Accountability in an Era of Celebrity

Martha C. Nussbaum[1]

> Now let's be clear, this problem is bigger than football. There has been, appropriately so, intense and widespread outrage following the release of the video showing what happened inside the elevator at the casino. But wouldn't it be productive if this collective outrage, as my colleagues have said, could be channeled to truly hear and address the long-suffering cries for help by so many women? And as they said, do something about it? Like an on-going education of men about what healthy, respectful manhood is all about.
>
> Consider this: According to domestic violence experts, more than three women per day lose their lives at the hands of their partners. That means that since the night February 15th in Atlantic City [when the elevator incident occurred] more than 600 women have died.
>
> James Brown, CBS Sports, Thursday, September 11, 2014

On December 30, 2015, actor Bill Cosby was finally charged with sexual assault.[2] For anyone who has followed the case, one striking aspect is how late an actual indictment came, and after a huge number of accusations. One legal problem has been the statute of limitations for rape, an issue by now much discussed. But another obvious aspect is the fact that as a society we have created a class of glamorous and powerful men – entertainers, athletes – who

---

[1] This paper was given as an inaugural lecture at the Dickson Poon Law Center at King's College, London on March 9, 2017, and has been updated and revised. I am very grateful to Emily Dupree and Nethanel Lipshitz for expert research assistance.

[2] See Commonwealth v. William H. Cosby, Jr., Police Criminal Complaint 2015-2583, www.montcopa.org/2312/Commonwealth-v-William-Henry-Cosby-Jr

are in a most literal sense above the law. They will almost always prevail against all accusations, no matter what they do in the sexual domain, because they are shielded by glamor, public trust, and access to the best legal representation. Cosby might prove the exception only because his abuses of women were so numerous and so flagrant. So what I think as I read the news is, "For one Cosby, there are hundreds like him who will never be indicted."

But as I write this, in July 2017, Cosby himself has just scored a huge legal victory that suggests that he too may escape accountability: after lengthy jury deliberations in his sexual assault trial, no verdict could be reached, and the judge declared a mistrial.[3] And this was in part a result of earlier legal victories, including the ruling that only one accuser other than the primary complainant was allowed to testify, even though the prosecution had planned to call thirteen women (out of the dozens who have told their stories publicly).[4] This made it virtually impossible to show that an obsessive pattern of conduct – drugging followed by rape – had been Cosby's modus operandi for years. The other women were prevented by the statute of limitations from bringing their own charges: Pennsylvania, where the trial took place, has a longer statute of limitations for rape than other states. Despite these setbacks, the District Attorney has "vowed to put Mr. Cosby on trial again," with a new trial set for November of 2017.

Like countless women, many of whom have written to me since I first published my story in Huffington Post, I have my own Bill Cosby tale to tell.[5] In the winter of 1968, when I was an enterprising twenty-year-old, I had a big crush on a well-known actor who shortly became another of America's beloved TV dads. He was a really good actor, and at that time he was

---

[3] Graham Bowley, "Bill Cosby's Sexual Assault Case Ends in a Mistrial," *The New York Times*, June 17, 2017, www.nytimes.com/2017/06/17/arts/television/bill-cosby-trial-day-11.

[4] See Commonwealth v. William H. Cosby, Jr., Order of February 24, 2017, www.montcopa.org/ArchiveCenter/ViewFile/Item/3640.

[5] See Martha Nussbaum, "Why Some Men Are Above the Law," *The Huffington Post*, January 15, 2016, www.huffingtonpost.com/martha-c-nussbaum/why-some-men-are-above-the-law_b_8992754.html.

playing a major stage role in New York. He was then around forty. After going out with him a couple of times, I asked him back to my off-campus apartment. I had had some sexual experience, but not much; however, I decided to be daring, since it was the late 60's and I felt that I should join the culture. Unlike the Cosby women, I certainly intended to consent to intercourse. What I did not consent to was the gruesome, violent, and painful assault that he substituted for intercourse. I remember screaming for help, to no avail, and I remember him saying, "It's all part of sex."

I never seriously considered going to the police, even though there was a lot of forensic evidence. I was just too embarrassed. I didn't even go to a doctor. And I thought, with good reason, that the police would dismiss the issue because I had after all consented to some kind of sex act. Even now, the law is not well equipped to handle that type of case, since consent is usually understood to be an all or nothing matter, despite the fact that there is a world of difference between what I intended to consent to and what happened to me. I've taught rape law and read a large amount on this topic and have never found discussion of this question. This, at least, we can fix, with more nuanced accounts of legal consent in the case of violent practices.

But the issue I want to focus on is that even had all these problems been solved, the celebrity in question would certainly have prevailed. He would have denied my allegations, cast aspersions on my reputation, even perhaps attempted to portray me as an extortionist. My life, personal and professional, would have been profoundly damaged, and nothing would have been accomplished. Not specific deterrence, since I am sure he was undeterrable, shielded by fame as he was, and not general deterrence, since I would have failed. No doubt dozens of other women have come to the same conclusion about this particular man. And who knows how many hundreds or thousands, about how many hundreds of other male celebrities.

So what did I do? After my injuries faded, I decided not to "join the culture." I met a lovely man my own age, settled down into a monogamous life, married, and soon had a child. I was very lucky: I have never experienced any sexual trauma from the episode, and to this day I think it has affected me almost not at all, except that I never wanted to watch his TV show, which is not the type of show I would normally watch anyway. (Perhaps the episode also explains my strong interest in "Law and Order SVU", my favorite show.) I've had a very happy life, in sexual and other respects. I observed the public enthusiasm for my assailant, as an icon of virtuous American fatherhood, with ironic detachment. Only thirty years later, when he ran for Congress, did I ever consider coming forward with my story, just to tell the story, since I thought it was preposterous that he should hold a position of public trust. But close friends assured me that nobody would believe me after such a lapse of time, and he would be certain either to portray me as an extortionist or to sue me for defamation. (The famous are indeed unusually exposed to extortion, and that vulnerability itself is an aspect of their impunity: everyone easily believes that this is what a complaining woman is after.) I consoled myself with the fact that he was after all a Democrat, running against an especially vapid Republican opponent. Even now that he is dead, I don't name him, because the Vince Foster case showed us that a person's privacy interest can be held to survive death, and who on earth knows what some court might say about a reputational interest? I note that U. S. obituaries made no mention of any problematic conduct, but the Guardian was different: they said that he had a notorious reputation for being completely unlike the virtuous character he portrayed. Good for them!

Mine has been a selfish and self-protective response. I do wonder whether even a futile complaint could have prevented other harms. But now I want to set this issue in a larger context before returning to the case of celebrity accountability.

First I'll give some facts about how women are doing around the world. Then I'll zero in on the unsolved problem of sexual violence. I'll describe some real progress on even this thorny issue, both in law and in culture. But then we must return to the recalcitrant case of actors and sports stars, where big money still prevents full accountability.

It is an honor and pleasure to dedicate this essay to my dear friend Josh Cohen. He has been a feminist since the very start of his career, at a time when many men, certainly including men on the left, were deaf to women's demands for full equality. Confident and strong, he never felt threatened by strong women articulating strong demands. As a teacher, he fostered the careers of many of our best women in political thought, prominently including Debra Satz and Annabelle Lever of this volume. As an editor, he continues to usher into print the most demanding and creative feminist work, for example Kate Manne's work on misogyny. His tough and incisive comments on work in progress challenge us to aim higher and do better. As a friend his support is unparalleled.

Women's Progress

Women are making progress.[6] In 1893, New Zealand became the first nation to offer women the vote;[7] in 2014, every nation of the world now gives women the vote: even Saudi Arabia did so in 2015. In 1900, there was no female member in any national parliament; in 2013, according to the World Bank, the proportion of seats held by women is 21.77 percent,

---

[6] I am indebted to an exhaustive compilation of data by Nethanel Lipshitz, on file with both Lipshitz and me, which amalgamates data from the World Bank, the Human Development Reports, the UN World Women's Report, and numerous other sources. I simply pick a few examples here. A more extensive treatment of these issues is in my "Women's Progress and Women's Human Rights," Human Rights Quarterly 38 (2016), 589-622.

[7] One should note, however, that women in the territory of Utah got the vote in 1870, until it was taken away from them by Congress in 1887 – a history that complicates facile assumptions about Mormon "patriarchy."

rapidly up from 12.74 percent in 1990.[8] In educational enrollment and attainment, although some nations still show substantial gaps, women have basically closed the gap worldwide, coming up to parity with men in primary and secondary enrollment, and surpassing men in tertiary enrollment. Women's labor force participation is also advancing, although it still lags behind men worldwide: 50.6 percent as contrasted with 76.7 percent for males.[9] Although aging women and single female heads of households still exhibit a dramatically higher-than-average rate of poverty, women are on average slowly rising economically, so that their share of national poverty is around fifty percent in Europe, Latin America, and Africa.

In the very basic area of life and health, we also see dramatic improvement. Women's life expectancy at birth has climbed from 54 years in 1960 to 72 years in 2012, about the same increase that we see for men. Women now outlive men in virtually every country. Maternal and infant mortality are declining, though they are still severe problems. Women appear to enjoy nutritional status in childhood similar to that of males. We see few disparities in immunizations or rate of communicable diseases. Even HIV affects women and men equally. A lot of this progress comes from development and affluence. But women's relative status has improved even in many nations that are still lagging behind in overall economic development.

There are two especially recalcitrant issues. One is women's burden of care work in the household. A vastly disproportionate amount of child care, elder care, and domestic labor is currently done, worldwide, by women. The rare case is where the woman is hired and paid a wage; even such women are exploited, since the wage for work perceived as "women's work" is not adequate. But a large proportion of such work is done for free by women, and they are

---

[8] The US is lower than the world average, with 18.5 percent of total seats in House and Senate held by women. The UN World Women's Report gives ten percent for lower or single houses of parliament in 1995, the year of the Beijing Platform for Action, and 17 percent by 2009.

[9] This does not count unsalaried domestic or care labor, a big issue, on which further below. Some nations have a much larger participation gap: in the Arab States, for example, the female rate is 24.7 percent, the male rate 73.2 percent. South Asia also has a very large gap.

supposed to do it out of love. This is just how things are. There are many issues here: the burden of the "double day," the failure of economic accounting to count this work as work or to assign to it a monetary value, the consequent devaluation of women's work in many contexts such as divorce or damage suits. But that is not my topic in this essay.

The other exceedingly recalcitrant issue is sexual violence. According to the 2014 Human Development Report, about one third of the world's women will experience sexual or other physical violence in their lifetime, usually from an intimate partner.[10] Good data in this area are very hard to come by, but it is clear that the problem is not endemic to poorer nations, and that the rate in the US is appallingly high, as I'll describe later.

Even on these issues, however, once highly controversial, or (worse) neglected as the way family life just is, there is an emerging international consensus that violence against women ought to be taken very seriously. Male business as usual is no longer business as usual. Rape, domestic violence, and sexual harassment still occur with depressing regularity, but they are publicly deplored as they were often not earlier; they are big news, when once they were just daily life. When Boko Haram kidnaps young women, this event, the sort of thing that has occurred for centuries without protest, is now the object of widespread international protest. The (former) Prime Minister of Italy, Enrico Letta, shone a spotlight on the frequency of domestic violence, stalking, and killings motivated by male jealousy, saying that Italy is "at war against femicide" --thus placing the crimes in a category comparable to that of genocide, as feminists have long since urged.[11] He followed this up with new tough laws.

---

[10] Khalid Malik, "Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience," *Human Development Report 2014*, United Nations Development Programme (2014). Accessible at http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf

[11] On both of these cases, and on the feminist argument about genocide, see below. See also Anushay Hossain, "Femicide in Italy: Domestic Violence Persists Despite New Laws," *Forbes*, August 26, 2013, www.forbes.com/sites/worldviews/2013/08/26/femicide-in-italy-domestic-violence-persists-despite-new-laws/#412bf5584bc2.

Even in one of those still quite primitive and patriarchal nations, the United States, there is movement.[12] For years rape on college campuses, fueled by alcohol abuse and the toxic atmosphere created by big-time college sports, has gone virtually unreported, as complainants are routinely dissuaded from pursuing their complaints. In his last two years in office, President Obama – actually led by (former) Vice-President Biden, a long-time feminist -- directed attention to this issue, launching a campaign against campus sexual assault and even publishing a list of fifty-five especially problematic institutions, on which, I am sorry to say, the University of Chicago figures.[13] And lately, wonder of wonders, the most all-American institution of all, the National Football League, is writhing in distress after a wave of domestic violence issues involving prominent players. Ray Rice is gone, a mere unsigned free agent. Greg Hardy is out, another unsigned free agent. Jonathan Dwyer is out, another unsigned free agent. MLB's Aroldis Chapman has returned after a suspension, but at least MLB now has an announced domestic violence policy. And the heat is on: a dozen still-active NFL players have domestic violence arrests, and there is mounting pressure on the league to discipline them too.[14]

---

[12] I put it this way because, after the notorious gang rape in India, numerous Americans took a superior stance, calling India a "patriarchal" nation, and a group of feminists at Harvard Law School published a report announcing that they had formed a task force to advise "India and other developing nations" on the problems of sexual violence that "their" people face. "Harvard to the Rescue!" was the headline of one Indian blog piece written by Nivedita Menon, a prominent member of India's very old and well-developed feminist movement. "It's been a long hard haul," wrote Menon, "so it's a great relief that the Harvard Law School has stepped in to take this burden off our shoulders." See Nivedita Menon, "Harvard to the rescue!" *Kafila*, February 16, 2013, https://kafila.online/2013/02/16/harvard-to-the-rescue. Charity should begin at home. In India female university students are comparatively safe (no campus sports, most students live at home), and domestic violence has not been a hallmark of big-time sports role models such as cricketers and tennis players.

[13] The Office of Civil Rights' investigation into the University of Chicago stemmed from a 2013 Title IX complaint filed by former student Olivia Ortiz, and was broadened to include the University's "policies and practices regarding sexual misconduct" in 2014. See Joy Crane, "University under federal investigation for sexual assault policy," *The Chicago Maroon*, February 11, 2014, www.chicagomaroon.com/2014/02/11/university-under-federal-investigation-for-sexual-assault-policy/.

[14] See "Still Playing: 12 NFL Players Have Domestic Violence Arrests," *NBC News*, September 17, 2014, www.nbcnews.com/storyline/nfl-controversy/still-playing-12-nfl-players-have-domestic-violence-arrests-n204831. The one accused person who emerges with honor is Chicago Bears receiver Brandon Marshall, who did have a string of domestic violence arrests, one leading to a battery conviction in 2008,

Of course it isn't as if these things are new events: it's the climate of their reception – from fans, from politicians,[15] sports journalists, and, perhaps most important, from the league's corporate sponsors,[16] that has undergone a virtual revolution. When you listen to The Score (a typical sports talk station in Chicago) these days, it's quite astonishing: you might almost be at a 1980's feminist consciousness raising session run by Andrea Dworkin. Even beer has joined the women's movement: on September 16, 2014, NFL corporate sponsor Anheuser Busch stated: "We are disappointed and increasingly concerned by the recent incidents that have overshadowed this NFL season. We are not yet satisfied with the league's handling of behaviors that so clearly go against our own company culture and moral code."[17] Wow. Either staggering hypocrisy or revolutionary change. And in a sense even hypocrisy would itself be a revolutionary change, reflecting deference to new social norms.

