January 28, 2019

John Doe
John Doe v. Yale University
3:16cv1380(AWT)
OCR Case No. 01-15-2204

Mr. Kenneth Marcus
Assistant Secretary for Civil Rights
Department of Education
Washington DC

Dear Mr. Marcus,

I am writing to you today to comment on your agency's proposed Title IX regulations. I want to commend you, Secretary DeVos, and former Acting Assistant Secretary Candice Jackson for your bravery and courage in the face of popular rage. The Obama Administration weaponized Title IX, without following procedure, to advance an extremist, unfair, dare I even say evil agenda, to maximize power within the radical feminist community, and to take revenge on men as a class. They created extra-judicial, government mandated sex tribunals on campus, to scrutinize with a microscope every sexual or even non-sexual interaction on campus, flouting established legal precedent, turning notions of burden of proof on its head, and introducing dubious theories of traumatization, to maximize power in the hands of one gender over another. This system created hostile educational environments for millions of male students, who could not participate in sexual activity, or sometimes even their educational program, without fear of false accusations against them.

I am writing to advise that while your proposed regulations go significantly in the direction of increasing fairness of process in Title IX tribunals, they do not go far enough. Colleges should not sit in judgment over their students' sex lives. I will explain more at length below.

(Please note: throughout my letter I address "accusers" and "accused" "female" or "women's" perspectives versus "men's" or "male" perspectives. This is not to suggest that all women are accusers and all men are accused. Nor is it meant to suggest that all women hold one view while all men hold another view. Reality is complicated and nuanced. But for simplicity's sake, I follow the norm. And the norm is that women's groups are advocating almost exclusively in one direction, and men's groups (to the extent that they even exist) advocate in another direction. Almost all accusers are women, and almost all accused are men. Accusations that don't follow this pattern are anomalous. In the media, on campus, and in activist organizations, increasing accusers' powers and rights is called empowering women. Increasing due process for the accused is labeled protecting men and rapists and hurting women. Because these stereotypes and narratives are so embedded in the activist sphere

and on the ground in practice, I label these perspectives with the broad brushes mentioned above.

Additonally, I refer throughout to issues with feminism. I am not referring to the notion of equal rights. I, and I suspect almost all Americans, are pro equal rights for all Americans. I am referring to a dominant form of contemporary feminism that operates through demonizing men in order to increase these feminists' societal power and/or increase and/or maintain their cash flows through victimhood mongering.)

My Experience

Personal experience is important to understanding how regulations will play out on the ground. I therefore share with you a brief summary of my experiences with Title IX, which led me to file a lawsuit and a civil rights complaint with OCR against Yale. Subsequently, I guided many men from Yale and elsewhere who had the unfortunate experience of being subject to character assassination by Title IX. Through my personal experiences undergoing several Title IX processes at Yale, through discovery in the legal sphere, through dealing with an OCR complaint against Yale, and through my mentorship to other accused male students, I gained extensive experience about how Title IX is implemented on campus. I have seen behind the veiled curtain, and it is not pretty. Title IX has been abused by radicals to implement a discriminatory and outrageous campaign against men and masculinity.

I graduated from Yale College in 2015. During my last year there, I was the subject of three separate Title IX complaints. While the public may instinctively judge this as a stigma on my character, when evaluated atomically, it is apparent that I was the victim in each complaint, and was severely victimized by Yale's discriminatory actions and deliberate manipulation of process. My experiences taught me that government can't expect interested and prejudiced parties to carry out justice. It is far better to limit schools' involvement to the bare necessities of what is necessary to enable conflicting parties to continue their education in peace.

The first complaint about me, the genesis of all subsequent complaints, was not over an act, but actually concerning the written word. When writing a paper on Plato's *Republic*, I critiqued Plato's conception of the tri-partite soul through the existence of rape. Plato had trouble finding a situation where Intellect conflicted with Desire for Power, and Lust. I offered rape as an example where I believed Intellect conflicted with Desire for Power and Lust.

For the mortal sin of merely *mentioning* the word "rape" in my paper, I was reported to the Title IX office. I was lectured by a senior Dean at Yale, who served as Title IX Coordinator, to not mention rape in my academic writing. I was then instructed to have no contact with the TA for the remainder of the semester, and instructed to attend sessions at the Mental Health Center. A report was generated for "sexual harassment" for this sin.

Think about that. Yale promises as part of its *Woodward Report* radical academic freedom and free speech guarantees. It says that if anybody hinders it, especially administrators, the suppressor of free speech must be expelled from the university. But instead of expelling this administrator, Yale went to great lengths to protect her, and punish me.

The immediate effect of this was a great chilling effect on my academic endeavors. From this point on I knew that I had to think twice about writing or talking about any subjectively provocative idea, or risk the wrath of the Title IX administrators. It wasn't even an issue of expressing an unpopular viewpoint. Yale made clear to me that I was not even allowed to *mention* these topics as part of my academic writing.

But this was just the beginning of my problems. Yale then used my paper to bring an additional complaint against me, from a woman I was seeing at the time. This woman, who knew I was called into the Title IX office, but did not know why, used this knowledge as a pretext to report a complaint against me. As emails showed, Yale was "deeply concerned" about my consternation, expressed in a private email to a chaplain, about being brought in over the paper. The GC had a meeting about my email expressing concerns about being called in over my writing, and had the same Title IX administrator type up a new complaint for the woman to file.

The woman would eventually recant her allegations. Yale still found me responsible, but would not explain what I had done wrong. Despite evidence that this woman had a history of acting violently against me when I refused to have sex with her, and of her consistently abusing me for sex, and despite her admissions to having yelled at me for hours and refusing to leave my apartment at three in the morning, Yale found me responsible for merely *asking* for sex when I felt I had no other way to get her to stop harassing me. She admitted to refusing to leave, she admitted to yelling at me, she admitted that I tried to disengage by going to bed in my bedroom, another room and that she followed me in, and she admitted to initiating the sexual encounter by getting on top of me. But in a case of reverse discrimination, I was found responsible for her aggression against me. Despite all the evidence to the contrary, Yale considered me an agentic actor, and considered her aggression to somehow be passive. As a man, I was held responsible for her actions. This regressive notion meant Yale found me responsible for merely asking her for sex after I exhausted all other possibilities of getting her to stop harassing me. In effect, then, Yale punished me, the victim of domestic abuse, by making me responsible for her aggression for discriminatory reasons: because I'm a man. This doubly victimized me, as they turned me from victim to aggressor all because of sex discrimination.

Yale then convinced another woman I was seeing at the time to participate in a claim against me, but luckily, I was able to prove her allegations false. Not merely for lack of evidence, but that she had fraudulently concocted a sexual interaction that never happened. When Yale realized they had shot themselves in the foot, they did

everything they could to manipulate the process to still have negative implications for me, and not for the false accuser. I subsequently filed a complaint against the accuser for fraud, but Yale dismissed it without investigation, despite having found that, on the evidence, her allegation never happened. Yale's manipulation of the process to protect my fraudulent accuser was the subject of my OCR complaint against Yale. Even after finding that the story never happened, Yale still issued a one way no contact order against me, and sympathized with the complainant's proven false "experience". They later gave her an award for "compassion to others" at her graduation.

The full extent of Yale's egregious behavior on this issue would be too extensive to document here. What I learned from Yale's behavior was that they granted the worst sort of activists and actors the power to do as they wanted to achieve their discriminatory gender war goals, with the full weight of Yale's resources behind them. This filled all sorts of institutional interests, as I will detail below.

I have been sexually assaulted and harassed several times in my life, and I can assert with full confidence that in my experience, being sexually assaulted (I'm not referring here to violent back-alley type rape, of course) is nowhere near as traumatic as facing false accusations of sexual assault under a discriminatory college regime. Government should therefore be just as interested, if not more so, in reigning in the current tyrannical Title IX regime as it should be in preventing sexual assault or harassment.

Supreme Court Precedent

In *Davis v. Monroe Board of Education*, the Supreme Court ruled that an elementary school was obligated to do what it could to stop a boy from incessantly bullying a girl when that harassment was severe, pervasive, and objectively offensive and significantly prevented that student from equally accessing their education. This was a landmark ruling, for it extended a school's obligation under Title IX not only to prevent its employees from discriminating against students, but also to prevent peer on peer harassment when it reached the above mentioned standard. The minority questioned the wisdom of this standard, at a most basic level, given that peer on peer harassment is not discrimination by the school, but rather by one of its students.

The proposed regulations, therefore, rightly limit Title IX obligations for schools to incidents that meet the above limitation of severe, pervasive and objectively offensive harassment that limits a student from participating in their educational program. The Obama administration wrongfully extended their enforcement of Title IX beyond the Supreme Court standard to include all "unwanted" sexual attentions. However, by mandating that colleges form rape tribunals, the proposed regulations go further than the Supreme Court ever intended their ruling to go.

Davis v. Monroe involved a situation that is commonly understood to be under a school's purview: stopping bullying among elementary aged students. Instituting sex courts on campus to monitor adult intimate relations, however, is an interpretive bridge too far, and should not be mandated, let alone allowed.

