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THE BIG IDEA

Why the #MeToo Movement Should Be Ready for a Backlash

As a much-needed reckoning happens in the workplace, look to college campuses for a note of caution.

By EMILY YOFFE | December 10, 2017

In the final five years of his presidency, Barack Obama's administration undertook a worthy and bold challenge: the elimination of sexual assault on campuses. In fact, Obama's team had a much more ambitious goal in mind. Vice President Joe Biden, the point person for the campus initiative, said at the end of his term that the administration was seeking "to fundamentally change the culture around sexual assault"—everywhere. New rules of sexual engagement between college students were written at the directive of the administration, but top Obama officials said they wanted these to be applied in the

workplace and beyond. “You’re going to change the workplaces you work in,” Tina Tchen, director of the White House Council on Women and Girls, said at a 2016 event honoring campus sexual assault activists. “You’re going to raise your sons and daughters differently.”

They expected this transformation to take years. But with the daily toppling of powerful men who have committed sexual violations in Hollywood, the media, Congress and more, these changes have become seismic. The silenced have been given voice, and their testimony has resulted in the swift professional demise of perpetrators. Shocking descriptions of the behavior of powerful men have shown that it’s not universally understood that it’s unacceptable to display one’s genitals at work or to sexually abuse colleagues.

We now have an opportunity for profound reform, for women and men to join together to treat each other with dignity and respect. But as this unexpected revolution unfolds, we should also keep in mind the dangers of creating new injustices in the service of correcting old ones.

For that, it’s useful to look at how reforms played out on campus, where, unfortunately, many of the Obama administration’s good intentions went awry. Among the principles and policies that have become entrenched at schools—and are now spilling out into the wider world—are the beliefs that accusers are virtually always telling the truth; that the urgency to take action is more important than fair procedures; that we shouldn’t make distinctions between criminal acts and boorishness; and that predatory male behavior is ubiquitous. These beliefs have resulted in many campus cases in which the accused was treated with fundamental unfairness, spawning a legal subspecialty of suing schools on behalf of these young men. Examining what happened on campuses shows where the politics and social rules of interaction between the sexes might be headed—and how to avoid making the same mistakes on a larger scale.

Much of the Obama administration’s policy was at the initiative of Biden, for whom the issue of violence against women was career-defining. In 1994, as a senator, he oversaw the passage of the Violence Against Women Act, what he calls his “proudest legislative accomplishment.” When he became vice president, a new position was created under his aegis, White House adviser on violence against women, and he appointed Lynn Rosenthal, a national leader on domestic abuse, to fill it. The administration then decided to focus its efforts on what it said was an epidemic of sexual violence against female students by their male classmates. In 2011, the Department of Education sent a bombshell letter with the

bland greeting, “Dear Colleague” to the country’s 4,600 institutions of higher education laying out new rules for how campuses were to root out and punish sexual assault.

It was the beginning of a concerted effort that radically remade how students could interact sexually, with severe penalties for violating increasingly stringent codes of conduct. Title IX is the federal law that prohibits discrimination in education on the basis of sex. Under the Obama pronouncements, college Title IX offices became vast bureaucracies, and students were encouraged to report any perceived violation. The Dear Colleague letter forbade “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.” To stay on the right side of federal regulators, many school codes expanded to turn even unwanted flirtation or sexual jokes between students into actionable offenses. New rules known as “affirmative consent” were put in place on many campuses, requiring that partners engaging in any sexual contact get explicit permission, preferably verbal, for each touch, each time. (Affirmative consent on campus has become law in California, Connecticut and New York.)

Rosenthal later explained why the administration put such focus on the sexual encounters of college students: “We felt it was a problem we could identify, evaluate, study and develop targeted interventions for,” she said at a seminar on sexual assault in January 2015, a few days after leaving the administration. “We also believed that what happens on our college campuses affects our nation. If we get this right on college campuses, we can influence an entire generation.”

