

Complicated Process

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INTRODUCTION

I come to this important Title IX Conversation from a unique perspective. This is not because I was a federal judge for seventeen years. Rather it is because before my judgeship, I was a feminist litigator and a criminal defense lawyer. And from this vantage point, my concern for Title IX reform is inextricably linked to my concern for fair process for the accused.

I am a feminist. And for over twenty-four years, I litigated women's rights cases, as discussed in my memoir, *In Defense of Women*.¹ Rape is a crime to which many women—myself included—feel uniquely vulnerable. And this vulnerability was part of what galvanized feminists to push for change. I was a strong participant in what Michele Anderson describes as the progressive law reform of the 1980s—efforts to level the playing field so that rape victims were not subject to greater disabilities than any other crime victims. I worked to end retrograde definitions of rape, establish rape shield laws, eliminate the corroboration requirement, and redefine rape from a crime of violence to an assault on autonomy. Title IX of the Education Amendments of 1972² was the jewel in the crown of statutory reforms for second-wave feminism. After I left the bench to join Harvard Law School's faculty, I celebrated the student activists who were confronting the scourge of sexual assault, and the new resolve on the part of the Department of Education's Office for Civil Rights (OCR) to enforce the law.

But I had also been a criminal defense lawyer. I understood more than most how unfair the criminal process could be, and how critical the enforcement of a defendant's rights was to the integrity and reliability of the criminal justice system. I appreciated the stigma of the very accusation, which persists—especially today on the Internet—even if the accused is exonerated.

1. NANCY GERTNER, *IN DEFENSE OF WOMEN: MEMOIRS OF AN UNREPENTANT ADVOCATE* (2011).

2. 20 U.S.C. §§ 1681-1688 (2012).

And I understood the racial implications of rape accusations: the complex intersection of bias, stereotyping, and sex in the prosecution of this crime.

While I applauded OCR's vigorous Title IX enforcement, I was appalled when in 2014 Harvard University, like many other universities, promulgated new procedures that went far beyond what OCR required. Twenty-eight faculty members, I among them, protested, calling for reforms that would restore a fairer process. As a result, Harvard Law School (HLS) adopted separate policies with stronger protections for the accused. This story is worth exploring in this Title IX Conversation: not just for its own sake, but as a cautionary tale. It is a story about the risk of excessive zeal on all sides of this discussion, about how moderate reforms were mischaracterized, and about the dangers that arise when too little protection for the survivor swings too far in the opposite direction. Some have argued that the new HLS procedures wrongly seek to impose a criminal-law model upon campus adjudication. Similarly, they argue that it is a return to rape exceptionalism, singling out this crime for more stringent treatment than any other. It is neither; the HLS procedures provide a modicum of procedural protections, modifying traditional notions of due process to fit a university context. And rather than creating a procedure especially protective of those accused of sexual assault, the HLS procedures represented a reaction to the University's rape exceptionalism. Exceptional protections for the *victims* precipitated a reaction to insure fair process for the *accused*.

Finally, it is worth stepping back and reflecting on both the limits and the perils of Title IX adjudications. Title IX proceedings cannot meaningfully generate the norms of conduct surrounding sexual behavior on campus that are so desperately needed; they are necessarily confidential. And there are risks to the creation of what has been described as sex bureaucracy: government and university bodies regulating sex, on the one hand, and the encouragement of a greater police presence on campus, on the other. Meaningful social change has to address the causes of misconduct, the conditions that foster it, and the attitudes that legitimize it.

I. PROPOSED TITLE IX REFORMS AT HARVARD UNIVERSITY

When I began teaching full time in the fall of 2011, Title IX issues were coming to a head on a number of campuses. Women were protesting the lack of campus enforcement; OCR was putting pressure on universities through its "guidance" and the speeches of its new Assistant Secretary. In response, Harvard University promulgated new procedures for accusations of sexual assault and sexual harassment. The twenty-eight HLS professors publicly opposed those new policies, finding them to be more like an inquisitorial Star

Chamber than a just process. Our efforts were successful, and HLS adopted its own policies, independent of Harvard University's.³

While ostensibly in response to OCR's pressures, Harvard University's 2014 Sexual Harassment Policy and Procedures were released without OCR's approval.⁴ In significant respects, they went beyond OCR's guidance as spelled out in its 2011 "Dear Colleague" letter.⁵

