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USING TITLE IX'S "PROMPT AND EQUITABLE" HEARING REQUIREMENTS TO FORCE SCHOOLS TO PROVIDE FAIR JUDICIAL PROCEEDINGS TO REDRESS SEXUAL ASSAULT ON CAMPUS

In the spring of 2002, Harvard adopted a new policy requiring victims of peer-to-peer sexual assault to produce "sufficient independent corroboration" as a prerequisite to a full investigation and adjudication of their complaints.

Prior to the adoption of this new policy, Harvard's student-based Coalition Against Sexual Violence (CASV) had been working in good faith with administrators toward the improvement of Harvard's sexual assault policy. Students were angry and frustrated that Harvard had consistently failed to credit the statements of women victims or take meaningful steps to redress sexual violence and instead, had developed a practice of discouraging the reporting and formal adjudication of rape cases on campus.

Despite students' effort to work with administrators, Harvard undertook a unilateral "study" of the issue in 2001 which culminated in the issuance of a report that recommended the adoption of a "sufficient independent corroboration" requirement in February 2002. CASV was neither involved in the study nor aware that a study was even underway.

When Harvard's new policy was announced in April 2002, students protested and expressed their outrage that Harvard would adopt a policy declaring the word of a woman insufficient to merit the allocation of the College's resources toward a fair and a meaningful investigation and resolution of a matter as serious as sexual assault. Students' demands that Harvard rescind the sexist and offensive new policy went unheeded.

Thus, in June 2002, an anonymous student filed a formal complaint with the Office for Civil Rights (OCR) at the Department of Education alleging that the "corroboration" deprived students of "prompt and equitable" grievance procedures as required by federal law.

OCR accepted the complaint for formal investigation in August 2002 and ruled it would investigate whether Harvard's new policy violated women students' constitutional right to an equal educational opportunity as guaranteed by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688.

Harvard filed its first response to the student's complaint in September 2002 and in mid-December 2002 posted a new page to its website characterizing the "sufficient independent corroboration" rule as a requirement of "supporting information" that would "corroborate" the student. Harvard wrote that such information might include an email sent by the victim to a friend, or a "prompt" report of the incident to a university official or student.

Ultimately, Harvard retracted its “corroboration” requirement altogether, causing OCR to rule that Harvard’s watered-down policy did not violate Title IX.

While OCR’s investigation generated the right result by forcing Harvard to retract its “corroboration” rule, it is unfortunate OCR did not issue a public ruling wherein it could have analyzed and commented on the impropriety of the rule and why it ran afoul of Title IX. Clarity on the scope and breadth of Title IX in this context is badly needed.

When the law in this area first started to evolve, threatened and actual litigation on behalf of accused students, but not victims, was common. Lawyers for men accused of rape injected themselves into college disciplinary proceedings demanding “due process” and arguing that accused students had constitutional liberty interests at stake. Thus, they argued, schools were obligated to provide accused students with various “due process” rights such as the right to counsel and the right to cross-examine witnesses.

That women students often saw themselves as aligned with the interests of the administration created a systemic disincentive for victims to seek legal counsel or demand their own due process rights. Simply put, victims saw no need for legal representation. This practice, in time, became the rule - and schools began to think about disciplinary proceedings in campus sexual assault cases as mini-criminal cases where quasi-criminal procedural rules should apply.

Of course, this is hardly what the law requires. As the Massachusetts Supreme Court held in *Schaer v. Brandeis*, accused students are entitled to no due process rights - even if a certain amount of due process is promised accused students as a matter of school policy. At the same time, student victims are entitled to some degree of due process and legal “fairness” because sexual assault is a form of gender discrimination and is prohibited by civil rights laws. Thus, colleges and universities have an affirmative obligation to provide fair and meaningful redress for student victims to ensure that all students enjoy an equal educational opportunity.

