

The decades-old intellectual debate simmering beneath the current conversation over sexual assault on campus.

By EMILY BAZELON



Catharine MacKinnon of Harvard and the University of Michigan. Credit Katherine Wolkoff for The New York Times

The Return of the Sex Wars

Last summer, the Harvard law professor Janet Halley sat down at her dining-room table to look through a set of policies that her university created for handling complaints of sexual assault and harassment. Halley had taught this area for years, and she was interested to see what the university came up with. The [new rules](#) were released amid pressure from student-led groups of rape survivors and their advocates, who demanded that schools across the country do more on behalf of victims. Harvard was also

responding to years of calls for change by the Obama administration. Just eight months earlier, Valerie Jarrett, a senior presidential adviser, [called for](#) a “more victim-centered” campus approach to dealing with the problem of sexual assault.

But as Halley read the new rules, she felt alarmed — stunned, in fact. The university’s definition of harassment seemed far too broad. She worried that Harvard’s new rules would not be fair to the accused. She thought of a case she wrote about years earlier, in which a military serviceman was discharged because another serviceman complained that the man had looked into his eyes for too long in the mailroom.

At 63, Halley is a self-described feminist, but she also wrote [a book](#) in 2006 with the subtitle “How and Why to Take a Break From Feminism.” Throughout her legal career, she has cautioned against treating sex exclusively as a danger from which women should seek the authorities’ protection. Wielding legal power responsibly, she said, requires exploring other theories of sex and sexuality alongside feminist ideas, in order to take into account “as many interests, constituencies and uncertainties as we can acknowledge.” She counsels women to think twice before calling on the law to shield them. And she has urged feminists to recognize that power, and gender itself, do not always fall predictably along male and female lines. “A lot of us have been struggling to keep alive the flame of opposition within feminism,” she told me.

Halley spent a month laying out her concerns about Harvard’s new rules [in a memo](#) that she distributed to her law-school colleagues and to Harvard’s president. She opened by saying that colleges and universities had a special opportunity to learn from their “slipshod, dismissive and actively malign” handling of sexual-harassment and -assault cases in the past — a history that has been hard on victims. “But it is also a moment of danger,” Halley wrote, given what is at stake for students the university decides to punish. Halley, along with other Harvard law professors, was particularly concerned about complaints against male students of color.

That October, she and 27 colleagues signed [a letter](#) that ran in The Boston Globe calling on Harvard to withdraw its new procedures. They “lack the most basic elements of fairness and due process,” the letter said. The professors faulted the university for failing to provide lawyers for students who couldn’t afford them and for centralizing power in one office during all the stages of a complaint, rather than handing appeals to an independent body with no stake in defending the initial result.

Around the same time, activism by student survivor groups intensified. At Columbia University last fall, [Emma Sulkowicz began carrying a mattress](#) in a piece of performance art that doubled as a protest against the university, which cleared a fellow student she accused of rape. At the University of Virginia, a searing tale of a fraternity gang rape exploded in November onto the pages of Rolling Stone. And in the spring, students at Northwestern University [held a rally](#) and filed a complaint protesting [an](#)

[essay in The Chronicle of Higher Education](#) by the film professor Laura Kipnis, who criticized university bans on faculty-student relationships and expressed puzzlement over student requests not to watch movies, assigned for class, that they felt “‘triggered’ something for them.” “The feminism I identified with as a student stressed independence and resilience,” Kipnis wrote. “In the intervening years, the climate of sanctimony about student vulnerability has grown too thick to penetrate.” Outraged by the “violence expressed by Kipnis’s message,” [the students petitioned](#) the university to issue “a swift, official condemnation,” adding, “We demand that in the future, this sort of response comes automatically.”



Janet Halley of Harvard Law School. Credit Katherine Wolkoff for The New York Times

Concerned that the students had gone too far, liberal and conservative faculty members and commentators rallied around Kipnis. “The reaction to Kipnis — the demands for official censure, the claims of emotional injury — demonstrated how correct she is about the broader climate,” Michelle Goldberg [wrote in The Nation](#). Other doubts about the tactics of the survivor movement, if not its goals, were also simmering. Male students, including the classmate Sulkowicz accused at Columbia, Paul Nungesser, [have sued](#)

[their universities](#), arguing that the new “victim-centered” policies are biased. Facing doubts about the veracity of facts provided by the woman who claimed she was victimized, Rolling Stone [was forced to retract](#) its story of gang rape and to acknowledge that it relied on the anonymous woman’s account without adequately trying to corroborate it.

