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### Anti-Rape Culture

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# Anti-Rape Culture

<http://crim.jotwell.com/anti-rape-culture/>

Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 *Harv. L. Rev. F.* 103 (2015).



Aya Gruber

I had just pulled up Janet Halley's compact and insightful (and incite-ful) commentary on sexual assault for re-reading in preparation for this Jot, when a student came in to chat. This student was involved in a soon-to-be launched pilot program, overseen by the University's Title IX office and funded by grant money, to provide peer counseling to those identifying as sexual assault victim/survivors. The student-counselor explained that the program aimed to "point students in the right direction" and give them a "confidential sounding board." The student further stated that the program would be "good for professors" because the peer counselors would deal with contextualizing class topics counselees might find uncomfortable or traumatizing. "You all shouldn't have to do that," she opined, "you should be able to just teach." So I asked, "What are you going to tell students who have concerns about class material being traumatizing?" "I'm not sure yet," she said, "we are going to receive trauma training from an expert." "An expert on what?" I asked. "I guess trauma," she replied. The student-counselor proceeded to reassure me that if a student came to her complaining about a lack of sufficient trigger warnings, she would tell her to "get over it."

This is the new world we teachers and scholars of criminal law live in. And although the student I spoke with was quite level-headed and well-intentioned, she is soon to be part of this powerful culture. In this new world, the "one-in-four" claim is not just a rallying cry of feminist advocates meant to counter widespread sexist beliefs that rapes never occur and women are liars. Today, the statistic is the "truth" that underlies extreme, one-sided, punitive disciplinary policies and a marked shift in free speech/academic freedom norms. We are told to assume that a quarter of the women (not to mention a tenth of the men) in the class have been *raped* and traumatized and accordingly to teach rape in a psychologically appropriate manner (at the risk of severely damaging students and our own reputations/careers if we misapprehend the propriety of our methodology). Classes are a source of danger, and student activists call for speech control in the name of safety. Thus, it is not surprising that my interlocutor's paradigmatic example of a student complaint did not involve actual psychological trauma but rather a sense of injustice when the professor fails to provide appropriate trigger warnings. We find ourselves in the midst of what I am calling "anti-rape culture," that is, a set of beliefs about what constitutes rape (many forms of sex), its psychological effects (ruinous), how frequently rapes occur (ubiquitous), and appropriate institutional responses (punitive), combined with a norm that "good" people (feminists, women, liberals, non-sexists, etc.) must adhere to such beliefs.

Anti-rape culture is no longer counter-culture. It is not just a creation of feminist activists striving to challenge the status quo through strong rhetoric and hyperbole, if necessary. It has power, specifically, the power of the federal government. Anti-rape culture embodies, for many, undeniable truth, and through legislation, bureaucracy, and informal norms, it governs. Thus, I am particularly pleased that Janet Halley, the foremost

expert on “governance feminism” (and coiner of the term) has lent her very important voice to the din of expositions on campus sexual assault. Halley uses the current campus sexual assault moment to illustrate the thorny issues produced when “advocates turn their rhetorical tools and social-movement protest into institutional government.” Halley’s analysis demonstrates why rape-reformers, who now bear the authority and responsibility of the gavel, no longer have the discursive luxuries that come with just a megaphone.

In making her case, Halley examines “ideal types” of hard cases illustrative of the problems that arise when the unyielding rhetoric of the counter culture becomes unyielding law-and-order. The first two involve policy that follows the directives to “take rape seriously” and “not blame victims.” In a signature Halley move of shifting the frame, the article deftly uncovers how recent high-profile claims that University administrators and institutions are indifferent (or worse hostile) to rape victims are, in fact, objections to typical procedural justice requirements. A particularly striking example involves reformed university policy’s treatment of witness credibility. The Harvard University training manual informs administrators that because rape complainants suffer from trauma, their stories “may come out fragmented or ‘sketchy,’” and be “misinterpreted . . . as lying.” The guidelines, Halley argues, are:

100% aimed to convince [administrators] to believe complainants, precisely when they seem unreliable and incoherent. . . . 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.

But for many of us (progressive/feminist criminal law teachers), formalist, libertarian concerns have to take an occasional backseat to distributive fairness concerns. Tinkering with procedure, one might argue, risks sacrificing the occasional innocent respondent, but it is fair in the larger scheme of things. Without reform, it is asserted, there will be far more female victim sacrificial lambs who fail to receive justice or are discouraged to report. Halley points out, however, that one should be circumspect about the distributional consequences assumed to justify the departure from due process. There is evidence that reformed procedures may not have the effect solely of increasing the chances that the right bad guys receive discipline. Rather, such reforms have the grave potential to disproportionately impact racial and sexual minorities.

The other types of hard cases Halley discusses illuminate how the anti-rape culture constructs sex, gender, and the relationship between sex and gender. For example, Halley examines reformed policy’s treatment of “drunk-drunk” sex. It is now old news that the feminist gold standard for disciplinary policy is to declare that a person commits rape if he has sex with someone that he “should know” is too drunk to consent and that the accused’s own drunkenness is not relevant. Some policies go so far as to say that a rape occurs even if the drunk complainant initiated the sex, creating the following theorem:

A and B are drunk.  
A initiates sex.  
A and B have sex.  
B is a rapist.

How can this possibly make sense? Add some gender and it suddenly seems more sensible: Anna is extremely drunk and vomited in the bathroom. Her friends tell her to go home, but she refuses. Instead, she accepts the invitation of Bob, who is also extremely drunk, to go to his dorm room. There they drink some more, and Anna tells Bob she’s “sooooo drunk” and “hopes she doesn’t vomit again.” Anna proceeds to initiate a “make out” session with Bob. They have sex. Anna wakes up naked in Bob’s bed the next morning, remembering nothing

and feeling horrible. She tells Bob she can't believe "he took advantage of her that way."

If this example sounds familiar, you have probably read a similar vignette on a University sexual assault web portal as an example of something that, although close, "would constitute sexual assault under our policy." Reformed policy produces a distinctly gendered vision of sexual relations and constructs drunk college men looking to have sex (and random "bystanders") as women's protectors from their own inebriated bad decisions (necessarily the decision *to* have sex). As Halley states, "This commitment cuts women off—in theory and in application—from assuming agency about their own lives. Since when was that a feminist idea?" In addition, rape reforms involving intoxication and affirmative consent construct sex as a site of danger—an act that risks life-shattering trauma if not subject to strict constraint.

Halley wonders whether "campus-sexual-assault movement expresses the priorities and visions of white middle-class women" and accordingly "may not be providing us with everything we need to know to make fair decisions in cases involving class, race, and other key differences." Perhaps, however, activists' unyielding embrace of white middle-class woman's vision of sex is the only way to counter the older white man's view of sex. Even as sex-positivists, who believe law often undervalues sexual pleasure, and civil libertarians oppose radical rape reforms because they encroach too much on sexual exploration or use too blunt a punitive tool to foment social change, there are many who scoff at affirmative consent as "ridiculous" because "women want men to dominate them." Male students routinely express disdain at rape reform because "it's so easy for anyone to lie about rape." And these contingents historically have had and desperately want to keep the gavel. In the days to come, as the law of rape gets parsed out by universities, the American Law Institute, and the public on social media, all of us involved in the debate should prepare to have strange, for lack of a better word, bedfellows. But that is Halley's point. The issue of sexual assault is complex, shifting, and unsettling, and we are not well served with sound-bites masquerading reasoned policy, on either side. For those truly interested in delving into the complexity, Halley's article is required reading.

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