This article will demonstrate why Harvard's “corroboration” rule was discriminatory and discordant with the Department of Justice's regulations promulgated under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, insofar as the rule was in violation of Harvard’s obligation to “adopt and publish grievance procedures providing for prompt and equitable resolution of student” complaints. 28 C.F.R. § 54.135(b).

Put simply, Harvard’s “corroboration” rule violated the human rights of all its female students by adopting as a matter of policy that the word of a woman was insufficient to justify a full investigation and resolution of sexual violence complaints on campus.

I. HARVARD'S SEXUAL ASSAULT POLICY IS INEQUITABLE BECAUSE IT DISPROPORTIONATELY BURDENS STUDENTS WHO REPORT RAPE AND SEXUAL ASSAULT-BASED DISCRIMINATION WITH THE REQUIREMENT OF "SUFFICIENT INDEPENDENT CORROBORATION" OR "SUPPORTIVE INFORMATION" (AS WELL AS ADDITIONAL PROCEDURAL BURDENS) AS A PREREQUISITE TO A FULL INVESTIGATION AND ADJUDICATION OF THEIR COMPLAINT, WHILE VICTIMS OF OTHER FORMS OF DISCRIMINATION ARE ENTITLED TO A FULL INVESTIGATION AND REDRESS OF THEIR GRIEVANCES BASED ON THEIR WORD, ALONE.

By adopting a "corroboration" rule, Harvard's institutional procedures and remedies for cases of rape or sexual assault on the one hand and discrimination on the basis of race or sexual orientation, et. al., on the other, were arbitrarily inconsistent. Despite the administration's repeated assertions to the contrary,¹ Harvard failed to comply with federal mandates to develop harmonious policies and procedures to equitably protect the civil rights of *all* students.

- a). Only Sexual Assault-Based Discrimination Was Defined As A "Peer Dispute" Requiring Victims To Produce "Sufficient Independent Corroboration", And Comply With Other Burdensome Requirements, As a Prerequisite to a Full Investigation and Adjudicatory Grievance Procedure.

1. See, e.g., the "Resolution on Rights and Responsibilities," which was approved by the Faculty of Arts and Sciences on April 14, 1970 ("The rights of members of the University are not fundamentally different from those of other members of society. ... All members of the University have the right to press for action on matters of concern by any appropriate means. ... Moreover, it is the responsibility of all members of the academic community to maintain an atmosphere in which violations of rights are unlikely to occur and to develop processes by which these rights are fully assured. In particular, it is the responsibility of officers of administration and instruction to be alert to the needs of the University community; to give full and fair hearing to reasoned expressions of grievances; and to respond promptly and in good faith to such expressions and to widely expressed needs for change. In making decisions which concern the community as a whole or any part of the community, officers are expected to consult with those affected by the decisions. Failures to meet these responsibilities may be profoundly damaging to the life of the University. ... All members of the community--students and officers alike--should uphold the rights and responsibilities expressed in this Resolution if the University is to be characterized by mutual respect and trust. It is implicit in the language of the Statement on Rights and Responsibilities that intense personal harassment of such a character as to amount to grave disrespect for the dignity of others be regarded as an unacceptable violation of the personal rights on which the University is based.").

Harvard's official policy statement on rape and sexual assault provided that victims can "choose to initiate disciplinary or remedial action for sexual misconduct, including rape and sexual assault, through Harvard College", but only "*in accordance with the procedures for adjudicating peer disputes*, as established by the Faculty of Arts and Sciences" (emphasis supplied). In sharp contrast to the procedures for filing complaints of other forms of "discrimination," rape was defined as a "peer dispute," that *could not* be initiated "unless the allegations presented by the complaining party are supported by sufficient independent corroborating evidence." This rule was later amended to eliminate the requirement of "sufficiency" but "independent corroborating evidence" remained the standard.

This amended rule has been characterized as necessitating that a victim produce at the outset, a "detailed list" of "all sources of information that may help to corroborate the allegations".² While clearly an attempt to soften the original "independent corroborating evidence" language, the crux of the issue remained unchanged: *redress for "peer disputes" requires some degree of proof beyond the word of the victimized student*. This is fundamentally and substantively different from—and more burdensome than—that which is required for other forms of "discrimination."

