



Fairness For All Students Under Title IX

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Fairness for All Students

FAIRNESS FOR ALL STUDENTS UNDER TITLE IX

Elizabeth Bartholet, Nancy Gertner, Janet Halley and Jeannie Suk Gersen

August 21, 2017

We are professors at Harvard Law School who have researched, taught, and written on Title IX, sexual harassment, sexual assault, and feminist legal reform. We were four of the signatories to the statement of twenty eight Harvard Law School professors, published in the Boston Globe on October 15, 2014, that criticized Harvard University's newly adopted sexual harassment policy as "overwhelmingly stacked against the accused" and "in no way required by Title IX law or regulation."

We welcome the current opportunity to assess the response to campus sexual harassment, including sexual assault. In the past six years, under pressure from the previous Administration, many colleges and universities all over the country have put in place new rules defining sexual misconduct and new procedures for enforcing them. While the Administration's goals were to provide better protections for women, and address the neglect that prevailed before this shift, the new policies and procedures have created problems of their own, many of them attributable to directives coming from the Department of Education's Office for Civil Rights (OCR). Most of these problems involve unfairness to the accused; some involve unfairness to both accuser and accused; and some are unfair to victims. OCR has an obligation to address the unfairness that has resulted from its previous actions and the related college and university responses.

In 2011, OCR issued a "Dear Colleague Letter" which gave colleges and universities instructions on how to regulate this area. That document was never opened for notice and comment and as a result does not itself have the force of law and could not add new obligations for regulated parties. Nevertheless the previous Administration's OCR threatened colleges and universities with the institution-wide cutoff of all federal funding if they did not

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comply with the Dear Colleague Letter's instructions, including ones that had never before been considered legally required by Title IX. Terrified, administrators not only complied; they over-complied. Below is a list of some of the most severe problems left in the wake of this overcorrection.

Definitions of sexual wrongdoing on college campuses are now seriously overbroad. They go way beyond accepted legal definitions of rape, sexual assault, and sexual harassment. They often include sexual conduct that is merely unwelcome, even if it does not create a hostile environment, even if the person accused had no way of knowing it was unwanted, and even if the accuser's sense that it was unwelcome arose after the encounter. The definitions often include mere speech about sexual matters. They therefore allow students who find class discussion of sexuality offensive to accuse instructors of sexual harassment. They are so broad as to put students engaged in behavior that is overwhelmingly common in the context of romantic relationships to be accused of sexual misconduct. Overbroad definitions of sexual wrongdoing are unfair to all parties, and squander the legitimacy of the system.

Though OCR did not require schools to treat accused students unfairly in the investigation and adjudication process, its tactics put pressure on them to stack the system so as to favor alleged victims over those they accuse. The procedures for enforcing these definitions are frequently so unfair as to be truly shocking. Some colleges and universities fail even to give students the complaint against them, or notice of the factual basis of charges, the evidence gathered, or the identities of witnesses. Some schools fail to provide hearings or to allow the accused student's lawyer to attend or speak at hearings. Some bar the accused from putting questions to the accuser or witnesses, even through intermediaries. Some schools hold hearings in which the accuser participates while remaining unseen behind a partition. Some schools deny parties the right to see the investigative report or get copies for their lawyers for preparing an appeal. Some schools allow appeals only on very narrow grounds such as new evidence or procedural error, providing no meaningful check on the initial decisionmaker.

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Moreover, many schools improperly house the functions of investigation and adjudication in dedicated Title IX offices. These are compliance offices with strong incentives to ensure the school stays in OCR's good graces to safeguard the school's federal funding. Title IX officers have reason to fear for their jobs if they hold a student not responsible or if they assign a rehabilitative or restorative rather than a harshly punitive sanction. Many Title IX offices run all the different functions in the process, acting as prosecutor, judge, jury, and appeals board. Appeals are to an administrator in the institution's Title IX apparatus, rather than to a person who is structurally independent and not invested in the outcome. Some Title IX officers even take on the role of advisor to an accuser through the process of complaint, investigation, adjudication, or appeal, which means they are not neutral. They do so, moreover, without providing analogous support to the accused.

Compounding matters, many institutions follow the "investigator only" or "single investigator" model, wherein the investigator is also the adjudicator. In this model, there is no hearing. One person conducts interviews with each party and witness, and then makes the determination whether the accused is responsible. No one knows what the investigator hears or sees in the interviews except the people in the room at the time. This makes the investigator all-powerful. Neither accuser nor accused can guess what additional evidence to offer, or what different interpretations of the evidence to propose, because they are completely in the dark about what the investigator is learning and are helpless to fend off the investigator's structural and personal biases as they get cooked into the evidence-gathering.

These common arrangements together offend two requirements of fairness: *neutral* decisionmakers who are independent of the school's compliance interest, and *independent* decisionmakers providing a check on arbitrary and unlawful decisions.

These substantive and procedural fairness issues are exacerbated by OCR's requirement that institutions use a preponderance of the evidence standard rather than a higher standard such as clear and convincing evidence. To be sure, our legal system uses the preponderance standard – which means "more

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likely than not” – in many important fora, such as civil trials. But civil trials have many features that have been developed over centuries to produce an overall system fair to both parties, including an independent and neutral initial decisionmaker and appeal body, legal counsel, a hearing with rules of evidence, and a right of appeal that relates to all aspects of the decision. Dropping the preponderance standard into the severely skewed playing field of the new OCR–inspired procedures risks holding innocent students responsible.

It is extremely important for colleges and universities to have robust policies and procedures to address sexual wrongdoing on campus. Schools’ struggles with providing fair procedures have led some observers to throw up their hands and propose 1) that schools should not decide these cases at all; 2) that schools should toss these cases off to law enforcement instead; and 3) that schools should be legally required to refer all reports of criminal acts to law enforcement regardless of whether the schools also adjudicate the cases (sometimes called “mandatory referral”). These proposals are irresponsible. A school must be able to discipline students for violating its conduct codes and protect its students from harm, whether or not the violations are also crimes. Often the conduct involved is not a crime – for example, much sexual harassment as defined by law is not criminal conduct. And even if a violation of the school’s policy is also a crime, schools should be free to discipline the offending student without satisfying the very strict evidentiary standards that govern in criminal law and make it so hard to convict. Also, requiring schools to report all reported sexual misconduct to the police without the alleged victim’s permission interferes with that person’s autonomy, given the important privacy and relationship issues at stake.

OCR must continue to recognize the responsibility of colleges and universities to address sexual harassment and sexual assault in their communities. But in shouldering their burden, schools owe fairness to *all* students: the accuser and the accused. And they owe it to all their students to develop substantive definitions of sexual misconduct that don’t invite arbitrary enforcement against innocuous conduct. Only when schools adopt both fair procedures and fair substantive definitions will the sanctions they levy send the message that sexual misconduct is unacceptable. Now, instead, they send a dreadful

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message, that fairness is somehow incompatible with treating sexual misconduct seriously. That message is wholly unnecessary.

In the next phase of reform, it is crucial that OCR make clear that schools must treat all students fairly. To that end, some basic principles of fairness should be observed. Schools must:

Return to the Supreme Court's definition of sexual harassment: unwelcome sexual conduct that is sufficiently severe or pervasive to interfere with the victim's educational opportunity. Repeatedly the Court has said that a reasonable person test must be applied in determining whether conduct was wrongful, to provide a necessary check on arbitrary accusations. To impose liability, the decisionmaker must find that a reasonable person in the accuser's position would experience the incident to be abusive, and also that a reasonable person in the defendant's position would have known that the conduct was unwelcome. These traditional reasonable person limits are central to preserving academic freedom and individual autonomy.

Provide parties with the complaint and inform them of the factual basis of the complaint, the evidence gathered, and the identities of witnesses.

Provide a hearing and allow the parties the opportunity to hear the testimony in real time and to offer amendments and corrections.

Allow parties to bring counsel to any interviews and hearings, and allow counsel to speak to assert the parties' rights.

Allow parties to ask questions of other parties and witnesses in a meaningful way, even if through intermediaries rather than face-to-face or in direct confrontation.

Use a preponderance of the evidence standard *only if* all other requirements for equal fairness are met.

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Provide parties copies of reports produced by investigators and adjudicators.

Separate the Title IX compliance officer role from the roles of advising individual students considering filing complaints, investigation, adjudication, and appeal of individual cases.

Separate the functions of investigator, adjudicator, and appeal into different individuals or panels independent of each other, and not invested in the outcome of previous stages of the case.

Allow appeals on any grounds, rather than limit them narrowly.

We urge OCR to thoughtfully undertake much-needed refinement or replacement of the guidance provided in the 2011 Dear Colleague Letter, to better protect the rights of sexual assault victims and accused students along the lines we recommend here.

Most of the procedural principles listed above are reflected in the procedures that Harvard Law School adopted in 2015, with OCR's approval. We attach those procedures to this statement.

Additionally, OCR should abandon its senseless blanket disapproval of mediation or restorative approaches to accusations of sexual misconduct. An exclusively disciplinary or punitive approach needlessly deprives victims of options that may benefit them in the pursuit of equal educational opportunity.

Finally, it is urgent that OCR undertake to study the disproportionate impact on racial minorities of discipline for campus sexual misconduct, just as OCR has previously done for discipline in elementary and secondary schools. Our experience as lawyers and researchers in this area leads us to fear a significant risk of race discrimination in college discipline cases. That risk must be transparently analyzed as part of the project of enforcing sex discrimination law.

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The unfairness that currently infects colleges and universities' procedures is in no way necessary to address the problem of sexual misconduct. Indeed, it is counter-productive, undermining the legitimacy of the important project of addressing sexual misconduct. To address sexual misconduct effectively, appropriate definitions of misconduct must be developed that avoid risk to the relational autonomy of students and academic freedom in the classroom. Equally important is the development of procedures providing fair treatment to both accuser and accused. That is the challenge of the next crucial stage of reform in the service of Title IX's mandate against sex discrimination in education.

Attachments:

Elizabeth Bartholet *et al.*, *Rethink Harvard's Sexual Harassment Policy*, Bos. Globe (Oct. 15, 2014),

<https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>

Nancy Gertner, *Sex, Lies, and Justice*, American Prospect (Jan. 12, 2015), <http://prospect.org/article/sex-lies-and-justice>

Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 123 Harv. L. Rev. F. 103 (2015), <https://harvardlawreview.org/2015/02/trading-the-megaphone-for-the-gavel-in-title-ix-enforcement-2/>

Jacob Gersen & Jeannie Suk Gersen, *The Sex Bureaucracy*, Chron. Higher Educ. (Jan. 6, 2017), <http://www.chronicle.com/article/The-College-Sex-Bureaucracy/238805>

Harvard Law School Sexual Harassment Resources and Procedures for Students, <https://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf>

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OPINION

Rethink Harvard's sexual harassment policy



Michael Fein/Bloomberg

OCTOBER 15, 2014

In July, Harvard University announced [a new university-wide policy](#) aimed at preventing sexual harassment and sexual violence based on gender, sexual orientation, and gender identity.

The new policy, which applies to all schools within the university and to all Harvard faculty, administrators, and students, sets up the Office for Sexual and Gender-Based Dispute Resolution to process complaints against students. Both the definition of sexual harassment and the procedures for disciplining students are new, with the policy taking effect this academic year. Like many universities across the nation, Harvard acted under pressure imposed by the federal government, which has threatened to withhold funds for universities not complying with its idea of appropriate sexual harassment policy.

In response, 28 members of the Harvard Law School Faculty have issued the following statement:

AS MEMBERS of the faculty of Harvard Law School, we write to voice our strong objections to the Sexual Harassment Policy and Procedures imposed by the central university administration and the Corporation on all parts of the university, including the law school.

We strongly endorse the importance of protecting our students from sexual misconduct and providing an educational environment free from the sexual and other harassment that can diminish educational opportunity. But we believe that this particular sexual harassment policy adopted by Harvard will do more harm than good.

As teachers responsible for educating our students about due process of law, the substantive law governing discrimination and violence, appropriate administrative decision-making, and the rule of law generally, we find the new sexual harassment policy inconsistent with many of the most basic principles we teach. We also find the process by which this policy was decided and imposed on all parts of the university inconsistent with the finest traditions of Harvard University, of faculty governance, and of academic freedom.