Let me now briefly trace the evolution of law and social norms toward greater accountability, and then to show what still needs to be done.

Sexual violence in the US[18]

First let me describe the current dimensions of the problem.

The most recent National Intimate Partner and Sexual Violence Survey, published by the Centers for Disease Control and Prevention, puts the incidence of sexual violence even higher than previous

---

but who has sought help for "borderline personality disorder" and has become a national spokesperson for mental illness issues. Since that time he has had no further violence issues.

[15] The Governor of Minnesota has been very vocal in the Peterson incident.

[16] Radisson, Nike, and Target all quickly dropped sponsorship of Peterson, and Anheuser Busch made perhaps the most influential move of all (see below).

[17] See Michael Klopman, "NFL Sponsor Anheuser-Busch 'Disappointed And Increasingly Concerned' With League," *The Huffington Post*, September 16, 2014, www.huffingtonpost.com/2014/09/16/anheuser-busch-statement-nfl_n_5831532.html.

[18] I apologize for this narrow focus. Every country has its own history, but ours is complicated enough to demand a full-length analysis.

studies.[19] Nearly one in five women surveyed said they had been raped or had experienced an attempted rape, and one in four reported having been beaten by an intimate partner. One in six women have been stalked. Sexual violence is, of course, not only toward women, but it affects women disproportionately. 1/3 of women said they had been victims of some form of sexual assault. One in seven men have experienced sexual violence and one in 71 have been raped (usually when very young). More than half of female rape victims were raped by an intimate partner and 40 percent by an acquaintance.

Nor are these numbers unconnected to traditional patriarchal attitudes: Edward Laumann, one of the great sociologists of our era, found some highly disturbing facts in his exhaustive survey of American sexual attitudes and experiences, published in The Social Organization of Sexuality, and the more popular Sex in America.[20] Here's what Laumann found. And I emphasize that Laumann is no radical and not even a feminist, but a very conservative quantitative scholar of impeccable respectability.

First, American men widely share a picture of male sexuality as easily aroused then uncontrollable. Once aroused, a man just "can't stop." Women are commonly seen as temptresses whose very presence and whose physical allure makes men lose control, and after that they just aren't responsible for what they do. Men combine this beliefs with a related myth about women: that they really want sex even when they say they don't, and even when they fight against it. Laumann came to the following conclusion about how these attitudes lead to problematic acts of aggression:

---

[19] Smith, Chen, Basile, Gilbert, Merrick, Patel, Walling, and Jain, "The National Intimate Partner and Sexual Violence Survey (NISVS): 2010-2012 State Report" (April 2017), www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf.

[20] See Edward Laumann, *The Social Organization of Sexuality*, (Chicago: University of Chicago Press, 1994); and Edward Laumann, Robert T. Michael, John H. Gagnon, and Gina Kolata, *Sex in America: A Definitive Survey* (New York: Warner Books, 1995).

> Although, clearly, sexual interactions between men and women are fraught with ambiguity and potential conflicts, there is something more going on than a few misunderstandings. There seems to be not just a gender gap but a gender chasm in perceptions of when sex was forced. We find that large numbers of women say they have been forced by men to do something sexually that they did not want to do. But very few men report ever forcing a woman. The differences that men and women bring to the sexual situation and the differences in their experiences of sex sometimes suggest that there are two separate sexual worlds, his and hers.[21]

Specifically, Laumann found that 22 percent of women said they were forced sexually at some time after age thirteen (and only .6% were forced by another woman). Only 2% of men were forced. All but 4% of these women knew the man who was forcing them and nearly half said they were in love with him.

Men, by contrast, overwhelmingly denied using force: only 3% said they forced a woman and .2% said they forced a man. Some may be lying; but Laumann and his co- authors plausibly hold that the huge disparities cannot be explained away in this manner. They suggest that a more likely explanation is that "most men who forced sex did not recognize how coercive the women thought their behavior was."[22] They imagine the husband who comes home drunk from a night out with the boys, wanting sex now and thinking it his due; the young man on a date with a sexy woman who makes and accepts some advances but says no to intercourse. Laumann and his co-authors summarize: "He thinks the sex they have was consensual. She thinks it was forced."[23]

Law can't change culture on its own, obviously enough. But we'll now see that law has aided and abetted some of these problems, defining some acts of sexual violence as not

---

[21] Laumann et al. (1995), 223.
[22] Ibid., 229.
[23] Ibid.

problematic. We'll also see, however, that by the 1970's, under the influence of feminism, law began to be a force for change.

U.S. Law and How it has Changed

Before the feminist challenge to criminal law that began in the 1970's, a woman complaining of rape was required to show that the man involved had used physical force, and force additional to the force requisite to consummate the sexual act itself. The mere threat of force was often considered insufficient, although the threat of death or grave bodily injury usually was. Usually, too, the woman had to show that she had resisted, even in the face of force or the threat of force, since only this was taken to given evidence of non-consent. Some states made resistance a formal statutory requirement, but more often it was read into statutes as a requirement implicit in the notions of force and/or non-consent. The old requirement was that the victim resist "to the utmost"; more recently, this was replaced by terms such as "reasonable resistance" or "earnest resistance". Typical of its period was a New York statute of 1965 saying that rape is committed only when the man uses "physical force that overcomes earnest resistance," or makes a threat of "immediate death or serious physical injury."[24] A woman who did not resist physically, or who succumbed to lesser threats, was treated as consenting, and the man's conduct was not criminal at all.

The standard produced bizarre results. In one case, the victim said she submitted to intercourse because the man threatened her with a knife or box cutter. She got the weapon away from him, then submitted to intercourse a second time when he choked her and told her he could kill her. A 1973 New York appellate court set aside the man's conviction, saying, "[R]ape is not committed unless the woman opposes the man to the utmost limit of her power.

---

[24] See Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Cambridge: Harvard University Press, 2000), 24. See also N.Y. Penal Law § 130.00(8) (McKinney 1965).

The resistance must be genuine and active. It is difficult to conclude that the complainant here waged a valiant struggle to uphold her honor."[25] In another case, a petite Illinois woman who had stopped along a secluded bike path submitted to oral sex when a man, almost twice her weight and a foot taller than her, put his hand on her shoulder and said ominously "This will only take a minute. My girlfriend doesn't meet my needs. I don't want to hurt you."[26] Understanding this as an implicit threat, the woman did not fight back. Nonetheless, an Illinois court set aside the man's conviction, saying "the record is devoid of any attendant circumstances which suggest that complainant was forced to submit."[27]

These stringent requirements were criticized by law enforcement professionals, who believe it unwise for women to fight back in situations of attack. But even in 1981, in a case in which the defendant took away a woman's car keys in a dangerous area of town, "lightly choked" her, and made menacing gestures, a lower court concluded that the woman had not resisted sufficiently to establish non-consent.[28] Although the conviction was reinstated on appeal, a three-vote minority, in the 4-3 decision, said of the victim, "She must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person by a stranger or an unwelcome friend."[29] In another case, a high school principal coerced a female student to submit to sexual intercourse multiple times by threatening to block her impending graduation.[30] Nonetheless, the case was dismissed because the principal did not threaten the victim with physical force (a narrow statutory scope that even the court was hesitant to enforce).

---

[25] People v. Hughes, 41 A.D.2d 333 (N.Y. App. Div. 1973).
[26] People v. Warren, 446 N.E.2d 591 (Ill. App. 1983). This case, and others in this section, are helpfully discussed by Schulhofer (2000), at pp. 1-10, and 33-34.
[27] Ibid.
[28] State v. Rusk, 289 Md. 230, 424 A.2d 720 (1981).
[29] Ibid.
[30] State v. Thompson, 792 P.2d 1103 (Mont. 1990).

Notice the strange asymmetry between this treatment of sexual crime and our standard attitudes to property crime. If I remove your wallet without your express permission, I am committing a crime. I cannot defend myself by pointing to the fact that you failed to put up a fight. But if a man had intercourse without a woman, invading her intimate bodily space, our system thought it a crime only if she offered physical resistance, frequently in the face of danger. Nor does a conviction of theft require a showing that the thief used more force than was necessary to accomplish the theft itself (although such force may be an aggravating factor). But it was only in 1992, in an unusual ruling, that a New Jersey court held (explicitly *f*rejecting prior tradition) that the element of "force" in rape was established simply by "an act of non-consensual penetration involving no more force than necessary to accomplish that result."[31] (This analogy to property crime is developed in a powerful way by U. S. criminal law academic Stephen Schulhofer, a former colleague with whom I've been privileged to co-teach, in his important 2000 book Unwanted Sex: The Culture of Intimidation and the Failure of Law.[32])

Moreover, a woman who brought a rape charge would typically be subjected to humiliating questioning about her sexual history. It was oddly assumed that the fact that a woman was not chaste was evidence of consent to the particular sexual act in question. Why would such an assumption be made? When we encounter a friend dining at a fine restaurant, we usually do not infer that he or she would love to have a plate of rancid broccoli rammed down his throat. And yet it is just this sort of "reasoning" that pervaded most rape trials. It would appear that the inference reflects an underlying picture of women as divided into two groups: either chaste, or whores with whom anything is permitted. These pictures of women have deep roots in our entire culture, coloring the ways in which we see, or mis-see, particular events. As eminent a cultural authority as Samuel Johnson once said to Boswell, in response to his inquiry regarding

---

[31] State in Interest of M.T.S., 609 A.2d 1266, 1267 (N.J. 1992).
[32] See Schulhofer (2000).

whether it was “hard that one deviation from chastity should so absolutely ruin a young woman”: "Why no, Sir; it is the great principle which she is taught. When she has given up that principle, she has given up every notion of female honour and virtue, which are all included in chastity."[33] This idea is surely at work in the perception that a woman who does not struggle, at some risk to herself, has consented and has no right to complain. These beliefs are greatly reinforced by pornographic depictions of women. Women whose non-chastity implies consent to anything and everything exist in pornography, but they do not exist in reality -- except in the limiting case of a person whose selfhood is so broken down by repeated ill treatment that she can no longer assert choice and selfhood at all.

These judgments about women also colored the interpretation of the mental element of rape. Men who hold these stereotypical views of women -- widely disseminated in our society through pornographic depictions of women and many other cultural sources -- may actually come to believe that a woman who says no is consenting to intercourse. The question the law typically had to face, as we have seen, is whether such beliefs were reasonable. The standard of the "reasonable" is notoriously elusive, and frequently serves as a screen onto which judges project their own (generally male) ideas of appropriate social norms. Many will recall the rape trial of Mike Tyson, at which he claimed (unsuccessfully) that the willingness of D. W. to accompany him to his room was sufficient to make his belief in her consent reasonable, despite the evidence of her vigorous objections and her attempts to escape.[34] Such beliefs about consent were not found reasonable in 1993; earlier they probably would have been. In a 1982 case, in which a group of Boston doctors took a nurse bodily to a car, drove her up to Rockport, and had sex with her over her repeated protests, Justice Brown of the Appeals Court of

---

[33] James Boswell, The Life of Samuel Johnson, L.L.D., Vol. III (London, 1835), 47.
[34] See http://www.nytimes.com/1992/03/27/sports/tyson-gets-6-year-prison-term-for-rape-conviction-in-indiana.html?pagewanted=all.

Massachusetts commented that it was high time to reject the defense of reasonable mistake as to consent in cases such as this:

> It is time to put to rest the societal myth that when a man is about to engage in sexual intercourse with a "nice" woman, "a little force is always necessary." ...I am prepared to say that when a woman says "no" to someone[,] any implication other than a manifestation of non-consent that might arise in that person's psyche is legally irrelevant, and thus no defense....In 1985, I find no social utility in establishing a rule defining non-consensual intercourse on the basis of the subjective (and quite likely wishful) view of the more aggressive player in the sexual encounter.[35]

As Justice Brown recognizes, men often indulge in wishful thinking about women's wishes, and (whether hypocritically or sincerely) convince themselves that aggressive behavior is what the situation calls for. If we interpret the "reasonable" in "reasonable mistake" in line with prevailing male social norms, we encourage this sort of wishful thinking. Justice Brown announces a truly radical conclusion: when a woman says "no," it is never reasonable in the legal sense to believe that she means "yes."

These false beliefs had a large effect on law and public policy. They informed men's sexual desires and sexual behavior -- as when the knowledge that a woman is not chaste gave rise to an assumption that she would "do it" with anyone,[36] as when arousal by a woman's clothing, gestures, or kissing was taken to license the use of sexual force. They also shaped the desires and preferences of women, in many harmful ways. Women who had been raped, however violent and non-consensual the incident, felt shamed and sullied, and frequently did not even consider turning to the law for help. Often guilt about their own sexual desires, or about having consented to kissing or petting, made women feel that they had "asked for it," even when the

---

[35] Commonwealth v. Lefkowitz, 20 Mass. App. 513, 481 N. E. 2d 277, 232 (1985).

[36] A vivid description of the gang-rape of a young woman of lower class and bad reputation, spurred on by the mythology in question, is in Joyce Carol Oates, *We Were the Mulvaneys* (1996).

rape involved violence and substantial physical damage. In addition, women who had consented to intercourse, but who had not consented to acts of violence within intercourse, also felt it impossible to complain, since the reigning view was that a woman who said yes to intercourse had no right to complain about any further act that ensued. Such a woman would surely have been treated with mockery and abuse by the police had she complained of assault, as in my own case.

These frequently tragic reactions were caused by a kind of distortion in belief and desire that the feminist movement of the 1970's exposed, arguing repeatedly that female sexual desire and attractiveness are not a way of "asking for it", that the only thing that counts as "asking for it" is a woman's expressed consent to the acts in question -- just as the only way of "asking for" someone to take your wallet is to take it out and give it to that person, without intimidation or threat, either explicit or implicit. It seems clear that this critique has exposed damaging falsehoods -- although much more work needs to be done to achieve a legal system that adequately protects women's choices.

No Means No

A watershed moment in the feminist legal struggle was the 1983 case of Cheryl Araujo, subject of the 1988 film The Accused, starring Jodie Foster, which I would rank as one of the very best films about law.[37] The film is reasonably faithful to the case with one large change: the male rapists were working-class Portuguese men, but in the film they are college fraternity boys. The choice, wise I think, was to avoid denigrating men of a particular class or ethnic origin, but to portray rape culture as universal, as indeed it is.

---

[37] *The Accused*. Kaplan, Jonathan. Paramount Pictures, 1988. Film.

The events took place in New Bedford, MA. Cheryl Araujo, age 21, 5'5", 110 pounds. March 1983, walked into Big Dan's bar to get cigarettes. I now quote from the trial record. "The facts the jury could have found are as follows. On the evening of March 6, 1983, a young woman (victim) entered Big Dan's Tavern in New Bedford to purchase cigarettes. While there, she ordered a drink and engaged in a brief conversation with another woman patron. The two women also conversed with and observed the pool game of codefendants John Cordeiro and Victor Raposo."[38] There were approximately fifteen men in the tavern. "Sometime after the other woman left Big Dan's, the victim also prepared to leave. Cordeiro and Raposo offered to give her a ride home, which she declined. While the victim was standing in the area of the bar, Silvia and Vieira approached her from behind, knocked her to the floor, and removed her pants as Cordeiro and Raposo tried to force the victim to perform fellatio.

