



# Trading the Megaphone for the Gavel in Title IX Enforcement

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TRADING THE MEGAPHONE FOR THE GAVEL  
IN TITLE IX ENFORCEMENT

*Janet Halley\**

When feminist advocates on campus sexual assault “speak truth to power,” they speak for (and often as) victims and survivors. In that position, it’s perfectly fair for them to pick and choose the constituencies to which they give voice. They can and should specialize. But as feminists issue a series of commands from within the federal government about what the problem of campus sexual violence is and how it must be handled, and as they build new institutions that give life to those commands, they become part of governmental power. Now that they have the power to adjudicate cases and determine sanctions, they are facing the full range of cases. For those feminists — and I would argue they should include, by now, the advocacy branch — the days of specialization should be over. It is time to govern. The current moment is a classic opportunity to observe how advocates turn their rhetorical tools and social-movement protest into institutional government.

The paradigm cases of the movement have been women drugged at fraternity parties and raped by groups of men, or women staggering home from these parties with the supposed help of men who proceed to rape them there. Included in that paradigm are women who have agreed to have some sex and find themselves forced to have much more, or much different, sex than they signed on for. If those were the only cases that the new system was destined to address, it would be no big deal to trade the megaphone for the gavel.

But there are lots of harder cases. How will feminists handle them? Denial and a taboo on blaming the victim have been the favored strategies among advocates: will their allure carry over into governance? My own hope is that governance feminists designing and running a new campus sexual assault establishment can acknowledge the full weight of the responsibility they are taking on.

In what follows, I set out “ideal types” of several species of “hard cases” I’ve encountered over the years of my involvement in sexual harassment enforcement, advocacy, scholarship, and teaching. Each of them will come up, some of them often, in the new Title IX student-discipline institutions. Moreover, each of them raises policy concerns

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that will never be addressed in the language of a single-purpose social movement but that are at the core of responsible government.

CIVIL LIBERTIES FRAMED AS  
INDIFFERENCE TO ABUSED WOMEN

Consider the case of Anna, a freshman at Hobart and William Smith Colleges who reported being raped at a party in the first weeks of her freshman year. The *New York Times*'s bombshell article exposing this case — *Reporting Rape, and Wishing She Hadn't: How One College Handled a Sexual Assault Complaint*<sup>1</sup> — has become a rallying cry for reform advocates.<sup>2</sup> A reasonable conclusion from the *Times* article is that at least some institutions of higher education systematically undervalue victims, protect wrongdoers, and expose their women students — whether through misogyny and patriarchal bias, callous indifference, or sheer incompetence — to a male-dominant hostile environment.

But read more carefully, Anna's case is more ambiguous. To my mind, there is no question that she was raped, almost certainly by more than one man. Her injuries as reported by emergency-room personnel could not be explained any other way. The problem was figuring out how many people were involved, whether the encounters were consensual, and, if one or more sexual assaults occurred, who was responsible for them.

The prosecutor and the Colleges' Board collected different evidence in Anna's case, and the published record provides only glimpses of what they gathered.<sup>3</sup> But it seems clear that Anna was alleging sexual assault in two settings: first at a fraternity-house party, and later at a

<sup>1</sup> Walt Bogdanich, *Reporting Rape, and Wishing She Hadn't*, N.Y. TIMES, July 12, 2014, <http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html>.

<sup>2</sup> See, e.g., *Thoughts on Hobart and William Smith Colleges Case*, TITLE IX BLOG (July 14, 2014, 3:30 PM), <http://title-ix.blogspot.com/2014/07/thoughts-on-hobart-and-william-smith.html> [<http://perma.cc/98FG-A2JY>] (activist assessment); see also, e.g., Edward F. Dragan, *Campus Sexual Assault and Harassment Lawsuits: Title IX Standards and Questions of Liability*, EDUC. EXPERT (Aug. 14, 2014), <http://education-expert.com/2014/08/college-university-campus-sexual-assault-lawsuits-standards-care-questions-liability> [<http://perma.cc/F347-ENTH>] (published advice to schools).

