# Why Campus Rape Tribunals Hand Down So Many 'Guilty' Verdicts

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*Title IX training is a travesty.*

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In November 2014, a female member of Brown University's debate team had oral sex with a male colleague while they watched a movie. Eleven months later, she filed a complaint with Brown, accusing him of sexual assault.

Both parties in the case had credibility issues; he had violated a no-contact order, she had withheld from the university the bulk of their text messages. But the accused student possessed strong exculpatory evidence. He produced the full record of their communications, which included texts from the accuser to him discussing the encounter in a highly positive fashion and referencing a "plan" to have sex again. Further, a friend of the accuser, who saw her shortly after the incident, recalled her raving about her "really hot" experience.

Nonetheless, Brown's disciplinary panel returned a guilty finding by 2-to-1. The decisive vote came from Besenia Rodriguez, the university's associate dean for curriculum.

In subsequent court testimony after the accused sued Brown, Rodriguez admitted that she had not considered the accuser's text messages or other post-incident behavior as having any bearing on the case. The reason, she said, was the hours of training that Brown had provided to prepare her to adjudicate the complaint—training required by the federal government. Rodriguez was specifically told that the impact of trauma on sexual-assault victims often causes them to behave in counterintuitive ways, such as not being able to recount a consistent set of facts or choosing to communicate with (rather than to avoid) the

alleged assailant. “I felt like it couldn’t—I couldn’t really put myself in her shoes to understand why she was representing it that way,” explained Rodriguez, “so best not to attempt to judge her behavior.”

But judging the accuser’s behavior, noted U.S. District Judge William Smith, “was precisely her job as a panel member: to interpret the evidence and make factual determinations about it.” He added, “It appears what happened here was that a training presentation was given that resulted in at least one panelist completely disregarding an entire category of evidence”—evidence severely damaging to the accuser’s credibility.

Smith invalidated the university’s decision, noting, even apart from Rodriguez’s dereliction of duty, the overall process was far from equitable. The Brown official who designed the training Rodriguez received, Alana Sacks, did not respond to a request for comment.

Since 2011, the federal government has required all universities that receive federal money to provide “training or experience in handling complaints of sexual harassment and sexual violence” to adjudicators and investigators. Since nothing in the experience of most academics prepares them to competently investigate an offense that’s a felony in all 50 states, it makes sense to train those who are assigned to investigate campus sexual-assault allegations. But the 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.

“In a criminal trial,” says former Baltimore state’s attorney Gregg L. Bernstein, “we ask jurors to use their common sense and apply their own life experiences to determining questions of credibility and guilt or innocence. We do not ‘train’ jurors at the expense of considering equally plausible factors as to why [an alleged] victim’s testimony might not be

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credible." Bernstein, who during his term in office created a special unit to handle sexual-assault cases, believes a balance "can be struck in which the victim's account is given credence and she is respected, while at the same time, the alleged assailant has the right to test the story. We should ask for no less when a person's reputation can be altered for life by these types of [campus] allegations."

The training mandate originated with the Obama administration's 2011 "Dear Colleague" letter, which dictated campus procedures for sexual-assault allegations that dramatically increased the chances of guilty findings. Expanded guidance in 2014 from the Department of Education's Office for Civil Rights ordered that the training include "the effects of trauma, including neurobiological change"—a phrase pregnant with hidden meaning. The Obama training requirements (without the "neurobiological change" part) were then formalized in a binding federal regulation in 2015.

While Secretary of Education Betsy DeVos has rescinded the 2011 and 2014 Obama commands, the 2015 regulation keeps most of the Obama training mandate in place. All the while, the secrecy of almost all the training materials has enabled them largely to escape public scrutiny.

"The biggest problem with these training materials," says Justin Dillon, a Washington, D.C., lawyer who has defended dozens of students accused of sexual assault, "is that if the accuser comes in, contradicts herself and the evidence, all that gets explained away because of 'trauma.' Junk science like that makes it extraordinarily hard for students to defend themselves effectively. Schools cherry-pick studies without actually understanding anything about them; they just take this chicanery at face value. Students would need to first pay a lawyer, and then pay that lawyer to find a neuroscience expert who is both willing and qualified to take on this issue. And if you think lawyers are expensive, wait until you see how much experts charge."

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Middlebury College's training, for instance, urges adjudicators to "start by believing" the accuser, while asking themselves whether the accused student is "who he said he is." The training materials twice feature a hypothetical campus rapist announcing: "I am going to have sex tonight. If it is consensual, fine. But, I am going to have sex tonight."

