Professionals, Amateurs, and Rape: How Colleges Are Failing Their Students

by Paul J. Larkin, Jr.

A Review of:
The Campus Rape Frenzy: The Attack on Due Process at America's Universities, by KC Johnson & Stuart Taylor, Jr.

https://www.amazon.com/Campus-Rape-Frenzy-America%C2%92s-Universities/dp/1594038856

Note from the Editor:

The reviewer favorably discusses a new book critiquing universities' approach to handing sexual assault allegations, while providing context for the discussion of such a controversial topic.

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• Know Your IX, *In the News*, http://knowyourix.org/know-your-ix-in-the-news-2/.

• Amanda Hess, *To Prevent Rape on College Campuses, Focus on the Rapists, Not the Victims*, Slate XX factor (Oct. 16, 2013), http://www.slate.com/blogs/xx_factor/2013/10/16/it_s_the_rapists_not_the_drinking_to_prevent_sexual_assault_on_college_campuses.html.

• Jonah Newman and Libby Sander, *Promise Unfulfilled?*, The Chronicle of Higher Education (April 30, 2014), http://www.chronicle.com/article/Promise-Unfulfilled-/146299/.

• *The Hunting Ground* (film), http://thehuntinggroundfilm.com/.

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In the interest of full disclosure, one of the authors—Stuart Taylor, Jr.—is a friend of mine, and I discussed the subject of the book with him while he worked on it. See *KC Johnson & Stuart Taylor, Jr., The Campus Rape Frenzy: The Attack on Due Process at America's Universities 277 (2017). I leave it to the reader to decide whether either fact affects my objectivity.*

In their new book *The Campus Rape Frenzy: The Attack on Due Process at America's Universities*, KC Johnson and Stuart Taylor, Jr. address a very controversial subject: sexual assault on American college campuses. They argue that universities, acting (sometimes, it seems, readily) at the behest of the federal government, have overreacted to the problem of campus sexual assault. The authors claim this is so for two reasons: For one thing, the incidence of sexual assault, while greater than anyone would like it to be, is far less than the federal government and universities claim it to be. In addition, colleges have adopted disciplinary procedures that virtually guarantee that even innocent male students[1] will be convicted in order to satisfy the federal government and thereby avoid the risk of losing federal funds.[2]

Society's attitude toward sex offenses has matured over time. Consider popular culture. At the beginning of every episode of the television show *Law & Order: Special Victims Unit*, we are told that sexual offenses are "especially heinous" and that "an elite squad" of the New York City Police Department is responsible for investigating those crimes. The first half of that opening has always been true, but, unfortunately, the second has not.

Rape has been a crime throughout our nation's history and is one of the most heinous offenses on the books.[3] In fact, until recently, it was punishable by death in a considerable number of American jurisdictions.[4] At the same time, it was not too long ago that law enforcement authorities distinguished between "rape" and "real rape."[5] That attitude too often enabled a rapist to escape

1 College sexual assault disciplinary policies are facially neutral with respect to gender, but approximately 99 percent of the accused students are men. KC Johnson & Stuart Taylor, Jr., The Campus Rape Frenzy: The Attack on Due Process at America's Universities 280 n.18 (2017).

2 For other statements of the authors' views, see KC Johnson, *How American College Campuses Have Become Anti-Due Process*, The Heritage Foundation, Backgrounder No. 3113 (Aug. 2, 2016), file:///C:/Users/larkinp/Downloads/BG3113.pdf; KC Johnson & Stuart Taylor, Jr., *Campus sexual assault and the Brown trial*, The Volokh Conspiracy, Wash. Post (Feb. 2, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/02/campus-sexual-assault-and-the-brown-trial/?utm_term=.9c372647ad29; KC Johnson & Stuart Taylor, Jr., *Campus due process in the courts*, The Volokh Conspiracy, Wash. Post (Feb. 1, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/01/campus-due-process-in-the-courts/?utm_term=.3aa3f6048ae2; KC Johnson & Stuart Taylor, Jr., *The path to Obama's 'Dear Colleague' letter*, The Volokh Conspiracy, Wash. Post (Jan. 31, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/?utm_term=.d46db22ca045.