<sup>3</sup> In what follows, I rely on the *New York Times*' *Reporting Rape* story, see *supra* note 1, and disclosures made to the press by the prosecutor, R. Michael Tantillo, as reported in the local press, see Mike Hibbard, *DA Says No Basis for Sexual Assault Charge in HWS Case*, FINGER LAKES TIMES (July 21, 2014, 3:07 PM), [http://www.fltimes.com/news/article\\_7f181016-ofco-11e4-9637-001a4bcf887a.html](http://www.fltimes.com/news/article_7f181016-ofco-11e4-9637-001a4bcf887a.html) [<http://perma.cc/2DQE-2VHP>], and on the Colleges' website, see Sean Carroll, *D.A.: The New York Times Got It Wrong*, HOBART & WILLIAM SMITH COLLEGES (July 21, 2014, 8:06 AM), <http://www.hws.edu/news/media/13wham.aspx> [<http://perma.cc/LUF6-DL6H>]. For a refutation of Hibbard's claims, see Inga Parsons' *Complete Statement to the Finger Lakes Times*, FINGER LAKES TIMES (July 23, 2014, 10:55 AM), [http://www.fltimes.com/hws\\_anna/article\\_142f7fe8-1275-11e4-8e86-0019bb2963f4.html](http://www.fltimes.com/hws_anna/article_142f7fe8-1275-11e4-8e86-0019bb2963f4.html) [<http://perma.cc/VU9H-NCPA>].

campus-wide party at a facility known as the Barn. Anna identified her alleged assailant at the fraternity party, but the prosecutor had testimony, some of which he disclosed publicly, that led him to believe that her sexual contacts there were consensual. The Board also could have heard that or similar evidence. The Board could have decided, even on a preponderance standard, that the contacts at the fraternity were not supported by enough evidence to hold the identified student responsible for wrongdoing.

In my own assessment of the published record, the Barn is almost certainly where Anna sustained the injuries discovered later at the hospital. Through alcohol-induced memory loss, however, Anna was unable to remember what happened at the Barn; according to the *Times*, she could not remember being there at all. Thus, for the contacts for which evidence of sexual assault was clear, the problem of identification looms large. Three students were suspected and questioned by the Board. The identity of one of them was supported by disclosures to Anna by a bystander who was present both at the fraternity house and at the Barn. He also told the prosecutor what he saw. But he refused to testify before the Colleges' Board. Anna testified to the bystander's identification, but, had the Board relied solely on that, it would have imposed a finding of responsibility on a student on the basis of Anna's report of the bystander's report — that is, on hearsay. The publicly available information provides not even that level of certainty about the other two students who were suspected. To be sure, some of the suspected students changed their stories as the police and Colleges' investigations proceeded, calling the credibility of their denials into question. But there was no direct evidence identifying them, or any other students present at the Barn, as Anna's assailant there. The Board could have decided, even on a preponderance standard, that it could not hold any *particular* student responsible. And that does not seem to me like shoddy or biased work: it seems like a reasonable call that college and university boards *should* make in cases where the identity of the wrongdoer cannot be established, lest they hold students responsible for expellable offenses on a guess.

Advocacy that blazons Anna's story as an open-and-shut case of rape makes complete sense: what happened to Anna was brutal victimization, pure and simple. A student culture in which a rape like this one can happen is seriously broken. But the story does not appear to be in fact what it stands for today in the debate over campus sexual assault: a paradigm instance of institutional failure to sanction wrongdoing. The firestorm of blame heaped on Hobart and William Smith bore an unacknowledged but alarming message: that the Colleges had

to assign blame to one or more of their students despite their complete lack of direct evidence about which of them actually deserved it.<sup>4</sup>

The furor over Anna's case amounts to pressure on schools to hold students responsible for serious harm even when — precisely when — there can be no certainty about who is to blame for it. Such calls are core to every witch hunt. Speaking as a feminist governor to other feminist governors,<sup>5</sup> I have this simple message: we have to pull back from this brink.

#### FACILITATING BIAS AGAINST AND DISPROPORTIONATE IMPACT ON SEXUALLY STIGMATIZED MINORITIES

From Emmett Till<sup>6</sup> to the Central Park Five,<sup>7</sup> American racial history is laced with vendetta-like scandals in which black men are accused of sexually assaulting white women that become reverse scandals when it is revealed that the accused men were not wrongdoers at all. No reader of *To Kill a Mockingbird* should be able to forget how this American classic convinces its readers that some of these accusations will be based on racially exploitative evasions of responsibility by

