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*1 COHEN V. SAN BERNARDINO VALLEY COLLEGE: THE SCOPE OF ACADEMIC FREEDOM WITHIN THE CONTEXT OF SEXUAL HARASSMENT CLAIMS AND IN-CLASS SPEECH

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***2** I. INTRODUCTION

The price of freedom has always been expensive. [FN1]

-Martin Luther King, Jr.-

Freedom has always been costly. These costs have sometimes included limitations on our individual expression, dignity, or liberties. As Louis Menand writes, "Coercion is natural; freedom is artificial. Freedoms are socially engineered spaces which parties engaged in specific pursuits enjoy protection from parties who would naturally seek to interfere in those pursuits. One person's freedom is, therefore, always another's restriction." [FN2]

Within the context of the First Amendment, freedom of speech has not been without its own price. [FN3] This price is perhaps more expensive because of the value we place on the philosophical and constitutional tenets which guard free speech. [FN4] These philosophical and constitutional tenets are the very principles and foundations upon which America and its democratic institutions ***3** were founded. Thus, "freedom" has become a passionate word, symbolic of democracy and all that protects us from governmental tyranny and excessive intrusions. [FN5] Yet, the tyrannies which cost us our freedom are often subtle. These subtle intrusions into our homes, places of employment, and educational institutions are sometimes disguised.

One subtle intrusion or attack upon our freedom is the threat to uninhibited dialogue and free speech in a classroom setting. This tyranny of censorship in an educational environment reaches to the very core of our democratic principles and the preparation of our citizenry to adequately participate in the American political and economic arenas. As Justice Frankfurter noted in his concurrence in Wieman v. Updegraff: [FN6]

> The process of education has naturally enough been the basis of hope for the

perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.

To regard teachers in our entire educational system, from the primary grades to the university as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice; ... they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. [FN7]

The preparation of our citizenry and the molding of our leaders is, therefore, at the very heart of the rigorous discourse which takes place between college professors and their students. Ideas central to this exchange include the concept of academic freedom and the creation of an academic environment which is conducive to learning and the critical thought process. [FN8] Academic ***4** freedom, as it relates to a teacher or instructor, embraces three basic elements. These elements include: 1) an instructor's freedom to conduct research, 2) to publish the related results, and 3) to openly discuss related subject matter in the classroom. [FN9]

However, there is often a clash between the concept of academic freedom, and campus policies which promote an educational environment free from intimidation and coercion. [FN10] Campus sexual harassment policies are an example of policies, designed to promote an educational atmosphere conducive to learning, but which have come into conflict with the doctrine of academic freedom and a professor's in-class speech. [FN11]

Conservative studies indicate that20 to 30 percent of undergraduate female students experience some type of sexual harassment from at least one of their professors or an administrator during their undergraduate years. [FN12] When definitions of sexual harassment are broadened to include sexist remarks and other forms of gender harassment, the frequency of sexual harassment among undergraduate women exceeds 75 percent. [FN13] A 1993 survey of 2,000 doctoral students and 2,000 doctoral faculty revealed that between 15 percent to 40 percent of faculty and between 5 percent and 35 percent of students surveyed had knowledge of someone who had been sexually harassed by a faculty member. [FN14] The issue of sexual harassment becomes even more complicated when the role of the state or a public university as educator is examined in light of the state's duty as an employer. In particular, ***5** the need to promote an efficient and effective learning environment for students free from sexual harassment is arguably in conflict with the state's need as an employer to protect a professor's academic freedom in the classroom. [FN15]

This dilemma can best be illustrated by Cohen v. San Bernardino Valley College. [FN16] Professor Cohen was accused of creating a hostile sexual environment by a female student due to his use of obscenities in the classroom, confrontational teaching style, and discussion of issues such as consensual child sex and articles he had written for Playboy and Hustler. [FN17] Cohen was sanctioned by the college based upon a recently adopted sexual harassment policy. [FN18] College officials ordered Cohen to attend a sexual harassment seminar, warn students of his teaching style, and modify his teaching style. [FN19] After an unsuccessful appeal, Cohen filed suit against San Bernardino Valley College alleging violation of his free speech rights, academic freedom, and due process. [FN20] Thus, the Cohen case demonstrates the problem that postsecondary institutions face as they try to develop sexual harassment policies which ensure that students are free from intimidation and unreasonable discomfort in the classroom while protecting academic freedom and critical thinking.

In deciding whether Professor Cohen's speech was protected, the district court focused upon whether his speech was a "matter of public concern." [FN21] This analysis, commonly referred to as the Pickering- Connick test, has its doctrinal origin in Pickering v. Board of Education [FN22] and Connick v. Myers. [FN23] Under the Pickering-Connick test, the court focuses on the government as an employer and

first discerns if the speech in question is of private or public concern. [FN24] If the public employee's speech is on a matter of private concern, ***6** the speech is unprotected and the analysis ends. [FN25] Thus, the government can legally regulate purely private speech. However, if the court determines that the speech is on a matter of public concern, it engages in a balancing test to note if the value of the controversial speech outweighs the state's interest in efficiency or in preventing disruption to the workplace or educational environment. [FN26] The problem with the use of the Pickering-Connick test in a postsecondary setting is that it fails to take into consideration the special role of the government as an educator. Additionally, the Pickering- Connick test does not delineate between the educational mission of elementary/secondary education, which includes the transmission of a defined body of knowledge and values, in comparison to postsecondary education with its emphasis on developing the higher order and critical thinking skills of adult students. [FN27]

Thus, Part II of this article discusses the tension between in-class speech and the need to protect a professor's academic freedom while still providing an atmosphere free from sexual harassment. Cohen v. San Bernardino Valley Community College [FN28] is used to set the stage and illustrate the complexities of the problem. Part II also provides a brief look at encroachments upon the modern postsecondary institution and the impact of these encroachments on academic freedom. Part III argues that the Pickering-Connick or "matter of public concern" doctrine, which is often employed by courts in reviewing a public university professor's speech, is an inappropriate starting point for evaluating a hostile environment claim involving in-class speech. The Pickering-Connick test was developed as an outgrowth of a secondary education case involving a teacher's speech outside the classroom and also "government as employer" litigation. Therefore, it is argued that this test fails to take into consideration the state's educational objectives and higher education's distinct culture. Part III further discusses the analytical framework used by various circuit courts in assessing the protection due a professor's in-class speech and academic freedom. These cases demonstrate the inconsistent legal frameworks used by courts in evaluating the constitutional protection to be given a professor's in-class speech based on a First Amendment claim.

Part IV includes a discussion of hostile environment claims and the analytical frameworks used by courts in reviewing these cases under Title VII of the Civil Rights Act of 1964 [FN29] and Title IX of the 1972 Educational Amendments. ***7**[FN30] Part V entails a discussion of the problems with the analytical frameworks used by the courts in evaluating academic freedom and sexual harassment claims involving public colleges and universities and why a new framework is needed. Part V also outlines a new theoretical framework which takes into consideration the goals of a public postsecondary institution, the educational needs of students, the pedagogical aims of public postsecondary professors, and the need to provide a classroom atmosphere free from sexual harassment. This new framework is then applied to the Cohen case to illustrate its application in a postsecondary setting. Finally, recommendations are provided to help campus officials design sexual harassment policies without infringing upon academic freedom.

II. POSTSECONDARY INSTITUTIONS: SECURING THE RIGHTS OF FACULTY AND STUDENTS

Public colleges and universities are similar to other state agencies in that they are political entities. As political entities that are dependent upon state legislatures, private donors, and federal grants, they are heavily influenced by societal forces and changing community values. Additionally, because higher education serves a variety of constituencies, throughout history these constituencies have sought to shape its internal policies and educational mission. Students, alumni, philanthropists, government officials, and taxpayers have used various political, legal, and economic avenues to affect curricular choices, hiring of faculty and staff, and the measurement of student outcomes. The influence of various constituencies has often been viewed by those within the academy as not only an encroachment upon faculty and student rights, but also an infringement upon institutional autonomy and academic freedom. These external and internal pressures,

however, have their origins in the founding and expansion of the modern postsecondary institution.

A. A Brief Look: Encroachments Upon the Modern Postsecondary Institution And Academic Freedom

With the expansion of the modern university in the early 1900's, came the push of big business and the need to fund more classrooms and build larger institutions. Faced with the complexity of building contemporary colleges and universities that functioned much like corporations, the architects of modern higher education turned to state legislatures and private donors for ***8** support. [FN31] With these donations came private and public interest groups and a desire to control instruction, and the hiring and firing of professors. [FN32]

Seeking self-protection, Arthur Lovejoy, a noted Stanford philosopher and seventeen other academicians, formed the American Association of University Professors (AAUP) in 1915. [FN33] The AAUP would not only become a major professional organization for college and university faculty but would take the lead in drafting a statement on the principles of academic freedom. The AAUP's 1915 General Declaration of Principles states that the university professor's major responsibility is to society at large and not to the university or board of governors. [FN34] The 1915 Declaration further notes that professors should be free to announce the fruits of experimental ideas both inside and outside the classroom but with this privilege comes the burden of doing so responsibly. [FN35] The AAUP also adopted additional statements on academic freedom in 1940 and interpretative comments in 1970. [FN36] These statements and principles have often been viewed as a type of "industry custom" by the courts and universities. [FN37]

***9** The Depression, two world wars, and the "Cold War" brought new political and intellectual pressures to higher education. These pressures manifested themselves in the form of state and private regulation of instructional content and curriculum. Other realities included the onslaught of loyalty-oath legislation of the 1930s. [FN38] Additionally, with McCarthyism and Red Scare fears, universities required faculty to sign statements denouncing communism or lose their jobs. [FN39] National security issues and the Cold War with Russia further increased national tension, and institutions tolerated little diversity of opinion relating to communism. [FN40]

Contemporary issues, along with external and internal pressures, continue to interface with the concept of academic freedom and the role of the university in shaping the ideas and the future of our nation within a global community. Today, this debate manifests itself in the form of political correctness and the "politicization" of the humanities. In particular, the phrase, "political correctness," has been used broadly to define "the belief that 'leftist' attitudes to the problems of the world have come to dominate the universities, the ideological fallout of 1960's radicalism, and the notion that this attitude [has been] accompanied by a growing intolerance of those who [do] not subscribe to the 'correct world view."D¢ =EQP:0010¢ =' [FN41] Often cited examples of political correctness are pressure by feminist and ethnic groups to infuse the accomplishments, viewpoints, and the writings of women and persons of color into a curriculum that has traditionally been defined as Western or Eurocentric. [FN42] ***10** Under this rationale, new university departments such as African American, Chicano, and Women's Studies are viewed as illegitimate and a plan by some to undercut the quality of higher education.

Politicization, the idea that all knowledge is political and ultimately furthers the goals of some person or group, implies that instruction and scholarship should be undertaken with this goal in mind and should specifically redress the wrongs of subordinate groups and victims. [FN43] Additionally, another concept which has clashed with the concept of academic freedom in the last decade is the concept of "epistemological relativism." Epistemological relativism is the idea that judgments and values are not objective or universal. Since there are ultimately no genuine ideals, epistemological relativism holds that "reason" and "truth" should, therefore, be disregarded for historical expressions which focus more on one's

"perspective," ""understanding," and "interpretation." [FN44] Scholars favoring such views focus on multiculturalism, deconstructionism, and postmodernism. [FN45] Thus, there is mounting discord between academic freedom and the dogmas of politicization, epistemological relativism, and other rising philosophical tenets regarding the proper use of the classroom in promoting these ideas. [FN46]

The conflict between the role of higher education in shaping the values and viewpoints of society, and the need for free and deliberative dialogue in the classroom, has come into sharp opposition with the image of higher education as the "marketplace of ideas." [FN47] An additional conflict is the tension between campus policies, which promote an educational environment free of sexual harassment, and the freedom of professors to discuss subject matter and teach in a way which promotes a marketplace of ideas. In particular, sexual harassment guidelines often clash with the pedagogical styles and instructional methods of college instructors and a student's right to be free from a hostile sexual environment.

***11** B. Restrictions on Academic Freedom in an Educational Setting

Recognizing a form of academic abstention, the judiciary has often been reluctant to interfere with higher education decisions and issues involving academic freedom. [FN48] The Supreme Court, however, has never precisely defined the protection to be given a college professor's speech within the context of the First Amendment and the doctrine of academic freedom. [FN49] Nevertheless, to prove a First Amendment violation involving academic freedom, a professor at a public institution must demonstrate that: 1) his speech is constitutionally protected and 2) the speech was the motivating factor in the decision to discipline him. [FN50]

Noting the importance of academic freedom, the Court in Keyishian v. Board of Regents held that a New York law, which required the faculty at the State University of New York - Buffalo to sign a statement of non-Communist membership, was unconstitutional. [FN51] Justice Brennan in an opinion for the majority wrote, "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to ***12** the teachers concerned." [FN52] Although the concept of academic freedom had been alluded to in other cases, in Keyishian the Court clearly linked the concept of academic freedom to the First Amendment, thus, laying the foundation for future cases. [FN53]

Although the Supreme Court has determined that academic freedom is within the confines of the First Amendment, educational officials may place some restrictions on academic expression in an educational setting. [FN54] Specifically, in Tinker v. Des Moines School District, the Court held that a school policy banning the wearing of black armbands by students protesting the Vietnam War violated students' First Amendment freedom of expression rights. [FN55] Despite the Court's denouncement of the school policy in Tinker, the Court recognized that school administrators could place prohibitions on freedom of speech in some cases. However, the Court noted that in order to restrict free speech or freedom of expression, the questionable activity must "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." [FN56]

The Court has also recognized that educational institutions have wide discretion in selecting their course offerings and subject matter. In Hazelwood School District v. Kuhlmeier, the Supreme Court ruled that high school administrators have "broad control over their curriculum" and could control the content of a curriculum-prescribed student newspaper if the control was related to "legitimate pedagogical concerns." [FN57] In Hazelwood a high school principal censored two articles that had been written and edited by students in connection with a journalism class. The students contended that this censorship violated their First Amendment right to free speech. [FN58] In addition, the Court noted that schools have a recognized interest in disassociating ***13** themselves from speech which interferes with the work or rights of other students and which is reasonably considered inappropriate or unsuitable for immature audiences. [FN59] In a footnote, the Court declared that it was not deciding what deference is appropriate with respect to school- sponsored activities in a university or college setting. [FN60]

Although Hazelwood and Tinker are two Supreme Court cases dealing with student academic freedom and censorship in secondary schools, these cases have had important implications for higher education. Hazelwood and Tinker are often used by the courts in deciding First Amendment postsecondary issues. [FN61] In particular, these cases are cited for the proposition that education officials can place restrictions on speech and expression which interfere with the basic educational mission or which reasonably relate to ""legitimate pedagogical concerns."

The application of First Amendment secondary education law to postsecondary cases, involving allegations of infringements upon academic freedom, has led to confusion. Because the Supreme Court has never determined what legal protection is due a public college professor's in-class speech, no clearly manageable standard exists. Thus, conflict exists among the circuits as to what appropriate legal standard should be used to assess academic freedom violation claims in public higher education classrooms. This is a particularly difficult problem as campuses face lawsuits which challenge the enforcement of "hate speech codes" [FN62] and "sexual harassment policies" to promote diversity and an environment conducive to learning. [FN63] The ***14** need to harmonize academic freedom with an educational atmosphere which promotes intellectual discourse, yet, protects students from a hostile environment is further illustrated by the Cohen case below.