3 The Campus Rape Frenzy, *supra* note 1 at 10 ("The mere existence of rape instills fear in its victims and potential victims, especially women, in all segments of society. It inflicts deep psychological, emotional, and physical harms, which can last for a lifetime.") (footnote omitted).

4 *See* Kennedy v. Louisiana, 554 U.S. 407, 422, *modified on denial of rehearing*, 554 U.S. 945 (2008) (noting that fact but holding nonetheless that the death penalty was unconstitutional for the rape of a minor); Coker v. Georgia, 433 U.S. 584, 593-95 (1977) (same, for the rape of an adult).

5 Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1088 (1986) ("I learned, much later, that I had 'really' been raped. Unlike, say, the woman who claimed she'd been raped by a man she actually knew, and was with voluntarily. Unlike, say, women who are 'asking for it,' and get what they deserve. I would listen as seemingly intelligent people explained these distinctions

arrest and conviction for a crime that he committed, in some cases more than once. The result was injustice for the women already victimized by his crime, as well as danger for potential future victims of a rapist still at large.

The criminal justice system has not halted the crime of rape from recurring, but society has now demonstrated a sincere commitment to bringing rapists to justice.[6] Over the last few decades, the nation's law enforcement community has largely abandoned its antediluvian attitudes toward sex crimes and has modernized its approach to the investigation and prosecution of sexual assault cases. Some large metropolitan police departments now even have special sexual assault units. Most small departments do not, but they often provide detectives with the specialized training needed for the investigation of those crimes and the proper ways to help their victims.[7]

If physical sexual assault were not a big enough problem on its own, women today also can suffer psychological sexual assault from the phenomenon known as "revenge porn"—the post-break-up, nonconsensual online posting of intimate photographs by a former husband or boyfriend that were originally given with an implied expectation of confidentiality.[8] Revenge porn has caused its victims a host of injuries, such as "a debilitating loss of self-esteem, crippling feelings of humiliation and shame, discharge from employment, verbal and physical harassment, and even stalking."[9] Some have been driven to attempt or commit suicide.[10] States and the federal government have attempted to quell this phenomenon by strengthening the criminal, civil, and administrative tools available to the government and to victims.[11] Only time will tell how effective those new responses are.

The physical and psychological injuries caused by sexual assaults are genuine and serious problems, and deciding how to prevent the crimes that cause them is a subject that is worthy of honest discussion. Unfortunately, however, our society too often responds to divisive and delicate issues and crises too quickly and swings the pendulum too far in the other direction. The result is to force a proposed solution into a setting where it does not work well or creates more problems than it sought to resolve. The outcome can be unsatisfactory for both the intended beneficiaries and the unintended victims of the new policy.

That dynamic is a virtual certainty when politics becomes involved. In order to obtain media attention and electoral credit for being the one who "solved" a problem, elected officials can wind up competing to adopt the most draconian response to a social ill to show, for example, that they are "tough on crime," without regard to whether their response actually benefits the victims of a crime or tosses aside individuals who are either innocent of any crime or undeserving of the dreadful punishments they receive. Excessive societal responses are a mistake all by themselves; when those excesses become law, however, the harm they generate only multiplies. The Framers made it difficult to enact a federal statute,[12] so once a bill becomes a law, legislators must overcome the same difficulties to revise or repeal it that they earlier bore to pass it.[13] The result is that, while a bad problem might be only transitory, a bad law could last forever (or a very long time). But in a day when instant solutions don't come fast enough for some people, anyone who counsels for caution when considering a political or legal answer to a problem often gets run over by the throng who believe that their answer is correct, that their solution that will work, and that their proposal should be implemented yesterday.[14]

I. Overcorrection and Amateurism on College Campuses

According to *The Campus Rape Frenzy*, American universities have overreacted to allegations that male students

to me, and marvel; later I read about them in books, court opinions, and empirical studies. It is bad enough to be a 'real' rape victim. How terrible to be—what to call it—a 'not real' rape victim."); *see also* Susan Estrich, Real Rape 27-56 (1987).

