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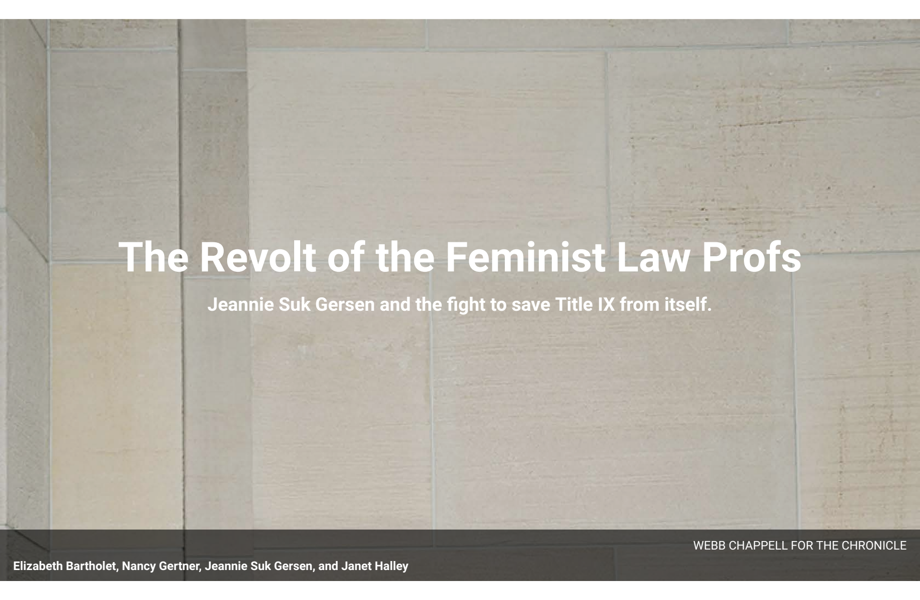

WEBB CHAPPELL FOR THE CHRONICLE

Elizabeth Bartholet, Nancy Gertner, Jeannie Suk Gersen, and Janet Halley

THE REVIEW

By *Wesley Yang* | AUGUST 7, 2019

On a crisp and gray September morning, Jeannie Suk Gersen stepped into a lecture hall at Tufts University. She was a small, tidy woman of unobtrusive demeanor in a belted, off-white dress. A professor at Harvard Law School, she had been invited to Tufts to speak on the topic of "#MeToo and the Constitution." Reminiscing about her early life, Gersen, who was born in South Korea and grew up in Queens, N.Y., once described herself as someone whom the typical onlooker would assume to be "a meek Asian girl."

Something had changed in the intervening years. A Marshall scholarship; the publication of her first book, on colonial French poetry, by Oxford University Press; a Supreme Court clerkship; a stint in the Manhattan District Attorney's Office prosecuting domestic violence; and the rapid accession to her present post as the first Asian-American woman — and the second woman of color — to win tenure at Harvard Law School: such experiences will alter a person's aspect. The quietly unyielding way she inclined her face upward at the crowd of undergraduates and law professors at Tufts radiated self-possession.

Gersen is a feminist legal scholar and a writer of wry, slightly elliptical commentary on legal matters at *The New Yorker*. She is our foremost guide to the challenges that the #MeToo movement poses to the legal system. She has staked out a position at once conventional and embattled. She shares #MeToo's goal of ending the impunity surrounding sexual assault. But she remains committed to the principles of due process, presumption of innocence, and the right to a fair hearing. This commitment places her in tension with some of the most impassioned actors in American public life, some of whom have come to regard due process as a fatal obstacle to deterring and punishing sexual misconduct.

