Commentary

Sentence First, Verdict Afterward

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July 2013

Perhaps the Obama administration was not expecting a great public outcry this spring when it unveiled a "blueprint" for how campuses across the nation will henceforth need to handle complaints of sexual misconduct. Under the scheme as announced on May 9, colleges must crack down on a wide array of sexually oriented conduct defined as "unwelcome" to one or more persons, including many instances of what the feds quaintly term "verbal conduct," better known as "speech."

Colleges will also have to tighten up disciplinary procedures that the feds view as excessively observant of due process toward those accused of sexual misbehavior. For example—in what one critic called an "Alice in Wonderland" standard of "Sentence first, verdict afterward"—colleges will often need to take action against an accused student or faculty member *before* an investigation reaches any conclusion as to whether the charges against that person are accurate.

The initiative, a joint project of the Department of Education's Office for Civil Rights (OCR) and the U.S. Department of Justice, took the form of a "resolution agreement" sent to administrators at the University of Montana. As the term "blueprint" indicates, however, the new scheme is meant to bind colleges and universities across the nation, at least those that receive federal money in one form or another—which in practice means nearly all of them.

Whether or not the administration was expecting an outcry, it got one. The civil-libertarian lawyer Wendy Kaminer wrote in the *Atlantic* that the blueprint unacceptably blurs the line between unwanted date requests and rape: "If a student feels harassed, she may be harassed, regardless of the reasonableness of her feelings, and school administrators may be legally required to discipline her 'harasser.'" Kaminer dubbed this "an educational nightmare." The "breathtakingly bold" move has "mandated the effective abolition of free speech on college campuses, as well as the almost certain conviction of large numbers of students, many of whom will be innocent, of 'harassment,'" contended another noted civil libertarian, Harvey Silverglate, writing with Juliana DeVries. George F. Will called the blueprint "so patently unconstitutional that it will be swiftly swatted down by the courts" and stated that it "underscores today's widespread government impulse for lawless coercion." Education blogger Joanne Jacobs said the scheme "makes every student a sex harasser."

Not quite three weeks later, the Office of Civil Rights backed down, or seemed to, on a couple of the blueprint's most outrageous aspects. In a May 29 letter sent to members of the public who had expressed concern, the agency said it did not expect universities to discipline students for conduct that was not objectively offensive after all, or for isolated

low-level offensive conduct that did not add up to some more serious pattern. (In good bureaucratic fashion, OCR refused to concede that it had modified its position at all, insisting that it was merely clarifying the policy it intended all along.)

Even with that concession, the blueprint is a document full of ominous portent: for the fairness of the disciplinary processes that have now come under federal prescription, for the once proud independence of the higher-education sector, and, yes, for the continued health of what passes for free speech on the American campus.

The new scheme did not emerge out of the blue. Many of its elements were already discernible two years ago when the Obama appointee who then headed OCR, Russlynn Ali, sent universities a "Dear Colleague" guidance letter that made something of a stir in the press. Notably, the letter announced that it would now be deemed a violation of Title IX, the federal sex-discrimination law, for a university to require "clear and convincing evidence" of wrongdoing before disciplining a student or faculty member charged with sexual misconduct. That is, it would be a violation to follow what former Education Department lawyer Hans Bader calls a "strong presumption of innocence" on such matters. The only acceptable standard from now on would be one of a "preponderance of the evidence"—often described as a 51 percent likelihood that the accused is guilty as charged. The University of Virginia, Brandeis University, Stanford University, and other leading institutions promptly changed their discipline policies to conform to the new diktat. While the 2011 letter did include a perfunctory acknowledgment that accused persons deserved the benefit of due process, its thrust on this and many other points was consistent: The disciplinary process should be made more welcoming for accusers, even if that meant stripping away protections for the accused.

Such protections varied considerably from one college to the next, given the natural diversity among institutions of higher learning. While few, if any, colleges tried to invest disciplinary proceedings with the procedural rigor of a criminal-law trial, many did consider it meet and proper to make sure accused students and faculty were promptly informed of charges, had a chance to confront accusers, had an avenue of appeal, and so forth.

