

The Case for a Sexual Assault Policy at the University of the West Indies (Cave Hill)

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The vibes at the 'Beer Lime' was at fever pitch. Sweaty bodies bumped and grinded to the 'libido- stimulating' sounds of Mavado's 'Force it Up'. Their eyes met, she smiled and he came over. He offered her a drink and she accepted. She had always liked him but never had the nerve to make any advances. Tonight was different. The Banks beer and the sultry music seemed to have freed her mind... and body. They began to dance: hips locked together, gyrating in unison.

They both lived on Frank Worrell Hall, so when the fete ended they left together. He walked her to her room and she invited him in. They began to kiss; he pulled her to the bed and began to undress her. She pushed him away but he insisted 'You know you want it'. He pinned her down, made one, two, three, four thrusts and came inside her.

He left.

She cried.

Introduction

Women represent over seventy percent (70%)¹⁰⁰ of the student population enrolled at the University of the West Indies, Cave Hill Campus [hereinafter the University]. Therefore, it would only seem natural that with an overwhelming number of its students being women, the University would work towards promoting an environment which is sensitive to the specific needs of its female students. One of the specific vulnerabilities that women, more specifically women on campus, face is the threat of sexual violence. Reports from surveys done in the United States

¹⁰⁰ United Nations Development Programme, Regional Report on the Achievement of the Millenium Development Goals in the Caribbean Community, September 2004
<http://www.undp.org/latinamerica/docs/RegionalMDGCaribbean.pdf>
accessed 25 November 2008

illustrate that one in four women on campus will be the victim of sexual assault including rape and attempted rape.¹⁰¹ In most cases the perpetrator will be another student who is known to the victim¹⁰². Additionally, twenty-two percent (22%) of women at Cave Hill have been victims of sexual assault¹⁰³. Despite the known threat of sexual violence against women, the University, unlike most US universities¹⁰⁴, does not have a comprehensive sexual assault policy which is aimed at sexual assaults committed against students by other students. The closest version of a sexual assault policy is the *Sexual Harassment Amendment to Ordinance 8*. However, this only covers incidents of sexual harassment between students and certain members of staff (lecturers and senior University officials). It is interesting to note that even in its attempts to regulate sexual assault between students and staff, the University has failed to develop policies in relation to other types of assaults such as rape and has neglected to protect students from sexual assaults perpetrated by members of staff other than lecturers and senior University officials.

It would appear that the University has justification for its negligence, since reports from the Security Unit on campus show

¹⁰¹ T Steinberg, 'Rape on College Campuses: Reform through Title IX' (1991) 18 JC & UL 39 at 42.

¹⁰² *Ibid*

¹⁰³ These results are from an independent survey conducted by the students in the Gender and Law class. The aims were to find out: 1) how students at Cave Hill perceived sexual assault 2) students who had been affected by sexual assault 3) students understanding of consensual versus non-consensual sex 4) how students dealt with being sexually assaulted. A sample of 30 randomly selected students was used. While we cannot definitively argue that this is a wholly representative sample of the student population at Cave Hill, it does give us useful insight on the extent of the problem of sexual assault on campus. Perhaps this will be the catalyst for more extensive studies.

¹⁰⁴ Most US universities have a sexual assault policy that can be accessed online. See example Division of Student Affairs, Duke University, Policies: Sexual Misconduct, http://judicial.studentaffairs.duke.edu/policies/policy_list/sexual_misconduct.html accessed 22 November 2008

that for the period September 2006 to October 2008, there were only one incident of attempted rape and one rape (which turned out to be a ‘false alarm’). Nonetheless, these statistics can be attributed to under-reporting by victims and should not be interpreted to mean that cases of sexual assault on campus are negligible or non-existent. Moreover, it has been proven that even though college women face the highest likelihood of being sexually assaulted, they are less likely to report their assaults than victims in other age groups¹⁰⁵. Additionally, only one in ten will report sexual assault cases to the University’s administration¹⁰⁶. Furthermore, sexual assault violates a woman’s right to sexual autonomy: the ability to exercise control over one’s body and sexuality. Given the threat of sexual violence to women’s sexual autonomy, the University has both a fiduciary and social duty to develop a sexual assault policy which will govern sexual relations among students. Consequently, the recommendations in this report will: 1) highlight the implications of defining prohibited sexual behaviour using the ‘affirmative consent’ model; 2) propose that the University develops specific security, counseling and academic services to cater to the needs of victims of sexual assault and; 3) and discuss the nature of disciplinary proceedings and the implications for the victim and alleged offender.