6 We still can and should do better. *See*, *e.g.*, Stephen J. Schulhofer, Unwanted Sex: The Culture of Intimidation and the Failure of Law 1-16 (1998). In law enforcement's defense, however, society has also not eliminated murder, robbery, burglary, or any of the other crimes that have existed since King Ethelbert drafted the first English criminal code in approximately 600 C.E. The perfect should not be the enemy of the good.

7 *See* The Campus Rape Frenzy, *supra* note 1 at 22-23.

8 *See, e.g.*, Paul J. Larkin, Jr., *Revenge Porn, State Law, and Free Speech*, 48 Loyola L.A. L. Rev. 57 (2015).

9 *Id.* at 65.

10 *Id.* at 66.

11 *Id.* at 66-70; *see also* Paul J. Larkin, Jr., Fighting Back Against "Revenge Porn," The Heritage Foundation, Legal Memorandum No. 199 (Feb. 23, 2017).

12 *See* INS v. Chadha, 462 U.S. 919 (1983).

13 *See* Clinton v. City of New York, 524 U.S. 417 (1998). In fact, statutes generally are *more* difficult to repeal than to pass. Over time, the public also becomes accustomed to the new statute, making it increasingly difficult to generate sufficient interest to repeal it absent some large-scale, adverse event triggered by the law. Plus, once on the books a law benefits one or more interest groups that can and will mobilize their efforts to defend whatever benefit to which they are now legally entitled. *See* Mancur Olson, The Logic of Collective Action (1965). That has happened in the case of campus sexual assault, because a number of companies have arisen to advise colleges how to comply with Title IX.

14 Consider how the federal sentencing laws for the distribution of crack cocaine came into being. The emergence of crack in the nation's African-American communities in the mid-1980s led Congress to react—overreact, in truth—by passing legislation imposing harsh mandatory minimum sentences on the distribution of crack cocaine. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. § 841 (2012)) (amended 2010). The initial proposal was to punish the distribution of crack more severely than that of powdered cocaine because it was seen as more addictive, debilitating, and dangerous. *See*, *e.g.*, United States v. Thompson, 27 F.3d 671, 678 & n.3 (D.C. Cir. 1994). Yet members of Congress bid up the sentencing disparity in a real-life version of *Quien Es Mas Macho?* (http://norewardisworththis.tumblr.com/post/64845798933/snl-quien-es-mas-macho-sketch-from-21719) until the amount of crack that triggered lengthy terms of imprisonment was only one percent of the amount of powdered cocaine. *See*, *e.g.*, Randall Kennedy, Race, Crime, and the Law 368-74 (1988); Naomi Murakawa, The First Civil Right: How Liberals Built Prison America 124-25 (2014); Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 Harv. J.L. & Pub. Pol'y 241, 241-42 (2014). Congress later recognized that its 1986 legislation was unduly severe and, in 2010, ratcheted down the powder-to-crack ratio from 100:1 to 18:1. The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified at 21 U.S.C. § 841 (2012)). But that revision took more than two decades to

have sexually assaulted female students. As Johnson and Taylor have documented in elaborate detail, over the last six-plus years, colleges have chosen to refer sexual assault allegations to their own school disciplinary procedures rather than to law enforcement—that is, to use amateurs rather than professionals to investigate and adjudicate allegations of serious crimes. That decision is problematic. Amateurs might make acceptable sleuths when a matter is relatively easy to investigate (e.g., When did the student return the book to the library? Did the student plagiarize a term paper?). But amateurs are out of their depth when it comes to the investigation of a complex crime like sexual assault. Yet many colleges are using amateurs to handle these allegations today.

Traditionally, colleges never tried to act as junior varsity police departments. The historic mission of a college or university has been to educate its students, to train their minds so that they can solve society's financial, social, political, or legal ills after graduation (perhaps providing some brief exposure to those problems and their attempted resolution during internships). Members of the faculty have had the two-fold responsibility of teaching students and conducting research. Administrators have made sure that the lights are turned on and the trains run on time. The responsibility to actually solve societal problems or redress their harms has been a task generally reserved for others. Institutions such as the government (e.g., police departments, the courts), private self-governing bodies (e.g., state medical associations), national or local charities (e.g., the American Red Cross), worldwide religious organizations (e.g., United Methodist Committee on Relief), individual churches (e.g., hosts for Alcoholics Anonymous meetings), and others have borne that burden. University faculty who are experts in their field have offered advice on how those other institutions can best address society's problems. But universities themselves have not been the so-called "change agents" because they are not equipped or staffed to handle that chore.

