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SHUTTING DOWN CONVERSATIONS ABOUT RAPE AT HARVARD LAW

By Jeannie Suk Gersen December 11, 2015

This is a piece on a subject about which I may soon be prevented from publishing, depending on how events unfold. Last month, near the time that CNN broadcast the documentary “The Hunting Ground,” which focusses on four women who say their schools neglected their claims of sexual assault, I joined eighteen other Harvard Law School professors in signing a statement that criticized the film’s “unfair and misleading” portrayal of one case from several years ago. A black female law student accused a black male law student of sexually assaulting her and her white female friend. The accuser, Kamilah Willingham, has graduated from the law school and is featured in the film. The accused, Brandon Winston, who spent four years defending himself against charges of sexual misconduct, on campus and in criminal court, was ultimately cleared of sexual misconduct and has been permitted to reënroll. The group that signed the statement, which includes feminist, black, and leftist faculty, wrote that this was a just outcome. (The faculty, of which I’m a member, made the final decision not to dismiss Winston from the law school, after a contrary recommendation made by the school’s administrative board, but I rely only on public knowledge produced by the film and his criminal trial, and don’t draw on any confidential or internal information about the case.)

Winston’s attorneys have put public documents related to his case on a dedicated Web site so that people who see the film can evaluate the facts of the case for themselves. I won’t belabor the merits of the case or the accuracy of the film here, but, as Emily Yoffe noted on *Slate*, “what the evidence (including Willingham’s own testimony) shows is often dramatically at odds

with the account presented in the film.” The evidence reveals that Winston, who was involved in a confused, drunken encounter, was not, as Willingham claims in the film, “a rapist” or “a predator” (Her statement that “he is a rapist” was edited out when the film was broadcast on CNN.) Harvard officials were not indifferent to Willingham’s complaint; Winston was removed from the law school and investigated by the school, an independent fact-finder, and the local district attorney. In e-mails to the lawyer for a white female student, who had accused a black college quarterback of rape and ultimately appeared in the film, one of the producers expressed the filmmakers’ intent to “ambush” him, and explained that “we don’t operate the same way as journalists” since the film is “very much in the corner of advocacy for victims” and had no “need to get the perpetrator’s side.” This raised questions about whether fairness and accuracy are even important for an advocacy film, but the filmmakers have continued to insist that “the truth is on our side.” In a comment to *The New Yorker*, they wrote, “We fully stand behind Willingham’s account—everything in the film is accurate.” Disagreement is an expected part of the exchange, which, on the whole, helps move the public discussion toward more nuanced perceptions of campus sexual-assault narratives.

But last week the filmmakers did more than understandably disagree with criticism of the film, which has been short-listed for the Academy Award for best documentary. They wrote, in a statement to the *Harvard Crimson*, that “the very public bias these professors have shown in favor of an assailant contributes to a hostile climate at Harvard Law.” The words “hostile climate” contain a serious claim. At Harvard, sexual harassment is “unwelcome conduct of a sexual nature,” including verbal conduct that is “sufficiently persistent, pervasive, or severe” so as to create a “hostile environment.” If, as the filmmakers suggest, the professors’ statement about the film has created a hostile environment at the school, then, under Title IX, the professors should be investigated and potentially disciplined.

To my knowledge, no complaint of sexual harassment has been filed with Harvard’s Title IX office—though I’ve been told by a high-level administrator

that several people have inquired about the possibility—and I don't know if the school would proceed with an investigation. Precedent for such an investigation exists in the case of Laura Kipnis, a feminist film-studies professor at Northwestern University, who earlier this year wrote an article criticizing aspects of Title IX policies and culture and was accused of creating a hostile environment on campus; Northwestern conducted an investigation and ultimately cleared Kipnis of sexual-harassment charges. A handful of students have said that they feel unsafe at Harvard because of the professors' statement about the film. If a Title IX complaint were filed and an investigation launched, the professors wouldn't be permitted to speak about it, as that could be considered "retaliation" against those who filed the complaint, which would violate the campus sexual-harassment policy.

