

## TITLE IX IN THE CLASSROOM: ACADEMIC FREEDOM AND THE POWER TO HARASS

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Imagine the following situation in a company mail room. A female employee is repeatedly questioned by her male supervisor about her sexual experiences. He wants to know how many partners she has had, what positions she likes, and “what a man has to do to score with her.” The questions are put to her and her fellow female employees in a steady barrage during working hours because, the male employee says, he “wants to create a study of female sexual habits.”

Now switch the setting. Imagine instead that the questioning takes place in a college classroom, in a psychology class perhaps. As class begins in the morning the male professor queries all of the female students in the front row about their sexual practices. He asks the same questions as the supervisor in the mail room, and when challenged gives a similar explanation: he is thinking of starting a new research project on female sexual habits. But imagine that he, as well as the mail room supervisor, have been subjecting their female students and subordinates to this barrage for years. In fact, both have a reputation as being a bit of a “lech.”

While the facts here do not mirror any particular case exactly, they do reflect a composite of sexual harassment cases in the employment and academic environments.<sup>1</sup> There are many instances in which women sue their employers for hostile, intimidating and sexualized treatment in the workplace,<sup>2</sup> and as research has shown, sexual harassment is hardly less prevalent in the academy.<sup>3</sup> However, when sexual harassment cases are brought from each setting the plaintiffs hardly have an equal playing field. Courts treat sexual harassment dif-

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1. See, e.g., *Rubin v. Ikenberry*, 933 F. Supp. 1425 (C.D. Ill. 1996) (finding that a professor was removed from class for inappropriate remarks); *Rabidue v. Osceola Refining*, 584 F. Supp. 419 (E.D. Mich. 1984) (finding that an administrative assistant claimed harassment based on fellow employee's use of offensive language); *Morgan v. Hertz*, 27 Fair Empl. Prac. Cas. (BNA) 990 (W.D. Tenn. 1981) (finding that male workers promoted over women because of employer's bias).

2. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19 (1993) (finding female manager subjected to sexual innuendoes and derogatory remarks); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983) (finding female air traffic controller subjected to pervasive atmosphere of “sexual slur, insult and innuendo” and personal verbal sexual harassment); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991) (finding female welder subjected to pornographic posters and calendars in workplace).

3. See STEPHEN MOREWITZ, *SEXUAL HARASSMENT AND SOCIAL CHANGE IN AMERICAN SOCIETY* 245-47 (1996).

ferently in the academy than in the workplace, at least to the extent the cases concern the creation of a hostile environment.<sup>4</sup> Unlike employment cases, courts often seem to balance faculty and student conduct with concerns for “academic freedom,” in the process dismissing collegiate claims that would go forward in the workplace.<sup>5</sup> While this paper agrees that academic freedom is an important value and deserves to be considered in some collegiate cases, it contends that academic freedom has the potential to become a defense that prohibits the prosecution of cases that deny women equal treatment in the university setting.

In making this argument, the paper is divided into four sections. The first part describes sexual harassment law as it pertains to the workplace and the academic environment. In the second section the paper compares the application of sexual harassment law in both settings. While finding that quid pro quo cases are not handled that differently between the shop floor and the academy, the paper concludes that hostile environment cases—because they raise issues of expression—are handled differently by the courts. Plaintiffs in hostile environment workplace cases are generally more successful than their counterparts in the college or university settings. The third section considers the basis for that distinction, focusing on the different importance placed on expression in the workplace and the academy. Because intra-academic expression is held in such high esteem, many courts seem to counterbalance a separate right of academic freedom in collegiate sexual harassment cases.<sup>6</sup> Finally, using a few recent cases in which the courts have thrown out hostile environment cases in the classroom, the paper argues that academic freedom has been interpreted too broadly, becoming essentially a defense for courts—and perhaps collegiate administrators—who do not want the difficult but essential task of distinguishing constitutionally protected speech from illegal harassment.

## I. SEXUAL HARASSMENT LAW

### A. Sexual Harassment in the Workplace

While now well established in the law, sexual harassment has a more convoluted past. In fact, rather than enjoying direct statutory support, the tort of sexual harassment developed out of the larger doctrine of unfair employment practices. Under Title VII of the Civil Rights Laws, employers are prohibited from “discriminat[ing] against any individual with respect to his . . . conditions or privileges of employment because of such individual’s race, color, religion, sex or national origin.”<sup>7</sup> Originally, this language was used to bring suits challenging wages and promotions, but over time courts began to recognize that

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4. See *infra* Part II.B. As the U.S. Supreme Court has noted in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986), sexual harassment law involves two claims: quid pro quo requests of sexual acts for favorable treatment and the creation of a hostile work environment.

5. See, e.g., *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996) (finding college sexual harassment policies may not be unconstitutionally vague); *Silva v. University of N.H.*, 888 F. Supp. 293 (D.N.H. 1994) (finding professor’s use of “jello” and “vibrator” had to be analyzed for First Amendment protection).

6. See *supra* note 5 and accompanying text.

7. 42 U.S.C § 2000e-2 (1994).

harassment could become “so severe and pervasive that it affects the conditions of employment” and thus violates Title VII’s prohibition of workplace discrimination.<sup>8</sup>

The initial wave of lawsuits under Title VII challenged racial harassment,<sup>9</sup> but today Title VII supports claims for unfair harassment on the basis of race, sex, religion, or national origin.<sup>10</sup> This is not to say that the caseload is varied, for the vast majority of harassment claims are those alleging sexual misconduct. In fact, “harassment” today has widely come to mean sexual harassment. The various legal manuals on the subject speak primarily of sexual harassment.<sup>11</sup> The courts have become accustomed to seeing mainly sexual, not racial harassment cases.<sup>12</sup> Even the EEOC, while noting that harassment cases may cover race and other bases, has drafted regulations dedicated solely to sexual harassment.<sup>13</sup>

As commentators have noted, sexual harassment law is directed against the “kinds of prejudice and stereotyped thinking” that treat women as “one-dimensional sex objects.”<sup>14</sup> Particularly as women have become more equal partners in the workplace and classroom, the consequences of sexual harassment are both personally and professionally debilitating. As a recent study indicates, a majority of women experience physical harassment on the job, with nearly two-thirds of women reporting that they have faced verbal harassment at work.<sup>15</sup> These are not simply small slights that can be sloughed off. Studies show that a vast majority of sexual harassment victims “experience [an] adverse effect on their work performance.”<sup>16</sup> Victims “frequently are angry, embarrassed, fearful, and anxious about the incidents. . . . [T]hey feel less trustful, have problems in their . . . work, and develop negative attitudes toward career development.”<sup>17</sup> In the most severe cases of sexual harassment, victims may suffer headaches, sleeplessness, fatigue, gastrointestinal problems, and appetite loss.<sup>18</sup> Some “experience significant disruption in their relationships with their boyfriends or husbands,” and almost all see their attendance and work or academic perform-

8. BARBARA LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 10 (1992).

9. The numbers were so great that one commentator has called Title VII’s first years “a substantive law on blacks.” CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 127 (1979).