C. The Clash Between Academic Freedom and Campus Hostile Environment Policies: Cohen v. San Bernardino Valley College

Cohen, a tenured professor at San Bernardino Valley College (College), was charged with violating the College's sexual harassment policy by a female student, Anita Murillo. [FN64] The College, a public community college, determined that Cohen had violated its new sexual harassment policy based on the theory of hostile sexual environment. [FN65] Specifically, Cohen taught a remedial English class at the College. Murillo filed a sexual harassment complaint with the College stating that she was offended by Cohen's use of profanity and vulgarities and his comments which she believed were intentionally directed at her and other female students. During the class, Cohen, using a "confrontational" teaching style, discussed the issues of pornography and read several articles aloud that he had written for Playboy and Hustler. [FN66] He also discussed topics such as cannibalism, obscenity, and consensual sex with children as it related to Jonathan Swift's essay, "A Modern Proposal." As a writing assignment, Cohen instructed the class to write an essay defining pornography. Ms. Murillo asked Cohen for an alternative assignment, and he refused. [FN67] Eventually, Ms. Murillo stopped attending remedial English class and complained about Cohen's statements and conduct to the Chair of ***15** the English Department. [FN68] Subsequently, Ms. Murillo filed a sexual harassment grievance against Cohen. [FN69]

After a hearing, the Grievance Committee found that Professor Cohen had violated the College's policy against sexual harassment by creating a hostile environment. [FN70] Upon a recommendation from the Grievance Committee, the President of the San Bernardino Valley College District issued a ruling, finding Cohen also in violation of the sexual harassment policy. Both Cohen and Murillo appealed the finding to the Board, and a hearing was held. The Board found that Cohen had engaged in sexual harassment which unreasonably interfered with an individual's academic performance and created an intimidating, hostile, or offensive learning environment. [FN71] The Board disciplined Cohen by requiring him to: 1) provide a syllabus to students at the beginning of class regarding his teaching style, 2) attend a sexual harassment seminar within 90 days, 3) undergo a formal evaluation in connection with the collective bargaining agreement, and 4) become sensitive to the particular needs and backgrounds of his students and to modify his teaching style when it became apparent that he was creating an environment that impedes a student's ability to learn. [FN72] Cohen was also warned that further violations would result in suspension or termination. [FN73]

Cohen filed a lawsuit on February 18, 1994, in the U.S. District Court for the Central District of California under 42 U.S.C. Section 1983 against the College and

various college officials. [FN74] He also alleged that his First and Fourteenth Amendment rights had been violated and that he was being punished ***16** for his classroom speech under the sexual harassment policy without due notice. He asserted that his rights to free speech, academic freedom, and due process were violated. The district court dismissed the suit against the College educational officials on the theory of qualified immunity under the Eleventh Amendment. [FN75] The district court also granted summary judgment for the College with respect to Cohen's due process claim and entered a judgment against Cohen on his First Amendment Claim. [FN76]

D. The District Court's and 9th Circuit's Analysis of Cohen

In its analysis, the district court outlined when the "government as employer" can preclude an instructor from publicly expressing his views. Recognizing that in-class speech by a professor falls under the doctrine of academic freedom, the district court's framework focused on whether Professor Cohen's speech could be characterized as a matter of public concern (Pickering- Connick test). [FN77] Noting that if Cohen's speech was a matter of public concern, the court recognized that the state of California must show that his speech "substantially interfered" with governmental duties. [FN78] In denying injunctive relief on Cohen's First Amendment claim, the district court held that Cohen's profanity was not speech on a matter of public concern and under Waters v. Churchill, [FN79] the government could prohibit profanity. However, Cohen's discussions of pornography and other sexually-oriented topics were held to be matters of public concern, and thus, protected speech. [FN80]

Having concluded that the topic of pornography was protected, the district court then engaged in a balancing test, as outlined in Connick, to determine if the state's legitimate interest in fulfilling its educational mission outweighed Cohen's First Amendment interest in free speech. The court reasoned that the College's interest in effectively educating in the classroom outweighed Cohen's interest in focusing on sexual topics, to the extent that the College only required him to warn students of his teaching style. [FN81] The district court ***17** also stated that the College's interest was further bolstered by the constitutional implications of sexual harassment. [FN82]

On appeal, the Ninth Circuit Court of Appeals held that the College's sexual harassment policy was unconstitutionally vague as applied to Cohen, thereby, reversing the district court's judgment. [FN83] The Ninth Circuit did not address Cohen's due process claim or the First Amendment protection due a public college professor's classroom speech. [FN84] Relying on Broadrick v. Oklahoma, [FN85] the Ninth Circuit stated that "statutes regulating First Amendment speech must be narrowly drawn to address the specific evil at hand." [FN86] The court then stated that regardless of the college officials' intentions, Cohen was simply without notice that the policy would be applied in such a way as to punish his "longstanding teaching style." [FN87] The court went on to state that the College's sexual harassment policy was unconstitutionally vague, and the sanctioning of Cohen a "legal ambush." [FN88] However, the court did not decide if the College could have punished Cohen's speech if its policy had been "more precisely construed by authoritative interpretative guidelines" or if the policy was "clearer or more precise." [FN89]

III. THE PICKERING-CONNICK TEST: THE PUBLIC CONCERN DOCTRINE IN AN EDUCATIONAL ENVIRONMENT

In deciding if a public employee's speech or conduct is due First Amendment protection, the Supreme Court has traditionally applied the "matters of public concern" doctrine (Pickering-Connick test). This test requires that the employee's speech be not on a private concern but on a "matter related to public concern" or a matter that is of "political, social, or other concern to the community." [FN90] Courts then apply a balancing test to decide if the public employee's First Amendment interests in the speech at issue outweigh the government's interest in efficiency. [FN91]

***18** A. Balancing A State's Efficiency Interests Against A Public Employee's Right to Free Speech

The Pickering-Connick test derives from two cases. [FN92] In the first case, Pickering v. Board of Education, [FN93] Marvin Pickering, a high school teacher, was dismissed for writing a letter to a local newspaper criticizing a bond proposal and tax increase to raise school revenue. [FN94] Pickering asserted that the writing of the letter was protected by the First and Fourteenth Amendments. The school system claimed that the information in Pickering's letter was erroneous and that Pickering owed a duty of loyalty and support to his superiors and that "if he must speak publicly, he should do so factually and accurately, commensurate with his education and experience." [FN95] The Supreme Court held that Pickering's dismissal violated his constitutional rights and focused particularly on whether his letter was of legitimate public concern. The Court, using a balancing test, weighed Pickering's interests as a "teacher, [and] as a citizen, in commenting on matters of public concern, [against] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." [FN96] In reaching its conclusion, the Court stated that Pickering's letter, although containing erroneous information, did not impede the performance of his classroom duties or the regular operation of the school. [FN97] Thus, the school system's interest in limiting Pickering's discourse in the public debate was not significantly greater than its interest in limiting similar contributions by members of the public at large. [FN98]

In the second case, Connick v. Meyers, [FN99] the Supreme Court expanded its holding in Pickering. Connick involved the dismissal of Sheila Myers, an Assistant ***19** District Attorney in New Orleans. Myers circulated an office questionnaire which asked office workers about participation in political campaigns and morale. The Court reasoned that unless it concluded that Myers' questionnaire could be "fairly characterized as constituting speech on a matter of public concern," it was "unnecessary for [the Court] to scrutinize the reasons for her discharge." [FN100] In other words, the employee's expression must be on "any matter of political, social, or other concern to the community" in order to receive a presumption of First Amendment protection. [FN101] According to the Court, "government officials should enjoy 'wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment' ... when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision." [FN102] Therefore, if the speech in question is not on a matter of public concern, the court's analysis ends, and the state may regulate the speech. [FN103] If the court determines that the speech was on a matter of public concern, it then weighs the state's efficiency interest against the value of the speech. [FN104] In the final analysis, the Court held that Myers' question regarding political campaigns was a matter on which the public had a legitimate interest, and thus, was a matter of public concern. [FN105]

After determining that one of the questions (political campaigns) dealt with an issue of public concern, the Court then employed the Pickering balancing test to determine if the state's interest in efficiency and preventing insubordinate speech outweighed Myers' interest in circulating the questionnaire. [FN106] The Court concluded that the District Attorney's Office could censor Myers' actions as acts of insubordination which interfered with the efficient operation of the government. The Court also emphasized that some constitutionally unprotected speech "falls into one of the narrow ... well-defined classes of expression which carries so little social value, such as obscenity, that the state can prohibit and punish such an expression by all persons in its jurisdiction." [FN107] In addition, the Court stated that in situations ***20** other than Connick, where the employee's speech more substantially involves matters of public concern, a stronger showing of disruption to efficiency of the operation would be needed. [FN108]

In Mt. Healthy City School District Board of Education v. Doyle, the Supreme Court

held that the conduct of Doyle, president of the local teacher's association and an untenured public high school teacher, was protected under the First Amendment. [FN109] Doyle, the teacher in question, did not have his contract renewed after he was involved in a dispute with local teachers. He was also accused of making obscene gestures to students and providing a copy of the principal's memorandum on the teacher dress code to a community radio station. The Court stated that whether a governmental employee's speech is protected entails a balance between interests of the teacher, as citizen, in commenting upon matters of public concern and the interest the state as an employer has in promoting efficiency. [FN110] According to the Court, Doyle's lewd gesture in the cafeteria was not considered protected speech. However, since Doyle's conduct regarding the memorandum was protected speech, the case was remanded in order to give the Board a chance to prove by a "preponderance of evidence that it would have reached the same decision" regardless of Doyle's protected conduct. [FN111]

Mt. Healthy has important implications for the Pickering-Connick test. Under the Pickering-Connick test, the plaintiff initially had the burden of ***21** proof in demonstrating that his dismissal was constitutionally protected. However, Mt. Healthy also requires a plaintiff to prove that his speech was a "motivating" or "substantial" factor in the dismissal. [FN112] The burden then shifts to the defendant to show that based on a constitutionally permissible reason the "same decision" would have been made to discipline the plaintiff. [FN113]

Thus, a university professor alleging a First Amendment or academic freedom violation, would have to first prove under the Pickering-Connick test that his speech was on a "matter related to public concern." Next, the court would balance the professor's interest in the speech at issue against the university's interest in efficiency. Additionally, under Mt. Healthy, a professor would have the burden of establishing that his in-class speech was 1) constitutionally protected, and 2) a "substantial or motivating factor" in his dismissal or sanctioning. The university then has the opportunity to prove by a preponderance of evidence that it would have made the same adverse employment decision for a constitutionally or legally permissible reason. If the university fails in its burden, the disciplinary measure or dismissal is not upheld. [FN114]

The Supreme Court's most recent pronouncement regarding the Pickering-Connick test was in Waters v. Churchill. [FN115] In Waters, the Court held that before a public employee can be discharged for unprotected speech, the employer must undertake a reasonable investigation in order to evaluate the content of the speech. In its evaluation, the government must also in good faith believe the facts upon which it based its disciplinary measure. [FN116] Although the Waters Court did engage in the Pickering-Connick balancing test, the ""reasonable investigation" step by the employer is an additional procedural element. The new element forces courts to evaluate the public employee's speech based on facts gathered from the employer's investigation. [FN117]

Waters involved the dismissal of a nurse, Churchill, from a public hospital. The dismissal was based on her criticism to another employee of the hospital's cross-training policy and the obstetrics department. The conversation was overheard by other nurses who reported Churchill's conversation to her supervisor. Churchill's supervisor contended that Churchill was insubordinate, ""knock[ed] the department," and had said that obstetrics was a "bad place to work." [FN118]

In announcing its decision, the Water's Court stated that the government as employer has broader powers in censoring speech than does the government as sovereign in restricting the speech of regular citizens. [FN119] According to ***22** the Court, this additional power derives from the interest the government has as employer in carrying out an assigned task both effectively and efficiently. Therefore, the "government's interest in achieving its goals as effectively and as efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant interest when it acts as employer." [FN120]

Ultimately, the Court noted that Churchill had "produced enough evidence to create a material issue of disputed fact" regarding the hospital's actual motives in

dismissing her. Particularly, Churchill had criticized the cross-training program in the past and hospital management had shown some sensitivity toward these previous comments. Thus, the Court concluded that a reasonable fact finder could have concluded that Churchill was fired not because of her disruptive comments to other employees, but due to her non- disruptive criticisms of the cross-training program which were made in the same conversation or criticisms of the program which she had made earlier. [FN121] In light of its reservations regarding the hospital's true motive, the Court remanded the case for a determination of which statements made by Churchill were actually protected. [FN122]

Waters has important implication for public employees and public academic institutions. In an educational context, Waters raises two essential questions: 1) how are public colleges and universities to respond if they deem it necessary to sanction a faculty member or employee for speech in which the factual statement is disputed, and 2) can colleges and universities sanction faculty members and employees for the "potential disruptiveness" that their speech may cause in the workplace without violating the employee's First Amendment rights? In examining the first question, Waters demonstrates that employers must undertake an investigation as it relates to the disputed statement in question and that courts in applying the Pickering-Connick test will look to the "reasonableness of the employer's conclusions." [FN123]

***23** Signaling a move toward greater protection of governmental efficiency and effectiveness, the Court also concluded that even if Churchill's criticism of the cross-training program was on a "matter of public concern," which was left undecided by the Court, that the "potential disruptiveness of the speech as reported was enough to outweigh whatever First Amendment value it might have had." [FN124] Thus, it appears that, based upon their professional experiences, administrators and educational entities may sanction a public employee for a statement if they reasonably believe that the employee's comments may "potentially interfere" with university efficiency and effectiveness. Therefore, Waters takes on particular importance if a university wishes to sanction a professor for in-class speech which the university views as "potentially" disruptive to the learning environment.

The Court acknowledged that because the government must often rely on hearsay, its personal knowledge of a person' s credibility, and other factors that the judicial process ignores, the government's reliance on these "practices [may] involve some risk of erroneously punishing protected speech." [FN125] Nevertheless, in light of the significance of academic freedom, it is unclear under Waters how the Supreme Court would balance the efficiency interests of the government against the principles of academic freedom and a professor's in-class speech.

B. Rethinking the Pickering-Connick Test In An Educational Setting

Although Pickering's speech or letter to the newspaper involved speech "outside" of the classroom, the Pickering-Connick test has been used by lower courts to assess the protection due a professor's "in-class speech" in the context of an alleged First Amendment violation and within the context ***24** of academic freedom. The continued use of the Pickering-Connick test in relationship to in-class speech is most likely due to the fact that public school teachers and university professors enjoy some of the same privileges and have some of the same responsibilities to the government as do other public employees. However, the development of the Pickering-Connick test is also based upon jurisprudence which has no connection to academic institutions. Specifically, in the Connick case, Myers' questionnaire was not conducted in an educational or instructional setting but a legal office. [FN126] The failure to distinguish between these two settings ignores the importance of academic freedom and the need for a teacher or professor to exercise broad discretion in helping the state fulfill its unique instructional mission and in satisfying its function as educator.

Despite the fact that courts have routinely applied the Pickering-Connick test in these cases, recent case law reflects a new shift in Pickering-Connick jurisprudence or an evolutionary turn in its application in a public classroom setting. For

example, the First Circuit has utilized an alternative analysis or different balancing test in weighing the value of a teacher's instructional speech in the classroom against an educational institution's (government) efficiency interests. [FN127] Additionally, the Tenth Circuit has rejected the "matters of public concern test" as it relates to issues involving in-class speech and the academic enterprise. [FN128] While noting the importance of the Pickering-Connick balancing test, the Eleventh Circuit has used additional factors in balancing the value of a professor's in-class speech against the efficiency interest of a public university. [FN129]

1. The First Circuit: Mailloux v. Kiley

In Mailloux v. Kiley the First Circuit upheld a district court's ruling regarding the dismissal of a public school teacher who demonstrated theories relating to taboo words and phrases by using the word, "fuck." [FN130] Describing two ***25** types of academic freedom, the district court held that the teacher's dismissal violated his due process rights. The first type of academic freedom defined by the court was a substantive right to select a teaching method or strategy which serves a demonstrated educational purposes. [FN131] The second type involved a procedural pronouncement against being dismissed for using teaching methods that were neither clearly proscribed or which a teacher should not have known [were] proscribed. [FN132] The district court concluded that Mailloux was carrying out a function that was a ""vital First Amendment right." [FN133] Furthermore, in concluding that Mailloux's dismissal violated his due process rights, the district court focused on his right to be warned about experimental teaching methods that are not in the public's best interest before discharge. [FN134] Neither the district court nor the First Circuit Court of Appeals addressed the issue of whether Mailloux's speech was on a matter of public concern. However, citing Pickering and Tinker, the district court stated that "the Fourteenth Amendment recognizes that a public school teacher has not only a civic right to freedom of speech both outside and inside the schoolhouse, but also some measure of academic freedom as to his in-classroom teaching." [FN135]

In affirming the district court's decision, the First Circuit cautioned that "at present [there is] no substitute for a case-by-case inquiry into whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech." [FN136] However, the First Circuit also noted that "free speech does not give teachers a license to say or write in class whatever they may feel ... and that the propriety of regulations or sanctions ... depend[s] on ... 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 the presentation." [FN137]

2. The First Circuit: Ward v. Hickey

A 1993 case, Ward v. Hickey, involving the dismissal of a nontenured biology teacher in Massachusetts, presented the First Circuit with a similar issue. [FN138] Failing to be reappointed by the school board, Toby Ward, a teacher in the town of Belmont, alleged a violation of her First Amendment rights. ***26** Ward was not reappointed following a discussion with her ninth grade biology class regarding the abortion of Down's Syndrome fetuses. Following a district court ruling upholding the school board's action, the First Circuit affirmed the decision based on Ward's failure to request jury determination on the principle issue in her case, specifically, the right to notice regarding the controversial teaching method. [FN139]

Despite the First Circuit's decision in favor of the school board, Ward provides needed insight into the First Circuit's analysis of First Amendment issues and in-class speech. In Ward, the First Circuit focused on three major Supreme Court cases. [FN140] Using Mt. Healthy, the court required Ward to establish her First Amendment violation by proving: 1) her discussion of Downs Syndrome fetuses and abortion was constitutionally protected; and 2) the discussion was a motivating factor in the decision not to rehire her. Meeting this burden, the burden shifted to the school

board to prove it would not have rehired Ward even if she had not made the controversial statements. [FN141] Citing Keyishian v. Board of Regents and using an alternative analysis other than Pickering-Connick, the First Circuit stated that the school board could regulate Ward's classroom speech if: 1) the regulation was reasonably related to a legitimate pedagogical concern and 2) the school provided the teacher with notice of what conduct was prohibited. [FN142] Relying upon its holding in Mailloux [FN143] and the Supreme Court's ruling in Hazelwood, [FN144] the First Circuit reasoned that whether a restriction on speech was "reasonably related to legitimate pedagogical concerns depend[ed] on, among other things, the age and sophistication of the students, the relationship between the teaching method and valid educational objective, and the context and manner of the presentation." [FN145]