Among our many concerns are the following:

Harvard has adopted procedures for deciding cases of alleged sexual misconduct which lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation. Here our concerns include but are not limited to the following:

- The absence of any adequate opportunity to discover the facts charged and to confront witnesses and present a defense at an adversary hearing.
- The lodging of the functions of investigation, prosecution, fact-finding, and appellate review in one office, and the fact that that office is itself a Title IX compliance office rather than an entity that could be considered structurally impartial.
- The failure to ensure adequate representation for the accused, particularly for students unable to afford representation.

Harvard has inappropriately expanded the scope of forbidden conduct, including by:

- Adopting a definition of sexual harassment that goes significantly beyond Title IX and Title VII law.
- Adopting rules governing sexual conduct between students both of whom are impaired or incapacitated, rules which are starkly one-sided as between complainants and respondents, and entirely inadequate to address the complex issues in these unfortunate situations involving extreme use and abuse of alcohol and drugs by our students.

Harvard has pursued a process in arriving at its new sexual harassment policy which violates its own finest traditions of academic freedom and faculty governance, including by the following:

- Harvard apparently decided simply to defer to the demands of certain federal administrative officials, rather than exercise independent judgment about the kind of sexual harassment policy that would be consistent with law and with the needs of our students and the larger university community.
- Harvard failed to engage a broad group of faculty from its different schools, including the law school, in the development of the new sexual harassment policy. And Harvard imposed its new sexual harassment policy on all the schools by fiat without any adequate opportunity for consultation by the relevant faculties.
- Harvard undermined and **effectively destroyed the individual schools' traditional authority to decide discipline for their own students. The sexual harassment policy's provision purporting to leave the schools with decision-making authority over discipline is negated by the university's insistence that its Title IX compliance office's report be totally binding with respect to fact findings and violation decisions.**

We call on the university to withdraw this sexual harassment policy and begin the challenging project of carefully thinking through what substantive and procedural rules would best balance the complex issues involved in addressing sexual conduct and misconduct in our community.

The goal must not be simply to go as far as possible in the direction of preventing anything that some might characterize as sexual harassment. The goal must instead be to fully address sexual harassment while at the same time protecting students against unfair and inappropriate discipline, honoring individual relationship autonomy, and maintaining the values of academic freedom. The law that the Supreme Court and lower federal courts have developed under Title IX and Title VII **attempts to balance all these important interests. The university's sexual harassment policy departs** dramatically from these legal principles, jettisoning balance and fairness in the rush to appease certain federal administrative officials.

We recognize that large amounts of federal funding may ultimately be at stake. But Harvard University is positioned as well as any academic institution in the country to stand up for principle in the face of funding threats. The issues at stake are vitally important to our students, faculties, and entire community.

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Sex, Lies and Justice

Can we reconcile the belated attention to rape on campus with due process?

By Nancy Gertner

January 12, 2015

This article appears in the Winter 2015 issue of The American Prospect magazine. [Subscribe here.](#)

Campus sexual assaults are horrifying, made all the worse because the settings are bucolic and presumed safe—leafy campuses, ivy-walled universities. Assaults are reported in dormitories, off-campus

apartments, and fraternity houses, in elite and non-elite institutions, from one end of the country to the other. Title IX (of the Education Amendments of 1972) was supposed to promote equal opportunity in any educational program receiving federal money. But until recently, Title IX was dormant and largely ignored. The enforcer, the federal government, had been a paper tiger. Universities were not reporting, much less dealing with, either sexual harassment or explicit sexual violence. Sexual misconduct impairs a woman's ability to function as an equal in an academic environment—and by extension menaces all women. Unless a woman is safe, all the other guarantees of equal treatment are irrelevant.

President Barack Obama, in a January 25, 2014, speech, assured his listeners that “anyone out there who has ever been assaulted: You are not alone. We have your back. I’ve got your back.”

In 2011, the government's approach changed dramatically: A “Dear Colleague” letter on sexual violence was sent to colleges and universities from the Department of Education's Office for Civil Rights (OCR), pointedly reminding them of their obligations under Title IX and presaging aggressive enforcement. By August 2013, the public face of the department's enforcement efforts was Catherine Lhamon, assistant secretary at the Office for Civil Rights, a zealous advocate, formerly head of impact litigation at Public Counsel, a public interest law firm; before that, she was assistant legal director of the ACLU of Southern California. At a July 2014 meeting of college administrators, Lhamon made the threat of disciplinary action unmistakable: While no school accused of violating Title IX had ever lost its federal funding, “do not think it's an empty threat,” she warned them. A department **website** announced the campaign against sexual violence on campus, **Not Alone**. President Barack Obama, in a January 25, 2014, speech, assured his listeners that “anyone out there who has ever been assaulted: You are not alone. We have your back. I've got your back.” Even the department's language changed, no longer referring antiseptically to a complainant and an accused but rather to victims or survivors, and perpetrators.

To feminists—I among them—it was about time that pressure was brought to

bear on educational institutions. Too often colleges and universities had excused or turned a blind eye to the crimes of serial sexual predators. The media, after often dismissing the claims of rape victims, was finally more sympathetic, covering accounts of sexual violence from the University of Virginia to Yale and Harvard. This kind of sustained attention was precisely what was needed to come to grips with the problem. Nothing less would have done the trick. Indeed, nothing had worked before. It was as if women, especially young women, had to speak especially loudly and especially often to finally be heard—a not unfamiliar concept.

The problem was that the issues surrounding campus sexual assault were more complicated than the public debate reflected. How were universities and colleges to deal with the range of campus sexual encounters—a continuum from violent rape, to sex fueled by alcohol impairing all involved, to the expectations about women and men in the so-called “hookup culture,” to consensual sex followed by second thoughts. There are plenty of bright lines such as forcible rape—but also blurry ones. Genuine ambivalence and ambiguous signals seem almost inherent in courtship and sexuality, especially in first encounters. Where should the Title IX violation line be? What was a reasonable adjudication process? What was the role of the criminal justice system in cases in which university conduct codes overlapped with possible prosecutions?

Further, how were colleges and universities to balance the interests of the complainant with those of the accused? Just as the complainants must be treated with dignity and their rights to a fair resolution of their charges be respected, so too must those accused of sexual misconduct. You don’t have to believe that there are large numbers of false accusation of sexual assault—I do not—to insist that the process of investigating and adjudicating these claims be fair. In fact, feminists should be especially concerned, not just about creating enforcement proceedings, but about their fairness. If there is a widespread perception that the balance has tilted from no rights for victims to no due process for the accused, we risk a backlash. Benighted attitudes about rape and skepticism about women victims die hard. It takes only a few celebrated false accusations of rape to turn the clock back.

Rape, I insisted, is a crime to which women—including me—feel uniquely vulnerable, no matter who they are, no matter what their class, their race, their status.

I come to this issue—campus sexual assault—from all sides. This is not because I was a federal judge for 17 years, where “considering all sides” was part of the job definition. I left the bench in 2011 to teach at Harvard Law School, among other things. I am an unrepentant feminist, a longtime litigator on behalf of women’s rights, as my memoir, *In Defense of Women*, reflects. Rape, I insisted, is a crime to which women—including me—feel uniquely vulnerable, no matter who they are, no matter what their class, their race, their status. No one should have been surprised that I supported stronger enforcement of Title IX, more training for investigators, more services for complainants, systematic assessments of the state of enforcement on college campuses, and other tough remedies. What surprised many, however, was that I was one of 28 Harvard professors who signed a letter opposing Harvard University’s new sexual harassment and sexual assault policies, policies introduced ostensibly in response to pressures from the Department of Education.

When I was a lawyer, I understood how inadequate the law was in addressing sexual violence at all. I worked for changes to the retrograde definition of rape in statutes around the country and their disrespectful treatment of rape victims, laws that were a throwback to medieval conceptions about women. I lobbied for rape shield laws that limited the defense counsel’s cross-examination of a woman about her prior sexual experiences. So little did the law trust a woman’s account of rape that some states required that a woman’s accusations be corroborated by independent evidence, a requirement to which no other crime victim was subject. The definition of the crime focused on the woman’s conduct, whether she had resisted “to the utmost;” a simple “no” did not suffice. To the extent that the man’s conduct was considered at all, the statutes required that he use force before his acts amounted to rape; drugging a woman, or having sex with one wholly incapacitated by alcohol, was not enough. And date rape was never prosecuted no matter what the circumstances.

But I was also a criminal defense lawyer. I understood more than many how unfair the criminal process could be, how critical the enforcement of a defendant's rights were to the integrity and, even more, to the reliability of the criminal justice system. I understood what it meant to have a defendant's liberty hanging in the balance, how long terms of imprisonment could wreak havoc on the lives of defendants and their families. I appreciated the stigma of the very accusation, which persists—especially today on the Internet—even if the accused is exonerated. And I understood the racial implications of rape accusations, the complex intersection of bias, stereotyping, and sex in the prosecution of this crime.

I reconciled the pressures pushing me in opposite directions by choosing not to represent men accused of rape, while bringing civil lawsuits for women against the universities or the building owners that failed to provide them with adequate security, or against psychiatrists and psychologists who sexually abused them. I steered clear of prosecutions for rape—except for one case.

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A young man, a freshman at a local college at the time the incident happened and a friend of a former roommate of mine, was referred to me. (In my memoir, I call him “Paul.”) He'd had sex with a classmate, his very first sexual encounter; he believed his classmate had consented. And while we can never know what went on between them, the facts—her actions, her words, the testimony of others—made her charges wholly unconvincing. A few examples: She went out of her way to invite him to her parents' home a short time after the sex to stay for the weekend. Nine months after their sexual encounter, she claimed to have been raped and mentioned his name following the breakup of a different relationship and her hospitalization for depression. She accused Paul during a conversation with her father, but accused another male student while speaking to a classmate. Witnesses reported nothing out of the ordinary that evening, no evidence of drinking, no impairment, not even anxiety about

what had occurred. Her account itself was improbable, internally inconsistent, and contradicted by the evidence and the testimony of her own classmates. While from decades of work on rape and my women's rights advocacy, I understood that this young woman could be telling the truth—that her behavior in the days and weeks after the sex, and even her multiple accounts of what went on, could be explained by post-traumatic stress disorder, or simply embarrassment—her account seemed unlikely.

By the late 1980s, when the accusations against Paul were brought, the women's movement had succeeded in making some of the changes for which I and others had fought. The popular media finally reported on the horror of date rape and its consequences. District attorneys and police belatedly began to prosecute the offense. The definition of rape changed in states across the country, although progress was far from uniform. Gone was the mandatory corroboration requirement and limitless attacks on a woman's "chastity," whatever that meant in the late 20th century. Still, we were a long way from adequately dealing with these issues. There were many jurisdictions where change came slowly or not at all, where prosecutors and even courts not so subtly sided with perpetrators and blamed victims.

While I believed that Paul had been wrongly accused, and would be exonerated, true to my practice I declined to represent him. I asked one of my law partners to step in, and then watched with horror as the prosecution unfolded.

The atmosphere surrounding date rape had changed more dramatically than I had appreciated, at least in Massachusetts. The district attorney, though he fully understood the weaknesses of the case, felt compelled to bring the charges lest he face political repercussions, for being yet another politician ignoring a woman's pain. Even the grand jury ignored their serious doubts about the case and indicted Paul. As I later learned from one of its members, they felt comfortable indicting Paul because I was rumored to be representing him and they assumed he would be acquitted. And the judge—with life tenure—likewise felt the pressure. The judge was critical; my partner decided to waive the jury when a program on date rape was aired on the eve of the trial. While the judge expressed his skepticism throughout the trial—every single comment of his pointed to reasonable doubt about Paul's guilt—his verdict was "guilty." He did not say so explicitly, but the message seemed clear. If he

acquitted Paul, he would be pilloried in the press. “Judge acquits rapist,” the headlines would scream. But if he convicted Paul, no one would notice.

Just because the legal system has moved away from the view that all rape accusations are contrived does not mean it must move to the view that none are.

