

Open Letter Regarding Inequitable Victim-Centered Practices¹

“The great enemy of the truth is very often not the lie— deliberate, contrived and dishonest— but the myth— persistent, persuasive, and unrealistic.” -- John F. Kennedy²

The undersigned professors and legal experts write regarding the use of investigative “victim-centered” practices that threaten to subvert the objective collection and presentation of evidence in administrative, civil, and criminal sexual assault proceedings. These guilt-presuming methods include “victim-centered” investigations, “trauma-informed” theories, and the admonition to always “believe the victim.”

Supreme Court Justice Felix Frankfurter once wrote that *“the history of American freedom is, in no small measure, the history of procedure.”*³ That “procedure” is the constitutional guarantee of due process, rooted in the Fifth and Fourteenth Amendments. “Without due process for those we hate and fear — even those whose guilt is obvious — we will all lose our freedoms.”⁴

To enforce this guarantee of due process, our criminal justice system has been refined over the years to strike a delicate balance between the interests of the government and its citizens. To ensure the thorough and unbiased discovery and production of evidence, law enforcement ethics codes have required diligence, integrity, and impartiality in the conduct of investigations. “Investigators do not determine the suspects to be guilty; they remain objective in their investigation.”⁵

Over the last decade, however, policies that direct investigators to “believe the victim” have come to the fore. These policies undermine neutrality in campus Title IX disciplinary processes as well as in the criminal justice system. This trend is disturbingly reminiscent of the 1980s and 90s satanic daycare child abuse “witch hunt” during which investigators were instructed to “believe the children” without scrutiny.⁶

Ideological Origins of Victim-Centered Practices

The movement to prioritize belief over truth can be traced back to the early 1990s when advocates began to call for “swift and unquestioning judgments about the facts of [sexual] harassment without standard

¹ This Open Letter, dated February 7, 2018, is sponsored by Stop Abusive and Violent Environments: <http://www.saveservices.org/sexual-assault/investigations/> For more information, contact Christopher Perry, Esq. at cperry@saveservices.org.

² Kennedy Library & Museum Rededication Film (1993): Source of Quotation, *We Enjoy the Comfort of Opinion*, Address by President John F. Kennedy Yale University Commencement, June 11, 1962 <https://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/Kennedy-Library-Fast-Facts/Yale-University-Commencement-Address.aspx>

³ *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Assoc. Justice Felix Frankfurter, concurring opinion.)

⁴ Andrew Napolitano, *Why Due Process is Vital to Freedom*, The Washington Times, (Sept. 21, 2016) <https://www.washingtontimes.com/news/2016/sep/21/why-due-process-is-vital-to-freedom/>

⁵ Karen M. Hess, Christine Hess Orthmann & Henry Lim Cho, *Introduction to Law Enforcement and Criminal Justice*, 12th Ed., Chapter 7: Specialized Roles of Police, p. 255, Cengage Learning (2016).

⁶ Maureen Casey, *How the daycare child abuse hysteria of the 1980s became a witch hunt*, The Washington Post, (July 31, 2015) https://www.washingtonpost.com/opinions/a-modern-witch-hunt/2015/07/31/057effd8-2f1a-11e5-8353-1215475949f4_story.html?utm_term=.34045a13ae52

evidentiary procedures with the chant ‘always believe the victim.’”⁷ Within the realm of psychological treatment and care, the need for the therapist to believe the victim is necessary and appropriate. But in the investigative or adjudicative contexts, it is decidedly not.

The central “believe the victim” concepts are recited in a 2006 End Violence Against Women International (EVAWI) manual titled *Effective Report Writing*.⁸ The manual is expressly designed to train investigators to prepare an investigative report that “support[s] the charges filed”⁹ and undermines “potential defense strategies,”¹⁰ with the explicit goal of achieving a “successful prosecution.”¹¹ Investigators are cautioned to focus on “suspect” and witness statements that “corroborate the victim’s account”¹² and highlight only inconsistencies in witness or “suspect” statements that support the allegations.¹³

Conspicuously absent from *Effective Report Writing* is any discussion about how to reconcile misleading or implausible statements. Instead, the manual ascribes inconsistencies in witness statements to investigator errors in documentation.¹⁴ Moreover, the manual advocates “making sure” the incident does “not look like a consensual sexual experience”¹⁵ by making the complainant “appear more innocent.”¹⁶

