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ARTICLE

Seeking campus justice: challenging the ‘criminal justice drift’ in United Kingdom university responses to student sexual violence and misconduct

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Abstract

In recent years, growing concerns have been expressed – including in the press and social media – over the apparently inadequate responses of many United Kingdom (UK) universities to complaints of student sexual violence and misconduct (SSVM). In this article, we underscore universities’ legal, ethical, and civic responsibilities to students, which require them to implement effective regimes for the prevention and sanctioning of such behaviour. We suggest, however, that current responses are moving in the wrong direction. More specifically, universities are too often turning (back) towards adversarial and procedural paradigms, developed within the criminal justice system, where the persistence of a ‘justice gap’ in cases of rape and sexual assault has been well documented. We argue that this ‘criminal justice drift’ may frustrate the possibility for more tailored, transformative, and trauma-informed processes for addressing SSVM within higher education institutions.

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1 | INTRODUCTION

In recent years, growing concerns have been expressed over the adequacy of responses on the part of many United Kingdom (UK) universities to complaints of student sexual violence and misconduct (SSVM). Students reporting SSVM have publicly denounced investigative and disciplinary procedures that excluded them or caused them additional trauma, as well as remedies that they felt failed to recognize the severity of the conduct in question.¹ Meanwhile, some of those accused of sexual violence and misconduct have complained that university processes are not fit for purpose and that the protections afforded to them have been insufficient.² The strong public appetite for in-depth discussion of such cases has become increasingly apparent, often leading to national headlines.³ Not surprisingly, particularly in light of the increasingly market-oriented nature of UK university education,⁴ many institutions fear the reputational damage associated with such high-profile (alleged) failings to tackle SSVM; however, many also appear unable or unwilling to implement more robust processes, or to act decisively through education initiatives to prevent it.

Universities, both in the UK and elsewhere, are moving away from developing distinctive practices and responses to tackle SSVM and turning (back) towards a more familiar criminal justice paradigm. In this article, we suggest that this ‘criminal justice drift’ poses a number of risks, including the creation of protracted and adversarial procedures that are often beyond the competence and training of those involved in university discipline and have been shown in other contexts to impose additional harm and distress upon complainants of sexual violence. Adopting this approach also frustrates the potential to realize more innovative and trauma-informed ways for universities to respond to SSVM.

To make this argument, we first provide a brief overview of the approach taken by UK universities to SSVM to date, charting the move from a typically ‘hands-off’ approach towards the more recent recognition – at least formally – of their responsibilities. We set out why universities must take robust action in response to reports of SSVM, re-emphasizing universities’ legal duties

¹ Following C. Humphreys and G. Towl, *Addressing Student Sexual Violence in Higher Education: A Good Practice Guide* (2020) 6–7, we adopt the term ‘reporting party’ to refer to the person making a report of SSVM and ‘respondent party’ to refer to the person about whom the report is made. This distinguishes the university context from the criminal justice context, where the terms ‘complainant’ or ‘complainer’ and ‘accused’ are more appropriate. We use ‘SSVM’ as an umbrella term that includes ‘all non-consensual, unwanted, forced and/or coerced sexual behaviours including, but not limited to, rape, assault by penetration, sexual assault, sexual harassment, indecent exposure, image-based sexual abuse, stalking and domestic abuse’ (id., p. 5).

² See for example *AB v. University of XYZ* [2020] EWHC 2978 (QB) (6 November 2020).

³ See for example D. Lee and K. West, ‘Universities “Failing” Victims of Sexual Misconduct’ *BBC News*, 17 September 2019, at <<https://www.bbc.co.uk/news/uk-49421735>>; B. Jeffreys, ‘Student Rape Survivor: “It Felt Like I Was Being Interrogated”’ *BBC News*, 3 October 2019, at <<https://www.bbc.co.uk/news/education-49893389>>; R. Croxford, ‘Sexual Assault Claims “Gagged” by UK Universities’ *BBC News*, 12 February 2020, at <<https://www.bbc.co.uk/news/uk-51447615>>; J. Lawthom, ‘Sexual Assault Claims “Mishandled” by Universities’ *BBC News*, 20 May 2021, at <<https://www.bbc.co.uk/news/uk-wales-57174251>>. The authors’ own institutions have also very recently featured in such headlines: *BBC News*, ‘Call for Action at Edinburgh University over Students’ Rape Claims’ *BBC News*, 2 April 2021, at <<https://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-56589820>>; J. Murray, ‘Warwick University Students Stage Sit-In over Sexual Abuse’ *Guardian*, 2 April 2021, at <<https://www.theguardian.com/education/2021/apr/02/warwick-university-students-stage-sit-in-over-sexual-abuse>>.

⁴ M. Molesworth et al. (eds), *The Marketisation of Higher Education and the Student as Consumer* (2011).

in equality, human rights, and consumer law in particular. We also highlight that universities, as educators and public institutions, have significant ethical obligations to take the lead in preventing and responding to SSVM within their communities. Next, we examine the complex spectrum of justice interests of students experiencing SSVM, highlighting the ways in which universities may in fact be uniquely well placed to meet those interests. In the final section, reflecting on recent developments in the UK and insights from campuses elsewhere, we consider some of the problematic implications of the criminal justice drift in university disciplinary policies and practices. We reflect on what may be lost through uncritical mimicking of criminal-style investigative and adversarial paradigms that have been shown – in respect of rape and sexual assault in particular – to re-traumatize survivors and to generate a persistent and substantial ‘justice gap’.⁵ We also explore how, in borrowing from a criminal justice approach that divorces incidents of ‘deviant’ behaviour from broader structures of gender inequality, universities reduce their opportunities for more transformative engagement.

It is important to begin by briefly explaining the scope and limitations of our analysis. First, our focus is on reports of SSVM made by students against other students at UK universities.⁶ This is not to dismiss significant concerns regarding both the scale of sexual violence and misconduct perpetrated upon students by university staff and the inadequacy of existing policies and disciplinary practices in response to such conduct.⁷ However, staff–student sexual misconduct merits distinct attention because of the particular relational and power dynamics involved, the circumstances in which it most frequently arises, and the specific ways in which universities’ responsibilities are engaged and exercised as a result of employment and trade union policies.⁸

Second, our focus is on university responses to reports of SSVM, particularly their investigatory processes and disciplinary mechanisms, rather than on the necessary and vital work around prevention initiatives and consent training,⁹ or mechanisms for supporting disclosures. Such interventions, which focus on communicating and embedding codes of behavioural conduct across campuses and providing appropriate first-responder support, must be developed in tandem with effective mechanisms for enforcement through investigative and disciplinary protocols. Our aim here, though, is to build upon rather than replicate that work, in particular by shifting focus to those latter stages of university processes and procedures.¹⁰

⁵ On the justice gap in the UK, see for example J. Temkin and B. Krahé, *Sexual Assault and the Justice Gap* (2008); L. Kelly et al., *A Gap or a Chasm? Attrition in Reported Rape Cases* (2005). On the justice gap in the United States (US), see for example K. A. Lonsway and J. Archambault, ‘The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform’ (2012) 18 *Violence Against Women* 145. On the consequences of mimicking criminal justice processes in the US, see X. Méndez, ‘Beyond Nassar: A Transformative Justice and Decolonial Feminist Approach to Campus Sexual Assault’ (2020) 41 *Frontiers: A J. of Women Studies* 82.

⁶ We use the term ‘universities’ or ‘institutions’ to refer to all higher education institutions across the UK.

⁷ See further National Union of Students and the 1752 Group, *Power in the Academy: Staff Sexual Misconduct in UK Higher Education* (2018).

⁸ *Id.*

⁹ R. Fenton et al., *A Review of Evidence for Bystander Intervention to Prevent Sexual and Domestic Violence in Universities* (2016), at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/515634/Evidence_review_bystander_intervention_to_prevent_sexual_and_domestic_violence_in_universities_11April2016.pdf>.

¹⁰ For a discussion of prevention and education measures across the UK, see Humphreys and Towl, *op. cit.*, n. 1.

2 | SETTING THE SCENE: PREVALENCE, HARMS, AND EMERGING GUIDANCE

Catalysed by social movements such as #MeToo and #TimesUp,¹¹ there has been a growing impetus to ‘call out’ sexual violence and misconduct, with survivors seeking redress in a range of fora outside the criminal justice system (such as workplace complaints processes). Among the drivers for this avoidance of criminal processes has been a recognition that the treatment of complainants, especially in proceedings for serious sexual violence, can be re-traumatizing and the prospects for redress remain remote.¹² For a student who has been sexually assaulted by a peer, lodging a complaint for breach of their university’s codes of conduct, alongside or in preference to a criminal complaint, may offer an alternative route to justice.

Universities in the UK have historically been reluctant to intervene in, or adjudicate upon, such complaints of SSVM. However, recent developments have promoted a formal reversal whereby governing bodies within higher education have encouraged UK universities to assume jurisdiction over this issue. In this section, we explore the factors that precipitated this shift in approach, while also reflecting on remnants of prior reticence that may linger within institutions.

2.1 | SSVM: a problem too big to ignore

The hands-off approach to SSVM that was until recently adopted as the norm by UK universities was legitimated by the ‘Zellick guidelines’. Following a high-profile rape case involving two students at a London university in the 1990s, the Zellick Review recommended that universities must not investigate serious criminal matters, and should not involve themselves in the investigation or disciplining of such alleged conduct, unless and until a criminal investigation was concluded.¹³ Despite evidence attesting to many individuals’ reluctance to report, and their reasons for this,¹⁴ these guidelines also extended to cases in which students had declined to make a police complaint, on the basis that it was not permissible to ‘opt in’ to an internal, rather than external, process.

This approach has become increasingly untenable due to a number of coalescing factors, including a growing evidence base documenting high levels of sexual violence perpetrated on university

¹¹ In its 2017 incarnation, #MeToo was a Twitter campaign, initiated by Alyssa Milano in the wake of allegations against Hollywood film producer Harvey Weinstein. It called for women to speak out about their experiences of sexual harassment and violence. However, the #MeToo initiative was originally started ten years earlier by the African American feminist Tarana Burke as a grassroots movement to aid sexual assault survivors, particularly women of colour: see *Democracy Now!*, ‘Meet Tarana Burke, Activist Who Started “Me Too” Campaign to Ignite Conversation on Sexual Assault’ *Democracy Now!*, 17 October 2017, at <https://www.democracynow.org/2017/10/17/meet_tarana_burke_the_activist_who>. See also N. Khomami, ‘#MeToo: How a Hashtag Became a Rallying Cry against Sexual Harassment’ *Guardian*, 21 October 2017, at <<https://www.theguardian.com/world/2017/oct/20/women-worldwide-use-hashtag-metoo-against-sexual-harassment>>. #TimesUp was a legal defence fund started in the wake of the Weinstein revelations to support women bringing claims of sexual assault and harassment in the workplace.