I took over the appeal. The brief my firm filed was what I described as a feminist brief: Just because the legal system has moved away from the view that all rape accusations are contrived does not mean it must move to the view that none are. This conviction was not just technically imperfect, I argued, it was a true injustice. I was successful. The Massachusetts Supreme Judicial Court reversed Paul’s conviction on a procedural error, the trial court’s evidentiary rulings. The prosecutor could have retried the case, but, thankfully, chose not to do so.

After decades of feminist advocacy (the case establishing the right to choose abortion in Massachusetts, the first introduction of Battered Woman Syndrome in a defense to a murder charge, and on and on), I was picketed by a women’s rights group when I spoke on a panel following the reversal of Paul’s case; I was a “so-called women’s rights attorney,” one sign announced, simply because I had represented a man accused of rape. When I explained why, including the fact that I believed he was innocent, a demonstrator yelled, “That is irrelevant!” The experience was chilling; to the picketers, a wrongful conviction and imprisonment simply did not matter. Paul would have been incarcerated, but for my firm’s advocacy and the appellate court’s independent review. Still, advocacy and appellate review could only go so far: Though the charges against Paul were dropped, he was expelled from the college he had been attending; he struggled to reapply years later and finally get his degree. Worse yet, he continues to suffer from the stigma of the accusation to this day, many, many decades later.

As a federal judge, I did not have much occasion to address the issues with which I had been so concerned as a lawyer. Rape is principally a state, not federal, crime. I did deal with accusations of sexual harassment in the

workplace, fully appreciating the extent to which sexual harassment obstructs equal opportunity and discriminates against women. I wrote articles decrying the state of civil rights enforcement in the federal courts. And on the criminal side, while I did everything I could to mitigate the harsh effects of onerous drug sentencing, I had no problem sentencing sex traffickers as harshly as the law allowed.

Still, I could not forget Paul's case. It shaped the context in which I saw the university sexual assault controversy. As in the '80s, women mobilized against institutions that had woefully failed to deal with sexual violence and sexual harassment. While the movement had successfully raised public awareness about violence and harassment in homes, on the streets, and in workplaces, many police, prosecutors, and courts were stuck in an earlier era of victim-blaming. And progress seemed to have stalled at the doors of the academy, where at least some institutions still dissuaded women from bringing complaints while they shielded alleged perpetrators.

In the summer of 2014, Harvard issued its new *Sexual Harassment Policy and Procedures*. It contained both new procedures for when students are accused of Title IX violations and new definitions of the covered conduct. While ostensibly in response to the Office for Civil Rights' pressures, they were released without OCR's approval. In some respects, they go beyond what the 2011 "Dear Colleague" letter spelled out.

OCR has clearly mandated that universities and colleges evaluate accusations of rape under a preponderance of the evidence standard. A preponderance of the evidence is in fact the lowest standard of proof that the legal system has to offer. In effect, if the evidence leans in favor of the victim to any degree, say 50.01 percent, that is sufficient. OCR's rationale was that this was the standard for suits alleging civil rights violations, like sexual harassment. True enough, except for the fact that civil trials at which this standard is implemented follow months if not years of discovery—where each side finds out about the other's case, knows the evidence and the accusations, and has lawyers to ask the right questions. Not so with the new Harvard regime, which has no lawyers, no meaningful sharing of information, no hearings. It is the worst of both worlds, the lowest standard of proof, coupled with the least protective

procedures.

The new standard of proof, coupled with the media pressure, effectively creates a presumption in favor of the woman complainant. If you find against her, you will see yourself on *60 Minutes* or in an OCR investigation where your funding is at risk. If you find for her, no one is likely to complain.

But Harvard's new policy goes further than OCR's mandated preponderance standard. Harvard establishes a fact-finding process that takes place entirely within the four corners of a single office, the Title IX compliance office. The Title IX officer has virtually unreviewable power from the beginning of the proceeding to its end. The officer deals directly with the complaining witness, advises her, determines if the case should be investigated, proceeds to an informal or to a formal resolution. If there is a formal investigation, the Title IX officer appoints and trains the "Investigative Team," which consists of one investigator, who is also an employee of the Title IX office, and a designee of the school with which the accused is affiliated. The investigative team notifies the accused of the written charges, giving him one week to respond. While he has a short deadline, there is no time limit for the complainant's accusations, no period of time within which she must complain—what the law calls a statute of limitations.

Thereafter, the team interviews the parties and, if it deems appropriate, witnesses identified by the parties as well as any others it decides to consult. The team issues a final report on a preponderance standard and working jointly with the Title IX officer—who was in fact involved in the investigation throughout—may provide recommendations concerning the appropriate sanctions to the individual schools. There is an appeal, but it is to that same Title IX officer and only on narrow grounds. While the final sanction is determined by the individual school, the fact-findings on which that sanction is based—this critical administrative report—cannot be questioned.

As the letter of the 28 faculty members noted, this procedure does not remotely resemble any fair decision-making process with which any of us were familiar: All of the functions of the sexual assault disciplinary proceeding—investigation, prosecution, fact-finding, and appellate review—are in one office, we wrote, and that office is a Title IX compliance office, hardly an impartial entity. This is, after all, the office whose job it is to see to it

that Harvard's funding is not jeopardized on account of Title IX violations, an office which has every incentive to see the complaint entirely through the eyes of the complainant.

Nothing in the new procedure requires anything like a hearing at which both sides offer testimony, size up the respective witnesses, or much less cross-examine them. Nothing in the new procedure enables accuser and accused to confront each other in any setting, whether directly (which surely may be difficult for the accuser) or at the very least through their representatives. Nor is there any meaningful opportunity for discovery of the facts charged and the evidence on which it is based; the respondent gets a copy of the accusations and a preliminary copy of the team's fact findings, to which he or she can object—again within seven days, a very short time—but not all of the information gathered is necessarily included. Everything is filtered through the investigative team, which decides the scope of the investigation, the credibility of witnesses, and whom to interview and when.

Nothing in the OCR's 2011 "Dear Colleague" letter called for a proceeding remotely like this.

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Indeed, the letter underscored the need for an "adequate, reliable and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence," and to have access to any information that would be used at the "hearing." And while the 2014 White House "Not Alone" report mentioned that some schools had a "single, trained investigator" doing "the lion's share of fact finding," as in Harvard's policy, it did not—and I would argue, should not—require such an approach.

Nor is there any meaningful role for lawyers in the Harvard policy. The parties may use a "personal adviser" who can be a lawyer, but that adviser may not speak for their advisees at the only relevant stage in this policy, the interview with the investigative team, "although they may ask to suspend the interviews briefly if they feel their advisees would benefit from a short

break.” (Indeed, this description sounds like a grand jury proceeding, which is notoriously one-sided, controlled entirely by the prosecutor with no role for the defendant’s lawyer, within the hearing room.) Harvard makes no provision for representation of the accused, particularly for students unable to afford counsel, as the letter of the 28 professors notes. Richer students will have lawyers; poorer students will not. Nothing should prevent a university with Harvard’s resources from providing lawyers for those who cannot afford them, as, for example, Columbia University does. In contrast, the complainant has advisers and advocates from the Title IX office at the outset of the proceeding, advocates especially provided for under the policy. The respondents are left to their own resources.

As the 28 law school faculty members’ letter noted, even the definition of the misconduct is skewed. The new Harvard standards governing sexual conduct between students when both are impaired or incapacitated are “starkly one sided” and “inadequate to address the complex issues involved in these unfortunate situations involving extreme use and abuse of alcohol and drugs by our students.” “Impairment” and “incapacitation” are not the same, under the law. Sex with an individual who is incapacitated or unconscious, who does not understand what is happening, is plainly egregious, and is rape by any modern definition. But “impairment” because of alcohol is surely a different matter. Worse yet, the policy is not equally applied: The accused’s “impairment” based on drugs or alcohol is not at all relevant; it is not an argument for his “diminished capacity” as it might be under the criminal law of some jurisdictions. Instead, the policy treats him as if he were fully sober, fully responsible for his acts. The complainant’s “impairment” is another matter. If both parties are drunk, but not unconscious, not incapacitated, and only impaired by their drinking, and they have sex, only he is responsible under Harvard’s policy.

In fact, there is no reason to believe that the students themselves define what Professor Janet Halley of Harvard Law School calls “drunk/drunken” cases as rape at all. While 10 percent of female MIT undergraduates in a recent study identified themselves as having “been sexually assaulted,” 44 percent reported having sex while being incapacitated by drugs or alcohol. Plainly, some of the students did not regard sex under those circumstances as sexual assault. The unfairness of this policy is nowhere clearer when the misconduct allegations

are also the subject of a criminal investigation. The policy requires that the respondent be advised to get a lawyer—again on his own dime—before he provides any statement, but the investigation may well proceed at the discretion of the Title IX office. And should that investigation continue—given his silence—he stands a good chance of losing the disciplinary proceeding and being subject to academic sanctions. At the same time, should a legal prosecution end with dismissed charges or an acquittal, there is no provision for a reconsideration of the academic sanctions.

Sexual assault advocates will argue that this is as it should be. It will be traumatic for the complainant to confront her accuser, even if only through her representatives rather than directly. It will be traumatic for the complainant to be asked to repeat her story over again. A speedy resolution is critical to her recovery, they would suggest. These arguments, however, assume the outcome—that the complainant’s account is true—without giving the accused an opportunity to meaningfully test it. However flawed, the way we test narratives of misconduct—on whichever side—is by questioning the witness, by holding hearings, by sharing the evidence that has been gathered, by giving everyone access to lawyers, by assuring a neutral fact-finder. While we know from the Innocence Project that even these “tests” can produce wrongful convictions, they are at least more likely to produce reliable results than the opposite—a one-sided, administrative proceeding, with a single investigator, judge, jury, and appeals court.

Indeed, the Office for Civil Rights has agreed to investigate a claim of a wrongful accusation of sexual assault at Brandeis University. A male student was found guilty of assaulting his ex-lover, also a man. He claims that the school’s investigation was skewed, that he was not permitted to respond fully to the accusations, that his accuser had counsel while he did not, and that his counter allegations were not sufficiently credited in Brandeis’s investigation. In effect, the complainant is arguing that a flawed, unfair process undermines his Title IX rights to equal participation in university life. While all of the details of the Brandeis complaint are not clear at this time, to the extent that Harvard’s new procedures mirror those of Brandeis, Harvard may also be vulnerable to wrongful-accusation charges.

Some will say that all of this shows that a university has no business at all dealing with sexual misconduct accusations, which amount to a crime. The

police should be called; the sanction should not simply be suspension or expulsion but prison. And in a criminal trial, there is no question about due process; the accused has the benefit of all the rights guaranteed in the Constitution. Indeed, Yale Law Professor Jed Rubenfeld argues that recourse to university remedies rather than a criminal prosecution for rape trivializes the offense, and may even enable serial predators to get away with their crimes.

Yet women are right to be skeptical about the criminal justice system—about full-blown criminal trials and appeals and the toll they take on witnesses and accusers, about the higher standard of criminal proof, beyond a reasonable doubt, which, though justified by the risk of imprisonment, can leave many claims un-redressed. To be sure, there is overlap between the two—when a student accused of misconduct under Title IX is also vulnerable to a criminal prosecution—but they cannot be mutually exclusive. In any event, Title IX’s definition of sexual misconduct and sexual harassment is appropriately broader, more nuanced than even the recent statutory definitions of rape. While the colleges and universities abandoned their role as *parens patriae* (de facto parents) decades ago, in a sense, Title IX has invited them back in, policing sexual activities and misconduct—although, according to some commentators, not paying enough attention to the conditions that make that misconduct possible, like alcohol and drugs. Still, just because prison is not a risk hardly means that Title IX disciplinary proceedings are without serious consequences for those accused, and surely does not justify a process as one-sided as is Harvard’s.