Rape is a problem that colleges are ill equipped to resolve. It is a serious crime requiring the tools that law enforcement institutions can bring to bear in their investigations. Among these tools are the questioning of the victim, witnesses, and any suspects by trained police detectives and rape investigators; acquisition of relevant evidence by the police from the complainant or third parties, either with or without the use of judicial process (e.g., evidence obtained from a physical examination of the complainant, the so-called "rape kit"); reliance on laboratories for scientific analysis of forensic evidence; review of cell phone records such as text messages and email communications; and an impartial analysis of the strength of the proof by an expert in the prosecution of sex crimes. The advantages of specialization in this area are hardly surprising or undesirable. In fact, we ordinarily view specialization as beneficial in an organized but complex society.

Colleges are not exempt from that proposition. Schools may use athletic trainers to handle minor sports injuries, but they turn to orthopedic specialists when surgery might be necessary. Perhaps an even better example is what universities do when they are confronted with legal issues. A university may include a law school among its professional disciplines, but it will turn to an outside law firm, rather than its own law school faculty, to handle difficult legal problems, particularly ones that might involve litigation. Universities do not want law professors who have not been litigators to make their bones at the school's expense.

That outsourcing approach makes particular sense in the case of serious crimes. Colleges would not rely on internal administrative disciplinary procedures were a student to engage in large-scale drug trafficking on campus or commit armed bank robberies off campus. Until recently, colleges have also used that approach for sexual assault, referring allegations that a crime occurred to local law enforcement for investigation and, if justified by the evidence, prosecution. Police departments have the skills and tools to investigate sex offenses, and district attorneys' offices have the learning and experience to make the independent legal judgment whether a crime likely occurred. Colleges don't.

In the abstract, of course, there might be little objection to universities' attempts to intervene in handling sexual assault allegations involving their students. Residential colleges provide their students with a home as well as an education and believe that the college environment should challenge students' minds, not abuse their bodies or ruin their lives. Schools should not have to invoke the cumbersome apparatus of the criminal justice system—or wait until a criminal case becomes final—before learning what happened and deciding whether to administratively punish a guilty student for sexual misconduct. Businesses do not; churches do not; private clubs do not; athletic teams do not;[15] and average individuals do not. So why not allow colleges to make those decisions too? Moreover, juries generally consist of lay members of the community, people untrained and inexperienced in the investigation and prosecution of crimes. If they can be trusted to find the facts carefully in a courtroom in a rape prosecution where the stakes are high (e.g., imprisonment), why not in a classroom in a college disciplinary proceeding where the stakes are far lower (e.g., expulsion)? That seems reasonable.

Unfortunately, as Johnson and Taylor have explained, colleges' responses to sexual assault allegations have made it far too easy to find someone guilty of some type of sexual impropriety. How? To offset their investigative and adjudicatory shortcomings, colleges have adopted overinclusive definitions of "sexual assault" and have rigged the disciplinary procedures so that even amateurs cannot flub them. And the federal government has been their partner in crime.

II. Unjust Procedures

Johnson and Taylor are not the first authors to criticize colleges for adopting an outcome-determinative disciplinary

accomplish and, because it was not made retroactive, it left thousands of offenders imprisoned under the stiff sentences required by the 1986 law that Congress now sees as unjustified. Larkin, *Crack Cocaine*, *supra*, at 243. That omission spurred former President Barack Obama to use his clemency power through his Clemency Project 2014 to reduce what he believed were excessive sentences of imprisonment for some drug offenders. Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 Harv. J.L. & Pub. Pol'y 833, 885-92 (2016).

