

**WHITE PAPER**

**‘Believe the Victim:’  
The Transformation of Justice**



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‘Let the jury consider their verdict,’ the King said, for about the twentieth time that day.  
‘No, no!’ said the Queen. ‘Sentence first—verdict afterwards.’  
‘Stuff and nonsense!’ said Alice loudly. ‘The idea of having the sentence first!’  
‘Hold your tongue!’ said the Queen, turning purple.  
‘I won’t!’ said Alice.  
‘Off with her head!’ the Queen shouted at the top of her voice.

— *Lewis Carroll, Alice’s Adventures in Wonderland*

The guarantee of “due process” afforded by the U.S. Constitution entitles citizens to certain procedures which limit the government’s arbitrary infringement on their fundamental rights, such as the rights to life, liberty, and property.

Supreme Court Justice Felix Frankfurter once wrote that the history of American freedom is, in no small measure, following fair procedures — which means enforcing the guarantee of due process. Without due process for those we hate and fear — even those whose guilt is obvious — we will all lose our freedoms.<sup>1</sup>

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. This system of truth-seeking and imposition of appropriate sanctions rests on the discovery and production of evidence that is accurate, relevant, adequate, and unbiased.

The need to assure due process rights are respected has generated ethical codes that mandate law enforcement professionals exercise diligence, integrity, and impartiality in the conduct of criminal investigations:

- International Association of Chiefs of Police, Canons of Police Ethics: “The law enforcement officer shall be concerned equally in the prosecution of the wrong-doer and the defense of the innocent. He shall ascertain what constitutes evidence and shall present such evidence impartially and without malice.”<sup>2</sup>
- World Association of Detectives: “We will be faithful and diligent in carrying out assignments entrusted to us, and to determine the true facts and render honest, unbiased reports in reference thereto.”<sup>3</sup>
- National Association of Legal Investigators: The investigator “Will make all reporting based upon truth and fact and will only express honest opinions based thereon.”<sup>4</sup>
- Council of International Investigators: Members agree to “conduct myself in my profession with honesty, sincerity, integrity, fidelity, morality and good conscience in all dealings with my clients.”<sup>5</sup>

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<sup>1</sup> 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/>

<sup>2</sup> International Association of Chiefs of Police, *Article 10 of the Canons of Police Ethics* (1957).  
<http://ethics.iit.edu/ecodes/node/3352>

<sup>3</sup> World Association of Detectives, *Code of Ethics* <http://www.wad.net/code-of-ethics>

<sup>4</sup> National Association of Legal Investigators, *Code of Ethics* <http://nalionline.org/become-a-member/code-of-ethics/>

<sup>5</sup> Council of International Investigators, *Code of Ethics* <http://www.cii2.org/code-of-ethics>

Ascertainment of truth is the central challenge of any system that adjudicates claims of wrongdoing. Each of the four codes of ethics cited above emphasize that a law enforcement professional must remain neutral in the search for truth. A leading criminal justice textbook likewise reinforces the vital importance of neutrality: “Investigators do not determine the suspects to be guilty; they remain objective in their investigation. The investigator seeks the truth, not simply proof of the suspect’s guilt.”<sup>6</sup>

It is therefore alarming that the neutrality central to these ethical codes has become eroded over the last decade in favor of the insistence that the investigator initiate an investigation by believing anyone who claims to have been a victim of sexual assault or harassment. This movement to assume the truth of such allegations is infiltrating the criminal justice system and institutions of higher education.

### Origins of the “Believe the Victim” Movement

In early years, the trauma of an adult sexual assault victim often was discounted.<sup>7</sup> Beginning in the 1970s, experts began to recognize the psychological harm suffered by sexual assault victims.<sup>8</sup> In the context of psychological treatment, the need for the therapist to believe the client claiming to be a victim was necessary and appropriate.

By the early 1990s, women’s groups began to call for “swift and unquestioning judgments about the facts of harassment without standard evidentiary procedures with the chant ‘always believe the victim.’”<sup>9</sup> As a result, law enforcement investigators were increasingly encouraged to “reassure the victim that he or she will not be judged and that the complaint will be taken seriously.”<sup>10</sup> The rationale for this shift is the generally accepted belief that complainants who are disbelieved not only suffer additional trauma, they are also less likely to report their assault.<sup>11</sup>

These developments laid the foundation for a “believe the victim” approach to law enforcement investigations. This prioritization of belief over truth is actualized by three interrelated investigative practices, each of which is discussed in detail below:

1. Start by Believing
2. Trauma-Informed Investigations
3. Victim-Centered Investigations

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<sup>6</sup> Karen M. Hess, Christine Hess Orthmann & Henry Lim Cho, *Introduction to Law Enforcement and Criminal Justice*, Cengage Learning, Chapter 7: Specialized Roles of Police, at 255.

<sup>7</sup> *Id.* at 22-23, 27 (PDF).

<sup>8</sup> [Joanna Bourke](#), *Sexual Violence, Bodily Pain, and Trauma: A History*, *Theory, Culture and Society*, 29(3); 25-31, 20, (May 1, 2012).