There are plainly other options, other ways of protecting the rights of both students who bring complaints and of those they accuse. The policy adopted by Oberlin College offers an instructive counter-example. This is all the more interesting, since Oberlin has a reputation as a left-wing and politically correct college. Indeed, the college was widely ridiculed last year when a professor proposed a conduct code requiring teachers to give “trigger warnings” when a class included material that might upset some students. (Oberlin quickly shelved that proposal.) Yet Oberlin’s procedure on sexual misconduct may be a model for other schools.

Oberlin has devised a symmetrical due process proceeding. In language suggested by the students, the parties to the case are termed “reporting party” and “responding party” rather than victim and perpetrator. After a

preliminary assessment, designed both to provide support to the complainant and to determine whether there is reasonable cause to move to a fact-finding panel, a disciplinary proceeding may be called. Both parties may present information, call witnesses, and, in lieu of a cross-examination, may forward questions that they want the panel to ask the other party. The three panelists are trained administrators, none of whom is part of the Title IX office. “That would be a conflict of interest,” says Meredith Raimondo, Oberlin’s Title IX director. In the event that punishment is meted out, the responding party has the right of appeal to the dean of students, who is also not affiliated with the Title IX office. If the complainant feels the outcome is unfair, she may also appeal. This policy was created by a task force that included students, faculty, and administrators meeting over the course of 18 months. “We feel there can be great harm when the process is seen as biased against reporting parties,” says Raimondo, “and there can be great harm when it is perceived to be biased against responding parties.”

We put our work at risk when the media can dredge up the shibboleths about false accusations of rape, a collective “We told you so” tapping into old attitudes.

Feminists should be concerned about fair process, even in private institutions where the law does not require it, because we should be concerned about reliable findings of responsibility. We put our decades-long efforts to stop sexual violence at risk when men come forward and credibly claim they were wrongly accused. We put our work at risk when the media can dredge up the shibboleths about false accusations of rape, a collective “We told you so” tapping into old attitudes. The recent feeding frenzy around Rolling Stone’s account of a gang rape at the University of Virginia campus shows just how much damage can be done by the claim that a rape report was flawed—damage to the women making the accusations, to the men who are accused, and to the cause of combating sexual violence.

There is no question that we have to confront sexual misconduct on campus

and elsewhere as aggressively and comprehensively as we can. There is no question that we have to lift the protection offered the star athlete, confront the administrators more concerned with the man's future than with a woman's trauma, challenge the atmosphere of impunity at fraternity houses and social clubs. And we can do so without turning every disciplinary proceeding into a full-blown trial, without imposing the maximum due process protections, on the one hand, or an administrative Star Chamber, on the other. It isn't necessary to jettison every modicum of a fair process to redress decades-long inattention to these issues. It never is. As I argued in Paul's case, we should not substitute a regime in which women are treated without dignity for one in which those they are accusing are similarly demeaned. Indeed, feminists should be concerned about fair process, not just because it makes fact-findings more reliable and more credible, but for its own sake.

This article has been updated.

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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

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that will never be addressed in the language of a single-purpose social movement 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 reported being 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.² A reasonable conclusion from the *Times* article is that at least some institutions of higher education systematically undervalue victims, protect wrongdoers, and expose their women students — whether through 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. To my mind, 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 how many people were involved, whether the encounters were consensual, and, if one or more sexual assaults occurred, who was responsible for them.

The prosecutor and the Colleges' Board collected different evidence in Anna's case, and the published record provides only glimpses of what they gathered.³ But it seems clear that Anna was alleging sexual assault in two settings: first at a fraternity-house party, and later at a

¹ Walt Bogdanich, *Reporting Rape, and Wishing She Hadn't*, N.Y. TIMES, July 12, 2014, <http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html>.

² See, e.g., *Thoughts on Hobart and William Smith Colleges Case*, TITLE IX BLOG (July 14, 2014, 3:30 PM), <http://title-ix.blogspot.com/2014/07/thoughts-on-hobart-and-william-smith.html> [<http://perma.cc/98FG-A2JY>] (activist assessment); see also, e.g., Edward F. Dragan, *Campus Sexual Assault and Harassment Lawsuits: Title IX Standards and Questions of Liability*, EDUC. EXPERT (Aug. 14, 2014), <http://education-expert.com/2014/08/college-university-campus-sexual-assault-lawsuits-standards-care-questions-liability> [<http://perma.cc/F347-ENTH>] (published advice to schools).

³ In what follows, I rely on the *New York Times*' *Reporting Rape* story, see *supra* note 1, and disclosures made to the press by the prosecutor, R. Michael Tantillo, as reported in the local press, see Mike Hibbard, *DA Says No Basis for Sexual Assault Charge in HWS Case*, FINGER LAKES TIMES (July 21, 2014, 3:07 PM), http://www.fltimes.com/news/article_7f181016-ofco-11e4-9637-001a4bcf887a.html [<http://perma.cc/2DQE-2VHP>], and on the Colleges' website, see Sean Carroll, *D.A.: The New York Times Got It Wrong*, HOBART & WILLIAM SMITH COLLEGES (July 21, 2014, 8:06 AM), <http://www.hws.edu/news/media/13wham.aspx> [<http://perma.cc/LUF6-DL6H>]. For a refutation of Hibbard's claims, see Inga Parsons' *Complete Statement to the Finger Lakes Times*, FINGER LAKES TIMES (July 23, 2014, 10:55 AM), http://www.fltimes.com/hws_anna/article_142f7fe8-1275-11e4-8e86-0019bb2963f4.html [<http://perma.cc/VU9H-NCPA>].

campus-wide party at a facility known as the Barn. Anna identified her alleged assailant at the fraternity party, but the prosecutor had testimony, some of which he disclosed publicly, that led him to believe that her sexual contacts there were consensual. The Board also could have heard that or similar evidence. The Board could have decided, even on a preponderance standard, that the contacts at the fraternity were not supported by enough evidence to hold the identified student responsible for wrongdoing.

In my own assessment of the published record, the Barn is almost certainly where Anna sustained the injuries discovered later at the hospital. Through alcohol-induced memory loss, however, Anna was unable to remember what happened at the Barn; according to the *Times*, she could not remember being there at all. Thus, for the contacts for which evidence of sexual assault was clear, the problem of identification looms large. Three students were suspected and questioned by the Board. The identity of one of them was supported by disclosures to Anna by a bystander who was present both at the fraternity house and at the Barn. He also told the prosecutor what he saw. But he refused to testify before the Colleges' Board. Anna testified to the bystander's identification, but, had the Board relied solely on that, it would have imposed a finding of responsibility on a student on the basis of Anna's report of the bystander's report — that is, on hearsay. The publicly available information provides not even that level of certainty about the other two students who were suspected. To be sure, some of the suspected students changed their stories as the police and Colleges' investigations proceeded, calling the credibility of their denials into question. But there was no direct evidence identifying them, or any other students present at the Barn, as Anna's assailant there. The Board could have decided, even on a preponderance standard, that it could not hold any *particular* student responsible. And that does not seem to me like shoddy or biased work: it seems like a reasonable call that college and university boards *should* make in cases where the identity of the wrongdoer cannot be established, lest they hold students responsible for expellable offenses on a guess.

Advocacy that blazons Anna's story as an open-and-shut case of rape makes complete sense: what happened to Anna was brutal victimization, pure and simple. A student culture in which a rape like 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 wrongdoing. 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 despite their complete lack of direct evidence about which of them actually deserved it.⁴

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,⁵ 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 Till⁶ to the Central Park Five,⁷ American racial history is laced with vendetta-like scandals in which black men are accused of sexually assaulting white women that become reverse scandals when it is revealed that the accused men were not wrongdoers at 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

⁴ See, e.g., *Rape on Campus: Anna's Trauma*, N.Y. TIMES, July 15, 2014, <http://www.nytimes.com/2014/07/16/opinion/the-rape-case-hobart-and-william-smith-and-readers-respond.html>; Jessica Wakeman, *New York Times Cover Story Reveals How Hobart & William Smith Massively Failed Student Rape Victim*, THE FRISKY (July 14, 2014), <http://www.thefrisky.com/2014-07-14/new-york-times-cover-story-reveals-how-hobart-william-smith-massively-failed-student-rape-victim> [<http://perma.cc/564Q-JRNC>]. Condemnation of college and university procedures was premature in the notorious University of Virginia rape allegation as well. 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 Allegations in Doubt*, WASH. POST (Dec. 5, 2014), http://www.washingtonpost.com/local/education/u-va-fraternity-to-rebut-claims-of-gang-rape-in-rolling-stone/2014/12/05/5fa5f7d2-7c91-11e4-84d4-7c896b90abdc_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, 2014), <http://www.rollingstone.com/culture/news/a-note-to-our-readers-20141205> [<http://perma.cc/P4L7-NL5V>] (a partial retraction).

⁵ 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.

⁶ See generally STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* (1988).

⁷ Robert D. McFadden & Susan Saulny, *A Crime Revisited: The Decision; 13 Years Later, Official Reversal in Jogger Attack*, N.Y. TIMES (Dec. 6, 2002), <http://www.nytimes.com/2002/12/06/nyregion/a-crime-revisited-the-decision-13-years-later-official-reversal-in-jogger-attack.html>.

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 seriously⁸ is the idea — vividly manifested in the institutional reforms adopted at Harvard University last summer⁹ — 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;¹⁰ the Harvard Title IX Office, dedicated exclusively to enforcing the University's new 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

⁸ 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/67CH-9KKD>]. 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.

⁹ 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>].

¹⁰ “No person in the United States shall, on the basis of sex, be excluded from participation in, 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).

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.¹¹) 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*,¹² 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 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

¹¹ See DCL, *supra* note 8, at 7–8; Q&A, *supra* note 8, at 10–11, 25.

¹² 424 A.2d 720 (Md. 1981). For an in-depth analysis of this case, see Jeannie C. Suk, “*The Look in His Eyes*”: *The Story of Rusk and Rape Reform*, in CRIMINAL LAW STORIES 171 (Donna Coker & Robert Weisberg eds., 2013).

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,¹³ 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.¹⁴ 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 take-away 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 fragmented or ‘sketchy,’” and she can be “[m]isinterpreted as being cavalier about [the event] or lying.” These problems, in turn, can

¹³ DCL, *supra* note 8, at 4, 6, 12; Q&A, *supra* note 8, at 38–40.

¹⁴ Mia Karvonides & William McCants, Harvard Law School Administrative Board Title IX Training (October 23, 2014) (on file with author).

cause police and sexual harassment investigators to dismiss serious claims, tragically because of symptoms of the trauma itself.¹⁵

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 subjectively give a free consent to engage in sexual activity),¹⁶ or who were confused about whether to consent or not but who "went along"

¹⁵ *Id.*

¹⁶ See Mark Kelman, *Thinking About Sexual Consent*, 58 STAN. L. REV. 935, 946 (2005) (book review).

(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.¹⁷

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

¹⁷ See Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 11:53 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.*

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.¹⁸

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.¹⁹ No: young women are willingly drinking heavily and using powerful drugs. So are young men. It is an immense public health problem.

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

¹⁸ 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-RHR8>]. 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>].

¹⁹ See, e.g., Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Campus Sexual Assault*, 128 HARV. L. REV. F. (forthcoming 2015).

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:

[W]hen 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.²⁰

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 irrebuttable 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 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

²⁰ HARVARD UNIV., SEXUAL AND GENDER-BASED HARASSMENT POLICY 3 (2014), http://diversity.harvard.edu/files/diversity/files/harvard_sexual_harassment_policy.pdf [<http://perma.cc/YF8T-VPC2>].

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.²¹ 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 strategies²² — 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 immiserating breakup, morphed into the form of a sexual misconduct charge.

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 situation — 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.

²¹ See Jean Laplanche & Jean-Bertrand Pontalis, *THE LANGUAGE OF PSYCHOANALYSIS* 356–57 (Donald Nicholson-Smith trans., W.W. Norton & Co. 1973) (1967) (entry on “Projective Identification”).

²² See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 968, 974, 976 (1979).

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 OCR²³ 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

²³ In dealing with sexual harassment, schools must “end such conduct, prevent its recurrence, and address its effects.” DCL, *supra* note 8, 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 8, at 2–3.

the persons they accuse continue in school: merely “seeing” the harasser is deemed traumatic.²⁴

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. *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?