Female Autonomy and Sexual Violence

According to Robin West ‘women’s subjective, hedonic lives are different from men’s’ and therefore ‘the quality of our suffering is different from that of men’s, as is the nature of our joy’¹⁰⁷. Consequently, women and men will experience shared social realities differently. Sexual intercourse in the above example produced two different results: the man experienced orgasmic pleasure (he came) but for the woman it was painful and

¹⁰⁵ T Steinberg (n.2) 43

¹⁰⁶ *Ibid*

¹⁰⁷ R West , ‘The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory’ (2000) 15 WIS WOMEN’S LJ 149

debilitating (she cried). The dichotomous experience of both man and woman results from the fact that the woman was denied the right to exercise control over *her* body while the man saw it as *his* right to tell the woman how she should use her body. She was made powerless and he assumed power over her. The power differential between men and women is not accidental but is a direct consequence of patriarchal structures of power and domination that have stymied women's ability to achieve autonomy and self-governance. Sexual violence, as illustrated above, is the materialization of patriarchal ideologies which teaches both sexes that women are sexual objects, created to satisfy man's pleasure and needs. These ideologies assume that a woman does not have a right to exercise control over her body. Therefore, when 'she pushed him away', he replied 'you know you want it'. These assumptions and their materializations create situations of vulnerability for women, vulnerabilities which must be remedied if women are to attain self-governance and bodily integrity.

Autonomy is a liberal concept that assumes that individuals are rational beings whose decision-making is free from externally-imposed influences. Therefore, female autonomy would guarantee women the ability to define themselves and make choices that are not socially imposed. As a constituent of female autonomy, sexual autonomy means that a woman is able to choose who she has sex with and under what circumstances. In addition, it guarantees her the freedom to decide how she should use her body. Under the liberal model the law must intervene where the individual's right to exercise autonomy has been violated. For example, a person's right to use of his/her property is violated when he/she is a victim of theft. As a result the law steps in to remedy the injury suffered. Similarly, if a man violates a woman's sexual autonomy through forced sexual intercourse or unwanted sexual contact, the law must step in to remedy the woman's injury.

Affirmative Consent and Sexual Assault

In requiring women to prove the existence of force in sexual assault cases, the law in many Commonwealth Caribbean

jurisdictions has placed little emphasis on the protection of sexual autonomy and the integral role consent plays in sexual autonomy. On the other hand, a sexual assault policy that focuses on consent rather than the element of force would ensure that a woman's right to sexual autonomy is protected. By focusing on consent the law would not look primarily to evidence of forceful resistance to determine whether a woman gave or withheld consent to sexual activity. The difficulty in defining what constitutes consent is remedied if we define consent to mean affirmative consent.

Affirmative consent requires that individuals have clear, unambiguous consent before proceeding with sexual activity or contact. While there is some debate over whether the consent should be verbal or non-verbal, the key ingredient is that the consent whether verbal or non-verbal is unequivocal and expresses an individual's willingness to participate in sexual activity. As a result affirmative consent eliminates notions of implied consent or that silence equal consent. In the above example, the woman's decision not to say 'no' or give further resistance would, under current rape laws, allow the attacker to argue that he reasonably believed she was consenting¹⁰⁸. However, affirmative consent does not allow the man or the law to assume that a woman's ambivalence means consent; instead the law and the man should assume that ambivalence means 'no'. Additionally, affirmative consent to sexual intercourse would warn men not to interpret a woman's consent to kissing and heavy petting as an invitation to coitus. In New Jersey(the only US state that has adopted an affirmative consent model for defining prohibited sexual penetration), the Supreme Court in *Ex rel MTS* found that while the victim had consented to the kissing and petting, she had not consented to the penetration¹⁰⁹. The court held further that "any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the