Effective Report Writing meticulously avoids use of the words “complainant” or “accuser.” Instead, it refers to complainants as “victims,” even though District Court Judge F. Dennis Saylor wrote it was presumptuous to assume someone is a “victim” in the investigative context because “[w]hether someone is a ‘victim’ is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning.”¹⁷

Ideological biases in favor of alleged sexual assault victims are particularly ubiquitous in the campus setting. Harvard Law professor Jeannie Suk Gersen describes the “believe the victim” mantra as attaining the status of a “near-religious teaching.”¹⁸ Writers KC Johnson and Stuart Taylor further explain, “[T]he ideological regimes used on many campuses are designed more to stack the deck against accused students than to ensure a fair inquiry.”¹⁹

⁷ Patricia Sharpe and Frances E. Mascia-Lees Source, “Always Believe the Victim,” “Innocent Until Proven Guilty,” “There Is No Truth”: *The Competing Claims of Feminism, Humanism, and Postmodernism in Interpreting Charges of Harassment in the Academy*, *Anthropological Quarterly*, Vol. 66, No. 2, p. 88, Part 1 (1993).

⁸ End Violence Against Women International, *Effective Report Writing: Using the Language of Non-Consensual Sex* (2006). <http://olti.evawintl.org/images/docs/REPORT%20WRITING%205-15-12.pdf>

⁹ *Id.* at 4.

¹⁰ *Id.* at 4, 26.

¹¹ *Id.* at 3.

¹² *Id.* at 3, 19.

¹³ *Id.* at 20.

¹⁴ *Id.* at 23.

¹⁵ *Id.* at 14.

¹⁶ *Id.* at 11.

¹⁷ *John Doe v. Brandeis University*, Memorandum and Order on Defendant’s Motion to Dismiss, J. Saylor (March 31, 2016).

¹⁸ Jeannie Suk Gersen, *Shutting Down Conversations About Rape at Harvard Law*, *The New Yorker* (Dec. 11, 2015) <https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school>

¹⁹ KC Johnson and Stuart Taylor, *Why Campus Rape Tribunals Hand Down So Many ‘Guilty’ Verdicts*, *The Weekly Standard* (Nov. 9, 2017) <http://www.weeklystandard.com/why-campus-rape-tribunals-hand-down-so-many-guilty-verdicts/article/2010401>

Victim-Centered Investigations

On college campuses, “believe the victim” ideology is evidenced by the widespread use of “victim-centered” investigations. According to a Human Rights Watch report, a “victim-centered” approach means the investigator assumes “all sexual assault cases are valid unless established otherwise by investigative findings.”²⁰

The University of Texas School of Social Work’s *Blueprint for Campus Police* takes the “victim-centered” concept a step further. The manual instructs investigators to anticipate legal defense strategies²¹ and urges that inconsistencies be downplayed by not recording “a detailed account of prior interview statements.”²²

The utilization of victim-centered investigations on campus has given rise to numerous lawsuits by accused students alleging incomplete or faulty collection of evidence.²³ Eric Rosenberg, who has represented many accused students, notes that “systemic bias” in training materials essentially “mandat[es] adjudicators shield accusers from exculpatory evidence” because such evidence may “re-victimize the victim.”²⁴

Understandably, the use of victim-centered investigations in university settings has been roundly criticized:

- The Federalist Society: “Many of the professors and campus officials who adjudicate campus sexual assault claims are ‘trained’ to believe accusers and disbelieve accused students, and barely feign impartiality.”²⁵
- The Heritage Foundation: “Extreme care must be taken to avoid having either investigators or members of a tribunal with preconceived biases or conflicts of interest.”²⁶
- The Association of Title IX Administrators: recognized that certain Title IX investigators have taken victim-centered investigations too far, thereby placing their “thumb on the scale” on the side of guilt.²⁷

²⁰ Human Rights Watch, *Improving Police Response to Sexual Assault*, p. 23 (2013).

https://www.hrw.org/sites/default/files/reports/improvingSAInvest_0.pdf

²¹ Noel Busch-Armendariz, Caitlin Sulley, & Kathleen Hill, *Blueprint for campus police: Responding to sexual assault*, Institute on Domestic Violence & Sexual Assault, University of Texas at Austin, p. 68, Table 7.3 (2016)

<https://utexas.app.box.com/v/blueprintforcampuspolice>

²² *Id.* at 68, Table 7.4.