The student movement of the 1960s generated a certain amount of pressure toward more elaborate due process: Demonstrators who had occupied the university president's office were not about to let some kangaroo court expel them without calling in a celebrated radical lawyer to probe every procedural defense.

But then came modern feminism, and in particular its foundational conviction, dating back at least to Susan Brownmiller's *Against Our Will* (1975), that the prospect of sexual assault by men is a defining feature of the oppression of women for which male-dominated society generally, not just individual offenders, should take the rap. And it must be said that the modern American college campus has sometimes furnished fuel for Brownmiller's critique: For not a few women, surveys suggest, the danger of being raped will peak during their college years. It's hard to be sure of this because, as Christina Hoff Sommers has pointed out, estimates of the incidence of campus sexual assault vary wildly depending on the source you consult. Officials at OCR insist that 1 in 5 women at college suffer sexual assault—truly a terrifying number. But then, a different federal agency estimates that the figure is 1 in 40—still unsettlingly high, but an eight-fold

difference from 1 in 5. To reach the higher figure, researchers categorized as sexual assault a variety of behaviors that not everyone agrees are such, Sommers has written, including unsought, attempted kisses and sex that takes place while one or both parties are intoxicated.

If one uses the broadest definition of sexual assault observed on many campuses, a large share of seemingly consensual late-night sexual interactions qualify. At Stanford and many other places, for example, intoxication in itself voids a claim of consent whether or not that drunkenness reaches a level of incapacitation. Other colleges provide that even milder states of being "under the influence" are enough to defeat consent.

Federal efforts to make the disciplinary process more friendly to complainants have been going on for years. They have taken the form not only of the 2011 guidance letter but also of compliance pressure from regional OCR offices. One recommended step, for example, is to introduce what is called an "informal" complaint procedure, whose goal, per a Yale administration document, "is to achieve a resolution that is desired by the [accuser]," the better for accusers to "regain their state of wellbeing." As Brooklyn College's K.C. Johnson has pointed out, this essentially therapeutic goal can result in a grievance mechanism "in which limited or no investigation occurs and in which the accuser retains all but total control of the process." Such an approach is missing a component that might seem rather crucial—namely, a process for determining whether or not the accusation is *true*.

At Yale, the new informal processes resulted in at least one case in which a faculty member was placed on "monitoring," as a result of a colleague's complaint, without being informed that such a thing was happening. Worse yet, despite policies of confidentiality, word can leak out that someone has been accused in this informal process, as in the case of a star Yale quarterback whose unproved alleged misconduct wound up being splashed across the pages of the *New York Times* at dire expense to his reputation. This is a system in which the opportunity to be told that an investigation against you is going forward, to present evidence on your own behalf, and to seek a definite resolution to put the matter behind you, have effectively been dispensed with.

Other procedural rights have rarely fared better. OCR guidance "strongly discourages" colleges from letting accused parties cross-examine their accusers. And while it does countenance a right of appeal, it specifies that if the defense side in a discipline case is given such a right, the complainant must be given one, too. This spells an end to the option of mirroring the well-known arrangement in criminal proceedings, which grants the defense wider appeal rights than the prosecution gets so as to steer clear of any whiff of double jeopardy.

Washington University in St. Louis, revising its rules, specified that while the accused could bring an individual to assist at disciplinary hearings, that person could not examine parties or witnesses—thus making it less likely that holes would be exposed in a dubious story. Yielding to OCR's insistence, Washington University also abolished the use of mediation in assault cases—even though its spokeswoman publicly regretted this step, saying that complainants had often valued and sought mediation. For its part, the University of Virginia began entertaining complaints based on conduct that had occurred many years in the past or far from its Charlottesville campus.

Despite OCR's strenuous objections that it is respectful of the First Amendment, its new policy is sure to restrict protected speech. Already, despite numerous court decisions striking down campus-wide "speech codes" as an encroachment on free speech, countless individual campuses continue to restrict unwelcome sex talk. According to Greg Lukianoff of the Foundation for Individual Rights in Education (FIRE):

UC Berkeley lists "humor and jokes about sex in general that make someone feel uncomfortable" as harassment. Alabama State University lists "behavior that causes discomfort, embarrassment or emotional distress" in its harassment codes. Iowa State University states that harassment "can range from unwelcome sexual flirtations and inappropriate put-downs of individual persons or classes of people to serious physical abuses such as sexual assault."