15 That is, unless your team brings in beaucoup bucks for the university. *See* The Campus Rape Frenzy, *supra* note 1 at 176-79.

system.[16] But no one has documented this phenomenon in the depth they have. *The Campus Rape Frenzy* is an exhaustively researched, elegantly written, detailed analysis of the procedures that colleges have recently adopted to resolve allegations of sexual assault (usually) by women against men across the nation's campuses. Anyone defending those procedures will need to respond to the problems identified in *The Campus Rape Frenzy* because it sets a new standard for criticism of this phenomenon.

Starting with the description of one such case that arose at Amherst and moving on to others at different colleges, Johnson and Taylor discuss approximately 48 different cases, compiling a list of college disciplinary proceedings that have gone seriously awry.[17] Along the way, they also identify a considerable collection of flaws in the procedures that colleges use to adjudicate sexual assault claims, resulting in proceedings that stray far from what most people would expect for a serious charge.[18] For example, a student might be able to file a complaint months or even years after the event at issue.[19] The accused student may have a limited notice of a scheduled hearing. The accused cannot always see the evidence against him, but, if he can, the school might have excised any exculpatory information from the file. The accused student might not be allowed to confront or question his accuser.[20] He could be forced to submit his proposed questions to the board's chair, who is not required to put his suggested questions to the accuser even if her story is filled with contradictions stemming from an alcoholic haze. The accused student is generally not permitted to bring an attorney to the proceeding. And the disciplinary board might consist of administration officials who are biased in favor of a conviction for at least two reasons: they might have been trained to treat almost any evidence as proof of guilt,[21] and they might have a financial stake in seeing a high conviction rate due to their fear that anything else will put at risk their college's federal funding.[22]

At bottom, Johnson and Taylor argue that American colleges have railroaded male students accused of sexual assault by subjecting them to the equivalent of show trials, hearings with a foregone conclusion disguised as fair judicial proceedings. Their tale should be frightening to anyone who believes that, when allegations of serious, life-changing wrongdoing are at stake, colleges—like any other decision-maker—should use procedures that satisfy our notions of fundamental fairness. Put another way, most people believe that colleges should be no more able than the infamous prosecutor Mike Nifong[23] to mock justice by deciding questions of guilt or innocence via hearings that are better described as parodies of justice than as fundamentally fair proceedings.

After you read Johnson and Taylor's account of this problem, step back and ask yourself this question: If you were tasked with the responsibility of crafting a disciplinary system that guaranteed the conviction of 90+ percent of the male students charged with campus sexual offenses while also giving the appearance of affording accused students a fair hearing, wouldn't you come up with precisely the same procedures that Johnson and Taylor have criticized? It is disturbing that the answer to that question will almost always be "Yes." The law permits a decisionmaker to infer that someone intends the natural and probable consequence of his actions. Here, it is an entirely reasonable inference that colleges know what they are doing and intend the outcomes described by Johnson and Taylor.

III. Campus Rape Culture

How did we wind up in this predicament? According to Johnson and Taylor, the story began three decades ago with the writings of feminist authors Andrea Dworkin and Catharine MacKinnon. Dworkin maintained that, in a patriarchal society, the physical, social, political, and legal dominance exercised by men over women infected sexual relationships between the two, often leaving women with little ability to truly consent to sex. MacKinnon took the position that sex could amount to rape if the woman later regretted it. In each case, the author's espoused theory of rape effectively eliminated the possibility of freely given

16 Other authors have expressed many of the same criticisms found in *The Campus Rape Frenzy*, but they have not offered the same level of detail found in Johnson and Taylor's book. *See*, *e.g.*, Katie Roiphe, The Morning After: Sex, Fear, and Feminism (1994) ("'Rape' has become a catchall expression, a word used to define everything that is unpleasant and disturbing about relations between the sexes. Students say things like 'I realize that sexual harassment is a kind of rape.' If we refer to a spectrum of behavior from emotional pressure to sexual harassment as rape, then the idea itself gets diluted.") (footnote omitted); Heather MacDonald, *An Assault on Common Sense*, The Weekly Standard (Nov. 2, 2015), http://www.weeklystandard.com/an-assault-on-common-sense/article/1051200; Heather MacDonald, *The Campus Rape Myth*, City J. (Winter 2008), https://www.city-journal.org/html/campus-rape-myth-13061.html; Katie Roiphe, *Date Rape's Other Victim*, N.Y. Times Mag. (June 13, 1993), http://www.nytimes.com/1993/06/13/magazine/date-rape-s-other-victim.html?pagewanted=all; Ashe Schow, *Campus sexual assault is rarely black and white*, The Examiner (Oct. 1, 2015), https://www.highbeam.com/doc/1P2-38848693.html; Robert Shibley, *Time to Reform the Kangaroo Courts on Campus*, Wall St. J. (Dec. 29, 2016), https://www.wsj.com/articles/time-to-reform-the-kangaroo-courts-on-campus-1482882574.