¹⁰⁸ *DPP v Morgan* [1972] AC 182

¹⁰⁹ *Ex rel. M.T.S.*, 609 A.2d at 1269

specific act of penetration constitutes the offense of sexual assault.”¹¹⁰

According to Schulhofer, affirmative consent would allow women to avoid the serious injury of ‘reluctant submission’.¹¹¹ The idea of reluctant submission is particularly crucial for cases of assault on campus where the perpetrator is usually known by the individual. Instances of ‘date’ or acquaintance rape usually occur because the woman trusts the man to the extent that she would invite him to her room, go to his room or accept a ride in his car. In these situations the woman is alone with the man and the difference in physical power could force the woman to have sex even if she is reluctant.

Additionally, affirmative consent would protect women whose capacity to consent to sexual activity is hindered by alcohol/drug intake and emotional/psychological coercion. If we require men to ensure that they have positive and freely given consent before sexual activity, it will not only help to validate the rape claims of women who have sex while under the influence of drug/alcohol but it will cause men to think twice before engaging in sex with women who are intoxicated. The large consumption of alcohol at University ‘beer limes’ and fetes, act to decrease the capacity of a woman to consent to sexual activity. Nonetheless, many men use this opportunity to engage in sexual intercourse with women who under normal circumstances would have refused. In an independent survey conducted by students in the Gender and the Law class, 53% of the students viewed sexual intercourse where the woman was drinking as non-consensual sexual intercourse. While, there still seems to be a level of uncertainty as to whether alcohol negates consent (one student described it as ticklish), a rule on affirmative consent would eliminate the grey area.

¹¹⁰ *Ibid*, 1277

¹¹¹ S Schulhofer, (n.17) 23

Moreover, the survey we conducted revealed that the student body would be supportive of defining sexual assault and more specifically rape as conduct that the victim did not give affirmative and freely given consent to. The students were given five scenarios and asked to state which ones they would consider as sex without consent. In the first scenario the man and woman are kissing, he puts his hands inside her, she says ‘No don’t’ and he penetrates her. Over 83% of the students considered it to be sex without consent. Additionally, in all the other scenarios in which the woman coupled the verbal protest with physical resistance, 93% of the students considered penetration as sex without consent. This indicates that non-consent to sex can be given even without the element of force since the scenarios did not involve the man using any type of force. The important element was whether the woman had consented either verbally or through physical conduct. In the first scenario the ambivalence created by the fact that the woman only expressed her non-consent verbally without any type of physical resistant did not prevent persons from viewing it as non-consensual sex. Therefore, it would seem that students would be in favour of a sexual assault policy that defines sexual misconduct as any type of sexual conduct where there is no positive and freely given consent.

Currently, the University does not have a working definition for what would constitute sexual assault. In its Code of Principles and Responsibilities for Students (hereinafter the Code) the only sexual assault that is recognized as a form of misconduct is sexual harassment¹¹². Nonetheless, sexual harassment is not defined in this document. Furthermore, the definition of sexual harassment in the *Sexual Harassment Amendment to Ordinance 8* allows the assault to be dependent on the reasonable belief of the perpetrator. There is no indication that the sexual harassment can be established solely on victim’s non-consent: the perpetrator must have a reasonable belief. Additionally, Mr. Oral Reid, Head of Security at Cave Hill, stated that sexual assaults other than

¹¹² Appendix C at paragraph 19

sexual harassment would be covered by paragraph 6 of the Code. Paragraph 6 states that misconduct by students would be defined as offences which are recognized under the Criminal Law. However, the laws on sexual assault in the Commonwealth Caribbean focus more on the requirement of force to establish sexual assault and therefore they do not adequately protect women's sexual autonomy. A definition of sexual assault that centralizes affirmative consent would adequately protect the sexual autonomy of women and reflect the attitudes of students towards the requirement for consensual sexual activity. Moreover, the University could follow the lead of many US universities which have adopted the affirmative consent model in defining sexual assault¹¹³. For example, Antioch College states that 'consent is required each and every time there is sexual activity'. Sexual activity is defined 'as sexually based touching' and 'consent is the act of willingly and verbally agreeing to engage in a specific sexual conduct'. The Antioch definition is desirable because it not only defines sexual activity widely, it also makes it clear that consent to one type of sexual activity does not mean consent to all types of sexual conduct.

