

St. John's Law Review

Volume 69
Number 3 *Volume 69, Summer-Fall 1995,*
Numbers 3-4

Article 12

March 2012

Silva v. University of New Hampshire: The Precarious Balance Between Student Hostile Environment Claims and Academic Freedom

Timothy E. Di Domenico

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Di Domenico, Timothy E. (1995) "Silva v. University of New Hampshire: The Precarious Balance Between Student Hostile Environment Claims and Academic Freedom," *St. John's Law Review*. Vol. 69 : No. 3 , Article 12.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol69/iss3/12>

This Comment is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

SILVA v. UNIVERSITY OF NEW HAMPSHIRE: THE PRECARIOUS BALANCE BETWEEN STUDENT HOSTILE ENVIRONMENT CLAIMS AND ACADEMIC FREEDOM

INTRODUCTION

Sexual harassment¹ of college students² by professors is a practice as old as the university system itself.³ Only in the past two decades,⁴

¹ Catharine A. MacKinnon, in her work *Sexual Harassment of Working Women*, supplied a workable definition of sexual harassment that several courts have accepted:

Sexual harassment . . . refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another When one is sexual, the other material, the cumulative sanction is particularly potent.

CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 1 (1979); see Elaine D. Ingulli, *Sexual Harassment in Education*, 18 RUTGERS L.J. 281, 283 & n.8 (1987). "MacKinnon is probably the most widely-cited reference in the law of sexual harassment." *Id.* Courts which have cited to MacKinnon's definition include *Henson v. City of Dundee*, 682 F.2d 897, 908 n.18 (11th Cir. 1982) (citing MacKinnon while delineating two basic varieties of sexual harassment, 'offensive environment' and 'quid pro quo'); *Turley v. Union Carbide Corp.*, 618 F. Supp. 1438, 1442 (S.D.W. Va. 1985) (referring to MacKinnon's definition of sexual harassment); *Ferguson v. DuPont*, 560 F. Supp. 1172, 1196 (D. Del. 1985) (holding that employer cannot be held liable for hostile environment created by employee when employer took prompt measures to improve environment); *Stewart v. Thomas*, 538 F. Supp. 891, 897 (D.D.C. 1982) (utilizing MacKinnon's explanation of limitations on tort remedies for sexual harassment). Cf. ROBERT O. RIGGS ET AL., *SEXUAL HARASSMENT IN HIGHER EDUCATION: FROM CONFLICT TO COMMUNITY* 36-38 (ASHE-ERIC Higher Education Report No. 2. 1993) (noting definitions of sexual harassment utilized by various universities).

But see KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* 87-112 (1993) (criticizing MacKinnon's and other feminist definitions of sexual harassment).

² Sexual harassment on college campuses includes serious assault, rape, verbal harassment, pressure for sexual activity, remarks about women's clothing, unnecessary and unwelcome patting, pinching, and touching. See Ingulli, *supra* note 1, at 284. Sexual harassment in the educational context is also problematic in elementary and secondary schools. See generally Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119 (1993) (discussing student to student sexual harassment in elementary and secondary schools).

³ See BILLIE W. DZIECH & LINDA WEINER, *THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS* 11 (2d ed. 1990). "Sexual harassment of college students is not new. A familiar jest is 'Where there has been a student body, there has always been a faculty for love.'"

however, has the true magnitude of this problem become apparent.⁵

. . . [I]t seems likely that sexual harassment has existed as long as there have been women students and male professors." *Id.*

Ancient Rome adopted many Greek methods of education for young students, chief among which was the "pedagogue" system:

[T]o protect [the student] from danger, both physical and moral, [the student] was placed in the care of a trusted slave of the household, who . . . was known as [the student's] *paidagogos* It was he who helped the parents to instil [sic] into the children what was right and what was wrong, all the details of proper behaviour.

STANLEY F. BONNER, *EDUCATION IN ANCIENT ROME* 38 (1977). "Pedagogues" were severely punished for any form of sexual advance towards their students. *Id.* at 41. "[I]n one instance, when a 'pedagogue' allowed a young girl to be seduced, the father, a Roman knight, with all the ruthless severity of early Rome, put them both to death." *Id.* But see ALAN B. COBBAN, *THE MEDIEVAL UNIVERSITIES: THEIR DEVELOPMENT AND ORGANIZATION* 62-63 (1975) (describing how students at earliest known university in Bologna controlled hiring and payment of professors, and effectuated "quasi-totalitarian regime").

⁴ In the 1960s and 1970s both male and female students, described as "activists," demanded student representation and grievance procedures. See DZIECH & WEINER, *supra* note 3, at 11. While a multitude of women's issues were addressed, sexual harassment was ignored. *Id.*

⁵ Sexual harassment of college students by their professors is still a pervasive problem. See DZIECH & WEINER, *supra* note 3, at 13-14 (summarizing studies on prevalence of sexual harassment of students by faculty members); L.A. Kauffman, *Sexual Harassment: How Political is the Personal?*, *THE NATION*, Mar. 26, 1988, at 419.

As a 1982-1985 investigation by *MS.* and other studies have shown, about 15 percent of women at American colleges and universities have been raped. More than half experience some form of sexual harassment during their academic career, ranging from verbal abuse to unwanted sexual contact, assault or rape. Between 20 and 25 percent are sexually propositioned or harassed by their professors.

Id.; see also MICHELE A. PALUDI & RICHARD B. BARICKMAN, *ACADEMIC AND WORKPLACE SEXUAL HARASSMENT: A RESOURCE MANUAL* 11-12, tbl. 1.6 (1991) (reviewing current research on incidence of sexual harassment in public schools). See generally Anne L. Bryant, *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools*, 63 *J. SCH. HEALTH* 355 (1993) (discussing survey revealing 85% of girls and 76% of boys in secondary and elementary school have been sexually harassed); Kelly Corbett et al., *Sexual Harassment in High School*, 25 *YOUTH & SOC'Y* 93 (1993) (discussing study of college students' recollections of sexual harassment in high school); Robert D. Glaser & Joseph S. Thorpe, *Unethical Intimacy: A Survey of Sexual Contact and Advances Between Psychology Educators and Female Graduate Students*, 41 *AM. PSYCHOL.* 43-51 (1986) (discussing fact that approximately one-fourth of females with Ph.D. in Psychology have been sexually harassed by professors); Michelle A. Marks & Eileen S. Nelson, *Sexual Harassment on Campus: Effects of Professor Gender on Perception of Sexually Harassing Behavior*, 28 *SEX ROLES: A JOURNAL OF RESEARCH* 207 (1993) (explaining how gender differences among perpetrators and recipients of harassment affects perception of sexual harassment).

A key obstacle to eradicating sexual harassment from college campuses remains its definition. See Ronna G. Schneider, *Sexual Harassment and Higher Education*, 65 *TEX. L. REV.* 525, 533-43 (1987) (describing difficulties in precisely defining sexual harassment and proposing objective standard); see also PALUDI & BARICKMAN, *supra*, at 2-5 (reproducing several legal definitions of sexual harassment); Louise F. Fitzgerald, *Sexual Harassment: The Definition and Measurement of a Construct*, in *IVORY POWER: SEXUAL HARASSMENT ON CAMPUS* 21, 22-24 (Michele A. Paludi ed., 1991) (listing legal definitions and categorizing them into "Type 1," general statements describing character of behavior and status of participants and "Type 2,"

Female students⁶ have refused to accept the libidinous advances of faculty members as an inevitable part of the educational process.⁷ Students confronted with “quid pro quo”⁸ sexual harassment have historically

specific, proscribed conduct).

Law review articles have addressed the analogous problem of university regulation of racist speech. See generally Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U. L. Rev. 343 (1991) (discussing consequences of enacting rules forbidding certain kinds of campus speech and ensuing conflict of values); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431 (arguing that racist campus speech should not be protected under First Amendment).

⁶ This Comment focuses on sexual harassment on college campuses between male professors and female students, although the writer is cognizant of the fact that other harassment scenarios do exist, such as those between female professors and male students and between same-sex professors and students. See Natalie J. Malovich & Jayne E. Stake, *Sexual Harassment on Campus: Individual Differences in Attitudes and Beliefs*, in SEXUAL HARASSMENT IN THE EDUCATIONAL ENVIRONMENT 127-45 (Dan H. Wishnietsky ed., 1992) (exploring difference between male and female students in frequency and effects of sexual harassment); cf. Terry Hazard, *Sexual Harassment: What's Good For the Goose is Good For the Gander*, in SEXUAL HARASSMENT IN THE EDUCATIONAL ENVIRONMENT 33-47 (Dan H. Wishnietsky ed., 1992) (discussing males as objects of sexual harassment in workplace).

