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POINT OF VIEW

Rape Charges: It's Time to End 'He Said/She Said' Justice

By HARVEY A. SILVERGLATE and JOSH GEWOLB

Two students were involved in a sexual encounter. He said it was consensual. She said it wasn't. There were no witnesses or other reasonably reliable corroborative evidence.

Each year colleges face dozens of sexual-assault cases that, stripped to their essence, consist of those facts. Despite the often hysterical sexual politics on our campuses, some institutions remain reluctant to find students responsible for rape (or date rape or acquaintance rape), which often carries the penalty of expulsion and life-altering stigma, simply on the basis of dueling accusations.

During the 2000-1 academic year, Harvard University conducted seven lengthy sexual-misconduct investigations, but found sufficient corroborative evidence to discipline only one accused student. Recognizing that it is illogical and cruel to both sides even to initiate disciplinary proceedings when conviction is almost impossible in any ethical or just sense, Harvard has established a new rule, to take effect this fall. Before the university opens a disciplinary case, a complaint will have to indicate that "sufficient corroborating evidence" exists for the charge.

The new policy is one of the best things to happen to a campus-judicial system in years, but it has drawn a firestorm of controversy. Students rallied to protest the changes, contending that a woman's word is enough to sustain a rape charge, and that the new rules amount to sexual discrimination. A student group, the Coalition Against Sexual Violence, declared that the rule "sends the message to perpetrators of sexual assault that they can commit assault freely without needing to worry about being punished." The U.S. Department of Education is currently investigating a complaint filed by a student, with the aid of a high-profile Boston lawyer, that the change violates the requirement of Title IX that colleges provide access to "prompt and equitable"

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grievance procedures for allegations of sexual harassment.

As the controversy demonstrates, it is tremendously difficult for colleges to take even a small step toward implementing fairer procedures. But false convictions abound in campus courts, and institutions desperately need better procedural protections, as well as more-rational fact-finding mechanisms, to guard against nonmeritorious convictions.

In the past, Harvard began a full-scale date-rape investigation whenever it received an allegation from one student that sexual activity with another student had not been fully consensual. Under the new rule, a preliminary screening must be conducted before full proceedings can begin. If a student initiates a complaint, she or he will be asked to submit a list of possible witnesses, or an account of the evidence that the complainant believes the board will be able to obtain. The board will then conduct a preliminary screening to determine whether the complaint establishes something more than a pure "he said/she said" credibility contest.

While modest, the change is important because it protects students from the initiation of disciplinary proceedings on the basis of groundless and unprovable accusations. For centuries, Anglo-American common law has prescribed grand-jury proceedings, in which ordinary citizens review cases to see if there is a reasonable basis to suspect the accused. Such reviews, which now occur before a grand jury or in a probable-cause hearing before a judge, ensure that the full weight of the justice system is not brought to bear against either the demonstrably innocent or those, innocent or not, in whose cases no corroboration of the accusation exists.

Further, ethics rules prevent prosecutors from bringing charges that are too weak to convince trial jurors of guilt beyond a reasonable doubt. And prosecutors, concerned for their reputations, do not normally bring charges based on thin evidence. That becomes clear when one bears in mind that a charge of date rape is a criminal violation. In fact, few prosecutors would charge someone with a serious crime without adequate corroboration of the victim's account, because the criminal-justice system has numerous layers of protection against trials of unwarranted charges. Harvard has now instituted just one such layer.

Ironically, many people at Harvard are opposed to the new procedure for the very reason that the criminal-justice system has an analogous protection. Harvard's official position is that "procedures of the Administrative Board are designed to achieve ends different from those

of criminal or civil litigation." Because the board's purpose is "educational" rather than disciplinary, according to this theory, making it mirror the criminal-justice system is unnecessary and unwise.

That position does not hold up. The fact that Harvard is interested in "the larger educational implications of student conduct" indicates a need to incorporate, rather than to discard, rational and reliable fact-finding procedures. Harvard should neither adopt rules of the criminal-justice system simply to emulate that system, nor reject them so as not to be like it. Instead, the institution should recognize that it must proceed with the greatest care, because the punishments it administers -- especially the expulsion likely in sexual-misconduct cases -- has a profound impact on students' lives.

A fair tribunal for adjudication of a serious allegation that can be life-changing for both complainant and defendant would include aspects of the rules and procedures of the Anglo-American legal system as the best tools for getting at the truth. After a complaint has passed a preliminary screening, the institution should hold a formal recorded hearing before an impartial board of faculty members, students, and administrators. The roles of judge or jury and prosecutor should be separate at the hearing. The burden of proof should rest on the prosecution, and a unanimous or near-unanimous agreement of the board should be required to sustain the charge.

The accused should have the right to call witnesses, to testify, to cross-examine witnesses against him or her, and to confront the accuser. Students should be given time to prepare commensurate with the seriousness of the charge, and they should be allowed to have a lawyer as an adviser. Even though lawyers, by their training, are versed in fact-determination methods, college disciplinary systems have been notoriously resistant to allowing them to play any role -- except, hypocritically, to advise administrators on how to avoid getting sued.

Harvard's current system fails to meet even the most basic of those requirements. When a disciplinary matter arises, the administrative board usually appoints a three-member subcommittee of its members to investigate. That investigation is not guided by any binding rules. The parties may suggest that the panel solicit written or oral testimony from witnesses, but it is not required to do so. Evidence is not reviewed at a single formal hearing, but piecemeal over several weeks or months, and then only by the subcommittee, not the full board that ultimately decides the student's fate.

Complainants and accused students are barred from the subcommittee's

secret meetings. Worse, the panel is not required to keep either written or taped records of interviews and deliberations that would allow the students or its own members -- much less the full board -- to review the evidence gathered. Often months after beginning its investigation, the subcommittee presents its findings to the complainant and the defendant, who may offer written critiques. After that, the subcommittee's findings are given to the full board.

It is the full board that decides the case, an arrangement that ignores the basic principle of jurisprudence that the body that hears the evidence should rule on innocence or guilt. The board does not record its deliberations and does not issue a written explanation of the reasoning behind its findings, leaving students mystified and making a meaningful appeal nearly impossible.

In our experience advising student defendants, accusation under this system has been extraordinarily difficult to overcome, even with exculpatory evidence available. The system appears to be getting more discerning, however, with six out of the seven students accused of sexual crimes in 2000-1 found not responsible. Even so, with the consequences of conviction as severe as they are, a false conviction in even a single case is appalling. Last year the board came frighteningly close to such a conviction, in a case in which our law firm was involved (as advisers to the defendant) and which led to a review of Harvard's procedures that resulted in the present policy change. The accused student in that case would almost certainly have been falsely convicted were it not for the intervention of a faculty member who conducted an independent investigation that uncovered exculpatory evidence the subcommittee had ignored.

Apparently, the university's review of its procedures has given its administrators an inkling of what outside observers have known for some time: Harvard for many years has convicted students on the basis of evidence that would not persuade real-world prosecutors to bring charges, much less persuade judges and juries to convict. Now that accused students have begun to fight back, and some internal faculty criticism has emerged, the wholly inadequate nature of the administrative board will finally be exposed.

We are confident that the growing recognition of that inadequacy will lead to changes in the more fundamental process of how the board conducts its investigations and reaches its decisions. That not only would bring long-overdue rationality and justice to Harvard's system, but also set an example for judicial bodies at colleges throughout the country.

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