OCR had clearly mandated a change in the burden of proof for accusations of sexual assault or harassment, requiring a preponderance of the evidence standard, with which Harvard now complied.⁶ The rationale was that the "preponderance" standard was all that was required for civil-rights or sexual-harassment cases litigated in the courts—so the same should be true for university procedures adjudicating sexual-assault allegations under Title IX. But the analogy was less than perfect. Preponderance is the standard in civil trials following months, if not years, of discovery through which each side finds out about the other's case, knows the evidence and the accusations, and has lawyers to ask the right questions. This was not so with the new Harvard regime. In that system, there were no lawyers, no meaningful sharing of information, and no hearings whatsoever.

Harvard's fact-finding process existed entirely within the four corners of the Title IX compliance office.⁷ The Title IX officer advised the complaining witness, determined if the case should be investigated, and proceeded to a formal or informal resolution. If there was a formal investigation, the same officer appointed and trained the "Investigative Team," which included an employee of the Title IX office and a designee of the school with which the accused was affiliated. The Team notified the accused of the written charges, but while the accused had only one week to respond, there was no statute of limitations for the complainant's accusations.⁸

The Team interviewed the parties and, if it deemed appropriate, additional witnesses.⁹ It issued a final report together with the Title IX officer, who had

3. For a fuller description of the history of the HLS procedures, see Nancy Gertner, *Sex, Lies and Justice*, American Prospect (Winter 2015), <http://prospect.org/article/sex-lies-and-justice> [<http://perma.cc/PB5W-QKKW>].

4. Harvard University could have waited for OCR approval before promulgating these procedures, as many schools have done.

5. Office of Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP'T EDUC. (Apr. 4, 2011) [hereinafter *DCL 2011*], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> [<http://perma.cc/X3CX-YKXG>].

6. *Id.* at 10-11.

7. *Procedures for Handling Complaints Involving Students Pursuant to the Sexual and Gender-Based Harassment Policy*, HARV. UNIV. 5 (2013), http://titleix.harvard.edu/files/title-ix/files/harvard_student_sexual_harassmnt_procedures.pdf [<http://perma.cc/GD67-CH96>].

8. *Id.* at 4.

9. *Id.*

been involved throughout, and provided recommendations concerning the appropriate sanctions to the individual schools. There was an appeal, but it was to that same Title IX officer and only available on narrow grounds. While the final sanction was determined by the individual school, the fact finding on which that sanction was based—this critical administrative report—could not be challenged.

To the twenty-eight HLS faculty members who signed the letter in opposition, this procedure did not remotely resemble a fair decision-making process.¹⁰ All of the functions of the sexual-assault disciplinary proceeding—“investigation, prosecution, fact-finding, and appellate review”—were in one office, the Title IX compliance office—hardly an impartial entity.¹¹ Nothing in the new procedure required anything like a hearing at which both sides offer testimony or cross-examine opposing witnesses. Nothing enabled the 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 was there any meaningful opportunity for discovery of the facts charged and the evidence on which it was based; the respondent received a copy of the accusations and a preliminary copy of the Team’s fact findings, to which he or she could quickly object—again, within seven days—but not all of the information gathered was necessarily included.

Nor were lawyers allowed to participate. The parties could have a “personal advisor” who could be a lawyer, but that advisor could not speak on his or her client’s behalf at the critical stage—namely, the Team’s interview.¹² The lawyers could only “ask to suspend the interviews briefly if they fe[lt] their advisees would benefit from a short break.”¹³ This procedure mirrored a defense lawyer’s role in a grand jury: huddling with his client in the hallway, but only if the client happened to decide they needed to confer.

Nothing in OCR’s 2011 “Dear Colleague” letter called for anything remotely like this proceeding. It called 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.”¹⁴

The letter of the twenty-eight faculty members led to an HLS-specific procedure. The procedure requires a more formal process: adjudicators from

10. Elizabeth Bartholet et al., *Rethink Harvard’s Sexual Harassment Policy*, BOSTON GLOBE (Oct. 15, 2014), <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqBM/story.html> [http://perma.cc/5SDT-LN7P].

11. *Id.*

12. *Procedures for Handling Complaints*, *supra* note 7, at 5.

