Metropolitan News-Enterprise

Monday, July 27, 2015

Page 6

PERSPECTIVES (Column)

Federal Government Requires Peering Through Students' Bedroom Windows

By ROGER M. GRACE

Just when did sexual conduct, not involving the crossing of state lines, become a concern of the federal government?

And what business do colleges have in passing judgment on whether adult students have observed proper sexual etiquette?

A petition for writ of mandate filed in Los Angeles Superior Court on June 29 prompts these questions—though these aren't issues in the case. Los Angeles Superior Court Judge James Chalfant will be asked to decide whether Occidental College breached the "fundamental vested rights" of a 20-year-old male student who performed oral sex on a 20-year-old female student, not ceasing in response to an ambiguous utterance on her part that arguably constituted a directive to stop—and was expelled.

★

According to the petition, drafted by attorney Mark M. Hathaway of Werksmann, Jackson, Hathaway and Quinn, petitioner "John Doe" (a false name, in this instance justified) "continued performing oral sex" on a classmate "after she said, 'Wait, I haven't shaved.' " He thought she was concerned that "he might not want to continue performing oral sex because she hadn't shaved," evoking his response, "I don't mind, it's ok," the pleading recites. It adds that "the female student put her hand on his head and moved or pushed his head while he was giving her oral sex."

The college determined that this was "sexual misconduct" because, Hathaway recites, it viewed the female's utterance as signaling "a withdrawal of consent due to hesitancy or uncertainty."

Moreover, the college found, there was a "sexual assault" because the male engaged "in sexual intercourse without first obtaining verbal consent from the female student and relying instead upon non-verbal indications of consent, stopping when the female student said, 'Ow, That hurts.' "

★

No criminal charges were brought. "Jane Roe" didn't sue. Yet, the college conducted its probe and ejected Doe from its student body, employing the federally prescribed "preponderance of the evidence" standard.

Hathaway explains that educational institutions, such as Occidental, which receive federal funding, are being pressured by the federal government into cracking down on "sexual violence."

That phrase is broadly defined. Under the Occidental College Sexual Misconduct Policy—guidelines it adopted pursuant to a federal mandate—if a sex partner says "yes," and there then arises the slightest uncertainty as to whether there has been a change of mind, the activity must cease.

"An incident does not have to occur on campus to be reported to the College," the policy manual declares. "Off-campus conduct that is likely to have a substantial effect on the Complainant's on-campus life and activities…may also be addressed under this policy."

The word "may" implies discretion as to whether to investigate complaints of off-campus activities. However, the manual elsewhere specifies:

"If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures."

With respect to those procedures, it's stated:

"These procedures are entirely administrative in nature and are not considered legal proceedings.

"Neither party may audio or video record the proceedings, nor is formal legal representation allowed."

In a portion of the petition published on the adjoining page, under the column heading, "In My Opinion," Hathaway complains that the administrative process is one "with no rules of evidence, no right to the evidence against him, no right to confront witnesses, no right to counsel, an internal appeal that ignores the hearing record entirely, and with the accused student labeled as responsible for 'sexual assault' under the college's policy, not under any penal code or civil code, but with similar adverse life-time consequences."

Charles B. Wayne, a District of Columbia attorney who represented a plaintiff in an action against a Tennessee university, is quoted in an Aug. 20, 2014 article in the Washington Post as saying that college personnel who adjudicate sexual violence claims "are not properly trained and don't have the necessary expertise." He adds that "the assumption that a 19-year-old can defend himself without counsel against rape charges is absurd."

★

There was a time when this instruction was given in all rape cases:

"A charge such as that made against the defendant in this case is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent.

"Therefore, the law requires that you examine the testimony of the female person named in the information with caution."

A trial judge—Armand Arabian, later a justice of the California Supreme Court (now a private judge)—refused to give that mandatory instruction. The California Supreme Court, in *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, said he was right.

It would appear that now, the label of "sexual violence" is used in situations where there was mere miscommunication. If Doe in good faith construed Roe's remark as other than a "halt" command, as he quite reasonably could have, there is a gross injustice in labeling him for life as a sexual aggressor. An agreement as to what is consented to during the course of a sexual encounter should not have to put into writing beforehand, with any

sound or gesture that could *conceivably* be perceived as a withdrawal of consent being presumed to be just such an indication.

Hathaway charges that "[a]fter years of criticism for being too lax, the pendulum has now swung far in the other direction with Occidental College discriminating against male students in order avoid federal penalties and settlement pay-outs…." He makes a good point.