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Jeannie Suk Gersen

In the minutes before the moderator introduced her, Gersen, who took the name of her second husband, Harvard Law colleague Jacob Gersen, told me about something remarkable she had found in her *New Yorker* writer's contract: a "morality" clause granting to Condé Nast, *The New Yorker's* parent company, a right to terminate her if she ever became the subject of controversy. A finding of wrongdoing would not be required. She flashed me a look with which I would grow familiar: wide-eyed astonishment and incredulity. The stipulation that an accusation was sufficient grounds for removal was at once ironic and right on the nose. "How could any writer sign such a thing?" she said, laughing derisively. She refused to sign. *The New Yorker* amended the clause.

Back in 2014, Gersen wrote a *New Yorker* column describing the growing reluctance among law professors to teach the law of rape. She described the fear that some students might construe the hypothetical scenarios through which law professors teach as creating a hostile atmosphere. Students increasingly arrive in class primed to regard speech on sensitive topics as a violation. New rules regarding sexual harassment encompass classroom discussion as itself charged with the potential to inflict trauma.

She began her talk by observing that we were on the cusp of a national melodrama — the Supreme Court confirmation hearings for Brett Kavanaugh. "Given Republican control of the Senate," she noted, "the confirmation has seemed to be a sure thing, short of a lightning strike." The lightning had struck in the form of an accusation of sexual assault lodged against Kavanaugh.

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The controversy over the appointment, Gersen explained, had become intertwined with the #MeToo movement, of which it displayed many hallmarks: "The presumed relevance of incidents more than three decades old and beyond the statute of limitations. The initial anonymity of the alleged victim. The fear of retaliation against her. The idea of trauma and PTSD suffered by the alleged victim. And the threat of professional disgrace and job loss for a prominent male. So whatever happens now will feel like a victory or a defeat for the #MeToo movement."

Gersen explained that #MeToo was an outgrowth of an effort to punish and deter sexual assault and harassment on college campuses. #MeToo, she argued, could usefully be thought of as an extension of Title IX beyond the campus. It was likely to follow an analogous course — altering the law and galvanizing cultural change, while also inviting legal challenges.

It was likely, for instance, to promote the practice of so-called "trauma-informed" investigation, which proceeds on the assumption that inconsistent or confused victim recollections reflect the traumatic effects of assault and are themselves evidence of the truth of the accusation. This and other innovations would be tested in appellate courts, which would clarify and update the law.

In the end, Gersen predicted, the #MeToo movement would be compelled to respect due process. The "time for reckoning with sexual assault and harassment," she declared, would also be "a time for reckoning with our commitment to fair process, fair hearing, fair consideration of evidence, fair decision-making, all of that being consonant with our constitutional values."

"I don't think that we can accomplish those social justice goals, including justice for women and equality for women, through a path that undermines due process."

Her prediction signaled at once a certainty that the bedrock principles of our legal system should compel such an outcome, and a determination to ensure it. She quoted Ruth Bader Ginsburg, who criticized "college codes of conduct" for "not giving the accused person a fair opportunity to be heard." "That's one of the basic tenets of our system," Ginsburg said. "Everyone deserves a fair hearing."

Gersen invoked the public stand that she had taken with three of her feminist colleagues at Harvard Law School. In the fall of 2011, the Department of Education's Office for Civil Rights issued informal, non-binding guidance on how colleges should treat claims of sexual assault and harassment in a document now referred to as the Dear Colleague letter. It was accompanied by public claims of an ongoing crisis of sexual violence on universities made by President Barack Obama and Vice President Joe Biden. In 2014, Gersen and three of her colleagues — Elizabeth Bartholet, Janet Halley, and Nancy Gertner — led a contingent of their peers in calling out the system of investigation and adjudication that emerged during the Obama years as "so unfair as to be truly shocking."

The four were joined by 24 of their Harvard Law colleagues in an open letter published in *The Boston Globe* decrying Obama's Title IX recommendations as "overwhelmingly stacked against the accused."