In the court's reasoning, schools are obligated to regulate behavior which they have control over, and which they are expected to regulate. The court explicitly excluded such regulation over adults: "We have observed, for example, "that the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Vernonia School Dist. J,7J* v. *Acton,* 515 U. S. 646, 655 (1995)."

Colleges' responsibilities to their students is not custodial and tutelary; their students are adults capable of regulating themselves. If they have disputes or conflicts with their peers they are capable of dealing with it themselves, or through legal means, like adults outside of school. While schools may opt to include policies against bullying on their campuses, they should not be mandated to do so by the government. And certainly, adults having sex is different than peer bulling among elementary aged children, where schools serve in *locus parentis*, and are obligated to regulate the behavior of the children in lieu of the parents. To extend this obligation to the intimate relations of adults, in their private lives, in fact, into the most intimate and private interactions adults have--to regulate their sex lives with a fine tooth comb, by school officials, is to extend the idea of a school's responsibilities well beyond the intent of the court. Schools should never be involved in the sex lives of their adult students, full stop.

But moreover, such intrusive oversight actually creates a reverse hostile environment that significantly impacts students' access to their education. For policies that police the sex lives of their students so punctiliously prevent students who want to have sex lives from accessing their education without fear of discipline. I speak here from my own experience: I am petrified of attending graduate school, knowing how little protection I have from false or wrongful accusations, given my experience at Yale College. Title IX policies mandating these draconian sex bureaucracies in fact create a severe, pervasive and objectively offensive hostile environment on campus for male students, by regulating their sex lives to such an unbearable extent that they have to decide between being sexually active and accessing an education.

If a school is to have any involvement between adults, it should be limited to cases where the police are involved, and should facilitate equal access for both students to their education until a criminal process resolves itself. This is not a controversial opinion. The response to a recent op-ed in the NYT, an established leftist publication, indicates this. The op-ed, by Dana Bolger of *Know Your Nine*, criticized this administration's efforts to create new Title IX regulations. 353 NYT subscribers commented on the article. Well over 95% of the responses criticized Bolger for her authoritarian instinct. Overwhelmingly, these commentators, almost all identifying

on the left, begrudgingly admitted their support for Secretary Devos on this issue, an incredulity, given their hatred for the Trump administration; but they go further than the current guidelines: they overwhelmingly go on to say that schools should not be holding rape tribunals.

Perhaps schools should regulate bullying or harassment in a similar way to the way Title VII mandates business stop harassment. But only when it is on campus bullying or harassment, of the type that schools have traditionally regulated, that directly impedes a student's access to their education; and only when it is sufficiently severe, pervasive and objectively offensive; not the mere effect that a one time occurrence now supposedly impedes a student from their education because they're scared of seeing that person around.

In fact, the Court in *Davis* said as much:

> Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on one peer harassment.

In short, the Court indicates that peer on peer Title IX liability is limited to situations where schools are expected to have disciplinary control over their students, like elementary school bullying. Peer on peer harassment in colleges, and even less so adult sex, was never intended to be regulated by the court, and therefore should not be subject to Title IX oversight.

What Colleges Should Be Doing

Colleges should not be holding sex tribunals. Full stop. They are not equipped to adjudicate such cases, students should not be subject to having to explain their intimate relations to their school administrators, and schools have no business pronouncing whether their students' sex lives are kosher or not. Sexual Assault is far too serious a business to leave to schools to adjudicate.

If we are to extend the Supreme Court's *Davis* ruling to colleges, it should be limited to harassment, of the bullying kind, that meets the court's definition of severe, pervasive, and objectively offensive harassment. Bullying that meets this criteria should be easy to adjudicate, and involves the kinds of behavior that schools have the means and experience of handling.

College is a time for exploration, both sexually and socially. Students must be given the leeway to explore and to *educate* themselves without constant concern of big brother waiting to pounce at every potential wrong or questionable wrong.

Moreover, men should not have to live in constant fear that any person they experiment with might later try to exact revenge on them through easily falsifiable accusations that require no evidence other than her credibility, and require no initial standard to initiate a burdensome and emotionally and financially trying process on them with potentially severe lifelong consequences.

What, then, should a school do if a rape or sexual assault allegation is made? It can offer mental, social and educational support services to the alleged victim. It can help walk her through making a criminal complaint. It can connect her to outside victim services. If the accused is amenable, they can agree not to contact each other. The school may also provide mediation. But under no circumstances should the accused be prevented from accessing his education without a criminal process indicating his guilt.

If a criminal process is under way, a school may feel that for the safety of their students they have to temporarily suspend the student. But schools should make every effort to accommodate the student so that the criminal process does not end up delaying their education for years. Schools should enable students to take up to two years of classes online, perhaps at other institutions, as they may allow for transfer students. In less severe instances, schools may bar someone undergoing a criminal process from attending social events, but they should still allow that person to attend classes, as a commuter. If for some reason a school cannot accommodate the student and temporarily suspends the student, the school should be mandated to reimburse that student, if that student is found not guilty, for the student's lost time and income.

There is, however, possibly a third way, as a compromise:

When I was first accused, I was told by Yale that their adjudicatory process was an educational process, not a punitive one, and that Yale is an educational institution and therefore educates. If I didn't take responsibility for the accusation, therefore, Yale's panelists would determine that Yale was not the place for me as I was not participating in the educational process. Of course, this claim could not have been further from the truth. Yale was not interested in education at all. In fact, they didn't even explain to me what I did wrong when they punished me. When I later emailed the Dean of Yale College asking for him to educate me about what I did wrong so I can improve myself, he told me: "Don't expect an answer." I never received one.

Let schools indeed live up to their role as educators. If we absolutely must institute sex tribunals, let them educate, not penalize. Let them hear the students out and propose an educational solution. Let them hire a mediator. Perhaps have a tribunal with a preponderance of evidence standard for this purpose. If a determination is made that the accused student likely violated the school's sexual misconduct policy, let the school inform the student what they believe the student did wrong. Perhaps allow schools, on this standard, to institute protective orders. But there should be no discipline.

Personally, I believe this, too, should not be allowed, as it conditions a student's desire for acquiring an education on their subjecting their sex lives to the school's intrusive invasion of their privacy. But if OCR wants to placate the activists through a middle path, perhaps this is one that could be taken.

If OCR determines schools must discipline—which would be a great tragedy—and allows schools to use the preponderance of the evidence—also a tragedy--then perhaps create a two-tiered process, where one determination is made at the preponderance level, and another one at the clear and convincing or beyond a reasonable doubt level. At the preponderance level a school only educates. Only at the higher level would a school impose discipline. This of course, is far from an ideal solution, but a compromise if OCR determines a school must impose discipline for sexual misconduct.

The Issues

As my experience shows, the issues with Title IX on campus runs much deeper than merely hot button topics like the standard of proof or cross examination. Every step of the process and its associated environment is subject to deeply embedded and omni-present discrimination. I will endeavor to enumerate some of these issues here, to clarify why OCR's proposals don't go far enough to eliminate the discriminatory environment in school's Title IX processes.

Interests

Schools interests are not justice. They therefore should not be tasked with carrying out justice. Schools interests stem from a conflation of sources, all of which are orthogonal to effecting just outcomes.

Liability to OCR

Schools first interest is to placate OCR. While OCR is currently constructing a middle ground, OCR has historically, and almost will certainly again in the future, be used as a cudgel against Title IX moderation. OCR's bureaucrats, and their administrators in Democratic administrations, have severely pressured schools to side with women's perspectives. Schools therefore know that they have to lean towards discriminating against men if they are to stay on OCR's good side long term.

Legal Liability

From a risk management perspective, schools are incentivized to discriminate against men. The development of Title IX and Title VII jurisprudence largely occurred from a female point of view. A sophisticated set of legal precedents and

perspectives have therefore developed to account for the female point of view when facing discrimination. Courts understand how women face discrimination, and value their experiences. A long history of precedent has established well tread legal perspectives, experiences, and outcomes for lawsuits filed by women. Alleged rape victims therefore also get a lot of money in court.

The male perspective, that of being falsely accused, and even that of sexual victimization, is not established in the courts, and was barely even a blip on the legal landscape until about five years ago. Courts still have not adjusted to this shifting landscape: they tend not to value male perspectives on how men face discrimination, and offer men less sympathy and lower payouts. Schools therefore know that they are less likely to be harmed by facing a subsequent lawsuit filed by a male student than they are by a lawsuit filed by a female student.

The Faculty

Faculty at schools tend to be hard left. Less than five percent of faculty at colleges across America identify as Republican. As part of their political ideology, faculty tend to be strong supporters of the feminist agenda. And in the last decade or so, this agenda has taken a strong anti-male world view. Colleges are therefore pressured by their faculty to find negative outcomes against men.

The Student Mob

Students these days are also strongly on the left and identify with the feminist perspective, which in the last decade or so had held some very strong anti-male worldviews. To placate their students, colleges are incentivized to find against men.

The Title IX Industrial Complex

Title IX administration does not happen in a vacuum. There is a large, well funded Title IX industry set up to train Title IX employees and help schools design Title IX policies as well as to advise schools on managing their Title IX risk. This industry is heavily invested in the dominant anti-male Title IX narrative, to keep the dollars flowing into their coffers.