⁷ See Kauffman, *supra* note 5, at 419 (“When sexual harassment first surfaced as a campus issue in the mid-1970’s, feminist students defined it primarily as an abuse of institutionally conferred authority. . . . This conception of sexual harassment provided a solid basis for fighting institutionalized sexism.”); Lawrence Walsh, *Law Prof Assaulted Student, Suit Says*, PITT. POST-GAZETTE, Apr. 20, 1994, at B1 (describing lawsuit brought by former Duquesne University law student against professor for sexual harassment); *Navy Offers Courts-Martial in Sex Scandal*, UPI, Dec. 14, 1994, available in LEXIS, Nexis Library, Wires File (reporting U.S. Navy’s recommendation that four instructors at San Diego training base be court-martialed for alleged sexual harassment of 16 female students); Kenneth Jost, *Questionable Conduct*, A.B.A. J., Nov. 1994, at 71 (recounting University of Maine student’s sexual harassment allegation against history professor, professor’s subsequent termination by university, and arbitrator’s reinstatement of professor); see also Rorie Sherman, *School Districts Sued on Sexual Harassment by Fellow Students*, NAT’L L.J., Dec. 13, 1993, at 10 (describing student lawsuits against school districts that allegedly failed adequately to address student-on-student sexual harassment).

Historically, students have not sought legal redress for sexual harassment because of the university’s interest in protecting faculty members. See Schneider, *supra* note 5, at 527-29. Other reasons include students’ temporary status as students and their financial inability to pursue legal remedies. *Id.* Student sexual harassment victims have also been more concerned with their education than the vindication of their rights. Walter B. Connolly, Jr. & Alison B. Marshall, *Sexual Harassment of University or College Students by Faculty Members*, 15 J.C. & U.L. 381, 392 (1989).

⁸ Since little guidance exists concerning the regulation of sexual harassment in academia pursuant to Title IX of the Educational Amendments of 1972, the following definition of quid pro quo sexual harassment is adopted from workplace guidelines employed by the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964. See EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1994).

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, [or] (2) submission to or rejection of such conduct by an individual is

employed the statutory framework of Title IX of the Educational Amendments of 1972,⁹ which governs sexual discrimination in the educational context.¹⁰ In addition, other victimized students have sought to extend Title IX to "hostile environment"¹¹ claims,¹² which arise from more

used as the basis for employment decisions affecting such individual

Id.; see MACKINNON, *supra* note 1, at 32-40 (describing quid pro quo harassment in employment context); Schneider, *supra* note 5, at 535 (addressing and defining quid pro quo harassment). Title IX prohibits quid pro quo sexual harassment but does not explicitly prohibit environmental sexual harassment. Jollee Faber, *Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment*, 2 UCLA WOMEN'S L. J. 85, 91 (1992).

⁹ 20 U.S.C. §§ 1681-1688 (1988). The Congressional purpose for enacting Title IX was to prevent the distribution of funds to educational institutions engaging in sex discrimination and to provide students with protection against such practices. 118 CONG. REC. 5806-07 (1972).

¹⁰ Title IX states in pertinent part that "[n]o 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" 20 U.S.C. § 1681(a) (1988). The Office for Civil Rights ("OCR") of the United States Department of Education, the agency authorized to enforce Title IX, has passed regulations that address the sexual harassment problem and further define the statute's scope. 34 C.F.R. §§ 106.1-.71 (1994).

[I]n providing any aid, benefit, or service to a student, a recipient [of federal assistance] shall not, on the basis of sex: . . . (4) Subject any person to separate or different rules of behavior, sanctions, or other treatment; . . . (6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees; [or] . . . (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R. § 106.31(b). *But see University Responses to Racial and Sexual Harassment on Campuses, 1992: Hearing before the Senate Comm. on Labor and Human Resources*, 102d Cong., 2d Sess. 97-98 (1992) (statement of United States Student Association) (criticizing OCR as underfunded and inattentive to student concerns) [hereinafter *University Responses*].

¹¹ For a broad definition of "hostile environment" sexual harassment in the employment context, see 29 C.F.R. § 1604.11(a) (1994). Sexual harassment in violation of Title VII occurs when verbal or physical conduct of a sexual nature "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (1994). This Comment addresses the First Amendment issues raised by faculty members' sexual harassment of students and is, therefore, more concerned with emerging judicial recognition of Title IX "hostile environment" claims than the easily defined claims of *quid pro quo* harassment.

¹² See Dirk Johnson, *A Sexual Harassment Case to Test Academic Freedom*, N.Y. TIMES, May 11, 1994, at D23. At the Chicago Theological Seminary, a religion professor, Graydon Snyder, filed suit for defamation after being publicly reprimanded by the University for relating a religious story that offended a female student. *Id.* "In a discussion of the role of intent in sin, Professor Snyder recited a story from the Talmud . . . about a man who falls off a roof, lands on a woman and accidentally has intercourse with her. The Talmud says he is innocent of sin, since the act was unintentional." *Id.* The female student objected to the story because it conveyed a message that unintentional abuse of women was permissible. *Id.* Professor Snyder contended that he told the story to illustrate the Sermon on the Mount, that once a man looks at a woman with lust in his heart, he has committed adultery. *Teacher Says Gender Correctness Won Over Free Speech*, CNN NEWS, May 12, 1994, available in LEXIS, News Library, Script File: see

subtle forms of sexual harassment. The hostile environment cause of action derives from analogy to Title VII of the Civil Rights Act of 1964,¹³ which regulates workplace sexual discrimination.¹⁴ Many professors faced with student hostile environment sexual harassment claims have responded to such allegations by asserting their First Amendment¹⁵ right to academic freedom in the classroom.¹⁶ Recently, in *Silva v. University of New*

20/20: *The Speech Police: Is Sexual Speech Sexual Harassment?* (ABC television broadcast, May 12, 1995), available in LEXIS, News Library, Script File [hereinafter *The Speech Police*]. A student at the California State University of Sacramento, Craig Rogers, alleged that Professor Joanne Marrow, one of his psychology professors, sexually harassed him by conducting a sexually explicit lecture on female sexuality. *Id.* "I came in and there were slides of women's genitalia. Here I have this woman who has this huge vagina on the screen, and she's stroking it in a very personal, sexual, intimate way which aroused me, and this is not something that I think should be allowed." *Id.* (statement of Craig Rogers). Professor Marrow stated that she used the lecture to discuss masturbation, an aspect of female sexuality, and that before conducting the class, she warned anyone who might be uncomfortable with the lecture to leave the classroom. *Id.* Rogers left, but returned when he realized that the material would be on his final exam. *Id.* When the university refused to remove questions from the lecture from the final exam, Rogers sued the state for \$2.5 million on the ground that Professor Marrow had created a "hostile and offensive learning environment" in violation of the school's sexual harassment code. *The Speech Police, supra.* Rogers compared Marrow's lecture to being raped: "I had no power. I had no control. I was being aroused and didn't want it. I felt like I was being held down." *Id.*

¹³ 42 U.S.C. §§ 2000e to e-4 (1990).

¹⁴ Title VII states, in relevant part, that:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1990).

¹⁵ U.S. CONST. amend. I. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

¹⁶ "Campuses across the country have been roiled in recent years by accusations that sexual harassment complaints have been used to override the free speech rights of professors who hold traditional views on the role of women." Kenneth Jost, *Questionable Conduct: There Can Be A Fine Line Between Preventing Sexual Harassment and Punishing Protected Speech. The Struggle Between Acceptable Behavior and First Amendment Rights is Straining College Campuses and Workplaces Across the Nation*, 80 A.B.A. J., Nov. 1994, at 70-71; see Dennis Cauchon, *Harassment, Free Speech Collide in Florida*, USA TODAY, Nov. 20, 1991, at 9A (stating that First Amendment challenge is most serious threat to sexual harassment law); Anthony Flint, *Speech Codes on Campus Stir Debate over Rights*, BOSTON GLOBE, Mar. 31, 1991, National/Foreign Section at 1 (demonstrating growing belief that restrictions on speech limit free expression and violate First Amendment rights); Nat Hentoff, *Speech Codes that Punish Speech*,

Hampshire,¹⁷ the New Hampshire District Court held that the University of New Hampshire ("UNH") violated a professor's First Amendment right to speak out on matters of public concern by suspending him for using sexually explicit examples in a writing course.¹⁸

Professor J. Donald Silva ("Silva"),¹⁹ a tenured instructor of communications at UNH, used two sexually-charged illustrations while teaching a technical writing class. The first was a metaphor that compared the process of "focusing" a thesis statement to the act of sexual intercourse.²⁰ The second was one in which Silva compared belly dancing to a plate of jello with a vibrator underneath to illustrate the concept of "good definition."²¹ Upon hearing Silva's classroom statements, eight female

WASH. POST, Mar. 28, 1992, at A21 (finding that colleges keep devising speech codes to reflect notion that civility can be obtained through censorship); Johnson, *supra* note 12, at D23 (noting that Supreme Court has not yet determined whether sexual harassment codes violate First Amendment right of free speech); Lawrence Walsh, *Duquesne Panel OK's Reinstating Professor*, PITT. POST-GAZETTE, Dec. 24, 1994, at B1 (discussing Duquesne University's reinstatement of professor discharged for violating university's sexual harassment policy).

