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A fair process matters in alleged sexual assault cases

thehill.com/opinion/criminal-justice/497738-a-fair-process-matters-in-alleged-sexual-assault-cases

Cynthia V. Ward, opinion contributor

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We might never know for sure what happened between Tara Reade and then-Sen. Joe Biden in 1993, but amid the contentious debate over Reade’s sexual assault allegation, let’s not ignore a piece of good news: A new consensus appears to have formed to support fair process in cases of alleged sexual assault.

Affirming an important premise from the #MeToo movement — that allegations of sexual harassment and sexual assault must be treated with respect — the new consensus also insists that disputed accusations must be investigated, and proven by objective corroborating evidence, before the accused is condemned or punished. Whatever “Believe Women” has meant in the past, commentators from across the political spectrum now agree that it does not require the immediate and unquestioning acceptance of every allegation of sexual assault. That is a good thing for women and a good thing for justice.

The #MeToo movement has raised difficult issues of venue and process in cases of alleged sexual misconduct. In striking contrast with feminist reform efforts in the late 20th century, which focused on amending the law of sexual assault to make it fairer to victims, #MeToo looked beyond the law and called upon the internal authority of public and private entities, outside the court system and within the ambit of their own workplace policies, to prohibit sexual misconduct and punish those who inflict it. Because of its reach beyond legal process, #MeToo raised a number of compelling questions.

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What should happen when independent institutions are asked to sanction or terminate persons accused of sexually exploiting others, when such exploitation either does not violate the law or is barred from court for some other reason — for example, by procedural obstacles such as statutes of limitations? Under what standard should such institutions adjudicate cases? What proof should they require before determining that an accusation justifies a serious institutional sanction against the accused person? To what extent are the trappings of “due process,” so integral to our understanding of court-based adjudication, necessary in these non-legal settings? And, from the perspective of fairness in deciding such cases, how should we think about the structural differences between court-based adjudication, on the one hand, and adjudication by institutions — such as private companies or public political entities — whose purpose and behavior are greatly influenced by market forces, reputational concerns, or political agendas which may accord little or no weight to the standard of impartial and neutral adjudication that is the lodestar of the legal system?

In short: What constitutes fair process in extra-legal cases of sexual assault?

The emerging consensus in favor of fair process is part of the answer, but it cannot be all. General agreement that complainants must be respected and that their allegations must be objectively proved is a major step forward, but it is not enough to resolve actual cases when a claim of sexual assault is disputed by the accused — as in the Reade-Biden case, as well as the case of Christine Blasey Ford and Justice Brett Kavanaugh and others before it.

The resolution of real cases also requires a set of standards to guide the investigation and adjudication of disputed allegations, and a trustworthy venue whose judgment on that issue is most likely to be accepted by the parties and the public.

We don't yet have all the answers, but the new consensus has brought us part of the way there. First, it suggests that an accuser must prove the charge by at least a preponderance of the evidence — must prove it is more likely than not that the accused is guilty. Second, as for what kinds of proof are most relevant and persuasive in this context, broad agreement is forming around four types:

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- The existence (or not) of contemporaneous corroboration from persons told about the misconduct by the complainant;
- The existence (or not) of documentary or other evidence that tends to show the truth of the allegation;

The consistency, over time, of the complainant's account of the alleged assault and of the accused's denial; and

The presence or absence of a pattern of behavior by the parties (for example, any prior acts of sexual misconduct by the accused or false accusations by the complainant) that either lends support to the allegation or detracts from its credibility.

Finally, in cases that are not brought to court, the question of venue can be difficult to determine. But even here we should not mistake the hard cases for the whole. Many, if not most, alleged non-legal cases of sexual misconduct arise in a specific institutional context — for example, between two employees of a company, or within a legislative body whose rules allow for an ethics investigation, and so forth. For the people who must decide such cases, the standard and types of proof already described will offer a useful framework to resolve individual cases.

The Tara Reade allegation is, of course, one of the hard cases — it arose in an employment context, while the former vice president and current presumptive Democratic presidential nominee was a U.S. senator, but Biden long ago left the Senate and is not serving in public office. Although it may be far from ideal, in such cases the public might have no choice but to rely on fact-based investigative journalism while keeping in mind the danger of bias and the inevitability of mistakes and misunderstandings that afflict even the most honest and good-faith reporting of fast-moving news events.

Politics will intrude, especially in a presidential election year. But over the long term, the affirmation of fair process will help to preserve our stability, our belief in each other, and our collective commitment to keep working on the problems we encounter in delivering justice to victims of sexual assault.

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