

Faculty Senate Minutes #222: Part I

John Jay College of Criminal Justice

Friday, December 7, 2001

9:30 AM

Room 630 T

Present (27): Yahya Affinnih, Orlanda Brugnola, James Cauthen, Leslie Chandrakantha, Edward Davenport, **Kirk** Dombrowski, P. J. Gibson, Betsy Gitter, **Amy** Green, Maki Haberfeld, Karen Kaplowitz, Kwando Kinshasa, Gavin Lewis, Tom Litwack, James Malone, Peter Mameli, Evan Mandery, Lorraine Moller, Dagoberto Orrantia, Jodie Roure, Ellen Sexton, Carmen Solis, Davidson Umeh, Margaret Wallace, Robin Whitney, Susan Will, Liza Yukins

Absent (11): Luis Barrios, Jane Davenport, Edward Green, Robert Hair, **Ann** Huse, Sandra Lanzone, Mary Ann McClure, Jill Norgren, Daniel Paget, Rick Richardson, Agnes Wieschenberg

Guests: Professors Ned Benton, Janice Bocluneyer, Jay Hamilton, Eli Silverman, Maria Volpe

Invited Guest: CUNY Budget Director Ernesto Malave

December 7, 2001 meeting agenda

1. Announcements from the chair
2. Adoption of Minutes #221 of the November 20, 2001, meeting
3. Proposal that the Senate be a co-sponsor of the September 11 Testimony Project
4. Report of the November 21 College Council meeting
5. Discussion of the agenda of the December 11 College Council meeting
6. Followup on the Senate's meeting with the Student Council President
7. Computer monitoring and the development of a privacy policy
8. **Profanity** in the classroom: protected versus unprotected speech
9. Sexual harassment: CUNY & John Jay policies and procedures
10. Invited guest: CUNY Budget Director Ernesto Malave
11. New business

1. Announcements from the chair

19 new substitute full-time faculty lines have been allocated to academic departments for the Spring 2002 semester: Art, Music, Philosophy: 1 (Philosophy); Counseling: 1 (Domestic Violence/Women's Center); English: 2; Foreign Language: 1; Law, Police Science, CJ Adm: 3; Library: 1 (Information Technology); Mathematics: 2; Psychology: 3; Public Management: 1 (Protection Management); Puerto Rican & Latin American Studies: 1; Sciences: 1; Sociology: 1;

Speech & Theater: 1. The salaries for these 19 substitute faculty are being paid from the \$750,000 Phase II lease revenues provided by the CUNY Central Administration. These substitute lines will continue as substitute lines during the 2002-2003 academic year during which time searches are to be conducted beginning in the Fall 2002 for hiring tenure-track faculty who will begin in Fall 2003.

The recently released draft of CUNY's revised Policy on Intellectual Property states that CUNY owns all computer code produced on CUNY computers; Professor Anthony Carpi pointed out and the UFS concurs that this language would mean that the University owns all Writing, including research, art, music, and literature, produced on college computers. When this was pointed out by the UFS to Vice Chancellor for Legal Affairs Frederick Schaffer, the Vice Chancellor responded that this had not been intended and that the language would be changed.

Chancellor Matthew Goldstein, upon the advice of Vice Chancellor for Legal Affairs Schaffer, has decided that CUNY must henceforth, beginning in February 2002, charge non-documented students out-of-state tuition even if these students are residents of New York State and even if they graduated from New York **high** schools. The Chancellor, upon recommendation of the Vice Chancellor for Legal Affairs, has determined that Federal law requires CUNY to amend its practices. Legislation is being introduced in Albany to change the *NYS* Education Law to emulate California and Texas: in those states, the law was amended so that graduates of the state's high schools are charged the same in-state-tuition **as** those state residents who are citizens or whose immigration status is documented.