<sup>9</sup> 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, Constructing Meaningful Dialogue on Difference: Feminism and Postmodernism in Anthropology and the Academy. Part 1 (Apr., 1993), pp. 88.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> IACP National Law Enforcement Policy Center, *Investigating Sexual Assaults: Concepts and Issues Paper*, (July 2005), <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=328>

## Start By Believing

In 2006, End Violence Against Women International (EVAWI) published *Effective Report Writing: Using the Language of Non-Consensual Sex*,<sup>12</sup> which laid the groundwork for its 2011 *Start by Believing* campaign. The 2006 publication was intended to prepare “law enforcement professionals to investigate sexual assault cases” with the specific goal of a “successful prosecution.”<sup>13</sup>

To achieve that goal, the *Effective Report Writing* document discouraged investigators from using words that have the potential, in the language of the report, to “convey positive, mutual interactions” such as “sexual intercourse,” “oral sex” when documenting sexual assault accounts, in favor of words such as “rape” and “sexual assault,” which more clearly specify the alleged assault was nonconsensual.<sup>14</sup>

Encouraging investigators to move beyond the traditional role of neutral fact finder, EVAWI’s *Effective Report Writing* manual also urged that investigative reports be written to “successfully overcome” sexual assault defense strategies.<sup>15</sup> Nowhere in the document is the investigator advised to identify or explore inconsistencies in the complainant’s statements or evidence, a key strategy used by investigators to validate investigative findings. Indeed, the manual ascribes many past inconsistencies in witness statements not to the possible falsity of reports, but rather to investigator errors in documentation.<sup>16</sup>

In 2011, EVAWI launched a campaign dubbed *Start by Believing*, ambitiously describing its goal as a “global campaign transforming the way we respond to sexual assault.”<sup>17</sup> Funded by millions of dollars in grants from the Department of Justice’s (DOJ) Office of Violence Against Women,<sup>18</sup> the *Start by Believing* philosophy has been disseminated to law enforcement and other professionals throughout the country, including detectives, criminal investigators, and college administrators.

### *Analysis: From Neutral Fact-Finder to Advocate*

Despite EVAWI’s attempts to explain how the presumption of *Start by Believing* can coexist with an investigator’s ethical responsibility to conduct a fair, impartial, and thorough investigation,<sup>19</sup> the latter appears to be of only secondary importance in EVAWI publications. For example, five problematic themes permeate the *Effective Report Writing* manual:

1. *The investigator is an agent of the prosecutor, not an independent fact-finder.*

Though the *Effective Report Writing* manual reassures readers that “law enforcement professionals must conduct a thorough investigation,” that reassurance is undercut by its

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<sup>12</sup> EVAWI, *Effective Report Writing: Using the Language of Non-Consensual Sex* (Feb. 2006).

<http://olti.evawintl.org/images/docs/REPORT%20WRITING%205-15-12.pdf>

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.* at 12-13.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.* at 23.

<sup>17</sup> EVAWI, <http://www.startbybelieving.org/home>

<sup>18</sup> To date, EVAWI has received over \$7.5 million in grant funding, mostly from the Department of Justice.

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

<sup>19</sup> EVAWI *Training Bulletin: Start by Believing; Participation of Criminal Justice Professionals*, (September 2016), <http://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=789>

instruction that the report needs to “support the charges filed,”<sup>20</sup> and not only anticipate, but also include “the information necessary to undermine” “potential defense strategies.”<sup>21</sup>

2. *All allegations are true and a complainant should always be regarded as a “victim.”*

The pro-conviction, pro-victim orientation of EVAWI’s 2006 manual and other documents is evident in EVAWI’s choice of terminology: the words “alleged,” “complainant,” or “accuser” never appear. In contrast, “victim” appears literally *hundreds* of times in its 34-page *Effective Report Writing* manual.

3. *The investigator should discount the possibility of a false allegation.*

The *Effective Report Writing* manual instructs investigators to focus on “suspect” and witness statements “that corroborate the victim’s account.”<sup>22</sup> The investigator is urged to document “suspect statements, especially those that corroborate the victim’s account or provide an implausible or even absurd version of reality.”<sup>23</sup> There is no mention of the possibility of misleading, exaggerated, or false statements made by a complainant or other witnesses.

4. *Inconsistencies occur rarely, and when they do, they should not be interpreted as evidence of a false claim.*

The *Effective Report Writing* manual advises that “investigators can minimize the risk of contradiction by not writing a detailed report for any victim or witness who has already provided a detailed, written summary of events.”<sup>24</sup> Should there be inconsistencies in witness or defendant statements, investigators should highlight only those that “corroborate [] the victim’s statement.”<sup>25</sup>

5. *Exculpatory statements provided by the suspect have little bearing on the findings of the investigative report.*

The *Effective Report Writing* document focuses on methods by which a suspect’s defenses may be undermined. For example, much attention is devoted to counteracting any evidence that supports the defendant’s “virtually inevitable” consent defense,<sup>26</sup> pointing out that a suspect’s descriptions of how a complainant may have manifested consent are “clearly based only on their own self-serving ideas and not a realistic understanding of how people really behave.”<sup>27</sup> The manual even suggests “making sure” the incident does “not look like a consensual sexual experience,”<sup>28</sup> by making the complainant “appear more innocent,” or by including details about the complainant’s feelings during the incident, as though the

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<sup>20</sup> EVAWI *Effective Report Writing*, at 4.