10. In a footnote to 29 C.F.R. § 1604.11 (1998), the EEOC declares that the “principles of [harassment law] continue to apply to race, color, religion or national origin” in addition to sex.

11. See, e.g., LAWYERS COOPERATIVE PUBLISHING, *HANDLING SEXUAL HARASSMENT* (1993).

12. See LINDEMANN & KADUE, *supra* note 8, at 8; Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 815 (1991).

13. See 29 C.F.R. § 1604.11 (1998).

14. LINDEMANN & KADUE, *supra* note 8, at 8; see also MOREWITZ, *supra* note 3 (arguing that politicization of gender roles underlies recent sexual harassment law).

15. See Deborah Epstein, *Can a “Dumb Ass Woman” Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 403 (1996). In a 1994 survey of 2000 lawyers at twelve large law firms across the nation, 91% of the women and only 13% of the men reported that they had been subject to verbal harassment within the past year. See *id.*

16. *Id.* at 404.

17. MOREWITZ, *supra* note 3, at 253.

18. See *id.*

ance suffer.<sup>19</sup>

It is important to remember that the claim of sexual harassment is exclusively a creation of the common law. At no time has Congress passed legislation expressly prohibiting sexual harassment. While the EEOC has issued regulations both defining and prohibiting sexual harassment, the courts have essentially created this doctrine by reading in a claim of sexual harassment to the larger area of sex discrimination.<sup>20</sup> At any point the courts might have retreated, and in fact, there were ample legal bases to refuse to create the tort. Judges might have declined to create new law when there was not direct statutory support.<sup>21</sup> They might have concluded that the terms of the claim, including such requisites as “unwelcome,” “hostile,” or “intimidating,” were too ambiguous or vague to survive judicial scrutiny.<sup>22</sup> They might have refused to extend the claim to verbal harassment. Or they might have dismissed the underlying theory of sexual harassment on the grounds that it would *chill* relations in the workplace by making co-workers “walk on egg shells.”

To be sure, several courts have adopted these positions and refused to recognize sexual harassment claims.<sup>23</sup> But as the U.S. Supreme Court announced in 1986, sexual harassment is not only founded under Title VII of the Civil Rights Laws but the claim has two bases: quid pro quo harassment; and the creation of a hostile, intimidating or offensive workplace.<sup>24</sup> Quid pro quo harassment generally covers sexual advances or requests for sexual favors when presented as a condition of employment.<sup>25</sup> It is hostile workplace harassment that is most relevant to this paper. The tort of hostile workplace harassment has five elements:

- 1 verbal or physical conduct of a sexual or sex-based nature;
- 2 that is unwelcome;

19. *Id.*

20. See *supra* text accompanying notes 7-8.

21. According to the courts, sexual harassment flows from 42 U.S.C. § 2000e-2 of the federal code, which declares it unlawful for “an employer 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.” *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); see also *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976). At no point does this statute explicitly mention sexual harassment. Rather, the courts have read sexual harassment to be sex discrimination “with respect to [an individual’s] terms . . . of employment.” *Bundy v. Jackson*, 641 F.2d 934, 939 (D.C. Cir. 1981); see also *Garber v. Saxon Bus. Prods.*, 552 F.2d 1032 (4th Cir. 1977).

22. As one court defines this objection, “[a] statute is unconstitutionally vague when men of common intelligence must necessarily guess at its meaning. A statute must give adequate warning of the conduct which is to be prohibited and must set out explicit standards for those who apply it.” *Doe v. University of Mich.*, 721 F. Supp. 852, 866 (E.D. Mich. 1989) (citations omitted).

23. See, e.g., *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986) (holding plaintiff must prove employer knowledge); *Corne v. Bausch & Lomb*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated and remanded*, 562 F.2d 55 (9th Cir. 1977) (holding employer not liable where harassing behavior not in furtherance of employer policy or interest); *Clark v. World Airways, Inc.*, 24 Fair Empl. Prac. Cas. (BNA) 305 (D.D.C. 1980) (finding the president of company not supervisor).

24. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-66 (1986).

25. See *id.* at 65.

- 3 that is directed against an individual because of her (or his) sex;
- 4 That has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.
- 5 And that an employer knew or should have known of and did not take adequate action to stop or prevent.<sup>26</sup>

In defining what cases rise to the level of a hostile or intimidating environment, the courts have added the requirement that verbal or physical conduct be “severe” or “pervasive.”<sup>27</sup> The courts have also grappled with the proper standard for evaluating such conduct—whether acts should be viewed “objectively” from the courts’ perspective or “subjectively” from that of the victim.<sup>28</sup> The accepted rule, that cases should be evaluated by a reasonable person in the same circumstances of the victim, is, as well as much of the tort, a creation of the courts.<sup>29</sup>

## B. Sexual Harassment on Campus

To the extent that collegiate harassment cases involve collegiate employees, Title VII applies. Like any employer, colleges and universities are bound by the civil rights laws and the EEOC’s regulations.<sup>30</sup> Thus, cases between co-workers, faculty and even student employees (in the course of their employment only) can be brought under Title VII.

Besides Title VII, many colleges have adopted their own sexual harassment policies, covering students, faculty and staff, whether in a work setting or not. According to a 1994 study of the policies at public universities, 300 of 384

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26. 29 C.F.R. § 1604.11 (1998).

27. *Robinson*, 760 F. Supp. at 1523. The court reiterated *Meritor* in stating, “[t]o affect a ‘term, condition or privilege’ of employment within the meaning of Title VII, the harassment must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” *Id.* (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)). This test “is a question to be determined with regard to the totality of the circumstances.” *Id.* (quoting *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 (11th Cir. 1987)). As another court has said, “[w]hile an isolated incident is not enough, the number of incidents alone is not determinative . . . . Conversely, incidents that are much less severe may constitute harassment in the context of a working atmosphere ‘polluted’ with racial tension.” *Woods v. Graphic Communications*, 925 F.2d 1195, 1201-02 (9th Cir. 1991).

28. See *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (focusing on the perspective of victim to determine whether sexual harassment is sufficiently severe to be actionable); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986) (holding that a district court possesses broad discretion in considering evidence establishing actionable sexual harassment and must adopt a reasonable person standard); *Highlanders v. K.F.C. Nat’l Mgmt. Co.*, 805 F.2d 644 (6th Cir. 1986) (requiring that a court must adopt perspective of reasonable person’s reaction to similar environment under similar or like circumstances).