"Silvia and Vieira then dragged the victim, kicking and screaming, and swung her onto the pool table. There, Silvia penetrated her vaginally while she was restrained at various points by Cordeiro, Raposo, and Vieira. After Silvia got off the victim, he held her by the hair as Vieira got on top of her. While restrained on the pool table, Cordeiro again attempted to force the victim to perform fellatio. Eventually, clothed only in a shirt and one shoe, the victim escaped and ran into the street where she flagged down a passing truck."[39]

The bartender on duty testified at trial that Araujo was “lying on the floor screaming” as two men forcibly removed her clothing, and two other men could be heard boisterously shouting "Do it! Do it!”[40] The defendants testified that she led them on, dancing with them and returning their kisses. Despite the court's efforts to shield her, Araujo’s name was repeatedly broadcast

---

[38] Com. v. Vieira, 401 Mass. 828, 830 (Mass. 1988).
[39] Ibid.
[40] “Witness’s Testimony Implicates Two Men in Tavern Rape Case,” *The New York Times,* March 1, 1984, www.nytimes.com/1984/03/01/us/witness-s-testimony-implicates-two-men-in-tavern-rape-case.html

on cable TV. Leading feminists gathered to talk about the case, and it became a national cause célèbre.

In the end, four defendants were convicted of rape. Two others were acquitted. One of the jurors said: "She wasn't the greatest of women. She probably egged them on to some degree and they lost control. But after she said no, she was violated. That's how they broke the law."[41]

The juror's utterance is confused. It includes the time-honored idea that when men are led on they will "lose control." But then, it veers around to a different idea: she said no, and that means that when they went ahead she was violated and they broke the law. Many years later, one of the witnesses who picked up Araujo after she fled into the street echoed this idea: "So many things came out with the case, so many lies – that she was a whore, and things like that – but my thoughts were always that a woman, no matter what, has the right to say no. And frankly, even if she was a whore, it doesn't matter, because she said no."[42] Like both of these remarks, the case was a true turning point in US law, and a major occasion of public education. It established that No MEANS NO.

Under the pressure of this feminist critique, rape law has changed considerably, increasingly reflecting the insight that a woman's "no" means that she does not consent, and does not mean that she is "playing games" and "asking for it", and that her prior sexual history is irrelevant to the question of consent on a particular occasion. Change has been slow, and there are many problems to solve.

1. The longstanding emphasis on "no means no" does not yet enable the law to grapple well with cases in which the victim is silent out of fear (as in Warren, the case of the small

---

[41] Source was accessed in 2000 but can no longer be traced.
[42] Jay Pateakos, "After 26 Years, Brothers Break Silence," *Wicked Local*, October 26, 2009, www.wickedlocal.com/x884487240/After-26-years-brothers-break-silence.

Illinois biker), and there remains a tendency to suppose that silence expresses consent. Note that we would never think that a patient's silence in response to a question about whether he wanted a medical procedure was evidence of consent to that procedure; a doctor would be culpable if he simply went ahead and did the procedure, claiming that the patient had expressed consent by silence.[43] Our failure to think similarly about women probably betrays the legacy of the "societal myth" that good women will fight to the utmost. The law has not yet figured out how to articulate the idea of consent in a consistent manner that protects a woman's autonomy in cases like Warren.[44]

2. "No means no" also doesn't enable us to deal well with extortionate use of power: the high school principle. The student probably didn't fear physical force, but she submitted to an extortionate demand that would clearly have been illegal in the financial area.

3. Date rape: the beliefs about "asking for it" are still operative here: men see petting or even kissing as invitation to intercourse and are outraged if they are expected to stop.

Where sexual violence on campus is at issue, we are currently grappling with these issues, but with many confusions and uncertainties. The new Title IX guidelines, under which we all work, establish mandatory reporting.[45] The minute a student makes a faculty or administrator aware of any issue of sexual misconduct, she is required to report it to the Title IX coordinator, who then confers with the victim and decides how to proceed. The victim certainly doesn't have to press charges, and may ask for complete confidentiality. Usually if she doesn't want to press charges they will not be pressed, since there is typically no other evidence. If she does,

---

[43] See Stephen J. Schulhofer, "Taking Sexual Autonomy Seriously," *Law and Philosophy*, Vol. 11, No. 1/2 (1992), 35-94.

[44] See Ibid.

[45] See Russlynn Ali, "Dear Colleague Letter," *United States Department of Education – Office for Civil Rights*, April 4, 2011, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

then there is a lengthy process in which the accused is asked for a statement, accuser and witnesses also submit their statements, and the Title IX panel reaches a determination of some type. In one case I know well, the process worked well: the women's grievance of inappropriate touching (but not assault) at a public event led to probation for the male student, together with mandatory sex and alcohol counseling, which seemed an appropriate result. But the procedures still raise difficult questions:

First, how can confidences be protected when there is mandatory reporting? I worry that women will be less likely to open up to me or other faculty, knowing that I am now legally obliged to report it and name her – even though in principle the Title IX office says it protects confidentiality.

Second, there is a huge question about the standard of proof. Title IX recommends that the standard be the preponderance of the evidence, not reasonable doubt. Miscarriages of justice can easily occur. A group of law academics – after a difficult case at Harvard that did look like a miscarriage of justice – signed a statement protesting the standard and recommending reasonable doubt.[46]

Third, is the Title IX process really right to require affirmative consent, and what exactly is that? Schulhofer and others have made excellent points about the shortcomings of "no means no."[47] And yet the idea that sex will be turned into a ritual in which each step must be preceded by explicit verbal permission seems both chilling and unrealistic to many people. And also ridiculous when both parties are typically very drunk. I am on the Schulhofer side here, but one can see the point of view of critics who suggest that affirmative consent has gone too far.

---

[46] See "Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault," May 16, 2016, www.lankford.senate.gov/imo/media/doc/Law-Professor-Open-Letter-May-16-2016.pdf.
[47] See Schulhofer (1992).

Fourth, are campus tribunals equipped to deal with these issues? It's easy to see why Title IX wants universities to do so. If nothing happened unless the complainant were to go to the police, very few cases would be prosecuted. Women do not trust the police, and they fear the inevitable loss of privacy and confidentiality that would ensue. Often they also do not want to charge the man with a felony, which would surely blot his life indefinitely. But people's lives are now in the hands of people most of whom lack legal training, and it's only the rare campus that subsidizes legal counsel for the accused.

We are grappling with those questions. They are tough and subtle. That we have reached this place is a tremendous victory. It means that we have achieved consensus on a bunch of really difficult things, and are now pushing the frontier toward greater accountability with regard to some thorny issues that otherwise would not get dealt with.

Celebrity and Accountability

Now we must introduce a large qualification. Some especially serious sexual crimes, serial predation of a very damaging sort, still face no accountability. And now we return to professional sports and to my Huffington Post piece. We have reached a further frontier in terms of accountability. Private citizens who rape women are frequently, held accountable, although non-reporting and imperfections of the criminal justice system are still serious problems. Even politicians face accountability, since politicians are considered expendable. But there are certain people who have talents that make a lot of money for other people, and those people are typically shielded from accountability. Sports stars are not fungible. They have big talents, difficult to replace, and those talents make lots of money for other people. Media stars and actors might have been expendable and replaceable at one time in their career: after all, for every role there are probably several hundred out of work actors who could play that role very

well. But once actors become stars they are no longer fungible, and studios and investors have a lot invested in them.

More generally, we live in a culture of celebrity which makes these people think that they are above the law, sometimes from a very early age. Things are worse with athletes because the corrupting effect of big-money talent sets in very early. They are groomed from high school on, pampered in colleges and universities, and made to feel like the rules for other people don't apply to them. They are encouraged to deceive. Thus U. S. colleges often give fake classes and fake grades to athletes, and the athletes understand that faculty are lying to protect them from academic accountability.[48] As for sex, they are often recruited in situations that positively encourage sexual misconduct: women are virtually pimped out to athletes universities are trying to recruit, and most big-sports universities have no shame about acting as pimps in this way.[49] So from a very young age they live in a culture of deceit and sexual corruption. Actors typically learn corruption later on, although the very real corruption of sleeping your way to a role is surely a bad influence on younger actors.

Let me now mention one issue on the other side, which makes accountability even more difficult. It is the ever-present possibility, which I mentioned earlier, that superstars will be lied about for purposes of extortion, which really does muddy the waters. We know that sometimes celebrities are really guilty as charged, but sometimes not. I believe, for example, that charges of sexual assault against the basketball star Derrick Rose were probably false, and made in order to extort money. He courageously contested them, and a court found in his favor.[50] But no doubt for every case where the person is innocent (and of course this is just my conclusion,

---

[48] For the particularly egregious but hardly isolated case of the University of North Carolina at Chapel Hill, see https://www.nytimes.com/2017/03/31/sports/ncaabasketball/north-carolina-final-four-cheating-fake-classes.html. s

[49] An egregious but hardly atypical case was that of the University of Colorado, see http://articles.latimes.com/2004/feb/20/sports/sp-colorado20.

[50] Jane Doe v. Derrick Rose, et al., 2016 WL 9023602 (C.D. Cal. 2016).

which could be utterly wrong) there are many more where the person is guilty, and defends himself by raising the extortion issue.

I've mentioned some athletes who did face accountability. One salient case is Ray Rice, the case mentioned in my epigraph at the beginning, where the misconduct (punching his then-fiancée so hard that he knocked her unconscious) took place in an elevator that had a hidden camera. In a few other similar cases the conduct has been documented beyond dispute. But these cases don't really show that big money stars aren't above the law, because what we see is that women are still not empowered to bring charges, and are treated very badly by authorities when they do come forward. Consider Cosby's case, where many women tried hard over the years to press charges against him, but one by one had no success in establishing culpability, though some had received financial settlements. This past year it is only the overwhelming record of cases with a precisely similar pattern that finally caused Cosby to lose honors and lucrative opportunities – and now one prosecution, the only one not blocked by the statute of limitations, is actually going forward. Most cases are not at all like this. And even this case, which looks like success, has had many twists and turns, so we should not predict with confidence that he will be convicted. Surely the long Cosby saga has been draining and terrible for the women involved because of the great power of the celebrity machine protecting him. Another factor that discourages optimism is that, despite the large number of accusers, it took the statement of a male comedian, Hannibal Burress, calling Cosby a "rapist," to catapult the issue to the front of public attention, ultimately causing more women to come forward, and giving credibility to the ones who had. Women should not need to depend on a male voice to validate their accusations.

Cosby is now seventy-nine years old. His acting career was over even before it was ended by the revelations about him. It is I think no accident that people stopped defending him just

when he was not making money for them anyway. (It is rather encouraging, however, that two famous media personalities, Roger Ailes and Bill O'Reilly, have recently been fired because of credible accusations of sexual harassment – and fired by the conservative Fox News.[51])

Now, as my last grim exhibit, let's consider a case where big money is at stake and credible allegations don't get taken fully seriously: the case of Jameis Winston. Jameis Winston is an extremely gifted quarterback who began his fame while at Florida State University and since 2015 plays for the Tampa Bay Buccaneers of the NFL. He is 6'4" and weighs 227 pounds. He is 23 years old. He has broken the franchise's record for passing yards and passing touchdowns in a season, and he is the first quarterback in NFL history to start his career with consecutive seasons of 4000 yards passing. He holds several other records I won't bother to enumerate. So: a big talent.

Now the facts about sex and non-accountability. On November 14, 2013, the State Attorney of the Second Judicial Circuit announced they were opening an investigation into a sexual assault allegation involving Winston that was originally filed with the Tallahassee Police Department (TPD) on December 7, 2012.[52] The complaint was originally investigated by the police and classified as open/inactive in February 2013 with no charges being filed. The police report, containing the complainant's original statement, was posted by the Tallahassee Police Department. Tallahassee police then stated that the complaint was made inactive "when the victim in the case broke off contact with TPD, and her attorney indicated she did not want to move forward at that time"[53] and then re-examined after media requests for information

---

[51] https://www.nytimes.com/2017/05/18/business/media/roger-ailes-fox-news-sexual-harassment-.html, https://www.nytimes.com/2017/04/19/business/media/bill-oreilly-fox-news-allegations.html. Ailes died shortly after being fired. O'Reilly remains active on his own podcast.

[52] See "Tallahassee Police Department Incident Report 00-12-032758," December 7, 2012, http://media.graytvinc.com/documents/Complete+Case+File.pdf.

[53] "No charges filed yet against Winston," *The Chicago Tribune*, November 22, 2013, http://articles.chicagotribune.com/2013-11-22/sports/chi-no-charges-filed-yet-against-winston-20131122_1_sexual-assault-charges-dna-florida-state.

started coming in early November. Note the importance of the media in pressuring the recalcitrant institutions of the law for real accountability.

On December 5, 2013, State Attorney Willie Meggs announced the completion of the investigation and that no charges would be filed against anyone in this case, citing "major issues" with the woman's testimony. Meggs stated that "We have a duty as prosecutors to determine if each case has a reasonable likelihood of conviction. After reviewing the facts in this case, we do not feel that we can reach those burdens."[54] Allegations of improper police conduct were made by both parties, with the complainant claiming to have been pressured into dropping her claim and Winston's attorney alleging inappropriate leaks to the media. Florida State's policy is that athletes charged with a felony cannot play until their case is resolved, but Winston continued to play throughout the investigation because he was never charged**.**

On April 16, 2014, the New York Times reported irregularities in the rape investigation involving Winston.[55] The complainant developed bruises and semen was found on her underwear. 34 days later the complainant identified Winston by name as her attacker. Tallahassee police contacted Winston about 13 days later. No DNA sample was taken from Winston until the prosecutor took over the case, months later; once it was taken in November 2013, it was found to match DNA found in the complainant's underwear. The investigation was conducted by Officer Scott Angulo, who, the Times article notes, did private security work for the Seminole Boosters, the primary financier of Florida State athletics.

---

[54] Mark Schlabach, "FSU's Jameis Winston not charged," *ESPN*, December 6, 2013, www.espn.com/college-football/story/_/id/10082441/jameis-winston-not-charged-sexual-assault-investigation.

[55] Walt Bogdanich, "A Star Player Accused, and a Flawed Rape Investigation," *The New York Times*, April 16, 2014, www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html.

The official FSU hearing, presided over by retired Florida Supreme Court Justice Major B. Harding, on December 21, 2014, cleared Winston of violating the student conduct code in the sexual assault allegation. He said:

> I do not find the credibility of one story substantially stronger than that of the other. Both have their own strengths and weaknesses. I cannot find with any confidence that the events as set forth by you, (accuser), or a particular combination thereof is more probable than not as required to find you responsible for a violation of the Code. Therein lies the determinative factor of my decision.[56]

So that was that for the criminal charges. However, in January 2016 the university paid the accuser $950,000 to settle a civil suit she brought against the university. The accuser, Erica Kinsman (who has publicly identified herself), also filed a civil suit against Winston in April 2014 and Winston countersued her for defamation and tortious interference in May 2014.[57] In a September 2015 ruling, a federal judge dismissed Winston's tortious interference claim, but declined a motion to dismiss his claim for defamation. Winston's and Kinsman's suits were combined and are scheduled for the US District Court for the Middle District of Florida to begin in May 2017.