The Feminist/Sexual Victimization Industrial Complex

The Title IX Industrial Complex is but one small component of the much larger feminist and sex victimization industrial complex. Billions of dollars flow nationwide to support women's issues. Just one law, VAWA, for example, is responsible for over $500,000,000 of funding towards female victimhood organizations. Barely a six figure sum, if even that, goes to support men's issues. This imbalance has led to a huge industry of sex victimization inflation, so as to keep dollars running in to support the tens of thousands of employees of the women's centers, women's studies programs, domestic abuse and violence centers and

advocacy groups. The imbalance is so great and pervasive that this industry has cornered the market by convincing the average American that feminism is about goodness and equality while Men's Rights Activists are evil and advocating for the subjugation of women. This could not be further from the truth. In fact, the reverse has largely become true. Many of these feminist groups now advocate for female supremacy, but are exceptionally skilled at masking their agenda through the use of victimization language. Male victims of sex abuse are routinely derided. And men often become the victims of these organizations' agendas. Fake statistics are routinely peddled to the point that the public believes them due to their pervasiveness.

The Media

The media is also a large part of the problem, and they work hand in hand with the Feminism industry. They create false statistics and write stories intended to whip up outrage. They almost always (but with some notable exceptions) side with the female perspective on this issue. Schools know that if they want to remain in good standing with the media, they have to come down hard on men on this issue.

Those Who Self Select to Serve in Title IX Offices

The administrators who self select to serve as Title IX Coordinators, administrators, or as panelists generally do so out of a deep identification with the contemporary feminist perspective. People without axes to grind, people who are indifferent to the issue, or people who don't buy into the feminist indoctrination on this issue tend not to volunteer or self select to work in Title IX. Title IX employees and agents are therefore not a "jury of one's peers," but rather in general are the most extreme of ideological feminist activists. Putting them in charge of developing and actuating schools' Title IX policies is like letting the inmates run the asylum. For them, Title IX is almost always a railroad to run men out of town. Men who get caught up in Title IX therefore have little hope of sympathy or understanding from neutral arbiters. They are set up to be tarred and feathered from the outset.

Ideology

Title IX operates under a contemporary weltanschauung of intersectionalism: the belief that the myriad identities through which a person is experiences the world is central to how oppressed they are by institutional and class power. The power of intersectionalism is that it inverts the hierarchy of allegedly oppressed groups. From the intersectional persepctive, a gay trans woman of color is more oppressed, and therefore more morally pure than a white man or anyone with less oppressed identity categories. While the initial perspective of intersectionalism, that it is worthwhile to view the world through the lenses of others, is worthwhile, intersectionalism has turned in the a battering ram of reverse racism and sexism, and is the operative contemporary ideology on campus. Consequently, the players in the Title IX sphere are generally motivated by a desire to readjust the moral social

calculus, through exacting revenge on men as a class, in order to bring justice to the groups allegedly oppressed by men.

Training

Title IX training combines all these influences to effect the worst outcome for men. Ideologically aggrieved students and faculty join together with liability conscious GC's and their self selecting ideologically bent administrators to use feminist industry produced training materials to reinforce the existing prejudices of their trainees so as to find the most possible accused men guilty of Title IX violations. They do this through a number of methods.

Statistics

One method of creating bias on the parts of Title IX agents is through indoctrinating them with false statistics. At Yale, for example, the Title IX trainer goes through a long list of women's victimization rates, but entirely ignores male victimization rates or the ways men are likely to be victimized. She falsely states that she only offers female victimization rates because male victimization rates are not known, ignoring well publicized data from the CDC, for example, to create the impression that men are not nearly as victimized as women.

She then incorporates a litany of false statistics, which are commonly repeated in the media, to buttress her female preferential agenda.

False statistic # 1

20-40% of women in higher education will be sexually assaulted during their time as undergraduates.

This is a false and misleading statistic, based on a study that used a very questionable methodology and is not representative of a national sample. This statistic is also often buttressed by quoting a 2015 study of students at elite universities which found rates of 20-35% sexual assault victimization rates among their students.

I participated in that 2015 study, and can vouch for its falsehood. Students were not asked whether they were sexually assaulted, but rather whether they received any unwanted sexual advances. Anyone who responded "yes" was then considered a victim of sexual assault. But this is ridiculous. I responded "yes" myself, but that does not mean I was sexually assaulted as the word is commonly understood. Indeed, most respondents asserted that these unwanted advances were not serious enough to report. This indicates, indeed, that they were not actually sexually assaulted. The trainer, however, dismissed these students' perspectives, stating that they could not be trusted to identify themselves as sexual assault victims because

internal conflict and shame prevents people from acknowledging their own victimhood. She, therefore, based on barebones reports, dismisses students' own experiences to declare them all sexual assault victims. Indeed, any unwanted kiss, wink, or dance in a nightclub becomes sexual assault according to this trainer. She conveniently ignores DOJ statistics that women in college are *less* likely to be sexually assaulted than their non college bound peers. But no one seems to care about women not in college, probably because they're poor.

False statistic # 2

Only 2-8 percent of accusations are false.

This one is also peddled over and over again ad nauseum, but is also blatantly false. The study they extrapolate this number from, an aggregation study by David Lisak of other studies on false reporting, does not state this. It also ignores studies whose numbers are not desirable, like studies of Illinois and Great Britain that indicate as much as 40-60% of accusations may be false. But even Lisak's own conclusion does not state this. Rather, he states that of accusations made to the police (where false reporting is a felony), only 3-11 percent of accusations are determined by police to be false. But by this measure, RAINN's statistic that only 2-3% of rapists are found guilty could be interpreted to mean only 2-3% of rape accusations are true. Indeed, no one knows how many accusations are true or false, only how many are proven to be true or false. Lisak's study only addresses the latter. The vast majority, of course, are unknown whether they are true or false. And in college cases, where false accusers are protected and even lauded, and little effort is needed to make an accusation, false reporting rates are likely much higher. The feminist industrial complex deliberately distorts this by conflating the percentage of proven false allegations with the number of possibly false allegations, which, again, is unknown.

False statistic # 3

Rape on campus is committed by serial offenders.

This statistic, also extrapolated by a David Lisak study, is used to justify expelling accused students, because they are likely to reoffend, thereby creating dangerous environments for women on campus. This is also a misleading extrapolation from one study, which was taken from an urban campus by questioning respondents who may not even have been college students. Indeed, this statistic is used to stoke such fear that Melanie Boyd, Yale's trainer, states that at any time, there are *1000 rapists on Yale's campus* (of course, all of them presumed male). This would mean, according to Boyd, that almost 1 out of 5 men on Yale's campus are rapists. This is intended to scare Title IX trainees into thinking they must eliminate this pervasive scourge by expelling any accused man from campus.

Trauma Theory

The next framework that is used in training to discriminate against the accused is trauma theory. The purpose of trauma theory is to upend traditional notions of honesty and credibility to always conclude that an accuser is credible. For example, the more times an accuser changes her story, the more reliable her testimony is. Of course, if she doesn't actually change her story, this is used to indicate her credibility. But if she changes her story, especially if she changes her story multiple times, this theory is then used, in an especially Orwellian catch 22, to *especially* show her credibility. For given that she would have no reason to lie, her change in story must be a result of the trauma she experienced, which muddled her memory of the alleged incident. The very notion that trauma serves to muddle memory is denied by many neuropsychologists, who say that trauma actually serves to sharpen memory of the traumatic event. But the trauma theorists rely on one academic who had made her career on this very flimsy notion.

Trauma theory goes further though, to account for every misstep of an accuser. For example, Yale trains its trainees that the *longer* it takes for an accuser to come forward, the more likely she is telling the truth, because trauma creates internal conflict, and the more trauma there is, the greater the conflict, which takes a longer time to process, thereby delaying the accusers' making the allegation.

An accuser therefore can never be found to be not credible. If she comes forward right away and sticks to her story, she is credible by traditional notions of credibility. If she takes years to come forward and changes her story and misremembers facts, this is only evidence of her trauma, and thereby evidence of her credibility and victimhood. An accused man, in this environment, can never win on credibility.

Trauma theory is then used to minimize procedural safeguards, too. It is used to prevent investigators from asking complainants prying questions, and is used to prevent cross-examination. It is used to always trust the complainant and always question the accused.

This is then combined with other dubious practices to seal the case against the accused. For example, as happened in my case, women who come forward are first assumed to be credible, because trauma theory combined with the false statistic that women don't make false accusations determines that she would only make the accusation if something traumatic had actually happened to her. The burden of proof is then flipped in practice. On the basis/evidence of the accusation alone, women accusers are judged to be credible because if nothing happened, why would she come forward?

Accused men, however, are judged to be guilty for "as defendants, they have every reason to lie about their innocence". So while in practice there may be a burden of proof, the burden of proof is actually nullified by this basic acrobatic logical assumption.

Similarly, the way accusations are made and defended against are then used against defendants. A woman's tears are used as evidence of her credibility, as an indication of her trauma. But a man's defenses are then used to indicate that he has an argumentative, belligerent attitude, which indicates his guilt, or, at the very least, that he is not educable and therefore does not belong on campus. But if an accused man can't make arguments for his innocence, than how is he supposed to defend himself?