29. See *Daniel’s v. Essay Group, Inc.*, 937 F.2d 1264, 1271 (7th Cir. 1991) (offering a judicial explanation).

30. In this situation both the perpetrator and victim would have to be employees of the college or under its control to trigger Title VII.

schools had a sexual harassment policy.<sup>31</sup> Almost all of the policies are modeled on the EEOC's regulations, and many take an expansive view of improper behavior. For example, the University of Iowa's policy encompasses verbal conduct, covering comments, statements, jokes, questions, anecdotes, and remarks.<sup>32</sup> Even a policy statement from the American Council on Education suggests that sexual harassment may include "inappropriate put-downs of individual persons."<sup>33</sup>

Besides these internal policies, students may also use Title IX of the Civil Rights Laws<sup>34</sup> to pursue a private action against their schools for sexual harassment. Title IX, of course, is best known as a gender equity statute, having been "designed to protect individuals from sex discrimination by denying federal financial aid to those educational institutions that bear responsibility for sexually discriminatory practices."<sup>35</sup> Title IX provides that:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.<sup>36</sup>

At no point does Title IX speak of sexual harassment, nor does it reference terms from Title VII or any other employment-related legislation or regulation. Yet, the "courts have regularly applied Title VII principles" when "reviewing sexual discrimination claims by teachers and other employees of educational institutions under Title IX."<sup>37</sup> "Courts have also relied upon Title VII . . . in recognizing that Title IX prohibits the existence of a hostile environment due to a teacher's sexual harassment of a student."<sup>38</sup> Granted, many of these cases involve primary or secondary schools where the greater need for discipline may outweigh other interests in public discourse,<sup>39</sup> but Title IX has also been used to apply the hostile work environment standard to sexual harassment at the university level.<sup>40</sup> Nor do these cases involve only university employment which Title VII would cover. Many of Title IX's sexual harassment claims flow from the heart of the educational program—classroom instruction. They include such cases as *Rubin v. Ikenberry*,<sup>41</sup> where a professor regularly engaged in outrageous "sexual commentary, inquiries and jokes during class,"<sup>42</sup> and *McClellan v. Board*

31. See ARATI R. KORWAR, WAR OF WORDS: SPEECH CODES AT PUBLIC COLLEGES AND UNIVERSITIES 32 (1994).

32. See SEXUAL HARASSMENT ON CAMPUS: A LEGAL COMPENDIUM 179, (Elsa Kircher Cole ed., 1990). Other schools, like Mt. Holyoke College, prohibit verbal actions, including "unwelcome slurs [or] jokes." *Mt. Holyoke College Policy on Human Rights* (last modified Sept. 4, 1998) <<http://www.mtholyoke.edu/cic/stulife/handbook/hbkl04.shtml>>.

33. *Id.* at 224.

34. 20 U.S.C. § 1681(a) (1994).

35. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1190 (11th Cir. 1996).

36. 20 U.S.C. § 1681(a).

37. *Davis*, 74 F.3d at 1190.

38. *Id.*

39. See, e.g., *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993).

40. See, e.g., *Moire v. Temple Univ. Sch. of Med.*, 613 F. Supp. 1360 (C.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986).

41. 933 F. Supp. 1425 (C.D. Ill. 1996).

42. *Id.* at 1429.

of *Regents of the State University*,<sup>43</sup> in which a faculty member harassed a student about her body. As the Supreme Court acknowledged in *Franklin v. Gwinnett County Public Schools*,<sup>44</sup> “a student should have the same protection in school that an employee has in the workplace. . . . Indeed, where there are distinctions between the school environment and the workplace, they ‘serve only to emphasize the need for zealous protection against sex discrimination in the schools.’”<sup>45</sup>

Title IX is in many ways like Title VII, by its terms prohibiting the general wrong of gender discrimination. However, cases under Title IX lack the more specific criteria that the EEOC has instituted for Title VII. For example, unlike the regulations that cover sexual harassment cases in the workplace, Title IX contains no statutory requirement that conduct be hostile, intimidating or unwelcome. As a practical matter, though, Title IX cases turn on the same sorts of behavior as do their Title VII counterparts: litigants must demonstrate conduct, directed to them on account of their gender, that is so “sufficiently obvious and severe or pervasive” that it denies them their equal rights to education.<sup>46</sup> For example, in *Davis v. Monroe County*,<sup>47</sup> the Eleventh Circuit permitted a case to proceed in which a student had been “sexually harassed on a continuous basis” by a classmate who attempted to “fondle her” and “direct[ed] offensive language toward her.”<sup>48</sup> Like sexual harassment cases in the workplace, the courts have read in a private claim of sexual harassment to Title IX so that the remedies available in a suit brought under Title IX are substantially similar to those arising under Title VII.<sup>49</sup>

## II. COMPARISON OF SEXUAL HARASSMENT CASES

### A. Workplace

It has now been over twenty years since the courts first considered sexual harassment claims.<sup>50</sup> Over that time, the lower courts have legitimized the claim,<sup>51</sup> with the Supreme Court’s 1986 decision in *Meritor* confirming what other courts had already established: that sexual harassment is a viable claim in the workplace.<sup>52</sup> Certainly, the courts have been willing to uphold claims for quid pro quo harassment, whether between supervisors and employees or simply co-

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43. 921 S.W.2d 684 (Tenn. 1996).

44. 503 U.S. 60 (1992).

45. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1192-93 (11th Cir. 1996) (quoting *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1292-93 (N.D.Cal. 1993)).

46. *Lipsett v. University of Puerto Rico*, 637 F. Supp. 789, 801 (D.P.R. 1986).

47. 74 F.3d 1186 (11th Cir. 1996).

48. *Id.* at 1188-89; see also *Lam v. Curators of the Univ. of MO.*, 122 F.3d 654 (8th Cir. 1997) (holding that a single allegedly offensive videotape did not create a pervasive hostile environment for a university dental school student).

49. See *Franklin*, 503 U.S. at 72.

50. See LINDEMANN & KADUE, *supra* note 8, at 3.

51. See *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Garber v. Saxon Bus. Prods.*, 552 F.2d 1032 (4th Cir. 1977); *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976).

52. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 57-58 (1986).

workers. For example, in *Fisher v. San Pedro Peninsula Hospital*,<sup>53</sup> nurses were subject to continuous sexual demands from a doctor who tried to pull them “onto his lap, hugging and kissing them while wiggling.”<sup>54</sup> The California Court of Appeals remanded the case so that the plaintiff could amend her complaint to establish a cause of action for hostile environment sexual harassment.<sup>55</sup>

So too, hostile work environment cases pass judicial muster. The easiest cases are those covering physical harassment, including touching, groping, or acts of sabotage.<sup>56</sup> For example, in the case of *Maturo v. National Graphics Inc.*,<sup>57</sup> the court found sexual harassment when a co-worker “came up from behind plaintiff, grabbed her arms, . . . and fondled her.”<sup>58</sup> In addition, in *Woods v. Graphic Communications*,<sup>59</sup> the court based a finding of harassment on such actions as “a karate chop” and the scrawling of graffiti near the plaintiff’s work space.<sup>60</sup>

The courts also seem willing to extend hostile work environment to verbal conduct or expression, including such things as “gender-baiting, teasing, [or] hazing.”<sup>61</sup> For example, the court in *Katz v. Dole*<sup>62</sup> upheld a claim of sexual harassment when the plaintiff “was personally the object of verbal sexual harassment by her fellow” workers.<sup>63</sup> The “harassment took the form of extremely vulgar and offensive sexually related epithets,” using words “widely recognized as not only improper but as intensely degrading, deriving their power to wound not only from their meaning but also from ‘the disgust and violence they express phonetically.’”<sup>64</sup>

The *Katz* court was among the more decorous, refusing to list the degrading words at issue. But there are cases in which “cunt” and “pussy” are some of the more pleasant terms used,<sup>65</sup> and others where women confront their tormenter in front of their manager with, “You have called me a fucking bitch,” only to be answered, “No, I didn’t, I called you a fucking cunt.”<sup>66</sup> In fact, the Supreme Court has refused to overturn a case of sexual harassment based largely on “unwanted sexual innuendos.” In that case, *Harris v. Forklift Systems, Inc.*,<sup>67</sup> the company

53. 214 Cal. App. 3d 590 (1989).

