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## Risky Sexual Behavior -- The "Broken Windows" of Sexual Assault: A Proposal for Universities to Incorporate Targeted Intervention to Bridge the Gap Between Sexual Assault Prevention and Response

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# RISKY SEXUAL BEHAVIOR — THE “BROKEN WINDOWS” OF SEXUAL ASSAULT: A PROPOSAL FOR UNIVERSITIES TO INCORPORATE TARGETED INTERVENTION TO BRIDGE THE GAP BETWEEN SEXUAL ASSAULT PREVENTION AND RESPONSE

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\* Military Justice Attorney-Advisor, United States Air Force Academy; B.A. University of Notre Dame, *summa cum laude*, 2002; J.D. Notre Dame Law School, *magna cum laude*, 2005. The views expressed in this article do not necessarily reflect those of the United States Air Force Academy or the Department of Defense. Prior to my current position, I served 10 years on active duty as a Judge Advocate in the Air Force, in roles ranging from prosecuting attorney to senior defense counsel to Assistant Professor of Legal Studies at the USAF Academy. In those capacities, I have seen the damage caused by sexual misconduct through the eyes of victims whose cases I prosecuted, subjects whose cases I defended, and victims/subjects who were students in my classes. As a law student, I spent two years as an Assistant Rector, living with 180+ male undergraduates at the University of Notre Dame, where I witnessed college students struggle with alcohol and sexual boundaries. I would like to thank my colleagues at USAFA for their contributions, particularly Captain Joseph Groff whose comments helped inspire this topic. In addition, I thank my wife, Ashley, whose work as a Response to Intervention (RTI) Coordinator at the elementary-school level inspired the use of Targeted Intervention/Tertiary Prevention as a tool to prevent and address sexual misconduct.

## INTRODUCTION

In the last 20 years, concern about sexual assault prevention and response on college campuses has received tremendous attention, achieving a crescendo with former President Obama's "It's on Us" campaign, Title IX lawsuits by victims, the release of the documentary *The Hunting Ground*, and, most recently, reignited with the #metoo movement.<sup>1</sup> In response, colleges have been increasingly more engaged when it comes to their approach to sexual assault prevention – moving from seemingly short-sighted and impersonal approaches such as call boxes and self-defense classes to creative and community-focused paradigms in the form of “bystander-intervention” programs such as Green Dot®.<sup>2</sup>

On the response side, universities have built support systems for survivors with the help of their surrounding communities, but have often struggled to find the right balance of due process when attempting to hold offenders accountable.<sup>3</sup> Following Title IX lawsuits by victims and Department of Education (DoE) directives such as the 2011 Dear Colleague Letter, schools developed formal administrative hearings to evaluate allegations of sexual misconduct and hold offenders accountable.<sup>4</sup> However, universities have

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1. See Lena Felton, *How Colleges Foretold the #MeToo Movement*, ATLANTIC (Jan. 17, 2018), <https://www.theatlantic.com/education/archive/2018/01/how-colleges-foretold-the-metoo-movement/550613/> (explaining that the realization of the severity and extent of sexual assault on college campuses occurred several years prior to the #MeToo movement); Tyler Kingkade, *This is Why Every College is Talking About Bystander Intervention*, HUFFINGTON POST (Feb. 2, 2016, 3:06 PM), [https://www.huffingtonpost.com/entry/colleges-bystander-intervention\\_us\\_56abc134e4b0010e80ea021d](https://www.huffingtonpost.com/entry/colleges-bystander-intervention_us_56abc134e4b0010e80ea021d) (discussing the rise in popularity of bystander intervention programs).

2. See, e.g., Kingkade, *supra* note 2 (noting how bystander intervention programs empower students to step in and prevent sexual assault); Eilene Zimmerman, *Campuses Struggle with Approaches for Preventing Sexual Assault*, N.Y. TIMES (June 22, 2016), <https://www.nytimes.com/2016/06/23/education/campuses-struggle-with-approaches-for-preventing-sexual-assault.html> (citing data that Kentucky high schools where students received Green Dot program training found a decrease in the frequency of sexual assault by more than 50 percent).

3. See, e.g., *Doe v. University of Cincinnati*, 872 F.3d 393, 396, 399-401, 407 (6th Cir. 2017). See generally Marina N. Bolotnikova, *Sex and Due Process on Campus*, CURRENT AFFAIRS (Dec. 30, 2017), <https://www.currentaffairs.org/2017/12/sex-and-due-process-on-campus>; Sara Ganim & Nelli Black, *An imperfect process: How campuses deal with sexual assault*, CNN (Dec. 21, 2015), <https://www.cnn.com/2015/11/22/us/campus-sexual-assault-tribunals/index.html>.

4. See Sec'y for Civil Rights, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., *Dear Colleague Letter: Sexual Violence 1*, 11-12 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (applying Title IX to sexual violence and providing procedural guidance on equitable hearings for accused and accusing parties); Lindsay L. Rodman, *Fostering Constructive Dialogue on Military Sexual Assault*, 69

now found themselves in a quagmire because the more aggressively they attempt to address survivors' needs and protect potential victims, the more likely they are to be criticized and sued by the accused.<sup>5</sup> In fact, the recent rescission of the 2011 DoE Dear Colleague Letter and issuance of temporary guidelines giving more due process to the accused and recommending a heightened standard of proof to find offenders responsible of sexual misconduct demonstrate the continued discord surrounding this issue.<sup>6</sup> This discord has also impacted the Department of Defense (DoD).<sup>7</sup> In my role at the United States Air Force Academy (USAFA), I have responded to inquiries from Congress and media outlets on both sides of the issue. On one hand, the media, advocacy groups, and Congress have criticized USAFA (and the military at-large) for not doing enough to combat sexual assault and hold possible offenders accountable.<sup>8</sup> On the other hand, those same entities

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JOINT FORCES Q. 25, 28 (2013) (listing alternative dispute resolution, disciplinary boards, and honor boards as a few of the mechanisms employed by colleges and universities to address sexual assault).

5. See Jake New, *Out of Balance*, INSIDE HIGHER EDUC. (Apr. 14, 2016), <https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault> (discussing due process concerns that arise when Universities address sexual assault); see also Doe, 872 F.3d at 396, 399-401, 407 (holding that suspended state university students' due process rights were violated because neither the student nor the Title IX hearing officers were permitted to ask questions of the alleged victim).

6. In 2011, the Department of Education (DoE) issued a Dear Colleague Letter, which issued guidance for appropriately responding to allegations of sexual assault, to university presidents. Among other things, the Letter included requirements to use a "preponderance of the evidence" standard of proof in hearings, to conduct administrative investigations and hearings regardless of whether criminal charges were pursued, and to grant a right of appeal to both accused students and victims. In 2017, the DoE rescinded the 2011 Letter and associated guidance, replacing it with temporary guidelines, which removed the requirement to allow a right of appeal for victims and encouraged schools to use a heightened "clear and convincing" standard of proof to find offenders responsible. See generally Sec'y for Civil Rights, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., *Dear Colleague Letter on Withdrawal of Sexual Violence Policies and Guidance*, 1-2 (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [hereinafter *Dear Colleague Letter on Withdrawal of Sexual Violence Policies and Guidance*]; Sec'y for Civil Rights, OFFICE FOR CIVIL RIGHTS, DEP'T OF EDUC., *Q&A on Campus Sexual Misconduct*, 14, 26 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [hereinafter *Q&A on Campus Sexual Misconduct*] (stating that the "preponderance of the evidence" standard may be employed by schools without violating Title IX).

7. See Rodman, *supra* note 5 at 26; Matthew Burris, *Thinking Slow About Sexual Assault in the Military* (Feb. 27, 2014) (unpublished manuscript) (available at SSRN) <http://dx.doi.org/10.2139/ssrn.2414494>.

8. See e.g., *Former Air Force prosecutor calls academy chief's response to sexual*

have criticized USAFA and the military for speaking out too strongly against sexual assault, to the detriment of the accused's due process.<sup>9</sup>

Meanwhile, despite these efforts over the last decade, the prevalence of sexual assault remains fairly stagnant -- nearly one in four female students are still sexually assaulted during their time on campuses, suggesting that prevention and response programs are still inadequate.<sup>10</sup> Recognizing that these approaches have been inadequate (for alleged victims and alleged perpetrators), this Article advocates for a more proactive approach, specifically that universities and the military service academies (MSAs), should expand their policies to enable tertiary prevention in the form of targeted interventions. These interventions are designed to address lower-level "risky sexual behavior" (RSB) *before* conduct rises to the level of sexual assault thereby filling the gap between prevention and response.<sup>11</sup>

The suggestion to address RSB independent of the crime of sexual assault is not an entirely new concept. In 2005, Harvard Professors Ian Ayres and Katherine Baker published an article, titled *A Separate Crime of Reckless Sex*, in the University of Chicago Law Review, in which they advocated for states to criminalize "reckless sex" in an effort to reduce acquaintance rape and the spread of sexually transmitted infections (STIs).<sup>12</sup> They advocated

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*assault investigation "pathetic"*, CBSNEWS.COM, Dec. 13, 2017, <https://www.cbsnews.com/news/air-force-academy-sexual-assault-investigation-former-prosecutor-don-christensen/>; *Overview of The Annual Report on Sexual Harassment and Violence at the Military Service Academies*, HOUSE ARMED SERV. COMM. (May 2, 2017), <https://armedservices.house.gov/legislation/hearings/overview-annual-report-sexual-harassment-and-violence-military-service>. In addition to these two publicized examples, anecdotally in my current position I have responded to over a dozen Congressional staffs and multiple media queries concerning the military's handling of sexual assault cases.

9. See e.g., *As Military Combats Rape, the Accused Become Collateral Damage*, REAL CLEAR INVESTIGATIONS, [https://www.realclearinvestigations.com/articles/2017/04/22/as\\_military\\_combats\\_rape\\_some\\_accused\\_are\\_collateral\\_damage.html](https://www.realclearinvestigations.com/articles/2017/04/22/as_military_combats_rape_some_accused_are_collateral_damage.html) (last visited Apr. 10, 2018); Reggie D. Yager, *What's Missing from Sexual Assault Prevention and Response* (Apr. 22, 2015) (unpublished manuscript) (available at SSRN) <https://ssrn.com/abstract=2697788>. Although less common, anecdotally, I have also responded to queries from Congressional staffs concerned that an accused constituent was not provided sufficient due process.

10. Tovia Smith, *Massive Survey Confirms Prevalence of Sexual Assault on Campus*, NPR: ALL THINGS CONSIDERED (Sept. 21, 2015, 4:35 PM), <https://www.npr.org/2015/09/21/442308356/massive-survey-confirms-prevalence-of-sexual-assault-on-campus> (summarizing a survey of 27 campuses that revealed 23% of undergraduate females have experienced some form of sexual assault).

11. See *infra* Part III (emphasis added).

12. See Ian Ayres & Katherine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599, 601-02 (2005).

the creation of a misdemeanor-level offense, in which a defendant would be guilty of reckless sexual conduct if the defendant had a first-time sexual encounter with another person without using a condom.<sup>13</sup> Consent to unprotected sex would be an affirmative defense, which would have to be proven by the defendant.<sup>14</sup> The proposed law was premised on empirical research suggesting that unprotected first time sexual encounters greatly increase the risk of STIs and acquaintance rape.<sup>15</sup> While their article was sharply criticized by some scholars as overbroad, given that it sought to punish the "morally innocent," critics nonetheless applauded the proposal's goals as "admirable."<sup>16</sup> In that regard, while Ayres and Baker's proposal may be flawed in the context of a criminal law, the underlying concept, to proactively address RSBs and harmful attitudes that lead to sexual assault, might be a key part of the solution that many colleges desperately seek.<sup>17</sup>

The focus on lower-level behaviors as a means to address and prevent more serious offenses is also not a new concept. Decades before Ayres and Baker proposed the crime of "reckless sex" to combat the more serious issues, two sociologists recognized the importance of addressing "low-level" disorder in neighborhoods in an attempt to reduce more serious crimes.<sup>18</sup> In 1982, James Q. Wilson and George L. Kelling developed the controversial "Broken Windows" theory in response to significant increases in crime in urban areas during the 1970s and 1980s.<sup>19</sup> The approach focused on addressing what were traditionally viewed as low-level crimes (i.e. graffiti and panhandling).<sup>20</sup> Wilson and Kelling suggested that "untended" behavior (e.g., broken windows) led to the breakdown of community control and thus

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13. *See id.* at 601.

14. *See id.* (noting that the defendant must establish such defense by a preponderance of the evidence).

15. *See id.* at 602, 609-10 (stating that unprotected first time sexual encounters have a dramatic effect on the spreading of STIs).

16. Kimberly Kessler Ferzan, *A Reckless Response to Rape: A Reply to Ayres and Baker*, 39 U.C. DAVIS L. REV. 637, 641 (2006) (elaborating that while admirable, the proposal is "morally and constitutionally impermissible").

17. *See, e.g., id.* at 641 (describing Ayres and Baker's emphasis on the use of communication to prevent rape as a novel approach to sexual assault); Lisa T. McElroy, *Sex On The Brain: Adolescent Psychosocial Science And Sanctions For Risky Sex*, 34 N.Y.U. REV. L. & SOC. CHANGE 708, 726-27 (2010) (mentioning that beneficially increasing communication between sexual partners can improve health outcomes).

18. *See generally* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.

19. *See id.*

20. *See id.*

an increase in more serious crimes.<sup>21</sup> They proposed that police focus on lower-level and/or quality of life offenses to enhance community control which would eventually reduce more serious offenses.<sup>22</sup> The “Broken Windows” theory, like Ayres and Baker’s proposal, was and still is divisive and controversial, but some still credit (in varying degrees) New York City’s significant reduction in crime in recent decades to the theory’s underlying principles.<sup>23</sup> In the same vein, this Article suggests that universities should shift their focus further to the left side of the sexual misconduct spectrum to focus on areas such as sexual harassment and RSB to address actions that correlate to incidence of sexual assault.<sup>24</sup> The area of focus would be areas labeled sexual harassment and the left side of the “sexual assault” section in the following “Continuum of Harm” chart, commonly used in Department of Defense sexual assault prevention briefings.<sup>25</sup>

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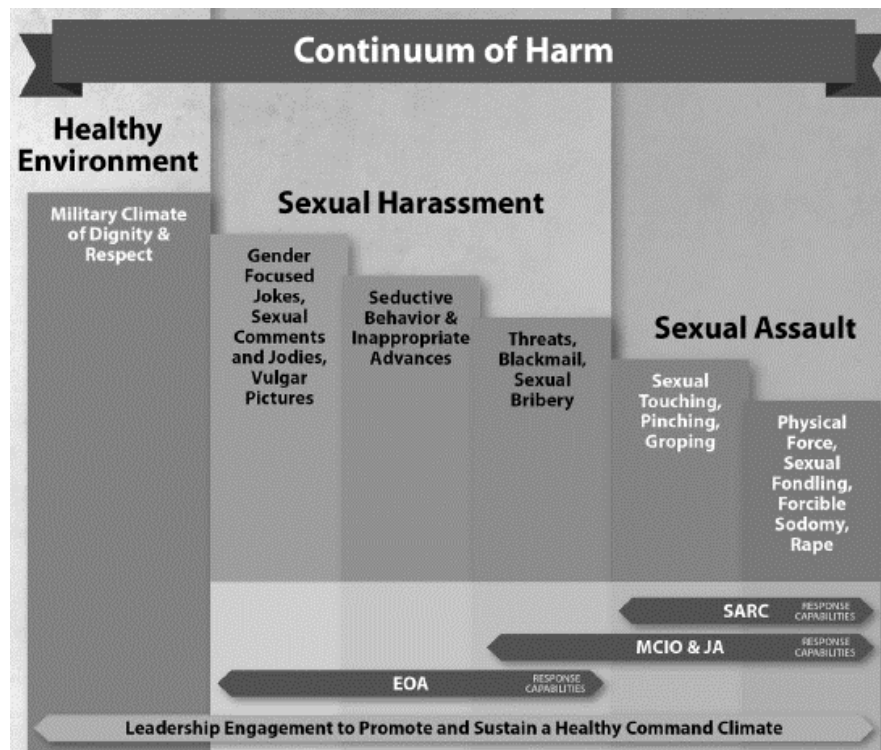
21. *See id.*

22. *See id.*

23. *See generally Broken Windows Policing*, CTR. FOR EVIDENCE-BASED CRIM. POL’Y, [cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/broken-windows-policing](http://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/broken-windows-policing) (last visited March 12, 2018) (providing a short summary of studies on the effectiveness of “broken windows” policing).

24. *See infra* Part II; Part III.

25. Mark Thompson, *Military’s War on Sexual Assault Proves Slow Going*, TIME (Dec. 4, 2014), <http://time.com/3618348/pentagon-sexual-assault-military/> (using to chart in Figure 1 to illustrate how varying degrees of inappropriate sexual behavior is addressed by the military).



However, unlike the proposals by Ayres and Wilson, which focused on criminal law as the enforcement mechanism, I argue that universities should address these behaviors through a targeted intervention or tertiary prevention model focused on addressing RSB behaviors through education and counseling programs, similar to those programs already in place at universities for irresponsible alcohol use and academic struggles, among others.<sup>26</sup> Then, only if the individual's response to intervention fails, universities may pursue additional administrative disciplinary means (e.g., probation, suspension, and disenrollment).<sup>27</sup> Obviously, the existing discipline and criminal systems would still be used to address more egregious and blatant behaviors, as well as criminal offenses such as sexual assault and rape.

Anecdotally, the inspiration for this Article originated from a conversation that occurred years ago with a junior attorney in which we expressed frustration at the limits of the military justice system's ability to adequately address the disturbing, yet legal, behavior of an individual initially accused

26. See *infra* Part III.

27. See *infra* Part II; Part V.



of sexual assault. In that particular case, as with many sexual assault cases, the limited evidence would have made proving the case beyond a reasonable doubt incredibly difficult. Despite not being convinced (or able to prove) that the accused actually committed a sexual assault, based on the legal definition and the available evidence, it was clear that the accused demonstrated troubling judgment preceding and during the sexual encounter.<sup>28</sup> Based on the accused's aggressive actions with a new partner, it was no surprise that the encounter was rife with issues of consent, as well as physical and emotional injuries to the victim. As we discussed the case among attorneys and administrators, everyone scratched their heads wondering how to address the individual's behavior.

I vividly recall my colleague wondering out loud while in my office – “Isn't there something we can do about his poor judgment?” Our primary concern was that if there was nothing we could do to address his poor judgment, there would be a high likelihood that this situation might present itself again, or worse -- that his behavior would escalate. Undoubtedly, the traditional disciplinary and justice systems would not only prove inadequate to resolve this case in light of the alleged victim's expressed consent, but would likely be counter-productive since the accused might view any vindication in the traditional system as an acknowledgment that his actions were innocent. My colleague then blurted out, “It certainly isn't sexual assault, but his behavior was reckless,” to which I responded, “Maybe we need a policy addressing ‘reckless sex.’” At that point, we had no idea how “reckless sex” would be defined and had no idea that a similar concept had suggested by Ayres and Baker a decade earlier. Nevertheless, we both agreed that in our combined experience, we had come across plenty of instances in which individuals could not and should not have been held criminally responsible for sexual assault, but still exhibited behavior worthy of being addressed in some manner. In the context of a college environment and the military, such a policy seemed to be a no-brainer, so much so that I was certain that universities must have already had something in place to address such behavior as they have similar policies for misuse of alcohol.

This Article will begin by examining the notion of RSB, to include factors that should be considered in evaluating what behaviors should be considered “risky.”<sup>29</sup> In addition, I will provide a proposed policy to be used by

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28. The primary evidentiary issue in this case was the fact that the alleged victim admitted to multiple individuals that she expressly consented to the accused's behavior, despite thinking to herself during the incident that she was not interested in the sexual act. More details of this case will be discussed subsequently in this Article. *See infra* Part V.