²³ SAVE, *Victim-Centered Investigations: New Liability Risk for Colleges and Universities* (2016)

<http://www.saveservices.org/wp-content/uploads/Victim-Centered-Investigations-and-Liability-Risk.pdf>

²⁴ KC Johnson and Stuart Taylor, *supra* note 19.

²⁵ Hans Bader, et al., *A Review of Department of Education Programs: Transgender Issues, Racial Quotas in School Discipline, and Campus Sexual Assault Mandates*, Regulatory Transparency Project of the Federalist Society, (Sept. 12, 2017) <https://regproject.org/wp-content/uploads/RTP-Race-Sex-Working-Group-Paper.pdf>.

²⁶ Hans von Spakovsky, *Campus Sexual Assault: Understanding the Problem and How to Fix It*, Heritage Foundation (July 25, 2017) <http://www.heritage.org/crime-and-justice/report/campus-sexual-assault-understanding-the-problem-and-how-fix-it>

²⁷ ATIXA, *The ATIXA Playbook*, p. 56 (2017) <https://atixa.org/wordpress/wp-content/uploads/2017/04/The-ATIXA-Playbook-Final-Electronic-Version.pdf>

Trauma-Informed Theories

While “victim-centered” investigations rest upon an easily discernible ideological foundation, “trauma-informed” theories represent an attempt to impute a veneer of scientific respectability to the broader “believe the victim” movement.

Trauma-informed behavioral theories originated with anecdotal reports of how victims of forcible rape responded to their experiences. The concept of “rape trauma syndrome” (RTS) stemmed from a 1974 survey of 92 forcible rape victims’ self-reported symptoms.²⁸ Authors of the survey classified the symptoms into two stages: “fear or terror,” followed by efforts to “reorganize” their lives.²⁹

The 1974 survey has been the focus of sharp criticism, highlighting “definitional problems, biased research samples,” and unreliability because “the inherent complexity of the phenomenon vitiates all attempts to establish empirically the causal relationship implicit in the concept of a rape trauma syndrome.”³⁰ The survey’s credibility is also compromised by its “failure to distinguish between victims of rapes, attempted rapes, and molestation.”³¹ One legal expert concluded rape trauma syndrome is not “generally accepted by experts.”³² Another found it “troubling” that theories of traumatic memory “continue to thrive as tenacious cultural memes” despite “very minimal” scientific support.³³

But these criticisms have not deterred the accretion of even more symptoms putatively encompassed by “rape trauma syndrome,” creating a veritable chicken soup of quasi-diagnoses like “tonic immobility,” “fragmentation of memories,”³⁴ and “factual inconsistencies.”³⁵ One author predicted, “[i]f virtually any victim behavior is described as consistent with RTS, the term soon will have little meaning.”³⁶

Despite research concluding that extreme stress may actually *enhance* the subsequent recall of stressful incidents,³⁷ rape trauma theories have spawned an industry to teach investigators “trauma-informed” approaches. Rebecca Campbell, PhD, long-time victims’ advocate and psychology professor at Michigan State University, has popularized the “trauma-informed” approach through numerous publications³⁸ and presentations to professional audiences across the country.

²⁸ Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 *Am. J. Psychiatry* 98 (1974).

²⁹ Julian D. Ford, Christine A. Courtois, *Rape Trauma Syndrome, Prevention of PTSD, Posttraumatic Stress Disorder* (2015) <http://www.sciencedirect.com/topics/medicine-and-dentistry/rape-trauma-syndrome>

³⁰ Giannelli, Paul C., *Rape Trauma Syndrome*, Faculty Publications, Paper 346, p. 271 (1997). http://scholarlycommons.law.case.edu/faculty_publications/346

³¹ Robert R. Lawrence, *Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings*, 70 *Va. L. Rev.* 1657, 1678-1680 (1984)

³² William O’Donohue, Gwendolyn C. Carlson, Lorraine T. Benuto & Natalie M. Bennett, *Examining the Scientific Validity of Rape Trauma Syndrome*, University of Nevada, Reno, *Psychiatry, 21 Psych. & Law*, Issue 6, 858-876, 860 (2014).

³³ Robert A. Nash and James Ost, ed., *Concluding Remarks; Malleable knowledge about malleable memories, False and Distorted Memories*, p. 159, Psychology Press (2016).

³⁴ Stephen Porter and Angela R. Birt, *Is Traumatic Memory Special?* *Appl. Cognit. Psychol.* 15 S101-S117, S101 (2001).