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In a statement called "Fairness for All Students Under Title IX," jointly authored with Halley, Bartholet, and Gertner, Gersen noted that at many colleges, investigators are trained to start by believing the complainant. Many schools would "improperly house the functions of investigation and adjudication" in the same office, with "strong incentives" to keep the schools in the Office for Civil Rights' "good graces." "Some schools," they wrote, "allow appeals only on very narrow grounds such as new evidence or procedural error, providing no meaningful check on the initial decisionmaker." The evidentiary threshold required was the lowest one, the "preponderance of the evidence" standard, meaning anything greater than 50 percent certainty should yield a finding of wrongdoing.

As informal guidance, the Dear Colleague letter was not subject to the normal rule-making process, which would have permitted give-and-take with universities through formal comment-seeking. It was, however, accompanied by the threatened withdrawal of all federal funds from universities that did not comply with its instructions, including ones that "are in no way required by Title IX law or regulation," as Gersen and her colleagues put it in *The Boston Globe*.

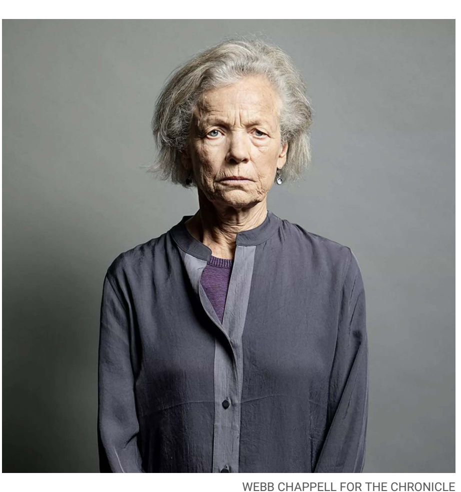
The process was so irregular, Halley told me recently, that if any university had asked a court to declare whether the guidance was legally binding, "Every single court would have said, 'You don't have to do this.'" But no university wanted the bad press. "They would have been portrayed as protectors of rapists," Halley said. In response, colleges hastily overhauled their Title IX investigative procedures, with new definitions that were, as Gersen and her colleagues put it in "Fairness for all Students," "so broad as to put students engaged in behavior that is overwhelmingly common in the context of romantic relationships to be accused of sexual misconduct."

Writing in the *California Law Review*, Gersen and her husband Jacob argued that the creation of a "sex bureaucracy," as the title of that article christened the system of administrative oversight of student sex lives, entailed "the enlargement of bureaucratic regulation of sexual conduct that is voluntary, non-harassing, nonviolent, and does not harm others." The Gersens go on to note that "watered-down notions of nonconsent" embedded into regulation allowed "ambivalent, undesirable, unpleasant, unsober, or regretted sexual encounters to meet the standard." The system thus "will investigate and discipline sexual conduct that women and men experience as consensual (if nonideal) sex." The conduct deemed illegal, the Gersens wrote, "plausibly covers almost all sex students are having today."

These expansive definitions of wrongdoing were paired with an adjudication system lacking nearly every aspect of fair process. "In recent years, it has become commonplace to deny accused students access to the complaint, the evidence, the identities of the witnesses, or the investigative report, and to forbid them from questioning complainants or witnesses," Gersen noted in a recent piece in *The New Yorker* looking back at the changes wrought by the Dear Colleague letter.

The sex bureaucracy, in other words, pivoted from punishing sexual violence to imposing a normative vision of ideal sex, to which students are held administratively accountable. Georgia Southern University, for instance, explains that "Consent is a voluntary, sober, imaginative, enthusiastic, creative, wanted, informed, mutual, honest, and verbal agreement." The *California Law Review* article culminates in a discussion of a case in which a gay male student was found responsible for sexual misconduct for waking his partner with a kiss (the sleeping cannot consent) and for looking at his partner's genitals without consent while showering (consensually) with him.