²⁴ DCL, *supra* note 8, at 13 n.33.

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THE CHRONICLE REVIEW

The Sex Bureaucracy

To fight assault, the feds have made colleges clumsy monitors of students' sex lives.

By *Jacob Gersen and Jeannie Suk Gersen* | JANUARY 06, 2017 ✓ PREMIUM



André Chung for The Chronicle Review

Often with the best of intentions, the federal government in the past six years has presided over the creation of a sex bureaucracy that says its aim is to reduce sexual violence but that is actually enforcing a contested vision of sexual morality and disciplining those who deviate from it.

Many observers assume that today's important campus sexual-assault debate is concerned with forcible or coerced sex, or with taking advantage of someone who is too drunk to be able to consent. But the definition of sexual assault has stretched enormously, in ways that would have been unimaginable just a few years ago. Indeed, the concept of sexual misconduct has grown to include most voluntary and willing sexual conduct.

Behind this elastic idea of sexual misconduct is a web of well-meaning federal statutes, especially Title IX, which prohibits sex discrimination in education, and the Violence Against Women Act, which, in its 2013 reauthorization, requires colleges to publicly disclose how they define, prevent, investigate, and discipline sexual misconduct. Under President Obama, the Department of Education's interpretations of those laws have greatly expanded the control exercised by the federal government over sexual conduct.

In essence, the federal government has created a sex bureaucracy that has in turn conscripted officials at colleges as bureaucrats of desire, responsible for defining healthy, permissible sex and disciplining deviations from those supposed norms. The results are not only cringeworthy but also unfair, potentially racially discriminatory, and detrimental to the crucial fight against sexual violence.

College officials have been conscripted as bureaucrats of desire. The results undermine the fight against sexual violence.

With a new administration set to take office, a host of open questions arises about what President-elect Donald J. Trump and his appointees will do with the sex bureaucracy's reins. Will they stay the course? Will they abandon the current trajectory, lessening the role of the federal government in establishing norms of sexual conduct? Or, as seems more likely, will they use the extensive administrative apparatus at their command to advance a different, retrograde vision of sexual morality?

Title IX became law in 1972. Since then, what it means to discriminate "on the basis of sex" has evolved through a process of judicial and agency interpretation. Today the phrase "Title IX complaint" commonly refers to an allegation of sexual misconduct by one college student against another, but this view was alien at the time of the law's enactment. The Department of Education's Office for Civil Rights, known as OCR, is the lead agency for Title IX. Early regulations implementing Title IX required colleges to establish their own internal grievance procedures, so that individuals would have a forum to complain about their institution's sex discrimination.

Since the 1990s, OCR and the courts have established that sex discrimination under Title IX includes sexual harassment. As a result, the mandate not to discriminate on the basis of sex includes a college's obligation to ensure that harassing conduct by employees or students doesn't create a hostile environment. According to this legal logic, if a college did not have effective policies and procedures in place to address

harassing conduct that is pervasive or severe enough to create a hostile environment, the college would be discriminating on the basis of sex and in violation of Title IX.

In 2011, OCR announced a spate of new interpretations of Title IX in its "Dear Colleague" letter explaining how colleges that receive federal funds must address allegations of sexual violence. The letter argued that because sexual violence is a form of sexual harassment, colleges' responses to sexual violence are also governed by Title IX's ban on sex discrimination. Most colleges have long had procedures to handle student discipline, including for sexual assault and other sexual misconduct. But the 2011 "Dear Colleague" letter made clear that a college's sexual-conduct policies, including the investigatory and disciplinary processes, are mandatory and dictated by OCR's interpretations of Title IX, whatever they might be. Before 2011, OCR had taken inconsistent positions on what was required of colleges, sometimes stating even that they were "under no obligation to conduct an independent investigation" of an allegation of sexual assault if it "involved a possible violation of the penal law, the determination of which is the exclusive province of the police and the office of the district attorney."

The past five years have seen hundreds of investigations into colleges whose sexual-misconduct policies and procedures differ from OCR's wishes. Although many investigations remain unresolved, the modus operandi has been to announce an investigation and then negotiate college-by-college "resolution agreements" — lengthy documents that specify the defects in the college's sexual-conduct policies and procedures and include an agreement that the institution will take specific steps to ensure compliance with OCR's views. The office has no legal authority to force colleges to do anything that the law — whether a statute or regulation — does not mandate. But it has pressured colleges to take measures that are clearly beyond what the law requires, and colleges have entered these resolution agreements "voluntarily" to resolve OCR investigations and avoid public-relations nightmares. For example, OCR told colleges to put in place measures that, as the "Dear Colleague" letter put it, "may bring potentially problematic conduct to the school's attention before it becomes serious enough to create a hostile environment." In other words, Title IX compliance meant disciplining "potentially problematic conduct" *before* it became unlawful.

As part of a federal investigation, OCR sent a letter to the University of Montana in 2013 stating that, rather than limit sexual-harassment claims to unwelcome conduct that creates a hostile environment, the university should define sexual harassment "more broadly" as "any unwelcome conduct of a sexual nature." By that definition, touching a person's hand during a date in a romantic way, sending a text message expressing romantic attraction — or, for that matter, asking for consent to have sex, could qualify as sexual harassment, and has, on some campuses. The college's failure to prohibit, investigate, and discipline this conduct would then be unlawful, according to OCR's broad definition, even if the conduct itself had not created a hostile environment.

Under the rubric of preventing sexual violence, colleges are now deep in the business of providing advice on sex and relationships. And they're not good at it.

OCR explicitly made the Montana letter a "blueprint" for the reform of other colleges' sexual-misconduct policies, and the push to expand the definition of sexual harassment has steadily continued. On September 9, 2016, OCR informed Frostburg State University that it was violating Title IX because its sexual-harassment policy stated that "in assessing whether a

particular act constitutes sexual harassment forbidden under this policy, the rules of common sense and reason shall prevail." The university's policy continued: "The standard shall be the perspective of a reasonable person within the campus community." Could it really be that a university engages in sex discrimination by using the perspective of a reasonable person to evaluate conduct, a standard that has long been a key feature of sexual-harassment law, civil tort law, and criminal law?

The sex bureaucracy's insistence that using reasonableness and common sense is illegal would be amusing if the stakes for individuals and institutions were not so high. The lives of both individual complainants and students accused in the complaints are often seriously altered by findings or nonfindings of responsibility for sexual misconduct. In addition to the

reputational costs of being seen as soft on sexual violence, colleges have been threatened with defunding by the federal government if they maintain policies and procedures that do not satisfy OCR. And colleges are now regularly defending lawsuits brought by students disciplined under the very procedures that colleges adopted to appease OCR.

Because sex without consent is sexual assault, and sex with consent is just sex, the meaning of consent carries the weight of nearly the entire legal regime. How to define and evaluate consent is a subject of legal, political, and cultural dispute. While regulations that implement the Violence Against Women Act of 2013 require colleges to publish a definition of consent for purposes of disciplining sexual misconduct, the government has not provided a universal definition. Each college has been left to come up with its own, and some have produced definitions that seem to prohibit the vast majority of actual sexual conduct.

As consent became the distinguishing feature of permissible sexual conduct, many colleges, parents, and advocacy groups offered common-sense advice: If there is any ambiguity about consent, stop. Don't take the absence of "no" to mean "yes." Make sure your partner is not just willing but enthusiastic. Soon, asking for and receiving a clear "yes" for each discrete act during a sexual encounter became a common requirement. At some colleges, enthusiasm became not just precautionary advice but also a definitional requirement of consent itself. Here, for instance, is the University of Wyoming's version: "Anything less than voluntary, sober, enthusiastic, verbal, noncoerced, continual, active, and honest consent is Sexual Assault." By that standard, moving forward even after a clear assent that is less than enthusiastic is, by definition, sexual assault.

So, too, could be sexual conduct with someone who is not completely sober or who agrees to have sex after repeated requests (potential pressure constituting coercion). Because some colleges' expansive definitions render much if not most sex that occurs on campus a technical violation of the rules, there is wide discretion and leeway for a participant in a sexual encounter to interpret or label the incident as sexual misconduct. This definitional overinclusiveness makes it difficult for both colleges and students to distinguish serious cases of sexual assault and harassment from cases in which the absence of affirmative or enthusiastic agreement

nonetheless accompanied a genuinely voluntary decision to engage in sexual conduct. Students who were at the time willing to have sex can still bring complaints against their partners, and under the college's rules, such complaints should be considered valid.

If the difference between consent and nonconsent turns on whether agreement to each discrete act (e.g., kiss, touching of each body part, penetration) in a sexual encounter was affirmative or enthusiastic, we will increasingly see students who believe they were victimized after they willingly engaged in sexual activity. One might ask, if a person was actually willing, why would he or she afterward bring a complaint? It is not because the complaint is fraudulent, but because a common feature of human sexuality is ambivalence — both wanting and not wanting at the same time, or wanting at one time and later wishing one hadn't. This is an acute and pervasive challenge for college administrators, because legal ambiguity and sexual ambivalence are a dangerous combination. When everybody is technically violating an overly broad policy but only a small and unpredictable subset is investigated and disciplined for it, largely at the discretion of the partner who decides whether to complain, the results will not be fair. Worse, it distracts from the important fight against sexual violence and erodes the legitimacy of serious efforts to combat it.

You may think that an enlarged definition of sexual assault, even one that leads to incidents of overpunishment, is acceptable if it also reduces sexual violence against women. But sexual-conduct policies are gender neutral. Women who do not receive affirmative consent for each step of a sexual encounter with a man, or if the man was not entirely sober, have also violated those policies. Men are beginning to file Title IX complaints against women, because, according to the absurdly broad policy definition, they can claim to have been sexually assaulted.

A set of adjudicatory procedures that are fair, neutral, and rigorous could serve as a check, albeit imperfect, on vague and overinclusive policy definitions. Even if most sexual encounters could formally qualify as sexual misconduct, robust and rigorous adjudication might accurately sort cases that are worthy of discipline from those that are not. Unfortunately, since 2011, colleges have adopted inadequate and unfair procedures, perhaps in overzealous efforts to avoid negative attention by OCR.



André Chung for The Chronicle Review

Many students disciplined under these new policies have sued their colleges, arguing that the procedures used to investigate and adjudicate the complaints were unfair and unlawful. Such cases provide a glimpse both at the sexual conduct that is being disciplined by the sex bureaucracy and at how the campus adjudicatory

process holds up in court.

In one federal case in 2015, a male student sued Washington and Lee University after being expelled for "nonconsensual sexual intercourse" with a female student. His court complaint claimed that the university's Title IX officer in charge of the proceeding had earlier given a presentation arguing "regret equals rape," a position she framed as "a new idea everyone, herself included, is starting to agree with." The complaint said the officer, citing an article titled, "Is It Possible That There is Something In Between Consensual Sex and Rape ... And That It Happens to Almost Every Girl Out There?," from a website called Total Sorority Move, had suggested "that sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations that she did not outwardly express."

The accused student claimed that the Title IX officer had not shown him a copy of the accuser's complaint in a timely fashion, refused his request to have a lawyer participate in the proceedings, failed to interview several of his suggested witnesses, selectively omitted facts from the investigative report, denied his request to record the hearing, and hindered him from putting questions to the accuser, who attended the hearing behind a partition. After the court denied the university's motion to dismiss the case, the parties settled.

Another federal case last year involved two male undergraduates at Brandeis University who had a sexual relationship that lasted almost two years. After they broke up, one of them attended a campus session on sexual assault, and his thinking about his former boyfriend began to change. He filed a complaint with the university, alleging "numerous

inappropriate, nonconsensual interactions" during the relationship. While sleeping together, he said, his boyfriend occasionally woke him up with kisses, and sometimes continued kissing him when he wanted to go back to sleep. When they showered together, his boyfriend looked at his genitals. At the start of their romance, his boyfriend once put a hand on his clothed groin while they watched a movie together. A year and a half into their relationship, his boyfriend once tried to perform oral sex when the accuser didn't want it, and they quarreled and then made up.

