

Accountability in and at the outskirts of the law

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

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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,

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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 Here, when the institutions of justice are sluggish, in the thrall of sectarian interests, or reflect outdated values, an active citizenry instigates much-needed reform, but in a way that realises the twin pillars of reasonableness and impartiality.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.