Services for Victims

Sexual assault covers a range of behaviours from inappropriate touching to rape. The type of assault will determine the services that should be available to the student. However, a victim of *any* type of sexual assault has to deal with 'whether she wants to tell anyone what has happened, who she can tell, and who

¹¹³ Duke University defines sexual misconduct 'as conduct where no clear consent, verbal or non-verbal is given'. http://judicial.studentaffairs.duke.edu/policies/policy_list/sexual_misconduct.html accessed 22 November 2008. Similarly, the University of Houston's Student Handbook states that 'sexual assault has occurred if there is no consent. In addition, it further explains that 'accompanying someone to their dorm or bedroom is not affirmative consent for sexual intercourse or contact, nor is voluntary hugging or kissing'. <http://www.uh.edu/dos/hdbk/relpolicies/sexualassault.html> accessed 22 November 2008

she can look to for help'¹¹⁴. Therefore, the University's policy on sexual assault must have a wide range of readily available services to respond adequately to these concerns and the other psychological and academic needs of those affected by sexual assault. Kathryn Reardon recommends that a campus policy committed to providing services for victims of sexual assault must be fourfold: 1) information and resources for victims of sexual assault must be made available to all students; 2) school policy on sexual assault must be published to signal to students that the school takes these issues seriously; 3) victims should be able to get assistance without having to file formal complaints or interact with assailants and; 4) procedures for filing complaints must be user friendly, accessible and possess mechanism to punish offenders¹¹⁵.

Victims of sexual assault, especially rape victims suffer not only physical but also psychological harm. Furthermore, victims normally want to keep information about their ordeal private. As a result the University should be able to provide emergency medical care, counselling services specific to sexual assault victims and a confidential environment. For example at Duke University, there is the Office of Sexual Assault Support Services (SASS) which provides education, crisis prevention, ongoing counselling, support groups, medical services, law enforcement and academic advice for victims of sexual assault. Centralizing these services has the advantage of making it easier for victims to access all these services in one place, rather than having to go to several different places for specific services. At Cave Hill a victim of rape will have to be referred to several different places to access all these services. This can prove inconvenient and discourage persons from reporting the incident or seeking help. On the other hand, we might also find that providing effective services for victims might require coupling on-campus with off-campus resources. Wedding the on-

¹¹⁴ K Reardon, 'Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights' (2005) 38 SUFFOLK U. L. REV. 395 at 402

¹¹⁵ *Ibid*

campus services with off-campus counselling and law enforcement services will ensure that: 1) students who perceive on-campus service as hindering their privacy will have access to other sources and 2) students are encouraged to report the matter to the local police even if they do not want the University to undertake disciplinary proceedings against the perpetrator. More importantly, the University should have specific academic regulations for students who have been subjected to sexual assaults such as rape. This could include allowing victims excused absences, extensions on projects and exams, and the option to withdraw from courses, even late in the semester.

In a second independent survey conducted by the Gender and Law Class, we found that 96 % of the student body was never informed by the University administration that there was a sexual assault policy. This lack of awareness contributed to 98% of students admitting that they did not know the procedure for filing a sexual assault complaint. Consequently, the University should ensure that its policy on sexual assault is made available to all students through the University's website, Student Handbook and the Code. This will facilitate an environment in which victims will know that their reports will be taken seriously. This will encourage reporting of these matters, especially when victims know that their privacy will be protected and perpetrators disciplined.

