

JH Statement and Call for Action on HU SHP & P, 10/28/14

A Call to Reform the New Harvard University Sexual Harassment Policy and Procedures

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Today colleges and universities around the country enjoy a moment of special opportunity: a chance to change slipshod, dismissive and actively malign handling of sexual harassment claims, and to offer genuine remedies for victims. But it is also a moment of danger: because one such remedy involves discipline for wrongdoers, the rules must define misconduct to include the conduct we want to sanction and deter (and not socially valuable or unharmed behavior), and to process complaints in a way that is fair to all parties. The new University Policy and Procedures realize these dangers: they provide an overly broad definition of sexual harassment, far beyond anything that federal courts recognize; they trench directly on academic freedom and freedom of speech; they threaten stigmatized minorities with unjustifiable findings of responsibility; they will rush low-income students who cannot afford counsel to unfair judgment; and they are defective on every known scale of equal procedural treatment of the parties and due process.

This memo is written in the spirit of improving Harvard's approach to sexual harassment discipline. It is premised on my firm belief that we can provide a full and robust response to complaints *while also* guarding vigilantly against ratifying frivolous claims, damaging academic freedom, harming stigmatized minorities, depriving accused students of the support they need, and violating the due process and equality rights of the parties to these disputes.

A bit of background. This summer Harvard University announced new policy and procedures on sexual harassment.¹ The former sets out the substantive sexual harassment policy for the entire University, and the latter contains new procedures for use when students are accused of violating it. I will call them the University Substantive Policy and the University Student Procedures (or the University Policy and Procedures for short). They were drawn up by an unnamed committee without any public consultation. Later in the summer, Harvard Law School's Title IX Implementation Committee developed Interim Sexual Harassment Policies and Procedures that replace our Sexual Harassment Policy, setting up procedures both for determining sanctions on students found to have violated the University Policy under the University Procedures, and for handling complaints against faculty, staff, and employers like law firms using our Office of Public Interest Advising for recruiting purposes.²

All of these documents emanate from an effort to bring the University into compliance with Title 9 and other federal legislation imposing requirements of anti-discrimination and anti-sexual-harassment on federally funded institutions like ours. It is not true, however, that everything in

¹ Available at <http://diversity.harvard.edu/pages/title-ix-sexual-harassment>.

² Available at : <http://www.law.harvard.edu/about/hls-titleix-interimpolicy.pdf>.

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*Title IX and Sexual Violence*⁵ (the 2014 Q&A document) were ever opened for comment. They are far less balanced. In a *Harvard Gazette* interview (that is to say, in an official publication of the University), Mia Karvonides, the new University Title IX Officer, acknowledges that these latter documents do not themselves have the binding force of statutes or duly promulgated regulations.⁶

As I will show, some of the most problematic differences between the Law School's Sexual Harassment Policy and disciplinary procedures and the new University Policy and Procedures nevertheless "comply" with these merely advisory documents. Colleges and universities are entitled act on their own judgment when they believe that the government's mere advice is misguided.

II. *Substance: The New University Sexual and Gender-Based Harassment Policy (New University Substantive Policy)*

A. *The New University Substantive Policy has no objective or reasonable-person test for assessing whether challenged conduct constitutes actionable harassment, and thus ignores clear Supreme Court directives and overrides the Law School's firm commitment to this limitation in its Sexual Harassment Policy*

Sexual harassment is defined in both the Law School's and the new University policy as unwelcome sexual conduct that either comes with a job/education condition (*quid pro quo*) OR creates a hostile environment. It creates a hostile environment if the conduct is sufficiently severe or pervasive (in the new University Policy, also sufficiently persistent) to interfere with the victim's work or education.

The Law School's retired Sexual Harassment Policy has three elements. The first is unwelcomeness and it seems to be purely subjective in character. The second looks for conduct that is "abusive or unreasonably recurring or invasive" and is treated throughout the Policy's Commentaries and Illustrative Examples as "primarily objective." The third requires conduct that "has the purpose or effect of *unreasonably* interfering with an individual's work or academic performance or creating an intimidating, demeaning, degrading, hostile, or otherwise *seriously offensive* working or educational environment[.]" (SHP Part I, Guidelines, 3; emphases added) These requirements are repeatedly conditioned on objective unreasonableness in the Commentaries and Illustrative Examples.

Supreme Court definitions of hostile-environment sexual harassment under Title VII and Title IX consistently require objective reasonableness. *Davis v. Monroe County Bd. of Ed.*, the case establishing the actionability of student/student sexual harassment under Title IX, explicitly requires that the harassment be "objectively offensive."⁷ *Harris v. Forklift Systems*, a similarly

⁵ Available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

⁶ "Q & A with Harvard's Title IX Officer: Mia Karvonides discusses new University-wide policy, procedures," *Harvard Gazette*, July 2, 2014, available at <http://news.harvard.edu/gazette/story/2014/07/qa-with-harvards-title-ix-officer/> (last checked 7/28/14). To be sure, the DOE OCR may threaten the University with the heavy sanction of withheld federal funding if we do not comply with these documents.

⁷ *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 651 ("[A] plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims'

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canonical workplace/Title VII case, requires that the workplace environment be objectively hostile or abusive and spells out the reasonable person test as the relevant inquiry.⁸ *Oncale v. Sundowner Services*, the case that made same-sex sexual harassment actionable, insisted on this limitation, noting that it was needed to prevent Title VII from becoming a “general civility code.”⁹ The DOE OCR 2001 Guidance on sexual harassment relies on these cases (p. 30 n.29) and insists that “OCR considers the conduct from both a subjective and an objective perspective.” And its April 2014 Q&A document spells out the rules clearly:

... OCR considers a variety of related factors to determine if a hostile environment has been created; and also considers the conduct in question *from both a subjective and an objective perspective*. Specifically, OCR’s standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim’s position, considering all the circumstances. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment ... (p. 1; emphasis added)

The new Harvard University policy, however, is silent on this point.

In omitting a reasonable person test, the University Policy achieves one of its most dramatic reversals of the Law School Sexual Harassment Policy and expands liability well beyond anything required by law.

1. *Unwelcomeness can rest on Complainant’s subjective experience of mere undesirability or offensiveness*

The new University Policy provides that “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.” It then provides:

Whether conduct is unwelcome is determined based on the totality of the circumstances, including various objective and subjective factors. The following types of information may be helpful in making that determination ...

educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”)

⁸Harris v. Forklift Systems, Inc., 510 US 17, 21-22 (1993) (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.”)

⁹ *Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75, 81 (1998) (“And there is another requirement that prevents Title VII from expanding into a general civility code [That requirement] ... forbids only behavior so objectively offensive as to alter the “conditions” of the victim’s employment.”; “We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering all the circumstances.”; “We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory ‘conditions of employment.’”)

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The contrast between this and the most recent DOE OCR statement, quoted just above, is stark. The new University Substantive Policy demotes the objective element from a required “perspective” to a mere “factor”, and omits entirely the settled sexual harassment rule that the conduct be assessed from the perspective of a reasonable person in the alleged victim’s circumstances.

If this reading is correct – and it will be vital for University officials to clarify whether it is or not – the University Policy substantially overrules a more stringent requirement of the Law School’s Policy – that unwanted conduct *also be* “*abusive or unreasonably recurring or invasive[.]*” Under the University’s new Policy, Complainants can establish the unwantedness element without any showing of abusiveness or unreasonable importunity: all they have to show is subjective offense or undesirability.¹⁰

If there were a reasonable person test, the factfinder would infer from other facts in the record whether the conduct was invited or not. The case could then turn on *circumstances that a reasonable person would deem to be inviting*. (Were the parties in bed? Unclothed? Had they been having sex on prior occasions or on this one?) If there were a reasonable person test, the factfinder could ask whether a flirtatious overture that was undesirable or offensive to the Complainant was *unreasonably* so. And a reasonable person requirement would ensure that the Complainant’s claims of unrequestedness or uninvitedness, and of undesirability or offensiveness, entail more than her assertion that she “regarded” the conduct that way. Instead, we have an *entirely subjective element* in the current Policy. It will be hopeless for Respondent to contest unwelcomeness without a reasonableness test.

