In Making Campuses Safe for Women, a Travesty of Justice for Men

By Christina Hoff Sommers | *The Chronicle of Higher Education**

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Michael Morgenstern for *The Chronicle*

American courts take exacting precautions to avoid convicting an innocent person of a crime. It was therefore startling to read the April 4, 2011, directive on sexual violence sent by the U.S. Department of Education's assistant secretary for civil rights, Russlynn H. Ali, to college officials across the country. In an effort to make campuses safe and equitable for women, Ali, with the full support of her department, advocates procedures that are unjust to men.

She begins by describing the "deeply troubling" state of the American campus, where "one in five women are victims of completed or attempted sexual assault." The Title IX equity statute, she says, guarantees students a right to an education free of discrimination on the basis of sex. Sexual assault and harassment violate this right; therefore, colleges that fail to pursue offenders aggressively can be found in violation of Title IX and lose federal government funds. No matter what the local police choose to do, says Ali, colleges are obligated to carry out their own investigation of all complaints.

"We will use all of the tools at our disposal including ... withholding federal funds ... to ensure that women are free from sexual violence," Ali told NPR last year. One such tool is

the standard of proof that college disciplinary committees use when determining guilt. Many colleges employ a "beyond a reasonable doubt" or a "clear and convincing" standard. (Roughly speaking, "beyond a reasonable doubt" requires a 98-percent certainty of guilt; clear and convincing, an 80-percent certainty.) Ali, however, orders all colleges to adopt the far-less-demanding standard of "preponderance of the evidence." Using that standard, a defendant can be found guilty if members of a disciplinary committee believe there is slightly more than a 50/50 chance that he committed the crime. That standard will make it far easier for disciplinary committees to try, convict, and punish an accused student (almost always a male).

Marching under the banner of Title IX and freed of high standards of proof, campus disciplinary committees, once relatively weak and feckless, will be transformed into powerful instruments of gender justice. At least, that is the fantasy. But here is the reality: Campus disciplinary committees—often a casual mix of professors, students, and an assistant dean or two—are well suited to resolving cases involving purported plagiarism and cheating, and violations of college rules on drugs and alcohol. But no one considers them prepared to adjudicate murder, arson, or kidnapping cases, or criminal assault. They lack the training and the resources to investigate and adjudicate felonies. So why are they expected to determine guilt or innocence in cases of rape?

As with murder and arson, serious charges of sexual assault should be left to the police and the courts. The Department of Education should not pressure universities to enact a system whereby a student can be found guilty of a major crime by a mere preponderance of evidence.

How did Ali and her fellow lawyers in the Department of Education manage to find in the Title IX gender-equity statute grounds for demanding colleges to adopt a "preponderance of evidence" standard? That is a mystery. Hans Bader, a former Education Department lawyer, says that nothing in Title IX justifies taking away an accused person's right to a firm presumption of innocence, requiring clear and convincing evidence. Ali and

her colleagues, he suggests, are "legislating through administrative fiat, in a way that is arbitrary and capricious." And dangerous, one might add.

In 2006 three Duke University lacrosse players were falsely accused of gang rape. They endured a nightmarish, yearlong ordeal in which abundant evidence of their innocence seemed not to matter at all—not to the police, not to the prosecutor, not to Duke's faculty or president. Protesters gathered outside the lacrosse house carrying a banner with the word CASTRATE, banging pots and pans, and chanting "Confess, confess!" Student vigilantes plastered the campus with "Wanted" posters bearing the players' photographs. Duke professors took out an ad in a local newspaper in support of the pot bangers and poster wielders. After living under suspicion for months, the players were ultimately exonerated by prosecutors, who dropped all charges: The athletes had been wrongly accused, and the North Carolina attorney general who had flamboyantly pressed and publicized the charges later recused himself and resigned, and was prosecuted and disbarred for unethical conduct in his prosecution of the case.

Now imagine that Ali's proposed sexual-safety regime had been in place when the attorney general's charges were pending, and the innocent young men had been put on trial before a committee of Duke professors, administrators, and students.

