



SEX, LIES, AND JUSTICE

Can we reconcile the belated attention to campus sexual assaults with due process?

BY NANCY GERTNER

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.

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 sec-

retary 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. gov. President Barack Obama, in a January 25, 2014, speech, assured his listeners that "anyone out there who has ever been assaulted:

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You are not alone. We have your back. I've got your back." Even the department's language changed, no longer referring antisepically 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. (At least one feminist scholar, Catharine MacKinnon, has expressed skepticism that a woman could ever voluntarily have sex, given the disparate power relations between men and women in society.) 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 accusa-

tion 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.

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*

How were colleges to deal with the entire sexual continuum, from violent rape to ambiguous, alcohol-fueled casual hookups?

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.

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,

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 decid-

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.

All the functions of the disciplinary proceeding—investigation, fact-finding, prosecution, and appellate review—are in the same compliance office.

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

ed 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.

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

IN THE SUMMER OF 2014, Harvard issued its new Sexual Harassment Policy and Procedures. They 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 work-

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



Saluting Survivors: President Obama embraces the campaign against campus sexual assault.

ing 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,

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. 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,"



Kicker To Come: The Phi Kappa Psi fraternity house at the University of Virginia has been the scene of numerous protests.

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. 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 Rubinfeld 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 unredressed. 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. Oberlin's policy 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

Feminists should be concerned about fair process to establish reliable findings of responsibility, and to prevent media claims of false accusations of rape.

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."

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. ■

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