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

∗ Royall Professor of Law, Harvard Law School.
that will never be addressed in the language of a single-purpose social
collection 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 was 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*¹ — has become a rallying cry for
reform advocates, cited again and again as slam-dunk evidence that a
more thoroughly punitive system must be adopted. This case of anec-
dotal reporting carried the *Times*’s denunciation of institutions of high-
er education for systematically undervaluing victims and protecting
wrongdoers, and for deliberately exposing their women students —
whether though 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. 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 who did it.
Anna herself was too drunk at the time to remember anything that
happened. The next morning a male friend identified another male
student as one of the assailants — but only in private conversation
with Anna herself. He refused to repeat the accusation to the board
convened to handle her complaint, leaving Anna to offer the infor-
mation as hearsay. The bona fides of the identification could not be
tested. Meanwhile, though the local prosecutor stands willing to indict
and has, unlike the Colleges, the subpoena power to move the identifi-
cation question to the next level, Anna has refused to release the rape
kit.²

Advocacy that blazons Anna’s story as an open-and-shut case of
rape makes complete sense: what happened to Anna was brutal vic-
timization, pure and simple. A student culture in which a rape like

¹ Walt Bogdanich, *Reporting Rape, and Wishing She Hadn’t*, *N.Y. Times*, July 12, 2014,

² See Mike Hibbard, *DA Says No Basis for Sexual Assault Charge in HWS Case*, *Finger
circumlocutions around Anna’s refusal, through her attorney, to release the rape kit until the
prosecutor obtained DNA evidence from her preferred suspect, see Walt Bogdanich, *Support for a
College Student Grows After a Rape Complaint Is Dismissed*, *N.Y. Times*, July 21, 2014,
-policies.html.
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 wrong-
doing. The whole point of the New York Times story was that the
Colleges were in the wrong. 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
de spite their complete lack of reliable evidence about who actually de-
served it.3

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,4 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 Till5 to the Central Park Five,6 American racial his-
tory is laced with vendetta-like scandals in which black men are
accused of sexually assaulting white women that become reverse scan-
dals when it is revealed that the accused men were not wrongdoers at

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3 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
/u-va-fraternity-to-rebut-claims-of-gang-rape-in-rolling-stone/2014/12/05/dfa5f7d1-7c91-11e4-84d4-
7c89690abcde_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,
P4L7-NL5V] (a partial retraction). No one until now, as far as I know, has scru

4 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.

5 See generally Stephen J. Whitfield, A DEATH IN THE DELTA: THE STORY OF
EMMETT TILL (1988).

6 Robert D. McFadden & Susan Saulny, A Crime Revisited: The Decision; 13 Years Later,
/06/nyregion/a-crime-revisited-the-decision-13-years-later-official-reversal-in-jogger-attack.html.
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 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 is the idea — vividly manifested in the institutional reforms adopted at Harvard University last summer — 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; the Harvard Title IX Office, dedicated exclusively to enforcing the University’s new

7 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/6yCH-9KRD]. 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.

8 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].

9 “No person in the United States shall, on the basis of sex, be excluded from participation in, or 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).
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 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.\textsuperscript{10}) 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*,\textsuperscript{11} 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

\textsuperscript{10} See DCL, supra note 7, at 7–8; Q&A, supra note 7, at 10–11, 25.

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 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, 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. 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 takeaway 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

12 DCL, supra note 7, at 4, 6, 12; Q&A, supra note 7, at 38–40.
13 Mia Karvonides & William McCants, Harvard Law School Administrative Board Title IX Training (October 23, 2014) (on file with author).
fragmented or ‘sketchy,’” and she can be “[i]misinterpreted as being cavalier about [the event] or lying.” These problems, in turn, can cause police and sexual harassment investigators to dismiss serious claims, tragically because of symptoms of the trauma itself.\textsuperscript{14}

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

\textsuperscript{14} Id.
subjectively give a free consent to engage in sexual activity),\textsuperscript{15} or who were confused about whether to consent or not but who “went along” (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.\textsuperscript{16}

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, \textit{at the time}, with a frequent concomitant of heavy drug and alcohol use: memory loss. This poses


\textsuperscript{16} See Emily Yoffe, \textit{The College Rape Overcorrection}, SLATE (Dec. 7, 2014, 11:33 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://perma.cc/M3WM-BTHB]. The accused in this case was held responsible and expelled. Id.
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 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.17

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.18 No: young women are willingly drinking heavily and using powerful drugs. So are young men. It is an immense public health problem.

17 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-RHRS]. 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].

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 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:

[When 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.]

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 irrefutable 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

19 Harvard Univ., Sexual and Gender-Based Harassment Policy 3 (2014),
[http://perma.cc/YF8T-VPC2].
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 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.\textsuperscript{20} 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\textsuperscript{21} — 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 immerising breakup, morphed into the form of a sexual misconduct charge.

\textbf{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 situ-


ation — 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.

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 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 the

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22 In dealing with sexual harassment, schools must “end such conduct, prevent its recurrence, and address its effects.” DCL, supra note 7, 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 7, at 2–3.
persons they accuse continue in school: merely “seeing” the harasser is deemed traumatic.\textsuperscript{23}

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. \textit{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?

\textsuperscript{23} DCL, \textit{supra} note 7, at 13 n.33.