<sup>21</sup> EVAWI *Effective Report Writing*, at 4, 26.

<sup>22</sup> EVAWI *Effective Report Writing*, at 3, 19.

<sup>23</sup> EVAWI *Effective Report Writing*, at 3.

<sup>24</sup> EVAWI *Effective Report Writing*, at 30.

<sup>25</sup> EVAWI *Effective Report Writing*, at 20.

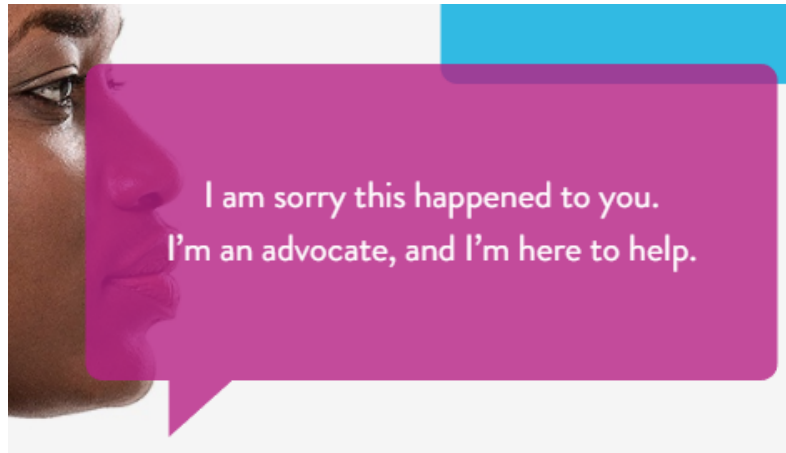
<sup>26</sup> EVAWI *Effective Report Writing*, at 11,19.

<sup>27</sup> EVAWI *Effective Report Writing*, at 21.

<sup>28</sup> EVAWI *Effective Report Writing*, at 14.

complainant's innocent appearance or subjective feelings should be relevant to the existence of consent.<sup>29</sup>

EVAWI's *Start by Believing* campaign carries these five problematic themes to the next logical step, admonishing persons to embrace the role of advocate and support person: "I am sorry this happened to you. I'm an advocate, and I'm here to help," the EVAWI home page advises investigators and other law enforcement officials:<sup>30</sup>



*Criticisms: "Strongly cautioned against adopting Start By Believing"*

EVAWI's *Start by Believing* campaign has not escaped criticism. After all, it threatens the long established principle that investigators must remain neutral throughout their investigation and assess the credibility of the complainant at its conclusion, rather than tossing out neutrality at the start and pursuing only evidence designed to "support the charges filed"<sup>31</sup> and "undermine" defense strategies.<sup>32</sup>

On October 4, 2016, an expert panel consisting of investigators, attorneys, and other experts analyzed investigative methods such as those endorsed by the *Start by Believing* campaign, 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."<sup>33</sup>

In November 2016, 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."<sup>34</sup> The Commission's letter explained the distinction between respecting the

<sup>29</sup> EVAWI *Effective Report Writing*, at 11.

<sup>30</sup> EVAWI, <http://www.startbybelieving.org/home>

<sup>31</sup> EVAWI *Effective Report Writing*, at 4.

<sup>32</sup> EVAWI *Effective Report Writing*, at 4, 26.

<sup>33</sup> Center for Prosecutor Integrity, *Victim-Centered Investigations Undermine the Presumption of Innocence and Victimize the Innocent: Report of an Expert Panel* (Oct. 4, 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/>

<sup>34</sup> 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>

victim as a response to reported assault versus allowing a presumption of guilt to taint the criminal justice system:

The *Start By Believing* campaign is most appropriate for non-criminal justice agencies and others not involved in the 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*.<sup>35</sup>

The governor's office cited a case in Iowa where a detective testified the *Start by Believing* campaign required him to believe the victim, "no matter what."<sup>36</sup> The prosecutor in the case later explained that the *Start by Believing* verbiage "is what's killing everybody in court."<sup>37</sup> Instead, the governor's commission urged that law enforcement conduct an "un-biased investigation of allegations of sexual assault."<sup>38</sup>

### Trauma-Informed Investigations

A second offspring of "believe the victim" ideology is the emergence of trauma-informed investigative practices. In 2013, the Campus SaVE Act was enacted as part of the reauthorization of the Violence Against Women Act (VAWA). The Campus SaVE Act required schools to "develop, expand, and strengthen victim-centered investigations" and to provide services and training that address "the emotional, cognitive, and physical effects of trauma."<sup>39</sup>