29. *See infra* Part II.

universities along with research-based justifications for the various factors that should constitute RSB.<sup>30</sup> In Part III, I will address the rationale for instituting a policy addressing RSB, and in Part IV provide a framework for how such a policy would operate in a university-setting.<sup>31</sup> Part V seeks to preemptively address the various concerns about such a policy, based on the criticisms previously expressed in response to "Broken Windows" and the criminalization of "reckless sex."<sup>32</sup> Finally, in Part VI, I argue that such a policy is uniquely suited to the military and more specifically military service academies (MSAs) in addition to the broader application to universities.<sup>33</sup>

### I. WHAT IS "RISKY SEXUAL BEHAVIOR?"

In their 2005 article, Ayres and Baker defined "reckless sex" as unprotected sex with a first-time partner.<sup>34</sup> Similarly, in her article *Alcohol Use and Risky Sexual Behavior among College Students and Youth: Evaluating the Evidence*, Dr. M. Lynne Cooper defined "risky sexual behavior" as "any behavior that increases the probability of negative consequences associated with sexual contact, including AIDS or other sexually transmitted diseases (STDs) and unplanned pregnancy."<sup>35</sup> Dr. Cooper further divided these behaviors into two broad categories: "(1) indiscriminate behaviors, including having multiple partners; having risky, casual or unknown partners; and failure to discuss risk topics prior to intercourse and (2) failure to take protective actions, such as use of condoms and birth control."<sup>36</sup> With regard to the role of alcohol, Cooper noted that the combination of alcohol and the decision to engage in sex can be viewed as the "ultimate root cause of sexual risk taking."<sup>37</sup>

As previously discussed, the primary purpose of Ayres and Baker's proposal was to reduce the spread of STIs and enable "easier" criminal prosecutions for sexual misconduct.<sup>38</sup> Because my focus is on deterring and

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30. *See infra* Part II.

31. *See infra* Part III; Part IV.

32. *See infra* Part V.

33. *See infra* Part VI.

34. *See* Ayres & Baker, *supra* note 13, at 601 (providing an illustrative example of "reckless sex" through Kobe Bryant's experience).

35. M. Lynne Cooper, *Alcohol Use and Risky Sexual Behavior Among College Students and Youth: Evaluating the Evidence*, 14 J. STUD. ON ALCOHOL 101, 101-02 (2002).

36. *Id.* at 102.

37. *Id.* (stating that alcohol is widely assumed to promote risky sexual behaviors).

38. *See* Ayres & Baker, *supra* note 13, at 644-45, 657 (explaining that the crime of

responding to a wider range of behavior through non-criminal means, however, my proposed definition of RSB is less black-and-white than that of Ayres and Baker and more in line with that of Cooper's. As a starting point, I propose universities consider the following policy in addition to existing sexual misconduct policies:

The University of X encourages its students to engage in healthy relationships—among peers, roommates, and intimate partners. Healthy relationships are built on mutual respect and effective communication and contribute to an environment conducive to fostering education and character development. Particularly in the intimate partner setting, certain behaviors have correlated with proven to place those involved at an increased risk for physical, emotional, and social harm and correlate with incidents of sexual assault. Those behaviors may include, but are not limited to: sexual acts with first-time intimate partners, engaging in sexual acts while impaired by alcohol or drugs, lack of communication about or use of safe-sex methods (e.g., condoms), and aggressive physical or emotional behavior during or as a means to engage in sexual acts. Students are encouraged to consider the implications of these behaviors in their intimate relationships and to avoid these behaviors. To the extent that the University becomes aware that a student's engagement in these behaviors has harmed that student or others, or put that student or others at risk of harm, the University may refer the individual to intervention services [specified by University]. Failure to respond to interventions as demonstrated by repeated engagement in these risky sexual behaviors may ultimately result in disciplinary actions.

In determining which behaviors should be specifically incorporated into the definition of RSB, I considered those factors that have been shown through research to correlate to a higher incidence of sexual assault and are well-recognized by both academics and government organizations as risk factors for sexual violence.<sup>39</sup> A more detailed justification for each of those factors follows. I emphasize that while one may disagree with the wording

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reckless sex will make it "truly abnormal" not to wear a condom, making it easier to punish those that do not).

39. See, e.g., *Sexual Violence: Risk & Protective Factors*, CTRS. FOR DISEASE CONTROL AND PREVENTION, [cdc.gov/violenceprevention/sexualviolence/riskprotectivefactors.html](https://www.cdc.gov/violenceprevention/sexualviolence/riskprotectivefactors.html) (last visited March 12, 2018) (listing the individual risk factors as well as the relationship, community and societal risk factors leading to sexual violence perpetration); Claudia A. Mellins et al., *Sexual Assault Incidents Among College Undergraduates: Prevalence and Factors Associated with Risk*, PLOS ONE (Nov. 8, 2017), <https://doi.org/10.1371/journal.pone.0186471> (citing binge drinking and "hook ups" as risk factors associated with experiencing sexual assault as a college student).

of the actual policy or with the inclusion or exclusion of a particular factor, the more important takeaway for readers is the need to focus on the risky behaviors and respond with some sort of targeted intervention to change those behaviors and underlying attitudes.

#### A. *First-Time Intimate Partners*

In their 2005 article, Ayres and Baker noted that “[t]he lion’s share of acquaintance rape (that is, nonstranger, nonrelative rape) occurs in unprotected first-time sexual encounters.”<sup>40</sup> They further elaborated that the “miscommunication, or lack of communication, that characterizes many acquaintance rapes can often be traced to recklessness,” observing that “recklessness can lead a man to complete the sexual act heedless of the consequences.”<sup>41</sup> For the purposes of their article, “first-time sexual encounter” referred to the “first time that two particular people have sexual intercourse.”<sup>42</sup> For the purposes of my proposed RSB policy, however, Ayres and Baker’s definition of “first-time sexual encounter” is unnecessarily broad. To characterize a first-time encounter using Ayres and Baker’s definition as reckless or risky would have the absurd result of characterizing as reckless a sexual encounter between a couple that had been together for 10 years and consciously restrained from having sex during those years. In that situation, the decision to have sex after years of conscious and deliberate abstinence is much less likely to be fraught with the perils of miscommunication that exists between two partners who just recently met.

Thus, for the purposes of the RSB, I define “first-time sexual encounter” as a sexual encounter (to include penetrative and non-penetrative sexual acts) between individuals who have had either no prior relationship (e.g., strangers) or those who had a relationship, but it did not involve a prior *intimate* relationship, defining “intimate” broadly ranging from kissing to sex. In essence, the definition is designed to address situations in which individuals go from “zero-to-sex” in a single encounter (colloquially referred to as a “one-night stand,” “casual sex,” or “random hook-up”). These relationships obviously fall on a spectrum -- ranging from a situation in which the individuals meet minutes before engaging in a first-time sexual encounter to situations in which the two individuals were long-time friends

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40. Ayres & Baker, *supra* note 13, at 602 (associating unprotected first time sexual encounters with coercion).

41. *Id.* at 620 (adding that reckless rapists, whether acquaintances or strangers, rarely use condoms).

42. *Id.* at 601 (distinguishing a “first-time sexual encounter” from a “subsequent sexual encounter,” which encompasses subsequent sexual intercourse between the same two people).

or acquaintances, but had never previously engaged in any intimate behavior.<sup>43</sup> Generally speaking, the level of risk would be significantly higher in the in a situation in which the individuals had never previously met before engaging in a sexual encounter.<sup>44</sup>

The notion that engaging in sexual activity with a first-time intimate partner increases the risk of sexual assault is supported by the most recent (2014) data available from the Federal Bureau of Investigation (FBI) considering college-age females, in which 76% of female students reported that their assault involved a non-intimate partner.<sup>45</sup> Although correlation does not necessarily mean causation, the data is consistent with notions of common sense. As Ayres and Baker noted, a large number of sexual assaults involve miscommunication—logically, the better you know someone and the more experience you have with them, the more opportunities you have to communicate, and the stronger communication they have, the better sense one would have concerning what one’s partner does or does not desire.<sup>46</sup> This Article is not suggesting that we return to the debunked assumption that most sexual assaults are “stranger danger” assaults. Rather, it recognizes that the common phrase “acquaintance rape” is more complex than it suggests and that the risk associated with having sex with an acquaintance is dependent upon the nature of the acquaintance relationship (intimate acquaintances vs. non-intimate acquaintances). In essence, this Article

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43. *Id.* at 602 n.10 (“Some researchers define casual sex as a ‘one night stand.’ Others define it as intercourse on the first meeting . . . Still others make the prior or later relationship between the two individuals irrelevant.” (citing Timothy Edgar and Mary Anne Fitzpatrick, *Expectations for Sexual Interaction: A Cognitive Test of the Sequencing of Sexual Communication Behaviors*, 5 HEALTH COMM. 239, 242 (1993) (defining a “casual sexual encounter” as “one in which two individuals meet for the first time and have sexual intercourse within a few hours”)); Jeffrey A. Simpson and Steven W. Gangestad, *Individual Differences in Sociosexuality: Evidence for Convergent and Discriminant Validity*, 60 J. PERSONALITY & SOC. PSYCHOL. 870, 870 (1991) (characterizing an “unrestricted sociosexual orientation” by three factors, two of which disregard either prior or later relationships: “sex without commitment” and “several different sexual partners in [a given] year”).

44. *See generally* Mellins, *supra* note 40 (discussing various factors that contribute to the greater risk associated with “hooking up”).

45. FED. BUREAU OF INVESTIGATION, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995-2013, 7 (1994) <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> (reporting that 24% of students [hereinafter FBI] (20% of non-students) were assaulted by an intimate partner, the remaining 76% of students (80% of non-students) were assaulted by a non-intimate partner (stranger, relative, or acquaintance)).

46. *See* Ayres & Baker, *supra* note 13, at 620-21 & n. 97 (explaining that miscommunication and misperception are less prevalent in intimate relationships).

argues that the relationships most rife with risk are not necessarily the relationships on the extremes (complete strangers and prior intimate partner), but those undefined relationships that lie somewhere in the middle.

Intuitively, non-prior intimate partner relationships are the most fraught with the risk of a lack of communication, especially given the subtle verbal and non-verbal cues common in sexual encounters. On the one hand, when engaging in sexual behavior with an individual with whom one has had some prior intimate relationship, one would likely have some familiarity with that individual's likes, dislikes, and non-verbals. In addition, the individuals would presumably be more comfortable communicating with each other. On the other hand, with either a stranger or a casual acquaintance, it would be much less likely for someone to either communicate or recognize the others' subtle verbal or non-verbal cues. For example, one might be hesitant to express discomfort with a stranger because they do not know how that stranger might respond. Similarly, one might also be more hesitant to express discomfort with a casual acquaintance, an individual whom you do not know all that well, but whom you will likely see again in the future and with whom you likely have some connective tissue (e.g. common friends, classes together). Again, you may not know the individual well enough to know how they would respond. In addition, with an acquaintance, the two individuals may be less likely to communicate openly and honestly because it is human nature to want people to like you and to value what they think of you; thus, in the early stage of a relationship, people are much less likely to do or say something that would "rock the boat." Essentially, a relationship with an acquaintance is similar to a "honeymoon" period, or in the context of group dynamics, the "forming stage" during which members of the group tend to avoid conflict as much as possible.<sup>47</sup> Further complicating this issue is a situation in which the acquaintance is someone to whom you are initially attracted. In that scenario, you are even less likely to do or say something that would jeopardize one's future prospects of a relationship especially when combined with the fact that women particularly are socialized to be "polite" in such situations rather than express pain or discomfort.<sup>48</sup>

In addition to the FBI research and the research cited in Ayres and Baker's

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47. See Bruce W. Tuckman, *Developmental Sequence in Small Groups*, 63 PSYCHOL. BULL. 384, 396 (1965) (defining the "forming" stage as the point when the groups "identify the boundaries of both interpersonal and task behaviors").

48. See, e.g., Sheryl Ubelacker, *Experts say socialization can affect how women deal with sexual assault*, CTV NEWS ATLANTIC (Feb. 11, 2016), <https://atlantic.ctvnews.ca/experts-say-socialization-can-affect-how-women-deal-with-sexual-assault-1.2773507> (discussing the phenomenon in which women continue to remain in contact with their assailants and abusers due to the way women are socialized).

article, an article published in November 2017 stated that “participation in more casual sexual encounters (‘hook-ups’)” was associated with increased risk for sexual assault.<sup>49</sup> Thus, there is little doubt that first-time sexual encounters with non-intimate partners are rife with risk for not only sexual assault, but all of the associated physical and psychological harms.<sup>50</sup> Although I certainly do not advocate for an end to one-night stands or casual sex, this factor is certainly one to be considered in identifying RSB and responding with targeted intervention.

### B. *Failure to Use or Communicate About Safe-Sex Methods*

The most obvious benefit to the use of a condom is a substantial decrease in the risk of *physical* harm (e.g., STIs) to either party, as well as a decreased risk of unplanned or unwanted pregnancy. In addition to these readily apparent physical consequences of failing to use a condom, Ayres and Baker highlighted a less intuitive benefit to condom/prophylactic use that may lead to a reduction in sexual assault prevalence. Specifically, they noted, “[t]he very act of stopping to put on a condom should increase deliberation and communication—the more deliberation and communication, the lesser the likelihood of acquaintance rape.”<sup>51</sup> They added, “[t]he message of our proposal is not necessarily to forgo one night stands, but rather to use a condom to communicate enough so that one can know one’s partner is consenting to unprotected sex.”<sup>52</sup> Logically, this concept makes sense for several reasons. First, as noted by Ayres and Baker, the mere act of retrieving a condom and then putting it on (or stopping to discuss safe-sex or birth control) forces a “timeout” and creates an opportunity, even if brief, where the individuals are physically separated thus creating an opportunity for rational thought and communication to occur.<sup>53</sup> In some ways, this line of thinking is similar to the Supreme Court’s rationale in *Miranda v. Arizona*, in which the Court required police to read a suspect his rights when in custody, noting that a rights advisement forced a break in the coercive nature of an interrogation and served to level the playing field between the accused

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49. Mellins, *supra* note 40.

50. *Cf.* Ayres & Baker, *supra* note 13, at 602, 609-10; U.S. DEPT. OF JUST., *supra* note 38; Mellins, *supra* note 40.

51. Ayres & Baker, *supra* note 13, at 602-03 (describing how criminalizing the non-use of condoms will discourage the miscommunication that leads to confusion regarding consent).

52. *Id.* at 603.

53. *Id.* at 602-03, 636 (resulting in improved communication between the man and woman regarding whether sex is wanted or not).

and police.<sup>54</sup> In the same vein, the mere act of stopping to put on a condom creates a break in a visceral and sexually-charged environment to allow for a “cooling of the minds” and a less-charged opportunity for the parties to consider the implications of their actions and communicate with each other. In addition, particularly for the more submissive partner, such an act also serves to “level the playing field” in situations in which there may be a power imbalance or when on individual is more aggressive.

Again, this intuitive notion is supported by empirical data.<sup>55</sup> Research by Dr. Kelly Cue Davis strongly suggests a correlation between non-condom use and sexual assault, or at the very least attitudes that may increase risk of sexual assault perpetration.<sup>56</sup> “A survey of young men recruited from an urban community health center found that men who had committed intimate partner violence were more likely to forgo a condom, or to use condoms inconsistently during vaginal and anal sexual intercourse; in fact, many had forced sexual intercourse without a condom within the past year”<sup>57</sup> In addition, Davis found that “perpetrator alcohol consumption and condom nonuse were significantly globally correlated for forcible rape: [t]he more frequently men drank prior to or during forcible rape acts, the greater their frequency of not using a condom during these acts.”<sup>58</sup> However, Davis noted, that “for forcible rape, condom nonuse was more likely than expected even in situations that did not involve alcohol.”<sup>59</sup> She subsequently cited various studies evidencing the association between non-condom usage and coercive and forceful tactics prior to and during sexual acts.<sup>60</sup> In fact,

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54. *Miranda v. Arizona*, 384 U.S. 436, 444, 456-57 (1966).

55. Kelly Cue Davis et al., *Men’s Alcohol Intoxication and Condom Use During Sexual Assault Perpetration*, 27 J. INTERPERSONAL VIOLENCE 2790, 2791, 2796, 2799 (2012) [hereinafter *Men’s Alcohol Intoxication*] (assessing the association between alcohol consumption and condom use during penetrative sexual assault acts by young adult men); Kelly Cue Davis et al., *The Use of Alcohol and Condoms During Sexual Assault*, 2 AM. J. MEN’S HEALTH 281, 281-82 (2008) [hereinafter *The Use of Alcohol*] (assessing the frequency of sexual assault perpetration, alcohol use, and condom use during sexual assault in a community sample of young, heterosexual male social drinkers).

56. *Men’s Alcohol Intoxication*, *supra* note 56, at 2791, 2796, 2799 (reporting that condoms were not used in 70% of penetrative sexual assaults); *The Use of Alcohol*, *supra* note 56, at 281-82 (stating that 41.2% of sexual assault perpetrators reported never having used a condom during sexually aggressive acts).

57. *The Use of Alcohol*, *supra* note 56, at 281-82 (comparing men who committed intimate partner violence to men who had not).

58. *Men’s Alcohol Intoxication*, *supra* note 56, at 2792.

59. *Id.* at 2800.

60. *Id.*



according to Davis and various studies cited in her article, the lack of condom use is often connected to misogynistic attitudes, use of coercion, personality factors (e.g., sexual sensation seeking), which she identified as factors “useful for identifying men in most need of intervention efforts.”<sup>61</sup>

In addition, the use of a condom reduces not only the actual risk of physical harm, but also the anxiety, stress, and emotional harm that might be associated with having just had unprotected sex with someone and now not knowing whether it has resulted in contracting an STI or pregnancy.<sup>62</sup> Such emotional stress itself could cause days or weeks of fear and uncertainty. As with all of the factors, the interplay among them is key. As it relates to unprotected sex, the potential risk increases dramatically when the sexual encounter is with a first-time intimate partner, in that it is less likely that the individuals would have communicated about birth control or STIs, and/or that they would trust that the other is being honest about their sexual/medical history.<sup>63</sup> Thus the risk of both physical and emotional harm increases substantially when unprotected sex occurs between first-time intimate partners.

Consequently, although there may certainly be debate concerning whether non-condom usage is a necessary cause of or contributing factor to sexual assault, there is little doubt that a correlation exists and, more importantly, that one’s risky decision to not use or discuss the use of a condom (or other prophylactic) may be indicative of unhealthy/risky attitudes that would warrant a targeted intervention, especially if combined with other RSB factors.<sup>64</sup>

### *C. Engaging in Sexual Act While in an Altered State-of-Mind (Sex + Drugs/Alcohol)*

A significant amount of research has been conducted concerning the dangerous combination of sex and alcohol consumption.<sup>65</sup> In summary, the

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61. *Id.* at 2800-001.

62. *Cf.* Ayres & Baker, *supra* note 13, at 604-05, 617-18, 636 (making clear that the use of a condom will not, however, eliminate the emotional harm associated with rape).

63. *Cf. id.* at 617-18 (noting “deep parallels between the physical and emotional harms of reckless sex, and that unprotected first-time sexual encounters play a crucial role in the incidence of both.”).

64. *See The Use of Alcohol, supra* note 56, at 281-82.

