fantasy life has changed all that much in a mere 50 years. One might also suppose that extracting sexual pleasure from suppressing sexual guilt is not the only source for these fantasies—that the desire to be desired beyond control is, especially for those insecure about their bodies, perhaps the ultimate affirmation of power and value.¹⁹

4) But Joan Howarth, law dean emerita, authority on gender and, most important here, a former administrator in Title IX sexual misconduct enforcement proceedings at Michigan State University, aligns herself with Friday in finding sexual guilt and tying it to assault complaints.²⁰ Like Nobel Laureate Danny Kahneman who has undermined the notion of the "rational" consumer, Professor Howarth pokes holes in the notion of the rational copulator.

While a strong advocate for women throughout her career, Howarth wrote in 2017 that she had expected hookup culture to reflect women's "widespread comfort with sexuality and confidence in seeking sexual pleasure."²¹ What she discovered in the sexual assault files instead was "seemingly bottomless pits of shame about sexuality."²² One, of course, would expect guilt to turn into shame. Howarth's Title IX work has taught her that "many highly

¹⁹ Readers, one hopes, have never dealt with a woman like this: "I love seeing a man's lips red with arousal, his eyes, his nostrils dilated with lust, and reminding him that there is no way in hell that he is going to get to f*** me." Hanne Blank, *Confessions of an Unrepentant C***tease*, in *SEX & SINGLE GIRLS: STRAIGHT AND QUEER WOMEN ON SEXUALITY* 3 (Lee Damsky ed., 2000).

²⁰ See Joan W. Howarth, *Shame Agent*, 66 J. LEGAL EDUC. 717 (2017).

²¹ *Id.* at 727.

²² *Id.* at 721.

accomplished women students suffer from sexual identities that are painfully constrained [and] fearful.”²³

Elaborating on her soul-crushing discovery, Howarth reports that as a result of feeling that sex is owed to their pursuers in today’s free-wheeling campus hook-up culture, a number of women

experience very little control or autonomy over their own sexuality[, and t]his can lead to the enforcement regime being activated to vindicate honor, provide safety from a third party [i.e., boyfriend], reinforce identities of sexual innocence, protect against jealousy, or protect young women from falling from someone’s grace. It can be a safety net to catch someone from falling from “good” to “slut.”²⁴

While sexual shame can easily lead to underreporting of assault, Howarth continues, some women, contrariwise, may “have complicated pressures to exaggerate the harm that they suffered, substitute certainty for uncertainty about exactly what happened, or pursue serious penalties for conduct that may not be considered serious to others. Unpleasant and unwelcome as this reality may be,” she adds, “we should recognize it,”²⁵ because as a matter of social justice, “‘we believe you’ does not translate fairly into individual adjudications.”²⁶ The sins of men, that is, ought not be visited on an accused man.

Tuerkheimer’s argument is further dissected below with particular attention given to such matters as sexual assault data; the operation of the criminal justice system; adjudicatory experience; reasons why complainants are not believed; a possible solution to sexual assault; the desires of young women; the physical environment in which sexual activity takes place including parties, bars, and dorm rooms; and affirmative consent. Even at this early point, however, is it not clear that there is more to credibility than Tuerkheimer imagines?

Not to put too a fine point on it: Is it not reasonable to imagine, as much of the country apparently did, that the incident that Dr. Ford complained of could be better understood not as an attempted rape that, especially in these times, needed to be roundly and publicly condemned, but as unruly horseplay that she took badly? This would

²³ *Id.* at 726.

²⁴ *Id.* at 722.

²⁵ Howarth, *supra* note 20, at 730.

²⁶ Howarth, *supra* note 20, at 731.

not make Kavanaugh an innocent, but it would explain a recent letter to the New York Times.²⁷ “‘Believe Women?’ ‘No,’” the female writer avers, “that is as wrong as the prior ‘Ignore Women’ standard. We women must ground our campaign for redress in the ageless principles of justice.”²⁸

II. THE STORY IN THE NUMBERS

Emphasizing the pervasiveness of sexual assault, Turkheimer claims that 18.3% of women have experienced rape and that, in addition, 44.6% of women have experienced other forms of sexual violence, “including sexual coercion and unwanted sexual contact.”²⁹ This parallels President Obama’s claim that the overall rate of sexual assault for college women is 20%.³⁰

Not all research, however, supports this datum. For some, the incidence of sexual assault is wildly overstated. The 2014 National Crime Victimization Survey published by the Bureau of Justice Statistics found the *annual* rate to be not 5% per year (20% divided by 4 years), but 6.1 per thousand or .61% per year.³¹ Even more striking, the national sexual assault rate in 2013 as reported in the Department of Education mandated Clery filings was .0003, or 3 in 10,000, 1/167 of the 5% rate.³² Reconciling these divergent results, however, is not the purpose of this article. Accepted here is the proposition that sexual assault is a problem worthy of grave concern.

²⁷ See *Concerns About Kavanaugh’s Temperament*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/2018/10/02/opinion/letters/kavanaugh-temperament.html> (citing Paulette Altmaier’s Letter to the Editor).

²⁸ *Id.*

²⁹ See Turkheimer, *supra* note 3, at 8 n.36.

³⁰ Office of the Press Secretary, *Remarks by the President and Vice President at an Event for the Council on Women and Girls*, WHITE HOUSE: PRESIDENT BARACK OBAMA, Jan. 22, 2014, 2:05 PM, <https://obamawhitehouse.archives.gov/the-press-office/2014/01/22/remarks-president-and-vice-president-event-council-women-and-girls>.

³¹ See WENDY McELROY, RAPE CULTURE HYSTERIA 159 (2016). It is hard to complain that sexual assault is widely underreported because this datum is based not on the number of complaints or convictions but on thousands of random telephone interviews. Note that the arithmetic is simplified here. The 20% figure does not account for reported sexual assaults of individuals who were assaulted more than once.

³² Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL., PUB. POL’Y & L. 1 (2015). The National Center for Educational Statistics reportedly assesses the rate of sexual offenses against college students at .1 percent per year. See VANESSA GRIGORIADIS, BLURRED LINES: RETHINKING SEX, POWER, & CONSENT ON CAMPUS 176-77 (2017).

To her credit—and perhaps to derail an attack that she knew would be coming—Tuerkheimer admits that in the mix of assault complaints are false rape charges, i.e., claims that women *know* to be false. She assesses that rate at no greater than 6.8% and that datum is accepted here as well.³³

False rape charges, however, cannot be ignored, especially since the Tawana Brawley, Duke Rape, and University of Virginia cases set the nation on edge. We could limit ourselves here to exploring whether false rape charges could really be uncovered without interrogating complainants. But that would be too easy. So this article deals rather with claims that cannot be corroborated or refuted through polygraph tests. Tuerkheimer's fault in this regard lies in failing to consider reasons for false rape claims, reasons that might bear upon the evaluation of sexual assault complaints more generally. We will return shortly to this matter.