³⁵ Joanne Archambault (Ret.), *Understanding the Neurobiology of Trauma and Implications for Interviewing Victims*, p. 25 (2016) <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=842>.

³⁶ Frazier and Borgida, *Rape Trauma Syndrome: A Review of Case Law and Psychological Research*, 16 *Law & Hum. Behav.* 293, 304-305 (1992).

³⁷ Richard McNally, Pres. and Fellows Harvard Col., *Remembering Trauma*, Harvard University Press, p. 180 (2005).

³⁸ See, for example, Campbell, R., Shaw, J., & Fehler-Cabral, G., *Evaluation of a victim-centered, trauma-informed victim notification protocol for untested sexual assault kits (SAKs)*, Violence Against Women (April 24, 2017).

Campus investigators stand at the epicenter of trauma-informed concepts. Guidance from the Department of Education’s Office for Civil Rights directed Title IX training to include “the effects of trauma, including neurobiological change”³⁹ — a phrase pregnant with hidden meaning. Although this guidance has been rescinded, many college Title IX programs continue to follow its admonitions.

The illusory evidence for trauma-informed theory is found in various training regimes, including a program on trauma-informed sexual assault investigation offered by the National Center for Campus Public Safety (NCCPS).⁴⁰ NCCPS’s *Why Campuses Should Conduct Trauma-Informed Sexual Assault Investigations* webinar repeats the same unsupported “trauma-informed” theories on memory fragmentation, and suggests it is normal for victims to engage in counterintuitive victim behavior such as communicating and “consensual sexual or social activities” with the alleged perpetrator.⁴¹

Journalist Emily Yoffe has characterized trauma-informed approaches as emblematic of “junk science:”

The result is not only a system in which some men are wrongly accused and wrongly punished. It is a system vulnerable to substantial backlash. University professors and administrators should understand this. And they, of all people, should identify and call out junk science.⁴²

Harvard law professor Janet Halley has ridiculed the trauma-informed training employed by her university, noting the materials provide a “sixth grade level summary of selected neurobiological research” and are “100% aimed to convince them to believe complainants, precisely when they seem unreliable and incoherent.”⁴³

In sum, under the umbrella of “trauma-informed” theories, victims’ advocates not only recommend disregarding complainants’ inconsistencies or behavioral anomalies; they also insist such inconsistencies should be viewed as probative evidence of trauma. Illogically, this interpretation precludes any consideration of a complainant’s incongruous statements or inconsistent behavior as evidence, resulting in an irrefutable argument that the victim’s fragmented or lost memories are certain evidence of trauma, with the implication that therefore the allegations are true.

Start by Believing Campaign

The *Start by Believing* campaign, launched in 2011 by End Violence Against Women International, has been touted as a “global campaign transforming the way we respond to sexual assault.”⁴⁴ Funded by

³⁹ Department of Education Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, p. 40 (2014), withdrawn by 2017 *Dear Colleague Letter*, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>; see archived 2014 *Questions and Answers*, <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

⁴⁰ National Center for Campus Public Safety, *Not Alone Report*, <https://www.nccpsafety.org/resources/library/not-alone-report/>.

⁴¹ Jeffrey J. Nolan, J.D., *Why Campuses Should Conduct Trauma-Informed Sexual Assault Investigations* (webinar) Trauma-Informed Sexual Assault Investigation and Adjudication Institute, Slides 23, 24 (2016). <https://www.nccpsafety.org/training-technical-assistance/webinars/why-campuses-should-conduct-trauma-informed-sexual-assault-investigations#embeds>

⁴² Emily Yoffe, *The Bad Science Behind Campus Response to Sexual Assault*, *The Atlantic*, (Sept. 8, 2017) <https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211/>

⁴³ Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, *Harvard Law Review* 128 *Harv. L. Rev. F.* 103 (Feb. 18, 2015) <https://harvardlawreview.org/2015/02/trading-the-megaphone-for-the-gavel-in-title-ix-enforcement-2/>

⁴⁴ End Violence Against Women International, *Start by Believing*, <http://www.startbybelieving.org/home>

numerous federal grants,⁴⁵ the *Start by Believing* philosophy has been disseminated to law enforcement and other professionals throughout the country, including detectives, criminal investigators, and college administrators.