The First Circuit also rejected the district court's reliance upon Perry Education Ass'n v. Perry Local Educators' Ass'n. [FN146] Using Perry as a model, the district court held that the school board's retaliation against Ward was permissible as long as the board did not suppress the speech based on her viewpoint. [FN147] The First Circuit distinguished the facts in Perry from Ward. It ***27** noted that Perry dealt with a school system which allowed one teachers' association to use an interschool mailing system as part of a collective bargaining agreement without allowing rival associations to use the mailing system. The rival association filed a suit alleging violation of its First Amendment rights. In Perry, the Supreme Court held that the state may reserve public property for its intended use, but may only regulate the property if the regulation is reasonable and not an effort to suppress viewpoints. [FN148] The First Circuit noted that Perry did not deal with classroom speech; therefore, it was inapplicable to Ward. [FN149]

3. The Tenth Circuit: Miles v. Denver Public Schools

The Tenth Circuit, in Miles v. Denver Public Schools, upheld the disciplinary measures taken by the school principal against John Miles. [FN150] Miles, a ninth-grade teacher, made comments to his class about a rumor that two students had been caught "making out on the tennis court" during lunch. [FN151] Miles stated to his class, "I don't think in 1967 you would have seen two students making out on the tennis court." [FN152] The incident that the teacher referred to involved a rumor that two students had been caught having sexual intercourse the previous day. The parents of the two students caught in the display complained about the discussion of the rumor in class. [FN153] Miles, who had not witnessed the incident or confirmed it, was placed on administrative leave with pay. Miles wrote a letter of an apology to the principal, and after an investigation, a letter of the reprimand was placed in Miles' personnel file referencing his poor judgment in discussing the matter with his students. Eight months after his reinstatement, Miles filed suit claiming a violation of his freedom of speech and academic freedom. [FN154]

The Tenth Circuit held that the school had legitimate pedagogical interests in exercising control over Miles' classroom expression and that the school's sanction was reasonably related to its interests. [FN155] The court also required Miles to meet the standards established in Mt. Healthy. [FN156] Relying primarily on the reasoning in Hazelwood, the court held that school officials may sanction educators so long as their actions are "reasonably related to legitimate ***28** pedagogical concerns." [FN157] The court further concluded that if the school facilities were not open for "indiscriminate use by the general public ... the school is not a public forum, [and] school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community." [FN158] Holding that Miles' class was not a public forum, the Tenth Circuit rejected the Pickering-Connick test. [FN159] Judge Tacha writing for the court stated:

> Although the Pickering test accounts for the state's interests as an employer, it does not address the significant interests of the state as educator. The Court in Hazelwood recognized that a state's regulation of speech in a public school setting is often justified by peculiar responsibilities the state bears in providing educational services: "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the

individual speaker are not erroneously attributed to the school." These responsibilities warrant application of the standard adopted in Hazelwood for reviewing regulation of classroom speech rather than the Pickering standard for reviewing regulation of speech in a more general public setting. [FN160]

The Tenth Circuit held that Miles also had no constitutionally protected academic freedom right related to the substantiation of a rumor in the classroom. [FN161] The court reasoned that the Supreme Court had recognized a "university's" right to academic freedom in Regents of the University of California v. Bakke, [FN162] but a university's right to academic freedom is distinguishable from an "individual" right to academic freedom. [FN163] Relying upon Parate v. ***29** Isibor, [FN164] the court noted that only the Sixth Circuit had recognized an individual right to academic freedom under limited circumstances. [FN165] In order to trigger this individual right, the school administration's actions would have to create a "pall of orthodoxy" over Miles' classroom expression. [FN166] The Tenth Circuit found no such ""pall of orthodoxy" over the classroom. [FN167]

4. The Eleventh Circuit: Bishop v. Aronov

In Bishop v. Aronov the Eleventh Circuit held that a restriction by the University of Alabama on Professor Bishop's in-class speech was not a violation of his freedom of speech or the Establishment Clause. [FN168] Professor Bishop taught physiology and discussed his personal religious philosophy during class. Bishop commented to a group of students, "I try to model my life after Christ, who was concerned with people, and I feel that is the wisest thing I can do. You need to recognize as my students that this is my bias, and it colors everything that I say and do. If that is not your bias that is fine." [FN169] Professor Bishop also organized after-class meetings with students and others in which he discussed "Evidences of God in Human Physiology." [FN170]

After students complained to the Department about Bishop's comments, the University of Alabama sent Bishop a letter reaffirming its commitment to academic freedom and freedom of religion but warning that some of his actions were unwarranted at a public institution and should cease. Bishop filed a complaint with the district court asserting that his free speech and free exercise of religion had been violated. [FN171] The district court concluded that the memorandum was overly broad and vague and that the classroom constituted a "public forum" where professors and students could interchange ideas. The district court also held that Professor Bishop's conduct had a secular effect and did not amount to an establishment of religion. [FN172]

In its opinion, the Eleventh Circuit, relying on Hazelwood, reversed the district court's decision. Reasoning that public universities and high schools are similar, the court stated that reasonable restrictions can be placed on in- ***30** class speech. [FN173] The Eleventh Circuit also concluded that the classroom was not a public forum since the classroom was reserved for its intended purposes and not open to the general public during instructional time. [FN174] Finally, the Eleventh Circuit determined that since the state had an interest as an employer in regulating the speech of its employees, there must be a balance between the interests of the teacher, as a citizen, in commenting on matters of public concern and the state, in promoting efficiency. The court also stated that the Pickering test ("matters of public concern" doctrine) was the beginning point of the analysis because of the balancing suggested. [FN175] Despite this recognition, the Eleventh Circuit did not engage in the balancing test outlined in Pickering but based its decision on the administration's right to regulate expressions which are of a legitimate pedagogical concern as expressed in Hazelwood. [FN176] Basically, the court developed its own multi-factor test utilizing Hazelwood. First, the court stated that in looking at the context of the speech in the classroom, it must consider the "coercive effect upon students that the professor's speech inherently possessed and that the University may wish to avoid." [FN177] Secondly, the court considered the university's position as a public employer "which may reasonably restrict the speech rights of employees more readily than those of other persons." [FN178] Thus, the court considered "the University's authority to reasonably control the content of

its curriculum" and that the professor's in-class speech might possibly give the "appearance of endorsement by the university." [FN179] Relying on Keyishian, the court further considered the "strong predilection for academic freedom as an adjunct of the free speech rights of the First Amendment." [FN180] Balancing these factors, the court concluded that the "University's interests in the classroom conduct of its professors [were] sufficient ... to warrant the reasonable restrictions it [had] imposed on Dr. Bishop." [FN181]

IV. TITLE VII AND TITLE IX: ASSESSING HOSTILE ENVIRONMENT SEXUAL HARASSMENT CLAIMS

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex, or national origin. [FN182] Equal Employment ***31** Opportunity Commission (EEOC) guidelines further detail requirements that all employers, including colleges and universities, must abide by in maintaining a workplace free of sexual harassment. The EEOC recognizes two types of sexual harassment: 1) quid pro quo and 2) hostile environment. [FN183] Quid pro quo sexual harassment involves "[u]nwelcome[d] sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature ... when 1) submission to such conduct is made explicitly or implicitly as a term or condition of an individual's employment, [[and] 2) submission to or rejection of such a conduct by an individual ... is the basis for employment decisions affecting [the] individual." [FN184] The second type of sexual harassment, hostile environment, involves unwelcomed sexual advances or "such conduct [which] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating hostile, or offensive working environment." [FN185] Sexual harassment charges in higher education may involve both quid pro quo and hostile environment. [FN186] However, in terms of academic freedom and in- class instruction, hostile environment sexual harassment is the more elusive or difficult to define. [FN187]

***32** A. Title VII and Hostile Environment Claims

In order to succeed in a hostile environment claim, the Supreme Court held in Meritor Savings Bank v. Vinson that the conduct and/or speech must be ""severe or pervasive" to alter the conditions of employment and create an abusive working environment. [FN188] In Meritor a female bank employee, Michelle Vinson, filed suit against her employer charging that her supervisor made unwelcome demands for sexual favors, fondled her in front of her coworkers, exposed himself to her, and forcibly raped her on several occasions. Vinson stated that she had participated in the sexual acts fearing loss of her job. Her supervisor, Sidney Vinson, denied the allegations. [FN189] The Court rejected the defendants' argument that Title VII covered only conduct that resulted in tangible or economic harm. Basing its decision on EEOC guidelines defining "hostile environment," the Court held that no tangible economic injury was necessary to establish an actionable claim of sexual harassment so long as the harassment was "sufficiently severe or pervasive" to alter the conditions of the victim's employment and create an abusive working environment. [FN190] The Court, therefore, concluded that unwelcomed sexual advances could include "voluntary" participation by the victim in the acts. [FN191]

The Court later clarified the standard for establishing an actionable hostile environment claim in Harris v. Forklift. [FN192] The Court rejected a Sixth Circuit ruling that plaintiffs had to prove that they had suffered severe psychological harm in order to establish a hostile environment claim. In its ruling, the Court held that the plaintiff need only demonstrate that the conduct was severe or pervasive enough to create an objectively hostile environment to a "reasonable person." [FN193]

The plaintiff in Harris sued her former employer, Forklift Systems, alleging that the sexual comments and conduct of the company's president created an "abusive working environment" in violation of Title VII. [FN194] In determining if the environment was hostile, the Court cautioned that the following circumstances should be considered: 1) the severity of the conduct; 2) frequency of the discriminatory

conduct; 3) whether the conduct was physically ***33** threatening or humiliating or simply an offensive utterance; and 4) whether the conduct unreasonably interfered with the employee's work performance. [FN195]

In holding that a female IRS employee was the victim of hostile environment sexual harassment, the Ninth Circuit in Ellison v. Brady used a "reasonable woman" standard. [FN196] Ellison was subjected to harassing notes and sexual advances from a co-worker. The Ninth Circuit in adopting a "reasonable victim" standard stated that by examining whether a "reasonable person" would engage in the conduct might condone discriminatory behavior which might have become custom. The court, therefore, adopted a "reasonable woman" standard, choosing to analyze harassment from the victim's perspective. The Ninth Circuit stated that such an analysis required an understanding of the different perspectives of both men and women. [FN197]

Although Meritor, Harris, and Ellison are Title VII hostile environment cases set in an employment environment, the principles and standards set forth in these cases are relied upon by the courts in assessing Title IX sexual harassment cases. In particular, lower courts and education policymakers utilize the principles from these cases in evaluating campus guidelines and in determining if the conduct in question is "severe and pervasive" enough to affect the educational and working conditions of students and employees. [FN198]

In a postsecondary setting, where dichotomous forces and divergent viewpoints clash daily, the line between confrontational instructional methods and critical inquiry which mask themselves as sexual harassment can be thin. [FN199] In tailoring their policies to meet the requirements of Titles VII and IX, the thin line between legitimate pedagogical techniques and illegitimate methods has been increasingly difficult for colleges and universities to discern. [FN200] This difficulty manifests itself as postsecondary institutions investigate and respond to charges of hostile environment. In responding to charges by students, investigators and educators, who often sit in judgment of their peers, are asked to determine if the conduct complained of was "severe" and "pervasive" to affect the performance or academic outcome of students. Therefore, the question becomes do the legal parameters require that the questionable conduct be "severe" and "pervasive" to an objective "reasonable person," or is the standard more subjective as in a ""reasonable woman," or "reasonable victim" standard? The courts have applied various standards, ***34** including the "reasonable student" standard or a "sophistication of adults" test in the context of education. [FN201] In particular, the district court in Silva v. The University of New Hampshire held that the university's sexual harassment policy was not reasonably related to the legitimate pedagogical purpose of providing a congenial "academic environment." The court stated that the university's policy was strict in its standard and failed to take into account the nation's interest in academic freedom. [FN202] The University of New Hampshire dismissed Professor J. Donald Silva, a tenured communications instructor, for violating its hostile environment policy. Silva had used a sexual metaphor involving sexual intercourse to describe the concept of "focusing" to his technical writing class. [FN203] In demonstrating how a good definition combines general classifications with metaphors, Silva stated, "Belly dancing is like jello on a plate with a vibrator under the plate." [FN204]

After a university hearing and appeal to the president and board, Silva filed suit charging that his First Amendment right to freedom of speech and Fourteenth Amendment right to due process were violated. [FN205] The district court ruled that Silva's in-class speech was not sexual and that the university failed to provide Silva with notice regarding the use of the sexual harassment policy as it related to sanctioning his in-class speech. [FN206] The court also used the Pickering-Connick test and concluded that Silva's speech dealt with matters of public concern. [FN207]

In assessing the sexual harassment claim, the Silva court, despite its reference to the Pickering-Connick doctrine, focused on the test used by the First Circuit in Mailloux. [FN208] Pointing out that the Mailloux test is consistent with the Hazelwood requirement, the district court stated: "It stands to reason that whether a regulation is reasonably related to legitimate pedagogical concerns will depend

on, among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, ***35** and the context and manner of presentation." [FN209] The court then noted that the students at issue in this case were exclusively adult college students; accordingly, they are presumed to have acquired the "sophistication of adults." [FN210] Although little else is provided in the Silva case regarding the "sophisticated adult standard," it appears that the district court utilized some form of a ""reasonable adult student" standard in Silva. [FN211]

B. Title IX and Hostile Environment Claims

Title IX of the 1972 Educational Amendments 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 educational program or activity receiving Federal financial assistance." [FN212] Title IX actions cannot be brought against individuals but only against institutions such as schools, related boards, and colleges or universities. [FN213] In 1993, the U.S. Department of Education's Office of Civil Rights, which is statutorily charged with enforcement of Title IX, interpreted Title IX to be analogous to Title VII. [FN214]

Title IX does not specifically afford an individual protection against hostile environment sexual harassment. However, in 1992 the Supreme Court decided Franklin v. Gwinnett County Public Schools, a Title IX case involving a female student who sued a Georgia school system for sexual harassment. [FN215] The student charged that a male teacher had made sexual advancements toward her, kissed her, telephoned her at home on three occasions asking for a date, and had forced her to engage in sexual intercourse with him in his office. ***36**[FN216] The Court reasoned that Title IX required the Gwinnett County School District to refrain from discriminating on the basis of sex. [FN217] The Court held that under Title IX a student could maintain a sexual harassment claim against a school system. [FN218] The Court further stated that the same reasoning applies to "students and teachers" as does ""supervisor and subordinate." [FN219] Additionally, the Court held that, although Title IX did not specifically provide for monetary damages as a remedy, monetary damages could be awarded under Title IX. [FN220]

Citing Meritor, [FN221] a California district court held in Patricia H. v. Berkeley Unified School District [FN222] that three minors could establish a Title IX sexual harassment claim against the school district based on Title VII theory. Over the course of a year, the three female students were allegedly involved in a romantic relationship with their band teacher, Mr. Hamilton. While on a school-sponsored trip to Lake Tahoe, one student stated that Hamilton forced her to handle his genitals and made lewd remarks to her. [FN223] Hamilton also admitted entering the student's room at her home and ""stroking and tickling her." [FN224] Two other students later accused Hamilton of similar molestations. [FN225]

A major question before the California district court in Patricia H. was whether one of the students, Jackie H., was subject to a hostile environment because Jackie H. still encountered Hamilton in her everyday activities at school. Jackie H. stated that she feared encountering Mr. Hamilton and often fled the school grounds. [FN226] School officials did suspend Hamilton briefly, but after reinstatement, advised Jackie H.'s mother to move her ***37** daughter to another school. [FN227] Adopting the "reasonable victim" standard articulated in Ellison, the court stated that the question of whether a "reasonable female student" would find Hamilton's mere presence created a hostile environment, is one for the jury. [FN228] However, the court noted that EEOC guidelines urge that the age of the victim; frequency, duration, severity, and scope of the acts of harassment; and nature of context of incidents be considered in using a "reasonable victim" standard. [FN229] Thus, the court adopted a "reasonable student" standard in deciding if a plaintiff has established a hostile environment claim under Title IX. [FN230]

The Gwinnett and Patricia H. decisions opened the door for students to file similar hostile environment claims against universities using Title IX. Although Title IX hostile environment claims have rarely been litigated at the postsecondary

level, future litigation based on Title IX will probably become more prevalent. Furthermore, recent Title IX decisions regarding hostile environment claims serve as warnings to colleges and universities that failure to adequately respond to constructive or actual notice of sexual harassment could bring tough penalties and sanctions by the courts. [FN231]

V. TOWARD A NEW ANALYTICAL FRAMEWORK: INCORPORATING THE ELEMENTS OF A HOSTILE ENVIRONMENT CLAIM AND THE LEGITIMATE PEDAGOGICAL CONCERNS TEST

In determining the protection due a university professor's in-class speech, the courts have relied heavily on cases dealing with secondary education. [FN232] Although public postsecondary and secondary education have common ***38** goals, the courts have failed to distinguish between cases involving "student academic freedom" and "faculty academic freedom" issues. [FN233] This point is crucial because faculty need greater latitude in the area of academic freedom due to the need to develop flexible instructional methods which benefit all students. Students, however, do not have this critical task. [FN234] Additionally, elementary/secondary education is concerned with the training of minors; yet, higher education focuses on the preparation of less impressionable minds. For example, certain words and subjects may be derogatory to women and persons of color. Although these terms and subjects are offensive, within the proper context such as a discussion of hate speech, they are an appropriate form of intellectual discussion at the college level. Intense and explicit discussions of such topics, however, may not be appropriate for less mature students. Judge Hill's concurrence in Martin v. Parrish [FN235] provides a good synopsis of why courts must give significant weight to the differences between elementary/secondary school and postsecondary instruction. Judge Hill writes:

> The largest problem in my view with the majority's extension of cases like Bethel and Pico is that the majority does not give sufficient weight to the differences between the high school instructional setting involved in the cases it cites, and the college instructional setting involved in this case. The purpose of education through high school is to instill basic knowledge, to lay the foundations to enable a student to learn greater knowledge, and to teach basic social, moral, and political values. A college education, on the other hand, deals more with challenging a student's ideas and concepts on a given subject matter. The college atmosphere enables students to rethink their views on various issues in an intellectual atmosphere which forces students to analyze their basic beliefs. Thus, high school is necessarily more structured than college, where a more free-wheeling experience is both contemplated and needed. What might be instructionally unacceptable in high school might be fully acceptable in college. [FN236]

Furthermore, even though both secondary and postsecondary institutions have as their goals the dissemination of knowledge, they differ. The primary ***39** aim of higher education is the "discovery" and "improvement" of knowledge, theories, and intellectual principles. [FN237] As the Supreme Court articulated in Keyishian:

> 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 which cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is no where more vital than in the community of American schools. The classroom is 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. [FN238]

Therefore, since colleges must provide a more flexible educational setting which allows for open and robust debate, the courts must rethink the analysis used in assessing sexual harassment policies which clash with speech in the classroom.