13. *Id.*

14. *DCL* 2011, *supra* note 5, at 11 nn.26, 28.

outside the law school; reasonable time limits; and advisors, including lawyers, who are paid for by the school and are permitted to fully participate in the proceeding.¹⁵ If either side requests a formal hearing, one is scheduled.¹⁶ The Title IX investigator is charged with presenting the results of its investigation, but the parties may counter with witnesses and evidence.¹⁷ While the parties may ask questions of each other, that questioning is done through the panel chair who is obliged to submit all relevant questions.¹⁸ Closed-circuit television is available to allow questioning out of the physical presence of the other party.¹⁹ And the outcome of the proceeding can be appealed to an appellate board consisting of faculty members of the Administrative Board (the board charged with handling disciplinary violations).

II. COMPLICATED PROCESS

It should have come as no surprise that law professors would press for a fairer process than the one implemented by the university. But what was surprising was the reaction to these modest reforms, a reaction in part reflected in this Title IX Conversation by the *Yale Law Journal*.²⁰

First, the HLS procedures do not amount to imposing a criminal-law model on accusations of campus sexual assault. I agree with Nancy Cantalupo that a criminal model is inappropriate, because Title IX's purpose is fundamentally different than the criminal law: Title IX has an affirmative mission of promoting equal educational opportunity for all students.²¹ In addition, a college has the right to enforce norms of civility on its community, a higher standard of conduct than the criminal law. But the HLS procedures did not conflate the two; they did not engraft all of the protections of the Bill of Rights onto Title IX adjudications. The procedures sought to moderate the opposite tendency: the extent to which Harvard University's policy stripped the accused of even minimal procedural protections.

15. *HLS Sexual Harassment Resources and Procedures for Students*, HARV. L. SCH. 6 (2014), <http://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf> [<http://perma.cc/FN5P-U3Y2>].

16. *Id.* at 10.

17. *Id.*

18. *Id.* at 10-11.

19. *Id.*

20. See e.g., Greg Piper, "The Hunting Ground" Director Compares Due-Process Advocates to "Climate Change Deniers", COLLEGE FIX (Feb. 9, 2016), <http://www.thecollegefix.com/post/26149> [<http://perma.cc/VY2M-976W>].

21. Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 282 (2016) <http://www.yalelawjournal.org/forum/for-the-title-ix-civil-rights-movement-congratulations-and-cautions> [<http://perma.cc/H66E-BMZT>].

Second, the HLS reforms do not represent a return to what Michelle Anderson has called rape exceptionalism,²² mirroring “the traditional special burdens placed on rape prosecutions in the criminal law.”²³ No one cared, she suggests, when the disciplinary process involved plagiarism, hazing, nonsexual assault, or even race discrimination.²⁴ Those who seek the kinds of procedural protections that the HLS faculty sought need to “make the case for why respondents in sexual assault cases should enjoy uniquely favorable rights, which so far, they have not done.”²⁵

The reality, however, is that the HLS reforms were not about creating “uniquely favorable” rights for those accused of sexual assault or harassment. History is instructive here: it was OCR that created special procedures for sexual assault and sexual harassment, as part of its mission to eliminate sex discrimination in education.²⁶ It was OCR, through its guidance as well as its decision to publicize investigations and their resolutions, that pressured universities to adopt special protections for accusers. The (appropriate) concern about the trauma of confronting the accused, and about the delay occasioned by hearings, led to special victim-centered rules that victims of hazing, nonsexual assault, or race discrimination did not enjoy. In effect, exceptional protections for the *victims* precipitated a reaction to ensure fair process for the *accused*, as the letter from the twenty-eight faculty members suggests.

Third, a fair process does not mean a return to old shibboleths about rampant false accusations of rape, but nor does it ignore such concerns. For example, hearing officers, after OCR’s “Dear Colleague” letter, are instructed to take into account the neurobiology of sexual trauma. This means that when an accuser’s story is inconsistent, when her memory is fragmented, or when recall is slow or difficult, the hearing officer is supposed to understand that such evidence is consistent with the neurobiological impact of stress

22. Michelle Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. (forthcoming 2016) (manuscript at 46) (on file with author).

23. *Id.* at 35.

