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A Perfunctory Change?

Harvard University’s New Sexual Misconduct Complaint Procedure: Lessons from the Frontlines of Campus Adjudication Systems

Stephanie Schmid†

I. HARVARD’S HAPLESS FORAY INTO POLICY REVISION

The Administrative Board of Harvard College has this year adopted a new procedure for responding to complaints of peer-on-peer misconduct, including sexual misconduct. This procedural change does not alter the College’s policies regarding rape, sexual assault, or other sexual misconduct. The new procedure also does not change the substantive standards used by the Board in deciding peer dispute cases.1

At a time when some universities have chosen to expand the scope of their sexual harassment and misconduct policies,2 Harvard University has chosen in-...
stead to limit its procedures for peer dispute resolution. Although the new policy pertains to all peer disputes, it has come under fire particularly for its impact on sexual misconduct allegations by placing the burden for evidentiary production solely upon the complainant. Essentially, Harvard has instituted a preliminary investigation stage for each peer dispute filed with the college, during which time the complainant is asked to submit not only her complaint, but also a "list of all sources of information that may help to corroborate the allegations." If the University determines that it will be unlikely to resolve the case after this preliminary inquiry, it may then decline to pursue the complaint further. While the University maintains that its substantive standards have not changed, the new procedure does alter the substance of the policy by adding the preliminary explicit communications." Georgetown does not require corroborating evidence for a sexual assault complaint to be fully investigated by the university).

In the winter of 2000, Columbia University enacted a revised sexual misconduct policy aimed at eliminating sexual misconduct on their campus. See Katherine Haenschen, Misconduct Policy Office Facing Critical Decisions, COLUM. DAILY SPECTATOR, Sept. 21, 2001, available at http://www.columbiaspectator.com/vnews/display.v/ART/2001/09/21/3c740920b960d?in. Despite being thrust into the national spotlight and receiving criticism from civil liberties groups claiming the new policy denied accused students due process, Columbia's policy remained in place. Id. The majority of students, however, felt the new policy represented a vast improvement over the old one because of the newly established Office of Sexual Misconduct, signaling a more substantive and comprehensive approach. Id. While the policy has undergone a series of revisions and evaluations to address concerns, both the new Office of Sexual Misconduct Policy and Education and the separate disciplinary procedure for sexual misconduct still comprise the core of Columbia's current approach to sexual misconduct. Id. For the full text of the current Columbia sexual misconduct policy, see COLUMBIA UNIVERSITY OFFICE OF SEXUAL MISCONDUCT PREVENTION AND EDUCATION, SEXUAL MISCONDUCT POLICY AND DISCIPLINARY PROCEDURE, available at http://www.columbia.edu/cu/sexualmisconduct/policy.html (last visited Jan. 25, 2003) [hereinafter COLUMBIA SEXUAL MISCONDUCT POLICY].

Yale University also has a separate body to deal with complaints of sexual misconduct. See YALE COLLEGE DEAN'S OFFICE, YALE COLLEGE GRIEVANCE BOARD FOR STUDENT COMPLAINTS OF SEXUAL HARASSMENT, available at http://www.yale.edu/yalecol/pages/shcomplaints.html (last visited Jan. 25, 2003). Students can bring "questions concerning procedure, seek informal advice, or present a complaint to any member of the Board, either orally or in writing." Id. In addition, the student is responsible for guiding the entire complaint process, and no action is undertaken without his or her explicit consent. Id. While a student wishing to file a formal complaint against another student must ultimately go before the Yale College Executive Committee (the equivalent of Harvard's Ad Board which handles all student violations of university policy) in order to have penalties imposed, the Grievance Board can be a resource to those students, in addition to giving its recommendations on the case to the Executive Committee. Id. The Grievance Board has several undergraduate student members. Id.

Note—the author was a member of the Yale College Grievance Board for Student Complaints of Sexual Harassment from the fall of 2000 until the spring of 2002.

3. NEW PROCEDURE, supra note 1.
4. See infra note 9 for a list of sources discussing the new policy.
5. NEW PROCEDURE, supra note 1.
6. Id.
7. See supra note 1.
RECENT DEVELOPMENTS

investigation stage and the corroborating evidence requirement – both of which can lead to an earlier dismissal of a complaint than was previously possible.\(^8\)

The procedural change occurred after a special committee of the Administrative Board [hereinafter “Ad Board”] was asked to investigate the sharp increase in the number of sexual assault complaints filed during the previous calendar year.\(^9\)

Although some have applauded the school’s decision,\(^10\) the University now finds itself at the center of a firestorm of criticism from members of the Harvard community and national organizations and media outlets.\(^11\) The first calendar year of the new policy has brought student protests,\(^12\) a Title IX complaint filed against the school,\(^13\) and a new committee that aims to study comprehensively