The college further orders that in order to be "objective," investigation reports must not use the word "alleged" before "victim" or "sexual assault" and must avoid passages such as "the victim's account of the incident is not believable or credible to officers given her actions during and after the encounter with the suspect" or the "victim has inconsistencies with her story."

The role of the investigative report is especially important at Middlebury because, like more and more schools, it has abandoned disciplinary hearings on sexual-assault claims in favor of a single-investigator system. This was designed to shield the accuser from cross-examination, but also empowers a school-appointed official to serve as "detective, judge and jury," in the words of Greg Lukianoff, president of the Foundation for Individual Rights in Education. In the specific system used at Middlebury, a college administrator renders the final decision based primarily on a report prepared by the investigator. The accused student and his representatives have no opportunity to cross-examine the accuser or the investigator. The training's restrictions on the content of the investigator's report thus have a direct effect on the final outcome.

After we wrote about the Middlebury training, the firm that conducted it, Margolis Healy, removed the associated material from its website. The company did not respond to a request for comment.

Eric Rosenberg, an Ohio lawyer who has represented accused students in both state and federal lawsuits, says that the "systemic bias" in training materials extends to essentially "mandating adjudicators shield accusers from exculpatory evidence" as it might "re-

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victimize the victim." A state or federal judge, Rosenberg explains, "would undoubtedly find [that any] jury pool members who promise not to re-victimize a party who alleges an injury should be stricken for cause."

Beyond putting a thumb on the scale towards guilt, campus-training materials are permeated by highly debatable psychological theories, spawned in part by the Obama administration's requirement of training about "neurobiological change."

Emily Yoffe's blockbuster September article in the *Atlantic* on "The Bad Science Behind Campus Response to Sexual Assault" uncovered widespread use of a concept called "tonic immobility." Yoffe explored the pervasive influence of Rebecca Campbell, a Michigan State psychology professor, who claims that as many as half of all sexual-assault victims experience tonic immobility and that this condition, along with other neurological effects that occur during an assault, renders them unable either to resist or to recall the alleged attack accurately later. Campbell has done no empirical research on tonic immobility, and there is no clear evidence that the phenomenon—in which some prey animals go into a type of temporary paralysis when threatened—occurs in humans.

Training at Harvard Law School in 2014 borrowed heavily from Campbell's ideas about tonic immobility, according to an article by Harvard Law professor Janet Halley. She said the school provides its tribunals with "a sixth-grade level summary of selected neurobiological research," which claims that rape victims' trauma causes neurological changes, which can result in tonic immobility. This "can cause the victim to appear incoherent and to have emotional swings, memory fragmentation, and 'flat affect' [so that her statements] can be '[m]isinterpreted as being cavalier about [the event] or lying.' " The Harvard training, Halley wrote, is "100% aimed to convince [disciplinary panelists] to believe complainants, precisely *when* they seem unreliable and incoherent."

A still-pending case led U.S. District Judge John Padova to suggest that the University of Pennsylvania's training of campus adjudicators is so biased that it may violate Title IX by discriminating against males. In a September 13, preliminary ruling, Padova cited the

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university's training materials as a basis for rejecting Penn's motion to dismiss a Title IX claim in a lawsuit filed by a student the school had found guilty of sexual assault.

Penn used a training document, "Sexual Misconduct Complaint: 17 Tips for Student Discipline Adjudicators," disseminated by Legal Momentum, a women's advocacy group that has harshly assailed Betsy DeVos's efforts to make the handling of campus sexual-assault complaints more fair. The 17 "tips" about accusers include:

*"The fact that a complainant recounts a sexual assault somewhat differently from one retelling to the next may reflect memory processes rather than inattentiveness or deceit."* Legal Momentum provides no guidance on how adjudicators should identify "memory processes," "inattentiveness," or "deceit." The implication that inconsistencies are irrelevant to assessing credibility is contrary both to our legal traditions and human experience.

*"Victim behaviors during and after a sexual assault may appear counterintuitive to those unfamiliar with sexual assault."* The Legal Momentum document goes on to offer examples suggesting that virtually any conduct or statement by an accuser—resisting or not resisting the alleged assaulter; subsequently contacting or subsequently avoiding the alleged assaulter; testifying emotionally or listlessly; recalling or not recalling events—is consistent with the guilt of the accused.

*"False allegations of rape are not common"* and *"research places the [false rape report] rate in the general population between 2% and 10%."* But this research defines "false" extremely restrictively and excludes a great many cases in which the accused is clearly not guilty of sexual assault and many more in which the available evidence leaves unclear the veracity of the accuser's account.

