Anti-Harassment

Building Law School Policies

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Several years ago, the Section on Women in Legal Education of the Association of American Law Schools began a project on sexual harassment. Our goals initially were to collect information about the phenomenon and to make suggestions for improvements in the ways law schools handle the issues.[1] In 1992, the project was enlarged to include consideration of efforts by law schools to combat all forms of harassment, whether based on sex, race, ethnicity, sexual orientation, age or any other factor.[2] We were inspired by the experience of Anita Hill to enlarge the scope of our work. Her testimony demonstrated that harassment often is neither exclusively race-based nor

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[1] The project was under the valuable leadership of Professor Judy Maute of the University of Oklahoma and Professor June Weisberger of the University of Wisconsin.

[2] The members of the reconstituted Committee are (in alphabetical order): Kathryn Abrams, Cornell; Anita L. Allen, Georgetown; Marina Angel, Temple; Frances Lee Ansley, Tennessee; Taunya Lovell Banks, Maryland; Katharine T. Bartlett, Duke; Mary E. Becker, Chicago; Bari R. Burke, Montana; Okianer Christian Dark, Richmond; Angela P. Harris, Boalt Hall; Lynne N. Henderson, Indiana at Bloomington; Margaret Howard, Vanderbilt; Kathy Venturatos Lorio, Loyola, New Orleans; Martha Mahoney, Miami; Joyce E. McConnell, CUNY at Queens; Lynn McGilvray-Saltzman, Florida; Charlotte Elizabeth Parsons, Arkansas at Little Rock; Judith Resnik, University of Southern California; Susan Deller Ross, Georgetown; Laura F. Rothstein, Houston; Ronna Greff Schneider, Cincinnati; Judith W. Wegner, North Carolina; June M. Weisberger, Wisconsin; and Judith A. Winston, American.

The Co-chairs of the Committee for 1993 are Professors Parsons and McConnell.

As Committee Chair for 1992, I want to pay tribute to the members of this Committee. Unlike many committees, this was a working group. People were dedicated to the project and stayed dedicated to it, even when our discussions became painful or discordant. On a personal level, I must thank the members of this committee for restoring my faith in the power of conversation to bring people together at many levels, not only the verbal.

exclusively sex-based. Rather, what she experienced was affected by both race and sex, and such harassment is not identical to either race-based harassment or sex-based harassment.

We began the new enterprise by asking law schools to provide us with copies of their anti-harassment policies and procedures. Over seventy percent of the law schools in the country sent us materials which were reviewed and analyzed. We found it revealing that nearly all the materials related exclusively to sex-based harassment. Very few schools interpreted our request to include harassment on the basis of any other characteristic or group identity. Based on this nearly universal omission, we concluded that few law schools have policies addressing harassment based on multiple identities.

After consulting over the phone for a number of months, the entire drafting committee[3] met early in January at a marathon eight-hour session where we considered the collected materials, analyses of relevant law, and the subcommittee drafts. We hoped to develop and agree upon a fairly comprehensive set of principles for combatting harassment in law schools. Our goal was impossible to meet, however, and we failed. We agreed on a set of principles for some of the problems, and this article is the interim report describing these principles. We will be continuing our work on a comprehensive set of principles, and we will be issuing reports as we go along. In addition, we plan to engage in educational efforts.

The Committee began its discussions by considering what principles should apply to sexual relationships involving a faculty member and a student. We agreed initially that a good law school should foster close and caring relationships between faculty and students. We also agreed that the line should be drawn at sexual relationships in most instances, as I will explain.

Research assistance was provided to the Committee by Evan Stolove, University of Maryland School of Law, Class of 1994. Evan read and analyzed each law school policy, created the chart on which we all relied, and wrote exceptional memoranda on the law school policies, on hate speech, and on race-based harassment. Evan's work was invaluable; without his dedication and effort, we could have made very little progress.

Many thanks to the University of Maryland School of Law for providing material support and an environment welcoming to the efforts of the Section.

[3] One of our panelists, Professor Marc Fajer, joined in the deliberations of the Committee, and we were grateful for his insights and candor.

The Committee's focus on faculty/student relationships, as opposed to relationships involving other members of the law school community, arises out of our belief that our primary responsibility as educators puts us in a different position with respect to students than with respect to the other members of our communities. We exercise enormous power with respect to students, but it is a power we exercise for a limited period of time — sometimes as brief as a semester, certainly no longer than a few years. The relatively brief time frame is quite different from the time frames of our relationships with faculty colleagues or with staff members. At a later point in the work of the Committee, we expect to return to the question of sexual relationships involving these other members of the law school community.

