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Fair Process, Not Criminal Process, Is the Right Way to Address Campus Sexual Assault

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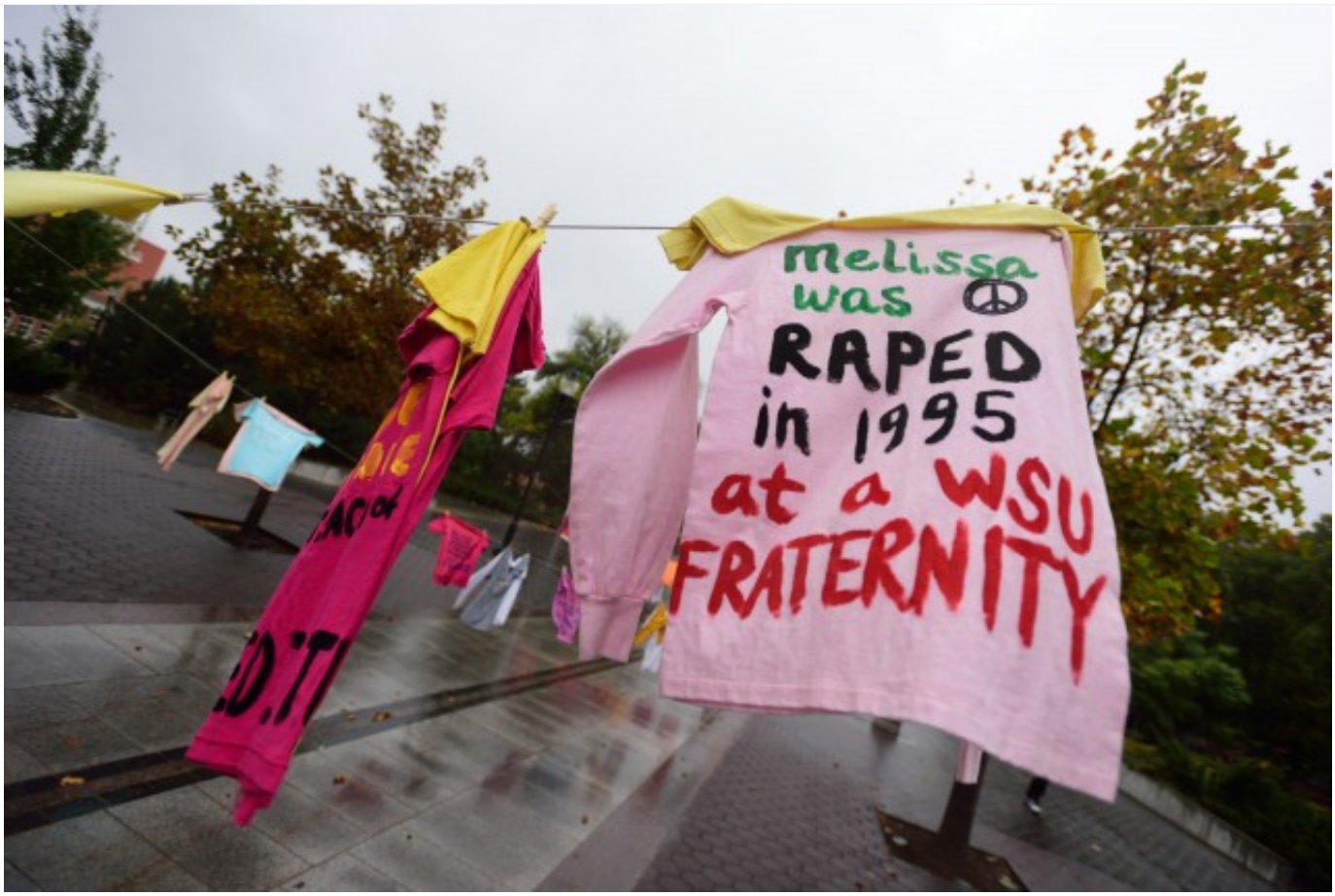
School investigations don't look like trials because they aren't supposed to.



(Photo by Alex Milan Tracy/Sipa USA) (Sipa via AP Images)

The Clothesline Project, pictured at Washington State University' s Glenn Terrell Mall, in Pullman Washington, on October

14, 2014, during the 'Week Without Violence', is a visual display of shirts bearing witness to sexual violence, child abuse, bigotry, family violence and racism, with each shirt representing the personal experience of a survivor or someone who cares for a survivor. WSU was among 55 schools that were investigated earlier in the year for sexual violence and the handling of assault reports. According to the university, ten forcible sex offenses were reported on campus in 2013, six in 2012 and eight in 2011. The White House has cited that one in five female college students are sexually assaulted.