According to Yale's deans he is not supposed to defend himself. When I was accused, I was told I had "to take responsibility" "and "be the gentleman in the room," for if I denied my guilt, that would be evidence that I didn't belong at Yale. For "Yale is an educational institution, not a judicial one, and if I wasn't showing that I was learning the lesson, then the panel would see that I didn't belong at Yale." I was therefore told I had to take responsibility and apologize for something I was actually the victim of.

Indeed, Yale goes so far as to train its panelists that any indication of intelligence is an indication of lack of credibility. For an intelligent person can know how to deliberately mislead the panel. Accusers at Yale, incredibly, are trained to cry and make their accusations unintelligible, so that they will gain credibility. Men who take the time to argue logically point by point are seen as pedantic, argumentative, and cunning and therefore lacking in credibility. How then can an accused man win a case based on credibility?

Indeed, Yale has never made a finding that a female accuser lacks credibility, for such a finding questions the experience of the accuser. The only way for an accused male to be found not responsible is for him to provide corroboration, or facts that call into doubt whether the woman is remembering correctly. The accuser is still assumed to be telling the truth, despite the evidence to the contrary, but "unfortunately", Yale determines that it cannot make a finding against the accused man, because it just doesn't have the facts to justify a finding. In this way, Yale never questions the authenticity of the experience of the accuser. All accusers are assumed to be telling the truth all the time, even when the facts directly contradict the accusation. In my case, when the accuser changed her story multiple times, she was still believed; when I provided facts that disproved her timeline, she was still believed. If a man, however, even slightly changes his story, or if there is even the slightest fact that questions his narrative, he is then found responsible, as happened in several high profiles cases at Yale. Indeed, Yale has found many accused men to have lied to the investigator in a Title IX process, and subsequently punished them. Yale has never found an accuser to have lied to an investigator, and has never punished an accuser for lying to the investigator. This is not for lack of accusers' lying, for in my personal case, both accusers indisputably lied. The first admitted to it, while the second had material evidence contradicting her claims beyond a shadow of a doubt. Nevertheless they continued to be considered credible and were even offered continued protections by Yale.

What This Means in Practice

Because Yale will never doubt the credibility of the accuser, the only way for an accused man to be found not responsible is to provide material evidence that the alleged incident could not have happened, beyond a reasonable doubt. This means that if a man cannot provide facts that corroborate his account, he will automatically be found guilty, because the accuser always has credibility, never the accused man. Indeed, David Post, Yale's sex czar, once boasted in the Wall Street Journal that Yale's findings indicate fairness of process because only 80% of complaints lead to guilty findings. Besides for the horridness of an 80% rate of guilt finding, and the irony of that number being used to show *fairness* of process, this number actually bears out how Yale arrives at number. Of the cases decided on credibility, 100% go to the accuser. Of the cases decided on corroboration, only those cases where the accused is lucky enough to have corroborating evidence that is at least manifestly clear and convincing is he exonerated. This leads to a roughly 20% not responsible finding rate.

But even when not found responsible, giving the accuser automatic credibility leads to discrimination. For example, in my case, Yale ignored all the holes in her story as well as the evidence that proved she was an indisputable liar, so as not to impugn the accuser's credibility, and instead rested the not responsible finding on one cherry picked fact that corroborated my account against hers. But even so, she was still assumed to be credible. Yale therefore gave her the benefit of the doubt and sympathized "with her experience" in their findings, despite having just found that facts determined it more likely than not that her allegations never happened. This was then justified to continue a no contact order against me so as to enable my accuser to continue studying comfortably on campus. So even after I "won" I was still penalized with a one way no contact order, against a person I had shown had falsely accused me of accusations which included stalking. This thereby prevented me from staying on campus, as she was given the power to continue harassing me through false accusations of me breaking the no contact order she had against me. Of course, this situation was not recognized by Yale as creating a hostile educational environment for me on campus, when in reality it prevented me from continuing participating in Yale's educational program.

<u>Definitions and Affirmative Consent</u>

Another issue with the the Title IX environment are the definitions used to prosecute the cases. As explained above with regard to statistics, any time a student reported an unwelcome advance, this was assumed to be sexual assault, which simply belies common sense understanding of sexual assault. As explained by Jeannie Suk of Harvard Law, bureaucratic creep also includes a definition creep, which expands the spectrum of behavior included within the proscribed and regulated category. Words that mean one thing to lay people and jurists are then expanded beyond all sensibility to include almost all kinds of behavior.

So for example, the paper I wrote on rape, where I analyzed rape abstractly from an academic perspective, was interpreted as "an unwelcome sexual behavior." A kiss between two lovers that one is not interested in at the moment becomes "sexual assault." Sending flowers to someone is considered stalking, and sending a text message asking how someone is doing is considered harassment via electronic media. I know, because this happened to me. I was accused of non-consensual hand holding with a date at a play, of later sending her non-consensual flowers, and of harassing her via 5 text messages I sent her, over a period of two months, asking how she was doing. Walking down my block on the way to campus and passing the Starbucks on my corner became an allegation of stalking, as did hanging out in my friend's suite in her dormitory. I could not do anything without it becoming an accusation. My spooning my sex partner after sex became an accusation of "restraint" and my merely asking to have sex with my long term sex partner was interpreted by Yale as "initiating sexual activity" and therefore punishable.

When combined with Affirmative Consent, these redefinitions become even more intolerable. While affirmative consent makes sense when gauging overt sexual initiatives between strangers, it is a ridiculous standard to apply to those in sexual relationships, or even to the typical college party. According to affirmative consent, waking up a lover with a kiss is sexual assault (as happened at Brandeis), as is every thrust if consent is not somehow re-communicated in between. With these definitions, there is no married person in this country who is not a rapist or serial sexual assaulter. One cannot use sexually tinged language with a lover without first gaining consent, and one cannot have sex in the dark because one cannot see if their partner is continuously consenting. And when OCR defined sexual harassment as any *unwelcome* advance of a sexual nature, even asking for consent became an act of harassment. Thus, one had to apparently ask if they can ask to ask, *reducto ad absurdum.* Affirmative consent policy is strategically deployed to be almost indefensible. Given that in our society men are expected to be the initiators and actors in sexual exchanges, it is a policy that is deployed with the knowledge that it will be used as a sword almost exclusively against men, while claiming to be gender neutral.

While it makes sense in theory that one should not assume they can act sexually with another without first gaining their consent, this policy is actually used as a surefire way to find men guilty. If there is a place for it to be used, that should perhaps be limited to situations where people who do not know each other, or have never been sexually involved, make a bold move; not kissing or the like; but rather a grab at someone's breasts or genitals, or for first time penetration. But affirmative consent has no place between sexual partners, other than as a sword to exact a spurned lover's vengeance, for it is an impossible standard to live by.

Moreover, the assumption of the purveyors of affirmative consent is that if the accused did nothing wrong, they have nothing to worry about. All they have to do is ask for consent before each act, and they'll be fine. Besides for the impossibility of living up to this standard consistently, it also has the effect of reversing the burden

of proof. With traditional standards of consent, an accuser must prove that consent was not given. But with affirmative consent, the accused must prove that consent was obtained, which is often difficult to prove in a he said she said situation. This standard, then, is used to flip the liberal notion of innocent until proven guilty by making an accused guilty until proven innocent. With affirmative consent, even if the accused received affirmative consent, he will have to prove he did so to be found not responsible; a very difficult standard to meet.

While OCR does the right thing by mandating that Title IX limits colleges liability to conditions that are severe pervasive and objectively offensive, OCR does not give a clear definition of what kind of behavior meets this definition. Definition expansion will thereby expand these terms to include much behavior not traditionally understood to be included by these terms. For example, if a man is receiving oral sex from a woman, and in the process grabs her breasts without receiving explicit permission, has he just assaulted her? Does this constitute severe, pervasive and objectively offensive behavior? If one rape constitutes pervasiveness, what's to say the above example doesn't also constitute pervasiveness? In short, without more detailed guidance on what behavior meets this criteria, schools will expand the definition of severe, pervasive and objectively offensive to include almost all unwanted sexual activity.

Due Process

There are many issues with due process that need to be clarified by the proposed regulations.

Standard of Evidence

Many schools use a preponderance of evidence standard to determine even serious accusations like ones that result in expulsion and tarnish a person's name for life. They rely on the Obama mandate that the preponderance standard is reasonable because the standard is used in civil courts.

This claim however, is untenable. First of all, when used in civil courts, the preponderance standard is the tip of an iceberg of other legal protections for the accused. In civil court, the accused has discovery rights, cross examination rights, rights to attorneys, sworn testimony, a jury of one's peers, a neutral judge, etc. etc., rights which don't currently exist in the college framework. Schools should therefore have to at least be convinced they are right when they expel or suspend someone. An intuition or inclination that they may be guilty is simply not sufficient for such a severe result.

Second, schools don't know how to apply the preponderance standard. At Yale, for example, there is no burden of proof. The panel is simply asked who they believe more. Whoever they believe more wins. No evidence is actually required to reach

this conclusion. Schools must be instructed that they must actually require material evidence to reach a conclusion.