¹² See for example O. Brooks-Hay et al., *Justice Journeys: Informing Policy and Practice through Lived Experience of Victim-Survivors of Rape and Serious Sexual Assault* (2019), at <https://www.scjr.ac.uk/wp-content/uploads/2019/08/Justice-Journeys-Report_Aug-2019_FINAL.pdf>; C. McGlynn and N. Westmarland, ‘Kaleidoscopic Justice: Sexual Violence and Victim-Survivors’ Perceptions of Justice’ (2019) 28 *Social & Legal Studies* 179.

¹³ Committee of Vice-Chancellors and Principals, *Final Report of the Taskforce on Student Disciplinary Procedures* (1994).

¹⁴ B. S. Fisher et al., ‘Reporting Sexual Victimization to the Police and Others: Results From a National-Level Study of College Women’ (2003) 30 *Criminal Justice and Behavior* 6; K. Hohl and E. Stanko, ‘Complaints of Rape and the Criminal Justice System: Fresh Evidence on the Attrition Problem in England and Wales’ (2015) 12 *European J. of Criminology* 324.

campuses and a recognition by sector regulators and, in contested cases, by the courts of students' rights to equality and education. The higher education culture in the UK, characterized by growing marketization and the consequent assumption by each university of additional responsibilities and obligations towards their student 'consumers', has also played a role.¹⁵

Arguably, a key catalyst was the 2011 study conducted by the National Union of Students, which revealed the considerable scale of SSVM across UK universities.¹⁶ During their time as students, one in seven female respondents had experienced serious physical or sexual assault; 68 per cent had been subjected to harassment, which regularly included groping, flashing, and unwanted sexual comments; and 16 per cent had experienced unwanted kissing, touching, or molesting, often in public spaces on and around the campus.¹⁷ In 2014, a follow-up poll indicated that 37 per cent of female students and 12 per cent of male students had experienced unwelcome sexual advances at university, and 62 per cent reported that they had heard jokes about rape or sexual assault on campus.¹⁸

Considerable subsequent research has confirmed high levels of SSVM. In 2018, a sample of 4,500 students across 153 different institutions found that 62 per cent had experienced some form of sexual violence at UK universities, with this figure rising to 70 per cent for female respondents.¹⁹ Only 6 per cent had reported their experiences to their universities, with a similar proportion reporting to the police.²⁰ A 2019 study, with over 5,000 participants, likewise found that more than half of UK university students had been exposed to unwanted sexual behaviours, such as inappropriate touching, explicit messages, cat calling, being followed, and/or being forced into sex or sexual acts, with only 8 per cent having ever officially reported this conduct.²¹ In the vast majority (80–90 per cent) of student cases, the perpetrator is already known to the victim.²² This is in line with findings from national crime and victimization surveys which, over many years, have highlighted the increased risk of sexual victimization that is faced by women, and by young women in particular, and the fact that women are far more likely to experience such abuse from acquaintances than from strangers. Furthermore, data from the Office for National Statistics in

¹⁵ The UK government began to refer to students as customers and consumers in the 1990s: see R. Dearing, *Higher Education in the Learning Society: Report of the National Committee of Inquiry into Higher Education* (1997). The rise in the cap on student fees, the introduction of the National Student Survey, the removal of the cap on student numbers, and the introduction of the Consumer Rights Act 2015 which applies to students have contributed to the increased marketization of the sector: see S. Collini, 'The Marketisation of Higher Education' *Fabian Society*, 22 February 2018, at <<https://fabians.org.uk/the-marketisation-of-higher-education/>>; J. Williams, *Consuming Higher Education: Why Learning Can't Be Bought* (2013).

¹⁶ National Union of Students, *Hidden Marks: A Study of Women Students' Experiences of Harassment, Stalking, Violence and Sexual Assault* (2011), at <https://www.nus.org.uk/Global/NUS_hidden_marks_report_2nd_edition_web.pdf>.

¹⁷ *Id.*

¹⁸ National Union of Students, *Lad Culture and Sexism Survey* (2014), at <<https://www.nus.org.uk/Global/20140911%20Lad%20Culture%20FINAL.pdf>>.

¹⁹ Revolt Sexual Assault and The Student Room, *National Consultation into the Sexual Assault and Harassment Experienced and Witnessed by Students and Graduates from Universities across the UK* (2018), at <<https://revoltsexualassault.com/wp-content/uploads/2018/03/Report-Sexual-Violence-at-University-Revolt-Sexual-Assault-The-Student-Room-March-2018.pdf>>.

²⁰ *Id.*

²¹ Brook and Absolute Research Dig-In, *Sexual Violence and Harassment at UK Universities* (2019), at <http://legacy.brook.org.uk/data/Brook_DigIN_summary_report2.pdf>.

²² Humphreys and Towl, *op. cit.*, n. 1, p. 11.

England and Wales demonstrate that full-time students are more likely to experience sexual victimization than any other occupational group.²³

Reflecting wider patterns of disadvantage, oppression, and abuse, it is also clear that factors such as race, disability, sexuality, and ethnicity intersect to create further differential exposure to risk.²⁴ National crime data in England and Wales show that women students with a long-term illness or disability are more likely to be victims of sexual assault.²⁵ Research by the Equality and Human Rights Commission has found significant experiences of racial discrimination and harassment within UK universities,²⁶ and the National Union of Students has reported that a third of Muslim students experienced some type of abuse or crime at their place of study.²⁷ These findings as to differential experiences of discrimination, and of SSVM in particular, on UK university campuses also resonate significantly elsewhere. In a recent US study involving nearly 90,000 students, Coulter and colleagues found that predicted rates of sexual assault on campus ranged from 2.6 per cent (for Asian/Pacific Island cisgender men) to 57.7 per cent (for Black transgender people).²⁸ It is clear, therefore, that any university response to SSVM cannot take a 'one-size-fits-all' approach.

Particular (and potentially heightened) harms and impacts of SSVM on survivors also occur as a result of their environment and student status. The US White House Taskforce, for example, has highlighted that student survivors of sexual violence face additional challenges as a result of living in close proximity to offenders and attending classes or other educational or campus spaces in which they might meet. This has a pronounced effect on survivors' academic performance (and resultant career prospects after graduation) as well as a financial impact if they are required to take a period of leave from study. Concern about their ability to maintain anonymity within a closed

²³ Office for National Statistics, *Sexual Offences Victim Characteristics, England and Wales: Year Ending March 2020* (2021), at <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesvictimcharacteristicsenglandandwales/march2020>>. For discussion of the prevalence of sexual victimization in university contexts and its impacts on gendered perceptions of safety, see N. Roberts et al., 'Gendered Landscapes of Safety: How Women Construct and Navigate the Urban Landscape to Avoid Sexual Violence' (2020) *Criminology & Criminal Justice* 1, at <<https://doi.org/10.1177/1748895820963208>>.

²⁴ Id.; Revolt Sexual Assault and The Student Room, op. cit., n. 19; National Union of Students and the 1752 Group, op. cit., n. 7; Equality and Human Rights Commission, *Racial Harassment Inquiry: Survey of Universities* (2019).

²⁵ Office for National Statistics, *Disability and Crime: UK* (2019), at <<https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/disability/bulletins/disabilityandcrimeuk/2019>>.

²⁶ Equality and Human Rights Commission, op. cit., n. 24.

²⁷ National Union of Students and the 1752 Group, op. cit., n. 7.

²⁸ R. W. S. Coulter et al., 'Prevalence of Past-Year Sexual Assault Victimization among Undergraduate Students: Exploring Differences by and Intersections of Gender Identity, Sexual Identity, and Race/Ethnicity' (2017) 18 *J. of the Society for Prevention Research* 726. Brubaker and colleagues explain that most US studies have focused on white, middle-class, heterosexual students: S. J. Brubaker et al., 'Measuring and Reporting Campus Sexual Assault: Privilege and Exclusion in What We Know and What We Do' (2017) 11 *Sociology Compass* 1. However, some have highlighted intersecting 'risk factors' for sexual assault. For instance, Cantor and colleagues found that 23 per cent of female undergraduates and more than 5 per cent of male undergraduates experienced non-consensual penetration or sexual contact involving physical force or incapacitation, but non-heterosexual and disabled undergraduate women were more likely to report SSVM than heterosexual or non-disabled peers: see D. Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (2015), at <https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf>. Others suggest that identifying as a cisgender woman or sexual minority (in other words, non-heterosexual) or having a more severe sexual assault history is associated with sexual assault victimization: see A. K. Gilmore et al., 'Sexual Assault Victimization: Latinx Identity as a Protective Factor for Sexual Minorities' (2021) *J. of Interpersonal Violence* 1, at <<https://doi.org/10.1177/0886260521999122>>. To date, there have been no similar studies looking at the intersecting risk factors for SSVM in the UK campus context.

campus environment was also identified as an important barrier to disclosures, and one that left many student survivors struggling silently as their ability to access education diminished.²⁹ Moreover, as we discuss further below, a failure to address sexual violence or misconduct perpetrated without apparent redress on campus has implications not only for individual survivors but also for the wider student community and culture.³⁰

2.2 | Changing the rhetoric or changing the culture? Emerging regulatory recognition

These stark statistics suggest that the safest assumption for UK universities is that SSVM is highly prevalent, and that most of it goes unreported.³¹ The Office for Students (OfS) – which has assumed the role of regulator of the higher education sector in England – has also now formally acknowledged that there is a ‘substantial body of evidence’ regarding the ‘extent and scale of harassment and sexual misconduct in the higher education sector’.³²

In this light, and with growing attention paid to the particular harms and disadvantages that may be experienced by survivors of SSVM, the pressure for UK universities to take an active role in addressing it has become acute. The sector’s umbrella organization Universities UK (UUK) undertook a review of policies and approaches to sexual violence and misconduct, and in 2016 published its *Changing the Culture* report.³³ This recommended the adoption of ‘zero-tolerance’ policies on sexual violence and misconduct across all higher education institutions, to be supported by initiatives to reinforce positive behaviour in student communities and disciplinary regulations to sanction unacceptable conduct.³⁴ Associated guidance, produced with Pinsent Masons, attempted to set out a core legal framework for university action,³⁵ which was followed in 2018 by a *Good Practice Framework* from the Office of the Independent Adjudicator for Higher Education (OIA), an independent body that reviews student complaints across the UK sector.³⁶ These represent important steps in acknowledging that – *contra* Zellick – universities are not precluded from investigating alleged sexual misconduct that, if established, would breach disciplinary codes³⁷ or

²⁹ United States Department of Justice Office on Violence Against Women, *Not Alone: The First Report of the White House Taskforce to Protect Students from Sexual Assault* (2014), at <<https://www.justice.gov/archives/ovw/page/file/905942/download>>.