Amid this controversy, the letter the Harvard law professors published in The Globe was a sign that universities, striving to address campus sexual violence, could find themselves under attack from all sides. Harvard has defended its procedures; a spokesman says the university has been “at the forefront of campus efforts” to prevent and respond to sexual assault and harassment. But Halley’s critique has reverberated — as the latest salvo in a long-running war, with deep intellectual roots, over how to grapple with rape and sex as a feminist.

In the late 1970s, when Janet Halley was writing a dissertation on 17th-century poets like Donne and Milton, a young lawyer and political scholar named Catharine MacKinnon [opened new possibilities](#) for the women’s movement by conceiving the legal claim for sexual harassment as a form of sex discrimination — before this, an employee who lost her job for refusing to sleep with her boss had no way to succeed in court. MacKinnon’s work made her the central figure in the emerging field of feminist legal theory. She cemented that status over the following decade by developing an overarching theory of inequality. Women lived in a state of subordination, MacKinnon argued, with pornography, sexual harassment, prostitution, child sexual abuse, domestic violence and rape as core elements in male domination.



Deborah Rhode of Stanford Law School. Credit Katherine Wolkoff for The New York Times

Within this hierarchy, inequality functioned as a form of coercion, and a woman's consent to sex, as defined by the law, did not necessarily mean that she was not raped. "The unquestionable starting point has been that rape is defined as distinct from intercourse," MacKinnon wrote in her 1989 book, "[Toward a Feminist Theory of the State](#)," "while for women it is difficult to distinguish the two under conditions of male dominance."

MacKinnon described her theory as the "dominance approach," and it came to be known as "dominance feminism" — a term she says she doesn't like, because "it's as much about subordination as dominance." Linda Boreman, featured in the 1972 hardcore porn movie "Deep Throat" under her stage name, Linda Lovelace, contacted MacKinnon, saying that men had coerced her into making the film, and MacKinnon began representing her. At the invitation of the Minneapolis City Council, MacKinnon worked with the writer Andrea Dworkin — they taught together at the University of Minnesota — to draft an ordinance that allowed people to sue the makers and distributors of pornography, defined as the "sexually explicit subordination of women."

The mayor of Minneapolis vetoed the ordinance, but in Indianapolis, the conservative City Council and mayor enacted a similar one. In response, a group of more than 50 feminists, including Betty Friedan and Adrienne Rich, signed a statement opposing the ordinance for potentially censoring speech and for accepting sexist stereotypes. MacKinnon fired back, accusing her opponents of “fronting for male supremacy.”

The Indianapolis law was struck down in court, but within the women’s movement, the war waged on. A group calling themselves “sex-positive” feminists took aim at MacKinnon and Dworkin for turning sex into the enemy. Some sex-positivists were lesbians who identified with the politics of the gay male bathhouse, where people gathered for sexual freedom. Others were straight women who had learned from feminism to connect with their bodies. “A lot of girls don’t grow up knowing they have a clitoris,” Candida Royalle, who became a director of adult films geared toward couples, said in [“Female Chauvinist Pigs,”](#) Ariel Levy’s 2005 book about shifting perceptions of feminism. For Royalle, celebrating all kinds of female desire was central to women’s liberation. ([She died this week.](#))

At the time, in the early to mid-1980s, Halley was a dominance feminist, teaching English at Hamilton College in New York. “My tools of analysis led me to be very suspicious — even if something seemed innocuous, it was really male domination working its way in,” she said. But slowly other influences complicated her thinking. She read sex-positive writers like Carole Vance, who edited a collection of essays called [“Pleasure and Danger.”](#) Vance explained the title: “To speak only of sexual violence and oppression ignores women’s experience of sexual agency and choice and unwittingly increases the sexual terror and despair in which women live.” Halley started thinking that sex, in all its chosen permutations, “could be a force for good.” She also had gay male friends who felt alienated by the women’s movement. They saw gender as fluid rather than binary. “I was part of the queer wave that crested in the ’90s, and the idea that it wasn’t just women and men, that people had all kinds of different identities — that all made sense to me,” Halley said. She started eschewing the labels of gay and straight. She believed that both men and women could use power and violence against each other, and she wanted feminists to recognize this.

