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The Know of "No," The Guess of "Yes"

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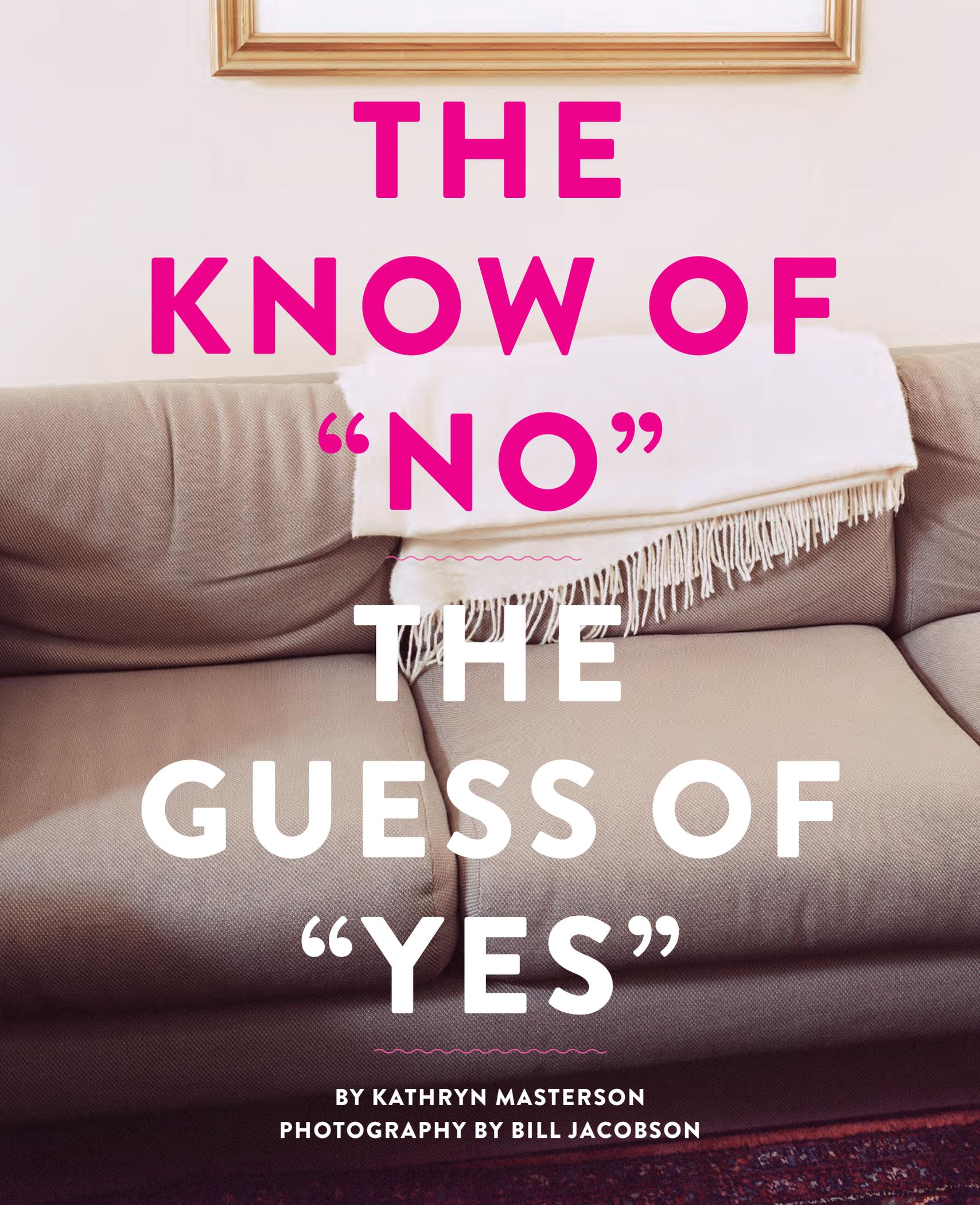
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**THE
KNOW OF
“NO”**

**THE
GUESS OF
“YES”**

BY KATHRYN MASTERSON
PHOTOGRAPHY BY BILL JACOBSON



In the wake of a flood of accusations and inquiries, universities across the country are soul-searching about the issue of sexual consent between young men and women.