The Pickering-Connick test or "matters of public concern doctrine" is an ineffective way to determine if a professor's in-class speech creates a hostile sexual environment or is due constitutional protection. [FN239] In Miles the Tenth ***40** Circuit noted that the Pickering-Connick test does not account for the

significant interests of the state as educator. [FN240] In Miles, the Tenth Circuit also noted that the state's regulation of speech in a public education setting is justified by the unusual responsibility the state has in assuring: 1) students learn, 2) students are not exposed to material inappropriate for their age, and 3) the viewpoints of school officials or speakers are not erroneously attributed to the school. [FN241] Thus, the Tenth Circuit adopted the legitimate pedagogical concerns test in Hazelwood. [FN242] The test articulated by the Supreme Court in Hazelwood was whether the school's restriction upon the content of a student newspaper was "reasonably related" to "legitimate pedagogical concerns." [FN243]

Nevertheless, the Tenth Circuit did not distinguish between the academic freedom rights of the public school teacher in Miles as opposed to the academic freedom interests of the public school students in Hazelwood. Although students have academic freedom, teachers should be given greater protection because of their special role in the delivery of content and promoting critical debate. Both courts failed to adequately consider the importance of this broad discretion.

Like school officials, faculty members also have "legitimate pedagogical" interests of their own. The delivery of course content by faculty demands a certain level of artistic license (freedom of expression) which is due special First Amendment protection. As noted in State Board of Community Colleges v. Olson, [FN244] courts, relying on Keyishian, [FN245] have recognized that public education teachers have a constitutionally protected right to select a "particular pedagogical method for presenting the idea-content of a course, as long as the course is part of the official curriculum of the educational institution and the teaching method serves a demonstrable educational purpose." [FN246]

It is often true that the interest of the teacher must yield to the interests of the school or college. However, the Pickering-Connick test does not adequately ***41** provide guidance to the courts in determining when a teacher's legitimate pedagogical concerns or interests should yield to the legitimate pedagogical concerns of an academic institution. It also does not address issues of academic freedom, the state's special role as educator, and elements of a sexual harassment claim.

Furthermore, although the university as a governmental employer is implicated by the very nature that it employs faculty, college faculty also fulfill instructional tasks, foster intellectual inquiry, and help the state in its educational mission through principles of shared governance. No other public employees have such a charge or special mission. Although key information can be gleamed from cases involving the "government as employer," these cases do not take into consideration the unique role of the state as educator and its role in fashioning the "marketplace of ideas." [FN247] As recognized by the court in Patricia H., the distinctions between an academic environment and the workplace "serve only to emphasize the need for zealous protection against sex discrimination in the schools." [FN248] Writing for the Patricia H. court, Judge Orrick stated:

> [T]he importance and function of environment is different in academia than in the workplace....A nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program.... The student- faculty relationship encompasses a trust and dependency that does not inherently exist between parties involved [employer/employee] in a sexual harassment claim under Title VII. [FN249]

The Court in Waters stated that the "government as employer" derives its additional power because of its interest in carrying out a particular assigned task both effectively and efficiently. [FN250] However, in an educational context, the "government efficiency" paradigm does not work well without considering the basic principles of academic freedom and the government's unique role in protecting the marketplace of ideas. In Connick, the Court stated:

> We reiterate, however, the caveat we expressed in Pickering: Because of the enormous variety of fact situations in which critical statements by [[teachers and other] public employees may be thought by their superiors ... to furnish grounds for

dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. [FN251]

***42** The Pickering-Connick test must, therefore, be restructured in order to consider the special role of a professor in the classroom in comparison to other governmental employees. In other words, when assessing a First Amendment claim, the court must give significant weight to the range of employment functions that public teachers and professors perform in the classroom. As noted in Scallet v. Rosenblum, [FN252] courts must:

> consider the [university's] educational mandate. On the other hand, the court must consider the [professor's] status as instructor at an institution of higher education. In the latter regard, the court must, give weight to the nature of the employee's job in assessing the possible effect of his action on employee morale, discipline or efficiency. In so doing, it must recognize that such effect may vary with the job occupied by the employee. In analyzing the weight to be given a particular job in this connection, non-policymaking employees can be arrayed on a spectrum from university professors at one end to policemen at the other. [FN253]

When the government acts as educator, the concept of academic freedom is an integral part of its educational mission; and thus, the concept of academic freedom is tied directly to governmental efficiency interests. In a postsecondary setting, the efficiency interest is also linked to whether faculty, as state employees, utilize reasonably legitimate pedagogical methods to promote effective student learning. The government's efficiency interest as educator is, therefore, central to its need to foster critical thinking and reflective thought. Thus, in evaluating a First Amendment claim involving a professor's in-class speech, a better test is needed which takes into account the unique role of educational institutions as essential places in the maintenance of democracy and the evolution of ideas.

A. The Legitimate Pedagogical Concerns Test

Traditionally, under the Pickering-Connick test, the court must first determine whether the restricted speech addresses a matter of public or private concern. If the subject matter addresses a purely private concern, the court usually has no right to interfere with an employer's sanction. [FN254] In Connick, the Court noted that in determining whether an employee's speech is on a matter of public or private concern, the analysis turns on whether "an employee ***43** expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community." [FN255] However, when evaluating a First Amendment claim brought by a public university professor involving in-class speech and a hostile environment claim, courts must rethink current Pickering-Connick jurisprudence. A different test, which I will refer to as the "legitimate pedagogical concerns" (LPC) test, is needed in order to address key educational and governmental interests such as: 1) the need to engage students in robust dialogue and develop critical thinking skills and new theories, 2) the unique educational mission of the state as educator, 3) the role of faculty in designing and developing instructional methods which foster learning and intellectual discovery for different students, and 4) the need to maintain a classroom which is conducive to learning and free from a hostile sexual environment.

In adapting the Pickering-Connick test, the courts should no longer focus on whether the professor's in-class speech was on a matter of public concern. Under the LPC test, the paradigm shifts from the usual Pickering- Connick (matters of public concern) doctrine. The question becomes whether the questionable speech addresses a matter of "private concern" or is "reasonably related to a legitimate pedagogical concern" which is "germane to the subject matter." Thus, issues involving the "legitimate pedagogical concerns" of the professor are substituted for the "matter of public concerns" analysis. If the court determines that the professor's in-class speech is on a matter of private concern, then the inquiry ends and the university may sanction the speech.

However, if the court determines that the professor's in-class speech "reasonably relates to a legitimate pedagogical concern" which is "germane to the subject

matter," there is a presumption that the professor's in-class speech is protected. [FN256] For example, teaching different societal viewpoints toward premarital sex in a Gender and Psychology class would be reasonably related to a legitimate pedagogical concern which is germane to the subject of gender. Also, a teaching strategy or pedagogical method which forces students to "aggressively" contrast various societal values relating to gender and premarital sex, may make some students feel uncomfortable. However, without more the professor's aggressive teaching style and pursuit of this topic would most likely receive a presumption of protection under the LPC test.

Furthermore, a professor's "legitimate pedagogical concerns" involve freedom of expression in terms of teaching style. An instructor's legitimate pedagogical concerns, therefore, include the interest that a professor has in using a reasonably effective instructional method to engage students with differing ***44** academic abilities and developmental levels in learning and debate. As noted in Mailloux, academic freedom includes a "substantive right to select a teaching method [or strategy] which ... serves a demonstrated educational purpose." [FN257] Thus, discussions of a teacher's legitimate pedagogical concerns must include ideas central to the concept of freedom of expression, particularly as they relate to faculty interests in perfecting their craft and the art of teaching.

Working from the presumption that the professor's speech is protected, the court then balances the legitimate pedagogical concerns of the professor against the legitimate pedagogical concerns of the college or university. Specifically, the court balances the interests of the professor in using legitimate pedagogical methods and in commenting on matters germane to the subject matter against the university's interest in protecting students from a sexually hostile environment in the classroom. This balancing incorporates the university's efficiency interest as it relates to protecting its educational mission, making sure statements made by professors in-class are not erroneously attributed to the educational institution, the university's right to ultimately control the curriculum in the classroom, and its interest in maintaining classrooms that are conducive to learning.

In balancing the professor's interests against the university's interest, the court considers the test set forth in Meritor as it relates to the sanctioning of a professor's in-class speech under a hostile environment sexual harassment policy. [FN258] First, the court asks if the professor's conduct was "severe and pervasive" enough to interfere with a "reasonable adult student's" ability to learn or academic performance. As noted in Patricia H., Mailloux, and Silva, the court also considers the "totality of circumstance" in evaluating if a "reasonable adult student" would find that the professor's conduct created a hostile environment. [FN259] Therefore, a student's age, sex, sophistication, and maturity should be taken into consideration, along with the educational level (graduate or undergraduate), frequency, duration, and nature of the conduct in question. If the court determines that the professor's conduct was "severe and pervasive" as to constitute a hostile sexual environment to a reasonable adult student, then the university's interests in promoting efficient and effective learning out weighs the professor's interests in using legitimate pedagogical methods and in commenting on issues germane to the subject matter. If the speech or conduct is not considered severe and pervasive enough to interfere with a reasonable adult's academic performance, then the professor's pedagogical interests outweigh the college's efficiency interest.

***45** Finally, the court must determine whether the professor would have been sanctioned "but for" the protected "in-class" speech or conduct. As set forth in Mt. Healthy, [FN260] in asserting a First Amendment violation, a professor sanctioned for creating a hostile sexual environment in the classroom must demonstrate: 1) that his speech was constitutionally protected and 2) the speech was the motivating factor in disciplining him. [FN261] In justifying the restriction, the defendants (state/college) may as a defense demonstrate that they would have made the "same decision" absent the protected in-class speech or conduct. Therefore, the defendant would have to demonstrate that it would have discharged the professor for a constitutionally or legally permissible reason. [FN262]

Although not part of the legitimate pedagogical concerns test, courts would also

have to determine if the college's sanction was "reasonably related" to its interest in exercising reasonable control over the professor's classroom expression. [FN263] Another important factor to be considered is whether the faculty member received notice that his or her teaching methodologies and in- class speech could constitute a violation of the campus sexual harassment policy.

B. Striking the Balance: Application of the Legitimate Pedagogical Concerns Test to the Cohen Case

Using the legitimate pedagogical concerns test, the court would first ask if Cohen's in-class speech and conduct (instructional method) was on a matter of "private concern" or "reasonably related" to a "legitimate pedagogical" concern which is "germane to the subject matter." [FN264] The court record does not indicate that Professor Cohen used profanity to demonstrate any particular type of writing or English related concept which served a valid educational objective. [FN265] Also, as noted in Hazelwood, schools have a recognized interest in disassociating themselves from speech which interferes with the work or rights of others or that is unreasonably considered inappropriate. [FN266] Thus, indecent language and profanity may also be regulated in the schools. [FN267] A jury would most likely find that profanity, in this instance, is not reasonably related to any legitimate pedagogical concern germane to the subject matter of remedial English. Therefore, Cohen's profanity would probably not survive the LPC test.

***46** Plaintiffs in Cohen's situation would likely assert that English professors are usually given lots of discretion and artistic license in choosing subject matter and material. However, a jury is unlikely to believe that "intense" and "in-depth" discussions of pornography, Playboy and Hustler articles, and consensual child sex are reasonably related to legitimate pedagogical concerns or appropriate for remedial English instruction. Therefore, based on the facts of this case, Cohen's in-class discussions of consensual sex with children, as it related to Jonathan Swift's, "A Modest Proposal," and his in-class discussions of any of his Playboy or Hustler articles would also be unprotected. A credible argument that could be advanced by Cohen is that a fine line exists here between legitimate discussions of controversial topics which are to "shock students" in order to force them to think and those which are coercive and intimidating. Nevertheless, it is likely that a reasonable jury weighing the evidence would still find that Cohen's speech is unprotected. [FN268] Understandably, a community college would probably assert that controversial topics such as pornography may foster intellectual debate; nevertheless, explicit discussions of pornography and consensual child sex are not the legitimate expectations of students enrolling in a remedial English course at a two-year institution. As noted by Cindia Cameron, "Choice is a big issue here. Did this young woman [Murrillo] know what was coming? Did she have a choice to take another class and still get good grades?" [FN269]

From the court record it is difficult to determine the depth in which students were required to delve into the issues of pornography and consensual child sex. Regardless, under these circumstances a community college could contend that intense and in-depth study of this kind would probably be best served by senior or graduate level courses which are not remedial in nature. Based on the assumption that Cohen's discussions of pornography and sex were not reasonably related to legitimate pedagogical concerns which were germane to the subject matter, a reasonable jury could find that the college was justified in sanctioning Cohen for his speech. Nevertheless, issues of notice and due process regarding the College's policy are still essential.

Assuming, however, that a jury did find that Cohen's discussions of pornography and consensual child sex were of legitimate pedagogical concerns which were germane to the subject matter, the value of Cohen's in-class speech would be balanced against the College's interests in efficiently carrying out its educational missionand maintaining a classroom conducive to learning. Thus, the jury would assess whether Cohen's discussion of pornography and sex were "severe and pervasive" enough to interfere with a "reasonable adult student's" ability to learn or academic performance. Jury instructions would probably require jurors to consider Murillo's

age, sex, the ***47** frequency of Cohen's speech, the type of educational institution and level, the sophistication of the students, the course subject, and the nature of the conduct. Part of the jury's focus would be on whether a thirty-five-year-old female enrolled in a remedial English class at a two-year community college would perceive Cohen's style of teaching, discussion of child-consensual sex and pornography as "severe and pervasive" enough to interfere with her academic performance. The court record noted that Cohen required students to read an article which he wrote. After watching a particular type of pornographic film called a four-handkerchief movie, Cohen stated in the article that he received an "erection in about eight seconds." [FN270] Particularly in the context of a remedial English class, it is possible that a reasonable jury would determine that a professor's sexual response to a film is not germane to the subject matter or any legitimate pedagogical or instructional teaching method that would deserve First Amendment protection. Additionally, the community college could further argue that reading assignments detailing "four-handkerchief movies" are inappropriate in remedial English classes which focus more on basic grammar, sentence structure, and writing skills. Therefore, a jury may be prone to find that a persistent use of these types of articles and discussions of his personal sexuality, coupled with his aggressive teaching method, would create an environment "severe and pervasive" enough to interfere with a "reasonable adult student's" academic performance and the institution's efficiency interests and educational mission.