¹⁷ 888 F. Supp. 293 (D.N.H. 1994).

¹⁸ *Id.* at 316; *see infra* notes 20-21 and accompanying text (discussing Silva's classroom examples).

¹⁹ At the time of the controversy, Silva was also pastor of the Newcastle Congregational Church outside of Portsmouth, New Hampshire. *See Professor is Suspended in Sexual Harassment Controversy* (NPR radio broadcast, Apr. 12, 1994), available in LEXIS, News Library. Script File [hereinafter *Professor is Suspended*].

²⁰ "Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one." *Silva*, 888 F. Supp. at 299. Professor Silva made this statement to his technical writing class on February 24, 1992. *Id.* In an affidavit, Silva recalled his first encounter with the "focus" metaphor in a 1960's interview with Ernest Hemingway contained in a French magazine. *Id.* He remembered seeing it again in *The New Yorker* and in a piece by Ray Bradbury. *Id.* at 299-300. He later explained to school authorities:

Focusing is the second stage of the writing process after collecting information. Focusing on the central idea of a long technical report is a complex task for freshm[e]n in their second semester. The relationship of the writer to her subject must have intimacy and proximity similar to the sexual relationship between people.

Focusing requires the same long probation, adjustment, centering, a back and forth, give and take relationship until the writer and the subject are connected and fused as one. . . . Focus objectifies the personal experience, the act of fusion into language of the careful observations made by the writer.

Id. at 298-99.

²¹ Later, Silva explained to school authorities that "a good definition combines a general classification (belly dancing) with concrete specifics in a metaphor (like jelly shimmying on a plate) to bring home clearly the meaning to one who wishes to learn this form of ethnic dancing." *Silva*, 888 F. Supp. at 299. In an affidavit, Silva stated: "I had used both examples in my classes on numerous prior occasions without incident, the Little Egypt simile [belly dancing] since the early 1970's." *Id.*

students filed written sexual harassment complaints with UNH.²² Relying on a university hearing panel's findings and recommendations,²³ the university president concluded that Silva had violated the University System of New Hampshire ("USNH") Sexual Harassment Policy.²⁴ Silva

²² The complaints were filed between February 27, 1992 and March 2, 1992. *Silva*, 888 F. Supp. at 300.

While six of the complaints addressed Silva's classroom speech, two of the grievances alleged sexually-charged, out-of-classroom conduct by Silva during the fall of 1990. *Id.* at 301-02. One student, Kate Allen, alleged that Silva asked her: "[H]ow would you like to get an A [for the class]?" *Id.* at 310. Another student, Holly Woodhouse, claimed that while she was on her knees looking through the bottom drawer of a card catalog at the UNH library, Silva observed her and said: "It looks like you've had alot [sic] of experience on your knees." *Id.* at 305. In addition, after one student told her classmates that she was going to "jump on a computer," Silva was overheard commenting to other students nearby, "I'd like to see that!" *Id.* Finally, suggesting a lesbian relationship, Silva asked two female students seeking his help on an assignment: "How long have you been together?" *Silva*, 888 F. Supp. at 302.

After meeting with several UNH authorities one week after he made the second classroom statement, Silva became aware of the complaints lodged against him. *Id.* Those authorities included: Dr. Brian A. Giles, the Director of the Thompson School; Neil Lubow, a professor of philosophy and Associate Vice President of Academic Affairs at UNH; and, Jane Stapleton, a counselor at the UNH's Sexual Harassment and Rape Prevention Program. *Id.*

Following the meeting, the University created "shadow classes" for those students who wanted to transfer out of Silva's class. *Id.* at 303. "All of the complaining students transferred out of Silva's class." *Id.*

²³ *Silva*, 888 F. Supp. at 306-08. "It is the conclusion of the hearing panel that a reasonable female student would find Professor Silva's comments and his behavior to be offensive, intimidating and contributing to a hostile academic environment." *Id.* at 307. The panel conditioned Silva's reinstatement on several conditions including: (1) reimbursement to UNH for all costs associated with any and all alterations in teaching assignments necessitated by Silva's behavior; (2) participation in approved counseling sessions for a minimum of one year at his own expense; (3) a written apology to the complainants for having created a hostile and offensive environment; and (4) a promise not to retaliate against the complaining students. *Id.* at 307-08.

²⁴ *Id.* at 308. Ultimately, seven of the eight original complainants requested that their complaints be resolved under the USNH Sexual Harassment Policy. *Id.* at 305. The University System of New Hampshire [USNH] Sexual Harassment Policy provides:

All faculty, staff and students have a right to work in an environment free of discrimination, including freedom from sexual harassment. It is the policy of the University System of New Hampshire that no member of the University System community may sexually harass another. . . .

Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating a hostile or offensive working or academic environment.

- submission to or rejection of such conduct by an individual is used as the basis for employment or academic decisions affecting that individual.

- submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or academic work . . .

Examples of conduct which may, if continued or repeated, constitute sexual harassment are:

appealed the president's decision, and an appeals board affirmed the ruling.²⁵ Subsequently, Silva filed suit in federal district court against UNH, several school authorities, and the eight students who initiated the inquiry that resulted in his dismissal.²⁶ Silva sought a preliminary injunction against his suspension and a declaratory judgment that the defendants' conduct violated both his First Amendment right to freedom of speech and his Fourteenth Amendment right to due process.²⁷ The court denied the defendants' motion for summary judgment on the Professor's First Amendment claim, finding that Silva was likely to succeed on the merits.²⁸ The court's opinion led the trustees of UNH to settle the case.²⁹

- unwelcome sexual propositions
- graphic comments about a person's body
- sexually suggestive objects or pictures in the workplace
- sexually degrading words to describe a person
- derogatory or sexually explicit statements about an actual or supposed sexual relationship
- unwelcome touching, patting, pinching or leering
- derogatory gender-based humor

Such conduct whether intended or not constitutes sexual harassment and is illegal under both State and Federal law. Violations of this policy will not be permitted. Any faculty, staff or student who violates this policy will be subject to discipline up to and including dismissal.

Id. at 298.

²⁵ *Id.* at 311.

²⁶ *Id.* at 297.

²⁷ *Silva*, 888 F. Supp. at 297. Silva brought this action pursuant to 28 U.S.C. §§ 2201, 2202; 42 U.S.C. §§ 1983, 1988; and New Hampshire state law. *Id.* In addition to his First and Fourteenth Amendment claims, Silva sought the following: (1) a declaratory judgment that the defendants' conduct denied him his civil rights under color of state law in violation of 42 U.S.C. § 1983; (2) a permanent order enjoining the defendants from acting to prevent him from teaching at UNH or from otherwise punishing him on the basis of protected speech; (3) damages under 42 U.S.C. § 1983 for the alleged violation of his First Amendment and due process rights; (4) damages under state law based on allegations of breach of contract and breach of a contractual duty of good faith and fair dealing; and (5) an award of reasonable costs and attorney's fees pursuant to 42 U.S.C. § 1988. *Id.*

²⁸ *Id.* at 317.

²⁹ The trustees agreed to pay Silva \$60,000 in back pay and damages, to pay \$170,000 in legal fees, and to remove all disciplinary references from Silva's record. *Professor Accused of Harassment is Reinstated*, N.Y. TIMES, Dec. 4, 1994, at 35. While Silva felt vindicated by the district court's decision, many students expressed concern that the decision would lead to a "chilling effect" on students' voicing sexual harassment complaints. *Id.* Some students scheduled a campus protest of the decision. *Id.*

Thomas Carnaselli, a UNH English professor stated: "This case involves a classroom speech by a teacher, and the speech he used was relevant to the subject matter of his course. The staff [was] relevant. Maybe it was somewhat misguided Some people are offended by any reference to sex, but that's . . . their problem." *Professor is Suspended*, *supra* note 19. Moreover, Chris Bawling, a UNH Physics professor added: "[I]n the case of Professor Silva,

Ruling on Silva's First Amendment claim, the court initially concluded that Silva's classroom examples were "not of a sexual nature"³⁰ and promoted the valid educational objective of explaining concepts related to his course.³¹ Then the court stated that the university's sexual harassment policy³² was unconstitutional because it failed to provide Silva with adequate notice³³ that his conduct was prohibited,³⁴ and was not reason-

we see someone who's actually been . . . fired for accidentally offending someone." *Id.*

³⁰ *Silva*, 888 F. Supp. at 313. The court also concluded that the students misinterpreted this statement by viewing the statement in a sexual light. *Id.* at 312-13. With questionable analysis, the court stated that the word "vibrator" does not necessarily connote a sexual device. *Id.* at 313. It noted that this "misunderstanding" caused the complainants to view Silva's focus statement as part of an "offensive academic environment." *Id.* This appraisal would be accurate if it did not ignore the fact that Silva's "focus" statement was blatantly sexual in nature and occurred before the belly-dancing statement, not after.