³⁰ United Nations Women, *Guidance Note on Campus Violence Prevention and Response* (2018), at <<https://www.unwomen.org/en/digital-library/publications/2019/02/guidance-note-on-campus-violence-prevention-and-response>>.

³¹ Humphreys and Towl, *op. cit.*, n. 1, p. 30.

³² Office for Students, *Office for Students Consultation on Harassment and Sexual Misconduct in Higher Education* (2020) 7, at <<https://www.officeforstudents.org.uk/media/ebff4577-6ada-42af-ba98-07250db97c2f/consultation-on-harassment-and-sexual-misconduct-in-higher-education-18032020.pdf>>.

³³ Universities UK, *Changing the Culture: Report of the Universities UK Taskforce Examining Violence against Women, Harassment and Hate Crime Affecting University Students* (2016), at <<https://www.universitiesuk.ac.uk/policy-and-analysis/reports/Documents/2016/changing-the-culture.pdf>>.

³⁴ *Id.*

³⁵ Pinsent Masons and Universities UK, *Guidance for Higher Education Institutions: How to Handle Alleged Student Misconduct Which May Constitute a Criminal Offence* (2016), at <<https://www.universitiesuk.ac.uk/policy-and-analysis/reports/Documents/2016/guidance-for-higher-education-institutions.pdf>>.

³⁶ Office of the Independent Adjudicator for Higher Education, *The Good Practice Framework* (2018), at <<https://www.oiahe.org.uk/resources-and-publications/good-practice-framework/>>.

³⁷ Pinsent Masons and Universities UK, *op. cit.*, n. 35, p. 10.

from identifying some minimum standards to be met in fulfilling their associated responsibilities.³⁸

At the same time, however, there are limits to the reach and robustness of this sector guidance. Specifically, the substantial discretion left to institutions regarding the interpretation of standards and application of procedures may diminish the prospects for significant change. For example, the Pinsent Masons/UUK guidance indicates that universities *can* undertake investigations concurrent to a criminal process ‘if the disciplinary case is based upon facts and matters which are different to those being dealt with under the criminal process’,³⁹ but this wording is disappointingly vague, allowing for inconsistent interpretation of the appropriateness, and remit, of concurrent action.⁴⁰ If universities interpret this as inhibiting concurrent investigation of SSVM, it will mean lengthy delays while the case is progressed through the criminal justice process, rather than timely and effective redress for reporting parties. This is especially problematic where the alleged perpetrator remains a member of the campus community. It also potentially returns institutions to the Zellick hands-off approach. Furthermore, while legal advice for some employers has estimated that properly conducted internal investigations pose a relatively low and tolerable risk of prejudicing criminal investigations (see, for example, the advice given to parliamentary standards bodies⁴¹), the loosely worded guidance offered to universities on this may fuel rather than appease anxieties about the inadvertent contamination of criminal processes.

Similarly, the OIA *Good Practice Framework for Handling Complaints and Academic Appeals* states that a student should be told the outcome of the complaint that they have made, though perhaps not ‘specific details’ where disciplinary action has been taken.⁴² This leaves difficult questions unanswered about what level of specificity is appropriate, bearing in mind the need to balance protections of data and privacy with duties of equality and care (discussed below), and recognizing that – alongside the rights and interests of reporting and respondent parties – there is a legitimate interest, held by the campus community as a whole, in the deterrence of SSVM. For many institutions, anxieties regarding the significant consequences of a potential data compliance breach are likely to encourage non-disclosure of outcomes, even at the cost of disempowering reporting parties, inhibiting their campus reintegration, and undermining wider student confidence regarding campus safety.

³⁸ Universities UK, op. cit., n. 33; Universities UK, *Tackling Online Harassment and Promoting Online Welfare* (2019), at <<https://www.universitiesuk.ac.uk/policy-and-analysis/reports/Documents/2019/tackling-online-harassment.pdf>>; Office of the Independent Adjudicator for Higher Education, op. cit., n. 36; Office of the Independent Adjudicator for Higher Education, *OIA Briefing Note: Complaints Involving Sexual Misconduct and Harassment* (2018), at <<https://www.oiahe.org.uk/resources-and-publications/latest-news-and-updates/oia-briefing-note-complaints-involving-sexual-misconduct-and-harassment/>>.

³⁹ Pinsent Masons and Universities UK, op. cit., n. 35, p. 12.

⁴⁰ Concurrent action is widely undertaken in employment contexts, including where one or more of the parties is an employee of a university: see Equality and Human Rights Commission, *Sexual Harassment and Harassment at Work: Technical Guidance* (2020), at <https://www.equalityhumanrights.com/sites/default/files/sexual_harassment_and_harassment_at_work.pdf>. It is not entirely clear whether the UUK guidance would allow for this approach to be extended to circumstances where both parties are students.

⁴¹ D. Perry and K. Hardcastle, ‘Annex E: Legal Opinion on Criminal Cases’ in *Independent Complaints and Grievance Scheme Delivery Report* (2018) 99, at <<https://www.parliament.uk/globalassets/documents/news/2018/1-ICGP-Delivery-Report.pdf>>.

⁴² Office of the Independent Adjudicator for Higher Education, *The Good Practice Framework for Handling Complaints and Academic Appeals* (2018) 25, at <<https://www.oiahe.org.uk/media/1859/oia-good-practice-framework.pdf>>.

In respect of the mechanics of the underpinning disciplinary process, the OIA *Good Practice Framework: Disciplinary Procedures* stipulates that it would be ‘reasonable to assume’ that where an institution does not clearly state the standard of proof to be applied, it would be that of civil proceedings (balance of probabilities) rather than criminal ones (beyond reasonable doubt). Just as it would have been more helpful if the guidance had taken the opportunity to give examples of what sorts of specific details in relation to complaint disposal should not be shared, here one might have hoped for a more direct insistence that the balance of probabilities threshold *ought* to be the one that is adopted, particularly since this is of such crucial significance to the operation and outcomes of the disciplinary process itself.⁴³

More broadly, the pace and level of engagement with these sorts of issues has also varied substantially across UK universities. Some have now developed bespoke sexual violence and misconduct policies, sometimes as a result of proactive initiative, but often prompted by high-profile cases that have highlighted failings in existing processes. Some policies have been developed as an extension of universities’ ‘dignity and respect’ frameworks, but there has been variability in the scope and content of these codes, in how complaints are to be received and responded to, in how investigations and disciplinary hearings are to be conducted, and in what remedies are available.⁴⁴ This has been recognized by the OfS, which – following a review of the sector’s implementation of guidance on preventing and responding to SSVM – concluded that there is ‘evidence of a lack of consistent and effective systems, policies and procedures in place’ and that ‘progress in adopting the recommended approaches is slow and not widespread or consistent’.⁴⁵ Meanwhile, in Scotland, which is not under the jurisdiction of the OfS, a ‘toolkit’ to address ‘gender-based violence in universities and colleges’ was launched in 2018 as part of the Government’s ‘Equally Safe’ policy.⁴⁶ This toolkit only provides a ‘reference point’,⁴⁷ however, meaning that inconsistency of interpretation and implementation across the sector is similarly possible.

Thus, a lack of specificity within existing guidance, and the grafting of responses onto pre-existing disciplinary procedures and campus codes, have allowed a plurality of norms and processes to emerge across this largely self-regulating sector. In 2021, following a consultation that promised to examine mechanisms for better regulating institutional responses, the OfS published a *Statement of Expectations* for English universities, which it purported would assist them in developing and implementing ‘clear, accessible and effective complaints procedures’.⁴⁸ The seven-page document sets out key expectations that extend to making staff and students aware of their

⁴³ Office of the Independent Adjudicator for Higher Education, *The Good Practice Framework: Disciplinary Procedures* (2018) 8, at <<https://www.oiahe.org.uk/media/2045/good-practice-framework-disciplinary-procedures-section.pdf>>.

⁴⁴ TortoiseMedia, *Campus Justice: Is My Campus Safe?* (2020), at <https://members.tortoisemedia.com/2020/02/19/campus-justice-is-my-campus-safe/content.html?sig=7yE-Ju-qODXgjHYNuQ-2Ci7ldFAuvAEIC4fJJCQt_0>.

⁴⁵ Office for Students, op. cit., n. 32, p. 7.

⁴⁶ A. Donaldson et al., *Equally Safe in Higher Education Toolkit: Guidance and Checklist for Implementing a Strategic Approach to Gender-Based Violence Prevention in Scottish Higher Education Institutions* (2018), at <https://www.strath.ac.uk/media/1newwebsite/departmentsubject/socialwork/documents/eshe/UoS_Equally_Safe_Doc_1_visually_impaired_18_July.pdf>. There has been much debate about the scope of the policy, given its gendered focus. Note that, like Scotland, neither Wales nor Northern Ireland are under the jurisdiction of the OfS, and so will also be required to develop their own responses.

⁴⁷ Id., p. 15.

⁴⁸ Office for Students, op. cit., n. 32, p. 4. See also Office for Students, *Statement of Expectations for Preventing and Addressing Harassment and Sexual Misconduct Affecting Students in Higher Education* (2021), at <<https://www.officeforstudents.org.uk/media/d4ef58c0-db7c-4fc2-9fae-fcb94b38a7f3/ofs-statement-of-expectations-harassment-and-sexual-misconduct.pdf>>.

university's policies on harassment and sexual misconduct, engaging with students in the development and evaluation of those policies, ensuring adequate and effective procedures for handling disclosures of harassment or misconduct, and ensuring that reporting parties have access to appropriate support. Again, however, the language remains vague, with substantial discretion left to institutions in the interpretation. Moreover, as commentators predicted, the *Statement of Expectations* is not supported by robust enforcement mechanisms, lessening the likelihood of meaningful improvement.⁴⁹ While in our view this reflects a significant missed opportunity, others who have been more hesitant about the shift from Zellick to zero tolerance may be reassured. Despite judicial recognition that universities are 'duty bound' to prevent, investigate, and discipline SSVM as a component of their obligations to ensure 'that the safety, welfare and interests of all students are protected',⁵⁰ some have continued to raise principled objections or concern about universities' ability to execute such functions, and argued that this move is seriously ill advised.⁵¹

For these reasons, we should not be complacent regarding either the scale of the challenge involved in assuming and properly discharging responsibility for campus justice, or the potential for resistance to be encountered in its implementation. In the next section, therefore, we underscore why universities not only ought to rise to this challenge, but are also uniquely placed to do so.

