

The Demise of Due Process on Campus

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By **Peter Berkowitz** - December 26, 2014

Universities' mishandling of sexual assault allegations has been making the news -- but not in the way feminist activists and progressive politicians had hoped. Swarthmore College settled a case brought in federal court in Pennsylvania by an undergraduate wrongly expelled by means of a severely defective disciplinary process. A federal court in New York rejected Colgate University's motion to dismiss on the pleadings former student Abrar Faiaz's claim that in the rush to expel him for pushing two women, the university falsely imprisoned him, and Colgate has not challenged his federal and state discrimination claims.

Slate's Emily Yoffe published a major story earlier this month recounting the University of Michigan's grotesque violations of due process while investigating, prosecuting, and imposing onerous probationary restrictions on sophomore Drew Sterrett, which finally drove him from the university but which left him unable to secure acceptance elsewhere. Sterrett filed suit in federal court alleging that the school deprived him of constitutional due process rights.

Yoffe contends that universities' implementation of procedures that presume guilt are an overcorrection to "the often callous and dismissive treatment of victims." But the abuses of power perpetrated by university administrators and faculty that are now attracting national attention are anything but new. Kangaroo courts have been a staple of university life for decades. And the abuses of power are anything but incidental to the purpose of education as many administrators and professors conceive it. Indeed, the abuses are committed in furtherance of that purpose.

University administrators and faculty increasingly mishandle allegations of sexual assault because of a cluster of illiberal sentiments, habits of mind, and beliefs to which they subscribe and which, over the course of 30 years or so, they have embedded in university education. This is the root cause of the problem. No reform will succeed that does not address the culture of illiberalism that our campuses cultivate.

To be sure, the mishandling of sexual assault encompasses the dismissing or covering-up of allegations as well as the convening of pseudo-hearings that presume the accuser's victimhood and the accused's guilt.

There can be no justification and no tolerance for coddling criminals on campus or blaming victims. Universities must create an environment in which women can be confident that, in the event of sexual assault, they can meet with well-trained administrators who will listen

compassionately and help them obtain necessary medical attention, get suitable psychological counseling, and speak to proper law enforcement officials about filing criminal complaints.

The state-of-the-art abuses of power on campus, however, must be distinguished from the traditional form of abuse of power. Ignoring or concealing charges of sexual assault to protect beloved coaches, star athletes, and the offspring of wealthy donors is inexcusable -- and has always violated official university policy.

State-of-the-art abuses of power represent something quite different. Universities are now building arbitrary and capricious authority into official disciplinary procedures. And our most distinguished institutions of higher education are at the forefront in promulgating these mechanisms of injustice.

In October, 28 Harvard law professors issued a statement published in the Boston Globe protesting new university-wide procedures for adjudicating accusations of sexual harassment and sexual violence. While stressing their commitment to protecting students, the law professors observed that "Harvard has adopted procedures for deciding cases of alleged sexual misconduct which lack the most basic elements of fairness and due process" and "are overwhelmingly stacked against the accused."

The law professors highlighted "the absence of any adequate opportunity to discover the facts charged and to confront witnesses and present a defense at an adversary hearing," and "the failure to ensure adequate representation for the accused, particularly for students unable to afford representation."

In addition, the Harvard legal scholars objected to "the lodging of the functions of investigation, prosecution, fact-finding, and appellate review in one office and the fact that that office is itself a Title IX compliance office [whose principle task is to root out discrimination against women] rather than an entity that could be considered structurally impartial."

In the race to dismantle due process on campus, Harvard is not exceptional. Like many premier colleges and universities, it has proved only too eager to comply with guidelines issued in 2011 by the Obama administration Department of Education's Office for Civil Rights. The OCR threatened universities with the loss of federal funding if they did not further weaken already weak due process protections for those accused of sexual misconduct.