54. *Id.* at 600; *see also* *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (abolishing female employee’s job for refusing male supervisor’s sexual advances violated the Equal Employment Opportunity Act of 1972); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979) (holding the employer liable for tortious conduct of employee who held a supervisory position over the plaintiff).

55. *See Fisher*, 214 Cal. App. 3d at 622.

56. By its very nature, physical harassment closely resembles quid pro quo acts. Moreover, it does not engender any First Amendment defense, which verbal harassment may generate.

57. 722 F. Supp. 916 (D. Conn. 1989).

58. *Id.* at 921.

59. 925 F.2d 1195 (9th Cir. 1991).

60. *Id.* at 1198.

61. LINDEMANN & KADUE, *supra* note 8, at 170.

62. 709 F.2d 251 (4th Cir. 1983).

63. *Id.* at 254.

64. *Id.*

65. *See McNabb v. CubFoods*, 352 N.W.2d 378 (Minn. 1984) (describing language used by the plaintiff co-worker).

66. *Id.* at 381.

67. 510 U.S. 17 (1993).



president “often insulted [the employee] because of her gender,” calling her a “dumb ass woman,” and telling her on several occasions, in the presence of other employees, “[y]ou’re a woman, what do you know’ and ‘[w]e need a man as the rental manager.’”<sup>68</sup>

In response, some courts have gone so far as to require that employers “take prompt action to prevent . . . bigots from expressing their opinions in a way that abuses or offends their co-workers,” by “informing people that the expression of racist or sexist attitudes in public is unacceptable.”<sup>69</sup> Others have banned such inquiries as “Did you get any over the weekend?”<sup>70</sup> “Many courts have permitted [sexual] harassment actions to proceed based in part upon offensive speech that was not directed toward the plaintiff. . . and some courts have permitted [sexual] harassment actions based in part upon speech that was not even witnessed by the plaintiff.”<sup>71</sup> In fact, it took until 1991 for a defendant to raise, and for a court to rule on, a First Amendment defense to hostile work environment. In that case, *Robinson v. Jacksonville Shipyards*,<sup>72</sup> the court balanced the “governmental interest in cleansing the workplace of impediments to the equality of women” against the free speech interest in “sexually demeaning remarks and jokes,” as well as “pictures of nude and partially nude women in sexually suggestive poses.”<sup>73</sup> Not surprisingly given the terms of this test, the court found the First Amendment defense lacking.<sup>74</sup> Yet *Jacksonville Shipyards* is far from an anomaly. As Professor Eugene Volokh has amply chronicled, the courts are quite willing to uphold claims of verbal harassment in the workplace.<sup>75</sup>

It is hardly a stretch to say that the courts grant special deference to sexual harassment claims in the workplace, a fact seen most plainly in the case of *R.A.V. v. City of St. Paul*.<sup>76</sup> In *R.A.V.*, the Court had the opportunity to consider a municipal hate code, St. Paul, Minnesota’s Bias-Motivated Crime Ordinance.<sup>77</sup> Under that ordinance, individuals were prohibited from displaying a symbol “which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . . .”<sup>78</sup> In a somewhat fragmented opinion, the Supreme Court overturned the law on the basis of its content discrimination,<sup>79</sup> concluding that the ordinance imposed “special prohibitions on those speakers who express views on the disfavored

68. *Id.* at 19.

69. *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 3166 (1989).

70. *Morgan v. Hertz Corp.*, 542 F. Supp. 123, 128 (W.D. Tenn. 1981).

71. Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 535 (1991).

72. 760 F. Supp. 1486 (M.D. Fla. 1991).

73. *Id.* at 1493, 1522, 1536.

74. *See id.* at 1536.

75. *See* Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L.J. 563 (1995).

76. 505 U.S. 377 (1992).

77. *See id.* at 380.

78. *Id.*

79. *Id.* at 378.

subjects of 'race, color, creed, religion or gender.'"<sup>80</sup>

Under this reasoning, one might also have expected the Court to overturn sexual harassment law. It too "imposes special prohibitions on those speakers who express views on the disfavored subject of . . . gender,"<sup>81</sup> and as the lower courts have shown, an individual may not hurl sexual invectives at his female co-workers and escape a finding of sexual harassment.<sup>82</sup> Yet the Supreme Court refused to include sexual harassment claims in its broad prohibition against content discrimination. To the contrary, the Court went so far as to craft a deliberate exception for sexual harassment, saying such claims really reflect a situation where "a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech."<sup>83</sup>

This exception did not escape the attention of the concurring justices in *R.A.V.* In criticizing the majority's reasoning, Justices White, Blackmun, O'Connor and Stevens noted that "[u]nder the broad principle the Court uses to decide the present case, hostile work environment claims based on sexual harassment should fail First Amendment review."<sup>84</sup> Because the Court could not accept that result, the concurrence suggests, it crafted an exception to cover sexual harassment claims.<sup>85</sup> In essence, the Court felt compelled to protect the viability of sexual harassment claims in the workplace.

## B. College/University

On the other hand, the courts are not so deferential to sexual harassment claims arising in the collegiate setting. As an initial matter, the Supreme Court decided just this year that the standards of notice are different for Title VII and IX claims. In *Burlington Industries v. Ellerth*,<sup>86</sup> the High Court ruled that plaintiffs may pursue a Title VII sexual harassment claim even if the employer did not know—but should have known—of the alleged harassment.<sup>87</sup> By contrast, in *Gebser v. Lago Vista Independent School District*,<sup>88</sup> the Court held that actual notice was required for a Title IX sexual harassment case.<sup>89</sup>

It is true that the courts treat some collegiate sexual harassment claims like analogous cases in the employment setting. Indeed, judges do seem to take academic quid pro quo cases seriously, regularly upholding the actions of administrators who discipline faculty and staff who use their positions of power to try to

80. *Id.* at 380.

81. *Id.* That is, under the hostile work environment test, defendants can be held liable for speech that disparages a woman on the basis of her gender.

82. Technically, it is the employer that would be found liable for maintaining a hostile work environment. But it is the behavior of supervisors or co-workers that creates the hostile work environment.

83. *R.A.V.*, 505 U.S. at 389.

84. *Id.* at 409-10 (White, J. et al., concurring).

85. *Id.* at 419 (White, J., concurring).

86. 118 S. Ct. 2257 (1998).

87. *See id.* at 2271.

88. 118 S. Ct. 1989 (1998).

