

# Harvard's new sexual harassment policy, democratic rights and the new right

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On October 15, 28 professors at Harvard Law School published a statement sharply criticizing the university's new sexual harassment policy announced this summer. The institution, the professors argued, "has adopted procedures for deciding cases of alleged sexual misconduct which lack the most basic elements of fairness and due process, [and] are overwhelmingly stacked against the accused."

The diverse group of law professors, which includes a number of distinguished legal scholars, pointed to three concerns in particular: the absence in the new procedures "of any adequate opportunity to discover the facts charged and to confront witnesses and present a defense at an adversary hearing"; "the lodging of the functions of investigation, prosecution, fact-finding, and appellate review in one office"—and one that essentially has an incentive to find instances of sexual harassment; and "the failure to ensure adequate representation for the accused, particularly for students unable to afford representation."

The public statement went on to assert that Harvard had adopted "a definition of sexual harassment that goes significantly beyond Title IX [of the federal Education Amendments of 1972, which prohibits discrimination on the basis of sex in educational institutions receiving federal aid] and Title VII [of the federal Civil Rights Act of 1964, which prohibits employers from discriminating against employees on the basis of sex, race, color, national origin and religion] law."

Furthermore, the professors accused the university of adopting rules "governing sexual conduct between students both of whom are impaired or incapacitated, rules which are starkly one-sided as between complainants and respondents, and entirely inadequate to address the complex issues in these unfortunate situations involving extreme use and abuse of alcohol and drugs by our students."

University officials dismissed the law professors' concerns out of hand.

However, a perusal of the new sexual harassment policy adopted by Harvard suggests that the professors' points are well taken and, if anything, understate the deeply unfair and undemocratic character of the new regulations.

Harvard's change in policy needs to be put in its proper context. The instigator here is the Obama administration, which has launched a well-publicized campaign against sexual assault on campuses. As part of this campaign, in April 2011, the Office for Civil Rights (OCR) in the US Department of Education issued a "Dear Colleague Letter" on student-on-student sexual harassment and sexual violence. The letter, according to the Department of Education, explained "a school's responsibility to respond promptly and effectively to sexual violence against students in accordance with the requirements of Title IX."

In January 2014 the administration established the "White House Task Force to Protect Students from Sexual Assault." President Barack Obama directed the Office of the Vice President of the United States and the White House Council on Women and Girls to "strengthen and address compliance issues and provide institutions with additional tools to respond to and address rape and sexual assault."

This effort has several related political purposes. The extremely right-wing character of the Obama administration—revealed in the massive bailing out of Wall Street, the failure to offer any relief to the unemployed and the poor, the ongoing and unprecedented assault on democratic rights, the policy of drone strikes and assassinations and the launching of new neo-colonial wars—has alienated masses of people in the US and around the world. Obama, the candidate of "change," is an increasingly—and well deservedly—reviled figure.

The campaign against sexual violence, the political calculation goes, which requires absolutely nothing from the Obama White House except a lot of hot air, can only improve its "progressive" image. So we are subjected to the obscenity of a president who personally presides over "kill lists" and who has authorized drone attacks that have killed thousands of civilians, including many women and children, mouthing off about "teaching young men in particular to show women the respect they deserve and to recognize sexual violence and be outraged by it."

Obama's sexual assault publicity stunt is directed in particular at shoring up support for the Democrats among those liberal and "left" layers of the upper middle class mesmerized by questions of personal identity. These layers, who are as indifferent to the conditions of the broad mass of the population as the White House itself and who support the administration's imperialist interventions abroad, are being rallied on issues of gender, sexual orientation and race.

As the Harvard law professors indicate in their statement, the university's decision to change its sexual harassment policy came about as the result of pressure from the Obama administration. The Department of Education's OCR announced May 1, 2014 that Harvard was one of the institutions (now 68 in total) receiving federal financial assistance "under investigation for possible violations of federal law over the handling of sexual violence and harassment complaints."