Since September of 2014, Emma Sulkowicz, a student at Columbia University, has carried a 50-pound mattress around Columbia's campus in protest of an alleged sexual assault that she says has gone unpunished by the university. Sulkowicz has promised to carry the mattress until the male student she claims raped her, Paul Nungesser, leaves Columbia.

Sulkowicz acknowledges that she and Nungesser were friends who had been sexual before, but she says the time in question turned non-consensual. After hearing from other women who had negative experiences with Nungesser, she filed a complaint. Columbia determined that Nungesser was not responsible, which prompted Sulkowicz, who was invited to January's State of the Union address, to create—and become—a symbol for sexual assault survivors who feel mistreated by their universities.

Not long after the State of the Union, *The Daily Beast* published an article that featured a long interview with Nungesser in which he denied raping Sulkowicz. To support his case, Nungesser shared friendly Facebook messages the two had exchanged for weeks after the incident. The Columbia University student newspaper then ran editorials raising the possibility that they had been too quick to believe Sulkowicz's side of the story, even after the ruling, out of a desire to be sensitive to rape victims.

A couple months after Sulkowicz began her protest, and several states to the south—at the stately, Thomas Jefferson-designed University of Virginia—another media firestorm began to rage. In November, *Rolling Stone* magazine recounted a brutal gang rape at a UVA fraternity in 2012. The story, relayed to the journalist by a victim named Jackie (not her real name), alleged disturbing, predatory behavior by nine fraternity members who lured and locked Jackie in a room, after which seven raped her while two, including her date, shouted encouragement. Jackie's account generated worldwide headlines—not to mention horror, outrage, and protest—and months later, an apology. By *Rolling Stone*. Will Dana, the

magazine's managing editor, explained that in honoring Jackie's request not to speak to the men accused—and in light of conflicting information about the case unearthed by *The Washington Post*—troubling discrepancies had emerged. In the months since, the *Rolling Stone* piece has been widely discredited, prompting its own backlash, though Jackie still stands by her account.

In January of this year, a Nashville jury convicted two former Vanderbilt football players on multiple accounts of sexual battery and aggravated rape. The trial, which was not overseen by the university, examined a host of evidence gathered by the police that showed, among other things, surveillance video of the unconscious victim being dragged down a dormitory hallway and text-messaged mobile phone photographs of her being assaulted. The victim said that due to intoxication she remembered nothing, and none of the others who later testified to being at the scene intervened. The case, which may never have gone to trial without the police evidence, became a study on university cultures, which many believe are steeped in drinking. Even attorneys for one of the convicted football players attempted, ineffectively, to use Vanderbilt's hard party and hookup sex atmosphere as a defense.

Of course, rape and sexual misconduct on college campuses are not new, but they have come under the klieg lights recently due to such cases, as well as a combination of grassroots activism from students assaulted and the federal government ordering colleges to step up and do more to protect them. The messages seem to be everywhere—across social media, on the front pages of the nation's major newspapers, even at the GRAMMY Awards, where President Obama appeared in a public service message to say it's on all of us to stop sexual violence.

Yet this upsurge in interest has also resurrected thorny arguments about what truly constitutes consent, how it is articulated in intimate moments, if dynamics between the sexes are increasingly dysfunctional, whether changing attitudes about privacy via social media are affecting social mores, and if colleges are the proper legislators for any and all of the above.

“This issue of ‘consent’ is what really gets hard,”

says Connie Carson, vice president for student life at Furman. “Colleges struggle with how do you handle sexual misconduct cases, particularly the student-on-student cases where they know each other, and they’ve been acquaintances, and perhaps they’ve even out been out together.”

Carson says that when most people think of sexual assault, they assume force must be involved. But that’s not necessarily so. “Were they incapacitated? Or did they say yes to some parts of sexual touching but no to other parts? These are the kind of conversations we’re asked to have.”

Part of Carson’s role is to respond to the government’s increased pressure on universities to change policies and laws to more precisely define consent and then to thoroughly apply them. California, for example, now requires its public universities to have “affirmative consent” policies, which means a “yes means yes” standard. The governor of New York wants a law imposing the same for both public and private institutions. And while the difference between “no means no” and “yes means yes” may seem semantic, it is anything but.