17 The Campus Rape Frenzy, *supra* note 1 at 11.

18 *See id.* at 147-49 (describing the procedures used at Stanford University).

19 *See id.* at 148.

20 *See id.*

21 *See id.* ("Stanford provided special guilt-presuming training for disciplinary panelists. The 2010-2011 training manual advised that 'act[ing] persuasive and logical' or being 'vague about events and omit[ting] details' should be considered signs of guilt in the accused.").

22 *Cf.* Tumey v. Ohio, 273 U.S. 510, 523 (1927) (holding unconstitutional a state law conditioning a portion of a judge's salary on the number of judgments of conviction he enters, saying "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case").

23 The villain of Stuart Taylor, Jr. & KC Johnson, Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case (2008). Johnson and Taylor summarize that book in their new one. The Campus Rape Frenzy, *supra* note 1 at 69-79.

consent. One theory rendered consent impossible; the other allowed it to be retroactively erased.[24]

In the 1980s, those theories were just that—theories. Beginning a decade later, however, they started down the road to becoming law.

In 1991, Antioch College became the first institution to implement such an approach as a disciplinary rule. It adopted a policy that required a male student to obtain consent from a woman on a step-by-step basis from the first to the last physical contact between them. The Antioch policy was criticized, even derided in some quarters, including in a *Saturday Night Live* parody.[25] But its supporters had the last laugh.

On April 4, 2011, the Office of Civil Rights (OCR) in the Obama Administration's Department of Education changed the discussion. OCR circulated an advisory opinion in the form of a "Dear Colleague" letter, in which it set forth its interpretation of how Title IX of the Education Amendments of 1972[26] applied in the case of a college's handling of a female student's sexual assault claim.[27] Colleges deem OCR's views as being of considerable importance because it can decide whether a college receiving federal funds—which virtually all of them do—has complied with Title IX and, if not, whether it should have its federal funds docked in whole or in part. Accordingly, given OCR's minatory presence, the letter effectively directed universities to adopt a variety of procedures that increase the likelihood of conviction: using no more stringent standard of proof than the preponderance standard when determining the truth of an allegation, forbidding cross-examination of the claimant by the accused, allowing accusers to appeal "not guilty" findings, and more.[28] To justify those requirements, the letter rested on two bold premises: 20 percent of college women will be sexually assaulted at some point during their college years, and only a trivial number of sexual assault claims are unfounded.

Johnson and Taylor criticize both the procedures that OCR requires and the grounds OCR uses to justify those procedures. Johnson and Taylor maintain that, as applied by colleges, the OCR procedures are so one-sided as to virtually guarantee a conviction in every case where the complainant does not admit to fabricating her claim or offer statements that are so wildly inconsistent that any reasonable person would question her veracity or sanity. What is more, Johnson and Taylor identify numerous shortcomings in the justifications offered by OCR for its guidance. "The Obama Administration based its radical policy on a dubious set of assumptions regarding sexual violence on college campuses,"[29] all of which, Johnson and Taylor argue, are false.[30] It is not true that (1) one in five women college students will be sexually assaulted, (2) there has been an alarming increase in the number of on-campus rapes, (3) the on-campus environment is more dangerous than the one off-campus, (4) a small number of male college students are sexual predators who commit roughly 90 percent of the campus sexual assaults, or (5) colleges can dispense with needless concern for the accuracy of their judgments because 90-98 percent of the accused students are guilty.[31]

If the figures being used to support advocates' claims of a "campus rape culture" were true, a female Wesleyan undergraduate would be substantially more likely to be a victim of violent crime than a resident of Detroit, Michigan—which, according to the FBI's Uniform Crime Reports, is the nation's most dangerous city.[32] Wesleyan's president, however, has not urged any increase in the presence of law enforcement on campus.[33] That is quite odd. In fact, Johnson and Taylor believe that, far from being a stage on which *The Rape of the Sabine Women* is being played out daily across the nation, America's universities are safer than the locales where you will find women who have graduated from college or who never went there at all.