2. Educational/work impact can also be purely subjective

The Supreme Court’s lead Title VII cases consistently require a *hostile or abusive environment*.¹¹ And it has done so saying that these limitations are needed to keep hostile environment sexual harassment law *in employment* from becoming a trivializing social conduct code backed up by law. The DOE OCR cited Supreme Court and lower court authority requiring a hostile or abusive environment repeatedly in its 2001 Guidance.¹² But *Davis*, the lead Title IX case establishing school-district liability for hostile-environment sexual harassment among students never uses the term abusive – possibly because *Davis* involved primary school children for whose vulnerability would counsel a lower threshold.¹³ The DOE OCR’s 2011 and 2014 documents – never opened for comment or revised in response to comments – also omits any “abusive environment” in its 2011 and 2014 documents. Abusiveness hasn’t been *rejected* as a threshold test under Title IX; but it does seem to be fading away. The way the DOE OCR puts

¹⁰ Severity/pervasiveness seems to have migrated to the environmental impact element, but there too, as I note below, *objective* importunity makes no appearance. See subsection 2. immediately below.

¹¹ *Harris v. Forklift Systems, Inc.*, 510 U.S. at 21 (“When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment, Title VII is violated.”); *Oncale* at 81 (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII’s purview.”)

¹² *Davis v. Monroe County Bd. of Ed.*, 526 U.S., passim (word search for abuse and abusive).

¹³ DOE OCR 2001 Guidance, pp. vi, 29-30 nn. 38-39.

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it now, a *nominally* hostile environment arises when unwelcome sexual conduct *imposes limitations* on a student's access to educational programs.

The brake on this trend in *Davis* was its requirement that, to be “unwanted” within the legal definition of sexual harassment, sexual conduct must be *objectively* offensive. As we've seen in Part II.A.1 on “Unwelcomeness,” above, the University has given that up, *and* adopted *Davis*'s looser definition of impact.

The new University Policy – which applies not only to students but to faculty, employees, independent contractors, and both student and professional guests visiting our campus or programs – almost 100% of whom are adults – thus cuts out into new territory for sexual harassment not only under Title IX but also under Title VII. The new University Substantive Policy breaks all this new ground *and* goes further, by dropping any reference to an objective reasonableness requirement.

Thus, under the new University Policy, “hostile environment” is merely the name for a type of claim: there is no express requirement that the *actual* environment be actually *hostile*. Nor need it be actually *abusive*. Instead, a hostile environment claim arises when unwelcome conduct of a sexual nature “is sufficiently *severe, persistent, or pervasive* that it *interferes with or limits a person's ability to participate in or benefit from the University's education or work programs or activities*”¹⁴ or, as the Policy later states, “den[ies] a person equal access to the University's programs or activities.”

The Policy never states that proof on these elements must satisfy the reasonable-person test.

3. *The arguments that the University has advanced so far to defend the Policy on this point are flimsy and incoherent*

In conversations over the late summer and fall, the University has advanced a series of unsatisfactory arguments defending the abandonment of a reasonable person requirement.

One such argument has been that various terms in the definition of hostile environment harassment and of unwantedness are intrinsically objective. These include: the definition of hostile environment sexual harassment as “conduct of a sexual nature . . . that is *sufficiently severe, persistent, or pervasive* that it *interferes with or limits a person's ability to participate in or benefit from*” the University's work/education programs; a passage stating that a hostile environment inquiry will probe “a *variety of factors*, including: degree to which the conduct affected on or more persons' education or employment; the type, frequency, and duration of the conduct; the relationship between the parties; the number of people involved; and the context in which the conduct occurred”;¹⁵ and, in the section on Unwelcome Conduct, a statement that “[w]hether conduct is unwelcome is determined based on *the totality of the circumstances*,

¹⁴ Note another limitation in the Law School's Sexual Harassment Policy jettisoned here: that unwanted conduct must also be “abusive or *unreasonably* recurring or invasive[.]” III.3.

¹⁵ Policy Statement p. 2. Note that it is only the *degree* of impact that is reduced to a factor – the new University Substantive Policy's definition of sexual harassment, as set forth above, classifies educational or work impact as an essential element of hostile-environment sexual harassment.

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including *objective* and subjective *factors*”¹⁶ and a list of “*types of information* that may be helpful in making”¹⁷ the unwelcomeness determination. (Emphases added.)

I also understand that our University officers in the Title IX compliance network may well be committed to objective proof of severity/persistence/pervasiveness and interference/limitation. But nothing in the *positive language of the Policy* commits it to this inquiry..

It is true that these scattered elements need not be mere states of mind – they can be states of the world demonstrable through objective evidence. They can be “objective” in that sense. But the *impact* on a Complainant can be severe, and can be proven by objective evidence to be so; and he or she can experience real limitations in her participation on academic or work programs, and prove it through objective evidence – without coming close to satisfying the reasonable person test.

An example may clarify this point. Let us say that a student rebuffs a flirtatious overture at a party, but the suitor persists, sending flowers and “friending” her on Facebook the next day. This could be deemed persistent unwanted conduct (note that the University Policy jettisons the Law School Policy’s requirement of *unreasonable* recurrence). The student also claims that she is so disturbed by the suitor’s failure to disappear from her life that she cannot attend classes or dine in the house dining hall if he is there. The impact could be completely demonstrable by objective evidence – her psychotherapist could attest that she is indeed experiencing distress, and her meal card could demonstrate her absences – but would it be reasonable? No mere list of relevant factors or types of information, however “bricks and mortar” they are, can guide a factfinder to the right answer.

I am more puzzled by the argument, which I understand the University has also made here, that the list of included *conduct* on p. 2 of the policy constitutes an implicit objectivity/reasonableness requirement for the *hostile environment* element. This list includes quid pro quo harassment,¹⁸ which by definition cannot be an example of hostile environment claims and is always objectively unreasonable. The list is manifestly nonexclusive, so the fact that it does include a number of acts that do belong on the hostile environment side of the roster and would always be objectively severe or pervasive¹⁹ does not send any clear message that *unlisted* acts must also meet that objective test. And the only remaining forms of conduct on this list – “sexual advances, whether or not they include physical touching” and “lewd or sexually

¹⁶ It should be impossible to pass one’s 1L courses without learning that a requirement must be satisfied while a factor can be balanced (and therefore balanced *away*).

¹⁷ The list provided reads: “statements by any witnesses to the alleged incident, information about the relative credibility of the parties and witnesses, the detail and consistency of each person’s account, the absence of corroborating evidence where it should logically exist, information that the Respondent has been found to have harassed others, information that the Complainant has been found to have made false allegations against others, information about the Complainant’s reaction or behavior after the alleged incident; and information about any action the parties took immediately following the incident, including reporting the matter to others.” This list strongly suggests that *credibility*, not *objective reasonableness*, will be the inquiry. It strengthens rather than allays the concern that subjective claims will determine cases.

¹⁸ “Requests for sexual favors in exchange for actual or promised job benefits, such as favorable reviews, salary increases, promotions, increased benefits, or continued employment.”

¹⁹ These are recording private nudity or sexual activity without consent; sharing recordings of nudity or sexual activity without consent; and stalking.

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suggestive comments, jokes, innuendoes, or gestures” – embrace vast ranges of innocuous conduct which nevertheless might be seriously unwanted and limiting to some people, giving rise to bootstrapped arguments of severity and pervasiveness, for reasons and under circumstances that would never survive a reasonable person screening. I don’t see how a list that includes these two items can send the message that there is an objective reasonableness requirement. *Au contraire*, it is precisely to put limits on these categories of sexual conduct (or conduct perceived to be sexual) that we need a reasonable person test.