The disadvantages to a student that may flow from engaging in a sexual relationship with a faculty member can be enormous. At the same time, those disadvantages are not likely to be readily apparent to the student. Consider the example of a faculty member and a student research assistant who enter into a sexual relationship that ends after a period of time. The student may feel at that point that she cannot get a fair employment reference from the faculty member, but, at the same time, her work as a research assistant may be her only legal work experience when she begins to look for her first post-graduation job. Many of us know the value of a professor's recommendation; its loss can severely harm a career.

With respect to faculty/student sexual relationships, we agreed to distinguish in our principles between situations where the student is subject to the evaluative authority or power of the faculty member and situations where the student is not explicitly or functionally subject to such authority or power. An explicit or functional power relationship would exist, for example, where the faculty member holds the power to determine a grade, to award or withhold credit for a project, to hire or fire a research assistant, or to recommend a student for a job. In situations such as these, we believe that the faculty member must be barred from engaging in a sexual relationship with a student. The potential for a conflict of interest is simply too great for it not to be part of the decision of whether to have a sexual relationship in nearly every case.

Student/faculty sexual relationships may also occur in the absence of a conflict of interest. In our view, that is a more complex situation. Most members of the Committee concluded that since some such relationships are entered into

for reasons of genuine and mutual love or desire, barring them is inappropriate. At the same time, however, the fact is that faculty members — as a group — possess greater social power and institutional power than students — as a group — in an educational environment. As a result, the absence of a conflict of interest does not place the faculty member and the student on a level playing field. Furthermore, students who are not in a sexual relationship with the faculty member may find cause to feel disadvantaged because of the relationship the faculty member has with some other student, and the law school atmosphere may become infected with discord as a result.

Our Committee, therefore, endorses the principle that all faculty/student sexual relationships should be discouraged in the strongest terms. Law schools should cultivate an educational culture in which mutual respect and affection of faculty and students does not become expressed in sexual relationships. Consistent with this principle of supporting non-sexual relationships while discouraging sexual relationships, we endorse the principle that the burden would rest on a faculty member who has a sexual relationship with a student to demonstrate that the relationship is the result of mutual attraction and not the result of professorial power. Thus, if the student in the relationship complains about the relationship, the presumption would be that the relationship is grounded in the exercise of professorial power rather than in a mutual attraction.

Anti-harassment policies must address matters other than sexual relationships. Members of the law school community can be made to feel unwelcome and even driven from the community by a variety of behaviors ranging from assaults and stalking to insults and other insensitive and excluding words and verbal conduct. The initial two questions before our Committee with respect to these forms of harassment are, first, whose conduct should be subject to regulation; and, second, what group or groups should anti-harassment policies seek to protect.

On the first question, our Committee agrees that the principle of universality is paramount. Harassment cannot be permitted by anyone in the law school community, including faculty, students, staff and other people who participate in the educational enterprise. Law schools should be careful to include within the coverage of their policies occasional members of the community, such as trustees, externship supervisors, visiting moot court

judges and recruiters. Reaching these occasional members of the community to educate them about the importance of their good conduct is a challenge. In light of their position as role models for law students and their power to have a long term negative impact on a student's professional development, however, we think such efforts are necessary. For example, many women law students report being treated by the Moot Court judges in ways that convince them that women don't belong in the profession. These volunteer judges might volunteer comments on the attire or the attractiveness of women law students, while ignoring the attire or attractiveness of male law students, or they may insist on an argument style that is uncomfortable for some women to adopt. Similarly, an externship supervisor who assigns clerical work to an African-American law student while assigning research projects to a white law student may be sending a harassing message about who belongs in law in the legal profession.

The Committee found it somewhat more difficult to agree on two questions. First, should principles governing harassment be defined solely on the basis of sex or should it be more inclusive? Second, if the definition should be more inclusive, should it include harassment on the basis of membership in a historically disadvantaged group, or should it include all forms of harassment. Each path has its difficulties. If the definition is limited to sexual harassment, the benefit is that focused attention can be paid to the various ways, many of them still unrecognized, in which women are made to feel unwelcome in the law school and the profession. The difficulty is, however, that not all women are alike nor are all women harassed solely on the basis of gender. For example, Anita Hill was harassed on both race and sex grounds. In that type of case, why should a woman have to elect which way she was harassed, when in fact the phenomenon of being harassed on both race and sex characteristics may be experienced quite differently from being harassed on a single characteristic?

