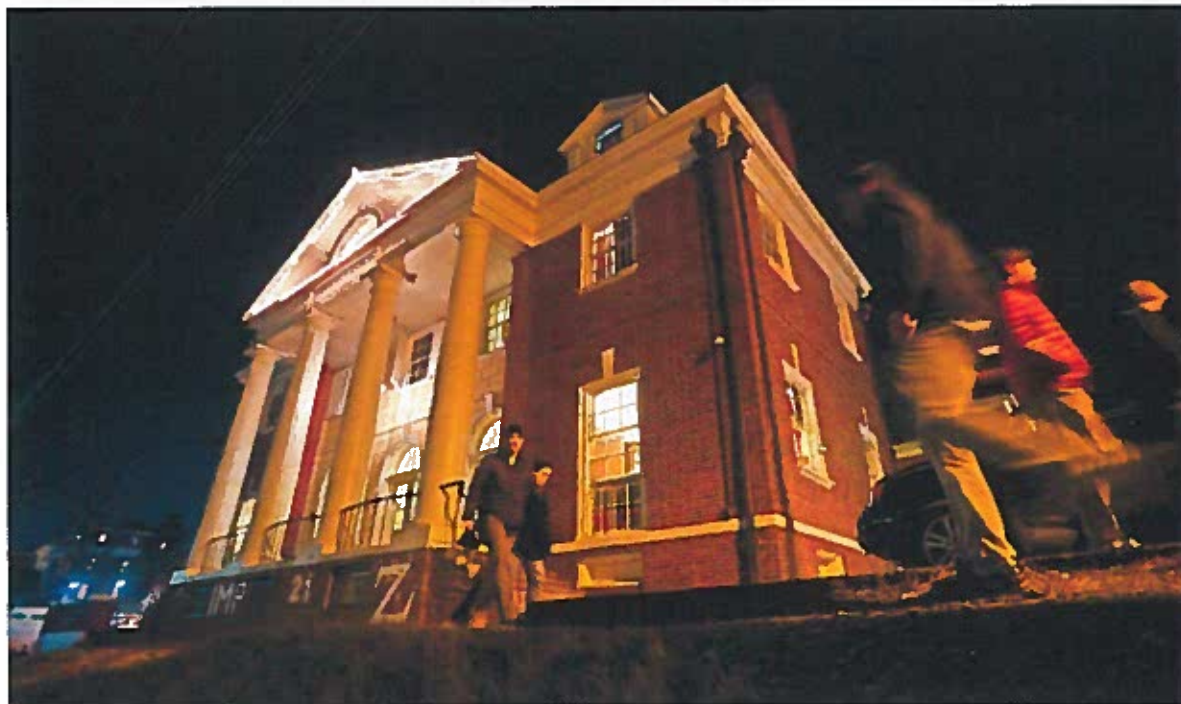


THE ORANGE COUNTY REGISTER

Opinion

College rules punish innocent as well as guilty



AP Photo/Steve Helber

In this Jan. 15, 2015 file photo shows students participate in rush pass by the Phi Kappa Psi house at the University of Virginia in Charlottesville, Va. The house was depicted in a debunked Rolling Stone story as the site of a rape in September of 2012.

By James E. Moore |
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In April 2011, the U.S. Department of Education launched a broad policy intervention intended to reduce student sexual misconduct at universities. Unfortunately, the DOE initiative has created objectionable new problems.

The DOE contends that requiring women to attend school with men whom the preponderance of the evidence indicates are guilty of sexual violence against these women violates Title IX of the U.S. Civil Rights Act. The DOE's remedy is suspending or expelling the men from school. Universities that do otherwise risk an expensive investigation — 380 to date — and possible loss of eligibility to compete for federal research funds if the school's practices are found deficient.

Criminal courts ascribe guilt only if the evidence is at least clear and convincing — and more often beyond a reasonable doubt. Consequently, criminal courts free many of the guilty, but convict few of the innocent.

The DOE Office of Civil Rights rejects this convention, and, against the advice of the American Council of Trial Lawyers, mandates that universities adjudicate accusations of student sexual misconduct on the basis of the civil law's more-likely-than-not standard, rather than the criminal standard. Even under ideal conditions, a significant share of these preponderance-of-the-evidence adjudications will be factually incorrect in the long run.

This is critical, because the economic injury to an innocent student resulting from an incorrect finding is enormous. Selective academic institutions decline applications from students who have been expelled from other schools. Precluded from setting a high standard of proof for evaluating accusations of student rape, universities instead find themselves required to suspend or expel an unknown number of innocent students along with the guilty. Unable to matriculate elsewhere, many of these injured parties will file lawsuits against their former institutions, justifiably intent on being made whole and compensated for the harm done to them.

The organization Stop Abusive and Violent Environments analyzed 122 lawsuits brought by accused students against their universities since January 1, 2012. Of the 51 cases resulting in rulings, 30 at least partially favored the accused student. SAVE noted an increasing number of lawsuits by both victims and accused students, and found that plaintiffs from both groups are prevailing in many of these cases. Universities have been forced into an untenable position.

The current DOE administration is likely to rescind, or otherwise modify, the 2011 guidance issued by the OCR, which attorney Candice Jackson recently was appointed to head as the acting assistant secretary for civil rights. Many of her published views differ sharply from those of her predecessor, Catherine Lhamon.

Unfortunately, California may resist reform. In March, State Sens. Kevin de León, D-Los Angeles, and Hannah-Beth Jackson, D-Santa Barbara, introduced Senate Bill 169 to enshrine the DOE's 2011 guidance in state law, requiring compliance as a condition of receiving state funding.

SB169 would affect public and private schools differently. California's private universities compete relatively ineffectively for state funds, leaving the state with little economic leverage to compel compliance. The state would have to resort to criminal or civil steps. Public institutions, though, rely on state funding, and would be more vulnerable.

There are steps all universities should take to blunt the worst aspects of the DOE's requirements, regardless of who wants to enforce them. Students sometimes lie and collude. Multiple accusations should never be treated by student conduct codes as cumulative evidence of guilt. Universities should address each case separately, accepting no character evidence. Absent a criminal conviction, universities should rethink their reluctance to admit applicants who have been expelled from other schools, because the decision to expel a student no longer means what it once did.

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