3 | EQUALITY, ETHICS, AND JUSTICE: WHY UK UNIVERSITIES MUST ACT

3.1 | Securing rights to equality in education

Several international and regional frameworks – including the Convention on the Elimination of Discrimination Against Women and the Istanbul Convention – place legal obligations on states to address sexual violence as a form of human rights abuse, linked to a requirement to protect educational rights.⁵² In the UK, universities' exercise of public functions (within the parameters of the Human Rights Act 1998) also entails that they have a duty – under the European Convention on Human Rights (ECHR) – to develop policies and practices that provide students and staff with effective remedies for complaints (Article 6), and protect against threats to life or of inhuman or degrading treatment (Articles 2 and 3), which is now well established to include sexual violation.⁵³ Some have interpreted such obligations as imposing a requirement on UK universities to have clear procedures regarding their responses to and investigation of a report of rape or serious sexual

⁴⁹ The 1752 Group and McAllister Olivarius, *Sector Guidance to Address Staff Sexual Misconduct in UK Higher Education* (2020), at <<https://1752group.com/wp-content/uploads/2020/03/the-1752-group-and-mcallister-olivarius-sector-guidance-to-address-staff-sexual-misconduct-in-uk-he-1.pdf>>.

⁵⁰ *AB v. University of XYZ* [2020] EWHC 206 (QB) para. 86 (19 March 2020).

⁵¹ See for example E. A. O. Freer and A. D. Johnson, 'Overcrowding under the Disciplinary Umbrella: Challenges of Investigating and Punishing Sexual Misconduct Cases in Universities' (2018) 12 *International J. of Law in Context* 1. There has been similar resistance in the US context: see for example Méndez, op. cit., n. 5; M. Anderson, 'Campus Sexual Assault Adjudication and Resistance to Reform' (2016) 125 *Yale Law J.* 1940.

⁵² United Nations Women, op. cit., n. 30.

⁵³ Case 57/1996/676/866 *Aydın v. Turkey* Merits and Just Satisfaction [1997] ECHR App No 23178/94.

misconduct.⁵⁴ In addition, students' Article 8 rights to private and family life (including personal identity interests) may be engaged and unjustifiably interfered with by a broad range of abusive and harassing behaviours, or by the handling of information by universities during investigations.

In terms of wider issues of equality of access and opportunity, moreover, universities have a duty to ensure that ECHR rights are operationalized in a way that does not discriminate, including on the basis of gender and race (Article 14). This is particularly significant when read in conjunction with Protocol 1, Article 2 of the ECHR, which provides for the right to education (understood to include not only the act of instruction but also surrounding processes and administration of education). Thus, universities may be in breach of their equality and human rights obligations if they fail to take steps to ensure that students are, and feel, safe when accessing education, and can do so without undue obstacles relative to their counterparts.⁵⁵

The Equality Act 2010 strengthens these responsibilities: Section 149(1) dictates that universities, as public bodies, must have due regard, in exercising their duties, to the need to eliminate discrimination and harassment, advance equality of opportunity for people with protected characteristics (including sex and race), and foster good relations between different groups. Among other things, this 'public sector duty' dictates that management personnel in universities should assess the equalities impact of any policy, process, or decision that is likely to affect people with protected characteristics, and that this should be integral to their decision making, evaluated with rigour and an open mind.⁵⁶ This applies not only to individual universities but also to governmental and quasi-governmental sector regulators (including the OfS, the OIA, and UUK). Thus, policies and practices (or the lack thereof) that have a disproportionately adverse impact upon particular groups, including women as the most common victims of SSVM,⁵⁷ may constitute unlawful discrimination.⁵⁸

3.2 | Students as consumers and the duty of care

The statutory framework within which UK universities now operate entails, therefore, a responsibility for preventing and punishing SSVM where that (mis)conduct interferes with an individual's fundamental rights or threatens their equal access to education. Universities also have responsibility for a broader duty of care to those living and learning on their property, as well as a contractual relationship initiated through their commercial transactions with fee-paying students.⁵⁹

Even in the Zellick Review, this underpinning duty of care was recognized: '[U]niversities are communities whose members work, and often live, together. This requires certain standards of

⁵⁴ End Violence Against Women, *Spotted: Obligations to Protect Women Students' Safety and Equality* (2015); Universities UK, *op. cit.*, n. 33.

⁵⁵ *Id.*

⁵⁶ End Violence Against Women, *id.*

⁵⁷ Data from March 2018 to March 2020 indicate that 11.6 per cent of female full-time students in England and Wales experienced sexual assault in the last year, compared with 4.2 per cent of male full-time students: see Office for National Statistics, *Sexual Offences Victim Characteristics, England and Wales: Year Ending March 2020* (2020), at <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesvictimcharacteristicsenglandandwales/march2020>>.

⁵⁸ G. Calvert Lee, 'Campus Rape: Breach of Care' (2019) *Counsel*, at <<https://www.counselmagazine.co.uk/articles/campus-rape-breach-of-care>>.

⁵⁹ Universities UK, *op. cit.*, n. 38.

behaviour. It also places obligations on universities which owe a duty of care and responsibility to the members of that community.⁶⁰ More recently, UUK has made it clear that this duty extends to all aspects of students' experiences, and is not limited to when students are on university property: it 'applies whether a student is physically on campus, in student accommodation, undertaking placements or overseas study, participating in sports or social activities away from campus, or studying online'.⁶¹ Beyond this, health and safety law also requires universities to take reasonable steps to protect and ensure the health and safety of staff and students, which may encompass prevention, education, and effective processes for addressing SSVM complaints.⁶²

Since 2015, the relationship between the university and its students has become increasingly formalized in the UK and this has reinforced the obligations of parties on both 'sides' of the agreement. The Consumer Rights Act 2015 has cemented the role of students as consumers, and universities as 'traders' who supply them with services. Information provided by universities to their students, including the details of courses on websites or prospectuses, has also become part of the contract, meaning that the terms of obligations vary to some degree across institutions. However, in respect of disciplinary processes, the Competition and Markets Authority has made it clear that information and practices must be 'accessible, clear and fair to students'.⁶³ While there may be much to bemoan about the marketization of the higher education sector, this has – at least formally – given students further leverage with which to demand that processes for handling complaints will be 'fair, accessible and timely'.⁶⁴ This may be especially important for students alleging SSVM, given both the intimate nature of the violation and attendant investigation, and their often uncertain – and relatively powerless – position in a disciplinary process that is formally between respondent party and university, rather than between reporting and respondent parties.

Thus, the recent consumer framework in which UK higher education has come to operate works alongside the university's wider duty of care. It has placed obligations on individual institutions, in exchange for sometimes substantial fees, to create the sorts of conditions in which all students can flourish educationally, including a commitment to support their wellbeing. In that sense, the contractual interaction between universities and students has generated obligations that are ethical as well as legal in orientation, as we discuss below. In holding themselves out – in part for commercial and recruitment reasons – as 'communities' with 'shared values' to which members adhere, universities have invoked claims to integrity and justice that underpin ethical codes of conduct and cement attendant expectations regarding accountability and enforcement.

3.3 | Ethical commitments and civic functions

Publishing its research into the incidence of SSVM in 2011, the National Union of Students declared that all students have a 'right to live and study in an environment of dignity and respect, free from the fear of harassment or violence'.⁶⁵ This claim is embedded in broader ideas of

⁶⁰ Committee of Vice-Chancellors and Principals, op. cit., n. 13, para. 3(a).

⁶¹ Universities UK, op. cit., n. 38, p. 27.

⁶² J. Sladdin, 'Duty to Care for Student Mental Health Has Legal Implications for Universities' *Out-Law Analysis*, 17 October 2018, at <<https://www.pinsentmasons.com/out-law/analysis/duty-to-care-student-mental-health-legal-implications-universities>>.

⁶³ Competition and Markets Authority, *UK Higher Education Providers: Advice on Consumer Protection Law* (2015) 17.

⁶⁴ Id., p. 20.

⁶⁵ National Union of Students, quoted in Humphreys and Towl, op. cit., n. 1, p. 1.

students as ‘citizens’ of university communities. Universities play a significant role in society, providing both formal and informal education to millions of (mostly) young people and shaping the individual aspirations and societal norms of the next generation. Tied to their educational mission, universities thus have ‘civil duties’ to prevent and take action in respect of SSVM; indeed, as Humphreys and Towl put it, ‘when we think about the ability to influence society on a macro-level, it begs the key question, why *wouldn’t* we address sexual violence in higher education?’⁶⁶

Though more work is needed to ensure that these obligations are consistently met, their existence has now also been formally accepted by organizations including UUK, who acknowledge that ‘universities have a significant opportunity to lead the way in preventing and responding to violence against women and harassment’.⁶⁷ Meanwhile, the UK Government minister responsible for universities recently endorsed the ‘civic role of institutions’.⁶⁸

It is also important to recognize the extent to which universities in the UK invoke and benefit from the ethical connotations of ‘shared values’ or ‘partnership’ in their promotional materials, which often promise a certain vision of community in which staff, students, and alumni derive a sense of belonging. In making these aspirational, value-laden vision statements, universities assume a welfare role and accompanying responsibility – one that they do not discharge satisfactorily if they are unable to provide students with spaces in which they feel able to safely work, socialize, and live. Failing to act against sexual violence not only harms individual victims but also undermines any averred commitment to ensuring that all students are able to participate equally, and equally safely, in the diverse aspects of campus life; as United Nations Women has noted, it has ‘deleterious impacts on the university and campus community at large ... putting other students at risk’.⁶⁹ Thus, it is clear that there are both legal and ethical grounds upon which UK universities bear a responsibility to prevent and respond to complaints of SSVM.

Devising strategies to best discharge that responsibility requires a critical appreciation of the diverse contours of what justice might look like for those who report SSVM to their universities, and a commitment to capitalizing upon universities’ unique ability to marshal expertise across the whole campus⁷⁰ in respect of young people’s socio-sexual attitudes and behaviours. We explore these aspects further in the next section, before considering some of the ways in which an unreflective mimicking within university investigative and disciplinary contexts of adversarial methods and proof processes designed for the criminal courtroom may be counter-productive, reducing the prospects for voice and recognition, and the potential for effective redress.