Oddities like that lead Johnson and Taylor to step back and ask some larger, obvious, but often overlooked questions. If American male college students have sexually assaulted one out of every five women students, why have university trustees and presidents not taken the steps that most people would see as reasonable ways to reduce that crime wave? For example, college presidents could do the following:[34]

- Strictly enforce a ban on the consumption of alcohol on campus and other college property, because alcohol seems to be a major contributing factor to a large majority of

24 *See* The Campus Rape Frenzy, *supra* note 1 at 20-22.

25 *Id.* at 219-20.

26 The Education Amendments of 1972, Tit. IX, Pub. L. No. 92-318, 86 Stat. 235 (1972). Title IX states in part as follows: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

27 *See* The Campus Rape Frenzy, *supra* note 1 at 33-41. A copy of the letter can be found at the OCR website, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

28 The Campus Rape Frenzy, *supra* note 1 at 37.

29 *Id.* at 40.

30 *Id.* at 40-41, 43-84.

31 *Id.* at 43-44.

32 *Id.* at 48. The FBI's figures undercount the number of sexual assaults because not all women report them. Robert VerBruggen, *Witch Hunt on Campus*, The American Conservative (Jan. 30, 2017), http://www.theamericanconservative.com/articles/witch-hunt-on-campus/.

33 The Campus Rape Frenzy, *supra* note 1, at 48.

34 Some of these suggestions come from Johnson and Taylor. Some are my own.

situations in which sexual assault allegedly and actually occurs;[35]

- Petition state legislators to make it a crime to sell alcohol within 1,000 feet of a college campus for the same reason;[36]
- Return co-ed dorms to the single-sex status they enjoyed decades ago;
- Use a curfew to prevent men and women from sleeping over at the other sex's dorms;
- Make it easier for victims to report sexual assaults to the local police and provide follow-up counseling when necessary;
- Place cameras throughout the university to obtain evidence of the comings and goings of intoxicated students;
- Urge the local police department to make patrol officers visible in cars, on bicycles, or on foot throughout the campus;
- Ask local law enforcement to permit younger police officers to work undercover and pose as students at parties; and
- Hire retired local detectives to conduct administrative investigations of alleged rapes.

That colleges have not taken any of those steps in the face of a perceived crisis is remarkable. Colleges are certainly aware of the widely cited estimate that 20 percent of college women have been or will be raped. Universities would take such drastic steps if one in five of their students were victims of assault, identity theft, or other forms of blue- or white-collar crime perpetrated by their fellow students. So why have they not done so to prevent sexual assault? Perhaps they have done so and are just being closed-mouth about it. Perhaps they have not in the hope that the problem will go away. Or perhaps, as Johnson and Taylor argue, they know that the 20 percent figure is inflated. For Johnson and Taylor, the failure of colleges to take any of the normal steps that a responsible party would undertake when facing a severe crime wave justifies skepticism that the figures cited by OCR are genuine. That omission, they say, also justifies a suspicion that university presidents are more worried about the damage that could be done to the university's ranking (and their own careers) by public OCR investigations, unfavorable media stories, and vocal faculty protests than about the prospect of ruining a student's life by finding him guilty of an unjustified charge. If Johnson and Taylor are right, achieving the fact and appearance of fairness in college disciplinary proceedings now seems like little more than a quaint custom.

IV. Calming the Frenzy

The last chapter of *The Campus Rape Frenzy* offers some possible solutions to the problems discussed in the book. Johnson and Taylor maintain that colleges should refer every serious case to law enforcement. The breadth of the term "sexual assault" that some colleges use, however, reaches conduct such as an unwanted kiss. That conduct is technically a battery, but it is not the type of crime that district attorneys would generally prosecute. Besides, as Johnson and Taylor showed in their earlier book *Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case*, elected law enforcement officials can be as self-interested and corrupt as the worst college officials.