Now, it’s not just an entire generation—it’s the entire nation. No matter whether an accusation is made about violations on campus, in the workplace or on the streets, it is essential that the accounts be taken seriously and the accusers be treated respectfully. But in the debate over campus sexual assault, believing accusers, especially female ones, has become a virtual article of faith. Many Democratic politicians have expressed an opinion similar to the one recently tweeted by California Senator Kamala Harris, regarding college campuses: “Survivors of sexual assault deserve to be believed, not blamed.” As Harvard Law professor Jeannie Suk Gersen wrote in the *New Yorker*, wanting to examine the evidence before coming to a conclusion has come to mean being perceived on campus as being “biased in favor of perpetrators.”

In this national “just believe” the accuser moment, it’s important to remember that part of the power of the recent accusations against movie producer Harvey Weinstein and so many others is that they are backed up by meticulous reporting that has provided contemporaneous corroboration and other evidence. Presented with these revelations, the accused themselves in many cases have provided confirmation by acknowledging at least

some of their violations. A failed attempt by the right-wing group Project Veritas to persuade the *Washington Post* to publish the account of a fake accuser of U.S. Senate candidate Roy Moore demonstrated the power of verifying before believing.

The complications of “just believe” are illustrated by the saga of Al Franken, who, on Thursday announced his upcoming resignation as a Democratic U.S. senator from Minnesota. In the past few weeks, he has been accused by several women of unwanted attempted kissing, or touching them on the buttocks or breast while having photographs taken with them. Franken started by issuing a series of tortured apologies, which neither acknowledged that he did the touching, nor categorically denied it. In responding to Leeann Tweeden, a fellow performer who says Franken aggressively kissed her during a rehearsal for a United Service Organizations show more than a decade ago, he said, “While I don’t remember the rehearsal for the skit as Leeann does, I understand why we need to listen to and believe women’s experiences.” He added, “And the truth is, what people think of me in light of this is far less important than what people think of women who continue to come forward to tell their stories. They deserve to be heard, and believed.”

This made it sound as if either Franken knew he had done inappropriate things and wouldn’t admit it, or he believed he hadn’t but couldn’t say so—proclaiming his innocence would mean casting aspersions on his accusers’ truthfulness. Franken sounded as if he had taken last year’s mandatory Title IX training for freshman at the University of Southern California, where the first piece of advice given to USC students accused of sexual assault is to acknowledge the likelihood that they are guilty, as documented in an article in the conservative outlet Campus Reform: “Admit to yourself that even if you don’t remember the event, or don’t believe yourself capable of hurting someone, that it’s possible that you may have crossed a boundary.”

In the announcement of his resignation, Franken took a more defiant tone, backing off the admonition to believe his accusers’ version of events. He said he had “wanted to be respectful of that broader conversation, because all women deserve to be heard and their experiences taken seriously,” but that his statements “gave some people the false impression that I was admitting to doing things that in fact I haven’t done. Some of the allegations against me are simply not true. Others I remember very differently.” So we are left knowing Franken was forced out by his Democratic colleagues, but not knowing exactly what to believe about the charges against him.

Ironically, Franken has been an ardent supporter of the Obama-era policies on campus sexual assault, policies that have required the creation of an industry to train, adjudicate and litigate Title IX matters. In August, four feminist Harvard Law professors—Gersen,

Elizabeth Bartholet, Nancy Gertner and Janet Halley—released a paper, titled “Fairness for All,” writing that the procedures on campus today “are frequently so unfair as to be truly shocking.” For example, “some colleges and universities fail even to give students the complaint against them, or notice of the factual basis of the charges, the evidence gathered, or the identities of witnesses.”

The Obama administration Dear Colleague letter also required that “interim measures” be taken against the accused, before any adjudication. These can be harshly punitive, resulting in students being removed from certain classes, their movements on campus limited; sometimes they are even banned from school. The case of veteran New York public radio host Leonard Lopate illustrates what such “interim measures” look like in the workplace. On Wednesday, just before he was about to go on the air, Lopate was told he was being suspended because an investigation of “many” sexual harassment complaints against him was underway. He told the *New York Times* that he was “shocked” and “baffled” and that WNYC “didn’t even give me a clue” about the nature of the allegations. He added, “I am sure any honest investigation will completely clear me.” Indeed, both Lopate and the public are entitled to hear the results of a fair investigation. But surely before being publicly shamed, Lopate was entitled to know what the accusations against him were.