³¹ *Id.* at 313. The court offered only a cursory explanation of these findings.

³² The court ultimately held that the USNH Sexual Harassment Policy, as it applied to Silva's speech, was not reasonably related to the legitimate pedagogical objective of maintaining a harmonious academic atmosphere. *Silva*, 888 F. Supp. at 314. The court stated that the subjective standard of the USNH Sexual Harassment Policy failed to take into account the nation's interest in academic freedom. *Id.* Emphasizing its deference to the tradition of academic freedom in the classroom, the court stated:

No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Id. (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

³³ *Silva*, 888 F. Supp. at 312. The court noted that to establish a violation of the First Amendment, Silva had to show that his classroom speech was constitutionally protected and that the speech was a motivating factor in his dismissal. *Id.* (citing *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). Nevertheless, before addressing whether Silva's speech was constitutionally protected, the court stated that, in an effort to prevent a "chilling effect" on the exercise of free speech or conduct, the First Amendment requires that teachers be provided with notice of the prohibited conduct. *Id.* (citing *Keyishian*, 385 U.S. at 604).

In *Keyishian*, several professors refused to sign a certificate stating that they were not Communists, or that if they ever were Communists, that they had notified the university president to that effect. *Keyishian*, 385 U.S. at 592. In addition, a part-time lecturer refused to take a written oath that he had never taught or advised the overthrow of the United States and had never been a member of a group advocating the overthrow of the United States. *Id.* The certificate and oath were conditions of employment and were required pursuant to New York State regulations promulgated in accordance with a plan "to prevent the appointment or retention of 'subversive' persons in state employment." *Id.* at 591-92. Holding the requirements unconstitutional, the Supreme Court noted:

When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone' For 'the threat of sanctions may deter . . . almost as potently as the actual application of sanctions.' The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being

ably related to the legitimate pedagogical objective of maintaining a harmonious academic atmosphere.³⁵ Finally, the court applied the "Connick-Pickering" test,³⁶ articulated by the Supreme Court in *Connick v. Myers*³⁷ and *Pickering v. Board of Education*,³⁸ and held that because the content, form, and context³⁹ of Silva's statements implicated matters of public concern,⁴⁰ his statements were constitutionally protected under

proscribed.

Id. at 604 (citation omitted).

³⁴ *Silva*, 888 F. Supp. at 312-13. Conduct prohibited by the University's sexual harassment policy includes unwelcome sexual advances, requests for sexual favors, and repeated derogatory or sexually explicit statements about actual or supposed sexual acts. *See supra* note 24. It is submitted that since UNH partially based Silva's dismissal upon his out-of-classroom conduct and since the USNH Sexual Harassment Policy arguably provided Silva with notice that his out-of-classroom speech and conduct was prohibited, the court's consideration of those incidents should have led to a different result.

³⁵ *Silva*, 888 F. Supp. at 313. In reaching this conclusion, the court used the First Circuit's test for determining the legality of state regulation of an educator's classroom speech. *Id.* at 313 (citing *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971)). The district court considered several factors obtained from *Mailloux*: the age and sophistication of the students, the relationship between the instructional technique used and the educational objective, and the context and manner of demonstration. *Id.*

³⁶ *Id.* at 314-16. Under the *Connick-Pickering* test, a government employee's speech is protected by the First Amendment if: (1) the speech is a matter of public concern; and (2) the employee's interest in expression on the matter is not outweighed by any injury the speech could cause to "the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)).

The court noted that the First Circuit did not use the *Connick-Pickering* test to determine whether a public school teacher's classroom speech is constitutionally protected. *Silva*, 888 F. Supp. at 315 n.16. Although the court followed the First Circuit's approach in applying the *Connick-Pickering* test, it did so without deciding whether the *Connick-Pickering* test was applicable to the classroom speech. *Id. But cf. Blum v. Schlegel*, 18 F.3d 1005, 1010-11 (2d Cir. 1994) (applying *Connick-Pickering* test to speech of state law school professor).

³⁷ 461 U.S. 138 (1983).

³⁸ 391 U.S. 563 (1968).

³⁹ "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. The Court further noted that this is a question of law, not fact. *Id.* at 148 n.7.

⁴⁰ *Silva*, 888 F. Supp. at 316. The court noted:

Silva's classroom statements were not statements "upon matters only of personal interest," but rather were made for the legitimate pedagogical, *public* purpose of conveying certain principles related to the subject matter of his course. Further, the content, form, and context of said statements demonstrate that they are directly related to (1) the preservation of academic freedom and (2) the issue of whether speech which is offensive to a particular class of individuals should be tolerated in American schools. Accordingly, the court finds and rules that Silva's classroom statements were related to matters of public concern.

Id.

the First and Fourteenth Amendments.⁴¹

It is submitted that the *Silva* court erred in holding that Silva's speech was related to matters of public concern and constitutionally protected under the First and Fourteenth Amendments. This Comment suggests that the court failed to determine whether the nature of Silva's conduct, and the context in which the alleged offenses took place, constituted harassment "sufficiently severe or pervasive"⁴² to create a hostile academic environment for his students. Part I submits that Title IX of the Educational Amendments of 1972 contains an implied "hostile environment" cause of action analogous to Title VII of the Civil Rights Act of 1964, and argues that Silva created a hostile environment through his sexual illustrations. Part II analyzes the notion of academic freedom in the classroom and explores Silva's contention that his sexually-charged classroom speech was protected under the First Amendment. Finally, Part III uses *Silva* as a benchmark from which to differentiate constitutionally protected faculty speech that is the product of an audacious pedagogical approach from unprotected speech that truly harasses and injures students.

I. TITLE IX HOSTILE ENVIRONMENT SEXUAL HARASSMENT

A. *Hostile Environment Sexual Harassment*

Although the Supreme Court has never explicitly decided whether Title IX of the Educational Amendments of 1972 contains an implied hostile environment cause of action,⁴³ it has twice addressed the issue in

⁴¹ The court concluded that Silva's First Amendment interest in his classroom speech was "overwhelmingly superior" to UNH's interest in prohibiting it. *Id.* Placing a high value on academic freedom, the court liberally quoted from the discussion of this principle in *Keyishian*: [O]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through a wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Id. at 314 (quoting *Keyishian v. Board of Regents*, 385 U.S. at 603 (1967)) (alteration in original) (citation omitted).

⁴² See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (noting that to establish violation of Title VII based upon hostile work environment, harassment "must be sufficiently severe or pervasive 'to alter the conditions'" of workplace) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

⁴³ In two decisions, the Supreme Court discussed the remedies available to students under Title IX. In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Court held that an implied private right of action under Title IX exists, even though the statute does not specifically provide for one. *Id.* at 708. Additionally, in *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S.

the employment context under Title VII. In *Meritor Savings Bank v. Vinson*,⁴⁴ a former bank employee claimed that she had been subjected to continuous sexual harassment by her supervisor during her four years at the bank.⁴⁵ The Supreme Court agreed that a hostile work environment claim was actionable as a violation of Title VII⁴⁶ if the basis for the claim was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"⁴⁷ This determination is made by examining the nature of the sexual advances and the particular context in which the alleged events took place.⁴⁸

In *Harris v. Forklift Systems*,⁴⁹ the Supreme Court expanded the "abusive work environment" standard articulated in *Meritor*. *Harris* involved a company president's alleged sexual harassment of a female manager of the company.⁵⁰ The Supreme Court reversed the lower court's finding that the president's conduct did not create a hostile work environ-

60 (1992), the Court provided that monetary damages are an available remedy for students victimized by individuals and schools that intentionally violate Title IX. *Franklin*, 503 U.S. at 75 n.8.

Although the Supreme Court had limited courts' jurisdiction over Title IX cases, *see, e.g.*, *Grove City College v. Bell*, 465 U.S. 555 (1984) (holding that receipt of federal money by one school program does not create jurisdiction under Title IX), the Civil Rights Restoration Act of 1987 expanded this jurisdiction. 20 U.S.C. § 1687(2)(A) (1988); *see also* Carrie Baker, Comment, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 EMORY L. J. 271 (1994) (noting that Supreme Court has narrowed jurisdiction over Title IX cases).

⁴⁴ 477 U.S. 57 (1986).