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<sup>4</sup> See, e.g., *Rape on Campus: Anna's Trauma*, N.Y. TIMES, July 15, 2014, <http://www.nytimes.com/2014/07/16/opinion/the-rape-case-hobart-and-william-smith-and-readers-respond.html>; Jessica Wakeman, *New York Times Cover Story Reveals How Hobart & William Smith Massively Failed Student Rape Victim*, THE FRISKY (July 14, 2014), <http://www.thefrisky.com/2014-07-14/new-york-times-cover-story-reveals-how-hobart-william-smith-massively-failed-student-rape-victim> [<http://perma.cc/564Q-JRNC>]. Condemnation of college and university procedures was premature in the notorious University of Virginia rape allegation as well. The meltdown of the notorious *Rolling Stone* article about a brutal gang rape in a fraternity at the University of Virginia left readers unsure whether the harm suffered by the anonymous woman student was fictitious, exaggerated, or somewhat accurately described but falsely attributed to members of the fraternity named in the story. See Sabrina Rubin Erdely, *A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE (Nov. 19, 2014), <http://www.rollingstone.com/culture/features/a-rape-on-campus-20141119> [<http://perma.cc/3GF4-QVDB>] (the original story); T. Rees Shapiro, *Key Elements of Rolling Stone's U-Va. Gang Rape Allegations in Doubt*, WASH. POST (Dec. 5, 2014), [http://www.washingtonpost.com/local/education/u-va-fraternity-to-rebut-claims-of-gang-rape-in-rolling-stone/2014/12/05/5fa5f7d2-7c91-11e4-84d4-7c896b90abdc\\_story.html](http://www.washingtonpost.com/local/education/u-va-fraternity-to-rebut-claims-of-gang-rape-in-rolling-stone/2014/12/05/5fa5f7d2-7c91-11e4-84d4-7c896b90abdc_story.html) [<http://perma.cc/EF8C-JYWA>] (the initial *Washington Post* story undermining Erdely's account); Will Dana, *A Note to Our Readers*, ROLLING STONE (Dec. 5, 2014), <http://www.rollingstone.com/culture/news/a-note-to-our-readers-20141205> [<http://perma.cc/P4L7-NL5V>] (a partial retraction).

<sup>5</sup> For my argument that feminists sometimes do gain control over levers of power, see Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1 (2008). The claim is not that feminists then get everything they want; rather, that they have a will to power and sometimes succeed in their efforts to become governors.

<sup>6</sup> See generally STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* (1988).

<sup>7</sup> Robert D. McFadden & Susan Saulny, *A Crime Revisited: The Decision; 13 Years Later, Official Reversal in Jogger Attack*, N.Y. TIMES (Dec. 6, 2002), <http://www.nytimes.com/2002/12/06/nyregion/a-crime-revisited-the-decision-13-years-later-official-reversal-in-jogger-attack.html>.

white women who willingly had sex with black men and then disavowed it as rape.

But nothing so malign need be at work when black men show up in the dock: morning-after remorse can make sex that seemed like a good idea at the time look really alarming in retrospect; and the general social disadvantage that black men continue to carry in our culture can make it easier for everyone in the adjudicative process to put the blame on them. Similar dynamics affect gay men, lesbians, and trans individuals: being attracted to them can so shock some people that the easiest way back to equanimity is to attack *them*. Remember *Boys Don't Cry*.

One of the most dangerous effects of the U.S. Department of Education Office for Civil Rights (OCR) campaign to force institutions of higher education to take sexual harassment and sexual assault on campus more seriously<sup>8</sup> is the idea — vividly manifested in the institutional reforms adopted at Harvard University last summer<sup>9</sup> — that a single-purpose Title IX office, specializing exclusively in sexual and gender-based harassment, is the right institutional response. Title IX, after all, is dedicated solely to sex discrimination;<sup>10</sup> the Harvard Title IX Office, dedicated exclusively to enforcing the University's new rules on sexual and gender-based harassment, has no mandate to ensure racial equality. Case after Harvard case that has come to my attention, including several in which I have played some advocacy or

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<sup>8</sup> Of the OCR's documents on sexual harassment, only the 2001 *Revised Sexual Harassment Guidance* was ever opened for comment. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2 (2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<http://perma.cc/67CH-9KKD>]. The severe restrictions under which institutions now labor — for instance, the insistence on the notorious preponderance standard — emerged only in the 2011 Dear Colleague Letter and the 2014 *Questions and Answers on Title IX and Sexual Violence*, neither of which was ever opened for comment. See “Dear Colleague” Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<http://perma.cc/WQ79-SGXC>] [hereinafter DCL]; OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<http://perma.cc/JWS9-T2M2>] [hereinafter Q&A]. However much the Department of Education says it is enforcing “the law” when it insists on compliance with the latter two documents, any administrative law student knows that it is in fact enforcing its own policy choices.

