

CONFIDENTIAL MEMORANDUM

October 5, 1994

TO: Task Force Members
FROM: Eben Moglen
RE: Access to counsel for sexual assault proceedings

As the discussion at our last meeting indicated, progress toward completion of new legislation covering the investigation and trial of sexual assault complaints is now impeded by a disagreement over the availability of counsel. As I indicated when last we met, I had regarded the present legislative language, which permits "advocates," provided that they take no role in the hearing process, as a place-holder for substantive discussion. I was dismayed at the expressed intent to finalize this astonishing provision; my dismay was deepened by the procedural context, a subject to which I return at the end of this memorandum. Given the procedures selected by the chairs at the end of that meeting, it is now incumbent upon me—in view of the fact that I cannot attend the meeting called by the chairs to consider objections I myself raised in a timely fashion—to state those objections in writing. I trust that colleagues will excuse the length at which I consider the various questions; it is not clear, given the procedures adopted, that there will be another chance for me to seek changes in this aspect of the legislation before the floor debate in the Senate.

Accordingly, I consider below the nature of the system so far implied by our draft, and the reasons why I believe counsel is a required component of such a system. I consider some of the arguments advanced for prohibiting counsel, and I analyze the possible effects of external legal norms in conditioning our decision on this question. Finally, I review briefly the political context as I see it. I conclude that I cannot lend my support to, and indeed must oppose, any plan which does not provide for the full and active involvement of counsel freely chosen by the parties involved in the procedures created by the pending legislation.

I. The System as it Stands

Much valuable work has already been done in the drafting of a statutory scheme. Substantive definition of the offenses covered has determined the nature of the triable complaints. Delineation of complaint procedures has shown us the outlines of a

voluntarist, complainant-centered prosecutorial system. The pool of potential judges has been defined. The nature of the hearing process has been broadly described, as have requirements for fact-finding and the composition of the record on appeal. Discussion at this stage about whether or not to afford counsel is not a theoretical discussion about the value of counsel in all systems. The issue is whether to afford counsel in a particular legal process, itself encased within other enclosing processes, civil and criminal, in the community. I emphasize these points because I have attempted below to discuss questions relevant to the activities of counsel *in this system*. Those arriving at other points of view must carry, I believe, the same burden. The controversy is about the role and importance of counsel in an architecture already substantially defined.

To begin with, this is a system for handling intra-communally complaints externally cognizable by the criminal law. Under the offense definition already agreed to, complaints prosecutable under the University statute will meet at a minimum the New York State Penal Law's definition of sexual misconduct, a misdemeanor punishable by imprisonment. It should be noted that the Supreme Court unanimously agreed in 1972 not only that all such defendants are entitled to the assistance of counsel, but also that it is the State's responsibility to *provide* counsel to all defendants without the money to retain counsel of their own.¹ We are not bound to observe the requirements of the Sixth Amendment, a point to which I return in part III below. But it is more than symbolically significant that a defendant in our process is entitled to active representation if the complaint is brought extra-communally—as it may be even when the internal procedure has also been initiated. Since every complaint filed internally alleges a crime, we should expect those against whom complaints are lodged to seek the assistance of counsel for reasons external to the University process in many if not most cases, and we must be prepared to treat defendants, as a class, as people having or likely to have representation regardless of the University's procedural preferences.

Second, our definition of the complaint process strongly implies, though it does not state beyond all contravention, that a formal hearing will occur whenever the complainant chooses to seek one. Not only is our process compulsory, in the sense that defendants will court whatever penalty is assessed for default if they refuse to cooperate with the internal procedure, but because there is no institutional prosecutor there is no role for prosecutorial discretion. This is in keeping with the strongly pro-complainant drift of the proposed code, which appears to take a right-to-be-heard approach to the complainant's situation, but it also means that the full range of considerations typically addressed to the prosecutor in advance of indictment (including whether the conduct falls within the statute, what the evidentiary problems are, and whether the case can be successfully prosecuted) will be left to be resolved, implicitly or explicitly, at the hearing.