89. *See id.* at 1993.

extract sexual favors from students or subordinates.<sup>90</sup> A classic example is *Parks v. Wilson*.<sup>91</sup>

[D]efendant told [the plaintiff] that she would need to have sexual intercourse with him in order to graduate. She did not have sexual intercourse with defendant, but she agreed to allow him to take photographs of her in the nude. The two arranged to meet at defendant's rented home. Plaintiff appeared at the home on the appointed date with her father, now deceased, secreted away in the back seat of the car. When defendant met her at the car, the father emerged from the car to defendant's surprise. At that point, according to plaintiff's testimony, defendant exclaimed: "I give up. You graduate. You graduate."<sup>92</sup>

But when the claim is for a hostile educational environment, the courts are hardly as sympathetic. Part of the reason that the courts do not act as favorably to academic harassment cases is that they are not as familiar with them. While they are regularly inundated by sexual harassment claims in the workplace, an on-line computer search shows that academic environment cases are filed less than ten percent as often as workplace claims.<sup>93</sup> The reasons for this disparity are somewhat speculative, although it may be that academicians, because they keep abreast of societal changes, are more likely to conform their behavior to evolving sexual harassment standards. Or, more plausibly, it may be that many collegiate harassment cases are handled internally. Indeed, for an academic harassment claim even to reach the courts one of two things must occur: either the victim must file a Title IX suit against the school, claiming that the institution failed to respond to the alleged harassment; or the perpetrator must file a claim against the school's disciplinary process, charging that the institution did not follow its procedures or that the punishment somehow violated his rights to conduct class or express himself.<sup>94</sup>

However, regardless of whether the courts are familiar with hostile environment claims in the academy, they are more suspicious of these cases than those in the workplace. This is not the same as saying that courts *refuse* to enforce sexual harassment claims between faculty and students. For as *McClellan v. Board of Regents*<sup>95</sup> and *Rubin v. Ikenberry*<sup>96</sup> attest, there are cases in which the

90. See, e.g., *McDaniels v. Flick*, 59 F.3d 446 (3d Cir. 1995) (finding that university properly fired professor because of sexual harassment); *Wexley v. Michigan State*, 25 F.3d 1052 (6th Cir. 1994) (affirming the district court's ruling in favor of university that fired tenured professor for making sexual advances towards students); *Korf v. Ball State Univ.*, 726 F.2d 1222 (7th Cir. 1984) (affirming summary judgment for university in suit brought by professor fired for sexual advances towards students).

91. 872 F. Supp. 1467 (D.S.C. 1995).

92. *Id.* at 1468-69.

93. Research results are from a September 1998 Lexis search of Title VII and Title IX cases in state and federal courts.

94. That is, given *Gebser v. Lago Vista Independent Sch. Dist.*, 118 S. Ct. 1989 (1998), the plaintiff must first give the school a chance to remedy the harassment before charging it with maintaining a sexually hostile academic environment. Similarly, as the courts in *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996) and *Silva v. University of New Hampshire*, 888 F. Supp. 293 (D.N.H. 1994) show, those charged under a school's sexual harassment code may also challenge the policy in court as abridging their First Amendment rights.

95. 921 S.W.2d 684 (Tenn. 1996).

96. 933 F. Supp. 1425 (C.D. Ill. 1996).

courts have upheld hostile environment claims against professors. In *McClellan*, the Tennessee Supreme Court upheld a finding of sexual harassment against a professor at Middle Tennessee State University who, in the course of a clinical health class, looked under a female student's t-shirt, remarking that she was "no Dolly Parton."<sup>97</sup> "The next day [the professor] asked [the student] if she believed in 'equal rights.' When she said she did, he inquired why women should not remove their shirts for EKG procedures as men did. He also commented that since she had several brothers, being nude around males should not affect her."<sup>98</sup>

In *Rubin*, a federal district court ruled that the University of Illinois acted appropriately in disciplining a professor where the complainant alleged that the professor "created a sexually demeaning and sexually threatening environment in [his]class."<sup>99</sup> Among the comments the professor was alleged to have said included:

You're smart—for a woman. Was that sexist? I have to tease to keep you awake. . . . The problem in schools is uppity, greedy women. . . . If I were king, all women teachers would have to spend fifteen minutes on a moonlit night, in a canoe, on a lake with a drunken sailor. . . . Suppose a husband and wife came to your adult education class and requested you teach a class on lovemaking because the cause of divorce is incompatibility and lovemaking is part of compatibility—so would you teach a class on lovemaking? Foreplay? Afterplay?<sup>100</sup>

However, there are many more cases where hostile environment claims meet a skeptical judiciary.<sup>101</sup> Perhaps the best example is *Cohen v. San Bernardino Valley College*,<sup>102</sup> where the Ninth Circuit Court of Appeals refused to enforce a college's sexual harassment policy against an English professor.<sup>103</sup> In that case, the College of San Bernardino had adopted a sexual harassment policy modeled almost identically on Title VII standards.<sup>104</sup> Shortly after its adoption, a female student charged her professor with violating the new policy for his "statements and conduct" in class.<sup>105</sup> The professor taught a required remedial English course, and according to the District Court, used a "controversial teaching style," which included a "repeated focus on topics of a sexual nature" and

97. *McClellan*, 921 S.W.2d at 686.

98. *Id.*

99. *Rubin*, 933 F. Supp. at 1445.

100. *Id.* at 1445-47.

101. See *Booher v. Board of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404, at \*1 (C.D. Ky. July 21, 1998) (stating that university sexual harassment policy unconstitutionally vague and overbroad); *Lam v. Curators of the Univ. of Mo.*, 122 F.3d 654 (8th Cir. 1997) (single videotape that contained sexual innuendo shown by university instructors did not create a pervasive hostile environment); *Alexander v. Yale Univ.*, 631 F.2d 178 (2d Cir. 1980) (finding students' sexual harassment claims against the university were moot because they had graduated and that other students lacked standing because their claims were too speculative).

102. 92 F.3d 968 (9th Cir. 1996).

103. *Id.* at 973.

104. *Id.* Under the policy, a faculty member could be disciplined for "unwelcome sexual advances, requests for sexual favors and other verbal, written or physical conduct of a sexual nature" when "such conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile or offensive learning environment." *Id.* at 970.

105. *Id.* at 970.

regular “use of profanity and vulgarities.”<sup>106</sup> In the spring semester of 1992, the professor began class discussion on the issue of pornography and played the “devil’s advocate” by asserting controversial viewpoints.<sup>107</sup> During a classroom discussion on the subject, the professor stated in class that he wrote for *Hustler* and *Playboy*, and he read some articles out loud in class.<sup>108</sup> At the end of class discussion, he required his students to write essays defining pornography.<sup>109</sup> According to the student, the professor then told her that if she met him in a bar, he would help her get a better grade.<sup>110</sup> Furthermore, she claimed, that “he would look down her shirt, as well as the shirts of other female students.”<sup>111</sup> He even told her that, “she was overreacting because she was a woman.”<sup>112</sup>

The professor’s conduct had already warranted punishment from college officials, but the Ninth Circuit ruled that the behavior:

Did not fall within the core region of sexual harassment as defined by the [College’s Sexual Harassment] Policy. Instead, officials of the College, on an entirely ad hoc basis, applied the Policy’s nebulous outer reaches to punish teaching methods that [the professor] had used for many years . . . [The professor] was simply without any notice that the Policy would be applied in such a way as to punish his longstanding teaching style.<sup>113</sup>

Similarly, in the case of *Silva v. University of New Hampshire*,<sup>114</sup> a federal district court overturned disciplinary action against a communications instructor who had been reprimanded by the University for sexual harassment.<sup>115</sup> Among the charges against him were that he sexualized classroom discussion and made personally or sexually offensive statements to female students outside of class.<sup>116</sup> As one student remembered the class, “Don Silva was trying to explain another subject, and to do so he used the analogy of intercourse, ‘Find the target, loosen up, back and forth, side to side.’”<sup>117</sup> He also described a belly dancer as being like a “bowl of jello being stimulated by a vibrator.”<sup>118</sup>

By contrast, Silva claimed his comments were more benign:

I will put focus in terms of sex, so you can better understand it. 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.<sup>119</sup>

That the court would credit Silva’s testimony over the students’ memories

106. *Id.*

107. *See* Cohen v. San Bernardino Valley College, 883 F. Supp. 1407, 1410 (C.D. Cal. 1995).