Additionally, in hostile environment sexual harassment cases like this one, most courts would likely uphold sanctions such as warnings in syllabi regarding teaching style and subject matter and also mandatory sexual harassment training for the sanctioned professor. A court would probably view these sanctions as legitimate ways to reasonably ensure that students are free from hostile sexual environments in the classroom. Based on these assumptions, a jury would most likely conclude that the College's "legitimate pedagogical" concerns or interest in a classroom conducive to learning outweighed Cohen's interest in discussing Playboy and Hustler articles in a remedial English class. Thus, based on these assumptions the College could discipline Cohen in order to protect its efficiency interest and mission.

Nevertheless, the Ninth Circuit held that the College's sexual harassment policy was broad and ambiguous in its application. [FN271] The Court stated that the campus failed to adequately provide Cohen with notice that his in-class speech and longstanding teaching methodology could constitute a hostile environment. [FN272] Therefore, the critical question becomes what can colleges do to provide professors with due notice and avoid overly broad policies?

C. Guarding Against Vague and Overly Broad Sexual Harassment Policies

Colleges and universities must design campus sexual harassment policies which protect students from hostile sexual environments but which do not ***48** infringe upon academic freedom and open debate. In the Cohen case, the College's sexual harassment policy, which prohibited conduct that "has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment," was based on EEOC guidelines. [FN273]

The Cohen case is unique because Professor Cohen had taught at the College for fourteen years and had apparently used a similar teaching style and topics with little warning from officials that his conduct might constitute sexual harassment. [FN274] Many hostile environment sexual harassment cases do not involve years of continuous conduct or teaching of this type. Usually, the professor's speech or introduction of controversial subject matter is more recent and has not gone unnoticed and unsanctioned for many years.

The Ninth Circuit found that the College's sexual harassment policy was unconstitutionally vague as applied to Professor Cohen. [FN275] However, the court did not decide if the College could have punished Cohen's conduct if the policy had been more precisely construed by campus guidelines, Cohen had received notice, or if the policy itself had been more precise. [FN276] The important question in the application of sexual harassment policies or guidelines are do these mechanisms

provide due notice and appropriately define sexual harassment? The AAUP's statement on sexual harassment provides guidance to campus officials in designing their policies. It states:

It is the policy of this institution that no member of the academic community may sexually harass another. Sexual advances, requests for sexual favors, and other speech or conduct of a sexual nature constitute sexual harassment when:

1. Such advances or requests are made under circumstances implying that one's response might affect academic or personal decisions that are subject to the influence of the person making the proposal; or

2. Such speech or conduct is directed against another and is either abusive or severely humiliating, or persists despite the objection of the person targeted by the speech or conduct; or

3. Such speech or conduct is reasonably regarded as offensive and substantially impairs the academic or work opportunity of students, colleagues, or co-workers. If it takes place in the teaching context, it must also be persistent, pervasive, and not germane to the subject matter. The academic setting is distinct from the workplace in that wide latitude is required for professional judgment in determining the appropriate content and presentation of academic material. [FN277]

***49** The Ninth Circuit stated that "statutes regulating First Amendment speech must be narrowly drawn to address the specific evil at hand." [FN278] Ohio State University's sexual harassment policy provides a good example of such a narrowly drawn policy. [FN279] It reads:

Sexual harassment is any unwelcome sexual advance, request for sexual favor, reference to gender or sexual orientation, or other physical or verbal conduct of a sexual nature when:

1. Submission to or rejecting of such conduct is used either explicitly or implicitly as a basis for any decision affecting terms or conditions of an individual's employment, participation in any program or activity, or status in an academic course; or

2. Such conduct has the effect of unreasonably interfering with an individual's work performance or educational experience, or creates an intimidating, hostile or offensive environment for working, learning, or living on campus, and has no legitimate relationship to the subject matter of the course.

Sexual harassment can occur between any individuals associated with the University, i.e. between an employee and a supervisor; between co-workers; between faculty members; between a faculty, staff or student and a customer, vendor, or contractor; or between a student and a faculty member or another student. [FN280]

Ohio State University's policy narrowly restricts a professor's expression to speech which "unreasonably" interferes with an individual's "educational experience." [FN281] The conduct or speech must also "create an intimidating, hostile, or offensive environment for learning." [FN282] Additionally, unlike the sexual harassment policy in the Cohen case, the speech or expression must have "no legitimate relationship to the subject matter of the course." Thus, the policy defines sexual harassment and incorporates the principles of academic freedom while protecting students from sexual harassment. The policy also provides notice to professors, students, and the university community that in-class speech and instruction which unreasonably interferes with a student's learning and that is not legitimately related to the course could violate the sexual harassment policy.

In order to make sure that professors have notice that their conduct in class could violate the policy, campus officials should also provide training which gives specific examples of conduct which may violate the sexual harassment ***50** policies. Although difficult and controversial, examples of speech which are unrelated to the subject matter, intimidating, hostile, offensive, and which unreasonably interfere with learning should also be discussed during training. Furthermore, campus guidelines, faculty handbooks, and student handbooks should provide specific examples of classroom conduct that could possibly violate the policy.

Campuses should also incorporate a statement into their sexual harassment policy which expresses the university's commitment to academic freedom and the importance of critical debate. John Hopkins University's sexual harassment policy includes such a statement. It reads, "Fundamental to the University's purpose is the free and open

exchange of ideas. It is not, therefore, the University's purpose, in promulgating this policy, to inhibit free speech or the free communication of ideas by members of the academic community." [FN283] This statement is important in establishing and fostering an institutional culture or campus community dedicated to the "marketplace of ideas." [FN284]

VI. CONCLUSION

The price of freedom has always been expensive. [FN285]

- Martin Luther King, Jr. -

Freedom is indeed expensive. Thus, the individual and collective freedoms in which we all enjoy are not without their own costs. Freedom of inquiry and the freedom to pursue one's own intellectual pursuits are no different. Therefore, when students attend institutions of higher learning, the cost is usually a certain level of "intellectual discomfort." In discussing the Cohen case, law professor Kingsley Browne noted:

> The issue is not whether someone could challenge the professor. It was not her [Murrillo's] expression that was being challenged. It was his. The question is whether the university can force him to stop ... from talking about certain things because they make somebody uncomfortable. There is this notion now about hostile learning environments that suggests that learning is suppose to be a comfortable process, but the best learning takes place when people are made to feel uncomfortable and made to challenge their pre- existing beliefs. [FN286]

One of the freedoms that scholars and intellectuals enjoy is the opportunity to engage students and help them challenge and examine their own pre-existing beliefs. In noting the importance of freedom of inquiry in the development of modern civilization, the Court in Sweezy v. New Hampshire observed, "no one should underestimate the vital role in a democracy that is ***51** played by those who guide and train our youth.... Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise civilization will stagnate and die." [FN287] With these freedoms and privileges come the First Amendment protection of academic freedom. Academic freedom is, therefore, a necessary element which seeks to protect university constituents from external and internal forces that encroach upon autonomy and other institutional and faculty prerogatives. [FN288]

Colleges and universities are also entrusted with the responsibility of patrolling and monitoring their agents to make sure that these agents do not infringe upon a student's right to learn and excel academically. Although a certain level of intellectual discomfort is inevitable, and perhaps even healthy, careful guidelines and policies are needed which ensure that women and men can equally participate in scholarship and debate without fear of intimidation or coercion.

These policies, which promote a campus free of sexual harassment, must be based upon guidance provided by the courts. Currently, the Pickering-Connick test makes it difficult for public colleges and universities to adequately adopt policies which guard against a hostile environment without infringing upon academic freedom and freedom of speech in the classroom. Without a more clearly defined test which addresses the state's unique pedagogical role as educator, the freedom to teach and explore one's own intellectual endeavors will become too costly. This is a cost that we as a democratic society cannot bear.

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[FN1]. MARTIN LUTHER KING, JR., THE WORDS OF MARTIN LUTHER KING, JR. 35 (1984).

[FN2]. Louis Menand, The Limits of Academic Freedom, in THE FUTURE OF ACADEMIC FREEDOM 3 (Louis Menand ed., 1996).

[FN3]. "Congress shall make no law ... abridging the freedom ...'' U.S. Const., amend. I.

[FN4]. Freedom of speech is based upon philosophical boundaries which are constitutionally, legally, and morally prescribed. Freedom grants individuals certain liberties, and at the same time restricts particular forms of speech. Restrictions on speech, such as defamation, may limit the manner, context, and purpose for which an individual speaks. Nevertheless, this restriction is another person's right to be free from remarkswhich may injure his reputation or character. This restriction, which limits one individual's form of expression, while protecting another individual's right to be free from injury, is an example of the price we pay for free speech.

[FN5]. See Cass R. Sunstein, A Republic of Reasons, in MODERN CONSTITUTIONAL THEORY: A READER 53 (John H. Garvey & T. Alexander Aleinikoff eds., 3d ed. 1994) (stating that the Framers of the American constitution sought to create a system of government that would simultaneously counteract three related dangers: the legacy of the monarchy; self-interested representation by government officials; and the power of faction, or majority tyranny).

[FN6]. 344 U.S. 183, 73 S. Ct. 215 (1952) (holding that a statute was unconstitutional which required state employees and teachers to sign loyalty oaths stating that they were not and had not in the last five years been affiliated with any communist organizations).

[FN7]. Id. at 196, 73 S. Ct. at 221.

[FN8]. By a classroom conducive to learning, I mean a learning environment where students are free to express ideas without the threat of intimidation and coercion. Students and faculty have the flexibility to challenge pre-existing beliefs and theories which legitimately relate and are germane to the subject matter of the course without fear of penalty or censorship. Unreasonable penalties and censorship of students may take the form of derogatory and harassing comments or the belief that an unfavorable grade, not based on one's academic performance, will result. Unreasonable penalties may also include pressure to provide tangible favors or benefits in order to receive a favorable grade or that academic outcomes are conditioned on anything other than the student's educational performance. Additionally, classrooms conducive to learning promote a free exchange of ideas and robust dialogue, not only for students, but also for faculty members. Professors are

allowed to teach, conduct research, develop sound instructional methods without fear of unreasonable interference or sanctioning.

[FN9]. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS: POLICY DOCUMENTS AND REPORTS 3 (1995). See also Walter P. Metzger, Profession and Constitution: Two Definitions of Academic Freedom in America 66 TEX. L. REV. 1265, 1309 (1989) (defining two types of academic freedom: 1) professional academic freedom and 2) constitutional academic freedom).

[FN10]. See, e.g., Dambort v. Central Michigan University, 55 F.3d 1177, 1190 (6th Cir. 1995) (involving challenges to a discrimination policy that was used to discipline a head basketball coach who told his players to "play like niggers on the court"); Silva v. University of New Hampshire, 888 F. Supp. 293 (D.N.H. 1994) (holding that a University of New Hampshire sexual harassment policy which was used to sanction English Professor Silva for using a ""vibrator" metaphor to describe the concept of "focusing" to his class violated Silva's right to due process and free speech).

[FN11]. See infra, Part IV for a detailed discussion of sexual harassment claims in an educational setting and the necessary elements to state such a claim.

[FN12]. See ROBERT O. RIGGS ET AL., SEXUAL HARASSMENT IN HIGHER EDUCATION: FROM CONFLICT TO COMMUNITY iv (1993) (citing B.W. DZIECH & L. WEINER, THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS (1984)).

[FN13]. Id. (citing J.W. Adams et al., Sexual Harassment of University Students 24 J.C. & U.L. 484 (1983)).

[FN14]. See COMBATING SEXUAL HARASSMENT IN HIGHER EDUCATION 17 (Bernice Lott & Mary Ellen Reilly eds., National Education Association, 1996) (quoting Judith P. Swazey et al., Ethical Problems in Academic Research 81 AM. SCIENTIST 542-53 (1993)).

[FN15]. See generally BERNICE R. SANDLER ET AL., NATIONAL ASSOCIATION FOR WOMEN IN EDUCATION, THE CHILLY CLASSROOM CLIMATE: A GUIDE TO IMPROVE THE EDUCATION OF WOMEN (1996) (describing the different experiences of women in the classroom and ways to improve their experiences through instructional methods, faculty evaluations, curricular modifications, and programs for faculty and staff); IVORY POWER: SEXUAL HARASSMENT ON CAMPUS (Michele A. Paludi, ed. 1987) (providing a portrait of the problem of sexual harassment on college campuses and methods to tackle these problems); ACADEMIC & WORKPLACE SEXUAL HARASSMENT: A RESOURCE MANUAL (Michele A. Paludi & Richard B. Barickman, eds., 1991) (discussing the impact of sexual harassment on individuals and institutions, along with individual and legal remedies); SEXUAL HARASSMENT ON CAMPUS: ABUSING THE IVORY TOWER (Michele Paludi ed., 1997) (expanding upon her book, Ivory Power, and devoting a portion of the new book to abuse of power issues in consensual relationships between faculty and students).

[FN16]. 92 F.3d 968 (9th Cir. 1996), cert denied, 117 S. Ct. 1290 (1997). For a more thorough discussion of the Cohen case see infra Part II. C & D.

[FN17]. Cohen, 883 F. Supp. 1407, 1410 (C.D. Cal. 1995). The Ninth Circuit reversed the district court's holding based upon due process grounds.

[FN18]. See infra note 65 and accompanying text.

[FN19]. Cohen, 92 F.3d at 971.

[FN20]. Id. at 969.

[FN21]. Cohen, 883 F. Supp. at 1415.

[FN22]. 391 U.S. 563, 88 S. Ct. 1731 (1968).

[FN23]. 461 U.S. 138, 103 S. Ct. 1684 (1983).

[FN24]. Id. For a good analysis of the flaws in the "public concern" threshold test and its serious problems under First Amendment analysis, see Karin B. Hoppmann, Concern with Public Concern: Toward a Better Definition of the Pickering-Connick Threshold Test, 50 VAND. L. REV. 993, 1012-15 (1997).

[FN25]. Connick, 461 U.S. at 150, 103 S. Ct. at 1691.

[FN26]. Id.

[FN27]. See Katheryn D. Katz, The First Amendment's Protection of Expressive Activity in the University Classroom: A Constitutional Myth, 16 U.C. DAVIS L. REV. 857, 898-99 (1983) (discussing the judiciary's treatment of precollege education as both a local matter and an element of parent's Fourteenth Amendment "liberty" interest in their children and the purpose of precollege education as a tool of indoctrination as opposed to postsecondary education which serves as a means of developing the critical faculties of its students).

[FN28]. 92 F.3d 968 (9th Cir. 1996).

[FN29]. 42 U.S.C. § 2000e-17 (1995).

[FN30]. 20 U.S.C. § 1681(a) (1995).

[FN31]. See EDWARD SHILS, THE ORDER OF LEARNING: ESSAYS ON THE CONTEMPORARY UNIVERSITY 57 (1997) (discussing increased financial support of universities by government); Thomas L. Haskell, Justifying the Rights of Academic Freedom in the Era of Power/Knowledge, in THE FUTURE OF ACADEMIC FREEDOM 43 (Louis Menand, ed. 1996) (identifying Charles William Eliot of Harvard, Andrew Dickson White of Cornell, and Daniel Coit Gilman of John Hopkins as architects of the modern university and the internal and external pressures upon the founders of these institutions).

[FN32]. JOHN S. BRUBACHER & WILLIS RUDY, HIGHER EDUCATION IN TRANSITION 312 (1968) (discussing the dismissal of Professor Robert T. Ely of the University of Wisconsin for his writings on corporate abuse and socialism and Mrs. Leland Stanford's call for the dismissal of Professor Edward A. Ross of Stanford University, due to his support of the free silver market in the bimetallism controversy and denouncement of Asian immigration in favor of Anglo-Saxon purity, as examples of pressure from

external sources and private donors).

[FN33]. See Haskell, supra note 31, at 53.

[FN34]. BRUBACHER & RUDY, supra note 32, at 309 (quoting American Association of University Professors, General Declaration of Principles, 1 BULLETIN OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 20-39 (1915)). The 1915 Declaration reads: "The professor should no more be responsible to the board than the federal judiciary is to the President.... Responsibility to the lay public is no simple affair for public opinion which, while a democratic safeguard against tyranny of an autocrat, can itself also be tyrannical. The role of the university in public opinion should be to help inform that opinion and make it more circumspect and self-critical. Obviously, this function is impaired by any restriction imposed on academic freedom. Public opinion, therefore, should regard the university as an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or the world." Id.

[FN35]. Id. See discussion infra Part VI Conclusion.

[FN36]. See Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments, ACADEME, MAY-JUNE 1990, AT 37.

[FN37]. See NEIL HAMILTON, ZEALOTRY AND ACADEMIC FREEDOM 216 (1995) (citing Martin H. Malin and Robert Ladenson, University Faculty Members' Rights to Dissent: Toward a Unified Theory of Contractual and Constitutional Protection 16 U.C. DAVIS L. REV. 933, 937-38 (1983)).

[FN38]. BRUBACHER & RUDY, supra note 32, at 313-16 (discussing the crisis at the University of California-Berkeley requiring faculty to sign conventional oaths of loyalty to the state and federal constitutions and statements asserting non-participation in the Communist party).

