Caution! What You Learn Here May Offend You

By Paul Weizer

Proper handling of the issue of sexual harassment has become a major challenge for colleges and universities. But, while it is clearly a concern on our nation's campuses, there is no consensus among administrators or courts on how to define sexual harassment or what its boundaries are.

The principal difficulty lies in the fact that these occurrences are not always easy to define: Sexual harassment to one person might be considered immaturity, ignorance, or simply bad manners to another.

In the United States, employment discrimination laws have been developed, it might seem, in a constitutional vacuum. The restrictions on speech allowed in the workplace have developed outside the mainstream of free speech jurisprudence and, therefore, lack consistency with other areas of so-called offensive speech.

At work and in the classroom, words that offend on the basis of sex, race, or religion may be held to be harassment, and thus limited, seemingly without reference to free speech rights.

Most sexual harassment cases arise under Title VII of the Civil Rights Act of 1964, whose original purpose was to outlaw racial segregation. Sex, as a protected category, was added at the last minute as an amendment in a cynical attempt to defeat the bill altogether.[1]

Though an afterthought, sex-based criteria as grounds for illegal discrimination have developed into one of the most litigated parts of the civil rights agenda.

Title VII does not specifically outlaw sexual harassment or sexual speech. Instead, its broad proclamation makes it illegal for an employer to discriminate "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[2]

Sexual harassment can take

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two separate and distinct forms. The first of these is called "quid pro quo something for something harassment," when, for example, an employer demands sex in exchange for a job or promotion.

This type of sexual harassment does not pose much of a First Amendment problem. Although there are words involved, they do not necessarily make it speech in the First Amendment sense. What is being restricted in this case is not the message involved in the statement, but rather the illegal activity suggested by the message.

Crimes such as bribery, extortion, treason, assault, and blackmail all involve words, but these activities may be restricted because of the illegal nature of the transaction being communicated through those words. The restrictions involved are not aimed at the suppression of free speech and any limitations on speech that do occur are merely incidental.

Clearly, the First Amendment does not protect physical assault nor sexual harassment. Further, not all words would necessarily be protected either. Threats, extortion, blackmail, and the like are all unprotected uses of language, whether they are called by the names of these established criminal offenses or sexual harassment. But speech involving rude comments or dirty jokes overheard by an offended co-worker should not be subjected to the same standard. Nor should provocative classroom statements or controversial lecture topics be treated the same as a physical assault or a rape.

The second and more troubling form of sexual harassment, from a First Amendment standpoint, is what is called "hostile environment harassment." This occurs when the workplace is so polluted with discrimination that it makes the environment of the employment setting hostile or intimidating. While a well-intentioned regulation, its scope has grown beyond discrimination and has begun to reach the same type of offensive speech that the Supreme Court has repeatedly found constitutionally protected.

Allowing university administrations or even judges and juries to interpret these court decisions, without clear guidelines, is to allow censorship predicated on notions of what the jurors or administrators themselves find acceptable. This development can and will lead to inconsistency in the application of the law.

In the 1990s, a new form of censorship emerged in the ever-expanding definition of sexual harassment. No greater threat to free speech and individual rights in the university presently exists within the scope of American

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jurisprudence.

First, when a charge of harassment is leveled, university administrators are very quick to respond. Second, the definition of sexual harassment is becoming more and more sweeping. Finally, regardless of the basis of the charges, careers and lives are forever altered. The following cases illustrate these points.

California University of Pennsylvania had a particularly poor record during the mid-1990s, despite its relatively small size (300 faculty members, 5,300 students).

In 1994, the university fired a tenured business professor who had been charged with harassment by three women. Under the threat of a lawsuit, the president of the institution also authorized a settlement of the harrassment suit to the tune of $600,000.

Later an arbitrator ruled in favor of the professor and ordered his reinstatement, as well as $220,000 in back pay.[3]

But this was not the only incident at California University of Pennsylvania. In 1996, the dean of students, with 26 years experience at the institution, was demoted to purchasing agent after a ruling in a sexual harassment case.

The action was taken after the dean assisted in the defense of a professor after determining that, in his opinion, there was no basis for the harassment claim.