4 | STUDENTS’ JUSTICE INTERESTS AND THE POTENTIAL OF UNIVERSITIES

It is worth noting that the broadening ethical and legal role for UK universities in tackling SSVM has developed at a time when the efficacy and adequacy of criminal justice responses to sexual violence has come under increasing scrutiny and challenge. Despite decades of well-meaning and

⁶⁶ Id., p. 38.

⁶⁷ Universities UK, op. cit., n. 38, p. 22.

⁶⁸ C. Skidmore, *Universities Minister Reinforces the Civic Role of Institutions* (2019), at <<https://www.gov.uk/government/speeches/universities-minister-reinforces-the-civic-role-of-institutions>>.

⁶⁹ United Nations Women, op. cit., n. 30, p. 6.

⁷⁰ M. A. Beres et al., ‘A Whole Campus Approach to Sexual Violence: The University of Otago Model’ (2019) 46 *J. of Higher Education Policy and Management* 646.

important reforms, extensive research has demonstrated that victims of sexual violence are still regularly failed by the criminal justice system, resulting in a significant justice gap.⁷¹ The criminal process is typically a lengthy one, punctuated by periods of delay and a lack of communication, which is not helped by complainants' status as 'only' witnesses. In the minority of cases that progress to trial, the prospect of intrusive questioning and defensive strategies that impugn credibility, together with a concern about conviction rates, mean that many complainants decide to withdraw. Of those who do not, many come to wish subsequently that they had, for the trial process is often experienced by complainants as re-traumatizing.⁷²

To be clear, our argument here is not that attention should be diverted away from this battle to reform, and improve, the criminal justice system; student survivors who wish to make recourse to that process should be supported and empowered to do so. Equally, it is appropriate, given the seemingly enduring nature of this justice gap, to reflect on whether additional and/or alternative routes to justice, or at least resolution, might be available. As noted above, added momentum has been given to this exploration of 'other' pathways by social movements, including #MeToo, which have encouraged survivors to call out sexual misconduct in a variety of ways and to push for greater accountability of perpetrators within a range of fora. In recent years, survivors of rape and sexual assault have increasingly explored and secured civil remedies,⁷³ including financial compensation;⁷⁴ engaged with restorative⁷⁵ and other transformative justice processes;⁷⁶ and initiated complaints under workplace codes of conduct and employment laws.⁷⁷

For those students now turning to universities to report and seek redress for experiences of SSV, it is clear that although this may be driven in part by a reluctance to engage with an evidently failing criminal justice system, it may be motivated more positively too by a desire to satisfy a broader range of justice interests than can be accommodated within those adversarial and carceral criminal processes. Over a decade ago, Herman's research with sexual and domestic abuse survivors made clear that their needs and wishes are often diametrically opposed to the requirements of formal criminal proceedings.⁷⁸ More recent work has highlighted the nuanced

⁷¹ Kelly et al., op. cit., n. 5; Temkin and Krahé, op. cit., n. 5; Hohl and Stanko, op. cit., n. 14; S. Cowan, 'Sense and Sensibilities: A Feminist Critique of Legal Interventions against Sexual Violence' (2019) 23 *Edinburgh Law Rev.* 22.

⁷² See for example Brooks-Hay et al., op. cit., n. 12; E. Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (2018); G. M. Matoesian, *Reproducing Rape: Domination through Talk in the Courtroom* (1993).

⁷³ N. Godden, 'Claims in Tort for Rape: A Valuable Remedy or Damaging Strategy?' (2011) 22 *Kings Law J.* 157.

⁷⁴ O. Smith and J. Galey, 'Supporting Rape Survivors through the Criminal Injuries Compensation Scheme: An Exploration of English and Welsh Independent Sexual Violence Advisors' Experiences' (2017) 24 *Violence Against Women* 1091.

⁷⁵ C. McGlynn et al., "'I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice' (2012) 39 *J. of Law and Society* 213; E. Zinsstag and M. Keenan, *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (2017).

⁷⁶ E. Dixon et al. (eds), *Beyond Survival: Strategies and Stories from the Transformative Justice Movement* (2020); M. E. Kim, 'Transformative Justice and Restorative Justice: Gender-Based Violence and Alternative Visions of Justice in the United States' (2021) 27 *International Rev. of Victimology* 162; M. E. Kim, 'From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration' (2018) 27 *J. of Ethnic & Cultural Diversity in Social Work* 219, where at 225 Kim defines restorative and transformative justice as challenging 'punitive, retributive criminal responses to gender violence'.

⁷⁷ Equality and Human Rights Commission, *Turning the Tables: Ending Sexual Harassment at Work* (2018), at <<https://www.equalityhumanrights.com/en/publication-download/turning-tables-ending-sexual-harassment-work>>.

⁷⁸ F. Herman, 'Justice from the Victim's Perspective' (2005) 11 *Violence Against Women* 571.

and shifting patterns of victim-survivors' justice interests, which include securing 'consequences' for perpetrators, but also a desire for 'recognition' of their experiences, and an opportunity for voice and dignified treatment, as well as for preventing future harm to others and reintegrating themselves back into their communities.⁷⁹

McGlynn and Furgalska have suggested that this multiplicity and complexity of justice interests can be traced through the reasons that are being offered by students for reporting experiences of SSVM to their universities and pursuing a disciplinary process against the alleged perpetrator.⁸⁰ Research suggests that some students may recoil from the punitive aspects of the criminal justice process because their primary goal is not to seek outcomes that 'ruin' the perpetrator's life.⁸¹ For others, reporting to the university appears to be about proactively pursuing consequences that are outwith the criminal justice system but within that institution's control, such as no-contact orders, or suspension or expulsion from campus. For example, one student disclosed that she reported sexual violence to her university with the aim of protecting herself from constantly 'bumping into' the alleged perpetrator,⁸² while another sought a similar outcome after she found herself confined to her room after a sexual assault since 'the last time I saw him, I threw up'.⁸³ The ability to control one's space and, as a result, be able to continue with one's education, is – unsurprisingly – a significant justice interest for student survivors,⁸⁴ and one that is uniquely within the gift of universities as gatekeepers of campus access and institutional affiliation.⁸⁵

Universities are also particularly well positioned, in theory at least, to redress another justice interest that survivors have frequently identified: that of 'recognition' or 'acknowledgement'. Universities, as providers of community, education, and norm formation for many young people, can play a substantial role in affirming institutional recognition of survivors' experiences as significant and harmful.⁸⁶ This can operate at both the individual and the collective level: a complaint made by one individual student against another can be motivated by individual needs or interests as well as by the desire to fuel wider processes of acknowledgement and accountability, such as through campus-wide initiatives that focus on consent training or bystander intervention. Some survivors have spoken of wanting the perpetrator to understand that what they did was harmful, and to appreciate why it was wrong, in a way that draws both harm recognition and prevention into a collaborative, educative dialogue alongside peers.⁸⁷ Research with students alleging

⁷⁹ See for example McGlynn and Westmarland, op. cit., n. 12.

⁸⁰ C. McGlynn and M. Furgalska, 'What Does Campus Justice Mean for Survivors of Sexual Violence?' *Social & Legal Studies Blog*, 23 October 2019, at <<https://socialandlegalstudies.wordpress.com/2019/10/23/what-does-campus-justice-mean-for-survivors-of-sexual-violence/>>.

⁸¹ S. Das and S. Griffiths, 'University Is Protecting My Rapist' *Sunday Times*, 6 July 2019, at <<https://www.thetimes.co.uk/article/university-is-protecting-my-rapist-3lpzzqt95>>.

⁸² Id.

⁸³ B. Machell, 'Crisis on Campus: The Rise of the "Unilad"' *Times*, 9 May 2015, at <<https://www.thetimes.co.uk/article/university-is-protecting-my-rapist-3lpzzqt95>>.

⁸⁴ H. Antonsdottir, 'Injustice Disrupted: Experiences of Just Spaces by Victim-Survivors of Sexual Violence' (2019) 29 *Social & Legal Studies* 718.

⁸⁵ A. Bull, 'Catalysts and Rationales for Reporting Staff Sexual Misconduct in UK Higher Education Institutions' (forthcoming) *J. of Gender-Based Violence*.

⁸⁶ A. Bull and T. Page, 'The Governance of Complaints in UK Higher Education: Critically Examining "Remedies" for Staff Sexual Misconduct' (2021) *Social & Legal Studies* 1, at <<https://journals.sagepub.com/doi/pdf/10.1177/09646639211002243>>.

⁸⁷ McGlynn and Westmarland, op. cit., n. 12; Brooks-Hay et al., op. cit., n. 12.

sexual violence or misconduct from staff has likewise found that, when complaining to universities, reporting parties are seeking recognition of the harm experienced as well as the safeguarding of future students.⁸⁸ In other words, students who report to universities want to protect themselves and others; and while this might be secured by disciplinary sanctions that include expulsion from campus, for many survivors, education and rehabilitation are also key, and are aspirations that are arguably better met within university environments than by the criminal justice system.⁸⁹

It is important, though, that rehabilitation and reintegration are not understood thinly by universities as a mechanism by which to ‘smooth over’ ripples and ruptures that the conduct and its investigation may have generated, or to trivialize the severity of the harm done.⁹⁰ The OIA has recently advised that interventions made, and remedies pursued, in university disciplinary processes should be aimed at ‘returning’ students to ‘the position they were in before the circumstances of the complaint’.⁹¹ However, in the SSVM context, Bull and Page’s observation in respect of staff–student complaints is equally pertinent here: it is ‘likely to be impossible’ to ‘return’ students (whether as reporting or respondent parties) to their pre-complaint position, regardless of the process outcome.⁹² What is required, therefore, is a deeper engagement with what justice looks like for those students, and a recognition that universities hold a unique potential (and responsibility) as public, educational communities to achieve more transformative justice outcomes than may ever be available via the criminal process.

In summary, then, students who report SSVM may be seeking a range of different outcomes, including to punish wrongdoing, prevent harm to others, protect their own welfare, or ensure continuation of their studies,⁹³ or more collective forms of redress that challenge community norms⁹⁴ and disrupt institutionalized power structures, especially those that Méndez identifies as ‘structures and reward systems that enable harmful behaviour to happen and to continue’.⁹⁵ However, the ‘individualised nature of complaints processes’ within a consumerist model of higher education risks frustrating such potentially transformative outcomes.⁹⁶ As we argue below, this risk is increased by protocols adopted by universities that uncritically endorse punitive logics or investigative procedures that rely on the adversarial trappings of criminal justice templates.

⁸⁸ Bull and Page, *op. cit.*, n. 86.

