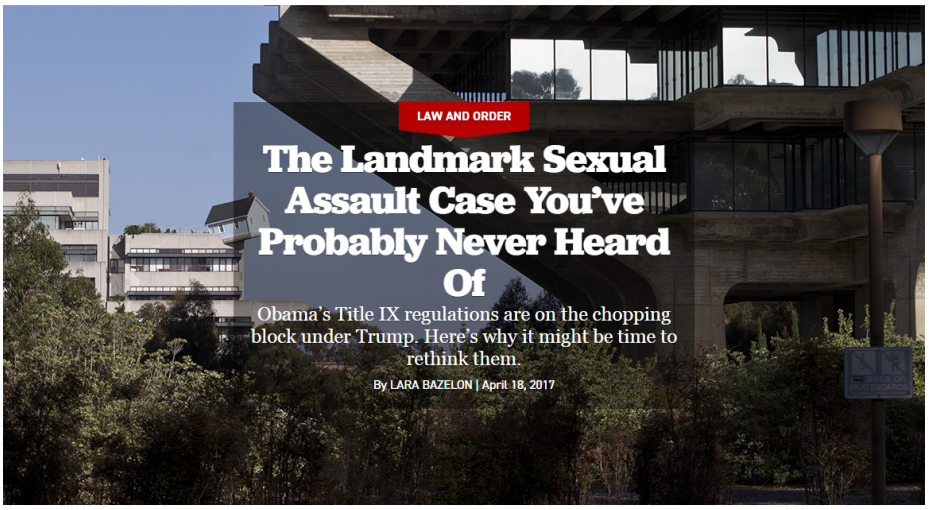

LAW AND ORDER

The Landmark Sexual Assault Case You've Probably Never Heard Of

Obama's Title IX regulations are on the chopping block under Trump. Here's why it might be time to rethink them.

By LARA BAZELON | April 18, 2017

AP Photo

This much is not in dispute: In early 2014, John Doe and Jane Roe, both students at the University of California, San Diego, had a brief sexual relationship. Jane, blonde, pretty and outgoing, was a freshman. She was also Mormon, raised in a religious household. Before going away to college, she had never tasted alcohol or had sex. While at school, she said, "I tested the waters."

That included starting a relationship with John, a dark-haired, good-looking sophomore. Jane told him that she wanted to remain a virgin, but she would—and did—give and receive oral sex. On January 31, 2014, after a few weeks of hanging out, John and Jane made plans to go to a party that his fraternity was hosting. Jane dropped off an overnight bag in John's room. During the party, Jane says she drank eight to nine shots of vodka; John puts the amount closer to four to five. Afterward, the couple returned to John's room, where Jane spent the night. Sometime later on the morning of February 1, John drove Jane back to her dorm. That evening, she took him to her sorority formal, and the two spent the night together again, this time in Jane's room. (Jane and John are pseudonyms used in court documents; neither has been publicly identified.)

Nearly everything else about John and Jane's short-lived relationship has become the subject of a bitter, bizarre and high-stakes legal dispute that has dragged on for years. Jane says that on the night of January 31, John raped her. John says that he is the victim, falsely accused by Jane either for her own "sick enjoyment" or because of "an internal religious conflict resulting from her own regretful decision to lose her virginity." Their story, told here in detail for the first time based on interviews and a review of transcripts, emails, letters and court documents, is currently binding law affecting hundreds of thousands of students enrolled in California schools of higher education.

Their story also marks the first time that a state appellate court has ruled on the constitutionality of a campus sexual assault proceeding since the Obama administration, six years ago this month, directed schools to take a tougher approach in resolving these cases or risk losing millions of dollars in federal funding for violating Title IX.

The Obama rules set off a furious national debate about how on-campus sexual assault cases should be handled by schools—one that has continued to make headlines. One Columbia University student carried a mattress around for two years to protest the university's failure to punish another student she says raped her. In 2014, after the Obama administration placed the University of Virginia under investigation for failing to respond to sexual assault complaints, the country was briefly transfixed by a jarring *Rolling Stone* exposé about a UVA gang rape and the university's subsequent dismissiveness—a story that turned out to be false. On the one hand, there are those who think campuses do too little to protect their students—overwhelmingly women—from sexual violence. On the other are those who think the new guidelines limit the due process rights of the accused—overwhelmingly men—and that the federal government has no business dictating what schools must do in he-said, she-said cases that carry dire disciplinary consequences.