As long as the Policy itself is written so laxly on this important point, we face the live possibility that it will lead enforcers astray. Once Title IX compliance fades into the light of common day, weakening the esprit de corps that currently binds University officers working together on this issue, enforcers may give up on holding a line not explicitly stated in the Policy. And a secret handshake among full-time enforcers may entirely elude potential and actual Complainants, people accused of misconduct, and – a matter of particular concern for Respondents, who are entitled to zero assistance under the new University Student Procedures (see II.B. 3 and 4 below) – Personal Advisors and attorneys drawn from outside the University’s magic circle of Title 9 enforcers.

But the situation may be less reassuring by far, if the settlement letter issued by the Department of Justice and the DOE OCR to the University of Montana suggests anything about the ongoing investigations of our University and Law School. In the Montana case, the government took the position that unwantedness *could not be* subjected to an objective unreasonableness test:

Third, Sexual Harassment Policy 406.5.1 improperly suggests that the conduct does not constitute sexual harassment unless it is objectively offensive. This policy provides examples of unwelcome conduct of a sexual nature but then states that “[w]hether conduct is sufficiently offensive to constitute sexual harassment is determined from the perspective of an objectively reasonable person of the same gender in the same situation.” Whether conduct is objectively offensive is a factor used to determine if a hostile environment has been created, but it is *not the standard* to determine whether conduct was “*unwelcome conduct of a sexual nature*” and therefore constitutes “*sexual harassment*.” As explained in the Legal Standards section above, the United States considers a *variety of factors, from both a subjective and objective perspective*, to determine if a hostile environment has been created.²⁰

This paragraph may well be the source of the University Policy’s otherwise puzzling reduction of objectivity to a factor and elimination of an unreasonableness test on unwantedness. The language is verbatim. This would seem to be the DOJ’s and DOE OCR’s actual intention: the University of Montana letter states that “Th[is] Agreement will serve as a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault.” (p. 1) The Government seems to be intent on stripping the reasonableness element that the

²⁰ Letter from Department of Justice Civil Rights Division and DOE OCR to President Royce Engstrom and University Counsel Lucy France, *DOJ Case No. DJ 169-44-9, OCR Case No. 112601* (May 9, 2013), p. 9 (Montana Agreement Letter) (emphases added). The letter is available at http://www.nacua.org/documents/UMontana_AllegedViolationsTitleIXTitleIV_LetterOfFindings.pdf

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Supreme Court has insisted on, via privately settled cases. Its investigations of the University and the Law School may be premised on these (legally baseless) assertions.

For all these reasons, the reassurances aren't reassuring.²¹

4. *The lack of an objective reasonableness test is a rule of law problem, threatening fundamental fairness for Complainants and Respondents alike*

If the University's plan is to use "objective ... factors" and various scattered language in the Policy to reintroduce a reasonable-person test in practice, the parties won't know about it in advance and may never find out about its role. Perhaps the University may be persuaded to issue a guidance document or FAQ clarifying that it intended to impose a reasonable person requirement and will do so in fact. While I would welcome such a development, it would leave significant rule of law problems unaddressed.

The definition of sexual harassment should appear in the *definition* section of the Policy. That is where people will look for it. Many Complainants will file complaints that could be much stronger if they knew they would face an objective reasonableness standard, while others will initiate informal and/or formal processes that they might reconsider if they were advised of the need for objective reasonableness. Accused persons will attempt to exonerate themselves without notice about a core dimension of the policy and proceedings. They, their lawyers, or advisors may scan the Policy for the expected language, see that it is missing, and adopt a far more defensive posture than their cases warrant. In short, leaving the parties "by indirections [to] find directions out" – or to figure out what relationship pertains between the Policy itself and more informal documents associated with it – is a manifest rule of law and fairness problem.

5. *The lack of an objective reasonableness test is a social justice issue*

The reasonableness gap favors Complainants – but not all Complainants should be cut all this slack. Forgive me for providing some graphic examples of how dangerous the reasonableness gap in particular can be from my own service as a sexual harassment enforcer in a university setting and in my scholarly work on sexual harassment.

Here is one kind of case that sexual abuse personnel have to handle all the time, exemplified by a case I was involved in handling. An employee, who disclosed eventually that she had been the victim of sexual abuse as a child and was ever-vigilant about her personal security, brought repeated complaints of sexual harassment against male faculty. She experienced being physically bumped by a male faculty member in the tight quarters of a copy room to be a sexual assault so humiliating that she could not communicate directly any more with that person. Hallway eye-contact that lasted too long had the same effect on her – giving rise to an accusation

²¹ The University may be willing to clarify that, for conduct of a sexual nature to be sexual harassment, it must "be severe, persistent, or pervasive enough to create an objectively hostile environment." While an improvement, this does not extend a *reasonable person requirement* to the claimed *unwelcomeness* of the conduct itself, or to its claimed *severity, persistence, or pervasiveness*.

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against another faculty member for repeated unwanted conduct. Eventually we realized that these complaints would keep coming in and, on investigation, keep failing to meet any reasonableness standard. It was a tragic situation – the episodes were both severe and persistent for her, and severely limited her work activities, but we could not keep entertaining the idea that they were sexual harassment. Without an express reasonableness standard to point out to her, she would surely have construed our decision to discourage rather than process her complaints as “revictimization.”

Minorities thought to be sexually dangerous – black and gay men in particular – often provoke reactions of this kind without intending or even knowing what’s happening. They are far more likely to become the object of complaints like the ones I just described than people perceived to be white and heterosexual. And they are far more likely to face complaints based on morning-after remorse than straight white people of either sex. Claims of sexual harassment against black and gay men, in my experience, require particular scrutiny because people often have such soul-destroying remorse for having or wanting to have sex with them that retaliation can be the only apparent path to mental peace – retaliation through private violence or through a legal claim so framed as to push all responsibility for the contact or the yearning onto the forbidden object of desire. A Policy lacking intelligible notice of a reasonableness requirement will be a menace to these minorities.

Muting the objective reasonableness element will put the Title IX officer in the political cross-fire when he or she discovers the need to dismiss or discourage these (and many other) kinds of questionable claims, but has no explicit backup in the Policy. If eliminating the reasonable person requirement is a strategy for pacifying the DOE OCR and for keeping the University out of the news, it is an unwise one, trading zero to tiny short-term gains for real long-term risks.

But there is more than strategy at stake here. We do not honor our moral and legal obligation to protect victims of egregious or even moderate sexual wrongdoing by removing all limits from the redress we hold out for them. Instead, we squander our moral authority to vindicate real wrongdoing *and* put innocent members of the community at risk of career- and reputation-destroying processes and sanctions. It may seem impossible, in the current political and legal climate, to put some simple, up-front, intelligible limitations on hostile environment claims. Omission of key protective rules may be expedient. But that doesn’t make it right.

B. The provisions on drunken and/or drugged interactions and on giving false and misleading information treat Complainant and Respondent unequally, privileging the former and disadvantaging the latter

Two provisions of the new University Substantive Policy treat the Complainant and Respondent differently even when they are situated similarly – a classic equality problem. And in each case, the Complainant enjoys privileges denied to Respondent.

- 1. The new University Substantive Policy’s simplistic, overinclusive and discriminatory rule addressed to drunk/drunken cases will run roughshod over complex cases and create perverse incentives*

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The new University Student Procedures' provisions on incapacitation are starkly asymmetric:

[W]hen a person is so impaired or incapacitated as to be incapable of requesting or inviting the [unwelcome] conduct, conduct of a sexual nature is deemed unwelcome, provided that the Respondent knew or reasonably should have known of the person's impairment or incapacity. The person may be impaired or incapacitated as a result of drugs or alcohol or for some other reason, such as sleep or unconsciousness. A Respondent's incapacitation at the time of the incident as a result of drugs or alcohol does not, however, diminish the Respondent's responsibility for sexual or gender-based harassment under this Policy. (Unwelcome conduct, p. 3)

This paragraph opens up a category of incapacitation short of sleep and unconsciousness – a category of incapacitation affecting people who are up and about, saying and doing things. Without questioning for a minute the premise that anyone initiating sexual contact with a person who is asleep or unconscious is guilty of a serious violation against that person, I draw a distinction between that clear case and other cases invited by this language, in which the Complainant and/or the Respondent were in this intoxicated-but-up-and-about group and the claim is that they were *also* incapacitated.²² In many disputed cases, both parties were highly intoxicated and/or drugged at the time of the challenged conduct – I call them drunk/drunken cases – and the unequal treatment in those cases will be particularly graphic, but it will arise across the range of cases too.