Such cases, Gersen told me, are not outliers: "They really became the modal way in which these things are enforced." These apparent reductiones ad absurdum are the inexorable result of encouraging people to regard their intimate relations through the lens of the sex bureaucracy. "We are giving young people the idea that the unhappiness that they have about their relationships is a matter to be taken up with the authorities," Gersen said. "In this very large continuum of unpleasant interactions that can happen, at some point you draw a line and say, 'These are consensual, these are not consensual.' Lots of people disagree about where to draw the line. But most people would want to draw a line so there is such a thing as consensual sex." She went on, "Everyone who works in the Title IX world, if you talk to them about the nature of these factual claims, for the most part we are not talking about accusations of forcible or coercive conduct."



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Elizabeth Bartholet

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In addition to inciting a general bureaucratization of intimate life, such expansive constructions of wrongdoing tend to produce a host of other injustices. "We disfavor broad bans because it allows the decision maker too much discretion to make a determination of who to target on the basis of whatever criteria they might bring to bear — including race," Gersen said. Recently, for instance, a black, autistic student with cerebral palsy was charged and found responsible for a Title IX violation for asking a woman to give him a fist bump. In a separate article on the Title IX system, Janet Halley describes an order placed on a student at an Oregon liberal arts college to avoid any contact with a female student because he reminded her of someone who had raped her, forcing him to quit his job and placing him in constant jeopardy of being punished for violating the order, despite no wrongdoing on his part even being alleged.

Though the Office for Civil Rights does not keep statistics on the race of the accused, Halley told me that "Jeannie and I and Nancy all agree that in the range of cases that we have happened to see, the number of accused who are men of color is just creepily high. And you could draw from that the conclusion that men of color are more often committing wrongful conduct, but I don't think that's right. I think this is part of the overenforcement of criminal and criminal-like sanctions against people of color continuous with what's going on in the legal system. I think that the bias that's in all of our heads is producing this."

Once Gersen and her colleagues had explained what the proposed Title IX changes were likely to produce, it was not hard to corral support for a petition opposing it from the Harvard Law School faculty. "They did not need to be convinced. It came down to a very basic sense of fairness. And the majority of the people on that list of 28 are left-wing. It was not a conservative impulse. It was an impulse toward fairness and rules and in some ways a pushback against authoritarian university governance."

Gersen's eyes widen and she becomes freshly incredulous as she recalls the blowback she received. "To call for fairness meant that you were on the side of rapists. Which sounds ridiculously unreflective. Yet it was a claim that people were making." Conversely, "To stand up for fair treatment became something considered brave. That was so amazing! People kept saying, 'This is so brave of you!'"

I asked her if she felt fear.

"If it were truly an innovative or outlying position, then maybe I would have been nervous. It didn't seem that was warranted. This truly was nothing more than living up to the ideals we live by and teach our students every day."

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The professors had cause to be afraid. Title IX allows students to bring harassment claims against professors for creating a hostile environment on the basis of their speech. When 19 Harvard Law professors signed a petition asserting that the documentary movie *The Hunting Ground* had misrepresented the facts of a case concerning an alleged assault by a black Harvard Law School student — a case with which those faculty members were intimately acquainted, having played a role in adjudicating it— some law students openly discussed the possibility of bringing Title IX charges against them.

I asked Halley how that made her feel.

"It makes me sad, because our students are supposed to study all sides of cases. They're supposed to care about the facts. They're supposed to wonder when the plaintiff makes a claim, what the defendant will say in his defense. That's being a lawyer. For them to be so blatantly indifferent to the ambiguity makes me very sad and a little embarrassed for them."

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Janet Halley

Gersen, Halley, Bartholet, and Gertner designed an alternative set of Title IX procedures — applicable only to Harvard Law students — that the Office for Civil Rights eventually certified as meeting the requirements laid out in the Dear Colleague letter, while also satisfying the principles of fair process as Gersen and her colleagues understood them. Students accused of sexual misconduct at Harvard Law School receive legal representation and the opportunity to review the charges and evidence, and to question witnesses. The policy was drafted in hopes that Harvard would adopt it for the university as a whole and that it would become a model for other colleges. Instead, the university allowed the law school to use its procedures for its own students while retaining the policy that the four had so sharply criticized for everyone else.