108. *See id.*

109. *See id.*

110. *See id.*

111. *Id.*

112. *Id.*

113. Cohen v. San Bernardino Valley College, 92 F.3d 968, 972 (9th Cir. 1996).

114. 888 F. Supp. 293 (D.N.H. 1994).

115. *See Id.* at 332.

116. *See Id.* at 302.

117. *Id.* at 301.

118. *Id.* at 300.

119. *Id.* at 299.

is not that egregious, but the court seems to have ignored charges from “several students [who] described things that were said to them [by Silva] as individuals during various library exercises that were personally and/or sexually offensive. They all expressed a fear of going to speak to him directly because they would never wish to be alone with him.”<sup>120</sup>

In spite of the student’s testimony, the court concluded that Silva’s “classroom statements advanced his valid educational objective of conveying certain principles related to the subject matter of his course” and were protected by the First Amendment.<sup>121</sup> The comments “were made in a professionally appropriate manner as part of a college class,” and were not so outrageous as to offend the sensibilities of a reasonable person.<sup>122</sup> The court went even further, concluding that the University’s sexual harassment policy was not “reasonably related to the legitimate pedagogical purpose of providing a congenial academic environment because it employs an impermissibly subject standard” in determining which behavior rises to the level of outrageousness.<sup>123</sup> How the court reached this conclusion is confusing, since the University of New Hampshire’s sexual harassment policy tracked almost identically the terms of Title VII.<sup>124</sup>

Neither *Cohen* nor *Silva* is an anomaly at the college level, where other courts also seem equally reluctant to punish faculty for their conduct and behavior to students.<sup>125</sup> But what makes these cases so unusual is that if a similar fact pattern were to occur in the workplace, a court would likely find a violation of sexual harassment. Indeed, *Cohen* is not that different from *Morgan v. Hertz*,<sup>126</sup> where a supervisor questioned employees about their sexual practices,<sup>127</sup> or *EEOC v. Horizons Hotel Corporation*,<sup>128</sup> where a co-worker unleashed a “stream of comments about [the plaintiff’s] body” and propositioned her for sex.<sup>129</sup> Sexually suggestive speech can be actionable on the shop floor, yet courts seem reluctant to enforce similar norms in the classroom.

### III. ACADEMIC FREEDOM

How then do we explain the courts’ different treatment of hostile environment claims between the workplace and the academy? Why are courts willing

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120. *Id.* at 300.

121. *Id.* at 313.

122. *Id.*

123. *Id.* at 314.

124. According to the UNH sexual harassment policy, sexual harassment encompassed “[u]nwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature . . . 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.” *Silva*, 888 F. Supp. at 298. Granted, the policy did give examples of sexual harassment including “sexually suggestive objects of pictures in the workplace” or “sexually degrading words to describe a person.” *Id.* However, all of these examples have previously supported harassment cases in the workplace. See LINDEMANN & KADUE, *supra* note 8.

125. See *infra* note 101.

126. 542 F. Supp. 123 (W.D. Tenn. 1981).

127. See *Id.* at 128.

128. 831 F. Supp. 10 (D.P.R. 1993).

129. *Id.* at 12.

to enforce quid pro quo cases between faculty and students, but yet seem reluctant to extend hostile work environment principles from Title VII to the academic environment?

Ironically, the answer comes to us from the *Cohen* and *Silva* courts. In reviewing both decisions it is difficult to see how the courts could have reached their rulings unless they concluded that special “protection [should] be given a public college’s professor’s classroom speech.”<sup>130</sup> Among other things, the court’s conclusion in *Cohen* that a faculty member has to be warned of a policy’s reach would be preposterous if applied in the workplace.<sup>131</sup> In such case, a group of men who had previously hassled their female co-workers could not be held responsible under a sexual harassment rule unless they were first personally warned by a supervisor that their behavior violated the policy.<sup>132</sup> This is simply not the case, as supervisors and employees alike are held responsible for informing themselves of new personnel policies and conforming their behavior to any new standards.<sup>133</sup>

The *Silva* court was even more direct, essentially enshrining *Silva*’s speech under the “transcendent value” of “academic freedom.”<sup>134</sup> Said the court, “our Nation is deeply committed to safeguarding academic freedom.”<sup>135</sup> That freedom “does not tolerate laws that cast a pall of orthodoxy over the classroom.”<sup>136</sup> In *Silva*’s case, his classroom statements “were made for the legitimate pedagogical, *public* purpose of conveying certain principles related to the subject matter of his course,” and thus merited special protection from the court.<sup>137</sup>

That the courts would seek to enshrine academic speech is not surprising, nor for that matter is it necessarily ill advised. Universities occupy a hallowed position in American culture. We enshrine scholarly life, as politicians, journalists and the general public prize the intellectual inquiry carried on there. Indeed, the courts have joined this chorus in their historical approach to campus speech,<sup>138</sup> concluding the classroom to be “peculiarly the ‘marketplace of

130. *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 971 (9th Cir. 1996).

131. *See id.* at 972.

132. *See id.*

133. *See Weaver v. Minnesota Valley Labs Inc.*, 470 N.W.2d 131 (Minn. App. 1991).

134. *Silva v. University of N.H.*, 888 F. Supp. 293, 314 (D.N.H. 1994).

135. *Id.*

136. *Id.* at 314 (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1987)).

137. *Id.* at 316. While the court does enshrine *Silva*’s comments under academic freedom, much of the rest of its argument is confusing. The court seems to apply the Conick-Pickering test to claim that *Silva* is also protected as a public employee speaking on a matter of public concern. *See id.* The court’s rationale is that because the “issue of whether speech which is offensive to a particular class of individuals should be tolerated in American schools” counts as a matter of public concern, so do *Silva*’s in-class comments. *Id.* However, “*Silva* was not punished for speech on a political or social issue, but for using sexually hostile remarks to teach writing. If the court’s flawed interpretation of what constitutes a public concern were widely adopted, the harassing speech of university professors would be insulated in almost every case, regardless of the particular circumstances.” Amy H. Candido, Comment, *A Right to Talk Dirty?: Academic Freedom Values and Sexual Harassment in the University Classroom*, 4 U. CHI. L. SCH. ROUNDTABLE 85, 111 (1997).

