

## KRAKAUER'S *MISSOULA*:

### WHERE SUBVERSIVE MEETS VERISIMILITUDE

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I wanted to like *Missoula*, Jon Krakauer's new book subtitled *Rape and the Justice System in a College Town*.<sup>1</sup> Krakauer promises on the book jacket to cut through the "abstract ideological debate" and "illuminate the human drama behind the national plague of campus rape."

While many stories have been written from the "human drama" perspective, Krakauer took on a particularly important story because the University of Montana in Missoula, along with prosecutors and law enforcement officials in the larger Missoula community, were facing a first-of-its kind joint investigation by the Department of Justice (DOJ) and the Department of Education's (DOE) Office for Civil Rights (OCR) during the time *Missoula* was being written. Allegations focused on conspiratorial violations of Title IX and Title IV, arising out of the mishandling of sexual assault complaints by university officials, civilian law enforcement, and the county prosecutor's office.<sup>2</sup>

Krakauer has an excellent reputation, and the last two lines on the inside back cover sounded promising. "College-age women<sup>3</sup> are not raped because

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1. JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN* (2015).

2. See, e.g., *Justice Department Announces Investigations of the Handling of Sexual Assault Allegations by the University of Montana, the Missoula, Mont., Police Department and the Missoula County Attorney's Office*, DEP'T OF JUSTICE (May 1, 2012), <http://www.justice.gov/opa/pr/2012/May/12-crt-561.html> (announcing Title IX compliance review and Title IV investigation of the University of Montana and noting, "Title IX of the Education Amendments of 1972 and Title IV of the Civil Rights Act of 1964 each prohibit sex discrimination, including sexual assault and sexual harassment, in education programs"); Amy Knight Burns, *Improving Prosecution of Sexual Assault Cases: Can the Justice Department Use 42 U.S.C. § 14141 to Investigate Prosecutors' Offices?*, 67 STAN. L. REV. ONLINE 17 (July 5, 2014) <http://www.stanfordlawreview.org/online/improving-prosecution-of-sexual-assault-cases> (noting the unprecedented nature of the investigation).

3. I am primarily focused on sexual assault as an offense committed by males against females, which is Krakauer's focus as well, although I readily acknowledge that males are victims too, and that gender itself is not an either or concept.

they are promiscuous, or drunk, or send mixed signals, or feel guilty about casual sex, or seek attention. They are the victims of a terrible crime and deserving of compassion from society and fairness from a justice system that is clearly broken.” Those words set the right tone, and made me feel hopeful that the book would reveal not only how the victims<sup>4</sup> suffered, but also why injustice happens.

Maybe I was wrong to expect incisive writing from an author who said at the outset that he was writing only about the “human drama” of injustice, but time and again Krakauer diverged from the “human drama” genre and dipped a literary toe into serious legal subjects like the constitutional rights of accused students, definitions of rape in the criminal justice system, and what happens during a criminal prosecution that causes victims to feel retraumatized. So while his claim that he was writing solely about “human drama” may have been sincere, he wrote about a lot more, and in that sense, he opened himself up to scathing reviews because his substantive writing on many legal issues is woefully inadequate, and, in several places, biased against the rights and interests of women and girls.

I set my standards low because I knew Krakauer is not an academic, and would not likely write about doctrinal problems, such as how the very structure of rape law produces high incidence rates because of its still-relevant roots in men’s ownership of and sexual access to women’s bodies.<sup>5</sup> A more scholarly author would have written about the need to redesign rape law away from sexual regulation, and toward a baseline of respect for women’s autonomy, bodily integrity, and self-determination. This idea is not

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4. I use the term “victim” throughout, not to imply that all people accused of sexual assault are always guilty, but for efficiency and clarity. Also, as an academic who teaches sexual violence law, I resent the plethora of literature premised on the tired myth that reports of rape are inherently suspicious, and that women as a class are worthy of extra skepticism. So long as the word “victim” is used in other articles, without public criticism, to describe the status of individuals who report civil rights assaults when they occur “on the basis of” categories such as race and ethnicity, I will use the word “victim” to describe the status of women who report civil rights assaults when they occur “on the basis of” sex. If a pattern emerges such that victims of other types of civil rights offenses are made to use skepticism-laden terms such as “alleged victim,” and “complainant,” I will re-evaluate my position. Note that I will never use the offensive word “accuser” as that term is a dangerous and offensive misnomer. The “accuser” in a criminal case is the government, and in a school-based civil rights proceeding there is no actual “accuser;” there is only a federal mandate that schools respond to and redress discrimination. Indeed, schools are obligated to prevent discrimination, just as law enforcement officials are obligated to deal with criminal violence, irrespective of whether a particular victim wants officials to do their jobs on behalf of the public interest. The label “accuser” implies falsely that the victim is the charging party, and that she bears all legal burdens and responsibilities.

5. STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998).

new,<sup>6</sup> and should have been mentioned in a book about injustice and the “national plague” of sexual assault.

Krakauer could have at least talked to one of the countless scholars that have collectively written millions of pages on the pervasive problem of violence against women, and the ways that law and society conspire to incentivize violence and produce injustice. In my own book, *And Justice For Some*, first published almost ten years ago, I make many of the points Krakauer makes about society’s irrational readiness to excuse rape by discrediting and blaming victims—as if some people deserve to be sexually brutalized.<sup>7</sup> He did not have to cite me, though I did write the first law review article in the nation explaining the legal relationship between Title IX and sexual assault,<sup>8</sup> but with so many experts available to talk to him about the underlying causes of high rates of sexual violence in society, it is strange that he did not cite anyone with significant depth of knowledge on the legal and political aspects of the subject matter about which he was writing.

A scholar might have helped Krakauer expand on his observations about the problem of prosecutorial discretion, and how it enables prosecutors to refuse to file criminal charges even in rock solid cases.<sup>9</sup> Krakauer appears to believe, as do I, that prosecutorial discretion is profoundly anti-democratic because it allows a politician, rather than the evidence itself, to determine whether justice is served. In an effective democracy, individuals would have greater control over the means by which government officials determine which crimes are prosecuted, and purely political decision-making would at

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6. *Id.* See also, *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (noting that rape is “highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter’s privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the ‘ultimate violation of self.’ It is also a violent crime because it normally involves force or the threat of force or intimidation, to overcome the will and capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community’s sense of security, there is public injury as well.”); *Johnson v. State*, 328 P.3d 77, 89 (Alaska 2014) (“The criminal prohibition on rape has as its goal preventing the loss of autonomy, dignity, free will, and bodily integrity that comes with non-consensual sexual penetration. We have stated that ‘[t]he reason [rape] is most serious is because it amounts to a desecration of the victim’s person which is a vital part of her sanctity and dignity as a human being.’” (quoting *Newsom v. State*, 533 P.2d 904, 911 (Alaska 1975))); Dorothy E. Roberts, *Rape, Violence, and Women’s Autonomy*, 69 Chi.-Kent L. Rev. 359 (1993) (noting that rape law historically has regulated competing male interests in controlling sexual access to females, rather than protecting women’s interest in controlling their own bodies and sexuality).

7. WENDY MURPHY, *AND JUSTICE FOR SOME* (2007).

8. Wendy Murphy, *Using Title IX’s “Prompt and Equitable” Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to Redress Sexual Assault on Campus*, 40 NEW ENG. L. REV. 1007 (2006).

9. KRAKAUER, *supra* note 1, at 121.

least be subject to meaningful public oversight. Krakauer acknowledges that prosecutorial discretion in sex crimes cases is a problem, but he nowhere mentions the obvious remedy, which is that people can mobilize, politically, to elect only prosecutors who agree to file charges based not on whether they believe they will win, but whether they believe justice will be served. Too often, the decision not to file charges, as Krakauer recognizes, is driven not by a prosecutor's belief that a victim is not credible, but by his or her fear that a biased jury will, unfairly, find the victim not credible enough to justify a guilty verdict. This problem is easily fixed by the election of prosecutors who will confront, rather than indulge, such biases.

Like prosecutors, school officials also make unjust discretionary decisions not to subject sex offenders to meaningful consequences for their actions, and again, Krakauer understands this, but he seems almost mystified about whether the problem is fixable. And he obfuscates the critical role of federal oversight agencies in holding schools accountable by never pointing out how important it is for aggrieved victims to file complaints with OCR at the DOE, and OCR at the DHHS,<sup>10</sup> and that it is exceedingly easy to do so, on-line, for free, with the push of a button.

*Missoula* also fails to explain why the DOJ and the DOE had authority to conduct an investigation on behalf of women as a class. Readers would have benefitted from knowing that the investigation was initiated under the authority of civil rights laws, including Title IV of the Civil Rights Act of 1964,<sup>11</sup> which forbids sex discrimination (including sexual assault) by public entities and officials, including public schools, and Title IX of the Education

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10. See *Doe v. U.S. Dept. of Health and Human Services*, 85 F. Supp. 3d 1 (D.D.C. 2015)(mandamus action against DHHS for its failure to promptly resolve a student's complaint that had been filed with OCR at the DHHS.) Most students are not even aware that there is an OCR at the DHHS, and that it has co-equal authority to investigate and remediate violations of Title IX related to sexual assault when they occur in connection with a victim's medical treatment or health care. See *Laws and Regulations Enforced by OCR*, HHS.GOV, <http://www.hhs.gov/ocr/civilrights/resources/laws/index.html> (last visited April 17, 2016). I filed the above-referenced complaint with OCR at the DHHS, believed to be the first of its kind, against the University of Virginia (UVA). I alleged that UVA violated my client's Title IX rights when a university nurse took photographs of the victim's genital injuries, then filed a report with the school's disciplinary board saying there were no injuries indicative of sexual assault. When the perpetrator was found not responsible, the family asked for copies of the photographs showing the injuries so they could file an OCR complaint, but the nurse refused to provide copies, and a university official claimed there were no photographs, even though the victim recalled that numerous photographs had been taken, and her medical record had a notation stating that photographs of the victim's injuries were taken using special dye and catheterization. See Petition for Writ of Mandamus & for Equitable Relief, *Doe v. Sebelius*, (D.D.C. 2014) (No. 03-12-145773), available at <http://www.campusaccountability.org/docs/UVA-DHHS-MANDAMUS.pdf>.

11. 42 U.S.C. § 2000d et seq. (2012).

Amendments of 1972,<sup>12</sup> and its implementing regulation,<sup>13</sup> which forbids sex discrimination (including sexual assault) in public and private schools that receive federal funds. Krakauer could have explained how a conspiracy of official misconduct by university, prosecutorial and law enforcement officials contributes to a dangerous mindset in the community at large that conceives rape as harmless male behavior, or at worst, a night of bad judgment, rather than a serious civil rights issue for women and girls.

I can accept that Krakauer did not intend to write the book I was hoping for, but not only was the phrase “women’s civil rights” never used, the term “Title IV” appears nowhere, and “Title IX” is barely mentioned at all. When it is, Krakauer gets it wrong. For example, the first time he talks about Title IX, he says it was designed primarily to provide girls with more opportunities in sports.<sup>14</sup> This is a serious error because even a superficial review of Title IX’s history would have revealed that it had nothing do with sports when enacted.<sup>15</sup> Indeed, Title IX nowhere mentions sports; it simply states that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .”<sup>16</sup>

As was recently emphasized by the Department of Justice in an important new findings letter issued against the University of New Mexico, Title IX is co-extensive with Title IV of the Civil Rights Act of 1964, hence requires schools to treat sex-based harms exactly the same as harms that occur based on other protected class categories, such as race and national origin.<sup>17</sup> This idea that women have exactly the same civil rights in education as racial and ethnic minorities, etc., is not new. When Title IX was enacted in 1972, it was intentionally modeled after Titles IV and VI of the Civil Rights Act of 1964. The language of Title VI states, “No person in the United States shall, *on the ground of race, color, or national origin*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial

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12. 20 U.S.C. § 1681(a) (2012).

13. 34 C.F.R. § 106 (2015).

14. KRAKAUER, *supra* note 1, at 83.

15. See Wendy Murphy, *From Explicit Equity to Sports to Sexual Assault to Explicit Subjugation: The True Story Behind Title IX and Women’s Ongoing Struggle for Equality in Education*, in *SEXUAL HARASSMENT IN EDUCATION AND WORK SETTINGS: CURRENT RESEARCH AND BEST PRACTICES FOR PREVENTION*, 47 (Michele A. Paludi, et al., eds., 2015).

16. 42 U.S.C. § 2000c et seq. (2012).