65. *See* Christine Chambers Goodman, *Protecting the Party Girl: A New Approach for Evaluating Intoxicated Consent*, 2009 BYU. L. REV. 57, 80-81, 84-85 (2009) (outlining the effects of alcohol on women in understanding and handling sexual situations); Rodman, *supra* note 5, at 28 (reporting on the role of alcohol in military sexual assault); Valerie M. Ryan, *Intoxicating Encounters: Allocating Responsibility in*

combination presents a perilous scenario for the variety of reasons described below.<sup>66</sup> In addition, the presence of alcohol also impacts perception and memory thereby making it even more difficult to secure convictions in sexual assaults involving alcohol.<sup>67</sup> The varying ways in which alcohol affects men and women creates a “perfect storm” and a recipe for emotional, psychological, and physical harm in the days that follow.<sup>68</sup> For example, after consuming alcohol, females tend to have decreased risk aversion, increased risk of misperception, and a decreased ability to resist.<sup>69</sup> On the other hand, males tend to have increased aggression and increased risk of misunderstanding consent (a phenomenon referred to in the scientific community as “alcohol myopia”).<sup>70</sup> This combination not only increases the risk of sexual assault, but also situations in which signals become crossed because one individual, fueled by alcohol-induced sexual aggression, becomes blind to signals by the other individual (which may themselves be unclear given the impact of alcohol). While these observations by themselves may lead to the logical conclusion that the combination of alcohol and sex has a high likelihood of leading to sexual assault allegations, research also provides empirical data supporting this logical conclusion. In fact, half of all sexual-assault victims and perpetrators drink alcohol before an offense occurs.<sup>71</sup> Looking specifically at instances of acquaintance rape, alcohol is also often involved.<sup>72</sup> This connection between acquaintance rape and alcohol provides further support to not only considering alcohol or drugs as an RSB factor, but also supports considering whether individuals are first-time intimate partners as a factor. Paradoxically, however, despite the strong correlation between alcohol and sexual assault, many still struggle with how

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*the Law of Rape*, 40 CAL. W. L. REV. 407, 411-12 (2004) (summarizing research on sexual assault and the effect of alcohol to show the close relationship between the two).

66. See Goodman, *supra* note 66, at 80-81, 84-85; Rodman, *supra* note 5, at 28; Ryan, *supra* note 66, at 411-12.

67. See Rodman, *supra* note 5, at 28 (stating that the presence of alcohol often makes the victims’ version of the events less plausible, making a conviction more difficult to obtain).

68. See Goodman, *supra* note 66.

69. Goodman, *supra* note 66, at 80-81 (leading women to engage in more risky behavior or go further with a partner than she intended).

70. *Id.* at 84-85 (defining “alcohol myopia” as the inability to regulate conduct as to socially accepted behaviors).

71. See Ryan, *supra* note 66, at 411 (stating that alcohol is often a factor in violent crimes such as rape and sexual assault); Lori E. Shaw, *Title IX, Sexual Assault, and the Issue of Effective Consent: Blurred Lines—When Should “Yes” Mean “No”?*, 91 IND. L.J. 1363, 1372, 1394-95 (2016).

72. *Id.*

to address the role of alcohol both out of concern that it might be perceived as “victim blaming,” and difficulty drawing the line between society’s acceptable use of alcohol as a “social lubricant” and the unacceptable use of alcohol to incapacitate partners and facilitate sexual assault. Contributing to that blurred line is the fact that courts and legislatures still struggle with precisely defining “how drunk is too drunk?”<sup>73</sup>

The Center for Disease Control (CDC), Department of Justice (DoJ), and the overwhelming majority of academics researching sexual assault risk factors, particularly among college students, all identify alcohol-use, risky alcohol use, or binge drinking as risk factors for offenders and victims of sexual assault.<sup>74</sup> In fact, according to her 2008 review of literature, Davis noted that for decades, survey research indicated that, “a majority (55-74%) of acquaintance sexual assault incidents involves alcohol use by male perpetrators, female victims, or both.”<sup>75</sup> In her review, Davis cited several studies that supported the relationship between alcohol and sexual assault, including a studies which found: connections between alcohol consumption and dates that ended in sexual assault, significant correlation between alcohol-use by the perpetrator and dates involving sexual assault, admissions by sexually aggressive men indicating alcohol as a causal factor in rape, and a correlation between a perpetrator’s alcohol consumption and misperception of their partner’s sexual willingness.<sup>76</sup>

Although some of the studies reviewed by Dr. Davis are somewhat dated, current research continues to support the strong correlation between alcohol consumption and sexual assault.<sup>77</sup> Just as recently as November 2017, Mellins, et al. published their findings concerning sexual assault risk factors at Columbia University and Barnard College, finding that risky alcohol use and binge drinking increased risk of assault for male victims (penetrative offenses) and female victims (penetrative assault, attempted assault, and touching).<sup>78</sup>

The interesting aspect of alcohol or drug use as a factor affecting sexual

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73. Mellins, *supra* note 40.

74. See Mellins, *supra* note 40; *Sexual Violence: Risk & Protective Factors*, *supra* note 40; FBI, *supra* note 46, at 8 (47% of victims believed their offender used drugs or alcohol prior to their assault).

75. See *The Use of Alcohol*, *supra* note 56, at 282 (citing studies by Muehlenhard and Linton (1987); Testa and Livingston (1999)).

76. See *id.*

77. See Mellins, *supra* note 40 (observing that incapacitation due to alcohol use is one of the most prevalent perpetration methods).

78. See *id.* (reporting that around 50% of the sexual assaults reviewed involved alcohol).

assault prevalence is that this it is a compounding factor.<sup>79</sup> In other words, not only can alcohol or drug usage be an RSB factor by itself, but it increases the likelihood of occurrence for other RSBs. For example, an intoxicated individual is less likely to use a condom, more likely to engage in aggressive behavior, and more likely to engage in sex with a first-time intimate partner. Intoxication is related to both the occurrence of sexual assault and the occurrence of RSB, as studies have “consistently identified a global positive association between alcohol use and RSB,”<sup>80</sup> such as not using a condom with a partner with whose sexual history or potential infections one is not familiar.<sup>81</sup>

One concern about including the combination of drugs or alcohol and sex as an RSB factor (despite the strong correlation with sexual assault) would be the difficulty in defining what level of intoxication or impairment triggers RSB. As previously mentioned, and as will be discussed in further detail in Part III, legislatures, courts, and sexual assault prevention programs have long struggled to articulate the level of alcohol consumption that transforms alcohol from a social lubricant to a weapon used to perpetuate sexual assault.<sup>82</sup> For years, sexual assault training in the military taught that “one drink and you can’t consent.”<sup>83</sup> In my experience prosecuting and defending sexual assault cases in the military, I found that judges struggled to define vague terms such as “impairment” or “substantial incapacitation,” with some using the familiar .08 standard and others equating the level of impairment necessary to be considered physically or mentally incapacitated to insanity.<sup>84</sup> Eventually, the military appellate courts, like many civilian criminal courts,

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79. See *The Use of Alcohol*, *supra* note 56, at 282 (citing Cooper, 1992, 2002; Cook and Clark, 2005).

80. See *id.*

81. See *id.* (citing George and Stoner, 2000).

82. See *infra* Part III.

83. See *United States v. Newlan*, No. 201400409 (N.M.C.C.A. 2016) (“Put more plainly, mere impairment is no more the standard under Article 120(b)(3)(A), UCMJ, than the SAPR-perpetuated “one drink and you can’t consent” axiom is the standard. And litigants and military judges who fixate solely on the term “impairment” do so at their peril.”)

84. Cf. Teresa P. Scalzo, *Prosecuting Alcohol-Facilitated Sexual Assault* Am. Prosecutors Research Inst. 3 (2007); Rodman, *supra* note 5, at 28 (explaining how courts have used toxicology evidence to overturn convictions); Annys Shin, *Judge, Not Jury, to Decide Naval Academy Sexual Assault Case*, WASH. POST (Mar. 14, 2014), [https://www.washingtonpost.com/local/judge-not-jury-will-decide-naval-academy-sexual-assault-case/2014/03/14/763332d6-ab9e-11e3-adbc-888c8010c799\\_story.html?utm\\_term=.329027c54dc0](https://www.washingtonpost.com/local/judge-not-jury-will-decide-naval-academy-sexual-assault-case/2014/03/14/763332d6-ab9e-11e3-adbc-888c8010c799_story.html?utm_term=.329027c54dc0) (demonstrating a judge’s influence in determining the legal standard for “substantial incapacity”).

settled on a fairly narrow definition requiring a showing that the victim was either “lack[ing] the cognitive ability to appreciate the sexual conduct in question or [lacking] the physical or mental ability to make and to communicate a decision about whether they agreed to the conduct.”<sup>85</sup> Fortunately, given that RSB operates outside of the criminal system, which requires precise definitions to satisfy due process, it is not necessary to create some arbitrary dividing line. Administrators and prevention specialists can use a “totality of the circumstances” type test to determine which situations warrant an intervention – based on the combination of RSB factors, the impact on the individuals involved, intent of the individuals involved, etc.<sup>86</sup>

Based on the current research, it should be no surprise to anyone with experience in the field of sexual assault prevention and response that one of the primary risk factors for both victimization and perpetration is alcohol use. In addition, as indicated, alcohol is what I would categorize as a compounding factor given that it is positively connected as a cause of other risk factors, while it also negatively impacts the ability to appropriately investigate, prosecute or administer discipline given the evidentiary issues that arise from lack of memory, miscommunication, and alcohol myopia. Similar to the other factors, I am in no way suggesting that any sexual encounter involving alcohol is *per se* risky, nor am I suggesting that “drunk sex” is immoral or criminal. Rather, the use of alcohol combined with sex becomes risky when combined with other factors, when the behavior is consistently repeated, when the behavior results in physical or emotional harm, and when alcohol is used with the intent to obtain consent from someone who might not consent when sober. Those situations would warrant a targeted intervention with individuals involved to ensure that they understand the potential implications of both their risky alcohol use and RSB, as well as identifying root causes of their RSB.

#### D. Aggressive Behavior

As I previously alluded to in the Introduction, as an attorney in a prosecutor’s office, my team struggled with a case involving two individuals who had a first-time sexual encounter and led to one of the individuals alleging a sexual assault.<sup>87</sup> This case was unique for several reasons – first, unlike most acquaintance rape allegations, which have little to no physical

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85. United States v. Pease, 75. M.J. 180, 185 (C.A.A.F. 2016)

86. Cf. Goodman, *supra* note 66, at 94 (discussing the implementation of a totality of the circumstances test in determining whether silence is assent).

87. The details that follow have been altered to protect the privacy of both the complainant and accused in this particular case.

evidence, this case involved physical evidence of trauma. Second, the complainant told others that during the course of this first-time encounter with a friend, the friend began to get rough (e.g., biting, squeezing) and that since the complainant winced throughout the encounter, the friend asked on several occasions, "Are you sure this is okay?", to which the complainant responded something to the effect of, "Yes, that's just the face I make when I feel pleasure," thereby insinuating not only that the complainant consented to the sadistic and masochistic (S&M) behavior, but also that it was pleasurable. The complainant later told individuals, "I can't believe I told [friend] it was okay." The complainant reported the assault noting that although the complainant told her friend the behavior was okay, 1) it was not really wanted and 2) the friend should have known based on her body language that it was not actually consensual.

From a prosecutor's perspective, this allegation was incredibly difficult – on the one hand there was physical evidence of sexual violence, but on the other hand the complainant admittedly consented when asked by the accused.<sup>88</sup> Given the consent issue, our team determined that probable cause was lacking and that, ethically, we could not charge the accused with sexual assault. However, our team was left with an uneasy feeling that the accused would continue to engage in such aggressive behavior with first-time intimate partners. Films such as *Fifty Shades of Grey* and *Eyes Wide Shut* brought the S&M culture into the mainstream, but the risk of physical and emotional harm from engaging in such behavior, especially within the context of a brand-new relationship, is tremendous. In many ways, the story above was one of the factors which led me to explore the policy against RSB as a means to address similar behavior.

Unfortunately, this anecdote is not unique, nor is that particular young individual's approach to sex. In February 2015, a 19-year-old college student in Illinois, Mohammad Hossain, was charged with sexual assault after engaging in what began as a consensual sexual encounter, but then turned into non-consensual S&M.<sup>89</sup> According to media reports, Mr.

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88. From a victimology perspective, the complainant's response in this situation was completely understandable. However, the significant issues of proof prevented any criminal prosecution.

89. Steve Schmadeke, *Judge Throws Out Case Against UIC Student Charged with '50 Shades of Grey' Assault*, CHI. TRIB. (Mar. 20, 2015, 6:00 AM), <http://www.chicagotribune.com/news/local/breaking/ct-fifty-shades-of-grey-uic-sex-charge-met-0320-20150319-story.html> (describing how the encounter was consensual until the individual hit the victim with a belt); Kevin McSpadden, *Fifty Shades of Grey Inspired Student's Sexual Assault, Prosecutors Say*, TIME (Feb. 24, 2015), <http://time.com/3719978/> (explaining the individual intended to reenact a scene from a movie featuring bondage and sadomasochism).

Hossain and the victim were friends, but had been previously intimate.<sup>90</sup> The encounter began as consensual, but then Mr. Hossain proceeded to tie her to the bed, whip her with a belt and hit her with his fists.<sup>91</sup> The alleged victim reported that she repeatedly told him to stop.<sup>92</sup> Mr. Hossain admitted to the underlying acts, but stated that the encounter was consensual as the two were re-enacting scenes from the movie *Fifty Shades of Grey*.<sup>93</sup> Similar to my anecdote above, however, a judge found no probable cause existed following the preliminary hearing.<sup>94</sup> The judge asked the victim whether she had said anything to Mr. Hossain when he bound her wrists or while he assaulted her.<sup>95</sup> She answered “no” to both questions.<sup>96</sup> Following the hearing, Mr. Hossain made a statement to the media and was asked by the reporter whether he had learned anything from the experience.<sup>97</sup> Mr. Hossain responded that he had learned a lesson—that he had learned to be careful about whom he can trust.<sup>98</sup> His defense counsel stated, “It was two college students who were having a sexual encounter, and that’s all it was.”<sup>99</sup>

As was the case in the anecdote I shared, whether or not the behavior in question amounted to sexual assault, it demonstrates the high risk of engaging in such behavior with a fairly new acquaintance. In this situation, however, the two had prior intimate (even S&M) encounters.<sup>100</sup> That said, the severity of the behavior (e.g., whipping with a belt and hitting with fists) warrants a corresponding level of consent.<sup>101</sup> In other words, as Goodman noted in her article *Protecting the Party Girl: A New Approach for Evaluating Intoxicated Consent*, perhaps we should look at sexual misconduct on more of a sliding scale.<sup>102</sup> In her article, Goodman proposed

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90. See Schmadeke, *supra* note 90.

91. See *id.*

92. See *id.* (quoting the victim as saying, ‘No, stop,’ while shaking her head from side to side).

93. See McSpadden, *supra* note 90.

94. See Schmadeke, *supra* note 90.

95. See *id.*

96. See *id.*

97. See *id.*

98. See *id.*

99. See *id.*

100. See *id.*

101. Cf. *id.*

102. See Goodman, *supra* note 66, at 58-59, 89-90, 92-94 (proposing a sliding scale for the evaluation of whether a sexual act was consensual in acquaintance rapes when one or both of the parties have previously consumed alcohol). One could expand Goodman’s concept beyond simply sexual encounters involving alcohol, but to any

that as the number of drinks or level of intoxication of the alleged victim increases, so too should the appropriate level of explicit consent.<sup>103</sup> Using that model, as the riskiness of the activity increases (whether by means of alcohol consumption, aggression, etc.) so should the level of consent. Thus, on one side of the spectrum, it might be reasonable for an individual to lean in for a kiss with someone with whom he has had minimal prior contact, no prior intimate relationship, but whom he believes to have demonstrated mutual interest. In that situation, if the male were to have misinterpreted the female's level of interest, which would certainly create an awkward situation, but the potential harm would likely be *de minimis*. Thus, given the very low risk of harm, engaging in the behavior based on implied consent would not necessarily be considered risky or even unreasonable depending on the specific circumstances. On the other end of the spectrum, imagine the scenario in which two individuals have had minimal or no prior intimate relationship, but the male decides that he wants to engage in violent S&M with the female, to include biting, bondage, and whipping with a belt. Even if the two had previously discussed S&M, the potential physical and emotional harm that would be inflicted if the female did not consent to or desire this type of contact warrants a correspondingly high level of certainty that the female is a willing participant, namely explicit verbal or written consent.<sup>104</sup>

In both of the scenarios discussed above, the accused seemingly experienced little to no formal repercussions for his risky behavior. In my experience as a defense counsel, I know that some accused individuals learn a valuable lesson simply from being accused and being subjected to the initiation of the criminal justice process, even if the process does not result in a conviction. However, for every vindicated accused who learns a lesson, there are others who perceive the vindication as evidence that they did *nothing* wrong, or even worse, that *they* were wronged by the alleged victim. The statement by Mr. Hossain that "he learned to be careful about whom he can trust" suggests that he might be one of the latter.<sup>105</sup> Furthermore, the

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sexual encounters.

103. *See id.*

104. *Cf.* Kate Horowitz, *An Essay on Consent, From a Woman Who Hosts Huge Sex Parties*, HUFFINGTON POST, [https://www.huffingtonpost.com/entry/consent-explained\\_us\\_57acdedce4b0e7935e04755a](https://www.huffingtonpost.com/entry/consent-explained_us_57acdedce4b0e7935e04755a) (last updated Aug. 17, 2016) (explaining the importance of enthusiastic consent and that once an individual loses the ability to revoke consent, there can be no consent).

105. *See* Schmadeke, *supra* note 90. As additional support that Mr. Hossain might have failed to appreciate his risky behavior, apparently immediately following the dismissal of his case in February 2015, he emailed naked photos of the alleged victim tied to his bed to four of his friends, which resulted in him being charged again in June



statement by his defense counsel, that “[i]t was two college students who were having a sexual encounter, and that’s all it was,” missed the mark and simply reinforced the risky behavior rather than discouraging it.<sup>106</sup> Although the DA was unable to pursue criminal charges for sexual assault, this opportunity would have been a ripe one for the university to intervene with targeted intervention and education to help address Mr. Hossain’s seemingly unhealthy and RSB.<sup>107</sup>

In addition to the physically aggressive behavior discussed above, research suggests that more subtle forms of aggression, including acceptance of violence, hostility toward the opposite sex, preference for impersonal sex, and coercive practices, are also connected to increased risk for perpetration of sexual violence.<sup>108</sup> In fact, in their study, Mellins et al. evaluated the role of verbal coercion in sexual assault perpetration.<sup>109</sup> Examples of verbal coercion included “telling lies, threatening to end the relationship, . . . continually verbally pressuring [a partner despite prior declinations], showing displeasure, criticizing sexuality or attractiveness, [and] getting angry.”<sup>110</sup> Mellins’ study found that the presence of coercion or criticism was the method of perpetration in 40% of assaults, second only to alcohol incapacitation, which was the method of perpetration in 50% of assaults.<sup>111</sup> Thus, physical aggression is but one type of behavior that would constitute “aggressive behavior” for the purpose of RSB, and it only serves as a symptom of attitudes that also increases risk of sexual assault.<sup>112</sup>

The role of more subtle aggression and coercion is particularly interesting

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2015 for sending the photos. He was again cleared, however, given that Illinois law only prohibits footage of “another person in that person’s house without that person’s consent.” See Jason Silverstein, *Ex-Student in Ill. ‘Fifty Shades’ Rape Case is Again Cleared*, N.Y. DAILY NEWS, <http://www.nydailynews.com/news/national/student-fifty-shades-rape-case-cleared-article-1.2259365> (last updated June 16, 2015, 10:31 AM).

106. See McSpadden, *supra* note 90.

107. Cf. Rodman, *supra* note 5, at 29 (exploring training and educational measures to prevent and address sexual assault in the military context).

108. See *Sexual Violence: Risk & Protective Factors*, *supra* note 40 (listing individual risk factors for perpetration of sexual assault including “coercive sexual fantasies” and “general aggressiveness and acceptance of violence”); Mellins, *supra* note 40.

109. See Mellins, *supra* note 40 (noting that verbal coercion occurs in 21-40% of sexual assaults, depending on the type of assault).

110. *Id.*

111. See *id.* (explaining that verbal coercion is a “powerful driver” of assault).

112. Cf. *Sexual Violence: Risk & Protective Factors*, *supra* note 40 (reporting emotional and family issues as factors contributing to sexual assault perpetration); Mellins, *supra* note 40 (describing both the physical and emotional factors that lead to sexual assault, such as economic precarity and race/ethnicity).

because, though it appears to be a fairly common contributor to allegations of sexual assault, subtle aggression is nearly impossible to prosecute because most states do not have a crime prohibiting the use of coercive tactics to obtain sex (or to obtain anything else for that matter).<sup>113</sup> Certainly, a threat of death or bodily harm in exchange for sex could be prosecuted in most jurisdictions, but the more subtle (yet still disturbing) types of coercion cited by Mellins et al. (e.g., threatening to end a relationship, telling lies, expressing anger or disappointment, and repeated requests despite declinations) would not be considered criminal despite all of those behaviors representing an unhealthy attitude toward sex and increased risk of eventually leading to sexual assault.<sup>114</sup> As a practitioner, I have found these cases the most difficult to explain to alleged victims.

