

COMMENTARY

Title IX's Witness Intimidation

In a culture that presumes guilt, honest testimony on behalf of the accused can carry a high price.

By Jillian Kay Melchior

Witness intimidation in criminal cases usually calls to mind organized-crime bosses trying to conceal their guilt. In campus Title IX proceedings, however, a different kind of mob exacts a social and professional price from witnesses who defend the accused. Ask Tanaya Devi, a Harvard doctoral candidate in economics. Her mentor, Roland Fryer, founded Harvard's EdLabs, which describes itself as "an education research and development laboratory devoted to closing the racial achievement gap." Last year two unnamed women who once worked there filed Title IX complaints accusing Mr. Fryer of verbal sexual harassment; one also filed a state antidiscrimination complaint. To date, Harvard has found Mr. Fryer responsible for six instances of verbal harassment and rejected 26 others. The university hasn't decided on a penalty. Mr. Fryer's lawyer told me the state complaint was "dismissed upon agreement of the parties." Ms. Devi worked at EdLabs. She says in an interview that she was close friends with one of the accusers, that she witnessed many of the disputed interactions—and that Mr. Fryer did nothing wrong. Good-natured and occasionally bawdy banter was incessant at EdLabs,

Ms. Devi says: “There was so much laughter, so much participation, and so much reciprocation of the joking and teasing. My friend, the accuser, even started some of these jokes.” The friend often complained about low pay but never mentioned sexual harassment, Ms. Devi says. “To me, it seems like you got angry, you left angry, and somehow you’re doing this for personal gain or for revenge.”

Ms. Devi publicly defended Mr. Fryer. Since then, she says she’s struggled to find research collaborators and has lost nearly every female friend at Harvard:

“Suddenly, I would find that my emails were going unanswered. People would avert their gaze from me walking down the hall. There was this culture of guilty until proven innocent and, if you’re defending him, guilt by association.”

Ms. Devi adds that every one of her remaining friends has advised her not to defend Mr. Fryer. One told her that “at a place like this, which is extremely progressive, it will only have a cost—it will have no benefit.” Ms. Devi says she knows of others who also wanted to defend Mr. Fryer but “don’t want to go against the social-media mob.” An immigrant from India, Ms. Devi fears her outspokenness will limit her job prospects in the U.S. “It’s very, very high-risk to identify myself and defend an accused person,” Ms. Devi says. “Everyone protects the identity of the accuser. She gets to hide under the mask of anonymity, and we have to destroy our futures.”

Another example comes from Matthew Sahm’s lawsuit against Ohio’s Miami University, which expelled him after another student accused him of sexual assault. The accuser also went to local police, who investigated but did not arrest or charge Mr. Sahm. A sorority sister of the accuser, identified in court as A.T., wrote in an affidavit that she told the Title IX investigator, Susan Tobergte, that eyewitnesses might have exculpatory testimony. “I left feeling very uncomfortable, especially after Susan had suggested I google statistics about sexual assault to find that less than 2% of sexual assault cases were wrongful convictions,” A.T. wrote in the affidavit. “I felt that she was biased towards one side of the case.” She added that it was “hard to bring information to a table when you are unsure if it will affect your status or relationships in a sorority.” A university spokeswoman said in an email: “Miami University has been and remains committed to a fair and impartial student disciplinary process and denies any bias in that process. Ms. Tobergte vigorously denies the allegations of bias by the student in this or

any investigation she has conducted.” Judge Susan Dlott described A.T.’s accusation as “troubling” but reached no conclusion as to whether it was true. She dismissed Mr. Sahm’s complaint on the ground that he failed to demonstrate he had been a victim of sex discrimination. A.T.’s allegations “do not suggest a gender bias against males so much as against students accused of sexual assault,” the judge wrote. At least one other witness, identified as K.W., also described social pressures not to defend Mr. Sahm. On the night of the alleged assault, the accuser repeatedly told friends she was upset because she had cheated on her boyfriend, K.W. wrote in an affidavit. “I have been extremely disturbed by the accusations [against Mr. Sahm] and the literal abandonment of the truth,” K.W. wrote. “This has been really hard to write. . . . I think that if one’s constructed truth begins to hurt another’s character, future, or dignity, that is it is only fair that ‘predisposed alliances’ be let go with the opportunity for reality to surface.” In other cases, those who stick up for the accused risk more than their popularity. In December 2016, more than 3,000 people signed an online petition demanding that the University of Minnesota fire head football coach Tracy Claeys. He had supported his players when they questioned whether 10 teammates had received due process before they were suspended for sexual assault. The suspended athletes had certainly behaved shamefully—the event at issue was at best a degrading orgy—but there was reason to question the fairness of the process. Police had reviewed partial video of the sexual encounter and described the alleged victim as “lucid, alert, somewhat playful and fully conscious.” According to the university’s Title IX report, the accuser told a witness, “I think I was raped but I am not really sure.” She also initially told a detective that she had consensual sex with at least one of the players but later claimed he had assaulted her, adding she had misspoken in part “because I was still in the state of shock.” The Title IX report attributed the numerous inconsistencies in her account to “gradual recollection of what she found to be a very traumatic experience, rather than a lack of care or truthfulness.”

Hennepin County Attorney Mike Freeman said that although the players’ behavior was “deplorable,” there wasn’t enough evidence to charge them with a crime. Nonetheless, as the backlash against Mr. Claeys intensified, administrators gave in and fired him. Athletic director Mark Coyle said that the dismissal aimed “to address challenges in recruiting, ticket sales and the culture of the [football] program” and that it was “not helpful” when Mr. Claeys tweeted in support

of the players' criticism of the Title IX process. Given risks like that, witnesses for the accused are reluctant to come forward, says Justin Dillon, a lawyer who has represented dozens of students accused of campus sexual assault or misconduct. Education Secretary Betsy DeVos has proposed much-needed reforms to mitigate some of Title IX's other due-process shortcomings. But these procedural changes won't stop peer pressure or prevent social ostracism of witnesses.

A culture that begins with a presumption of guilt punishes honest witnesses as well as innocent defendants.

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