Let us posit a case that may be painfully common: the Complainant *has requested or invited* sexual contact but *later argues that he or she was incapable of doing so* because he/she was drinking heavily.²³ Even if this Complainant and his/her Respondent were equally incapacitated at the moment of the sexual encounter, they come in for dramatically different treatment. If knowledge of the Complainant's alcohol and/or drug consumption can be imputed to the Respondent, the Complainant is not only allowed to disavow his/her request or invitation, but is entitled to a finding of unwelcomeness (and probably severity) *tout court*, while the Respondent must be treated as sternly as though his/her understandings and actions were those of a fully sober, mentally alert adult. Note that it is by now *found* that she was incapacitated, so the analysis of this case from here on in may not differentiate it at all from one in which a sober, mentally alert adult initiates sexual contact with a person who is asleep or unconscious.²⁴

²² The University has gone much further here than it is urged to do by the DOE OCR, which provides this definition of sexual violence in its 2011 Dear Colleague Letter: "Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol." (p. 1) The University's elaboration of this language extends to all conduct of a sexual nature, not just physical sexual acts; and it reaches out for conduct committed with or on Complainants who were not rendered asleep or unconscious by drugs or alcohol – who can easily appear quite capable of inviting and requesting sexual interactions, and who often *do* issue such invitations and requests.

²³ It is important to further disaggregate loss of memory the next day from inability to give meaningful consent at the time.

²⁴ Here is a mental experiment that clearly reveals the gender bias that motivates this discriminatory rule structure and makes it seem so plausible to so many people on first glance. It is also a prediction of what will actually happen. In a drunk/drunken case, a male student rushes to be the first to file a complaint against a female student under the Policy. The fact of sexual conduct is established by nondrunken witnesses. She knew or reasonably should have known of his intoxication. He can now claim his intoxication as a reason he must be credited, and hers as a reason that her responsibility is virtually a foregone conclusion.

The University must somehow come to grips with the physical and emotional health – and the moral responsibility – of voluntarily drunk, drugged students, whether they get that way at parties or on their own. This is a huge and daunting problem both as a matter of public health and as a crisis in community norms. For the foreseeable future, student intoxication and drug use will generate hard cases – morally ambiguous, politically contested, and chronically obscured by self-induced memory loss. The new University Substantive Policy’s rule pre-decides these hard cases as though they were simple – and does so in a glaringly unequal way. And from a public health perspective it creates a perverse incentive encouraging irresponsible drinking by students who perceive themselves as plausible victims rather than plausible perpetrators: students planning a night of heavy drinking and/or drug use, sometimes seeking precisely the sexual disinhibition that these substances provide, can hope to be insured against shared responsibility by the evidentiary exclusion of their own invitations and requests for sexual interaction. We don’t need to blame victims of sexual assault to say that this permission may induce more students – and in particular, more *women* students – to take the consequences of heavy substance abuse lightly as they head off for some serious partying.

2. *The new University Substantive Policy excuses false and misleading complaints submitted in good faith, while holding all other contributions to the process to an objective truthfulness standard*

The new University Substantive Policy provides that “[s]ubmitting a complaint that is not in good faith or providing false or misleading information in any investigation of complaints is also prohibited.” (Policy Statement, p. 1) Complaints and “providing ... information in any investigation of Complaints” are thus subject to different rules. *Everyone* responding to the investigation must refrain from providing false or misleading information. But in submitting the *complaint*, the Complainant has leeway that applies nowhere else: if that document is false or misleading, the Complainant can respond that she submitted it in good faith. A *sincerely* overheated or exaggerated or even baseless complaint is OK. Respondent has no similar safe harbor: from the very first instant of the investigation, his or her subjective good faith in providing information will not excuse false or misleading statements.²⁵

It’s not clear to me why good-faith but false and misleading complaints get a free pass. Complaints are the single documentary form given the highest level of support in the entire University Title 9 enforcement process. They are the only basis on which the legal sufficiency of the claim can be tested. They guide the investigation and may propel criminal complaints which can have a significant *in terrorem* effect on accuseds, even if they are false and misleading. This provision may be an unintended drafting slipup. However it came to be, it establishes an unwarranted privilege for Complainants.

- C. *The extension of the policy to “verbal ... conduct” needs to be expressly cabined to protect freedom of speech and academic freedom.*

²⁵

For procedural inequality attached to this provision, see II.B.13 of this memo.

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The Policy provides that sexual harassment can be committed by speech: “unwelcome conduct of a sexual nature” includes “sexual advances, requests for sexual favors, and other *verbal* ... conduct of a sexual nature” (Definitions; Sexual Harassment). If someone experiences “verbal ... conduct of a sexual nature” to be severe, persistent, or pervasive enough to limit his or her work or educational opportunity, that will be sexual harassment. Conduct will be classified as unwelcome if the complainant “(1) did not request or invite it and (2) regarded the unrequested or uninvited conduct as undesirable or offensive” (Definitions; Unwelcome Conduct). The Policy gives, as examples of hostile environment sexual harassment, “sexual advances, whether or not they include physical touching” and “lewd or sexually suggestive comments, jokes, innuendoes, or gestures” (Definitions; Sexual Harassment). Classroom instruction, academic debate, and normal everyday conversation can and will become the basis of complaints.

This reach of the Policy is a direct threat to academic freedom. And though the Policy states on its first page that “Nothing in this Policy shall be construed to abridge academic freedom and inquiry, principles of free speech, or the University’s educational mission” (Policy Statement), this is a mere rule of interpretation. It is negative, not positive, making no assertions on behalf of academic freedom or free speech. The Policy and Procedures are bereft of provisions telling decisionmakers how to put this proviso into effect, or advising potential complainants and respondents that there are real protections for academic expression and freedom of speech in place. The core mission of the University – its very reason for existence – is reduced to an add-on.

Chill is already happening: teachers at Harvard, alarmed by the Policy’s expansive scope, explicit inclusion of speech, and lack of any language actively setting academic inquiry aside, are jettisoning hypos and other pedagogic tools that make any reference to human sexuality. For teachers, scholars, and participants in public debate whose subject matter expertise or matter of public concern *is* human sexuality, this is not an option. For a law school, the threat to academic freedom touches the very heart of the educational enterprise: law is almost always about deeply disturbing human conflicts, conflicts which often involve gender and sexuality. In these areas, much of what teachers have to teach and students have to learn and debate will be – must be – conveyed by words that are unwelcome, undesirable or offensive to some. The very topic of the Policy is a dangerous place for teachers and students to be. Indeed, it is hard to imagine a more counterproductive thing for a sexual harassment policy to do, than to make it harder for us to discuss, teach, debate and improve sexual harassment policy – but that is what the University Policy threatens to do.

Free speech issues abound. Are all dirty jokes or allusions off limits? What about allusions? Innuendoes? The Policy activates but does not address these questions.

And subsidiary questions await illumination. For instance, if a student sends an email to a friend that tells an off-color joke, and that friend posts it to social media whence it is distributed on a mass scale to students and/or other members of the community – will that make the message “pervasive”? Will it reach readers to whom it is uninvited and offensive? Will the original sender be responsible? (Note that there is no mens rea or intent requirement in sexual harassment law.) The friend? On paper, the answer to all of these questions could well be yes.

The University needs to make a much more robust statement of its commitment to academic freedom and freedom of speech within the policy, and it needs to show everyone who uses the Policy precisely how enforcement will leave those important values and activities intact.