Halley decided to go to law school, and when she turned to legal scholarship, she proved herself partly by taking on MacKinnon. In 1997, the Supreme Court heard [the case of Joseph Oncale](#), a former oil-rig worker who brought a sexual-harassment claim charging that his co-workers on an all-male crew taunted him, threatened to rape him, pinned him down in the shower and assaulted him. Asked to help with the case, MacKinnon filed [a brief arguing](#), among other things, that Oncale was a victim of sex discrimination because men like him are “feminized: made to serve the function and play the role customarily assigned to women as men’s social inferiors.”

Some gay rights groups signed the brief. But Halley saw trouble brewing for sexual

minorities. She wrote [an incendiary essay](#), published in the 2003 collection “[Directions in Sexual Harassment Law](#).” In it, she called MacKinnon’s approach “a big mistake” that opened “a quick and easy route to homophobia.” In her brief, MacKinnon said that the sexual orientation of Oncale and his attackers was legally irrelevant. Halley, however, singled out a footnote in which MacKinnon quoted Oncale’s testimony that he thought his attackers were homosexuals. Halley said the footnote implied that the men were gay and therefore deviant wrongdoers.



Alexandra Brodsky, a student at Yale Law School. Credit Katherine Wolkoff for The New York Times

MacKinnon and others rejected Halley’s reading, but Halley went further, widening the scope of her attack. She voiced increasing suspicion of sexual-harassment law more generally, worrying that it reinforced repressive ideas about what was normal and what was deviant. She also objected to the way in which she thought dominance feminists saw women primarily in terms of innocence and injury, treating an experience of sexual violence as a focal point of identity. “Representing women as end points of pain,” feminists refuse to see women “as powerful actors,” Halley wrote in her book. “*Feminism* objectifies women, *feminism* erases their agency — could that be right?”

Halley's skepticism about using law to fight female inequality is out of sync with many feminists in the legal academy, who argue that she is also out of sync with many women. "The actual lived experience of real women is that they often are the victims of sexual violence," said Michele Dauber, a Stanford law professor who helped rewrite the university's policies on sexual harassment and assault and teaches a course on the issues. "It's absurd to say that it undermines women's agency to give them a tool to stop that bad thing from happening. People are suffering from harm, you provide them with a remedy, and somehow that's infantilizing? No, it's empowering."

Halley and MacKinnon are both on Harvard's campus these days, Halley full time and MacKinnon, who is 68 and has tenure at the University of Michigan, for one semester a year. Some students say Halley can be unyielding, but she also listens well; she's often seen walking her pair of golden retrievers on campus. MacKinnon's formidable ideas and reputation, as well as her teaching style, limit the interplay of ideas among students in the classroom, some of them say, though one student described her class as "transformative."



Jessica Fournier, a student at Harvard. Credit Katherine Wolkoff for The New York Times

Standing at feminism's outer poles, MacKinnon and Halley loom large for students in debates about gender at Harvard Law School. For some feminist students, the division between the two camps is intensely frustrating. "Harvard is turning out generations of high-powered leaders who think feminists are extremists, because they're mostly only hearing from Halley on one side and MacKinnon on the other," said one recent graduate, who did not want her name used because she feared professional repercussions. The split, she added, hinders "problem solving, community building, finding allies — all the gushy stuff that actually leads to change."

Nationally, the leaders of the survivor movement include law students for whom MacKinnon is an intellectual touchstone. "She resonates with us for recognizing the way sexual violence holds back individuals and classes of marginalized people from flourishing," said Alexandra Brodsky, a co-founder of the group [Know Your IX](#). (Title IX is the federal law that provides for equal access to education.) "That feels very real to students. It's not abstract when you're failing out of school because you have to share a library with your rapist." (Brodsky, a law student at Yale, took a writing course that I teach there.)