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8. Id.
9. In 2000-2001 alone, seven complaints were filed with the Ad Board with a definitive resolution reached in only one of the seven cases. REPORT OF THE AD HOC FACULTY COMMITTEE ON THE ADMINISTRATIVE BOARD (Jan. 18, 2002) (on file with author). Such numbers were alarming, given that the Board received a total of thirteen complaints during the entire preceding decade. Id. The Dean of the Faculty established the Ellison Committee to analyze prior adjudications of sexual misconduct complaints and to recommend any policy revisions they deemed appropriate. Id.; see also Adjudicating Sexual-Assault Cases, HARV. MAG., July-Aug. 2002, at 81, available at http://www.harvard-magazine.com/online/0702104.html; but see infra note 10 for another explanation of why the policy revision occurred.
10. See Anne K. Kofol, Lawyer Praises Harvard’s New Sexual Assault Policy Changes, HARV. CRIMSON, Aug. 16, 2002, available at http://thecrimson.harvard.edu/article.aspx?ref=253986. Boston attorney Harvey A. Silverglate praised Harvard’s new policy as “one of the best things to happen to a campus-judicial system in years.” Id. Silverglate claims he represented a Harvard undergraduate in the 2001-2002 school year who “came frighteningly close” to being falsely convicted by the Ad Board for sexual misconduct. Id. In an earlier editorial, Silverglate had claimed that it was this near conviction that led Harvard to establish a committee to review its peer dispute adjudication policies. Id.

The “false conviction” was prevented by the intervention of an unnamed faculty member whom Silverglate states conducted an independent investigation into the case, leading to the discovery of “exculpatory evidence that the subcommittee had ignored.” Id. Harvard officials have declined to comment on Silverglate’s statements, saying that the review was initiated due to Board members’ concerns over an increase in sexual assault complaints during the 2000-2001 school year. Id. Another Boston attorney, however, challenges Silverglate’s conclusion that such a policy change is welcome. Id.

Wendy Murphy, a Boston attorney who has filed a Title IX complaint against Harvard contesting the policy change (see infra note 11), stated that if the policy change had indeed been motivated by the case of Silverglate’s former client, it would be “extremely disturbing.” Id. Murphy further stated, “[c]learly the data does not show a problem in the adjudicatory process that cries out for a ‘cure’ to protect against ‘false convictions.’ It does the opposite – and Harvard’s new corroboration requirement is not only sexist and regressive, it is plainly a move in the wrong direction.” Id.

12. Id.
13. See TITLE IX, supra note 11. The failure to pursue some student complaints, namely those made by female students alleging sexual misconduct or assault, is the basis for a Title IX complaint to the Dep’t of Educ. Office of Civil Rights filed by attorney Wendy Murphy (a former sex crimes prosecutor who is a visiting scholar at Harvard Law School) on behalf of a
Harvard's policies and services pertaining to sexual misconduct has been convened shortly after the protests began. National organizations, scholars, and media representing myriad stances all seek to influence the debate and the direction that Harvard policy should take in the future. Will Harvard stand by its new procedure in the face of possible government sanctions and continued opposition from many community members, or will it choose instead to begin a process of analysis and revision in order to address both current and past criticism?

Section II examines the history of formal sexual assault policies at Harvard and the adjudication of student complaints, focusing on several periods of student critique and protest during the past decade that were not adequately taken into account during the 2002 policy revisions. In particular, two high profile sexual assault cases in 1999, which both resulted in guilty admissions by the accused and their subsequent dismissal from the University, will be used to illustrate problems with the old policy that are further compounded by the new procedure. Section III expands upon the lack of student involvement in the University's decision-making process by looking at an analysis of the racial differences in women's experiences of sexual assault, particularly in terms of a woman's likelihood to report an incident. In addition, the racial, ethnic, and socio-economic differences between the student body and the faculty/administration are explored as both a possible explanation for the disjunction between students and University policy-makers and as a compelling reason for progressive policy revision.

The final section analyzes the risk of error under both the old and the new policies for peer dispute resolution before advocating for systemic change at Harvard. The changes recommended in this section are all aimed at accomplishing the four goals Harvard should keep at the forefront of its sexual misconduct agenda: 1) to raise awareness on campus and to thoroughly educate the community about sexual assault, including what constitutes sexual assault, what avenues of redress are open to students, and how the Ad Board process works; 2) to increase the reporting rate for sexual assault; 3) to decrease the number of sexual assaults committed; and 4) to comprehensively consider student experiences, cri-

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Harvard undergraduate, whose name has not been publicly revealed, in the early summer of 2002. E-mail from Wendy Murphy, Visiting Scholar, Harvard Law School, to Stephanie Schmid, J.D. Candidate (Oct. 12, 2002, 07:42:00 PST) (on file with author).