The most common scenario in which this subtle coercion might occur is when victim reports that he or she was forced to engage in sex against his or her desires, but necessarily without consent. The victim often relays a situation in which the alleged offender pressured the victim into engaging in an unwanted sexual act or repeatedly requested that the victim perform an act until finally the victim reluctantly conceded – often times these scenarios are characteristic of a physically or emotionally abusive relationship involving isolation, dependency, etc. For that reason, the harm caused and the corresponding harm felt in these situations might be just as traumatizing as the harm caused by an incident that resulted in a criminal conviction for sexual assault or rape. As Rodman stated, “[i]f the accused caused harm to the victim, the harm is still real. The accused may even have done something morally wrong under the circumstances. But it may not have been a crime.”<sup>115</sup> With few exceptions (e.g., threats of violence, kidnapping, incapacitation, etc.), the law is only concerned with whether consent was obtained, not how it was obtained.<sup>116</sup> This scenario leaves victims struggling to understand why the alleged offender is left with no repercussions for

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113. See Matthew Burris, *Thinking Slow About Sexual Assault in the Military*, 23 *BUFF. J. GENDER L. & SOC. POL’Y* 21, 67 (2015) (stating that deception or coercion, without more, are generally not considered sexual assault or rape).

114. See Mellins, *supra* note 40 (explaining that a victim who was verbally coerced into providing consent, despite not actually wanting to give consent, would likely not have a claim for sexual assault); cf. Burris, *supra* note 114, at 67 (noting that in virtually every other legal arena outside of rape law, consent achieved through deception or coercion would not be considered true consent).

115. Rodman, *supra* note 5, at 30 (describing how an accused perpetrator may have acted negligent or reckless, but without malice, leaving the victim with no redress).

116. See, e.g. 18 U.S.C. § 875 (1996) (establishing a federal crime for interstate communication of extortion or threats); 18 U.S.C. § 1210 (2006) (establishing a federal crime for interstate kidnapping); see also Burris, *supra* note 114, at 67.

forcing the victim to engage in an unwanted sexual act. Even seasoned attorneys and sexual assault response professionals struggle to reconcile the difference between *unwanted* and *non-consensual* sexual acts. Matthew Burris discusses this particularly complex issue in his article *Thinking Slow About Sexual Assault in the Military*.<sup>117</sup>

Thus, while the role of coercion and sexually aggressive behavior undoubtedly increases the risk of sexual assault, those behaviors are traditionally not addressed in any manner other than through primary prevention and possibly education about bystander intervention.<sup>118</sup> In addition, the behaviors provide insight into attitudes about gender roles and sexuality that requires some level of intervention before those attitudes perpetuate and devolve.<sup>119</sup>

#### *E. Other Factors Considered*

Obviously, the list of factors discussed above is not an exclusive list of all factors that one might consider in defining RSB. In addition, the list does not fully account for all of the risk factors correlated to sexual assault perpetration or victimization. As I drafted and redrafted this Article, I struggled to determine which factors to include in the definition of RSB, and how RSB could best be defined by schools. However, the purpose of this Article is simply to provide a concise suggestion – should universities adopt an RSB policy, they are free to consider the wealth of research concerning sexual assault risk factors to modify or add to the list of RSB factors. Nevertheless, the following are some additional factors that might be worth considering along with my explanation for not including them in this proposal.

(1) *Viewing Pornography*. The correlation between exposure to pornography and sexually aggressive behavior is well-established.<sup>120</sup> In my experience, the correlation has anecdotal support as well. I have seen several cases in which the accused engaged in certain behaviors because that is what he saw in porn videos. Increasingly, young adults, particularly men, receive

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117. See Burris, *supra* note 114, at 65-66 (“Nonstranger rape cases . . . are marked by complexities and challenges unseen in any other type of violent crime . . . . Among these complexities and challenges is the often unrecognized distinction between non-consensual sex, which is a crime, and ‘unwanted sex,’ which is not.” (internal citations omitted)).

118. See Zimmerman, *supra* note 3 (describing the effectiveness of bystander intervention programs such as Green Dot in preventing sexual assault).

119. See *The Use of Alcohol*, *supra* note 56, at 281.

120. *Id.*

much of their sexual education from pornography.<sup>121</sup> Unfortunately, the sex education those men are receiving often emphasizes and glamorizes aggression, degradation, and violence – the very behaviors they should be avoiding.<sup>122</sup> Given the correlation between harmful attitudes and behaviors and pornography consumption, as well as the potential correlation between pornography consumption and sexual assault, I considered including “use of pornography” as a factor in evaluating RSB.<sup>123</sup> However, the factors I have employed are all characteristics of specific sexual behaviors, not underlying personality issues or habits. For example, while I have identified alcohol as a factor, alcohol use is only a relevant factor for an RSB policy to the extent that the sexual behavior involves alcohol use. Thus, while pornography may contribute to the factor of “sexual aggression,” it is the actual sexual aggression that should be recognized as an RSB factor, with pornography a root cause or contributing factor that can be further explored in a targeted intervention program. Thus, in any type of prevention or intervention program, university officials should pay particular attention to the role of pornography as a possible root cause of harmful attitudes and RSBs.

(2) *Lack of Prior Communication about Sexual Boundaries.* Another factor I considered was instances of sexual acts or contact in which the individuals involved failed to adequately communicate, thereby leading to a miscommunication between the individuals regarding the presence of consent or appropriate boundaries during the encounter. In other words, engaging in sexual acts without clear communication (verbal or nonverbal) is inherently risky. However, unlike the other factors, which are fairly clear and identifiable, this factor can be incredibly difficult to measure in any objective manner. In addition, this factor is the ultimate issue to which the other factors contribute. The reason why the use of drugs or alcohol and having sex with a first-time partner is risky is because of the increasing risk for miscommunication.

#### F. Application of RSB Factors

As repeatedly discussed in this Section, the mere presence of a single RSB

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121. See, e.g., Peggy Orenstein, *When Did Porn Become Sex Ed?* N.Y. TIMES, Mar. 19, 2016, <https://www.nytimes.com/2016/03/20/opinion/sunday/when-did-porn-become-sex-ed.html>; Donna Bowater, *Pornography is Replacing Sex Education*, TELEGRAPH (Dec. 16, 2011, 1:47 PM), <https://www.telegraph.co.uk/news/8961010/Pornography-is-replacing-sex-education.html>.

122. Ana J. Bridges, et al., *Aggression & Sexual Behavior in Best-Selling Pornography Videos: A Content Analysis Update*, 16 VIOLENCE AGAINST WOMEN, 1065, 1079-1080 (2010).

123. *Id.*

factor does not necessarily mean that an individual has engaged in RSB, rather administrators and prevention specialists should consider the “totality of circumstances.” In addition, universities should avoid connecting RSB (and its underlying factors) with moral judgments about the individual. The RSB factors were selected based on correlation with incidence of sexual assault and risk of harm, not based on moral judgments. In fact, that is the primary reason RSB is focused on the behavior, rather than the individual. An act or behavior might require intervention given its correlation with sexual assault or risk of harm—that is not an indictment of the individual whose behavior might have been caused by his or her upbringing, past victimization, or mental health or emotional issues, among other factors.

## II. WHY SHOULD UNIVERSITIES ADOPT AN RSB POLICY?

Having established a working definition or list of factors concerning RSB, the next issue is evaluating why a policy concerning RSB is necessary for universities and MSAs. The rationale can be broken down into three categories: (1) filling the gap between consensual sex and rape; (2) bridging the gap from prevention to response; and (3) changing cultural norms.

### A. *Filling the Gap Between Consensual Sex and Rape*

One of the primary issues with sexual assault prevention and response is that, often times, offenders do not fully comprehend that their actions constituted a sexual assault until after an accusation has been made, or perhaps after disciplinary or criminal actions have been initiated. Even then, the offender may not fully comprehend *why* his or her acts might have been perceived as wrong or criminal. As Ayres and Baker noted, “[t]he line between sex and rape is far from clear . . . both for the participants and for society at large.”<sup>124</sup> This quote identifies a key problem in adequately addressing sexual assault: it has been painted as a black-and-white issue. The sexual act must either be wholly innocent and consensual sex or rape, which exist at complete opposite ends of the spectrum with a vast grey chasm in between.<sup>125</sup> In other words, right now there is no productive way for universities to define or address the vast grey area between innocent sex and rape.<sup>126</sup> One the one side of the spectrum there is “innocent” sex, which I

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124. Ayres and Baker, *supra* note 9, at 619.

125. *Cf.* Burris, *supra* note 114, at 67 (explaining that under most rape laws, a “yes” obtained through deception may be considered an expression of true consent, thereby blurring the lines of what is considered sexual assault).

126. *Cf. id.* (discussing the line between non-consensual sex and unwanted sex and the struggle of addressing unwanted sex and problematic behavior that is not illegal).

would describe as sex in which both individuals consent to and agree on exactly what sexual acts will be performed. On the other end of spectrum there is "sexual assault" or "rape" in which one of the individuals engages in a sexual act knowing that the other person does not consent to that act. In the middle of that spectrum within the grey area lies instances in which one or both parties are confused as to whether consent has been given and to which acts that consent applies. Contributing to that confusion within that grey middle area might be alcohol, hormones, miscommunication, inability to read verbal/non-verbal cues, and a multitude of other factors.

From an accused's perspective, defense attorneys often cite concerns about their clients being able to understand the line between innocent sex and sexual assault, noting that, "[r]ight now, schools are creating new norms for sex and sexual contact that may be better but aren't what people have known in the past . . . . And men are following an unspoken set of rules that they have been following for decades, and when a change comes, men often feel blindsided."<sup>127</sup>

From a victim's perspective, the lack of clarity causes a great deal of frustration since this vast grey area has also contributed to the inability to prosecute many sexual assault cases, as highlighted by Rodman and Burris.<sup>128</sup> As Rodman indicates, victims feel harmed and wronged, only to be told the evidence is insufficient to prove an offense or that the act was not even criminal.<sup>129</sup> Thus, victims perceive universities and military commanders as not taking sexual assault seriously because an allegation, with harm truly felt by the victim, does not lead to an investigation or prosecution.<sup>130</sup> Similar to Rodman's quote concerning the limits of criminal law in addressing morally reprehensible acts by an accused, Burris sums this up perfectly in referencing the current inability to prosecute coerced consent or the more common types of alcohol-facilitated sex, stating, "[t]o be sure, *one may behave awfully in the sexual realm—with utter disregard for the*

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127. Zimmerman, *supra* note 3 (internal citations omitted) (noting that men and women may disagree as to what sexual activity constitutes assault).

128. Burris, *supra* note 114, at 67-68 ("This is not to suggest that these types of behavior could not or should not be criminalized, it is only to say that they are not currently criminalized . . . ."); Rodman, *supra* note 5, at 28 ("The criminal justice system—both the civilian and military systems—would most likely not produce a criminal conviction, nor should we want it to. Constitutionally, the accused may only be convicted if it has been proven, beyond a reasonable doubt, that he or she committed a crime. There is often . . . inherent reasonable doubt in a 'he-said-she-said' scenario. Alcohol contributes to reasonable doubt by making stories less plausible.").

129. See Rodman, *supra* note 5, at 26, 28.

130. See *id.* at 26 (reporting that, empirically, there are more victims than criminally convicted perpetrators because of the difficulties in convicting sexual assault and rape).

*physical and emotional well-being of others*—but that behavior is not necessarily criminal.”<sup>131</sup> This sense that men’s behavior and cultural norms have not caught up to the new norms for sexual behavior also potentially explains what some view as overly lenient sentences for individuals (primarily men) convicted of sexual assault.<sup>132</sup> Judges appear to acknowledge that although a sexual assault occurred in the technical sense, the actual culpability of the offender is minimal and not worthy of severe punishment, especially when the sexual assault involves alcohol.<sup>133</sup> In that sense, judges seem to recognize the steep learning curve for both men and women in overcoming decades of culture, to include media coverage, personal experiences and pornography that have normalized, if not glorified/glamorized RSB.<sup>134</sup>

The answer to both of these dilemmas for Ayres and Baker was to criminalize a lesser form of sexual assault and make it easier to prove, thereby increasing criminal accountability for defendants in those sexual misconduct cases that ordinarily would not result in prosecution or a guilty verdict.<sup>135</sup> In exchange for arguably shifting the burden of proof, Ayres and Baker threw the defendant a bone by proposing that the crime of reckless sex be characterized as a misdemeanor and not trigger sex offender registry.<sup>136</sup> As their critics admitted, this attempt was noble, but misguided given the constitutional implications of criminalizing such behavior.<sup>137</sup> However, besides being a noble attempt, Ayres and Baker at least recognized the wide

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131. Burris, *supra* note 114, at 67-68 (emphasis added).

132. See Janette Gagnon & Emanuella Grinberg, *Mad about Brock Turner’s Sentence? It’s not Uncommon*, CNN (Sept. 4, 2016, 4:28 PM), <https://www.cnn.com/2016/09/02/us/brock-turner-college-athletes-sentence/index.html> (discussing critics of Brock Turner’s lenient sentence and the effect of being an athlete on conviction and sentencing, or lack thereof).

133. Mitchell Byars, *Boulder’s Brock Turner? Austin Wilkerson Case Renews Rape Sentencing Outrage*, DAILY CAMERA (Aug. 11, 2016, 7:22 PM), [http://www.dailycamera.com/news/boulder/ci\\_30232194/boulders-brock-turner-austin-wilkerson-rape-sentencing-outrage](http://www.dailycamera.com/news/boulder/ci_30232194/boulders-brock-turner-austin-wilkerson-rape-sentencing-outrage) (drawing comparisons between Austin Wilkerson and Brock Turner, who both escaped prison sentences after sexual assault convictions because the victims consumed alcohol before the assaults).

134. See Gagnon & Grinberg, *supra* note 133 (stating that judges have considerable discretion to convict and sentence sexual assault offenders).

135. See generally Ayres & Baker, *supra* note 13, at 656.

136. See *id.* at 633-34 (arguing this will make it easier to punish RSB because the punishment will not ruin the defendants’ lives).

137. See generally Ferzan, *supra* note 17, at 637 (noting that such a law would impermissibly shift the burden of proof to the defendant, thereby violating the Constitution).

gap between consensual sex and sexual assault, and attempted to fill it with something, whereas others have simply ignored or failed to recognize the gap despite the widely held beliefs from many alleged victims and perpetrators that the all-or-nothing approach was inadequate for both sides.<sup>138</sup>

Some argue that most jurisdictions already incorporate varying degrees of culpability for sexual offenses. For example, in the military, sexual misconduct is broken down into abusive sexual contact, aggravated sexual contact, sexual assault, and rape.<sup>139</sup> The key factors are whether penetration occurred (sexual assault/rape) and whether force was used (aggravated sexual contact/rape).<sup>140</sup> Thus, the distinction is in the severity of the actions, not to the nature of the consent (or lack thereof). Thus, for the purposes of determining guilty vs. not guilty, a fact-finder is left with resolving a very black-and-white question: did the alleged victim consent? Yes or no? Even in jurisdictions that permit a mistake-of-fact defense, the question is whether a *reasonable* person would have viewed the statements/actions of the alleged victim as indicative of consent.<sup>141</sup> In some cases, this grey area is resolved later in sentencing -- an accused is found guilty, but then given a light punishment as an acknowledgment that while his or her mistaken belief was unreasonable it wasn't *that* unreasonable. However, the issue this creates is that the individual is already convicted and subjected to all the collateral consequences of a felony-level sex conviction (e.g. sex offender registry). In addition, this only takes into account the grey cases that are decided in favor of a conviction; there is no telling how many are decided in favor of an acquittal. In fact, the burden of proof and beyond a reasonable doubt standard help to ensure that the system errs in favor of an acquittal in close cases. While that may not be the right (and Constitutional) outcome in the criminal system, the contributing conduct of both parties in engaging in RSB is left unaddressed and possibly even worse – validated by the outcome.

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138. See Ayres & Baker, *supra* note 13, at 630; see also Jeannie Suk Gersen, *Betsy DeVos, Title IX, and the "Both Sides" Approach to Sexual Assault*, NEW YORKER (Sept. 8, 2017), <https://www.newyorker.com/news/news-desk/betsy-devos-title-ix-and-the-both-sides-approach-to-sexual-assault> (citing concerns from the public that the incoming Secretary of Education would ignore such gaps by rolling back protections for students that are victims of sexual assault or rape).

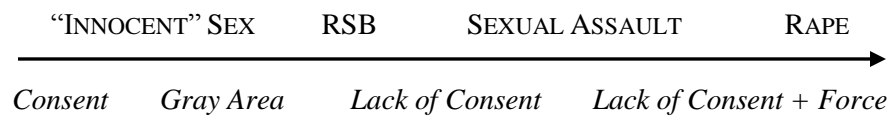
139. See DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2017 6 (2017) [hereinafter ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY].

140. See *id.* at 26, 32.

141. See generally Robert J. Mann, *Statutory Rape - Mistake of Fact as Defense*, 33 U. MO. KAN. CITY L. REV. 158, 159 (1965) (emphasis added) (finding that a reasonable belief that consent was given may constitute a valid defense to sexual assault allegations).



Creating a policy that addresses RSB will help universities bridge the gap between innocent consensual sex and sexual assault and address that conduct that Burris refers to as an “utter disregard for the physical and emotional well-being of others.”<sup>142</sup> Consider the spectrum below -- whereas the traditional criminal model incorporates only consensual and non-consensual (some would argue a third category of “non-consensual by force”), the addition of a policy of RSB allows universities to address behavior that while not sexual assault, is by no means “innocent” or without a substantial risk of emotional and physical harm. This provides a means for intervention/services for either or both parties involved in incidents of RSB -- whether they are the initiator or alleged victim. In a perfect world, the RSB model would allow universities to deviate from the traditional binary mode of looking at sexual misconduct which identifies a perpetrator and victim.



With RSB and the associated intervention approach, there is no need for binary labels that focus on the person. Instead, the approach would involve a more fluid approach that looks at the underlying *behaviors* on a spectrum of risk rather than in terms of right-wrong, guilty-not-guilty, or subject-victim. The lack of labels might encourage participation and perhaps even self-reporting by those who would ordinarily be viewed as the offender, since doing so would not result them in being labeled a sex offender. Within the Air Force, there has been a growing trend in which individuals report a sexual assault in a confidential manner (referred to as a “restricted” report) in order to obtain services/counseling, but do not necessarily identify as a victim of sexual assault and therefore choose not to participate in criminal/disciplinary proceedings.<sup>143</sup> In addition, research in the area of restorative justice, as well as anecdotes from sexual assault victims’ counsel, also suggests that a primary motivation in reporting and a desired outcome among victims is not necessarily to achieve criminal or punitive sanctions against the offender, but rather to ensure that the offender: (1) understands

142. Burris, *supra* note 114, at 68.

143. See, e.g., Doe v. Hagenbeck, 870 F.3d 36, 40 (2017) (stating that individuals have a choice between filing an “unrestricted report” or a “restricted report”, the former of which includes the victim and perpetrators’ names); ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, *supra* note 140 app. B at 6 (Statistical Data on Sexual Assault and Harassment).

the harm they caused (and when possible, apologizes for the harm caused); and (2) does not harm the victim (or someone else) again.<sup>144</sup> In some instances, the demand for an apology is not an apology for an actual sexual assault, but for the lack of respect before, during or after the sexual encounter. An RSB model would allow an individual to come forward if they were physically, socially, or emotionally harmed as a result of a sexual encounter, even if the individual was not legally a "victim" of a sex offense. Similarly, bystanders (in the broad sense) would have another tool to affect their intervention (i.e. notifying helping agencies/university officials of RSB). The university would then use a targeted intervention model to focus on strategies for preventing future incidents and correcting behavior and attitudes.