Meanwhile, in the fall of 2015, Winston began his stellar pro career.

I am not a retributivist. I think that the appropriate goals of criminal law in this and other cases are specific deterrence, general deterrence, and reform. It's pretty obvious that general deterrence has not been served here: other athletes see, from this case, that if you are a big

---

[56] See "Full copy of Jameis Winston hearing decision," December 21, 2014, www.foxsports.com/college-football/story/full-copy-of-jameis-winston-hearing-decision-122114.
[57] Kinsman v. Winston, 2015 WL 11216946 (M.D.Fla.)

talent you are above the law. University officials and rich alumni will pay to protect you. But what about specific deterrence and reform?

On February 23, 2017, Winston made a guest appearance at a St. Petersburg Florida elementary school – the type of thing athletes do to show that they are good people and to help public relations for the sport. During the motivational talk, he said,

> All my boys stand up, all my ladies you can sit down. But all my boys, stand up. We strong, right? We strong! We strong, right! All my boys, tell me one time: I can do anything I put my mind to. A lot of boys aren't supposed to be soft-spoken. You know what I'm saying? One day, y'all are going to have a very deep voice like this, One day, you'll have a very very deep voice. But the ladies – they're supposed to be silent, polite, gentle. My men, my men supposed to be strong.[58]

School officials and parents were very upset, and on February 24 Winston apologized for his "poor word choice."[59]

So here we see someone utterly undeterred, unreformed, unreformable. Even when his goal is to motivate students to strive, the only way he finds to express that idea is a set of sexist stereotypes. And guess what stereotypes: male force, male strength, female silence and non-resistance. But then, why would Winston be deterred or educated, when a public university, using taxpayer dollars, paid out a million of those dollars to settle a complaint involving him, and when at every step in the road powerful university officials and alumni (those Seminole Boosters) were conniving to corrupt the justice system. I almost feel sorry for Winston, since he has been exploited throughout his life, used as a tool for the enrichment of

---

[58] Alanna Vagianos, "NFL Player to Elementary School Class: Girls Are 'Supposed To Be Silent,'" February 23, 2017, www.huffingtonpost.com/entry/jameis-winston-accused-of-rape-to-elementary-class-girls-are-supposed-to-be-silent_us_58af20a2e4b0a8a9b78012e6.

[59] Ibid.

others, never permitted to get a decent education, and, no doubt, already on the road to a horrible later life of dementia from CTE.[60] Corrupt university officials and alumni are as much in need of accountability as he, and indeed more so, since they are almost certainly serial offenders and perhaps he won't be.

The longer history I've narrated contains many signs of hope both for culture and for law. Law has indeed been an active participant in changing rape culture. But there is unfinished business. In a culture of celebrity, and especially when celebrities make money for others, accountability is likely to prove elusive – unless the public rises up. After all, both sports and theater depend on us. And we can already see the results of public outcry in the Ray Rice incident, in the attitude of sports talk shows, in the behavior of beer companies. The sports leagues have already shown their deference to public opinion in such actions as their boycott of North Carolina over that state's recent anti-LGBT law (later repealed, in large part because of that pressure), and their threatened boycotts of other states currently considering such laws. Both leagues and corporate sponsors are our hopes for the future. Winston's past misconduct was sheltered because the old-boys' club of Florida State University was determined to protect their rare star. But I actually believe that at this point, if he were to behave in a similar way in the NFL, things would be different – because the good old boys don't hear women's voices, but beer and the NFL do seem to, at least sometimes. Consumers are powerful in a consumer culture, and we are all consumers.[61] Both sports leagues and their corporate sponsors are accountable to us, to a large and diverse public. They need to hear all the time from people who

---

[60] For the latest evidence, see https://www.upi.com/Health_News/2017/07/25/Nearly-all-NFL-players-in-study-show-evidence-of-brain-disorder-CTE/7201500998697/. Accountability for the likely concealment of this evidence belongs to many, and yet, for the financial reasons I've discussed, those who participated are unlikely to face any penalty. 99 percent of former NFL players show evidence of CTE! This issue of accountability is huge, but lies beyond the scope of this article.

[61] Many of us are also parents, and of course parents play a huge role in forming a new generation that lacks such attitudes. Indeed because of the CTE issue, which has already engaged parents across the nation, we can expect the demise of football within one generation, although the sexual violence issue in sports does not stop there. So parents have a bigger job to do!

care about women, about LGBT people, about general decency of conduct. So let's applaud James Brown and other sportscasters who keep the heat on the league and the sponsors. (Brown is the host of The NFL Today and Thursday Night Football, so he's a very influential figure.) Let's express outrage about outrageous offenders like Winston, but let's not stop with the past. As Brown rightly said: outrage is useful only if it leads to a real project: really hearing women's voices, and really telling the leagues, the sponsors, the players and the parents of future players, (to use Brown's words) "What healthy, respectful manhood is all about."

Frances Stead Sellers, Washington Post

There is no shortage of public outrage about sexual violence and famous men these days. About Bill Cosby, who will go back to court in November on charges of sexual assault. And about a president who, we learned last year, boasted on a hot mic back in 2005 that as a "star" he could have his way with women – even "grab 'em by the pussy."

But outrage, as Martha Nussbaum rightly points out, is useful only if it leads to something more substantial – like "really hearing women's voices." And Nussbaum has, she writes, her "own Bill Cosby tale to tell."

That's a tantalizing introduction to a complicated story of consent to intercourse followed by an alleged assault, artfully recounted both at the inaugural YTL lecture and in a shorter, more provocative version published in the Huffington Post. In both places, Nussbaum relies on the increasingly popular means of using a first-person anecdote as the basis for her legal and philosophical arguments. That approach -- replacing reported or hypothetical examples with remembered experience -- is being adopted widely in such burgeoning disciplines as narrative medicine. And understandably so: Now that website editors can track online clicks and comments, they can tell how widely readers engage in and respond to writing of this kind.

But the use of personal experience—and in such public fora as the Huffington Post -- brings burdens of its own. It invites judgement not only of the arguments put forward but also of the decisions the writer made--a level of personal accountability rare in academic writing.

Nussbaum decided to use her story but not to name the man she says mistreated her. Not at the time of the alleged incident when she was a 20-year-old theater and classics student at NYU, and he was a 40ish actor who would become one of "America's beloved TV dads". Not 30 years later when she was a tenured star at the University of Chicago and he made a bid for a Democratic seat in Congress. And not after he died, by which time she had earned celebrity status of her own as the United States' most famous female philosopher, recognized internationally in disciplines beyond her own through her membership in the American Academy of Arts and Sciences and as a corresponding fellow of the British Academy.

From that elevated perch, Nussbaum advises women today to follow her example in deciding neither to expect nor seek retribution in courts of law. That admonition brings her Huffington Post article to its startling keep-your-legs-crossed-ladies conclusion:

"Law cannot fix this problem. Famous men standardly get away with sexual harms, and for the most part will continue to do so. They know they are above the law, and they are therefore undeterrable. What can society do? Don't give actors and athletes such glamor and reputational power. But that won't happen in the real world. What can women do? Don't be fooled by glamor. Do not date such men, unless you know them very, very well. Do not go to their homes. Never be alone in a room with them. And if you ignore my sage advice and encounter trouble, move on. Do not let your life get hijacked by an almost certainly futile effort at justice. Focus on your own welfare, and in this case that means: forget the law."

Hers is a "selfish and self-protective response," Nussbaum concedes, outlining in persuasive prose her reasoning. She feels certain that in those early days the man, "shielded by fame as

he was" would have prevailed against her: "He would have denied my allegations, cast aspersions on my reputation, even perhaps attempted to portray me as an extortionist." Half a century after the alleged attack and after his death, she still has doubts about the wisdom of trying to hold him to account, based on her observation that "the Vince Foster case showed us that a person's privacy interest can be held to survive death, and who on earth knows what some court might say about a reputational interest?"

A posthumous accusation would of course have been unsatisfactory, in some ways, as the example of Jimmy Savile shows. While the British TV star's reputation has suffered, he cannot be brought to justice for his multiple abuses. He incurred no punishment. Nor was he given the opportunity to defend or, perhaps equally important, explain himself. We cannot learn from him why he acted as he did and perhaps prevent other men from following his example. He is another potent example of what Nussbaum suggests her alleged assailant was – a multiple abuser who was shielded by his fame.

But does this mean, as Nussbaum contends, that women should "forget the law" because the male celebrity remains above it? In the past, most men shared that status of being above the law, and in some parts of the world, many still do. Nussbaum cites a 2014 Human Development Reports showing "one third of the world's women will experience sexual or other physical violence in their lifetime, usually from an intimate partner." At those times and in those places, countless female victims must similarly have concluded that the best path for them was indeed to "forget the law." But Nussbaum also notes an "emerging international consensus that violence against women ought to be taken very seriously" resulting in outrage overseas, where Boko Haram's kidnapping sparked widespread protests, and in the United States where campus rape and the misdeeds of NFL players have generated condemnation and public rebukes. And she shows how, since the 1970s, as women gained economic and political leverage, at least in the US, "law began to be a force for change."

The decision Nussbaum made in 1968 when she was a relatively powerless undergraduate is an inadequate model for today, following the feminist empowerment of the '70s and parallel evolution in US legal thinking. And while celebrity men may remain close to impervious to accusations of sexual assault, celebrity women have a role to play in changing that dynamic, making them more vulnerable to legal retribution as other men have gradually become.

Now into the debate steps Taylor Swift, who decided to take the stand this summer to make sure a prominent victim's voice was heard, when she recalled being manhandled in 2013 by country radio DJ David Mueller.

It was not a decision the pop icon reached immediately.

"I did not want this event to define her life," her mother told the court. "I did not want every interview from this point on to have to talk about it."

But Swift ultimately suggested that by speaking up, her testimony could serve as an example for other women. After the favorable verdict, she made a statement thanking the judge and her attorneys for "fighting for me and anyone who feels silenced by a sexual assault." Her lawyer called the ruling "not just a win" but "something that can make a difference."

Though almost 30 years younger than the man who, the jury found, assaulted her, Swift has advantages most women do not. In the celebrity wars, she out-fames a radio disc jockey. She also had the money and the confidence to speak out in public.

“I acknowledge the privilege that I benefit from in life, in society and in my ability to shoulder the enormous cost of defending myself in a trial like this,” she said. “My hope is to help those whose voices should also be heard. Therefore, I will be making donations in the near future to multiple organizations that help sexual assault victims defend themselves.”

Despite her many advantages, as Christina Cauterucci points out in Slate, Swift had to relive, in public, the trauma of the assault and face the verbal attacks of lawyers determined to prove her testimony untrue. As her mother suggested, fame brings its own risks, with every salacious detail becoming potential tabloid fodder.

The statute of limitations and now her alleged assailant’s death mean Nussbaum won’t share Swift’s experience. But it would be hard to imagine a better mentor for women who find themselves in that position than a scholar of Nussbaum’s stature, an articulate expert not only in the specific parts of the legal system that relate to sexual assault, but in how that system has evolved and with personal experience of assault. And were she to make a posthumous allegation and then to face the argument that the man’s “reputational interest” survives his death, what better woman to challenge that theory than Nussbaum?

Nussbaum also faults the U.S. press for its failure to report on her assailant's alleged misdeeds in his obituary. “I note that U.S. obituaries made no mention of any problematic conduct,” she writes. “But the Guardian was different: they said he had a notorious reputation for being completely unlike the virtuous character he portrayed. Good for them!”

But unless they have credible sources, such as Nussbaum, to testify to the violent behavior, how could news organizations responsibly report on the man’s alleged misdeeds? Even under extreme competitive pressure, reputable news organizations verify salacious material about public figures and give them an opportunity to respond. Journalism’s reputation depends on it. On Friday October 7, after my colleague David Fahrenthold received the “Access Hollywood” tape in which Donald Trump made his pussy-grabbing boast, Fahrenthold contacted NBC for comment and the Trump campaign to verify the tape’s authenticity before The Post published the video along with his news story.

Good journalism, like the law, relies on accurate testimony.

Women’s status has changed since 1968 when Nussbaum says she suffered the assault and understandably stayed mum. When powerful women speak up these days in print or in a court despite the costs and possible embarrassment, as Taylor Swift has done, they bring broad attention to their causes -- advancing the possibility that women who are roughed up by actors, politicians and sports stars won’t feel they should “forget the law.”

Good Girls: on “Not Quite Rape” (Culture)

A recent episode of HBO’s *Girls*, “American Bitch,” opens with Hannah Horvath entering the apartment building of an acclaimed, middle-aged writer, Chuck Palmer. He’s been accused of exploiting his intellectual stardom to sleep with undergraduates while visiting college campuses around the country, giving lectures and master-classes. It’s not exactly clear whether the sex was consensual: and, indeed, that is part of the point. The consensual/non-consensual distinction has come to mark the line between legal and criminal sex acts, by default if not by design, at least to a first approximation. It follows that the question of consent isn’t all that needs to be asked, when it comes to what men like Palmer may have to answer for.

In the show, Hannah (played by *Girls’* creator, Lena Dunham) is a writer herself—considerably younger than Palmer, at 27, and not yet famous. She has written about Palmer’s indiscretions—as he thinks of them—for an obscure feminist website. Despite the difference in their age and professional status, Palmer sees himself as Hannah’s victim, and as vulnerable to young women’s power in general. They are now empowered to ruin his reputation by exposing his sexual exploits *as* exploitation. That is ostensibly why he’s invited Hannah to his lavish, tasteful home: to tell her his side of the story, as a pariah now racked with anxiety.

***

How should we think about sex which ranges from actively sought, but only to please or appease a partner, to sex which is gone along with passively, in a blank, dissociative haze? What if the agent who wants it, and pushes for it, is aware of his partner’s ambivalence or her frozen state of play-acting? “Not rape, not quite that, but undesired nevertheless, undesired to the core”—is how the character of David Lurie, a 52-year-old professor, describes the sex he has with his student Melanie in J.M. Coetzee’s dark moral masterpiece, *Disgrace*. “As though she had decided to go slack, die within herself for the duration, like a rabbit when the jaws of the fox close on its neck.”

Melanie moves of her own accord—even lifting her hips to help David to undress her—but not quite, nor even close to quite, of her own volition. When David knocks on her door that afternoon, surprising her in her slippers, she finds herself cast in a cultural

script in which male sexual desire has presumptively overriding normative force, all else being equal (i.e., holding fixed other forms of privilege, including whiteness).

Melanie would have to make her own will hard and steely in order to resist David—soon to be disgraced and forced to resign from the university, due to his sexual misconduct and subsequent lack of remorse. Instead, Melanie goes limp. She is caught off guard: she freezes.

This makes the sex not quite rape. But what makes it morally gross, to David as well as the reader—who slumps over his steering wheel, fighting dejection and shame after leaving Melanie's apartment—is that he is aware it might have been rape had she been forewarned. More precisely, if Melanie had had more in the way of agency or sheer wherewithal and a sense of entitlement to deny him, she might well have said "no." She would have been far more likely to turn him down, or alter the terms of the affair (as he regards it). David, in knowing this, clearly took advantage (an old-fashioned expression, but a useful one, for all that). And this is so even if he would have stopped, had she in fact firmly resisted; which one suspects he knew, or almost knew, she wouldn't.