The university president contended that the dean used poor judgement. But in this instance also an arbitrator ultimately ruled for the dean and ordered him reinstated. The arbitrator found the president's investigation to be "grossly flawed"[4] and that the dean had been "fair and professional in his actions."[5]

The same university also fired two tenured marketing professors in 1996 on charges of sexual harassment. This time, having lost two arbitration cases already, the president hired a private investigator to build the sexual harassment cases against these professors.[6]

Despite these efforts, separate arbitrators ruled in favor of the professors. This time, the arbitrators found that the firings were not at all based on facts, but on "the basis of rumors or old claims that the president had recycled."[7] In fact, one of the fired professors was dismissed on the basis of a six-year-old claim that had been investigated and ruled groundless by the U.S. Department of Education five years earlier.[8]

After the professors won reinstatement, the story gets even stranger. Rather than being placed back in their classrooms, the two professors were ordered to spend at

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least 24 hours per week in adjoining glass cubicles in the campus library. The professors compared this treatment to "the stockades."[9] Both professors filed suit against the university; one was again suspended by the president,[10] the other resigned his position after 30 years of service.[11]

In another case, this one at the Chicago Theological Seminary, a theologian told an ancient story from the Talmud, the Jewish book of laws, to his class. Although he had used the same story in class for 34 years, this retelling brought a charge of sexual harassment. Also bringing sexual harassment charges was Jesus's *Sermon on the Mount*, which says "everyone who looks at a woman with lust has already committed adultery with her in his heart."[12]

The accused professor's punishment was not termination, but a restriction on academic freedom. The seminary issued a formal reprimand and put notices in the mailboxes of every student and teacher at the school detailing the rebuke. The notices related that the professor "had engaged in verbal conduct of a sexual nature that had the effect of creating an intimidating, hostile, or offensive environment."[13]

Further, at all of this professor's classes, a school official now sits in the front row with a tape recorder in case any other sexually offensive statements are made.[14] The professor was stunned by the uproar. "If I told a dirty story or made sexual advances, I could understand. But it never occurred to me I could have a grievance lodged against me for telling a story illustrating the Bible from the field of Judaism at the time."[15]

At Vanderbilt University, a professor of Fine Arts was charged with sexual harassment and had restrictions placed on his future teaching at the school. This was in response to a complaint by one student that the discussion and presentation of nude photographs in a photography and design course created a hostile learning environment.[16]

After receiving the sexual harassment complaint, the university questioned each student in the class individually without informing the professor. In response, the professor was ordered to place a disclaimer in all future syllabi and catalogs warning students in advance about "the potential nature and content of the material shown in this class may be considered offensive or degrading to some."[17]

The professor's reaction was understandable. "I guess we'll have to put a sign over the entrance of the university that says, 'Danger: some of the information you receive

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here might offend you.' "[18]

At Bennington College, a tenured professor of drama charged with sexual harassment was fired immediately. The process that followed the firing was cursory at best. Under Bennington's complaint procedure, the only appeal available was to the college president. At the appeal hearing, the professor was not allowed to have a lawyer present or to call witnesses. Students who had been present at the time of the alleged harassment were not allowed to read prepared statements. The professor was also denied a transcript of the proceedings.[19]

Alan Dershowitz, co-counsel for the professor, described the process as a "Kangaroo Court,"[20]and said, "[t]he hearing was a charade. There was no semblance of due process. The university is the next major place where due process has to be established. It is one of the last bastions of elitism, with autocrats sitting under fig trees dispensing justice."[21]

Later, a federal district court ruled in favor of the professor,[22] awarding him $500,000 in back pay, more than double the amount owed on his five-year contract.[23] The jury found that the college had ignored the due process rights of the accused professor.

Despite these legal victories, it is much tougher to win back one's reputation. And reputation, in academia, is the backbone of one's career. Even after these professors had been vindicated through the legal process, the accusation alone was enough to permanently alter their careers.

The cases described above are not uncommon. As outrageous as some of the charges are and as shocking as the institutional responses have been, neither is terribly surprising. In fact, they are understandable responses, given the U.S. Supreme Court's failure to adequately define sexual harassment.

Three recent decisions of the Supreme Court illustrate this problem. The first two cases came to the Supreme Court in 1998 in an attempt to clear up confusion as to the scope of liability for employers.

In both *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, the Supreme Court held that an employer is liable for the actions of its employees that are deemed sexual harassment, even if the employer had no knowledge or any reasonable way of knowing that the harassment took place.

