

Feb. 22, 2017

To: Laurie Zoloth, President, Faculty Senate

From: Ad hoc committee on academic freedom

You asked us to form this committee to address two unhappy recent episodes at Northwestern, each of which was widely regarded (and which we too regard) as a threat to academic freedom. We have considered the cases, based on matters of public record, and concluded that both reveal that Northwestern should modify certain policies for the sake of academic freedom.

We will describe the two episodes, and then offer our recommendations.

1. The Kipnis investigation

Prof. Laura Kipnis published an essay in February 2015 criticizing universities' decisions to prohibit sexual contact between faculty and students. She discussed a recent case at Northwestern in which an undergraduate accused a professor of unwanted sexual contact and charged that the university's sanction, denial of a raise and revocation of a named chair, was inadequate. Kipnis expressed skepticism about the student's claim, but did not name the student. Two students claimed that Kipnis's essay improperly retaliated against them for complaining about Title IX violations, and the university hired a law firm to investigate the complaint. Kipnis was subjected to hours of questioning about the essay. The investigation dragged on for months before the charge was dismissed.

Kipnis's account of what she described as her "inquisition" observes:

As I understand it, any Title IX charge that's filed has to be investigated, which effectively empowers anyone on campus to individually decide, and expand, what Title IX covers. Anyone with a grudge, a political agenda, or a desire for attention can quite easily leverage the system. And there are a lot of grudges these days.¹

She also writes:

¹ Laura Kipnis, My Title IX Inquisition, Chronicle of Higher Education, May 29, 2015, <http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf>.

The reality is that the more colleges devote themselves to creating "safe spaces" – that new watchword – for students, the more dangerous those campuses become for professors. It's astounding how aggressive students' assertions of vulnerability have gotten in the past few years. Emotional discomfort is regarded as equivalent to material injury, and all injuries have to be remediated.

Most academics I know – this includes feminists, progressives, minorities, and those who identify as gay or queer – now live in fear of some classroom incident spiraling into professional disaster. After the essay appeared, I was deluged with emails from professors applauding what I'd written because they were too frightened to say such things publicly themselves.²

A review of the case by University of Michigan Law Professor Samuel Bagenstos concluded that it is not true that Title IX requires an intensive investigation of every complaint.

When the students filed a complaint with Northwestern alleging that Kipnis's article and tweet retaliated against them in violation of Title IX, the university was required to investigate it. But the investigation should have been nearly instantaneous. It should have been obvious from the face of the complaint that a published essay and a tweet, from a professor who neither named nor had any power to do harm to the students who complained, could not possibly constitute impermissible retaliation against them under the statute. The university could have, and should have, simply dismissed the complaint without requiring Kipnis to submit to an "inquisition."³

² Id.

³ Samuel R. Bagenstos, What Went Wrong With Title IX?, Washington Monthly, Sept./Oct. 2015, <http://washingtonmonthly.com/magazine/septoct-2015/what-went-wrong-with-title-ix/>. Geoffrey Stone, a major free speech scholar who is also the former provost of the University of Chicago, reached a similar conclusion:

An essay that takes aim at the substantive values and procedures employed by universities in their efforts to regulate sexual relationships on campus is not, and cannot rationally be taken to be, an act of discrimination, retaliation, or harassment directed against any particular student who may have filed such a complaint.

What Northwestern should have done in the face of such a complaint was to dismiss it as quickly and decisively as possible and to reaffirm the fundamental right of members of the university community to write, speak, argue, and complain openly and vigorously about matters of public concern. Instead, Northwestern put Kipnis through months of "investigation" for doing nothing more than writing

2. *Atrium*

Atrium is a magazine published by the Medical Humanities and Bioethics program, and edited by its faculty. In early 2014, the dean of the Medical School, Eric Neilson, ordered that an article that had already been published in print in the most recent issue be removed from the web version. The article, "Head Nurses," described the author's experience of a nurse performing consensual oral sex on him after he was paralyzed at age 18. The guest editor of the journal, Prof. Alice Dreger, told *Inside Higher Ed* that "soon after publication, medical school administrators asked *Atrium's* editors to remove the essay from the web, because the content was considered inflammatory and too damaging to the new Northwestern Medicine 'brand.' (Northwestern Memorial Health Care recently acquired Northwestern's Feinberg School of Medicine faculty practice and merged with Cadence Health to operate under the Northwestern Medicine banner.)"⁴

The article was restored to the website after faculty involved with the journal threatened to publicly protest. Thereafter, however, the medical school cut the journal's budget and created a new committee that would review, and have the power to veto, editorial choices. That committee included a representative of the dean's office and a member of the school's public relations staff.⁵ The university publicly defended its choice by saying, "The magazine now has an editorial board of faculty members and others, as is customary for academic journals."⁶

an interesting and provocative article in a journal of considerable
repute.