Statistics on the scale of the sexual assault problem on campuses nationally are controversial. And there are no good numbers about the breadth and nature of schools’ responses. But we do know that since the Dear Colleague letter was issued in 2011, more than 200 civil lawsuits have been filed by the accused, almost all males, against their universities, according to one advocacy group that tracks such suits. And these plaintiffs are getting an increasingly positive response from judges, who often express astonishment at the campus procedures that have been promulgated. In a scathing rebuke of today’s investigation and adjudication processes on campus, the National Center for Higher Education Risk Management, a leading Title IX consulting firm, released a white paper in April accusing many Title IX officers of “victim-favoring” and putting students’ “sexual decisions under a microscope.” The paper warned that unless campus processes were reformed, a backlash could “set back the entire consent movement.”

Democratic politicians in particular have acted with disdain for the rights of accused male students, and with disregard for ending their education and professional prospects. At a 2015 congressional hearing on campus sexual assault, Representative Jared Polis of Colorado suggested that anyone accused of sexual misconduct should be dismissed without any fact-finding at all. “If there are 10 people who have been accused, and under a reasonable likelihood standard maybe one or two did it, it seems better to get rid of all 10 people,” he said. “We’re not talking about depriving them of life or liberty. We’re talking

about them being transferred to another university, for crying out loud.” (Polis was heavily criticized and walked back his remarks.)

Now, Franken and his colleagues seem to have absorbed at least some of that thinking. In his forced farewell, he noted that he was now forgoing his once-promised Senate Ethics Committee investigation: “I said at the outset that the ethics committee was the right venue for these allegations to be heard and investigated and evaluated on their merits. That I was prepared to cooperate fully and that I was confident in the outcome.” Senators had praised the idea of a proceeding that would provide, in the words of Senator Dick Durbin at the end of November, “due process.” But last week, Durbin called for Franken’s resignation, along with 31 other Democratic senators. Now the public, and Franken’s soon-to-be former constituents, are left to draw their own conclusions.

In the past few weeks, a number of accused men have disappeared Soviet-style from public life, with the work of some—Louis C.K. and Garrison Keillor, for example—withdrawn from distribution. There has been discussion about whether everyone accused deserves a professional death penalty, or whether there should be a scale of punishment. After all, the violations run the gamut from multiple allegations of rape to unwanted touching. But in a statement on Facebook calling for Franken’s resignation, New York Democratic Senator Kirsten Gillibrand came out against making such distinctions. “While it’s true that his behavior is not the same as the criminal conduct alleged against [Alabama Senate candidate] Roy Moore, or Harvey Weinstein, or President Trump, it is still unquestionably wrong,” she wrote. “We should not have to be explaining the gradations between sexual assault, harassment and unwelcome groping.”

In a *New York Times* op-ed, actress Amber Tamblyn wrote that making distinctions will mean the cultural change that is happening will stall and bad behavior will win out. So, she wrote, “The punishment for harassment is you disappear. The punishment for rape is you disappear. The punishment for masturbation in front of us is you disappear. The punishment for coercion is you disappear.” (She conceded that some men may be allowed to come back professionally after a period of contrition.)

This erasing of distinctions between the criminal and the loutish was a central feature of the campus initiatives of the Obama administration and led to many unjustified punishments. “Definitions of sexual wrongdoing on college campuses are now seriously overbroad,” the feminist Harvard Law professors wrote. “They are so broad as to put students engaged in behavior that is overwhelmingly common in the context of romantic relationships to be accused of sexual misconduct.”

What is considered a reportable offense on campus should give pause to those concerned about free speech and about the possibility of campus rules taking over the workplace. In his book, *Twisting Title IX*, Robert Shibley, executive director of the civil liberties group the Foundation for Individual Rights in Education (FIRE), writes about a 2014 case at the University of Oregon. A female sophomore called out a raunchy remark—"I hit it first!"—to a male and female couple who were outside her dorm room window making out. The couple didn't appreciate her joke—the female yelled, "F--k you, bitch!" Then the couple came into the dorm to find the sophomore. She immediately apologized, but they reported her to the school's Title IX office. The school investigated, and the sophomore faced potential suspension or expulsion. She contacted FIRE, which issued a news release about the case, and soon after the university dropped the proceedings. Do we really want to create workplace policies where any perceived wrong of a sexual nature leads to possibly career-ending sanctions?

