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BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS

“FIGHTING SEXUAL HARASSMENT IN AMERICAN HIGHER EDUCATION”

JULY 25, 2014

CHAIRMAN CASTRO AND MEMBERS OF THE COMMISSION:

I am honored to appear before you again today at this briefing on Civil Rights Enforcement of Sexual Harassment Policy at Educational Institutions by the Department of Education's Office of Civil Rights and the Department of Justice's Civil Rights Division (collectively the "Agencies").¹ This issue has gained prominence over the last year in light of the controversial agreement that the Agencies reached on May 9, 2013, with the University of Montana (the "Montana Agreement").² In my testimony, I will discuss the conflicts arising from the Agencies' efforts to combat sexual harassment when that conduct either (i) does not meet the legal definition of a hostile environment or (ii) is protected under the First Amendment to the U.S. Constitution. I will argue that there is a kernel of wisdom in the Montana Agreement that should be taken seriously, although the Agreement is vulnerable as it stands to certain legal and policy criticisms and merits additional clarification.

I have wrestled with these issues for many years. During the 1990's, I served as plaintiffs' lead counsel in a prominent case that established the rights and remedies that Fair Housing Act defendants have against investigations into their political activities. Later, at the federal Office of Fair Housing and Equal Opportunity, I worked on ways to ensure that fair housing laws are vigorously enforced in the face of the success of the litigation that I had brought. At the U.S. Department of Education's Office for Civil Rights, I worked on policy guidance and technical assistance to ensure that First Amendment rights would not be trampled in the course of protecting educational equity. More recently, at the Louis D. Brandeis Center, I have developed best practices guides to inform university administrators on how they can best

¹ Kaitlyn Boyle provided research assistance for this testimony, and Aviva Vogelstein provided helpful comments.

² DOJ Case No. DJ 169-44-9, OCR Case No. 10126001, page 9 (May 9, 2013), <http://www.justice.gov/opa/documents/um-ltr-findings.pdf>.

resolve hostile environments – especially in the context of anti-Semitic incidents – while fully adhering to constitutional limitations.

As an initial matter, I would like to underscore that the Agencies are addressing a matter of great seriousness and urgency. In a study conducted by the American Association of University Women, 62% of college aged students reported experiencing some form of sexual harassment and 66% said they knew of someone else who had experienced it.³ According to the U.S. Department of Justice's National Institute of Justice (NIJS), nearly 2.8 percent of female college students had been victimized by rape or attempted rape within the academic year (a reference period of approximately seven months).⁴ NIJS calculated that this 2.8 percent victimization figure would be equivalent to approximately five percent (4.9 percent) of college women per calendar year. Over the course of a college career, which now averages 5 years, NIJS estimates that between one-fifth and one-quarter of college women are victimized by completed or attempted rape in higher educational institutions.⁵ By any measure, this incidence must be considered shocking and unacceptable. At the same time, we must remember that federal sexual harassment policies typically address not only such violent assaults but also less heinous conduct, such as sexually themed jokes. Moreover, to the extent that alleged harassment involves purely expressive conduct, rather than physical violence, a host of other constitutional concerns arise.

On May 9, 2013, the U.S. Departments of Education and Justice issued the Montana Agreement. The Montana Agreement resolved allegations that Montana had inadequately

³ Catherine Hill and Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, American Association of University Women, 14 (Dec. 2005), <http://www.aauw.org/files/2013/02/drawing-the-line-sexual-harassment-on-campus.pdf>.

⁴ Bonnie S. Fisher, et al., *The Sexual Victimization of College Women*, U.S. Department of Justice National Institute of Justice, 11 (Dec. 2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>

⁵ *Id.*, p. 10.

responded to alleged sexual assaults on female students. The Agencies underscored their ambitions for the Montana case, writing that, “The Agreement will serve as a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault.”⁶ The Agreement has become controversial in part because of criticisms that the Departments are infringing upon the constitutional rights of persons who may be falsely accused of harassing conduct.⁷ This has raised broader, longstanding questions about apparent conflicts between the civil rights of those who allege that they have been harassed and the civil liberties of those who are accused of harassing others.