In operational terms, unless you believe that all charges are well-founded and present an adequate case to sustain a conviction, some number of ill-founded or untriable cases that the executive prosecutor weeds out discretionarily will reach the hearing panel in the proposed system. Though Sergeant Hawkins thought in 1725 that an innocent man

1. In the present version of this memorandum I have eschewed extended citation of legal materials. For this point see *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

requires no counsel,² this is directly contrary to the culture of our criminal procedure over the last 275 years.

Third, these complaints—each of which alleges a crime under local law and none of which has been subjected to the testing scrutiny of a prosecutor with discretion to dismiss some at the initial stage—will be tried before a panel of judges who, the draft explicitly states, may be rendered qualified to try them on the basis of *one half day* of training. Nothing has so far been said about the appointing authority, or the other prerequisites to appointment, but whatever may be the content of that half day of training I think it may fairly be said that many complaints will be tried before judges inexperienced in the traditional problems of structuring a formal record on the basis of sharply contested factual testimony. Moreover the current draft, which is silent on questions of discovery and compulsory process for witnesses, seems to presuppose that the primary investigative responsibility resides in the same lay magistrates. The problem of transcending the level of “he said, she said, whom do we believe?”—which is the rock on which most such prosecutions founder, and on which no fact-finder can candidly hold the clear and convincing standard met—thus devolves on the shoulders of three persons of whose training little that is satisfactory can be said.

Fourth, the proposal requires, as it must, that the hearing officers structure a formal record, including written findings of fact, to constitute the basis of appeal to the University authorities actually having power to punish. It cannot be contemplated that the parties must present their appeals *in propria persona*. Nor will it do to suggest that fundamental errors in the hearing process will be unreviewable by University authorities on appeal. Given these premises, it hardly makes sense to prohibit counsel from participating in hearings, after which any defects in fairness which counsel’s participation might have prevented will be grounds for reversal or an order of retrial from the appellate authority. The sole effect is to put pressure on the finality of trial results.³

In sum, the process under creation uses potentially quite inexperienced judges to conduct factual investigations and hold potentially contentious hearings, leading to the creation of a formal record for substantive review, concerning matters which are all in theory—and may often be in practice—the subject of professional investigation and prosecution in the external system of criminal justice, in which full and effective participation by counsel of defendant’s choice is a constitutional right. It is this specific context, and no other, to which arguments about the propriety of excluding counsel from all effective participation must apply.

2. 2 W. Hawkins, *Pleas of the Crown*, ch. 39, § 2 (1725). The only copy ready to hand in my study is the 4th edition of 1742; the passage there appears on p. 400.

3. It is worth noting, in this context, that English criminal procedure tolerated absence of trial counsel in felony in part because the system did not provide for substantive appellate jurisdiction in criminal cases, as my own work and that of Prof. Langbein has pointed out.

II. Why Counsel is Required

As is already clear, I am primarily concerned in this memorandum with the reasons why effective participating counsel must be provided to defendants in proceedings under the proposed code. There are also reasons why the provision of counsel is essential for complainants, and I shall mention them in passing along the way. But there should be no doubt that this is an argument addressed to the fundamental fairness interests of defendants, and no progress can be made in understanding the argument until the mental effort necessary to substitute oneself, or one's child or student, in the role of defendant has been made.

The present code embodies a profoundly misguided belief in the possibility of effective self-representation. I have never represented anyone even potentially the subject of a criminal prosecution who did not experience profound psychological disorientation. Accustomed as we are to a minimal context of social approval or mere acceptance as a condition of ordinary functioning, the subjective experience of having one's community explicitly engaged against one—with the concomitant losses of dignity, privacy, and sense of control—is often literally paralyzing. The schedule of confrontation, with its long intervals of waiting, calls for patience and steady nerves, as well as a clear grasp of the issues, and a strong sense of the social context. None of these is easy to acquire the first time through, but for the target of any prosecution the disorienting effects of the situation virtually preclude effective response. Much of the task of the lawyer in criminal defense practice is to counteract those absolutely predictable disabilities. *Mutatis mutandis*, we should observe, many of the same symptoms of disturbed social functioning are characteristic of victims of violence, including sexual violence. There is reason to suppose therefore (though the structure of the prosecutorial system in the outside world gives little basis for direct empirical study) that complainants will also experience difficulty in presenting their cases to maximum effect.⁴