President Obama proclaimed that such steps are necessary to combat the war that he and his allies maintain is being waged against American college women: One in five of them, he contended, will be assaulted while in college. A just-released Justice Department study, however, refutes the president's flawed statistics. The actual number is about one in 53 -- still

too many but vastly fewer assaults among college students than the president asserts and, not surprisingly, also fewer than for non-students and therefore not a reason to eviscerate venerable requirements of due process.

Harvard is particularly culpable for acquiescing to federal dictates and the president's propaganda. The law professors' well-reasoned criticisms did not move Harvard University President Drew Gilpin Faust to withdraw or reform the university-wide policy even though the university's enormous prestige and staggering endowment -- in the neighborhood of \$35 billion -- give Faust and her administration the clout, were they so moved, to call the government's bluff by standing up for *both* the rights of accusers *and* the rights of the accused.

In bullying universities to secure convictions and to forget about fairness, the Obama administration conscripts willing accomplices. Under the guise of liberal education, universities have been inculcating an illiberal sensibility extending back to the generation currently controlling the executive branch.

Our universities have eroded liberty of thought and discussion. To control what is said and thought, they have promulgated speech codes. They have created small "free speech zones," effectively rendering most of campus an unfree speech zone. And they have encouraged students to believe that they have a right to not hear speech they find offensive and that the university has a duty to punish those who commit offensive speech.

Our universities have glorified narrative, particularly victim narratives. Professors typically do not invoke the notion of narrative to emphasize that facts must be grasped in context, but rather to undermine the authority of facts and affirm the supremacy of subjective perceptions and personal experience. All narratives are created by subjective viewpoints, but according to fashionable campus doctrine -- and knee jerk campus reaction -- not all narratives are created equal. The subjective viewpoints of alleged victims of Western civilization -- minorities and women -- possess superior moral worth and political relevance.

Our universities have promoted a narrative that converts all women into victims and all men into villains. This narrative originated among radical feminists but it has been widely internalized in universities. It claims that discriminatory norms and nefarious institutions established by men to serve male power render women unfree and incapable of thinking and fending for themselves. It legitimated University of Virginia President Teresa Sullivan's decision in late November, in swift response to what has turned out to be an invented tale of a brutal gang rape reported in Rolling Stone, to suspend all fraternities. Those women who think they are free to choose and capable of taking care of themselves without intrusive university or government assistance only demonstrate the power of patriarchy to delude and degrade them. And those men who think they are innocent are blind to the guilt they incur from perpetuating, consciously or unconsciously, male privilege.

Accordingly, our universities have dismantled due process to serve what they regard as a higher conception of social justice. Due process presumes innocence and declares guilt based on the accuracy of specific allegations. In contrast, university justice implies that since all women are victims, all accusations, even the false ones, capture a deeper truth. This peculiar notion of justice also gives rise to the conviction that while a man may not have committed any of the specific infractions of which he is accused, as a perpetrator and beneficiary of male privilege he is party to a vast criminal conspiracy and therefore deserves whatever limited punishment university authorities mete out.

This illiberal fantasy world perpetuated by universities harms women as well as men. Campus disciplinary procedures treat individual women as pawns to be manipulated in a larger struggle. They dispose of individual men in the service of what they suppose to be a lofty cause. And they teach all students to indulge a cavalier contempt for the supposedly simple-minded elements of due process, which for centuries in the West have protected individuals against the abuse of power.

Two measures are key to restoring to our campus that form of justice rooted in the dignity of the individual to which the Constitution is dedicated and which is crucial to the future of freedom and equality in America. The first is straightforward. We must end university involvement in the investigation, prosecution, adjudication, and punishment of sexual assault. University personnel generally have little or no training for these vitally important tasks, and universities have more than demonstrated their incompetence and untrustworthiness. Instead, we must allow the police and the courts to do their jobs, and hold them accountable when they don't.

The other measure is the work of generations. It involves restoring the integrity of liberal education, on which depends the integrity of leaders in a free society.

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