⁴⁵ *Id.* at 60. The supervisor's alleged harassment included repeated demands for sexual favors, resulting in actual intercourse between the victim and her supervisor. *Id.* Ultimately, the behavior allegedly led to forcible rape. *Id.*

⁴⁶ *Id.* at 73.

⁴⁷ *Meritor*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). The Court held that because the victim's allegations in *Meritor* included not only extreme harassment, but criminal conduct, she sufficiently stated a claim for "hostile environment" sexual harassment. *Id.*

⁴⁸ *Id.* at 69 (quoting EEOC Guidelines, 29 C.F.R. § 1604.11(b) (1985)).

⁴⁹ 114 S. Ct. 367 (1993).

⁵⁰ *Harris*, 114 S. Ct. at 369. A Magistrate found that during the complainant's tenure at Forklift, her superior directed gender-based insults at her and subjected her to repeated, unwanted sexual innuendos. *Id.* The president said to her several times, in front of other employees: "You're a woman, what do you know?" *Id.* He also suggested that they both "go to the Holiday Inn to negotiate [her] raise." *Id.* On various occasions, he threw objects on the ground in front of the complainant and other women and asked them to pick up the objects. *Id.* at 369. He also asked the plaintiff and several other female employees to get coins from his front pants pocket. *Harris*, 114 S. Ct. at 369.

See also Supreme Court to Rule on Second Sexual Harassment Case (NPR radio broadcast, Oct. 13, 1993), available in LEXIS, News Library, Script File. Theresa Harris, the plaintiff in *Harris v. Forklift Sys.*, detailed the effects of her superior's harassment: "I hated to go to work . . . I cried every day at work and I cried every day when I went home. There were a lot of days [when] I would sit in my office and literally shake." *Id.*

ment because it did not seriously affect the plaintiff's psychological well-being.⁵¹ Adopting an objective standard,⁵² the Court emphasized that Title VII provides protection long before an employee's psychological health is seriously affected.⁵³ A violation of Title VII occurs when the work environment can reasonably be perceived as being abusive or hostile, and is in fact perceived as such.⁵⁴ In assessing whether an employer has created a hostile environment, a jury must consider all relevant facts and circumstances⁵⁵ including: (1) whether the harassment was frequent and severe; (2) whether the behavior was physically threatening or humiliating; and (3) whether the conduct interfered with an employee's work performance.⁵⁶

Courts⁵⁷ and commentators⁵⁸ have recognized an implied Title IX

⁵¹ See *Harris*, 114 S. Ct. at 371.

⁵² See *id.* at 370 ("This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.").

⁵³ *Id.* at 370-71. The majority stated:

Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.

Id.

⁵⁴ *Harris*, 114 S. Ct. at 371. In his concurring opinion, Justice Scalia noted that the Court's objective, reasonable person standard failed to clarify an already ambiguous standard for Title VII hostile environment cases. *Id.* at 372. "As a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages." *Id.*

⁵⁵ *Id.* at 371.

⁵⁶ *Id.*

⁵⁷ See, e.g., *Parks v. Wilson*, 872 F. Supp. 1467, 1469 (D.S.C. 1995) (holding that standards developed in Title VII litigation are appropriate guidelines for determining whether graduate student suffered sexual harassment from professor); *Saville v. Houston County Healthcare Auth.*, 852 F. Supp. 1512 (M.D. Ala. 1994) (stating that jury could reasonably find student nurse established hostile environment claim under Title VII and Title IX because she suffered from unwelcome comments and sexual advances from employer on account of sex); *Bustos v. Illinois Inst. of Cosmetology*, No. 93C5980, 1994 WL 710830, at *3 (N.D. Ill. Dec. 15, 1994) (comparing effects of hostile work environment on employee's job performance to hostile environment in educational setting); *Ward v. Johns Hopkins Univ.*, 861 F. Supp. 367, 375 (D. Md. 1994) (determining that student's Title IX claims were appropriately evaluated under Title VII standards); *Murray v. New York Univ. College of Dentistry*, No. 93 Civ. 8771, 1994 WL 533411, at *2 (S.D.N.Y. Sept. 29, 1994) (recognizing student's claim, but ultimately rejecting it under both Title VII and Title IX), *aff'd*, 57 F.3d 243 (1995); *Mann v. University of Cincinnati*, 864 F. Supp. 44, 47 (S.D. Ohio 1994) (allowing student's hostile environment claim under Title IX to proceed against school and individual officials in effort to fulfill "Supreme Court's mandate to give Title IX 'a sweep as broad as its language'" (quoting *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982))); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp.

"hostile environment" claim by using Title VII as an analogous standard.⁵⁹ This interpretation of Title IX more effectively promotes the

1560, 1563 (N.D. Cal. 1993) (recognizing Title IX hostile environment claim of junior high student sexually harassed by other students); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1293 (N.D. Cal. 1993) (recognizing student plaintiffs' right to state claim for hostile environment sexual harassment under Title IX); *Moire v. Temple Univ. Sch. of Medicine*, 613 F. Supp. 1360 (E.D. Pa. 1985) (allowing medical student's Title IX hostile environment claim to be asserted against university but not against individual or medical clinic, neither of which received federal funds), *aff'd*, 800 F.2d 1136 (3d Cir. 1986).

But see *Seamons v. Snow*, 864 F. Supp. 1111, 1118 (D. Utah 1994) ("Title IX does not expressly create a cause of action based on negligence for hostile environment. It would be inappropriate for this Court to import the doctrine of hostile environment sexual harassment from Title VII into this Title IX action."); *Bougher v. University of Pitt.*, 713 F. Supp. 139, 145 (W.D. Pa.) (declining to use Title VII as standard for Title IX action), *aff'd*, 882 F.2d 74 (3d Cir. 1989).

⁵⁸ See generally *Baker*, *supra* note 43, at 293-318 (proposing standards under federal law for sex-based harassment of students based upon Title VII guidelines); *Ingulli*, *supra* note 1, at 285-96 (outlining federal statutes and cases pertaining to sexual harassment in educational context and analogizing Title VII's operation to that of Title IX); *Schneider*, *supra* note 5 (exploring scope of Title IX and difficulties students face when bringing Title IX action); *Kimberly A. Mango*, Comment, *Students versus Professors: Combatting Sexual Harassment Under Title IX of the Education Amendments of 1972*, 23 CONN. L. REV. 355, 360-90 (1991) (discussing legislative history of Title IX, its interplay with Title VII, and arguing that statute includes remedy for environmental sexual harassment of students).

⁵⁹ In the wake of the *Meritor* and *Harris* decisions, at least two circuits have accepted Title IX hostile environment claims using Title VII as an analogous standard. See *Lipsett v. University of P.R.*, 864 F.2d 881, 901 (1st Cir. 1988) (recognizing Title IX hostile environment claim brought by female medical school student against University of Puerto Rico, several administrators, and director of residency program); *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316 (10th Cir. 1987) (holding that under doctrine of issue preclusion, trial court's failure to find Title VII sex discrimination against fired instructor collaterally estopped plaintiff's Title IX claim), *cert. denied*, 484 U.S. 849 (1987). "Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard it as the most appropriate analogue when defining Title IX's substantive standards . . ." *Id.* at 316 n.6.

In *Lipsett*, the plaintiff alleged the existence of a particularly egregious hostile environment. 864 F.2d at 886. For example, she claimed that the chief resident, under whom she worked, stated in the presence of the plaintiff and six male patients that he wanted to engage in sexual intercourse with a nurse who walked by. *Id.* at 887. In another instance, as the plaintiff was performing a rectal examination, the chief resident remarked to the patient that the plaintiff was about to give the patient "pleasure." *Id.* Furthermore, the supervisor assigned the plaintiff trivial tasks, commenting that women should not be surgeons because they were unreliable while menstruating or while "in heat." *Id.*

The plaintiff also alleged sexual harassment by her male resident peers. *Id.* at 887-88. This included hanging Playboy centerfolds upon the walls of the men's rest area, posting a list of sexually offensive names for the female residents and posting a sexually explicit drawing of the plaintiff's body on the bulletin board. *Lipsett*, 864 F.2d at 888. The plaintiff and other female residents could not avoid the offensive, sexually charged exhibits because all of the residents went to the men's rest area during the day to receive and check for notices and to discuss administrative matters. *Id.*

statute's central purpose: the elimination of both sexual discrimination and sexual harassment from public schools.⁶⁰ Such a reading is justified because teachers have a unique influence on students' lives.⁶¹ This power, when coupled with students' youth and inexperience, seems to make students potentially more vulnerable than employees to the abuse of authority that is the hallmark of sexual harassment. Therefore, it is imperative that students receive the same hostile environment protections under Title IX as employees are afforded under Title VII.⁶²

⁶⁰ See *supra* note 9.