So one must attempt to imagine the subjective effects of the process before one blithely declares the defendant a sufficient representative for himself. Once or twice in my career I have met defendants capable of adroit and effective self-representation, at least when they were called upon to do nothing more technical than the admittedly difficult cross-examination of an informant witness. But none of these rarities was a nineteen-year-old boy, caught in a maelstrom of rage and fear, subjected to ostracism and other forms of public opprobrium, inexperienced with the social process of structured confrontation that is a criminal hearing, faced with an experience that—one way or another—will change his life forever. So far as evaluating medical evidence or locating

4. One could compare the experience of defense practitioners and their clients with the experiences of prosecutors in sex crimes units in preparing their complainants. But the dissimilarities in situation make the comparison difficult.

and interviewing witnesses is concerned, surely no one will even suggest that this is a reasonable expectation.

Nor is this the entirety of what self-representation involves. Trying a case before a single experienced judge, confident in her rulings and able to shape the record without bias or negligent error, the chances of sharp disagreement between counsel and the Bench are still substantial. Even where the tactical environment calls for the utmost attempt to minimize such frictions (as where the judge seems inclined toward the defendant's ultimate position) I have rarely seen a proceeding in which effective counsel could altogether avoid occasional testiness from the Bench. For counsel, this is all in a day's work. For the self-representing defendant, already enmeshed in a strange and implicitly hostile environment, dependent upon the judge's goodwill for the difference between salvation and catastrophe, only an iron will and a completely dissociated intelligence could make the necessary tactical calculations, instantly, and act upon them be the momentary cost what it will. The social situation is more rather than less coercive before a Bench of three mutually reinforcing judges, inexperienced in doing their jobs and accordingly likely to huddle together, certainly unlikely to differ publicly once a incorrect spur-of-the-moment ruling has been questioned. Only the likelihood of fundamental error increases, not the ability of the unrepresented defendant to stamp it out or at least make an adequate record for its later reconsideration.

There can be no doubt that in our constitutional order the defendant in a criminal case has an absolute constitutional right to self-representation, as an outgrowth of the Sixth Amendment guarantee.⁵ But the lawyer's adage that he who acts as his own lawyer has a fool for a client is not a maxim of self-interested business-getting. I have never met an experienced criminal defense practitioner self-confident or foolhardy enough to declare self-representation a tenable option, were she or he placed in the position. It is simply unrealistic to contend that a system in which counsel is not allowed to participate will produce the same results as one in which counsel is permitted. Even assuming that counsel conduct investigations, interview witnesses, receive the prosecution's discovery, prepare challenges to the prosecution's evidence, draft the defendant's proposed findings, and in general perform every necessary function right to the door of the hearing room, there will still be little alternative but to challenge on appeal the various procedural or other problems that should have been resolved *in situ*, upon objection at the hearing. And this will not suffice to substitute for the absence of effective cross-examination, which is probably the gravest difficulty the unrepresented defendant faces.

Cross-examination is undoubtedly the most difficult and technically demanding skill developed in the course of life in the courtroom. It would be absurd to suppose that an inexperienced judge with half a day's training in whatever the trainer's expertise may be (which is unlikely to be cross-examination) could conduct even a minor one effectively, let alone the cross of a crucial witness upon whom the defendant's fate depends. This is true *a fortiori* for the unrepresented defendant who, for the reasons previously described, is psychologically unprepared to estimate the value and importance of the direct testimony on the fact-finder, much less fit to undertake the delicate task of finding the weaknesses without strengthening the strengths. And the defects in botched examination, whether by the "court" or the defendant, cannot be rectified on appeal.