⁸⁹ C. McGlynn, ‘Universities Should Offer Restorative Justice for Sexual Misconduct Victims’ *Times Higher Education*, 11 July 2019, at <<https://www.timeshighereducation.com/opinion/universities-should-offer-restorative-justice-sexual-misconduct-victims>>. See also M. Koss et al., ‘Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance’ (2014) 15 *Trauma, Violence & Abuse* 242. For a recent discussion of the potential, and responsibility, of US universities to assist in the development of sexual citizenship, see J. Hirsch and S. Khan, *Sexual Citizens: Sex, Power and Assault on Campus* (2020).

⁹⁰ For example, in the use of small monetary fines levied against perpetrators: G. Barradale, ‘Revealed: How Unis Issue Meaningless Fines to Students Guilty of Sexual Assault’ *The Tab*, 12 June 2020, at <<https://thetab.com/uk/2020/06/12/revealed-how-universities-misuse-fines-to-punish-students-who-sexually-assault-others-161153>>.

⁹¹ Office of the Independent Adjudicator for Higher Education, *op. cit.*, n. 36, p. 4.

⁹² Bull and Page, *op. cit.*, n. 86, p. 12.

⁹³ *Id.*

⁹⁴ McGlynn and Furgalska, *op. cit.*, n. 80.

⁹⁵ Méndez, *op. cit.*, n. 5, p. 97.

⁹⁶ Bull and Page, *op. cit.*, n. 86, p. 9.

5 | THE CRIMINAL JUSTICE DRIFT: INVESTIGATIONS AND HEARINGS

Those uneasy with recent developments in respect of universities' jurisdiction have highlighted that existing disciplinary structures, which have been formulated primarily with an eye to academic misconduct (such as plagiarism), are often 'not suited' to 'serious matters' such as sexual misconduct.⁹⁷ It is true, no doubt, that a substantial step change may be required in aspects of 'standard' disciplinary training and procedures to address SSVM complaints adequately, whether in terms of handling disclosures sensitively, conducting investigations appropriately, evaluating evidence effectively, or determining proportionate penalties. At the same time, however, the inadequacy of existing processes does not, and should not, provide a basis for a 'rape exceptionalism'⁹⁸ that would enable universities to abdicate the responsibility for addressing SSVM that is so clearly owing. Disciplinary investigations and hearings have long been conducted by universities in respect of other forms of conduct that might constitute criminal offences (including theft, criminal damage, and drug use) without provoking such anxiety, and the complexities and sensitivities associated with the handling of student complaints of sexual violence must be read as challenges to be overcome rather than reasons for avoidance.

Some disciplinary policies and procedures on SSVM have 'borrowed' familiar frames from the criminal justice arena. This is understandable in the midst of much anxiety over the adequacy of existing processes, a lack of detailed guidance on alternative mechanisms to be applied, and the weighty ramifications for reporting and respondent parties, as well as for the reputation of the university, of SSVM complaints. In this section, however, we highlight some of the reasons why such a criminal justice drift may be ill suited and ill advised. We focus in particular on the substantive and evidential differences between campus and criminal justice codes (including in regard to relevant standards of proof), and the ways in which expertise in each context may require different skill sets and ambitions in terms of what constitutes a progressive outcome. We present our concern that, without more careful consideration, university processes on SSVM may be cemented across the sector in ways that replicate the flawed responses of the criminal justice system to complaints of rape and sexual assault, and that frustrate the potential for more transformative engagement with the individual justice interests of the parties involved, as well as the needs of the wider campus community.

5.1 | Standards of conduct, burdens of proof, and perceptions of professionalism

It is important to note from the outset that the conduct required to be investigated and established by university SSVM policies often diverges in important respects from that prohibited by criminal law. Though there may be overlaps and parallels, in developing their campus codes, universities are at liberty to – and often do – introduce a wider range of conduct prohibitions than would be covered in any criminal process, such as some forms of sexual harassment. They may also include breaches that do not hinge at all on the question of consent (which remains core to sexual offences laws across the UK), but are framed instead around, for example, abuse of power or vulnerability.

⁹⁷ Freer and Johnson, *op. cit.*, n. 51, p. 19.

⁹⁸ A. Brodsky, 'A Rising Tide: Learning about Fair Disciplinary Process from Title IX' (2017) 66 *J. of Legal Education* 822.

Importantly, where the conduct in question *is* framed around an absence of consent, there is no necessity for university disciplinary codes to require that a perpetrator knew, or ought to have known, that the victim was not consenting, which is a fundamental requirement for establishing a criminal fault element. Instead, policies usually restrict themselves to the conduct element, with the requirement to show – to the appropriate degree of proof – that the reporting party did not consent, regardless of the knowledge of the respondent party. Further, it is open to universities to use – and, again, some do – more exacting thresholds in respect of that consent standard than the criminal law, such as requiring ‘enthusiastic consent’ to avoid breach.⁹⁹

The burdens of proof in criminal justice and university disciplinary contexts are very different, with the latter typically adopting a balance of probabilities standard. Assessing evidence on a balance of probabilities means determining whether the alleged conduct is ‘more likely than not’ to have occurred, described as ‘51% or more’ in the Pinsent Masons/UUK guidance.¹⁰⁰ Thus, although there might be limited evidence, or uncertainty in evidence, a finding of a disciplinary breach can appropriately be made if it is determined that the conduct is more likely than not to have occurred. This can be contrasted with the criminal burden of proof, which requires adjudicators to determine whether the evidence has established guilt ‘beyond a reasonable doubt’, often interpreted to mean ‘satisfied so that they are sure before they can convict’.¹⁰¹

Understanding, and adhering to, the appropriate burden of proof is clearly vital to the integrity of university processes. It is crucial that those tasked with undertaking investigations and hearings apply the norms of campus codes on their own terms, and without any ‘gloss’ imposed by interpreting them through the lens of criminal processes in which evidential protocols, types of prohibited conduct, and standards for liability may be fundamentally different. This can, of course, be developed through training. However, in many UK universities, those who have been recruited to date as specialist SSVM investigators often have prior criminal justice experience, frequently as former police officers.¹⁰² Such personnel may have training in forensic interview techniques, investigative case building, and/or trauma-informed practice, and their justice credentials may be attractive to universities keen to emphasize the robustness of their processes. At the same time, however, there is a risk that criminal justice practices and norms will become embedded through ‘muscle memory’, or considered ‘better’, by those initiated in them, and that this may make attending to the specifics of campus codes and communities more challenging. The paucity of detailed guidance and oversight across the sector that we noted earlier amplifies these concerns, as does the fact that charting an alternative, bespoke, and innovative approach for universities, beyond the familiarity of criminal justice processes, is likely to be challenging and resource-intensive work.¹⁰³

These concerns connect to a wider debate about whether investigations and hearings should be conducted by those internal to the institution. For example, while routinely ‘contracting out’

⁹⁹ See for example Goldsmiths, University of London, *Policy and Procedure on Sexual Violence, Sexual Harassment, Stalking, Domestic Violence and Sexual Misconduct for Students, Staff and Visitors* (2019) 8, at <<https://www.gold.ac.uk/media/documents-by-section/about-us/governance/policies/Goldsmiths-policy-on-sexual-violence-harassment-misconduct.pdf>>. In the US context, see Anderson, *op. cit.*, n. 51, pp. 1979–1980.

¹⁰⁰ Pinsent Masons and Universities UK, *op. cit.*, n. 35, p. 10.

¹⁰¹ Crown Court Compendium Part 1 (updated December 2020) 5-2, at <<https://www.judiciary.uk/wp-content/uploads/2020/12/Crown-Court-Compendium-Part-I-December-2020-amended-01.02.21.pdf>>.

¹⁰² Specialist consultancy firms have also been established to perform this investigative role for universities, and these often similarly rely heavily on former criminal justice expertise: see G. Barradale, ‘Top Unis Are Hiring Investigators to Deal with Students Accused of Sexual Assault’ *The Tab*, 14 June 2021, at <<https://thetab.com/uk/2021/06/14/top-unis-are-hiring-investigators-to-deal-with-students-accused-of-sexual-assault-209839>>.

¹⁰³ Beres et al., *op. cit.*, n. 70.

SSVM investigations to external consultants may increase the appearance of independence, jettisoning ambitions to train and utilize internal investigators may undermine the potential to engage existing expertise *within* an institution in ways that can be more productive of embedded and sustained cultural change.¹⁰⁴ Likewise, while some commentators have insisted that it is ‘wholly inappropriate’¹⁰⁵ to include student community representatives on disciplinary panels, their involvement can be seen to signal an important recognition of the collective interests at stake in the handling of an SSVM complaint – interests that we have suggested sit alongside (and often in conversation with) questions of individual wrongs. As Ridolfi-Starr puts it, in SSVM cases, ‘all students share a common interest: ensuring fair and transparent campus disciplinary processes’.¹⁰⁶

So, too, are there potential risks associated with ‘professionalizing’ the handling of SSVM complaints through the greater involvement of lawyers in disciplinary panels. The claim has been that legal knowledge is required to competently adjudicate breaches of university policy, and that it is therefore inappropriate to retain ‘adjudicating panels that are not necessarily legally qualified’.¹⁰⁷ Recent support for this view has come from a 2019 judgment of the Queensland Supreme Court. Although its conclusion that the University of Queensland lacked jurisdiction to respond to a complaint of sexual misconduct was tied specifically to the wording of that institution’s constitution and governance structures (which were interpreted narrowly), the court intimated a wider unease regarding the legitimacy of at least certain forms of disciplinary intervention, noting that

it would indeed be a startling result if a committee comprised of academics and students who are not required to have any legal training could decide allegations of a most serious kind without any of the protections of the criminal law.¹⁰⁸

The court referred to the primary (first instance) judge’s citation of a number of previous judgments about university disciplinary processes, and in particular a concern about ‘the lack of procedural fairness afforded to a student against whom allegations were made of sexual misconduct’.¹⁰⁹ This was expressed more prosaically in one newspaper headline: ‘It’s Time We Culled These Kangaroo Courts’.¹¹⁰ However, this is an example of the sort of criminal justice drift that requires interrogation, since the judgment fails to draw any clear distinction between the university’s

¹⁰⁴ *Id.*

¹⁰⁵ J. Norris, ‘Universities Lack the Skills to Properly Investigate Sexual Misconduct Claims’ *Times Higher Education*, 18 October 2019, at <<https://www.timeshighereducation.com/blog/universities-lack-skills-properly-investigate-sexual-misconduct-claims>>.

¹⁰⁶ Z. Ridolfi-Starr, ‘Transformation Requires Transparency: Critical Policy Reforms to Advance Campus Sexual Violence Response’ (2016) 125 *Yale Law J.* 2156, at 2158.