<sup>9</sup> In July of 2014, Harvard announced a new Sexual and Gender-Based Harassment Policy applicable to all who belong to the University community, whether as students, employees, or guests, and new Procedures for Handling Complaints Against Students. For Harvard's policies, see *Title IX & Gender Equity*, HARV. U.: OFF. ASSISTANT TO THE PRESIDENT FOR INSTITUTIONAL DIVERSITY AND EQUITY, <http://diversity.harvard.edu/pages/title-ix-sexual-harassment> (last visited Feb. 10, 2015) [<http://perma.cc/8W4U-LFRX>].

<sup>10</sup> “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .” 20 U.S.C. § 1681(a) (2012).

adjudication role, has involved black male respondents, but the institution cannot “know” this because it has not been thought important enough to monitor for racial bias.

The best way to correct for this, in my view, is to reduce the Title IX Office to a compliance-monitoring role, and get it out of the business of adjudicating cases. (This would, incidentally, be entirely consistent with the OCR’s announced policy documents.<sup>11</sup>) Cases should go to a body charged with fairness to *all* members of our community, and with particular charges not only to secure sex equality but also to be on the lookout for racial bias and racially disproportionate impact and for discrimination on the basis of sexual orientation and gender identity — not only against complainants but also against the accused.

#### CASES INVOLVING SEXUAL MESSAGES THAT ARE CULTURALLY CODED

Campuses are multicultural environments, bringing together people from a wide range of backgrounds sounding in socioeconomic class, cultural and linguistic vocabularies, and historical experience. Across these cultural lines, communication about many things, including matters relating to sex, sexuality, and gender, can be torqued by the incommensurability of the parties’ social codes and their inconsistent and even clashing sexual moralities. The question raised by the cultural defense in criminal law comes up here: when two cultures come into conflict over the meaning of a sexual encounter, which one wins? Adjudicators have to anticipate that their own experiences and biases may play a role in the way that they answer.

For example, a classic casebook rape case, *State v. Rusk*,<sup>12</sup> involved Pat, a white female complaining witness from a middle-class suburb outside Baltimore and Eddie, a white male defendant from a poor, inner-city background in Baltimore proper, a city notorious then and now for its toughness. When they met at a local bar, she was working as a secretary and he was out of work, trying to get by fixing and then selling cars he bought through the want ads. What makes this a classic casebook rape case is that the jury might not have believed Pat’s testimony that Eddie threatened her physically (by taking her keys and “lightly choking” her when they were having sex); Eddie categorically denied ever doing either of these things and the jury could have thought that these actions were not proved beyond a reasonable doubt. It nevertheless convicted, and the only other evidence available to

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<sup>11</sup> See DCL, *supra* note 8, at 7–8; Q&A, *supra* note 8, at 10–11, 25.

<sup>12</sup> 424 A.2d 720 (Md. 1981). For an in-depth analysis of this case, see Jeannie C. Suk, “*The Look in His Eyes*”: *The Story of Rusk and Rape Reform*, in CRIMINAL LAW STORIES 171 (Donna Coker & Robert Weisberg eds., 2013).

support the element of a threat of force was what Pat called “the look in his eye,” that is, her entirely subjective belief that he was threatening her. *State v. Rusk* therefore raises the question: is entirely subjective evidence of a threat of force sufficient to establish guilt?

Many feminists have argued that Pat’s subjective belief not only should but must suffice to establish a threat of force. But in this case — *if* it turns on a disagreement between Pat and Eddie about the significance of their gestures in a gendered script for communicating consent or nonconsent — that may mean committing the legal system to supporting Pat’s white middle-class assumptions about how men and women communicate with each other when they go home together after a night out drinking, and to assigning to Eddie’s understandings the moral freight associated with criminal negligence, recklessness, or even intentional coercion.

Is that what the legal system should be doing in a complex society marked by immense cultural diversity? Maybe not, or maybe not always. To the extent that the campus-sexual-assault movement expresses the priorities and visions of white middle-class women, it may not be providing us with everything we need to know to make fair decisions in cases involving class, race, and other key differences.

But current pressures are building a sex harassment enforcement system that is indifferent to these concerns. The OCR insists that all participants in the processing of sexual harassment complaints receive training that makes them competent to render prompt and equitable decisions,<sup>13</sup> and Harvard complies. I have a copy of the PowerPoint slides shown to colleagues at Harvard Law School in the Fall Semester of 2014, as the outline for their required training.<sup>14</sup> Approximately two-thirds of the document is devoted to quotations from OCR documents and the Harvard Policy and Procedures about the standard to apply and the procedures to be used. The remaining third of the document (and thus the entire remainder of the training) provides a sixth-grade level summary of selected neurobiological research. The take-away lesson of these pages is that a victim of sexual assault may experience trauma, which in turn causes neurological changes, which in turn can result in “tonic immobility.” Tonic immobility, in turn, can cause the victim to appear incoherent and to have emotional swings, memory fragmentation, and “flat affect.” Her story “may come out fragmented or ‘sketchy,’” and she can be “[m]isinterpreted as being cavalier about [the event] or lying.” These problems, in turn, can

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<sup>13</sup> DCL, *supra* note 8, at 4, 6, 12; Q&A, *supra* note 8, at 38–40.

