A Review of the Sexual Harassment Policy

Paris Kanellakis*

January 31, 1996

In the thirteen years I have been on the Brown faculty, the administration has done much to foster a pleasant and intellectually stimulating environment for teaching and research. It has been accessible, reasonably flexible, and small in comparison to the bureaucracies of similar institutions. Unfortunately, poorly executed bureaucratic regulation, even well intentioned, has the potential to adversely affect a university environment. The document "Sexual Harassment Misconduct & Assault Prevention: Policy and Procedures" has this potential. The document in question is dated September 6, 1994 and was published by the Brown Equal Employment Opportunity / Affirmative Action Office (EEO/AA). It often refers to itself as the Policy.

If you have not read it, you should. Indeed, the Policy is required reading by all members of the Brown community (Policy p. 18). Upon sober reflection, I decided to exercise my freedom of speech and submit a review to the faculty bulletin of this "must-read" piece of regulation. This review contains many quotes from the Policy and other sources, which I gratefully acknowledge.

There has been much discussion recently on campus and in the national press about sexual harassment/sexual assault. The official Brown position on this important subject is codified in the Policy. In the first section of my review, I offer some commentary on the Policy's definition of sexual harassment. These personal opinions are not the main point of this review, but merely provide some context for the second section, where the main point is raised: that there are fundamental problems with the informal/formal grievance procedures of the Policy.

The intent of the Policy's grievance procedures is to take strong and effective measures to prevent and remedy sexual harassment/sexual assault. Unfortunately, despite its good intentions, the Policy has at least three major problems: (1) the informal procedure allows compilation by the administration of sensitive data on individuals and academic units, some of which is gathered by anonymous accusation, (2) the informal/formal procedures treat the accuser much more favorably than the accused, and (3) the formal procedure allows findings involving misconduct whose nature is not specified.

Individually, and even more in combination, (1-3) are potentially damaging to the Brown community. They provide the preconditions for false and malicious accusations. The threat of their use can easily silence honest members of the community who happen to hold views unpopular with those administering the Policy.

*Professor of Computer Science. Box 1910. Tel 401-863-7647. Email pck@cs.brown.edu

Let me stress that I am not a free-speech absolutist and would not argue against the Policy on the basis of academic freedom of speech. Many parts of the Policy are commendable. Also, I view absolutism of any sort with considerable suspicion. I have personal experience with nonfreedom of speech and suppression of other rights. I was an undergraduate in Greece when the government was a military dictatorship (1967-74) and the police force was a genuine instrument of repression. Some of my classmates were killed in 1973, in one of the few acts of resistance during that grim period, and others are now in the democratic Greek parliament. This formative experience taught me that freedom of speech is an empty abstraction if those in power can: (1) intimidate by using data gathered through anonymous accusation, (2) ignore the rights of the accused, and (3) punish misconduct of an unspecified nature. Of course, any analogy is exaggerated. Rhode Island is not the Greece of 20 years ago; it is not even the Isle of Rhodes.

1 On the Definition of Sexual Harassment

Here is the definition of sexual harassment (Policy, p. 1):

"Sexual harassment may involve the behavior of a person of either sex against a person of the opposite or same sex, and occurs when such behavior constitutes unwelcome sexual advances, request for sexual favors, and other unwelcome verbal or physical behavior of a sexual nature where:
(a) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's education or employment;
(b) Submission to or rejection of such conduct by an individual is used as the basis for academic or employment decisions affecting the individual's welfare;
(c) Such conduct has the purpose or effect of substantially interfering with an individual's welfare, academic or work performance, or creates an intimidating, hostile, offensive education or work environment."

This definition is clarified, but not circumscribed, by six examples on page 2 of the Policy. The last of these examples illustrates that even consensual relationships can be grounds for grievance by a sensitive third party. This form of grievance follows from part (c) of the definition and is explained further on page 5, first paragraph:

"A third party may also file a grievance under this policy if the sexual conduct of others in the education or work environment has the purpose or effect of substantially interfering with the third party's welfare, academic or work performance."

I could not agree more with the definitions in (a) and (b) above, as well as with the definitions of the more severe offenses of sexual misconduct and assault that I do not quote (see Policy, p. 3). I would even make (a) and (b) stricter by pointing out that such behavior is morally wrong even when it is welcome and no third party is affected.

I do have some problems, however, with (c)'s "unwelcome verbal behavior...that creates an intimidating, hostile, offensive education or work environment", when (a) and (b) don't apply.

Many of the terms used here are to at least some degree subjective. Consider the following three examples (1,3,4) from the six on page 2, in the context of definition (c), where definitions (a) and (b) do not apply:

"(1) Unwelcome sexual propositions, invitations, solicitations, and flirtations."