In an interview with Security on Campus, Inc., a non-profit watchdog group, Murphy said: "By requiring corroboration from the victim before they will agree to take any steps against a rapist on campus, Harvard has instituted a set of policies that will discourage reporting of sexual violence, undermine the deterrent value of disciplinary sanctions and render female students in particular less able to enjoy an education environment free from intimidation."

TITLE IX, supra note 11.


15. This Note addresses only the rape of women by men, since it is by far the most prevalent and widely-studied kind of rape and therefore the most appropriate topic for this limited space. This is not meant to suggest that men at Harvard and other universities are/may not be subjected to sexual assault. Any comprehensive set of university policies and resources should pertain to survivors of any gender or sexual orientation.
tiques, and diversity including race, ethnicity, sexual orientation, religious affiliation, socio-economic status, and the particular vulnerability of college women when formulating new policy, procedure, and resources to assist students. Harvard must consider other colleges’ policies, undergraduate student concerns, and lessons from the University’s institutional past in order to construct a superior peer dispute resolution procedure.

II. INSTITUTIONAL (DIS)MEMORY BIDES ITS TIME AND DEFEATS ACTIVIST EFFORTS

"The history of date rape at Harvard goes roughly as follows: some highly publicized event arouses the attention of activist students. The administration agrees, under pressure, to consider new policies. Eventually the activist students graduate and the policies remain essentially unchanged. Activists forget and a new conflagration restarts the cycle."\(^16^\)

The participants in the current debate within both the university and the national media have failed to consider the lessons from Harvard’s own history of rape policies, as well as the lessons from other colleges—lessons which, if heeded, would preclude a future of conflict, anger, and continued criticism. Missing from all the press releases, new procedural guidelines and justifications, and newspaper articles—but buried deep within the Harvard Perspective archives and the memories of many in the administration—lies more than a decade of conflict over sexual assault policies within the Harvard community.\(^17^\)

In the fall of 1990, L. Fred Jewett, then Dean of Harvard College, and Dean Jeffrey Wolkowitz were interviewed for a student newspaper article in the Harvard Crimson on the adjudication of sexual assault complaints.\(^18^\) Wolkowitz, who subsequently headed the Ad Board subcommittee on date rape, said: "I think that women often find it difficult to say a forceful no. I have a sense that in many of these cases the woman thinks she has said no, but it may have been in subtle ways—ways that may have caused confusion."\(^20^\) In response to his assertion, forty-five students stormed Jewett’s office.\(^21^\) On November 8, 1990, Jewett established a date rape task force.\(^22^\) Two years later, at the task force’s recommendation, the Ad Board adopted the first university definition of “rape” as “sexual intercourse without expressed consent” and changed the adjudication of

17. The *Perspective* is a monthly student magazine at Harvard University.
18. *Two Harvard Rape Survivors*, supra note 16.
19. Id.
20. Id.
21. Id.
22. Id.
assault cases from an ad hoc case-by-case basis to a process formalized by University regulations.\textsuperscript{23}

Eight years later, on April 13, 1999, the Harvard faculty voted to dismiss undergraduate Joshua M. Elster for rape.\textsuperscript{24} Elster's case became the focal point of a heated community debate over sexual assault and the campus justice system, this time resulting in the creation of the student Coalition Against Sexual Violence (CASV).\textsuperscript{25} That same year, a second student, D. Drew Douglas, was also dismissed for rape.\textsuperscript{26} Both men pled guilty to charges in criminal court—Elster pled guilty prior to his dismissal from Harvard and received three years probation; Douglas received five years.\textsuperscript{27} Dismissals, by definition, permit students to reapply for admission after five years, while expulsions are permanent.\textsuperscript{28} The leniency of sentences for confessed rapists like Elster and Douglas, together with the slow response of the administration and controversial statements made by some administrators in the Elster case,\textsuperscript{29} threw a portion of the student community into an uproar.\textsuperscript{30}

In February 1999, Perspective published an interview with the two women whom Elster and Douglas had raped.\textsuperscript{31} The interview focused on the women's experiences with the Ad Board and with other members of the administration.\textsuperscript{32} Their troubling stories shine a harsh light on two cases that the Board had considered successfully resolved since a full adjudication was made and a final determination was reached. Such "success" stories have been rare in recent Harvard adjudications.\textsuperscript{33} Due to the rarity of definitive action, the experiences of