<sup>14</sup> Mia Karvonides & William McCants, Harvard Law School Administrative Board Title IX Training (October 23, 2014) (on file with author).



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cause police and sexual harassment investigators to dismiss serious claims, tragically because of symptoms of the trauma itself.<sup>15</sup>

So far, that is the only training provided to Harvard personnel handling sexual harassment claims directed to the social and psychological dynamics surrounding sexual assault. It is 100% aimed to convince them to believe complainants, precisely *when* they seem unreliable and incoherent. Without disputing the importance of the insights included in this section of the training, one can ask: precisely what do they prove? Surely not a claim that, *because* a complainant appears incoherent and unreliable, she *has* been assaulted. Meanwhile, the immense social, cultural, and psychological differences that can affect the credibility and coherence of *both* parties' accounts do not seem, yet, to warrant any mention. On all of those, cultural incompetence is okay.

#### CASES INVOLVING DRINKING AND/OR DRUGS

This very large class of cases includes sexual intercourse or other sexual contact with persons who have been administered mind-altering substances without their knowledge or consent. It is such a grave wrong to impose that experience, along with its vulnerabilities, on another person without their knowledge and consent that I think we can all agree those are among the easy cases: anyone who does that and proceeds to have sexual contact with his victim is a serious wrongdoer. Also among the easy cases: someone having sex with an unconscious person who has not, before falling asleep or passing out, given consent to such contact. No question, people who do either of these things are serious wrongdoers.

But let's expose ourselves to the harder cases, where a person complaining about sexual contact as unwanted, unconsented to, or in any other way wrongful, was at the time of the conduct *voluntarily* altered by drugs or alcohol. It includes sexual contact with a person who is not unconscious but severely impaired. Ditto but only somewhat impaired. It includes people whose preferences and judgments differ in their substance-affected state from those they would have entertained or made while stone-cold sober. It embraces cases brought by women who have willingly consumed drugs and/or alcohol, and who gave their assent to sexual activity (in the sense that they signaled willingness or desire), but who did not consent (that is, they did not actually subjectively give a free consent to engage in sexual activity),<sup>16</sup> or who were confused about whether to consent or not but who "went along"

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<sup>15</sup> *Id.*

<sup>16</sup> See Mark Kelman, *Thinking About Sexual Consent*, 58 STAN. L. REV. 935, 946 (2005) (book review).

(that is, assented without making a decision either way) because they feared social conflict or social awkwardness if they didn't accede to importunities for — or accept gentle offers of — sexual contact. It includes women who assented and consented competently after consuming alcohol or drugs and who, on becoming sober the next day — or months, or even years, later — sincerely reject that idea that they *could have* consented. It includes women who did all of that and now — the next day, or months, or even years later — reject the idea that they *should have* consented and enter into a state of bad faith denial of the fact that they *did* consent. It even, apparently, includes at least one woman whose *mother* rejected the idea that her daughter should or could have consented, and who insisted that her daughter submit a sexual assault complaint to signal moral rejection of the sexual conduct in question.<sup>17</sup>

The cases differ, moreover, in the degree of incapacitation and/or impairment, and this is not merely a factual but also a morally difficult definitional question. Setting aside sex with unconscious persons and persons deliberately intoxicated without their knowledge and consent (the easy cases), we could say a person is incapacitated only when rendered physically incapable of intentionally signaling her consent: “falling down drunk.” Or we could say that she is incapacitated whenever she has lost any of the capacity to reason that she enjoys while stone-cold sober. Or we could set the breaking point somewhere on the spectrum between these two extremes. Thus, we could distinguish incapacitation and impairment, reserving the former for some extreme state of mental and/or physical dysfunction, and recognizing impairment along a spectrum of differences from the person's (or the average person's) reasoning capabilities while stone-cold sober. We could say that she has to be *really* impaired or only a *little* impaired to be held incapable of giving consent (even if she did assent or even consent). We could assume she was impaired simply because the consumption of drugs and/or alcohol, in any appreciable amount, does in fact alter one's preferences.