17. Justice Department Releases Investigative Findings on University of New Mexico’s Response to Sexual Assault Allegations, April 22, 2016, *available at* <https://www.justice.gov/opa/pr/justice-department-releases-investigative-findings-universtiy-new-mexico-s-response-sexual>.

assistance.”<sup>18</sup> Except for the word “sex,” Title VI uses exactly the same language as Title IX. And like Title IX, Title VI applies to schools that receive federal funds, including private schools. Title IV, by contrast, applies only to public schools, yet all three statutes impose the exact same legal obligations on school officials.<sup>19</sup>

Put simply, Title IX guarantees equality and forbids discrimination, based on sex, in education. That is it. And while Krakauer is correct that gender equity in sports is covered by Title IX, he is wrong that sports was the focus behind Title IX’s enactment. The focus in 1972 was equal employment opportunities for women in higher education, and equal access to education through gender-equitable admissions policies.<sup>20</sup> Although sexual assault was a problem for women in 1972, it was not widely discussed when Title IX was being debated, though it takes little effort to appreciate why violence and assault are the most serious forms of discrimination. Indeed, after the United States Supreme Court decision in *Brown v. Board of Education*,<sup>21</sup> armed guards were sent to accompany black students to school for fear they would experience race-based violence and harassment.<sup>22</sup> The guards were not present to ensure that black children would be allowed on the swim team. Likewise, most raped and beaten women do not give a damn about equal distribution of basketballs.

Krakauer’s fundamental lack of appreciation for the fact that Title IX was not designed as a sports-equity law taints the entire book because

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18. 42 U.S.C. §§ 2000d - 2000d-7 (2012).

19. Investigative Findings, *supra* note 17; 34 C.F.R. § 106.71 (2015) (“The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference.”). *See* the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (2012), making clear that substantive standards from Title VI apply with equal force to Title IX; 29 U.S.C. § 794 (2012), 42 U.S.C. § 2000d-4a (2012), 42 U.S.C. § 2000d-7 (2012) (requiring equal treatment on behalf of all protected class categories) and 42 U.S.C. § 6101 (2012); *accord* *Barnes v. Gorman*, 536 U.S. 181, 185 (2002); *see* U.S. Dep’t of Justice, Resolution Agreement among the University of Montana-Missoula, the U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section and the U.S. Department of Education, Office for Civil Rights, available at <http://www.justice.gov/crt/about/edu/documents/Montanaagree.pdf> (announcing resolution agreement with the University of Montana and noting that Title IV and Title IX both require “equity” and are subjected to the same standards of enforcement regarding discrimination, harassment, and violence); *see also* *Title IX Legal Manual*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/crt/about/cor/coord/ixlegal.php> (last visited April 18, 2016) (noting that “Congress consciously modeled Title IX on Title VI” and citing *Alexander v. Choate*, 469 U.S. 287, 294 (1985), for the proposition that because Title IX and Title VI contain parallel language, the same analytic framework should apply in the context of administrative redress proceedings because both statutes were enacted to prevent unlawful discrimination and to provide remedies for the effects of past discrimination).

20. Murphy, *supra* note 15.

21. 347 U.S. 483 (1954).

22. JEAN EDWARD SMITH, *EISENHOWER IN WAR AND PEACE* 723 (2012).

Krakauer then sets up a dangerous false premise making it appear as though the very idea of sexual assault as a civil rights issue under Title IX is a new concept, rather than a well-settled legal doctrine. He then exacerbates the problem by nowhere acknowledging that Title IX mandates “equitable” treatment for women, and that women can assert “rights” under Title IX, on campus, in federal oversight agencies, and in real world courts.

Title IX’s guarantee of gender “equity” was made explicit and mandatory through the promulgation of Title IX regulations in the 1970s.<sup>23</sup> Krakauer says he wrote *Missoula* to expose the unfair treatment of victims, yet he never once says that Title IX requires “equitable” treatment of women. He writes only that schools are mandated to establish “a comprehensive system for handling sexual-assault complaints.”<sup>24</sup> By never mentioning Title IX’s mandate of “equitable” redress, Krakauer implies that schools are allowed to treat victims as second-class citizens, so long as they do so “comprehensively” and “systematically.”

It is bad enough that Krakauer never frames Title IX as a civil rights law for women and girls, he then erroneously declares that perpetrators *do* have civil rights at stake.<sup>25</sup> Krakauer got it exactly backward. Victims of discrimination (including sexual assault) enjoy civil rights legal protections. Perpetrators of discrimination do not. Accused students sometimes have *other* rights at stake, as when a handbook says a student has a “right” to certain procedures in disciplinary matters, but they are not “civil rights.” Students in public schools have constitutional “due process” rights when they face suspension or expulsion, but the United States Supreme Court held in *Goss v. Lopez*, that such rights exist for children in public schools where there is a state-created right to a public education. *Goss* did not create similar rights for college students, public or private, and even if *Goss* can be read to extend to public universities, the “process” due prior to short-term suspensions is minimal. There is no right to counsel, to call witnesses, to conduct cross-examination, or to file appeals. It is enough that a student receives “notice and a rudimentary hearing.”<sup>26</sup>

More than minimal notice and hearing rights is likely required prior to lengthy suspensions or expulsions of public school students under *Goss*,<sup>27</sup> but exactly what process is due, and whether college students are constitutionally entitled to the same rights as K-12 students, is unclear because court rulings are inconsistent. Some find no substantive or

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23. 34 C.F.R. § 106.8(b) (2015); 20 U.S.C. §§ 1681-1688 (2012); and 28 C.F.R. § 54.135(b) (2015) (requiring schools to “adopt and publish” policies and procedures “providing for prompt and equitable resolution” of student complaints).

24. KRAKAUER, *supra* note 1, at 83.

25. *Id.*

26. *Goss v. Lopez*, 419 U.S. 565, 583-584 (1975).

27. *Id.*

procedural due process rights for suspended or expelled students enrolled in private or public colleges and universities,<sup>28</sup> while others recognize “due process” rights for students at *public* universities, when there is a constitutional interest at stake, such as reputational liberty.<sup>29</sup> A disciplined student might also have enforceable contract rights,<sup>30</sup> but such rights have nothing to do with due process in the commonly understood constitutional sense of the doctrine as it applies to the liberty interests of defendants being prosecuted in criminal court.<sup>31</sup>

To the extent school officials overly indulge offenders’ rights as a way of avoiding expensive lawsuits, they do so in part because *Goss* created due process rights only for punished students, not mistreated victims, or even students whose punishment does not exceed a few days of suspension. This necessarily means that correctly punished offenders who commit the most horrific acts of violence are more likely to sue than are horribly mistreated victims or offenders who suffered meager punishments because their conduct was not severe enough to warrant lengthy suspension or expulsion. In other words, current liability standards perversely reward the worst offenders with the greatest rights to sue. In turn, schools that make decisions based on concerns about lawsuits have the strongest incentives to rule in favor of the most brutal assailants on campus.

Schools are also generally incentivized to favor offenders over victims because the liability standards under which disgruntled offenders can sue schools are easier to meet than the liability standards under which victims can sue for violations of Title IX. Offender students can simply allege that officials failed to comply with promised disciplinary rules and/or due process.<sup>32</sup> A victim, by contrast, must prove that the school not only failed to comply with Title IX, but also that officials were “deliberately

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28. *Schaer v. Brandeis*, 432 Mass. 474 (2000)(private); *Dibrell v. University of Michigan*, 2:12-cv-15632, E.D. Mich. (May 18, 2016) (public) at 49-50 (Because the Supreme Court of the United States has never recognized a constitutionally protected interest in continued enrollment at a public university, there can be no substantive or procedural due process claim for wrongful suspension or expulsion).

29. See e.g., *Doe v. The Rector and Visitors of George Mason Univ.*, No. 1:15-cv-209, 2016 WL 775776 (E.D. Va., Feb. 25, 2016), *citing* *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961) (minimum due process required prior to expulsion from state college or university).

30. *Schaer*, 432 Mass. 474 (noting that a university should comply with its own policies, and that if a policy promises students “basic fairness,” and “due process,” students may have a right to sue for a breach of contract if those promises are not met in connection with a disciplinary proceeding).

31. *Id.* (“A university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts. . . .”)

32. *George Mason Univ.*, 2016 WL 775776.



indifferent.”<sup>33</sup> Offenders are not held to the additional burden of proving “deliberate indifference,” although it should be noted that victims can equally effectively sue both public and private schools under Title IX, while disgruntled offenders can more easily sue public schools than private schools, under *Goss*. Overall, the liability advantage inures to offenders, and women will never be safe or fully equal until the law establishes liability parity.

Schools can *practice* liability parity in the meantime by applying *only* Title IX’s equitable legal standards when responding to sex-based violence on campus. Strict compliance with Title IX ensures that accused students receive fair treatment while preventing due process and breach of contract lawsuits because civil rights laws create no rights for perpetrators of civil rights violence.

As an example of the liability-free ease with which officials can expel students who commit civil rights violations, consider the case of a student in Indiana who was accused of beating a Muslim student on October 17, 2015 and was expelled three days later, on October 20.<sup>34</sup> The expelled student did not sue, and there were no public objections to his swift expulsion.

A small group of academics who have been speaking out in support of more rights for students accused of sexual assault on campus<sup>35</sup> stayed silent about the treatment of the Indiana student. Many of those individuals, including Harvard’s Nancy Gertner, are criminal defense advocates who argue that accused students should be afforded rights such as cross-examination, counsel, and application of a “clear and convincing evidence” burden of proof,<sup>36</sup> which is a more onerous burden of proof (70-75%)<sup>37</sup> than the “preponderance of the evidence” standard (51%)<sup>38</sup> which is required

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33. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285, 292-93 (1998).

34. *Indiana University expels student in attack on Muslim woman*, CHICAGO TRIBUNE (Oct. 20, 2015), <http://www.chicagotribune.com/news/nationworld/midwest/ct-indiana-student-muslim-woman-attack-20151020-story.html>.

35. Matthew Q. Clarida, *Law School Profs Condemn New Sexual Harassment Policy*, THE HARVARD CRIMSON (Oct. 15, 2014), <http://www.thecrimson.com/article/2014/10/15/law-profs-criticize-new-policy/>

36. *Id.*

37. *Clear and Convincing Evidence*, CORNELL UNIVERSITY LAW SCHOOL, [https://www.law.cornell.edu/wex/clear\\_and\\_convincing\\_evidence](https://www.law.cornell.edu/wex/clear_and_convincing_evidence). “Clear and convincing” is described as a “medium” burden of proof, between “preponderance” and “reasonable doubt.” While “clear and convincing” lacks a designated numerical value akin to the 51% value assigned to “preponderance,” it is reasonable to assign the standard a value of 70-75% as this is the mid-point between preponderance (51%) and “reasonable doubt,” which is necessarily a number somewhat less than 100%.

38. *Preponderance of the Evidence*, CORNELL UNIVERSITY LAW SCHOOL, [https://www.law.cornell.edu/wex/preponderance\\_of\\_the\\_evidence](https://www.law.cornell.edu/wex/preponderance_of_the_evidence).

under Title IX and other civil rights laws.<sup>39</sup> Despite fervent public demands for more rights for accused students, Gertner and her allies said absolutely nothing about the essentially summary expulsion of the Indiana student in an exceedingly short period of three days.

The demand of defense advocates that a “clear and convincing” standard be applied in sexual assault cases is especially galling because it is not a request for “due process” for offenders so much as a thinly-veiled demand that schools declare the word of a woman inherently inadequate to justify the punishment of a man. Obviously, the “preponderance of evidence” standard is the only “equitable” burden of proof because it presumes the *equal* credibility of all students at the outset. By contrast, the “clear and convincing” evidence standard accords greater presumptive credibility to the accused because the victim must be credible to a degree of “clear and convincing” while the offender can be vindicated by being much less credible, to a degree of only that amount of proof that rests between “clear and convincing” and 100%. A mathematical explanation helps to illustrate the point. If a victim’s report is determined to be 100% credible, and her assailant’s denial is determined to be 32% credible, the assailant will prevail because his less credible denial will be applied to diminish the weight of the victim’s statement to 68%, a credibility weight lower than the 70% amount of proof needed to satisfy the “clear and convincing” standard.

Many schools prefer to use a “clear and convincing” standard because it allows them to claim that they believe the victim, but not *enough* to punish the offender. Such an approach keeps tuition dollars flowing and avoids public scandal, but it also subjugates women as a class by declaring them inherently less credible than other members of the campus community. Such structured inequality is morally repugnant under any legal regime, but is unconscionable and the very antithesis of “equitable” treatment for women under Title IX.