⁶¹ See PALUDI & BARICKMAN, *supra* note 5, at 101-02 (describing nature of power possessed by faculty members). "Professors give grades, write recommendations for graduate schools . . . and can predispose colleagues' attitudes towards students." *Id.* at 102. A professor's greatest power lies in his or her ability to affect a student's self esteem and to motivate or discourage a pupil's learning through feedback and interaction with the student. *Id.*: see OFFICE OF CIVIL RIGHTS, U.S. DEPT. OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC (1991), reprinted in EDUCATOR'S GUIDE TO CONTROLLING SEXUAL HARASSMENT, Appendix II (1991). The OCR's Guidelines state that sexual harassment may lead a student to receive undeserved grades in important courses, force changes in courses of study, cause transfer to other colleges or universities, impede the ability to secure important job referrals and contacts, and foster emotional problems. *Id.*

A professor may manipulate this power to obtain sexual gratification in a number of ways. See DZIECH & WEINER, *supra* note 3, at 122-24 (naming "counselor-helper," "confidante," "intellectual seducer," "opportunist," and "power broker" as roles played by harassing professors seeking manipulative relationships with students). Rather than taking advantage of chance opportunities or openly negotiating with his or her control over grades or jobs, a teacher/harasser will often play one of these roles in an attempt to gain sexual favors from a student. *Id.*

⁶² Most colleges and universities have detailed complaint procedures designed to encourage students to report cases of sexual harassment. See *University Responses to Racial and Sexual Harassment on Campuses*, *supra* note 10, *passim* (addressing problems of racial and sexual harassment on college campuses and discussing university responses to harassment in context of proposed "Freedom of Speech on Campus Act"); see also EDUCATOR'S GUIDE TO CONTROLLING SEXUAL HARASSMENT, Appendix V (1993) (reprinting selected sexual harassment policies and procedures of Cornell University, Howard University, Middlebury College, Rice University, University of Iowa, University of California, Santa Barbara, University of Minnesota, and University of Wisconsin-Madison).

Some universities are considering proposals banning all student and faculty romantic involvements. See *Sonya Live: Student Affairs* (CNN television broadcast, Apr. 7, 1993), available in LEXIS, News Library, Script File (discussing proposals and alternative plans to combat sexual harassment on college campuses). One commentator has suggested a "Model Campus Conduct Policy" that addresses potential First Amendment issues. See John T. Shapiro, Note, *The Call for Campus Conduct Policies: Censorship or Constitutionally Permissible Limitations on Speech*, 75 MINN. L. REV. 201, 229-37 (1990). The model policy incorporates a definition of campus "hostile environment" that combines the *Meritor* standard adopted from Title VII with time, place, and manner restrictions. *Id.* at 229-31. "A single harassing act may be so severe or pervasive as to constitute a hostile environment in violation of this Policy." *Id.* at 231.

B. *Silva's Speech and Conduct Created a Hostile Environment*

When the *Meritor* and *Harris* Title VII hostile environment standards are applied to Silva's classroom examples, it is obvious that a hostile environment was created. Clearly, Silva's students interpreted his words as more than mere instructional tools.⁶³ Furthermore, it is submitted that the court ignored key facts which showed that Silva manifested a preoccupation with sex both inside and outside the classroom.⁶⁴ In addition, these facts support the conclusion that a reasonable female student would have perceived Silva's speech and conduct as a severe, recurrent, and degrading pattern of sexual harassment directed towards women.⁶⁵ Moreover, the frequency and severity of Silva's sexual harassment would have led reasonable jurors to conclude that such conduct would interfere with a student's academic performance.⁶⁶

II. ACADEMIC FREEDOM AND HOSTILE ENVIRONMENT

When professors are accused of hostile environment sexual harassment they often justify their behavior by raising an academic freedom, First Amendment defense.⁶⁷ This concept of academic freedom⁶⁸ is rooted in

⁶³ See *Silva*, 888 F. Supp. at 300-02 (detailing student perceptions of Professor Silva's classroom speech). One student noted that her encounters with Silva involved "powerful, aggressive, physical intimidation tactics" which made her very uncomfortable. *Id.* at 302. Most students felt fear and did not wish to be alone with Silva. *Id.* at 300.

⁶⁴ *Id.* at 301-02, 306-07. For example, Silva assigned a project requiring students to reveal "what they did, with whom they did it, as well as what they thought and dreamed about." *Id.* at 307.

⁶⁵ This was the precise determination made by the UNH hearing panel. See *Silva*, 888 F. Supp. at 307. "[A] reasonable female student would find Professor Silva's comments and his behavior to be offensive, intimidating and contributing to a hostile academic environment." *Id.*

⁶⁶ Cf. *Harris*, 114 S. Ct. at 371 (noting factors which jury should consider in determining whether environment is hostile). For examples of Title VII hostile environment sexual harassment, see *Andrews v. City of Phila.*, 895 F.2d 1469 (3d Cir. 1990) (derogatory and sexual remarks made to female police officer); *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989) (female employee repeatedly groped and propositioned); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987) (black female security guard subjected to racial and sexual harassment); *Arnold v. City of Seminole*, 614 F. Supp. 853 (E.D. Okla. 1985) (female police officer subjected to lewd sexual comments and innuendos and discriminatory employment action).

⁶⁷ See *supra* notes 15-16 and accompanying text; see also Shapiro, *supra* note 62, at 209-19 (examining several Supreme Court cases occurring in academic context involving First Amendment, with competing interests arising in each case); John M. Ryan, Comment, *Teacher Free Speech in the Public Schools: Just When You Thought It Was Safe to Talk*, 67 NEB. L. REV. 695, 696 (1988) (stating that public school teachers have fewer constitutional rights than ordinary citizens).

⁶⁸ In *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969), the Supreme Court opined:

the belief that the university is a “marketplace of ideas”⁶⁹ committed to the largely unfettered flow of opinion and information.⁷⁰ Admittedly, teachers and students must be free to reason, think, speak, and disagree in a tolerant educational environment that inculcates the values of a modern society without unduly restraining individual autonomy or freedom.⁷¹ Thus, the freedom of expression sought in a “marketplace of ideas” occasionally requires tolerance of provocative speech or conduct which may offend many in the university community.⁷²

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.

Id.; see *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us [It is] a special concern of the First Amendment”); see also *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”); William A. Kohlburn, Note, *The Double-Edged Sword of Academic Freedom: Cutting the Scales of Justice in Title VII Litigation*, 65 WASH. U. L.Q. 445, 446 (1987) (arguing that Supreme Court analyzes classroom First Amendment issues separately from academic freedom, and that “academic context” merely “heighten[s] the Court’s concern” in such cases).

⁶⁹ “The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’” *Keyishian*, 385 U.S. at 603 (citation omitted); see Terrence Leas & Charles J. Russo, *Waters v. Churchill: Autonomy for the Academy or Freedom for the Individual*, Dec. 1994, available in WESTLAW, JRL Database (“In fact, compared with their colleagues in public elementary and secondary schools, faculty in higher education have significantly fewer limitations on their academic freedom . . . [due to] their search for truth as researchers coupled with their work involving adult learners”).

⁷⁰ “[A college campus], at least for its students, possesses many of the characteristics of a [traditional] public forum The college classroom with its surrounding environs is peculiarly the marketplace of ideas.” *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (citation omitted) (quotations omitted); see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death”).

⁷¹ “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Shelton*, 364 U.S. at 487; *Keyishian*, 385 U.S. at 603.

⁷² Colleges and universities have increasingly addressed the dilemma of maintaining a free and tolerant academic environment when confronted with campus speech, expression, or conduct that students, professors, or administrators find objectionable. See generally Craig B. Anderson, *Political Correctness on College Campuses: Freedom of Speech v. Doing the Politically Correct Thing*, 46 SMU L. REV. 171 (1992) (addressing conflict between “political correctness” and First

This freedom, however, is not boundless. Courts must balance the university's interest in regulating teachers' speech and conduct with academic freedom and the professors' right to speak on matters of public concern.⁷³ A "matter of public concern" encompasses "any matter of political, social, or other concern to the community,"⁷⁴ but does not

Amendment rights); James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163 (1991) (describing rights conflict between freedom of speech and expression on college campuses and right of targeted groups to be free from harassment); Steven R. Glaser, Comment, *Sticks and Stones May Break My Bones, But Words Can Never Hurt Me: Regulating Speech on University Campuses*, 76 MARQ. L. REV. 265 (1992) (discussing and analyzing problems created by hate speech codes); Thomas L. McAllister, Comment, *Rules and Rights Colliding: Speech Codes and the First Amendment on College Campuses*, 59 TENN. L. REV. 409, 424 (1992) (arguing that "[c]olleges and universities . . . should be fortresses where restrictions on speech are not tolerated"). The concept of a hostile educational environment as a limitation on free speech may be justified by reference to existing restrictions on expression. See Weinstein, *supra*, at 172-90; *University Responses to Racial and Sexual Harassment on Campuses*, *supra* note 10, at 14-27 (statements of William M. Schendel, Indiana University; Kenya Welch, Clemson University; and Jonathan Karl, Vassar College) (presenting personal accounts of harassment and discrimination on college campuses). But see *id.* at 5 (statement of Sen. Craig):

[A]ny thoughtful citizen understands the danger in the method of attacking the problem [of sexual harassment]. Speech restrictions don't just blunt a weapon that could be used to do harm—they also destroy . . . the best weapon any of us have to fight against harassment itself.