Full-time status has been granted to various staff who had been College Assistants (part-time employees) at least temporarily during John Jay's budget difficulties during the past two years: these personnel changes are within the \$45,000 allocated for the differential in salary that had been part of the College's budget plan.

- ▶ Alan Wiedenfeld: Admissions
- ▶ Sarah Scadifari: Testing (Virginia Gardner retired)
- ▶ Litna McNickle: Freshman Services (Jessica Waterhouse resigned)
- ▶ Kelsie Sosa: Alumni Affairs
- ▶ Anna Wildner: Graduate Studies
- ▶ Jennifer Nislow: Law Enforcement News (IFR account rather than JJ's tax-levy payroll)

2. Adoption of Minutes #221 of the November 20, 2001, meeting

By a motion duly made and approved, Minutes #221 were adopted.

3. Proposal that the Senate co-sponsor the September 11 Testimony project

Vice President Amy Green reported that since September 11, she **has** been creating a theatrical performance piece which incorporates interviews of individuals and their stories about the events of September 11 and their aftermath: the oral history interviews will be conducted **and** performed by the students, faculty, and staff of John Jay, under her direction. The theatrical reading of "What Happened: The September 11th Testimony Project" will be presented **in** the John Jay Theater on April 16 at 6:30 PM; on April 17 at 3:15 PM; and on April 18 at 5 PM. Vice President

Green said that she would welcome the Senate's co-sponsorship.

Senator Peter Mameli noted that Professors Glenn Corbett and Charles Jennings and others in our Fire Science and Protection Management Programs are **urging** that those who work at Ground Zero be interviewed so that more can be learned about the tragedy from engineering and **fire** science perspectives. Senator Robin Whitney made a motion that the Faculty Senate be a co-sponsor of Vice President Green's Testimony Project. Senators Betsy Gitter, **Kirk** Dombrowski, and Edward Davenport spoke in support of the motion. The motion was approved Without opposition: the vote was 25 yes, 0 no, and 2 abstentions.

4. Report of the November 21 College Council meeting

The November 21 College Council meeting was changed to November 19, a change that few faculty who serve on the College Council were informed about. There was one, minor, agenda item.

5. Discussion of the agenda of the December 11 College Council meeting

Three items are on the agenda: endorsement of a statement by the Curriculum Committee's Subcommittee on Educational Technology recommending that the University's proposed revision of the **CUNY** Policy on Intellectual Property be amended to delete the statement that all computer code created on college computers is owned by CUNY; approval of a revision in the Puerto Rican/Latin American Studies Department's minor/program **as** approved by the Curriculum Committee; revision of the B. S. in Criminal Justice **as** approved by the Curriculum Committee.

6. Followup on the Senate's meeting with the Student Council President

President Kaplowitz reviewing the Senate's visit at its last meeting, on November **20**, with the president of Student Council, explained that each year the Senate invites the newly elected Student Council president, who usually comes to a Senate meeting in September, but the Student Council president, Ms. Timyiaka Thomas, had not accepted the Senate's invitation until November **18** when she left an urgent message asking to be permitted to come to the Senate's November 20 meeting. President Kaplowitz had then explained to her that the Senate already had a very full agenda, with a guest scheduled about an issue of paramount concern to the faculty (VP Pignatello about potential monitoring of computer use) and that if she came, it could **only** be for about **5** to 10 minutes. Ms. Timyiaka agreed and expressed her appreciation.

At our meeting, Ms. Thomas raised a number of issues [see Minutes #221] about which the Senate made no response because of lack of time. Those issues were a proposition that students should be on all committees of the College, including the grade appeals committees; an assertion that 400 faculty had not yet obtained upgraded turnstile-readable ID cards; a recommendation that the faculty should commemorate September 11 in some way; a request that faculty should refrain from using profanity in class; and the claim, once again, that large numbers of faculty do not submit course **book** orders to the bookstore on time. Furthermore, Ms. Thomas brought With her, **as** her

guests, three students, one of whom, **Mr. Shard Pierre**, is the president of the John Jay Times and who also writes for the student newspaper.