[FN39]. See HAMILTON supra note 37, at 23-31 (citing PAUL LAZARSFELD & WAGNER THIELENS, JR., THE ACADEMIC MIND: SOCIAL SCIENTISTS IN A TIME OF CRISIS 3-7 (1958)). Hamilton discusses a 1955 study by Paul Lazarsfeld and Wagner Thielens, Jr., on the ramification of McCarthyism. According to the results, of the 2,451 social scientists interviewed at 165 randomly selected four-year undergraduate colleges, respondents reported 798 incidents of professors who were subjected to communist accusations. Twenty-eight percent reported that a colleague's academic freedom had been threatened, and twenty percent said their own academic freedom had been threatened because of accusations of disloyalty, communist associations, or un-American activities.

[FN40]. BRUBACHER & RUDY, HIGHER EDUCATION IN TRANSITION 325 (1997).

[FN41]. See Wendy Hollway & Tony Jefferson, PC or not PC: Sexual Harassment and the Question of Ambivalence, 49 HUMAN RELATIONS 373, 375 (1996) (discussing political correctness and the ambivalence between men and women in sexual relationships and the need for a new definition of sexual harassment).

[FN42]. See HAMILTON, supra note 37, at 85-88, 126. Hamilton provides examples of

attacks on academic freedom as it relates to political correctness. Notable examples include: the occupation in 1987 of the Stanford University President's Office by minority students protesting the required Western Civilization course because it was too Eurocentric; Hispanic students demanding the elevation of the Chicano Studies program causing between $35,000-$50,000 in damages to the faculty center at UCLA in 1993; Professor Alan Dershowitz at Harvard Law School who was shouted down by the Black Law Student Association in 1989 after he asked C. Vernon Mason, the attorney for rape victim Tawana Brawley, for any proof of Ms. Brawley's accusations; and the occupation of Professor Murrey Dolfman's class by two hundred students in 1988 to keep him from teaching after he was accused of making racially incentive remarks at the University of Pennsylvania. See also DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 201 (1991) (discussing Professor Christie Farnham Pope who was constantly disrupted by a black student asking why the Iowa State University allowed Pope, a white woman, to teach a black history course and a later sit-in Professor Pope's classroom by the Black Student Alliance).

[FN43]. Menand, supra note 2, at 4.

[FN44]. Id.

[FN45]. Id. (discussing the use of "catch-all" terms or buzz words that have been used to launch a full-scale attack on the academy); See also STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING TOO 19, 34 (1994) (expounding upon liberalism and arguments by neoconservative polemicists in recent "culture wars" and other apolitical labels used to construct political ideologies).

[FN46]. See generally, ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND (1987); LYNNE CHENEY, NATIONAL ENDOWMENT FOR THE HUMANITIES, TELLING THE TRUTH: A REPORT ON THE STATE OF THE HUMANITIES IN HIGHER EDUCATION (1992); ARTHUR SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTING ON A MULTICULTURAL SOCIETY (1991) (discussing the decline of academic quality and criticizing the role of the university and academe in suppressing academic speech to promote multiculturalism and politicization).

[FN47]. Keyishian v. Board of Regents, 385 U.S. 589, 607, 87 S. Ct. 675, 683 (1967).

[FN48]. See Board of Education v. Pico, 457 U.S. 853, 102 S. Ct. 2799 (1982) (holding that federal courts should ordinarily decline to intervene in the affairs of public educational institutions where the "comprehensive authority of States and of school officials ... to prescribe and control conduct has historically been acknowledged"). Id. at 864-65. Regents University of California v. Bakke, 438 U.S. 265, 311-12, 98 S. Ct. 2733, 2759- 60 (1978) (reaffirming the freedom of the university to make its own judgments as to education); University of Pennsylvania v. EEOC, 493 U.S. 182, 118 S. Ct. 2811 (1990) (quoting Regents University of Michigan v. Ewing, 474 U.S. 214, 225, 106 S. Ct. 507, 513 (1985)) (cautioning that "judges ... asked to review the substance of a genuinely academic decision ... should show great respect for the faculty's professional judgment" and noting that the decision in University of Pennsylvania was not a "retreat from this principle of respect for legitimate academic decision making"). Id. at 199, 110 S. Ct. at 587. See also HAMILTON, supra note 37, at 215 (defining academic abstention as 1) the view that lower courts should first determine if judicial review of a case involves the substance of an academic decision, and 2) reviewing courts must determine if the academic decision is made legitimately through the exercise of professional judgment of faculty and if so, the court should give much respect or deference to the decision); WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE LAW MAKING 306 (3d ed. 1995) (discussing courts' general reluctance to become involved in academic freedom disputes, concerns of course content, teaching methods, grading, and classroom

behavior).

[FN49]. See Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir. 1996), cert. denied, 117 S. Ct. 1290 (1997). Writing for the Ninth Circuit, Judge Merhige stated: "Neither the Supreme Court nor this Circuit has determined what scope of First Amendment protection is to be given a public college professor's classroom speech. We decline to define today the precise contours of the protection the First Amendment provides the classroom speech of college professor's because we conclude the Policy's terms were unconstitutionally vague." Id. See also Gregory A. Clarick, Public School Teachers and the First Amendment: Protecting the Right To Teach, 65 N.Y.U. L. REV. 696 (discussing the right of students and public teachers to think and act free of state coercion along with the interest of the state as both educator and employer).

[FN50]. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977).

[FN51]. 385 U.S. 589, 87 S. Ct. 675 (1967).

[FN52]. Id. at 603, 87 S. Ct. at 683.

[FN53]. See, e.g., Adler v. Board of Education, 342 U.S. 485, 72 S. Ct. 380 (1952) (upholding a New York statute prohibiting the employment of public school teachers who were members of any violent organization advocating the overthrow of the government but later overruled by Keyishian v. Board of Regents, 385 U.S. 589, 87 S. Ct. 675 (1967)); Weiman v. Updegraff, 344 U.S. 183, 73 S. Ct. 215 (1952) (holding that a statute requiring faculty and staff at a public college to sign an Oklahoma loyalty oath violated the due process clause of the 14th Amendment); Shelton v. Tucker, 364 U.S. 479, 81 S. Ct. 247 (1960) (holding that an Arkansas statute, which required prospective college faculty and staff to provide an annual report of all organizational memberships in the last five years, violated employee's freedom of association).

[FN54]. See generally William W. Van Alstyne, Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review, in FREEDOM AND TENURE IN THE ACADEMY 79 (William W. Van Alstyne, ed., 1993) (discussing the evolution of academic freedom within the context of the First Amendment and emerging Supreme Court jurisprudence in the area).

[FN55]. 393 U.S. 503, 508, 89 S. Ct. 733, 737 (1969).

[FN56]. Id. at 509, 89 S. Ct. at 738 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[FN57]. 484 U.S. 260, 271, 273, 108 S. Ct. 562, 570, 571 (1988).

[FN58]. Id. at 264, 108 S. Ct. at 566. The Hazelwood Court also stated that "students in public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Id.

[FN59]. Id. at 271, 108 S. Ct. at 570.

[FN60]. Id. (discussing other cases which have given deference to public school officials with regard to censoring school-sponsored newspapers and other expressive activities) (cited in note 7). See also Lovelace v. Southeastern Mass. Univ., 793 F.2d 419, 424 (1st Cir. 1986) (holding that universities have substantial control over course content, homework load, and grading policy).

[FN61]. See generally Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991); DiBona v. Matthews, 269 Cal. Rptr. 882 (Cal. Ct. App. 1990); Silva v. University of N.H., 888 F. Supp. 293 (D.N.H. 1994), and Cohen, 883 F. Supp. 1407 (C.D. Cal. 1995); see also Gail Sorenson and Andrew S. LaManque, The Application of Hazelwood v. Kuhlmeier in College Litigation, 22 J.C. & U.L. 977 (1996) (discussing the cases that cite Hazelwood and relate to classroom activities and academic freedom).

[FN62]. Colleges and universities face similar problems relating to charges of racial harassment in the classroom. Although campus policies which protect students and employees from racial harassment are similar to sexual harassment policies, the author makes no attempt to deal with racial harassment policies and hate speech codes as they relate to academic freedom in this article. For a discussion of hate speech codes and First Amendment implications see generally MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993) (discussing "assaultive speech" and critical race theory); HENRY LOUIS GATES, JR., SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES (1994) (discussing the recent regulation of hate speech or words which reflect racial and sexual hatred and bigotry within the context of the First Amendment and critical race theory).

[FN63]. See Dambrot v. Central Mich. Univ., 55 F.3d 1177 (6th Cir. 1995) (holding that a college basketball coach's who use of the word, "nigger," to motivate his players was not a matter of public concern, and thus, not protected by the First Amendment); Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 393 (4th Cir. 1993) (overturning a university sanction against a fraternity for a skit in which members wore black face and dressed in women's clothes in an "ugly woman contest" because the sanctioning of the fraternity violated the Fourteenth Amendment and constituted a content-based restriction on speech).

[FN64]. Cohen v. San Bernardino Valley College, 92 F.3d 968, 969 (9th Cir. 1996). See also Appellant's Opening Brief at 2, 3, Cohen, 92 F.3d 968 (9th Cir. 1996) (No. 95-55936) (indicating that Murrillo was thirty-five years old).

[FN65]. Id. at 971. San Bernardino Valley College's sexual harassment policy stated: "Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal, written, or physical conduct of a sexual nature. It includes, but is not limited to, circumstances in which: 1) Submission to such conduct is made explicitly or implicitly a term or a condition of a student's academic standing or status; 2) 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; 3) Submission to or rejection of such conduct is used as the basis for academic success or failure." Id. The College's sexual harassment policy was based on EEOC guidelines on sexual harassment. See also 29 C.F.R. § 1604.11(a)(1)(2); 29 C.F.R. § 1604.11(a)(3).

[FN66]. Cohen v. San Bernardino Valley College, 883 F. Supp. 1407, 1410 (C.D. Cal. 1995). The record is unclear as to the specific articles that Murillo had to read in class. However, students from Cohen's other classes testified that he required them to read an article that he had written entitled, The Film Critic and Pornography. In the article, Cohen discusses the definition of a "four-handkerchief movie," a

pornographic film which is extremely arousing to male viewers. A line from the article also contains the sentence, "I had an erection in about eight seconds." This article was also discussed in class with students.

[FN67]. Id. See also Appellant's Opening Brief, at 3 Cohen, 92 F.3d 968 (9th Cir. 1996) (No. 95-55936) (indicating that Murillo wrote a first draft of the assignment, taking a position against pornography).

[FN68]. Cohen, 92 F.3d at 971. See also Appellant's Opening Brief, at 3, Cohen, 92 F.3d 968 (9th Cir. 1996) (No. 95-55936) (stating that after Murillo complained about the pornography writing assignment, the English Department offered to give Murillo a final exam, which she took and failed, and a final grammar test by Cohen, which Murillo never undertook).

[FN69]. Id.

[FN70]. Id.

[FN71]. Id. at 971. See also Appellant's Opening Brief, at 3, Cohen, 92 F.3d 1996 (No. 95-55936) (explaining that Murillo also charged Cohen with quid pro quo sexual harassment but the Grievance Committee found no quid pro quo sexual harassment) (cited in note 12). When asked at a Board hearing if he ever asserted that he would raise Murillo's grade if she would go to a bar with him, Cohen answered, "Never. First of all, I don't go to bars, despite the jokes I make about it in class. I do not spend my time in bars. Secondly, if someone might make a [inaudible] like that, it might be a matter of jest. I would not have made a jest like that I don't know where she got the idea. It was never anything I alluded to, implied or said." Id. at 5 (cited in note 15).

[FN72]. Id.

[FN73]. Id.

[FN74]. 42 U.S.C. § 1983 allows plaintiffs to bring civil suits for deprivation of rights against state and local governments and other state actors who violate their rights under the constitution or a federal statute. Section 1983 specifically reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceeding for redress." Id.

[FN75]. Cohen, 92 F.3d at 972. The doctrine of qualified immunity shields public officials performing discretionary functions from personal liability under some circumstances. Whether an official is protected by qualified immunity depends upon the objective legal reasonableness of his actions, assessed in light of the legal rules that were clearly established at the time. Thus, according to the court, governmental officials are "entitled to qualified immunity when their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known." Id. at 973 (citing Lindsey v. Shalmy, 29 F.3d 1382, 1384 (9th Cir. 1994)). See also Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982) (holding officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or

constitutional rights of which a reasonable person would have known").

[FN76]. Cohen, 92 F.3d at 969.

[FN77]. Cohen v. San Bernardino Valley College, 883 F. Supp.1407, 1414 (C.D. Cal. 1995).

[FN78]. Id. (quoting Connick v. Myers, 461 U.S. 138, 147-48, 103 S. Ct. 1684, 1690-91).

[FN79]. 511 U.S. 661, 114 S. Ct. 1878 (1994). See infra, p. 21 for a more in-depth discussion of Waters.

[FN80]. Cohen, 883 F. Supp. at 1417.

[FN81]. Id. at 1421.

[FN82]. Id.

[FN83]. Cohen v. San Bernardino Valley College, 92 F.3d 968, 971 (9th Cir. 1996).

[FN84]. Id.

[FN85]. Broadrick, 413 U.S. 601, 93 S. Ct. 2908 (1973) (upholding an Oklahoma statute which restricted the political activities of the state's classified civil servants regarding the receiving and solicitation of political campaign funds and membership on political committees. The Court held that this statute was not overly broad or vague).

[FN86]. Cohen, 92 F.3d at 971 (citing Broadrick, 413 U.S. at 611-12, 93 S. Ct. at 2915-16.)

[FN87]. Id. at 972.

[FN88]. Id.

[FN89]. Id.

[FN90]. Connick, 461 U.S. at 142, 103 S. Ct. at 1687 (1983).

[FN91]. Id. at 145, 103 S. Ct. at 1689.

[FN92]. See Cynthia K. Y. Lee, Comment, Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement, 76 CAL. L. REV. 1109 (1988) (discussing the rights and privileges given public employees under the Pickering-Connick test);

Hoppman, supra note 24, at 997 (analyzing the destruction of the rights/ privileges distinction of a public employee as both public employee and citizen); D. Gordon Smith, Comment, Beyond "Public Concern:" New Free Speech Standards for Public Employees, 57 U. CHI. L. REV. 249 (1990) (examining the legal analyses used by courts in assessing a public employee's speech and defining new standards); Stephen Allred, From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern, 64 IND. L. J. 43 (1988) (arguing that the public concern doctrine is difficult to administer and that a public employee's speech falling into this category is difficult to discern).

[FN93]. 391 U.S. 563, 88 S. Ct. 1731 (1968).

[FN94]. Id.

[FN95]. Id. at 568-69, 88 S. Ct. at 1734-35.

[FN96]. Id. at 568, 88 S. Ct. at 1734.

[FN97]. Id. at 572-73, 88 S. Ct. at 1736-37.

[FN98]. See Linda S. Lovely, Beyond The Freedom To Do Good And Not To Teach Evil: Professors' Academic Freedom Rights In Classrooms of Public Higher Education, 26 WAKE FOREST L. REV. 711, 720 (1991) (discussing the Court's analysis in Pickering and outlining the following five factors striking the balance in Pickering's favor: "1) no close working relationship existed between Pickering and the school board; 2) the subject of the letter was a matter of legitimate public concern; 3) the letter had no detrimental impact upon the school's operation; 4) the letter in no way impeded Pickering's classroom performance; and 5) Pickering wrote the letter as a member of the general public").

[FN99]. 461 U.S. 138, 103 S. Ct. 1684 (1983).

[FN100]. Id. at 146, 103 S. Ct. at 1689.

[FN101]. Id.

[FN102]. Id. at 146, 147, 103 S. Ct. at 1689, 1690.

[FN103]. Id. at 146, 103 S. Ct. at 1689.

[FN104]. Id. at 147, 103 S. Ct. at 1690.

[FN105]. Id. at 149, 103 S. Ct. at 1691.

[FN106]. Id. at 150, 103 S. Ct. at 1692.

[FN107]. Id. at 147, 103 S. Ct. at 1690. See also Roth v. United States, 354 U.S.

476, 77 S. Ct. 1304 (1957); New York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348 (1982)). The speech in Chaplinsky involved "fighting words," and the speech in Roth and Ferber involved obscenities. But see R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377, 112 S. Ct. 2538 (1992). In R.A.V. the Supreme Court declared unconstitutional a municipal ordinance which made it illegal conduct to place on public and private property messages that one would reasonably know to "arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender." The Court held that the ordinance was facially unconstitutional because "it prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addressed." Even though the statute was to reach only "fighting words," the majority ruled it impermissible as a content and viewpoint-based restriction. Id. at 381, 112 S. Ct. at 2542. Justice White stated that the decision would have severe implications on Title VII hostile environment claims. Justice White observed that the restrictions of Title VII were similar to the ordinance because both placed "special prohibitions on those speakers who express views on disfavored subjects." Thus, based on the majority's ruling, hostileenvironment claims would "fail First Amendment review, because a general ban on harassment ... would cover the problem of sexual harassment, [and] any attempt to proscribe the subcategory of sexually harassing expression would violate the First Amendment." Id. at 381, 409-10, 112 S. Ct. at 1254, 2557-58 (White, J., concurring). The Supreme Court's holding in R.A.V. has further ramifications based on the "secondary effects" doctrine, which states that the government may restrict speech or expression which seeks to regulate the "secondary" harm resulting from the speech rather than the content of the words communicated. See Boos v. Barry, 485 U.S. 312, 320, 108 S. Ct. 1157 (1988). However, the majority in R.A.V. concluded that the "secondary effects" doctrine would allow the government to regulate racial and sexual harassment. R.A.V, 505 U.S. at 425, 102 S. Ct. at 2565. Nevertheless, Justice White argued that these policies would not withstand scrutiny under the "secondary effects" doctrine. Id. at 410, 102 S. Ct. at 2558.