24. *Id.*

25. *Id.*

26. Office of Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP’T EDUC. (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<http://perma.cc/AHR6-8YF8>]. OCR notes that the “Dear Colleague” letter “[p]rovides guidance on the unique concerns that arise in sexual violence cases.” *Id.* at 1. And while a school may use the regular student disciplinary procedures, those procedures must meet the special requirements of Title IX. And inappropriate procedures can themselves generate Title IX accusations: “Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuated a hostile environment.” *DCL 2011, supra* note 5, at 12.

and emotional memories.²⁷ But the opposite is also true: the hearing officer should understand that such characteristics may also be consistent with lack of credibility, evasiveness, and contrivance. Likewise, evidence that the complainant did not express any objection to sex may be consistent with being “frozen in fear,” the neurobiological condition known as “tonic immobility.”²⁸ But it may also be consistent with second thoughts following a consensual encounter. It is surely traumatic for the accuser to repeat her story over again. However flawed, that is the way we test narratives of misconduct: questioning the witness and probing for contradictions or improbable accounts. While we know from the Innocence Project that even these “tests” can produce wrongful convictions, they are more likely to produce reliable results than a one-sided administrative proceeding with a single investigator.

Fourth, while the procedures for adjudicating sexual assault and sexual harassment are critical, there are obviously limits to any process, especially campus adjudications of sexual harassment and sexual assault. Adjudication typically generates norms of conduct—a civil or a criminal trial results in a “public judgment implementing state-generated regulatory norms.”²⁹ But norm generation is difficult in the context of sexual-assault cases in which the proceedings are confidential. And norm generation is especially critical here, given the pace at which sexual mores are changing and the profound generational and cultural divides surrounding them. The proper procedures for adjudicating these claims are the beginning, not the end, of the analysis. Even a perfect procedure cannot guarantee a favorable outcome for the victim; old attitudes die hard, and addressing those attitudes is where the movement should focus.

Fifth, there are other perils here. On the one hand, as Jeannie Suk and Jacob Gersen describe, there are dangers in inviting bureaucracies—university and governmental—to regulate not just rape and sexual violence but what the authors call “ordinary sex”: conduct in which consenting adults choose to participate.³⁰ There is, as they suggest, “a real contest about where the line between sex and sexual violence or harassment is, and as with all lines, there

27. See, for instance, the slides presented by Rebecca Campbell, Ph.D. (Professor of Psychology, Michigan State University) for the National Institute of Justice. Rebecca Campbell, *The Neurobiology of Sexual Assault*, NAT'L INST. JUST. (Dec. 3, 2012), <http://nij.gov/multimedia/presenter/presenter-campbell/Pages/welcome.aspx> [<http://perma.cc/PL3P-NNB3>]. The “Dear Colleague” letter called for special training and experience precisely along these lines, namely training in the effects of trauma including “neurobiological changes” that derive from rape.

28. *Id.*

29. Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1123 (2006).

30. Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. (forthcoming 2016) (manuscript at 1), http://web.law.columbia.edu/sites/default/files/microsites/law-theory-workshop/files/the_sex_bureaucracy_21.pdf [<http://perma.cc/2D5L-EG9V>].

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will be uncertainty over where some marginal cases fall.”³¹ An administrative framework—the “sex bureaucracy”—policing these lines with few procedural protections, and less than transparently, raises all of the questions about fairness that concerned the HLS faculty.

On the other hand, there are dangers at the opposite pole, such as greater police involvement in campus activities, as Nancy Cantalupo recognizes.³² Legislation has been proposed mandating that school officials refer all reports of sexual violence to law enforcement. This mandatory referral infantilizes women and reduces the incentive to report.³³ Minorities are rightly concerned about increasing the police presence on campuses, given the clear biases of law enforcement. And even due-process protections are insufficient in the face of what Michelle Anderson describes as the “draconian [reform] movements” that seek to increase criminal punishments and collateral consequences of convictions for sexual offenses.³⁴

CONCLUSION

The Title IX movement, OCR, and universities were right to focus on campus sexual assault and its real costs to equal education. But the HLS story helps us understand the other side of the issue. A deeply held concern for the victims of sexual assault led to special protections for their claims and interests. But special protections for the victims skewed the procedures against those accused of misconduct. The effort to restore the balance should be welcomed, not mischaracterized. Fair process should be urged for its own sake, but also for strategic reasons. If there is a widespread perception that the balance has tilted from no rights for victims to no fair process for the accused, there is risk of a backlash that no advocate should want to invite.

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31. *Id.* at 3.

32. Cantalupo, *supra* note 21, at 291.

33. *Id.* at 296.

34. Anderson, *supra* note 22, at 14.