\begin{itemize}
  \item \textsuperscript{23} Id.
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} Id.
  \item \textsuperscript{27} Elster's sentence was shorter because he pled guilty to indecent assault and battery, a lesser charge than the rape with which Douglas was charged. Id.
  \item \textsuperscript{28} No student has ever been expelled from Harvard for rape. Instead, this most severe punishment has been reserved for those who falsify their records. Id.
  \item \textsuperscript{29} Though Elster pled guilty on September 9, 1998 in Middlesex Superior Court and was ordered to stay away from Harvard and the victim as a condition of his three-year probation, it took the university more than seven months to officially dismiss him from the College. Id.
  \item \textsuperscript{30} Id.
  \item \textsuperscript{31} Douglas was not identified by name at the time. Two Harvard Rape Survivors, supra note 16.
  \item Unfortunately, no published information was found on the race, ethnicity, religious affiliation, or socio-economic status of the women raped by Elster and Douglas. The future collection and dissemination of demographic data on victims of sexual misconduct at Harvard would help the University to better assist complainants and improve policy formulation, if they were to pursue such a policy.
  \item \textsuperscript{32} Id.
  \item \textsuperscript{33} As previously stated, the Ad Board heard seven cases during 2000-2001 and only reached a definitive determination in one of them. Adjudicating Sexual-Assault Cases, supra note 9. Similarly, in the 2001-2002 school year, the Ad Board heard four cases dealing with sexual misconduct—one student was required to withdraw, while in the other three cases, the Board voted to "take no action." HARVARD COLLEGE, ADMINISTRATIVE BOARD OF HARVARD
those students who do receive a decision from the Ad Board are all the more important in an analysis of Board responsiveness and procedure.

When asked whether she received adequate support from the administration, the woman raped by Elster replied:

"No. I was contacted ... but nothing was followed through on. I think that they were working under the assumption that if I wanted help I would come to them. That’s a fallacious assumption because I had Post Traumatic Stress Syndrome because of what I was going through and I was expected to be able to arrange meetings with these people.... There’s no way I could have done that. I was disappointed that the outreach didn’t come.... In the administration’s case it’s really been nothing unless I did the contacting. I wasn’t even aware that there was a motion to have him dismissed until I contacted the administration myself .... That really bothers me ... especially when they say that they are here to help."34

The other survivor interviewed was even more critical of the Ad Board’s handling of her case and the administrative response. She initiated Massachusetts court proceedings by pressing charges just minutes after receiving the Board’s decision to dismiss rather than expel her rapist.35

"[T]he system is flawed and the system is very, very wrong. The system is not equipped to deal with cases of sexual assault or even harassment.... I feel that my biggest mistake was taking care of this through the Ad Board. You can’t take care of it through the Ad Board. You can’t .... My recommendation is to say, don’t bog yourself down in what this administration has to protect, which is its reputation, its publicity machine. They don’t want it to get out.... They weren’t honest about their shortcomings."36

Unlike Harvard’s characterization of these adjudications as “successful” merely because the Ad Board reached decisions, the resolutions of these proceedings were anything but successful. The procedures and the support system available to these two women were far from adequate.

The current policy change, which occurred just three years after these cases were heard, has exacerbated—rather than remedied—the shortcomings of the system that these two women experienced. The new policy restricts the possibilities for thorough investigation and adjudication rather than expanding them. In its explanation of the new procedure, the administration stated:

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34. Two Harvard Rape Survivors, supra note 16.
35. Id.
36. Id.
Although the new procedure will inevitably mean that the Board may decline to pursue some peer dispute complaints, it seeks to avoid the frustration and dissatisfaction both complainants and respondents report when the Board conducts a lengthy, intrusive investigation of a matter that could have been predicted to be irresolvable.37

"Frustration and dissatisfaction," however, can occur not only in those cases that are irresolvable but also in those that are “successfully” adjudicated by the Ad Board, as evidenced by the Elster and Douglas cases. Screening out irresolvable cases at a preliminary stage hardly represents a satisfactory solution to these problems. A full investigatory process could unearth facts which could lead to a determination of fault or at the very least facilitate a compromise between the parties. At a minimum, the University should provide safety measures and support to the woman who—truthful or not—does not feel safe and deserves to feel safe in her own community. Any of these potential resolutions would be preferable to the early dismissal of a complaint. Indeed, a thorough overhaul of the Board’s procedure for adjudicating sexual misconduct cases seems to be the most appropriate and thorough course of action.

Instead of being remembered and consulted, the voices of these women, the students who stormed Dean Jewett’s office, and the students who founded CASV, were silenced when Harvard implemented its new adjudication procedure in May 2002. These exclusions are even more problematic if it is true that, as one attorney alleged, the policy change was driven by one man’s “frighteningly close ‘false conviction.’”38 Why were the lessons of the Elster and Douglas cases not taken into consideration as well? This selective method of institutional memory does a disservice to the Harvard community and is potentially dangerous for the thousands of students affected by its implementation. Rather than use its institutional memory to bar changes that the student body advocates, the University should use its powers as a catalyst for progressive change. Only then will the University be able to break the cycle of student frustration, outrage, and protest.