Indeed, the handling—some would say bungling—of Jane and John's case as it has snowballed its way through the university's disciplinary proceeding to the courts is a powerful demonstration of the weaknesses of the Obama administration's Title IX guidelines. The directive for schools

to come up with a "fair and prompt" resolution came with a powerful stick, but little in the way of clear guidance in how to construct a truth-seeking forum that respects the rights of both the accuser and the accused. For that reason, university efforts to comply with new rules can fall short of delivering any real justice.

Now, the guidelines themselves might be on the chopping block. President Donald Trump has made no secret of his disdain for many of the rules and regulations enacted by his predecessor and has already set about rolling back some of them. Trump's secretary of education, Betsy DeVos, who refused to commit to the Title IX guidance during her confirmation hearing, met this past week with a Georgia lawyer currently challenging the regulations. She has also previously donated money to the Foundation for Individual Rights in Education, an organization that fiercely opposes the Obama administration's top-down directives to schools confronting campus sexual assault complaints.

The legal outcome of John and Jane's case may well become a rallying cry for those who view the Obama administration's sexual assault standards as an example of federal overreach and political correctness run amok. But even if the Obama guidelines remain in place for now, several legal challenges are currently winding through the federal courts that seek to undo them. Perhaps one of these court cases will resolve the question once and for all: When one student accuses another student of sexual assault, what must a school do to make sure its disciplinary process is fair to both sides?

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John and Jane's sexual relationship ended on the night of February 1, 2014, but John insists they remained friends. On April 25, John texted Jane asking when he and his friends should come over to "pregame." Jane wrote back, "Like soon if guys wanna come." Three days later, on April 28, Jane texted John asking about a math problem assigned in a class they shared. John wrote back with the answer.

Jane denies that there was a friendship of any kind, despite the text-message exchanges. She says she became depressed, then despondent, self-medicating with alcohol.

In early May 2014, Jane went to the university's Sexual Assault Resource Center, where she told a counseler John had assaulted her. It didn't take long for John to get wind of Jane's accusations. According to Jane, John approached her at a party on May 14 and yelled, "I could ruin your life." On May 15, John sent Jane a text message: "I have no reason to ever talk to you again nor do I want anything to do with you but I'm asking that u stop going around telling people I raped u because first off it's far from the truth and secondly it's starting a lot of unnecessary drama. That's a serious accusation to make and it's not okay."

On June 5, Jane filed a complaint with the university's Office of Student Conduct accusing John of sexual assault. Eight days later, Jane met with Elena Dalcourt, an attorney employed by the university's Office for the Prevention of Harassment and Discrimination to investigate sexual assault complaints. In a written request for a formal investigation, dated June 16, Jane alleged that John had sex with her on the night of January 31 when she was too drunk to consent. She also, in Dalcourt's words, "expanded on her original complaint" to add that John forced his fingers into her vagina during the morning of February 1, even though she told him to stop, and retaliated against her after he found out she had reported him by threatening her on May 14. Jane acknowledged that she consented to having sex with John on the night of February 1, the night after she said he raped and digitally penetrated her. At that point, she wrote, "I had given up on myself."

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Colleges and universities across the country regularly confront sexual assault complaints similar to Jane's in which excessive alcohol consumption and diametrically opposed accounts of what happened make it extremely difficult to dive through the murk and find the truth.

But the stakes were raised when schools came under tremendous pressure from the Obama administration to provide a quasi-judicial forum for the accusers and those they accuse.

On April 4, 2011, the U.S. Department of Education's Office of Civil Rights issued a "Dear Colleague Letter" to colleges and universities making explicit their obligations under Title IX, which prohibits discrimination on the basis of sex. Sex discrimination, the OCR letter stated, includes "sexual violence," defined as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent." The letter reminded schools of their legal obligation "to take immediate and effective steps to end sexual harassment and sexual violence," which included providing grievance procedures designed to result in a "prompt, thorough, and impartial" resolution of such complaints.