In addition, the policy should include procedures for filing formal complaints and disciplinary proceedings. These complaint procedures should not have prompt complaint requirements, corroboration requirements or instructions cautioning officials to only proceed with complaints that are 'credible'. Harvard recently adopted these requirements but the policy was strongly criticized for reducing the number of successful disciplinary proceedings against sexual assailants and deterring the original complaints themselves¹¹⁶. Instead of these requirements, Michelle Anderson

¹¹⁶ M Anderson, 'The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault' (2004) 84 B.U. L. Rev. 945 at 950

proposes that 'sexual assault policies should allow a complainant to pursue campus disciplinary proceedings against a student as long as that student remains enrolled at the institution'¹¹⁷ and the standard of proof for finding a violation of the disciplinary code should be a "preponderance of the evidence"¹¹⁸. In addition, the complainant's testimony should be sufficient to establish proof of sexual assault and he/she should not be subjected to unwarranted scrutiny or procedural hurdles in bringing claims to campus administration.¹¹⁹

Cave Hill's lack of a comprehensive and single policy on sexual assault, results in students not being aware of the services available to sexual assault victims and the disciplinary procedures for offenders. While the Security officials have procedures for dealing with these reports, the nature of the counselling services and the role of the Office of Students Services (OSS) remains undefined (in the former) and unknown (in the latter). Attempts to obtain information from the OSS proved futile. The only person who knew about the OSS's procedure on sexual assault was the Director of Students and she was too busy with meetings to provide the needed information. The recommendations outlined above would serve to rectify some of the problems a sexual assault victim would experience at Cave Hill.

Disciplinary Proceedings for Offenders

Most universities with a sexual assault policy institute proceedings against the alleged perpetrator even if the victim does not want to bring charges under the criminal law. Similarly, at Cave Hill victims of sexual assault who do not wish to institute legal proceedings can get redress when the matter is brought before

¹¹⁷ *Ibid*, 953

¹¹⁸ *Ibid*

¹¹⁹ *Ibid*

the University's Disciplinary Committee¹²⁰. This redress is only contingent on the victim identifying the perpetrator. A weakness in the disciplinary proceedings at Cave Hill is that students do not become aware of the nature of the investigations and the disciplinary hearings until they have to appear before the Committee. Nonetheless, the existence of this alternative remedy is important as it ensures that the offender gets punished for violating the woman's sexual autonomy even if the police are not involved. Additionally, punishing the offender prevents the possibility of him repeating the behavior. This would reduce the possibility of other women being sexually assaulted. More importantly, a campus sexual assault policy based on affirmative consent would make it easier for victims of 'date' and acquaintance rape to prove the assault without having to provide evidence of force. This is in contrast to the criminal law in the region which requires the victim to demonstrate that physical force had negated her consent.

Furthermore, I would like to recommend that the University's policy on sexual assault must balance the right of the sexual assault victim to have the student offender punished and the student offender's right to a fair investigation and trial. This balancing of interest is extremely important in disciplinary proceedings. Two recommendations that can achieve this purpose are the right of the accused to legal representation and interim measures to protect the victim from the alleged attacker before the actual proceedings.

It can be quite uncomfortable and traumatic for the victim of sexual assault to share the same living and campus space with his/her alleged attacker. Therefore, Reardon recommends that the University implements interim measures to protect the victim from this experience before the start of the disciplinary hearings. These measures could include requiring the accused to move off hall or transfer to other classes which she/he does not share with the

¹²⁰ Information obtained through interview with Mr. Oral Reid, Head of Security at UWI Cave Hill

victim. These interim measure might infringe the accused right to these facilities but a speedy investigation and access to counsel during disciplinary hearings act as sufficient guarantee to the accused right to fairness.

Conclusion

Sexual assault threatens a woman's ability to exercise control over her and ultimately violates her right to sexual autonomy. The relationship between the University and students is akin to a contractual relationship in which the students is required to pay tuition and other fees in return for the University's promise of providing education in a safe and wholesome environment. The implementation of a sexual assault policy that governs sexual relations among students is the University's fulfillment of this promise. Critics of an affirmative consent model have argued that it will cause more men to be accused of sexual assault, take the romance out of intimate relationships and criminalize the conduct of those men and women 'who like it a little bit rough'. However, this is a small price to pay if we are able to protect the large percentage of women who have had and could have their sexual autonomy threatened by violence. Additionally, these critics fail to see the potential that affirmative consent has in making gender relations more equitable. Providing adequate support services for victims of assault and ensuring that offenders are punished become key ingredients in acknowledging a woman's right to sexual autonomy; but the University is also obligated to undertake prevention programmes. These should include publishing statistics of sexual assault on campus and getting the OSS to educate the student body on the components of the sexual assault policy.