38. See supra note 10.
III. ESSENTIALIZING HARVARD: THE RACIAL, RELIGIOUS, ETHNIC, & NATIONAL ORIGIN IMPLICATIONS OF THE NEW POLICY

The history of rape in the United States is clearly a history of both racism and sexism.39

[Intentions to report [sexual assault] varied substantially according to ethnic group membership.40

The website for the Committee to Address Sexual Assault at Harvard offers a select bibliography of recent reports, studies, and articles that served as some of the Committee's background material on sexual violence.41 The Committee provides these materials as suggested reading for students and other community members to gain "a better understanding of the issues that CASAH focuses on."42 The materials are grouped into five broad categories: prevalence and incidence, psychological impact and treatment, race and gender, feminist perspective, and relationships and sex among college students.43 Under the heading of "race and gender," the Harvard committee identifies a single article, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," by Kimberlé Crenshaw.44 In their description of Crenshaw's article the Committee summarizes Crenshaw's discussion of the elimination of women of color from decisions due to a debate design that ignores differences within a specific identity affiliation ("i.e., race issues often focus on the male, and gender issues often focus on mainstream white women").45 However, the select bibliography simultaneously effaces minority women from the Committee's deliberations by referencing just one article pertaining to violence against women of color.

The absence of articles pertaining to specific racial and cultural identities exemplifies the University's apparent categorizing of women of color into the same default category of experience. In addition to addressing the varied experiences of women of color inadequately, the CASAH list does not offer any resources pertaining to international women, various religious communities, dif-

42. Id.
43. Id.
45. SELECTED BIBLIOGRAPHY, supra note 41.
different socio-economic classes, or sexual orientation issues.46 As Crenshaw states, "[i]n the context of violence against women, this elision of difference is problematic, fundamentally because the violence that many women experience is often shaped by other dimensions of their identities, such as race and class."47 Finally, her article focuses almost exclusively on women of color and domestic violence. While there are parallels between sexual assault and domestic violence, particularly as to the "dynamics at play in racial and gender politics," there is not a single resource offered by the Committee that deals solely with rape and the myriad differences among its survivors.48 This type of omission results in the type of binary system Crenshaw critiques: "And so, when the practices expound identity as 'woman' or 'person of color' as an either/or proposition, they relegate the identity of women of color to a location that resists telling."49

What emerges from Harvard's scant acknowledgment of the different identities women possess is a disturbing image of the student whom Harvard resources are aimed at assisting—she is definitely white, heterosexual, and a native-born American. She is also most likely from an affluent as opposed to a disadvantaged background, already possessing some knowledge about sexual assault, and without the additional barriers to reporting that may arise if a woman is from a particular religious or cultural community where silence and stigmatization may be more prevalent. This is the hypothetical student envisioned by CASAH and the other university bodies who formulate, control, and administer the campus justice system. A very different woman walks the halls of Harvard University today. There are 1,638 registered members of the class of 2006.50 Approximately 11.6% of enrolled students are foreign citizens, hailing from countries in Europe, Africa, Asia, Latin America, and the Middle East.51 Almost one-third of the freshman class, 32.8%, identifies as a member of a particular minority group: 17.4% Asian-American, 6.8% African-American, 1.8% Mexican-American, 1.5% Puerto Rican, 3.9% other Hispanic, 0.7% Native American, and 0.7% other minority.52 Data on religious affiliation, socio-economic status, and sexual orientation are not accessible; but it is likely that there are a significant number of women in the class of 2006 who are not heterosexual or affluent, or are from a religious or ethnic community with distinct teachings on rape, or some combination of these three as well as other factors. It is this composite of the Harvard woman, or one of the infinite variations of her, that is much closer to the truth, more representative of the "majority" or (a)typical than the archetypal

46. Id.
47. Crenshaw, supra note 44.
48. SELECTED BIBLIOGRAPHY, supra note 41.
49. Crenshaw, supra note 44.
51. Id. at FOREIGN CITIZENS.
52. Id. at MINORITIES.
student lurking in the spaces and silences of the CASAH website and the policies of the administration.\footnote{33}

Consideration of both student and administrative diversity is crucial because likelihood to report an incident of rape commonly varies significantly according to ethnic group membership.\footnote{54} In a study of one hundred women from each of four ethnic groups (Asian, Black, Hispanic, and White), researchers analyzed data regarding participants’ family income, age, ethnicity, education, religious preference, number of children, and the number of adults in the household. Only ethnicity and age were found to correlate to the behavioral intentions of the women in a reliable fashion, with ethnicity showing a significant variation.\footnote{55} The study revealed that white women indicate a greater likelihood of reporting a rape than all minority women; the difference was most pronounced when the women reported were asked to report the assault to a police department or a sexual assault center.\footnote{56} The report’s authors explain that such findings should not be surprising: “There is evidence that Blacks, Hispanics, and Asians tend to be distrustful of and alienated from public agencies in this country. It has been suggested that minority women are hesitant to report sexual victimization to the police because they do not think that they will be believed.”\footnote{57} Feldman-Summers and Ashworth conclude that “special efforts need to be made to encourage ethnic women to report their victimization to public agencies.”\footnote{58}