People can disagree about whether certain rights should be in place for accused students, but obviously there should be no *extra* rights for offenders who target women. On this point, it bears repeating that when the Indiana student described above was expelled after only three days, without all of the rights Gertner et al. have been demanding for accused students, Gertner and the others stayed silent. I suppose it is possible that none of them heard or read about the widely publicized case, but their silence permits the inference that their demand for *extra* rights *only* for students accused of sex-based offenses is an ideological attempt to legitimize the subjugation of women,

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39. *Dear Colleague Letter*, U.S. Dept. of Education: Office for Civil Rights (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>. The letter points out the consistent application of the preponderance of evidence standard by federal courts, including the United States Supreme Court, and federal regulatory bodies, when addressing anti-discrimination claims. *Id.* at 10-11.

on campus and in larger society.

That Gertner calls herself a feminist makes it especially hard for the public to see through her claim that extra rights for accused sex offender students is somehow good for women as a class,<sup>40</sup> just as Krakauer's claim that he wrote *Missoula* because he cares about rape victims makes it hard for readers to see the ways that his book belies that claim.

Neither Krakauer nor Gertner and her allies seem to understand that when sexist violence happens, as when racist violence happens, only the victim has "civil rights" to assert. A student accused of committing a "civil rights" violation on campus is not elevated to the noble status of a student with "civil rights" at stake simply because he stands accused of *committing* a "civil rights" violation. Imagine a white student member of the KKK, accused of racist violence, claiming during a disciplinary proceeding that because he has been accused of a civil rights infraction, he enjoys the protection of "civil rights" laws, on par with his black victim. An accused student should always be treated fairly, but his rights, whatever their source, cannot encroach on the victim's predominant federal civil rights.<sup>41</sup> As the legal adage by Oliver Wendell Holmes Jr. has long made clear, "the right to swing one's fist ends where another person's nose begins," and as I like to add to that adage, when the nose is on the face of a person with civil rights at stake, the rights in your fist end much sooner.

Krakauer does not seem to understand this at all, though *Missoula* does succeed in rattling the cages simply because Krakauer has the platform to make people listen. Whatever else is said about *Missoula*, the book is embarrassing to the University of Montana, which means it might scare other schools into taking more effective steps to prevent sexual assault so that a similar book is not written about them.

While cage rattling has its place, I was hoping Krakauer would provide readers with basic information about how and why framing and redressing *all* violence against women on campus as a civil rights issue is essential. But on this fundamental issue, *Missoula* is deafeningly, inexplicably, silent.

Krakauer does expose some of the ugly underbelly within the criminal and campus justice systems, as when he writes about a prosecutor in *Missoula* who, after working on some of the cases highlighted in the book, abruptly leaves her job at the county attorney's office to work as a defense

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40. Wendy Murphy, *An Open Letter to Harvard Law Professor Nancy Gertner*, TITLE IX ON CAMPUS (Feb. 2, 2015), <http://titleix.us/an-open-letter-to-nancy-gertner/#.Vki9LF88LCQ>.

41. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 575 (1983) (finding that a compelling governmental interest in "eradicating racial discrimination in education" is sufficient to justify a limitation on the First Amendment right to the free exercise of religion).

attorney for one of the accused students.<sup>42</sup> Such a move is usually unethical under attorneys' professional codes, but Krakauer does not say whether it violated any ethical rules in Montana, and he makes the woman seem smart, if shady, for having exploited her position of public trust for personal gain.

Krakauer rightly takes the time to explain how it is not the victim's responsibility to "press charges" or determine whether and how law enforcement officials do their jobs. "In fact," Krakauer writes, "the criminal justice system gives victims no direct say in the matter," and he correctly points out that it is the responsibility of police and prosecutors to enforce the law irrespective of the fact that a victim does not want criminal charges to be pursued.<sup>43</sup> But he fails to add that schools are similarly obligated to address civil rights matters on campus even if a victim does not wish to pursue a formal complaint because civil rights injuries, by their nature, harm entire communities. This is why, when racist violence happens on campus, students of all "types" feel injured. The same response should occur when sexist violence happens, but it does not, in part because people like Krakauer, who have a platform to inform the public that sexist violence is as much a civil rights issue as racist violence, fail to communicate this simple point.

Rather than explaining why it is important to understand sexual assault as a civil rights issue, Krakauer conveys the opposite idea: that sexual assault is a private problem, to be resolved by private decision-making. In one section, for example, he quotes a university official saying that "if a victim says, 'I do not want this brought to the police,'" the university will honor that request and keep the incident secret.<sup>44</sup> Krakauer should have seized that moment to point out that because sexual assault is both a crime in the "real world," and a civil rights matter on campus, it is obviously a public, not a private, concern, and should be subject to public, not private, resolution, oversight and accountability.

Krakauer obviously understands that sexual assault is a crime, but why he misses the civil rights nature of sexual assault is perplexing, and whatever his explanation, it taints the whole book because the compelling stories from real victims who suffered terrible injustices come off as cranky carping rather than serious narratives about violations of important rights. Had he written the victims' stories through a civil rights lens, their voices would have been elevated and the book itself would have been established as the first widely available true story about how why our failure to understand violence against women and girls as a collective problem has contributed to profoundly high rates of sexual assault on campus and in larger society.<sup>45</sup>

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42. KRAKAUER, *supra* note 1, at 226.

43. *Id.* at 77

44. *Id.* at 131.

45. David Cantor, et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Sept. 21, 2015),

By depriving the reader of a deeper understanding of the issue, *Missoula* waters down the very nature of what justice means, especially for women seeking redress on campus. Indeed, throughout the book, Krakauer presumes that rape on campus *should* be handled under student discipline codes, rather than civil rights laws. Which makes me wonder: what does Krakauer think should happen when a black Muslim woman is raped on the basis of her race, religion and sex? Should a school respond *equitably* under civil rights laws for the race and religion parts, and *inequitably* under non-civil rights laws, for the sex part? How would that even work with a single incident?

Many schools have second-class sexual assault policies in place, in addition to first-class civil rights policies,<sup>46</sup> but victims are generally unaware of the ways the policies differ, or that the second-class policies do not require “equitable” treatment. The second-class policies are typically long, and confusing, and they nowhere explain that victims who report incidents under Title IX can have their cases “downgraded” for second-class treatment, without the victim’s knowledge. Nor are victims informed that OCR cannot provide recourse for violations of rights when they occur under generic sexual misconduct policies because OCR only has jurisdiction to review violations of civil rights laws, such as Title IX.<sup>47</sup>

Krakauer could have said that because Title IX affords victims much better, “equitable,” redress, victims and their families are wise to insist in writing that school officials apply Title IX, and only Title IX, when sexual assault happens. The importance of ensuring *equitable* treatment cannot be

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[https://www.aau.edu/uploadedfiles/AAU\\_Publications/AAU\\_Reports/Sexual\\_Assault\\_Campus\\_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf](https://www.aau.edu/uploadedfiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf) (more than one in four female undergraduates at 27 different universities report being sexually assaulted).

46. See, e.g., Columbia University, *Essential Policies for the Columbia Community*, <http://www.essential-policies.columbia.edu/gender-based-misconduct-policies-students>; *Student Sexual Assault Policy*, UNIVERSITY OF MICHIGAN, <https://studentsexualmisconductpolicy.umich.edu/> (last visited May 21, 2016); UNIVERSITY OF DELAWARE, *Sexual Misconduct Policy* (July 1, 2015), available at <https://sites.udel.edu/sexualmisconduct/files/2015/08/FINALSexual-Misconduct-PolicyJuly-2015-1-217elf5.pdf>; *Sexual Misconduct and Other Forms of Power-Based Personal Violence*, VANDERBILT UNIVERSITY, [http://www.vanderbilt.edu/student\\_handbook/sexual-misconduct/](http://www.vanderbilt.edu/student_handbook/sexual-misconduct/) (last visited May 21, 2016); *Student Sexual Misconduct Policy*, GEORGIA INSTITUTE OF TECHNOLOGY, <http://policylibrary.gatech.edu/student-affairs/student-sexual-misconduct-policy-change> (last visited May 21, 2016); *Student Conduct Code*, University of Oregon, <http://policies.uoregon.edu/vol-3-administration-student-affairs/ch-1-conduct/student-conduct-code> (last visited May 21, 2016).

47. See e.g., *Letter from Office for Civil Rights, Department of Education Docket Number 07142234 (August 20, 2014)* (responding to a complaint filed against St. Louis University and declined jurisdiction on the grounds that OCR has no authority to review violations of victims’ rights that occur when complaints are addressed on campus under the SaVE Act rather than Title IX).

overstated as it means sex-based civil rights harms will be redressed under the same first-class legal standards as civil rights harms that occur on the basis of other protected class categories such as race, color, or national origin.<sup>48</sup>

Krakauer also should have pointed out that in 2013 Congress passed a first-of-its-kind law authorizing (albeit unconstitutionally) schools to address sexual assault and other forms of gender-based violence under “second-class” policies, without complying with Title IX, and in a manner that evades the scrutiny of government oversight agencies such as the OCR. Although many schools had such policies in place prior to 2013,<sup>49</sup> the new law, popularly known as the “Campus SaVE Act” (“SaVE”),<sup>50</sup> made “second-class” treatment of women legal by expressly allowing schools to apply less protective, inequitable legal standards *only* in matters involving sex-based violence. All other forms of class-based violence remained protected by the gold standards of civil rights laws.

Unless he lived under a rock, Krakauer would have known about SaVE because Congress was actively debating the bill while he was writing *Missoula*. Any author writing about campus sexual assault, but especially one purporting to write a well-researched book, should have known that Congress was poised to enact a new federal law that, for the first time since Title IX’s enactment in 1972, would authorize schools to subject victimized women to “second-class” treatment.<sup>51</sup> In a sense, SaVE can be compared to the Supreme Court’s 1896 *Plessy v. Ferguson* decision, which was interpreted as allowing states to establish “separate but equal” schools for black children.<sup>52</sup> Of course, *Plessy* was later effectively overturned as unconstitutional in *Brown v. Board of Education*,<sup>53</sup> and *Plessy* and SaVE address very different issues, but SaVE allowed schools not only to segregate out sex-based violence for separate treatment, but also to apply unequal legal standards.<sup>54</sup> Most significantly, SaVE replaced Title IX’s mandate of “equitable” treatment and replaced it with the word “fair,” thus expressly permitting inequitable treatment.<sup>55</sup>

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48. See *supra* note 19.

49. See Murphy, *supra* note 8.

50. 20 U.S.C. 1092(f) (2012); 34 CFR 668.46 (2015); The Campus SaVE Act is also known as the 2013 Clery Act Amendments, and the 2013 Violence Against Women Reauthorization Act.

51. See Petition for Writ of Mandamus & for Equitable Relief, *supra* note 10 (this was a federal lawsuit filed by me and Bernice Sandler, PhD, which details the numerous ways that SaVE permits the second-class treatment of women).

52. 163 U.S. 537 (1896).

53. 347 U.S. 483 (1954).

54. See *supra* note 39.

55. Murphy, *supra* note 15.

SaVE was introduced into Congress in mid-April 2011, only days after the DOE released the DCL, which provided new clarity on the obligation of schools to address sexual assault and other gender-based violence under civil rights laws, and to apply Title IX's "equitable" legal standards.<sup>56</sup> The DCL was widely celebrated by victim advocates,<sup>57</sup> but universities were generally unhappy.<sup>58</sup> Hence, when I learned that SaVE was introduced into Congress only days later, I was naturally suspicious because victims have little lobbying power compared to the industry of higher education,<sup>59</sup> and I knew that advocacy groups had not asked for, drafted, or submitted any proposed language to Congress regarding campus sexual assault.

When I and other advocates expressed concerns about the ways that SaVE would weaken Title IX, the bill was tacked onto the Violence Against Women Reauthorization Act, which is a big funding bill, and advocates went silent.<sup>60</sup> Unwary advocates initially supported SaVE because they were told it would codify the DCL,<sup>61</sup> and an early version of the bill looked promising because it included important provisions from the DCL, such as the mandate that victims receive "equitable" treatment, and that the "preponderance of evidence" standard of proof be applied in redress proceedings. But those provisions were later removed, as one Congressman made clear when he thanked a congressional committee for amending the bill:

The majority bill said that college campuses must provide for 'prompt and equitable investigation and resolution' of charges of

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56. See *supra* note 39.