The "trauma-informed" approach instructs investigators and adjudicators to consider the impact of trauma on the complainant's physical, emotional, and cognitive reactions to an incident. Proponents claim the trauma of a sexual violation can provoke a disabling physiological response that explains the lengthy delays before the complainant reports the incident to police, as well as gaps and inconsistencies in his or her recall of the details of the alleged assault.<sup>40</sup>

Rebecca Campbell, PhD, long-time victims' advocate and psychology professor at Michigan State University, has done much of the work to popularize the concept of trauma-informed investigations. Campbell has authored numerous publications<sup>41</sup> and made various presentations<sup>42</sup> to professional and academic audiences across the country. Subsequently, other groups in the

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<sup>35</sup> *Id.* The Commission's letter is embedded in the article.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Violence Against Women Reauthorization Act of 2013, at 32. <https://www.gpo.gov/fdsys/pkg/BILLS-113s47enr/pdf/BILLS-113s47enr.pdf>.

<sup>40</sup> Emily Yoffe, *The Bad Science Behind Campus Response to Sexual Assault*, The Atlantic (2017). <https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211/>

<sup>41</sup> Campbell, R., Shaw, J., & Fehler-Cabral, G. (in press). Evaluation of a victim-centered, trauma-informed victim notification protocol for untested sexual assault kits (SAKs). *Violence Against Women*. See also Shaw, J.L., Campbell, R., Cain, D., & Feeney, H. (in press). Beyond surveys and scales: How rape myths manifest in sexual assault police records. *Psychology of Violence*.

<sup>42</sup> Campbell, R. (2014, May). Invited Talk: Bridging research & practice: A trauma-informed campus response to sexual violence. Loyola University, Chicago, IL. See also, Campbell, R. (September 2016). Invited Talk. The neurobiology of sexual assault. National Institute of Justice, Sexual Assault Policy Symposium, Washington, DC.



“believe the victim” movement have incorporated trauma-informed concepts into their publications and training materials.

In its 2016 bulletin, *Understanding the Neurobiology of Trauma and Implications for Interviewing Victims*, EVAWI endorsed many of Campbell’s claims.<sup>43</sup> The bulletin identifies physiological responses suffered by victims of sexual assault such as dissociation and “tonic” or “collapsed” immobility, and claims that a victim’s memory of an assault may become fragmented due to the manner in which memories are encoded.

Without citing any research to buttress its claims, EVAWI’s *Neurobiology of Trauma* bulletin explains why a complainant may make inconsistent statements and sternly warns that “it is critical to understand that victims are not lying or deliberately ‘making things up.’”<sup>44</sup>

Unfortunately, when victims do not know the answer to a question, they often feel ashamed of not being able to make a useful contribution to the investigation. They may even feel that they failed the investigator, or worse, that they failed themselves. As a result, many victims “fill in” gaps in their memories based on what they think (must have) happened or even imagined happened as they strain to recall what the investigator is asking for.<sup>45</sup>

In other words, trauma-informed proponents caution investigators to not base doubts concerning a complainant’s credibility on gaps or inconsistencies in the complainant’s recall of the event or counterintuitive behavioral responses. These advocates not only recommend disregarding such inconsistencies or behavioral anomalies, they interpret them as evidence of psychological trauma. Illogically, this interpretation precludes any consideration of incongruous statements or behavior as evidence, resulting in an irrefutable circular argument:

- We must assume the ‘victim’ suffered a sexual assault,
- The trauma of the assault caused the ‘victim’s’ fragmented or loss of memory,
- The ‘victim’s’ fragmented or loss of memory resulted in inconsistent testimony,
- Inconsistencies in the ‘victim’s’ testimony are proof the ‘victim’ was traumatized,
- The ‘victim’s’ inconsistencies due to trauma are therefore evidence the assault occurred.

*Analysis: ‘Junk science’*

Credible research points to the commonsense notion that someone who experiences a traumatic, life-threatening sexual assault can respond in a variety of ways. He or she may or may not react in the same manner as others, may or may not be withdrawn and quiet, and may recall the various details of the incident in different ways. Furthermore, inconsistencies in a complainant’s statements may indicate the excessive ingestion of alcohol, or may be suggestive of a mistaken allegation.

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<sup>43</sup> EVAWI, *Understanding the Neurobiology of Trauma and Implications for Interviewing Victims* (Nov. 2016). <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=842>

<sup>44</sup> *Id.* at 25.

<sup>45</sup> *Id.* at 25.

According to the widely recognized General Adaptation Syndrome, short-term stress enhances, rather than impedes, performance.<sup>46</sup> Richard McNally, a Harvard psychology professor and expert on trauma and memory, notes that much of the neuroscience research does not support Dr. Campbell's claims. In his book *Remembering Trauma*, McNally cites research that shows how extreme stress may actually enhance the subsequent recall of life-threatening incidents.<sup>47</sup>

Elizabeth Loftus, psychology professor at UC Irvine, takes the concern a step further. She warns that when dealing with alcohol-induced memory fragmentation, attempts to reconstruct events are "very vulnerable to post-event suggestion."<sup>48</sup> Often in campus cases one or both parties were under the influence of alcohol at the time of the alleged incident. Thus, if the investigator exhibits bias when interviewing the complainant, it may result in an "exaggerated, or even entirely false" statement, Loftus explains.