The study’s findings also suggest that women who choose not to report an incidence of rape do so because they perceive little or no social support.\footnote{59} Perspective’s interview with Elster’s survivor corroborates the importance of community support: “[I] would have hoped that people would have understood that I would not have gone through with this if it didn’t happen. Why would I create this hell for myself? . . . I thought more of the kids here.”\footnote{60} Yet it was the support of her roommates that gave her the strength to report: “The thing that really
helped me was that I was believed. My roommates didn’t question me one bit... Just be supportive and just believe [anyone who tells you they were raped], bottom line, believe them.”

Perhaps the most troubling aspect of Harvard’s new procedure is the message it sends to female undergraduates by requiring evidence to corroborate their complaints. Title IX attorney Wendy Murphy explains: “It is [a] rule that embodies the idea that the word of a woman is not weighty enough to justify the expenditure of resources even for the purpose of conducting an investigation.” Such a message is not the correct solution to an increase in reported rapes. Rape is one of the most underreported crimes on campuses today, particularly when it happens to non-white women. Harvard’s procedure should be reversed and its system analyzed and overhauled so that the correct message will be sent to its student body: We will support you. We will investigate your complaint because you have given us your word. This does not mean that we will automatically believe you without further investigation or that your case will ultimately be resolved, but we will devote all of our available resources to a fair and just adjudication of your claim.

IV. CHARTING A BETTER COURSE: RECOMMENDATIONS FOR HARVARD UNIVERSITY & POLICY-MAKERS AT INSTITUTIONS OF HIGHER EDUCATION ACROSS THE COUNTRY

College administrators wish students would rely unquestioningly on the wise governing of their elders in the academy. But college administrators recognize that the student population has become diverse in ways never imagined fifty years ago. Over that same time period, the willingness of students to defer to administrators’ wide discretion with regard to the regulation of student conduct has markedly eroded. Students want to be informed and to participate in all facets of a campus governance.

61. Id. at 8.
62. See Kofol, supra note 10, at 2.
63. Id.
64. Bonnie Fisher et al., U.S. DEP’T OF JUSTICE, VICTIMIZATION OF COLLEGE WOMEN 23 (Dec. 2000). In a survey of over 4,000 college women, the study concluded that “fewer than five percent of completed or attempted rapes were reported to law enforcement officials.” Id. While in two-thirds of the incidents, a victim did tell another person, it was most often a friend, not a college official or family member. Id. Some of the reasons given for not reporting the incident to officials were “lack of proof the incident happened,” “fear of being treated with hostility by the police,” and “anticipation that the police would not believe the incident was serious enough and/or would not want to be bothered with the incident.” Id.
66. Eileen N. Wagner, Why Campus Crime, Even Sexual Violence, Can No Longer Be Wrapped In Secrecy, SEC. ON CAMPUS, INC. EDITORIALS, May 1997, or http://www.campussafety.org/aboutsoc/editorials/wagner97.html. Wagner was the attorney for Christy Brzonkala in Brzonkala v. Morrison, the first Violence Against Women Act’s civil remedy provision lawsuit to reach the Supreme Court. Brzonkala sued Virginia Tech and members of the school’s football team for the mishandling of her rape complaint to the college.
A. Harvard’s Increased Risk of Error—the Old Procedure vs. the New Procedure

Underlying the procedural unfairness of Harvard’s new policy is every student’s right to due process. In Mathews v. Eldridge the Supreme Court developed a three-part balancing test weighing the interests of each party in a dispute (typically the plaintiff government and an individual defendant) against the risk of error under the current procedure to determine whether or not a change would be necessary. An altered version of this test, in order to balance the interests of more than two parties, facilitates an evaluation of Harvard’s procedure and allows for effective comparison of the new policy with the former policy.

Under the old procedure, there was no preliminary investigation stage requiring the complainant to produce any corroborating evidence; instead, the Ad Board conducted a full-fledged investigation in its capacity as fact-finder. A series of hearings over several months enabled it to decide whether to take a specific action or, in the alternative, to take no action because it deemed the case unresolvable. Under the new policy, a full-fledged investigation may never occur if the preliminary stage leads the Ad Board to believe that the complaint will never be adjudicated. In both procedures, the interests of the various parties remain the same: the complainant wants to tell her story and have her alleged attacker punished, the accused wants to tell his story and prove his innocence—unless he confesses as both Elster and Douglas did—and the Ad Board wants to discover all of the information possible, as well as reach a fair and just decision. The community at large has similar interests, including the removal of any individual deemed dangerous in order to preserve the safety and welfare of the community.