Like MacKinnon, student activists see the law as a tool of resistance against oppression, usually though not exclusively perpetrated by men. (Today's activists include L.G.B.T.Q. students, and the movement makes plenty of room for their experiences.) Student editors of *The Yale Law Journal* asked MacKinnon to speak at a conference on Title IX at the end of September and invited her to contribute to the journal for the first time since 1991. Halley was not invited. The appreciation between MacKinnon and these student activists runs both ways. "I'm flat-out inspired by these girls," MacKinnon said when I called her last spring.

The influence of the survivor movement is particularly apparent in how schools have broached the topic of drinking in the context of sexual assault. "Alcohol is the No. 1 'date rape drug,' and is often used as a tool to commit an assault," states [the website of the University of New Hampshire](#), a national leader in sexual-assault prevention. But it's harder for schools to talk about voluntary drinking by women. Student activists object to rape-prevention programs incorporating warnings about the risk heavy drinking poses. They say that questioning how much a female student drinks is like questioning her choice to wear a short skirt — just another form of victim blaming.

In times past, feminists urged self-reliance as a means of fighting rape — through, for example, self-defense classes. In June, *The New England Journal of Medicine* [published a study](#) of a Canadian program that cut the risk of rape by nearly half, and the rate of attempted rape by even more. In four three-hour sessions, the program trained female students on assessing risk among male acquaintances, overcoming obstacles to resisting coercion, practicing verbal and physical resistance and focusing on their own desires and relationship values. "Effective interventions focusing on men's behavior are

also needed,” the authors of the study said. Yet student activists argue that the burden should be almost entirely on men to stop sexually assaulting women, not on women to keep themselves out of danger. “If someone is so incapacitated they can’t stand up or use their words, then you should not be having sex with that person,” said Jessica Fournier, a Harvard junior who belongs to the survivor group [Our Harvard Can Do Better](#). “That’s where the focus needs to be. That’s much more effective than giving out a list of 5,000 things victims shouldn’t do.”

To Halley, it’s strange to hear feminists appealing to men to change their behavior while leaving women out of the equation. “I’m really troubled by this trend in which women are helpless and passive and men are the big responsible protectors,” she said. “That’s the ideology of the gilded cage. It’s astonishing to see feminists reawakening it uncritically. If young people are going to have a robust role in creating the conditions they want to live in, feminists have to call off this ban on discussing the risks and the moral ambiguities that come up with excessive alcohol use.”

On this point, she has support among liberal feminists. “Schools have been reluctant to incorporate issues of alcohol abuse in rape-prevention programs out of concern that victims will be blamed, and blame themselves, for assault,” writes the Stanford law professor Deborah Rhode, who has advocated women’s advancement in the legal profession throughout her career, in a forthcoming article in *The U.C.L.A. Women’s Law Journal*. “That needs to change. Warning women that intoxication increases their risk of sexual assault does not imply that they are responsible for it.” The Yale law professor Reva Siegel, who coedited the 2003 essay collection on sexual-harassment law with MacKinnon, wants schools to expend more resources on prevention efforts, rather than channeling a vast majority of their time and money into punishment after the fact. “Universities have to make sure they balance punishment with acting preventatively, by enlisting students in an ongoing debate about their own culture,” she said. Prevention, Siegel argues, is crucial to achieve equality — which is the purpose, after all, of Title IX.

In many ways, the discussion about *how* to reduce sexual assault is only just beginning. Halley is gaining an audience among university administrators not unlike the one MacKinnon is having with student activists. She traveled to Roanoke College and the University of Chicago in the last year to talk about her ideas for ensuring that university policies are fair to both sides. Harvard conducted a universitywide survey on sexual assault earlier this year and is keeping statistics on the race of accused students and possible victims. The number of students filing formal complaints has risen. Recently, Harvard Law School broke from the university, announcing different procedures for its own students, which include providing lawyers to those who cannot afford them and hiring independent adjudicators with legal training (like retired judges) to hear and decide cases. The changes at the law school have MacKinnon’s support as well as Halley’s. It’s a rare and productive moment: Two opposing views of feminism coming together.