Journalist Emily Yoffe notes the repercussions 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.<sup>49</sup>

One professor who has identified these problems is Harvard law professor Janet Halley, who has ridiculed the trauma-informed training used at her university. She notes the materials provided a "sixth grade level summary of selected neurobiological research" and was "100% aimed to convince them to believe complainants, precisely when they seem unreliable and incoherent."<sup>50</sup>

### **Victim-Centered Investigations**

Victim-centered investigations are the third type of investigative method generated by the "believe the victim" ideology. As discussed above, the 2013 Campus SaVE Act includes a provision to "develop, expand, and strengthen victim-centered investigations."<sup>51</sup>

The term "victim-centered" was originally used in the context of human trafficking relief programs,<sup>52</sup> and later came to be applied to sexual assault investigations. This section reviews the products of four groups that espouse victim-centered approaches:

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<sup>46</sup> Hans Selye, *The physiology and pathology of exposure to stress: A treatise based on the concepts of the general-adaptation-syndrome and the diseases of adaptation*. (1950)

<sup>47</sup> Richard McNally, *Remembering Trauma*, President and Fellows of Harvard College, at 180 (2005).

<sup>48</sup> Quoted in Emily Yoffe, *The Bad Science Behind Campus Response to Sexual Assault*, The Atlantic (2017). <https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211/>

<sup>49</sup> *Id.*

<sup>50</sup> 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/>

<sup>51</sup> Violence Against Women Reauthorization Act of 2013, at 32. <https://www.gpo.gov/fdsys/pkg/BILLS-113s47enr/pdf/BILLS-113s47enr.pdf>.

<sup>52</sup> Office of Justice Programs, *Human Trafficking Task Force e-Guide* <https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/>; Department of Homeland Security, *A Victim Centered Approach* <https://www.dhs.gov/blue-campaign/victim-centered-approach>

1. Margolis Healy
2. University of Texas School of Social Work
3. Human Rights Watch
4. Police Executive Research Forum

### 1. Margolis Healy

The first known application of the “victim-centered” concept in the sexual assault context can be seen in a 2012 presentation by the higher education consulting firm Margolis Healy. Echoing the same concepts as EVAWI’s *Effective Report Writing* manual, Margolis Healy’s PowerPoint presentation repeatedly use the words “victim” instead of “complainant.” One of the slides from the presentation is shown here:<sup>53</sup>



The Margolis Healy presentation does not provide a rationale for only focusing on the “offender’s” behavior, nor does it explain why it refers to the accused as an “offender.”

### 2. Human Rights Watch

In 2013 Human Rights Watch (HRW) published *Improving Police Response to Sexual Assault* which recommends that law enforcement detectives utilize “victim-centered” methods when conducting sexual assault investigations.<sup>54</sup> According to HRW’s report, a “victim-centered” investigation assumes “that all sexual assault cases are valid unless established otherwise by investigative findings.”<sup>55</sup>

The HRW report:

- Uses the word “victim” 350 times, according to a computer word search, while neutral descriptors such as “alleged,” “complainant,” or “accuser” do not appear once.

<sup>53</sup> Margolis Healy, Title IX Investigations. Slide 28 (2012). <http://www.prosecutorintegrity.org/wp-content/uploads/2016/05/Margolis-Healy-VCI-presentation.docx>

<sup>54</sup> Human Rights Watch, *Improving Police Response to Sexual Assault* (2013).

[https://www.hrw.org/sites/default/files/reports/improvingSAInvest\\_0.pdf](https://www.hrw.org/sites/default/files/reports/improvingSAInvest_0.pdf)


<sup>55</sup> *Id.* at 23.

- Recommends reassuring the complainant with such statements as “I believe you” or “something” surely happened.<sup>56</sup>
- Instructs police officials that inconsistencies in complainant statements are not evidence of a false report.
- Endorses trauma-informed concepts: “Training in the effects of trauma on memory can help officers understand that these are not causes for suspicion and that inconsistencies should not be confused with a false report.”<sup>57</sup>

### 3. University of Texas School of Social Work

The University of Texas School of Social Work published in 2016 a *Blueprint for Campus Police*.<sup>58</sup> The 170-page *Blueprint* instructs officials to “avoid repeating a detailed account of prior interview statements and instead only record in detail the new information” in subsequent interviews.<sup>59</sup>

Similar to EVAWI’s *Effective Report Writing* manual, the *Blueprint* recommends that investigators seek to anticipate defensive strategies, devoting an entire table to detailing the types of evidence that should be collected to counter various types of defense.<sup>60</sup> This is an excerpt from the table titled, “Evidence Needed by Type of Anticipated Defense:”