Harvard specifically described rape and sexual assault as the *only* forms of discriminatory misconduct falling within the category of "peer disputes." In its official policy on "Peer Disputes,"³ Harvard referred students to a "*full*" list of resources for "sexual harassment, sexual assault, and rape."⁴ There was no similar language referring students to a "full" list of resources for race harassment, harassment based on ethnicity or sexual orientation or any other form of discrimination. To the contrary, while Harvard's anti-discrimination policy purported to prohibit with equal force, discrimination based on "race, color, sex, sexual orientation, religion, age, national or ethnic origin, political beliefs, veteran status, or disability", only sexual assault-based discrimination was singled-out for additional burdens as a "peer dispute". Harvard's policies and procedures for initiating, fully investigating, and adjudicating other forms of

2. "When a student chooses to present a peer dispute complaint to the Administrative Board, he or she will be asked to submit to the College a detailed written statement summarizing his or her complaint along with a descriptive list of all sources of information (persons, correspondence, records, actions taken, etc.) that may help to corroborate the allegations."

3. See http://www.college.harvard.edu/academic/adboard/peer_dispute_procedure.html.

4. The full title of this document is *How to Tell Someone: Responding to Sexual Harassment, Sexual Assault and Rape*.

discrimination, even between peers, demanded nothing more from students than the word of the victim.

Here it should be emphasized that Harvard had also taken the outrageous and unlawful position that rape and sexual assault are *not* “discrimination” despite clear federal guidelines to the contrary.⁵ Under federal civil rights laws, it is well-settled that even a *single* “incident” of sexual assault can amount to a claim of discrimination because the “frequency of the discriminatory conduct” is only one factor in the analysis⁶ and conduct is actionable if it is either “sufficiently severe *or* pervasive.”⁷ As the Ninth Circuit recently noted in an analogous Title VII context:

[r]ape is unquestionably among the most severe forms of sexual harassment. Being raped ... irrevocably alters the conditions of the victim’s work environment. It imports a profoundly serious level of abuse into a situation that, by law, must remain free of discrimination based on sex. Being raped is, at minimum, an act of discrimination based on sex.”⁸

Harvard’s discrimination policy made no effort to inform students that sexual misconduct may amount to sexual harassment. Indeed, nowhere was even the most serious and pervasive form of sexual violence defined as sexual harassment or discrimination. Instead, Harvard treated all sexual misconduct alike, as if a one-time nonconsensual touch of the buttocks is no different

5. 29 C.F.R. § 1604.11(g) (allowing an employer to be held liable for sexual discrimination for sexual assault, pursuant to § 703 of Title VII).

6. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993) (noting that “no single factor is required”).

7. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986). (emphasis added).

8. *Little v. Windermere Relocation, Inc.*, 301 F.3d 958 (9th Cir. 2001). *See also Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) (“Just as every murder is also a battery, every rape committed in the employment setting is also discrimination based on the employee’s sex.”). Thus, the employer’s reaction to a single serious episode may form the basis for a hostile work environment claim.

Other circuits have come to a similar conclusion. *See, e.g., Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) (noting that “even a single incident of sexual assault sufficiently alters the conditions of the victim’s employment and clearly creates an abusive work environment for purposes of Title VII liability”); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 464 (7th Cir. 1990) (holding that a single incident where supervisor picked up plaintiff and forced her face against his crotch impliedly considered to create hostile environment); *cf. DiCenso v. Cisneros*, 96 F.3d 1004, 1009 (7th Cir. 1996) (“[Although this single incident was insufficient, we do not] hold that a single incident of harassment never will support an actionable claim.”)

than a knife-facilitated rape committed by a serial rapist.