Under California’s law, for example, consent is only consent when it is “an affirmative, unambiguous, and conscious decision” by each party to engage in sexual activity. Some critics of the policy worry that it may be unrealistic and that alcohol use can cloud it.

In *The New York Times* last fall, Jed Rubenfeld wrote an editorial in which he argued: “Consider the illogical message many schools are sending their students about drinking and having sex: that intercourse with someone ‘under the influence’ of alcohol is always rape. Typical is this warning on a joint Hampshire, Mount Holyoke, and Smith website: ‘Agreement given while under the influence of alcohol or other drugs is not considered consent’; ‘if you have not consented to sexual intercourse, it is rape.’ Now consider that one large survey showed that around 40 percent of undergraduates, both men and women, had sex while under the influence of alcohol. Are all these students rape victims? And what if both parties were under the influence? Asked this question, a Duke University dean answered, ‘Assuming it is a male and female, it is the responsibility in the case of the male to gain consent.’ This answer shows more ideology than logic.”

Melissa Nichols of the Julie Valentine Center, a nonprofit organization in Greenville dedicated to sexual and child abuse survivors, says the idea that false accusations are widespread, and that young men and their parents need to be worried, does not track with what she sees in her work.

“Only a small percentage [of abuse cases] are reported,” says Nichols, “and of that percentage, a smaller percentage [will] ever to go to trial.” She cites national research that shows false reports for rape range from two to 10 percent (although no exact figure is known), and that sexual assault is less about a misunderstanding between two people and more about predatory behaviors.

One often-cited study shows only a small percentage of college men commit sexual assault, but of those who do the majority have committed multiple assaults. A study of a small group of college men in North Dakota, however, showed nearly one-third would consider acting on intentions to force a woman to have sex if they thought they could get away with it (the number went down when the word “rape” was used).

It’s not just professionals like Nichols who stress vigilance and victims’ rights. Men are speaking out, too. Last year, a group of male movie stars addressed consent in a White House public service announcement called “1 is 2 Many.”

“If she doesn’t consent, or if she can’t consent, it’s rape,” Benicio Del Toro said. Steve Carrell followed with: “It’s a crime, and it’s wrong.” Daniel Craig said, “If I saw it, I wouldn’t blame her, I’d help her.”

The growing, and prominent, attention to the consent debate has spawned a backlash. A small but vocal group of people believes the legal rights of those accused are being trampled in the current rush for colleges to show they are tough on rape and in protecting victims. These voices come from liberal and conservative quarters alike, including 28 current and retired professors at Harvard Law School who penned a *Boston Globe* editorial deploring the new standards at universities. They wrote that these policies violated “the most basic elements of fairness and due process [and] are overwhelmingly stacked against the accused.”

“I feel there is a hysteria,” says Sherry Warner-Seefeld, who founded a group called Families Advocating for Campus Equality (FACE) after her son was falsely accused of sexual assault while a student in North Dakota. “All a person has to do is make a statement or make a claim...making another set of victims should not be our objective.”

With around 90 schools under investigation by the federal government for mishandling assault complaints—and the recent release of the documentary *Hunting Grounds*, which portrays a pattern of whitewashing efforts surrounding consent cases by prominent colleges—the discussion around sexual assault and consent seems only to be escalating. But even with all this attention and noise, it’s unclear if the average college student is taking it all in.

Furman senior **Anna Brown ’15**, a student member of the university’s task force on sexual assault (SHARP), says there are misunderstandings around consent, such as whether consent is null if a woman has had a drop of alcohol to drink (the university’s

and the state's standard is incapacitation). She's even heard a student say the university didn't have a sexual misconduct policy at all. "If I wasn't involved in SHARP I probably wouldn't know that much about Furman's sexual misconduct policy or their consent policies," she says. "There's a lot of misinformation out there, which is sad."

Carson believes most students understand the basics of consent, but they're not aware of the full policy because they don't think they'll ever be in a situation involving misconduct. "Who's going to read all that until they have an issue?" she says. "Do I think students think about this every single day? No, I do not."