Third, as discussed earlier, schools are heavily incentivized and prejudiced to decide on behalf of the accuser. When a case comes down to mere credibility, an accuser will almost always win, because nothing she does can detract from her credibility. Credibility, on its own, however, should never result in a guilty finding, certainly at the preponderance of evidence standard.

Because of the lack of all the other procedural safeguards, schools should be mandated to use the clear and convincing standard before they ruin someone's life.

Evidence

At Yale there is no right to evidence, nor mandated norms for the discovery process. Everything is pretty much at the whim of the school. Anonymous witnesses are allowed. OCR is on the right track to mandate that if a school investigates, it must share all evidence acquired with the parties, and name all witnesses. Additionally, parties should have discovery nights, and have the right to call an external investigator to review electronic records, as parties to a lawsuit would be entitled to.

Advisers

Schools must make equally trained and capable advisers available for both parties. When I was accused, I was illegally told I could not even talk to an attorney. Yale then assigned me an adviser who was not specially trained by the school. The accuser, on the other hand, was given an adviser who was not only specially trained and specialized in this area, but also participated in the same training the panelists and investigators received. Her adviser was therefore more knowledgeable on the subject and also more knowledgeable on how the panelists were trained to think. This was an unfair advantage.

Schools should also not be allowed to spy on the parties through their advisers. In my case, Yale used my adviser to spy on me and get feedback about me.

Schools should also not be able to mandate that advisers not be able to speak or write on behalf of the students. The only party that benefits from this rule is the school itself. No student should have to defend themself in such a process without the full participation of an attorney or advocate.

Criminal Processes

If a complainant files a complaint with the school as well as a simultaneous criminal complaint, the respondent should have a right to temporarily suspend the school process until the criminal process is completed.

If the complainant does not file a criminal complaint at the time of the school complaint, the complainant should have to sign some sort of release that she would not file a criminal complaint. Otherwise, school complaints can be used to circumvent the protections offered in criminal processes to defendants.

When I asked Yale what guarantee I had that the school process would not be used in such a way, their response was: "we believe that people are not going to abuse the process." Processes, however, get abused. That's the whole reason why we have protections for the accused in processes. Respondents must therefore have recourse to be able to defend themselves without worry that the school process is merely a proxy to circumvent defendant protections in a future criminal process.

Cross Examination

Students must absolutely have the right to cross examine their accuser, if only through a delegate, such as their lawyer. And during the cross examination process, each party should have a right to be present in the room, as physical presence makes it more difficult for the other party to lie. While we don't want to retraumatize a complainant, it is more important that we don't traumatize an innocent for life.

Equity

Another guideline pushed by the Obama administration, but that failed in practice, is equity. The Obama administration mandated that both the accuser and the accused have an equal opportunity to prove their case.

On the face of it, this is simply absurd. It places the cart before the horse, by assuming that the accuser is not lying. But an accused person is a human with rights too, and should have a right not to be harassed by Process. There therefore needs to be standards by which an accuser can initiate a process to harm another person through accusations. These include minimal facts, like time, place, and details of the accusation, and an initial determination that the accuser is likely to win on the merits of her accusation.

Second, in practice, the processes are never equal. For while, in the name of equity, protections were minimized for the accused, equity was not applied to they myriad protections offered to the complainant.

In typical jurisprudence a complaint is not equal; the accuser has burdens to meet that an accused doesn't. In Title IX, these burdens were eliminated to achieve equity. But then, despite this goal of equity, new protections were created to shield the *accuser*, so as to " encourage accusers to come forward." Equity, then, was merely a ploy to reverse the playing field. Instead of having a field tilted in favor of the accused, a new playing field was created, through the farcical use of "equity," to

shield accusers so as to encourage them to come forward. At Yale, for example, a complainant is protected at all steps of the process through unilateral no contact orders against the accused. She is also protected if she violates any of the school policies surrounding confidentiality or no contact. If she initiates contact, only the accused will be punished. If she violates confidentiality, she will not be punished. If she lies throughout the process, she will not be punished. This, of course, is not applied to the accused, who is harassed and punished by the administration for even a whiff of violation of any of the school policies. Yale's records show that it only has ever punished accused men for lying, never the accuser. When accusers have been shown to be lying, Yale does everything they could to protect her, even barring counter-complaints from ever being made, as happened to me.

Additionally, schools protect accusers when they harass or sexually violate the accused. Yale, for example, tells respondents that if they file a counter complaint, they could be disciplined for retaliation. Yale also ignores all counter-complaints of sexual misconduct made by respondents against accusers. Yale says it will determine whether these counter-allegations have any credibility only after the process is done, but then dismisses them at the end of the process for "having no factual basis," even when greater factual basis is supplied for the counter allegations than for the initial accusations or findings themselves.

This problem goes deeper. For example, if an accuser punches someone and the accused punches back, because of the protection for the accuser, the panel will isolate the return punch out of its context and determine that the respondent violated school policy. It does so because it cannot consider counter allegations against the accuser until after the process is completed. This protection for the accuser victimizes the accused, in that that accused cannot defend themselves against an accuser who is also the instigator. This has the bizarre result of protecting accuser harassers and making findings against the accused who act in self defense or who are actually the victims of the accuser, as happened in my case.

Discrimination

Asking schools to institute processes to prevent discrimination sounds good on paper, but in practice, this actually exponentially increases discrimination.

First of all, as explained elsewhere, the school, its administrators, its students, and the legal atmosphere all have incentives to discriminate.

But crucially, we are now in an environment where schools routinely practice reverse discrimination, due to the prevailing ideology of *intersectionalism*, which reigns on campus these days. Intersectionalism, briefly, is the belief that all of a person's minority status categories intersect to create a unique experience for how that person experiences oppression or "marginalization" from society or social political institutions.

While this is a great observation, and can be used as a compass for compassionate interaction with others who may experience this world differently, it has been turned into a religion on campuses, in a kind of reverse pyramid, where those who claim the most oppression sit on top and dictate morals to everyone else. Like a game of rock paper scissors, oppression categories are overly simplified into calcified groups that win based on what category beats the other, and prevail based largely on how influential the members of that minority group are. In this equation, for example, a gay, trans, black woman ranks higher than say a straight "cis" gendered, or normal gendered white woman. And white men sit at the very bottom of the pyramid, and are routinely held accountable for the misfortunes of all the groups piling on top of them. In this world, the woman card almost always trumps the man card. Therefore, if a man and woman mutually assault each other, it is the man who is responsible, for men are responsible for women's oppression.

Discriminatory intent is hard to isolate, and in sophisticated systems, discrimination can be pervasive but yet hidden behind "legitimate" concerns. This is how Harvard and Yale, for example, excluded Jewish students from their institutions for years. Because of the pervasiveness of the toxic effects of intersectionalism, and because schools are so incapable of judging a person by their character rather than by their skin, genitals, or sexual orientation, schools should absolutely not be delegated the task of adjudicating these matters.

The environment of campus sexual misconduct allegations is particularly prone to discriminatory motivations. For example, the trigger for an allegation is often not the conduct itself, but the status of the accuser and the accused vis-à-vis the larger community. "Creepiness" for example, is often simply a matter of the man not being handsome enough, not the content of his actions. Similarly, in a homogenously cultural environment, accusations are much more likely to be made against those who are different, or don't seem to belong. This is how bullying works: bullies pick on weaker people who don't quite belong. And especially with regretted sex, accusers are more likely to target marginalized men who don't quite fit in on campus. For this reason, many if not most accusations are disproportionately made against cultural and behavioral others. On a secular campus, this may mean religious people. On a religious campus, this may mean secular people. Like the lesson of *To Kill A Mockingbird*, accusations often pick up on people's fears regarding social class and identity, and allow society to vicariously achieve class based vindication. Therefore, international students, students from religious backgrounds, autistic students, etc. are the most likely to face Title IX complaints on campus. On some campuses, this may also mean racial or gender or sex non-conforming students might be targets. In this way, the Title IX tribunal system actually *creates* a system of discrimination and intolerance whereby "marginalized people" become the targets of unfair complaints because of the perception of otherness they radiate to their accusers and to the power-holders on campus.

This reality is but another reason why stronger burdens must be placed on initiating a process, and mandating a more rigorous system for finding guilt.

Hostile Environment

It is very important to take accusations of sexual assault or sexual harassment seriously. But in the current campus environment, taking every accusation seriously actually creates a sexually hostile environment for the accused.

Think about it. The traditional assumption is that when an accusation is made, a process must be started to sort out what happened. If a person is innocent, they should welcome that process and provide a vigorous defense, and let the truth be sorted out. But this only works if accusations are limited to incidents in which there is a high probability of the accusation being credible, and where there is a high probability of the accusation being judged fairly--both of which are lacking on campus.

On the contrary, the adjudication process is now used by bullies and harassers to exact revenge by process. One feminist talking point is that a process is by no means difficult, and if a person is found not responsible, nothing bad has happened to them. But this could not be further from the truth. Going through a sexual adjudication process as a defendant is a harrowing, traumatizing, life changing experience, for many reasons.

For one, merely going through a process is attached to a stigma. Headlines will read "John Doe was accused of sexual assault at X College." This is not neutral, this is life changing. Most people will never know or care that there was no adverse finding. All they will remember was the person was accused. In our current culture of guilty even after proven innocent, the person will still be assumed to be guilty.