Federal guidance predating the Obama administration encourages this sort of thing. According to one 2008 Department of Education document, "sexual conduct" that when unwelcome constitutes harassment includes such things as "sexual gestures," "telling sexual or dirty jokes," "spreading sexual rumors" (even presumably if true), and "circulating or showing emails or Web sites of a sexual nature."

The new blueprint would be worrisome even if all it did were to turbo-charge the penalties and likelihood of discipline for such speech under existing university codes. But it does much more to push colleges into the monitoring and restriction of currently unregulated speech.

The May 9 version of the blueprint strongly implied that colleges would be expected to punish unwelcome sex talk even if that talk were not objectively offensive, but merely gave offense to the particular complainant, and even if it took the form of trivial or isolated instances that did not interfere with the overall ability to get an education. Both of those notions depart sharply from existing court precedent.

Under the standard announced by the Supreme Court in the 1999 case of *Davis v. Monroe County Board of Education*, for example, schools are not liable for damages unless they have shown "deliberate indifference" to "known acts of harassment" that are so "severe, pervasive, and objectively offensive" as to impair "equal access" to education. Other court decisions make clear that speech falling outside that standard—speech whose offensiveness is only subjective, or which is too trivial or transient in nature to interfere with education—will sometimes itself enjoy First Amendment protection.

In its May 29 emendation, OCR was at pains to deny what had seemed the most logical reading of its earlier language. In defining incidental and subjectively offensive remarks, jokes, rumors, and gestures as "sexual harassment" akin to assault, it didn't mean to suggest that colleges should *ban* those things. Certainly not! As the earlier court decisions had made clear, only when a series of such things added up to an educationally damaging "hostile environment" as a whole would discipline become necessary. No, what it *was* requiring was that colleges make the lesser sorts of offense "reportable." By recording and monitoring them, according to this view, the college would be laying a basis to make sure they did not accumulate and become something bigger and more serious.

Put differently, the message is that college administrations must open up their complaint process to complaints of trivial or subjective harm—the bathing-suit photo of a spouse on a desk, the dorm radio tuned to a "shock jock" program, the cafeteria discussion of a racy HBO series—but are not expected to *punish* such speech unless it amounts to part of some larger and damaging pattern.

This is a distinction without a difference. To begin with, the process itself amounts to punishment: Once people realize that a certain type of joke or gossip can get them summoned involuntarily into a grievance process of indefinite length and destination, many will get the message and shut up. Second, in defining such speech as harassment while claiming the intent is merely to record and document but not to suppress it, OCR is departing from the commonly shared meaning of the word *harassment* as something objectionable that should be stopped.

While posing as something short of a zero-tolerance policy, the new blueprint will tend to engender exactly such policies in practice. If administrators hesitate about erring "on the side of compliance," their budgeters will be there to remind them of the cataclysmic financial consequences—often amounting to tens or even hundreds of millions a year for a research university—of seeing their federal funds cut off.

Under the best of circumstances, the higher-education establishment has been feeble about defending its autonomy in areas like this, perhaps because it includes a large and vocal feminist contingent to whom the rules are not (to pick a word) unwelcome. In the 2011 round of federal guidance, which made a point of stripping accused faculty of due-process rights, the American Association of University Professors (AAUP) objected; it really had no choice but to do so, given its organizational mission. In a letter to Russlynn Ali, it gingerly took issue with the new "preponderance of evidence" standard, "given the seriousness of accusations of harassment and sexual violence and the potential for accusations, even false ones, to ruin a faculty member's career." It noted the policy's failure to recognize the ways in which sexual themes within entirely legitimate curricular content might make some students uncomfortable, and OCR's failure to build into its prescribed mechanism any genuine deference to educators' professional judgment. Even so, the letter chose to "applaud" the guidance as a "positive step"—and given the lack of a more forthright tone of opposition, it stirred little notice in the press. If the academy is to turn back the ideological assault on its autonomy, on procedural fairness, and on freedom of speech itself, stronger resistance than that will be necessary.

About the Author
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