138. *See Widmar v. Vincent*, 454 U.S. 263 (1981) (finding a state university’s regulation of speech to be content-neutral); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (finding the New York statute barring employment in public universities of “subversive” persons unconstitutionally vague); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (finding a lecturer’s right to academic free-

ideas.’”<sup>139</sup> As enunciated by one court, “[t]he 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.’”<sup>140</sup>

In 1940, the American Association of University Professors (AAUP) and the Association of American Colleges (AAC) issued their Statement of Principles on Academic Freedom and Tenure. As part of that statement, the AAUP and AAC said:

The common good depends upon the free search for truth and its free expression. Academic freedom is essential to these purposes. . . . Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning.<sup>141</sup>

The AAUP and AAC’s statement, being a fairly broad declaration, does not define the limits of academic freedom, nor for that matter have the courts set out specific rules for its application. One commentator has argued that academic freedom has two components—a protection for professors against administrative or political interference with research, teaching and governance,” and a “constitutional academic freedom” that insulates the university in its “core academic affairs from interference by the state.”<sup>142</sup> In his view, the courts should only have jurisdiction over the latter constitutional academic freedom, with the former freedom the province of faculty interactions with administrators and outside regulators.<sup>143</sup>

But the courts have seemed to apply a blanket academic freedom to scholarly activities at the collegiate level.<sup>144</sup> As the Supreme Court has said, “[s]cholarship 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.”<sup>145</sup> Part of what concerns the courts in enshrining academic freedom is that administrators or government officials may “chill that free play of the spirit which all teachers ought especially to cultivate and practice,”<sup>146</sup> that without judicial protection high-minded expression may be limited. But this is a concern reserved primarily for academe, a province necessarily involving the exchange of ideas. As another commentator explains the courts’ deference to academic expression,

[T]he university setting is different from the workplace. Workplace speech is

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dom was violated by state’s investigation).

139. *Silva*, 888 F. Supp. at 314 (quoting *Keyishian*, 385 U.S. at 603).

140. *Id.* (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

141. American Assoc. of Univ. Professors, *1940 Statement of Principles of Academic Freedom and Tenure*, in *AMERICAN FREEDOM AND TENURE* 34 (Louis Joughin ed., 1969).

142. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 *YALE L.J.* 251, 255 (1989).

143. *See id.*

144. *See Candido*, *supra* note 137.

145. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

146. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Black, J., concurring)).



generally limited to that which is necessary to get the job done, and restrictions are permitted on speech that gets in the way of the job. University education, on the other hand, requires that students confront and engage in speech that is often offensive and disagreeable. The heart of undergraduate and graduate education takes place in the context of wide open debate.<sup>147</sup>

#### IV. CRITIQUE

My point here is not to challenge academic freedom but to urge that it be kept in perspective. Certainly, faculty and students deserve deference when engaged in scholarly expression. I, no less than others, am concerned about chilling academic interchange and the innovative ideas that can be created in an atmosphere of open dialogue. But my concern is that academic freedom has become, or at least is becoming, a defensive shield that discourages courts (and perhaps collegiate administrators) from enforcing equal opportunity requirements within academic life.

As an initial matter, the Eleventh Circuit reminds us that academic freedom is not an independent First Amendment right.<sup>148</sup> To the contrary, colleges may regulate expression where it materially disrupts classwork or other university activities or unduly interferes with the rights of others.<sup>149</sup> In fact, as Cass Sunstein notes, “[C]olleges and universities are often in the business of controlling speech, and their controls are hardly ever thought to raise free speech problems.”<sup>150</sup> He adds:

There are major limits on what students can say in the classroom. For example, they cannot discuss the presidential election if the subject is math. The same is true for faculty members. . . . The problem goes deeper. A paper or examination that goes far afield from the basic approach of the course can be penalized without offense to the First Amendment.<sup>151</sup>

Sunstein’s point seems to elude a number of courts and commentators, whose response is a blanket claim that the “prohibition of discriminatory speech which creates a hostile environment” may be applied in “employment, not educational, settings.”<sup>152</sup> As they say, such restrictions are acceptable in the workplace because, unlike college campuses, “the First Amendment has no application” there.<sup>153</sup> The First Amendment protects “public discourse”—those “communicative processes necessary for the formation of public opinion.”<sup>154</sup> By their very nature, universities are concerned with public discourse, but as the same commentators maintain, “[s]peech in the workplace does not generally

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147. Jeanne M. Craddock, *Constitutional Law — “Words that Injure; Laws that Silence:” Campus Hate Speech Codes and the Threat to American Education*, 22 FLA. ST. U.L. REV. 1047, 1049 (1995).

148. See *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991).

149. See Arthur L. Coleman & Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses*, 23 J.C. & U.L. 91, 93 (1996).

150. Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 830 (1993).

151. *Id.* at 830.

152. *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991).

153. Browne, *supra* note 71, at 513.

154. Robert C. Post, *Racist Speech, Democracy and the First Amendment*, 32 WM. & MARY L. REV. 267, 289 (1991).

constitute public discourse.”<sup>155</sup> “[W]ithin the workplace . . . an image of dialogue among autonomous self-governing citizens would be patently out of place.”<sup>156</sup>

Yet this view fails to appreciate the expanding role of the workplace in public discourse and its similarities to the academy. “[C]ommunication contributing to public opinion is [hardly] limited to the press, handbillers on public streets, and fiery orators in the parks. . . . [F]or most citizens—who are not political activists—the great bulk of their discussion of political and social issues probably occurs in the home and the workplace.”<sup>157</sup> Indeed,

[t]he special import of speech in the workplace is crucially affected by the role of the workplace as an intermediate institution in the society. The workplace mediates between individuals and the society as a whole, and it affords a space in which individuals cultivate some of the values, habits, and traits that carry over to their roles as citizens. In the workplace individuals interact with others—initially strangers, often from diverse cultural, ethnic, political, and religious backgrounds—in a constructive way toward common aims.<sup>158</sup>

If one did not know this passage’s source, one might consider it to be from a college catalogue. Just as the workplace serves as an intermediate institution, so too the college campus brings together people of varied backgrounds to learn from and with each other. Open dialogue is important in each setting.

A critical reader may object to this point, unconvinced that the workplace and college campus share similar interests. After all, unlike the college student, an employee is paid to work, not converse. Moreover, the college campus is composed of several settings—classroom, dormitories, open fora—each of which demand different approaches by the First Amendment. Even if we accept the notion that the classroom and workplace share much in common, the Supreme Court has already ruled that a college campus, “at least for its students, possesses many of the characteristics of a public forum.”<sup>159</sup>

The criticism is well taken, for the similarities between the college campus and workplace are not absolute. That, however, should not dissuade our analysis. Much of this paper considers the courts’ treatment of harassment on the shop floor and in the classroom, the two sites that are most comparable. In this respect, both Title VII and Title IX seek to prevent the same kind of harassment—speech so “serious or pervasive” that it impedes equal opportunity in the workplace or classroom.