As it is, "nothing will stop him," at least short of that, and (so?) she does not even try. "All she does is avert herself—avert her lips, avert her eyes." She turns her back and removes herself—"So that everything done to her might be done, as it were, far away." And so he has his way with her: his little death, his resurrection.

Later, Melanie turns up on David's doorstep, asks if she can stay with him. She plays her role in his life with some enthusiasm for a short while. But "to the extent that they are together, if they are together, he is the one who leads, she the one who follows. Let him not forget that," he tells himself. His words ring hollow. He disgraces himself by regretting nothing officially, nothing on paper, during his university's ethics investigation.

***

This lack of desire at the core, this sexual Milgram experiment, this obedience to a culturally designated authority figure in the relevant domain—it goes beyond sex too. Most obviously, it extends to other forms of pawing, preying, boundary-pushing, touching, and grooming which may be more or less sexually-inflected, but are nonetheless inappropriate and presumptuous. An 11-year-old Hannah responded with a

passivity similar to Melanie's when her teacher, Mr. Lasky, was overly familiar with her, 'handsy' (to invoke another old-fashioned, but again suggestive, turn of phrase). Hannah said she didn't mind, that she liked it, even: but for the wrong reasons, at the wrong time, in the wrong way, to invert Aristotle. She recalls:

He liked me, he was impressed with me. I did special creative writing: I wrote a little novel or whatever. Sometimes, when he was talking to the class he would stand behind me and he'd rub my neck. Sometimes he'd rub my head, rustle my hair. And I didn't mind. It made me feel special. It made me feel like someone saw me and they knew that I was going to grow up and be really, really particular… Anyway, last year I'm at a warehouse party in Bushwick, and this guy comes up to me and he's like, "[Hannah] Horvath, we went to middle school together, East Lansing!" And I'm like, "Oh my god, remember how crazy Mr. Lasky's class was? He was basically trying to molest me." You know what this kid said? He looks at me in the middle of this fucking party like he's a judge, and he goes, "That's a very serious accusation Hannah." And he walked away.

This episode resonated with me because, like so many other women (though by no means women alone), I had my own Mr. Lasky story. I wasn't planning to tell it. But then I began to think I ought to.

***

In a public lecture delivered in March 2017 at King's College London on which I was invited to comment, the distinguished moral philosopher Martha C. Nussbaum departed from the time-honored tradition in our discipline, universal until recently, of ignoring sexual violence—particularly the subjective experience of the victims of such assault and predation. Instead, Nussbaum began with and further enriched a narrative she had shared in a powerful and provocative Huffington Post piece from 2016, one eventful year earlier. She spoke out about being sexually assaulted by a famous actor twice her age, in the late 60s, when she was 20. She referred to it, aptly, as "her own Bill Cosby story." Hence my above adaptation, to similarly emphasize continuities with others' experiences, and try to foster solidarity, along the lines laid out by the philosopher Regina Rini in defending the practice of calling attention to micro-aggressions. In other words, I like and want to draw attention to Nussbaum's formulation, "my own X story," as against the victim-shaming myth that the point of telling one's story is to siphon attention away from other people somehow, garner sympathy beyond one's ration (as it

were—is there a war going on?), and advertise the wrong done to one as exceptional. I allude here to the mean-spirited critiques which have proliferated lately of so-called "victim culture."

As Nussbaum went on to explain, both in her Huffington Post piece and lecture, that she consented to sexual intercourse with this man, but not to the gruesome and painful sexual ordeal he substituted. And, although she cried out for help at the time, to no avail, she was too embarrassed to report his crime to the police. She did not even see a doctor, despite her pain and injuries.

After giving this moving account, all the more so when delivered in person by the victim whose survival as an agent was self-evident in the performance, hence obviating the need for an explicit demand or plea for such minimal (though sadly still far from automatic) recognition, Nussbaum moved from descriptive to normative terrain. She argued that her decision not to seek legal recourse was, on balance, a good one, even *the* right decision at the time. For, had she sought to bring her assailant to justice:

[T]he celebrity in question would certainly have prevailed. He would have denied my allegations, cast aspersions on my reputation, even perhaps attempted to portray me as an extortionist. My life, personal and professional, would have been profoundly damaged, and nothing would have been accomplished. Not specific deterrence, since I am sure he was undeterrable, shielded by fame as he was, and not general deterrence, since I would have failed. No doubt dozens of other women have come to the same conclusion about this particular man. And who knows how many hundreds or thousands have about how many hundreds of other male celebrities. So what did I do? After my injuries faded, I decided not to "join the culture."

Have times since changed? Not sufficiently to change the best course of action, according to Nussbaum, at least in her original *Huffington Post* piece.

Mine has been a selfish and self-protective response. I do wonder whether even a futile complaint could have prevented other harms. Still, to make one's life all about a harm, since that is what protracted litigation would have done, seems to me a sacrifice that morality does not demand. Law cannot fix this problem. Famous men standardly get away with sexual harms, and for the most part will continue to do so. They know they are above the law, and they are therefore undeterrable. What can society do? Don't

give actors and athletes such glamor and reputational power. But that won't happen in the real world. What can women do? Don't be fooled by glamor. Do not date such men, unless you know them very, very well. Do not go to their homes. Never be alone in a room with them. And if you ignore my sage advice and encounter trouble, move on. Do not let your life get hijacked by an almost certainly futile effort at justice. Focus on your own welfare, and in this case that means: forget the law.

I can't disagree with Nussbaum's pessimistic assessment of the odds here, unfortunately. Indeed, I think these dismal odds are manifestly not restricted to celebrities and likely have less to do with celebrity culture than sheer male privilege, as it intersects with privilege of other kinds, e.g., whiteness, being cis, non-disabled, physically fit or thin, and so on. Current estimates suggest that just six in a thousand rapes on average will result in the rapist serving jail time: a strikingly low rate compared with other crimes.

Such statistics highlight a central aspect of rape culture: the widespread impulse to exonerate the (almost exclusively male) perpetrators, especially when they are privileged as compared with their (typically, though by no means exclusively, female) victims. I refer here both to legal and extra-legal exonerating projects, practices, and narratives.

Nussbaum did not reiterate the "move on" advice in her inaugural lecture, and recorded a somewhat greater optimism about the possibility of bringing perpetrators to justice. As against this, I would echo a point made by Ashwini Vasanthakumar (one of my co-panelists on the lecture). Vasanthakumar noted that, in all but one of the cases Nussbaum had canvassed, the accused was African-American, and hence plausibly much more likely than a white counterpart to be pursued by law enforcement and convicted by a jury. Moreover, as I went on to note in my own comments, the fact that Donald Trump was elected president in the US in 2016 is among various pieces of evidence which together suggest that powerful white men still routinely get forgiven for serial sexual assault, harassment and predation. ("I don't even wait. And when you're a star, they let you do it. You can do anything," Trump boasted, following his now notorious pussy-grabbing remarks. And we collectively let him get away with it, and still take the White House. Over half of the white women who voted cast their ballots for him over Hillary Clinton.) And this moral laxity extends to such men's criminal acts more broadly, as my other co-panelist, Amia Srinivasan, rightly argued in her commentary.

Whether or not this means that one shouldn't bother, or is even entitled to forgo, reporting such sexual crimes is a tricky and likely context-dependent matter—addressed in work by Vasanthakumar, among others. I confess I am quite unsure about how to weigh the relevant moral and self-interested considerations. So let me leave criminal proceedings and even civil law suits entirely to one side here, and turn to Title IX matters in relation to sexual assault in college campuses instead, which Nussbaum also considered in her lecture. Given the vagaries, burdens, and sheer failures of the law in this respect, which Nussbaum powerfully crystallized, I believe she may have underplayed the subsequent importance of internal Title IX proceedings in educational institutions, and the strong case that emerges for mandatory reporting.

This isn't to say that mandatory reporting is costless, of course. But I think the benefits may well significantly outweigh the costs, on balance. And this partly because we have strong reasons not to place a victim in the unduly burdensome position of having to choose whether or not to protect a dominant man who has behaved badly toward her, after she has disclosed his abuse, assault, harassment, or misconduct. The crime or wrong begets the impulse not to choose to hurt him. It may also bespeak the prior strength if this motive, as the Coetzee example demonstrated.

So as far as possible, a victim of sexual assault or wrongdoing ought not to be tasked with being the keeper of the perpetrator's secrets—secrets he has already tacitly pressured her to keep. (Sometimes even targeting her for that very reason, i.e. her anticipated discretion, or her lack of credibility, were she to come forward.) From such a position, one should not have to be concerned with the omni-salient prospect of costing him something, or life's not being fair to him. Life is often too fair to these men at the expense of others, to whom they are unfair, for this reason. They feel entitled, and they know they can take advantage with impunity. For, we let them.

Yet fairness to hin was the primary topic of conversation about Title IX investigations, and the possibility of implementing similar policies in the UK, during the informal dinner discussion following Nussbaum's lecture—and was also salient during the lecture itself. In view of this, I believe we must ask first and foremost: what about fairness to *her*, i.e., girls and women and people of any gender (including the genderqueer and non-binary), when it comes to having equal access to education? This being, of course, what Title IX (together with the Clery act) is meant to uphold and safeguard.

Internal investigations into sexual assault (inter alia) in educational institutions, under Title IX provisions, are not intended to be punitive. Nor does their power extend to punishing likely perpetrators in any standard legal sense. Their aims and reach are primarily *protective*. So, e.g., the most severe potential consequence for a student found, by the preponderance of the evidence, to have committed sexual assault would be expulsion from that institution: not jail time, nor the payment of punitive damages, nor even compensatory ones. And expulsion, I should add, is exceptionally rare in practice.

The same is not true for similar hearings on academic honesty (e.g., plagiarism) at certain universities, my own included. Usually the remedies for Title IX-related complaints are much less burdensome for the likely perpetrator, e.g., placing him in different housing, making sure the accuser does not have to take classes with her assailant. And such internal proceedings in no way forestall standard criminal ones: rather, they are a parallel option with different standards of evidence, aims and, again, potential remedies.

***

In a chapter of my forthcoming book, *Down Girl: The Logic of Misogyny*, I try to bring out the culturally prevalent exonerating tendencies which benefit comparatively privileged men, such as the failed aspiring football player turned Oklahoma City cop, Daniel Holtzclaw. Holtzclaw was convicted of multiple counts of rape and other sexual crimes against African-American women who had little legal recourse in having, e.g., outstanding arrest warrants or histories of drug abuse.

The most frequently asked question when I give talks based on this chapter is some variant of the following: “But isn’t holding him to be innocent until proven guilty morally required, in order to be fair to him?” The answer depends crucially on whether one is in the non-juridical he said/she said scenario that I’m restricting myself to considering here, as opposed to an adversarial criminal justice proceeding, where it’s the state prosecuting the accused on behalf of the people. In the extra-legal cases with which I’m concerning myself here, we *can’t* coherently maintain an “innocent until proven guilty” stance toward both of the parties involved. If he’s assumed to be positively *innocent*, then she must be lying.

Remaining agnostic is a different and sometimes the correct option, as I freely acknowledge. But my point is that positively maintaining his innocence following such extra-legal testimonial clashes would come at the cost of *her* default moral reputation. And her claim to being trustworthy, and prospects of being believed, already tend to be too tenuous and unduly dim, respectively.

I learned this lesson fairly young, at the age of 14, when I tried to get out of an uncomfortable situation with a new piano teacher, Mr. M, at my middle school. I told a female friend my age about what was happening: she said, maybe he's just a very affectionate person. I must be misinterpreting. "Have you even considered that?" She snapped at me, angrily. I was taken aback, and didn't reply or bring it up again. Then I told a trusted family member something of what he was doing: she said, "I'm glad he feels comfortable massaging your sore muscles from practicing the piano so much. Male teachers worry too much about people getting the wrong idea these days."

Maybe I could have made her listen if I'd pushed. But I was too embarrassed. And I felt, rightly or wrongly, warned off pressing or saying something that couldn't be reiterpreted as innocent, explained away as a misunderstanding, or kept within the family. I can't shake the suspicion that unless I'd pressed harder than I knew how given the ambiguity of the touching, nothing would have happened.

(This family member has since taken an active interest in child and adolescent sexual assault victims. Male ones.)

And so I said nothing: feeling not only embarrassed but obliged, in the name of charity and fairness to him, not to cast aspersions. I wound up trapped in a small room with him for individual, hour-long lessons once a week, sometimes more, on his say-so. ("Come here" he would beckon to me, across the school yard, grinning. And I would follow him, obediently.) None of it was strictly non-consensual; nor desired, on my part, in the end. The crush on him I made an effort to develop was short-lived and half-heartened. Ultimately, he sickened me; his smell not bad but seeming wrong to me somehow, just slightly off, and far too strong, indeed overpowering.

The so-called massages were painful and deep to the point of leaving bruises (always under my uniform). His hands roamed freely, deceptively casually, as he leant over me from behind as I kept on playing the piano, doggedly. From that position, he had access

to everything, though there were limits to where he would go, and for how long, seemingly. He retained full control. He knew exactly what he was doing. But I doubt he'd ever have admitted it, even inwardly.

(If this was a fledgling sexual Milgram experiment, and I was both the teacher and the learner, the autodidact, then who was he? And who, or what in the social world, was Milgram? Questions all for another day, however.)

I couldn't protect myself, couldn't evade his hands, with my own glued to the keyboard, trying to get the piece right or improvise. And I wanted at that point to have a career in music: I dreamed of being a concert pianist, though I'm sure now I hadn't the talent. But I was implacably, stubbornly driven: and so, I persisted.

Mr. M was the first person to talk to me openly about the sexiness of sex: what it was like, what he liked, the ways in which music, to him, he said, was sexual. When he had sex, he confided, he would play his partner's body like a piano. He simply couldn't help it—or himself, on his telling. But the sexiest thing of all, he said, was always anticipation.

It seems comical and cringe-worthy in retrospect: much less so in the third person, if I make myself peer in through the window, as it were, imagining the scene from the outside. If I saw a male teacher doing that to a teenage girl these days, I would knock on the door and extract her, then read him the riot act. I have become that sort of person.

Whatever the case, my discomfort in that too-small room, where he seemed to saturate every drop of air with his smell, tempered my love of playing the piano. I stopped making progress for a time—in music, and beyond that.

Like Nussbaum, I don't think my (more drawn out, but obviously vastly less severely harmful) experiences affected me all that much in the long term; though, ultimately, it's hard to say. But the main point is just that: in the short term, it made school a much more fraught place than it ought to have been. I began to tear strips of flesh off the soles of my feet at night for no reason I could discern. As a result, I walked around in the daytime gingerly: it might have been painful, had I been feeling.

***

One day, after a year of this, suddenly, he was gone. He left the school so abruptly, without anyone knowing the reason. I can now guess why, of course: I can't have been the only one. But it was all kept very quiet. Then there was the issue of glass houses and throwing stones. In 2015, the principal of the school was sentenced to five years in jail, having plead guilty to multiple counts of sexual assault of boys under his instruction.