As "peer disputes", even the most serious rape cases were bogged down in procedural and substantive requirements that did not encumber other forms of discrimination. To file a "peer dispute" claim for sexual violence, a victim had to first file a "detailed list" of "supporting information" with the Secretary of the Advisory Board. Second, she had to wait while her attacker compiled his response to her complaint. Third, she had to wait while the Secretary reviewed the victim's list of "supportive information" and "collected any other statements or documents that help to corroborate the students' accounts." Fourth, she had to wait while the Secretary decided to either refer her complaint to the full Advisory Board or to a smaller investigative subcommittee—and the latter may take additional time to "interview the students involved, gather additional facts, and prepare a report of findings and recommendations to the full Board."

By way of contrast, complainants under Harvard's "discrimination" policies were given *immediate* access to the college's administrators and investigative and grievance procedures, *even if the discriminatory act alleged did not rise to the level of harassment* under federal law. This point deserves repeating. Women victims of serious or pervasive sexual and gender harassment had to jump through all the burdensome hurdles of the "peer dispute" policy, including the "corroboration" or "supporting information" requirement, while students reporting even a single verbal slur regarding their race or sexual orientation received immediate and meaningful intervention from high-ranking Harvard administrators based on their word alone.

Harvard's specific policy on race discrimination provided that any member of the college community who believed that he or she had been the target of harassment based on race⁹ could initiate a claim with "an appropriate advisor or administrator," *including an Assistant Dean* within the Dean of Students Office, who would then conduct a fair and confidential inquiry into the factual basis of the complaint. There was no requirement that the student produce "*corroboration*" or "*supportive information*." Similarly, with respect to harassment based on sexual orientation, Harvard's written policy as expressed by the Faculty Council in a statement issued in May 1981, "called upon Masters and Senior Tutors as well as Deans and other officers of administration to be alert to the need or opportunity to... assist students who report incidents of harassment or discrimination. ... Complaints can and should be vigorously investigated by the

9. According to Harvard's "Faculty Policy Statements on Harassment," "racial harassment [is defined] as actions on the part of an individual or group that demean or abuse another individual or group because of racial or ethnic background. Such actions may include, but are not restricted to, using racial epithets, making racially derogatory remarks, and using racial stereotypes."

appropriate agencies, including the Administrative Boards, the Committee on Rights and Responsibilities, the Commission of Inquiry, and individual officers of administration.” Again, there was no requirement of "corroboration" or "supportive information". In neither situation were these types of complaints described as “peer disputes” and at no place in any of Harvard’s policies on discrimination were students advised that they were obligated to produce "corroboration" or “supportive information” at any point in the investigative, reporting or adjudicatory process.

By virtue of this disparate system whereby certain forms of discrimination received preferential treatment from college officials, Harvard established policies that allowed some—*but not all*—types of sexual assault victims to avoid the new “peer dispute” hurdles. For example, if a gay male student was raped by another student, he could choose to report it as an act of “discrimination” based on sexual orientation and by doing so, avoid the added burdens imposed on non gay rape victims. Likewise, if a minority woman was raped, she could choose to define the assault as an act of discrimination based on race. Simply put, Harvard’s new policy created a hierarchy of victim “types” that was outrageously inequitable and unjust because it valued the word of some "types" of students more than others.

The special rules imposed on victims of sex-based discrimination added not only substantively inequitable burdens when compared to the streamlined and burden-free system accorded victims of other forms of discrimination, but significant delay such that the process was also not "prompt". In light of the college’s policies regarding other forms of discrimination, including that the word of a student alone was sufficient to initiate a full and vigorous investigation, Harvard’s policies for the initiation of rape and sexual assault-based discrimination claims could hardly be described as “prompt and equitable.”

b). Only Victims Of Sexual Assault-Based Discrimination Were Encouraged to Pursue Legal Remedies Outside the College In The First Instance

According to Harvard's official “Policy Statement on Rape, Sexual Assault, and Other Sexual Misconduct,” victims of sexual violence were “strongly encouraged to pursue legal remedies” before burdening the University’s internal disciplinary system. If criminal sexual assault charges were initiated against a student, Harvard would take no action until the criminal matter was resolved. Harvard's policy in this regard provided that if a sexual assault victim decided to pursue criminal charges against her attacker: “those processes take precedent over Administrative Board review and are ordinarily completed before the College disciplinary process

begins.” Victims of other forms of discrimination were not similarly "encouraged" to seek redress outside the college in the first instance. To the contrary, students who believed they had been subjected to other forms of discrimination were advised to "exhaust institutional routes for complaints before seeking legal redress under public law.”