A second option is to include in the definition of harassment all groups who historically have suffered disadvantage: white women, people of color, gays and lesbians, and people with a disability. This option has the advantage of giving voice to the claims of most people who have been kept out of law historically and whose entry into law can be deterred by harassing behaviors. It also permits many people who are harassed on the basis of multiple identities to have the entire matter known and aired. A woman called a black bitch, the classic example, need not decide if she is harassed on the basis of

race or sex. A disadvantage of this route is that the largest group not covered, able-bodied heterosexual white males, may express resentment that their grievances will not be recognized as harassment.

A third option is to define harassment in terms that include conduct that impairs the ability or opportunity of any student to engage in learning. The advantage of this option is its recognition that law school can be a disrupting, disrespectful and even hurtful experience for everyone from time to time, not only for those from historically disadvantaged communities. A disadvantage of this option is the dilution of the efforts that need to be undertaken in order to include historically disadvantaged groups within legal education and the legal profession. Moreover, this option increases the vulnerability of faculty from historically disadvantaged groups to unreasonable attacks by majority students.

While the Committee has not concluded its consideration of which groups should be protected by anti-harassment policies, we did conclude that our principles must seek to diminish problems arising at intersectionality points, as well as problems of the enhanced vulnerability of faculty from historically disadvantaged groups by majority students. For example, African-American faculty members who use a few hypotheticals involving civil rights cases outside of civil rights courses sometimes report that white male students complain that their interests are being ignored and that they are feeling excluded from the classroom. It seems to us that most law schools would understand that such a students's claim is unreasonable, but it also seems clear that the vulnerability of African-American faculty members can be increased if the definition of harassment is not sensitive to the potential for such claims to be made. Another case occurred recently in a major eastern law school where a woman faculty member was speaking about sexual harassment in legal education. In the course of her speech, she cited a number of examples collected by Professor Taunya Banks in her study of gender bias in law school classrooms.[4] She concluded with what she thought was a humorous statement, a statement that received some laughter from a mixed male/female audience. She said, "I have now taken to saying that there is no such thing as a reasonable man." She was then startled to learn that the Dean did not think her comment was humorous. In fact, a letter was placed in her permanent file saying that she would make male students feel unwelcome in her classroom.

[4] Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL ED. 137 (1988).

The last issue that the Committee had time to address in our marathon meeting was remedies. The hate speech case of *R.A.V. v. St. Paul*[5] has made this an unusually hot topic.

As a first principle, the Committee thinks it very important, indeed critical, to emphasize that the scope of *R.A.V.* is much, much narrower than the media hype that has arisen around it would suggest. For example, *R.A.V.* has nothing to do with much of the harassment experienced by members of historically-disadvantaged groups, because that harassment has nothing to do with speech. It is instead the harassment of assaults, the harassment of physical confrontations, the harassment of stalking, the harassment of demands for sexual access. Law schools, we felt, need to be much more assertive about developing and enforcing the prohibitions already in place to sanction such conduct on the part of members of the law school community. *R.A.V.* is in no way a barrier to that type of effort to make members of historically disadvantaged groups welcome in the legal community.

R.A.V. also has no literal application to private law schools since the First Amendment runs against the government. Accordingly, we would like to see private law schools take the lead in developing anti-harassment policies, because they will have greater freedom to experiment with and to learn where the line between academic freedom and a harassment-free educational environment needs to be drawn.

Finally, the Committee agreed that education is often the most effective way to combat a harassing environment. Education can include programs for incoming students, for faculty, and for staff. Ideally, it should be undertaken both prophylactically and in response to particular incidents. Nothing in *R.A.V.* suggests that a school cannot target harassment against particular groups for educational efforts. We believe that the greatest need is for schools to educate faculty about issues affecting women and other historically disadvantaged groups, and we urge that educational efforts of this kind receive the highest priority.

Professors Joyce E. McConnell of the City University of New York at Queens and Charlotte Elizabeth Parsons of the University of Arkansas-Little Rock have agreed to chair our Committee's work for the coming year. Under their

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[5] 112 S. Ct. 2538 (1992).

leadership, we hope that the Committee will be continuing to develop principles for anti-harassment policies. In addition, the Committee plans to work with other groups to begin to develop educational materials and programs. The Committee will be networking with other members of the AALS as well as with the Society of American Law Teachers in these efforts.

Making it possible for people of every background and condition to enter the legal profession must be a central mission of American legal education in the last decade of the twentieth century. To accomplish this goal, law schools must strive to be welcoming institutions. Developing and implementing anti-harassment policies are, unfortunately, necessary steps to the achievement of the goal. The Section on Women in Legal Education welcomes participation from everyone in legal education in our work on this important project.