57. Allie Grasgreen, *Call to Action on Sexual Harassment*, INSIDE HIGHER ED (April 4, 2011), [https://www.insidehighered.com/news/2011/04/04/education\\_department\\_civil\\_rights\\_office\\_clarifies\\_colleges\\_sexual\\_harassment\\_obligations\\_title\\_ix](https://www.insidehighered.com/news/2011/04/04/education_department_civil_rights_office_clarifies_colleges_sexual_harassment_obligations_title_ix) (quoting the director of a leading campus security organization who described the DCL as "a significant advancement for the victims of sexual violence and preventing sexual violence. . . that. . . will better protect [victims and] better ensure that they have [justice and] access to protections in an educational environment").

58. See Jake New, *Guidance or Rule Making?*, INSIDE HIGHER ED (Jan. 7, 2016), <https://www.insidehighered.com/news/2016/01/07/senators-challenge-legality-us-guidance-campus-sexual-assault> (quoting Senator James Lankford, chairman of the Senate Subcommittee on Regulatory Affairs and Federal Management, stating that "[c]olleges and universities across the nation . . . view the [April 4, 2011] Dear Colleague letter[] as improperly issued guidance that require[s] constitutionally questionable and ill-conceived policies. . .").

59. Jon Collins, *Higher Ed Lobbyists: Growing Presence, Growing Power*, CBS NEWS (Nov. 13, 2008), <http://cbsnews.com/news/higher-ed-lobbyists-growing-presence-growing-power> (noting in 2008 the dramatic increase in higher education lobbying since the 1990s when members of Congress began treating higher education as a private good, rather than a public good, and that almost 68 million dollars was spent by higher education lobbyists in 2008 alone, the sixth highest spending on lobbying by any industry).

60. Murphy, *supra* note 15.

61. *Id.*

violence or stalking. This would have codified a proposed rule of the Department of Education that would have required imposition of a civil standard or preponderance of the evidence for what is essentially a criminal charge, one that, if proved, rightly should harm reputation. But if established on a barely 'more probable than not' standard, reputations can be ruined unfairly and very quickly. The substitute eliminates this provision.<sup>62</sup>

SaVE was filed as an amendment to the Higher Education Act, under which Title IX was enacted, hence SaVE posed a significant risk that the law would be construed as weakening Title IX because an amendment to one federal law usually affects all related laws.<sup>63</sup> This was a particularly serious concern given that SaVE did not include language typically included in new laws to ensure the courts would not interpret SaVE as an expression of congressional intent to weaken Title IX. For example, in 1994, Congress amended the General Education Provisions Act (GEPA) to add language specifying that nothing in GEPA "shall be construed to affect the applicability of Title VI of the Civil Rights Act of 1964, Title IX of Education Amendments of 1972, Title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program."<sup>64</sup> The Department of Education then interpreted GEPA to mean that if there were a conflict between the requirements of GEPA and the requirements of Title IX, the requirements of Title IX would override any conflicting provisions.<sup>65</sup> Similarly protective language was left out of SaVE, thus rendering Title IX vulnerable to the argument that Congress meant to weaken Title IX by enacting SaVE.

The bill was signed into law in March 2013 and was scheduled to take effect one year later.<sup>66</sup> During that year, many schools changed their policies to adopt SaVE's worse standards while I, with the help of Dr. Bernice Sandler (well-known as the "Godmother of Title IX"), drafted a federal lawsuit to enjoin SaVE from being enforced on any campus on the grounds that it violated women's equal protection and due process rights, and that

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62. Testimony of Senator Charles Grassley, Iowa, 158 Cong. Rec. S 2761, Congressional Record, Sen., 112th Congress, 2nd Session Senate, April 26, 2012; Violence Against Women Reauthorization Act of 2011, Reference: Vol. 158, No. 61.

63. *Watt v. Lsk*, 451 U.S. 259, 267 (1981); *see also* *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001).

64. 20 U.S.C. § 1221(d) (2012).

65. *See* U.S. DEPARTMENT OF EDUCATION, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, (2001), <https://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf>

66. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89-92 (2013) (modified Section 485(f) of the Higher Education Act of 1965).



Congress lacked authority to regulate violence against women.<sup>67</sup> My local counsel in D.C. filed the suit in federal court two weeks before SaVE was scheduled to take effect, and the court allowed the suit to proceed one day before SaVE's effective date of March 7, 2014.<sup>68</sup>

It is difficult to imagine that Krakauer was unaware of SaVE, or the lawsuit I filed, considering that he was fully aware of, and wrote repeatedly about, the DCL.<sup>69</sup> Had he done adequate research, he could have informed his readers that a new federal statute threatened to undermine the DCL because a statute trumps an interpretive "letter" from an oversight agency. Instead, Krakauer wrote about the DCL only that it had "decreed" that schools take certain steps in response to sexual assault, such as using a "preponderance of evidence" standard of proof.<sup>70</sup>

Krakauer described the "preponderance of evidence" as a radical new requirement because "most universities" prior to the DCL were using a more onerous "clear and convincing evidence" or "beyond a reasonable doubt" standard of proof.<sup>71</sup> Krakauer got this critical issue wrong. Over 80% of schools were using the preponderance standard before the DCL was issued.<sup>72</sup> Krakauer could have confirmed this fact with a phone call to the DOE. He also could have mentioned that Congress removed the "preponderance" standard and "equitable" treatment" for women in the SaVE Act, but he said nothing.

*Missoula's* silence about SaVE is perplexing because SaVE was very much in the news when Krakauer was writing *Missoula*. My lawsuit to stop SaVE was being litigated in federal court for an entire year, during which time numerous briefs were filed by me and by lawyers for the Department of Justice. Likewise, regulations related to SaVE were being debated and promulgated in Washington D.C.; regulations that were approved at the end of October 2014 and ameliorated *some*, but not all, of the inequities I identified in my lawsuit as unconstitutional.<sup>73</sup>

The lawsuit I filed against SaVE specifically implicated the University of Virginia, Harvard Law School, and Princeton University because OCR investigations were then pending against all three schools in cases of mine that had been filed years earlier alleging significant noncompliance with

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67. Petition for Writ of Mandamus & for Equitable Relief, *supra* note 10.

68. Murphy, *supra* note 15.

69. *Id.* at 87, 179.

70. *Id.* at 87.

71. *Id.* at 87, 179.

72. Stacy T. Khadaroo, *Feds Warn Colleges: Handle Sexual Assault Report Properly*, THE CHRISTIAN SCIENCE MONITOR (Sept. 2, 2011), [http://www.msnbc.msn.com/id/44376767/ns/us\\_news-christian\\_science\\_monitor/t/feds-warn-colleges-handle-sexual-assault-reports-properly](http://www.msnbc.msn.com/id/44376767/ns/us_news-christian_science_monitor/t/feds-warn-colleges-handle-sexual-assault-reports-properly).

73. 79 Fed. Reg. 62751 (Oct. 20, 2014); 34 C.F.R., 668.

Title IX. I filed suit not only to challenge the constitutionality of SaVE itself, but also because those investigations would be negatively affected if SaVE's "second class" legal standards were applied retroactively to OCR investigations that were still pending at the time of SaVE's enactment.

My OCR case against the University of Virginia was filed in 2012; cases against Harvard and Princeton were filed in 2010.<sup>74</sup> The University of Virginia had already adopted the preponderance standard in response to a different OCR case I won against them in 2010.<sup>75</sup> Harvard and Princeton were still using a standard akin to "clear and convincing" evidence, but they changed their policies to adopt the preponderance standard during the year when my lawsuit was pending.<sup>76</sup>

After all schools put preponderance standards in place, my lawsuit was resolved in a decision that held SaVE could have "no effect" on Title IX because Congress did not directly amend Title IX.<sup>77</sup> It was an important victory, but other problems were brewing because, following the filing of my lawsuit, a new bill was introduced into Congress to directly amend and weaken Title IX. Popularly known as the Campus Accountability and Safety Act ("CASA"),<sup>78</sup> the bill is still pending as of June, 2016. If enacted, CASA will weaken Title IX<sup>79</sup> by, among other things, allowing generic disciplinary policies to interfere with Title IX and mandating that schools teach and disseminate to students *criminal law definitions*, rather than civil rights definitions, of gender-based violence.<sup>80</sup> Disseminating criminal law definitions will inhibit students from understanding the important ways that criminal law terms such as "sexual assault" and "non-consent," differ significantly from Title IX's definition of an actionable offense, which requires only that a sex-based offense be "unwelcome." "Unwelcome" is "equitable" because it is a subjective test that honors women's autonomy and exclusive authority over their bodies by asking only whether they *wanted* sexual contact.<sup>81</sup> By contrast, criminal law and university definitions of

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74. Murphy, *supra* note 15.

75. OCR docket no., U.Va. 11-10-2086 (on file with author).

76. Matthew Q. Clarida & Madeline R. Conway, *Univ. Announces New Sexual Assault Policy Including Central Office, 'Preponderance of the Evidence' Standard*, THE HARVARD CRIMSON (July 3, 2014), <http://www.thecrimson.com/article/2014/7/3/new-sexual-assault-policies/>; Nicole Mulvaney, *Princeton University Incorporates New Sexual Assault Policies into Student Handbook*, NJ.COM (Sept. 29, 2014), [http://www.nj.com/mercer/index.ssf/2014/09/princeton\\_university\\_incorporates\\_new\\_sexual\\_assault\\_policies\\_into\\_student\\_handbook.html](http://www.nj.com/mercer/index.ssf/2014/09/princeton_university_incorporates_new_sexual_assault_policies_into_student_handbook.html)

77. *Doe v. United States Dep't of Health and Human Serv.*, 85 F. Supp. 3d 1, 3-4 (D.D.C. 2015).

78. Campus Accountability and Safety Act, S. 590, 114th Cong. (2015).

79. *Id.* at § 2 (20).

80. *Id.* at § 125.

81. *Sexual Harassment: It's Not Academic*, U.S. DEP'T OF EDUC. (Sept. 2008),

“non-consent” are inequitable because they ask not only whether a victim “consented,” but also whether an offender mistakenly *believed* the victim consented.<sup>82</sup>

Even trendy “affirmative consent” rules are inequitable in the way that they devalue women’s autonomy and bodily integrity by allowing an accused student’s alleged *mistake* to trump a perfectly credible victim’s *actual* non-consent.<sup>83</sup> This legal sleight-of-hand is not possible under Title IX’s “unwelcomeness” standard, yet many universities have adopted “affirmative consent” policies despite their derogatory effect on Title IX’s guarantee of “equitable” redress.<sup>84</sup>

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<http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html>. “Unwelcome” is defined as conduct the student “did not request or invite . . . and [that the student] considered the conduct to be undesirable or offensive. The age of the student, the nature of the conduct, and other relevant factors affect whether a student was capable of welcoming the sexual conduct. A student’s submission to the conduct or failure to complain does not always mean that the conduct was welcome.” *Id.*

82. See *People v. Mayberry*, 542 P. 2d 1337 (Cal. 1975), for an example of a criminal law definition of non-consent that permits an offender’s mistake to override a victim’s actual non-consent; see *Gender-Based Misconduct*, STONEHILL.EDU (June 24, 2014), [www.stonehill.edu/files/resources/2014-07-02-s114-gender-based-misconduct-policy.pdf](http://www.stonehill.edu/files/resources/2014-07-02-s114-gender-based-misconduct-policy.pdf), for an example of a university policy that permits the same harmful treatment of women’s autonomy. Consent to sexual activity includes consideration of whether an offender considered “the words or actions of the [victim] to have demonstrated agreement between them to participate in the sexual activity.” *Id.*

83. See e.g., 2016 Cal. Stat. AB1778. California’s new “affirmative consent” law (Section 67386 of the Education Code) which clearly permits a “reasonable mistake” as to consent defense in campus proceedings by forbidding the accused to assert such a defense only where: (A) The accused’s belief in affirmative consent arose from the intoxication or recklessness of the accused; or (B) The accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain whether the complainant affirmatively consented. Another section forbids the mistake defense only when the accused “knew or should reasonably have known” that (A) The complainant was asleep or unconscious; (B) The complainant was incapacitated due to the influence of drugs, alcohol, or medication, so that the complainant could not understand the fact, nature, or extent of the sexual activity; or (C) The complainant was unable to communicate due to a mental or physical condition. *Id.* These provisions leave the door wide open for the accused to assert a mistake defense in virtually all circumstances because he can simply say as to the first category of ostensible restrictions, “my defense did not arise from the victim’s intoxication or my recklessness and I took reasonable steps to ascertain that she did consent.” *Id.* As to the second category, the accused can say, “I did not know, nor should I reasonably have known” that the victim was [fill in the blank with whatever facts the victim reports about why she lacked capacity to make a decision about sexual contact]. *Id.*

84. Janet Halley, *The Move to Affirmative Consent*, SIGNS (Apr. 25, 2016), [http://signsjournal.org/currents-affirmative-consent/halley/#\\_edn9](http://signsjournal.org/currents-affirmative-consent/halley/#_edn9). In footnote 3, Halley states that several universities that recently amended their policies to adopt affirmative consent standards. *Id.* at n.3. Halley also notes that New York legislators recently passed legislation mandating that colleges and universities adopt affirmative consent standards, and that the American Law Institute is poised to generate a model law adding an affirmative consent law to the Model Penal Code. *Id.* at 1. The absence of organized

By requiring dissemination of criminal law definitions on campus, rather than promoting and mandating use of the “unwelcomeness” standard, CASA, if it becomes law, will deter reporting and incentivize violence by misleading students to believe that “mistaken” rapes are permissible. CASA will also require schools to enter into memoranda of understanding with civilian law enforcement agencies,<sup>85</sup> which will inhibit public awareness of sexual assaults on college campuses, and prevent effective oversight of schools’ responses, because police reports previously considered to be public records will be treated as confidential school records.