In the traditional criminal model, in my experience as a defense counsel, my clients often equated a decision by the prosecutor not to pursue charges or an acquittal (a fairly common result in sexual assault prosecutions) as vindication of their behavior. This was true even in cases in which the individual's behavior (while perhaps not criminal) resulted in physical or emotional harm. In fact, as a matter of practice following acquittals (not just in sexual assault cases), I would meet privately with my client and discuss "lessons learned" as well as point out that although they may have been found not guilty, their role in whatever the alleged crime was may not have been completely innocent, and unless they modified their behavior, they would likely end up in a similar situation again.

With other clients, regardless of whether the outcome resulted in a conviction or acquittal, I often had difficult conversations with young men who genuinely failed to appreciate how their actions could be perceived as sexual assault or harmful. Some scholars would argue that my clients were engaged in self-deception and knew full well that their actions were wrong, even if not criminal.<sup>145</sup> However, I experienced similar struggles during training sessions with students and Airmen that had never been accused of sexual assault. Participants struggled to navigate and understand the grey area – "Does she have to say 'yes' at every step along the way?" "How drunk is 'too drunk'?" "What if we were both drunk and I was too drunk to recognize that she was too drunk to consent?" As previously discussed, these

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144. See Margo Kaplan, *Restorative Justice and Campus Sexual Misconduct*, 89 TEMP. L. REV. 701, 704 (2017) (explaining that restorative justice provides the victim with an "opportunity to tell her story" and "describe to the responsible party the full impact of the harmful behavior").

145. See, e.g., Andrew E. Taslitz, *Willfully Blinded: On Date Rape & Self-Deception*, 28 HARV. J. L. & GENDER 381, 398 (2005) (posing the question: "should a man who consciously believed that he had consent nevertheless sometimes be liable for rape?").

fairly frequent questions suggest that perhaps there is a disconnect between the expectations of universities and the predominant cultural norms and existing sexual education.<sup>146</sup> Whether the failure to comprehend the difference was genuine or a result of self-deception is inconsequential for the purposes of this Article. Providing “early intervention” would enable universities to help both males and females navigate and appreciate this grey area and help to either re-educate individuals or overcome the self-deception of men in these situations. In fact, if these men are engaged in self-deception as argued by Taslitz, a policy addressing the lower-level risk behaviors would serve to put those individuals on notice as to what specific behaviors/factors should be avoided because they increase the risk that a sexual encounter might amount to sexual assault (or perceived as such).<sup>147</sup>

I will discuss the impact of the RSB policy on victims in more detail in Part V of this Article, but while certainly controversial, I suspect that because of fears of “victim blaming,” and negatively impacting the recovery of victims, counsel and advocates for victims of sexual assault rarely, if ever, have discussions with their clients about the victim’s RSB. Certainly, primary prevention programs have become weary of discussing risk reduction given implications of victim-blaming. However, as I’ve discussed in depth, the factors in RSB do not distinguish between victims and subjects, but are focused on behaviors. If the behaviors correlate to risk of harm and sexual assault, then just as we would be remiss to avoid conversations with alleged perpetrators concerning their behaviors, we would be remiss to avoid those conversations with victims as well, recognizing that engaging in RSB, however risky, does not excuse the criminal actions of a perpetrator.

From an accountability perspective, it is no surprise that convictions in acquaintance sexual assault cases are rare.<sup>148</sup> In fact, long before President Obama’s “It’s on Us” campaign, Title IX, and Congressional interest, British legal scholar, Matthew Hale, noted “[Rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.”<sup>149</sup> While Hale’s observation was “hard to be

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146. See Zimmerman, *supra* note 3 (describing the struggle on college campuses to understand and address sexual assault).

147. See generally Taslitz, *supra* note 146, at 398 (arguing that this can help to eliminate proof problems in establishing beyond a reasonable doubt what subconscious distractions or biases were at work leading up to the assault).

148. *The Criminal Justice System: Statistics*, RAINN, <https://rainn.org/get-information/statistics/reporting-rates> (last visited March 12, 2018) (reporting that out of every 1000 rapes, only seven perpetrators will be convicted and even fewer will be actually incarcerated).

149. MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 365, 634 (W.A.

proved”, it is certainly consistent with research indicating that of all sexual assaults reported, only 2% result in a conviction, the notion “tho never so innocent” is not necessarily an accurate depiction of those accused of sexual assault.<sup>150</sup> Although an accused may be “not guilty” of a sexual crime, that does not necessarily mean the accused is wholly “innocent” either, when one looks beyond the charged crime at the surrounding behaviors. As noted by Lindsay Rodman in her article concerning sexual assault in the military, “[t]here are sexual encounters that result in trauma and produce victims, yet at the same time do not rise to the level of criminality or provability that a rape or sexual assault charge in a felony court would require for conviction.”<sup>151</sup>

While the beyond a reasonable doubt (or even preponderance of the evidence) standard may not have been met based on the elements of sexual assault, the accused, nevertheless, may still have exhibited poor judgment or troubling behavior that should not go unaddressed. Again, anecdotally as both a defense counsel and prosecutor, I have been involved in dozens of cases in which the Government was unable to prove that sexual assault occurred, but without question, the behavior of the accused (as well as the alleged victim) was concerning and certainly worthy of either discipline or some type of intervention. However, in the current systems – both criminal and university/Title IX administrative hearings, a sexual assault may be addressed, but often the underlying behavior is ignored.<sup>152</sup> This creates confusion for everyone involved -- the accused views this as vindication that he did nothing wrong while the victim views this as either not being believed or that the fact-finder does not take sexual assault seriously. In fact, however, none of these are true -- officials are often hamstrung by a rigid definitions in an even more rigid system.

By adding a policy concerning RSB, even if an accused is determined to have not committed a sexual assault, yet still exhibited RSB, university officials have the means to address such behavior and avoid simply letting the accused off the hook and leaving him or her to believe his or her actions were wholly innocent. In addition, it allows university officials to act in the

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Stokes and E. Ingersoll eds., 1847).

150. *The Criminal Justice System: Statistics*, *supra* note 149 (stating that sexual violence offenders are less likely to receive jail time than other criminal offenders).

151. Rodman, *supra* note 5, at 26 (arguing that this creates a “vicious cycle” of acquittals in sexual assault or rape cases).

152. *Sexual Violence: Risk & Protective Factors*, *supra* note 40 (citing behaviors such as “hostility to women” and “poverty” as contributors to sexual assault, both of which are behaviors unlikely to be addressed by a conviction).

98% of cases that are not prosecuted and normally go unaddressed.<sup>153</sup>

As Ayres and Baker noted in their Article, there is a great deal of confusion on the part of both men and women as to what constitutes sexual assault.

The traumas associated with rape would not necessarily make sex dangerous if the line between sex and rape were clear. If sex was sex and rape was rape, then sex would bring with it the emotional risk of rejection, but not annihilation. The line between sex and rape is far from clear though, both for the participants and for society at large. Men who acknowledge using force to get sex are often confused about whether they actually raped because not all women resist in the same way; some men simply assume consent if there is little resistance. Women are confused about their own role in expressing consent and often feel responsible for any failure to communicate nonconsent. One prominent researcher has concluded that when rape happens early in a relationship, misperception is likely the primary cause. The National Health and Social Life Survey found that 22 percent of women reported having been forced to do something sexual, while only 3 percent of men admitted to having used force. To quote the authors, “[t]here seems to be not just a gender gap but a gender chasm in perceptions of when sex was forced.”<sup>154</sup>

Even in those rare cases in which a conviction is obtained, the presence of alcohol may contribute to a lower sentence because although a subject’s intoxication is not relevant (in most jurisdictions) to whether a sexual assault occurred, many judges may find the accused’s intoxication to be mitigating as it could be more indicative of a “mistake” as opposed to a conscious and fully culpable crime.<sup>155</sup> Such was the case in the sentence imposed by a judge against the former Stanford student, Brock Turner, in which the judge stated prior to sentencing Turner to 6 months in jail for sexual assault, “there is less moral culpability attached to the defendant, who is . . . intoxicated.”<sup>156</sup>

There are a myriad of situations in which an objective evaluation of behavior would suggest that an individual engaged in poor judgment and carelessness, but the behavior does not amount to sexual assault. For

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153. *The Criminal Justice System: Statistics*, *supra* note 149.

154. Ayres & Baker, *supra* note 13, at 619.

155. See Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 6, 2016), <https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html> (relaying the case of Brock Turner in which the judge considered alcohol consumption as a mitigating factor during sentencing).

156. See *id.* (quoting Aaron Persky, the Superior Court judge in the Brock Turner case).

example, imagine the following scenario:

*A sober male sees a female across the bar to whom he is attracted. He approaches her, begins talking and dancing with her, but notices she's a little "stand-offish" when he makes attempts to kiss or dance provocatively with her. In response, the male begins encouraging her to drink more in an effort to "loosen her up." Eventually, the male's plan begins to work and as the woman gets increasingly intoxicated she becomes increasingly willing to comply. Eventually, the two go to a separate room where they have unprotected sex. The following day, the woman reports being sexually assaulted. Assume for this scenario that testimony and other evidence shows that while the woman was intoxicated, she was not so intoxicated that she was "incapable of consenting."<sup>157</sup> As in many of these situations, the amount of alcohol considerably lowered the woman's inhibitions, impacted her judgment, but did not rise to the level where she was incapable of appraising the nature of the action.<sup>158</sup>*

In evaluating this scenario, one cannot help but be troubled by the male's behavior and concerned that he certainly seems culpable of something, even if not a crime. Essentially, the male was merely "lucky" and received a legal windfall – his goal was to fuel the woman with alcohol until she had sex with him; it just so happens that in this situation her level of intoxication did not render him criminally liable for sexual assault. The fact that the law said that the woman "could" consent, does not necessarily change the male's level of culpability since he recognized initially that the woman would not consent

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157. In many jurisdictions, including the military, legislatures and courts have created a high bar for the level of intoxication required to support a sexual assault conviction. For example, under the Uniform Code of Military Justice (UCMJ), the level of intoxication required is one that renders the victim either "unable to appraise the nature" of the sexual act or lacking the physical or mental ability to communicate consent or resist. Essentially, the courts have equated the level intoxication required to the mental state of a child or a mentally ill person. *See United States v. Pease*, 75 M.J. 180, 181 (C.A.A.F. 2015) (interpreting Unif. Code Mil. Justice art. 120, 10 U.S.C. § 920 (2012), which criminalizes rape and sexual assault); *see also United States v. Newlan*, No. 201400409, 2016 C.C.A. LEXIS 540, at \*18-19 (N-M Ct. Crim. App., Sept. 13, 2016) (holding that Article 120 "does not prohibit engaging in sexual acts with a person who is drunk or impaired by alcohol. Put more plainly, mere impairment is no more the standard . . . than the . . . 'one drink and you can't consent' axiom is the standard. And litigants and military judges who fixate solely on the term 'impairment' do so at their peril.").

158. Goodman, *supra* note 66, at 89 (asserting that intoxication incapacitates a woman's ability to conduct a deliberative process) (citing Mark Kelman, *Thinking About Sexual Consent*, 58 STAN. L. REV. 935, 953 (2005) (stating an "intoxicated woman is simply incapable of totaling up the costs and benefits [of consent] as well as a sober woman.")).

while entirely sober and therefore fueled her with alcohol until her inhibitions were sufficiently lowered that she changed her mind.<sup>159</sup> Although the criminal law might not be able to address the male's behavior, that does not necessarily mean that it should not be addressed at all especially at a time in the individual's life in which he remains malleable to behavioral change (e.g. adolescent/college-age).<sup>160</sup>

It is also critical to note that the role of an RSB policy is to simply fill the gap between innocent sex and sexual assault. It is not intended to punish "innocent" sex, nor is it intended to replace criminal prosecutions for sexual assault, though it could be used to supplement those prosecutions especially in situations in which charges are dismissed or the case results in an acquittal.

As Ayres and Baker noted, "[r]eckless sexual conduct should not be presented as a substitute for rape. It is not to be prosecuted, punished, or perceived as such. It is instead a crime that tries to control behavior that can lead to rape, just as drunk driving laws try to control behavior that can lead to manslaughter. If most people do not conflate a DUI conviction with a manslaughter conviction, people need not conflate a conviction for reckless sex with a rape conviction."<sup>161</sup> In the same vein, individuals should not conflate RSB interventions or discipline for RSB with a conviction or even substantiated claim of sexual assault. Though certainly related, the two are distinct concepts which trigger distinct processes and consequences.

### B. Bridging the Gap Between Prevention and Response

Traditionally, sexual assault programs have been characterized as either prevention or response. Prevention has largely involved only primary prevention, which incorporates broad training for groups of individuals regardless of their level of risk for perpetration or victimization.<sup>162</sup> Historically, response has largely involved providing services for survivors *after* a sexual assault has occurred and attempting to hold offenders accountable (for sexual assault) *after* the sexual assault has occurred.<sup>163</sup>

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159. Mellins, *supra* note 40.

160. See generally Ayres & Baker, *supra* note 13, at 608 (contending that changing behaviors could "pay huge dividends" in preventing sexual assault and related outcomes, such as STI contraction).

161. *Id.* at 655.

162. See CTRS. FOR DISEASE CONTROL AND PREVENTION, PREVENTING SEXUAL VIOLENCE ON COLLEGE CAMPUSES: LESSONS FROM RESEARCH AND PRACTICE 3 (2014) [hereinafter PREVENTING SEXUAL VIOLENCE ON COLLEGE CAMPUSES] (categorizing "one-session education programs conducted with college students" as an example of programs that do not work).

163. See, e.g., *Q&A on Campus Sexual Misconduct*, *supra* note 6, at 36 (noting that

While well-intended and certainly a start in the fight against sexual assault, these strategies can be best described as “too little” and “too late.”

Primary prevention, while a necessary start for any prevention effort, is never sufficient by itself and certainly not when they are brief one-session programs.<sup>164</sup> One problem with widespread, broad-reaching prevention and intervention strategies is that one-size does not fit all especially when considering issues involving relationships, attitudes about gender roles, etc. Individuals have diverse pasts, upbringing, etc. that have a significant impact on how they approach sexual relationships.<sup>165</sup> Thus, while prevention strategies can offer some educational benefits for students, they likely fail to address deeper issues that may have a greater impact on one’s tendency to engage in RSB.

In reviewing prevention strategies across multiple disciplines (e.g. elementary/secondary schools, public health, dental health, child abuse, academic growth), all of them include approaches beyond simply primary prevention to include secondary and tertiary prevention, which necessarily include intervention programs.<sup>166</sup> In the context of elementary and secondary schools who utilize this model to address both academic and behavioral issues among students, primary prevention is defined as schoolwide systems or programs for all students.<sup>167</sup> Secondary prevention includes specialized group systems for students with at-risk behavior or who are designated as at-risk based on other factors (e.g. risk/protective factors, socioeconomics, etc.).<sup>168</sup> Tertiary prevention includes specialized and individualized systems for students with high-risk behavior.<sup>169</sup> The model for addressing tertiary prevention is through intensive, individual

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schools will address whether to separate the victim and perpetrator after the investigation has concluded) (emphasis added).

164. PREVENTING SEXUAL VIOLENCE ON COLLEGE CAMPUSES, *supra* note 163, at 3 (defining primary prevention as preventing sexual assault before it occurs).

165. See Jill R. Bowers et al., *The Role of Transitional Instability, Psychological Distress, and Dysfunctional Drinking in Emerging Adults’ Involvement in Risky Sex*, 33 J. SOC. & PERS. RELATIONSHIPS 1097, 1102 (2016) (stating that child-rearing practices and family interaction patterns that affect child behavior often persevere into adulthood).

166. See George Sugai & Rob Horner, *Advanced Topics in PBS: Secondary/Tertiary Interventions*, POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, [https://www.pbis.org/common/cms/files/pbisresources/1107rhAdvanced\\_Topics\\_in\\_PBS.ppt](https://www.pbis.org/common/cms/files/pbisresources/1107rhAdvanced_Topics_in_PBS.ppt) (last visited March 12, 2018) (estimating that only 20% of children will actually need to utilize secondary and tertiary prevention to address at-risk or high-risk behavior).

167. *Id.* (reporting that primary prevention is appropriate for approximately 80% of a student body).

168. *See id.*

169. *Id.*



interventions, with a means to determine whether the students successfully respond to the particular interventions employed.<sup>170</sup>

In reviewing the successful programs highlighted by the CDC, nearly all of the programs involve only primary prevention, with a very limited number including some secondary prevention for at-risk groups.<sup>171</sup> In recent years, some organizations have expanded their intervention strategies into secondary prevention (e.g. the AF Academy's Athletic Department recently instituted "Health Relationships Training" for all intercollegiate athletes in recognition that college athletes are considered an at-risk group for incidents of sexual assault), but my research into this area found very few examples of secondary prevention in the area of sexual assault prevention.<sup>172</sup> It is no surprise then that the number of programs involving tertiary prevention is miniscule to non-existent. In fact, the few programs that I found referencing tertiary prevention were mostly victim-focused (e.g. survivor support groups), and what would be more commonly considered response programs as opposed to prevention.<sup>173</sup>

Although few tertiary prevention programs exist for sexual assault prevention, various researchers and even the CDC have identified the need and importance of such programs (though in many cases did not refer to the programs as "tertiary prevention").<sup>174</sup> For example, the CDC noted that "primary prevention is only one piece of the puzzle when it comes to reducing rates of sexual violence. These efforts complement and work in tandem with other important work focused on risk reduction, criminal justice, recidivism prevention, and victim services."<sup>175</sup> The CDC further notes the importance of focusing on risk and protective factors at all levels of prevention – individual, peer, organization, and community.<sup>176</sup> Although

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170. *Id.*

171. See generally PREVENTING SEXUAL VIOLENCE ON COLLEGE CAMPUSES, *supra* note 163, at 6 (conducting a review of 140 studies regarding the effectiveness of primary prevention strategies for sexual assault or rape).

172. See ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, *supra* note 140, at 10 (discussing the introduction of a 'Cadet Healthy Interpersonal Skills (CHiPs)' Program to reduce sexual harassment and sexual assault).

173. See, e.g., Ashley Schwedt, *Campus Save Compliance: Continuing, On-Going Education & Prevention*, CAMPUSCLARITY BLOG (Oct. 20, 2015), [home.campusclarity.com/tag/tertiary-prevention](http://home.campusclarity.com/tag/tertiary-prevention) (including "thoughtful sanctioning" of the perpetrator and the introduction of "peer educators" in schools as tertiary prevention methods).

174. See PREVENTING SEXUAL VIOLENCE ON COLLEGE CAMPUSES, *supra* note 163, at 3 (emphasizing the shift of prevention focus from the victims to the perpetrators).

175. *Id.* at 3.

176. *Id.* at 4. (noting the importance of achieving "comprehensive" strategies for prevention by focusing on risk and protective factors).

the CDC places more emphasis on organizational and community programs, they recognize the importance of establishing “healthy relationship skills and . . . positive norms about gender, sexuality and violence with evidence-informed interactive, multi-session intervention . . . .”<sup>177</sup> Although that may begin as a broad primary prevention strategy, such a strategy would be pointless if there were not some mechanism to address those individuals who failed to respond to the primary intervention. However, in the current system, most universities implement primary prevention, but have no mechanism to identify individuals or intervene when individuals have failed to exhibit the skills taught in primary prevention programs—it is only at the point that the individual is accused of sexual assault that the university intervenes, which at that point is “too late” and typically involves adversarial discipline proceedings rather than collaborative and individualized intervention.<sup>178</sup> Mellins, et al. identified this gap in their recent study noting that “our data underline the potential of programs and policies to reduce substance abuse and limit its harms as one element of comprehensive sexual assault prevention; we *found few evidenced-based interventions that address both binge drinking and sexual assault prevention.*”<sup>179</sup>

Although this is the norm in sexual assault prevention, the absence of secondary or tertiary prevention would be preposterous when viewed in the education lens. Consider a student who receives an initial math lesson and subsequently receives an “F” on his first assignment. The overwhelming majority of educators would recognize that student, for whatever reason, failed to comprehend the initial primary lesson. As a result, the student is at-risk for failing at this particular math concept. One option would be to simply ignore the obvious warning signs and risk factors and allow the student to continue down the path toward eventual failure. The other option would be to pursue some secondary (group) or tertiary (individualized) instruction, normally in the form of tutoring, which hopefully identifies and corrects whatever is the issue or root cause. To most educators, such inclination to ignore the student’s struggle would be unfathomable, yet such an approach is the norm in sexual assault prevention and education.