5. See *Faretta v. California*, 422 U.S. 806 (1975).

These, functionally considered, are the tasks performed by the courtroom advocate, and nothing whatever suggests that defendants are adequately situated to perform them instead. Operationally, the cost of deprivation of counsel is improper convictions. This point has been made in countless Supreme Court decisions, from *Powell v. Alabama* to *Gideon v. Wainwright* and beyond.⁶ Even the Rehnquist Court, not known for charity towards the interests of criminal defendants, has held that criminal adjudications occurring without effective and prepared counsel are fundamentally unreliable.⁷ Nothing that has been said in our debate so far suggests the presence of any consideration that would even remotely justify convicting the innocent by depriving them of the assistance of counsel. I submit, indeed, that no such consideration exists.

III. Objections to Provision of Counsel

Despite the unfortunate truncation of the discussion last time, a few points have been raised in objection to the presence of effective advocates in the hearing process. None seems to me close to sufficient to justify substantially increasing the chance of inappropriate convictions, and in this sense they are all immaterial. But it is appropriate that they should be addressed to some extent.

First, it is objected that other university disciplinary codes do not make provision for counsel. This is by and large, though far from uniformly, true. It is also, from my point of view, quite irrelevant. The present proposed code is not a general-purpose procedure for determining all classes of disciplinary claims, from minor to major. This code is only directed at the trial of a single class of offenses, each and every one of which is a crime under local law. Whatever may be said for the propriety of a single general system that fails to guarantee effective counsel in hearings on all classes of offenses, the arguments are substantially attenuated when the procedure's only scope of application is the trial of serious criminal offenses.⁸

It is further objected that we are not legally obliged to provide access to counsel in such proceedings. Even if we were a State University, this proposition would probably be true, though the Supreme Court has never ruled on the application of the Sixth Amendment to university disciplinary proceedings, and the Federal Courts of Appeals are divided on the question. The Fourteenth Amendment's Due Process Clause and the Sixth

6. *Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (in criminal cases, effective counsel are "necessities not luxuries").

7. *See, e.g., United State v. Cronin*, 466 U.S. 648 (1984).

8. Members of the Task Force may remember that I argued months ago against the creation of an exceptional special-purpose disciplinary code for a single class of serious, but not uniquely serious, offenses. It was said at the time that the mandate was for the attempt to create such a regulation. Whatever the force of this argument then was, it loses somewhat when the specialness of the purpose justifies unique rules in favor of the complainant, but defendants' alternatives are limited to the exiguous provisions of other institutions' general-purpose procedures. The effect is to strengthen the impression of a biased code devised for the purpose of disadvantaging defendants. A proposal so viewed cannot possibly win acceptance by all the political actors who must approve the final legislative result.

Amendment's guarantee of *effective* counsel do not apply to Columbia University, which under contemporary constitutional doctrine is not a state actor when it engages in trying and punishing its students under provisions paralleling those of the State's criminal code—a holding to which I cannot give unqualified assent. But this by no means implies that we are free of all moral responsibility to condition our conduct according to the prevailing norms governing invocations of public force. It would, after all, be just as correct to argue that because the Fifth Amendment does not apply to us we would be free to compel self-incriminatory testimony, or to secure convictions by the simple and doubtless effective means of beating confessions out of our students. I suppose that a consensus exists among our colleagues that such a course would be immoral. But it is no less immoral to require that a frightened and demoralized individual attempt to conduct a skillful and effective defense against serious criminal charges in the unfamiliar environment of an adversary hearing.⁹ Whether we are under legal compulsion to behave rightly is no more relevant in one case than in the other.