The interests of all of the parties are compelling and should be served. Accordingly, the risk of error under either system should be the deciding factor in favor of one procedure over the other. The former policy ensures that all parties will have the opportunity to present their perspective to the Ad Board through a series of hearings and statements, and that a thorough investigation of the facts will occur. While this procedure requires more time and more resources, it is a better means for ensuring fundamental fairness and due process for all concerned. The new procedure, on the other hand, allows a complaint to be dismissed after the preliminary stage, potentially sacrificing due process, full dis-

68. Four primary parties have distinct interests in Harvard’s resolution of sexual assault cases: the complainant, the accused, the University or administration acting through the adjudicating body of the Ad Board, and the Harvard Community at large.
69. NEW PROCEDURE, supra note 1.
70. Id.
71. Email from Wendy Murphy, supra note 13.
72. This is consistent with the fundamental requirement of due process, which “is the opportunity to be heard at a meaningful time and in a meaningful manner.” Mathews, 424 U.S. at 333.
closure of all available information, and, ultimately, justice. Such an egregious risk is unnecessary and unjustified. Only after a full inquiry has been conducted should the university be released from its duty to the individual students, the community at large, and itself.

B. Four Goals for a Conscientious Administration & General Recommendations

In order to comprehensively address sexual misconduct on its campus, the Harvard administration should keep four goals at the forefront of its agenda: 1) to raise awareness on campus and to thoroughly educate the community about sexual assault, including what constitutes sexual assault, what avenues of redress are open to students, and how the Ad Board process works; 2) to increase the reporting rate for sexual assault; 3) to decrease the number of sexual assaults committed; and 4) to consider at length student experiences, critiques, and diversity, including race, ethnicity, sexual orientation, religious affiliation, socio-economic status, and the particular vulnerability of college women, when formulating new policy, procedure, and resources to assist students.

In addition to abolishing the new procedure and returning to a system that fully investigates each complaint received, Harvard should undertake a number of other steps to ensure that it is doing everything possible to fairly address all complaints of sexual misconduct. CASV and CASAH member Sarah Levit-Shore has called upon the University to create a "community of support," which would combine an effective Ad Board procedure with well-trained mental health counselors, and an extensive and better-coordinated network of University resources.

"A more comfortable atmosphere, she reasons, will help reduce the number of unreported cases, raise campus awareness, and help women identify what qualifies as an incident of rape." Sharrona Pearl, one of Harvard's Sexual Assault, Sexual Harassment (SASH) Tutors, agrees: "The bottom line is that we need massive administrative and peer support."

In order to create such a system, Harvard must involve its students, both past and present, at every stage of the process, with a particular focus on ensuring diversity of experience in terms of race, religion, sexual orientation, ethnicity, and socio-economic status. Undergraduates with different backgrounds must

73. This is not meant to discount the impact that prolonged or indefinite hearings coupled with potentially negative press could have on both the alleged perpetrator and victim. While these interests are important, and serve as an appropriate counterweight on the scale, they do not over-ride the due process rights of the individuals involved or the right of the community to be safe.

74. Franken et al., supra note 24, at 5.

75. Id.

76. SASH Advisors are designated proctors or tutors who are specially prepared to deal with sexual harassment and assault issues. See OFFICE OF THE DEAN, HARVARD COLLEGE, TELL SOMEONE: RESPONDING TO SEXUAL HARASSMENT, SEXUAL ASSAULT, AND RAPE, available at http://www.college.harvard.edu/student/help/Tell_Someone.pdf (last visited Feb. 8, 2003).

77. Id.
be included not only in CASAH, but also on the Ad Board as well. In addition, the committees that create and alter policies should consult not only student groups such as CASV, but also students who are not members of sexual assault groups so that as many student voices as possible are heard before these decisions are made. The stories of former survivors, such as those interviewed by the Perspective, should be at the top of any suggested reading list or administrative agenda. The faculty, administration, and particularly the Ad Board should be formally and thoroughly educated on issues of sexual assault and harassment, including its varied impact upon and incidence among various subgroups of the community, so that they are better equipped to make informed decisions. Faculty committees should be diversified not just through a student presence, but through a concerted effort to incorporate more minorities and women in decision-making positions and faculty appointments in general.