There is another danger as well. The power of censoring certain ideas carries with it the ability to shape and control human understanding. That is why in some quarters, speech restrictions are not viewed as shields for protecting students, but as tools for indoctrinating them.

Id.

⁷³ See *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

Several cases have addressed the constitutionality of university speech codes; most have restricted their scope or entirely struck them down on vagueness or overbreadth grounds. See *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 773 F. Supp. 792, 795 (E.D. Va. 1991) ("The First Amendment does not recognize exceptions for bigotry, racism, and religious intolerance or ideas on matters some may deem trivial, vulgar or profane."); *aff'd*, 993 F.2d 386 (1993); *Wu v. University of Conn.*, No. H-89-649 (D. Conn. Jan. 19, 1990) (discontinuing aspects of speech code that forbid offensive, indecent, or abusive language and replacing them with rules addressed to "face to face use of 'fighting words'"); *U.W.M. Post, Inc. v. Board of Regents of the Univ. of Wisc. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (striking down University of Wisconsin speech code on overbreadth grounds); *Doe v. University of Mich.*, 721 F. Supp. 852, 868 (E.D. Mich. 1989) (holding university's policy on discrimination and harassment of students unconstitutionally overbroad and vague); cf. *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992) (holding city ordinance prohibiting bias-motivated disorderly conduct facially invalid under First Amendment).

⁷⁴ *Connick v. Myers*, 461 U.S. 138, 146 (1983). The Court held that if employee expression does not relate to a matter of public concern, courts should defer to government officials in the

involve personal issues.⁷⁵ In addition, a professor's interest in expressing herself on a matter⁷⁶ must be weighed against any injury that her speech could cause to the public university's ability to promote the educational services it provides through its faculty employees.⁷⁷

management of their offices "without intrusive oversight by the judiciary in the name of the First Amendment." *Id.*

⁷⁵ *See id.* at 147:

[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id.

⁷⁶ Recently in *Waters v. Churchill*, 114 S. Ct. 1878, 1882 (1994), the Supreme Court addressed whether the *Connick* test should be applied to something the government-employer thought the employee said, or to what the fact-finder ultimately determined had been said. The Court emphasized the difference between the government's roles as sovereign and as employer, as well as the resulting First Amendment implications of each, noting:

The key to First Amendment analysis of government employment decisions. . . [is that the] government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Id. at 1888. The Court held that where parties fundamentally disagree on the context of the speech at issue, courts should base their decisions on the facts as the employer reasonably found them to be. *Id.* at 1889. Employers, however, must reach their conclusions in good faith, using "the care that a reasonable manager would use before making an employment decision . . . of the sort involved in the particular case." *Id.* Finally, the Court held that once an employee is discharged for disruptive speech, regardless of whether it involves a matter of public concern, it becomes irrelevant whether the rest of the speech was related to a matter of public concern and was nondisruptive. *Id.* at 1891. An employee, therefore, cannot escape discharge by surrounding an unprotected statement with protected ones. *Waters*, 114 S. Ct. at 1891 (relying on *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286-87 (1977)).

Waters' impact on faculty speech was recently demonstrated in a Second Circuit case, *Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir.), *vacated*, 115 S. Ct. 502 (1994). In *Jeffries*, Leonard Jeffries, a black studies professor at the City College of New York was removed from his position as Department Chairman after giving a controversial speech on the bias he perceived to exist in New York State's public school curriculum. *Id.* at 1241. During the off-campus speech he made a number of statements disparaging members of several groups, particularly Jews. *Id.* at 1242. The court held that by reducing Jeffries' term as chairman the defendants—the president, chancellor, and trustees of the City College of New York—violated Jeffries' First Amendment right to free speech. *Id.* at 1241. The Supreme Court remanded the case for reevaluation in light of *Waters*. *Harleston v. Jeffries*, 115 S. Ct. 502 (1994).

⁷⁷ *Connick*, 461 U.S. at 142 (citation omitted). An inquiry into the "manner, time, and place" of the conduct is also relevant. *Id.* at 152. The *Connick* Court noted that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48 (footnote omitted). In *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), the Supreme Court added a causation requirement to the *Connick-Pickering* test, making it more

It is suggested that the *Silva* court employed circular reasoning in reaching its decision that Silva's "focus" metaphor and "vibrator" simile related to matters of public concern.⁷⁸ Rather than ascertaining whether the statements themselves implicated matters of public concern, the court affirmatively categorized them as part of a larger, "academic freedom" controversy.⁷⁹ It then determined that the illustrations necessarily related to matters of public concern.⁸⁰ Therefore, the district court erred by focusing on the preexisting debate over academic freedom as a justification for its conclusion concerning sexual harassment.⁸¹ It is submitted that this type of circular analysis effectively converts any type of faculty speech, no matter how outrageous or injurious, into a "matter of public concern" due merely to its controversial nature.⁸² Sexual harassment, however, like

difficult for teachers to assert their First Amendment rights. *Id.* at 287. The Court held that a teacher carried a *prima facie* burden of demonstrating that his conduct was constitutionally protected and was a "substantial factor" in the school board's decision not to rehire him: such determination must be made whether absent the teacher's conduct, employer would have acted similarly. *Id.*

For a case examining the limits of the public concern test, see *Rankin v. McPherson*, 483 U.S. 378 (1987). In *Rankin*, a data-entry employee in a county police office was fired for remarking to a co-worker, after learning of an attempt to kill the President, "[I]f they go for him again, I hope they get him." *Id.* at 381. The Court emphasized *Connick's* context factor and noted that the conversation involved the policies of the President's administration which is a matter of public concern. *Id.* at 386-87. After completing the *Connick-Pickering* analysis, the Court held that the employee's discharge violated her First Amendment right to freedom of expression. *Id.* at 392.

⁷⁸ See *supra* notes 30-42 and accompanying text (discussing rationale of *Silva* court).

⁷⁹ *Silva*, 888 F. Supp. at 314. "[T]he preservation of academic freedom is a matter of public concern." *Id.* at 315.

⁸⁰ *Id.* at 316. The court determined that Silva's statements were related to matters of public concern because in "content, form, and context [they] directly related to (1) the preservation of academic freedom and (2) the issue of whether speech which is offensive to a particular class of individuals should be tolerated in American schools." *Id.*

⁸¹ See *id.* at 314.

⁸² See *Rankin*, 483 U.S. at 387 ("The inappropriate or controversial character of a statement is irrelevant to the question [of] whether it deals with a matter of public concern."). Courts have varied in their determinations of what constitutes matters of public or private concern in the public school context. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (finding that college teacher's legislative testimony in favor of granting four-year status for college was matter of public concern); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 802 (5th Cir. 1989) (holding that teacher's failure to use appropriate administrative channels to approve reading list raised matter of private concern), *cert. denied*, 496 U.S. 926 (1990); *Coats v. Pierre*, 890 F.2d 728, 732 (5th Cir. 1989) (stating that allegations on preferential grading of athletes and grades given in exchange for sexual favors are matters of public concern), *cert. denied*, 498 U.S. 821 (1990); *Saye v. Saint Vrain Valley Sch. Dist.*, 785 F.2d 862, 866 (10th Cir. 1986) (holding that teacher's complaints about allocation of aide time among teachers did not involve matter of public concern); *Day v. South Park Indep. Sch. Dist.*, 768 F.2d 696, 700-01 (5th Cir. 1985) (stating that teacher's protest of unfavorable job evaluation raised matter of private concern), *cert. denied*.

other forms of unprotected speech, does not become a matter of public concern, and shall not acquire First Amendment protection, solely because it is controversial and has been well-documented.⁸³

III. SEXUAL HARASSMENT VS. OFFENSIVE SPEECH

Although in many cases teachers' sexual harassment of students is unequivocal and easily recognizable,⁸⁴ there is often disagreement over what constitutes "inappropriate" behavior.⁸⁵ This ambiguity endangers

474 U.S. 1101 (1986).

⁸³ "[I]t is not always enough that the subject matter of a communication be one in which there might be general interest, . . . but that what is *actually said* on the topic is the crux of the public concern content inquiry." *Wren v. Spurlock*, 798 F.2d 1313, 1317 n.1 (10th Cir. 1986) (emphasis in original) (citations omitted), *cert. denied*, 479 U.S. 1085 (1987); see *Egger v. Phillips*, 710 F.2d 292, 316-17 (7th Cir.) ("In assessing whether the speech touches upon a matter of public concern, it is important not to equate the public's curiosity about a matter with a matter having societal ramifications."), *cert. denied*, 464 U.S. 918 (1983); *Hullman v. Board of Trustees of Pratt Community College*, 725 F. Supp. 1536, 1545 (D. Kan. 1989) ("Plaintiffs cannot bring constitutional light to their personal grievances by bootstrapping them onto issues of public concern by general references to the manner in which public institutions are conducted.") (citation omitted), *aff'd*, 950 F.2d 665 (1991).