President Kaplowitz reported that following the Senate meeting, she called **Mr. Pierre** to review the fact that when he arrived as the guest of Ms. Thomas he introduced himself to her as the president of the John Jay Times, a student club, and that she had repeated that identification when introducing him to the Faculty Senate. She then told him that she, therefore, assumed he attended **as** president of the club and not as a reporter for the John Jay Times, which she knows he at times is, and he told her that is correct. She then commended him, noting that to introduce oneself in one capacity but to act in another would be misrepresentation and would not be journalistically ethical.

Mr. Pierre then said that although he did attend as Ms. Thomas's guest and did introduce himself as the president of the club, he might, in fact, write a story for the John Jay Times about Ms. Thomas's meeting with the Senate. President Kaplowitz then explained that she and the Senate assumed, **as** he has acknowledged, that he attended **as** Ms. Thomas's guest, and not **as** a reporter, and she told him that it is important that he know that the Senate's lack of response to Ms. Thomas's comments was not because of a lack of interest or a lack of knowledge about the issues Ms. Thomas raised, nor should the Senate's lack of response to be taken **as** tacit agreement with Ms. Thomas's comments – in fact, she said, that the Senate's positions are quite the opposite of Ms. Thomas's with regard to Virtually every issue. Rather, she explained to **Mr. Pierre**, the Senate simply did not have time to respond and she explained the reason for the lack of time and the fact that Ms. Thomas had known about the Senate's already full agenda and had asked to come to that meeting nevertheless.

President Kaplowitz said she also explained that unlike governmental bodies, the Faculty Senate is not subject to the Open Meetings Law, a point she also made when she called the editor of the John Jay Times, **Mr. Emanuel Jolonschi**, and she said that under such circumstances **Mr. Pierre's** presence at the meeting should not be, even in retrospect, that of a reporter, according to journalistic ethics. However, she told both **Mr. Pierre** and **Mr. Jolonschi** that if a story were to be written, **Mr. Pierre** has the journalistic obligation to give her and others on the Senate, whose names she offered to provide, the opportunity to comment on each issue. She also pointed out that it would be a misrepresentation were a story to be written that stated that the Senate had not responded to Ms. Thomas's presentation without explaining the circumstances and reasons of Ms. Thomas's visit and the Senate's lack of time to respond. **Mr. Pierre** responded that he completely agrees and would, of course, not misrepresent the situation and would also, of course, interview her and other Senators about the issues raised were he to write a story. **Mr. Pierre** was extremely respectful, thoughtful, and professional about the matter, as was **Mr. Jolonschi**, and both agreed that it would be incumbent upon **Mr. Pierre** to interview her and other members of the Senate if he were to write a story.

Because **Mr. Pierre** said he is, in fact, thinking about writing the story, she told him what the overwhelming majority if not the all the Senate members would undoubtedly have said had there been time to respond to Ms. Thomas. With regard to students being on grade appeals committees, she explained that grading and grade appeals are a faculty responsibility and prerogative and that they also require confidentiality as mandated by the 1974 Federal Family Educational Rights and Privacy Act (aka the Buckley Amendment); furthermore, the most important task is to ensure that the appeals process works properly, efficiently, and in a timely manner; she also noted that students are not necessarily advocates of student petitioners and that, for example, students on the Judicial Committee (which conducts disciplinary hearings) are often far less sympathetic to students against whom charges are brought and tend to impose harsher penalties on students than the faculty members of the Committee; and, furthermore, the Standards Committee, on which she sits as

president of the Faculty Senate, is already taking up the issue of improving the grade appeal process.

With regard to the necessity of faculty obtaining updated ID cards, she told Mr. Pierre that in October the Senate had as its invited guests VP Pignatello and Security Director Murphy for the express purpose of discussing policies and procedures regarding the turnstiles, including the ID cards, and that those Senate minutes went to the faculty as did the minutes of two previous Senate meetings with VP Pignatello and Director Murphy about the planned turnstile security system.