Harvard has suggested that this disparity was justified because “[r]ape and sexual assault are felonies in the State of Massachusetts”. But this distinction makes no sense as other forms of discriminatory criminal conduct aimed at certain "types" of individuals are also felonies under Massachusetts Civil Rights Laws.

Harvard unabashedly and arbitrarily erected a standard by which certain "types" of students who suffered certain "forms" of discrimination were entitled to Harvard's immediate attention while others were guaranteed to receive neither prompt nor equitable redress, if they received redress at all. This unjustified lack of institutional respect for women victims of sexual assault-based discrimination should not have been tolerated, much less approved by the Faculty of Arts and Sciences.

II. HARVARD'S POLICY REQUIRING VICTIMS OF SEXUAL ASSAULT TO PRODUCE "CORROBORATION" OR "SUPPORTIVE INFORMATION" WAS INHERENTLY INEQUITABLE

It is beyond cavil that the requirement of "corroboration" is a relic of gendered discrimination,¹⁰ which evidences the fact that rape historically has been treated differently from other crimes based on mythical notions about women's credibility and the diminished value of their "word" alone as evidence in a court of law.¹¹

The United Nations has noted that corroboration requirements are a threat to international law and universal human rights, and that such rules have been all but eradicated in the developed

10. See Comment, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 Va. L. Rev. 1500, 1529-30 (1975) (corroboration rule stems from distrust of rape complainants).

11. See, e.g., *In re Pittsburgh Action Against Rape*, 489 Pa. 15, 49, 428 A.2d 126, 143 (1981) (Larsen, J., dissenting) (“[T]he criminal justice system . . . has not been a mere passive observer to the legal injustice perpetrated upon the rape victim, or to the legal bonanza afforded the rapist.”); Berger, *Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1, 9-10 (1977) (corroboration of victim's testimony was often required for rape but not for other criminal offenses, and unique law of rape stems from public distrust of rape victims).

world.¹² As one commentator pointed out:

In essence, corroboration was the legal entrenchment of distrust based on the premise that women lie. The formal commitment to non-corroboration and the exclusion of a cautionary requirement is a significant advance [toward] the confirmation of formal international standards of equality between the sexes. It validates the principle that formal definitions of crime are not sufficient to ensure accountability for infraction. The reformation of these rules in an international forum may prevent the victims of gendered crime from experiencing violation a second time. Equally, it may intensify a reevaluation of domestic evidentiary standards.”¹³

Harvard’s effort to backpedal from its original standard of “sufficient independent corroboration” to one of “supportive information” was of no consequence. The rule remained clear that the word of a student rape victim, alone, was inadequate to require anyone at Harvard to take meaningful steps to fully investigate and adjudicate a rape complaint.

It is simply unjust to subject sexual assault claims to the extra burden of “corroboration” or “supportive information,” irrespective of how the standard is defined or how much proof is required. Many—if not most—sexual assault cases are evidenced by nothing more than the word of the victim.¹⁴ Indeed, that sexual violence is particularly likely to occur in private, unlike other types of “peer disputes,” makes it *especially* inappropriate to require any degree of proof

12. See, e.g., International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991: Rules of Procedure and Evidence, U.N. Doc. IT/32 (1994), amended by U.N. Doc. IT/32/REV.1 (1994), U.N. Doc. IT/32/REV.2 (1994), and containing the most recent changes set out in U.N. Doc. IT/32/REV.3 (1995), *reprinted in* 5 Crim. L. F. 651 (1994), *and in* 33 I.L.M. 484 (1994) (without amendments). The International Tribunal does not require corroboration for any claims of rape or other sexual violence. See Rule of Evidence and Procedure 96(i). See generally C.P.M. Cleiren & M.E.M. Tijssen, *Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issues*, 5 Crim. L. F. 471, 505 (1994).