It was an equivocal and partial victory. The Harvard Law guidelines exposed how drastically most American colleges had over-complied with the Dear Colleague letter. Such overcompliance had consequences: Since 2011, federal courts have decided in over 200 cases and counting that Title IX tribunals violated due process. Those rulings left little doubt that Gersen and her colleagues' characterization of Title IX policy as "shocking" was widely shared by the American legal system.

But there are signs of change. The Trump administration and Education Secretary Betsy DeVos have issued new guidelines purporting to grant fair process to accused students. Assessing these revised guidelines, Gersen praised their commitment to due process while also criticizing their occasional overcorrection of the prior regime. Between the extremes of the Obama administration's Dear Colleague letter and certain aspects of the DeVos proposal, Gersen, as ever, seeks the judicious balance, and commands a position of authority — DeVos herself quotes from Gersen's law review article, signaling an openness to her suggestions for how the law might be improved. "I agree with some parts and disagree with other parts of the proposed rule," Gersen told me. But on the merits, she told me, the policy was an improvement on what it replaced and a useful start of a conversation about how to negotiate the two principles — protection of women and due process — that would need to be reconciled for the law to be just. "I am confident," she said, "that if this rule had been proposed by a non-Trump administration, most of it would be hailed as a much-needed advance for fairness, and there could be a constructive discussion about how to improve the rest of it."

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Gersen recalls telling a colleague, back in 2009, that she worked in an obscure area of law of little concern to the wider public. "It feels so odd in retrospect that I would have said such a thing!" she marveled aloud in her office at Harvard's Hauser Hall. At the time, she was on the cusp of returning to Harvard Law School as an assistant professor. She had been recruited by Elena Kagan as part of a plan to diversify the school along several dimensions, including by bringing on younger faculty. The laws of rape and domestic violence were considered peripheral at Harvard and marginal to the wider public. Within the cloistered subculture focused on these subjects, Gersen grew habituated to operating within the intensely polarized atmosphere generated by the new activist movements.

She discovered how elusive the judicious balance can be in practice. The reform of domestic violence law was a part of an earlier wave of feminist reforms. The movement secured recognition of spousal abuse — hitherto seen as a private matter — as a crime enforceable by the state. It was while working as prosecutor in the Manhattan District Attorney's office (in what turned out to be a gap year between her Supreme Court clerkship with Justice David Souter and the start of her career as a professor at Harvard Law School) that Gersen came to see that overzealous efforts to protect women — efforts that paid insufficient attention to due process — could be injurious to those they purported to protect.

Gersen began her work as a domestic violence prosecutor confident that "it was the one area of the criminal law where you didn't have to have qualms about using prosecutorial power to go after the bad guys." She quickly learned otherwise.

"The women were just so not on board in general with me prosecuting their husband or boyfriends. And it was not necessarily, as I would have thought, that they were cowering in fear, or were really scared that if they cooperated they would be beaten up or killed," she told me.

A compelling narrative burned into the public consciousness by decades of activism, reform, and cultural exhortation held that battered women declined to press charges against their batterers out of a sense of "learned helplessness." On the basis of this understanding, New York City had created mandatory arrest laws for police officers called in to investigate domestic violence calls. The prosecutor's office had instituted a "no-drop" mandatory prosecution policy.

"The idea was that women generally are not going to cooperate because they are too scared, and it was important for the prosecution to move forward and take the decision off of her shoulders and leave her no option. That way everybody understood it's not her decision, and then she would be less likely to face retaliation from her perpetrator."