Even assuming that Silva's speech implicated matters of public concern, it is submitted that his First Amendment interest did not outweigh UNH's interest in promoting a harmonious academic environment. See *Hanton v. Gilbert*, 842 F. Supp. 845, 851 (D.N.C.) (holding that university employee's interest in First Amendment rights were outweighed by damage to morale and efficiency in biology department), *aff'd*, 36 F.3d 4 (4th Cir. 1994). Indeed, Silva used two sexually explicit examples when there were numerous other ways to teach the same concepts.

⁸⁴ See *Shub v. Hankin*, 869 F. Supp. 213, 215 (S.D.N.Y. 1994), *aff'd*, 66 F.3d 308 (2d Cir. 1995). The district court dismissed the procedural due process complaint of a professor who was suspended from teaching after allegedly engaging in several inappropriate behaviors towards female students, including: inviting several female students for drinks, commenting on a student's perfume, requesting home telephone numbers from students, and touching a female student while asking her questions about her personal life. *Id.*; see *In re Kozy*, 371 S.E.2d 778, 782 (N.C. 1988) (affirming lower court judgment against professor who sexually harassed several female students). In *Kozy*:

Claudia Williams observed [the professor] fondling a necklace Daisy Morales was wearing around her neck which was hanging between her breasts . . . [Morales] also complained . . . about [the professor] repeatedly putting his arms around her and leaning against her while examining her classwork. [The professor] testified that he had a habit of frequently placing his arms around students but did not feel that his behavior was offensive or intimidating.

Id. at 781.

⁸⁵ See *Mann v. University of Cin.*, 864 F. Supp. 44 (S.D. Ohio 1994) (denying partial summary judgment to student who claimed that professor created hostile environment by asking her to sleep with him); ROIPHE, *supra* note 1, at 90-91 ("The clarity of the definition of sexual harassment as a 'hostile work environment' depends on a universal code of conduct, a shared idea of acceptable behavior that we just don't have. Something that makes one person feel uncomfortable may make another person feel great.").

Under Catharine A. MacKinnon's broad definition of sexual harassment, it is possible to

the free exchange of views and pedagogical experimentation in the "marketplace of ideas," which ultimately hinders the educational process itself.⁸⁶ The facts and circumstances in *Silva* highlight this ambiguity.

Students have the right to be free from an abusive educational environment; there is, however, no similar constitutional right to be free from offensive language.⁸⁷ Too often, affronted students confuse "hostile

argue that *Silva* imposed an unwanted element of sexuality into his classroom, a place where he enjoyed power and influence over his students. *See supra* note 1 and accompanying text (stating MacKinnon's definition of sexual harassment); *see also* Schneider, *supra* note 5, at 534-35 ("[T]he question of legally cognizable sexual harassment in any setting turns on abuse of power in relationships Sexual harassment of a student by a faculty member, like that of an employee by an employer or supervisor involves the exploitation of a power relationship.") (footnotes omitted). According to these definitions of sexual harassment, each of *Silva*'s students would have a claim of sexual harassment against the Professor. Yet, if one employs the *Meritor* and *Harris* definitions of hostile environment sexual harassment, *Silva*'s speech would have constituted sexual harassment only if it had been "sufficiently severe or pervasive" to transform the students' educational environment into one reasonably perceived as being abusive or hostile. *See supra* notes 44-56 and accompanying text (discussing the *Meritor* and *Harris* decisions). Although the students in *Silva* who suffered harassment outside of class could satisfy this requirement, it is doubtful that any of the students who merely heard the illustrations in class could meet this test.

⁸⁶ *See The Speech Police*, *supra* note 12 and accompanying text. "Some teachers now even tape-record their lectures, in case of a lawsuit. Better just not talk about race or sex or anything that might 'hurt.' Yet . . . many [students] said these things ought to be talked about." *Id.* When asked in a CNN interview if after his experience there were things he would not discuss in class, Professor Graydon Snyder responded: "I'm a bit careful, and I think I should not be careful. When I hit a story which has deep sexual implications, I probably skip it, or I allow the students to bring it up." *CNN News: Teacher Says Gender Correctness Won Over Free Speech* (CNN television broadcast, May 12, 1994), available in LEXIS, News Library, Script File; *see* Johnson, *supra* note 12 (describing chilling effect that possibility of sexual harassment charges has on intellectual dialogue in colleges and universities); *see also* ROIPHE, *supra* note 1, at 92-93:

Many professors follow an unwritten rule: never close the door to your office when you and a female student are inside The irony is that these open doors, and all that they symbolize, threaten to create barriers between faculty and students. In the present hypersensitive environment [i]t may be easier not to pursue friendships with female students than to risk charges of sexual harassment and misunderstood intentions. The rhetoric surrounding sexual harassment encourages a return to formal relations between faculty and students.

Id.

⁸⁷ "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it." ROIPHE, *supra* note 1, at 92-93 (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978)); *see* *Papish v. Board of Curators*, 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas . . . no matter how offensive to good taste . . . on a state university campus may not be shut off in the name alone of 'conventions of decency.'"); *see also* *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.") (citations omitted).

In an interview with *Playboy Magazine*, Nadine Strossen, the President of the ACLU discussed the implications of offensive speech:

environment” with “offensive speech” and sue on the basis of the latter.⁸⁸ As the *Silva* court noted, such claims should not be rewarded with a remedy since it is presumed that college students possess a certain level of sophistication and maturity.⁸⁹ When professors like *Silva*, however, create an abusive academic environment by implementing an unnecessary and unwanted element of sexuality into the classroom, faculty speech evolves from constitutionally protected, offensive speech into unprotected sexual harassment.⁹⁰

CONCLUSION

Uncertainty over where the line should be drawn between an experimental or audacious pedagogical approach and sexually abusive speech continues to plague the courts. *Silva* may have intended his sexual illustrations to be a legitimate, instructive tool for his technical writing class. For many of his female students, however, *Silva*'s behavior was simply an attempt to obtain personal sexual gratification at the cost of creating a hostile educational environment. The *Silva* Court incorrectly ratified *Silva*'s effort to disguise his purpose by wrapping himself in the blanket of academic freedom. Professors who truly deserve the vital safeguards of academic freedom do not require the protection of a selective

Controversial subjects are subjects on which people have deep feelings and therefore are likely to be offended. Constitutional law is filled with controversy. If I am to fulfill my responsibility to expose my students to all points of view, everybody should be offended by something that's being said The notion that an idea or work of art should not offend anybody who happens to hear or look at it is absolutely appalling.

Dorothy Atcheson, *The Playboy Forum: Defending Pornography Face-to-Face with the President of the ACLU*, PLAYBOY, Feb. 1995, at 108.

⁸⁸ See *supra* notes 11-12 and accompanying text (defining “hostile environment” and discussing the *Snyder* and *Rogers* cases).

⁸⁹ See *Silva*, 888 F. Supp. at 313 (quoting *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971) (per curiam)).

[F]ree speech does not grant teachers a license to say or write in class whatever they may feel like . . . and . . . the propriety of regulations or sanctions must depend on such circumstances as the age and sophistication of the students, the closeness of the relation between the specific technique used and some concededly valid educational objective, and the context and manner of presentation.

Id.

⁹⁰ See Donna Prokop, Note, *Controversial Teacher Speech: Striking a Balance Between First Amendment Rights and Educational Interests*, 66 S. CAL. L. REV. 2533, 2540 (1993) (“[C]ourts generally uphold disciplinary action against a teacher for in-class speech if there is a rational relationship between the speech and a legitimate pedagogical goal. Avoiding disruption of the classroom almost always suffices to provide the court with such a goal.”) (footnotes omitted); see also *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972) (“[A]cademic freedom [is not] a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution.”), *cert. denied*, 411 U.S. 972 (1973).

interpretation of facts. Such interpretation ignores faculty conduct which substantially contributes to a hostile classroom environment. Although the notion of academic freedom should protect faculty members who sincerely push the boundaries of pedagogical convention, it should not serve to shield those who use their position to harass and degrade their students.

Timothy E. Di Domenico