The university found the accused ex-boyfriend "responsible" in each of these incidents and placed a record in his student file that he had been disciplined for "sexual misconduct, lack of consent, taking advantage of incapacitation, sexual harassment, physical harm, and invading personal privacy." On

What will the Trump administration do with the sex bureaucracy he's inheriting?

social media and elsewhere, the accuser referred to himself as a victim of sexual assault and called his ex-boyfriend his "attacker," "rapist," and "a threat to the safety of the well-being of the entire campus." The accused student filed a federal lawsuit against the university. In refusing to grant the university's motion to dismiss the suit, the judge found plausible the accused student's claim of unfair procedures, including Brandeis's failure to give him notice of specific charges, allow him to have counsel, or permit him to cross-examine the complainant or witnesses. The student then dropped the lawsuit, because, given the cost of continuing it, he felt vindicated by the court's ruling.

In September, a federal judge concluded that Brown University had breached a student's reasonable expectations about the university's disciplinary process by applying a new affirmative-consent definition to an earlier incident. Brown's new definition specified that consent obtained through "manipulation" was invalid; in a text exchange before the sexual encounter, the female complainant told the male student that he was trying to manipulate her, and he responded, "I'm trying to manipulate you a lot." Finding that the accused student's responsibility for sexual misconduct very likely turned on Brown's use of the new consent definition, the court held

that he was entitled to a new hearing. In November, another federal court held that the University of Cincinnati's failure to allow an accused student to put at least written cross-examination questions to the complainant violated constitutional due process.

On both procedural and substantive grounds, courts applying federal and state law have increasingly recognized unfairness in sexual-misconduct policies and practices adopted by colleges. And in October, in the wake of multiple court decisions in favor of accused students during the past year, OCR itself found that Wesley College, in Delaware, had violated Title IX with the unfair procedures it used to expel a male student accused of live-streaming without consent an otherwise consensual sexual encounter. The college's investigation had omitted an interview of the accused, and he had not been given the incident report before the hearing or a chance to provide or challenge evidence.

Because many new definitions of consent on campus diverge rather starkly from anything familiar in criminal law or civil tort law, colleges have developed educational campaigns, categorized as sexual-violence-prevention programs mandated by the Violence Against Women Act. Clark University's consent materials, subtitled "Doing It With the Lights On," tell students, "We want you to have great sex if you choose to have sex — safer, mutually enjoyable, consensual sex." The University of Wyoming has a "Don't Kill the Mood" section in its consent materials, that explains: "Asking for consent not only shows that you respect and care for your partner, but it also shows your creativity and can even make the sexual interaction more intimate." Students are instructed that consent should be verbal — "'Yes.' Or even, 'Yes, Yes, Oh! Yes!' " — and are offered phrases to use in a sexual encounter:

Baby, you want to make a bunk bed: me on top, you on bottom? Would you like to try an Australian kiss? It's like a French kiss, but "Down Under." I've got the ship. You've got the harbor. Can I dock for the night?

Putting aside whether such utterances reduce the ambiguity of sexual encounters, these instructions are not about rape, sexual assault, sexual harassment, or sexual violence. They are how-to's for sexual arousal, proposition, and seduction. Moreover, in a statement such as, "Consent is about real, honest, confident and open communication," consent stands in

for a whole normative world of assumptions about what makes sex and relationships good, satisfying, worthwhile, meaningful, and fulfilling. About this, Wyoming is especially explicit: "By communicating what you want and need from your sexual relationship (and your relationship outside the bedroom), you will develop a more caring, responsive, respectful love life."

Under the rubric of preventing sexual violence, colleges are now deep in the business of providing advice on sex and relationships. And they're not good at it.

The shift toward anticipating potentially problematic behavior before it occurs is a feature of what might be called the public-health model of sexual violence. This model of prevention centers on identifying factors that increase the risk of sexual violence. For example, the Department of Education requires colleges to publish their sexual-violence-prevention programs, which must "consider risk factors for sexual violence." The government's compendium of risk factors for sexual violence, assembled by the federal Centers for Disease Control and Prevention, includes "lack of employment opportunities," "poverty," a "lack of institutional support from police and judicial system," and "hyper-masculinity." Colleges are supposed to use these risk factors to formulate and target their sexual-violence-prevention programs. Ohio University's "Black Men's Think Tank" and "Healthy Masculinity Working Group," for example, are categorized by the university in its annual security report as focusing on "Relationship Level" risk factors; the "Better Bystanders" program focuses on individual risk factors, and the "Sober Sex" posters are classified as community-level interventions. This individual, relationship, and community (or environmental) risk-factor framework is taken almost verbatim from the CDC.

When the campus community is told by the federal government that students with the above risk factors are more likely to commit sexual violence, it is not hard to imagine that when it comes to accusation, investigation, and adjudication, those individuals



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will also be perceived as more likely to be perpetrators.

Last September, a black male student who had been accused of sexual assault by a white female student sued the University of Pennsylvania, claiming that an unfair investigation process discriminated on the basis of race, in violation of federal civil-rights laws. Elsewhere, OCR itself has acknowledged the serious risk of race discrimination in student discipline in elementary and secondary schools, and has gone so far as to issue guidance on "how to identify, avoid, and remedy discriminatory discipline." According to OCR, African-American students "are more than three times as likely as their white peers" to be expelled

or suspended, and those substantial racial disparities "are not explained by more frequent or more serious misbehavior by students of color."

When it comes to sexual misconduct in higher education, however, OCR has so far been silent about the risk of racial bias. The race of the parties in sexual-misconduct cases is not included in existing federal reporting requirements, so the issue is difficult to study and expose. Indeed, colleges may interpret their obligations under the Family Educational Rights and Privacy Act (Ferpa) as preventing the release of such data — if they even compile and save such information, which they are not legally required to do.

Among administrators, lawyers, and faculty members involved in sexual-misconduct cases, however, stories of disproportionate racial impact are common. "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," writes Janet Halley, our colleague at Harvard Law School. "But the institution cannot 'know' this because it has not been thought important enough to monitor for racial bias." It is incumbent on OCR, as well as colleges and universities, to study and address the potential for race discrimination in sexual-assault allegations.

Sexual norms change, and colleges have often been at the forefront of that change. What is different this time around is that the shift has been supervised by the federal government. Under the guise of sexual-violence prevention and discipline, the sex bureaucracy has grown to oversee sexual matters in a way that defies common sense and renders most sexual interactions impermissible.

What will President-elect Trump do with the sex bureaucracy he's inheriting? Ignoring it isn't a real option. Federal legal requirements are now intertwined with college bureaucracies. Once institutions are created, offices staffed, policies promulgated, and disciplinary boards have begun meting out punishments, existing practices are likely to continue even if the federal agency loses interest or cedes the field. An expansive bureaucratic apparatus operating on every campus in the country would remain to carry on a life and motivation of its own.

Title IX

Tracking Sexual Assault Investigations

(<http://projects.chronicle.com/titleix/?cid=T9WIDGET>)

In this era of enforcement, the government is conducting 300 investigations of colleges for possibly mishandling reports of sexual violence.

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It is possible that the Trump administration will retract the 2011 "Dear Colleague" Letter. But unless OCR adopts new interpretations of federal law that forbid the very practices it has required for the past five years, it is hard to imagine colleges making costly wholesale changes to the sex bureaucracy they have expended great resources to build. The many institutions that are

bound by resolution agreements they entered into with Obama's OCR will continue to be bound by them, unless OCR goes so far as to invalidate the existing agreements, which is highly unlikely. Inertia is now on the sex bureaucracy's side.

There is little in the historical record to suggest that any president — much less this one — would give up power and control on this order of magnitude. The sex bureaucracy is probably here to stay. During the campaign, a videotape emerged of Trump bragging about assaulting women, which was followed by a dozen women's accusations that he had assaulted or harassed them. His administration, in turn, may want to appear tough on sexual violence. Meanwhile, it will be filled with people who have gone on the record against premarital sex and homosexuality. The new administration will use the sex bureaucracy to advance its own version of sexual morality.

The norms of sexual conduct embraced by activists in recent years are, of course, not the same as the sexual morality potentially imposed from the right. But common ground between them may not be so elusive in the sex bureaucracy. Almost the entire domain of sexual interaction is now regulated under the guise of sexual-violence prevention, on which right and left can agree. The sex bureaucracy will therefore not only survive the change in administration, but it may flourish. What is more, future iterations may more explicitly reveal how an expansive regulation of problematic sex and a conservative project of sexual morality can converge.

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HLS Sexual Harassment Resources and Procedures for Students

1. Resources and Reports Relating to Sexual or Gender-Based Harassment.

HLS is committed to equal opportunity, respect, fairness and nondiscrimination, and to taking appropriate steps to end any harassment, prevent its recurrence, and, where appropriate, remedy its effects. To that end, HLS has a **Title IX Unit**, currently consisting of a **Title IX Coordinator** (currently, the Associate Dean and Dean for Academic and Faculty Affairs) and two **Deputy Title IX Coordinators** (currently, the Associate Dean and Dean of Students and the Assistant Dean and Chief Human Resources Officer), whose purpose is to oversee implementation of the [Harvard University Sexual and Gender-Based Harassment Policy](#) (the “**Policy**”). This includes receiving reports of sexual or gender-based harassment (see 1.2 below), determining interim measures, supervising investigation and resolution of complaints under these procedures, and informing students about the Policy and these procedures (including 1.1 through 1.8 below). Each Title IX Coordinator is an experienced administrator trained in identifying and responding to sexual harassment and its harm to equal educational opportunity, as understood in light of principles of academic freedom and free speech, and other aspects of Title IX and the Policy.

1.1 Confidential Resources. The HLS community should be aware of relevant **confidential** resources, which are available both before and after a person communicates with any Title IX coordinator about potential violations of the Policy:

- [Harvard University Office of Sexual Assault Prevention and Response](#)
- [Harvard Chaplains](#)
- [RESPONSE Peer Counseling](#)
- [UHS Counseling and Mental Health Services](#)

These resources can provide confidential advice and counseling. Information disclosed by an individual to these counselors will not be disclosed to a Title IX Coordinator or any other person without an individual’s express written permission, unless there is an imminent threat of serious harm to the individual or others, or a legal obligation requires disclosure (e.g., if there is suspected abuse of a minor). These counselors can provide more information about the extent of confidentiality.

Under applicable law, many members of HLS community – including faculty

and senior administrators – may be required to report incidents to the Title IX Unit, and so may not be able to keep the matter completely confidential. The Title IX coordinators themselves may be required to investigate and seek to address Policy violations, and so may not be able to keep the matter completely confidential. If a student’s information may not be kept confidential, the student will be notified of the information that will be disclosed, to whom, and why. The above confidential resources may be useful to consult as a first step.

1.2 Reports of Title IX Violations. Individuals are encouraged to report any violation of the Policy to the Title IX Unit. Contact information for the Title IX coordinators is here:

- Catherine Claypoole, HLS Interim Title IX Coordinator
Griswold 200
1525 Massachusetts Avenue
Cambridge, MA 02138
claypoole@law.harvard.edu
- Kevin Moody, HLS Deputy Title IX Coordinator
Hauser 010
1575 Massachusetts Avenue
Cambridge, MA 02138
kmoody@law.harvard.edu
- Marcia Sells, HLS Deputy Title IX Coordinator
WCC 3039
1585 Massachusetts Avenue
Cambridge, MA 02138
msells@law.harvard.edu

Reports of sexual harassment, including sexual assault and sexual violence will be processed under the Procedures detailed herein when both the complainant and the respondent are HLS students. If either the complainant or the respondent is a non-HLS student, the University’s Procedures for Handling Complaints Against Students will be used, and, when the respondent is an HLS student, will be supplemented by the Law School’s Interschool Sexual Harassment Procedures. The Law School’s Administrative Board Procedures will not be used for complaints of sexual harassment, including sexual assault or sexual violence.

1.3.1 Anonymous Reports. Persons may wish to report violations of the Policy anonymously. If a person reporting a potential violation self-identifies but asks to remain anonymous, the Title IX Unit will decide how to proceed, taking into account the person's wishes, the University's commitment to providing a safe and non-discriminatory environment, and the right of any person accused of a violation of the Policy to have notice of allegations if any action may be taken that would affect the accused. It may not be possible to guarantee the reporting party anonymity in certain circumstances.