Sponsored by women Senators Claire McCaskill (D. MO.) and Kirsten Gillibrand (D. N.Y.), and promoted as a good bill for victims, CASA eventually met with opposition, after which the Safe Campus Act (“SCA”),<sup>86</sup> was introduced by Representatives Matt Salmon (R. AZ.) and Pete Sessions, (R. TX.) Likely propped up as a straw-man bill to pressure CASA’s opponents to withdraw their complaints about CASA or face enactment of a worse bill, SCA would do even more harm to Title IX as it would, *inter alia*, forbid schools to impose interim punishments on offenders, or even redress cases on campus unless the victim first files a police report. SCA would also allow schools to apply a burden of proof more onerous than mere preponderance, and would empower accused students, but not victims, to file lawsuits against schools for noncompliance with SCA.<sup>87</sup>

CASA, SCA and SaVE are all profoundly harmful to women’s safety and equality because they nowhere require “equitable” treatment for victims, and they preclude victims from seeking recourse with the OCR or the courts when their rights are violated on campus.<sup>88</sup> Most schools fail to inform students about these important issues, or even whether a particular victim is *receiving* “equitable” redress under Title IX rather than inequitable redress under a second-class misconduct policy.

Amidst all the congressional obfuscation, it remains the case that schools are mandated to comply with Title IX’s “equitable” treatment mandate, which means schools that adopt and apply less than fully “equitable” redress policies, even if they believe they have congressional permission to do so, will face lawsuits under Title IX, and under the same equal protection and

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feminist opposition to these subversive attempts to codify and legitimize men’s authority over women’s bodies is disturbing.

85. S. 590, 114<sup>th</sup> Cong. § 124 (2015).

86. Safe Campus Act, H.R. 3403, 114th Cong. (2015).

87. *Id.* at 6–16.

88. It is interesting that CASA’s lead sponsors are Democrats, while SCA was filed by Republicans. SaVE was a bipartisan initiative with leadership in both parties supporting the idea that victims should be subjected to second-class redress on campus. And while it may seem surprising to some that Democrats failed to stand up for strict enforcement of Title IX, the ugly fact remains that sexual access to women’s bodies has long been a bipartisan entitlement.

due process doctrines that I used to challenge the SaVE Act. The legal argument is simple. Because schools are mandated by federal civil rights laws to provide “equitable” redress for “sex-based” violence, they have no discretion to frame and redress such violence using second-class definitions and misconduct policies. To do so would be discriminatory under Title IX, and unconstitutional under equal protection and due process doctrines, especially if violence “based on” other protected class categories, such as race and national origin, continues to be redressed and defined equitably under civil rights laws.

Krakauer’s silence about the fact that Congress was busily proposing and passing laws related to the topic he was writing about is strange (SCA hadn’t been proposed by the time his book was finished). Equally curious is his decision to single out Harvard for criticism as a “prime example” of a school with an especially bad sexual assault policy.<sup>89</sup> This is wildly off the mark as Harvard is one of the only elite schools to reject SaVE,<sup>90</sup> adopt Title IX’s “unwelcomeness” standard,<sup>91</sup> and refuse to codify more onerous definitions, such as “non-consent” and “affirmative consent.”<sup>92</sup> Harvard’s policy also guarantees victims *equitable* treatment, on par with students who experience other types of civil rights harms based on race, color, or national origin,<sup>93</sup> although a “frequently asked questions” (FAQ) page was recently added to Harvard’s website that could be construed as weakening certain provisions of Harvard’s policy.<sup>94</sup> For example, the FAQs describe Title IX’s “unwelcomeness” standard as a subjective *and* objective test, requiring analysis of a “totality” of the circumstances. This is a troubling development as it could be interpreted as allowing offenders to assert a “mistake” defense. That the FAQ page segregates out only sex-based offenses for application of the watered-down definition of “unwelcomeness” suggests that Harvard may have bestowed upon itself discretionary authority not to treat women equitably even as students from all other protected class categories who suffer civil rights injuries will continue to receive fully equitable redress.

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89. KRAKAUER, *supra* note 1, at 343.

90. HARVARD UNIVERSITY, *Harvard University Sexual and Gender-Based Harassment Policy* (Sept. 11, 2015), available at [http://titleix.harvard.edu/files/titleix/files/harvard\\_sexual\\_harassment\\_policy.pdf?m=1461104544](http://titleix.harvard.edu/files/titleix/files/harvard_sexual_harassment_policy.pdf?m=1461104544).

91. Wendy Murphy, *Harvard Gets It Right on Sexual Assault*, THE BOSTON GLOBE (Dec. 2, 2014), <https://www.bostonglobe.com/opinion/2014/12/02/harvard-gets-right-sexual-assault/mmM8hZRndrtP9MAPXwOvtM/story.html>.

92. Halley, *supra* note 84.

93. HARVARD UNIVERSITY, *supra* note 90.

94. HARVARD UNIVERSITY, *Frequently Asked Questions Concerning Harvard University Sexual and Gender-Based Harassment Policy and Procedures for Handling Complaint Involving Students* (Apr. 12, 2016), available at [http://titleix.harvard.edu/files/sexual\\_harassment\\_policy\\_procedures\\_faqs.pdf?m=44686376](http://titleix.harvard.edu/files/sexual_harassment_policy_procedures_faqs.pdf?m=44686376).

All universities should refuse to subject women to disparate treatment, and have one unified policy in place that spells out how all forms of harassment, assault and violence that occur “on the basis of” a protected class category will be treated *exactly* the same. A single “equitable” policy sends the right message that women are not second-class citizens, and that sexist violence, like racist violence, is not only a personal offense that affects the individual victim; it is also a collective *civil rights* offense that injures the entire campus community. When all students feel injured by sexual assault, all students will become more invested in prevention, and incidence rates will decline.

Parents are increasingly aware of the importance of sending their daughters (and sons) to schools that respect women’s safety and equality, by promising and delivering fully equitable redress when sexual assault happens. Schools that subject women to second-class treatment will inevitably suffer financial losses and lower enrollment rates when they become known as less desirable and less safe educational venues for women.

Krakauer does not seem to understand this, though he does have a knack for writing impactful descriptions of the ways victims are mistreated, which will be eye-opening for parents who assume that school officials *want* to treat their daughters with respect. But brilliant writing is small solace to those who will read *Missoula* hoping to better understand women’s rights on campus. Words are no less dangerous for their artistic flare if they leave out or misstate important truths. In addition to leaving out information that could help victims, Krakauer includes information about the litigation tactics that helped offenders prevail in their cases, and in that sense, *Missoula* is a kind of guidebook that will enable more offenders to evade responsibility for their actions.

With the turn of each page, I felt increasingly duped by *Missoula*’s promise to help victims, eventually reaching a point where I was literally damaging the book by bending corners of pages and underlining whole sections in red ink to make sure I could return quickly to the bad parts, and cite them in this review. Like many book lovers, I resist marking pages and bending corners because it feels sacrilegious. But this book needed fierce page-bending and lots of red ink. Subversive books are especially dangerous because it is hard for most readers to appreciate what is wrong and what is missing, especially when a book is written by a reputable writer, and the cover declares its own integrity by claiming the book was “meticulously” reported.<sup>95</sup>

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95. Similarly subversive federal lawsuits have recently been filed on behalf of victims by attorneys who have asked the federal courts to enforce the Campus SaVE Act (“SaVE,” also known as the 2013 Clery Amendments, and the 2013 Violence Against Women Reauthorization Act) rather than, or in addition to, Title IX. Murphy, W., When Lawyers Forget Equitable, March 26, 2016, Patriot Ledger, Quincy MA, *available at*

I probably would have been satisfied to see a single paragraph explaining the differences between civil rights laws and generic student misconduct codes, and why the differences matter. But it is not there. I find this almost as shocking as the complete absence of the word “*equitable*” in a book that purports to be about injustices endured by victims whose right to “*equitable*” treatment was denied. Stranger still, Krakauer includes no key word index in the back so that a reader could easily see whether terms like “*equitable*” and “*civil rights*” appear anywhere in *Missoula*, and if so, whether they are correctly defined, etc.

Krakauer does include little-known information about how Missoula officials conspired to cause injustice for victims, such as making sure that certain people were appointed to or removed from positions of influence.<sup>96</sup> He also understands that some cops, journalists, school officials and lawyers, are biased against victims, but he does not explain how victims and their parents can figure out who is really on their side, and that they should be suspicious of even *seemingly* unbiased people, like “*independent*” advisors, and counselors at rape crisis centers, because most of the advisors and counselors to whom schools refer victims are compensated by or have signed contracts with schools to provide services.<sup>97</sup> “*Independent*” investigators

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<http://stopabusecampaign.com/when-lawyers-forget-equitable/>. This is a disturbing trend for many reasons, including that SaVE, by its terms, explicitly forbids private lawsuits, and authorizes schools to subject victims to second-class treatment on campus compared to Title IX. By contrast, Title IX is enforceable through private lawsuits and affords victims much better legal protections on campus. Which raises the question: why would a victim’s lawyer *want* a federal judge to enforce SaVE? Why wouldn’t a victim’s lawyer fiercely argue that the second-class treatment of victims under SaVE is unconstitutional, and inequitable? One possible explanation is that the victims’ lawyers are acting covertly to protect the interests of schools, while appearing to advocate for women’s rights. No doubt the victims themselves are unaware that their lawsuits, even if successful, will hurt the cause of equality for all women by legitimizing in federal court decisions the endorsement of SaVE’s second-class policies. This troubling endorsement of SaVE is also present in a recently released investigative report regarding Baylor University’s response to sexual misconduct. Baylor University Board of Regents Findings of Fact, *available at* <http://www.baylor.edu/rtsv/doc.php/266596.pdf>. The investigation was conducted by a law firm that specializes in, *inter alia*, defending schools against discrimination lawsuits. The firm was hired by Baylor to examine Baylor’s handling of sexual assaults. The firm’s lengthy final report not only nowhere uses the phrase “*women’s civil rights*,” it also shockingly recommends that Baylor incorporate and enforce the SaVE Act as part of its Title IX policy. Because the report criticizes many aspects of Baylor’s mistreatment of women, and includes numerous phrases that appear sympathetic to victims, it is difficult for the general public to understand why the report is so dangerously subversive in its refusal to frame violence against women as a civil rights issue; in its utter silence on the fact that Title IX must be enforced exactly on par with other civil rights laws, such as Title VI; and in its disturbing endorsement of the SaVE Act’s second-class treatment of victimized women.

96. KRAKAUER, *supra* note 1, at 230, 309-313.

97. NOT ALONE, *Together Against Sexual Assault, Building Partnerships with Local Rape Crisis Centers: Developing a Memorandum of Understanding*, *available at*

should also generate parental skepticism because they may not be independent at all.<sup>98</sup> Even lawyers purporting to be experts who specialize in the representation of victims in Title IX lawsuits should be carefully vetted because many lawsuits have been filed on behalf of victims that, disturbingly, ask courts to enforce SaVE's second class standards, but do *not* ask for enforcement of either Title IX's equitable treatment mandate, or women's constitutional rights to equal protection and due process.<sup>99</sup>

While *Missoula* correctly describes many ways that victims experience injustice, including through the harmful tactics of defense attorneys, it does little to teach victims how to protect themselves even as it teaches offenders and their lawyers how to use those tactics to win. For example, Krakauer writes about one victim who allowed investigators to search her phone, presumably because she had nothing to hide and felt no guilt about what was in there.<sup>100</sup> But neither did she realize that all of her text messages would be handed to the defense attorney so he could conduct a fishing expedition.<sup>101</sup>

Asking a student to reveal irrelevant personal information during an investigation is an old defense trick that works well as an intimidation tactic. Many victims provide information without hesitation because they assume they have no choice and they want to cooperate. But they do not understand the consequences of turning over a cell-phone, just as they do not understand how submitting to a rape kit exam could reveal to the defense utterly irrelevant biological proof that they had sex with other men prior to the night in question. When victims later learn that deeply personal information such as past sexual conduct, mental health issues, STIs, etc., was cavalierly handed to the defense, they become reluctant to testify for fear that information will unfairly be released to the school community and to the public at large.