The holding in these companion cases went farther than any prior sexual harassment ruling, yet still failed to specifically define sexual harassment. Justice Kennedy, writing for the Court, held that "an

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employee who refuses the unwelcome sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, may recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions."[24]

In other words, if a jury or arbiter were to rule against one of the professors in the examples above, the university would be vicariously, and thus financially, liable for damages. Regardless of the circumstances, the university would have to pay if it supported their employee and lost in court.

On the other hand, siding against the professor has little financial liability. The only costs in most of these cases are to free speech and academic freedom—great costs, to be sure, but not to the bottom line of the university budget.

In 1999, the Supreme Court took things even farther. In *Davis v. Monroe County Board of Education*, a case focused on Title IX of the Education Amendments,[25] the Court held that a school may be liable for damages resulting from student-to-student sexual harassment.

In this case, a fifth-grade student had repeatedly harassed a classmate. He called her names, made propositions, and touched her in a sexually suggestive manner. The school was aware of the problem, but did little to prevent it.

Justice O'Connor, writing for the Court, tried to carve out a very narrow set of circumstances where school liability would be warranted by stating that the harassment must feature "deliberate indifference" on the part of the school and must be "severe, pervasive, and objectively offensive."[26]

This decision expanded for the first time the remedy of sexual harassment for student mistreatment by other students. This sounds good on paper, but once again, the Court failed to explain what harassment is or what exactly is objectively offensive. How severe is severe enough? How many instances constitute pervasive?

In a dissenting opinion, Justice Kennedy stated the difficulties associated with school discipline, especially in cases where student behavior is "inappropriate, even objectively offensive." However, Justice Kennedy questioned labeling such behavior "gender discrimination."[27]

It is interesting to note that the harasser in this case pled guilty to sexual battery and was punished within the existing framework of the law. This only becomes a sexual harassment suit against the school due to one overriding factor: money. The chance of a fifth grade boy paying damages are slim, the chances of a school district having unlimit-

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ed resources are much greater.

What the boy did here was unquestionably wrong and he was punished for it. The school could have done much more. But this does not translate into willful discrimination on the basis of sex, which is the very definition—if there is such a thing—of sexual harassment.

What ultimately comes from this decision is simple: In terms of liability, for every school in the nation from kindergarten through college, it is better to stop any speech or actions that anyone may find offensive. If you do not, you may find yourself on the hook for damages.

While the Davis decision was about a conflict in an elementary school, the implications for the university are clear. For a student to make romantic overtures to a classmate is hardly unheard of on college campuses. Does every persistent or overeager suitor become a sexual harasser in the eyes of the university?

In addition to raising the specter of unlimited litigation, this decision also causes some serious equal protection problems. Some commentators have argued that gravely offensive speech should be regulable due to the effects that this type of speech can have on an individual. Others argue that offensive speech poses consequences for the Fourteenth Amendment's guarantee of equal protection of the law.[29] The latter group contends that if people are treated differently, they will not be able to enjoy the same freedoms as all other citizens. In their view, the Fourteenth Amendment should provide that every citizen has equal opportunities in society. The university is no exception.

Following this logic, speech that creates offensive feelings can only lead to disparate conditions. The only way to ensure that this does not occur is to prohibit speech or actions that one could find hostile.

This move would ensure a university free from tensions where everyone could live up to their abilities without obstacles or distractions. Insults, epithets, and other derogatory statements can affect a person's psyche and therefore, affect one's abilities to perform equally to those who do not face these same hurdles.

The above argument neglects to consider that the Fourteenth Amendment does not guarantee protection against rude or offensive behavior. There is no law against being boorish. To make regulations—such as those being applied in the name of sexual harassment—that are viewpoint-based goes against the very principles that the Fourteenth Amendment was designed to protect. The Fourteenth Amendment only ensures that the law is applied equally to everyone. By preferring one

viewpoint over another, we not only violate the First Amendment, but the Fourteenth as well.

Further, the Fourteenth Amendment, by stating that no state shall deny any of its citizens equal protection of the law, does not place any affirmative burden on the government to do anything. It merely states that the government cannot deny equal protection to its citizens.

By allowing limitations on speech in the name of equal protection, we are placing a burden on government that should not exist. The government, at any level, cannot as a practical matter assure equal conditions at all times to all citizens. The Constitution requires that the government not deny equal protection through its own actions, and nothing more.

By making student-on-student sexual harassment actionable, the Court has also created a different equality problem. The Monroe County Board of Education is liable because one of their students made sexual remarks and physical contact. But the school would not be liable for any of the other harassment that goes on in schools today.