C. Procedures at Other Ivy League Schools: Separate Boards to Adjudicate Sexual Misconduct

Both Columbia and Yale have established separate boards to assist in the adjudication of peer sexual misconduct complaints.\footnote{See \textsc{Columbia Sexual Misconduct Policy}, \textit{supra} note 2; \textsc{Yale College Dean's Office}, \textit{supra} note 2.} The creation of these boards is in part due to university awareness that "being qualified to decide about Add/Drop cases does not mean the Ad Board is qualified to decide rape cases."\footnote{\textsc{Coalition Against Sexual Violence, Introductory Meeting Posting}, \textit{at} http://icg.harvard.edu/~ws131/News_and_Events/ (last visited Jan. 25, 2003).} In its explanation of the University's Sexual Misconduct Policy, the Columbia Office of Sexual Misconduct Prevention and Education states: "Sexual misconduct is a serious problem on college campuses. In addition, persons who have experienced sexual misconduct often find it difficult to talk about those experiences, so many incidents go unreported. To counteract this problem, the University provides ... accessible methods of complaint resolution.\footnote{\textsc{Columbia University Office of Sexual Misconduct Prevention and Education}, \textit{Office of Sexual Misconduct Prevention and Education}, \textit{available at} http://www.columbia.edu/cu/sexualmisconduct/introduction.html (last visited Apr. 8, 2003).} If a student chooses to file a complaint under the Sexual Misconduct Policy, her case is investigated by a specially trained hearing panel comprised of one student and two student affairs officers who are educated "regarding the psychological, social, and legal issues related to sexual misconduct.\footnote{Id. at \textsc{Frequently Asked Questions}, \textit{available at} http://www.columbia.edu/cu/sexualmisconduct/faq.html (last visited Jan. 25, 2003).} The Yale College Grievance Board for Student Complaints of Sexual Harassment (Grievance Board)\footnote{Yale's sexual harassment definition encompasses sexual assault or attempted sexual assault. \textit{See \textsc{Yale College Dean's Office}, supra note 2.}} takes a similarly strong stance against sexual misconduct on campus combined with a specialized approach for complaint resolution.\footnote{See \textit{id.}.} The Grievance Board is
comprised of two faculty members, two administrators, four undergraduate students, and one person with counseling experience.\footnote{Id.} The involvement of representatives from all segments of the Universities' communities coupled with the specialized training and mission of the Columbia and Yale boards have strengthened their campus' response to complaints of sexual misconduct. However, it is important to realize that the creation of a special grievance board is only one step in the process. Unless survivors' fears and rampant underreporting are addressed through community education efforts, trained mental health groups, continued activism, and a rape crisis center, a board will have few complaints to adjudicate because the underlying problems have not been eradicated.

Harvard should follow the examples set by its fellow Ivy League institutions and establish a board to specifically adjudicate complaints of sexual misconduct that includes student members.\footnote{At the very least, Harvard should appoint undergraduate representatives to the Ad Board.} Indeed, Harvard could become a leader among its peers by explicitly incorporating training that deals not just with sexual misconduct awareness generally, but also focuses on the myriad of differences within its student population in order to ensure that racial, religious, socioeconomic, ethnic, and sexual orientation issues become central to the procedures and adjudications. Such a board would be a wiser means of increasing the University's ability to resolve adequately a larger number of the complaints filed\footnote{The creation of such a board may also result in an increase in the number of complaints filed if students perceive the new board as more receptive towards their complaints and better equipped to deal with them. The University should regard an increase in complaints as a positive step since it potentially indicates less underreporting, rather than legitimizing the University’s response to the 2000-2001 increase in complaints.} than the current screening procedure.\footnote{Harvard, however, has taken some initial steps toward improving its response to issues of sexual misconduct since the most recent round of protests began in May of 2002. See Anne K. Kofol, University to Hire Sex Assault Educator, HARV. CRIMSON, Sept. 16, 2002, available at http://www.thecrimson.com/article.aspx?ref=254060. The University created a one-year position charged with directing all sexual assault programs, particularly those related to awareness, alcohol education, and outreach in September. \textit{Id.} While activists praised the University for responding quickly to one of CASV's requests, they cautioned that the creation of this position should be seen as one step in a process of change. \textit{Id.} Title IX attorney Murphy urged students not to be satisfied until Harvard repeals the changes to procedure enacted in May. \textit{Id.} "While I very much will extoll the virtues of... prevention education,... I don't want it to distract people from the focus—which is the fact that Harvard will require corroboration before an investigation. My feeling is that the message-sending power of the corroboration rule is stronger than any education effort." \textit{Id.} Undergraduates echo Murphy's concerns, and also believe the school needs to designate an advocate for students who bring complaints of sexual misconduct before the Ad Board. \textit{Id.}}

It is time for Harvard to consider seriously the criticisms of those who have gone through the Ad Board process and change it for the students who will need its assistance in the future. For, in the words of one survivor, "[p]eople in the
public should know that this administration doesn't take rape seriously. They take plagiarism seriously, and they take academic trust seriously and yet rape hasn't reached that status on our campus . . . And until that happens . . . it doesn't really feel safe for anybody."88

88. Two Harvard Rape Survivors, supra note 16.