As for accused students, Penn's training material seems designed to sow skepticism about their claims of innocence. The "typical" campus rapist, according to the document, might possess many "apparent positive attributes such as talent, charm, and maturity [and] a deep

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commitment to community service." But such traits are "generally irrelevant." Campus rapists "[p]lan and premeditate their attacks, using sophisticated strategies to groom their victims for attack and isolate them physically."

Bernstein, the former top Baltimore prosecutor, expressed concern that the Penn training did not meet the "standards" necessary for an "objective process" that could determine the truth of allegations. Most of the tips, he notes, "leave a clear presumption of guilt in the investigator or adjudicator's mind and provide a victim-centric explanation for otherwise inconclusive, inconsistent, and exculpatory testimony to the exclusion of other factors." Legal Momentum did not respond to a request for comment.

The training materials and practices that have surfaced from other institutions are equally one-sided.

George Mason's training plan contains a lengthy section instructing investigators and adjudicators to "avoid an implication of blaming a complainant," such as by holding "the belief or expressing an opinion that a person who is alleging sexual assault was in some way responsible, whether wholly or in part, for what happened." Testing an accuser's truthfulness by asking about her pre-incident behavior with the accused student or why she waited for months to file a report or why she did not go to the police would all constitute blaming the victim. If even considering asking any such questions, the adjudicator is ordered by the training to adjourn the meeting and consult with fellow panelists before proceeding. There is no comparable caution regarding questions asked of accused students.

A University of Texas blueprint for sexual-assault investigations recommends reducing "the number of reports prepared by investigators," so as to frustrate defense lawyers' efforts to point out contradictions among an accuser's statements. This recommendation belies any pretense that the university's investigators are neutral fact-finders.

The training at Ohio State tells disciplinary panelists that as many as "57 percent" of college males "report perpetrating a form of sexual[ly] aggressive behavior," among other points seemingly designed to prompt guilty findings. We are aware of no reliable study that makes

such a statistical claim. The judge who cited the 57 percent did not say where Ohio State got it, and the school's full training materials remain sealed.

Cooper Union's training program describes a "typical" sexual-assault case as the work of a scheming predator: An upper class male who meets a freshman female at a party, accompanies her alone back to her room, and "pours ten shots out of a bottle he pulls out of his backpack" for her to drink. The accuser can later recall nothing, but believes that they had sex.

At SUNY-Plattsburgh, the school's Title IX coordinator trains the members of sexual-assault hearing panels. In a recent appellate hearing in New York state court, it was revealed that she had misstated the university's own definition of consent to make a guilty finding more likely, by ruling out "consent by conduct" to sex. SUNY's lawyer conceded to the appellate judges that the coordinator's explanations of Plattsburgh policy to the tribunal members were "admittedly confusing."

The head of a Title IX disciplinary panel at the University of North Carolina, Charlotte, testified in federal court that his institution's training prompted him to deny the accused student a chance to present friendly, post-incident text messages the accuser sent to him, even though they contradicted her claim that she had come to fear him after they had sex. The panel chair said that the training allowed the tribunal to consider only any messages that "directly answer[ed] the question of consent, to consent to sexual acts." A federal judge called this exclusion of exculpatory evidence "troubling" and denied the university's motion for summary judgment.

Such training regimes are the norm across the country, according to four lawyers we talked to and to public statements by two others who have through lawsuits obtained the training materials adopted by many schools. The training materials used by the vast majority of colleges still remain secret.

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The new regulations that Betsy DeVos has promised to issue regarding campus proceedings—probably next fall, after publishing proposed rules and considering public comments—will likely continue to require training of some kind, which, at least for investigators, is sensible if it is done well.

Meanwhile, the training materials we have seen are flatly contrary to the Trump administration's interim guidance for colleges on campus sexual-assault allegations, which provides that "training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX." DeVos has repeatedly called for colleges to make their processes fair to accused students as well as their accusers.

The time is ripe for some of the accused to file complaints with the Department of Education's Office for Civil Rights challenging these training programs as violating Title IX's prohibition on sex discrimination. Such complaints would encourage the Education Department to require that schools make public the contents of their training for sexual assault investigations and tribunals. The accused—many of whom have wrongly assumed that they would be treated fairly and the truth would set them free—would then know what they are up against.

*K.C. Johnson and Stuart Taylor Jr. are the authors of* *The Campus Rape Frenzy: The Attack on Due Process at America's Universities* (2017).

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