Even if we consider other venues on campus, the analysis should not fail. If we move out of the classroom and into the dormitories, civility constraints are even more important. A student’s dorm room is her home on campus, and the added privacy she deserves there includes protection against uninvited and offensive harassment.<sup>160</sup> Perhaps the only place on campus where harassment

155. Browne, *supra* note 71, at 515.

156. Post, *supra* note 154, at 289.

157. Browne, *supra* note 71, at 515.

158. Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 727 (1997).

159. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981)

160. As Coleman and Alger add, “college dormitories are essentially the temporary private residences of individuals within the microcosm of a society that is a higher education institution. Thus,

policies would be inappropriate is the college public square, where students set up tables and soap boxes and debate the finer (and not so fine) points of the day. This I would concede is close to a public forum, a site no one need visit or remain. I certainly appreciate the perspective of those who argue a college campus cannot be a true public forum—that because the entire college serves an intermediate function civility constraints are appropriate even in the campus square. But we do not need to concern ourselves with this question because, as *Silva* and *Cohen* indicate, many of the courts that refuse to enforce hostile environment claims confine their analysis to classroom activities.

But if the workplace shares a quasi-public aspect with college campuses, how do we justify hostile environment restrictions in either setting? In fact, are we not trying to have it both ways? Under traditional First Amendment jurisprudence, both settings are either private forum, where expression may be more easily regulated, or the two are public sites where speech is presumed to be free and open. How does one justify hostile work environment in this situation, let alone collegiate harassment policies?

The answer, I think, may come from Cynthia Estlund, who herself borrows from Robert Post. To the extent that both the workplace and the college campus produce public discourse, “civility constraints”<sup>161</sup> are appropriate in each to prevent the type of poisoned attacks that destroy rational deliberation and the “possibility of constructive engagement.”<sup>162</sup> Civility constraints are a set of ground rules that say open dialogue rests on an assumption of decorum, that effective learning or work is impossible in an atmosphere of personal attack.<sup>163</sup> As Estlund herself explains:

If we understand public discourse as speech that is relevant to the collective process of self-definition and decisionmaking, then civility constraints and the preconditions of rational deliberation seem to belong somewhere *within* the realm of public discourse. . . . On this view, institutions such as schools and workplaces may be important sites for public discourse, though surely not of unbounded critical interaction.<sup>164</sup>

Civility constraints also imply a certain level of equality in both the workplace and classroom. If both sites serve as mediating institutions, it is crucial that no group of workers or students (faculty or staff) receive special preferences or disparate treatment without a valid basis. Against this backdrop, some commentators have argued that the government’s interest in workplace equality stands alone as a justification for punishing some harassment.<sup>165</sup> As they say, “speech that the speaker knows is offensive,” that is directed at an employee be-

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the educational benefits in this context must by necessity include the benefits typically associated with living in one’s own home, including privacy, personal security and safety. Conduct within this realm of interaction must be regulated to the extent necessary to protect these interests.” Coleman & Alger, *supra* note 149, at 121.

161. Estlund, *supra* note 158, at 736.

162. *Id.* at 735.

163. *See id.*

164. *Id.* at 736.

165. See Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1843-47 (1992).

cause of her sex, and that creates a hostile work environment may be restricted because it devalues the position of women in the workplace.<sup>166</sup> But again, it is entirely unclear why this rationale should not also extend to the classroom. As another commentator admits, “if the workplace context of offensive speech matters only because of the importance of equality in employment, then similar speech restrictions should be accepted in any sphere in which we could discern a strong commitment to equality, such as education . . . .”<sup>167</sup> Indeed, the very basis of Title IX is gender equity in education.<sup>168</sup> Because “[s]exual harassment creates an inhospitable, and even abusive, educational environment for women . . . [it] functions in much the same way as overt exclusion to create a significant barrier to equal opportunity in education. The denial of women’s educational equality sustains women’s subordinate social and work status and subverts women’s pursuit of autonomy.”<sup>169</sup>

Of course, one person’s ‘civility constraint’ is another’s ‘viewpoint discrimination,’ and many observers and courts instinctively flinch when hostile environment claims are applied to the college campus.<sup>170</sup> To be sure, there is precedent to fear censorship on campus. Apart from the McCarthy era, there have been cases in which university officials censored or expelled students because they deviated from “proper” values or beliefs.<sup>171</sup> And, of course, the fear of chilling speech is real, especially in an environment that prizes open dialogue.

But it is entirely possible to use sexual harassment law to forbid harassment in the classroom without touching other speech that is endemic to the educational mission. That higher education tolerates and encourages freedom of thought does not mean that we should hold off from punishing harassment in the classroom. In fact, harassment cases arise only infrequently and are unlikely to constrain meaningful discussion.<sup>172</sup> The terms of the claim insure this. By requiring that conduct be so “severe or pervasive” that it affects the educational environment, harassment law should screen out comments and behavior that are merely annoying, distasteful, or occur only once or twice.

In the end, I believe academic freedom has become a straw man, obscuring the real explanation for the courts’—and many academicians’—diffidence over hostile environment claims in the academy: they don’t want the responsibility of evaluating which speech is permissible and which comments are harassing. As a former college administrator I can certainly appreciate this concern, but it fails to relieve us of the responsibility of removing harassment from the academic environment.<sup>173</sup> The task is hardly different from other settings, where supervisors

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166. *Id.* at 1846.

167. Estlund, *supra* note 158, at 715.

168. See 20 U.S.C. § 1681(a) (1994).

169. Candido, *supra* note 137, at 108.

170. See, e.g., *Silva*, 888 F. Supp. 293 (D.N.H. 1994); *UWM Post v. University of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Browne*, *supra* note 71; *Post*, *supra* note 154.

171. In the 1928 case, *Anthony v. Syracuse University*, 224 A.D. 487 (1928), the Supreme Court of New York permitted university administrators to expel a student because “they did not think of her [as] ‘a typical Syracuse girl.’” *Id.* at 489.

172. See *supra* notes 93-94 and accompanying text.

173. Among other things, I recognize how a harassment charge against one faculty member can affect others, at times making them timid in class. In some sense this is a fact of life we must live

have to distinguish between harmless expressions of opinion and those that actively discriminate.<sup>174</sup> If anything, the responsibility is greater in collegiate life, where “the Nation’s youth are exposed to a multitude of ideas that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination.”<sup>175</sup>

Professors and administrators may not think this is their duty, but they have been doing similar things for years. Just as teachers reprimand students for speaking out of turn or straying wildly off topic, so may college officials punish students or faculty who seek to harass members of the college community.<sup>176</sup> A similar point holds true for the courts. Just as they have allowed employers to discipline employees who harass co-workers, they must permit colleges to punish those faculty or students who interfere with the educational rights of others. Academic freedom is about education. When hostile behavior gets in the way of the educational process, academic freedom must give way to equal opportunity.

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with in order to eradicate serious and pervasive harassment. The answer, I think, is to push forward anyhow, recognizing that teaching styles receive judicial deference, and to be unafraid to turn down harassment charges firmly when they have no merit.

174. See KENT GREENAWALT, *SPEECH, CRIME AND THE USES OF LANGUAGE* (1989) (discussing the challenges in separating personal opinion from actionable attacks).

175. *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 345 (1st Cir. 1989).

176. Among the possible sanctions are warning, reprimand, counseling, suspension or expulsion/termination.