 Table 7.3 Evidence Needed by Type of Anticipated Defense

Type of Defense	Evidence Needed
Denial	<ul style="list-style-type: none"> <li>• Seminal fluid collected from body of victim or their clothing</li> <li>• Evidence of spermicide or lubricants</li> <li>• Additional evidence of the reported sexual act by swabbing any areas of the body kissed, sucked, or bitten by suspect</li> <li>• Use of colposcope to magnify and document evidence of genital micro-trauma</li> <li>• Forensic examination of suspect for evidence of transfer from victim’s body such as vaginal fluid or cells, spermicide or lubricant</li> <li>• In gang rape, transfer of bodily fluid between suspects</li> </ul>

A second table, “Anticipating Defense Strategies in the Written Report,” describes how to draft the written report:

<sup>56</sup> *Id.* at 5.

<sup>57</sup> *Id.* at 20.

<sup>58</sup> Busch-Armendariz, N.B., Sulley, C., & Hill, K. (2016). *The Blueprint for campus police: Responding to sexual assault*. Austin, TX: Institute on Domestic Violence & Sexual Assault, The University of Texas at Austin, Table 7.4 “Anticipating Defense Strategies in the Written Report,” <https://utexas.app.box.com/v/blueprintforcampuspolice>

<sup>59</sup> *Id.* at Table 7.4.

<sup>60</sup> *Id.* at Table 7.3.

✿ Table 7.4 Anticipating Defense Strategies in the Written Report<sup>17</sup>

Defense Strategy	Definition	Prevention Strategies
Impeachment by Omission	When the defense undermines the credibility of the prosecution by pointing out that some fact was provided in a statement by the victim, witness, or suspect (or other evidence), but it was not documented in the police report.	<ul style="list-style-type: none"> <li>• Include all evidence required to prove the elements of the offence in the report,</li> <li>• Anticipate likely defense strategies and include the information to counter them,</li> <li>• Avoid short and vaguely written reports,</li> <li>• Include documentation on other suspects and investigative leads and how and why they were eliminated from consideration.</li> </ul>

The *Blueprint* discusses factors that are traditionally suggestive of innocence, and interprets them as indicative of guilt:

- “The alleged perpetrator knows what happened and therefore, appears to make more sense, which can be mistaken for credibility.”<sup>61</sup>
- “Studies have consistently shown that detecting deception is difficult, so officers may not realize when a perpetrator is lying.”<sup>62</sup>

The *Blueprint* also endorses trauma-informed concepts:

- “Trauma victims often omit, exaggerate, or make up information when trying to make sense of what happened to them or to fill gaps in memory. This does not mean that the sexual assault did not occur.”<sup>63</sup>

#### 4. Police Executive Research Forum

In 2016 the Police Executive Research Forum published *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence: A Roundtable Discussion*.<sup>64</sup> The report commends the use of the “victim-centered approach,” which is described as handing “control of the process back to the victim.”<sup>65</sup>

The manual indicates that “a victim may choose to have a sexual assault advocate report on their behalf.”<sup>66</sup> The *Roundtable Discussion* report goes so far as to state the complainant has the “right to request certain investigative steps not be conducted”<sup>67</sup> – see screen shot:

17. Investigators will collaborate with victims during the investigative process and respect a victim’s right to request certain investigative steps not be conducted.

<sup>61</sup> *Id.* at 97.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 90.

<sup>64</sup> Police Executive Research Forum, *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence: A Roundtable Discussion* (2016) <https://ric-zai-inc.com/Publications/cops-w0796-pub.pdf>

<sup>65</sup> *Id.* at 9.

<sup>66</sup> *Id.* at 12.

<sup>67</sup> *Id.* at 13.

Consistent with other documents of this genre, the report repeatedly uses the word “victim” instead of “complainant.” The document makes repeated claims about “gender bias,” but does not cite any research that compares the law enforcement experiences of male and female victims of domestic violence.

*Analysis: “Ideological Regimens”*

The four documents discussed above echo the same themes laid out in EVAWI’s seminal *Effective Report Writing* manual. They dismiss the possible exculpatory effect of a complaint’s inconsistent claims and urge the investigator to approach the job by assuming “something” must have occurred.

Regarding the Margolis Healy training materials, the admonition that “‘He said, she said’ becomes ‘he said, they said’” suggests that the investigator should attempt to collect numerous witness statements supportive of the accuser’s claims, but minimize the collection of statements that could be seen as exculpatory in nature.

The Human Rights Watch document, produced by an organization with the stated mission of protecting and promoting the human rights of all persons, incongruously advocates for investigative approaches that could well serve to eliminate the presumption of innocence during the adjudication of the case.

The University of Texas *Blueprint* goes further, providing detailed instructions to investigators how to alter the types of evidence collected and the contents of their investigative report based on suppositions about potential defense strategies.