This should not be construed as a condoning of sexual assaults—or even of sexual intercourse between two persons who are not married (and to each other). But there does seem to me to be something wrong with the federal government pressuring colleges and universities into conducting Star Chamber-like inquiries into students' sexual encounters, with virtually none of the protections which due process would dictate in a governmental proceeding.

★

Campus sex probes are said take place pursuant to Title IX, a 1972 federal statute that bars discrimination against students based on gender. It provides, in the first paragraph:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance…."

Those words are followed by exceptions—such as specifying that father-son or mother-daughter events are not being barred—and other provisions having nothing to do with students going to bed with each other.

The word "sex" has two distinct meanings: *gender* ("What's the baby's sex?") and *sexual intercourse* ("They had sex together.")

Title IX uses "sex" in the former sense. Only through bold perversion of the statute's plain meaning and intent could it be applied to instances of sexual conduct.

Yet, a 19-page letter of April 4, 2011, to institutions of higher learning which receive federal funds, addressed to "Dear Colleague" and signed by Russlynn Ali, the U.S. Department of Education's assistant secretary for civil rights, blithely declares:

"Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX."

That's Obama Administration twaddle. Nothing in the act even remotely supports the proposition that sexual conduct in a bedroom between two students somehow constitutes denial of the "benefits" of an "education program or activity" or "discrimination" in providing such a program or activity.

To state what should be obvious: John Doe's oral copulation of Jane Roe was not a program or activity provided by Occidental and was not supported by federal funding.

The notion that such an incident could then affect Roe as a student, depriving her of benefits male students have, is a stretch.

The federal government obviously could not directly order a private school such as Occidental to publish a notice of nondiscrimination policies (which it "recommends" contain sex policies), designate at least one employee to act as sexual activity monitor (or "Title IX coordinator"), or set up a system of sexual encounters grievance procedures. It could not dictate that the "clear and convincing evidence" standard used by some colleges be supplanted by the "preponderance of the evidence" standard. What it has done is to

coerce compliance with requirements it would be powerless to ordain. The 2011 "Dear Colleague" letter says: "Recipients of Federal financial assistance must comply with the procedural requirements outlined in the Title IX implementing regulations."

(Of course, no stricture can be an enforceable "implementing regulation" if it goes beyond the purpose of the statute.)

What the letter is saying is: "Do what we tell you or we'll see to it you won't get any federal money." That closely resembles extortion.

★

"Occidental gets $15 million a year from the federal government," Hathaway tells me. "If Occidental doesn't follow the guidance of the U.S. Department of Education, the federal government is going to take away that $15 million."

The University of Southern California, he notes, receives $592 million dollars annually from the federal government.

"How many people at USC are going to risk that kind of money?" he asks.

He's says it would be safer for USC to toss out any male ever accused of sexual aggression.

At that university, no hearings are held in connection with such allegations, Hathaway advises. One woman, who formerly operated a rape hotline, conducts interviews and "decides what happens," he says, commenting:

"She always sides against the male."

There is, he mentions, a Student Behavior Appeals Panel, but "no one knows who's on the panel," its operations being secret.

★

The case filed last month is by no means an isolated instance of a court challenge to lack of fairness in connection with a campus sex inquiry. Across the nation, male students are contesting the discipline or expulsion ordered in response to allegations of sexual misconduct. Hathaway says he is presently handling 10 such cases in California, four of them against Occidental.

An article in the April edition of Esquire Magazine describes another case involving a "John Doe" and a "Jane Roe," also a writ proceeding handled by Hathaway, where Occidental is the respondent. It's pending in Los Angeles Superior Court and is slated to be heard Oct. 8.

The article recounts that John and Jane, each of whom had an apartment in the same co-ed housing facility, were both drunk. According to accounts from witnesses, Jane made a play for John—grabbing him and attempting to kiss him—but John initially appeared disinterested. Summarizing one witness's account, the article says:

"John and Jane laid down together on John's bed, with Jane on top of John... 'getting really physical'... [with Jane] 'kind of riding on top of John. Her hips were moving....It looked like something sexual was going down.' "

Roe was persuaded by two friends to leave. At 12:31 a.m., Doe sent a text message calling upon her to return; she responded that the friends were still in her apartment; he instructed: "Make them leave." She queried, "Okay, do you have a condom[?]" He said he did; she advised: "Give me two minutes."

She sent a text message to a friend saying, "I'mgoingtohave sex now."