What about turning the disciplinary process over to students, letting them investigate, prosecute, defend, and adjudicate these cases? The argument would be that students do not have a financial interest in the outcome of a case, they are familiar with the hook-up culture prevalent on college campuses, and they can better enforce the campus mores than administrators and faculty 30 or 40 years their elders. For example, the Duke student body acted far more maturely and fairly than the Duke president and faculty did when three lacrosse players were unjustly accused of entirely fabricated sexual offenses.[37] So why not kick university officials off college tribunals and use students in their place?

At one time, that might have been an attractive option, and it still might work at some schools. But that solution certainly will not work at every university, and perhaps not at many. Things have changed.[38] In the last two years, the most highly publicized college rape case—detailed in a *Rolling Stone* feature story of a woman who said she had been raped by several members of a University of Virginia fraternity on a bed of broken glass—turned out to be a hoax.[39] But even after the story was shown to be false,[40] UVa students continued to support the claimant for her "brave[ry] in coming forward" with her phony allegations.[41] As Johnson and Taylor note, one college student "wrote an essay for *Politico* warning that 'to let fact checking define the narrative would be a huge mistake.'"[42] If a majority of students hold the same view, turning sexual assault cases over to students might actually *worsen*

35 *See* John M. Macdonald, *Alcoholism as a Medicolegal Problem*, 11 Clev.-Marshall L. Rev. 39, 41(1962) ("The conscience has been well defined as that part of the mind which is soluble in alcohol.").

36 The federal controlled substances laws imposed enhanced penalties for the distribution of controlled substances within 1,000 feet of a school. *See* 21 U.S.C. § 860(a) (2012). The Twenty-First Amendment, however, gives the states the authority to regulate the local sale of alcohol.

37 The Campus Rape Frenzy, *supra* note 1 at 249; *see* The Duke Lacrosse Rape Case, *supra* note 23.

38 Bob Dylan, *Things Have Changed* (2000), https://www.youtube.com/watch?v=L9EKqQWPjyo.

39 Sheila Coronel, Steve Coll, Derek Kravitz, *Rolling Stone and UVA: The Columbia University Graduate School of Journalism Report*, Rolling Stone (April 5, 2015), http://www.rollingstone.com/culture/features/a-rape-on-campus-what-went-wrong-20150405 (report on the journalistic failures that led to the publication of the false story).

40 *See* The Campus Rape Frenzy, *supra* note 1 at 239-49.

41 *Id.* at 249.

42 *Id.* at 250 (footnote omitted).

the plight of men wrongfully accused and further corrupt the procedures used to investigate campus sexual assault.

Can we hope for relief from the political process? Politicians generally stay as far away from issues like these as time and space allow. For example, most members of Congress have not spoken out about what is happening on campuses in their states or done anything else to earn their own chapter in a new issue of *Profiles in Courage*. Nonetheless, there may be some hope for reform in this area. The new Secretary of Education Betsy DeVos could rescind the OCR "Dear Colleague" letter. Congress could pass legislation overturning it. Or Congress could invalidate the letter under the Congressional Review Act.[43]

V. Conclusion

The motto on Harvard University's escutcheon is "*Veritas*." Johnson and Taylor (the latter, a Harvard Law School alum) maintain that, with the exception of its law school, Harvard, like numerous other colleges and universities, has abandoned the pursuit of truth in college disciplinary proceedings in sexual assault cases. Instead, colleges have succumbed to the demands made by OCR and radical members of their faculties, staffs, and student bodies, as well as outsiders, that innocent male students must be sacrificed for the sake of encouraging women who truly are the victims of sexual assault to come forward and identify their assailants. There is a better way to deal with these problems. With the help of local law enforcement and the use of college disciplinary procedures that are fair to all concerned, we can do better than the situation that Johnson and Taylor describe.

43 5 U.S.C. §§ 801–08 (2012); *see* Paul J. Larkin, Jr., *The Reach of the Congressional Review Act*, The Heritage Foundation, Legal Memorandum No. 201 (Feb. 8, 2017).