The accuser can malign the accused across campus, and his reputation is in shambles which is likely to permanently remain that way. Fraternities at Yale, for example, expel any member merely for being the respondent in a Title IX process, even before a determination is made. Indeed, many law schools and graduate schools know this, and ask applicants if they have ever been involved in a disciplinary process, independent of whether an adverse finding was made. A respondent will then have to subject himself a second time to probing and suspicion by the graduate school they want to attend.

Moreover, no matter how innocent an accused is, there are no guarantees they will be found not responsible, especially in the current campus environment. Even the most innocent of people will then have to endure a lengthy process of uncertainty and anxiety as they worry about being found responsible unfairly.

A respondent may be temporarily suspended pending the outcome, which has its own stigma and domino effect, as their life is put on hold pending the outcome. No contact restrictions are always put in place, which creates stresses and hostile environments on campus for the respondent, and which subjects the respondent to further potential discipline or harassment if they are accused of violating the no contact orders.

The respondent may have to spend tens of thousands of dollars on attorneys and private investigators to help them prove their innocence. Most schools do not help respondents with these costs. For most students who are struggling financially to attend college, these additional costs can drown them in debt, leading to a domino effect which leads them into perpetual debt and may prevent them from continuing their lives and education.

Merely going through a process, then, can have life changing and traumatizing effects on the respondent. Unlike the judicial system, which has evidentiary burdens to initiate a process, schools by and large do not have any evidentiary burden to initiate a process other than the accuser's word. Judicial processes also have other protocols in place, to protect the accused from frivolous or malicious accusations. Colleges, for example, as explained above, do not punish false accusers. False accusers therefore know they can abuse the process without fear of recrimination. There is no discovery process on campus, and false accusers therefore do not have to subject themselves to unwanted in depth scrutiny, which helps them control their false narrative. Women can then gang up on a guy they dislike, file multiple complaints, and drown the respondent in procedural hell as he fights multiple processes, while his highest hope can only be that perhaps he'll come out the other side with no responsibility finding; but he'll still have no contact orders, his reputation will be shattered, he'll be broke, traumatized, and have semesters gone. If word got out on campus, he'll likely never be able to socialize again without subjecting himself to further false accusations triggered by his now notorious reputation on campus.

In short, if campuses are to have procedures for sex offenses, there must be safeguards to prevent the accused from harassment by process.

False Accusers

If colleges have to discipline students for sexual harassment, colleges must also be mandated to punish false accusers of sexual misconduct or harassment.

In my complaint to OCR, I alleged that Yale failed to punish my proven false accuser, and that this failure was a violation of my Title IX rights. OCR dismissed my complaint for failing to state a violation of Title IX.

This cannot stand.

Courts have understood that sexual harassment constitutes sex discrimination under Title IX. The reason for this is that a sex harasser chooses his victim because of the sex of the victim. The victim therefore experiences discrimination on the basis of sex.

The same applies to false accusers. An accused person's sex is intrinsic to the nature of a sex misconduct accusation, for the accusation rests on the person's sexual interest in the accuser; their sexual interest is the basis of the complaint. For example, a man who is alleged to have raped a woman is accused because he is assumed to be a heterosexual; the same way a woman who experiences rape is discriminated on the basis of sex for if she wasn't a woman, she would not have been raped by that man. This is two sides of the same logical coin. One cannot constitute sex discrimination without the other also being considered sex discrimination.

That OCR did not consider this sex discrimination is a testament to how the history of Title IX and VII jurisprudence has evolved from a female perspective. Sexual harassment has traditionally been considered a women's issue. It has been extensively adjudicated, and is now easily recognizable to the courts and OCR as sex discrimination. False accusations, however, are sex discrimination from a traditionally male perspective. It therefore has not been extensively adjudicated by the courts, and has not been recognizable as sex discrimination by the courts and OCR. This has to change. OCR must include in the regulations that fraudulent or frivolous accusations of sexual misconduct constitute sex discrimination, and are therefore in violation of Title IX.

<u>They Myth of the Repeat Violator</u>

The proposed regulations state:

> We also propose adding paragraph (b)(2), stating *that when a recipient has actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint*; if the Title IX Coordinator files a formal complaint in response to such allegations, and the recipient follows procedures (including implementing any appropriate remedy where required) consistent with § 106.45 in response to the formal complaint, the recipient's response to the reports is not deliberately indifferent. (italics mine)

There is a stereotype operative in the sexual misconduct world that people who are accused by more than one woman are more likely to be predators or violators of sexual mores.

As described above, one source of this theory is the David Lisak study, which has been shown to be non-representative. But more importantly, the logic behind it just

doesn't add up. The assumption here is that several people making an allegation are less likely to be lying than one person making an allegation.

There is no basis to this logic however. In our current environment of sex panic, where a sex accusation places a huge stigma on the accused, multiple accusers may actually indicate that the accusations are *less* likely to be true than with one accuser.

For example, in the Columbia mattress case, one accuser, Emma Sulkowicz, had an obsession with the accused, and convinced multiple others to join her in making accusations against the accused. Given that people see those accused of sexual misconduct as deviant, or creepy, or perverse, they are likely to be prejudiced in how they construct their memories towards the accused, or in their attitudes towards the accused, and create false memories or act with deliberate malice to railroad the accused. This will be seen as justified, because the accused is a "deviant creep" who deserves to be banished and destroyed anyway.

Indeed, in my case, this is exactly what happened. The string of accusations against me all started because of a harmless paper I wrote. The paper created a stigma, a precedent, which was used by both Yale and my next accuser to start another process against me. This second process was then used by my next accuser and Yale to start a third process against me. Each accusation was false. But simply being called in for a paper I wrote created a social stigma and domino effect that I could never escape from, thereby creating a hostile environment on campus. And because I was stigmatized, I was seen as fair game by both Yale and ex lovers for abasement. Everything I did or didn't do then became fair game for another set of accusations.

Multiple accusations, therefore, should not be seen as indicative of guilt anymore than a single accusation, for it may actually be indicative that the accused is less likely to be a perpetrator, but rather has been designated as a target for abuse on campus, and is now the subject of gang abuse. Schools should therefore not be allowed to use multiple allegations against the accused as evidence of perpetration. Schools should definitely, therefore, also not be mandated to file a complaint in such a situation against the accused.

Extra-Judiciality

The entire notion of the government imposing extrajudicial mandates on non-government entities for actions that are normally the province of the criminal justice system, traditionally considered an exclusively government function, does not sit right with our constitutional system and liberal traditions. Whatever the government cannot itself do, it should not be able to impose on others. Therefore, if the government cannot itself find someone responsible for a crime without due process, it should not be able to impose such a process on a non-government entity, which has the effect of outsourcing a government responsibility, but without the restrictions the government must itself abide by.

Telling schools to hold rape tribunals, then, is absurd. Only government should be prosecuting violent crimes. Forcing others to hold such prosecutorial systems, but without the same standards a government entity must itself abide by, should be unconstitutional.

The activist response that when schools adjudicate rape schools don't adjudicate crimes, but rather civil violations like any other school disciplinary code, like restrictions against cheating, is absurd. Rape is not a mere civil dispute or school disciplinary infraction. Finding that someone had "non-consensual sex" implies a crime, not a mere civil offense. And schools should not be in the crime fighting business. For example, we would never expect, much less tolerate, schools investigating murders. The activists thereby weirdly claim rape is so severe that schools must regulate it, but not so severe, indeed, such that rape is merely a school disciplinary infraction; which in fact has the effect of trivializing rape. Rape is not mere theft; it is not like cheating or partying too late at night. It is a serious crime which should be regulated only by the government, and only with the strictest due process standards.

Necessary points of Clarification in the Proposed Regulations

The proposed regulations require some further elucidation.

> Moreover, the Department believes that teachers and local school leaders with unique knowledge of the school culture and student body are best positioned to make disciplinary decisions; thus, *unless the recipient's response to sexual harassment is clearly unreasonable in light of known circumstances, the Department will not second guess such decisions*. (italics mine)

OCR needs to clarify this position. Discrimination happens in myriad ways, and is often hidden in the details. While historically, the courts have not second guessed school decisions, this made sense where there was no obvious history or environment of discrimination. In Title IX, however, the discrimination is so omnipresent and embedded in all aspects of the reporting and adjudication process, that without oversight on substance, not just process, schools will be free to continue discriminating.

After all, what is to prevent a school from continually ignoring exculpatory evidence in favor of inculpatory evidence to perpetually find against the accused? OCR must therefore clarify what it means by "clearly unreasonable" to include conclusions that clearly and unreasonably exclude exculpatory evidence to find against the accused.