Ali's job as assistant secretary for civil rights is to protect the civil rights of all students, both alleged victims and the accused. Her letter provides detailed guidelines on the steps colleges should take to "minimize the burden on the complainant." Not a word about the burden on the accused or his rights. And it goes to remarkable lengths to discourage colleges from trying to diffuse and ameliorate volatile "he said, she said" confrontations. "In cases involving sexual assault," she instructs, "mediation is not appropriate even on a voluntary basis." The letter is suffused with the notion that college authorities must not use their judgment and discretion but rather become enforcers of legal procedure and harsh justice.

An egregious instance of this form of justice occurred recently at the Vermont Law School. On an August night in 2009, Joshua Vaughan, then 24, met a young woman (age 22)

at a bar in South Royalton, Vermont. They had something in common: both were one week away from beginning their studies at Vermont Law School. After a few beers, they went off together and had what he said was consensual sex. During the next few days, they exchanged friendly text messages, (According to court documents, these were initiated by the complainant.) But a few months later, in a conversation with two "student ambassadors," she volunteered that what happened between her and Vaughan that August night was date rape. The "student ambassadors" immediately reported the conversation to the law school's Dean of Student Affairs and Diversity. On January 28th, nearly seven months after the August encounter, the young woman filed a rape complaint. Though the young woman would soon drop out of case, and though independent investigators hired by the law school informed the dean that it was not possible to determine whether the sex was consensual or not, the dean charged Vaughan anyway.

Being a victim of rape is uniquely horrific, but being accused of rape is not far behind. If the person is guilty, then the suffering is deserved. But what if he is innocent? To be found guilty of rape by a campus tribunal can mean both expulsion and a career-destroying black mark on your permanent record. Vaughan not only spent eight months in limbo worrying about his fate, but he was treated by other students as a social pariah. School officials warned him that if he discussed the case with anyone, he would be expelled from the school. According to Vaughan, when he attempted to transfer to another school, the registrar would not release his transcript. On September 3, 2010, he was cleared of all charges by a unanimous vote of a campus code of conduct panel. Devastated by what he had to endure, he is now suing the school and the young woman for intentional and negligent infliction of emotional distress. The school is threatening to bring him up on new charges if he persists with the suit—this time for retaliating against an accuser. The Vermont Law School case shows us what will become routine under the Ali dispensation.

So why is Ali taking such draconian measures? Because she asserts that rape on campuses has reached epidemic levels, citing a study that states that 19 percent, or almost one in five women, will be a victim of assault or attempted assault during their college years.

But is that figure accurate or even plausible? Research on sexual assault is notoriously hard to conduct, and the studies are wildly inconsistent. A 2003 Bureau of Justice Statistics

special report, "Violent Victimization of College Students, 1995-2002," found that among the nation's nearly four million female college students, there were six rapes or sexual assaults per thousand per year during the years surveyed. That comes to one victim in 40 students during four years of college—too many, of course, but vastly fewer than Ali's one in five.

The study cited by Ali used an online survey, conducted under a grant from the Justice Department, in which college women were asked about their sexual experiences, on campus and off, and the researchers—not the women themselves—decided whether they had been assaulted. The researchers employed an expansive definition of sexual assault that included "forced kissing" and even "attempted" forced kissing. The survey also asked subjects if they had sexual contact with someone when they were unable to give consent because they were drunk. A "yes" answer was automatically counted as a rape or assault. According to the authors, "an intoxicated person cannot legally consent to sexual contact."

Surely, reasonable people can disagree on that: If sexual intimacy under the influence of alcohol is by definition assault, then a significant percentage of sexual intercourse throughout the world and down the ages qualifies as crime.

The Justice Department stamped a disclaimer on every page of the survey report, advising that it is not a publication of the Justice Department and does not necessarily reflect its positions or policies. Ali, however, treats it as an official government finding and ignores the controversies and ambiguities surrounding her "one in five" figure.

Deans at institutions including Yale, Stanford, and Brandeis Universities and the Universities of Georgia and of Oklahoma are already rushing to change their disciplinary procedures to meet the Education Department's decree. Now, on campuses throughout the country, we face the prospect of academic committees—armed with vague definitions of sexual assault, low standards of proof, and official sanction for the notion that sex under the influence is, ipso facto assault or rape—deciding the fate of students accused of a serious crime.

The new regulations should be seen for what they really are. They are not enlightened new procedures for protecting students from crime. They are a declaration of martial law against men, justified by an imaginary emergency, and a betrayal of the Title IX equity law.

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*A slightly abridged version of this article appeared in the *Chronicle of Higher Education*