The most novel element of the Montana Agreement is the Agencies’ insistence that Montana was wrong to define “sexual harassment” as being limited to conduct or speech that is severe or pervasive enough to create a hostile environment. Rather, the Agencies insist that “sexual harassment” must be defined as “unwelcome conduct of a sexual nature,” regardless of its severity or pervasiveness. At first blush, this appears to be a surprising development in light of the well-established principle that unlawful harassment consists either of *quid pro quo* demands (which not relevant here) or hostile environment. In the Montana Agreement the Agencies appear to insist that sexual harassment may occur even in cases that do not meet the legal standards of either hostile environments or *quid pro quo*. “Whether conduct is objectively offensive,” the Agencies wrote, “is a factor used to determine if a hostile environment has been created, but it is not the standard to determine whether conduct was ‘unwelcome conduct of a sexual nature’ and therefore constitutes ‘sexual harassment.’”

There are two possible interpretations of the Agencies’ unusual approach. First, the

⁶ Montana Agreement, p. 1.

⁷ See, e.g., Charlotte Allen, “The Big Chill,” *The Weekly Standard*, June 10, 2013, Vol. 18, No. 37, https://www.weeklystandard.com/articles/big-chill_732054.html

Agencies may have meant that universities must take regulatory action against unwelcome sexual conduct that is not yet “severe” or “pervasive” in the sense of long-standing Agency guidance. This would be a breathtaking policy change. If this is the meaning of the Montana Agreement, then it is no overstatement to say that its impact has been “to rewrite the federal government’s rules about sexual harassment and free speech on campus,” by announcing that “only a stunningly broad definition of sexual harassment—‘unwelcome conduct of a sexual nature’ – [including speech] will now satisfy federal statutory requirements.”⁸

The rationale for this approach would presumably be that even minor incidents may, if allowed to fester, increase in number and severity. It is certainly prudent to address developing problems before they reach the level of federal civil rights violations. The problem however is that regulatory conduct by a state actor – such as actions by public universities to censor or punish student speech – cannot be justified on the basis of expressive conduct that is petty and fleeting, rather than severe or pervasive. Indeed, the Agencies’ action would be all too easy to lampoon, since the Agencies are insisting, under this reasonable interpretation, that universities formally ban all dirty jokes, sexual rumors, risqué emails, and sexual advances unless they are favorably received. The risk of heavy-handed enforcement is severe, given the extent to which many universities have suppressed student and faculty speech in misguided efforts to address political sensitivities.⁹

Unfortunately, there is much textual evidence in support of this interpretation.¹⁰ After all, the Agencies insisted that Montana “update its program to provide regular mandatory training [that] will . . . make students aware of the University’s *prohibition* against sexual

⁸ Greg Lukianoff, “Feds to Students: You Can’t Say That,” *The Wall Street Journal* (May 16, 2013).

⁹ See, generally, GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE (Encounter Books 2012).

¹⁰ Such evidence is well marshaled, see e.g., Eugene Volokh, Blog posting, “The Administration Says Universities Must Implement Broad Speech Codes,” *The Volokh Conspiracy* (May 13, 2013).

harassment...” Such statements imply that public or federally assisted universities must prohibit all sexual harassment, regardless of whether it also meets the standard of hostile environment. Similarly, the Agencies admonished that other actions following a sexual harassment complaint “may also be necessary to address the educational environment, including special training, the dissemination of information about how to report sexual harassment, new policies, and other steps designed to clearly communicate the message that the college or university does not tolerate, and will be responsive to any reports of, sexual harassment.” Here again, the Agencies are saying that Montana must communicate that it “does not tolerate” sexual harassment, defined broadly as “unwelcome conduct of a sexual nature,” even where that conduct does not meet the standards of unlawful hostile environment harassment. In other words, the Agencies repeatedly articulate their demand that Montana “prohibit” and “not tolerate” unwelcome sexual conduct by college students, even if it is just occasional communications. Critics are well-justified in their inference that the Agencies are dramatically changing policy direction with these pronouncements.

Alternatively, the Agencies may have been making the subtler point, which has the advantage of greater wisdom albeit lesser textual support. This point is that universities should take invidious harassment seriously, even when it does not meet the definition of a hostile environment, is not prohibited by federal civil rights law, and may be protected under the Speech Clause of the First Amendment. That is to say, there are unquestionably many forms of harassment that do not rise to the level of a federal civil rights violation but which must nevertheless be addressed. In some cases, they may involve protected expressions of free speech and therefore cannot be suppressed or punished, but they also contain unwelcome or hateful elements that may exacerbate negative campus tendencies and therefore cannot be ignored. The

Agencies lack authority to prohibit this conduct, and public universities may be barred from banning it. Nevertheless, it is untenable for universities to turn the other way and ignore it. Unfortunately, administrators too often assume that offensive speech presents them with an untenable choice: either prohibit the speech, even if it is constitutionally protected, or ignore its impact, even if it contributes to a hostile environment. In fact, their options are never limited to these two options, which is to say: the correct response to offensive conduct is never to do nothing.

