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# Fellow Yale Student, Kavanaugh Contemporary: The Nominee Should Not Be Presumed Innocent

Too often the worst fears of these survivors are reinforced by those in power who fail to credit their allegations and take meaningful action to redress them.

By **Nina Pirrotti** | October 03, 2018

On Sept. 28, in announcing that he would vote to confirm Judge Brett Kavanaugh's nomination, Sen. Jeff Flake of Arizona issued this statement by way of explanation:

"What I do know is that our system of justice affords a presumption of innocence to the accused, absent corroborating evidence. That is what binds us to the rule of law. While some may argue that a different



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standard should apply regarding the Senate's advice and consent responsibilities, I believe that the constitution's provisions of fairness and due process apply here as well."

I have devoted a good part of my legal career to either conducting investigations as a New York City prosecutor or scrutinizing them now that I am a plaintiff's employment and civil rights lawyer.

While I admire Flake's courage in reversing course and recommending that sexual assault allegations against Kavanaugh be investigated, as a former prosecutor, I take issue with his pronouncement that a job applicant, particularly one for a lifetime position to the highest court in our country, is entitled to a presumption of innocence. In fact, as a civil rights lawyer, I recommend turning this very precept on its head: it is the person who comes forward with allegations of sexual harassment and/or assault who should be afforded the presumption that she is telling the truth.

Too often the worst fears of these survivors are reinforced by those in power who fail to credit their allegations and take meaningful action to redress them. I represented a woman whose co-worker sexually assaulted her over several years. When she finally summoned the courage to report it to her supervisors, not only did they fail to protect her, they made it clear they thought she was the problem. Such a response packs two powerful punches. First, it emboldens the predator who now has firsthand knowledge that he can act with impunity. Second, it chills fresh victim-survivors from taking action to protect themselves and others.

While I am proud of all of my clients who confront discrimination and persevere, my heroes are those courageous few who seek to hold sexual predators accountable for their conduct. I find that the ones who are the most

tenacious in that quest are those who do so not only for their own empowerment, but to ensure that others who may not yet be ready to come forward will not meet a similar fate.

This is why when I consult with clients who allege sexual harassment or assault, my approach is to presume they are telling me the truth unless the facts clearly indicate otherwise. Outrageous, some might say! After all, as Flake reminded us, isn't the accused presumed innocent until proved guilty? Yet that presumption is only afforded in the criminal context when his liberty is at stake, not in the workplace or on Capitol Hill for that matter, where the potential consequences are limited to one's job.

As the FBI investigators well know, there are two main reasons why someone would falsely accuse another of sexual harassment or assault, including making an assertion that she is 100 percent certain of the identity of her accuser when she is not. The first is because she is mentally ill. The second is because she has an ax to grind against the accused. There are ways to ferret out the former. I am hopeful that investigators will consider this when evaluating the latter: If a woman was seeking to inflict harm on another person by accusing him of something he did not do, why would she choose sexual harassment, where the spotlight will invariably be on her, her personal life, her personal choices, her sanity? Any other false accusation (stealing or lying, for example) would be preferable.

At the very least, those responsible for determining where the truth lies should not shy away from making that determination in "he said/she said" cases, given that those who engage in sexual harassment and assault rarely do so in front of neutral witnesses. Just as judges instruct jurors on how to evaluate credibility (such as considering motives to lie, internal inconsistencies,

demeanor, body language, etc.), investigators—and senators—must do the same. Hiding behind the “he said/she said” curtain to justify the cop-out of “inconclusive” findings should not be tolerated.

My client who survived sexual assault and was spurned by her supervisors when she reported it described how soul crushing it was for her not to be believed. She still vividly recalls how stricken the otherwise fearless professor Anita Hill looked as senator after senator took turns at bat, hoping to beat her into admitting that she was making it all up. She has informed me that the most recent attacks on Dr. Ford have inflicted fresh wounds on that memory.

It has taken 25 years since Hill spoke truth to power for the #MeToo movement to finally take hold. It did so by climbing on the broad and powerful shoulders of this giant. In this past week, Christine Blasey Ford has taken her place beside Hill and offered us up her own broad and powerful shoulders. How can we honor Hill’s and Ford’s courage and selfless sacrifice on our behalf? We can start by believing them.

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