1.3.2 Informal Reports. Individuals may wish to file a formal complaint about a Policy violation (see 2.1 below), or to report informally (i.e., without initiating a formal complaint). The Title IX Unit shall inform anyone making an informal report that he or she may initiate a formal complaint at any time, regardless of what steps are being or have been taken in response to an informal report. Reporting persons should be aware that although the Title IX Unit will often be able to maintain confidentiality of reporting persons, the Title IX Unit may sometimes be required to take actions to protect the safety of HLS community members that may result in the identity of the reporting person being disclosed (to the police, for example). Reporting persons are encouraged to consult with the confidential resources identified above before self-identifying to the Title IX Unit. When reporting persons seek to remain anonymous or have their identities kept confidential, they will be informed that honoring such a request may limit the ability of HLS to respond fully to any reported event, including discipline against a reported person, that the Policy prohibits retaliation, and that HLS will take steps intended to prevent retaliation and to respond to it strongly if it occurs.

1.3.3 Informal Process. If the Title IX Unit concludes that it is possible to resolve a matter, whether after a formal complaint or an informal report, in a prompt, fair and adequate manner through an informal process involving and with the consent of the parties (including the reporting person and person whose conduct may have violated the Policy), the Title IX Unit may seek to do so. After a formal complaint is made, this informal process may be used only if the complainant affirmatively seeks such a process, and any party may terminate or decline any informal process at any time, without penalty. No person reporting that he or she has been sexually assaulted will be asked to mediate or reach a resolution of the report directly with a person alleged to have committed the assault. Before using any informal process, the Title IX Unit will notify those involved about the advantages and disadvantages of the process, and establish and notify those involved about reasonable timeframes

for the process. The Title IX Unit will report to the Title IX Committee (see 6 below) about the use, timeliness and outcomes of the informal process, without disclosing parties' names.

1.3.4 Legal Advice. When reported conduct by any person might constitute criminal conduct, the person whose conduct is reported should, and the reporting person may wish to, seek legal counsel before making any written or oral statements, and seek advice about how his or her participation in an informal process could affect any criminal case in which he or she is or may become involved.

1.4 Leniency on Other Policy Violations. To encourage reports of violations of the Policy, HLS may at any point in an investigation or proceeding offer leniency with respect to violations of other HLS policies that may come to light as a result of such reports, depending on the circumstances.

1.5 Timeliness. Reports may be made at any time, regardless of how much time has elapsed. Those with information about violations of the Policy are encouraged to report as soon as possible. Prompt reporting allows for prompt and effective responses. If a person who violated the Policy is no longer employed or a student at the time of a report, HLS may not be able to take action against that person. Reports may be valuable in allowing HLS to support affected individuals, prevent recurrences or address the effects of reported conduct.

1.6 Interim Measures. As described in 5 below, HLS through its Title IX Unit will provide prompt and reasonable interim measures to support and protect the safety of all parties, the educational environment, and the HLS community; to deter retaliation; and to preserve the integrity of the investigation and resolution process.

1.7 Criminal Complaints and Police Assistance. Any member of the HLS community may at any time also file a criminal complaint or seek assistance in preserving physical evidence from the Harvard University Police. Information on those resources can be found here:

- [Harvard University Police Department](#)
1033 Massachusetts Avenue
6th Floor, Cambridge, MA 02138
Urgent: 617-495-1212
Business: 617-495-1215

HLS and the Title IX Unit will assist anyone reporting or accused of Title IX violations in contacting law enforcement officials.

1.8 Process Confidentiality. To encourage parties and witnesses to participate in these procedures (including anonymous reports, informal reports, and formal complaints), all involved should keep confidential any information they receive in the course of their participation, other than to consult with advisors and attorneys, and incidental to seeking support and advice from family, clergy, health professionals, and others playing a similar role, all of whom should also be advised by anyone seeking their support to keep such information confidential. To balance the interest of protecting confidential information and encouraging participation in these procedures by parties and witnesses, on the one hand, against the interest of participants in being able to disclose confidential information to family, clergy, health professionals, and others, on the other hand, the Title IX Committee (see 6 below) shall develop instructions on the confidentiality obligations of parties and witnesses. Disclosure of confidential information received in participating in these procedures has the potential to compromise the integrity of these procedures and may be viewed as retaliation that violates the Policy. Upon the initiation of an investigation, the Title IX Unit shall remind the parties, in writing, of their obligations regarding confidentiality. Public disclosure of confidential information received as a result of participation in these procedures may constitute a violation of HLS standards of conduct, and shall be subject to these procedures as a related matter (see 2.7 below).

2. Complaints and Investigations. HLS is committed to providing a fair and prompt investigation of violations of the Policy. During any investigation and resolution of a complaint, both complainants and respondents have the opportunity to obtain counsel or assistance from lawyers or advisers of their choice (see 2.3 below), to have an impartial adjudication (see 3 below), to present witnesses and relevant evidence and have the complaint reviewed at a hearing (see 3.3 below), and to appeal (see 4 below). HLS will promptly and concurrently notify the parties in writing of the outcome of any formal complaint or appeal (see 2.4.1, 3.5.3 and 4.4).

2.1 Formal Complaints. A formal complaint shall state (if known to the complainant) the name(s) of the persons involved in and witnesses to the conduct, describe the conduct, identify to the extent reasonably possible the dates and places of the conduct. The complaint shall be signed and dated by the complainant. The Title IX Unit shall promptly provide a copy of the

complaint to all respondents named in the complaint.

2.2 Investigations Generally. To protect complainants, respondents, and the HLS community, allegations of violations of the Policy will be investigated promptly (see 2.4.4 and 2.4.5) and fairly by or under the supervision of the Title IX Unit. Investigations may be initiated whenever warranted, including in response to a formal complaint, in the absence of a formal complaint, or after a formal complaint has been withdrawn. Where a complainant specifically requests a complaint not be investigated, an investigation may be initiated if the Title IX Unit determines that the facts warrant an investigation. The Title IX Unit will take into account concerns articulated by complainants and respondents, the best interest of the community, fairness to all concerned, and the University's legal obligations under Title IX. Investigations under these procedures may be carried out prior to, simultaneously with, or after criminal or civil proceedings (see also 2.4.4 and 2.4.5 below). Any investigator will be impartial and unbiased, will disclose any real or reasonably perceived conflicts of interest, and have training in investigating and evaluating conduct under the Policy, including applicable confidentiality requirements. The Title IX Committee (see 6 below) will periodically review and provide general guidance to the Title IX Unit on the qualifications and conduct of investigators.

2.3 Advisors and Counsel. All parties may consult with advisors of their choice, including an attorney, at any point in the process. The Title IX Unit will notify parties that they may consult with advisors (including an attorney), and the names of potential advisors (including attorneys). HLS will provide financial assistance to parties unable to afford an attorney who would like to do so, subject to reasonable fee structures and limits determined from time to time by the Title IX Committee (see 6 below). Ordinarily, an investigator (see 2.4.2 below) will speak directly with a complainant and respondent, and each may have an advisor or attorney present, and if a student requests, the student's advisor or attorney may participate in the conversation.

2.4.1 Initial Assessments. The Title IX Unit will make an initial assessment following a report or complaint about a violation of the Policy. Based on that assessment, the Title IX Coordinator may act as follows: (a) if the conduct, even if substantiated, would not violate the Policy, the Title IX Coordinator may dismiss the complaint; (b) if the conduct (or complaint) is outside the scope of the Policy, but within the scope of another policy, refer the matter to another office; (c) if the Title IX Coordinator concludes that it is possible to resolve the case in a prompt, fair and adequate manner through an informal process involving and with the consent of both the complainant and

respondent, the Title IX Coordinator may seek to do so (subject to limits in 1.3.3 above); or (d) if the conduct, if substantiated, would violate the Policy, the Title IX Coordinator may initiate an investigation. Before the commencement of any investigation or proceeding, the parties shall be promptly notified in writing of the result of this initial assessment. In any case, the Title IX Coordinator may also identify and implement appropriate interim measures (see 5 below).

2.4.2 Investigations and Investigatory Record. If the result of the initial assessment is an investigation, such investigations will generally include individual interviews of the complainant, respondent, and any relevant witnesses. The investigator will keep and preserve a record of the investigation. This record will be the basis for any recommended findings by the investigator (see 3.3 below).

2.4.3. Notice and Opportunity to Respond. The record prepared by the investigator (see 2.4.2 above) will be shared promptly and equally with complainant and respondent, redacted if and to the extent required by and consistent with law. Each party will have an opportunity to meet again with the investigator, respond in writing, and request gathering of additional information by the investigator. If additional information is gathered, it will become part of the record and shared with all parties, who again will have an opportunity to respond. The parties will be updated at regular intervals of the status of the investigation.

2.4.4 Timeframes. HLS will seek to complete any investigation and resulting disciplinary process (including a decision on any remedies) within 45 business days after receipt of a complaint. HLS will seek to complete any appeal within 20 business days after receipt of the appeal. An investigator may impose reasonable timeframes on all parties to allow the timely completion of a proceeding. Timeframes for all phases of a process apply to all parties equally. Investigations will continue according to these timeframes during summer and other times HLS classes are not in session.

2.4.5 Extensions. There may be circumstances requiring longer timeframes. Timeframes may be extended, for example, in the interest of the integrity and completeness of the investigation, to accommodate witness availability, or to comply with requests by or not to prejudice investigations or processes of external law enforcement, or for other legitimate reasons, including the complexity of the investigation and the severity or extent of alleged misconduct. HLS will notify the parties of any extensions of timeframes. Although

cooperation with law enforcement may require temporary suspensions of an HLS investigation, HLS will promptly resume its investigation upon being advised that law enforcement's evidence gathering is completed. HLS will not wait for the conclusion of criminal proceedings to begin its investigation, and will provide appropriate interim measures throughout, including during suspensions and extensions. The Title IX Unit will work with the parties to balance the value of promptness with the value of in-person meetings in an investigation.

2.5 Cooperation. HLS expects members of the HLS community, including witnesses, to cooperate with an investigation. It is understood that there may be circumstances in which complainants may wish to limit their participation, and a complainant may choose to do so, although HLS may be obligated to conduct an investigation. It is understood that respondents may be advised not to provide information in circumstances that could prejudice their rights in external proceedings, and a respondent may choose not to do so, although HLS may be obligated to conduct an investigation. HLS will not draw any adverse inferences from silence in such circumstances, but may impose interim measures, reach findings and implement any or all of the remedies available under 3.5.1 through 3.6 below, as appropriate.

2.6 Sexual History. The parties' sexual histories will not generally be a subject of an investigation or questions at a hearing (see 3.4 below). However, the history of relations among parties may be relevant. For example, if "unrequested or uninvited conduct" is at issue,¹ the sexual history between the parties may be relevant to determining whether the conduct was unrequested and uninvited during the incident in question, although it must be remembered that even in the context of a relationship, an acceptance of a request for one sexual act does not imply acceptance for another sexual act, and an acceptance of a request on one occasion does not constitute acceptance on a subsequent occasion. In addition, under very limited circumstances, sexual history may be relevant to explain injury, to provide proof of a pattern or of repeated events, or for another specific question raised by an allegation. The investigator shall determine the relevance of evidence to the investigation and whether its relevance is outweighed by the dangers of unfair prejudice, confusion, or undue delay, and the adjudicatory panel will determine such matters at a hearing.

2.7 Related Matters and Coordination. The Title IX Unit shall generally consolidate investigations of multiple related complaints under the Policy, and

¹ Policy at 2.

shall also generally consolidate investigations of complaints under other HLS or University policies that are factually related to a Policy violation investigation. The Administrative Board and the Title IX Unit shall coordinate their efforts in such cases, and the Administrative Board Chair shall ordinarily suspend Administrative Board proceedings for any matter covered by the Policy or factually related to such a matter, refer the matter to the Title IX Coordinator, and so notify the parties.