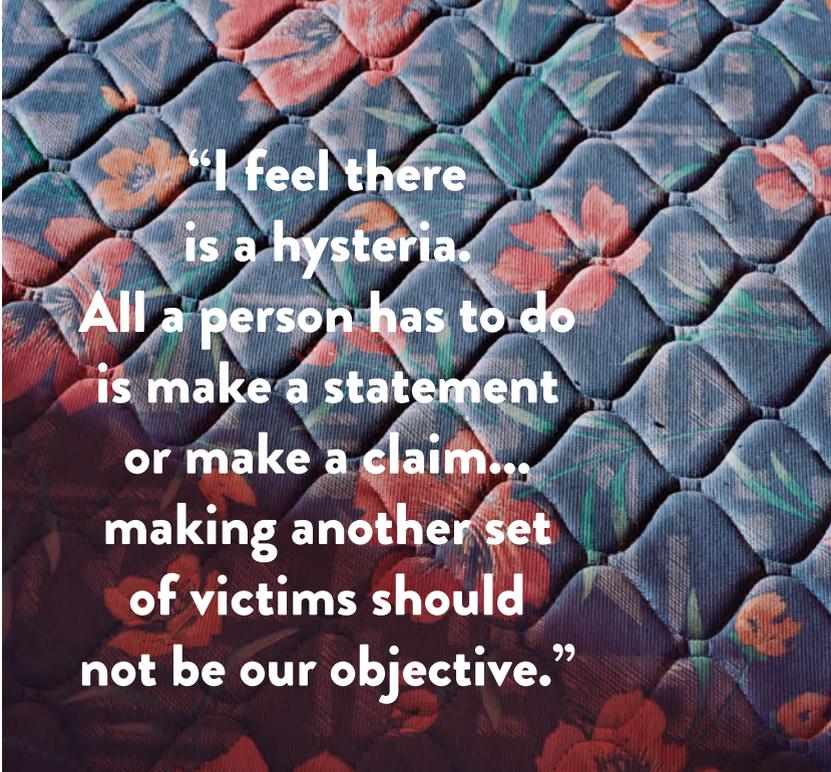
Jason Cassidy, Furman's associate vice president for student life and dean of students, says he's not surprised young people aren't fully versed in what consent is. "Often, these students are in situations for the first time and they don't know how to navigate that relationship and that interaction," he says. "Is it verbal? Is it nonverbal? Is it consent if she doesn't say anything? There's all kinds of confusion around consent." Even people who are sober are nervous in situations involving the potential for sex, he says. "Add in intoxication and impaired judgment, and it becomes even more cloudy."

Furman's policy, updated and expanded last year, requires "effective consent." That is defined as something "informed, freely and actively given, [with] mutually understandable words or actions that indicate a willingness to participate in mutually agreed-upon sexual activity."

Lack of consent doesn't just mean "no means no," either. The policy also spells out situations in which consent cannot be assumed: when one party pays for dinner or a date, or the two parties have or have had a dating relationship, or when consent was previously given, or if there is silence. If someone is incapacitated due to drugs or alcohol, consent cannot be given.

One of the emerging male voices on preventing college sexual assault is Jonathan Kalin, a recent graduate of Colby College who founded a group called Party with Consent. He argues that popular culture suggests that men don't need to ask their partners for permission. "You're tough, you're cool, you're suave if you don't have to ask anything," Kalin says there is a culture in locker rooms (Kalin was Colby's basketball captain) where rape jokes are okay. He doesn't believe everyone thinks they're funny, but that as a guy you aren't supposed to voice any objection to them. Kalin says he does encounter resistance or confusion when talking about consent. Someone will ask, "What are we supposed to get, a signed contract?"

At Furman, Cassidy speaks to groups of young men about making good, low-risk choices and tells them what they need to do to be protected when they are



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engaging in sexual activity. "You need to ask. You need to get verbal consent for everything," he says.

As one of the university's deputy Title IX coordinators, Cassidy is involved in hearing sexual misconduct cases. Most are complicated "he-said-she-said" cases, Cassidy says. "People agree on what happened, they just disagree on consent." The cases rarely provide evidence, sometimes witnesses, but more often just testimony. And memory can be impaired. "Essentially you're being asked to determine who is more credible," he says.