III. THE CRIMINAL JUSTICE SCENE

To be sure, as Tuerkheimer charges, there is a high attrition rate for complaints once they reach police and prosecutors.³⁴ Why the high rate? Are complaints being rejected willy-nilly? Maybe, but according to a new study of the Los Angeles Police Department showing that only 12.3% of complaints are misclassified as unfounded.³⁵

Without apparently talking to a single criminal justice system official, Tuerkheimer suggests that police and prosecutors have little sympathy for women. But is this likely when men in those offices have wives, girlfriends, mothers, daughters and sisters? A more compelling reason Tuerkheimer offers is the fear of police and prosecutors that their cases will not be provable beyond a reasonable doubt.³⁶ This

³³ See Tuerkheimer, *supra* note 3, at 20. Accepting that proposition here allows us to avoid dealing with troubling claims that only a small fraction of sexual assaults is reported. For if claims are not made, we don't have to be worried that they are not being taken seriously by the authorities. Of course, the existence of valid claims should be addressed in other ways.

³⁴ See Tuerkheimer, *supra* note 3, at 30.

³⁵ Cassia Spohn et al., *Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Reports*, 48 L. & SOC'Y REV. 161, 173 (2014). "One conclusion that can be drawn from these data is that the LAPD is clearing sexual assault cases as unfounded appropriately most, but not all, of the time." *Id.* at 173.

³⁶ See Tuerkheimer, *supra* note 3, at 37. One might add that failed efforts at securing convictions will, in turn, harm their careers.

probably explains why police abandon further inquiry into cases like Betty's.

Eighty-five percent of sexual assaults are committed by those the complainant knows one way or another³⁷ and, apparently, they do not result in measurable physical injury.³⁸ This presents a major evidentiary problem described by attorney Brett Sokolow, whom Grigoriadis calls "the nation's top university sexual conduct adviser" because he has reportedly trained three thousand Title IX coordinators and eight thousand investigators; written a hundred campus codes of conduct; and led one thousand college investigations.³⁹ In "hundreds, literally hundreds" of cases he followed, he thought the guy was a "slime bag . . . definitely guilty," and "still found him not responsible because the evidence wasn't there to find a violation."⁴⁰

Financial pressures on police and prosecutors also force a kind of triage upon them that leads to the attrition in question. A former prosecutor, Tuerkheimer should understand how all these factors play out.

In screening complaints out, are male prosecutors really seeking to protect their gendermates, or worse, themselves, from charges of predatory behavior? The idea certainly has an intuitive appeal. But such a theory suggests that women jurors would be harder on accused men than are men jurors. The problem is that no evidence shows it. What relevant gender-based evidence there is shows that 77% of college women "think [that] a student who has allegedly engaged in sexual misconduct should be considered innocent until proven guilty."⁴¹ If this is a case of women's false consciousness, of women swallowing patriarchal values, Tuerkheimer does not make it.

³⁷ Manuel Roig-Franzia, *Our Culture is Full of Myths About Rape. Bill Cosby's Trial Prosecutors Want to Tell Us What Really Happens*, WASH. POST (Apr. 20, 2018), https://www.washingtonpost.com/lifestyle/style/our-culture-is-full-of-myths-about-rape-bill-cosby-trial-prosecutors-want-to-tell-us-what-really-happens/2018/04/19/f789f2e4-43dd-11e8-bba2-0976a82b05a2_story.html?utm_term=.b1a03f8704f4 (citing forensic psychiatrist Barbara Ziv).

³⁸ Mary Graw Leary, *Affirmatively Replacing Rape Culture with Consent Culture*, 49 TEX. TECH. L. REV. 1, 31 (2016) ("Research demonstrates . . . that physical injury is rarely caused.").

³⁹ See GRIGORIADIS, *supra* note 32, at 176-77.

⁴⁰ GRIGORIADIS, *supra* note 32, at 183-84 (quoting Sokolow). Sokolow's finding that many men are slime bags will provide only limited comfort to Tuerkheimer. For Sokolow also found that many women are complete fantasists. See *infra* note 114 and accompanying text.

⁴¹ Kelsey Ann Naughton et al., *Proceeding Accordingly: What Students Think about Due Process on Campus*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., June 2018, <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2018/06/15100831/fire-proceeding-accordingly-2018-ed-3.pdf> (delivered from YouGov). YouGov is a non-partisan research and polling firm.

Why do criminal justice authorities side with men? Why do they not accept women's sexual innocence? Tuerkheimer blames recurring analytical "tropes" that the authorities apply in these cases,⁴² namely: 1) the rape accuser is "malicious or vindictive"; 2) she is "regretful about consenting to sexual activity with the accused and therefore lying about her rape"; 3) she is "incapable of assessing whether she consented due to intoxication, and therefore lying when she claims otherwise"; and 4) although perceived as offering a truthful account, she may "nevertheless be deemed unworthy of the law's protection, either because she is seen as inviting her violation or as exaggerating the extent of her injury."⁴³ Let's examine these tropes more closely.

Vindictiveness may play a role in sexual assault complaints, a point made by Howarth as well.⁴⁴ Since the connection between vindictiveness and sexual assault complaints has not been carefully studied, however, I address the matter no further.

Regret, and the ambivalence that underlies it, is another matter, one that will occupy much of our time here and that is interrelated with the other tropes. Could we expect anything else from hookup culture, which, author Vanessa Grigoriadis says, "is college"?⁴⁵ The ambivalence stemming from what former sexual assault administrator Howarth calls women's "bottomless pits of shame about sexuality," is, as we shall see below, demonstrated in a range of sexual settings and could be expected to underlie a proliferation of assault complaints.⁴⁶

IV. THE ADJUDICATORY TRENCHES

To bring her readers into the real world, Howarth highlights her own growth in understanding while she was working on sexual assault investigations. Coming into that line of work, she reveals, "I imagined that I would be vindicating women students' sexual autonomy and freedom. That was often true, but not always."⁴⁷ She further

⁴² See Tuerkheimer, *supra* note 3, at 30.

⁴³ See Tuerkheimer, *supra* note 3, at 9 (footnote omitted).

⁴⁴ See Howarth, *supra* note 20 and accompanying text.

⁴⁵ See GRIGORIADIS, *supra* note 32, at 24.