III. Procedure: *Procedures for Handling Complaints Involving Students Pursuant to the Sexual and Gender-Based Harassment Policy* (the new University Student Procedures)

The new University Student Procedures cover *only* accusations against students but they apply to *all* students. They thus supplant the Law School's procedures in cases where our students are accused of sexual harassment. As I demonstrate in this Part, the new University Procedures are tilted against Respondents in ways that offend principles of equality, due process, equality, and basic fairness. Subsection A. below introduces the Procedures. Subsection B. traces the equality problems that beset the process from beginning to end, and simultaneously provide a comprehensive description of the process. Subsection C. sums up the insult to due process that arises from housing this unequal proceeding in a structurally biased office responsible for charging violations in some cases, and responsible in all cases for investigations, adjudication (determination of whether there has been a violation) and appeal. This collapse of all the roles involved in accusing, investigating, deciding and reviewing cases in a single office is a Harvard innovation. The problem is structural and cannot be fixed by small tweaks insinuated "between the lines." The Procedures need to be rewritten from top to bottom.

A. Introduction to the process

For all their punitiveness, the new University Student Procedures are administrative and indeed corporate in design. The process is controlled by a single administrator who serves as judge, prosecutor, case manager, and appeals court, and who delegates investigation and factfinding to her own employment *supervisees* – the Investigative Team. To be sure, Schools and units can add a designated person to this Team. But the basic model is not civil procedure minus some selected rights for the defendant, or criminal procedure minus some protections for the accused, or the administrative process that the APA sets up for adjudication within administrative agencies of the government minus some protections for the parties – but the administrative process a large employer might install for firing employees at will, plus a few slim rights for the employee. The new University Student Procedures move a substantial distance toward treating accused students as "students at will."

When we look for due process, we look for a neutral decisionmaker, the separation of roles providing for checks on the prior decisionmaker and nonratification of one's own prior decisions, procedural equality, and appeal on matters of law and fact as well as procedure. But the new University Student Procedures lack all these key earmarks of due process: they provide no hearing, no right to confrontation (which can be provided obliquely to avoid face to face meetings, but is not provided at all), no right to see all (or even any) of the evidence, no right to argue for a legal dismissal, no right to bring a lawyer to interviews, no right to a neutral decisionmaker, and hardly any right to appeal. The standard of proof is now preponderance, not clear and convincing. They chronically lack symmetry of procedural opportunity: I count more than a dozen crucial rules that favor Complainant over Respondent.

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Moreover, the Title 9 Officer is appointed solely to secure compliance with Title 9 and other federal mandates to restructure education around a media-superheated mandate to vindicate, not reject or discourage, claims of sexual violence. There is no charge to provide fairness to Respondents. However strong the culture for fairness in the Title 9 Office is in its inaugural years, it may not last long. There is nothing in the Policy or the Procedures to promote, preserve or require it – or even to signal that it is a value.

Here is my tally of the protections for Respondent.

The Investigator must “have appropriate training” (III.D ¶ 1) but there are no provisions ensuring that this training will be anything more professionalizing than adherence to a narrow, contested feminist ideology dressed up as “expertise.”

The Office for Sexual and Gender-Based Dispute Resolution (ODR) will not pursue a complaint if it has already adjudicated a formal complaint based on the same conduct or if an informal resolution has been completely concluded. (III.A. ¶ 3)

The Investigative Team is instructed to conduct interviews with witnesses, including the Complainant and the Respondent. Neither party has any right to access to any of the information thus gathered. (III.E. ¶ 3) At the end of the interview process, the Investigative Team is to seek follow-up interviews with the Complainant and Respondent “to give each the opportunity to respond to the additional information,” but there is no provision for any prior disclosures, so it’s not clear what the parties will be seeing that’s new. (III.E. ¶ 4) Though the Complainant is not limited by any statute of limitations, the Respondent must commit him- or herself to a response extremely fast: the initial review process is set to take only 7 days; and only 7 additional days separate the day on which Respondent is told of the allegations and the day on which his or her deadline for submitting a written response. The Investigative Team is instructed also to provide both parties with a draft of its findings of fact and analysis, to give them one week to respond in writing, and to consider these responses in composing its Final Report. The Final Report should include both findings of fact, analysis, and a closing section spelling out any recommended measures to eliminate the harassment, prevent further harassment, and address its effects.

Other than these minimal “participation rights,” there is virtually no check on bias, oversight or error in the Investigative Team’s collection or interpretation of evidence or on its application of the substantive rules.

B. Unequal procedures put Respondents at a repeated steep disadvantage

Even though the (unenforceable) DOE OCR 2011 Dear Colleague letter insists that procedures treat the Complainant and the Respondent equally, all of its examples require that *Complainant* enjoy any procedural opportunities accorded to *Respondent*.²⁶ It never counsels that providing Complainants with opportunities which are denied to Respondents might also be unfair. You

²⁶ DOE OCR 2011 Dear Colleague Letter, pp. 11-12. The formalities of the Law School’s Ad Board adversarial procedures, formerly applicable to sexual harassment cases against our students, ensured that our process was never in line for accusations of this species of unfairness.

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could call this an implied permission to discriminate against Respondents, I suppose. Some of the inequalities listed here seem to be designed to comply with DOE's indefensible interpretations of federal law, and others seem to be Harvard innovations manifesting what I assess as a spirit of overcompliance.

1. *No access to Complaint.* There is no requirement that the Respondent be allowed to see or receive a copy of the complaint. Instead, the Procedures stipulate that the Investigative Team “will notify the Respondent in writing of the allegations and will provide a copy of the Policy and these Procedures.” (III.E. ¶ 1) This may even imply that the Investigative Team will *not* provide the Respondent with a copy of the Complaint. The same implication is created by a provision in the section on “Personal Advisors” – the only people who can accompany the parties to interviews. These individuals “may” (not “must”) view” – (not “receive a copy of”) – “a redacted version of the complaint[.]” (III.F ¶ 1) No similar disclosure is made to Respondents.²⁷
2. *No access to Complainant's list of witnesses and other sources of information.* The Complainant is required to append to the Complaint a list of sources of information which he or she believes may be relevant to the investigation. (III.A. ¶ 2) There is no requirement that this list be disclosed to the Respondent.
3. *Unequal provision of advisory assistance.* Potential and actual complainants are advised that they can request and obtain information and advice from the Title 9 Officer, the ODR, and the School or unit Sexual Harassment Coordinators.²⁸ (I.) No similar facilities are provided for potential or actual respondents.
4. *Maximum confidential advisors for Complainant; none for Respondent.* The new University Substantive Policy provides special instructions to those who have experienced gender-based or sexual harassment, including sexual violence, on how to obtain confidential advice within the University, with detailed contact information. (“Monitoring and Confidentiality”, p. 4; “Resources,” p. 5) This is a particularly challenging area, given cross-cutting priorities given to mandatory reporting and confidentiality for potential complainants, and the University has worked hard to ensure access to the maximum number of legally confidential sources of advice while advising complainants and potential complainants of the limitations. For example, the Office of Sexual Assault Prevention and Resolution, a unit of the Harvard University Health Services, maintains a webpage spelling out the exceptions from the general rule that it will not disclose any information about potential or actual complainants.²⁹ No similar

²⁷ The University may provide ancillary documents that clarify this but the language that I have seen is not satisfactory. Such ancillary documents may guarantee Complainant and Respondent “the opportunity to respond to all information used by the investigative team” and the opportunity “to provide the investigative team with whatever information they deem appropriate[.]” This leaves the question of the provision of the *Complaint* and other *documents* up in the air: redactions and narrative summaries could suffice. Nor is it a promise to provide *copies*. It leaves the Respondent in the dark even about the “information” disclosed until *after* the bulk of the investigation has been done.

²⁸ Other School or University officers may receive such requests but the rules suggest that they must pass them along unanswered to one of the personages listed above.

