Sex Smears and the Rule of Law at Yale

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The case of former Yale quarterback Patrick Witt provides additional evidence, as if more were needed, that our leading colleges and universities have lost their way.

Controversy erupted on Jan. 26, when the New York Times tarnished the reputation of Yale's star football player. According to reporter Richard Pérez-Peña, Mr. Witt, a finalist for a prestigious Rhodes Scholarship, did not withdraw from the scholarship competition in November because, as he claimed at the time, he preferred to lead his team against Harvard in "The Game" instead of flying to Atlanta for his scheduled Rhodes interview. Rather, according to Mr. Pérez-Peña, the Rhodes committee, having "learned through unofficial channels that a fellow student had accused Witt of sexual assault," suspended his candidacy until such time as Yale provided a letter re-endorsing it.

Mr. Witt has denied the charge, and the Times story has been harshly criticized. The Times reported the existence of a confidential accusation of sexual assault despite not knowing the name of the accuser or the content of the complaint. It relied on a half-dozen anonymous sources, all of whom were violating institutional confidentiality policies. And it highlighted a couple of minor infractions by Mr. Witt earlier in his college years, slyly suggesting that he had a propensity for lawbreaking.

The complaint lodged against Mr. Witt was part of a new system for dealing with sexual-assault accusations at Yale. The school put the system in place at least partly in response to an investigation by the Department of Education stemming from allegations in early 2011 that Yale maintains a campus atmosphere hostile to women. Under the new system, the Times reported, Mr. Witt's accuser chose to file an informal complaint, which does not involve a full investigation or a finding of guilt or innocence.

But the Times and many others who have pounced on a murky tale about a star athlete seem oblivious to the larger story. That is the erosion of due process at Yale and throughout American higher education, and the alliance of government policy and academic dogma that fuels it.

On April 4, 2011, Assistant Secretary Russlyn Ali, who heads the Department of Education's Office for Civil Rights (OCR), sent a 19-page "Dear Colleague" letter to colleges and universities across the country. The letter ostensibly was meant to clarify the schools'

obligations under Title IX, the 1972 law that prohibits discrimination on the basis of sex at educational institutions receiving federal funding. Schools that fail to comply with OCR directives risk the loss of government dollars. For top research institutions that amounts to hundreds of millions per year.

Garbed in the rhetoric of equality, with dubious data about the incidence of sexual assault on campus and misstatements about the law concerning sexual-misconduct complaints, the OCR letter tells colleges and universities precisely what they must do to bring their campus grievance procedures in compliance with Department of Education requirements.

Such proceedings may involve allegations of rape, a crime for which a defendant in the criminal-justice system can be sentenced to a decade or more in prison. Despite the high stakes, the OCR insisted that universities may not use a "beyond a reasonable doubt" standard, characteristic of the criminal law, or even the intermediate standard of "clear and convincing evidence." They must instead adopt the lowest of standards, or in the OCR's words, "a preponderance of the evidence" (which translates as more likely than not to be guilty).

In addition, the OCR letter "strongly discourages" cross-examination of the accuser. The OCR recommends that schools offer an appeals process for the accused. But if they do so, it requires that the complainant too be allowed an appeal. This flies in the face of the notion, deeply rooted in liberal Western jurisprudence, that subjecting the accused to a second trial for the same offense violates fundamental fairness.

It is outrageous but not surprising that little protest has been heard from faculty around the country. Some have succumbed to the poorly documented contention that campuses are home to a plague of sexual assault. Some are spellbound by the extravagant claim championed more than two decades ago by University of Michigan law professor Catharine MacKinnon that America is a "male supremacist society" in which women are rarely capable of giving meaningful consent to sex.

Rather than call it an "informal process," it would be better to characterize the system to which Patrick Witt was subjected by Yale's "University-Wide Committee on Sexual Misconduct" as undue process. Yale's promise of confidentiality to Mr. Witt turned out to be worthless. Yale also oversaw a grievance procedure concerning the serious accusation of sexual assault that nevertheless formally excluded a full investigation (which, according to Mr. Witt, he requested). So Yale left the charge against him hanging in the air in a university environment in which students, faculty and administrators casually equate accusations of wrongdoing with findings of guilt.

The Patrick Witt case, which is not atypical, reflects more than the decline of due process on campus. It also exhibits a failure of liberal education. At its best, university education has deteriorated into little more than random forays into the sciences, social sciences and

humanities. But traditionally, and for good reason in a democracy, liberal education at its heart involved instruction in the principles of freedom.

If Yale and other institutions across the country were fulfilling their promise to educate students, then their faculties would teach that riding roughshod over due process shows ignorance of or contempt for the rule of law. Professors would be teaching that the presumption of innocence is rooted in a commitment to treating individuals as ends in themselves and not as a means to advancing some social goal or another, even if that goal is given the name of equality or justice. And students would be learning that our established and legitimate justice system does not presume guilt, because to do so is to fail to appreciate the limits of human knowledge and the propensity of those who wield power to abuse it.

The need to restore due process on campus—and in the directives of the federal government—is urgent.

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