⁴⁶ See *supra* note 22 and accompanying text. Lord, "[g]rant me chastity and self-control," Augustine famously prayed, "but please not yet." THE CONFESSIONS OF SAINT AUGUSTINE 198 (Maria Boulding trans., 1997), https://www1.villanova.edu/content/villanova/mission/office/programs/pellegrinaggio/_jcr_content/pagecontent/download_4/file.res/confessions_viii.pdf.

⁴⁷ See Howarth, *supra* note 20, at 719.

“imagined that the fact that many women students engage in casual sex reflects widespread comfort with sexuality and confidence in seeking sexual pleasure.” Then reality set in. Presumably because of women’s increased power in the contemporary world, finding that these assumptions were dead wrong, and that women were in fact experiencing profound ambivalence led to Howarth’s “terrible disappointment” about women’s sexual self-possession.⁴⁸ Women, in short, are a problem needing a solution.

What were women seeking to accomplish through their accusations? To not be “considered a slut, a disloyal girlfriend or fiancée, or a ‘tease,’” says Howarth, “can be very important, perhaps crucial, for a young woman’s identity and well-being.”⁴⁹ So when, following a complaint, the accused is removed from classes, or from dorms, the remedial measures, as Howarth puts it, “may function to the complainant as evidence of the vindication of the correctness of her interpretation of the incident.”⁵⁰

If administrators understood young women’s psychological condition, they could use it in evaluating complaints against sexual aggressors. But they “seem to share the naiveté that I brought to this work.”⁵¹

The result is an injustice to men that is compounded by the current political climate in which women scholars have turned men into bogeymen (my term; Howarth is cautious here). Facing psycho-social pressures in these circumstances, women have a “deep self-interest to understand or interpret the context to *diminish any role in suggesting consent*,” and this will lead women to bring “relatively minor complaints.”⁵² Highlighting her feminist loyalties, Howarth does not rebuke such women who bring “self-interested perceptions into their understanding of sexual encounters. We all do.”⁵³

⁴⁸ Howarth, *supra* note 20, at 726.

⁴⁹ Howarth, *supra* note 20, at 731.

⁵⁰ Howarth, *supra* note 20, at 732. Does this suggest that women can be self-interested too when they bring sexual assault charges? Is this the motive for women’s accusations that Colb could not find? Cf. *Readers Respond to the 6.24.18 Issue*, *supra* note 1 and accompanying text.

⁵¹ Howarth, *supra* note 20, at 729. Perhaps everyone concerned with sexual assault should self-reflect about naiveté.

⁵² Howarth, *supra* note 20, at 731 (emphasis added).

⁵³ Howarth, *supra* note 20, at 731.

V. WHY NOT BELIEVE WOMEN?

While Howarth provides no data measuring ambivalence/regret, an academic study of 263 Norwegian men and women between the ages of 19 and 37 shows that the percentage of women regretting their latest presumably wanted “casual sex” experience is about 67% higher for women than for men, 34% to 20%.⁵⁴ This could explain sexual assault complaints.

Law reformers, judges, and politicians have weighed in on complainant credibility in sexual assault cases more directly. Consider the American Law Institute’s (hereinafter “ALI”) Model Penal Code (hereinafter “MPC”) which, despite strong criticism and a broadening of definitions of sexual assault at the state level, refuses so far to eliminate use of force or the threat of force as an element in sexual assault.⁵⁵ The MPC Commentary (quoted by Tuerkheimer) explains why women’s credibility must be evaluated:

Often the woman’s attitude may be deeply ambivalent. She may not want intercourse, may fear it, or may desire it but feel compelled to say “no.” Her confusion at the time of the act may later resolve into non-consent. Some have expressed the fear that a woman who subconsciously wanted to have sexual intercourse will later feel guilty and “cry rape.”⁵⁶

Is the ALI willfully or even maliciously ignorant? Of course, it is easy to mock this “fear” as just a self-interested patriarchal *cri de coeur*. But in light of the discussion here, could a reasonable jury not arrive at much the same conclusion?

Ruth Bader Ginsburg, now perhaps *the* feminist icon, expresses other misgivings about current investigative practice. While recognizing in a recent interview that too many men act badly, she insists that accused men have the right to defend themselves against charges of sexual assault—“everyone has that right.”⁵⁷ This view

⁵⁴ See Leif Edward Ottesen Kennair et al., *Sexual Regret: Tests of Competing Explanations of Sex Differences*, *EVOLUTIONARY PSYCHOL.* 1 (Oct.-Dec. 2016).

⁵⁵ MODEL PENAL CODE § 213 (AM. LAW INST., Official Draft and Revised Comments 1980).

⁵⁶ See Tuerkheimer, *supra* note 3, at 27 (quoting MODEL PENAL CODE § 213.1 cmt. at 302-03 (AM. LAW INST., Official Draft and Revised Comments 1980)).

⁵⁷ Bradford Richardson, *Ruth Bader Ginsburg on Campus Sexual Assault Trials: ‘Everyone deserves a fair hearing’*, *WASH. TIMES* (Feb. 20, 2018), <https://www.washingtontimes.com/news/2018/feb/20/ruth-bader-ginsburg-campus-sexual-assault-trials-e/>.

suggests that women today may be believed not too little, but too much. For if Ginsburg really thinks that women are worthy of *a priori* belief, she surely would not have made a point of upholding men's rights to defend themselves.

Hillary Clinton comes to the issue more personally and shows how context-specific a woman's position can be. Speaking to a political audience in 2016, she announced: "I think that when someone makes the claim, they come forward, they should be believed and that is what starts the process . . . [of] what if anything should be done about the claim that was made."⁵⁸ She went on to tell women: "You Have The Right To Be Heard, You Have The Right To Be Believed."⁵⁹ When later asked, however, whether her husband's accusers should also have been believed, Clinton backtracked, saying that after the complainant is believed, the charge needs to be investigated.⁶⁰

One wonders how long police must wait before considering a complainant's credibility. An hour? A week? Almost surely, the investigative mind cannot and should not refrain from drawing inferences, however tentative. An unconstrained mind is needed to evaluate evidence as it comes in.⁶¹

VI. INSIDE THE COMPLAINANT'S HEAD

The alert reader will have noted that what is missing in the discussion thus far about ambivalence/regret is the personal, qualitative side. New York Times columnist Maureen Dowd helps bridge the gap. Citing Kristen Roupenian's widely discussed short story, "Cat Person," Dowd evokes the voice of Margot, a college student, who recoils as she watches Robert undress: "the thought of what it would take to stop what she had set in motion was overwhelming; it would require an amount of tact and gentleness that she felt was impossible to summon."⁶² No captain of her soul she,

⁵⁸ *Hillary to Sexual Assault Victims: "You Have the Right to be Heard, You Have the Right to be Believed"*, REALCLEARPOLITICS (Sept. 14, 2015), https://www.realclearpolitics.com/video/2015/09/14/hillary_clinton_women_should_be_believed_when_they_claim_rape_have_to_increase_prevention.html

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ If a complainant reports that he was run over by a truck yesterday, yet shows no tire marks or bruises, do we want doubts to be squelched and then perhaps forgotten?