*This article references and responds, in part, to Nancy Gertner's article, "**Sex, Lies and Justice**," from the Winter 2015 issue of* The American Prospect *magazine. Gertner responds to Brodsky, **here**.*

In just a few years, the national conversation about sexual violence on college campuses has shifted from disbelief to an in-depth policy debate about how to respond to gender-based harms in the academic setting. While survivor groups push for meaningful sanctions, and universities struggle to avoid legal liability from all sides, a number of defense-minded advocates have pushed back, calling for schools to reform their internal decision-making to look more like criminal adjudication. Some are defense-minded lawyers, like the 28 Harvard Law professors who published an opinion piece in the *Boston Globe*, among them Nancy Gertner, a retired federal judge I greatly admire, whose **longform essay** on the topic appears in the current issue of *The American Prospect* magazine. Others are “men’s rights activists” who harass campus survivors on Twitter.

As an advocate for campus survivors of sexual violence, and a law student with a background in public defense, I have worried about college’s procedural fairness for both sides, and I’m glad to see this conversation, long discussed among lawyers and activists, reach the opinion pages of mainstream publications. But the criminal law-inspired alternatives some propose are counterproductive, recreating little trials rather than responding to the unique reasons we need Title IX. They ignore that campus assaults are addressed not to vindicate the rights of the state but as part of a **civil rights regime** to promote gender equity in education.

Many critics, rightfully invested in protections for the accused, find this equality-driven approach hard to accept. Their discomfort—almost always focused on university decision-making about rape alone, to the exclusion of other infractions—speaks to the monopoly that the criminal law holds in Americans’ understanding of

responses to gender-based violence. Despite the fact that U.S. civil law has long addressed these harms outside the criminal context, it is difficult to shake the feeling that rape is a matter for criminal courts alone. This narrow vision ignores both the failures of the criminal justice system, to which victims **overwhelmingly** choose **not to report**, and the diversity of harms sexual violence imposes. Rape is not only a crime. It is also a form of discrimination. That's the domain of civil, not criminal, law.

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Public accounts would have you think that the interests of the two parties involved in a dispute are mutually exclusive, with advocates for victims eager for secret councils that automatically brand every accused student a rapist. That's incorrect: the interests are, instead, mutually dependent.

We recognize that the same principle that leads us to fight for students' rights to an education that is free of violence and harassment—that the opportunity to learn is central to individual dignity and social progress—also requires us to take seriously potential suspensions or expulsions of accused students. The effects of an interruption in education can be devastating, whether a student is forced off campus by a rare false allegation of rape against him or (more commonly) because she has been assaulted and doesn't feel safe staying.

Rigorous procedural protections have the additional benefit for all parties of legitimizing the systems being used, so they can't be ridiculed as "kangaroo courts," as many school's disciplinary boards are today. Colleges will get help from students in stopping sexual violence only if their decisions about discipline are accepted by those involved and by the public. Survivors may lose faith in the system if they see it as unfair, as has happened with many crime victims who turn away from the police and criminal courts in the age of mass incarceration and documented police brutality.

The Constitution requires very few procedural protections in university decision-making: The Supreme Court has found that, before a public university can impose serious permanent sanctions, the Fifth Amendment requires only that it provide notice that an offense has been alleged and that it is holding a hearing about the matter. At private institutions, the Constitution requires no procedural protections. That's not nearly enough.

The good news is that the U.S. Department of Education has recognized constitutional protections for accused students are too thin for fair and effective disciplinary systems. Through guidance to universities on how to investigate reports of sexual violence, the department's Office for Civil Rights (OCR) has not only protected survivors but also created the country's most robust regime of procedural rights for their alleged assailants. A student accused of rape, then, is provided far more protections than his classmate accused of plagiarism.

Any continued failures, then, are the fault not of the law but of schools' refusal to follow it. Just as many colleges have long ignored their duties to survivors who report violence, so are some institutions now ignoring the OCR's requirements for accused students. More robust enforcement of Title IX, then, will help students on both sides of an accusation, ensuring protection of both of their rights.

Here are procedural protections every university should provide: In accordance with **OCR guidance**, both accused and accusing students should be informed of their rights, decision-making boards must be informed and impartial, and they must make their decisions in a timely fashion. OCR allows both sides access to lawyers if they can afford it, but schools should go further and, to ensure equal protection regardless of financial means, offer free legal consultation and a specially trained advocate to each student, complainant and respondent. Accused students should be provided with a detailed account of the allegations against them so they can respond in an informed way. Accommodations should be made to ensure respondents also facing criminal charges are not forced to self-incriminate (though, as in civil trials, decision-makers should be allowed to take non-responses into account). Each party should also be able to submit reasonable questions for the adjudicating board to ask the other side. Over

time, as schools refine the systems they are building today, it will become clear that further protections are needed and what they should be.

These campus policy reforms should benefit all involved: I spent much of this fall reading through lawsuits against schools from both respondents and those making sexual assault allegations against them, and often the two sides' procedural complaints were indistinguishable.