The OCR's menacing announcement, "U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations," was remarkably coy about specifics, explaining that the Department of Education would "not disclose any case-specific facts or details about the institutions under investigation." However, it went on to warn: "All colleges, and universities and K-12 schools receiving federal funds must comply with Title IX [sexual harassment is considered a type of sex discrimination]. Schools that violate the law and refuse to address the problems identified by OCR can lose federal funding or be referred to the U.S. Department of Justice for further action."

The Harvard policy unveiled July 2, whose implementation was no doubt sped up by the publication of the OCR list, but which had been under discussion for a year, is thus part of a nationwide trend (and not even the most draconian example at that).

The university's policy creates a new "central administrative body of trained investigators reporting to the Title IX officer" at Harvard, the Orwell-worthy "Office for Sexual and Gender-Based Dispute Resolution" (ODR). Its mandate is to investigate sexual and gender-based harassment

complaints against students.

The “Sexual and Gender-Based Harassment Policy” statement asserts that Harvard must provide programs regarding sexual or gender-based harassment, encourage reporting of statements, prevent incidents of harassment, make available services for those who have been affected by sexual harassment and provide methods of investigation and resolution to stop harassment and related actions. The statement adopts a thoroughly prosecutorial stance. It says next to nothing about the rights of the accused or the danger of false allegations. In fact, the word “right,” appropriately enough, does not appear at all in the five-page policy statement and appears only once in the eight pages of “Procedures for Handling Complaints.”

The policy defines sexual harassment as “unwelcome conduct of a sexual nature, including unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, graphic, or physical conduct of a sexual nature.”

The types of conduct that “may violate this Policy” include “Sexual advances, whether or not they involve physical touching.” The authors of the policy then tie themselves up in knots. “Conduct is unwelcome if a person (1) did not request or invite it and (2) regarded the unrequested or uninvited conduct as undesirable or offensive.” Although this is presumably not the intent of the policy, these provisions, if enforced, would effectively preclude new sexual relationships from ever occurring on the campus in Cambridge.

First of all, if an “advance,” one form of conduct under scrutiny here, has been requested or invited, it is no longer truly an “advance.” It is already a response to the other party’s conduct, whose request or invitation (verbal or nonverbal), in fact, is the initial advance. And how is the inviting or requesting party, or whomever the initiator is, to know if his or her invitation or request, or “advance,” is “welcome”? I doubt that anyone, including the authors of the policy, has the slightest idea, but the latter helpfully suggest that “Whether conduct is unwelcome is determined based on the totality of the circumstances, including various objective and subjective factors.”

In August, both houses of the California state legislature, in another reactionary act of political grandstanding, passed a so-called “Yes Means Yes” law, Senate Bill 967. Applicable to all colleges and universities accepting state financial aid, the measure requires “an affirmative, unambiguous and conscious decision” by each party to engage in sexual activity. Gov. Jerry Brown signed the bill into law in September.

The measure is both regressive and unenforceable, or its enforcement presents a moral and legal nightmare, with endless possibilities for vindictiveness and retribution. In essence, SB-967 treats all sexual activity as presumptively rape, unless the accused can “prove” that he or she obtained consent beforehand.

When asked how an innocent person was to prove he or she had indeed received consent, Assemblywoman Bonnie Lowenthal, Democrat-Long Beach, co-author of the bill, replied, “Your guess is as good as mine.”

An article at *Inside Higher Ed*, perhaps without meaning to, bluntly points to the anti-democratic content of the California law, which undermines presumption of innocence: “The proposal would shift the burden of proof in campus sexual assault cases in which the accused cites consent as the defense to those accused, rather than those making the allegations.”

The result of such measures will not be to reduce sexual assault, nor will they have the slightest impact on what the law professors legitimately refer to as “these unfortunate situations involving extreme use and abuse of alcohol and drugs.” Nor is that really their purpose.

In addition to providing an opportunity for various Democratic Party politicians to make cheap political hay, the sexual harassment policies and laws represent further encroachments on democratic and constitutional rights, increase the powers of the authorities, whether university or

government, and create new regulatory bodies that provide employment and activity for a good many middle class professionals.