⁶² Maureen Dowd, *What's Lust Got to Do With It?*, N.Y. TIMES (Apr. 7, 2018), <https://www.nytimes.com/2018/04/07/opinion/sunday/women-sex-dating-dowd.html>. That

Margot, then takes some whiskey to “bludgeon her resistance” and beat her repulsion “into submission.”⁶³ And, to deal with any remaining revulsion, maybe she later reports a sexual assault.

A question frequently raised of complainants: Why stay in a sticky situation like this? Stormy Daniels explains in classical “blame the victim” mode: maybe “I had it coming for making a bad decision for going to someone’s room alone.”⁶⁴

It’s complicated in still another way. Dowd quotes Sally, a college student, describing her weekends. “My friends and I go out on Friday nights, get drunk and hook up. And on Saturday morning, we go down to the health center to get Plan B.”⁶⁵ In the digital age, explains Dowd, “[t]here’s a new sense in which women feel that they are now in competition with porn, and if they don’t put out, it’s easy for the guy to go home, log in to Pornhub and get what he needs there. They’re sublimating their own needs to try to please the guy.”⁶⁶ Then they realize that in this charity sex “their [own] needs weren’t being met.”⁶⁷ Understanding what a really bad bargain they had struck, people like Sally just may wake up on the warpath the morning after.⁶⁸

What a sorry, indeed sickening position for Sally to be in. But what is the solution? If Tuerkheimer’s rules would effectively require that Sally prevail, there would be no “safe space” for sex on campus. Is this the point?

But beyond that, it would be crude to punish men who, pursuing their own goals, are accepting the resulting largesse of their female companions. Are men meant to be their sisters’ keepers? Do women even want them to be? If so—if men have to make decisions for women as well as for themselves—men will hardly count women

complainant did not want to be rude is apparently a common sentiment. See GRIGORIADIS, *supra* note 32, at 69.

⁶³ Dowd, *supra* note 62. For the story of how the sexualized environment pushes young women to have unwanted sex—and how they can protect themselves from having more unwanted sex as a result—see JILL P. WEBER, *HAVING SEX, WANTING INTIMACY* (2013).

⁶⁴ Dowd, *supra* note 62.

⁶⁵ Dowd, *supra* note 62.

⁶⁶ Dowd, *supra* note 62.

⁶⁷ Dowd, *supra* note 62.

⁶⁸ “You do it out of love sometimes, to save another’s feelings,” Comedian Margaret Cho explains. “[Y]ou do it out of hate sometimes, because you don’t want to hear your partner complain—like you hate their voice so much . . . Often I would initiate the encounter just to get it over with . . . It is the worst feeling; it is like unpaid prostitution . . . I hate it, but I have done it, and I really don’t want to ever do it again because it is dehumanizing.” Margaret Cho, *Foreword to JACLYN FRIEDMAN & JESSICA VALENTI, YES MEANS YES! VISIONS OF FEMALE SEXUAL POWER & A WORLD WITHOUT RAPE* 3 (2008).

as equals in school. And later, they will hardly invite women into the executive suite. If a woman is worried about letting a man down, could she be trusted to fairly say no to him when he, not surprisingly, demands a promotion, raise and transfer to the Paris office?⁶⁹

VII. POSSIBLE SOLUTIONS?

Emotional and psychological education of the young offers the only hope. Men have to learn, whether through college orientation programs or otherwise, that sexual assault has consequences. Enforcing criminal and college disciplinary rules cannot but help.

As for women, Professor Laura Kipnis teaches them not to serve as men's pincushions, not to "overvalue men and male attention in ways that make us stupid,"⁷⁰ as, one could add, the tormented memoirist does in "I love Dick."⁷¹ Women have to be able to say, euphemistically or otherwise: "Get your f***** hand off my knee."⁷²

This maternal advice may or may not make a difference in women's lives. Accepting Howarth's findings that too often women students are irrational and confused in their sexual dealings with men, what is to be done?⁷³ However great the imagined benefits, an attempt to restrict hookups among the young for reason of their (sexual) immaturity is likely a lost cause—and not only because men are not so charged. Since the average age of first sexual intercourse for women is 17.3, perhaps one-half of women students come to college with

⁶⁹ CAMILLE PAGLIA, *FREE WOMEN FREE MEN: SEX, GENDER, FEMINISM* 271 (2017). "[C]ontinually shocked and dismayed by the nearly Victorian notions . . . about the fragility of women and their naive helplessness in asserting control over their own dating lives [and thus] negotiating the oafish pleasures and perils of campus fraternity parties," Professor Camille Paglia concludes that women "are hardly prepared to win leadership positions in business or government in the future." *Id.*

⁷⁰ See LAURA KIPNIS, *UNWANTED ADVANCES: SEXUAL PARANOIA COMES TO CAMPUS* 202-03 (2017). How have women gotten to this point? "Women love men, more than [men] love women," Germaine Greer explains: "We are more aware of our men, more than they are aware of us. We are more easily pressured into pleasing them, or trying to please them. We tend to love our sons more than our daughters." Mark Brown, *Germaine Greer Calls for Punishment for Rape to be Reduced*, *GUARDIAN* (May 30, 2018, 2:23 PM), <https://www.theguardian.com/books/2018/may/30/germaine-greer-calls-for-punishment-for-to-be-reduced>. A step in the right direction?: "women actually have to *know* what they want to do, especially since there are endless pressures to say yes." See KIPNIS, *supra*, at 200 (emphasis in original).

⁷¹ See generally CHRIS KRAUS, *I LOVE DICK* (1998).

⁷² See KIPNIS, *supra* note 70, at 214.

⁷³ See Howarth, *supra* note 20 and accompanying text.

coital experience.⁷⁴ Student sex will thus not be pushed back in the box. And with adulthood regularly defined in American media as having had sex, those without experience will want some. Add the attraction of the illicit, and a university that dared to restrict the young, say those under 21, from having dorm room guests at night would be boycotted, with protests by the remaining students taking the form of nooners, “take-back-the-night-for-sex” marches, and public sex-ins.