²⁹ <http://osapr.harvard.edu/pages/confidentiality>

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resources or reassurances are provided within the University for Respondents, who are instead instructed to obtain paid attorneys on their own. In my experience, obtaining a lawyer experienced in these matters requires a \$100,000 retainer.³⁰

5. *Complainant can opt out of the informal process and start the formal process at will; Respondent in an informal process can request neither a shift to the formal process nor a dismissal for legal insufficiency of the claim.* At any time during the informal process the Complainant (at this point actually called an Initiating Party) can withdraw the request for informal resolution and initiate a formal complaint. It is not clear whether he or she can take the first step without taking the second also: nothing indicates that the Initiating Party could withdraw her request and simply drop the matter. Meanwhile, the Respondent is provided no opportunity to object to the informal process on grounds that the allegations are not true or that, even if true, they would not constitute a violation of the Policy. Nor can the Respondent request a formal process.
6. *No commitment to a presumption of innocence.* The Procedures nowhere announce fealty to a presumption of innocence, and the informal process virtually assumes, to the contrary, that the Respondent has something to answer for and had better lend assistance in identifying it and the appropriate informal sanction. Taken together, the initiating provisions require the Respondent to cooperate, even to submit to informally proposed sanctions, in order to avoid the risk being held responsible for a violation of the Policy based largely merely on the Complainant's assertions augmented by negative inferences from his or her own silence. The presumption of innocence will be undermined if not dissolved when this happens.
7. *No motion for dismissal before selection of informal/formal process.* If a potential Complainant requests informal resolution, no one is charged with asking whether the allegations, if true, would nevertheless NOT be a violation of the Policy and whether Respondent should therefore not be subjected to any process at all. Instead, the School or unit's Title 9 Coordinator or the Title X Officer is instructed to determine whether an informal process is appropriate using exclusively criteria which, if present, would indicate that the informal process is insufficiently protective of the Complainant and that the formal process should be used instead. These are the severity of the alleged harassment and the potential risk of a hostile environment for others in the community. (III. ¶ 1)
8. *Administrative closure is a "special circumstance."* Administrative closure is the Procedures' equivalent to a civil 12b6 motion or a criminal dismissal – termination of the case for legal insufficiency, assuming the Complainant's asserted facts to be true. The decision belongs to the Investigative Team managing the formal investigation, which is

³⁰ Even if the Respondent can afford a lawyer to assist him or her through the process, it is not clear whether the attorney can attend interviews. Both parties are entitled to bring a "Personal Advisor" to interviews; this person "should" be an officer of the University who is affiliated with the School or unit in which the person is enrolled or employed and "may" not be related to anyone involved in the complaint or have any other involvement in the process. (III.F. ¶ 1) The University may "clarify" this by explicitly allowing lawyers in some kind of guidance document.

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charged with determining, at the end of its initial review, whether the information gathered, if true, would constitute a violation of the Policy or, alternatively, whether the case warrants administrative closure. (III.J.ii. ¶ 1) Administrative closure is classified as a “Special Circumstance,” while finding the Respondent guilty and recommending sanctions is part of the normal procedure.

9. *No administrative closure until end of initial investigation; meanwhile Respondents bear heavy and possibly expensive burdens even in manifestly dismissable cases.*
Administrative closure is not available until the end of the initial investigation stage of the formal process. By this time, Respondents may have been required to attempt an informal resolution, have been advised that they should hire legal counsel, and have been interviewed on the basis of a Complaint they have no right to see – that is to say, they are required to cooperate at a very significant expenditure of time, distress and possibly expenditure. The Procedures thus give the Title 9 Officer and the Investigative Team absolutely no tools to protect potential Respondents from substantively baseless claims. They have no back-up for encouraging would-be complainants whose claims are not within the Policy to seek other remedies, counseling, and/or nonpunitive solutions to the conflict underlying their allegations.
10. *The administrative closure process excludes Respondent at every step.* The Respondent is kept entirely in the dark about this phase of the process. There is no provision for Respondent to propose administrative closure or to object to its denial. This inability first arises because he is not provided any notice of the process. Notification of the final decision on administrative closure must be given to the Complainant, the University Title IX Officer and the School Title IX Coordinator – but not to the Respondent. (III.D. ¶ 3) A somewhat different requirement appears later in the Procedures, whereby the University Title IX Officer is required to close the case and convey notice to the Complainant and the School Title IX Coordinator – again omitting Respondent. (III.J.ii ¶ 1)
11. *Appeals from the administrative closure process also exclude Respondent entirely.* The Complainant has two opportunities to challenge an administrative closure. Within one week of an administrative closure, the Complainant can request reconsideration of that decision from the Title 9 Officer, limited to the grounds of substantive and relevant new information not available at the time of the decision that may change the outcome, and is entitled to a response in one week; as we’ve seen, there is no provision that the Respondent will know about this process or its outcome. There is thus no provision for the Respondent’s offer of counterarguments or alternative evidence. The University Title IX Officer decides the request for reconsideration within one week and is required to notify the Complainant, but not the Respondent, of the decision. (III.J.ii. ¶ 3) Any party, but effectively only the Complainant, can then appeal an administrative closure to the Assistant to the President for Institutional Diversity and Equity; there is no limitation of grounds for this appeal. (IV. ¶ 2) Again, there is no provision for notice of this appeal to Respondent, though this time there is no unequal access; the section on appeals has no notice provisions for anyone. (IV, passim)

12. *Complainant, University, and law enforcement v. Respondent.* The Procedures warn Respondents that allegations in the Complaint, if true, may also constitute criminal conduct, and advise them to seek legal counsel before making any written or oral statements and specifically to get advice on how the University process could involve any criminal case in which they are or may become involved. (II ¶ 3 (informal resolution); III.E. ¶ 4 (formal complaints)) While harsh, this seems unexceptionable: it conforms to reality. But it is part of a network of rules that put Respondents at a unique disadvantage within the University process. The Policy meshes any criminal investigation or prosecution into the University's Title 9 process by instructing the Investigative Team to respond to status updates about any criminal investigation or enforcement action provided by the University Title IX Officer or law enforcement. In response to these status updates, the Investigative Team is instructed to suspend the timelines set out for each step so as to "assess and reassess the timing of the investigation under the Policy, so that it does not compromise the criminal investigation." (III.H) There is no similar instruction to receive status updates from defense counsel or to modify the timing so as not to compromise the defense.
13. *Some Respondents will remain silent because of bargaining power disadvantage, not guilt, and will be held responsible and punished.* This unequal commitment to confidentiality and high level of collaboration between the Title 9 Office and law enforcement will cause some defense attorneys to instruct our Respondent students to remain entirely silent during their University proceedings. It is almost certain that strong negative inferences will be drawn from this silence and that the preponderance – indeed, most or all – of the available evidence in these cases will counsel a finding of liability. There is no provision for relieving students of findings of liability achieved in this way even if law enforcement drops the case, if a prosecutor declines to prosecute, if a grand jury refuses to indict, or if respondents are later acquitted in a court of law.
14. *Both Complainant and Respondent are warned not to make disclosures about the process, but only the Respondent is subject to charges of retaliation if he/she does so anyway.* Both parties and all witnesses are to be notified that they could compromise the integrity of the investigation by disclosing information about the case that they obtain by participating in the process, and that they are expected to keep such information confidential. Only the Respondent, however, is subject to the further warning that any such disclosures "may be construed as retaliatory. Retaliation of any kind is a separate violation of the Policy and may lead to an additional complaint and consequences." (III.G. ¶ 1) The Policy provides no guidance about when seeking help from friends, faculty advisors, and the like will be deemed to be retaliatory.
15. *A retaliation process is provided for, but no procedure at all for bad-faith, false and misleading complaints.* In addition to prohibiting retaliation, the new University Substantive Policy provides that "[s]ubmitting a complaint that is not in good faith or providing false or misleading information in any investigation of complaints is also prohibited." (p. 1), but the Procedures make no mention of this obligation. While charges of retaliation by the Respondent are expressly provided for, the Procedures give a pass to forms of procedural misconduct that the *Complainant* may commit.