Credibility has a different scale in courts than in colleges. In a college proceeding, "preponderance of evidence" is now the typical standard for finding someone guilty of sexual assault. That equates to "more likely than not," or greater than 50 percent. In the past, and even to this day, some universities prefer the "clear and convincing" standard, which must meet a 75 percent litmus. Both, of course, are different from guilt beyond a reasonable doubt, the legal system's threshold for guilt.

Historically, universities may not have been prepared to handle such difficult issues, Carson says, but now they are receiving more training and preparation. And for those who have been assaulted, the safety and anonymity of a campus proceeding can be much more reassuring.

When a sexual assault case does come in front of a university panel, however, it is a time-consuming affair. Recently, Furman experienced its own sexual misconduct hearing. The two parties had been drinking, the man said he thought he had consent, the woman said she didn't give it. The investigation and hearing involved 12 staff people, including two investigators who hold other jobs and who each worked 60 hours on the case. In the end, the male student was found not responsible. But Carson and Cassidy know that doesn't tie up things neatly for either party.



“You never feel good when these cases are over, even if you think justice has been served,”

Carson says. “These are young people who have had their lives significantly altered and changed at a time when most people are telling them it’s the time of your life...no matter what side of it, they’ve had a terrible thing happen to them.”

Carson’s feelings are why some people believe sexual assault is better handled by law enforcement instead of, or along with, higher education institutions.

“I’ve seen what my son and other families go through, the unbelievable trauma of being called a rapist,” says Warner-Seefeld. She and others have begun to speak out against what they say is a dysfunctional system that is weighted in favor of the person who reports and against those accused. Some have even filed lawsuits against their institutions.

Joshua Strange is a member of FACE. While a student at Auburn University, he was accused by an ex-girlfriend of sexual assault and domestic violence. The criminal charges were dropped but Auburn expelled him. On the organization’s website, he has a letter to others in his situation, saying he is willing to listen if they need to talk.

Strange says that going through what he went through, he felt alone. He says he has heard from young men in all corners of the country who had a one-night stand or were accused by someone they know and feel “railroaded” by their university. “Neither side can prove they’re right, but neither side can prove the other wrong,” he says.

Few men kicked out of school for sexual assault have spoken publicly on the issue. But Strange says he wants to see changes to a system that he feels was stacked against him from the start. In addition to giving media interviews, he’s talked to the Department of Education rule-making committee.

“I’d like to see the process be more fair,” Strange says. “What I went through was one of the most horrible things, a very dark time in my life. I don’t want to see that happen to someone else. They changed my collegiate future and the course of my life forever.”

The Department of Education—whose Office for Civil Rights is responsible for enforcing Title IX’s prevention of sex discrimination within educational institutions—has said that colleges and universities are responsible for providing hearings when victims do not wish to pursue charges in the legal system. The founders of Know Your IX, a national student group against campus gender-based violence, say that Title IX contains fair processes for the accused, and if colleges turned reports over to law enforcement, many students would not report their abuse at all. “Let’s encourage schools to follow Title IX rather than destroy a safety net that many survivors of abuse or assault need to stay in school,” wrote Dana Bolger and Alexandra Brodsky in *The New York Times*.

Many critics of the university system—on both sides of the debate—argue that colleges are ultimately only looking out for their own “brands,” and so justice is unlikely for accuser or accused. They also argue that the fear of losing federal dollars that could accompany being found guilty of negligence by the Department of Education makes universities either complicit in letting sexual assault crimes go unpunished or overzealous in expelling students so accused.

C.D. Mock, who occupies a prominent position as head wrestling coach at the University of North Carolina at Chapel Hill, has written about his son being accused of sexual assault at the University of Tennessee at Chattanooga. Mock’s son was kicked out of school, a decision the family is fighting. Mock says the intent of his blog, which has come under fire for insensitivity, is to warn other young men that they are in danger.

“There has been a fundamental change in college campuses all over this country,” Mock writes. “In this current culture of ‘hookups’ in lieu of dating, with women being every bit as sexually aggressive as men on campuses, parents and young men heading to college need to understand the extent of this new danger.”

