UNFREE SPEECH

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It is a privilege to address this audience, and I am grateful to Dan Blatt, Gene Meyer, and the Federalist Society for inviting me. I owe the honor of my appearance here to the fact that my organization, the Center for Individual Rights (CIR), represents Professor Donald Silva in a free speech lawsuit against the University of New Hampshire.[1] The case illuminates the current national debate over sexual harassment and what has come to be known as "sexual correctness."

Professor Silva is a pastor at the Newcastle Congregational Church in Newcastle, New Hampshire. Until April 1993, he was also a creative writing teacher at the University of New Hampshire. Then, the University effectively terminated his thirty-year career because he had allegedly created a "hostile academic environment"—in short, because of sexual harassment. The evidence consisted of two offhand remarks that Professor Silva had made in class: one comparing "focus" in the writing process to sexual relations; the other, explaining the meaning of simile by means of a belly dancer's analogy of her profession to "jello on a plate, with a vibrator under the plate."

Following these two remarks, which were made in open class, and which all parties agree were neither personally abusive, gender-demeaning, nor even sexually graphic, seven female students complained that Professor Silva's speech had offended and "sexually harassed" them. At the urging of various representatives associated with the University's Sexual Harassment and Rape Prevention Program (SHARPP), the students proceeded to file formal complaints in accordance with the University's sexual harassment policy. This policy defines sexual harassment as verbal conduct or speech "of a sexual nature that has the purpose or effect of unreasonably interfering with an individual's work per-

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1. Silva v. University of N.H., 1994 WL 504417 (D. N.H.). Subsequent to this author's presentation, the court issued a preliminary injunction against the defendants, requiring them to reinstate Professor Silva pending a determination of the issues on the merits. *Id.* at *41. On October 15, 1994, the University filed an appeal of the court's ruling to the U.S. Court of Appeals for the First Circuit. The University later abruptly abandoned the appeal and paid Professor Silva $230,000 in damages, fees and costs to settle the case.

formance, or of creating an offensive working environment."[2] In response to these complaints, University administrators promptly suspended Professor Silva and established parallel writing courses to offer offended female students the possibility of studying with a different professor. As the situation progressed, University officials informed the professor that he would have to undergo officially approved psychological counseling, for a period of one year and at his own expense, before petitioning for reinstatement. In October 1993, with our help, Professor Silva filed a federal lawsuit alleging, *inter alia*, violations of his constitutional rights to free speech and academic freedom.[3]

There are several interesting aspects to Professor Silva's case. Here I would note three brief points to provide a backdrop for the discussion, followed by one dominant theme to consider. First, realize that the University of New Hampshire's sexual harassment policy is modeled directly on rules and guidelines promulgated by the Equal Employment Opportunity Commission (EEOC) during the early 1980s,[4] and is similar to those now in place at many other universities and business workplaces. The policy regulates "verbal conduct"—a clumsy circumlocution for speech. As such, the policy constitutes a speech code, regardless of whether anybody will admit it. That being so, you might think that university administrators would have been concerned about running afoul of the First Amendment before promulgating it. Not so. Because the policy is ostensibly aimed at combatting sexual harassment and came with the blessing of the EEOC, University of New Hampshire administrators viewed it as unproblematic. Indeed, we were told that there was not the least murmur of dissent in administrative circles when the University adopted the policy in the late 1980s.

Second, we can all agree that civility is important for creating an atmosphere in which education can flourish. As someone once said, the university is an island of retreat for the life of the mind. It is not "The Morton Downey Show." For this reason, harassment has no place at a university. But, as Professor Silva's case illustrates, this observation is totally beside the point. His remarks, whatever one may think of their appropriateness, were perfectly civil. He did not subject any students to personal abuse.

2. *See id.* at *1.
3. *See id.*
4. *See* 29 C.F.R. § 1604.11 (1993) and *Silva*, at *1-*2.

Nor did he make anyone the subject of a personal attack. If anything, Professor Silva was made the victim of a personal attack by being hounded, disciplined, and stripped of tenure for nothing more than the fact that students disliked what he had said in open class.