"(3) Unwelcome verbal expressions of a sexual nature, including graphic sexual commentaries about a person's body, dress, appearance, or sexual activities; the unwelcome use of sexually degrading language, jokes or innuendoes; unwelcome suggestive or insulting sounds or whistles; obscene phone calls."

"(4) Sexually suggestive objects, pictures, videotapes, audio recordings, computer communications, or literature, placed in the work or study area, that may embarrass or offend individuals. Brown University adheres to the principles and traditions of academic freedom, and recognizes that these freedoms must be in balance with the rights of others, including the right of individuals not to be sexually harassed. It is understood that the principles of academic freedom permit topics of all types, including those with sexual content, to be part of courses, lectures, and other academic pursuits. Materials with sexual content that are used or displayed in an educational setting should be related to educational purposes."

I certainly condemn the behavior in examples (1) and (3), even though I feel that "unwelcome" should have been defined more precisely (see below). With respect to example (4), my office books and periodicals do not even mention the word sex. There is a certain puritan quality in these examples. Reading them makes me wonder whether Brown must become a straight-laced, humorless place.

I presume that Rhode Island criminal law defines community standards for pornography, to which we are all subject. Example (4) takes a much more comprehensive approach to sexually suggestive material. How is sexually suggestive literature defined? Where does the naughty Greek mythology stand, or Sappho's erotic poetry, or the Biblical injunctions against sodomy? Why is the Brown standard so much more comprehensive than the community standard? Is it to justify to the average Rhode Islander the small matter of academic freedom, raised as an exception in example (4)? That part of the Policy sounds like the temperance league imposing prohibition on the common folks, while allowing its select few the use of alcoholic beverages for medicinal purposes. Here is the dilemma. Should sexually suggestive objects of educational value, but which Rhode Island law considers pornographic, be material for the Brown curriculum? Perhaps the Policy should use a First Amendment argument here instead of its weak argument on educational value, a precious commodity never mentioned in the constitution. The naughty Greek gods would call this hubris.

A technical fault of the Policy is that it never attempts to define "unwelcome". The following quote from page 6, third paragraph, implies that sexual harassment can occur before and without direct or (even sometimes) indirect feedback to inform the "harasser" (sic) of unwelcome behavior:

"An initial course of action for any faculty, staff, or student who feels that he or she is being sexually harassed is for that person to tell or otherwise inform the harasser that the conduct is unwelcome and must stop. However, in some circumstances this course of action may not be feasible, may be unsuccessful, or the individual may be uncomfortable dealing with the matter in this manner."

We should encourage our students to speak up. The administration should strive always to enforce the initial course in a polite and timely fashion, and the regulations should say so.

It is my opinion that the definition of sexual harassment can be improved, by using intuitions such as Susan Estrich's on the Jenny Craig sexual harassment case (USA Today 12/8/94) to distinguish some "charges (that seem) downright trivial" from what is illegal:

"Not every workplace insult or come-on should be considered a federal case, whether aimed at men or women. Some of the charges leveled at (the) Jenny Craig (weight-loss company) seemed to me downright trivial, regardless of who is on the receiving end. The Boston Eight, as they've called themselves, didn't like the conversations about menstrual cycles and boyfriends, or being asked where the fuse box was. Too bad. My answer to them is just the same as to the women who don't like men reading Playboy or telling dirty jokes. Handle it yourself. Bring your own magazines. Tell them to knock it off. This is not what the law is for."

2 On the Informal/Formal Grievance Procedures

In this section, I would like to draw attention to some aspects of the Policy that I feel are wrong and potentially damaging to the Brown community. There are at least three major problems:

(1) The EEO/AA Office has the power to compile sensitive data on individuals and academic units, some times by anonymous accusation. While this problem does not arise in the formal procedure, it does in the informal procedure. However, informal procedure data can be the basis for initiating a formal investigation, so that the transition from informal to formal procedure is problematic. The EEO/AA statistics gathering-activity in the informal case is described in Section III.C of the Policy. The informal resolution official and the Director, EEO/AA exchange information and written reports "prior to pursuing informal actions with the accused party" and throughout the informal process. In particular (p. 12, third paragraph):

"Situations in which the grievant has requested his or her name not be disclosed or no action to be taken, and those in which the grievant has not consented to informing the accused party of the action, should be reported without disclosing information which would identify the parties. Information about the category, frequency, and outcome of the sexual harassment/sexual assault cases will assist the EEO/AA Office in developing case profiles, identifying training needs, and to assure compliance with the sexual harassment/sexual assault policy and applicable federal laws. Furthermore, in order to assure that such claims are adequately handled, the Director, EEO/AA will monitor repeated grievances within the same department/unit or against the same individual (where appropriately identified), and when necessary recommend/or initiate a formal investigation. All information reported will be treated confidentially by the EEO/AA Office."