However, some critics, like the group of Harvard professors, Koch-funded **libertarian men's groups** and, to a lesser extent, Gertner, want campus decision-making about gender-based violence to look not like other forms of university discipline—which deal with offenses ranging from plagiarism to drug sales in dorms—but more like the criminal justice system. These critics call for gender violence school proceedings run more like trials than today's campus investigations, which sometimes never see both parties in a room together. Rather than private interviews, these critics imagine combative hearings with lawyers, or even the accused students themselves, cross-examining the alleged victims and decision-makers imposing near criminal-level evidentiary burdens.

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But school investigations don't look like trials because they aren't supposed to. Procedural protections run along a sliding scale in American law: The more serious the stakes, the harder we make it to prove a case. For example, civil courts—which can impose fines (and resulting reputational harms) but cannot levy prison sentences—provide fewer procedural protections than criminal courts. Like a civil verdict, an expulsion may be devastating, but does not compare in severity to incarceration. So it makes sense that the American system of justice makes it harder to get a conviction by a criminal jury than a finding of culpability by a university.

And, crucially, where the criminal law seeks to punish, Title IX (the 1972 federal civil

rights statute that forbids sex discrimination in education) seeks to engender equality. Schools are **required to respond** to gender-based violence as part of a broad obligation to promote equality. Title IX demands we value the education of women students (who are more likely to be victimized) just as much as that of their male peers (who are more likely to be victimizers). In a university proceeding under the statute, as in a civil rights trial and not a criminal trial, the victim is a full party to the proceeding and his or her interests are considered just as important as the accused's.

That's why, for example, all civil law responses to gender-based violence use the "preponderance of the evidence" standard for what must be proved by the complaining party. This evidentiary burden is required by sexual harassment and violence law suits under civil rights and tort law; federal agency processing of Title VII claims of harassment and violence in the workplace; prison decision-making under the Prison Rape Elimination Act; and, as required by the Department of Education, university disciplinary investigations.

The department's policy guidance reflects decades of civil law precedent, from a wide range of adjudicators and contexts, about how best to balance the interest in promoting gender equality against the interest in avoiding false findings of responsibility. A preponderance means more than half, so if most of the evidence suggests responsibility, or a lack of it, that's the conclusion the board should make. To do otherwise—to find, for example, that most of the evidence suggests a student raped a classmate, but to find him or her not responsible nonetheless because the decision-making process requires a higher burden of proof—is to value one student's education over the other's.

Gertner worries that other aspects of campus decision-making, compared with a civil trial, are so deficient that the standard requirement for evidence is too low. I agree with the professor that certain campus policies, like entirely excluding lawyers from the process, might stymy a search for truth. But the solution is not to place a bigger evidentiary burden on the alleged victim. Rather, we should solve the problem at its root. And, for *rightful* deviations from the trial-model, there is no need to so "compensate."

The **equality principles** underlying university decision-making also require that a school must take into account an interest criminal courts do not: The victim's physical and psychological safety during the hearing process. Unlike universities, which respond to sexual violence under a broad mandate of combating gender-based discrimination and hostility, the state prosecutes these crimes to vindicate its *own* rights, with little regard for the survivor's desires or feelings. Some proposed school reforms modeled on criminal practice, like providing accused students' (or their lawyers in their presence) the chance to directly question their alleged victim, likely would contribute to the kind of hostile environment that these proceedings are supposed to remediate. Schools have a responsibility to make sure that victims don't need to live or study or even speak with their assailants. Their investigations should not create the very situations they were charged to prevent, nor dissuade survivors from coming forward.

Schools, then, should continue to innovate, trying solutions that balance these interests like asking accused students to provide written questions to later be asked of the complainant by the board. They can also allow complaining students to answer directed questions in a written statement, analogous to written depositions outlined in the Federal Rules of Civil Procedure.

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Some critics, I believe, are so focused on the criminal justice system in their professional and academic lives that they fail to appreciate in the full the different goals and consequences of campus disciplinary hearings. I also worry that, for some but not all, this devotion to the criminal law response suggests a subtle misogyny that many focusing on this issue have internalized. No one cries foul when a student is expelled for cheating on an exam based on the preponderance of the evidence. Yet many mourn the lost "bright futures" of classmates accused of rape. And they insist that accusations of gender-based violence, and only gender-based violence, be put to the test of the criminal justice system. In doing so, they invoke old, insidious myths about the woman who "cries rape," found everywhere from the Bible to the Model Penal Code. Why do we think an accusation of sexual assault is any more likely to be

false than an accusation of a punch in the face? The answer necessarily lies in the differing confidence placed in different kinds of victims—and there is a special skepticism reserved for anyone who claims to have been raped.

Virtually everyone supports equality in education for men and women, as required by Title IX. But that equality requires placing survivors and their assailants on a level field – which current campus procedures try to do and criminal law-inspired proposals would not. Equality requires that students who report sexual violence be regarded as equally trustworthy as the students they accuse, and that their futures be considered just as bright.

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