Schools suspected of violating the letter's interpretation of Title IX have

found themselves under federal investigation. According to a recent article in the *San Francisco Chronicle*, more than 200 schools are awaiting word from the Department of Education on whether their policies are out of compliance, either in a particular case or systemically. On this list: Harvard, Dartmouth, Columbia, Brown, the University of Chicago and five California schools including Stanford, the University of Southern California, UCLA, UC Berkeley and UC Davis. An adverse finding could mean the loss of millions of dollars in federal funding—money that these schools rely on to survive.

The new Title IX guidelines have been controversial: Some say they are a much needed fix to a broken system, while others allege they are biased toward the accuser and don't do enough to ensure the rights of the accused.

Indeed, from a criminal justice perspective, the "Dear Colleague" rules are troubling. They specify no procedures for cross examination—a key constitutional right. And they insist colleges resolve sexual violence cases using the lowest standard of proof allowed in a court of law—what's called "a preponderance of the evidence." In a criminal courtroom, 12 jurors must all agree that guilt has been established beyond a reasonable doubt. But in a university setting, the preponderance of the evidence standard is met if it is "more likely than not" that the accuser's story is true. The difference between winning and losing turns on a razor-thin margin: 50.1 percent to 49.9 percent.

Campus disciplinary proceedings are, in theory, educational rather than punitive. School officials may hold hearings, take testimony and make factual findings, but they cannot convict or incarcerate—which is why the accused are not entitled to the full range of protections they would have in a court of law. But while the punishment isn't prison, it can be hugely significant. Janet Halley, a professor at Harvard Law School and a respected feminist scholar says, "I would ask people to think, what would it be like if your brother or your son was expelled. It's not nothing. Its the end of a life plan."

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Dalcourt, the university's sexual assault investigator, interviewed Jane a second time on July 29. She also interviewed 14 other witnesses. John, meanwhile, got his own attorney: Matthew Haberkorn, a Bay Area civil lawyer and long-time family friend who took the case pro bono. When Dalcourt asked to interview John, Haberkorn declined, citing John's Fifth Amendment privilege against self-incrimination. Instead, Haberkorn provided a written "offer of proof" that described John and Jane's relationship generally but did not address the specifics of Jane's allegations.

In a written report, Dalcourt found that Jane's charges of nonconsensual sex on January 31 and retaliation on May 14 were not supported by a preponderance of the evidence. But Dalcourt found that, more likely than not, John digitally penetrated Jane against her will on the morning of February 1. John refused to discuss what had happened, and Dalcourt found Jane credible, her behavior "consistent with the actions of trauma victims who attempt to cope with trauma by normalizing what has occurred."

With that finding, Jane's digital penetration accusation crossed the threshold necessary to hold a disciplinary hearing, which took place on December 12, 2014. John faced a three-member panel: Rebecca Otten, the panel's chairwoman and the university's director of Strategic Partnership and Housing Allocations; Jeff Hill, an assistant director of residence life; and Kris Nelson, a graduate student. Dalcourt submitted her report, a copy of which was provided to John. Neither side called Dalcourt to testify.

Before the hearing, John asked for the names and statements of the 14 witnesses Dalcourt interviewed; he was told he could not have them. John also asked for copies of Jane's statements from the interviews with Dalcourt that she gave on June 12 and July 29. Again, he was told no.

Any criminal justice expert will tell you that having access to the different statements an accuser has made over time is crucial to the ability to defend oneself in a legal proceeding. Even more crucial would be what other people with knowledge of the situation might have said about those accusations as well as about the accuser. Without this information—which would have been provided to him in any official court case—John was in the dark about who those 14 people were and whether they believed that Jane was credible. He was also deprived of the information necessary to determine whether Jane's "expanded" account differed from her original account in significant ways.