The Police Executive Research Forum *Roundtable Discussion* makes recommendations that could well be characterized as “extreme” in its victim-orientation, instructing the investigator to hand “control of the process back to the victim.” The report issues vague generalizations without providing any scientific reference, e.g., “There is a perception that law enforcement officers can hold bias against vulnerable populations such as LGBT individual; racial, ethnic, or religious minorities; immigrants; and sex workers.”<sup>68</sup>

A former police lieutenant satirically observed that the Police Executive Research Forum document ...

represents a radical departure from the usual method of police detective work and violates ethical codes to conduct investigations in an impartial manner. If the complainant is in control of the investigation, how will officers be able to conduct an unbiased investigation and reach the probable cause standard to decide whether an arrest should be made? How can there be a fair and unbiased investigation when this victim centered policy demands the officers ignore standard law enforcement procedures concerning investigations?<sup>69</sup>

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<sup>68</sup> *Id.* at Letter from the Director.

<sup>69</sup> Richard Davis, *Victim Centered Investigations: COPS/PERF Report Gets It All Wrong* (November 14, 2016). <http://www.saveservices.org/2016/11/victim-centered-investigations-copsperf-report-gets-it-all-wrong/>

The use of victim-centered investigations in university settings has been roundly criticized:

- A Federalist Society report warns, “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.”<sup>70</sup>
- The Heritage Foundation similarly cautioned, “Extreme care must be taken to avoid having either investigators or members of a tribunal with preconceived biases or conflicts of interest.”<sup>71</sup>
- The Association of Title IX Administrators, a leading Title IX training provider, has recognized that some Title IX investigators have taken victim-centered investigations too far, thereby placing their “thumb on the scale” on the side of guilt.<sup>72</sup>

Numerous individuals have criticized the victim-centered approach, as well.<sup>73</sup> Samantha Harris of the Foundation for Individual Rights in Education notes, “An investigator who is trying to anticipate and counter defense strategies in the course of his/her investigation is not acting as a neutral fact-finder — that is, someone who is trying to find out what actually happened.”<sup>74</sup>

KC Johnson and Stuart Taylor highlight the ideology that undergirds victim-centered approaches:

[T]he ideological regimes used on many campuses are designed more to stack the deck against accused students than to ensure a fair inquiry. The risk of injustice is enhanced by the fact that, to the best of our knowledge, no school discloses the contents of its training materials to accused students before commencing the disciplinary process. The contrast between this training regime and the instructions given by judges to jurors in criminal trials—most obviously, that they should presume defendants innocent until proven guilty—is stark.<sup>75</sup>

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<sup>70</sup> H. Bader, et al., *A Review of Department of Education Programs: Transgender Issues, Racial Quotas in School Discipline, and Campus Sexual Assault Mandates*, released by the Regulatory Transparency Project of the Federalist Society, (Sept. 12, 2017) <https://regproject.org/wp-content/uploads/RTP-Race-Sex-Working-Group-Paper.pdf>.

<sup>71</sup> Hans von Spakovsky, *Campus Sexual Assault: Understanding the Problem and How to Fix It*, The Heritage Foundation (July, 25, 2017) <http://www.heritage.org/crime-and-justice/report/campus-sexual-assault-understanding-the-problem-and-how-fix-it>

<sup>72</sup> ATIXA, *The ATIXA Playbook*, at 56 (2017) <https://atixa.org/wordpress/wp-content/uploads/2017/04/The-ATIXA-Playbook-Final-Electronic-Version.pdf>

<sup>73</sup> SAVE, *Believe the Victim Investigations: A ‘near-religious’ teaching* (2016) <http://www.saveservices.org/sexual-assault/investigations/>

<sup>74</sup> Samantha Harris, *University of Texas ‘Blueprint’ for Campus Police Raises Fairness Concerns*, Foundation for Individual Rights in Education, (March 11, 2016). <https://www.thefire.org/university-of-texas-blueprint-for-campus-police-raises-fairness-concerns/>.

<sup>75</sup> 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>

The widespread use of victim-centered investigations in the college setting has given rise to numerous lawsuits by accused students.<sup>76</sup> Given the admonition to “focus on offender behavior – not victim behavior,”<sup>77</sup> it is not surprising that these lawsuits often allege incomplete or inadequate collection of evidence. In one notable decision, District Court Judge F. Dennis Saylor scolded the university for its careless use of the word “victim:” “Whether 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.”<sup>78</sup>

### **Conclusion: ‘Queen of Hearts’ Justice**

Sexual assault is an under-reported offense, as are many crimes.<sup>79</sup> The “believe the victim” movement commendably seeks to improve reporting, and promotes respectful treatment of persons who report sexual assault crimes. But the crusade has its downsides.

#### *Implausible Allegations of Bias*

From the beginning, the “believe the victim” movement has been hampered by a questionable scientific foundation. Proponents make sweeping pronouncements about neuroscience and its application to victim behavior with little or no supporting research. But these studies, crafted from an advocacy perspective, typically do not:

- Analyze why half of all complainants rated their experience with the legal system in a positive light.<sup>80</sup>
- Account for the fact that the complainant’s dissatisfaction could be at least partly explained by the inherent unpleasantness of discussing the details of a recent traumatic experience, or by the mundane necessity of conducting a thorough interview.
- Indicate whether the detectives worked for specialized sexual assault units, or explain whether the office had received a training grant under the Violence Against Women Act.