The Association of Title IX Coordinators claims to have certified more than 2,000 Title IX Coordinators and investigators—whose job it is to look into sexual misconduct—since 2011. In addition, there are countless positions opening up for administrators, lawyers, consultants, therapists and others. One article on the subject refers to “the booming college sexual misconduct consulting industry”!

The new Harvard policy and procedures make disturbing reading. As the law professors point out, the Office for Sexual and Gender-Based Dispute Resolution is not an impartial body, its *reason for being* is to uncover and punish sexual misconduct. In its procedures, the ODR explains that alleged victims or “third parties who believe they are directly affected by the conduct of a Harvard student” are “encouraged to bring their concerns” to a relevant official. The image comes to mind of police officers standing outside their station importuning passersby to come in and register complaints.

An unstated notion that pervades the Harvard policy and procedures (and the arguments of their apologists) is that allegations of sexual harassment and assault are to be accepted as true on their face. Early on, the procedures note that “interim measures designed to support and protect the Initiating Party [the alleged victim or third party] or the University community may be considered or implemented at any time.” The assumption is that the complainant is a victim.

The procedure for lodging a formal complaint involves the Complainant, the accuser, filing a written report. The complaint is then assigned by the Title IX Officer to an investigator or Investigative Team, who determines whether or not to pursue an investigation. At this point, if an investigation is to go ahead, the accused is notified and has one week to respond in writing. The Team then holds individual interviews with the accused and the accuser, and with other witnesses. The accused is not permitted to bring a lawyer to such an interview, only a personal adviser who is not allowed to speak for or to the advisee during the meeting. This adviser “may view a redacted version of the complaint or other documents provided to the parties.”

At the conclusion of its investigation, the Team will make findings of fact, “applying a preponderance of the evidence standard, and determine based on those findings of fact whether there was a violation of the Policy.” In other words, the accused will be considered guilty if the evidence shows that the accusations are more probably true than not true. The “preponderance of the evidence” standard is the lowest standard of proof in the American legal system, far lower than the historic standard for the determination of guilt in criminal cases: “beyond a reasonable doubt.” The possibility for miscarriages of justice in such emotionally charged cases, involving young and often immature individuals, is obviously considerable.

Any appeal of the Team’s findings must be made to the Title IX Officer and “Disagreement with the Investigative Team’s findings or determination is not, by itself, a ground for appeal.”

What legal principles do we have here? First of all, presumption of innocence is all but thrown out. As the group of law professors suggest in their statement, the entire process is stacked against the accused. In this spirit, Vice President Joe Biden in an April 2014 speech asserted that school authorities “continue to ask questions like, ‘Well, what were you wearing? What did you say? What did you do?’ The real question is, what made him think that he had a right to do what he did?”

Second, there is no due process, including the lack of opportunity to question the alleged victim. An apologist for the new procedures argues on the “Our Harvard Can Do Better” web site that “these adjudications are not criminal in nature and therefore do not require the kind of protections we normally afford criminal defendants.” Wonderful reasoning. The only issue at hand, according to this supporter of the new

regulations, is which of the two parties will succeed “in his or her efforts to preserve his or her education.”

The argument here seems to be, “Well, we may well find against some innocent people, but the stakes are not especially high, so what’s all the commotion?” Castigating the *ancien régime* in France, the English novelist Smollett observed that its aristocratic officials operated “on the maxim of Herod, when he commanded the innocents to be murdered, hoping that the principal object of his cruelty would not escape in the general calamity.”

In reality, in this day and age, being suspended from or drummed out of Harvard (or nearly anywhere else) on sexual harassment charges, or even being reprimanded (perhaps even being investigated!), will likely ruin one’s life, certainly one’s professional life. True, it is not the same as spending decades behind bars, but that may come as small consolation if the accusation is false.

This same champion of democracy goes on, “The right to confront the accuser should not be a requirement for these hearings, as it would exert an enormous chilling effect on the lodging of such complaints. A huge percentage of rape victims are unwilling to confront the party who has caused such terrible humiliation, degradation and injury in their lives. Confrontation of the victim is not *necessary* as long as the accused’s questions can be submitted to the accuser, *and vice versa*.”