¹⁰⁷ Norris, *op. cit.*, n. 105.

¹⁰⁸ *University of Queensland v. Y* [2020] QCA 216, para. 70.

¹⁰⁹ *Id.*, para. 82, citing para. 66 of the primary judgment *Y v. University of Queensland & Anor* [2019] QSC 282, where the primary judge is referring to the case of *X v. [T]he University of Western Sydney*. The court here is using the term ‘procedural fairness’ in the administrative law sense of ‘due process’ or ‘natural justice’ – in other words, the procedures followed when making a fair administrative law decision – rather than in the social scientific sense of ‘procedural justice’ as developed through empirical analysis by Tom Tyler and others: see for example T. Tyler, ‘Procedural Justice, Legitimacy, and the Effective Rule of Law’ (2003) 30 *Crime and Justice* 283.

¹¹⁰ *The Australian*, ‘It’s Time We Culled These Kangaroo Courts’ *The Australian*, 26 November 2019, at <<https://www.theaustralian.com.au/commentary/its-time-we-culled-these-kangaroo-courts/news-story/b2107caa3d950507f418fd6931336ec2>>.

appropriate remit and a criminal process. In the former, a university deliberates on a breach of its own internal codes of conduct, which can and often do extend to behaviours that *might* amount to a criminal offence, including but by no means limited to those of a sexual nature. This is different from a determination of criminal *fault*, which the university is not equipped to issue. Each forum involves distinctive considerations of conduct and fault elements, evidential propriety, and jurisdictional competence. It is not only unhelpful but also misleading to collapse this distinction, especially where – as in the Queensland judgment – that conflation is relied upon to advocate for more juristic intervention.

5.2 | Due process, participation, and legal representation: in the shadow of adversarialism

The Queensland Supreme Court’s assessment of the university’s processes engaged not only the question of the legal competence of adjudicating panels but also wider concerns about the adequacy of protections afforded to respondent parties’ due process rights during hearings. In the UK, a key testing ground on this issue has been the entitlement of respondent parties to legal representation.

In 2020, the High Court took the opportunity to provide a steer on this, in the case of *AB v. University of XYZ*.¹¹¹ The claimant, during an Erasmus exchange to another European Union university, got into bed with a female student who ‘appeared to pass out’ as a result of her intoxication, and engaged in sexual activity with her. While he insisted that activity was consensual, she disputed this, lodging a formal complaint of sexual assault against him, which – if established – would constitute a serious breach of the disciplinary codes of the claimant’s UK university. The claimant failed to make written submissions or attend his resultant hearing, without explanation. Rather than appeal internally against his expulsion from the university, the claimant brought proceedings for breach of contract on the grounds that the stated policy of the university, which did not allow respondent parties to be legally represented at disciplinary hearings, contravened rules of natural justice. In response, the university explained that the rationale behind their policy was that disciplinary hearings are not legal proceedings, and that representation would not only make the process more adversarial but also raise questions about equivalent representation for reporting parties to whom a duty of care was also owed. This explanation had been more sympathetically received at a previous hearing where the judge observed that ‘it would not be appropriate for the disciplinary hearing to become lengthy and legalistic’. There, although the court noted that ‘the claimant has an arguable case with regard to the entitlement to legal representation’, it was ‘not satisfied that there is a high degree of assurance that he will be able to establish this right at trial’, and the claimant’s request for an interim injunction to allow him to return to the university was rejected.¹¹² The High Court took a different view, assessing the claim on legal representation favourably and concluding that concerns about the impact of this upon the complexity and tone of proceedings could be adequately addressed.

In reaching this conclusion, the High Court drew authority in particular from cases in which it had previously been determined that procedural fairness required the provision of legal representation: those cases arising in prison disciplinary proceedings;¹¹³ or ‘safeguarding’

¹¹¹ *AB* (6 November 2020), op. cit., n. 2.

¹¹² *AB* (19 March 2020), op. cit., n. 50, para. 105, para. 115(iv).

¹¹³ *R v. Board of Visitors of HMP The Maze ex p Tarrant* [1985] QB 251.

investigations, where serious allegations posed a significant threat to respondent parties' ability to continue to practice their profession.¹¹⁴ However, the applicability of these cases to *AB* is questionable: in the former context, the prisoner is already under coercive control by the state, with the prospect of additional sanction necessitating heightened procedural protection; in the latter, the Supreme Court had confirmed that protection was only required where ECHR Article 6 rights were engaged, and that this would not be the case in all disciplinary proceedings.¹¹⁵

The court in *AB v. University of XYZ* acknowledged that 'there was no right to representation simply because there were disciplinary proceedings',¹¹⁶ noting the concerns raised by Lord Hope in *R (G) v. Governors of X School* that routine representation would turn such proceedings 'into a process of litigation, with all the consequences as to expense and delay that that would involve' as well as a likely 'chilling effect on resort to the procedure' by complainants.¹¹⁷ However, it also drew attention to the OIA Guidance on Disciplinary Procedures, which stated that while 'students who have access to well-trained and resourced student support services will not normally need to seek legal advice ... [i]t is good practice for providers to permit legal representation in complex disciplinary cases or where the consequences for the student are potentially very serious'.¹¹⁸ The court regarded *AB*'s case as one in which complex points of law were unlikely to arise, stating – somewhat controversially, given experience within the criminal law – that 'consent is a relatively straightforward concept'.¹¹⁹ However, the court held that the serious nature of the allegation and the fact that the claimant had 'lost a substantial benefit by being withdrawn'¹²⁰ from the university meant that an increased level of protection – reflected in legal representation – was appropriate.

In regard to what Lord Hope described as a potential 'chilling effect', the High Court recognized the 'obvious risk that complainants may be deterred from making and pursuing complaints if they fear being subject to an overly formal procedure involving lawyers'. However, it concluded that 'the dangers of this should not be overstated'.¹²¹ Indeed, it was suggested that any risk of intimidation could be mitigated by effective chairing of the disciplinary committee and that the presence of a lawyer might even serve as a useful 'buffer' to minimize complainants' distress at encountering an alleged abuser. This fails to acknowledge evidence of substantial under-reporting of sexual victimization, often due to fear of adversarial justice processes, and the difficulties of managing proceedings involving a one-sided dynamic of legal representation.

In our view, it also fails to reflect adequately on how opening up the disciplinary process to legal counsel for respondent parties may shift the overall tone of SSVM investigations and hearings – in particular, by increasing the use of combative modes of engagement and questioning

¹¹⁴ *R (Dr S) v. Knowsley NHS Primary Care Trust* [2006] EWGC 26 (Admin); *R (G) v. Governors of X School* [2010] 2 All ER 555 (Court of Appeal). Again, we are using the term 'procedural fairness' here in the legal sense – in other words, the procedures followed when making a fair administrative law decision.

¹¹⁵ *R (G) v. Governors of X School* [2012] 1 AC 167 (UKSC).

¹¹⁶ *AB* (6 November 2020), op. cit., n. 2, para. 85.

¹¹⁷ *R (G) v. Governors of X School*, op. cit., n. 115, para. 95.

¹¹⁸ *AB* (6 November 2020), op. cit., n. 2, para. 67. As with the Pinsent Masons/UUK guidance referred to earlier, the wording of the OIA Guidance here is rather vague.

¹¹⁹ *Id.*, para. 90(ii).

¹²⁰ *Id.*, para. 90(i).

¹²¹ *Id.*, para. 90(iv).

intended to impugn the credibility and reliability of the reporting party around the issue of consent. That some of those legal practitioners who have most strenuously advocated for their profession's involvement in SSVM processes have done so by referring to universities finding students 'guilty' of offences only underscores this concern, highlighting the ease with which criminal justice logics can be uncritically transplanted.¹²² Determining 'guilt' is not an appropriate characterization of what universities do, given the various differences in the framing and purposes of codes of conduct and the scope of their disciplinary jurisdiction. As Anderson has said, the point is not whether universities have the same resources and safeguards as criminal proceedings – they clearly do not: 'the point is that campuses must use their resources to provide students with equal access to education'.¹²³ However, use of this criminal justice language strengthens the anxiety that institutions might experience regarding any inadvertent potential for infringement of respondent parties' rights.

As is often the case, the court maintained that the decision in *AB* was 'based on the circumstances'¹²⁴ and not intended to set a precedent for the sector in relation to SSVM investigations. However, it is not difficult to imagine that universities' awareness of the risk of having disciplinary decisions set aside through expensive and lengthy court processes if they are seen to breach natural justice (for example, by denying respondent parties legal representation) will amplify pre-existing anxieties about negative publicity and reputational damage. The likely result is that *AB* will usher in a new norm, at least for those respondent parties with the resources to instruct legal counsel.¹²⁵

We suggest that there are reasons to be circumspect about the counter-productive impact of this decision upon the potential for more trauma-informed and transformative university responses; but if legal representation is indeed what natural justice requires, then it begs the further question of whether 'fairness may even require the complainant to be legally represented'.¹²⁶ This at least ensures some 'equality of arms' in a formal dynamic in which – and here there is a parallel to criminal justice – the dispute is a bilateral one between university and respondent party. Moreover, it opens up for consideration other mechanisms that have been implemented in the criminal justice context to ameliorate the excesses of adversarialism and better serve the rights and interests of vulnerable witnesses, such as the use of special measures to give testimony remotely, via video or with screens; restrictions on the types of questions that can be asked regarding sexual history, character, and private records; and the availability of independent, specialist sexual violence advocates.

¹²² D. Sokol, 'Get Rid of Amateur University Justice' *Times*, 6 February 2019, at <<https://www.thetimes.co.uk/article/get-rid-of-amateur-university-justice-dfnfzcssr>>.

¹²³ Anderson, *op. cit.*, n. 51, p. 1995.

¹²⁴ *AB* (6 November 2020), *op. cit.*, n. 2, para. 92.

¹²⁵ Further support for this view comes in recent commentary by Jonathan Cohen, QC, who has observed that in employment contexts, notwithstanding the court's insistence that there is not a routine right to representation, *AB* may be used regularly as precedent for an entitlement to representation in investigations against senior executives; and that the court's finding that cross-examination should not be allowed providing that there is adequate questioning from the chair may lead to a situation where counsel for the respondent party will require a list of questions to be asked. See 'How to Navigate the Storm: Dealing with Investigations against Senior Executives and Founders – IFSEA 2021 Virtual Conference Video' *CM Murray*, 4 March 2021, 17:45, at <<https://www.cm-murray.com/knowledge/how-to-navigate-the-storm-dealing-with-investigations-against-senior-executives-and-founders-ifsea-2021-virtual-conference-video/>>.