3 Adjudications; Standard of Proof. When the Title IX Coordinator determines to conduct or supervise an investigation (see 2.4.1 above), in order to permit a timely hearing should one be requested by any party (see 3.3 below), the Title IX Unit or a delegate will initiate the scheduling and the parties' selection of a three-person adjudicatory panel, as set forth in 3.2 below. If used, such a panel will determine if the Title IX Coordinator has shown by a preponderance of the evidence that the Policy has been violated, and will adjudicate related matters under other policies in accordance with those policies.

3.1 Adjudicators' Qualifications. All panelists shall be trained in evaluating conduct under the Policy and these procedures, including applicable confidentiality requirements, have relevant expertise and experience, be impartial, unbiased, and independent of the community (i.e., not current students, faculty, administrators, or staff of Harvard University), will disclose any real or reasonably perceived conflicts of interest or recuse themselves in a particular case, as appropriate, and to the extent feasible reflect the value of diversity in all its forms and meet such other criteria as the Title IX Committee (see 6 below) may from time to time establish. A list of no fewer than twelve qualified panelists shall be chosen under the supervision of the Title IX Committee, and maintained and kept up to date by the Title IX Unit.

3.2 Selection of Adjudicators. Each specific adjudicatory panel will be determined as follows: each of the complainant and respondent may choose from the list of qualified panelists one adjudicator; and the two adjudicators so chosen will choose a third from the same list, who shall chair the panel. This panel of three will adjudicate the complaint. If the investigation does not involve a complainant, the Title IX Coordinator shall designate a panelist in place of the complainant.

3.3 Pre-Hearing Dispositions, Reports, and Requests for Hearings. If, at the completion of the investigation, the Title IX Coordinator or the investigator concludes there is no plausible basis for a finding of a violation of the Policy, the investigation may be terminated and the parties so notified. If the Title IX

Coordinator concludes that it is possible to resolve the case in a prompt, fair and adequate manner through an informal process involving and with the consent of both the complainant and respondent (subject to the limits in 1.3.3 above), the Title IX Coordinator may seek to do so. If the Title IX Coordinator or investigator believes no such informal resolution is possible, and concludes that there is a plausible basis for finding a violation of the Policy, the Title IX Coordinator or investigator will prepare a report stating the plausible basis for finding a violation of the Policy. The Title IX Unit will provide the report to each party, and inquire of the complainant and the respondent whether either desires an oral hearing (a “**hearing**”). If any party desires a hearing, the Title IX Coordinator will schedule a hearing with the adjudicatory panel. Otherwise, the adjudicatory panel will make its decision based on the investigator’s report, the investigation record, any further written materials the parties wish to submit to the panel (which shall be provided to the other parties), and any written materials other parties submit in response.

3.4 Conduct of Hearings. At any hearing, the parties will have equal opportunity to participate, with up to two advisors (including up to one attorney). The adjudicatory panel shall determine the conduct of the hearing, subject to these procedures and the Policy, and shall be provided with reasonable support and administrative assistance by HLS. Formal rules of evidence will not apply, and the panel may set reasonable time limits (subject to 2.4.4 and 2.4.5) and other regulations for the hearing. The investigator will present the results of the investigation, and the parties will have an equal opportunity to respond. The parties will also have an equal opportunity to present witnesses and relevant evidence and have questions asked of other parties (see 3.4.1 below), and to ask questions of the investigator. Hearings shall not be open to the public. The only participants shall be the parties, their advisors and attorneys, witnesses, the adjudicators and any staff they may need for the conduct of the hearing, the Title IX Coordinators and, with prior notice to the chair of the adjudicatory panel, any member of the Title IX Committee. A transcript of the hearing shall be kept and made available to the parties.

3.4.1 Questions at Hearings. These procedures recognize the potential harm to the parties of having questions asked directly by another party, and the potential for the prospect of such a form of questioning to deter legitimate complaints, while also recognizing that direct questions may provide a party with a greater ability to test the truth of claims by another party than other methods of questioning. Reflecting these competing interests: (a) parties may not directly address each other in the hearing; (b) if requested by a party, the panel will arrange for means to allow questions to be posed to the parties out

of the physical presence of the other parties and their advisors and attorneys, all of whom may watch from a separate, private room via closed-circuit television; (c) questions to be posed on behalf of one party to another party must be asked through the chair of the adjudicatory panel, including “live” questions during the hearing and in response to answers by those being questioned, via electronic text or other methods, and (d) the chair of the panel will ask in substance all relevant questions a party submits that are not prohibited by these procedures (see 2.6 and 3.4 above).

3.5 Post-Hearing Dispositions and Remedy-Relevant Evidence. The adjudicatory panel will determine by majority vote whether a violation of the Policy has occurred, and will write a decision (which may incorporate the investigator’s report, as the panel deems desirable) stating the basis for their conclusion. All adjudicators shall sign the final decision (including any dissent) as a record of their deliberations and dispositions. The parties will be notified of their decision (see 3.5.3 below). Each party may submit evidence or written argument relevant to remedies or mitigation up to two business days after receiving the final decision, and will have one business day to respond to evidence submitted by any other party.

3.5.1 Determination of Remedies. The panel will also determine remedies, by a majority vote. The remedies may include those described in 3.6 below. Remedies shall take into account the severity and impact of the conduct, the gravity and circumstances of the violation, including the awareness and intent of the parties, the impact of the violation on the complainant, the safety of the community, the student’s previous disciplinary history (based on consultations with the Secretary and the Chair of the Administrative Board), any evidence submitted by the parties relevant to remedies, and the goals of the Policy and these procedures, including HLS’s commitment to equal opportunity, respect, fairness and nondiscrimination. Remedies shall also take into account remedies imposed in prior cases at HLS, both within and outside the context of the Policy, based on consultations with the Administrative Board Chair and Secretary.

3.5.2 Adjudication of Related Matters. The panel will adjudicate any related matters in accordance with relevant policies, and state their conclusions as to those matters in the same decision (see 2.7 above).

3.5.3 Notice of Disposition and Remedies. Subject to law, all parties to a formal complaint shall be promptly and contemporaneously provided with a copy of the panel’s decision, including a description of remedies, as well as a

statement as to their appeal rights.

3.6 Remedies Available. Violations of the Policy may result in the following remedies: (1) Measures similar in kind to the interim measures listed in 5 below, such as a one-way no contact order, or changing academic schedules or restricting access to activities or facilities, except that following a finding that a respondent violated the Policy, no burden of such measures will fall on a complainant. Such measures may be put into place pending appeals. (2) Warnings that do not become part of a student's individual permanent record, but which may be considered in future disciplinary proceedings. (3) Reprimands, i.e., more serious warnings that become part of a student's individual permanent record. (4) Disciplinary probation for a set period of time, during which further violations of the Policy or other HLS policies will be grounds for suspension or dismissal, and during which counseling and formal apology may be required. (5) Suspensions, which may be conditional or unconditional. Conditions may include without limitation counseling and formal apology. (6) Loss of campus housing or on-campus employment. (7) Restriction of access to space, resources, and activities. (8) Withholding of degree. (9) Dismissal or expulsion.

4 Appeals. Each party (respondent and complainant) may request an impartial appeal.

4.1 Appeal Board. All appeals will be decided by a faculty board consisting of the faculty members of the Administrative Board, each of whom shall have received training under the Policy (including Title IX and applicable confidentiality requirements) and these procedures. Members of the appeal board shall be impartial and unbiased, and shall disclose any real or reasonably perceived conflicts of interest, or recuse themselves, as appropriate.

4.2 Grounds for Appeal. Grounds for appeal consist of (1) substantial relevant information not presented and that reasonably could not have been presented during the adjudication; (2) an excessive or insufficient remedy; (3) procedural unfairness, procedural error, or misinterpretation of the Policy's substantive legal standards that substantially affected the outcome; or (4) a conclusion that, on the record as a whole, no reasonable panel could have reached the same outcome using the same evidentiary standard.

4.3 Appeal Outcomes. The appeal board may uphold the original decision and remedy if any; alter the remedy; or return the case to the adjudicatory panel for further proceedings.

4.4 Appeal Procedures. The deadline for appeals is the fifth business day after the party requesting the appeal has been notified of the adjudicatory panel's decision. Requests for an appeal shall be in writing to the Title IX Coordinator. If any party requests an appeal, all parties shall be notified of the appeal, how to participate, and the outcome. Appeals will ordinarily be on the written record. The appeal board may by majority vote request an oral presentation on specific issues identified by the appeal board. The appeal board will determine procedures for any such oral presentations, consistent with the principles in 3 above, including equal opportunity for all parties to participate.

5 Scope of and Process for Interim Measures. On receipt of a report or complaint concerning a possible Policy violation, a Title IX Coordinator will identify reasonable and appropriate interim measures to meet the goals stated in 1.6 above. Interim measures may be provided regardless of whether a formal complaint is filed. To the extent feasible given the nature of the relief, any person significantly affected by an interim measure may seek a prompt review of interim measures for abuse of discretion from all other HLS Title IX Coordinators, who shall either approve or revise the measures.

5.1 Types of Interim Measures. Interim measures may include: (1) Access to counseling services, and assistance in arranging an initial appointment; (2) Access to tutoring or other academic support, including rescheduling of or extra time for exams and assignments; (3) Changes in class schedules, including the ability to transfer course sections or withdraw from a course without penalty; (4) Change in work schedules or job assignments; (5) Changes in campus housing; (6) Provision of medical services; (7) "No contact" orders (administrative remedy designed to curtail or bar contact or communications between or among individuals); (8) Provision of escort services; (9) Any other measures consistent with law and HLS's educational mission that can be used to achieve the goals of the Policy. Degrees will ordinarily not be awarded to a respondent while a formal complaint under these procedures is pending.

5.2 Design of, Procedures for, and Monitoring of Interim Measures. Interim measures should be designed in a fair manner to meet the goals stated in 1.6 above and so as to minimize the impact on all affected, including any complainant and respondent in a formal case under these procedures. Requests for interim measures should be directed to one of the Title IX coordinators, who will collaborate with the HLS Dean of Students in monitoring or supervising the monitoring of the implementation of such measures and coordinating any response by HLS with other offices at Harvard

and with law enforcement if needed. All members of the HLS community are encouraged to report to the Title IX Coordinator any failure to abide by restrictions imposed by interim measures. Violations of such restrictions are violations of the Policy.

6 Title IX Committee. The Dean shall designate a standing committee (the **Title IX Committee**) consisting of tenured faculty (other than faculty members of the Administrative Board who serve as the appeals board under these procedures), based on suggestions from faculty members and reflecting to the extent feasible diversity in all its forms. This committee will be responsible for monitoring the use, timeliness and outcomes of informal resolutions (see 1.3.3 above); appropriate instructions regarding confidentiality (see 1.8 above); the method and conduct of investigations chosen by the Title IX Coordinator (see 2.2 above); after consultation with the Dean for Administration, setting reasonable regulations for compensation of attorneys on behalf of students (see 2.3 above); approving and periodically reviewing and if necessary revising adjudicator criteria (3.1 above); and reviewing generally the use of interim measures (see 5 above). The committee shall consult regularly with student liaisons designated by the student government in consultation with the Dean of Students. The Title IX Committee shall report to the Dean and the faculty at least once a year on any significant decisions of interpretation or implementation of the Policy and these procedures by the Title IX Unit, the appeal board, the adjudicators, or the investigators. The Title IX Committee will be kept fully informed by all participants about any decisions or practices that may be of concern to the faculty, will be advised by the faculty of matters that are of particular concern to faculty members, and will be free to propose to the faculty changes to or interpretations of these procedures. The Title IX Committee's manner of reporting and consultation will be designed to provide needed or legally required confidentiality of information it receives.

7 Records. The Title IX Coordinator shall maintain records of notices, communications, assessments, records, and reports specifically required under these Procedures, including under 2.3 (notice regarding rights to advisors and attorneys), 2.4.1 (initial assessments), 2.4.2 (investigation records), 3.3 (investigation reports), 3.4 (hearing transcripts), 3.5 (decisions), and 4 (appeals). Student disciplinary records will be maintained separately, in accordance with HLS policies. All records under this section shall be maintained at least as long as any legally required period.