The Valentine Center’s Melissa Nichols, however, believes colleges have an important role to play with

the disciplinary process and with the victim protections provided under Title IX, regardless of whether or not the victim decides to go to law enforcement. “When you have a college and you have people living in the same dorm or who are going to classes together, I think the college has an obligation to make sure that the campus is a safe environment for someone who has already been victimized [and] for other students,” she says.

The members of FACE counter that involving law enforcement, though, would punish the “real” rapists who are predators targeting women, not those young men who thought they had consent and who see the accusations as next-day regret. To Warner-Seefeld, who believes both young men and women need to be taught how to better navigate sexual relationships, it seems crazy that if each is equally intoxicated, it is the man who holds all of the responsibility. “I see it as an American issue, and we all have a stake in getting this right.”



s passionately as people are debating the issue, they are also working hard to find short- and long-term solutions. They range in philosophy and scale: eliminating the Greek system; encouraging sororities to hold their own parties; wearing a fingernail polish that when swirled in a drink can indicate the presence of a date rape drug; letting women carry guns on campus; and employing an anti-rape device known as RapeX, which is a female condom with teeth lining the inside.

Anna Brown, the Furman student, says the solution isn't to tell women to stay inside or where they shouldn't go. Instead, the focus needs to be more on teaching men what not to do. “I think more of it is about respect and respecting people's boundaries, and that goes hand in hand with defining consent,” she says.

Some individuals say they won't ever get close to that line where consent can be misunderstood. **Nick Rossano '16**, a Furman junior, says religious and personal reasons keep him from drinking and participating in the college party culture, although many of his friends do.

“I can't imagine I would ever put myself in a situation where consent is up in the air,” says Rossano, who remembers his older brother telling him before he got to college about someone he knew at Furman who was accused of sexual assault after a night of drinking. “I try to live my life where I know the consequences of my actions in advance...and getting myself in situations where alcohol is affecting my decision-making...I would want to have the foresight to just avoid [those situations] completely.”

Taking personal and social responsibility in these types of situations is important, Rossano says, a belief he knows could open himself up to criticism from peers.

“I do think there is a certain amount of social responsibility to make sure the people around you are safe,” he says. “If I'm a guy and I see another guy taking advantage of a girl, then I absolutely have the social responsibility to stop that from happening. If I'm a girl and one of my friends is at risk, then I definitely have the social responsibility to stop that from happening. But then I also have a social responsibility as a guy to not take advantage of a girl, or as a girl to stay as in control of the situation as I possibly can, because I wouldn't want to be in a situation of vulnerability.”

What's interesting is that education—the very purpose of universities—appears to be the most cited answer by people considering how to create effective change. Training people to look out for one another—to become “active bystanders”—has gained particular momentum with activists. Bystander intervention is based on the belief that we have a collective responsibility to care about those around us and to intervene when someone is in trouble or entering a situation where consent seems iffy.

Bystander intervention instruction “gives students the tools to recognize potentially dangerous situations,” says Brown. She believes such programs may have the best likelihood of reducing assaults on campuses today. “If you're at a party and you see a relatively sober guy hitting on an incredibly intoxicated woman, it gives you the tools to know how to intervene in that situation, so that something wouldn't happen.”

Nichols sees potential in bystander education shifting people's perceptions about our responsibilities to one another. “Some of that effort really is changing this culture, so people understand this is not just somebody else's business, it's a community problem. If it looks like something is occurring without someone's consent, then you need to step in as you would with any other crime.”

Lee Bollinger, president of Columbia University, wrote in an essay in *The New Republic* that higher education's response to the sexual assault question should be measured not on short-term responses to cases in the media but on the long-term, lasting changes that occur.

Furman's Carson agrees. As higher education and society at large wrestle with this problem, the hope is that something good and lasting will come out of it.

“The bright star of this is the hope that the college students' culture will change, and that how people talk to each other, who want to be intimate, changes,” she says. “Can we change human behavior and can we raise a generation of people where this doesn't become an issue? If we can educate students about how to navigate these conversations and relationships, and do that better than other generations, that would be a great service.” **F**

Kathryn Masterson is a Chicago-based writer and former reporter for The Chronicle of Higher Education.