16. *Unreviewable and theoretically limitless “interim measures” restraining Respondent but not Complainant.* The Procedures provide that “interim measures designed to support and protect the Initiating Party or the University community may be considered or implemented at any time” and “are subject to review and revision throughout the processes described” in the Procedures. (Preamble) Specific instructions to this effect appear at every stage of the process up to the Final Report. They “might include, among others: restrictions on contact; course-schedule or work-schedule alteration; changes in housing; leaves of absence; or increased monitoring of certain areas of campus.” (Id.) These are intended to restrict Respondent and to preserve Complainant from any need to change courses, housing, etc. Given the bias of the entire structure in favor of the Complainant and against the Respondent, it is highly possible that unnecessarily restrictive interim measures will be imposed. They may be imposed even in cases where the Complainant has refused to allow her name to be disclosed. There is no appeal from their imposition. Conversely, Complainants face no warning that if they abuse or threaten to abuse the process or to make public accusations that injure the Respondent’s reputation, they could be subject to anything resembling a restraining order.
17. *Free counseling and mental health services for Complainant; none for Respondent.* The support mentioned in the prior paragraph includes free counseling and mental health services; no similar support is offered to the Respondent. The DOE OCR purports to require former; but there is no bar, real or advisory, on extending humane assistance to the Respondent.³¹
18. *Disparate impact on low-income Respondents.* As we have seen, the Procedures provide advisors who will advise and advocate for complainants from the beginning of the process to the end. No such services are provided for Respondents. Instead, Respondents are relegated to their own resources. As we have also seen, they are specifically advised to obtain counsel if the allegations against them might constitute crimes, and that the Title IX Officer and Investigative team will work with any law enforcement personnel, including campus police and prosecutors, to make sure that the Title IX proceedings do not prejudice the law enforcement/prosecution effort. And as I have mentioned, retaining experienced counsel to defend these cases typically costs \$100,000, with inexperienced counsel available for less. This will almost always be family money, and only wealthy families will be able to do it. Our nonrich students will have to rely on public defenders for any criminal matters, and on their Personal Advisors and their friends (but see point 13 above) within our process. There is no requirement that the Respondent’s Personal Advisor or attorney be given any advice about how the process works. The differential impact of this highly “sided” approach on all our student Respondents, but especially on our lower income students, will be dramatic.

³¹ If, in setting interim measures, a School determines that Complainant requires counseling, the DOE OCR purports to require that it be offered free of charge. DOE OCR 2014 Q & A p. 33. No similar purported rule or recommendation concerns the mental health needs of Respondent.

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C. *The Shift from clear-and-convincing standard to preponderance of the evidence – which, as the new Title 9 Officer has acknowledged, is not required by law – directly overrules the Law School’s Policy and will throw doubtful cases to the Complainant*

The Law School’s Sexual Harassment Policy requires clear and convincing evidence in sexual harassment cases. (Part III.3 (viii)) For our students, the new University Procedures replace this with a preponderance of the evidence standard.

The DOE OCR never mentions the standard of proof in its 2001 Guidance, but is highly insistent on the preponderance standard in its 2011 Dear Colleague Letter (DCL): “In addressing complaints filed with OCR under Title IX, OCR reviews a school’s procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints.” (p. 10). The DCL goes on to say that the use of the clear and convincing standard would be *inequitable* because preponderance is the standard that courts apply in civil damages actions for sex discrimination (of which sexual harassment is a subcategory) under Title 9. (DOE OCR DCL p. 11) This logic, transposed to in the context of our new University Student Procedures, is pure gibberish. As this memo shows, those Procedures accord the Respondent almost none of the protections he or she would enjoy in civil litigation under Title 9. And they can lead to expulsion and the termination of a professional career; money damages are off the table entirely. As the University’s Title 9 Officer Mia Karvonides acknowledges in her *Harvard Gazette* interview, cited in Part I above, the 2011 DCL itself does not have the binding force of statute or duly promulgated regulation, and her noting this publicly can, I think, be taken to indicate that the *University’s* understanding that the DCL has no independent binding force.³² And yet we see preponderance in the new University Student Procedures.

Why? Did the University make a choice here? Or was it commandeered in the DOE OCR investigation to adopt this risky standard? Once again, the University of Montana letter suggests that, when we hear professions that “we have no choice in the matter,” we are hearing an answer of “Yes” to this question. In the Montana settlement Agreement, use of a clear and convincing standard was one of the primary “violations,” and the University’s promise to shift to a preponderance was an express condition of the settlement.³³ Were similar strong arm pressures brought on our University?

To be sure, reasonable people differ on the determinative weight of this shift. But the adoption of a preponderance standard, *coming on top of everything else*, should cause concern even among skeptics. On an already tilted playing field, it will throw doubtful cases to the Complainant. The University is running a real risk that Harvard students will be expelled, dismissed and suspended on flimsy proof that could never lead to their conviction in criminal court, their liability in an action for civil damages, or their discipline under a clear and convincing standard.

³² The same can be said of the DOE OCR 2014 Q&A document, where the preponderance standard is prescribed twice. (pp. 13, 14).

³³ Montana Agreement Letter, pp. 17, 19-21.

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D. Appeals are unduly narrow and unequally structured and, for Respondents, are heard by a decisionmaker who is reviewing her own prior decisions

Appeals from final decisions made by the Title 9 Officer (of which there are two: administrative closure and denial of Complainant's request to withdraw the Complaint) go to his/her superior, the Assistant to the President for Institutional Diversity and Equity. These decisions will be appealed only when they are adverse to the Complainant. Nothing in the Procedures indicates that the Respondent will even be informed that administrative closure is being considered or decided (as we have seen the Procedures expressly provide notice of the decision on administrative closure to Complainant *and not* to Respondent) so the Respondent will have no opportunity to submit arguments against these appeals. Appeals from administrative closure decisions will therefore almost certainly all be Complainant's appeals.

Conversely, appeals from the Investigative Team's Final Report go to the Title 9 Officer. Both parties are entitled to appeal the Investigative Team's report, but as this document will announce liability and recommend sanctions, this will be the only form of appeal that Respondents will use.

Vastly predominantly, appeals to the Assistant to the President for Institutional Diversity and Equity will be Complainant's appeals and appeals to the Title 9 Officer will be Respondent's.

Thus, the Complainant's most important appeal pathway is to an Advisor to the President, a newcomer to the case and an outsider to the process; whereas the only appeal accessible to the Respondent is to the Title 9 Officer. I discuss the conflict of interest problem this unequal allocation creates in subsection 2. below.

The substance of these appeals is similarly biased to privilege Complainant and burden Respondent. A bit of DOE OCR background is necessary to understand these substantive appeals provisions. In its 2011 Dear Colleague Letter, the OCR recommended provision of an appeal, but said no more on the subject. (p. 12) But in its April 2014 Question and Answer document, it purported to make the provision of an appeal optional, and narrowed its positive recommendation to appeals "where procedural error or previously unavailable relevant evidence would significantly impact the outcome of a case or where a sanction is substantially disproportionate to the findings." (p. 37). This is a mere recommendation, contained furthermore in a document that – again, as Mia Karvonides disclosed in her *Gazette* interview -- has no legal force.

The new University Procedures provide no substantive limits on appeals to the Assistant to the President for Institutional Diversity and Equity, but – in yet another example of over-compliance – they offer Respondent a scope of appeal that is verbatim downloaded from the 2014 Q&A document.³⁴ Thus, these appeals are constrained to claims that a procedural error occurred which may change the outcome or offers of new substantive, relevant information that was not available at the time of the investigation and that may change the outcome of the decision. (IV. ¶

³⁴ Our Procedures do not repeat the third ground of appeal recommended by the DOE OCR, probably because sanctions are to be decided by the Respondent's School or unit faculty.