The other teacher who I was close to at the time, Mr. T, who I used to enjoy long, intense talks with about novels and poetry and writing, and who gave me the minimal yet, as it turned out, rare gift of valuing my curiosity without ever asking me for anything, or taking anything from me, caught me looking down one day soon after Mr. M had left. "Kate, I'm sorry," Mr. T said. "You must be so sad that Mr. M has gone. I know you were his favorite." And I shook my head wordlessly no, and Mr. T could see that something was wrong, and it all came pouring out. And he believed me, and I was so relieved, so deeply relieved that he didn't doubt me or question me or seem to think less of me despite my shame: a shame that has been lasting.

Hence my previous reluctance to tell the story: I also didn't see much point. But now, I can't think of another way to defend a claim which, though small, I do think has important normative implications. It has to do with the way someone with something to say in this connection has often been cast in a role which they would have to break with radically, at a time when they are likely to find that especially hard, in order to come forward. I was not only embarrassed and ashamed about what happened: it would have felt morally wrong to say anything. I would have felt like a tattle-tale, a little bitch, a traitor: in short, guilty.

After we talked, Mr. T told me he had to report it, it being mandatory in my state in Australia. I'd been dimly aware of this, but it hadn't been salient. And for the first time during that year of feeling frozen on the inside, and looking much the same as usual from the outside, I'd hazard, but propelled along largely by inertia and the social analogue of muscle memory, I started to cry. I begged and begged Mr. T not to tell anyone what I'd told him. I said: no one will believe me. No one has but you. I'm not one of the pretty girls, who would want me: nobody.

Mr. T shook his head sadly no, it's not like that, but there was nothing he could say. He went away to think about it, returning with his decision a few hours later. He reluctantly agreed not to make the report, despite his serious misgivings.

***

In her inaugural lecture, Martha Nussbaum questioned the wisdom of the mandatory reporting of sexual assault, abuse and harassment under Title IX regulations in the U.S. at educational institutions, including schools as well as universities, which receive federal funding. Nussbaum worried that victims might be less inclined to open up to her and other faculty members if they knew that reporting was mandatory, even though the Title IX coordinators who receive the reports are duty-bound to respect the victim's confidentiality, if she wishes to maintain it. (Unless violating confidentiality is required in order to address a hostile educational environment; but this is rarely necessary in practice.) To this, based on my own experiences, as outlined above, I want to make the following points:

1. She may well open up anyway, if she trusts you and needs to talk—these things often aren't planned or calculated disclosures. People spill; they spill over;
2. There are plenty of people to talk to, or at least try to, as someone subject to inappropriate treatment. But something only a faculty or staff member at a school can do is take it out of the hands of someone who may well feel numb or conflicted, for the sake of securing a suitable educational environment for students of any gender—and should not be done, I agree with Nussbaum, for the sake of retribution here;
3. Relatedly, it's not as if there aren't a litany of strong reasons, psychological if not normative, to keep one's story to oneself as the person who has to tell it: one more of these (in the form of the Title IX coordinator knowing one's name and the general issue) is a mere drop in a veritable bucket;
4. For faculty members, if push comes to shove, one can always exercise discretion and break the rules for a particular student. Title IX is, in truth, largely toothless. (Despite the hundreds of violations uncovered by the OCR, it has never taken *any* punitive action, let alone taken the step of withdrawing federal funding.) And while one's moral duty to uphold such mandates is plausibly strong, it is surely only *pro tanto*. That is, its default status to decide what one ought to do may be outweighed by extremely weighty countervailing considerations (or 'silencing' reasons) in particular cases;
5. Finally, as someone who once begged and successfully persuaded someone not to do his legal duty when it came to mandatory reporting, it seems relevant to point out that I now fervently wish that he'd done so regardless. I wish he'd gone over my head; I wish he'd overridden me. It might have spared many others, a fact the awareness of which

has troubled me deeply intermittently during the intervening two decades. Mr. M was just so creepy. And it might have helped me too, at least in the long run, to have seen him held accountable. It would have communicated that this, and by extension I, was taken seriously.

I know how it sounds. I know it's counter-intuitive to advocate overriding those who have been wrongly overridden, much of the time, in being put in this position. But sometimes being given a choice alters the choice space itself, and not for the better. In this case, it becomes a choice of whether or not to cost such a man dearly, to thwart him, to frustrate his will, his dominant, confident, overwhelming will—to embarrass, expose, out, him. And the logic of abuse—whether severe or, as in my case, fairly mild—involves wearing down one's sense of entitlement to say, no, get your roaming hands (among other things) off me. You learn to play along with it. Your body is claimed piece by piece, bit by insidious bit, both temporally and corporally, until you're jumpy but have lost a robust sense of where your own skin starts and intrusion begins. The soles of your feet may be raw and tender, your tongue tied, your muscles twisted. Mine were, at any rate. I learned my lesson: helplessness. I am not sure how well I've managed to unlearn it—though maybe I would have been prone to go limp, to fall prey to bouts of (to me too, irritating) passivity, regardless. It's a vice, a flaw: my weakness.

I encountered Coetzee's novel *Disgrace* shortly after all of this, as a late teen, and it had a powerful impact. Witness David's reaction to Melanie's eventual accusations. David is not only defensive, as is only to be expected, but deeply contemptuous of her—and then, deeply patronizing:

Abuse: he was waiting for the word. Spoken in a voice quivering with righteousness. What does she see, when she looks at him, that keeps her at such a pitch of anger? A shark among the helpless little fishies? Or does she have another vision: of a great thick-boned male bearing down on a girl-child, a huge hand stifling her cries? How absurd! Then he remembers: they were gathered here yesterday in this same room, and she was before them, Melanie, who barely comes to his shoulder. Unequal: how can he deny that?

How indeed could David deny the power imbalance between them? But the basis on which he affirms it—height—is so maddeningly irrelevant as to fail to impress, even as a

metaphor. The relevant inequalities are a product of a patriarchal culture, and the subsequent threats and punishment leveled at girls and women who challenge the will of male authority figures. Hence one important form of internalized misogyny: the dread and guilt I would have felt in my case, for one such, in not protecting Mr. M's reputation or his social position more broadly. "Better to suffer evil than to do it," following Socrates, it was argued in the first book of philosophy I ever read: *Good and Evil: An Absolute Conception*, by Raimond Gaita. I took this mandate very seriously at the age of 14. I wanted to be the one to swallow the pain. I wanted to be a good girl. I overlooked all of the other girls and women Mr. M likely treated badly. Hence a deeper sense of shame which still, to this day, lingers.

***

In the episode of *Girls* with which I opened, Chuck Palmer has charmed Hannah, worn down her defences before too long. As they stand around swapping stories, she pulls a book down off his shelf: *When She Was Good*, by Philip Roth. Hannah says she loves the novel, loves Roth, despite his misogyny. The book had an alternate title: *American Bitch*, as Hannah tells Palmer. He gives her his signed copy on the spot: a little reward for not being one.

In the next scene, Palmer lies down on his bed, and asks Hannah to lie down next to him. He just wants to feel close to someone, he says. He lies with his back turned to her; they are both fully clothed. Suddenly, uninvited, and without any warning, he turns around, jeans unzipped, and rubs his semi-erect penis against her thigh. He's expectant: and Hannah reaches down to jerk him off, instinctually.

Fuck it: I too have been there.

And then Hannah jumps up, yelling: "I touched your dick!" repeatedly. She's incredulous, furious, disgusted, and, above all, embarrassed. The latter was also the dominant emotion of participants in Milgram's famous experiments as well. The vast majority of the time, they didn't want to obey. "They disagreed with what they were doing," as Milgram put it, in his *Obedience to Authority* (1974). Still, two thirds cleaved to the script despite this, showing palpable distress, doing as the man in the lab coat bade them.

Chuck Palmer grins sardonically, even sadistically, as Hannah stands there yelling. He has won, and he knows it. Regardless of what happens next, he is back in control. He has shown Hannah how it was done, and at the same time spoiled her story, past and possible future. He has re-established dominance: not by dint of physical strength, nor by simple coercion. He has outsmarted her—which itself smarts—thanks to the power differential and the cultural scripts he has drawn on.

Now we see why it had to be staged in his apartment. The scene is interrupted by another young woman's voice: Chuck's tween daughter calling out to him, as she approaches his bedroom. He zips up his fly at an agonizingly languid pace, right as she reaches the open door. You can sense Hannah's shock: she had no idea the girl had been there.

***

My good teacher, Mr. T, who didn't report Mr. M at my behest, and who I believe made a mistake, for which I can't bring myself to blame him, did help me heal in another way. He swore that day that he wished he could hit Mr. M over the head with a blunt object. That was important for me to hear, though neither of us actually wanted such violence—not even remotely. (I doubt either of us so much as pictured it: we both were, are, gentle people.)

But there is a paucity of ways to express an anger that was not in the end retributive (the assumption Nussbaum makes in arguing against the intrinsic value of this emotion in recent work), so much as it was protective. Such anger had no other language with which to make itself known, in this context. And I had no other emotional repertoire as an adolescent girl with which to parse an adult man's loyalty to me, over a man with whom he'd been friends, or at least friendly. They must have been right around the same age: in their early 30s. I know this in the case of Mr. T from Facebook. We've been in touch for a few years now; I call him by his first name, outwardly.

And as for Mr. M, his name still provokes a Pavlovian shame response in me to say or even type, as I did here before blanking out the letters, as if to spin back the wheel of this minor misfortune. I nonetheless typed his name into the Facebook search engine, one day while I was writing this, largely on impulse, unexpectant. He pops up

straightaway: he has a public profile. I verify he is 17 years my senior, and try to recall why he told me this.

In his profile picture, he has his arm squeezed tightly around the shoulders of a younger blonde woman, perhaps 15 years his junior—or maybe more—by the looks of it. They have a baby, a little girl, who has just turned one year old. The second of the public photos from the search shows him seated on the floor, nestled close behind his daughter, as she is banging joyfully away on one of those little toy pianos for toddlers. His partner has tagged him in the photo and written a caption to the effect of: Music lessons! First of many.*

* *This is a paraphrase of the caption, to prevent searches for this photo.*

Comments on Martha Nussbaum's "Accountability in an Era of Celebrity"
Inaugural Lecture at the Dickson Poon Law Centre, King's College London
9th March 2017

Amia Srinivasan
University College London

1.

I remember reading the *Huffington Post* piece on which Martha's lecture is based, and being very struck by it. For it seemed to me that there was something importantly different in this piece from what I usually find in Martha's writing. Much of Martha's work is motivated by a fundamental faith in the institutions of liberal justice, and an optimism about our capacity to perfect those institutions despite the realities of oppression. But Martha's *Huffington Post* piece ends on a note of deep scepticism about the prospects of a liberal solution to the problem of sexual assault by famous men. She writes:

> Law cannot fix this problem. Famous men standardly get away with sexual harms, and for the most part will continue to do so. They know they are above the law, and they are therefore undeterrable. What can society do? Don't give actors and athletes such glamor and reputational power. But that won't happen in the real world. What can women do? Don't be fooled by glamor. Do not date such men, unless you know them very, very well. Do not go to their homes. Never be alone in a room with them. And if you ignore my sage advice and encounter trouble, move on. Do not let your life get

> hijacked by an almost certainly futile effort at justice. Focus on your own welfare, and in this case that means: forget the law.

Now, Martha's exhortation to women to 'forget the law' and to be, as she says, 'selfish and self-protective', might be *misread* as an instance of victim-blaming, a kind of old-fashioned pragmatism that obscures the fact that the responsibility for rape lies with the *men* who rape, not with their female victims. But I read Martha as offering a radical condemnation of not only liberal legal systems, but also of the liberal faith that the institutions of liberal justice will be sufficient to address real oppression. I see, in other words, a flash of the same, deep scepticism that motivates so many feminist, Marxist, black and post-colonial theorists to reject the liberal worldview that Martha usually exhorts us to adopt.

Moreover, I think it's striking, in this connection, that Martha's seeming departure here from her usual liberal optimism is driven by her personal experience of sexual assault. For it's precisely personal experience of class-, gender- and race-based oppression that drives so many critics of liberalism to their pessimism. So I wonder first if, extrapolating from her own personal disillusionment with the law, Martha can sympathise with those who are more generally disillusioned with the power of the liberal state to address the ravages of race-, sex- and class-based oppression?

My second thought is this. While it is no doubt vital, as feminists have long pointed out, to take seriously the role of first-personal experience and understanding in our political theorising, it is also vital, as especially black feminists have been arguing for decades, to ask ourselves *whose* experiences we are taking into account. Rape and sexual assault here form an object lesson.

In the U.S., college rape has become something of a national obsession. 1 out of 5 college women report being sexually assaulted, and as Martha points out, there are serious issues raised by the in-house handling of these assaults, especially when university administrators are often more interested in protecting their brands and endowments than in ensuring the safety of their students. There is no doubt something very worrying about the sexual culture of American university campuses. The same could be said of British university campuses. But sexual assault and rape rates are lower on university campuses than some other places in the U.S. – being a university student in the U.S. is less of a risk factor for becoming a victim of rape than being a sex worker, or being Native American. Being poor, non-white, trans, mentally disabled, or homeless are also serious risk factors for being raped. Indeed, an American college student is 20% *less* likely to be raped than a woman her same age who didn't make it to university.

Why then the contemporary focus on the college rape epidemic? Part of the reason no doubt has to do with the fact that powerful people – generally, middle-class white men – are likelier to care about rape when it is their daughters who are the potential victims. But mainstream feminism has also contributed to and colluded with this focus on young, relatively privileged women, out of a pragmatic realisation that a college rape crisis will be an easier sell than a Native American rape crisis, or a poor black women rape crisis. In short, while first-personal thinking is indispensable in understanding the horrors of sexual assault, we must also find a way to move outside our own particular vantage points, in order to think about rape and sexual assault not only individually, but structurally.

This takes me to my third and final thought. What sort of structures should we appeal to in order to make sense of the phenomenon that

particularly worries Martha, namely the phenomenon of famous men getting away with sexual assault? Why did it take so long for Bill Cosby to be charged with rape, given that the allegations against him date back to the 1960's? Why did Donald Trump's celebration of his own sexual assaults not make him an electoral pariah? And in this country, why was no action ever taken against Jimmy Saville, despite the widespread rumours of his serial sexual abuse against children?

Martha suggests that these cases are outliers, what she calls 'unfinished business' in the law's ability to hold sexual predators accountable. The forward march of the law, she argues, has done much to transform the misogynistic beliefs that make men feel entitled to women's bodies. While private citizens, she says, are 'typically, or at least frequently, held accountable', celebrities are 'shielded by glamor, public trust, and access to the best legal representation'. She recommends that rather than waiting for the law to find its grip on these men, we should embrace our roles as consumers, refusing to send our money their way.