There was an encounter which each of them barely remembered the next day. Roe did recall that when she arrived in Doe's room, she again queried if he had a condom; she performed oral sex on him; and that Doe advised her afterward that his roommate had come in while they were engaged in conventional sex.

After the episode, she dispatched a text message to two friends bearing a smiley face.

In the aftermath, they exchanged amicable text messages.

★

So, was this "Doe" a sexual predator?

It would not seem so. Yet, the Esquire article reports, campus activists convinced Jane —the initial aggressor—that she was a rape victim and proceedings were instituted by her against Doe.

Occidental hired Cerritos attorney Marilou Mirkovich to act as an "external adjudicator." She found that Doe and Roe had sex, that from the text messages consent on her part could reasonably have been inferred, but that her state of intoxication rendered her consent ineffectual, and that Doe's own state of intoxication did not excuse his lack of appreciation that Roe was incapable of rendering a knowing consent.

It is obviously irrational to impute to one drunken sex partner a lack of capacity to consent, while the other sex partner, equally intoxicated, is expected to be so perspicacious as to discern that the other's thinking is hampered.

Aside from that, Mirkovich's fact-finding is, on its face, bizarre. How could anyone so inebriated as to be incapable of rendering consent still be able to type the coherent text messages that Roe did?

Another aspect of the case is that Doe protested that Roe had orally copulated him without his express consent; was told by the college that it didn't matter because he hadn't filed a complaint; he filed a complaint; and it was rejected, in part, because it wasn't filed sooner. Yet, there's no set time limit for invoking the grievance process.

★

Meanwhile in San Diego, Superior Court Judge Joel Pressman on July 10 ordered the University of California at San Diego to scrap its findings of sexual misconduct on the part of a man who was ordered suspended for a year and a quarter. The man, then 20, had consensual sex with a female, then 18, after each drank heavily at a party on Jan. 31, 2014; the next morning, he made sexual advances to her; that night, they had consensual sex in her apartment.

She complained about the sexual advances occurring on the morning of Feb. 1. (She says he digitally penetrated her vagina; he says he didn't.)

Pressman's written ruling says the hearing conducted by the university had been unfair, declaring:

"In this particular case, the Court is concerned about petitioner's due process right to confront and cross-examine adverse witnesses. In almost every proceeding 'where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.' Goldberg v. Kelly (1970) 397 U.S. 254, 269. People involved in an administrative proceeding have a right to cross-examine witnesses, this right 'is considered as fundamental an element of due process as it is in court trials.' McLeod v. Board of Pension Commissioners (1970) 14 Cal. App.3d 23, 28.

'An improper denial of the right of cross-examination constitutes a denial of due process.' Priestly v. Superior Court (1958) 50 Cal.2d 812, 822.

"The right of cross-examination is especially important where findings against a party are based on an adverse witness's testimony. Manufactured Home Communities. Inc. v. Cnty. of San Luis Obispo (2008) 167 Cal. App. 4th 705. 711-12. Here, cross-examination was essential. The Student Conduct Review Report made findings regarding the credibility of Ms. Roe and the outcome turned on her testimony."

Pressman notes in his decision that Doe was allowed to propose questions to be asked Roe, but that the panel chair posed only nine of his 32 proposed queries, with some relevant ones being eliminated. He says the chair refused to ask Roe about text messages she exchanged with Doe, observing:

"These questions were significant because they were germane to Ms. Roe and Mr. Doe's relationship after February 1, 2014. which petitioner had denied."

The judge faults the university for having Roe testify from behind a screen.

The hearing panel placed reliance on a written report by a staff person at the university's Office for the Prevention of Harassment & Discrimination. That report concluded that it was "more likely than not" that Doe engaged in offensive conduct. Pressman scolds that "it was the *panel's* responsibility to determine whether it was more likely than not that petitioner violated the policy and not defer to an investigator who was not even present to testify at the hearing."

Pressman's conclusion is that substantial evidence does not support the findings. He also declares that "there is unfairness related to the penalty" which was increased, without explanation, after the student filed his appeal.

"[I]t appears the increased sanctions are punitive towards Petitioner for appealing the decision of the Panel," the judge says.

★

Hathaway has some other comments.

He says that there are many women who resent the "re-Victorianization" of them in the form of males being held responsible for their conduct, while women aren't.

The lawyer also quips that the campus crackdowns on sex will "do more for abstinence than the religious right could ever do."

MetNews Main Page **Perspectives Columns**