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1) Here, where appeals are far more likely to be Respondents' – indeed, in the *only* form of appeal to which Respondents have any access – they may not question the finding of facts or the application of the policy.³⁵ The Policy even seems to treat these matters as mere differences of opinion: “Disagreement with the Investigative Team’s findings or determination is not, by itself, a ground of appeal.” (Id.)

In short, Complainant’s appeals are to an officer superior to the Title 9 Officer and the Office of Sexual Abuse Prevention and Response and not otherwise involved in the sexual harassment disciplinary process, while Respondents’ appeals are to the Title 9 Officer, who has managed the process from start to finish; meanwhile Respondents’ appeals are tightly circumscribed substantively, while Complainants’ may raise any and all issues. The appeals process thus bristles with due process and equality deficits.

It may emerge that the University will attempt to ameliorate these problems by arranging a delegation of some appellate roles. The Procedures provide that the decision of the Investigative Team can be appealed “the Title IX Officer or designee.” In response to criticisms sounding in due process, the Title 9 Officer may designate some more neutral decisionmaker for an appellate role. This would definitely be an improvement. But even if it happens, it will leave in place the discriminatory procedure for appeals and the discriminatory limits on the substance of appeals (for Complainant no subject-matter limits on 2 key appeals; for Respondent always limited to new information or procedural lapses that change outcome). It would not change the many remaining inequalities and due process problems baked into the Procedures.

D. Due process problems are acute and structural

The new University Student Procedures lack fundamental due process. The norms I consider in this subsection include decisionmaker independence and neutrality; separation of prosecution, party, investigation, process-manager, adjudication, and appellate functions; and the presumption of innocence.

Going through the process from the beginning, the Title 9 Officer:

- Supervises the ODR; it is staffed with employees who report to her.
- Is designated, along with the ODR, School or unit Sexual Harassment Coordinators, and other School or University officers, as a person who can receive requests for information or advice and requests for informal resolution, and is a person to whom formal complaints may be submitted.
- Is designated, along with the ODR and the School or unit Sexual Harassment Coordinators, as a person who can respond to potential complainants’ questions seeking information and advice, advise about steps leading to informal resolution or formal complaint, and discuss possible initial interim measures;

³⁵ Our Policy seems to introduce a further limitation when it bypasses the DOE OCR’s language about likely “impact on the outcome” in favor of “outcome of the decision.” Query whether “outcome” means recommended sanctions as opposed to any reasoning process disclosed to the parties. See DOE OCR 2014 Q & A for complex rules about disclosure of the “outcome” to each party.

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- Is designated, along with the School or unit Sexual Harassment Coordinators, as a person who can receive oral or written requests for informal resolution;
- Is designated, along with the School or unit Sexual Harassment Coordinators, as a person who must assess the severity of the allegations and determine potential risk of a hostile environment for others in the Harvard community and determine whether interim measures are appropriate to address or prevent it;
- Decides whether informal resolution is appropriate;
- Assigns an informal resolution process to an Investigator;
- Is designated, along with the School or unit Sexual Harassment Coordinators, as a person who may now decide that interim measures are appropriate and who must put them into place;
- Is designated, along with the School or unit Sexual Harassment Coordinators, as a person who will attempt to aid the parties in coming to a mutually acceptable resolution in the informal process;
- Is designated, along with the School or unit Sexual Harassment Coordinators, as a person whose approval is needed to render an informal resolution that is acceptable to the parties, the final outcome of a case³⁶;
- Is designated as one of the persons (the others are the Investigative Team and/or the School Title 9 Coordinator, as appropriate) who determines whether a Complainant will be allowed to proceed anonymously, and whether an investigation must proceed and must involve disclosure against the Complainant's wish to remain anonymous;
- Is designated as the person who decides whether, when the Complainant decides not to participate in further investigation, to proceed with the investigation or to elect administrative closure;
- Assigns an Investigator, who is her own employment supervisee, for a formal process;
- Receives from the Investigative Team, along with the Complainant and the School or unit Sexual Harassment Coordinator (but not Respondent), a determination, at the end of the initial investigation, whether administrative closure is warranted;
- Provides status updates, along with law enforcement, of any ongoing law enforcement process involving the parties, to the Investigative Team so that it can adjust the timing of its process;
- Is designated, along with the School, to take "such measures as they deem appropriate" after the Final Report; this does not include the "administration of discipline" because that is "subject to the authority of the faculty," but it could include a broad range of efforts, including further restraints on Respondent, to eliminate the harassment, prevent its recurrence, and address its effects;
- Has the following roles in the "special circumstances" over and above finalizing administrative closures and pursuing cases over the Complainants' objections:
 - + Receives Complainant's request for reconsideration of administrative closure and decides on it, reporting the result to the Complainant;
 - + Determines, in cases of administrative closure, whether to refer the matter as a possible violation of other conduct policies to the appropriate School or university official.

³⁶ Two inconsistent provisions on this. II. ¶ 4 indicates that ONLY the School or unit Sexual Harassment Coordinator's approval is needed; III.A. ¶ 2 speaks of an informal resolution approved by the School or unit Sexual harassment Coordinator OR the Title 9 Officer.

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Exercising these responsibilities involves the Title 9 Officer in substantive and procedural decisions from the beginning to the end of the process. The likelihood that the Officer will perform all these duties without acquiring an interest in defending his or her execution of them by the next stage of his or her involvement is approximately zero. *Moreover, this person's very job depends on showing a high rate of enforcement.* The office is structurally biased.

It is also structurally not due process. The collapse of roles into the Title 9 Officer is pretty near complete. In cases where the Complainant declines to proceed, the Title 9 Officer can decide to be a prosecutor; and in all cases, that Officer is the investigator, the adjudicator, and the Respondent's only avenue of appeal. Just a few additional details to fill this picture out:

There is no provision for the appointment of an independent investigator. Instead, the Title 9 Officer is the employment supervisor of her investigators: they report to her, their jobs depend on her positive evaluation of their work, and the culture of job hierarchy ensures that they will be in the habit of deferring to their boss.

The Investigative Team operates without any internal check. Investigations are accomplished 100% within the personnel of the Title 9 Office, with the sole exception that a second member of the Investigative Team may be added by the student's School, at the discretion of the School. Nothing requires that this added member be free of administrative/employment supervision that taints his or her neutrality or independence. Nor do the Procedures say what happens if the Title 9 Office member of the Investigative Team and the member appointed by the student's school disagree with each other. Given the administrative and employment structure of authority that pervades the new University process, we can expect deference to hierarchical superiors to mark such moments as it will the process as a whole.

The most significant appellate review from the Respondent's point of view is done by the Title 9 Officer herself. Far from providing a check, this actually intensifies the administrative/employment control structure of the Title 9 process. (But see the last paragraph of the prior subsection for a possible forthcoming change.)

Due process and equality of procedural opportunity are so lacking from the new University Student Procedures that they threaten the presumption of innocence.

IV. A Call

I call upon:

Harvard University to restart the drafting process, to conduct it through a democratic process involving all affected sectors, and ultimately to promulgate better Policy and Procedures that define wrongdoing clearly and provide an effective response, protect academic freedom and freedom of speech, protect stigmatized minorities and low-income accuseds, support and educate all students first and punish them only when necessary, promote public health over individual punishment remedies in addressing substance abuse among our students, and maximize fairness, equality and due process for all parties.

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Harvard communities engaged with social justice issues and particularly feminists to decide in open debate whether they really want the paternalistic and punitive Policy and Procedures that are being advanced to protect them, and to explore ways to promote healthy and affirmative sexual culture.

Policymakers, advocates, and concerned community members of other educational institutions who may look to Harvard as an example to understand that Harvard's current Policy and Procedures are contested within the Harvard community.

Harvard administrators to stop vacillating between saying we "have to" and we "decide to" impose dangerous rules, and to expose to daylight precisely the pressures and threats they are under from the DOE OCR.

The DOE OCR to retreat from its assumption of exaggerated powers, to stop exploiting women who have experienced sexual harassment including sexual assault for political advantage, and to return to a consultative relationship with the entire academic community.