No law professor has captured the psychology of sex as well as Columbia Professor Katherine Franke, who explains how the problem of sexual assault will never be solved by administrators. Sexual desire, she holds,

is not subject to cleaning up, to being purged of its nasty, messy, perilous dimensions, full of contradictions and the complexities of simultaneous longing and denial. It is precisely the proximity to danger, the lure of prohibition, the seamy side of shame that creates the heat that draws us toward our desires, and that makes desire and pleasure so resistant to rational explanation.⁷⁵

This is why, for all the terror it brings, readers around the world still return to “Lolita” for pleasure. In linking sexual danger to sexual reward, in highlighting the benefits of living on the edge and shucking the bonds of quotidian control, Franke raises the question as to whether promises to students are oversold. For while alma mater may have succeeded in making itself into a “comfortable,” homey place for students generally, what with reputational risks, embarrassment, frustration, explicit rejection and ghosting—to say nothing of pregnancy and STDs—sex is inexorably dangerous. That is, there can be no place for safe sex on campus.

VIII. DRINKING AND THINKING

All of which brings us to Tuerkheimer’s third trope about credibility discounting—that drinking is held against women and this

⁷⁴ *National Survey of Family Growth*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/nchs/nsfg/key_statistics/s.htm#sexualactivity (last updated Aug. 14, 2017) (based on data for 2011-15).

⁷⁵ Katherine M. Franke, *Theorizing Yes: An Essay of Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 207 (2001).

leads to the fourth trope, that women are “inviting their violation.”⁷⁶ Alcohol does indeed play a major role in sexual assault cases,⁷⁷ in some cases, sadly, leading to stupefaction, when no real consent is possible.

Tuerkheimer’s explicit charge about intoxication, it will be recalled, is that authorities ignore complaining women, deeming them to be “lying” about consent.⁷⁸ But intoxication, as a sizeable literature discusses, can cover a wide range of conditions. And surely, most complaints of assault take place under less than extreme conditions. One wonders whether Tuerkheimer believes that any serious drinking negates consent. The problem with that notion is that parties to sexual acts often drink to precisely loosen inhibitions to the sexual contact that they seek.⁷⁹ Dowd is quick to point out the paradox: “If hooking up is so much fun for young women, why do they need to be insensate to do it?”⁸⁰

This does not mean that sex acts under these circumstances cannot constitute sexual assault. It does mean that any rule against copulating under the influence will interfere with a woman’s autonomy to have sex how and when she wants. Holding women unaccountable for their behavior in this way, far from promoting respect for women, actually undermines it.

As for the fourth trope, that women often invite sexual play (that they might later regret), a larger discussion is needed. Tuerkheimer complains of the intensely personal inquiries that lead to credibility discounting: jurors often want to know “why did she agree to go back to his room after the date, why did she agree to watch pornographic movies with him, and so on?”⁸¹ But do these inquiries, as implied, arise primarily from misogyny? Or from a view, expressed and lamented by Howarth, that too many women do not understand themselves or the sexual environment well?⁸² If Howarth is right, do

⁷⁶ See Howarth, *supra* note 20 and accompanying text.

⁷⁷ Though surely exaggerating, a campus official says that “99% of the time, both parties are stinking drunk.” See KIPNIS, *supra* note 70, at 186 (quoting the unnamed official).

⁷⁸ See *supra* note 43 and accompanying text.

⁷⁹ Consider Sally *see supra* notes 65-69 and accompanying text. “The reason I liked getting drunk was because it altered my consent: it changed what I would say yes to.” GRIGORIADIS, *supra* note 32, at 48 (quoting author Sarah Hepola, who in turn is quoting a student).

⁸⁰ See Dowd, *supra* note 62.

⁸¹ See Tuerkheimer, *supra* note 3, at 40.

⁸² See Howarth, *supra* note 20 and accompanying text. Compare Professor Paglia: “A girl who goes upstairs alone with a brother at a fraternity party is an idiot. Feminists call this ‘blaming the victim.’ I call it common sense.” See PAGLIA, *supra* note 69, at 51.

inquiries by jurors not serve best as a fair and common-sense metric for deciding the issue of consent?

Hoping not to be shilling for the patriarchy, I start with the premise that women, like men, are animals; as such, they seek sexual contact, a proposition that, again, Tuerkheimer does not even consider. There is, reportedly, a heavy price for this kind of studied unawareness. Sexual honesty about “women as desiring beings,” writes Kipnis, “making our own sexual choices (sometimes even terrible ones), can be painful, but no semblance of gender equality is ever going to be possible without it.”⁸³

Acknowledging the sexual positivity of women should agitate only those who want to protect women from their own sensuality. What might cause larger-scale anguish, as we will see in a moment, is that women often want sexual contact with those to whom they have *not* given explicit consent, as normally understood. For these women, sexual contact is the payoff.

IX. GIRLS WHO JUST WANT TO HAVE FUN

The typical college party, contains a “frothy mixture of ‘dramatic drunkenness, human wreckage, and primitive behavior,’” explains sociologist Thomas Vander Ven; “[i]t’s mayhem, ‘temporary derangement,’ an excuse for ‘a few hours of insanity.’”⁸⁴ Fleshing out the point, Lisa Wade writes that many women at college parties want a “regulated environment in which to enjoy the rush of touching and being touched,” and students attend these parties with “full knowledge that this is the case.”⁸⁵ And the touching may well include “hands [that] find their way up your shirt or down your pants”—at least until the maneuver is rejected⁸⁶—so that “[f]ingering occurs with some regularity.”⁸⁷ Does Tuerkheimer go to undergraduate parties? Given women’s expectations and hopes at parties, is it not clear that sexual assault testimony must be subject to challenge?

The bar scene is no different from the parties, according to a recent article on sexual mores and beliefs in “public drinking”

⁸³ See KIPNIS, *supra* note 70, at 96.

⁸⁴ See LISA WADE, AMERICAN HOOKUP: THE NEW CULTURE OF SEX ON CAMPUS 85 (2017) (quoting sociologist Thomas Vander Ven).

⁸⁵ *Id.* at 207.

⁸⁶ *Id.* at 29.