Compound all of that with the differences between incapacitation or impairment, however we define them, *at the time*, with a frequent concomitant of heavy drug and alcohol use: *memory loss*. This poses more than merely evidentiary problems and credibility issues in cases involving alcohol and drug use, though those are severe enough in themselves. Do we want to say that the sex assented to and engaged in by a person who forgets most or all of the details the next day

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<sup>17</sup> See Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 11:53 PM), [http://www.slate.com/articles/double\\_x/doublex/2014/12/college\\_rape\\_campus\\_sexual\\_assault\\_is\\_a\\_serious\\_problem\\_but\\_the\\_efforts.html](http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html) [<http://perma.cc/M3WM-BTHB>]. The accused in this case was held responsible and expelled. *Id.*

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was — for the reason of memory loss alone — done by a person who was morally or legally incapacitated? Sometimes we will say yes, for instance when we think that memory loss was caused not by drinking or drug use but by psychological dissociation from intensely aversive experience. But what if it is selective; what if it is self-serving; what if it is motivated by unconscious racial bias or by a felt need to disavow shame, avert a *crise de conscience*, or pacify an angry parent, spouse, or partner?

I have arrayed these cases on three spectrums from easy to hard: first by the character of the alleged victim's assent and consent (*vel non*); second by the degree to which we are willing to say she was sufficiently incapacitated or impaired that we are willing to set aside the fact of assent and/or consent; and third by the degree to which we are willing to say that memory loss reliably indicates lack of consent. Many would say that, toward the end of my sequences, we are back in the range of easy cases, though easy now because they are prepared to say that no valid claim of sexual misconduct should be based on the "case types" appearing there.<sup>18</sup>

I think it's merely irresponsible to dismiss this difficult range of cases by saying that women students are being slipped date-rape drugs in numbers so high that the difficult ranges of my three spectrums are, in real life, null sets, or even so small that they can be administratively assimilated to the date-rape-drug cases.<sup>19</sup> No: young women are willingly drinking heavily and using powerful drugs. So are young men. It is an immense public health problem.

This raises a final layer of difficulty: by far most of these cases arise in a student drinking culture that promotes heavy drinking and drug use — often rising to the level of *extreme* drinking and drug use — precisely for the disinhibition and altered consciousness that

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<sup>18</sup> Query whether the case reported in this article is hard or easy: Nicole Ng & Vivian Wang, *Enough Alcohol to Call It Rape?*, YALE DAILY NEWS (Nov. 7, 2014), <http://yaledailynews.com/blog/2014/11/07/after-uwc-complaint-two-students-wait> [<http://perma.cc/266G-RHR8>]. Here, a woman undergraduate at Yale drank until she was "hammered" and then contacted a male student she had just broken up with, sending a series of text messages that she claimed were efforts to deflect any resumption of sexual relations but that read to me like come-ons. The recipient testified that he thought they manifested ambivalence. He knew she had been drinking but not how much: the testimony supporting her claim that she was extremely inebriated was from the complaining witness herself and friends who had not been eyewitnesses. She invited him to her room, and he testified that she initiated sexual contact when they entered it together. She thought that her having no memory of this meant that the factfinder was required to find that it hadn't happened. The Yale sexual harassment process resulted in a finding of no violation. Nicole Ng & Vivian Wang, *After Holloway Sides with UWC, Complainant Elects Against Appeal*, YALE DAILY NEWS (Nov. 13, 2014), <http://yaledailynews.com/blog/2014/11/13/uwc-appeals-process-questioned> [<http://perma.cc/H9DA-RSFW>].

<sup>19</sup> See, e.g., Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Campus Sexual Assault*, 128 HARV. L. REV. F. (forthcoming 2015).

they provide. Students consuming these substances at large parties or in their own rooms with a few friends may want the titillation and have no plans to engage in sex; some may also intend to have a lot of sex, intimate or casual; many may take a “wait and see” attitude about adding sex to the general revels. But the drinking culture means that, in case after case, *both the complainant and the respondent* were voluntarily ingesting mind-altering substances.