According to Stuart Taylor and KC Johnson, “campus-training materials are permeated by highly debatable psychological theories, spawned in part by the Obama administration’s directive that Title IX training incorporate information on ‘neurobiological change.’”⁴⁶ Taylor and Johnson report, for example, that Middlebury College’s training urges adjudicators to ‘start by believing’ the accuser:

The training further suggests that in order to be “objective,” investigation reports must not use the word “alleged” before “victim” or “sexual assault” and must avoid concluding a victim’s account is inconsistent, “not believable or credible,” based on “her actions during and after the encounter with the suspect.”⁴⁷

An expert panel consisting of investigators, attorneys, and others analyzed investigative methods such as those endorsed by *Start by Believing*, and concluded these approaches “violate ethical requirements for impartial and honest investigations, are inconsistent with basic notions of fairness and justice, and give rise to wrongful convictions and determinations of guilt.”⁴⁸

In 2016, the Arizona Governor’s *Commission to Prevent Violence Against Women* issued a letter advising Arizona’s criminal justice agencies to reject the investigative methods proposed by *Start by Believing* because their use “creates the possibility of real or perceived confirmation bias.”⁴⁹ The Commission’s letter highlighted the distinction between respecting the victim versus allowing a presumption of guilt to taint the overall criminal justice system:

While investigations and interviews with victims should always be done in a respectful and trauma-informed manner, law enforcement agencies, and other agencies co-located in advocacy centers, are strongly cautioned against adopting *Start By Believing*.⁵⁰

Citing an Iowa case in which a detective testified the *Start by Believing* campaign required him to believe the victim, “no matter what,” the governor’s commission reminded Arizona law enforcement agencies that they must conduct an “un-biased investigation of allegations of sexual assault.”⁵¹

While interviews of complainants should always proceed in a respectful and nonjudgmental manner, investigators must be instructed to refrain from adopting policies like those advocated by the *Start By Believing* campaign.

⁴⁵ EVAWI has received over \$7.5 million in grant funding, mostly from the Department of Justice.

<http://www.evawintl.org/grants.aspx>

⁴⁶ KC Johnson and Stuart Taylor, *supra* note 19.

⁴⁷ *Id.*

⁴⁸ Center for Prosecutor Integrity, *Victim-Centered Investigations Undermine the Presumption of Innocence and Victimize the Innocent: Report of an Expert Panel* (2016) <http://www.prosecutorintegrity.org/wrongful-conviction-day/victim-centered-investigations-undermine-the-presumption-of-innocence-and-victimize-the-innocent-report-of-an-expert-panel/>

⁴⁹ Ray Stern, *Ducey’s Faith Office Assails ‘Start by Believing’ Advocacy Program for Rape Victims*, Phoenix New Times (Dec. 15, 2016). <http://www.phoenixnewtimes.com/news/duceys-faith-office-assails-start-by-believing-advocacy-program-for-rape-victims-8896373>

⁵⁰ *Id.* The Commission’s letter is embedded in the article.

⁵¹ *Id.*

Call to Restore Due Process and Fundamental Fairness

By their very name, their ideology, and the methods they foster, “believe the victim” concepts presume the guilt of an accused. This is the antithesis of the most rudimentary notions of justice. In directing investigators to corroborate allegations, ignore reporting inconsistencies, and undermine defenses, the “believe the victim” movement threatens to subvert constitutionally-rooted due process protections.

Canadian Justice Anne Molloy recently recognized the subversive impact of “believe the victim” policies:

Although the slogan “Believe the victim” has become popularized of late, it has no place in a criminal trial. To approach a trial with the assumption that the complainant is telling the truth is the equivalent of imposing a presumption of guilt on the person accused of sexual assault and then placing a burden on him to prove his innocence. That is antithetical to the fundamental principles of justice enshrined in our Constitution and the values underlying our free and democratic society.⁵²

The undersigned professors and criminal justice experts hereby call upon lawmakers, federal agencies, criminal justice officials, and college administrators to promptly discontinue the use of victim-centered, trauma-informed, and believe the victim practices that threaten to subvert the objective collection and presentation of evidence in administrative, civil, and criminal sexual assault proceedings.

Signed:⁵³

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⁵² *R v. Nyznik, et al.*, Superior Court of Justice, Ontario (Aug. 9, 2017). <https://www.thestar.com/news/gta/2017/08/09/the-acquittal-of-three-cops-accused-of-sexually-assaulting-another-is-a-victory-for-victims-dimanno.html>

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