In a sense, both interpretations may be equally valid. The Agencies have, by all appearances, overstepped their bounds by issuing an opinion that appears to require recipient universities to prohibit unwelcome sexual conduct that does not meet the standards of hostile environment sexual harassment. Moreover, they have done so in a manner that is not only imprudent but also potentially unconstitutional. On the other hand, the Agencies have also highlighted a significant shortcoming of sexual harassment policy, to wit: Universities cannot comprehensively and effectively address the crisis of sexual harassment and assault by merely prohibiting hostile environments. This is important both because unwelcome conduct may be problematic even if it is neither serious nor pervasive and also because minor and fleeting incidents may accumulate and become serious or pervasive if not promptly and effectively addressed.

The Montana Agreement can become an important contribution if it is construed in a manner that brings its interpretation within constitutional and statutory limitations. The Agencies should continue to emphasize that sexual harassment may include many activities that are not prohibited by federal civil rights laws. At the same time, they should also clarify that they cannot lawfully take regulatory action to bar such activities. That is to say, the Agencies

should clarify that the Blueprint should be read consistently with OCR’s “First Amendment: Dear Colleague Letter,” which emphasizes that “no OCR regulation should be interpreted to impinge upon rights protected under the First Amendment to the U.S. Constitution or to require recipients to enact or enforce codes that punish the exercise of such rights.”¹¹ Specifically, the Agencies should announce that they cannot lawfully take action against institutions that fail to address unwelcome sexual conduct unless that conduct violates sexual standards – but that such conduct nevertheless offends the broader norms that the civil rights laws were intended to address.

Universities should act similarly. They should use their moral suasion to discourage all forms of unwelcome sexual conduct within their communities. This should include unwelcome conduct that is neither severe nor pervasive. At the same time, they should avoid taking regulatory conduct with respect to such conduct if it is protected by broadly accepted norms of freedom of expression. This is especially important for state universities, such as the University of Montana, which conform to the requirements of the First Amendment. It is important to emphasize that the proper response is neither to balance the respecting values nor to strike a compromise among them. Public institutions must fully enforce civil rights protections while fully complying with civil liberties limitations. In many cases, they must respond to unwelcome conduct in a manner that does not include content-based regulation of expressive conduct in public fora. As we have seen, this leaves universities with many other ways of meeting their requirements.

Administrators always have options for active engagement that do not entail suppression or punishment. As a matter of sound policy, universities should take serious and effective

¹¹ Gerald A. Reynolds, Assistant U.S. Secretary of Education for Civil Rights, “First Amendment: Dear Colleague Letter” (July 28, 2003), <http://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

measures to address harassing conduct even when it falls short of a legal violation. These steps may include raising student awareness through orientation and training, articulating recommended standards of ethical conduct, and speaking out against coarse, degrading, or uncivil behavior even when it takes the form of protected speech. Additionally, universities may take numerous steps that do not raise constitutional concerns, such as:

- Non-regulatory responses, such as strong leadership statements;
- Regulating non-speech, including responses to the kinds of assault, battery, and vandalism, which have been recently alleged to occur on many campuses;
- Regulating the time, place or manner of offensive speech, including insuring effective security to prevent heckling at university lectures;
- Regulating non-speech aspects of actions with speech components, such as offensive touching that coincides with offensive speech;
- Regulating speech which falls under a specific exception (e.g., threats of imminent violence); and
- Providing enhanced discipline for conduct code infractions that are motivated by hate or bias.¹²

While these recommendations are offered in the context of sexual harassment policy, they apply with equal force to other forms of discrimination and harassment. For example, ethnic, racial and religious minority students are frequently made to feel unwelcome by words and conduct that fall short of forming a hostile environment. The kernel of truth in the Montana Agreement should be that universities should respond to such incidents in a serious and

¹² Kenneth L. Marcus, *Best Practices Guide for Combating Campus Anti-Semitism and Anti-Israelism* (Washington, D.C.: The Louis D. Brandeis Center for Human Rights Under Law), http://www.brandeiscenter.com/images/uploads/practices/guide_02.pdf. For further discussion of these alternatives, see William A. Kaplin and Barbara A. Lee, *The Law of Higher Education*.

thoughtful manner. The universities' protocols for address incivility should not kick in only when federal law is implicated. Nevertheless, universities – especially if they are public institutions – should exercise great caution in their responses. In particular, they should avoid suppressing or punishing protected speech on the basis of content, but they should not hesitate to respond to this speech with speech of their own.