And now look at the Harvard University Policy’s language governing cases of incapacitation and impairment:

[W]hen a person is so impaired or incapacitated as to be incapable of requesting or inviting the conduct, conduct of a sexual nature is deemed unwelcome, provided that the Respondent knew or reasonably should have known of the person’s impairment or incapacity. The person may be impaired or incapacitated as a result of drugs or alcohol or for some other reason, such as sleep or unconsciousness. A Respondent’s impairment at the time of the incident as a result of drugs or alcohol does not, however, diminish the Respondent’s responsibility for sexual or gender-based harassment under this Policy.<sup>20</sup>

This language supposedly settles all the hard questions I have been asking by tilting a per se rule in favor of the complainant and an irrebuttable presumption against the respondent. But it leaves open every application I’ve imagined on all three of my spectrums. You could limit the scope of this paragraph by interpreting it to say that if the complainant *did* request or invite, she was *capable* of requesting or inviting: assent would bar a finding of unwelcomeness. But a far more expansive understanding is also completely possible, allowing every single case on all three of my spectrums to lead to a finding that conduct was unwelcome *solely* because of the complainant’s drug or alcohol consumption. You could intensify the pro-accuser effect of that interpretation by also denying the accused any mitigation because of his. Similarly, a narrow or expansive interpretation could be given to respondent’s knowledge or imputed knowledge of complainant’s incapacity or impairment. These are not just fact questions; they are policy choices.

But note also the steep asymmetry between the consequences of drinking and drug use for the complainant and for the respondent: for the former, intoxication is, to one degree or another, the basis for a per se finding of unwantedness even when assent — even when *consent* — has been given; but for the latter, it has no mitigating effect on his conduct. And now let us say that two Harvard students — one male, one female — have sex after drinking, using drugs, or both, that

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<sup>20</sup> HARVARD UNIV., SEXUAL AND GENDER-BASED HARASSMENT POLICY 3 (2014), [http://diversity.harvard.edu/files/diversity/files/harvard\\_sexual\\_harassment\\_policy.pdf](http://diversity.harvard.edu/files/diversity/files/harvard_sexual_harassment_policy.pdf) [<http://perma.cc/YF8T-VPC2>].

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each of them feels intense remorse and moral horror about it afterward, and that they both rush the next morning to the Title IX Office with

complaints. Let's say they drop their complaints on the receptionist's desk simultaneously. Which of them gets the benefit of the per se imputation of unwelcomeness, and which of them carries the heavy handicap of no mitigation? The woman and not the man? Both of them? Neither?

I think this mental experiment reveals that a bias in favor of complainants and against respondents is embedded in this rule — a bias that almost certainly aligns with a bias for women and against men in the design of the Harvard paragraph on intoxication. *When so much of the drinking and drug use by students in the contemporary cultural scene is actively sought out by men and women alike*, and when so many of the sexual encounters are fueled by heavy consumption of consciousness-altering substances *by both parties*, I think feminist governors have to think hard about what they are doing when they try, through provisions like this and by advocating their expansive interpretation, to predetermine women as victims and men as wrongdoers.

One justification for biasing the system to favor women and disfavor men is a perception that, in the campus drinking culture, men have more power than women, along with a social-change intuition that a rule shifting bargaining power over sex decisions from the former to the latter, precisely through the threat of predetermined victimhood and guilt, will be an effective way to change that culture. This logic makes sense: get them by the balls and their hearts and minds will follow. But it is not cost free. It entails a decision to impose a serious moral stigma and life-altering penalties on men who may well be innocent. Doing this will, in turn, delegitimize the system. And it entails a commitment to the idea that women should not and do not bear any responsibility for the bad things that happen to them when they are voluntarily drunk, stoned, or both. This commitment cuts women off — in theory and in application — from assuming agency about their own lives. Since when was that a *feminist* idea?

#### CASES ARISING FROM THE BREAKUP OF LONG-TERM INTIMATE RELATIONSHIPS

Where there is no evidence of physical abuse, accusations of sexual misconduct arising after the breakup of long-term relationships can — and *should be* — very hard to sort out. These cases involve not only what he or she says happened but what he or she says it *meant* in the private language of each relationship. The adjudicator steps into a *Rashomon*-like maze in which identical episodes have such dramatically different valences that both sides can be truthfully and credibly telling their own understandings and experiences without offering a

decisionmaker any plausible basis of decision other than his or her own cultural assumptions and biases. I have participated in some cases that seemed to boil down to whether or not the adjudicator understood projective identification — the psychic dynamic in which one partner to an intense intimacy projects *into* the other his or her own fears of and desires for the other, successfully soliciting that person to receive, reproduce, ratify, or enact those fears or desires.<sup>21</sup> Projective identification profoundly confuses the self/other distinction, establishing a kind of intersubjectivity that baffles efforts to determine that patterns in the relationship originated in *one* of the partners and *not* the other. And no one participates in the management of high-conflict *divorces* without taking into account the role of spite in some spouses' negotiation and litigation strategies<sup>22</sup> — but somehow we have imagined sexual harassment charges to be pure of distorting motives like these.