One of the underlying themes supporting victim-oriented practices is a belief in systematic “gender bias,” in the criminal justice system, a claim that many who work there would dispute. In the current era, many sexual assault investigators are female and unlikely to be guilty of “gender bias.”

The claim of systemic sex bias against women is further repudiated by the *National Intimate Partner and Sexual Violence Survey*,<sup>81</sup> which found that male victims of partner violence, sexual assault, or stalking are substantially less likely to have positive experiences in their dealings with police, compared to female victims:

<sup>76</sup> 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>

<sup>77</sup> Margolis Healy, Title IX Investigations, Slide 28. (2012) <http://www.prosecutorintegrity.org/wp-content/uploads/2016/05/Margolis-Healy-VCI-presentation.docx>

<sup>78</sup> John Doe v. Brandeis University, *Memorandum and Order on Defendant’s Motion to Dismiss*, J. Saylor (March 31, 2016).

<sup>79</sup> Department of Justice, *Victimizations Not Reported to the Police*, Table 1 (2012). <https://www.bjs.gov/content/pub/pdf/vnrp0610.pdf>

<sup>80</sup> Rebecca Campbell, *The Psychological Impact of Rape Victims’ Experiences with the Legal, Medical, and Mental Health Systems*. *American Psychologist* (2008). <http://psycnet.apa.org/fulltext/2008-15778-022.pdf>

<sup>81</sup> [https://www.cdc.gov/violenceprevention/pdf/cdc\\_nisvs\\_ipv\\_report\\_2013\\_v17\\_single\\_a.pdf](https://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_ipv_report_2013_v17_single_a.pdf)



**Table 7.2**  
**Degree of Helpfulness of Various Sources among those Who Disclosed Lifetime Rape, Physical Violence, or Stalking by an Intimate Partner — NISVS 2010**

	Very (%)	Somewhat (%)	A little (%)	Not at all (%)
<b>Women</b>				
Police	36.5	22.2	14.2	33.7
<b>Men</b>				
Police	21.0	17.8	13.1	52.0

*“Near Religious Teaching”*

With Orwellian precision, “believe the victim” materials omit key words such as “due process,” “complainant,” and “allegation.” With each iteration, the “believe the victim” movement has become less grounded in reason, fact, and fairness. In some respects, it even has assumed certain cult-like characteristics. In the words of Harvard Law professor Jeannie Suk, the always-believe-the-victim mantra has become a “near-religious teaching.”<sup>82</sup>

The “believe the victim” ideology demands that a complainant always be believed and regarded as a “victim;” discounts the possibility of a false allegation; treats inconsistencies in a complainant’s statements as irrefutable evidence of trauma; and directs the investigator to abandon the traditional role of independent fact finder and instead act as an agent of the prosecutor.

The movement’s demands have even included advice that the complainant be given the “right to request certain investigative steps not be conducted”<sup>83</sup> and that “control of the process: be handed “back to the victim,”<sup>84</sup> thereby turning the investigator into little more than a personal scribe for the complainant.

Victim advocates’ efforts to assure serious consideration and respectful treatment for complainants are commendable. But demanding that investigators and adjudicators reflexively “believe the victim” places a priority on subjective feelings over objective evidence.

Some have predicted these approaches may backfire. Harvard Law professor Jeannie Suk worries the always-believe-the-victim concept will come back to harm rape victims: “When

<sup>82</sup> 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>

<sup>83</sup> *Id.* at 13.

<sup>84</sup> *Id.* at 9.

the core belief is that accusers never lie, if any one accuser has lied, it brings into question the stability of the entire thought system, rendering uncertain all allegations of sexual assault.”<sup>85</sup>

In a recent opinion, Superior Court Justice Anne Malloy wrote:

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.<sup>86</sup>

The “believe the victim” ideology represents an attempt to recast the neutral role of the investigator into that of an advocate and systematically insert bias into the criminal justice system. It focuses on corroboration of allegations and collecting evidence to oppose anticipated defenses. As such, the “believe the victim” movement not only threatens the reliability of sexual assault adjudications, it compromises the integrity of our entire legal system.

In Lewis Carroll’s fanciful tale, justice hinged on the whims of the Queen and the logic of the system was reversed: “Sentence first—verdict afterwards.” Under the “believe the victim” ideology, justice rests largely on the caprices of the investigator. And once again fairness is being turned on its head: “All allegations are true, and all accusers shall be regarded as victims.”

## ACKNOWLEDGEMENT

Christopher Perry, Esq. researched and drafted this report. Nasheia Conway, Esq. provided editorial assistance.

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<sup>85</sup> 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>

<sup>86</sup> R v. Nyznik, et.al, Superior Court of Justice, Ontario (Decided 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>