The obvious fact is that harassment policies, such as the University of New Hampshire's, are being applied not to encourage rational and civil argument on campus, but to seek a conformity of expression to the prevailing pieties of the day. The purpose of these policies is not increased civility on campus but coerced sensitivity towards a constituency of pre-approved victims—in this instance, women. That is why, for example, you rarely see the more extreme feminist instructors becoming entangled in the sexual harassment machinery for teaching, say, that all consensual heterosexual sexual relations constitute rape. Or why you are not likely to see gay literary theorists running afoul of the speech codes for prattling on in graphic detail about the hidden sexual imagery in Melville's or Whitman's writings. Many reasonable students will find such teachings offensive and complain. Yet nothing happens to these professors.

Recently, at the University of Maryland, a number of feminist students, at the urging of a professor, randomly culled the names of male students from the student directory and affixed them to boards around campus under the headline: "Be careful! These men are potential rapists." The women selected the identified students solely because they were men to make the point that all men are potential rapists. In this case, University administrators did apologize; however, no action was taken against the feminist students for having created an "offensive environment" for the male students who were defamed as potential rapists. In fact, it was reported that the women received credit for their "project" as part of a course entitled "Issues in Feminist Art."[5] Again, we see the policies being applied in a one-way direction.

Third, and most obviously, Professor Silva's case demonstrates how the zeal to extirpate hostile environment harassment from campus life—and I think we will see similar cases in the workplace soon—leads directly to the suppression of speech. One might argue that the University of New Hampshire's treatment of Professor Silva is a rare exception. But it is not. My organization

5. Washington Post B4, col. 1 (May 11, 1993).

is relatively small and not terribly well known, and yet it receives quite a few calls for help.

For example, in the CIR's most recent Docket Report, there is a description of another case, which we have called "Son of Silva."[6] In this case, we are representing another tenured professor in Minnesota, Richard Osborne, who was accused of sexual harassment for opposing curriculum changes at his college. The harassment charges were based upon the fact that the course changes had been proposed by women, and that our client "had never been observed opposing similar curriculum changes put forth by men."[7]

The charge in *Osborne* is, of course, ludicrous. However, as in the original *Silva* case, the proper focus is not what Professor *Osborne* said, but rather what other professors and students on college campuses around the country will refrain from saying as a result of his being charged with "sexual harassment." The current legal rules, which define a hostile environment on the basis of a case-by-case, multi-factor analysis,[8] are exceedingly vague. As a number of legal commentators have noted, general speech codes are remarkably similar to the Communist disclaimer affidavits required of university faculty in the 1950s.[9] By their very nature, they deter not only genuine harassment but also harmless and desirable speech. Faced with legal uncertainty, and seeing how the Silvas and Osbornes of the world are punished, individuals will strive to avoid any speech that might be interpreted as creating a hostile environment for anyone in the class.

Moreover, it is inadequate to say that the innocent victims of the anti-harassment campaign can eventually obtain judicial relief. Mere complaints of misconduct, and their adjudication by university committees that operate with less than mathematical precision, ensure that some people are going to be found guilty even though what they said was perfectly innocent. To be sure, there is always an intricate machinery provided for the processing of sexual harassment complaints before you are allowed to go

6. *Son of Silva*, DOCKET REP. (Center for Individual Rights, Washington, D.C.), First Quarter, 1994, at 3, 8.

7. *Id. See also* Osborne v. Braxton-Brown et al., No. 5-94 Civil 42 (D. Minn., filed April 6, 1994).

8. *See* 29 C.F.R. § 1604.11(a)-(b) (1993).

9. *See* David Cole, *Are You Now Or Have You Been A Member Of The ACLU?*, 90 MICH. L. REV. 1404, 1406 and 1412-13 (1992); Richard Hiers, *Public Employee's Free Speech: An Endangered Species of First Amendment Rights in Supreme Court and Eleventh Circuit Jurisprudence*, 5 U. FLA. J.L. & PUB. POL'Y 169, 175-76 (1993).

to court. But who would want to become enmeshed in such a process? The internal process established at universities to address sexual harassment issues is administered by people with a vested interest in sexual harassment programs—the equity officers who populate so many offices on college campuses and universities. And the machinery they have created itself is part of the *in terrorem* process. Witness the fact that the University of New Hampshire had Professor Silva sit through one sexual harassment hearing that lasted more than twelve hours.