Krakauer acknowledges that violations of privacy rights undermine justice for victims, as when he describes how 29,000 text messages from one victim's phone were scoured by defense attorneys, who used them to attack her credibility.<sup>102</sup> But Krakauer never tells the reader that victims can avoid privacy intrusions by not turning over cell phones and laptops for unbridled

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<https://www.notalone.gov/assets/mou-rape-crisis-centers.pdf>.

98. For example, the law firm of Kollman & Saucier, P.A. was hired by the University of Maryland to conduct an "independent" Title IX investigation in a case of mine, yet the firm's website describes the firm as specializing in the representation of businesses facing harassment and discrimination claims. *Harassment, Discrimination, and Retaliation*, Kollman & Saucier, P.A., <http://www.kollmanlaw.com/our-expertise/harassment-discrimination-and-retaliation/> (last visited May 22, 2016).

99. Wendy J. Murphy, *When Lawyers Forget Equitable*, STOP ABUSE CAMPAIGN (Mar. 26, 2016), <http://stopabusecampaign.com/when-lawyers-forget-equitable/>.

100. KRAKAUER, *supra* note 1, at 266.

101. *Id.*

102. *Id.*



inspection, and by objecting to all rape kit testing that might reveal irrelevant, constitutionally protected private information, and by not answering *any* irrelevant questions about past sexual conduct, past alcohol use, prescription drug use, etc. The defense cannot unfairly use irrelevant personal information against a victim if the information is not divulged in the first place.

Krakauer says nothing about these obvious strategies that could make a real difference for victims, but he does point out that *suspects* can protect *their* personal information by not turning over cell-phones, and deleting certain text messages so that investigators see only selective information, such as friendly text messages from the victim after a sexual assault.<sup>103</sup> Krakauer could have shown keen insight if he had pointed out the way that some offenders intentionally communicate with victims after an assault, and they use friendly and romantic language, to create a trail of evidence suggesting there was no rape. For a victim who was incapacitated and is having trouble remembering what happened, and who wants badly to believe she was not raped, a friendly text message can be a welcome sign. But as soon as the “friendly-after-the-fact” evidence is created, the pretext ends. If the victim then reports a sexual assault, those texts will be used by the perpetrator to prove there was no rape because “a real victim would not befriend her attacker the next day.” Thus, the defense argument will go, “she falsely accused the guy because he stopped showing interest.” Krakauer nowhere indicates an appreciation for the fact that some offenders are deviously tactical in their efforts to avoid punishment.

Krakauer himself seems almost tactical in the way he gratuitously violates a victim’s privacy by revealing in several pages very personal details about her past involvement in therapy after she was bullied in junior high school.<sup>104</sup> A responsible writer sincerely concerned about revictimization would not have revealed such sensitive information, even though it came out, unjustly, in a public trial. Although Krakauer used pseudonyms, many people know the identities of the victims in *Missoula*. Thus, Krakauer should have known better than to include details about the mental health treatment of a young woman who has obviously suffered a great deal of trauma in her young life.

To be fair, Krakauer also pointed out that one of the accused students had a history of bad behavior, and it is in the book even though it was deemed inadmissible and confidential under a federal educational privacy law known as FERPA.<sup>105</sup> But the bad behavior involved disorderly conduct on campus,

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103. *Id.*

104. *Id.* at 236, 244-245.

105. *Id.* at 235, *citing* The Family Educational Rights and Privacy Act, 20 U.S.C. §1232g (2012); 34 C.F.R. § 99 (2015).

while the guy was drunk and “running amok.”<sup>106</sup> The fact that the guy was punished for “running amok” can hardly be described as “private” because it happened in public, but Krakauer accepts without criticism that the behavior was confidential under FERPA. Because Krakauer writes about the victim’s therapeutic counseling only one page later, he had to know that the victim’s emotional problems, caused by bullying she experienced in *school*, were also protected by FERPA, not to mention the Constitution.<sup>107</sup> Yet Krakauer says nothing about FERPA when discussing the victim’s troubles, leaving the reader to assume, incorrectly, that FERPA grants privacy rights to public drunkenness for men, but not to confidential mental health care for women.

Krakauer could have at least pointed out that the “running amok” evidence *should* have been admitted after the guy called several witnesses to the stand to testify that he had a reputation for being a perfect gentleman. Even in the strict venue of a criminal courtroom, where Title IX does not apply and the rules do not require “equitable” treatment of victims, an accused has no right to prohibit testimony about his prior bad acts if he elects to introduce evidence of his good character. Simply put, once the good character door is opened, bad character evidence walks through.

Despite major missteps, *Missoula* will make parents of college students uncomfortable, which is a good thing. The book comes at a time when campus sexual assault is occurring at such high rates that women are significantly more likely to be victimized in college than even in the hyper-masculine environment of the military.<sup>108</sup> While this may seem shocking to some, the disparity may be tied to the fact that the military spends money on, rather than receives money from, women and men, so there’s no similar institutional financial loss when the military discharges offenders the way there is when universities expel offenders. Nor does the military face the same “liability disparity,” discussed above, that incentivizes college officials to side with offenders over victims in order to avoid lawsuits for “wrongful discipline.” In the military, neither the accused nor the victim has meaningful capacity to sue because of the *Feres* doctrine, which grants the military near total immunity against lawsuits.<sup>109</sup> Hence, military sexual assault rates are

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106. KRAKAUER, *supra* note 1, at 235.

107. Wendy Murphy, *Privacy Rights in Mental Health Counseling: Constitutional Confusion and the Voicelessness of Third Parties in Criminal Cases*, 39 J. AM. ACAD. PSYCHIATRY LAW 387 (2011).

108. Cantor, *supra* note 45, (more than 25% of female undergraduates report being sexually assaulted); U.S. COMMISSION ON CIVIL RIGHTS, *Sexual Assault in the Military* 6 (Sept. 2013), *available at* [http://www.usccr.gov/pubs/09242013\\_Statutory\\_Enforcement\\_Report\\_Sexual\\_Assault\\_in\\_the\\_Military.pdf](http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf) (6.1% of female service members reported being the victim of unwanted sexual contact).

109. *Feres v. United States*, 340 U.S. 135 (1950).

lower, in my opinion, because there's less of a financial incentive to favor offenders.

This is not to say the cultural construct of masculinity is not causally related to how boys and men view and treat girls and women, which Krakauer plainly understands. For example, he recognizes that pornography plays a role in sexual violence when he writes about one offender who developed his understanding of female sexuality from Internet porn, and that porn "led him to believe that . . . frenetically jabbing his fingers into [a woman's] vagina and anus" would elicit the "supreme female expression of sexual pleasure."<sup>110</sup> Krakauer then writes poignantly in the same section "A rapist does not care what a woman wants. If he did, he would not rape."<sup>111</sup> I would have added that some schools do not care what women want, either. If they did, they would stop spending money on silly programs and focus on prevention by treating all violence against women as a civil rights issue under Title IX in every case, no exceptions, once and for all.

Krakauer's insight into the harmful role of pornography in boys' lives is important, but the issue deserved more than four sentences in a book like *Missoula* because most boys, hence most offenders on college campuses, learn about sex from watching pornography, and they see it for free on their phones at younger ages than ever before. Well-known Wheelock College Professor, Dr. Gail Dines,<sup>112</sup> notes that readily available violent pornography has completely changed men's understanding of how they should relate sexually to women, and has made the violent degradation of women's bodies seem normal and pleasurable.<sup>113</sup> By the time boys get to college, they are acclimated to behave like the men they see in porn, and they land at their dorm rooms ready to practice what they have learned. Unwary freshmen girls have no advance warning that seemingly nice boys are looking for ways to act out sexual "fantasies" they saw in cyber-space. Add to that powder-keg the fact that college students are free from parental oversight; alcohol is everywhere; hormones are raging; fraternities and other "male-clubs" on campus incite bad behavior and a pack mentality; and readily available rape drugs make it exceedingly easy to get away with sex offenses because drugged victims cannot reliably recall what happened.

Some rape drugs make victims' bodies behave sexually, while their minds are completely unaware of what is going on.<sup>114</sup> Women who cannot

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110. KRAKAUER, *supra* note 1, at 93.

111. *Id.*

112. *Biography*, GAIL DINES, <http://www.gaildines.com> (last visited May 22, 2016).

113. Eric W. Owens et al., *The Impact of Internet Pornography on Adolescents: Review of the Research*, 19 *SEXUAL ADDICTION & COMPULSIVITY: THE JOURNAL OF TREATMENT & PREVENTION* 99 (2012).

114. Karl L. R. Jansen & Lynn Theron, *Ecstasy (MDMA), Methamphetamine, and Date Rape (Drug-Facilitated Sexual Assault): A Consideration of the Issues*, 38 *J.*

remember what happened, or whose bodies appear to be enjoying the attack, are “perfect victims” for men hoping to escape responsibility for their actions. Drugged victims are often told that charges are impossible to prove, on campus or in the criminal justice system, because forensic tests are usually negative given that rape drugs dissipate quickly in blood and urine.<sup>115</sup> Victims are not advised that drugs *never* dissipate in hair, and that reputable labs can determine, even many weeks after an incident, that a significant dose of specific drugs entered a victim’s body at a particular moment in time.<sup>116</sup>

Even without forensic proof of drugging, schools are free to conclude that drugging occurred based on physical symptoms, behavioral evidence, and memory deficits, yet *Missoula* is awkwardly silent on this important issue despite the high prevalence of drugs as a weapon of rape on campus.<sup>117</sup> In fact, Krakauer discusses one case involving a woman named “Kelsey Belnap” who was gang-raped by four football players, and whose symptoms strongly indicate drugging,<sup>118</sup> yet Krakauer says nothing about drugs.

When Krakauer is not silent, the words he uses, linguistically speaking, are at times excellent. For example, he appropriately uses anatomical words and phrases such as, “stabbing his fingers painfully into her vagina,”<sup>119</sup> and, “withdrew his penis from Washburn’s vagina and ejaculated. . . .”<sup>120</sup> Other times his word choice is oddly erotic as he describes offenses using terms

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PSYCHOACTIVE DRUGS 1 (2006).

115. ADAM NEGRUSZ, DETECTION OF “DATE-RAPE” DRUGS IN HAIR AND URINE, FINAL REPORT (2003), <https://www.ncjrs.gov/pdffiles1/nij/grants/201894.pdf>; Denise Ryan, *Hair test portends dramatic shift in date-rape trials: toxicologist*, VANCOUVER SUN (Nov. 4, 2010), [http://endingviolence.org/wp-content/uploads/2014/03/portends\\_dramatic\\_shift\\_in\\_date-rape\\_trials.pdf](http://endingviolence.org/wp-content/uploads/2014/03/portends_dramatic_shift_in_date-rape_trials.pdf).

116. P. Kintz et al., *Testing for GHB in hair by GC/MS/MS after a single exposure. Application to document sexual assault*, 48 J. FORENSIC SCI. 195 (2003).

117. DEAN G. KILPATRICK ET AL., DRUG-FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL STUDY (July 2007), *available at* <https://www.ncjrs.gov/pdffiles1/noj/grants/219181.pdf>.

118. KRAKAUER, *supra* note 1, at 38–44. The victim’s state of mind is described variously as follows: “. . . my body was like a limp noodle. I could not move;” “drifted ‘in and out of awareness;” “blacked out throughout pretty much the entire thing;” “remember bits and pieces of what happened;” “. . . began to drift up to the surface of unconsciousness,” after which, “the first thing she recalled was being ‘in the bathroom, throwing up in the bathtub. . . .” These classic signs of drugging were reported to medical and law enforcement officials only a few hours later, yet, (if Krakauer’s silence on the topic is any indication) not a single person in the medical or law enforcement community thought to test the victim’s blood or urine for the presence of rape drugs. If a victim could sue for forensic malpractice, Belnap would have a very strong case against the sexual assault nurse and the police because she arrived at the emergency room well within the window of opportunity to test her blood and urine for rape drugs. (See note 95).

