Written by **Steve Byas** on March 18, 2016

Yale Basketball Player Case: Why Title IX Should Be Nullified

Due process of law. The presumption of innocence until proven guilty. The right to confront your accusers. The exercise of the general police power by the states — not the federal government, which may only exercise those powers delegated to it by the Constitution.

All of these important legal principles — and more — are at stake in the case of an expelled Yale basketball player, which is only one of many examples stemming from federal Title IX statutes.

Yale faced highly-ranked Baylor in the first round of the NCAA basketball tournament — their first appearance in the "Big Dance" since 1962. Missing was their captain, Jack Montague (shown), who was expelled from the Connecticut Ivy League school in February. The expulsion followed the decision of a five-person panel that Montague had "unconsented sex" with a female student.

Montague's lawyer, Max Price, used the publicity of the basketball tournament to argue that his client had been wronged by a female accuser he portrayed as dishonest. Of course, the woman in question now has her own reputation to protect, and may have to come forward, as well.

Which leads to the obvious question. Is there an underlying criminal case here, and if not, why not?

Amazingly, the woman never contacted local police, and no investigation into her charges was ever conducted by them. What did happen is that the woman filed a complaint a year later, not with the police, but with the college. This action precipitated an administrative process at Yale, governed by the Yale Code of Conduct. Under the code, an independent lawyer was hired, who conducted his own investigation. He then turned over the results of his "findings" to a five-person panel.

The panel then held a hearing, with no questions from either party in the complaint allowed. In a criminal case, "discovery" is allowed. Discovery means that the defense gets to see what evidence the prosecution has obtained against the defendant. But no discovery is allowed under the Yale Code of Conduct. Additionally, no statute of limitations exists. The right of an accused person to confront his accuser does not exist. He does not even get to know if there is any exculpatory evidence — evidence that would help exonerate him.

Once the panel has finished its hearing, they determine the accused's guilt by a majority vote, under the standard of "preponderance of the evidence." This means that if the panel concludes that the scales tilt even one percent more for guilt than innocence, the accused person is judged guilty, and expelled from college. In actual criminal cases, the standard is that the prosecution must prove guilt beyond a reasonable doubt.

So, in this case, Montague did not face hard time in prison, but he was expelled during his last semester

of school, a few months short of graduation. Clearly, a life-changing experience.

This is not to say that the accusation against Montague is baseless. We don't know that. But in this country, a person accused of committing a crime is presumed innocent unless a jury decides otherwise.

If no criminal investigation was ever conducted, then why did Yale get involved at all? After all, why should any college be in the business of conducting what should be criminal investigations? Yes, rape is a serious crime, but so is armed robbery and murder. If a student were accused of holding up a liquor store, no one would think the college should conduct its own investigation. Just leave it to the legal system, and if a student is found guilty, then it is a simple matter to expel him. And probably redundant.

The answer is predictable: The federal government is pressuring colleges to conduct these types of inquisitions, regardless of what local law enforcement authorities have determined.

Title IX of the Civil Rights Act requires that colleges receiving any federal funds (even if students get any financial aid from the federal government) follow certain guidelines in the conduct of their "extracurricular" activities — such as sports, debate, and the like. In the past few years, the Office of Civil Rights of the U.S. Department of Education has determined that this also requires colleges to be proactive in the fight against sexual assaults on the college campus.

While few would tolerate sexual assault anywhere in American society, this historically was considered a matter for local law enforcement authorities to investigate. But if colleges refuse to conduct these types of investigations on their own and mete out punishments in the form of expulsions and the like, they could face revocation of federal aid.

Because of that, it is not surprising that colleges can be expected to err on the side of expelling any accused student. Otherwise, the Office of Civil Rights of the Department of Education could then decide that the college is not following Title IX's requirements, arguing the college should have expelled the student. Last year, 124 colleges were under investigation by the Department, examining whether they had properly handled such cases.

In fact, 23 schools in the NCAA baskeball tournament, including top-ranked Kansas, have fallen under the investigative eye of the federal government.

Dez Wells, a baskeball player at Maryland, sued Xavier for his 2012 expulsion on a charge of sexual assault. The local prosecutor had declared that the accusation "didn't reach anything close to a standard of proof," and a grand jury declined to indict. Despite that, Xavier held a hearing and kicked Wells out of school. Eventually, Xavier settled the case out of court.

In 2014 at the University of Oklahoma, Frank Shannon, a linebacker in its storied football program, received similar treatment. He was accused of sexually assaulting a woman, but she later opted not to press charges. The local prosecutor in this case said there were conflicting stories as to what happened, and he saw no reason to prosecute.

But the university did see a reason — no doubt fearing a Title IX case. With the threat of federal retribution hanging over them if they did nothing, OU conducted its own investigation, and suspended Shannon for a year. Shannon took the case to district court, where a judge ruled that he should not have been punished. Instead of accepting the decision of that court, OU appealed to the Oklahoma Supreme Court, which basically said it was up to OU what to do with Shannon. Which, of course, meant it was up to the U.S. Department of Education Office of Civil Rights.

These cases should cause grave concern to anyone who believes in the concept of due process of law.

While colleges do not have the power to imprison a student they find "guilty" in their proceedings conducted under the watchful eye of the federal government, their decision can ruin a student's academic career and reputation, and may also diminish future job opportunities.

Of course, there exists no constitutional authority for the federal government to do what it is doing. Furthermore, it is an effort to take over the general police power, which is left with the states as part of the "reserved powers" found in the 10th Amendment.

And while Yale is a private college, many of the institutions of higher learning where these types of cases occur are public. As such, they are agents of the state government, and should be required to follow due process of law, with all the procedural safeguards one expects when accused of a crime.

The travesty that took place at Duke University in 2006 when three members of the lacrosse team were falsely accused of sexual assault, and expelled with no real due process, should have caused other colleges across the land to be more cautious.

In the case of the Duke lacrosse players, the local prosecutor did attempt to convict the young men, but in his zeal, Durham District Attorney Mike Nifong committed so many violations of procedure he was disbarred and convicted of contempt.

One of the players, Reade Seligmann, summed up his feelings about the case: "This entire experience has opened my eyes to a tragic world of injustice I never knew existed. If police officers and a district attorney can systematically railroad us with absolutely no evidence whatsoever, I can't imagine what they'd do to people who do not have the resources to defend themselves."

At least Seligmann and his fellow players had those resources, and they had the due process protections afforded the accused across America. In the case of these college panels looking to keep out of trouble from the federal government, students do not even have that.

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