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New Factor in Campus Sexual Assault Cases: Counsel for the Accused

By **ARIEL KAMINER** NOV. 19, 2014

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On the Columbia campus. Defense lawyers are calling attention to what they say is the injustice in the way sexual misconduct cases are investigated. Times
Nicole Bengiveno/The New York

As the [Columbia University](#) student tells it, the encounter was harmless fun: A female freshman invited him into her suite bathroom, got a condom, took off her clothes and had sex with him. But as that young woman later described it to university officials, the encounter was not consensual. The university suspended him for a year.

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He felt the outcome was unjust, but he didn't know what to do about it. His lawyer, Andrew Miltenberg of Manhattan, did.

Invoking Title IX, the federal gender-equality statute that is typically used to protect the rights of female students, [he sued Columbia](#), saying his client had been “discriminated against on the basis of his male sex.”

At a moment when students who have been sexually assaulted are finding new ways to make their voices heard, and as college officials across the country are rushing to meet new government standards, a specialized class of lawyers is raising its voice, too. They are speaking out on behalf of the students they describe as most vulnerable: not those who might be subjected to sexual assault, but those who have been accused of it.

To do so, they have appropriated the legal tools most commonly used to fight sexual misconduct and turned them against the prosecution, confronting higher education's whole approach to the issue, which they describe as a civil rights disaster.

“Everyone's first blush when you think about this is: It's sort of an ugly position to take,” Mr. Miltenberg said of defending the accused students. “My own family members have said to me: ‘What are you doing? You're 49 years old. You have a successful business litigation practice. Why would you jump into this?’ ”

He said he felt compelled to get involved when he saw how colleges handled accused students. “You've got factual statements made that you're not necessarily allowed to review and you're certainly not allowed to have copies of,” he said. “You may or may not be able to present your witnesses. You probably don't have the chance to cross-examine.”

To women's rights activists, objections like those may have an oddly familiar ring. For decades, activists have argued

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"Most of the time I'm looking to seal the records or have this redacted upon graduation so it doesn't follow them around for the rest of their lives," said Andrew Miltenberg, a Manhattan lawyer who is critical of college sexual assault policies.

Nicole Bengiveno/The New York Times

that campus policies were biased against accusers, who are typically women; that the officials who run the investigations lacked training; that assailants were absolved far too easily. (One recent [study](#) determined that among students found by their colleges to have committed sexual assault, fewer than one-

third were expelled.) Now, defense lawyers are denouncing inconsistent standards and inadequate training, but they arrive at the opposite conclusion: The system is biased, the lawyers say, against men.

Last month, 28 members of the [Harvard Law School](#) faculty published an op-ed criticizing Harvard's sexual misconduct policies for "the absence of any adequate opportunity to discover the facts charged and to confront witnesses and present a defense at an adversary hearing," for exceeding the parameters of Title IX and for "the failure to ensure adequate representation for the accused."

Harvard defended those policies as "an expert, neutral, fair, and objective mechanism" but said it would continue to review them.

During the 12-month period it most recently tracked, the federal Education Department received 96 Title IX complaints related to sexual violence. In the previous period, that number was 32. The department does not track how many were lodged by women and how many by men.

A [database](#) maintained by a group called [A Voice for Male Students](#) counted 11 lawsuits this year in which male students "wrongly accused of sex crimes found themselves hustled through a vague and misshapen adjudication process with slipshod checks and balances and Kafkaesque standards of evidence."

A group of 30 or so lawyers from across the country participate in a running email discussion about how to approach these issues; 20 or so gathered in Washington last month to share their experiences.

A similar number recently stepped into the political arena when they signed

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a letter denouncing the [Campus Accountability and Safety Act](#) proposed by Senator Claire McCaskill, Democrat of Missouri; the measure is intended to help universities address sexual misconduct more effectively. “By presuming that all accusers are in fact ‘victims,’” the letter said, “the proposed legislation does a grave disservice to those accused of serious sexual offenses.”



Faculty members at Harvard Law School have been critical of Harvard’s sexual misconduct policies. Gretchen Ertl for The New York Times.

Members of this small but fast-growing legal specialty say the problem dates to 2011, when the Education Department advised colleges to take sexual assault more seriously and to lower the burden of proof for people bringing complaints. Since then, a [White House task force](#) has issued new guidelines and the Office of Civil Rights has released the names of more than 85 colleges that are under investigation for not doing enough. Faced with all that political pressure, said [Joshua Adam Engel](#), a lawyer in Mason, Ohio, colleges are panicking.

So are students. Since the beginning of the current semester, when a senior named [Emma Sulkowicz](#) began [carrying her dormitory mattress](#) as a public protest against the way Columbia had handled her sexual misconduct complaint, Mr. Miltenberg said, he gets a call from a new male Columbia student more or less weekly.

The client who sued the university for discrimination [argued](#) that his suspension amounted to “a rush to judgment, pandering to the political climate on campus” and pressure from women’s groups. Columbia has sought to have the lawsuit [dismissed](#), saying it failed to prove anti-male bias. “That argument proceeds from both a misapprehension about the

nature of university disciplinary proceedings — which are not criminal prosecutions — and a misunderstanding about Columbia’s definition of sexual misconduct — which is intended to protect students not only from forcible rape, but also from unreasonable pressure to accede to sexual advances,” Columbia’s lawyers wrote in a filing last month.

Colby Bruno, senior legal counsel at the [Victim Rights Law Center](#), said the growing involvement of lawyers could be beneficial. But too often, she said, defense lawyers enter the campus proceedings “shouting from the rooftops about things that aren’t relevant to the matter at hand.” Those include due process, a set of regulations that private colleges are not required to observe, and the right to avoid self-incrimination, which applies only to people facing criminal prosecution. “It’s when the decision-makers aren’t equipped to handle attorneys that the decision-makers start getting pushed around, policies start getting changed, and that is where a school can get in real trouble with Title IX,” Ms. Bruno said.

Lawyers for the accused, Mr. Miltenberg said, are not always seeking to have judgments overturned. “Most of the time I’m looking to seal the records or have this redacted upon graduation so it doesn’t follow them around for the rest of their lives,” he said. But success does not come cheaply. Litigating a case through a trial could cost \$100,000, he said.

Judith Grossman, a lawyer — and a feminist, she made a point of adding — got involved in the cause when her son successfully fought an accusation of sexual misconduct. “I think that there is no question that there is an issue of sexual assault in this country, on campus and off campus, but this is not the first issue in our country where a bumper sticker approach has been applied to a nuanced problem,” Ms. Grossman said.

The alternative, however, is not so easy to identify. Mr. Miltenberg said he thought colleges should leave the investigation of serious crimes to the police. But the judicial system moves slowly, he acknowledged, and if a daughter of his were assaulted he would not want her sharing a campus with her accused assailant for years as the case inched toward trial.

At Columbia, which recently became one of the few colleges to offer free legal help to both accusers and the accused, [Suzanne B. Goldberg](#), a special adviser to the university’s president on sexual assault prevention and response, observed that “lawyers can help protect the rights of accused students.” But, she said, “they come at a potential cost” to what is set up to be an educational experience. “There is no cost-free solution,” she said.

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