I want to offer a somewhat more pessimistic reading of the situation. Despite legal progress, rape culture is alive and well. Donald Trump wasn't elected despite his confessions of sexual assault, and Jimmy Saville wasn't popular despite the rumours of sexual predation. Part of what makes these men admired by many other men, and objects of attraction for some women, is precisely the way in which their worldly power extends into the sexual realm, the way in which the official sexual rules do not apply to them. We might have made progress in holding rapists legally accountable, but the vast majority of sexual assaults by even ordinary citizens go unreported, and the conviction rate for rape remains well below the conviction rate for other crimes, at around 6% in this

country. 1 out of 3 people in the UK think a woman is partially to blame for being raped if she flirted with her rapist.

Moreover, rich, powerful men get away with sexual assault not because rape law can't quite get a grip on them, but because rich, powerful men get away with all sorts of things. They get away with not paying their taxes, with not being held accountable for the financial crises they cause, with not having to be as smart or talented as their poor or female counterparts in order to succeed, and with buying unearned advantages for their children. And they get away with any number of criminal offences, both because of the legal representation they can afford, but also because of the systematic biases of jurors and judges. To give just one recent example, an 18-year-old Eton student was found with nearly 2000 graphic images and videos of babies and toddlers being sexually abused. The judge in the case decided to spare the defendant jail, saying, and I quote:

> This defendant Andrew Picard was a privileged young man. His family are clearly wealthy enough to send him to school in Eton…Quite how you found your way into this unpleasant world Mr Picard, the world of chatrooms and exchanging this material, is not clear to me…Why you did it doctors and others have sought to explain - the emotional difficulties you had, issues around your sexuality.

It's very hard to imagine a black or brown student from an inner city comprehensive getting the same exonerating treatment. No doubt the aura of celebrity makes some rich men particularly privileged with respect to the law. But it is a mistake, I think, to think that they constitute some sort of special case, discontinuous with what happens everywhere else.

In light of this, it seems to me that what we really need is not consumerism, as Martha recommends, but solidarity – solidarity against not just rape culture, but against the systematic racial and socieconomic inequalities that give so many rich white men, and not just the famous ones, a free pass.

Accountability in and at the outskirts of the law

Comments on Martha C. Nussbaum's *Accountability in an Era of Celebrity*

Ashwini Vasanthakumar[1]
September 1, 2017

Through vignettes from law, culture, politics, and personal experience, Martha Nussbaum traces a history of sexual violence in the United States. This history confounds any sunny narrative of liberal progress, and yet Nussbaum's powerful lecture gestures towards modes of accountability that reach even the most protected and powerful. My comments here focus on *non*-judicial avenues for accountability and the roles they play, variously, as the law's precursor and its poor cousin.

Now, *judicial* accountability holds out the promise of impartiality and reasonableness; a public forum in which the rights of complainants and alleged wrongdoers are vindicated; and where punishment therefore secures, among other things, deterrence and reform. When judicial accountability fails—as it spectacularly did in Bill Crosby's trial—the opposite happens. As one juror in that trial explained, "And what it really comes down to is who are you gonna believe more. That's all it was."[2] Combine a widespread cultural refusal to believe women, as "reliable witnesses to their own lives"[3] much less as to the violent conduct of others,

[1] Lecturer in Politics, Philosophy & Law, Dickson Poon School of Law, King's College London.
[2] "Another Cosby Juror Proves Why Even Another Trial May Not Convict Him," *Vanity Fair* (June 26, 2017).
[3] Rebecca Solnit, *Men Explain Things to Me* (Haymarket Books, 2014) at 8.

with a cultural eagerness to exonerate men,[4] and the promise of judicial accountability for sexual violence rings hollow. As Nussbaum notes, this is terrible from the perspective of deterrence and reform for alleged and would-be perpetrators. And if you are an expressivist, as I am, it blares loudly a confirmation of what many women already suspect: that their word and their dignity matter less, if at all.

As Nussbaum so eloquently details, however, this does not mean an absence of accountability. As the case of Bill Cosby and the many others she discusses illustrate, there is accountability to be had by engaged citizens, journalists, and consumers. In some cases, public outcry and media scrutiny prompt police investigation and prosecutorial action,[5] oversight of the judiciary;[6] and changes in the law. Here, when the institutions of justice are sluggish, in the thrall of sectarian interests, or reflect outdated values, an active citizenry instigates much-needed reform, but in a way that realises the twin pillars of reasonableness and impartiality. Perhaps this is the ideal: when the institutions of justice walk hand-in-hand with an activist citizenry. Other times, engaged citizens bring about their own accountability. In their roles as consumers, artists, and gatekeepers, and through public ridicule, lost

[4] I should qualify *some* men—men who fit longstanding tropes of sexual deviance, say because of their class or race, may not be met with such eagerness. Kate Manne, *Down Girl: the Logic of Misogyny* (OUP 2017).

[5] Nussbaum discusses the case of Jameis Winston and irregularities in the police investigation. The State Attorney ultimately declined to prosecute, and civil suits filed by the complainant against both Winston and Florida State University (including Winston's countersuit) were settled late last year. *See* Marc Tracy, "Jameis Winston and Woman Who Accused Him of Rape Settle Lawsuits," *New York Times* (December 15, 2016).

[6] For example, the Canadian Judicial Council recommended earlier this year the removal of a judge who, presiding over a rape trial in 2014 asked the complainant, among other things, "Why couldn't you just keep your knees together?" *See* Ashifa Kassam, "Canada Judge resigns over 'keep your knees together' comment in rape trial," *The Guardian* (March 9, 2017). The final report from the Canadian Judicial Council can be found here: https://www.cjc-ccm.gc.ca/cmslib/general/Camp_Docs/2017-03-08%20Report%20to%20Minister.pdf.

sponsorship deals, or the proverbial invitation lost in the mail, they express and uphold values by exacting *some* price.

Accountability outside the court might be secured by quasi-judicial proceedings, for example, by Title IX investigations into sexual misconduct at universities receiving federal funding. Nussbaum touches on these investigations and the several vexed questions they raise. In large part, these challenges arise from the tension between, on the one hand, respecting universities as self-governing communities that enforce student codes of conduct, and on the other, ensuring that all members of these communities enjoy basic rights, including to due process. As Nussbaum notes, the expansion of Title IX reporting requirements into sexual misconduct was a response to university inaction on reports of sexual misconduct and the perceived climate of impunity this inaction fostered.[7] Predictably, there has been a backlash to the backlash, with worries raised about inadequate due process for complainants and the accused alike. One solution, as Nussbaum proposes, is to ensure better legal training for those presiding in campus investigations and to ensure legal representation for all parties. Perhaps. But the more judicial *quasi*-judicial proceedings are expected to be, the less point there is in having these alternative venues for accountability, and the more likely they are to replicate the host of injustices and indignities of the criminal justice system. Exacting burdens of proof and the high protections of due process are required before the state deprives individuals of their

[7] The mandatory reporting requirement, for example, attempts to curtail universities' ability to discourage complainants or to otherwise minimise the recorded accusations of sexual misconduct. This may, at the same time, discourage complainants from coming forward at all, or hinder the useful exercise of discretion in finding solutions that work for all parties.

liberty; what is less clear, as Nussbaum concludes, is what is appropriate for a university sanctioning or expelling a student for misconduct.

And finally, there are even less formal modes of accountability. Take the community of scholars. (This is not an example Nussbaum discusses in her lecture but I hope she will indulge the digression.) Even though multi-million dollar contracts and lucrative sponsorship deals are not (yet) in the offing, academia has its own celebrities who might enjoy the impunity such celebrity affords. And yet, scholars are subject to ethical standards, including duties of care to students, to the community of scholars, and to the discipline, that go well beyond the law and on which the law is largely silent. And so it falls to the community of scholars to police itself, to challenge harmful practices, and to hold accountable those who violate, egregiously or unwittingly, professional and ethical norms. Some support, for example, shunning those who are known to be serial wrongdoers by not inviting them to conferences or not soliciting their contributions to publications.[8] Known, that is, through word-of-mouth, rumour, and the odd investigation.

So we have a spectrum of accountability mechanisms, ranging from judicial procedures that precede criminal sanctions, to quasi-judicial procedures that enforce student handbooks, to public outcry that cost wrongdoers millions, to the disapprobation of one's peers and shuffling about for a seat come the conference dinner. As I said earlier, the deprivation of liberty envisaged by the criminal law demands a high burden of proof and stringent protections

[8] *See, e.g.*, Scott Jaschik, "A call to shun," *Inside Higher Ed* (March 30, 2011). Available at https://www.insidehighered.com/news/2011/03/30/philosophers_consider_what_to_do_about_sexual_harassment.

of due process. This burden of proof is not a standard for plausible or reasonable or even justified belief. But even minor sanctions work a great injustice when they are unwarranted or disproportionate. As Nussbaum notes, these are people's lives—their careers, their reputations, their friendships—at stake. To many, the spectre of a witch-hunt looms large in the non-judicial modes of accountability canvassed here. The opposite is also true. For all the public outcry that clear cases of wrongdoing invoke, the accountability they provide often is ephemeral. Wrongdoers are rehabilitated, sometimes with astonishing alacrity; they continue to make millions; their latest art or scholarship is celebrated.[9] If we want sanctions to deter, reform—and in my case, express particular values—then fleeting public condemnation fails.

As Nussbaum concludes, public outcry and consumer activism will provide accountability and lead to sustained changes in law and culture only when these are organised and tied, ultimately, to institutions. In some cases, these institutions are the institutions of the state, and especially of the criminal justice system. In other spheres, where alternative or complementary *fora*, standards of proof, and protections of process are appropriate, these must be strengthened. Rumour, word-of-mouth, and social media are weapons of the

[9] A few days ago, Jerry Seinfeld said, on *Norm MacDonald Live,* that Bill Cosby is "the biggest comedian of all time. I don't think anyone will ever match his production and quality of material." There follows briefly a discussion about whether Cosby's actions should taint one's appreciation of his comedy. MacDonald helpfully supplies a hypothetical example of Beethoven raping his daughter and asks whether that would matter (he firmly denies that it should). Seinfeld thinks that would matter because –tellingly--"that's pretty bad. Pick a different crime." Recall Bill Cosby has been accused of sexual assault by nearly 60 women. http://www.smh.com.au/entertainment/comedy/jerry-seinfeld-says-bill-cosby-is-still-the-biggest-comedian-of-all-time-20170831-gy7xop.html.

weak that sometimes misfire; we all have a stake in doing, and must do, better.

Martha Nussbaum Responds

First, I would like to thank the four participants for their thoughtful and incisive responses. I admire them, and I think that this type of conversation among feminist philosophers -- deliberative, civil, and unafraid to be productively critical -- is a model for what ought to happen more often, on this urgent issue as well as on others. I've learned a lot, and am grateful. I would also like to thank the Yeoh Tiong Lay Centre for Politics, Philosophy and Law for organizing this high-profile event on a subject of such great importance, especially as its inaugural annual lecture.

Instead of answering the contributors one by one I will answer thematically.

A good time for us

The floodgates are opening. The Harvey Weinstein scandal seems to mark a turning point: women are coming forward, in large numbers, and women in power are supporting other women. Numerous powerful men are being held accountable: Weinstein, Roger Ailes, Bill O'Reilly. This is fantastic, largely (I believe) not for reasons of retribution, since I have criticized retributive views of punishment, though punishment of some type is surely warranted here, but more on account of deterrence and the expression of our new values (since I support deterrence and expressive theories of punishment). We are affirming a commitment to create a different future.

As one might expect, the outpouring of justified denunciation has led to some blurring of different cases. I believe, for example, that Leon Wieseltier is quite different from Harvey Weinstein: embarrassing, ridiculously theatrical, a little gross, but not threatening or malign, at least in my own experience, which may well be different from that of vulnerable employees. I always thought that Leon behaved rather like those gay men in the theater who embrace, kiss, and say "love" and "darling," but are not really asking for sex; he isn't gay, but his behavior had the over-the-top self-dramatizing character that I often see in gay theatrical subcultures. And given the public importance of the magazine he was creating, I can't help regretting his downfall, although I acknowledge that others may have experienced him as threatening and as creating a "hostile work environment." Still, that the whole magazine idea, urgently needed and of great cultural significance, will end, and that Leon himself may never work again, all seems rather sad to me, and I'm trying to see whether there may be other ways to revive the magazine.

What I definitely regret is that now, since the floodgates have opened and women are believed as they were previously not believed, false accusers, too, are coming forward, and I am aware of at least one case in which a major scholar has suddenly been falsely charged in ways that are terribly damaging to him and to his family, although I have confidence that he will eventually be vindicated. It's like what I said (conjecturally) about Derrick Rose in my article: celebrity gives men a shield for wrongdoing, but it also invites extortion, and that is one of the difficult issues that we need to acknowledge and thrash out in each case.

I would like to see much more discussion of the nuances of both legal and ethical issues. First, what conduct is ethically objectionable? It's a fact of life that a sexual overture from someone you don't find attractive seems creepy, but we must try to articulate clearer criteria of when that conduct becomes ethically objectionable. When the approached is a minor, as with Kate Manne's piano teacher, clearly; when the approached is a subordinate in the workplace, also clearly. Beyond that, however, when both are adults, I'd say persistent and unwelcome overtures are objectionable when the person has made their unwelcomeness clear, but one or two attempts are not, icky though one might find them.

There are hard cases. Like Kate Manne, I had a creepy music teacher. I was thirteen, and taking singing lessons. My teacher did not touch me at all, he just looked at me in what I felt to be an unpleasantly leering manner. He also assigned songs with a sexual content, in particular Ado Annie's song "I'm just a girl who cain't say no." I felt terribly uncomfortable singing that song. (If you don't

know Oklahoma, it is a pretty innocent song, all about kissing and not sexually explicit in any way.) However, I have to acknowledge that it might have been a good thing to assign that song in the persona of a lower-class woman to aristocratic me, and its joyful sexual content was not a bad thing for me either. As for the leering, who knows. Maybe I was right, maybe it was more that I found him physically rather disgusting anyway. (He had very greasy hair and some body odor.) So I am not sure that he did anything ethically wrong. Surely if I had been older it would have been just fine, and if I didn't like it I could have gone elsewhere. In this case I did, and soon found a good female teacher at my school.

Then again, when do such approaches become legally problematic, and are our laws well equipped to handle the range of situations that life presents? Kate Manne's teacher was pretty clearly over a legal line, given the amount of touching and her age. Even for adult women she is wrong to say that a woman who freezes has no legal recourse. Steve Schulhofer's Unwanted Sex deals extensively with such cases, some of which my paper discusses; and though states differ, at least some states have dealt with the challenges such cases present in a satisfactory manner, agreeing with his analogy to financial crime. (If I freeze and don't say no when you take my wallet you are still committing a crime – unless I affirmatively give it to you in non-extortionate circumstances.)

Where sexual harassment is concerned, we've evolved legal concepts ("quid pro quo," "hostile environment") that are very useful, together with a valuable incremental tradition of precedent; and most workplaces in addition have their own rules. I think the rule our university has, focusing on the supervisory role, is a good rule, though as I said in the article the more stringent rule that is in force in our law school (no faculty-student sex of any kind) is also fine. What we have not dealt with, however, is the situation where the entire profession is a diffuse workplace, as is the case with theater. The women Weinstein harassed were for the most part not his employees, and in at least many cases there was no explicit quid pro quo related to hiring. But his power in the industry was such that all women in it were in a more diffuse sense his employees or potential employees. I think the best way to deal with such an open-ended workplace, in addition to sexual harassment law, is through professional associations and their disciplinary procedures, though of course actual assault -- and some of his reported behavior constituted assault == is a criminal matter that should be dealt with by the criminal justice system.