This comment seeks to do away with basic rights that go back centuries. Again, the accuser, by sleight of hand, becomes in the course of a single paragraph the “rape victim” who should not have to confront “the party who has caused such terrible humiliation, degradation and injury.” What about the possibility that the accused has done nothing and is entirely innocent? How is that possibility to be given proper weight?

The stakes are terribly high, in fact, and in 2014 alleged victims of sexual assault should be capable of answering appropriate, probing questions about the incident that might shed light on the truth or non-truth of their accusations. Such a procedure will not have “a chilling effect” on anyone who is on the level and, in any event, it is an elementary legal protection.

Sexual assault is a serious crime and should be punished, on or off campus. But it is absurd and unrealistic, and in its own way patronizing, to suggest that alleged victims belong to a category of human beings immune from lying—or making mistakes. We are told by the advocates of these anti-democratic procedures that false allegations of rape are very rare. Perhaps they are, but how rare is rare?

We do know that two of the more notorious American political crimes of the 20th century involved such false allegations, the lynching of the Jewish factory superintendent Leo Frank in Georgia in 1915 and the frame-up of the Scottsboro Boys in Alabama in 1931.

One might point out that wrongful sexual assault allegations, with social and political implications, figure prominently in a number of significant literary works, including Harper Lee’s *To Kill a Mockingbird*, John Steinbeck’s *Of Mice and Men* and E.M. Forster’s *A Passage to India*.

In writing *To Kill a Mockingbird*, Lee, a native Alabamian, was apparently influenced by both the Scottsboro case and, more immediately, the 1934 trial in Monroeville, Alabama (her hometown) of Walter Lett, a black former convict, accused of sexual assault by a poor white woman. Lett was initially sentenced to death, but his sentence was reduced to life, and he died in prison.

The image of black rapists was widely reproduced in Southern fiction and, later, film. False rape charges frequently grew out of attempts by white women to cover up clandestine consensual relationships. As one commentator, Diane Miller Sommerville, notes, “No one was more outspoken about the ‘racket’ of black rape than antilynching advocate [African American journalist] Ida B. Wells ... Wells attributed many accusations of black-on-white rape to black men betrayed by their white lovers, who, fearing the scorn of neighbors and family, cried rape.”

The Nazis in Germany made much of supposed Jewish “sexual advances” against “Aryan” women in their propaganda. Their weekly tabloid *Der Stürmer* [“The Attacker”] was obsessed with Jews as “sex offenders” who were “violators of the innocent.” Claudia Koonz, in *The Nazi Conscience*, notes that “a typical headline” in *Der Stürmer* “announced ‘Jewish Beast Rapes Viennese Girl,’” and that the Nazi publication “gave new meanings to verbs associated with sexual acts. ‘Rape’ (*Vergewältigung*) and ‘molestation’ (*Misbrauch*) normally applied to illegal sexual assault, but in *Der Stürmer* they referred to sexual relations between consulting adults of different races.”

In one notorious Nazi show trial, a Jewish businessman, Leo Katzenberger, was accused of having an affair with a young “Aryan” woman, under the so-called Racial Protection Law, and sentenced to death in 1942.

The historic pedigree of campaigns over sex crimes and sex offenders is politically sinister, generally part of an emotive appeal aimed at the most backward elements of the population in an effort to distract attention from burning social and political questions.

While officially sponsored racism and anti-Semitism may not be available in the same fashion today, is it not clear that new avenues for political provocation have been opened up by the current hysteria about rape?

One has only to remember that the effort to impeach President Bill Clinton was precipitated by the Paula Jones sexual harassment case, which was staged as or became part of an ultra-right provocation. And, in an even more relevant incident, WikiLeaks founder Julian Assange, who helped expose major war crimes committed by the US government and military, remains under “house arrest” in the Ecuadorian embassy in London because of a conspiracy organized around trumped-up sexual assault allegations.