> Also consistent with feedback from stakeholders on the issue of supportive measures and to provide needed clarity, we (1) propose to define them as *non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available*, and without fee or charge, to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed; (italics mine)

OCR needs to clarify whether no contact orders are included in this provision. No Contact orders are by definition punitive. They restrict the respondent's access to campus and destroys the respondent's sense of security and access on campus. No contact orders are also designed to be punitive through their violation, for if a respondent is alleged to have violated a no contact order, they can be further disciplined. The no contact order therefore enables the complainant to further harass and control the respondent's life and access to their education. And if the complainant is a false accuser, this will give the accuser ammunition to continue filing false complaints against the respondent, only now for violating the no contact order. And of course, as explained earlier, no contact orders are not enforced against complainants, only against respondents. In my case, Yale perpetually harassed me for even provably false allegations of violating no contact orders, and protected my harassers when they violating theirs. Indeed, Yale, despite telling me that a no contact order was enforced equally, never actually sent the no contact order to the proven accuser. No contact orders should therefore always be considered punitive measures.

> During a complaint investigation or compliance review, *OCR's role is not to conduct a de novo review of the recipient's investigation and determination of responsibility for a particular respondent*. Rather, OCR's role is to determine whether a recipient has complied with Title IX and its implementing regulations. Thus, OCR will not find a recipient to have violated Title IX or this part solely because OCR may have weighed the evidence differently in a given case. (italics mine)

Earlier, OCR qualified this by including a "clearly unreasonable" clause. When a school weighs the evidence in a clearly unreasonable way, OCR should indeed review the schools determination; for otherwise, schools can discriminate and control the findings as they please.

> Thus*, a recipient may remove a student on an emergency basis* under § 106.44(c), but only to the extent that such removal conforms with the requirements of the IDEA, Section 504 and Title II of the ADA. (italics mine)

If a school may remove a student on an emergency basis, the school must be prepared to include full reimbursement of all tuitions and fees the student paid to attend the institution, as well as local living costs. The institution must also provide the removed person with basic living expenses until a determination is made, and if allowed to return to the school, until the person has returned to school. All accommodations must be made to allow that person to graduate on track and to live and socialize with his original cohort. Until a determination has been made, the accused must be considered innocent until proven guilty. A school, therefore, must make very effort to accommodate the student to enable the student to continue their educational process, as described above, and reimburse the student for any expenses incurred as part of their dislocation from campus.

> Because placing a non-student respondent on administrative leave does not implicate access to the recipient's education programs and activities in the same way that other respondent-focused measures might, and in light of the potentially negative impact of forcing a recipient to continue an active agency relationship with a respondent while accusations are being investigated, the Department concludes *that it is appropriate to allow recipients to temporarily put non-student employees on administrative leave pending an investigation*. (italics mine)

If a school puts an employee on leave pending an investigation, that leave must be *with pay*.

> Proposed § 106.45(b)(1)(iii) would address the problems that have arisen for complainants and respondents as a result of coordinators, investigators, and decision-makers making decisions based on bias by requiring recipients to fill such positions with individuals *free from bias or conflicts of interest*.

The department needs to clarify what constitutes bias or conflict of interest. As described above, Title IX departments are often staffed with activist students and faculty, often from departments specializing in gender based grievance theory. A faculty member from the Women's and Gender department, for example, who writes about how men persecute women through "patriarchy" is likely to have an axe to grind against the accused. In my case, for example, Yale used a prosecutor who specialized in looking for ways to find the accused guilty, and a therapist for victims of sexual abuse, who saw everything through the prism of the alleged victim of sex abuse. Both these individuals should have been considered biased. The same could be said about the individuals who sat on the panel, who were activists at the women's center or in the gender studies department, who volunteered to sit on Title IX tribunals as part of their advocacy for women. All these individuals should be considered biased with regards to participating in the Title IX adjudicatory process.

> The requirement to provide sufficient details (such as the identities of the parties involved in the incident, if known, the specific section of the recipient's code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient's code of conduct, and the date and location of the alleged incident, if known) applies whenever a formal complaint is filed against a respondent, whether the complaint is signed by the complainant or by the Title IX Coordinator. The qualifier "if known" reflects that in some cases, a complainant may not know details that ideally would be included in the written notice, such as the identity of the respondent, or the date or location of the incident.

Two things need to be addressed here. First of all, schools should have to provide a date and time for all allegations, unless something like drug use or kidnapping is involved where the date or time is simply unknowable.

In my case, an allegation was made that "sometime during the Spring semester, you sexually assaulted Jane." This allegation did not tell me the specific action I was alleged to have done, and did not tell me when, specifically, I was alleged to have done it. It thus became impossible, initially, to defend myself from such an allegation.

Second, Yale, as well as many other schools, have a policy whereby they do not tell the accused the accuser's version of the story until they hear the accused's version of the story. This way, the schools hope to get two independent stories, one from the accuser and one from the accused.

But schools should be prohibited from using this style of investigation, as it prevents the accused from adequately addressing the accusations against them. For without knowing the specific accusation, they may not be able to address the specific allegations against them, or even be able to respond to the allegations at all.

In my case, the accuser entirely made up a sexual encounter. I was told to recount my version of the story without knowing the exact date, or the details of the encounter. It therefore became impossible for me to provide "my version" of the story, as there was simply no story to recount. The investigator, trained that every accusation is true, therefore simply assumed that I was stalling or lying to her. But I wasn't. I simply could not respond to a made up story that had no date or details, and which had never occurred.

Schools, therefore, must be prohibited from using the investigatory method of withholding the specific details of the accusation against the accused, or proceeding with an investigation when a date and time could be known, but are simply not remembered. This allows accusers to abuse the process by initiating an

investigation even over the most frivolous of accusations, and prevents the accused from adequately responding to an accusation.

> Proposed § 106.45(b)(3) also states that if the conduct alleged by the complainant would not constitute sexual harassment as defined in § 106.30 even if proved or did not occur within the recipient's program or activity, *the recipient must terminate its grievance process with regard to that conduct;* (italics mine)

And later:

> Proposed § 106.45(b)(3) would set forth specific standards to govern investigations of formal complaints of sexual harassment. To ensure a recipient's resources are directed appropriately at handling complaints of sexual harassment, proposed paragraph (b)(3) would require recipients to dismiss a formal complaint or an allegation within a complaint without conducting an investigation if the alleged conduct, taken as true, is not sexual harassment as defined in the proposed regulations or if the conduct did not occur within the recipient's program or activity. This ensures that only conduct covered by Title IX is treated as a Title IX issue in a school's grievance process. *The Department emphasizes that a recipient remains free to respond to conduct that does not meet the Title IX definition of sexual harassment, or that did not occur within the recipient's program or activity, including by responding with supportive measures for the affected student or investigating the allegations through the recipient's student conduct code, but such decisions are left to the recipient's discretion in situations that do not involve conduct falling under Title IX's purview.* (italics mine)

In the initial paragraph, OCR states that when an allegation fails to state a violation that would meet the department's definition of sexual harassment, the school must terminate the investigation. In the second paragraph, OCR states that a school would be free to investigate the conduct under the school's general misconduct policies.

OCR needs to clarify what happens when a school investigates such conduct through its student conduct code. In such cases, do OCR's regulations not apply to the school, so that a school can investigate as it pleases? If this is the case, almost all sexual behavior can be investigated freely by schools without the protections for the accused detailed in these regulations. Schools would then be free to excessively regulate the sex of lives of their students and railroad accused students. As I described earlier, schools should not be involved in the private sex lives of their students at all as such involvement unnecessarily invades their private lives, can be

used by spurned lovers to retaliate against the other, and that such regulation necessarily creates a hostile environment for male students on campus.

OCR must therefore clarify how schools are to handle such gender and sex based accusations, and must clarify, if a school may indeed investigate such allegations, how the accused must be protected and whether the investigative process is beholden to Title IX regulations.

> Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, and not limit the choice of advisor or presence for either the complainant or respondent in any meeting or grievance proceeding; *however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties*; (italics mine)

Schools should not be allowed to regulate how an advisor may participate in the process. Schools initiated this restriction through arguing that this restriction allows for an educational process and not an adversarial one. But of course, this process was never meant or intended to be an educational process. The purpose of this restriction, of course, was to enable schools to control the process and make it easier for them to find against the respondent.

As I described above, schools use this restriction to tilt the process against the accused. When the accused makes arguments about their innocence, they are seen as belligerent, pedantic, or cunning. All the accuser needs to do is cry, and she has won the process. This is intended and is partially even a strategy of the activists who designed this provision, who know it is much more likely for an accusing woman to cry than an accused man, and who know that crying generally trumps logic and argumentation.

Schools therefore must be mandated to allow for the accused to have a representative respond for them, as the process is necessarily disciplinary, not educational, and is therefore necessarily adversarial. Students must also have this basic protection to even the playing field, so their arguments for their innocence are not seen, to their detriment, as indicative of the respondent's guilt by the very nature of being argumentative.

> With or without a hearing, all questioning must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if

> the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. The decision-maker must explain to the party proposing the questions any decision to exclude questions as not relevant;

This is too narrow a restriction. Prohibitions on questioning an accuser about her sexual history were instituted because if accusers were seen as promiscuous, they were somehow seen as not the victims of assault.

But questions about the accuser's sexual behavior or history can be relevant to the investigatory process. For example, a complainant's relationship with others during the period under investigation may be relevant to her credibility. For example, a complainant may say she was not interested in the accuser because she is not promiscuous. By making this statement, the accuser makes their promiscuity relevant to their credibility, and therefore relevant to the investigatory process.