Jane was the sole witness at the hearing, shielded by a screen that prevented John and Haberkorn from seeing her. Haberkorn and John allege that no member of the panel could see Jane except Otten. The university disputes this and says that all three panel members could see Jane. On direct examination, Jane testified about waking up on the morning of February 1 with no memory of the night before but recalling, "I

could tell that we had had sex because of the way my body felt." John, she said, kept trying to put his fingers into her vagina even though she said, "Stop, it hurts," and, "I am sore. Don't." About having sex the previous night, she said, "I don't remember if I said yes or no or anything, but the next morning I directly said no."

Through Haberkorn, John submitted 32 questions for Jane for cross-examination. Otten asked only nine of them. When Haberkorn objected, Otten told him, "You don't have the right to participate in this." Many campuses do not allow lawyers to advocate or even to be present in sexual assault proceedings. Nearly all prohibit the accused from directly questioning their accusers. But Otten went even farther: By refusing to pose the questions John was allowed to ask indirectly, she was severely constricting the limited right that he did have to test Jane's account.

For example, Otten specifically declined to ask any of John's questions about the text messages he and Jane exchanged on February 1 leading up to her sorority's formal—after Jane says that John forcibly penetrated her. Otten did ask Jane about her text messages with John about drinking together on April 25. Jane said she texted John at her friend's request and that she ultimately decided not to meet up with him "because I didn't want to be around him." Following that response, Otten stated that she would not ask Jane about the text message exchange initiated by Jane about math homework on April 28.

John declined to testify, citing the Fifth Amendment. But in response to a direct question from Otten, John said, "There was no touching" on the morning of February 1. Asked if he wanted to give a closing statement, he said no.

Five days later, on December 17, the panel cleared John of sexual assault—defined by the panel as "sexual activity that is engaged in without the effective consent of the other person and is intentional." But it found John responsible for the lesser charge of sexual misconduct—defined as "nonconsensual activity engaged in without the intent to harm another, such as when a person believes unreasonably that effective consent was given, when in fact, it was not." The panel recommended that John be suspended for one quarter.

From there, the matter went to Sherry Mallory, dean of student affairs. John and Jane both submitted statements attesting to the harm they had suffered as a result of what had happened. Of Jane, John said, "After impulsively and carelessly fabricating lies and duping school officials, she's effectively altered my life and future."

Jane stressed the devastating impact of John's actions, saying that she "hit rock bottom the first week of spring quarter" after attending an off-campus fraternity party. "I drank so much that I was picked up by the police and taken to the San Diego Detox Center and was cited for underage drinking. I woke up on a cold concrete floor surrounded by middle-aged men with no recollection of the night before. I smelled like puke and had mascara running down my face." It was at that point, Jane realized, "that I had to make a change. I could not let what John did to me affect me this much." She added, "my parents received a copy of the citation in the mail and freaked out." Jane urged Mallory to suspend John for a full year "to get a taste of the pain that I have felt."

Jane's letter added a new wrinkle to the story. The first week of spring quarter began on Thursday, March 27, 2014, and ended on April 3. If the information in Jane's letter is correct, that means Jane and John's apparently friendly text messages about pregame drinking and math homework occurred three weeks after the night Jane spent the night at the Detox Center, "hit rock bottom" and decided, "I had to make a change."

None of this information was contained in Dalcourt's report, given to John before the hearing or presented to the panel. Haberkorn says he had no idea about any of it until he received a copy of Jane's letter to Mallory. It was at that point, Haberkorn says, that he understood Jane's motivation for accusing John months after the fact. "She was in trouble with her parents for drinking and having gotten arrested and she needed someone to blame," he alleges.

Dean Mallory did not adopt the panel's recommended sanction. Instead, on January 13, 2015, she increased John's suspension to one year, as Jane had requested. Because a sanction of that length requires that the student apply for readmission, John had been effectively expelled.

John appealed to the University's Council of the Provosts. On June 20, 2015, his punishment was increased to one year and one quarter. No explanation was provided. The unreasoned increase of John's punishment is also unsettling: In a court case, that kind of action from a higher authority can be interpreted as arbitrary or as punishment for exercising a right to appeal.