119. KRAKAUER, *supra* note 1, at 104.

120. *Id.* at 153.

such as, “came in his hand,”<sup>121</sup> “thrust,”<sup>122</sup> “climax,”<sup>123</sup> and “fellatio.”<sup>124</sup> In one particularly inapt use of language, he writes that a rape kit examination is an “exceedingly humiliating experience,”<sup>125</sup> which is awkward because “humiliating” connotes that victims feel shame, and a lack of self-respect. Yet a woman’s vagina being examined by a medical professional is no more “humiliating” than when a man’s prostate is being examined for signs of cancer. It may be “re-traumatizing” for a victim when she is being examined vaginally in the aftermath of rape, and this should not be taken lightly, but Krakauer is wrong to imply that a victim should feel shame, or a loss of self-respect. It would have shown more compassion to imply that victims should feel strong and proud, not humiliated, when they submit to vaginal examinations in an effort to hold their attackers accountable.

In another part of the book, Krakauer again shows poor word choice when he cites an expert witness for the proposition that victims benefit psychologically from “retribution” against and “punishment” of the offender.<sup>126</sup> This claim, left undisputed, perpetuates the myth that women are vindictive. In fact, while punishment is certainly appropriate, some studies show that many victims want only peace and access to justice, not retribution, because being heard and being respected are more important than exacting punishment.<sup>127</sup>

As if to hammer home the myth that women have a disproportionate tendency toward malevolence, Krakauer cites several examples of false rape allegations, but not a single case where a guilty rapist’s false allegation of innocence caused a victim to suffer severe harm, such as quitting school, or committing suicide.<sup>128</sup> Krakauer actually opens *Missoula* with a line from

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121. *Id.*

122. *Id.* at 92, 94.

123. *Id.* at 257.

124. *Id.* at 105.

125. *Id.* at 18.

126. *Id.* at 237. Krakauer does include a lengthy quote from Dr. Judith Herman later in the book, in which Dr. Herman describes that victims want “acknowledgement and support,” and an “opportunity to tell their stories in their own way,” but this quote appears on page 268, nearly thirty pages later and in a context unrelated to the idea of retribution and vindictiveness, where Krakauer is discussing the distress victims endure during trial when forced to answer questions in a way that obfuscates the truth.

127. David Ford, *Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships*, 25 LAW & SOCIETY REVIEW 313 (1991); DAVID A. FORD & MARY J. REGOLI, THE INDIANAPOLIS DOMESTIC VIOLENCE PROSECUTION EXPERIMENT: FINAL REPORT (1993).

128. Petula Dvorak, *Stop blaming victims for sexual assaults on campus*, WASH. POST (Feb. 24, 2014), [https://www.washingtonpost.com/local/stop-blaming-victims-for-sexual-assaults-on-campus/2014/02/24/b88efb1e-9d8f-11e3-9ba6-800d1192d08b\\_story.html](https://www.washingtonpost.com/local/stop-blaming-victims-for-sexual-assaults-on-campus/2014/02/24/b88efb1e-9d8f-11e3-9ba6-800d1192d08b_story.html); Sophie S. Thomas, *Campus Police Chief Who Said Most Sexual Assaults ‘Aint Rape’ Is Back on Duty*, BROADLY (Nov. 13, 2015), [https://broadly.vice.com/en\\_us/article/campus-police-chief-who-said-most-sexual-](https://broadly.vice.com/en_us/article/campus-police-chief-who-said-most-sexual-)

an article on false rape accusations,<sup>129</sup> and while the article itself concludes that false claims are rare, the line he cites makes a more nuanced point, and as an opening sentence in a book on campus sexual assault, an equivocal sentence about false rape claims seems odd. If Krakauer really meant to debunk the myth that victims routinely lie about rape, he could have chosen a quote from one of the many articles that say something like: “the myth that women routinely lie about rape is itself a prolific lie.” But he did not, even though false reports of other crimes, such as auto theft, are much more common than false reports of rape,<sup>130</sup> and people who report car thefts are not subject to the same degree of public skepticism as rape victims.

Krakauer also fails to balance the length of his storytelling in the narrative accounts of the assaults he features in the heart of the book. For example, in one section where he writes about a case involving a victim named Cecilia Washburn and an accused student named Jordan Johnson, Krakauer dedicates three pages to the prosecutor’s opening statement,<sup>131</sup> and five and a half pages to the opening remarks of the defense.<sup>132</sup> At other places he seems more balanced in the number of pages used to describe the assaults, but overall, the ink scale favors the stories of accused offenders.

Maybe some of the book’s unfair biases can be blamed on the experts Krakauer relied on, who did not tell him things he needed to know. For example, Krakauer cites Rebecca Roe when explaining why the criminal justice system allows defense attorneys to make untrue statements in court with impunity, while prosecutors get in trouble for the same behavior.<sup>133</sup> Roe explains that the reason for the “double standard” is that if a prosecutor engages in misconduct and a defendant is convicted, the defense can appeal the conviction,<sup>134</sup> but when a defense attorney engages in the same misconduct, and a defendant is acquitted, the prosecution cannot appeal the acquittal because of the Fifth Amendment’s prohibition against double jeopardy. This is a correct statement in the sense that judges tolerate more misconduct from defense attorneys because they know there is little appellate court oversight to address whether a judge correctly handled such misconduct, but it is an incomplete explanation.

Prosecutors have tremendous authority to deprive individuals of liberty,

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assaults-aint-rape-is-back-on-duty.

129. David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318 (2010).

130. Donna Lyons & Anne Teigen, NATIONAL CONFERENCE OF STATE LEGISLATURES, *Auto Theft Prevention* (Dec. 2008), available at <http://www.ncsl.org/print/cj/autothftreport.pdf>.

131. KRAKAUER, *supra* note 1, at 255–58.

132. *Id.* at 259–64.

133. *Id.* at 266.

134. *Id.*

hence, their compliance with due process is essential as it ensures a proper balance between individual freedom and government power. Prosecutors who lie violate due process and face serious sanctions, as they should, including suppression of evidence and dismissal of charges. Similar sanctions are obviously not available to the prosecution when a defense attorney lies. This disparity has created for defense attorneys a kind of systemic permission to lie.<sup>135</sup> The code of professional conduct should be used to punish prosecutors *and* defense attorneys equally when they lie, but if there is to be a double standard, the code should bear down harder on defense attorneys precisely *because* they cannot face the same sanctions that prosecutors face for the same misconduct.

Krakauer does not see anything wrong with the way the criminal justice system favors offenders that cannot be chalked up to the sometimes painful realities of a process that values individual rights even at the expense of the fair treatment of victims. In a general sense, he is right. But on the issue of rape in particular, he is wrong. The criminal justice system imposes disproportionately unfair burdens on rape victims that are not mandated by the Constitution, and are not imposed on robbery victims, or victims of white-collar crime, or any other crimes.<sup>136</sup> Indeed, society fiercely protects, and makes heroes out of, people who do their civic duty and report crimes that they witness or suffer themselves, such as purse-snatching and drunk-driving. We would think it audacious and disrespectful to ask a citizen witness to a drunk driving accident to turn over their counseling files before being allowed to testify about what they saw.

Only rape victims are subjected to “special” burdens that impose needlessly on their lives, well-being and privacy, as a “price” for participating in the criminal justice system.<sup>137</sup> And while rape victims are made to bear “special” burdens, their attackers enjoy “special” benefits to which people accused of other crimes are not entitled. For example, accused rapists can force rape victims to reveal whether they have ever made a false allegation of rape<sup>138</sup> but accused robbers cannot force robbery victims to reveal whether they have ever made a false allegation of robbery. In a book that opens with a quotation about false rape allegations, you would think

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135. Krakauer appears to understand that defense lies are commonplace, as he states that “the system promotes chicanery, outright deceit, and other egregious misconduct. . .” *Id.* at 242. He’s right, but he then states, “In the adversarial system, . . . [d]ue process trumps honesty and ordinary justice.” *Id.* On this point Krakauer is wrong, and he should have emphasized not only that there is no due process right to lie, but also that defense lawyers who do so should be disbarred.

136. Wendy Murphy, *Gender Bias in the Criminal Justice System*, 20 HARVARD WOMEN’S L.J. 14 (1997).

137. MURPHY, *supra* note 7.

138. *See, e.g.*, *Commonwealth v. Bohannon*, 376 Mass. 90 (1978).

Krakauer might have pointed out this well-known injustice.<sup>139</sup>

Maybe Krakauer set out intentionally to write a fairly superficial book. If so, my critique is heavy-handed, though if he had spent just one paragraph saying something like, “all forms of targeted violence against students based on things like race, ethnicity, sex, sexual orientation, religion, disability, etc., should be addressed equitably, under the same civil rights policy,” I would have been less distraught about all the missing and misleading information in *Missoula*. But Krakauer allows the reader to remain ignorant about women’s civil rights, and to conclude, incorrectly, that violence against women on college campuses is no more a civil rights issue than the theft of a laptop.<sup>140</sup>

If there is new insight in *Missoula* it comes from the book’s focus on small town politics, and the almost creepy overvaluation of a third-tier school’s football program. Which is not to say that football does not matter—it does—even though some of us do not understand the allure, as was made embarrassingly clear to me a few years back when I gave a talk at the University of Alabama and my host glared at me when I asked the name of their mascot, and how their football team had done that year (they won the national championship). It is almost impossible for some people to believe that I did not know what a Nittany Lion was before the Penn State scandal, or that I thought Joe Paterno played for the NFL and died decades earlier. College sports is a big deal, and student athletes have significant value on campus. But the flip side of value is influence, which is why I see student athletes as having great potential to be effective leaders in sexual assault prevention, on campus and in the larger society.

I believe in the goodness of men and boys. Nobody is born a rapist, and most guys who do bad things to women are from “nice” families. Krakauer gets this point across very well when he writes about the glowing testimony of friends and teachers who support the accused students and sincerely did not believe they were capable of rape.<sup>141</sup> It is very difficult for some people to believe that a seemingly nice guy did something horrible, but, as Krakauer points out by wisely citing Dr. Judith Herman, it is much easier to disbelieve the victim.<sup>142</sup> Indeed, studies show that people subconsciously choose not to believe victims simply because it makes them feel better about the men in

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139. Brett Erin Applegate, *Prior (False?) Accusations: Reforming Rape Shields to Reflect the Dynamics of Sexual Assault*, 17 LEWIS & CLARK L. REV. 899, 907-10 (2013).

140. For example, Krakauer describes school officials as conducting “disciplinary investigations,” rather than “civil rights investigations,” and refers to the rules that prohibit violence against women as derived from the “Student Conduct Code” rather than “civil rights” laws. KRAKAUER, *supra* note 1, at 176-77.

141. *Id.* at 208-213, 219 *citing* a prosecutor’s observation that so many letters of support had been submitted on behalf of the perpetrator that, “you’d think we were talking about whether he should get the most valuable player award. . .”

142. *Id.* at 189-90.



their own lives.<sup>143</sup>

If Krakauer makes one point clear, it is that we are not reaching boys at a young enough age to interrupt whatever is making them believe, as men, that it is a good idea to impose themselves sexually on women. Talking about the issue more, with all the boys and girls we know, is a good first step. A high school football player recently knocked on my door, and asked if I would buy a discount card for local stores, as part of a fundraiser for the team. I told him I would, but only if he took a pledge to raise awareness about sexual assault and sexual harassment with his teammates, and only after he promised to tell his coach that he wanted the team to be leaders, and to be known on campus as the guys who want all relationships to be healthy and respectful. He looked at me funny, but he listened. And he said he would talk to his coach. So I bought a ticket. It is a start, especially in my town where, like most high schools, programming on dating violence, sexual assault and sexual harassment is nonexistent.

Girls also need guidance so they can better understand their rights, and they need the language to call what happens to them a “civil rights” injury so they can ask for and receive the best possible redress when sexual assault happens. Even ostensibly good ideas like anti-bullying laws are problematic because most bullying of girls is, in fact, sexual harassment.<sup>144</sup> Calling sexual harassment bullying is not only misleading, it renders invisible the very nature of sex-based offenses as civil rights problems for women and girls. It also causes victims to seek ineffective redress under toothless anti-bullying laws rather than highly enforceable, fully equitable, and serious civil rights laws, such as Title IX.

Krakauer had a chance to shine a light on many issues, but for the most part, he made things seem needlessly murky. He even clouded the truth on basic information like how widespread the problem of sexual assault really is. In one section for example, he bemoans the unreliability of data on reporting rates for sexual assault in the larger society,<sup>145</sup> but says nothing about sexual assault reporting rates on campus. And he never mentions that schools are mandated to count and report to oversight agencies all crimes and all civil rights violations, but that most schools go out of their way to mislabel and undercount the truth because they think parents are more likely to send their children to schools with low numbers.<sup>146</sup> In fact, parents these

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143. Daniel M Rempala & Frank J. Bernieri, *The Consideration of Rape: The Effect of Target Information Disparity on Judgments of Guilt*, 35 J. OF APPLIED SOCIAL PSYCHOL. 536 (2005).