⁸⁷ *Id.* at 38.

settings.⁸⁸ Seeking to unify sexual assault rules so that they are enforced in bars as strictly as they are in the workplace, three sociologist authors define non-consensual sexual contact to include “one-time sexual [acts] . . . like slapping or grabbing a person’s buttocks.”⁸⁹

Interviewing 197 young men and women “in-depth” in two college towns, the authors found that

[m]ost interviewees reported interactions that began as consensual and then became nonconsensual (e.g., a woman dancing with a man whose attention became unwelcome when he kissed too aggressively, or grinded, touched, or hugged too much). A large proportion also described an incident of opportunistic predation, where an unknown man groped (including grabbing a woman’s buttocks, breasts, or genitals), tried to undress (e.g., lift a woman’s skirt or pull down her top)” or forced a kiss on [her].⁹⁰

To the consternation of the researchers, most of the women did not refer to these interactions as aggression or as worthy of much concern. Of the 270 incidents of researcher-defined completed aggression, only 9 were labeled as such by research subjects.⁹¹ #MeToo might be put off, so a “twenty-one-year-old black woman” is quoted by the authors to help readers understand:

I guess it depends on whether you are thinking of something that would commonly occur or something in the extremes. When I think of unwanted sexual contact being aggressive or violent, I think extreme. Then I would think rape or something like that. But something that would happen in a bar in front of everyone, I wouldn’t think of it as being necessarily aggressive or violent, because that would be uncharacteristic.⁹²

⁸⁸ Justine E. Tinkler et al., ‘Kind of Natural, Kind of Wrong’: Young People’s Belief about the Morality, Legality, and Normalcy of Sexual Aggression in Public Drinking Settings, 43 L & SOC. INQUIRY 28 (2018).

⁸⁹ *Id.* at 29 n.1.

⁹⁰ *Id.* at 40.

⁹¹ *Id.* at 38.

⁹² *Id.* at 44.

Per the authors: “it is clear that people are vested (albeit unequally) in a social scene in which nonconsensual sexual contact . . . is very much a part of the heterosexual interaction.”⁹³

In the face of women’s lustful impulses, the authors take comfort from their parallel finding that three-quarters of men and women want the law to intervene in some cases.⁹⁴ In what cases? It is not clear. In any event, for excesses short of rape, the women in this survey just wanted to rap men on the knuckles, proposing fines, not expulsion and prison. What seems especially salient here is that women students keep coming back to bars knowing full well the risks involved.

Indeed, if a person’s intent is measured by knowledge of the likely consequences of her act, is it unfair to conclude that by going to that kind of bar—and not saying no—the complainant *intended* some touching? At least until she says no.⁹⁵ The man would have what might be called a defeasible option to poke. Looked at slightly differently, one might say, the feel is invited, or at least allowed. How to criminalize such an act? *Volenti non fit injuria*.⁹⁶

It would be foolish, of course, to think that the foregoing studies are the final word on sexual touching, which is understandably offensive to many. But what to do when other women at least to some extent are happy to share their private parts? How to know who is who? Can sanctions be applied willy-nilly? Astonishingly, notwithstanding the vast amount of writing on reform, *no* large-scale studies show where *women* would want the line drawn in these intimate situations.

One cannot help wondering under the circumstances whether activists really want to know. In any event, we are left where we were before, unprepared to weigh in on reform measures.

The problem of evaluating reform proposals is perhaps even better highlighted in higher-stakes environments. Query: if both parties are presumptively out to play in “public drinking settings”

⁹³ Tinkler et al., *supra* note 88, at 52.

⁹⁴ Tinkler et al., *supra* note 88, at 40.

⁹⁵ This is the position taken by one of Wade’s interviewees. See WADE, *supra* note 84, at 207.

⁹⁶ The English translation is that “an injury is not done to a party that is willing.”

where sexual payoffs are modest, what should be presumed in more intimate situations where one of the parties goes for the gold?⁹⁷

In the mid-1990s two psychologists Susan Hickman and Charlene Muehlenhard looked into the question of how young people manifest their *consent* to intercourse. The responses were placed into five categories: direct verbal, direct nonverbal, indirect verbal, indirect nonverbal, and no response. No one method captured a majority of the responses.

The plurality answer was “no response”; “[b]oth women and men reported that they most frequently signaled sexual consent by not resisting: letting the parties undress them, not stopping their partner from kissing or touching them, not saying no.”⁹⁸

X. AFFIRMATIVE CONSENT

Many women *and* men then prefer showing assent to intercourse passively, which likely means that they either seek the pleasure of being “taken” or that they think it unseemly to be more demonstrative.⁹⁹ Should the law do anything to clarify women’s intentions?

Affirmative consent was designed to address this. The problem is that good sex is not subject to being purged of its “nasty, messy, perilous dimensions, full of contradictions and the complexities of simultaneous longing and denial,” as Franke has it, when that is

⁹⁷ Academic icon Professor Catharine McKinnon, of course, has virtually conflated sexual intercourse and sexual assault. *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 FEMINIST THEORY 515 (1982). Rape, she complains, has been defined “as distinct from intercourse, when for women it is difficult to distinguish them under conditions of male dominance,” which allegedly exist now. *Id.* at 533. In the world she describes, where women are psychologically bludgeoned into coitus, sexual ambivalence and recriminatory impulses will likely be palpable. In such a world, it would seem, sexual intercourse, implying as it does mutuality, might better be referred to as sexual exploitation.

⁹⁸ See Susan E. Hickman & Charlene L. Muehlenhard, “By the Semi-Mystical Appearance of a Condom”: How Young Women and Men Communicate Sexual Consent in Heterosexual Situations, 36 J. SEX RES. 258, 271 (1999).

⁹⁹ Readers should be neither surprised nor troubled by the thought that women might want to be taken, a notion that could, if extended promiscuously, lead to the conclusion there is no real rape, that all sex is consensual. As for surprise, wanting to be taken every so often aligns perfectly with Friday’s description of rape fantasies. See FRIDAY, *supra* note 15 and accompanying text. As for being troubled, much evidence suggests that the heavy burden of always being responsible for themselves leads men as well as women to want to give up control for a while. Consider in this connection, NANCY FRIDAY, MEN IN LOVE (2010) and the psychology of BDSM.

precisely what “creates the heat that draws us toward our desires.”¹⁰⁰ Will forcing a woman to consent in a manner that she resists increase both her autonomy and her sexual pleasure?

Is it clear that women want affirmative consent, which is now the law in about one-half of our states? There are, strikingly, no studies supporting changes that affect our most intimate relations. Indeed, if a plurality of young women show consent through inaction, affirmative consent may have been imposed on them against their will.

So what to now make of a situation when, after a lively party, our Betty, accepting an invitation to a man’s room, proceeds to lie down on his bed with him, and, later brings charges against him?¹⁰¹ Should we hold that her actions have no social meaning when “let’s get out of here” is apparently a marker for intended intercourse?¹⁰² Maybe. But a better interpretation would seem to be that lying on a man’s bed will stand in the minds of recumbents as at least an invitation to play—until she says no. Lawyers at least should know about shifting burdens.