The National Registry of Exonerations, a joint project of the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law, provides information “about every known exoneration in the United States since 1989—cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence.” It currently lists 1,467 men and women fortunate enough to be cleared. How many thousands of innocent people continue to languish in the American gulag?

Of the 1,467 exonerees, 261 had been falsely convicted of sexual assault. More innocent individuals had been imprisoned for sexual assault than for any other crime, except murder and robbery. Perjury or false accusation was involved in the conviction of some 85 of the 261, or one-third.

Many of the accused received decades-long sentences, in some cases, life sentences. Some had already served 10 or 20 years in prison by the time exculpatory evidence emerged.

These troubling facts and precedents—and there are many more—never enter into the thinking of those recklessly and relentlessly promoting regulations that erode or eliminate elemental democratic procedures, either on the campuses or beyond. What does such willful ignorance indicate? What social pressures are at work?

What sort of element is prepared to sacrifice basic constitutional rights in the name of a supposed crackdown on sexual harassment? In fact, only a privileged social layer, increasingly comfortable with authoritarian forms of rule, could be so cavalier.

Such people have been drawn closer and closer to the establishment through the medium of gender and racial politics in particular. The election of an African American to the White House in 2008 was a “transformative” moment for these affluent middle class strata; it accelerated their return to the bourgeois fold. Yet their activity still passes, or claims to pass, even in their own minds perhaps, for some variety of “leftism.”

In reality, what has emerged is a highly dangerous form of right-wing politics, hiding behind the slogans of “human rights” and “women’s rights.” The political forces who favor doing away with elementary, long-standing rights on college campuses in many cases belong to the same camp that supported “humanitarian” intervention in Libya and Syria, defended the fascist-supported coup in Ukraine and opposes Russian “aggression.”

One of the most striking features of contemporary global politics is the alliance of powerful capitalist governments, media pundits and various “left” organizations making cynical use of women’s issues and gender violence to provide new opportunities, up to and including military operations, for imperialism to intervene around the globe.

A definite connection exists between the militaristic and repressive agenda of the Obama administration and the evolution of the upper-middle-class constituency from which he draws substantial political and financial support. This layer, as a whole, has become increasingly anti-democratic and pro-imperialist.

In fact, quite concretely, the panic about a “rape epidemic” and “rape culture” and the proposed remedies echo in a peculiar fashion the “war on terror” launched by the Bush administration and pursued, with tactical adjustments, by its successor.

In that case too, we are told that unprecedented, state of emergency conditions prevail in which constitutional and legal considerations should be pushed aside. Due process has also been thrown out the window by the Obama administration, in favor of a Title IX Officer ... pardon me, a president wielding quasi-dictatorial powers. The attorney general of the United States, Eric Holder, argued that the executive branch had unilateral power to function as judge, jury and executioner of those targeted for obliteration in drone strikes.

There is something remarkably inhumane about the pronouncements of the Office for Sexual and Gender-Based Dispute Resolution, “Our Harvard Can Do Better” and company. And it is particularly cruel when these attitudes and rules are imposed on university and college campuses, where young men and women are thrown together, where boundaries are not entirely clear, where experimentation inevitably goes on ...

The reader might consider the anti-democratic character of the regulations that have been put in place at Harvard, the oldest university in the US, and ask him- or herself: would such subjectively driven, self-centered elements hesitate an instant to use sexual misconduct allegations to destroy careers or conduct political and personal vendettas?

A sort of communalist warfare is taking place, an “ethnic cleansing” peculiar to frenzied sections of the American middle class, obsessed with obtaining an advantage.

The layer pushing for more repressive legislation and regulation, aided by the pseudo-left who give this foul drive a “socialist” tinge, is doing its best to turn the universities, or significant portions of them, into arenas in which they can wield real, intimidating power. Woe betide anyone who comes under their political-administrative thumb!

The Harvard policy is reactionary and dangerous, and should be rejected by every student and faculty member with an interest in or feeling for democratic rights and social progress.



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