There is a lot of formal reporting for a procedure that is called "informal". How is this to be implemented, in particular when the identities of the involved parties are not to be disclosed? Sensitive information can be compiled, without disclosing the identities of the involved parties. Just the time and general location of an alleged offense might not suffice to identify the parties, but might limit the possible participants to a very small set. An anonymous report might not, by itself, identify the involved parties, but do so in conjunction with publicly available data or with a second, subsequently submitted, report. Anonymous reports are not supposed to identify individuals, but they are allowed to identify individuals up to groups of small size. Because the description quoted above implies that something is reported about the parties, i.e., their academic department/unit. Consider the possible statement allowed by the current policy: "x cases of sexual harassment were reported in department Y but we can't tell you who was involved or who told us". Is the purpose of anonymous data gathering to monitor academic departments/units? Why these and not other groupings of Brown community members?

Interestingly, the informal procedure is not the only case in which data can be gathered anonymously. There is a provision, outside both informal/formal procedures, for data to be reported past the timelines for filing grievances. No mention is made of notification of the accused (p. 9, first bullet):

"Alleged incidences of sexual harassment and/or sexual assault occurring outside the timelines should nonetheless be brought to the attention of the EEO/AA Office for review."

Clearly, some of the data is gathered in a fashion that makes its accuracy suspect. What guarantees are there that information will not be misused, if one person both compiles it and decides how to use it? I am very much aware that EEO/AA is not the Greek police of 20 years ago, but I could not escape a slight shudder upon reading these examples of "phakeloma", modern Greek slang for "compiling a file of anonymous accusations about a citizen". The Brown administration might be relieved to learn that in the early '80's, the Greek police, in a fit of government reform, publicly burned the files or "phakeloi" (but not the data gatherers, who kept their jobs by limiting "phakeloma" to opposition politicians).

(2) There is insufficient protection of the rights of the accused. False allegations can often be as damaging as true ones. Throughout the Policy, the accused party is not assumed innocent until proven guilty, and if he/she is acquitted, the Policy offers no restitution.

A positive aspect of the Policy is that there is some defense of the rights of the accused (p. 5): "A grievant whose allegations are found to be both false and brought with malicious intent will be subject to disciplinary action". Note that false allegations brought inadvertently are OK but inadvertent insensitive conduct is not. I quote from page 19:

"The EEO/AA Office will develop a course designed to inform those who inadvertently violate this Policy of the problems they create by their insensitive and/or illegal conduct. The course shall be mandated for those in violation of this policy and may also be an element in an informal resolution settlement."

Taking a course may not be so bad, but there is a more serious aspect. The protection of the rights of the accused is very weak at the transition point between the informal and formal processes. Consider a case where the accused party is faced with a choice of: (i) formal investigation, generated by data gathered under the informal procedure or (ii) informal settlement. Choice (ii) might seem the most prudent course, since informal procedures involve less publicity and no disciplinary action. Except that the alleged offender is silenced, a re-education course may be mandated, and reputations may be tarnished anyway.

Brown is not a court of law, and the parties can always get their impartial hearing in a Rhode Island court. But should not Brown strive in its procedures to preserve constitutional rights? In addition to basic fairness, if Brown has to discipline a sexual harasser and the harasser sues, then the weaknesses of the Policy will be liabilities for Brown in a court of law.

(3) The formal procedure can produce a finding (in addition to yes/no on the sexual harassment allegation investigated) that "there is a reasonable basis for believing that other equal opportunity misconduct may have occured (sic)" (p. 15, last paragraph).

No definition or reference is provided in the Policy for what constitutes "other equal opportunity misconduct". The term misconduct is used in "sexual misconduct", which is defined as "non-consensual physical contact of a sexual nature" (p. 3). Sexual misconduct is within the sexual harassment/sexual assault spectrum, where all the offenses are of a sexual nature. The entire Policy addresses only such offenses, with the exception of the formal outcome that may find "other equal opportunity misconduct".

The lack of definition could be an oversight, given the legal importance of accurately specifying findings, or the term may be defined in another policy document. Or perhaps the extent of the term is left as an exercise for the reader's imagination and an added incentive for informal resolution.

3 Conclusion

I believe that it would be in the interests of the Brown community if the policy were revised to remove anonymous accusation, asymmetries of rights of the accused and accuser, and findings of an unspecified nature. In addition, a sharper definition of sexual harassment, distinguishing between illegal and impolite behavior, would improve the current policy. A revised policy based on fairness and common sense would address the important issue of sexual harassment/sexual assault in a far more effective fashion.

I tried to treat this serious matter with some humor and I hope my jokes were not unwelcome. If they were, I would like to apologize for the inadvertent misuse of language, and take the mandated course (with a follow-up faculty bulletin column as a term paper, which will require my retaking the course and writing columns for the rest of my years at Brown).