[FN108]. Connick, 461 U.S. at 152, 103 S. Ct. at 1693.

[FN109]. 429 U.S. 274, 97 S. Ct. 568 (1977). Mt. Healthy is an example of a "mixed-motive" case. Mixed motive cases involve the termination of an employee for a legitimate, constitutionally or statutorily protected reason and also for an unprotected or illegitimate reason.

[FN110]. Id. at 284, 97 S. Ct. at 574 (citing Pickering, 391 U.S. at 568, 88 S. Ct. at 1734 (1968)).

[FN111]. Id. at 287, 97 S. Ct. at 576. The "same decision defense" is asserted by employers to prove that they would have reached the same adverse employment decision based on a legally permissible reason, despite the fact that the plaintiff was also dismissed for an impermissible purpose.

[FN112]. Id.

[FN113]. Id.

[FN114]. Id.

[FN115]. 511 U.S. 661, 114 S. Ct. 1878 (1994).

[FN116]. Id. at 667-68, 114 S. Ct. at 1883-84.

[FN117]. Id. at 675-77, 114 S. Ct. at 1887-88.

[FN118]. Id. at 665, 114 S. Ct. at 1883.

[FN119]. Id. at 671, 114 S. Ct. at 1886.

[FN120]. Id. at 675, 114 S. Ct. at 1888.

[FN121]. Id. at 681-82, 114 S. Ct. at 1890-91. The Court referred to Churchill's previous criticisms of the cross-training policy in the past, management's sensitivity to the criticisms, and hostilities directed at Churchill as other possible motivating factors for her dismissal. Id.

[FN122]. Id. at 682, 114 S. Ct. at 1891.

[FN123]. Id. at 677, 114 S. Ct. at 1888 (discussing an employer's action based on what an employee "supposedly said" and the need for employers in conducting investigations to use the care that a reasonable employment manager would use in drawing factual conclusions but not requiring the employer to use evidentiary procedures which "substantially mirror" courts). Id. at 675, 677, 114 S. Ct. at 1886, 1888. See also Jeffries v. Harleston, 52 F.3d 9 (2d Cir. 1995). In Jeffries, a Black Studies Professor brought a section 1983 action against university officials for allegedly removing him as department chair because of a controversial speech he made "off-campus." In his speech on bias in the New York Public School curriculum, Jeffries made several derogatory and offensive comments about Jews. Id. at 11. Originally, the Second Circuit upheld the district court's finding that 15 university officials had violated the First Amendment rights of Jeffries by reducing his term as department chair due to the controversial speech. In its initial ruling, the Second Circuit held that the government had not shown that the speech actually "impaired the efficiency of government operations." The Second Circuit also vacated part of the judgment which found six of the defendants liable for punitive damages because the jury's special verdict responses were "hopeless irreconcilable" on whether these defendants harbored the necessary evil motives. Jeffries, 21 F.3d 1238, 1245, 1250 (2d Cir. 1994). On rehearing the Second Circuit, using the recent Waters decision, reversed its holding. The court reasoned that "Waters permits a government employer to fire an employee for speaking on a matter of public concern if: 1) the employer's prediction of disruption is reasonable; 2) the potential disruptiveness is enough to outweigh the value of the speech; and 3) the employer took action against the employee based on this disruption and not in retaliation for the speech." Jeffries, 52 F.3d at 13. Thus, the Second Circuit held that it was "reasonable" for the university to believe that Jeffries' speech would disrupt its operation and the "potential interference" with university operations outweighed the First Amendment value of Jeffries' speech. Id. While recognizing the importance of academic freedom, the court also held that Jeffries, as a faculty member at a public university, did not deserve greater protection from state interference due to his speech than did the nurse in Waters. Id. at 14. See also Richard H. Hiers, New Restrictions on Academic Free Speech: Jeffries v. Harleston II, 22 J.C. & U.L. 217 (1995) (discussing Jeffries and delineating between two types of First Amendment speech rights for public educators: 1) the general protections of academic freedom in public colleges and universities; and 2) the speech rights of public school teachers and public employees in other work contexts. Hiers also notes that the Supreme Court has not addressed "whether the severely restrictive standards developed in the second line of cases must also apply to academic free speech"). Id. at 218.

[FN124]. Waters, 511 U.S. at 680, 114 S. Ct. at 1690.

[FN125]. Id. at 675, 114 S. Ct. at 1888.

[FN126]. Connick v. Myers, 461 U.S. 138, 150, 103 S. Ct. 1684, 1691 (1983).

[FN127]. See Mailloux v. Kiley, 448 F.2d 1242 (1st Cir. 1971); Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993).

[FN128]. See Miles v. Denver Public Schools, 944 F.2d 773 (10th Cir. 1991). But see Blum v. Schlegel, 18 F.3d 1005 (2d Cir. 1994) (holding that a public law school did not violate the free speech rights of an associate law school professor, who was denied tenure, because he openly supported the legalization of marijuana but using the Pickering-Connick test and the Mt. Healthy test to arrive at the decision while acknowledging the special mission of law schools).

[FN129]. See Bishop v. Aranov, 926 F.2d 1066 (11th Cir. 1991).

[FN130]. Mailloux, 448 F.2d at 1243. Mailloux, a high school English teacher, assigned chapters from the novel, The Thread That Runs So True, by Jesse Stuart to his class. The novel centers around a rural Kentucky teacher who teaches students in a one room school. Mailloux, 323 F. Supp. 1387 (D. Mass. 1971). Typically, students in the novel were separated in the classroom according to sex; however, the teacher in the novel intermingles the boys and girls for seating purposes and parents object. In discussing the book with his class, some students thought the parents' objections were ridiculous. Mailloux commented that other things today were just as ridiculous and then began illustrating his point by discussing the subject of taboo words in society. Id. He wrote the word, "goo," on the board and solicited students for a definition. Mailloux then admitted that the word did not exist in the English language but stated that in another culture it could be a taboo word. He then wrote the word, "fuck," on the blackboard and asked for volunteers to define it. After a few minutes, a boy volunteered that it meant "sexual intercourse." Id. Mailloux then said to the class, "We have two words, sexual intercourse and this word on the board. One is acceptable by society; the other is not accepted. It is a taboo word." Id. After discussing taboo words for a few more minutes, the class went on to other subjects. The next day a parent, erroneously informed that Mailloux had called upon a female student to define the word, complained to the principal. Id.

[FN131]. Mailloux v. Kiley, 323 F. Supp. 1387, 1390 (D. Mass. 1987).

[FN132]. Id.

[FN133]. Id. at 1392.

[FN134]. Id.

[FN135]. Id. at 1390.

[FN136]. Mailloux v. Kiley, 448 F.2d 1242, 1243 (1st Cir. 1971).

[FN137]. Id.

[FN138]. 996 F.2d 448 (1st Cir. 1993).

[FN139]. Id. at 455.

[FN140]. See generally Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568 (1977); Keyishian v. Bd. of Regents, 385 U.S. 589, 87 S. Ct. 675 (1967); Hazelwood v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562 (1988).

[FN141]. Ward, 996 F.2d at 452.

[FN142]. Id.

[FN143]. 448 F.2d 1242 (4th Cir. 1971).

[FN144]. 484 U.S. 260, 108 S. Ct. 562 (1988).

[FN145]. Ward, 996 F.2d at 452.

[FN146]. Id. at 454 (citing Perry, 460 U.S. 37, 49-54, 103 S. Ct. 948, 957-60 (1983) (holding that the First Amendment is not violated by the preferential access to the interschool system granted to one teacher association over another).

[FN147]. Educational institutions may regulate disruptive speech; however, they may not impose special regulations on persons who express views which they do not support or favor. This is based upon the First Amendment and the idea that the government "must afford all points of view an equal opportunity to be heard." Carey v. Brown, 447 U.S. 455, 463, 100 S. Ct. 2286, 2291 (1980). If a school or university prohibits or regulates speech in a way that favors one side of the argument over another on a particular issue or limits expression of a particular idea, their actions are examined under heightened scrutiny. These types of restrictions are known respectively as viewpoint discrimination and content-based restrictions. Id.

[FN148]. Perry, 460 U.S. at 46, 103 S. Ct. at 948.

[FN149]. Ward, 996 F.2d at 454.

[FN150]. 944 F.2d at 773.

[FN151]. Id.

[FN152]. Id. at 774.

[FN153]. Id.

[FN154]. Id.

[FN155]. Id. at 778.

[FN156]. Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (requiring the plaintiff to show 1) the speech for which he was sanctioned was constitutionally protected and 2) the protected speech motivated the adverse employment decision in order to establish a First Amendment violation).

[FN157]. 484 U.S. at 266, 273, 108 S. Ct. 562, 570 (quoting Tinker, 393 U.S. 503, 506, 89 S. Ct. 733, 740 (1969)).

[FN158]. Miles, 944 F.2d at 775 (quoting Perry, 460 U.S. at 37, 46 n.7, 103 S. Ct. 948, 956 n.7). The Supreme Court has held that school facilities are not open for "indiscriminate use by the general public," and the school is not a public forum. Therefore, school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. Id.

[FN159]. See Clarick, supra note 49, at 65. Clarick provides a discussion of the First Amendment and a teacher's in-class speech as it relates to the educational process. A thorough analysis of the public concern, discrimination on the basis of viewpoint, and public forum doctrines is also included. Clarick argues that due to the aims of primary and secondary education that school boards should restrict a teacher's in-class speech only when it "substantially disrupts" the educational process. He calls for a balancing of a teacher's right to freedom of expression against the disruption caused by the expression. Id.

[FN160]. Miles, 944 F.2d at 777.

[FN161]. See also Pico v. Board of Educ., 457 U.S. 853, 920, 102 S. Ct. 2799, 2735 (1982) (Rehnquist, J., dissenting) (stating that the state as educator is subject to fewer restrictions when regulating the speech of primary and secondary teachers than university faculty.)

[FN162]. 438 U.S. at 311-12, 98 S. Ct. 2733, 2759 (citing Sweezy, 354 U.S. at 263, 77 S. Ct. at 1218).

[FN163]. Miles, 944 F.2d at 779.

[FN164]. 868 F.2d 821, 831 (6th Cir. 1989) (holding that the Dean's disruption to a non-tenured professor's class was not a violation of academic freedom because it did not create a "pall of orthodoxy" over the classroom); See also Keyishian, 385 U.S. 589, 87 S. Ct. 675 (1967) (stating that [[academic] "freedom is therefore a special concern of the First Amendment, which does not tolerate laws which cast a pall of orthodoxy over the classroom") Id. at 607, 87 S. Ct. at 680.

[FN165]. Miles, 944 F.2d at 777. See also J. Peter Byrne, Academic Freedom: A Special Concern of the First Amendment, 99 YALE L. J. 251 (1989). Byrne distinguishes between academic freedom, as used in the profession and constitutional

academic freedom. He also provides an analysis of academic freedom as a corporate right of the university against the state versus the rights of individual faculty members. Id.

[FN166]. 868 F.2d 821, 830-31 (6th Cir. 1989).

[FN167]. Miles, 944 F.2d at 777.

[FN168]. 926 F.2d 1066 (11th Cir. 1991).

[FN169]. Id. at 1068.

[FN170]. Id.

[FN171]. Id. at 1069.

[FN172]. Bishop v. Aronov, 732 F. Supp. 1562, 1567 (N.D. Ala. 1990).

[FN173]. See Gail Sorenson & Andrew S. LaManque, The Application of Hazelwood v. Kuhlmeier in College Litigation, 22 J.C. & U.L. 971, 977 (1996) (discussing the distinction between Bishop and Hazelwood).

[FN174]. Bishop, 926 F.2d at 1070.

[FN175]. Id. at 1072.

[FN176]. Id.; See also Hazelwood v. Kuhlmeier, 484 U.S. 260, 273, 108 S. Ct. 562, 571 (1988).

[FN177]. Id. at 1074; See also Scallet v. Rosenblum, 911 F. Supp. 999, 1010 (W.D. Va. 1996) (discussing Bishop and the court's fashioning of its own balancing test).

[FN178]. Id.

[FN179]. Id.

[FN180]. Id. at 1075. See also Scallet, 911 F. Supp. at 999, 1010 (discussing Bishop and the court's fashioning of its own balancing test).

[FN181]. Id. at 1076. See also Scallet, 911 F. Supp. at 999, 1010 (discussing Bishop and the court's fashioning of its own balancing test).

[FN182]. 42 U.S.C. § 2000e-17 (1985). Of equal importance was the passage of the Civil Rights Act of 1991. The 1991 Act provided for jury trials and increased compensatory and punitive damages available in sex discrimination and sexual

harassment cases from $50,000 to $300,000 per case. 42 U.S.C. § 1981a(b)(3) (Supp. 1992).

[FN183]. 29 C.F.R. § 1604.11(a).

[FN184]. 29 C.F.R. § 1604.11(a)(1)(2).

[FN185]. 29 C.F.R. § 1604.11(a)(3). To establish a quid pro quo or hostile environment sexual harassment claim, the plaintiff must prove that he or she: 1) is a member of a protected class; 2) has been subjected to unwelcome communication or conduct on the basis of sex; 3) the harassment affected a term or condition of employment or was severe and pervasive enough to alter the working environment; and 4) has a basis for imposing liability on the employer such as the employer knew or should have known of the harassment and failed to take remedial action. Id. See also AMERICAN ASSOCIATION OF COLLEGE AND UNIVERSITY PROFESSORS, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS POLICY DOCUMENTS AND REPORTS 171-72 (1995). This report discusses the American Association of University Professors' opposition to harassment in any form and its inconsistency with academic freedom. The Association outlines three types of sexual harassment in academe. The Association's policy statement reads: "Sexual advances, requests for sexual favors, and other speech or conduct of a sexual nature constitute sexual harassment when: 1) Such advances or requests are made under circumstances implying that one's response might affect academic or personnel decisions that are subject to the influence of the person making the proposal; or 2) Such speech or conduct is directed against another and is either abusive or severely humiliating, or persists despite objection of the person targeted by the speech or conduct; or 3) Such speech or conduct is reasonably regarded as offensive and substantially impairs the academic or work opportunity of students, colleagues, or co-workers." Id.

[FN186]. Meritor Savings Bank v. Vinson, 477 U.S. 57, 64, 106 S. Ct. 2399, 2404 (1986). The Supreme Court has implicitly endorsed the EEOC's guidelines on quid pro quo and explicitly endorsed the hostile environment sexual harassment in Meritor. Id.

[FN187]. 29 C.F.R. § 1604.11(a)(3). For a good discussion of the hostile environment problem on college campuses and related statistics, see Linda V. Gratch, Recognizing Sexual Harassment, in SEXUAL HARASSMENT ON CAMPUS 281 (Bernice R. Sandler & Robert J. Shoop, eds., 1997) (citing D.B. Mazer and E. Percival, Students' Experiences of Sexual Harassment at a Small University 20 SEX ROLES 1-22 (1989)) (discussing a 1989 study which indicates that 78 percent of female students and 72 percent of male students found hostile learning environments a problem at their universities).

[FN188]. 477 U.S. 57, 67, 106 S. Ct. 2399, 2405 (1996). See also Oncale v. Sundowner Offshore Services, 118 S. Ct. 998 (1998) (holding that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII).

[FN189]. Id. at 60-61, 106 S. Ct. at 2402.

[FN190]. Id. at 67, 106 S. Ct. at 2405.

[FN191]. Id. at 62-67, 106 S. Ct. at 2403-05. See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (defining unwelcome conduct as conduct that the "employee did not solicit or incite ... and regard[s] ... as undesirable or offensive").

Henson, 682 F.2d at 903.

[FN192]. 510 U.S. 17, 114 S. Ct. 367 (1993).

[FN193]. See Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987) (applying a "reasonable woman" standard); Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (applying a "reasonable woman" standard); Harris v. Forklift, 510 U.S 17, 22-23, 114 S. Ct. 367, 371 (1993) (applying the ""reasonable person standard" but not rejecting the "reasonable woman or man" standard); Newton v. Department of Air Force, 85 F.3d 595, 599 (Fed. Cir. 1996) (applying a "reasonable victim" standard); Torres v. Pisano, 116 F.3d 625 (2d Cir. 1997) (applying a "reasonable Puerto Rican woman" standard).