This conclusion should ordinarily present no moral or jurisprudential problems. Only a minority condemns unmarried sex; and a basic principle of legal theory is that the costs of ambiguities and misunderstandings should normally be borne by the person who can most efficiently bear them. Who would that be? Suffice it to say here that, however much women want sex, “men want more sex than women do, on average.”¹⁰³ It is mostly men, after all, who are charged with sexual harassment and assault. While the complainant may not be entirely sure of what she wants, does any nubile woman not know precisely what her partner is after and thus how he will likely understand her behavior?¹⁰⁴

¹⁰⁰ See Franke, *supra* note 75, at 207 and accompanying text.

¹⁰¹ See *supra* Part I.

¹⁰² See Anne Groggel et al., ‘Verbally, No, but Physically Yes’: Students’ Meanings of Sexual Consent (draft of article submitted for publication; manuscript on file with the present author).

¹⁰³ MARK REGNERUS, *CHEAP SEX* 24 (2017). The author supports the claim by reference to frequency of masturbation and sexual fantasies, and to payment for sex and initiation of sex. *Id.* at 23-24.

¹⁰⁴ Dr. Ruth’s advice couldn’t be clearer. “I am 100% against rape. [But] I do say to women if they don’t want to have sex with a man, they should not be naked in bed w[ith] him.” Dr. Ruth Westheimer (@AskDrRuth), TWITTER (June 2, 2015, 2:14 PM), https://twitter.com/AskDrRuth/status/605814846693572608?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E605814846693572608&ref_url=https%3A%2F%2Fwww.huffingtonpost.com%2F2015%2F06%2F03%2Fdr-ruth-sexual-consent_n_7499626.html.

How then have we come to the point of presuming that in the heat of the night women like Betty become so feckless and disoriented that they cannot stay out of a man's bedroom? Or that after coming into the bedroom, that they cannot later say no? Or, that if they stay and conditions become intolerable, that they cannot go to Plan C, i.e., get out of bed, put on their shoes, and just absquatulate?¹⁰⁵

Of course, for a variety of reasons, pulling away may not be easy, and will in some cases be impossible. The point here is that implicit in Tuerkheimer's position is that no inference of consent may be drawn from a woman's remaining on the scene. Believing women means believing that they are unable to disengage.

So, getting back to Betty, if she does not take advantage of her "outs," and later brings charges, is it not appropriate to withhold some credence?

XI. CONCLUSION

Rape law has come a long way in easing the burden on sexual assault plaintiffs. For hundreds of years, one of its principal purposes had been to protect men from supposedly crazed, self-deluded, and scheming women. To this end, legislatures adopted rules requiring corroboration, "resistance to the utmost," "force" or threat thereof, and warnings to jurors to scrutinize complainant assault testimony because of its special drawbacks.¹⁰⁶ No longer satisfying the cost-benefit test in light of current understanding of their harms to women—and except for the retention of the "force" element in about half the states—these are now gone. Rape shield laws today protect women from testimony about their prior sexual conduct. All these changes served to bolster a woman's credibility in assault cases in the face of claims by the accused that her "facts" were figments of her fervid imagination, or worse.

¹⁰⁵ This may prove virtually impossible, of course, where there are threats and physical restraints. If Margot (*see supra* notes 63-64 and accompanying text) does stay, of course, it might not be out of fecklessness but out of disinclination to leave her bed partner stew in his tumescence. In this respect, some might say that Margot's actions can be judged as commendable. Surely, though, any credit—and much more—is forfeited if she later brings a sexual assault complaint against him.

¹⁰⁶ See Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981 (2008).

Going all the way in the other direction, Tuerkheimer calls for *a priori* acceptance of the woman's testimony.¹⁰⁷ Should well-grounded readers march with her? Before doing so, sound psychological and jurisprudential analysis is required, which is what I have tried to provide here.

How then should we respond when pushing the envelope Tuerkheimer warns of the punishing effect on groups with "relatively scant social power," here women—presumably including herself—when their listeners are not buying?¹⁰⁸ The premise needs to be examined. How scant is women's power when ever-increasing numbers of women are reaching top rungs of American political and economic life, when a woman earned several million more votes than a man and came within a hair's breadth of the top job in the last presidential election? Consider just this test of her reportedly "scant" power: Does it extend to her credibility in cases other than sexual assault, say robbery? Tuerkheimer is silent.

When a woman's testimony is questioned, Tuerkheimer carries on, she is "dehumanized." Those suffering from "testimonial injustice" are regarded as "degraded qua knower . . . symbolically degraded qua human," demoted from "subject to object."¹⁰⁹ By this soaring logic, it would seem, women should prevail not only in sexual assault cases but also in divorce, custody, sex discrimination and indeed in all other cases. If Tuerkheimer's position is only that because of sexual insecurities women need to be believed in *sexual assault* cases, she should have said so. Since Tuerkheimer does not admit to women's sexual insecurities, however, her credibility would have been shaky.

Making his position clear, author Jon Krakauer takes Tuerkheimer's pronouncement to the next level: "[t]he harm done to a rape victim who is disbelieved can be at least as devastating as the harm done to an innocent man who is unjustly accused of [and expelled for] rape."¹¹⁰ A law professor can only say wow.

The point is that being disbelieved, hurts everyone. But if we continue to generally hold that it is "better to let ten guilty persons

¹⁰⁷ This is clearly the intended effect of discouraging challenges to a woman's testimony.

¹⁰⁸ See Tuerkheimer, *supra* note 3, at 47.

¹⁰⁹ *Id.* at 44-45.

¹¹⁰ KC JOHNSON & STUART TAYLOR, JR., THE CAMPUS RAPE FRENZY: THE ATTACK ON DUE PROCESS AT AMERICA'S UNIVERSITIES 37 (2017) (quoting Krakauer).

escape, than that one innocent suffer;”¹¹¹ there would seem to be no alternative to questioning plaintiffs’ testimony, whatever their sex. Adjudications in all kinds of cases, to elaborate, are tied to credibility; in these cases someone will not be believed and will suffer as a result. We do not turn the pain of disbelief into a prohibition of disbelief; complainants have to adjust. Should Brett Kavanaugh have been believed—rather than condemned—because of his emotionally wrenching public apologia after his moral and professional standing were thrown into question?¹¹² An old feminist bumper sticker comes leaps to mind: Men have feelings too but who really gives a damn?

In criminal adjudications, to state the obvious, claims are resolved on the basis of evidence bearing on whether the accused is guilty beyond a reasonable doubt of the acts charged. The consequences of the acts are irrelevant until the key witness’s believability has been resolved.