Academic Freedom Under Siege, Huffington Post, June 1, 2015,
http://www.huffingtonpost.com/geoffrey-r-stone/academic-freedom-under-si_b_7481620.html.

⁴ Colleen Flaherty, Censored Into Resignation?, *Inside Higher Ed*, August 26, 2015, <https://www.insidehighered.com/news/2015/08/26/northwestern-u-loses-second-faculty-member-over-alleged-censorship-medical-school>.

⁵ Madeline Fox, Feinberg magazine's future in question after controversial essay, *Daily Northwestern*, June 26, 2015, dailynorthwestern.com/2015/06/26/campus/feinberg-magazines-future-question-faculty-refuse-editorial-oversight-committee/.

⁶ Tyler Kingkade, Northwestern Magazine May Close In 'Vetting Committee' Standoff, *Huffington Post*, June 22, 2015, http://www.huffingtonpost.com/2015/06/22/northwestern-journal-censorship_n_7638880.html.

Thereafter, the journal's editor, Katie Watson, Prof. Kristi Kirschner, a former clinical professor humanities and bioethics, and Prof. Dreger all resigned in protest. Dreger wrote: "Provost Linzer made clear he wasn't going to acknowledge the censorship problem in a way that would signify we could work without fear of offending the dean."⁷ At no point has the University acknowledged that it behaved inappropriately.

Discussion

Both of these episodes involved serious violations of academic freedom. Faculty should not be subjected to interrogation, and the threat of sanctions, for publishing mere commentary on events at Northwestern. It is never acceptable for public relations staff to censor the work of faculty. This is true of both tenure track and non-tenure-eligible faculty. Policies should be put in place to assure that nothing like this happens again.

The university has already taken steps to prevent a recurrence of the Kipnis episode. There is new language in both the revised Policy on Sexual Misconduct and the new Sexual Misconduct Complaint Resolution Process. The policy contains the following language:

If, based on an initial inquiry into the report, the Title IX Coordinator determines that insufficient information exists to move forward or that the alleged misconduct, even if substantiated, would not be a violation of the policy, the Office may close the case unless the Title IX Coordinator determines that the interests of the community warrant further action on the report by the Office or the University.⁸

Had this been in place at the time of the complaint against Kipnis, it is likely that no investigation would have taken place.

No steps, however, have been taken to prevent a recurrence of the Atrium episode. Prof. Dreger's resignation letter indicates that she complained directly to Provost Daniel Linzer, but received no response. The university's claim that having

⁷ Madeline Fox, Feinberg professor resigns, citing censorship, Daily Northwestern, August 25, 2015, <http://dailynorthwestern.com/2015/08/25/campus/feinberg-professor-resigns-citing-censorship/>.

⁸ <http://www.northwestern.edu/sexual-misconduct/university-policy/sexual-misconduct-policy.html>.

public relations staff veto scholarly editorial decisions is "customary for academic journals" is preposterous and outrageous.

Recommendations

The university has gone a long way toward addressing the Kipnis matter. We would suggest, however, the addition of the following language, which we have borrowed from the policy of the University of Chicago,
<https://harassmentpolicy.uchicago.edu/page/policy>:

A person's subjective belief that behavior is intimidating, hostile, or offensive does not make that behavior harassment. The behavior must be objectively unreasonable. Expression occurring in an academic, educational or research context is considered a special case and is broadly protected by academic freedom. Such expression will not constitute harassment unless (in addition to satisfying the above definition) it is targeted at a specific person or persons, is abusive, and serves no bona fide academic purpose.

The University's response to the Atrium incident is unacceptable. An apology to the three professors who resigned would be appropriate. We recommend the adoption of the following policy:

Neither administrators nor public relations staff may participate in the editing of journals edited by faculty or students, nor have any control over the content of those journals.

We recommend that the administration be urged by the Senate to adopt these proposals.

Andrew Koppelman
Professor of Law and (by courtesy) Political Science, Affiliated Faculty, Philosophy Department

Carol Simpson Stern
Professor of Performance Studies

Martin H. Redish
Louis and Harriet Ancel Professor of Law and Public Policy

Benjamin Gorvine

Associate Professor of Instruction, Assistant Chair and Lead
Advisor, Department of Psychology, Faculty Chair, Shepard
Residential College