[FN194]. Harris v. Forklift Systems, 510 U.S. 17, 114 S. Ct. 367.

[FN195]. Id. at 23, 114 S. Ct. at 371.

[FN196]. 924 F.2d 872 (9th Cir. 1991).

[FN197]. Id. at 878.

[FN198]. See Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 112 S. Ct. 1028 (1992) (holding that under Title IX a student could maintain a sexual harassment claim against a school system) Id. at 69, 112 S. Ct. at 1034.

[FN199]. For a discussion of the "reasonable woman" standard in sexual harassment claims, see generally, Jolynn Childers, Is There A Place for A Reasonable Woman In the Law? A Discussion of Recent Hostile Environment Sexual Harassment 42 DUKE L. J. 854 (1993); Bonnie B. Westman, The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace, 18 WM. MITCHELL L. REV. 795 (1992).

[FN200]. 42 U.S.C. § § 2000e - 2000e-17 (1985).

[FN201]. See Patricia H. v. Berkeley Unified School District, 830 F. Supp. 1288 (N.D. Cal. 1993) (applying a "reasonable student" standard); Silva, 888 F. Supp. at 293 (applying a "sophistication of adults" standard).

[FN202]. 888 F. Supp. at 314 (D.N.H. 1994). The district court relied upon the language in Hazelwood in arriving at its conclusion.

[FN203]. Id. at 298. Silva states in an affidavit that he has used the sexual intercourse metaphor throughout his fourteen years of teaching and that he first heard it in used in an interview with Ernest Hemingway. Silva also notes that David Bartholomew, a writer for the New Yorker magazine, and Ray Bradbury had used the same metaphors. Id.

[FN204]. Id.

[FN205]. Id. at 287.

[FN206]. Id. at 314.

[FN207]. Id. at 315. The district court applies the Pickering-Connick test but also notes circuits which have chosen not to apply the test in an educational setting. The court also states that it does not propose to resolve the issue of whether such a test is appropriate in an educational setting (cited in note 16). See Timothy E. Di Domenico, Comment, Silva v. University of New Hampshire: The Precarious Balance Between Student Hostile Environment Claims and Academic Freedom, 69 ST. JOHN'S L. REV. 609 (1995) (arguing that Silva's speech was not a matter of public concern and not protected by the First and Fourteenth Amendments).

[FN208]. 448 F.2d 1242 (1st Cir. 1971).

[FN209]. Silva, 888 F. Supp. at 313 (quoting Mailloux, 448 F.2d at 1243).

[FN210]. Id.

[FN211]. The University of New Hampshire eventually settled the case with Professor Silva, agreeing to reinstate him and to pay him $170,000 in legal fees and $60,000 in back pay. See Lott & Reilly, supra note 14, at 15.

[FN212]. 20 U.S.C. § 1681(a) (1982).

[FN213]. See Doe v. Lago Vista Independent School District, 106 F.3d 1223 (5th Cir. 1997), cert. granted, 118 S. Ct. 595 (1997). The central issue in this case is the proper liability standard for a public school district under Title IX for a teacher's sexual harassment of a high school student. The Fifth Circuit held that the school district was not vicariously liable under Title IX for a teacher's sex harassment of a high school student based on a common-law agency theory of harassment. Alida Star Gebser, the fourteen year old high school student who brought the suit based on section 1983 and Title IX, did not present evidence that any school employee or official knew about the improper relationship between her and the teacher, Frank Waldrop. Id. at 1224. Gerber v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998). The Supreme Court held as a matter of first impression an implied private right for nonetary damages under Title IX will not lie by reason of teacher's sexual harassment due to the school district's lack of notice. See also Elaine D. Ingulli, Sexual Harassment in Education, 18 RUTGERS L.J. 281 (1987) (discussing the implications of Title VII and Title IX in sexual harassment litigation involving educational institutions); See also Lott & Reilly, supra note 14, at 117, 120 (noting that Title IX also covers employees and may afford remedies beyond Title VII because there is no cap on punitive damages but that expanded Title IX remedies established under Gwinnett are limited to cases of intentional discrimination).

[FN214]. 29 C.F.R. Chapter XIV, Part 1604, paragraph 310.

[FN215]. 503 U.S. 60, 112 S. Ct. 1028 (1992).

[FN216]. Id. at 63, 112 S. Ct. at 1031.

[FN217]. Id. at 75, 112 S. Ct. at 1037.

[FN218]. See also Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (holding that hostile environment claims are allowable in an employment context under Title IX); Moire v. Temple University School of Medicine, 613 F. Supp. 1360 (E.D. Pa. 1985) (holding that a medical student did not establish her claim in this case but recognizing a cause of action under Title IX sexual harassment claim for abusive environments); Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311 (10th Cir. 1987) (stating there is no reason not to apply Title VII's standards regarding sexual discrimination to Title IX suits). But see also Bougher v. University of Pittsburgh, 882 F.2d 74 (3d Cir. 1989) (holding that Title IX reaches quid pro quo harassment but not hostile environment harassment). However, the Supreme Court's analysis in Gwinnett, a Title IX case, basically decided this issue by comparing the student-teacher relationship to the employee-supervisor relationship. Citing Meritor, a Title VII hostile environment case, the Court stated, "We believe the same rule should apply when a teacher sexually harasses and abuses a student." Gwinnett, 503 U.S. at 74, 112 S. Ct. at 1037.

[FN219]. Gwinnett, 503 U.S. at 75, 112 S. Ct. at 1037.

[FN220]. Id.

[FN221]. 477 U.S. 57, 106 S. Ct. 2399 (1986).

[FN222]. 830 F. Supp. 1288 (N.D. Cal. 1993).

[FN223]. Id. at 1294.

[FN224]. Id. At one time, Hamilton was engaged in a romantic relationship with Patricia H., the mother of one of the students who alleged that she was molested. Id.

[FN225]. Id. at 1294-96.

[FN226]. Id. at 1296.

[FN227]. Id.

[FN228]. Id. at 1297.

[FN229]. Id. at 1296.

[FN230]. Id.

[FN231]. It should be noted that state tort laws, state sexual harassment statutes, and the Equal Protection Clause of the Fourteenth Amendment also provide alternative legal strategies for victims of sexual harassment. The Fourteenth Amendment reads:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The problems associated with basing a sexual harassment claim on the Equal Protection Clause are issues of qualified immunity for state actors and the inability to be successful against a municipality unless the injury or sexual harassment was based on some policy of the municipality. Nevertheless, the Seventh and Ninth Circuits have recognized sexual harassment as discrimination that is prohibited by the Equal Protection Clause. See Bohen v. City of East Chicago, 799 F.2d 1180, 1185-87 (7th Cir. 1986) (upholding the use of the Equal Protection Clause in a sexual harassment claim and stating that the victim need only prove intentional discrimination and not that the harassment altered the terms and conditions of employment); Bator v. Hawaii, 39 F.3d 1021, 1027 (9th Cir. 1994) (holding that a claim of sexual harassment can be impermissible sex discrimination based on the Equal Protection Clause).

[FN232]. See generally Hazelwood v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562 (1988); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 106 S. Ct. 3159 (1986); Peloza v. Capistrano Unified School Dist., 782 F. Supp. 1412 (C.D. Cal. 1992).

[FN233]. See Miles v. Denver Pub. Sch., 944 F.2d 773, 777 (10th Cir. 1991) (relying on Hazelwood, a student academic freedom case, to decide a teacher academic freedom issue); Bishop, 926 F.2d at 1071 (relying on Hazelwood to determine that a public university classroom is not an open forum).

[FN234]. The district court in Cohen acknowledged that the cases dealing with high school students may not apply in the college or university context, but then the court states that many of the First Amendment concerns remain the same, regardless of educational level. Cohen, 883 F. Supp. at 1413.

[FN235]. 805 F.2d 583, 585 (5th Cir. 1986) (holding that a college economic instructor's use of profanity in the classroom was not protected by the First Amendment and stating that "repeated failure by a member of the educational staff of Midland College to exhibit professionalism degrades his important mission and distracts from the subjects he is trying to teach"). Id.

[FN236]. Id. at 588.

[FN237]. See HAMILTON, supra note 37, at 201 (discussing the similarities and differences between precollege and higher education).

[FN238]. 385 U.S. 589, 603, 87 S. Ct. 675, 683 (1967) (citations omitted).

[FN239]. See also Amy H. Candido, Comment. A Right to Talk Dirty?: Academic Freedom Values and Sexual Harassment in the University, 4 U. CHI. L. SCH. ROUNDTABLE 85 (1997). Candido argues that there are three theoretical justifications for academic freedom as a First Amendment doctrine: search for truth, democracy, and autonomy. Candido notes the conflicts between academic freedom and equality and looks to autonomy to resolve the conflict. Examining Tinker and Pickering, she argues that the Tinker Court failed to "address the inherent benefits of academic freedom itself, especially the preservation of autonomy" and the Court's "broad and open-ended definition of what constitutes a permissible restriction does not create a principled basis for protection." Id. at 103. Candido also states that the Pickering test "does not provide adequate room for academic freedom in the classroom." Id. at

105. To resolve this problem as it relates to in-class sexual hostile environment and academic freedom claims, Candido argues that the Court should "first identify the autonomy interests that are infringed by the alleged hostile environment and the autonomy interest that will be infringed if the Court chooses to intervene to suppress the hostile speech." Id. at 115. She then argues that the courts should "balance these harms to determine the importance, as evidenced by the degree to which they restrict autonomy by distracting from mental capacities, range of options, and independence that autonomy requires." Id. According to Candido, the balance should be in favor of the "least harm to autonomy overall" and which "best allow [s] autonomy to flourish into the future." Id. In balancing the harms to autonomy, Candido identifies balancing the following interests: professors' autonomy interests, students' autonomy interests, autonomy rights of female victims, universities' autonomy interests, and society's autonomy interests. She then discusses these autonomy interests as they relate to the Silva and Cohen cases. Id. at 120-27. Although Candido provides an excellent overview of the autonomy interests that must be balanced in developing a new test which responds to issues of academic freedom and sexual harassment in the classroom, a more narrowly defined test is needed which thoroughly incorporates Title VII and Title IX jurisprudence, EEOC sexual harassment guidelines, and reframes academic freedom case law.

[FN240]. Miles v. Denver Pub. Sch., 944 F.2d at 777.

[FN241]. Id.

[FN242]. Id.

[FN243]. Hazelwood v. Kuhlmeier, 484 U.S. 260, 273, 108 S. Ct. 562, 571.

[FN244]. 687 P.2d 429 (Colo. 1984) (holding that a community college journalism instructor did not have standing to challenge the college's termination of funding of a student-run newspaper as an alleged entitlement used for her instructional purposes because she did not demonstrate injury to her First Amendment right to teach but that the teacher had third party standing to challenge the funding decision on behalf of the students since it had a chilling effect on free speech rights and association activity in exercising those rights through the medium of a publication funded in whole or in part by the college).

[FN245]. 385 U.S. 589, 87 S. Ct. 675 (1967).

[FN246]. 687 P.2d at 437 (citing Kingsville Independent Sch. Dist. v. Cooper, 611 F.2d 1109 (5th Cir. 1980) (school district constitutionally prohibited from refusing to renew high school history teacher's contract because she engaged students in racial-role-playing during class); Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969) (granting injunctive relief to prevent discharge of tenured high school English teacher for assigning an article containing vulgar term and for discussing the term in class).

[FN247]. Keyishian, 385 U.S. at 603, 87 S. Ct. at 683.

[FN248]. 830 F. Supp. at 1292-93.

[FN249]. Id. at 1293 (quoting Ronna Greff Schneider, Sexual Harassment and Higher Education, 65 TEX. L. REV. 525, 551 (1987).

[FN250]. 511 U.S. at 675, 114 S. Ct. at 1888.

[FN251]. Connick, 561 U.S. at 154 (quoting (Pickering), 391 U.S. at 569).

[FN252]. 911 F. Supp. 999 (W.D. Va. 1996). Scallet, a non-tenured instructor at the University of Virginia's Darden Graduate School of Business (Darden), alleged that three senior Darden faculty members violated his First Amendment rights by not renewing his contract in retaliation for his outspokenness on issues of diversity at Darden. Id. at 1003.

[FN253]. Id. at 1015-16 (citations omitted). Although the court used the Pickering-Connick test in assessing whether Scallet's in-class speech should be protected as opposed to his out-of-class speech, the court noted its "reservations about extending the Pickering analysis to the in-class speech of university professors and graduate school instructors since the test does not explicitly account for the robust tradition of academic freedom in those quarters." Id. at 1011 (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603, 87 S. Ct. 675, 683-84 (1967)).

[FN254]. Connick v. Myers, 461 U.S. 138, 146, 103 S. Ct. 1684, 1690 (1983).

[FN255]. Id. at 146-47, 103 S. Ct. at 1690.

[FN256]. By "germane to the subject matter," I mean content and class discussions which serve an educational function related to the course. The discussion or conduct should further the educational objectives of the course. See Settle v. Dickinson County Sch. Bd., 53 F.3d 152, 156 (6th Cir. 1995) (upholding the broad leeway of teachers to determine the nature of the curriculum ... [and] the teacher's responsibility in the classroom ... to encourage speech germane to the topic at hand and discourage speech unlikely to shed light on the subject). Id.

[FN257]. 323 F. Supp. at 1390. But see Dambrot v. Central Michigan Univ., 55 F.3d 1177, 1190 (6th Cir. 1995) (stating that a professor or teacher's "choice of teaching methods does not rise to the level of protected expression.").

[FN258]. Meritor Savings Bank v. Vinson, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405 (1986).

[FN259]. See generally Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1296 (N.D. Cal. 1993); Mailloux v. Kiley, 448 F.2d 1242 (1st Cir. 1971); Silva v. Univ. of N.H., 888 F. Supp. 293, 313 (D.N.H. 1994) for discussions of the "reasonableness" standard in sexual harassment cases in an educational setting.

[FN260]. 429 U.S. 274, 97 S. Ct. 568 (1977).

[FN261]. Id, 97 S. Ct. at 568.

[FN262]. Id. at 287, S. Ct. at 576.

[FN263]. See Miles v. Denver Pub. Sch., 944 F.2d 773 (10th Cir. 1991).

[FN264]. See supra note 36, at 1. The 1970 Interpretive Comments read, "Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject." Id.

[FN265]. See supra, Part II. C for a discussion of the facts in the Cohen case.

[FN266]. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271, 108 S. Ct. 562, 570 (1988).

[FN267]. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684, 106 S. Ct. 3159, 3165 (1986) (citations omitted).

[FN268]. See Cohen v. San Bernardino Valley College, 883 F. Supp. 1407, 1410 (C.D. Cal. 1995). Cohen admitted using a confrontational teaching style designed to shock students and make them think and write about controversial subjects. Id.

[FN269]. Freedom Speaks: Sexual Harassment and Free Speech (PBS television broadcast, Dec. 18, 1996) (videotape on file with author) (answering the question if a warning by Professor Cohen in his syllabus stating that he would use pornography would have been enough). Cindia Cameron is an advocate for the organization, Nine to Five.

[FN270]. See supra note 66 and accompanying text.

[FN271]. Cohen v. San Bernardino Valley College, 92 F.3d 968, 971 (9th Cir. 1996).

[FN272]. Id. at 972.

[FN273]. See supra note 65 and accompanying text.

[FN274]. Cohen, 92 F.3d at 972.

[FN275]. Id.

[FN276]. Id.

[FN277]. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, supra note 9, at 172.

[FN278]. Cohen, 92 F.3d at 971.

[FN279]. See also, Beverly Earle & Anita Cava, The Collision of Rights and a Search for Limits: Free Speech in the Academy and Freedom From Sexual Harassment on Campus,

18 BERKELEY J. EMP. & LAB. L. 282 (1997) (discussing the conflict between campus safeguards against sexual harassment and freedom of speech in the academic context and examining Stanford's and Harvard Law School's sexual harassment guidelines). Id. at 313.

[FN280]. SEXUAL HARASSMENT ON CAMPUS: A LEGAL COMPENDIUM 373 (Elsa Kircher Cole, ed., National Association of College and University Attorneys, 3d ed. 1997).

[FN281]. Id.

[FN282]. Id.

[FN283]. Id. at 371.

[FN284]. Keyishian v. Bd. of Regents, 385 U.S. 589, 603, 87 S. Ct. 675, 683 (1967).

[FN285]. King, supra note 1, at 35.

[FN286]. Freedom Speaks, supra note 269.

[FN287]. 393 U.S. 503, 508, 89 S. Ct. 753, 757 (1969) (affirming the role of academic freedom and the essential role that American universities play in democracy and the growth of civilization).

[FN288]. See also J. Peter Byrne, Academic Freedom Without Tenure? 13 (American Association for Higher Education Working Paper Series Inquiry No. 5, 1997) (comparing and contrasting institutional protections such as tenure, grievance procedures and peer review structures in the maintenance of academic freedom).

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