

# U.S. Colleges' Sexual Assault Crusade

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By **Peter Berkowitz** - September 5, 2014

If an undergraduate were accused of committing murder, no one in charge of a U.S. college or university would think of convening a committee of students, professors, and administrators to gather and analyze evidence, prosecute, adjudicate, and mete out punishment.

If an undergraduate were accused of the dramatically lesser but nevertheless quite serious offense of holding up the student cafeteria at gunpoint, no college or university would summon students, professors, and administrators to attempt to adjudicate the felony of armed robbery.

Why then if an undergraduate is accused of sexual assault or rape -- heinous crimes for which the criminal justice system can send the convicted to jail for many years -- do colleges and universities routinely convene committees of professors, students, and administrators to investigate, judge, and punish?

One part of the answer is that the Obama administration has intensified pressure upon them to do just that. Ostensibly, the administration wants to curtail sexual attacks on college campuses. But what the federal government is really doing is encouraging students, professors, and administrators to enmesh themselves in quasi-law enforcement activities for which they are utterly untrained. Underwriting that dubious enterprise is a pernicious notion that has taken hold in certain quarters of the academy that seems to equate heterosexual sex with assault.

In April 2011, amid controversy that universities shielded star athletes from prosecution and exposed other accused men to kangaroo courts, Department of Education Assistant Secretary for Civil Rights Russlynn Ali sent a letter to institutions of higher education throughout the country. The missive set forth requirements that universities must honor to comply with Title IX, which prohibits discrimination on the basis of sex in higher education. The requirements include conducting investigations and holding a hearing even if the criminal justice system concludes the accusation of sexual misconduct is meritless; using the lowest evidentiary standard to determine guilt -- preponderance of the evidence, which means more than 50 percent; shielding the accuser from answering questions from the accused; and, in the event of acquittal, also providing the accuser an appeal.

Such procedures constitute eviscerations of the due process afforded defendants in criminal courts across the 50 states while nevertheless subjecting the convicted to penalties that can blight their lives. They effectively eliminate the presumption of innocence, the right to

confront and cross-examine the accuser, and protection against double jeopardy. Nonetheless, the Department of Education letter warned that if schools didn't comply, they would face loss of federal funding, which in the case of top research universities involves hundreds of millions of dollars annually. To further ensure compliance with this dubious approach to guilt or acquittal, the Department of Education initiated more than four dozen investigations of pending cases at a wide range of schools including such marquee institutions as the University of California at Berkeley, Dartmouth, Princeton, Swarthmore, and Harvard Law School.

President Obama believes more needs to be done. In January, he established the White House Task Force to Protect Students From Sexual Assault. And were it delivered to his desk, he would undoubtedly sign the Campus Accountability and Safety Act introduced by Democratic Sen. Claire McCaskill, which would impose even stricter demands on colleges and universities to demonstrate to the federal government they are meeting their legal obligations to protect women.

Surely only a massive epidemic of sexual assault could justify such concerted federal government involvement in university governance. Indeed, Obama and Senate supporters of the pending legislation routinely assert that one in five women attending college have been sexually assaulted.

If this seems sky high, it's because the data show no such thing. As Washington Examiner journalist Ashe Schow has pointed out, the claim is based on a 2007 online survey conducted by the National Institute of Justice, a division of the Department of Justice, at only two universities. The survey, which paid participants, involved a non-random sample, a relatively low response rate, tendentious and ambiguous questions, and an expansive understanding of sexual assault.

According to a 2012 Department of Justice report produced by the Bureau of Justice Statistics, for every 1,000 citizens above the age of 12, 1.3 are sexually assaulted or raped. That's a rate of 0.13 percent. It seems inconceivable that the incidence of sexual assault at universities is more than 150 times higher than among the general population.

And who really believes the president's numbers? Parents certainly don't behave as if they do. Would mothers and fathers really spend almost \$60,000 a year to expose their daughters to a one-in-five chance of sexual assault?

Since the professed reason for the federal government's growing supervision of sex on campus is bogus, one is impelled to consider cynical explanations. One need not look far. By showcasing Obama's devotion to women, the 2011 Department of Education letter helped lay the foundation for his 2012 presidential campaign, which trumpeted the charge that Republicans were waging a war against women.

The 2014 presidential task force and McCaskill's bill revive the invidious but politically potent issue for the midterm elections. That some Republicans support the legislation only proves that in politics foolishness competes with cynicism for explanatory power.

But why does the academy readily embrace the illiberal practices foisted upon it by cynical and foolish politicians? Well, here the government is pushing on an open door. Since the 1989 publication of law professor Catharine MacKinnon's "Toward a Feminist Theory of the State," certain quarters of the academy have been internalizing -- and propagating -- the charge that America is a "male supremacist" society whose pervasive structures of oppression deprive women of the capacity to give meaningful consent to sex. The surprisingly widespread acceptance of this radical notion does much to explain the whole campus sexual misconduct industry.

In a male supremacist society, due process rights for men impede justice because by definition heterosexual sex occurs between a male exploiter and an exploited female. In a male supremacist society, the police and courts are hopelessly inadequate because they define rape in terms of physical coercion. Unconscious male objectification and subordination of women and unconscious female submissiveness to men necessitate campus disciplinary boards capable of understanding coercion in terms of impersonal social forces and emotional manipulation.

And, in a male supremacist society, a friendly presidential administration's supervision of campus sexual conduct codes is most welcome, even when it involves government officials' cynical manipulation of preposterous statistics, because extreme circumstances warrant extreme measures.

We do not, however, live in a male supremacist society. Despite lingering inequities, women in America enjoy the unprecedented security, freedom, and equality under law that men do. Our universities' assiduous efforts to transform men into monsters who can't be trusted with rights and women into frail creatures who bear no responsibility for their deeds represents educational malpractice. Paradoxically, those efforts also undercut the reality of female empowerment: for many years women have been earning more BAs, MAs, and PhDs than men.

Liberal education should equip our students to question the cynicism and foolishness of our politicians, not to make common cause with it.

*Peter Berkowitz is a senior fellow at the Hoover Institution, Stanford University. His writings are posted at [www.PeterBerkowitz.com](http://www.PeterBerkowitz.com) and you can follow him on Twitter @BerkowitzPeter.*