

American Sexual Culture as Public Health Crisis

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Margo Kaplan, *Rape Beyond Crime*, 66 **Duke L.J.** (forthcoming 2017), available at [SSRN](#).

Not long ago, I was indulging in one of my favorite lazy-day pastimes – standing in my local bookstore, reading. The book was [Girls and Sex](#), Peggy Orenstein’s latest, and I left the bookstore considerably more unsettled than when I walked in. Suddenly it seemed like a good idea, if not to forbid her to go to college altogether, at least to walk my 18-year-old daughter to the nearest feminist sex-toy store first. Now comes Margo Kaplan to offer a legal perspective on American “rape culture,” and a new plan for furthering the feminist project of healthy, happy sex lives for everyone.

The idea that men’s sexual desires are insatiable and that women are responsible for keeping them in check has been around for a long time, and in *Rape Beyond Crime* Kaplan cites abundant evidence that it remains a cornerstone of American beliefs, such as a survey finding that many young men do not see coercing women into sex as wrong. Orenstein’s book, which is based on interviews with young American college and college-bound women, underscores Kaplan’s argument. Orenstein’s interviewees talked about feeling sexually empowered. But their actions attested to intense cultural pressures: to always look “hot” (which, these days, involves Brazilian waxes and, occasionally, surgery to alter the look of one’s labia); to be seen as neither “prudish” nor “slutty”; to embrace a world of casual, ambiguous “hookup” relationships (facilitated by alcohol); and to place men’s sexual desires above their own. (On this last point, for example, Orenstein describes her frustration in trying to convince her young interlocutors that there is something not quite fair about regularly giving blow jobs but seldom requesting, or even being comfortable with, cunnilingus.)

Kaplan concludes that “absent a broader change in this culture, criminal law faces a double bind: rape laws can be either ineffective or unjust.” Because there is such a mismatch between the world sexual equality feminists, at least, would like to live in and the world we actually do live in, scholars and actors in the criminal justice system struggling to apply statutory terms like “force” and “consent” find themselves either confirming social norms that preserve men’s sexual access to women (ignoring the needs of male and female victims), or promoting idealistic norms that feel alien and unreasonable to the ordinary person.

The answer, Kaplan proposes, is to supplement the criminal law of sexual assault with a public health approach to sexual culture. As she notes, “public health law” is a grab bag of doctrines and policies including educational initiatives, data collection, and public-private partnerships among government, nonprofit organizations, media outlets, and advocates, all underwritten by the police power of the states and the federal power of the purse. The cornerstone of a public health approach, according to Kaplan, is its focus on “populations and prevention” – the exact opposite of the criminal justice system, which focuses on individuals and, despite its aspirations to deterrence, requires a violation as a trigger.

Kaplan’s proposed public health approach to rape has two main prongs. First, government agencies would amass detailed data on sexual violence (and where possible, presumably, sexual encounters that are unwanted regardless of whether they are understood as “violent”). Second, government agencies would promote new cultural norms for sexual behavior, challenging the norm of male aggression/female passivity and promoting in its stead an ideal of “good sex—sex that involves communication, mutual

respect, and mutual pleasure.” (On the model of Michelle Obama’s work on obesity, I imagine First Husband Bill Clinton traveling the country promoting good sex for all.) In addition, Kaplan would encourage rape prevention campaigns to look “upstream” at structural determinants of victimization, such as poverty.

Kaplan is forthright about her ambition to use the power of the law to promote social norms. In her view, “[i]nterventions that encourage empathy and respect, and that reject gender norms that encourage sexual violence, should start at an early age and progress in an age-appropriate way.” But she doesn’t note that such interventions would run straight into the buzz saw UC Berkeley sociologist Kristin Luker describes in her 2006 book, [When Sex Goes To School](#). Luker, studying K-12 sex education curricula in varied American communities, found a deep rift between “liberals” – for whom, [in the words of New York Times reviewer Judith Shulevitz](#), “sex is natural and unmysterious, a healthy, pleasurable, quasi-recreational activity” – and “conservatives” – who (again in the words of Shulevitz) “consider sex sacred but dangerous, transformative when contained by marriage but destructive outside it.” Kaplan’s “public health” approach to sex is clearly a liberal approach. It would likely face the conservative response of thinking that once again, liberal coastal elites are trying to use government power to force a secularist and even immoral way of life on unwilling communities. And just as North Carolina and other states have used “protecting children” and “protecting religious freedom” to push back against laws and policies protecting LGBT people from discrimination and exclusion, I can imagine the pitched battle that would erupt should a future administration decide to help elementary-school children [“theorize ‘yes.’”](#)

But let’s say that, as in the war over same-sex marriage, liberals can win the war over sex education with the help of social media, Oprah, and Hollywood. Kaplan also passes over a more subtle objection from critical legal theory. Queer scholars like Janet Halley and feminist scholars like Aya Gruber (whom Kaplan cites approvingly in her critique of the criminal justice approach to rape) might ask whether alliances between feminist advocates and the state to change social norms are necessarily a good idea. Halley’s concept of [“governance feminism,”](#) for instance, encapsulates the idea that feminists with a taste of power may, like other people, use it to run roughshod over people who don’t agree with them. [Gruber might suggest](#) that a generation from now we will look back on feminists working in alliance with government, Facebook, and Google to discover what everyone desires and does sexually, and shudder at the emergence of a new site of surveillance and discipline enabled by Silicon Valley and powered by the state.

Despite these omissions, however, Kaplan’s article is thoughtful and thought-provoking, timely, and well-argued. As a blue-state sexual liberal, I would love for my daughter to go to college secure that she knows what and whom she desires and how to get it, and able to trust that both her “yeses” and “nos” will always be respected. I am also thoroughly persuaded that criminal law alone will never get us there. It’s high time we pursued new approaches to a world of equal access to sexual pleasure and equal protection from sexual danger. Kaplan’s proposal is a terrific place to start.

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