To bridge this gap, I propose using RSB as the means to identify individuals who are at-risk and/or struggle to internalize the messages in primary prevention training. Upon identifying that an individual has engaged in RSB, counselors or prevention specialists at the university would

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177. *Id.* (providing that such strategies relate specifically to the individual aspects of sexual violence).

178. *Id.* at 7 (noting that the universities’ failure to implement secondary prevention is due, in part, to a lack of research evaluating sexual violence behaviors).

179. Mellins et al., *supra* note 40 (emphasis added).

evaluate the individual to determine the appropriate level of targeted intervention. Such an intervention may be as simple as additional education about the dangers and/or risk of certain RSB factors exhibited. On the other hand, the identification of RSB and initial evaluation may suggest deeper root causes (e.g. prior victimization, personality disorders, and alcohol/pornography addictions) that require referrals to more specialized support systems. Following an initial assessment, counselors and prevention specialists would develop an intervention plan for the student and evaluate progress, assessing throughout the process whether the individual has adequately responded to the intervention or whether the intervention plan should be modified. Alternatively in cases in which the individual continues to repeat the behavior, university administrators should consider whether disciplinary processes should be initiated.

An RSB intervention model not only serves to identify and hopefully address risky sexual behavior, but may also serve to identify individuals who are at-risk based on deeper underlying issues. For example, Bowers et al., evaluated the connection between instability and RSB/alcohol abuse.<sup>180</sup> In the context of college students, instability involved not only emotional instability (e.g. depression), but also instability caused by life-events to include changes in housing, relationships, etc.<sup>181</sup> Those factors are often at their peak for new college students who are in a new environment, meeting new friends, searching for acceptance, and often struggling with what to do with prior relationships (high school sweethearts, friends at other colleges, etc.). Thus, Bowers' article reinforces the idea that just as alcohol abuse is often a symptom of underlying psychological/emotional issues, so too is RSB.<sup>182</sup> Thus, the ability to identify RSB presents a ripe opportunity to intervene and address potential underlying social/emotional issues.<sup>183</sup>

In using the term "intervention" it is worth distinguishing the type of intervention to which I refer with the now-common concept of "bystander intervention." Many bystander intervention programs have proven effective in reducing rates of sexual violence and have been recognized for their effectiveness by the CDC.<sup>184</sup> However, bystander intervention has its

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180. See Bowers, *supra* note 166, at 1112-13 (noting that while the association is "clear," it is not necessarily clear why such association occurs).

181. *Id.*

182. *Id.* at 1100 (tracing the connection between the occurrence of RSB and the emotional and physical effects that accompany major life changes).

183. *Id.* (pointing out that there is a lack of adequate research regarding the link between emotional or social instability and RSB).

184. *Sexual Violence: Risk & Protective Factors*, *supra* note 40 (citing a study finding that Green Dot, a bystander intervention program, has been associated with reductions

limitations especially when it is defined narrowly in scope to include only intervention close-in-time to the alleged assault.<sup>185</sup> As Mellins, et al. noted, bystander interventions typically focus on alcohol or physical force, but few address the more subtle (and potentially more common) scenario of verbal coercion and therefore interventions that focus on verbal consent practice would be useful.<sup>186</sup> In addition, even those programs such as Green Dot® that define bystander intervention more broadly to include intervening when one hears inappropriate comments or sees signs of a unhealthy relationship, are a start, but still inadequate especially depending on the particular circumstance.<sup>187</sup>

Consider Green Dot's® approach to bystander intervention, which uses the mnemonic of direct, distract, delegate, and delay.<sup>188</sup> If the bystander distracts a potential offender or victim, they may prevent an incident from immediately occurring, but the distraction likely does nothing to actually address RSB or underlying attitudes. Similarly, even with the direct approach, a bystander may specifically "call out" RSB, but without any follow-up with the potential offender, it is unlikely that the intervention will actually change behaviors or attitudes. This is not to say that bystander intervention is not a valuable approach. In fact, when combined with an RSB policy and an RSB targeted-intervention program, the two would complement each other well. Effectively, bystanders would play a critical role in the identification of RSB. In the situation above, whether the bystander distracts, delegates, directs, or delays at the immediate moment, they can later report the RSB to the appropriate office to ensure that the university is aware of the RSB and can employ tertiary prevention/targeted intervention.

### C. Changing Cultural Norms

In their article, Dr. William DeJong and Linda Langford discussed the

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in sexual harassment and assault).

185. One of the most common examples of bystander intervention is an individual intervening as he sees a male escorting a stumbling, incoherent, and intoxicated female from a party up the stairs to a bedroom. *See, e.g.* Stack, *supra* note 156 (discussing how two students intervened to stop the sexual assault in the Brock Turner case).

186. Mellins, *supra* note 40 (promoting assertiveness interventions and verbal consent practices as methods that would be useful in addressing sexual assault).

187. *Sexual Violence: Risk & Protective Factors*, *supra* note 40.

188. Ann Coker et al., *Evaluation of the Green Dot Bystander Intervention to Reduce Interpersonal Violence Among College Students Across Three Campuses*, 21 VIOLENCE AGAINST WOMEN 1507, 1508 (2015).

importance of environmental factors in addressing alcohol abuse.<sup>189</sup> The premise being that one's environment affects cultural norms—if the environment continues to support the cultural norm of binge drinking and glorifies alcohol use, individual interventions to address alcohol use would be significantly stifled.<sup>190</sup> Thus, the authors note the importance of creating a safe environment by reducing foreseeable risks—although educational and intervention strategies are a key part of that approach, the authors note the importance of shaping environmental factors to include physical, social, economic, and legal.<sup>191</sup> The CDC referenced DeJong and Langford's research and endorsed the need for universities to enact alcohol policies as part of their comprehensive prevention strategy.<sup>192</sup> The CDC, however, missed an opportunity in reviewing DeJong and Langford's research to adapt their findings regarding alcohol abuse to sexual assault.<sup>193</sup> Using DeJong and Langford's approach, establishing a policy against RSB would provide an additional environmental factor contributing to a cultural change in how members of a university view healthy and unhealthy sexual behaviors. Research suggests that simply telling large groups of individuals “don't rape” is ineffective whereas personalized prevention programs and intervention will likely be more effective in changing behavior of sexually aggressive males.<sup>194</sup> In fact, DeJong and Langford noted that “information alone is usually insufficient to produce behavior change.”<sup>195</sup> Of critical importance, the authors note that “[n]ew laws and regulations will . . . help

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189. William DeJong & Linda M. Langford, *A Typology for Campus-Based Alcohol Prevention: Moving Toward Environmental Management Strategies*, 14 J. STUD. ALCOHOL 140, 142 (2002) (explaining that a change in environment can alter student norms away from risky behaviors, making it easier to identify students at a greater risk for such behaviors, as opposed to those that are going along with the “culture”).

190. *Id.* (listing three relevant environmental spheres: the institution of higher education, the surrounding community, and the state and federal laws and regulations).

191. *Id.* at 141 (citing research suggesting the need for a broader effort to achieve more effective prevention).

192. PREVENTING SEXUAL VIOLENCE ON COLLEGE CAMPUSES, *supra* note 163, at 10 (noting that current college social norms campaigns were less effective).

193. *Id.*

194. See generally Sarah R. Edwards et al., *Denying Rape but Endorsing Forceful Intercourse: Exploring Differences Among Responders*, 1 J. VIOLENCE & GENDER 188, 192 (2014) (finding that most men that commit acts of sexual assault/rape often do not identify their actions as “rape”).

195. See DeJong, *supra* note 190, at 141 (discussing how awareness efforts, such as freshman orientations, alcohol-awareness weeks and other special events, do not necessarily lead to students making better-informed decisions when employed independently).

perpetuate changes in social norms."<sup>196</sup> Thus, if prevention strategies have shifted to a greater focus on healthy behaviors and relationships, then university policies should follow suit by specifically addressing the importance of healthy relationships/behaviors and avoidance of RSB.

In the alcohol context, the DeJong and Langford break down the social ecological framework into four categories of strategic intervention: (1) changing people's knowledge, attitudes and behavioral intentions regarding alcohol consumption; (2) eliminating or modifying environmental factors that contribute to the problem; (3) protecting students from the short-term consequences of alcohol consumption; and (4) intervening with and treating students who show evidence of problem drinking.<sup>197</sup> This same framework can be applied to the context of sexual assault in several ways. While many suggestions fall outside of the scope of this Article, the idea of establishing policy and enforcement of RSB ties directly to changing people's attitudes/behavioral intentions while also providing a comprehensive intervention/treatment program to show evidence of problematic sexual behaviors.<sup>198</sup> Just as stronger alcohol policies (focusing on lower level but risky behaviors such as use of kegs, underage drinking, and common alcohol containers) led to reductions in serious alcohol violations, so too is the goal that focusing on stronger policies concerning RSB will result in decreases in sexual assaults and rape.<sup>199</sup> So long as cultural norms glorify casual sex and one-night-stands, the risk of sexual assaults/rape will continue especially without strong policies to counterbalance the existing norms. Merely instituting and enforcing a policy against RSB sends a strong message to students. The idea that "hooking up" with random partners is not only an accepted practice at the university but an encouraged practice in social circles, would be slowly overcome through individualized education and enforcement at the lowest level (peers, resident assistants, etc.). As previously discussed, merely focusing on the crime of sexual assault itself does little to raise awareness or change behavior as the majority of individuals engaging in the risky behavior that leads to allegations of sexual assault would likely all agree that sexual assault/rape is bad and should be

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196. *Id.* at 142.

197. *Id.* at 143.

198. *See generally* Ayres & Baker, *supra* note 13, at 602-03 (arguing that the enactment of laws prohibiting reckless sex will have greater effect of reducing the underlying risky behaviors, including the misuse of condoms and the consumption of alcohol).

199. *See* DeJong & Langford, *supra* note 190, at 145 (reporting that such policies led to a 60% decrease in alcohol related violations).

avoided.<sup>200</sup>

The key to preventing rape/sexual assault is helping at-risk students recognize healthy sexual behaviors as well as the potential harm/dangers of their lower-level behaviors, which they currently view as the cultural norm.<sup>201</sup> Thus, a policy addressing RSB necessarily forces a dialogue within universities concerning the difference between healthy sexual interactions and RSB. Such a dialogue is critical since universities face a steep uphill battle to overcome the years of “training” students have had in which they learn from media, pornography, and peers that RSB is the norm.<sup>202</sup> There is no doubt that many adolescents, especially males, view pornography, which rarely incorporates healthy sexual communication, but instead glorifies RSB—focusing largely on encounters with strangers, *Girls Gone Wild*, and unprotected sex (or at least simulating a lack of protection). Television shows, movies, and books, such as the *Fifty Shades of Grey* series, similarly strengthen RSB as a cultural norm rather than something that is fraught with risk.<sup>203</sup>

Similar to the need identified decades ago to strengthen university alcohol policies to counter the norms of “binge drinking”, so too should there be a focus to strengthen university policies concerning sex. Taking a step back, it seems almost absurd that while nearly every university recognizes the dangers of “binge drinking” and therefore have policies/programs to address it, there are virtually no universities that have policies geared toward preventing the physical/emotional dangers associated with “binge sex” – either in the positive (promoting “healthy relationships”) or the negative (prohibiting “RSB”). Perhaps it is a result of Americans’ strange and paradoxical avoidance to talk about healthy sexual relationships, all the while enjoying any media related to sex. Talking to students about how to drink responsibly has become a standard topic in college orientations and education whereas talking to students about how to have sex responsibly or engage in a healthy relationship remains an uncomfortable and taboo subject because of the moral implications of such a conversation.

In no way is this Article suggesting that campuses go “dry” and prohibit

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200. See e.g., McElroy, *supra* note 18, at 708 (communicating that individuals, and specifically teens, are unlikely to take the criminality aspect sexual assault into consideration when making decisions about sexual behavior).

201. See Taslitz, *supra* note 146, at 434-35.

202. See Ayres & Baker, *supra* note 13, at 655 n. 212 (explaining that to some groups of young men in our society, group sexual assault is normal); see also, discussion of pornography as a form of sexual education, *supra* notes 117-119.

203. See, e.g., McSpadden, *supra* note 90 (describing how a sexual assault arose from a young man’s desire to reenact *Fifty Shades of Grey*).

sex, just as I would not suggest that campuses prohibit alcohol. Rather, just as campuses have policies to address dangerous/harmful drinking habits while encouraging healthy/responsible alcohol consumption, so too should universities employ policies to address dangerous sexual behaviors while encouraging healthy/responsible sexual relationships. In fact, the issue of pornography presents a perfect opportunity for university officials to create a dialogue about RSB vs. healthy sexual relationships. Just as there is no *per se* problem with alcohol consumption at a university, there is not necessarily a *per se* problem with viewing pornography. On the other hand, by not addressing the fact that pornography glamorizes RSB and provides students (particularly males) with an unrealistic and potentially dangerous lens to view sexual relationships, university officials are missing an opportunity to engage in a critical dialogue with a direct impact on sexual assault prevention.

### III. PRACTICAL ASPECTS OF AN RSB POLICY

#### A. *Enforcement of RSB Policy*

An obvious concern one might have upon learning of a university's RSB policy is how a university will enforce such a prohibition and what the range of sanctions would be for what many consider to be very private and morally focused behaviors.

First, with regard to enforcement, this Article does not advocate a "Big Brotheresque" squad of dorm-room police. Just as university alcohol or curfew policies are rarely accompanied by aggressive and proactive enforcement mechanisms (e.g. dorm room searches, breath tests, etc.), but instead focus on behaviors that come to the attention of university officials, a similar approach should be used to enforce RSB policies. If university administrators learned that an individual engaged in RSB (whether through a reports by another student or as a result of a sexual harassment/sexual assault allegation), they would then have the discretion to address the RSB. Although one might have difficulty imagining a scenario in which college students report each other for such behavior, one scenario might be fairly common -- that in which a student becomes increasingly upset/concerned that his roommate repeatedly brings different girls back to their room for sex. As previously discussed, this also presents an opportunity to expand the role of "bystander intervention," by training students to identify RSB and intervene and report instances of RSB to appropriate authorities. Though the student's purpose for notifying university officials (to include a Resident Assistant (RA) may be very practical (e.g. allowing the roommate to get sleep or have access to the room), the report would bring the university's



attention to the roommate's RSB and enable them to address it through one of the vehicles discussed below.

*B. RSB Targeted Intervention Program*

This Article does not propose that universities return to a puritanical environment in which students will be expelled, suspended, or punished for having sex. The best analogy in terms of how such a rule would be enforced is the current model used by universities for drug and alcohol abuse. Universities long-ago recognized that 1) alcohol/drugs play a large role in many students' college experience; and 2) 18-22 year-olds often struggle with drinking responsibly, which leads to binge drinking, alcohol poisoning and other harmful behavior.<sup>204</sup> To further the analogy, students engage in "risky drinking behavior" and nearly all universities – public and private, impose some sort of regulation concerning drinking or drug use, to include prohibiting alcohol on campus and in dorms, even for students over the age of 21.<sup>205</sup>

More importantly, universities have some sort of alcohol and drug education/counseling program through which students that violate university alcohol policies or are involved in an alcohol-related incident, are required to obtain education/counseling from trained professionals.<sup>206</sup> In fact, all universities are required under the Drug-Free Schools and Communities Act Amendments of 1989 to implement a "program to prevent the use of illicit drugs and the abuse of alcohol by students."<sup>207</sup> At minimum, this program must include: distribution of information to students about (1) laws regulating alcohol and drug use, including minimum legal drinking-age laws, as well as any other standards of conduct that are applicable to students at the institution; (2) the penalties for breaking local, state, and federal laws and campus rules; (3) the health risks associated with the abuse of alcohol; and

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204. See Beth McMurtrie, *Why Colleges Haven't Stopped Binge Drinking*, N.Y. TIMES (Dec. 14, 2014), <https://www.nytimes.com/2014/12/15/us/why-colleges-havent-stopped-binge-drinking.html> (stating that college drinking in the U.S "remains as much if a problem as ever" and that "partying is getting even harder").

205. See *id.* (noting, however, that one mayor in Delaware actually weakened regulations on selling alcohol near dormitories at the local public university).

206. Vivian B. Faden & Marcy L. Baskin, *An Evaluation of College Online Alcohol-Policy Information*, 51 J. AM. COLLEGE HEALTH 101, 101 (2002) (discussing a study of 52 university websites indicating that the vast majority had sanctions for alcohol abuse to include: fines, parental notification, warning, suspension, expulsion or dismissal from university housing and stating that over 80% advertised alcohol evaluation and treatment programs as a consequence of alcohol abuse incidents).

207. Drug-Free Schools and Communities Act Amendments of 1989, 20 U.S.C. § 1011i(a) (2008) (amending the Higher Education Act, 20 U.S.C. §§ 1001-1019 (1965)).

(4) *any counseling, treatment, or rehabilitation programs that are available to students.*<sup>208</sup> Thus, in the realm of risky alcohol use, universities have already utilized tertiary prevention and targeted intervention. These programs act as a type of intervention and are often accompanied with some form of probation. The probation would first put the student on notice of the harmfulness of their behavior, given treatment/education/counseling, and then expected to modify their behavior or suffer more severe sanctions.<sup>209</sup> These programs recognize that not all students come to university with an understanding and ability to drink responsibly. University is the first time many students experience true freedom and these programs seek to provide the education/counseling to help students build healthy drinking habits.

These alcohol abuse prevention and intervention strategies have become so integrated in universities that little controversy surrounds them. Universities recognize that misuse of alcohol can have severe consequences. Those consequences range from emotional, social, academic, and physical. As a result, universities have recognized that early intervention is essential so when the university learns of an individual involved in an incident involving risky alcohol use, the university addresses the behavior through a combination of rehabilitative and punitive action.<sup>210</sup> This Article's proposal is similar to the alcohol-based model that has existed at universities for decades. The only difference is that the harm caused by RSB may not be as palpable or immediately recognizable. Seeing an individual hung-over at class or vomiting profusely as a result of binge drinking is easily recognizable as irresponsible/reckless alcohol consumption and is often a very public spectacle.

On the other hand, the impacts of RSB are much more private and less recognizable. Nevertheless, the emotional damage caused to a 19-year old, who while perhaps not sexually assaulted, felt taken advantage of after a night of drinking, is real.<sup>211</sup> The long-term physical impact of an STI will

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208. *Id.* at §§ 1011i(a)(1)(A)-(E). See Faden & Baskin, *supra* note 207, at 101.

209. See *id.* at 103 (using disciplinary sanctions, warnings, suspensions, expulsions, and parental notification as examples of prevention methods that put the student on notice of his or her risky behavior).

210. See *id.* (noting significant variance among schools in how such actions are applied).

211. See, e.g., Ctrs. for Disease Control and Prevention, *Sexual Violence: Consequences*, [cdc.gov/violenceprevention/sexualviolence/consequences.html](http://cdc.gov/violenceprevention/sexualviolence/consequences.html) (2017); Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* 100, 117 (1998) (referring to the "emotional vulnerability" and "emotional consequences" inherent in sexual encounters); John O. G. Billy et al., *Effects of Sexual Activity on Adolescent Social and Psychological Development*, 51 *Soc. Psychol. Q.* 190, 209 (1988) (finding that "having sex [in adolescence] gives rise to" emotional and

remain with an individual well beyond the effects of a hangover.<sup>212</sup> Thus, while less recognizable than reckless alcohol use, the potential for harm involved in RSB – emotional, social, academic, and physical is just as high, if not higher and thus worth of addressing as early as possible.