13. Fionnuala Ni Aolain, *Conceptualizing Violence: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War*, 60 Alb. L. Rev. 883, 901-02 (1997).

14. As the most private of crimes, rape and sexual violence rarely generate a public audience. See Susan Estrich, *Real Rape* 47 (1987); Comment, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 Va. L. Rev. 1500, 1529 (1975) (“there are rarely eyewitnesses to rape”).

beyond the word of the victim.¹⁵

To require more than the victim's word is to set up an arbitrary disciplinary system such that cases with "supportive information" will be fully and fairly processed, while those without such information will not. Students with minor complaints who happen to have an email message as "supporting information" are rewarded with a full investigation, bolstered by the authoritative might of the Administrative Board. Meanwhile, victims of the most serious rapes—who may have been too traumatized to tell anyone about the assault for weeks or months and report the assault to Harvard's officials without any hope of ever being able to produce a list of "supporting information"—could never make it over the first hurdle of the new procedures, and would never have a full investigation or access to the Administrative Board's disciplinary procedures.

To require corroboration or "supportive information" is to encourage the most dangerous of offenders to take extra steps to silence their victims. Perpetrators who know a school requires more than the word of the victim will have an incentive to be especially covert in the commission of their offense. This would likely lead to an increased use of so-called "date-rape" drugs and an increased risk of "extra" violence during an assault.

It is also important to acknowledge that evidence amounting to "corroboration" or "supportive information" may exist in the form of prior allegations against the accused student - but the victim - especially a freshman raped by a senior - would have no way of knowing this information. That a school may have access to prior accusations would be of no help to the victim because she would be incapable of including the material in her "list" of "supporting information". This point exemplifies the absurdity of putting any pressure on the victim to somehow bolster her credibility up front.

It was disingenuous for Harvard to claim it was treating rape victims with fairness and "equity" because the "corroboration" or "supporting information" rule applies to all "peer disputes". The application of a facially neutral policy can have disparate impact where it is applied to conduct that, unlike other types of "peer disputes", was highly likely to occur in isolation and without witnesses or any "supportive information", however minimal. This is particularly true in a campus environment where the typical dispute in a sexual assault matter revolves around the issue of consent rather than whether the act occurred. Sexual violence stands

15. Corroboration effectively victimizes the victim by concentrating on the evidence of force, resistance, the identity, and the character of the victim herself. Estrich, *supra* note , at 42-43. In essence, corroboration is an outmoded legal entrenchment of distrust based on the premise that women lie. *Id.* at 43 (noting that this premise provided the "justification for the formal rule").

alone as an offense that is rarely likely to produce "corroboration" or "supportive information" because the absence of consent is not "provable" beyond the word of the victim; it is a uniquely private event; it is emotionally debilitating and the victim is often silenced by valid concerns of community shame and victim-blaming.

After much public outrage, Harvard attempted to recharacterize the rule as requiring only "supportive information" and officials argued that any amount of evidence would satisfy the standard, including even a single email sent from the victim to a friend.

This watered-down phraseology offers little solace to the type of student who was brutally raped and suffered such debilitating trauma she was incapable of telling anyone about the incident. If the first person she tells is a school administrator and the report is not made for several months, a school with a "supportive information" requirement can do nothing. There is no rational, moral, legal or other justification for any academic institution to promote a disciplinary code that could tolerate such a result.

Any requirement of "corroboration" or "supportive information" is especially likely to harm the most vulnerable of students - freshmen - in their earliest weeks on campus because they will not have had a chance to forge intimate friendships and may not feel comfortable telling a new roommate or casual classmate about an act of intimate violence. Simply put, any requirement of "proof" beyond the word of the victim will clearly place women students at extra risk of sexual violence while potentially excluding from investigation and adjudicatory resolution the most serious of sexual assaults.