To date, the larger theme of First Amendment concerns has played only a marginal role in sexual harassment litigation. However, this is rapidly changing. Indeed, I have high hopes that our litigation on Professor Silva's behalf will help spearhead that change. One important question concerns what the Supreme Court will do when it finally has to confront the issues of free speech and verbal sexual harassment that it avoided in cases such as *Harris v. Forklift Systems, Inc.*[10]

For decades, civil rights and freedom of speech were thought to coexist in perfect harmony. The Supreme Court viewed a near-absolutist approach to the First Amendment as being fully consistent with an expansive civil rights jurisprudence. Its First Amendment cases, particularly those in the 1960s, reflect an abiding faith in the congruence between interests in social equality and freedom of speech. Anthony Lewis' book, *Make No Law*, for example, paints a very compelling portrait of how these two values intersect and how the justices viewed First Amendment freedoms and expansive protections for civil rights as going hand-in-hand.[11]

But this confidence in the harmony of civil libertarian and egalitarian aspirations is fast becoming a thing of the past. Many legal scholars now argue that speech can be an instrument of oppression, and that the members of powerless and oppressed minorities should receive special protection from hateful and offensive speech.[12] This egalitarian view of the First Amendment, once viewed as "far-out", has begun to make its mark on the law.

10. 114 S. Ct. 367 (1993) (stating that abusive work environment harassment need not seriously affect an employee's psychological well-being to be actionable).

11. *See generally* ANTHONY LEWIS, MAKE NO LAW (1991).

12. *See, e.g.*, Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990);

One would have thought that a general governmental prohibition of speech deemed to create an offensive environment could not possibly withstand review under any rational interpretation of modern First Amendment jurisprudence. Consider *Cohen v. California*,[13] in which Justice Harlan said that so long as the means of expressing one's views are peaceful, the communication in question need not meet standards of acceptability.[14] Consider *Gertz v. Robert Welch, Inc.*,[15] where Justice Powell said that no matter how offensive we find an idea, under the First Amendment, there is no such thing as a false idea.[16] Finally, consider Justice Brennan's opinion for the Court in the flag-burning case, *Texas v. Johnson*,[17] an opinion that again condemned the idea that the State had have any right to punish people for offensive utterances or symbolic speech.[18] However, the EEOC's sexual harassment guidelines,[19] which prohibit speech that creates an offensive environment, have seemingly been approved by the Supreme Court.[20] How can this be? Sad to say, recently the Court has become more willing to write what one may call a civil rights exception into its First Amendment jurisprudence;[21] that is, the Supreme Court will vigorously protect free speech and ensure the government's neutrality, *except* in the context of civil rights.

Thus, in a case from last term, *Wisconsin v. Mitchell*,[22] the Court unanimously upheld a Wisconsin statute that enhanced criminal penalties for a defendant who intentionally selected his victim because of his victim's race.[23] In that case, there was no question

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David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987); Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Responses to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

13. 403 U.S. 15 (1971).

14. *See id.* at 25 (citing Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)). In *Cohen*, the defendant was observed in the Los Angeles County courthouse corridor wearing a jacket bearing the words "Fuck the Draft."

15. 418 U.S. 323 (1974).

16. *See id.* at 339 (involving a libel action against the publisher of a magazine article which had labeled Gertz a "Communist-fronter" and a "Leninist").

17. 491 U.S. 397 (1989).

18. *See id.* at 417-20.

19. *See* 29 C.F.R. § 1604.11(a)-(b) (1993).

20. *See Harris*, at 371 (stating that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances").

21. For an extended discussion of this subject, see generally Michael S. Greve, *Yes, Call It What It Is — Censorship*, 80 A.B.A. J. 40 (1994).

22. 113 S. Ct. 2194 (1993).

23. *See id.* at 2196.

that the state legislature had passed the penalty enhancement law in order to punish offensive beliefs; however, because the law was couched as a "civil rights" measure, it escaped searching First Amendment scrutiny by the Court.

The Supreme Court would do well to revisit this issue. A reasonable set of rules would afford comprehensive First Amendment protection for all academic speech. Speech uttered that is not directed toward specific individuals should never be regulated as harassment. And even speech targeted at particular individuals should be punished only when it results in recognizable emotional distress to the victim. It might also be useful to impose some penalty for individuals who knowingly bring false and frivolous charges of sexual harassment.[24] If this regime were adopted, it would have the great advantage of curbing genuine harassment of the extortionate, quid pro quo kind, without intruding into the field of free speech and academic freedom.

24. *See* Migdalla Maldonado, Practical Problems with Enforcing Hate Crimes Legislation in New Yor, 1992/1993 Annual Survey of American Law 555-61 (discussing "the relatively high incidence of false reports" received by the Civil Rights Bureau of the Kings County District Attorney following enactment of New York State's bias crime law. *Id.* at 557.)