In effect, this meant that the majority of victims were noncooperative, making most of the cases impossible to win. The typical practice, though, was to continue to pursue the cases for as long as possible — far longer than the typical criminal case. During this period, the victim would often fiercely resist efforts to compel her cooperation. "They wouldn't call you back. They would outright yell at you about not wanting to go forward. They would say they didn't want to press charges, or they wanted to drop charges." Many or even most of the victims calculated that Gersen was their true enemy. "Much more than I expected, they were asking me: 'Why are you ruining my life? My life is fine. I wanted my husband to be taken in for the night. But I wanted to control what happened.'"

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People were regularly charged with domestic violence for throwing an object in anger (not at their victim) or hitting a table or a wall. Even stealing money from a partner would be charged not as petty larceny but as domestic violence. And as domestic violence, it would be treated differently than other kinds of crimes. "Was what they needed a criminal prosecution? Or some other kind of remedy or intervention?" Gersen asked.

It became a routine matter for prosecutors to seek, and receive, a protective order that forbade contact between the accused and the victim. Such orders removed an accused perpetrator from a home he might have owned, and could in effect impose,

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far in advance of any finding of guilt, what Gersen would later call "state-imposed de facto divorce." Defying the order was grounds for a new criminal accusation.

"We were putting people in prison, not for beating people up, but for violating the terms of a protective order. We were taking them from their homes. I lost sleep over that aspect of it. Not that I always thought it was wrong, but the fact that as a criminal prosecutor you were in charge of decisions to displace people from homes, and to reorder their family, without even proof of a crime, was so striking to me as a legal mechanism — and a phenomenon that nobody was really talking about."

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Nancy Gertner

What had begun as an effort to liberate women from the private tyranny of coverture, in which the woman's legal identity was subsumed within that of her husband, had ended by delivering her into the arms of the state, which had empowered itself to preempt her privacy and annul her autonomy and her will. All of this had happened, Gersen told me, with little notice beyond the world of lawyers and activists and professors who had shaped this system. Few considered the consequences of this expansion of state power, or the sometimes dramatic effect on other aspects of our legal doctrine.

The domestic violence regime was, as Gersen told me, "a really big part" of the system of pervasive surveillance feeding mass incarceration in poor and minority communities. Many of the accused were arrested because they were audible to their neighbors, or because an officer was present on site, and not because the ostensible victims had called the police.

Gersen's book on domestic violence and privacy, *At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy* (Yale, 2009), culminates with a remarkable case in which the government imposed a restraining order on a man accused of domestic violence against the expressed will of his victim. The alleged perpetrator and his ostensible victim got married in defiance of the order. The perpetrator was convicted of violating the terms of the protective order and sentenced to 10 years in prison. He appealed, arguing his incarceration violated his constitutional right to marry. (Even convicted murderers can and do marry, Gersen noted.) The appeal was denied. "Is this what we wanted?" Gersen writes plaintively.

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Gersen's research was met with much resistance. She was denounced at major conferences, accused, she says, of being "dangerous and irresponsible." At one conference, she was called "pro-perpetrator." At another, simply "Hitler."

"Like almost every academic feminist, I came into this field because I read her work in college," Gersen said. She was referring to Catharine MacKinnon. "MacKinnon was the first legal theorist I ever read," she said, calling her "by far the most consequential legal scholar alive today." Her work created the theoretical justification for recognition of harassment as a tort and provided Gersen a way of seeing that "went beyond looking at sexism as an incident or a series of incidents, but rather undertook a structural analysis of human relations in which one class is dominant and the other is subordinate, with the male on top, and the female on the bottom."

Despite the strained response to *At Home in the Law*, Gersen continues to identify as a feminist seeking to strengthen and guide the movement toward the attainment of those underlying goals she shares with those she criticizes. "I have experienced harassment," she told me. "And it has not been one time. It has not even been a handful of times. It's been a lot of times."

It wasn't until she attended law school that Gersen began to understand why the system of procedural protections functioned as it did — not exclusively as a shield for patriarchal power (though it did, sometimes), but rather as a means of ensuring a crucial margin of fairness for those confronting the awesome prosecutorial power of the state.

