

College Rape Accusations and the Presumption of Male Guilt

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By Peter Berkowitz

Late August and early September bring recent high school graduates, bright and eager, to campuses around the country. Carefully planned orientation sessions will impress upon freshmen the paramount importance of sensitivity, of avoiding offensive words and ideas, and—notwithstanding that in recent years approximately 55% of matriculating freshmen nationally have been female—the urgency of maintaining a campus atmosphere friendly to women.

But parents who might expect this orientation to include an introduction to the moral and political purposes of liberal education—including respect for liberty of thought and discussion, and due process of law—will be sorely disappointed.

The neglect at freshmen orientation of the aim of liberal education and how it undergirds and is undergirded by the principles of freedom is not an accident. It is emblematic of college as a whole. Our universities impair liberal education not only by what they teach and do not teach in classrooms but also by the illiberal rules they promulgate to regulate speech and conduct outside of class.

The Obama administration has aggravated the problem. On April 4, Assistant Secretary for Civil Rights Russlynn Ali, head of the Department of Education's Office for Civil Rights (OCR), distributed a 19-page "Dear Colleague" letter to "provide recipients with information to assist them in meeting their obligations."

At the cost of losing federal funding—on which all major institutions of higher education have grown dependent—colleges and universities are obliged under Title IX of the Civil Rights Act (which prohibits discrimination on the basis of sex) to thoroughly investigate all allegations of sexual harassment and sexual assault on campus, including the felony of rape. They are also obliged, according to Ms. Ali, to curtail due process rights of the accused.

OCR's new interpretation of Title IX "strongly discourages" universities from permitting the accused "to question or cross-examine the accuser" during the hearing. In addition, if universities provide an appeals process, it must be available to both parties—which subjects the accused to double jeopardy.

Most egregiously, OCR requires universities to render judgment using "a preponderance of the evidence" standard. This means that in a rape case, a campus disciplinary board of faculty, administrators and perhaps students serves as both judge and jury. Few if any of these judges are likely to have professional competence in fact-gathering, evidence analysis or judicial procedure. Yet to deliver a verdict of guilty, they need only believe that the accused is more likely than not to have committed the crime.

This is the lowest standard. It is much less demanding than "beyond a reasonable doubt," which is used in the criminal justice system, and the intermediate standard of "clear and convincing proof." Yale, Stanford and many other universities have rushed to comply with OCR's directives.

On campus, where casual sex is celebrated and is frequently fueled by alcohol, the ambiguity that often attends sexual encounters is heightened and the risk of error in rape cases is increased. The consequences for a wrongly convicted student are devastating: Not only is he likely to be expelled, but he may well be barred from graduate or professional school and certain government agencies, suffer irreparable damage to his reputation, and still be exposed to criminal prosecution.

OCR directives reducing critical due process protections on campus carry forward the work of extensive university bureaucracies built to ensure compliance with Title IX. These bureaucracies churn out materials on sexual harassment and sexual violence to train students, faculty and administrators to behave and think properly and to prepare those who serve on disciplinary boards. The materials are likely to include dubious statistics about the incidence of sexual assault; vulgar generalizations that men are controlling, angry and deceitful; and assurances that women neither lie nor make errors in alleging that they have been sexually assaulted.

In short, universities are institutionalizing a presumption of guilt in sexual assault cases. This implements the doctrine developed in the 1980s and '90s by postmodernists, radical feminists and critical legal studies scholars that inspired the ruinous campus speech codes. That doctrine teaches that the American political order is designed to oppress the weak; that racial minorities and women, whether they realize it or not, are victims; and that the truth, except for the first two propositions, is infinitely malleable.

These teachings—and the disdain for the rights of the accused and liberty of thought and discussion that they sustain—are animated by illiberal convictions shared by many faculty and administrators, as well as the Obama administration Department of Education. Notwithstanding their selective appeal to the relativity of truth to neutralize alternative views, they are convinced that in practice all the hard questions about right and wrong have been finally settled and that faculty and administrators are uniquely in possession of the correct answers. Such dogmatism and imperviousness to evidence are hallmarks of the authoritarian mind.

One might have hoped that in response to OCR's reduction of due process protections some professors and high university officials would come forward to object.

Where are the professors of literature who will patiently point out that, particularly where erotic desire is involved, intentions can be obscure, passions conflicting, the heart murky and the soul divided?

Where are the professors of natural science who will declare that OCR-dictated hearings are antithetical to the spirit of the scientific method, which depends on respect for the facts and testing claims through rational procedures?

Where are the professors of history, political science and law who will insist clearly and in public that due process is a fundamental component of American political institutions and culture, a cornerstone of our legal system, and indispensable in a free society to the fair administration of justice?

Where are the professors of moral philosophy and practical ethics who will stand up and declare that the presumption of innocence rightly gives expression to both the belief in the dignity of the individual and the awareness of human fallibility?

And where are the deans, provosts and university presidents who will explain in no uncertain terms to their campus communities and to the wider public that weakening due process and freedom of speech protections erodes the framework within which free inquiry flourishes?

So far such professors and high university officials are nowhere to be found.

Who then is welcoming our nation's freshmen to campus? And who, for the next four years, will be presiding over the cultivation of their minds?

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