Talking and not talking

I have great admiration for all the women who have been coming forward, in the cases of Ailes and O'Reilly and, most recently, in the Weinstein case. There is safety for other women in these women's daring. I am hopeful that theater will become professional and dignified, as it surely wasn't in my brief period as a professional actress (which ended before the incident I recorded), just as classical music has become more dignified and respectful by the policy of the musicians' union of conducting auditions behind a screen. That can't happen in theater and film, and the oversupply of talent is also a problem, far more than in classical music. So the only way to solve the sexual violence problem is through vigilance and presence. Let's hope that continues and grows.

Why didn't I name the man who abused me? I shall now do so: Ralph Waite (1928-2014), who starred in The Waltons as the pioneer father. (At the time of the incident he was starring as Claudius in the Joe Papp production of Hamlet at the Public Theater. He was very very good, and who knows whether his own contorted life lent authenticity to his portrayal of the tormented and guilty king.) In my Huffington Post piece I mentioned not speaking out at the time and in 1998 when he ran unsuccessfully for Congress, and indeed, as I said there, those two decisions were largely explained by the feeling that I would do no good for others and get myself embroiled in harmful litigation. After his death in 2014, I said in the Huffington Post, I might still have been sued, but in truth that was not my primary reason for not naming him. I had noticed that in the discussion of Bill Cosby's offenses the discussion somehow became all about Cosby, not about the problem, which was and still is

ubiquitous. So, as one of the replies sagely sees, by making it simply "my own Bill Cosby tale" I meant to signal that it is generic, and not about this or that famous individual. I did not want the conversation to be deflected to Waite or the image of pioneer masculinity he embodied. There was a subsidiary reason. Waite's difficulties clearly were connected to alcoholism, and I had reason to believe that for some time before his death he had been a sober recovering alcoholic and a born-again Christian. Since I think one should give people a chance to reform, and since I thought it was at least possible that he had, I saw no point in publicly shaming him at that time. The issue was the thing.

When I said that my decision was the right one in my particular situation, I did not mean that it was a "good" decision, as one respondent plausibly, but wrongly, infers. Let me explain. I have written a lot about tragic dilemmas, and it is my position that one may make the decision that is best all things considered, "the right decision" in that sense, and still not be free of serious wrongdoing. Agamemnon made the right decision when he chose to sacrifice his daughter at Aulis, because the only alternative was that the gods would kill the entire army and the daughter as well. Still, it was a horrible wrongful act, and his outcry, "Which of these is without evils?" is appropriate. Bernard Williams discussed this case long ago in "Ethical Consistency," and I have since built on his analysis, studying different types of conflict. One thing that I observe, as Williams does not, is that some such conflicts are caused by defective political and social arrangements. Thus, when women have to choose between attending appropriately to their children and doing a good job at work, these constant everyday dilemmas are often caused by bad workplace arrangements, which for example schedule department meetings after the pick-up time of child-care centers. Similarly, when Arjuna in the Mahabharata finds that in order to do his duty in the army he has to try to kill his kinsmen, the problem is caused by the horrible circumstances that led to civil war, and such dilemmas are ubiquitous there, as tragic authors in many traditions have seen. Similarly again, when a poor parent in a developing country finds that she has to keep her child out of school in order to put that child into the work force earning money essential if the family is to survive, the problem lies not with the parent, but with defective political and economic arrangements that force the terrible choice. Still, the parent is definitely wronging the child, even while making a decision that is best all things considered.

Many philosophers, including Aquinas, Kant, Henry Sidgwick, and R. M. Hare, but not including Aristotle (as Michael Stocker has shown in his excellent Plural and Conflicting Values), have denied that there were such conflicts: in such a situation, at most one option can be a genuine duty. I have spent a lot of time disputing this, following Williams. I think Christians have a hard time with tragedy, since it seems mean-spirited for a just God to land people in such situations. But that does not excuse philosophical error. And of course another source of error is blindness about how one's own privileged social order oppresses others, landing them in morally difficult situations not of their own making. Many if not most men in the past have been Creons in this regard.

What's the point of recognizing a class of tragic dilemmas? It is that the people themselves are not irrational: they have a pair of commitments (family and work, family and political duty, schooling and survival) that are in principle fully compatible, and that should always be compatible. Recognizing that the dilemma displaces people from fulfilling commitments that ought to be co-possible gives the entire society incentives for designing things differently, as Hegel noted in his eloquent writings on tragedy.

So my dilemma was in that sense tragic. I had a better choice but no "good" choice. (Tragedy doesn't need to be big and spectacular; it can often be small and unnoticed by many.) People should not have to choose between continued productivity and reporting a terrible crime. And I did understand this, and have been working in whatever way I can to push society in the direction of supporting women in their demand for accountability. I do believe that the person who is caught in a tragic dilemma and makes an all-things-considered decision that pursues one side but does wrong on the other side, owes it to her own ongoing commitments and to society to do two things: first, to make reparations for the wrong done, insofar as that is possible, and, second, to try to bring about a

state of affairs where that wrong does not happen. (Michael Walzer talks well about the first in "Political Action and the Problem of Dirty Hands.") So, having not done something I should in principle have done, I have also tried, going forward, to devote a large part of my career and such influence as I possess to speak out and write on justice for women generally and on sexual violence issues in particular. I shall continue to do so. And I hope that my voice along with many others may help to move society to a place where no woman need face such a dilemma. So my Huffington Post piece did not air these philosophical issues particularly well, and I am glad to have the chance to do so now.

Speaking out is valuable, and I agree with the responses that shunning can also be valuable. Ever since around 2000 I have refused to participate in any project with Thomas Pogge and I have refused to invite him to any conference of mine. Here I had solid evidence: Charles Larmore, then my colleague at the University of Chicago, told me at that time that he had been chair at Columbia when Pogge was convicted of sexual harassment in an internal university proceeding there, and he believed on the basis of the evidence he heard that this was a pattern of conduct likely to recur. (He said this because Iris Young and I were informally discussing whether one ought to try to get a position to hire Pogge in our Political Science Department.) I was hampered in this instance by the fact that Larmore was bound by a non-disclosure agreement, so he really should not have been telling me and Iris, and I worried that if I told further people it could get him in trouble. In another instance, Brian Leiter and I advised a prospective law student not to go to a law school where there was a notorious harasser in their very area. Brian and I agreed that the man's conduct was sufficiently well known, indeed notorious, that it was appropriate to say this. (Shortly after that the man resigned, in a way that appeared to reflect duress.) Basically, then, I agree with Peggy DesAutels that shunning is valuable, but best in the presence of solid evidence.

I do agree strongly that an active citizenry is crucial, and that women's solidarity is also very important as one part of active citizenship. However, I think that consumer movements are often more important than protest marches, and that they are one tool that concerned women and men can use and have used in the US to good effect. The baneful anti-transgender law in North Carolina was derailed largely through industrial boycotts spurred on by consumers, and there are many other similar examples. We need to be active on many fronts, not disdaining the market!

Colleges and Universities

The first thing to be said here is that college students are not just a small elite. 89 percent of US adults are high school graduates, and 87 percent of African-American adults. 53 percent have at least some college education, and that number is considerably higher among younger adults. As for college graduation from four-year colleges, the figure now stands at 57 percent in Canada, and 43 percent in the US, but again, much higher in younger decades. Racial disparities remain troubling within these graduation figures. But at any rate, it seems to me that these figures tell us that focusing on college students does not mean focusing on an elite. We need to do a lot more to make college education available to all Americans, especially given the labor market. But while we should study sexual violence in many contexts, college campuses provide one helpful source of understanding of these problems, one that is particularly tractable for those who study it, and it does not mean that those who focus thus are focusing on a narrow elite.

Another reason for the focus on colleges and universities in the context of accountability is that in the US college sports are much more corrupt than professional sports at this point, and are highly destructive to the academic endeavor. One does not hear of NFL or NBA teams pimping women to star athletes to recruit them. Indeed, the shoe is usually on the other foot, with many more people seeking these jobs than there are jobs to be had. With colleges and universities, by contrast, if there are, say, twenty big talents in a given entering year, every school in the top 500 will be after that person, with all sorts of incentives, some legal and some illegal. When a very talented sports star in football or basketball gets to a university, his presence quickly generates further corruption. Schools with top teams depend on TV revenue and strive to stay in the elite category in those two sports,

which has meant creating bogus classes, writing papers for athletes, and covering up for their sexual predation if it occurs. The entire system is a huge problem for learning. It is unfair to instructors (see the story in the NYTimes of the Florida state instructor who was fired because she refused to pass an athlete in a class for which he had done no work, https://www.nytimes.com/2017/09/01/sports/ncaafootball/florida-state-football.html.); it is unfair to the other students; and it is also unfair to the athletes, who, should they be injured, or for some other reason fail to get pro contract, have nothing to fall back on and often can barely read and write. The Jameis Winston story shows how corruption extends to the DA's office and the courts, through networks of alumni (the "Seminole Boosters"). By contrast, the professional leagues are all the time in the public eye and do not have devoted alumni networks to cover up wrongdoing. They have their zones of corruption, for example the heinous coverup of evidence linking football to CTE. But I believe that when it comes to policing the criminal behavior of individual athletes they are at least a little better, and they can be pressured further by all of us as spectators and consumers.

All in all the system of training athletes through college and university teams is a horrible system, and I am terribly happy that my own institution decided early on not to engage in athletic recruitment (which has been shown to harm campus life in the Ivy League as well as the Big Ten). The rare big-time sports schools who do manage to uphold standards (Northwestern and Stanford are often named) should be commended; but they cannot be emulated because their overall standards of admission are so highly selective that they are unlike most of their peers.

What should be done? The case of baseball, where the teams themselves fund minor leagues that are totally independent of universities, shows that this can happen. That is the way things happen in Europe generally. But of course by now the NFL and NBA teams are used to having their training costs subsidized by universities greedy for TV revenues (though it has been shown that all but the very top schools lose money on their athletic programs). They are not likely to change. So the only remedy is to keep working to regulate college sports effectively, a difficult battle, because of the collective action problems it presents: schools who cut corners get ahead. The philosopher Myles Brand, having observed the corruption and its damages as President of Indiana Univerity, decided to try to fix it, becoming President of the NCAA in 2002. He tried very hard and was making at least some progress. Alas, he died of pancreatic cancer in 2009, and my impression is that progress has stalled since then.

Let me now turn to Title IX. My remarks about the Title IX complaint process for sexual assault were not intended as criticisms. By and large, I am convinced that the process that was instituted during the Obama administration is a good one, and I think it is alarming that the Obama administration's interpretation of Title IX has now been abruptly withdrawn by the Trump administration. It is as yet unclear what will take the place of the old process. Indeed, many universities are likely to continue the old process on a voluntary basis, and there is some reason to think that ours will do so. My remarks about mandatory reporting and the burden of proof were intended simply to record ongoing debates among feminists and to show my respect for those who take a position different from my own (still tentative) position.

I do not think, however, that the presumption of innocence, were that to be adopted as the new standard for campuses (as a group of left-wing Harvard Law School faculty have recommended) ever entails that the accuser is a liar. This is simply not the way our criminal justice system operates, and everyone knows that. We have a system that is deliberately skewed in favor of the accused, because of a widely shared belief that it is better for a guilty person to go free than for an innocent person to be condemned. We know that many guilty people will be acquitted, and that means that we also know that many true accusations will not prevail. This is the price our society has agreed to pay for avoiding the conviction of the innocent. Given that DNA evidence now shows us that an alarmingly high number of innocent people have been convicted anyway, I think it's a good system to keep, and it does not stigmatize the accuser. Moreover, even when an accuser is incorrect, we should not and do not conclude that the accuser is lying. People are notoriously unreliable at eyewitness identification of assailants, and that is rarely because they are lying. It's just something people are

bad at, particularly when racial difference is involved. And that is one more reason why in the world at large we should keep the presumption of innocence. In campus cases, identification is less often the crucial issue, since most accusations are against acquaintances. Even here, however, there may be good-faith mistakes, and everyone knows such cases, particularly when alcohol is involved.

Optimism?

Am I optimistic? Yes. What feminist, studying world history, would not be? And indeed what person concerned with sexual orientation equality, a topic on which I've written for a long time. Hard-won progress can be followed by backsliding, but I believe that what Kant said about feudalism is true also of women's situation: the minute that we can name a problem and get society to see it as a problem, that is already "a form of improvement in itself," whether or not the problem is solved as yet:

> We are here concerned only with the attitude of the onlookers as it reveals itself in public while the drama of great political changes is taking place: for they openly express universal yet disinterested sympathy for one set of protagonists against their adversaries, even at the risk that their partiality could be of great disadvantage to themselves….And this does not merely allow us to hope for human improvement; it is already a form of improvement in itself….The revolution which we have seen taking place in our own times in a nation of gifted people may succeed, or it may fail. It may be so filled with misery and atrocities that no right-thinking man would ever decide to make the same experiment again at such a price, even if he could hope to carry it out successfully at the second attempt. But I maintain that this revolution has aroused in the hearts and desires of all spectators who are not themselves caught up in it a sympathy which borders almost on enthusiasm, although the very utterance of this sympathy was fraught with danger.

Kant, we should bear in mind, was not a supporter of the French Revolution, believing, as he did, that there was no right of revolution, even against an utterly unjust authority. His point is, rather, that widespread enthusiasm for the revolution is already a repudiation of feudal ideas of the naturalness of hierarchy, whether the Revolution succeeds or fails. Henceforth, human inequality is named as unjust, not understood as founded in some natural fittingness of things.

Feudalism and gender hierarchy are similar phenomena: in both cases, a hierarchy was established by force and long custom, but people came to believe it innate, unalterable, and founded in the way things must be and ought to be. Even though the physical differences between lords and serfs were caused by nutrition and health, people believed that there were basically two races of people, different innately; and in the case of gender, they believed this all the more firmly. As Mill points out in The Subjection of Women, people who loved to think of themselves as liberal democrats and who, in (male) political life insisted on the strictest equality, would just assume without even thinking about it that there is a nature-based inequality of ability, power, and competence between male and female that sufficiently grounds the permanent "subjection" of females to males. His title, of course, is deliberate: it is a reminder that Britain, while apparently repudiating feudalism, nourished a form of feudal hierarchy right in the bosom of the family, where all young people grow up and learn their norms.

The modern movement for gender justice changes the picture, just by existing and commanding public assent, even if lots of it is insincere. Now when bad behavior occurs, it will not be coded as unremarkable and natural. The baseline of public expression has changed. This widespread acceptance of a new baseline is, as Kant said, already a form of improvement in itself. And this is so even should behavior not change at all in any nation of the world. Indeed, it is so even should most men harbor in their hearts great doubt and even resentment concerning the equality to which they pay lip service. Lip service, in short, is not nothing. What people support with their lips (including the treaties, such as CEDAW, that they endorse) is not necessarily what they intend to live by, but it is what they think it prudent to own to publicly, and that, in turn, is a sign that women's concerns have won wide recognition. That's progress, despite the fact that there is much more work to do.