Gersen was denounced at major conferences, accused, she says, of being "dangerous and irresponsible." At one conference, she was called "pro-perpetrator." At another, simply "Hitler."

Gersen insists that her critique of domestic violence law, Title IX procedures, and #MeToo emerges from within feminism and in pursuit of its goals. She wants to strengthen the movement by protecting it from some of the dangerous temptations it courts. This is a difficult balance to strike in polarized times, but Gersen has always been acutely sensitive to the unintended consequences of good intentions. "It's not about going back to a status quo ante, it's about coming to a new place based on the critique, and then there will be more critique — it just is a continuing process, and so this whole idea that, 'Oh, you want to bring us back to the way things were' — no, that's just a straw man! I don't think that we can accomplish those social justice goals, including justice for women and equality for women, through a path that undermines due process."

In an article published in March in *The New Yorker*, Gersen wrote that an adversarial system of law depends upon defense lawyers "to make it harder for the government to impose suffering on their clients, whether innocent or guilty. This is a notion that most liberal Americans like, when we talk about mass incarceration or the war on drugs. It is often less comfortable in the context of #MeToo."

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Her piece was written in defense of her colleague Ronald Sullivan, who had agreed to defend Harvey Weinstein, the Hollywood mogul and accused serial rapist, against multiple rape accusations in New York City. Sullivan is a renowned criminal defense attorney who approaches his defense of some of the most reviled people in America with the crusading zeal peculiar to those who have adopted the moral investment in proceduralism that animates members of that guild. In addition to teaching at Harvard Law School, he also served in the role of "faculty dean" resident at Harvard's Winthrop House, charged with overseeing student life. The disclosure of his role as Weinstein's attorney led to demands for his resignation and an ongoing campaign of student protests, including graffiti scrawled on college buildings.

In *The New Yorker*, Gersen explained what was at stake in the ensuing contest. She cited the lawyers who defended accused terrorists detained in Guantánamo Bay and elsewhere in the years after 9/11. She argued that penalizing the lawyers who defend the objects of a powerful social movement's scorn jeopardizes the integrity of the criminal justice system. Indeed, "there is now such a stigma attached to people accused of sexual misconduct that anyone who defends legal principles on their behalf risks being mistaken, in the public mind, for a defender of sexual violence." Her usually elliptical voice bends toward exhortation: "[I]t doesn't take a totalitarian government to repress our thoughts. We have done it to ourselves."

Gersen and Halley summoned up 52 signatories for a petition arguing that any pressure placed on Sullivan to resign from his job as faculty dean would erode academic freedom. Many of the signatories have longstanding policies against signing petitions, policies that they broke in this instance "because the principle is that fundamental." "I know for a fact that there are people on that letter who agree in some part with what the students might be feeling," Gersen told me, "but don't agree with the idea that the response is this institutional one, that we're gonna do this climate review, that at the end of it, who knows, maybe removal is the answer. That's just beyond the pale."

She was hopeful that the university would refuse to cave to the pressure of the protesters.

"I just have a certain optimistic belief in reason. I'll self-correct if I turn out to be wrong."

In May, Rakesh Khurana, dean of Harvard College, announced that Sullivan's contract would not be renewed. He would leave his post as faculty dean of Winthrop House at semester's end.

Correction (Aug. 15, 2019, 10:37 a.m.): This article originally said Jeannie Suk Gersen cited the idealism of John Adams in The New Yorker. Gersen did not cite Adams. This article also said The New Yorker struck a "morality" clause from a companywide Condé Nast policy; the clause was amended for The New Yorker specifically, but not companywide. This article has been updated to reflect these corrections.

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We welcome your thoughts and questions about this article. Please email the editors or submit a letter for publication.

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Wesley Yang

Wesley Yang is a writer living in Vermont. His most recent book, *The Souls of Yellow Folk*, was published by Norton last year.

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