



10 Times Better for Our Democracy

That's what the new rules for Title IX are, argues Meg Mott.

November 13, 2020

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As someone concerned about the fate of the Constitution under the Trump administration, I wish to publicly commend the Office for Civil Rights at the U.S. Department of Education.

Through an arduous and inclusive process, it has struck an important balance between the rights of those accused of sexual assault and harassment and the needs of the accuser.

Unlike the earlier Obama-era rules, which demanded a “trauma-informed” process, the new rules follow the Bill of Rights. Instead of reducing accusers to psychologically damaged beings, the new rules require them to provide evidence for their accusations. Instead of assuming the accused is a sexual predator, it grants them the ability to mount a strong defense. By putting the burden on the institution to create a fair and adversarial system, both parties learn how to address harms in a constitutional democracy.

I didn't always feel this way. Thirty years ago, I wanted the authorities to do more to protect women from sexual abuse. I believed that the right to due process gave sexual predators a free pass at the expense of victims. I advocated for the Violence Against Women Act, believing that stronger laws against sexual violence would empower survivors. As VAWA was implemented, the role of prosecutors was greatly expanded at the expense of women's autonomy. If she balked at her co-parent's impending imprisonment, the district attorney would override her wishes. Once the machinery was put in action, there was no turning back.

The Obama administration took some of the most illiberal components of VAWA and applied them to colleges and universities. A 2014 report from the White House Council on Women and Girls, titled “Not Alone,” declared that sexual assault “is a unique crime: unlike other crimes, victims often blame themselves.” Because the misconduct was assumed to damage the accuser's psyche, basic principles of due process no longer applied. Complainants were described as “survivor” or “victim,” undermining the presumption of innocence. Neither party could freely discuss their case, a violation of their First Amendment freedoms. Persons charged with sexual harassment were not provided with specific details of the charge, nor were they given a chance to confront hostile witnesses -- both violations of the Sixth Amendment.

By contrast, the new rules for sexual harassment define the complainant as “an individual who is alleged to be the victim of sexual harassment.” The respondent is “an individual who has been

reported to be the perpetrator of conduct that could constitute sexual harassment.” College administrations are banned from using “gag orders,” and both parties are allowed to cross-examine each other’s testimony. Sexual harassment, which had been a notoriously vague charge, must now itemize specific instances and use objective standards as determined by the U.S. Supreme Court in the Davis decision.

One would think that all Americans would applaud the restoration of basic liberties, but that has not been the case. Former U.S. secretaries of education Arne Duncan and John King tweeted that the new rules will “put the accused before the victim.” Speaker of the U.S. House of Representatives Nancy Pelosi described the new rules as the “Trump administration’s wanton war to destroy Title IX’s critical protections for students and holding schools accountable.” The American Civil Liberties Union, normally a defender of fundamental rights, declared that the new rules were “devastating for survivors.” In these polarized times, commitment to civil liberties is determined more by party affiliation than respect for the Constitution. That is not good for our democracy.

In Anglo-American jurisprudence, the deck is stacked against the prosecution for a reason. Following the calculus that it is “better that 10 guilty persons escape than one innocent person suffer,” our criminal justice systems was designed to lean toward liberty and away from revenge. William Blackstone wrote that guiding principle in the 1760s. Known as Blackstone’s ratio, Benjamin Franklin amplified it in the colonies: “Better a hundred guilty persons should go free than one innocent person suffer.” In the land of freedom, the machinery of justice was designed to be imperfect in order to protect the innocent.

The Obama-era Title IX rules followed a different calculus: better for 10 innocent persons to suffer than for one survivor to experience more harm. This perversion of the Blackstone ratio was not just demanded by advocacy groups -- it became the mind-set of the Department of Education and the Democratic party.

But it’s not just Democrats who reject the demands of Blackstone’s ratio. When asked in 2016 whether it was better for 20,000 guilty people to go free or for 20,000 innocent people to be jailed, 40 percent of the participants said *it was better to put 20,000 innocent people in jail.* Think about that. Almost half of the participants want to sacrifice the innocent rather than let the guilty go free. The Cato Institute, which conducted the survey, found the strongest indicator was not race: 60 percent of African Americans, 61 percent of Caucasians and 55 percent of Hispanics agreed that imprisoning the innocent was worse than allowing the guilty to go free. The key indicator was whether or not the participant supported Donald Trump.

Had the Cato Institute asked college students whether it was better to let 10 guilty sexual offenders go free or expel 10 innocent persons, I worry that a high majority would opt for the expulsion of innocent people. By forcing colleges to use the “trauma-informed” approach, this generation of college students has confused therapeutic interests with citizen interests. The former focuses on the subjective experience of a harmed party and is best handled with an individual or family therapist. The latter focuses on the rights of all citizens in a democracy.

My hope is that under the new rules the next generation of students will develop the skills to live in a constitutional democracy. Those who have suffered from the actions of another will have a chance to describe how those actions affected their well-being and interfered with their education. Those who are accused will be afforded the chance to mount a strong defense. Everyone involved will need to use their thinking muscles and inner moral compasses to determine a just outcome.

The system will not work perfectly; some of the guilty will go free. But those inefficiencies are the costs society pays for freedom. The new rules give America's future leaders a deeper appreciation for liberty, even when it works against their personal interests. Perhaps in a few years, more Americans will embrace Blackstone's ratio. Better to let some of the guilty go free than look for healing in a judicial system designed to sacrifice the innocent.