#### IV. ADDRESSING CRITIQUES OF RSB POLICY AT UNIVERSITIES

##### A. *Legal Behavior (RSB) Should Not Be Punished*

No doubt this proposal may receive criticism for its impact on the liberties of adults, just as critics criticized the 2005 proposal by Ayres and Baker.<sup>213</sup> In anticipation of those criticisms, Ayres and Baker noted that there is precedence in the law for prohibiting and even criminalizing behavior that creates an increased likelihood of harm, even if the harm never occurs.<sup>214</sup> For example, nearly every state criminalizes “reckless driving” because engaging in certain behaviors while driving increases the likelihood that an accident will occur. Police can arrest someone and can prosecute someone for engaging in those behaviors even if no harm actually occurs. Similarly, Ayres and Baker argued that restricting one’s liberty by criminalizing reckless sex was appropriate even if no harm actually occurred given the proven risk of harm.<sup>215</sup>

While Ayres and Baker’s response still has merit, it is critical to also distinguish the difference between criminalizing reckless sex and imposing an administrative policy in the context of a university or MSA. In fact,

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psychological consequences, namely “more sexually permissive attitudes and expectations, which in turn may affect such outcomes as value on academic achievement, deviance proneness, religiosity, and church attendance”).

212. See J. Dennis Fortenberry, *Unveiling the Hidden Epidemic of Sexually Transmitted Diseases*, 287 JAMA 768, 769 (2002) (reporting that the number of undiagnosed and untreated cases of gonorrhea and chlamydia is exceedingly high). See also MEG MEEKER, EPIDEMIC: HOW TEEN SEX IS KILLING OUR KIDS 11 (2002) (estimating that 25% of sexually active teenagers carry an STI).

213. See generally Ferzan, *supra* note 17 (criticizing Ayres and Baker’s approach as morally and constitutionally impermissible).

214. See Ayres & Baker, *supra* note 13, at 634 (using drunk driving as an example, because drunk driving laws criminalize the act, regardless of whether it actually led to manslaughter); see, e.g., NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., DISTRACTED DRIVING, <https://www.nhtsa.gov/risky-driving/distracted-driving> (2018) (criminalizing distracted driving, which includes any activity that diverts attention from driving, regardless of whether the conduct caused an accident or not).

215. See Ayres & Baker, *supra* note 13, at 655 (explaining that lawmakers will be increasingly willing to enact laws intended to prevent harm as they become more aware of the dangers associated with the act, including as reckless sex).

universities and MSAs already impose restraints on the private lives of students, to include regulating legal behaviors that society at-large would not and could not regulate. For better or worse, 18 to 22-year-olds, while legally recognized as adults are often still viewed as adolescents and increasingly treated as such at universities.<sup>216</sup> In fact, many universities and their staff act as quasi-parents who assume an *in loco parentis* role to supervise and care for their “children” while at school (even though courts no longer formally recognize such a relationship).<sup>217</sup>

Although no longer legally recognized as a quasi-parent of its students, many universities still impose significant administrative restrictions on their student’s liberty.<sup>218</sup> The extent of those restrictions varies by school and most significantly whether the university is private or public. For example, some private universities prohibit *any* premarital sex<sup>219</sup> (albeit those are based on religious mores), impose curfews or restrictions on when students can visit the rooms of students of the opposite sex,<sup>220</sup> prohibit pornography

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216. See Eric Posner, *Universities are Right—and Within Their Rights—to Crack Down on Speech and Behavior*, SLATE (Feb. 12, 2015, 2:30 PM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2015/02/university\\_speech\\_codes\\_students\\_are\\_children\\_who\\_must\\_be\\_protected.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/02/university_speech_codes_students_are_children_who_must_be_protected.html) (describing how students in college must be protected like children while being prepared to be adults).

217. Philip Lee, *The Curious Life of In Loco Parentis at American Universities*, 8 HIGHER ED. REV. 65, 66 (2011) (referring to the legal relationship in which a temporary guardian of a child, such as university staff, takes on all or some of the responsibility for the child).

218. *Id.* at 67 (imposing social rules and restrictions as a component of the theoretical *in loco parentis* role).

219. See Nick Anderson, *How Some Colleges That Ban Premarital Sex Teach Prevention of Sexual Assault*, WASH. POST (July 12, 2014), [https://www.washingtonpost.com/local/education/how-some-colleges-that-ban-premarital-sex-teach-prevention-of-sexual-assault/2014/07/12/727ebb50-083d-11e4-bbf1-cc51275e7f8f\\_story.html?utm\\_term=.ef649b33bc6b](https://www.washingtonpost.com/local/education/how-some-colleges-that-ban-premarital-sex-teach-prevention-of-sexual-assault/2014/07/12/727ebb50-083d-11e4-bbf1-cc51275e7f8f_story.html?utm_term=.ef649b33bc6b) (highlighting how Brigham Young University, Liberty University, and Catholic University specifically ban premarital sex) (emphasis added).

220. *E.g.* Pepperdine University and the University of Notre Dame prohibit overnight/after-hours visitation by member of opposite sex and sexual intercourse outside of marriage. *E.g.* *Undergraduate Residence Hall Visitation (Parietals)*, UNIVERSITY OF NOTRE DAME, <http://dulac.nd.edu/community-standards/standards/parietals> (last visited Apr. 12, 2018); *Sexual Activity*, UNIVERSITY OF NOTRE DAME <http://dulac.nd.edu/community-standards/standards/sexual-activity/> (last visited Apr. 12, 2018); *Student Policies: Sexual Relationships*, PEPPERDINE, [https://www.pepperdine.edu/admission/student-life/policies/policies\\_procedures\\_overlay/seaver\\_policy\\_overlays/overlay\\_seaver\\_sexual\\_relationships.htm](https://www.pepperdine.edu/admission/student-life/policies/policies_procedures_overlay/seaver_policy_overlays/overlay_seaver_sexual_relationships.htm) (last visited Apr. 12, 2018); *Student Policies: Visitation*, PEPPERDINE, [https://www.pepperdine.edu/admission/student-life/policies/policies\\_procedures\\_overlay/overall\\_housing\\_overlays/overlay\\_seaver\\_visitati](https://www.pepperdine.edu/admission/student-life/policies/policies_procedures_overlay/overall_housing_overlays/overlay_seaver_visitati)

on university networks or in residence halls<sup>221</sup>, or limit speech by restricting “microaggressions.”<sup>222</sup> In addition, nearly all universities have policies prohibiting sexual relationships between students and faculty/staff, and most also prohibit consensual sexual relationships between student-athletes and coaches.<sup>223</sup> Thus, to some extent, universities already prohibit some instances of consensual sex based not on actual harm, but on the potential negative impacts that could result from such a relationship.<sup>224</sup> Furthermore, even if they do not specifically prohibit the behaviors mentioned above, nearly all universities at least advertise that their goal is not only to develop scholars, but to develop the character of their students.<sup>225</sup> In fact, in 1998,

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on.htm (last visited Apr. 12, 2018).

221. E.g. Northwestern University prohibits the use of university networks to view or transmit pornographic material. *Prohibited Use of Electronic Resources for Threats, Harassment, and Pornography*, NORTHWESTERN UNIVERSITY, [http://policies.northwestern.edu/docs/Prohibited\\_Use\\_of\\_Electronic\\_Resources\\_for\\_Threats\\_Harassment\\_and\\_Pornography\\_061410.pdf](http://policies.northwestern.edu/docs/Prohibited_Use_of_Electronic_Resources_for_Threats_Harassment_and_Pornography_061410.pdf) (last visited Apr. 14, 2018).

222. See, e.g., Greg Lukianoff and Jonathan Haidt, *The Coddling of the American Mind*, THE ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/> (defining microaggressions to include small actions or word choices that appear to have no malicious intent, but are received as a kind of violence nonetheless, such as asking an Asian or Latino American, “Where were you born?” because it implies they are not American); Conor Friedersdorf, *The Rise of Victimhood Culture*, THE ATLANTIC (Sept. 11, 2015), <https://www.theatlantic.com/politics/archive/2015/09/the-rise-of-victimhood-culture/404794/> (defining “microaggressions” as a “form of social control in which the aggrieved collect and publicize accounts of intercollective offenses” in order to persuade the public that minor issues or insults are part of larger patterns of injustice); Posner, *supra* note 217 (discussing the debate over “speech codes,” which prohibit students from making offensive comments to one another in or outside of the classroom).

223. Kevin Kiley, *Relationship Problems*, INSIDE HIGHER ED (Aug. 30, 2011), [https://www.insidehighered.com/news/2011/08/30/idaho\\_student\\_s\\_death\\_and\\_ties\\_to\\_former\\_professor\\_highlights\\_difficulty\\_of\\_preventing\\_faculty\\_student\\_relationships](https://www.insidehighered.com/news/2011/08/30/idaho_student_s_death_and_ties_to_former_professor_highlights_difficulty_of_preventing_faculty_student_relationships) (debating the effectiveness of policies at colleges and universities that prohibit relationships between faculty and students and noting that such relationships are typically not surprising among the education community). See also Allie Grasgreen, *Out-of-Bounds Relationships*, INSIDE HIGHER ED (May 2012) <https://www.insidehighered.com/news/2012/05/01/ncaa-asks-colleges-prohibit-romantic-relationships-between-athletes-coaches> (stating that “regardless of whether [student-athlete and coach sexual relationships] are consensual, these relationships are a form of sexual abuse . . . because the employee holds a position of power over the athlete.”).

224. Grasgreen, *supra* note 224 (discussing the various negative consequences that sometimes result from these relationships, e.g. suicide, negative impact on team, legal liability for the college).

225. JOHN TEMPLETON FOUNDATION, COLLEGES THAT ENCOURAGE CHARACTER DEVELOPMENT: A RESOURCE FOR PARENTS, STUDENTS, AND EDUCATORS (1999)

Congress amended the Higher Education Act of 1965 and urged “colleges and universities to affirm that the development of character is one of the primary goals of higher education.”<sup>226</sup> As such, schools routinely prohibit acts that would be considered criminal in society, in the name of developing character.<sup>227</sup> For example, it is common knowledge that most universities have some type of honor code that prohibits cheating in order to protect academic integrity,<sup>228</sup> others also include broad and vague prohibitions against “engaging in lewd, licentious or disorderly conduct (Fordham University),”<sup>229</sup> or “behaving in a manner that threatens or endangers the health or safety of any student or employee of the University, or of visitors on the campus,” (University of Texas).<sup>230</sup>

Thus, if universities can limit the liberty of students in the name of safety, character, and protection from offensive words, then it is not so far-fetched for them to institute policies focused on addressing the behaviors that undoubtedly contribute to sexual assaults on college campuses.

#### B. Universities Already Address RSB Through Public Health

One might argue that universities and secondary schools already address RSB using public health programs. This is true, to some extent, but a review of literature concerning already existing programs focusing on risk-reduction and sex indicates that any attempt to address RSB is normally focused on younger adolescents (not college students) in the context of sex education and HIV/AIDs prevention through the encouraged use and distribution of condoms.<sup>231</sup> While these programs are in some ways related to this Article’s

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(reviewing 2,500 programs from 1,000 institutions that claimed to focus on character development in the education of students).

226. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 863(b), 112 Stat. 1581, 1826 (1998).

227. See JOHN TEMPLETON FOUNDATION, *supra* note 226.

228. E.g., *Student Discipline and Conduct*, UNIVERSITY OF TEXAS AT AUSTIN, <http://catalog.utexas.edu/general-information/appendices/appendix-c/student-discipline-and-conduct/> (last visited Apr. 12, 2018). (prohibiting academic dishonesty, which includes, “plagiarism, collusion, falsifying academic records, misrepresenting facts, and any act designed to give unfair academic advantage to the student or another individual.”).

229. *The University Code of Conduct*, FORDHAM UNIVERSITY, [https://www.fordham.edu/info/21684/university\\_regulations/3693/the\\_university\\_code\\_of\\_conduct](https://www.fordham.edu/info/21684/university_regulations/3693/the_university_code_of_conduct) (last visited Apr. 12, 2018).

230. *Student Discipline and Conduct*, *supra* note 229.

231. See generally *Sexual Risk Behavior Resources*, CTRS. FOR DISEASE CONTROL AND PREVENTION, (Jan. 18, 2018), <http://www.cdc.gov/healthyyouth/sexualbehaviors/strategies.htm> (highlighting some of the sex education programs targeted at younger

concept of RSB and have been somewhat effective in reducing STIs and unwanted pregnancy, they do not come close to addressing the full gamut of RSB.<sup>232</sup> These programs primarily address the physical aspects/dangers of sex, rather than the social and emotional aspects of sex.<sup>233</sup> To use a simple analogy, this educational program is the equivalent of teaching students in a drivers' education class (drivers' ed.) the components of a car and the basic mechanics of operating a car, with no education about how to safely operate a car in day-to-day social settings. Thus, students enter college understanding the mechanics of how to have sex and the physical risks of unprotected sex (e.g. AIDS, STIs, etc.), but receive no guidance concerning how to navigate their sexuality in day-to-day interactions.

This is further complicated by the newfound independence and availability of drugs and alcohol in a university setting. Again, to use the drivers' ed. analogy -- imagine if drivers ed. consisted only of the basic mechanics of operating a vehicle, which was immediately followed by sending the new drivers onto a highway in Los Angeles. To continue this analogy, imagine that in addition to their minimal drivers' ed., their only other exposure to driving techniques is playing video games, watching NASCAR, and watching movies like "Fast and the Furious." No doubt, such a combination would be a recipe for disaster. Our approach to sexual education and intervention before sending students off to college is no different -- schools teach the physiology of sex, but leave students to their own devices (often peers or pornography) to learn the social aspects of sex. In sum, just as focusing on only the mechanics of driving is unworkable in drivers ed., it is unwise to limit the focus of sex education to only the physical aspects of sex while ignoring the psychological, emotional, and social aspects of sex.<sup>234</sup> Perhaps "safe sex" should be interpreted more broadly to focus on not only prophylactic measures to reduce risk of pregnancy/AIDS/STIs, but also on reducing physical or emotional harms related to unwanted or nonconsensual sex.

Finally, just as with sexual assault, many of the university public health programs only focus on primary prevention and response. Students receive basic education on safe-sex and receive treatment or medical care/support if they contract an STI. I would hypothesize, however, that the majority of universities do not have a comprehensive written safe-sex policy, nor do they have mechanisms in place for secondary/tertiary prevention for higher risk

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adolescents).

232. *Id.*

233. *Id.*

234. *Id.*

individuals or groups.

*C. Potential Impact on Victims/Survivors*

I suspect that at some point while reading this article, most readers considered the impact of such a policy on victims. As previously mentioned, a university's RSB policy should not be focused on the binary criminal concepts of subject and victim, largely because it is non-punitive and focused on behaviors. However, one cannot ignore the fact that such a policy could be misused by administrators or misunderstood as "punishing" victims for behaviors that individuals perceive as having contributed to a sexual assault. In essence, the question on many readers' minds is: "Will this lead to 'victim blaming?'" or "is the RSB policy itself a type of 'victim blaming?'"

As Mellins et al. acknowledged, there is a need for intervention to address the interaction of drinking and sexual assault prevention, but "any work addressing substance abuse as a driver of vulnerability must do so in a way that does not replicate victim-blaming."<sup>235</sup> This concern is valid and is something that weighed heavily on my mind while I researched and wrote this article. Unfortunately, I do not have a solution to avoid all concerns of victim-blaming. In the vast majority of cases, a policy of RSB would be independent of any sexual assault claims – while all sexual assaults would necessarily involve some level of RSB by one or more involved, not all instances of RSB would involve an allegation of sexual assault. In fact, the purpose of addressing RSB is to address behavior *before* it results in a sexual assault. In addition, even in cases in which RSB may have come to light as a result of a sexual assault allegation, the issues of whether a perpetrator committed a sexual assault and whether a victim engaged in RSB are independent and distinct. Consider the following common scenario:

*A male (Dave) and female (Dana) college student, both equally intoxicated (but not so intoxicated so as to be legally incapable of consenting) meet for the first time at an off-campus party and engage in unprotected sex. The following day, Dana has no recollection of having had sex and reports that she has been sexually assaulted because she could not consent in her intoxicated state. Assume for the purpose of this scenario, that an investigation reveals that while both individuals were intoxicated, the female was not so intoxicated that she was incapable of consenting.*

Given this scenario – when viewed from the perspective of engaging in RSB, both the male and female are equally culpable since both engaged in sexual behavior with a first-time partner while intoxicated. However, many

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235. Mellins, *supra* note 40 (attempting to avoid placing the burden on the victims instead of the perpetrators).



universities would be hesitant to discipline Dana for several reasons. First, such an action could be viewed as “victim blaming” since by punishing her for her risky behavior, the university would essentially be placing equal blame on her for putting herself in a situation which led to her alleged sexual assault. Second, many universities actually have policies giving victims amnesty/immunity for any offenses related to or arising from an alleged sexual assault.<sup>236</sup> In that regard, even if the university wanted to “punish” the female in this situation, their policy might prevent them from doing so since her behavior occurred at or near the time of the alleged sexual assault and would not have even been known, but for the report. Such a policy is common among universities in order to ensure that victims (and sometimes bystanders) are not chilled or deterred from reporting sexual assaults because of fears that doing so may lead to them getting disciplined for lower-level offenses such as drug use, underage alcohol, curfew violations, etc. Another justification is that that “but for” the report of sexual assault, the university would likely not have even known about the other underlying misconduct. Again, in this scenario, but for the female’s sexual assault report, the university would not have known about any RSB.

In the Dave-and-Dana scenario, the university is now placed in a “Catch 22” – if they address Dana’s RSB, they may violate their own amnesty policy while also be accused of “victim blaming.” On the other hand, if they discipline the male for his RSB (assuming they are unable to pursue the sexual assault claim), they will be criticized (and potentially sued) for singling out Dave’s behavior while ignoring the exact same behavior engaged in by Dana. One might argue that if these policies do not address both individuals similarly, it becomes a sword for attacking men that simultaneously shields females, which was one of the criticisms of Ayres and Baker’s proposal.<sup>237</sup>

Unfortunately, this scenario is not unique to this Article’s RSB proposal – the same difficulties are presented in many university sexual assault cases. However, based on the current state of the law, universities and prosecutors have an “out” in that most state laws and university policies do not allow an accused to argue that he or she is not guilty because they were “drunk too” or “too drunk to know that the other person was too drunk to consent.”<sup>238</sup> In

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236. See, e.g., *Policy for Alcohol and/or Drug Use Amnesty in Sexual and Interpersonal Violence Cases*, STATE UNIV. OF N.Y., <http://www.sunywcc.edu/student-services/policies/title-ixsexual-harassmentsexual-misconduct/policy-for-alcohol-and-or-drug-use-amnesty-in-sexual-violence-cases/> (last visited March 12, 2018) (hereinafter *Policy for Alcohol*).

237. See generally Ferzan, *supra* note 17.

238. See Gagnon, *supra* note 133 (noting that alcohol is a mitigating factor, but not

other words, alcohol is not a defense to the crime of sexual assault (though it may still be considered a mitigating factor in sentencing).<sup>239</sup> This creates a tenuous scenario in which the role of one's intoxication is determined by which individual is first to report having been sexually assaulted or which of the individuals was more intoxicated than the other.

The above approach (i.e. only addressing the RSB of the individual accused of RSB or some other offense) would be inconsistent with the purpose of an RSB policy. RSB is focused on behavior regardless of who engaged in the behavior or whether they were the person that reported the behavior. The goal of this policy is to identify and address this behavior which leads to instances of sexual assault, thus, ignoring this underlying risky behavior because it is considered "victim blaming" would be counter-productive. In addition, I would argue that university amnesty policies (even as written) would not apply to the RSB policy given that university amnesty policies typically reference amnesty from university disciplinary actions. As previously discussed in Section IV, initial "violations" of the RSB policy result in non-punitive intervention programs, not discipline. For those still concerned about the perception of victim blaming universities could incorporate an "actual harm" component to RSB, which would limit the scope of the RSB policy.