That's when Haberkorn, baffled and frustrated, decided to look outside of the university system for justice. With the assistance of Los Angeles attorney Mark Hathaway, Haberkorn sought relief in the California Superior Court by filing a writ of mandamus—an extraordinary order

Superior Court by filing a writ of mandamus—an extraordinary order issued by a court to a lower tribunal commanding it to reverse course and follow the law. Haberkorn told John the petition was a long shot, as state courts must defer to the university's findings as long as they are supported by "substantial evidence." But it was John's only remaining legal recourse.

On July 15, 2015, John won. Judge Joel Pressman threw out the university's finding of responsibility and its sanction. "Due process," Pressman wrote, "requires that a hearing … be a real one, not a sham or a pretense." Pressman found that the disciplinary proceedings against John violated one of the most fundamental rights guaranteed by the Constitution: the right to confront and cross-examine his accuser. Pressman also faulted the panel for viewing Jane's accusation "in a vacuum." Jane's decision to have sex with John later that same day, the judge wrote, did "not demonstrate non-consensual behavior."

Pressman's ruling amounted to a total condemnation of the university's attempt to craft a fair process. Because the decision spoke to a larger controversy about the Obama administration's pressure on schools to follow certain procedures to crack down on sexual assault, it made national headlines. Haberkorn fielded calls from reporters across the country. His face shrouded in shadow, John gave on camera interviews with CNN and the "Today" show.

But it wasn't over. On September 11, 2015, the university filed an appeal. At this point, Jane had transferred to a different school, while John continued at the university. In June of 2016, while the appeal was still pending, John participated in the graduation ceremony along with his fellow classmates, but the university withheld his degree, citing the uncertain outcome of the ongoing litigation.

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Oral argument before the San Diego-based California Court of Appeal took place on October 12, 2016. The three-judge panel took a battering ram to Grant Davis-Denny, the lawyer for the university and a partner at the powerhouse L.A.-based law firm Munger, Tolles & Olson. Presiding Justice Richard Huffman said that after reviewing the record, "my comment was, 'Where's the kangaroo?'" The statement was jaw-dropping. Huffman, it seemed, was referring to the university's procedures as a "kangaroo court"—a sham forum that makes a mockery of the justice system by ignoring the rule of law.

Huffman went on, "please understand, at least one of us on this panel, and maybe more"—Justice Gilbert Nares interrupted. "Two of us," he said. "Three of us," Justice Joan Irion added—"have really grave concerns about this system," Huffman finished.

Huffman seemed alarmed by the university's refusal to give John the notes of Dalcourt's interviews with Jane and the other 14 witnesses. "I am, one, at a total loss to understand why anybody interested in a fair and accurate outcome would do something like that," he said. When Davis-Denny responded with the far-fetched claim that that turning over the names and statements would "open the universities up to full-scale civil discovery," Irion responded with disbelief. "Really? Really?"

Turning to the way the school limited John's ability to question Jane's account, Huffman said, "anybody that's ever engaged in or watched cross-examination knows that that is not even half a loaf."

Haberkorn and John's appellate counsel, Andrew Chang, walked out of the courtroom feeling triumphant, anticipating a decision that would vindicate John and sweep more broadly, setting rigorous legal standards for all 10 University of California campuses, which collectively enroll hundreds of thousands of students. The opinion could also influence private colleges, those within the state, and those outside of it looking for guidance.

Haberkorn planned to file a civil suit against the school after the ruling, seeking hundreds of thousands of dollars in damages and legal fees. John, it appeared, was poised for a big win.

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Two days before Thanksgiving, when the court handed down a 3-0 decision written by Judge Huffman, John and his lawyers were floored.

"Jane's testimony, by itself," the justices said, was enough to hold John responsible, and Pressman, the judge who threw out the university's sanctions, was flat out wrong in concluding otherwise. Yes, the justices acknowledged, "the facts that Jane and John were involved in a romantic relationship, had previously engaged in consensual oral sex, and engaged in consensual sexual intercourse the night of February 1, 2014, all impact the credibility of Jane." But credibility was a question only for the disciplinary panel, and "it believed Jane." End of story.

Despite the "grave concerns" all three justices expressed repeatedly at oral argument, they found no fault with the university's procedures. They did, however, find fault with John. He could have called Dalcourt as a witness

himself, Huffman pointed out, called other witnesses in his defense, or provided his own account of what happened. "The fact that John's strategy did not prove successful does not undermine the fairness of the hearing, especially here where John did not take advantage of the opportunities presented to him."