If a student is repeatedly demeaned because he wears glasses or because he is overweight and the school does not prevent this, can it be held liable as well?

Can a school be sued every time a bully intimidates, threatens, or even physically assaults a weaker student? The answer to this is "no," and this creates a double standard.[30] Is the student who dreads going to school each day for fear of being beaten up any less harmed than the girl in Davis? Equal protection cannot be used in some circumstances and not in others, and still be considered equal.

Neither the First Amendment, nor the Civil Rights Act of 1964 are designed to protect people's sensibilities. The First Amendment was designed to protect the rights of the people from unwarranted governmental intervention. Titles VII and IX of the Civil Rights Act were designed to protect people from unlawful discrimination. Neither purpose is served by banning offensive speech.

A student may be offended by a lecture topic, but it is a far stretch to turn the content of that lecture into gender discrimination. Every objectively offensive utterance cannot be labeled a freestanding federal tort. By not explicitly defining sexual harassment, yet telling schools that they may be held liable, the Court has done more to undermine free speech and academic freedom than they have done to combat the very real problem of sexual harassment.

Until school administrators come to this realization, the university will be a very hostile environment indeed. Unfortunately, it will be a hostile environment toward controversial thought and expression—sacrificing the very mission of the university on the altar of political correctness.

Endnotes:

[1] Barnes v. Costle, 561 F. 2d 983 (1977).

[2] Title VII, Civil Rights Act of 1964, 42 U.S.C., Section 2000e-2.

[3] Milan Simonich, "Costs Grow in Unsettled California U. Cases," *Pittsburgh Post Gazette*, 6 April 1998, p. A-5.

[4] Milan Simonich, "Dean of Students Reinstated," *Pittsburgh Post Gazette*, 12 August 1998, p. B-3.

[5] Ibid.

[6] Milan Simonich, "Costs Grow in Unsettled California U. Cases," *Pittsburgh Post Gazette*, 6 April 1998, p. A-5.

[7] Ibid.

[8] Ibid.

[9] Ibid.

[10] Milan Simonich, "Sex Charges Rock University Again," *Pittsburgh Post Gazette*, 17 July 1997, p. B-7.

[11] Milan Simonich, "Trouble Drives Professor From His Job; California University Sexual Harassment Cases Take Their Toll," *Pittsburgh Post Gazette*, 2 August 1998, p. C-7.

[12] Adrienne Drell, "Bible Scholar Sues to Fight Taint of Sexual Harassment," *Chicago Sun Times*, 25 March 1994, p. 5.

[13] Dirk Johnson, "A Sexual Harassment Case to Test Academic Freedom," *The New York Times*, 11 May 1994, p. D-23.

[14] Ibid.

[15] Adrienne Drell, "Bible Scholar Sues to Fight Taint of Sexual Harassment," *Chicago Sun Times*, 25 March 1994, p. 5.

[16] Strossen, Nadine, *Defending Pornography*, (New York: Scribner Press, 1995), 26.

[17] Ibid.

[18] Strossen, 27.

[19] Sally Johnson, "Professor, Ousted on Sex Charge, Disputes Policy," *The New York Times*, 17 May 1991, p. B-16.

[20] Sally Johnson, "Jury Ignores Judge to Set Award in Suit," *The New York Times*, 24 July 1994, p. A-24.

[21] Sally Johnson, "Professor, Ousted on Sex Charge, Disputes Policy," *The New York Times*, 17 May 1991, p. B-16.

[22] Ibid.

[23] Ibid.

[24] Burlington Industries v. Ellerth, 118 S. Ct. 2257 (1998).

[25] Title IX, Education Amendments of 1972, 86 Stat. 373 as amended, 20 U.S.C. Section 1681.

[26] *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

[27] Ibid.

[28] Ibid.

[29] See "Regulating Racist Speech on Campus: A Modest Proposal?" *Duke Law Journal* 484 (1992), Charles Lawrence, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," *Duke Law Journal* 431 (1990), Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," *Michigan Law Review* 87 (1989), Kent Greenawalt, *Fighting Words* (Princeton, N.J.: Princeton University Press, 1995), as examples of this line of thought.

[30] For one example of this double standard, see *Stevenson v. Martin County Board of Education,* 2001 U.S. App. Lexis 1705 (2001). In this case, the Fourth Circuit Court of Appeals held that sexual harassment is treated differently than other forms of harassment under the law as presently applied.

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