President Donald Trump has boasted on tape that he sexually violated women and stands accused by more than a dozen of them of unwanted touching and kissing. So it seemed unlikely that his administration would want to draw attention to the issue of sexual assault at all. But Education Secretary Betsy DeVos announced this fall that she was rescinding much of the Obama-era guidance on sexual assault, declaring that what her predecessors created was a "failed system" that brought justice to neither accuser nor accused and significantly deprived young men of their civil rights. The interim guidance she issued on campus investigations and tribunals called for investigations to be fair, impartial and free of bias; demanded that campus Title IX officials avoid sex stereotypes; and required that interim actions against male students and final punishments be proportionate and weigh depriving someone of an education. DeVos received rare and unexpected support from both mainstream and left-leaning outlets like the *Washington Post*, *Slate*, the *New Yorker*, the *Chronicle of Higher Education* and the *Economist*.

These measures would seem consistent with basic Democratic principles, such as defending the rights of the accused. But Democrats, including many with presidential ambitions, have taken the stance that they will vehemently resist any and all of DeVos' efforts. New York Governor Andrew Cuomo tweeted, "What Betsy DeVos just did is repulsive." Senator Bob Casey of Pennsylvania said, "The Department of Education's reckless action will make it harder for schools to hold violent perpetrators accountable." Thirty-two Democratic senators, including Franken, wrote a letter to DeVos, rebuking her actions and asking for the reinstatement of the Obama guidance.

For years now, Democrats have described our nation's campuses as places of overwhelming danger, where female students are at the mercy of predatory male classmates and callous administrators. Senator Patty Murray of Washington said in 2015, "Across our country right now, on some campuses there are some basic human rights being violated." Last spring, in an interview in *Teen Vogue*, Biden said that after parents drop their daughters off at college, they aren't talking about how they hope her academic or social life will go. He said, "The conversation that's going on is, is she going to be safe?"

I have been reporting about campus sexual assault for several years; in September, the *Atlantic* published my series on the systematic deprivation of the rights of the accused and how this undermines the legitimacy of the very necessary fight against sexual assault. There is no good evidence that sociopathic predators beset campuses (a single study that made this assertion has been thoroughly debunked) or that callous administrators routinely abet such offenders. Nearly all of the many dozens of people I've interviewed—campus administrators, higher education experts, Department of Education civil rights investigators, professors, attorneys—describe the vast majority of cases as involving two students, usually in their first or second year, who are inexperienced at sex, and who frequently have been drinking, beginning an encounter that both parties often agree began consensually, and about which recollections later diverge.

But the descriptions of campuses as places of fear are moving into the workplace. Slate intern Lila Thulin recently wrote that as a student at Stanford, she had an experience largely free of the abuse Democrats describe. But now it seemed inevitable to her that something terrible was going to happen at the office: "I began to feel vulnerable, as if a clock somewhere was counting down the time until I, too, would be sexually harassed." If young women come to presume that male colleagues who take an interest in their work actually have a malign motive, or if male bosses wanting to give opportunities to female subordinates worry about inviting them on work trips, everyone loses.

The movement to stop sexual harassment in the workplace will eventually move past this moment of shocking allegations against famous men, and should soon focus on the many nonfamous people in quotidian circumstances. But top news organizations are not likely to provide as much due diligence about those cases. No doubt many disputes will more resemble those on campus, in that the charges will be about ambiguous situations for which there is little evidence. This amazing moment has a chance to be truly transformative. But it could also go off track if all accusations are taken on faith, if due process is seen as an impediment rather than a requirement and an underpinning of justice, and if men and women grow wary of each other in the workplace. As Laura Kipnis, a feminist professor at

Northwestern, writes in her book, *Unwanted Advances*, “I can think of no better way to subjugate women than to convince us that assault is around every corner.”