John lost, and he lost big. The university's decision finding John responsible for sexual misconduct was ordered reinstated.

Haberkorn and Chang filed an appeal with the California Supreme Court. On February 15, 2016, the court—the state's highest—declined to hear the case. Afterward, the university issued a statement praising the "the carefully reasoned" decision of the Court of Appeal that supported the university's "thorough investigation" of Jane's complaint and the "reasonable sanction" it imposed on John "for this serious violation of the University's policies against sexual misconduct."

Haberkorn considered filing a petition for certiorari with the United States Supreme Court, then abandoned the effort after speaking with experts. The case, he was told, did not frame a federal constitutional question in the way that the high court would want.

On April 4, 2017—six years to the day that the "Dear Colleague" letter was issued—the parties reconvened before Judge Pressman in a telephone conference to settle the remaining details. The university argued that since it could not suspend John for a year and a quarter as originally determined, the only recourse was to suspend the awarding of his diploma for that length of time. Haberkorn argued that John had been punished enough, having gone without a diploma since walking in the graduation ceremony the year before. This final step in the case is still pending.

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John's case is coming to an end, but the larger controversy surrounding campus sexual assault procedures is not. If anything, the tension has ratcheted up now that the federal policies determining how these cases are handled may not be viable for much longer. If the Trump administration takes a wrecking ball to the Obama administration's interpretation of Title IX when it comes to sexual assault, the consequences would be far-reaching. It is possible that many universities would revisit the policies they have in place and without a binding federal directive, relax their standards or tighten them, creating greater variability from campus to campus.

The same holds true if appellate courts in other states come to the opposite conclusion in cases similar to John and Jane's. There's also the federal route: In a lawsuit filed last year, Justin Dillon, a Washington, D.C., attorney whose firm defends students against sexual assault complaints nationwide, accused the Obama administration of acting outside its lawful authority and asked a federal judge to strike down some of the requirements it has imposed. The case is still ongoing.

If the Obama regulations are overturned in court, it is reasonable to expect not just a scramble for new rules, but also a host of new lawsuits. Many students punished under the old regime could go to court, demanding that the schools pay them for damages ranging from a violation of their civil rights to slander, libel, intentional infliction of emotional distress and, yes, even sex discrimination based on gender.

As it is, the California Court of Appeal's decision endorses a process—and a line of legal reasoning—that is troubling. As Justice Huffman put it during the oral argument, "I certainly understand the point of the federal government wanting the university to maximize these investigations and outcomes. But there's another person on the other side who has grave, grave consequences, and we think fairness, even in the university environment, ought to be some kind of factor that bears on this."

And yet Huffman and his colleagues gave the fairness factor short shrift in their opinion, by insisting that John had "defenses" he should have deployed. Those defenses seem more theoretical than actual. Cross-examination, the Supreme Court famously stated, is "the greatest legal engine ever invented for the discovery of truth." That engine was in idle throughout the disciplinary proceedings. Most of John's questions went unasked and unanswered. Put aside that John could not see Jane or speak to her directly—it is not clear from the record that two of three panel members could see Jane, either. On that disputed fact alone, how could the court conclude that the panel had the ability to weigh her credibility?

And then there is the information that the panel and John never had at all —from the names and statements of the witnesses to the new information Jane revealed after the hearing was over—all of which might have allowed John to ask more probing questions.

In the end, this case is about more than two individuals at the University of California, San Diego. It asks important questions about how colleges, universities and secondary schools across the country should be designing proceedings, deciding cases and meting out discipline for their Jane Roes and John Does. On-campus sexual assault complaints will continue to

generate a great deal of heat and not much light so long as they are perceived as being handled by schools in a lopsided manner that makes them appear unfair and illegitimate.

When being found "more likely than not" responsible for sexual misconduct makes the difference between staying at school or expulsion, between having a degree or a transcript with an ineradicable black mark, we owe it to our students to do better than a kangaroo and half a loaf.

Lara Bazelon is a writer and an attorney.

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