None of this is to deny that some breakups are precipitated or accompanied by acute sexual harassment, everything from quid pro quo to subtle but disadvantaging use of institutional power. But sometimes it's just an immiserating breakup, morphed into the form of a sexual misconduct charge.

#### IMPACTS WITHOUT MISCONDUCT

Here is the case that woke me, personally, up to the dangers of an unthinkingly broad, advocacy-based definition of sexual harassment. An employee, who disclosed eventually that she had been the victim of sexual abuse as a child and was ever-vigilant about her personal security, brought repeated complaints of sexual harassment against male faculty. She experienced being physically bumped by a male faculty member in the tight quarters of a copy room to be a sexual assault so humiliating that she could not communicate directly any more with that person. Hallway eye contact that lasted too long had the same effect on her — giving rise to an accusation against another faculty member for repeated unwanted sexual conduct. Eventually we realized that these complaints would keep coming in and, on investigation, keep failing to meet any reasonableness standard. It was a tragic situation — the episodes were both severe and persistent for her, and severely limited her work activities, but we could not keep entertaining the idea that they were sexual harassment.

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<sup>21</sup> See Jean Laplanche & Jean-Bertrand Pontalis, *THE LANGUAGE OF PSYCHOANALYSIS* 356–57 (Donald Nicholson-Smith trans., W.W. Norton & Co. 1973) (1967) (entry on “Projective Identification”).

<sup>22</sup> See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 968, 974, 976 (1979).

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It is not at all clear to me that this case, which occurred more than a decade ago, would be handled the same way today. Then, we were working in a framework that required sexual harassment enforcers to identify a wrongdoer. But the “prevention” branch of hostile environment policy emanating from advocates and the OCR<sup>23</sup> is eroding the link between harm and wrongdoing. Increasingly, schools are being required to institutionalize *prevention*, to control the *risk* of harm, and to take regulatory action to protect the *environment*. Academic administrators are welcoming these incentives, which harmonize with their risk-averse, compliance-driven, and rights-indifferent worldviews and justify large expansions of the powers and size of the administration generally.

I recently assisted a young man who was subjected by administrators at his small liberal arts university in Oregon to a month-long investigation into all his campus relationships, seeking information about his possible sexual misconduct in them (an immense invasion of his and his friends’ privacy), and who was ordered to stay away from a fellow student (cutting him off from his housing, his campus job, and educational opportunity) — all because he *reminded her* of the man who had raped her months before and thousands of miles away. He was found to be completely innocent of any sexual misconduct and was informed of the basis of the complaint against him only by accident and off-hand. But the stay-away order remained in place, and was so broadly drawn up that he was at constant risk of violating it and coming under discipline for *that*.

When the duty to prevent a “sexually hostile environment” is interpreted this expansively, it is affirmatively indifferent to the restrained person’s complete and total innocence of any misconduct whatsoever.

In a related development, OCR increasingly implies that the only adequate “interim measure” that can protect a complainant in the Title IX process is the exclusion of the accused person from campus pending resolution of the complaint. To be sure, in these cases the accused may eventually be found to be responsible for violations, sometimes very serious ones. But advocates and the OCR are arguing that *all* complainants are trauma victims subject to continuing trauma if

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<sup>23</sup> In dealing with sexual harassment, schools must “end such conduct, prevent its recurrence, and address its effects.” DCL, *supra* note 8, at 2. OCR advises that schools’ basic obligations are to “end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.” Q&A, *supra* note 8, at 2–3.

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the persons they accuse continue in school: merely “seeing” the harasser is deemed traumatic.<sup>24</sup>

These cases are becoming increasingly easy. Interim measures and environmental security provisions are justified as “merely administrative,” the equivalent of determining that more lights should be installed on campus walkways or that food safety certificates should be required for all vending machines. And like merely administrative acts conducive to public safety, they follow a strict liability model. But ending or hobbling someone’s access to education should be much harder than that. It may well be that the only effective way to convince people that this tendency is dangerous is to point to the rights they invade: rights to privacy, to autonomy, to due process. But the tendency *itself* is due for scrutiny. *Assuming* danger, risk, and holistic environmental contamination ensures that restrictions will go into effect even where the facts don’t justify them. Will decisionmakers — and in particular governance feminist decisionmakers — be able to resist this trend?

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<sup>24</sup> DCL, *supra* note 8, at 13 n.33.