There may be myriad versions of how the accuser's other sexual relationships or behaviors become relevant. If the accusers relationships with others or sexual history is relevant to her credibility or to the facts under investigation, they should be investigated.

For example, in my case, the accuser told me many details of her sexual exploits with others during the time we were interacting. She also decreased her communication with me shortly after starting to see somebody else. Moreover, some of her descriptions of her sexual behavior with others she was having sex with were relevant as to how she would have interacted sexually with me, given that she had such experiences and should therefore have had similar reactions.

Only questions designed to show the accuser is promiscuous, or " wanted it" should therefore be prohibited.

Additionally, Yale used this clause by OCR to preclude any evidence about the accusers state of mind. For example, I introduced evidence that the accuser suffered from a mental disorder (bipolar disorder) which includes symptoms of a persecution complex. Yale prohibited me from introducing this evidence, which was obviously relevant to her credibility.

OCR must therefore specify the limitation of introducing evidence about the accusers sexual history or private life, as many such details are relevant to the nature of the accusations and the credibility of the complainant.

Furthermore, if this limitation precludes a respondent investigating as to whether an accuser has a history of making false accusations, a respondent should be similarly protected from other accusations being introduced to show a pattern of

behavior. Each allegation should be judged on its merits, not on whether the respondent was accused or even found responsible for another accusation.

> Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, *that restricts the parties and advisors from downloading or copying the evidence,*

Why would OCR mandate that the parties not be allowed to download the evidence? On the contrary, the parties should have a right to download the evidence, to better enable to prepare their defense.

> Create an investigative report that fairly summarizes relevant evidence and, at least ten days prior to a hearing (if a hearing is required under § 106.45) or other time of determination regarding responsibility, provide a copy of the report to the parties for their review and written response.

Schools should be mandated that the respondent has the chance, during the investigative process, to respond to every allegation contained in the report. And if the accuser is allowed to reformulate their allegation in response to the accused's response, the respondent should be entitled to respond to that reformulation.

Additionally, if a respondent changes her allegation, that change must be noted in the investigative report.

Additionally, any changes or additions to the allegations after the investigative report has been filed must be voided. New allegations should not be allowed to be presented for the first time at the hearing.

In my case, Yale manipulated this part of the process to enable the accuser to change her allegations along the way without impacting her credibility. The investigators hid when the accuser changed her allegations, and did not notify me of all the allegations during the investigative process, until after the report came out. They then prevented me from filing a written response to the additional allegations at the hearing and restricted the amount of time I had to orally respond to the allegations. By doing this, Yale was able to control the narrative, to maintain the allusion of the accuser's credibility, and to prevent me from adequately responding to the allegations against me.

> In cases where the respondent is found not responsible, no remedies are required for the complainant, although a recipient may continue to offer *supportive measures* to either party. (italics mine)

OCR should clarify whether these supportive measures include protective orders. As I describe above, protective orders are necessarily punitive and should not be allowed against the will of the respondent after a not responsible finding.

> This protection against governmental restrictions on constitutional rights applies to all the civil rights laws that Department enforces, but we are adding paragraph (d) to the Title IX regulations because the issue arises frequently in the context of sexual harassment. When the Department enforces Title IX and its accompanying regulations, the constitutional rights of individuals involved in a recipient's grievance process will always be considered and protected.

To the contrary, schools accepting government money for its educational program should be mandated to provide students the same protections a government entity must provide. Including speech protection rights and due process. Taxpayers should not be funding institutions that do not provide its students the rights the government itself must provide.

> 2. *Applicability of provisions based on type of recipient or age of parties.* Some aspects of our proposed regulations, for instance, the provision regarding a safe harbor in the absence of a formal complaint in proposed § 106.44(b)(3) and the provision regarding written questions or cross-examination in proposed § 106.45(b)(3)(vi) and (vii), differ in applicability between institutions of higher education and elementary and secondary schools. We seek comment on whether our regulations should instead differentiate the applicability of these or other provisions on the basis of whether the complainant and respondent are 18 or over, in recognition of the fact that 18-year-olds are generally considered to be adults for many legal purposes.

As I described above, *Davis* implies that schools should not be responsible for peer on peer harassment at all. Period.

> 4. *Training.* The proposed rule would require recipients to ensure that Title IX Coordinators, investigators, and decision-makers receive training on the definition of sexual harassment, and on how to conduct an investigation and grievance process, including hearings, that protect the safety of students,

> ensures due process for all parties, and promotes accountability. The Department is interested in seeking comments from the public as to whether this requirement is adequate to ensure that recipients will provide necessary training to all appropriate individuals, including those at the elementary and secondary school level.

As I described above, schools' training can be extremely discriminatory, and include questionable training practices. Schools' Title IX training should be mandated to be made public to all students to prevent corrupt and discriminatory training programs.

Summary

- *Davis* indicates schools should not be mandated to regulate adult student behavior, and certainly not the private lives of their adult students. Schools liability in peer on peer harassment should be limited to bullying behavior that creates a severe, pervasive and objectively offensive environment that prevents a student from equally accessing their education, and only at the primary and secondary level, and only when it occurs on campus.

- Moreover, schools should not be *allowed* to regulate the private sex lives of their students, as it creates a hostile educational environment for their male students.

- If schools are to have any involvement it should be limited to assisting students to report to the police, and helping aggrieved students with their academic schedules, living quarters and perhaps mental health.

- Schools must be allowed to facilitate mediation between students.

- The current set up and recruiting of Title IX personnel makes the current Title IX regime on campus rotten to the core. The whole thing must be thrown out and redesigned so as to eliminate discriminatory administrators from the system.

- Title IX administrators must not be individuals who are associated with interests that see men as oppressors of women.

- Training must not engage in false statistic peddling, or in negative sex stereotypes. It must present sexual victimization facts about both sexes equally.

- Trauma theory should be banned.

- Stereotypes, like the crying woman or angry argumentative man should not be admissible.

- Training must train that the accused is innocent until proven guilty, and must train panelists as to how to properly assess burdens of proof, etc.

- Schools should not be allowed to tell students they must admit their guilt or they will be punished, or that the process is educational, not punitive.

- Credibility, lying and violations of school conduct codes must be assessed equally against the accuser and the accused. "Encouraging victims to come forward" should never be allowed to tilt the playing field in favor of complainants.

- When there is a finding of no responsibility, schools may not impose no contact orders or the like on the accused.

- Definition creep must be regulated.

- Affirmative consent standards must be banned, except in very limited circumstances.

- Schools should not be allowed to use the preponderance standard, and must rely on evidence beyond the mere say so of the accuser.

- The accused should have the right to know the what when and how they are being accused of, from the outset of the investigation.

- There must be a standard by which schools initiate investigations so as not to harass by process, and a motion to dismiss stage. If it is found the accuser harassed the accused by process, the school should have to compensate the accused for their time and stress.

- Before a finding, accommodations and restrictions must be extended equally to the accuser and the accused. Colleges must do everything in their power to allow the accused to continue their education.

- There must be an affirmative right to evidence and discovery.

- Because of the nature of discrimination in Title IX, school decisions that are prima facie outrageous should be subject to review by OCR.

- Advisors must be equally trained and accessible. Students must have access to lawyers. Advisors must be able to participate in the process and speak on behalf of their advisee. School appointed advisors must maintain an advisor advisee confidence.

- Where a criminal process is in motion, a student must be able to request a hiatus on the process until the criminal process concludes.

- When there is no criminal process, a school process should move forward only when the complainant makes some sort of guarantee that they will not later initiate a criminal complaint.

- Students have an absolute right to cross-examine their accuser, even if only through an advocate.

- Schools must punish false accusers.

- Successive accusations may not be taken as evidence of guilt, or even as cause to initiate a process.

- Schools should do everything in their power not to impede an accused student's educational access. If they do interim suspend a student, they must provide a way for that student to take classes. If the student was wrongfully accused, the school must reimburse the student for their time and pain.

- Schools must notify and provide equal access to all allegations made by the accuser in a timely manner. Accused students must have the opportunity to respond to all accusations at the same stage of the process in which the accusations were made. New allegations should not be allowed at the hearing.

- An accusers sexual history should be questioned when that sexual history is relevant to the credibility of the complainant, such as when she introduces facts or whether she interacted with others during the time in question such that those other sexual interactions become relevant to her credibility. Her sexual history should be off limits only when that sexual history is being used to show she is promiscuous or wanted it. Furthermore, this clause should not be interpreted to exclude her mental health or other personal issues from questioning.

- All changes in testimony must be documented by the investigator.

- *All this is only if a school has a process for complaints and is allowed by OCR to do so. As explained earlier, however, schools should not be monitoring their students' sex lives.*

- Schools accepting government money should have to provide the same rights to the accused that the government would have to provide, such as free speech and due process rights.

Thank you so much for your consideration.

Sincerely,
John Doe

Update December 2019: On August 15, 2019, Judge Jose Cabranes of the Second District Court of Appeals, ruled in No. 18-3089-cv JEFFREY MENAKER v. HOFSTRA UNIVERSITY that if a university does not prosecute a student who filed a false complaint of sexual misconduct, the university would be liable under Title IX or Title VII, depending on the status of the accused.

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