What could possibly be the logic on which criticism of "The Hunting Ground" could be said to contribute to a hostile environment, or to cause a student to feel unsafe? The film features the first-person narratives of individuals who describe their sexual assaults and then go on to describe the insensitivity of campus officials or police who did not vindicate their claims. At the Sundance festival premiere, which I attended, when an audience member asked what people could do to join the fight against campus sexual assault, one of the survivors featured in the film responded, simply, "Believe us." It is a near-religious teaching among many people today that if you are against sexual assault, then you must always believe individuals who say they have been assaulted. Questioning in a particular instance whether a sexual assault occurred violates that principle. Examining evidence and concluding that a particular accuser is not indeed a survivor, or a particular accused is not an assailant, is a sin that reveals that one is a rape denier, or biased in favor of perpetrators.

This is the set of axioms on which one might build a suggestion that challenging the accuracy of "The Hunting Ground" contributes to a hostile environment on campus. If I am a student at a school where professors seem to disbelieve one accuser's account, then it is possible that they could disbelieve

me if I am assaulted. That possibility makes me feel both that I am unsafe and that my school is a sexually hostile environment. Under this logic, individuals would not feel safe on campus unless they could know that professors are closed off to the possibility that a particular person accused of sexual misconduct may be innocent or wrongly accused. But, then, what would be the purpose of a process in which evidence on multiple sides is evaluated? Fair process for investigating sexual-misconduct cases, for which I, along with many of my colleagues, have fought, in effect violates the tenet that you must always believe the accuser. Fair process must be open to the possibility that either side might turn out to be correct. If the process is not at least open to both possibilities, we might as well put sexual-misconduct cases through no process at all.

The ironclad principle that you must always believe the accuser comes as a corrective to hundreds of years in which rape victims were systematically disbelieved and painted as liars, sluts, or crazies. This history, along with the facts that sexual assault is notoriously underreported and that the crime suffers no more false reports than other crimes—and the related idea that only those actually assaulted would take on the burden of coming forward—leads many advocates today to the “always believe” orthodoxy. We have seen recent high-profile instances in which that article of faith has led to damaging errors, as in *Rolling Stone’s* reporting of a rape at the University of Virginia, or the prosecution of the Duke lacrosse case. The extent of the damage comes out of the fact that “always believe” unwittingly renders the stakes of each individual case impossibly high, by linking the veracity of any one claim to the veracity of all claims. When the core belief is that accusers never lie, if any one accuser has lied, it brings into question the stability of the entire thought system, rendering uncertain all allegations of sexual assault. But this is neither sensible nor necessary: that a few claims turn out to be false does not mean that all, most, or even many claims are wrongful. The imperative to act as though every accusation must be true—when we all know some number will not be—harms the over-all credibility of sexual assault claims.

Sexual assault is a serious and insidious problem that occurs with intolerable frequency on college campuses and elsewhere. Fighting it entails, among other things, dismantling the historical bias against victims, particularly black victims—and not simply replacing it with the tenet that an accuser must always and unthinkingly be fully believed. It is as important and logically necessary to acknowledge the possibility of wrongful accusations of sexual assault as it is to recognize that most rape claims are true. And if we have learned from the public reckoning with the racial impact of over-criminalization, mass incarceration, and law enforcement bias, we should heed our legacy of bias against black men in rape accusations. The dynamics of racially disproportionate impact affect minority men in the pattern of campus sexual-misconduct accusations, which schools, conveniently, do not track, despite all the campus-climate surveys. Administrators and faculty who routinely work on sexual-misconduct cases, including my colleague Janet Halley, tell me that most of the complaints they see are against minorities, and that is consistent with what I have seen at Harvard. The “always believe” credo will aggravate and hide this context, aided by campus confidentiality norms that make any racial pattern difficult to study and expose. Let’s challenge it. Particularly in this time of student activism around structural and implicit racial bias pervading campuses, examination of the racial impact of Title IX bureaucracy is overdue. We are all fallible—professors, students, and administrators—and disagreement and competing narratives will abound. But equating critique with a hostile environment is neither safe nor helpful for victims. We should be attentive to our history and context, and be open to believing, disbelieving, agreeing, or disagreeing, in individual instances, based on evidence.



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