144. Wendy Murphy, *Sexual Harassment and Title IX: What's Bullying Got To Do With It*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 305 (2011)

145. KRAKAUER, *supra* note 1, at xiii-xiv.

146. Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL., PUB. POL'Y & LAW 1 (2015), available at

days know that a school with low numbers could be less safe than a school with high numbers because high numbers are an indication that problems are not being swept under the rug. Of course, high numbers also mean high numbers, and notwithstanding the benefits of institutional transparency, high numbers are a problem, especially if they remain high year after year. Oddly low numbers, on the other hand, could mean a school has found a sneaky way to undercount the truth, but Krakauer does not touch the subject of strategic undercounting even though it is a pervasive problem that leads to an increase in incidence rates.<sup>147</sup>

Despite recognizing that underreporting in general is a major problem, Krakauer accepts at face value the claim that Missoula had 80 reported rapes over three years. He never says how many incidents were reported at the University of Montana during the same time period, or how many of the 80 were campus-related, but he points out that 80 is “about average” compared to similar places.<sup>148</sup> I assume he means 80 is average for “reported,” cases, rather than incidents that *actually occurred*, because 80 would be out of line with reality on the number of actual incidents. But he does not even point this out, or explain the difference between “reported” and “occurred,” and why the difference matters. Krakauer does recognize that measuring incidence rates is difficult,<sup>149</sup> but he does not explain that the primary reasons why victims do not report include fear of being blamed and shamed, and concern that it “isn’t worth it” because nothing meaningful will happen to the offender.<sup>150</sup> These fears are legitimate, but Krakauer does not connect the dots between victims’ reluctance and the millions of incidents of sexual violence perpetrated in the United States every year, from which only a small percentage are reported and prosecuted.<sup>151</sup> Krakauer instead declares, without support, that when a person is charged with rape, they “could be sent

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<http://www.apa.org/news/press/releases/2015/02/sexual-assaults.aspx>.

147. Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), [http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html?\\_r=0](http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html?_r=0); <https://publichealthwatch.wordpress.com/2014/04/13/crisis-response-what-are-americas-colleges-doing-to-address-sexual-assault-and-is-it-working/>; <http://www.theepochtimes.com/n3/1022107-reports-of-campus-sexual-violence-increase/>.

148. KRAKAUER, *supra* note 1, at 9.

149. KRAKAUER, *supra* note 1, at xiii.

150. Kelsey Ruane, *Sexual Violence on College Campuses: Individual Experience and Collective Silence Among Survivors*, JMU SCHOLARLY COMMONS (Mar. 2014), available at <http://commons.lib.jmu.edu/cgi/viewcontent.cgi?article=1002&context=madrush>.

151. See, REBECCA M. BOLEN & DIANA E.H. RUSSELL, THE EPIDEMIC OF RAPE AND CHILD SEXUAL ABUSE IN THE UNITED STATES 211 (2000) (stating that 40% of adults report being sexually victimized as children, which translates into an annual incidence rate in the many millions, yet as many as 85% of victims do not report the crime).

to prison for life.”<sup>152</sup> Such hyperbole has no place in a book like *Missoula* because a minute’s worth of research would have revealed to Krakauer that only 2-3% of offenders spend even one day behind bars, a number that has not changed in decades.<sup>153</sup> Data showing the pervasive failure of America’s criminal justice system to deter sexual violence through the tertiary effect of prosecution and punishment should have been highlighted in a book about rape and injustice, as should the fact that strict enforcement of Title IX offers victims a better chance at justice because it mandates *equitable* treatment. When *equity* is done, injustice is impossible.

As discussed at length above, one of the most important ways that Title IX’s guarantee of *equity* ensures justice for victims is that it forbids schools to presume the greater credibility of one student over the other, though such presumptions *are* permissible during criminal trials because of the presumption of innocence doctrine. Under civil rights laws on campus, by contrast, a presumption that favors offenders over victims is prohibited as *inequitable*. Likewise, characterizations such as “sexual assault” and “affirmative consent” are *inequitable* because they deprive victims of 100% authority over their bodies, and impose disproportionately unfair legal burdens in the redress of sex-based violence, compared to the redress of violence when it occurs “on the basis of” other protected class categories, such as race and national origin.

Krakauer has not a clue about why *equitable* credibility presumptions, like *equitable* definitions of offenses, *matter*. Indeed, he describes, without analysis, the case of one student who was ultimately found not responsible in a campus proceeding because he said he made a mistake about a victim’s non-consent.<sup>154</sup> Krakauer could have pointed out why allowing an offender’s alleged “misunderstanding” to trump a victim’s actual non-consent is *inequitable* under Title IX, but he did not address the issue at all. This passive approval of harmful legal standards occurs in other places, too, as when Krakauer writes at the outset of a gang-rape of a woman who was “too drunk to resist.”<sup>155</sup> Krakauer implies by such language that a woman has a legal

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152. KRAKAUER, *supra* note 1, at 225.

153. MAJORITY STAFF OF THE SENATE JUDICIARY COMMITTEE, *THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE* (1993), available at <http://library.niwap.org/wp-content/uploads/2015/VAWA-Lghist-SenateJudiciary-6.93.pdf> (only 2% of rapists see even one day behind bars); see also *Reporting Rates, RAPE, ABUSE & INCEST NATIONAL NETWORK*, <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited May 23, 2016) (only 3% of rapists spend even one day behind bars and the majority of reported rapes are never prosecuted).

154. KRAKAUER, *supra* note 1, at 187, quoting a dean of students at the University of Montana who declared an accused student offender not responsible for an act of sexual violence, even after finding the victim credible, because it was “a case of differing perceptions and interpretations of the events in question.”

155. *Id.* at 7.

*duty* to resist, which is incorrect. There is no such duty for victims, under criminal or civil rights laws. There is only a duty on the part of all people not to rape.

Krakauer muddies the Title IX legal water even further by failing to point out that when a woman's capacity to decide whether sexual contact is "welcome" is diminished by an intoxicant, it is illegal for a person to have sexual contact with her body. This is not to say all drunk sex is a crime, though it may well be in theory, but then so is every incident of unreported underage drinking, unreported illegal possession of marijuana, etc. The important point that Krakauer misses is that when an individual lacks knowing, intelligent, and voluntary capacity to make a decision about whether sexual contact is "welcome," the one seeking to impose himself on that person's body bears a duty of restraint *and* a risk of punishment if he chooses to act. The "unwelcoming" receiver of harm has no duty to do anything and is considered vulnerable to, not liable for, the actions of another.

Although Krakauer shows some compassion for victims with diminished capacities, and an appreciation for why criminal law codes should not require proof of unconsciousness in order to prove rape of an incapacitated person,<sup>156</sup> he should have explained why Title IX's "unwelcomeness" standard is much fairer to victims with diminished capacities compared to standards of "non-consent" and even "affirmative consent." As discussed above, "unwelcomeness" asks only about the victim's subjective state of mind and capacity, while consent-based rules allow offenders' mistaken perceptions of a victim's incapacitation to override even an indisputably credible victim's report of total incapacitation.

Some argue that "unwelcomeness" is unfair to accused students because students can too easily lie about whether an act was "unwelcome." But students can just as easily lie about non-consent as "unwelcomeness," and valuing offenders' lies about "mistakes" does nothing to prevent malicious lies by victims about non-consent. Furthermore, officials have discretion to conclude that a student's report of "unwelcome" conduct is not sufficiently credible, by a preponderance of the evidence, to justify sanctions. Permitting a mistake defense adds nothing to a school's ability to conclude that unwelcomeness was not adequately established.

Policies that permit mistake defenses ignore the fact that offenders lie all the time. For this reason alone schools should preclude mistake defenses simply because they incentivize offenders to lie, while indulging the irrational view that an incapacitated victim can somehow be simultaneously incapable of self-protection, yet fully responsible for causing another person to "mistakenly" rape her body.

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156. *Id.* at 42-43.

Opponents of “unwelcomeness” object to the application of a subjective standard, yet ignore the fact that “unwelcomeness” is the established legal standard in all discrimination cases, and nobody ever complains that “unwelcomeness” is unfair when applied in the redress of racist and religious discrimination, etc. How can a legal standard be unfair only when the victim is female?

Consider this illustration: assume that a group of students is standing around making jokes about Jews, and one drunk Jewish student laughs in response, arguably indicating the joke was “welcome.” If one of the jokers then slaps the drunk Jewish student in the face while addressing him with an anti-Semitic epithet, the slapper cannot be vindicated in a campus civil rights proceeding by claiming that because the victim laughed at the joke, he mistakenly thought the Jewish victim welcomed the slap and wanted to be insulted with a religiously offensive epithet. If all the jokers say they thought the Jewish student welcomed the words and conduct, should school officials find that no civil rights violation occurred, even if the victim credibly reports that the slap and the epithet were unwelcome and offensive?

Surely some sincerely mistaken individuals in some cases should not be punished, and civil rights laws provide adequate protection against unfair punishment by requiring proof that an act was both subjectively “*unwelcome*,” and “*offensive*,” which includes an objective component.<sup>157</sup> This means that an unwelcome act might not lead to punishment at all if school officials determine that it does not rise to a level of offensive enough to merit a civil rights sanction. Finally, if schools wish to accord some degree of consideration to a truly sincere *mistaken* offender, they can do during the punishment phase, when assessing the degree of “offensiveness,” rather than watering down the subjective value of “unwelcomeness” itself. For incidents deemed low-level on the “offensiveness” scale because of a truly sincere mistake, a minor sanction might be appropriate, while the same type of offense, if committed by a student who lacks credible proof of having made a sincere mistake, would deserve harsher punishment.

Human behavior can be murky, sexual behavior especially so. And sometimes we do things we really do not want to do, including in sexual encounters. That is not rape, and it is not a Title IX violation either, even though one could argue about whether welcomeness can be present in the same mental space as reluctance. Ideally, welcomeness should be treated like pregnancy. You are either pregnant or you are not. You either welcomed the conduct, or you did not. An equivocal victim, by definition, is not a welcoming victim and an observer’s mistaken opinion about whether a woman is pregnant no more causes actual pregnancy than does a mistaken

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157. OFFICE FOR CIV. RTS, U.S. DEP’T OF EDUC., *Sexual Harassment: It’s Not Academic* (Sept. 2008), available at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html>.

observer's opinion about welcomeness transform a woman's reluctance to desire.

Theoretical debates aside, the focus in *Missoula* should have been on the ways that a woman's fundamental right to exclusive authority over her body is undermined by criminal laws and generic sexual misconduct policies on campus, precisely because neither regime requires the *equitable* treatment of victims. As repeatedly discussed throughout this article, only strict compliance with Title IX's equity mandate offers victims hope that justice is possible.

Krakauer does not seem to appreciate why the lack of fully equitable treatment for victims produces the very results he bemoans as unacceptable. Nor does he express much concern about institutional accountability even though institutions enjoy significant insulation from public accountability and oversight. He chalks up most of the injustices in the criminal justice system to a legitimate need to hold the government to a high burden before depriving a person of liberty. But Krakauer never points out that even in criminal cases where the rights of the accused are paramount, there is no constitutional right to cause gratuitous harm to victims. Nor does he acknowledge that in campus civil rights proceedings, the *victims'* rights predominate. Most importantly, Krakauer never says that schools cannot lawfully *choose* to treat *only* sex-based violence *inequitably*, while victimized students from other protected class categories enjoy fully *equitable* treatment. Krakauer should have stated repeatedly throughout *Missoula* that without fully equal treatment for victims, and strict enforcement of Title IX's equity mandate, women will never be safe or equal in education.

Sex discrimination in education, especially violent discrimination such as dating abuse and sexual assault, prevents women's equal access to education, promotes incivility, and destroys the integrity of the educational experience for all students. The very idea of unequal redress for the most severe expression of sex discrimination, is, itself uncivilized, and makes the following statement, crafted by me for use in this article, the most salient point by far:

Schools that address all forms of discrimination, harassment and violence under a single unified civil rights policy demonstrate the highest regard for women's equality, autonomy, and bodily integrity. Schools that segregate out violence against women for separate redress under second-class misconduct policies demonstrate profound disrespect for all women.

It is that simple, and in 350 pages, Krakauer does not see the point at all.