III. SEXUAL ASSAULT VICTIMS AT HARVARD FACED ADDITIONAL UNFAIR BURDENS BECAUSE THE ADMINISTRATIVE BOARD'S REMEDIAL PROVISIONS DIFFERED INEXPLICABLY AND UNJUSTIFIABLY FROM REMEDIES ACCORDED VICTIMS OF OTHER FORMS OF DISCRIMINATION AND HARASSMENT

Except for harassment and discrimination based on sexual assault, Harvard encouraged student victims of all other forms of harassment and discrimination "to bring a complaint through the College's formal procedures" for disciplinary sanctions. Such claims were neither defined as nor subject to the extra burdens of "peer disputes" as outlined above.

Not being "peer disputes", other forms of discrimination and harassment received the immediate attention of a final decision maker at Harvard based on nothing more than the word of

a student, alone, that they "believed" they suffered discrimination or harassment. A credible victim of rape or sexual assault-based discrimination or harassment was entitled to no such respect as she was shunted into the criminal justice system and burdened with "special" and significant substantive and procedural requirements. Her word, alone, entitled her to nothing, let alone direct access to a final decision maker in the administration.

Harvard's policy on discrimination complaints provided that, in his or her final adjudication, the Dean "may take whatever action is warranted" to provide full remedial redress to the aggrieved party. And if the Dean took no action or dismissed the complaint, both "the complainant and the accused would be informed of the factors leading to this decision." *Harvard made no similar promise of institutional remedies and explanations for claims of sexual violence because such claims were confined to the arbitrary boundaries of "peer disputes."*

Harvard attempted to justify this disparity on the grounds that "Rape and sexual assault are felonies in the State of Massachusetts". However, studies suggest as few as only 4 or 5% of rape victims ever report to law enforcement.¹⁶ Thus, nearly all Harvard's sexual assault victims were caught in a violent and vicious circle in which they had to decide whether (a) to endure the University's intolerably inequitable procedures for resolving "peer disputes," or (b) to suffer the physical and emotional pain in silence and *without any* remedial redress.

This attempt to justify Harvard's disparate treatment of sexual assault cases rang hollow as Harvard did *not* require criminal proceedings to take precedence over the Administrative Board's adjudication of other types of "peer disputes" that were also "felonies in the State of Massachusetts". In one recent larceny case, Harvard officials used their independent institutional authority to force two students to relinquish stolen goods and money *when they were arrested*.¹⁷ If Harvard required student thieves to disgorge their ill-gotten booty even *before* formal criminal charges were initiated, Harvard could similarly take steps to redress a sexual assault complaint by initiating an investigation, issuing a restraining order on behalf of the victim, etc., during the time that public criminal charges were under investigation or pending against her attacker.

Even a student with nothing more than his word, who *falsely* accused another student of minor verbal harassment based on race or sexual orientation, was *entitled*, at a minimum, to the Dean's explanation for his or her dismissal of the complaint. But a student who - with nothing more than her word - *credibly* accused another student of serious sexual assault, *was entitled to*

16. Estrich, *supra* note, at 102.

17. Garrett M. Graff, *Underhanded Undergraduates*, 104 Harvard Magazine 59 (May-June 2002).

nothing.

CONCLUSION

Harvard's sexual assault policy was both inherently inequitable and inequitable as compared to the prompt and just policies accorded victims of other forms of harassment and discrimination. Harvard's policy on sexual assault was not even equitable when compared to other forms of "peer disputes".

Schools that receive federal funds are obligated under Title IX to ensure that all students have an equal educational opportunity in an environment free from the impact of rules that promote sexual violence, gender harassment and discrimination against all women students. Harvard has taught an important lesson in how NOT to protect women's constitutionally-based right to an equal education opportunity.