First, as discussed previously, as part of implementing an RSB policy, universities should have a wide-range of services and options in addressing RSB to ensure that the behavior is addressed appropriately depending on the circumstances. This is crucial because the spectrum of RSB is vast and depends on the nature of the behavior, the history of the individual, and the culpability of the individual. The default for addressing such behavior is through therapeutic and/or educational programs in the form of targeted intervention. Consider the following scenarios:

*Joe is a freshman in college who never drank alcohol before. Joe goes to a party his first weekend at college, gets intoxicated, meets another male, Bryan, at the party and the two engage in consensual sex. Unbeknownst to Joe, Bryan has a boyfriend. Bryan's boyfriend later finds out about the infidelity and physically attacks Joe. Joe reports the attack to university officials, who as a result of the report become aware of possible RSB engaged in by both Joe and Bryan (in addition to the criminal assault by the boyfriend).*

*On the other end of the spectrum, is Jack. Jack has a documented history of alcohol-related incidents and has previously been accused of sexual*

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an excuse or defense).

239. *Id.*

*assault. He hosts a party in which he prepares two separate bowls of punch – one with a fairly low alcohol content, the other containing Everclear, an alcohol with a high alcohol content. Jack intentionally gives one particular female, Kelly, whom he had not met previously, the punch with the Everclear. Prior to doing so, Kelly mentions that this is her first college party and she’s not much of a drinker so she’ll just have a couple cups of the Everclear punch, which Jack describes as fruity and not too strong. Jack then takes her to a bedroom, and in her intoxicated, but perhaps not legally incapacitated state, tells her to remove her clothes and proceeds to have sex with her. Given her reduced inhibitions, slowed reaction, and other symptoms of intoxication, Kelly obliges. The following day, Jack shares story of his “conquest” with his peers and word spreads throughout campus and eventually makes its way to university administrators. Again, for the purpose of this scenario, assume that Kelly was not so intoxicated/incapacitated that the act would constitute sexual assault in the criminal context.*

No doubt the difference between Joe’s situation, Kelly’s situation, and that of Dana and Dave is substantial, though all may warrant some intervention by the university – the issue is how intense of an intervention is required and whether punitive action should also accompany the intervention. In these scenarios, Joe and Kelly could be considered victims. Certainly, Joe is a victim of Bryan’s boyfriend. Whether Kelly is a victim in the criminal sense is debatable, but she certainly may be a victim of Jack’s aggressive and predatory behavior. Most would agree that Jack’s behavior warrants at the very least an RSB intervention, if not additional disciplinary action given the multiple RSB factors at play, his level of culpability, and what appears to be a pattern of behavior. In addition, even though Bryan’s actions, based on the facts provided, appear less serious than Jack’s, one could understand why the university might refer him to RSB intervention, though based on the circumstances it would likely be much more limited than the intervention required for Jack. The difficult issue is how the university should address the behavior of Kelly and Joe given their status as either a victim or at the very least less-culpable behavior. In my opinion, if the goal of the RSB policy is to address and reduce RSB, universities consider only the behavior, not the status of the individual. Bryan and Joe are arguably equally culpable in this scenario as it relates to RSB so it would be inequitable to refer Bryan to RSB intervention, but not Joe. Regarding Kelly, certainly she was much less culpable than Jack, but for the purposes of RSB, a non-binary concept, the relative riskiness is immaterial, for referral. The rationale for referring Kelly to RSB intervention is to ensure that this new student, who has now been identified as “at risk” receives additional education about the potential risks of her behavior *and* an opportunity to assess possible root causes, if any.

Again, it is also important to recognize that risk-reduction and victim blaming are two distinct concepts whose lines often become blurred. Often it is instructive to consider non-sexual examples, which tends to remove any implicit biases concerning sexual assault, to better objectively evaluate whether a response is victim blaming. Consider this non-sexual example:

*Sally attends a party and becomes intoxicated. In her intoxicated state, she gets separated from her friends and becomes disoriented. She stumbles into the street and crosses the street without using a crosswalk. Meanwhile, James is drag-racing with another friend, blows through a red-light, and doesn't see Sally until it's too late. James' car strikes Sally injuring her.*

In this non-sexual example, one can easily conceptualize the different between risk-reduction and victim blaming. We can all agree that regardless of Sally's choices that evening, James committed a crime and his crime harmed Sally. Whether Sally was drunk, stumbling because she was in high-heels, is inconsequential to whether James' act was itself reckless/criminal. From a criminal perspective, James is the only one to blame for the harm to Sally. From a risk-reduction perspective, however, we can also agree that Sally made choices that evening that contributed to her injuries. In some ways, one can use the torts distinction between proximate and "but for" cause.<sup>240</sup> James was the proximate cause of Sally's injuries, but Sally's actions were a "but for" cause, given that "but for" Sally's intoxication, she likely would not have been in the street when James sped down the street.

In this scenario, James will likely be prosecuted and suffer criminal consequences.<sup>241</sup> The question remains, however, whether and how should Sally's behavior be addressed? The answer to that question depends on Sally's particular circumstances. If this were her first alcohol-related incident, odds are that little intervention would be required. However, if Sally's intoxication that evening was part of a growing pattern of alcohol abuse, her friends and her university would be negligent if they did not at least offer some type of alcohol-intervention to Sally—regardless of whether her risky behavior is viewed as having contributed to her injury, the incident brought her risky behavior to light and failing to address it would be more damaging to Sally.

Now take that scenario and consider it through the lens of a sexual assault – rather than Sally stumbling into the street and getting hit by James' car, imagine that she stumbles into the arms of a sexual predator. All of a sudden,

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240. See generally 57A AM. JUR. 2D *Negligence* § 462 (1989).

241. See generally M. C. Dransfield, Annotation, *What Amounts to Reckless Driving of a Motor Vehicle within Statute making such a Criminal Offense*, 52 A.L.R.2d 1337 (1957).

the concepts that were fairly non-controversial become fraught with concerns of victim-blaming. Nevertheless, the underlying RSB remains exactly the same. Consider the additional scenarios:

*Imagine Jane, a young prostitute, is raped by a “john.”*

In this more extreme example, on the one hand, the police and prosecutors should focus on the crime at hand and prosecute the “john” for his offense. The fact that the victim was a prostitute engaging in illegal behavior does nothing to excuse the crime committed by the “john.” However, separate from the criminal prosecution, social services organizations might look at this situation and see the victim’s involvement in prostitution as an inherently risky behavior and look to provide services to the victim to identify root causes and attempt to find less risky alternatives for her employment.

Similarly, imagine a scenario in which:

*Jade, a college student, regularly gets intoxicated and has unprotected sex with strangers. On one of these occasions, Jade gets intoxicated to the point of passing out and is sexually assaulted while unconscious.*

Similar to the prostitute example, Jade’s history should have no bearing on the prosecution of the offender. In other words, despite her history of RSB, Jade is not blameworthy for having been sexually assaulted – the blame rests entirely with the individual that had sex with her without her consent. However, separate from this particular incident and issues of criminal responsibility, there are deeper underlying issues that should not be ignored – namely that Jade has a history of engaging in RSB with alcohol and sex which warrants some type of intervention especially given the wealth of research suggesting that alcohol abuse and RSB are often indicators of deeper psychological and emotional issues, to include prior victimization.<sup>242</sup> Thus, to ignore the underlying behavior out of fear that it would be considered “victim blaming” and merely because it was discovered as a result of Jade’s sexual assault allegation would be to do an incredible disservice to Jade by failing to address behavior that not only places her at an increased risk of sexual assault, STIs, etc. but may also be causing additional physical and emotional harm, and be indicative of deeper emotional/psychological issues (e.g. low self-esteem, prior victimization). This is also critical to understand given that we know that victims of sexual assault and individuals suffering from PTSD are more likely to engage in

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242. See generally Rebecca Campbell, *The Impact of Rape on Women’s Sexual Health Risk Behaviors*, 23 HEALTH PSYCHOL., 67 (2004) (finding that 38% of women increased risky sexual behaviors after experiencing rape).

alcohol abuse or risky sexual behaviors.<sup>243</sup> Hence, providing some level of intervention/services based on the risky sexual behavior may ultimately help to identify and address symptoms of past sexual abuse.

On a related note, research suggests that prior victims of sexual assault are more likely to engage in RSB, to include lack of protected sex, more sexual partners, and more likely to use alcohol prior to sexual activity.<sup>244</sup> Thus, from a victim perspective, identifying an individual who repeatedly engages in RSB may lead to additional assistance for victims who have not yet sought or obtained services. In fact, Johnson and Johnson concluded that “it may be more fruitful to develop interventions which foster meaningful, satisfactory relationships with a smaller number of individuals.”<sup>245</sup>

For those who still struggle with the potential for RSB to be used “against victims,” or that it might deter reporting, universities could incorporate a requirement in their RSB policy that some direct and actual “harm” be shown in order to trigger the RSB policy. In other words, if University officials were to independently learn that two students engaged in behavior that met the definition of RSB, but neither student alleged any harm, the University could not impose any punitive sanctions, though perhaps they would still be permitted to intervene from an educational/therapeutic perspective by referring the individuals to classes, counseling, etc. In the scenario involving Kelly and Jack discussed above, if Kelly reported a sexual assault, whether it legally constituted sexual assault or not, Jack essentially alleged some form of harm arising from the sex with Jack, whereas Jack did not report any harm. Thus, the University might be justified in disciplining Jack, but not Kelly, if they determined that Kelly suffered harm while Jack did not. Essentially this incorporates an “egg-shell skull” theory<sup>246</sup> to the RSB, in that an individual engaging in RSB assumes the risk, if their partner suffers harm, even if the full risk of imposing harm was unknown to the partner. For example, the fact that the two engaged in the same exact behavior, is immaterial – the main issue is which of the partners suffered harm. The harm could be

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243. Joanna D. Lusk et al., *Reckless Self-Destructive Behavior and PTSD in Veterans: The Mediating Role of New Adverse Events*, 30 J. TRAUMATIC STRESS 270, 273 (2017).

244. Nicole L. Johnson & Dawn M. Johnson, *Factors Influencing the Relationship Between Sexual Trauma and Risky Sexual Behavior in College Students*, 28 J. INTERPERSONAL VIOLENCE 2315, 2316 (2013).

245. *Id.* at 2326.

246. The “egg-shell skull” theory is a tort law concept which states that the unexpected frailty of an injured person is not a valid defense to the seriousness of any injury caused to them. See Dr. J. Stanley McQuade, *The Eggshell Skull Rule And Related Problems In Recovery For Mental Harm In The Law Of Torts*, 24 CAMPBELL L. REV. 2 (2001).

physical or emotional. Physical harm might include bruises/abrasions/pain caused by the actual encounter or STIs contracted from the sexual encounter. Emotional harm is certainly more grey and subjective, but could be in the form of harm to reputation, embarrassment, trauma, etc. This would not be unlike various criminal “careless” or “reckless” statutes in which the offense is only triggered if it causes some negative effect. For example, several states have “distracted driving” or “cell phone use” offenses that are considered secondary laws in that they are only triggered if an individual gets into an accident or speeds as a result.<sup>247</sup>

#### V. APPLICATION OF RSB TO MILITARY ACADEMIES

As a former assistant professor at the USAF Academy and current attorney-advisor at USAFA, this proposal has unique implications for military service academies (MSAs), which make it an even more appropriate and attractive policy for them. First, like their civilian peers, MSAs already regulate their students’ personal lives.<sup>248</sup> However, MSAs traditionally have significantly more restrictions on liberty than civilian universities, so that regulations concerning RSB would be a much less dramatic leap at an MSA than at a traditional university, especially other public universities.<sup>249</sup> Interestingly, MSAs already regulate where military members can have sex (e.g. USAFA has a strict prohibition against “intimate behavior in the cadet area”) and with whom they can have sex (e.g. senior cadets are prohibited from having relationships with freshman cadets, all cadets are prohibited from having an intimate relationship with officers or enlisted personnel).<sup>250</sup>

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247. DISTRACTED DRIVING, *supra* note 215.

248. *See, e.g.*, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, *supra* note 140.

249. *Id.*

250. The “intimate behavior” policy at USAFA states: “Intimate behavior is prohibited in the Cadet Area. Do not engage in any form of intimate behavior in any room (common or otherwise) within the Cadet Area dormitories or other facilities. Intimate behavior includes, but is not limited to sexual activities (to include sleepovers), fondling, kissing, cuddling, and spooning.” AIR FORCE CADET WING INSTRUCTION, CADET STANDARDS, (2017). The Naval (Annapolis) and Military Academy (West Point) both have similar policies. *See* DEP’T OF DEF., COMMANDANT OF MIDSHIPMAN INSTRUCTION 5400.6T, <https://www.usna.edu/Commandant/Directives/Instructions/5000-5999/COMDTMIDNINST-5400.6T-MIDSHIPMEN-REGULATIONS-MANUAL.pdf>; UNITED STATES MILITARY ACADEMY, ARMY REGULATION 210-26, ¶ 6-8, [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/pdf/web/r210\\_26.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r210_26.pdf). The “fraternization” policy at USAFA states: “At no time will the upper three classes participate in an unprofessional relationship with [freshmen]. . . . [Freshman] are in training during their entire [freshman] year; therefore they cannot consent to a

Even outside of the intimate behavior realm, MSAs have broad discretion in regulating the lives of their students in the name of “good order and discipline.” The Supreme Court has held that in the name of “good order and discipline,” military members may have some restrictions imposed on their constitutional rights.<sup>251</sup> Accordingly, military appellate courts have provided substantial discretion to military commanders in determining how to best ensure good order and discipline to include limitations on sexual freedom.<sup>252</sup> For example, cadets are told what to wear, where to be (unlike university students who can elect not to attend class on any particular day, a cadet would be considered absent without leave (AWOL) if they failed to attend class without permission), etc. In addition, the penalty for violating these regulations can include restriction to the military base (aka university grounds), having to sit in a detention-like setting during the weekend, or having to repeatedly march back-and-forth. Thus, if MSAs can broadly regulate these aspects of cadet’s lives, to include the *who* and *where* of sex, regulating narrow aspects of *how* cadets and midshipman have sex would be fairly insignificant.

Imagine the Superintendent (aka “President”) of an MSA is looking to modify their policies on sexual conduct and asks you to prioritize the following policies in their effectiveness in addressing the root causes of sexual assault: (1) prohibiting cadets from engaging in any sexual behavior in their dorm rooms or other rooms on campus; (2) prohibiting upper-class cadets from engaging in any sexual behavior with freshmen cadets, enlisted members or officers; (3) prohibiting cadets from engaging in RSB. While the regulations concerning “who” certainly has a connection to sexual assault given the disparate power dynamics and potential for coercion, the policy addressing “where” arguably does more to perpetuate sexual assault than limit it as it creates an environment in which sexual behavior must occur in secret, isolated areas while also creating an incentive for victims not to report out of fear that they may be punished for any consensual sexual behavior that

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relationship with an upper classman.” AIR FORCE CADET WING INSTRUCTION, ¶ 1.4.5.

251. See *Parker v. Levy*, 417 U.S. 733, 758 (1974) (“The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.”).

252. See, e.g., *United States v. Marcum*, 60 M.J. 198, 208 (CAAF 2004) (“While service members clearly retain a liberty interest to engage in certain intimate sexual conduct, “this right must be tempered in a military setting based on the mission of the military, the need for obedience of orders, and civilian supremacy.”); *United States v. Sergeant*, 29 M.J. 812, 814 (A.C.M.R. 1989) (holding that it is lawful for a commander to impose a “safe-sex” order on a subordinate).



occurred prior to the assault. Thus, compared to the broad “who” and “where” prohibitions, the more narrowly tailored RSB prohibition would do more to prevent sexual assault, while having less of an impact on the freedoms of cadets.

Given the importance of ensuring “good order and discipline,” in situations of RSB, the impact of emotional/physical harm, rumors, etc. that stems from RSB not only has an individual effect on those involved, but also potentially impacts the organization and the mission. Furthermore, the increased risk of pregnancy and spread of STIs also has a tremendous impact on the mission – at all MSAs, cadets are prohibited from having dependents, meaning that when a cadet becomes pregnant, they’re left with the very difficult decision of terminating the pregnancy, terminating their parental rights, or withdrawing from the Academy.<sup>253</sup> Certainly, engaging in reckless sex vastly increases the chance of pregnancy or STIs, and the impact of such consequences may be felt more significantly at MSAs than at traditional universities given the unique policies previously described.<sup>254</sup>

In addition, the military routinely prohibits/regulates its members from engaging in risky behaviors or at minimum requires them to obtain special permission prior to doing so.<sup>255</sup> For example, if a military member wanted to go base-jumping in their personal capacity, they would be required to obtain approval from their chain-of-command to do so. Even where a military member travels in their personal capacity, such travel is regulated, and at minimum requires security briefings prior to visiting countries that might be perceived as unstable or risky.<sup>256</sup> The rationale of these policies is that the military at large has an interest in protecting its assets – to include human assets. Thus, in the Air Force, if an individual wanted to climb Mt. Everest, go skydiving, etc. she would be required to fill out a form to obtain approval to engage in that behavior given the potential implications of that behavior on their ability to serve. In the same vein, the physical and emotional risks of RSB have the potential to not only impact individual service members, but the military mission as a whole.

Finally, the MSAs routinely argue that given the future role of the cadets

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253. See DEPT. OF DEFENSE INSTRUCTION 1322.22, SERVICE ACADEMIES 9 (2015) <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/132222p.pdf> (“Those appointed as cadets or midshipmen must not have dependents.”).

254. See Ayres & Baker, *supra* note 13, at 608-618.

255. See AIR FORCE INSTRUCTION 91-202, THE US AIR FORCE MISHAP PREVENTION PROGRAM, ¶ A12.2.

256. See AIR FORCE INSTRUCTION 36-3003, MILITARY LEAVE PROGRAM, ¶ 3.8.4. [http://static.e-publishing.af.mil/production/1/af\\_a1/publication/afi36-3003/afi36-3003.pdf](http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-3003/afi36-3003.pdf).

as commissioned military officers, charged with the responsibility of leading soldiers, sailors, airmen, and marines as well as charged with handling multi-million dollar assets capable of inflicting catastrophic damage, that cadets should be held to a higher standard than their peers at traditional universities.<sup>257</sup> In this vein, the need to intervene when cadets demonstrate reckless behavior (in the sexual context or otherwise) and poor judgment is imperative. Again, in situations in which a cadet may not have been proven to have engaged in sexual assault, the MSAs have a substantial interest in intervening and sending the message to other cadets, that such RSB is not tolerable. Furthermore, the MSAs have an interest in ensuring that this cadet's behavior is addressed and rehabilitated before they make the decision to commission them as officers and send them off to lead.

#### VI. CONCLUSION

Universities and their peers at the MSAs have a unique relationship with their students in that they have the ability to monitor and guide behavior in ways that society-at-large cannot. While they should not become "morality police," when it comes to preventing and responding to sexual assaults, universities have the ability to identify the "broken windows" of sexual assault (i.e. risky sexual behaviors) and intervene to correct behaviors *before* those behaviors and underlying attitudes lead to sexual assault.

No doubt, some may see this as an unprecedented interference by universities into the private lives and mores of their students. Such a criticism, however, fails to acknowledge the unique role of universities in not only the education, but also character development of those individuals most at risk to be victims and perpetrators of sexual assault. For decades, universities have taken a multi-faceted prevention, intervention, and discipline approach to addressing irresponsible drug and alcohol use at universities, from establishing policies, to requiring treatment and intervention, to imposing disciplinary actions when intervention repeatedly fails. Thus, translating this approach to addressing irresponsible sexual behaviors is a natural transition and a necessary step when one considers the impact of sexual assault on universities and their consistent failure to adequately reduce prevalence.

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257. Five Superintendents of Federal Service Academies, *Lessons to Share*, INSIDE HIGHER ED., (May 7, 2015), <https://insidehighered.com/views/2015/05/07/essay-how-federal-service-academics-prevent-and-punish-sexual-assault>.