Thirdly, it is objected that the presence of counsel (here, as far as I can see, meaning lawyers) might render timid the panel of judges. This seems to me more an objection to the use of inexperienced and untrained judges than an objection to the presence of counsel. Timid or fearful judges are an appropriate object of apprehension, but it should be observed that they are more dangerous to defendants (whom they may unjustly punish) than they are to anybody else. And cowardly judges are subject to many other kinds of social coercion. They are swayed by the hostility of the community, by pressures imposed by their families and friends, by their desire to appear powerful and implacable, et cetera. Nor are cowards the only kind of judges to fear. Tyranny, vindictiveness, bigotry, and ideologically-motivated callousness to human suffering have all been represented on the Bench, and will be again. Everywhere lynch law has its advocates, and judges can always be found who will truckle to the bloodthirstiness of the crowd. Universities are not immune, as events in our own lifetimes amply prove. But centuries of experience have taught that the most effective remedy against the inevitability of abuse is the simple workaday conscientiousness of counsel, whose task it is to care about nothing other than a fair shake for the client. Despite the presence of anti-lawyer bigotry in most places at most times, those who formed our constitutional tradition emerged from a culture which had much reason to respect the contributions of such counsel to the edifice of the rule of law. To turn the frailty of judges into an argument against counsel seems to me fundamentally perverse—at odds with lessons legibly written in the blood of those unjustly condemned.

Fourthly, it has been said that effective assistance of counsel is inappropriate because this is not “a legal proceeding.” I cannot accept this claim. At the risk of undue repetition, this proposed code applies solely to the adjudication of claims each of which alleges conduct also violating the Penal Law of New York State. If these are not legal proceedings I cannot imagine to what sort of proceedings colleagues would choose to apply the term. Similarly, it has been stated that these are not “adversary hearings.” I consider this a word game unworthy of a community of scholars. When you are charged

9. This is not an adventitious juxtaposition. The medieval and early-modern English criminal procedure justified denial of counsel to felony defendants precisely on the ground that a guilty defendant's conduct of his own defense tended to produce self-incriminatory statements and behaviors. I have considered the close connection between eighteenth-century changes in the rules governing availability of counsel and the evolution of our constitutional rule against self-incrimination in *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 Mich. L. Rev. 1086 (1994).

with rape before a Bench of judges—however untrained or inexperienced—with power to find facts and recommend punishments of a most serious character, confronting accusatory testimony and other evidence, you are in an adversary proceeding. To pretend otherwise is to substitute words for things in an indefensible fashion. I submit that only a failure to put oneself, one's child, or one's student in the position of someone wrongfully accused of such an offense can motivate such an unrealistically sanguine view of the situation.

IV. A Political Overview

As the most recent tentative draft—dated but not distributed September 27—makes clear, this is a dispute about what “advocates” do, not who they are. The current draft utterly abandons the hypothesis, found in earlier drafts, that the members of my constituency could be prohibited from appearing on behalf of parties in these hearings solely because—in addition to being senior officers of the University—they are also members of the Bar. That was half a bow to political necessity, but it is insufficient. What now remains is a proposal that they should be permitted to appear, but prohibited from doing their job. I shall not here advert to the earlier political history of this proposal, except to point out that serious credibility problems created on a prior occasion remain to be overcome. The present draft is not a step in that direction. The proposal to afford defendants mere faineant counsel is fundamentally unfair. It will be opposed by my constituency throughout the legislative process, and if necessary in other fora.

Never having witnessed, nor seen in the records of the Senate, an attempt to pass a major piece of disciplinary legislation over the objection of that component of the University community most nearly concerned, intellectually and professionally, I cannot speak with certainty about whether it can be done. Appearances may be deceiving, but recent procedural developments suggest that some now wish to hazard that enterprise. I sought originally to have this matter discussed last month, and gave notice to that effect in August. I returned from Cambridge for the specific purpose of resolving this most important question. The matter was laid on the table by the chairs at the last meeting, to be resumed at a meeting it was known at the time I could not attend. The most recent transmittal memorandum indicates the chairs' intention to circulate a public draft following the meeting of October 10, which implies an intention to take a vote at that time. This sequence of events is, to say the least, discomfiting, and seems more likely to renew certain political reservations than to allay them. Let me for now limit myself to stating that if this course is pursued I shall respectfully insist upon public circulation of a dissenting statement along with the proposed draft, and I shall require a short period of time, after the new draft is ready, in which to prepare that dissent.