Tuerkheimer, it should be clear, is disclosing her full agenda here. It is not only in the first instance that Tuerkheimer wants women to be believed. Discouraging inquiries into women’s credibility to protect their mental health, Tuerkheimer seeks to turn just the claim of sexual assault into sexual assault per se. That bespeaks discrimination against men, not women.

That Tuerkheimer has not squarely faced the credibility issue has not stopped us from doing so here. Surely Justice Ginsburg had this in mind when calling for men’s civil rights in sexual assault cases: “men should be able to defend themselves too.”¹¹³

Not only for the sake of truly innocent males, I would add. For what we are witnessing now—in addition to the hundreds of “slime bags” that sexual assault investigator Brett Sokolow found in his work¹¹⁴—is, as Grigoriadis puts it, citing Sokolow, many women’s

lack of resilience, [] absence of coping skills, and susceptibility to mental health crises, resulting from compulsive sharing of stories by a number of women empowered by . . . [survivor] groups who are going around claiming victimization for something they

¹¹¹ WILLIAM BLACKSTONE, COMMENTARIES 4:352.

¹¹² An old bumper sticker comes to mind: “Men have feelings too, but who really gives a damn?”

¹¹³ See *supra* note 57 and accompanying text. Due process includes the right to challenge witness testimony.

¹¹⁴ See discussion of Sokolow *supra* note 40 and accompanying text.

absolutely *believe* happened, for which they are experiencing trauma, [and yet] did not occur—because they don’t have contact with reality the way the rest of us do. . . . I wish I could figure out why that’s happening, but it is happening a ton.¹¹⁵

If a woman’s sexual assault complaint is a “social construct” as well as a personal expression of injury, it is easy to see how sexual confusion can manifest itself in deans’ offices and courtrooms. “The only avenue of protest that remains socially sanctioned when a woman feels used, hurt, or ashamed after a sexual encounter,” writes Mona Charen, “is to claim rape.”¹¹⁶

In sum, while sexual assault claims must be investigated, we cannot create a strong presumption of guilt within a larger system of presumed innocence.¹¹⁷ Accepting women’s testimony at face value, ignores the role of jealousy, shame, regret, and unfulfilled needs. Consideration of these factors should satisfy any standard of scrutiny required under Equal Protection.

Propagating myths of women’s innocence—reflected in Kipnis’s sardonic observation that “[w]omen don’t drink; men get them drunk”—has implications for the nation’s psychological and social health as well as the well-being of individual defendants and their mothers, wives, daughters, and sisters.¹¹⁸ When blame for women’s unhappiness is heaped on men, fair-minded observers lose

¹¹⁵ See GRIGORIADIS, *supra* note 32, at 184 (quoting Sokolow, in part; emphasis is Sokolow’s). This point corresponds to one made above by Howarth. See *supra* notes 20-26 and accompanying text. Facing Sokolow’s “reality,” according to blogger, drunk sex participant, STD infectee, and therapist Lexa Frankl, who not surprisingly writes pseudonymously, just might help alleviate our “mental health crises.” Demanding that women renounce personal responsibility, she holds, is a “disempowerment trap”; it was

only once I was able to accept responsibility for my own actions that I was able to reclaim my sense of autonomy, repair my shattered self-esteem, and move forward with my life. Instead of embracing a distorted view of the opposite sex, or blaming my upbringing, or surrendering to the passivity of inert victimhood, I emerged from the experience stronger and freer, with a greater sense of self-worth, and a more realistic understanding of the world.

Lexa Frankl, *Why I am Uneasy With the #MeToo Movement*, QUILLETTE (Nov. 9, 2017), <https://quillette.com/2017/11/09/im-uneasy-metoo-movement/>.

¹¹⁶ MONA CHAREN, *SEX MATTERS* xvi (2018).

¹¹⁷ See *Readers Respond to the 6.24.18 Issue*, *supra* note 1 (citing Sherry F. Colb) and accompanying text.

¹¹⁸ See KIPNIS, *supra* note 70, at 205.

focus.¹¹⁹ The ironic result is that #MeToo, a movement of vital importance, has worked to block a key road to progress: our “preoccupation has been in getting society to change[] and getting men to change,” says Kipnis, when what women need now are “prolonged bouts of self-reflection.”¹²⁰ To the extent that Kipnis is right, the problem is not me, Professor Tuerkheimer, it’s you.

Self-examination and real change, alas, are unlikely, at least until we get more writers like Kipnis, Paglia, and Grigoriadis as well as fewer journals like the University of Pennsylvania Law Review which, in sparing women like Tuerkheimer the hard questions, fail to respect them and their readers as grown-ups. In an atmosphere of immanent #MeToo self-righteousness, dissonant opinions, especially those from men, come to be dismissed as a kind of hate speech. For in such a setting, just acknowledging the possibility of women’s shortcomings seems a threat to the whole feminist enterprise.

Yet perhaps the inquiry here will still prove useful. When our country is engaged in all-out combat over accusations of sexual assault, any evidence that our institutions are not engaged in a massive conspiracy against women can be a national blessing.

XII. A FORMATIVE ASSESSMENT

What have we learned? In a recent op-ed to the New York Times, an “editorial observer” talks about an experience of rape a decade ago.¹²¹ Though she has since relived the experience “over and over for years,” she writes, she did not come forward at the time with her account of sex “without my consent.”¹²² “I never felt compelled to share my story,” she explains, “because it is so common, because so many women have been through worse,” and because “I dated him afterward [and p]art of the encounter was consensual [so] I didn’t think there was anything to report.”¹²³

The Kavanaugh hearings precipitated a complete reversal of her thinking and she now hopes that going public will “prevent this

¹¹⁹ For evidence of the aversion to dealing with material critical of women, readers should consider the “Gender and the Law” blog.

¹²⁰ See KIPNIS, *supra* note 70, at 217-18.

¹²¹ Mara Gay, *Make My Sexual Assault Count*, N.Y. TIMES (Sept. 29, 2018), <https://www.nytimes.com/2018/09/29/opinion/sunday/sexual-assault-women-kavanaugh.html>.

¹²² *Id.*

¹²³ *Id.*

from happening to one more girl, or one more woman. We have done our jobs. And now it's up to the men of this country to hear us."¹²⁴

How should the nation respond to the challenge? Does the story, as Tuerkheimer probably would think, speak for itself? Has the narrator given us enough information to consider action? Or do we need to first question her about circumstances antecedent to the alleged rape, what exactly was made consensual in "part," and why she dated her attacker afterwards?

Finally, is just asking these questions about women's sexual behavior unfeeling, sexist, and hateful? Or are the good people—here—on both sides?

¹²⁴ *Id.*