¹²⁶ *AB* (6 November 2020), *op. cit.*, n. 2, para. 90(vi). The US Office for Civil Rights guidance on Title IX does not require universities to provide or allow legal representation, but says that if a student accused of sexual misconduct is permitted to have a lawyer, lawyers must be permitted for both parties. See Anderson, *op. cit.*, n. 51, p. 1986; D. Coker, 'Crime Logic, Campus Sexual Assault, and Restorative Justice' (2017) 49 *Texas Tech Law Rev.* 147.

It is notable that the majority of those calling for the greater involvement of lawyers within university disciplinary processes have not raised these matters, but are preoccupied instead with the interests and entitlements of respondent parties (and the entitlements of respondent parties within the SSVM context rather than across disciplinaries more widely).¹²⁷ Furthermore, the reasoning in *AB* does little to foreground the question of what natural justice might require for *all* parties; indeed, the closest the court comes to this is in recognizing that it is important ‘to ensure that the questions to be asked [of the reporting party] did not unduly distress her’, which it concludes can be done satisfactorily through the chair acting as a ‘filter’.¹²⁸ Whether that filtering is envisaged as extending beyond the tone of questions to their substantive content is unclear, but since no consideration is afforded to the standards by which the ‘appropriateness’ of questions should be assessed, the judgment does not offer a mandate for robust intervention. This in turn leaves reporting parties to face hostile and invasive questioning from counsel without the protections that – though they often fail complainants in rape and sexual assault cases¹²⁹ – are at least formally in place in criminal contexts.

The current situation in the US may also provide a useful cautionary tale here. For some time, federally funded universities there have been obliged to investigate reports of campus sexual harassment and misconduct. Indeed, under what is commonly known as ‘Title IX’, there is a constitutionally guaranteed right that protects all individuals at such institutions from discrimination on the basis of sex. This has been interpreted repeatedly to include the right to an equal education, free from sexual harassment and misconduct.¹³⁰ Furthermore, unlike in the UK, this obligation has come with effective sector-wide enforcement mechanisms; financing for federally funded universities is contingent upon their compliance with various rules and guidance, including provisions on employing appropriate staff to respond to complaints, procedures for conducting grievance hearings (including rules on evidence and pertinent burdens of proof), and definitions of the types of conduct to be covered. However, while the existence of this protection is far better cemented in the US than in the UK, it has been susceptible to political influence. Indeed, while the Obama administration took steps to mandate more proactive investigations, there was substantial retraction under rules subsequently adopted by the Trump administration. Among other things, these have narrowed the definition of sexual harassment, embedded an entitlement for advisors to be appointed who may not only represent respondent parties at hearings but also conduct live and direct cross-examination of reporting parties, and changed the burden of proof to enable institutions to impose a (higher) threshold of ‘clear and convincing evidence’ before a

¹²⁷ Freer and Johnson, *op. cit.*, n. 51. Similarly, Anderson critiques the exceptionalist approach to sexual misconduct in the US university context, which mirrors the heightened procedural hurdles faced by sexual assault victims in the criminal justice system: see Anderson, *op. cit.*, n. 51, pp. 1986–1990.

¹²⁸ *AB* (6 November 2020), *op. cit.*, n. 2, para. 97.

¹²⁹ For discussion, see for example O. Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (2018); S. Cowan, *The Use of Sexual History and Bad Character Evidence in Scottish Sexual Offences Trials* (2020), at <<https://www.equalityhumanrights.com/en/publication-download/use-sexual-history-and-bad-character-evidence-scottish-sexual-offences-trials>>. In 2021, in the first case of its kind, an out-of-court damages settlement was made to a rape complainant in recognition of the unacceptable tone and content of cross-examination that she encountered at trial: see J. Hyland, ‘Scots Sex Attack Victim Tormented with “Inhumane” Questioning in Witness Box Wins £35K Comp’ *Daily Record*, 28 March 2021, at <<https://www.dailyrecord.co.uk/news/scottish-news/scots-sex-attack-victim-tormented-23803344>>.

¹³⁰ M. Reilly, ‘Due Process in Public University Cases’ (2016) 120 *Pennsylvania State Law Rev.* 1001; Brodsky, *op. cit.*, n. 98.

complaint will be upheld.¹³¹ The exact impact of these changes upon the overall tenor of US campus investigations remains to be seen, but they can clearly be understood to mark a retreat from a less formalized civil justice approach and towards a more adversarial framework that mimics key criminal justice components. Early indications suggest that this will lead to a significant reduction in the number of reports of sexual violence and misconduct made to US universities, as survivors are disincentivized by the prospect of more intrusive and lengthier investigations and the need to find resources for legal representation to equal the challenge from respondent parties.¹³² On both sides of the Atlantic, then, the need to correct the drift to criminal justice logics in university processes and their tangible effects on the choices and experiences of survivors remains a live concern.

6 | CONCLUSION

We have argued in this article that, although the journey of UK universities from Zellick to zero tolerance has not been a linear one, the case is now compelling that higher education institutions, individually and collectively, owe a responsibility to students within their campus communities to prevent and protect against SSVM. While detailed sector guidance is crucial, it has not been forthcoming, meaning that different universities have adopted divergent practices and procedures, the development and implementation of which has been inconsistent and often inadequate.

The framing of university responsibilities in respect of SSVM through the language and approach of criminal justice – though common in public and professional discourse – is potentially both disingenuous and dangerous. It encourages higher education senior managers, many of whom are anxious about their university’s involvement (and potential exposure to reputational damage) within this terrain, to uncritically turn towards the use of external legally qualified or police-trained investigators, the inclusion and influence of legal representatives within disciplinary proceedings, and the incorporation of criminal justice evidential standards and rules. All of this, we have argued, is neither an inevitable nor a necessarily progressive direction of travel. Indeed, it is one that may end with universities cementing adversarial processes and punitive logics that frustrate their unique potential to think innovatively about what justice might look like for survivors of SSVM, what interventions might be meaningful for perpetrators, and what opportunities there might be for wider understandings of redress, reintegration, and rehabilitation within their campus communities.

Even when operationalized at their best, there is now a weight of evidence that illustrates how criminal justice processes can reduce the potential to acknowledge and respond to the ‘ever-evolving, nuanced and lived’¹³³ individual and collective experiences of sexual violence in genuinely transformative ways. Where they are poorly operationalized, partially adopted, or unreflectively mimicked, they risk imposing insurmountable obstacles to justice for all parties,

¹³¹ United States Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* (2020), at <<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf>>. For critical comment on the changes to Title IX and how they impact on students, see Anderson, op. cit., n. 51. Regarding their effect particularly upon marginalized students, who disproportionately experience sexual violence and misconduct, see Méndez, op. cit., n. 5.

¹³² E. Green, ‘DeVos’s Rules Bolster Rights of Students Accused of Sexual Misconduct’ *New York Times*, 6 May 2020, at <<https://www.nytimes.com/2020/05/06/us/politics/campus-sexual-misconduct-betsy-devos.html>>. See also Anderson, op. cit., n. 51.

¹³³ McGlynn and Westmarland, op. cit., n. 12, p. 179. See also Méndez, op. cit., n. 5.

frustrating opportunities for voice, recognition, and redress, and offering little of the protection from exposure to liability that institutions may anticipate. An over-reliance on adversarial modes of engagement across investigations and hearings also risks re-traumatizing survivors and generating remedies that focus only on punishing individual ‘bad apples’, rather than also on addressing the underlying issues of power and privilege in SSVM¹³⁴ that might be constructively challenged by educational interventions among future generations.

There has been a tendency in some reporting of recent high-profile SSVM cases to depict university management as disinterested, and university policies, procedures, and personnel as systematically unsympathetic to the plight of reporting survivors. It is important to recognize that universities may be well intentioned but struggling with the challenges presented by this complicated terrain. In the absence of clear sector guidance or alternative (non-criminal justice) frameworks from which to seek inspiration, even the most well meaning of universities may flounder in their attempts to develop effective policies and responses. The minimalist approach taken in the OfS’ recent *Statement of Expectations*, which mandates that institutions have fair, clear, and accessible disciplinary procedures, is unlikely to do much to address this, since it leaves these terms relatively undefined.¹³⁵ The time is ripe, therefore, for robust guidelines that establish clearer parameters for disciplinary action, and for a body or authority to enforce compliance.¹³⁶ The best guidance for university investigations currently available in the UK has been produced for use in relation to staff–student sexual violence and misconduct which, while having clear crossovers, will still require amendment to suit student–student reports.¹³⁷

Beyond this minimum, there is also opportunity for universities to take action that enhances our society’s response to sexual violence. This draws on and honours the ethical and civic mission of universities regarding education, change, and prevention. In the context of SSVM, this may entail – among other things – moving beyond an assumption that the only suitable process is individualized, adversarial, and punitive in orientation. Such an approach may not only be ill suited to the complex justice interests of reporting parties, respondent parties, and campus communities but may also ‘marginalise or even suppress an awareness of the institutional role of the employing organization in supporting organizational structures, norms and practices that facilitate and enable’ abusive behaviour.¹³⁸ Universities, both in the UK and elsewhere, must attend to their own role in encouraging or condoning misogynistic beliefs and behaviours that facilitate SSVM, provide context-appropriate remedies that take seriously the interests and needs of their student communities, and avoid an overly myopic focus upon adversarial and individualized processes within disciplinary structures that may obscure their broader responsibility to catalyse systemic change.¹³⁹

¹³⁴ See further A. Phipps, ‘Reckoning Up: Sexual Harassment and Violence in the Neoliberal University’ (2020) 32 *Gender and Education* 227, at 235; Hirsch and Khan, *op. cit.*, n. 89.

¹³⁵ Office for Students, *op. cit.*, n. 48. See also Office for Students, *op. cit.*, n. 32.

¹³⁶ The OfS *Statement of Expectations* suggests that investigatory processes need to be ‘demonstrably fair, independent, and free from any reasonable perception of bias’ and emphasizes the need for transparent information about processes and procedures: Office for Students, *op. cit.*, n. 48, para. 6(c). While it does not talk about criminal standards, and is very clear on universities’ obligations to act, there is no guidance regarding what any of these value-laden and complicated terms actually mean in practice.

¹³⁷ The 1752 Group and McAllister Olivarius, *op. cit.*, n. 49.

¹³⁸ A. Bogg and M. Freedland, ‘The Criminalization of Workplace Harassment and Abuse: An Over-Personalised Wrong?’ in *Criminality at Work*, eds A. Bogg et al. (2020) 151, at 158.

¹³⁹ Bull and Page, *op. cit.*, n. 86.

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