With reference to the faculty's commemoration of September 11, she told Mr. Pierre that the Senate Executive Committee had already planned to propose the Senate's co-sponsorship of Senate Vice President Amy Green's September 11 Testimony Project as a way of memorializing that event; in addition, the Senate held two Better Teaching Seminars in September about ways to help our students and colleagues cope with the trauma of September 11; and the Senate also held a special meeting, which other faculty attended, on a non-class day, to develop proposals to help students with their academic studies in the aftermath of September 11 and developed a set of proposals which the Senate submitted to the College Council but which the student members and administration members of the College Council Executive Committee refused to place on the agenda of the College Council.

President Kaplowitz said she spent a large portion of her hour and a half conversation with Mr. Pierre reviewing the faculty's experiences and reasoning regarding the bookstore's due dates for book orders and reported Senator Betsy Gitter's findings upon polling the other CUNY bookstores, including the fact that Hunter's book store considers seven days prior to the start of classes to be sufficient time for handing in book orders. She told him that the faculty consider the book order due dates to be unreasonably early and that often the faculty are not even informed of the due date and that both situations vitiate the fairness of anyone to complain about "due dates" not being met.

She told Mr. Pierre, just as she had told Ms. Thomas when they had spoken often and at length about the book orders, including this summer, that an analogous situation would be if a faculty member were to require that the term paper be handed in the third week of a semester and if, furthermore, the faculty member were to not tell the students in the course the due date for the paper and then that faculty member complained to everyone that the students in the course had handed in their paper late. She asked him if it would be fair for a professor to do this; when he said it would not be, she explained that this hypothetical situation is analogous to the situation of the book orders.

Upon receiving this information, she said, Mr. Pierre invited her to write a story for The John Jay Times about the bookstore and the book order due dates, saying he and other students had come to believe that the faculty simply do not care about their students and that is why book orders are "late." President Kaplowitz thanked him for the invitation but offered, instead, to provide any information and assistance for any article he may decide to write since it should be his story, for which he should receive the credit. Senator Litwack praised President Kaplowitz for having called both the newspaper's editor and president, saying it was very important that she had done so. President Kaplowitz said that she is reporting this information in case Mr. Pierre calls Senate members for a story, should he decide to write one and also so that this responses are on the record.

Senator James Cauthen said that he was asked by Mr. Pierre, who is his student, about his positions about the issues Ms. Thomas had raised and Senator Cauthen said he told Mr. Pierre that he *thinks* it is useful to hear those issues and that those that merit discussion by the Senate will be taken up by the Senate and that, in fact, one issue is scheduled to be. (That is the issue of the use of profanity by some faculty in the classroom.) Vice President Amy Green said she is concerned about

whether or not Ms. Thomas's views reflect a wider student perception of our faculty as uncaring and whether there is a way to determine this. She said her experience and her observations indicate that our faculty are very caring and that the students perceive the faculty to be very caring.

President Kaplowitz noted that the University's survey of student satisfaction reveals that John Jay students are the most satisfied among the students of the senior colleges. Also, the regular surveys by John Jay's Office of Institutional Research (OIR) reveal year after year that our students consider the John Jay faculty to be the best part of the College. She noted that OIR Director Gail Hauss conducted a survey last year, during the Fall 2000 semester, for our Middle States self-study and the results and analysis of the survey were issued last month, in November. The faculty are rated the highest in every category. The quality of the faculty and the quality of the instruction are rated **higher** than any other of the many possible categories. She did add that **from** what Mr. Pierre said she gathers that the idea that faculty don't hand in their book orders "on time" has become a widely promulgated perception. Senator Peter Mameli asked if the student survey for Middle States involved a random sampling. President Kaplowitz said it did, that Director Hauss randomly chooses course sections, such as every eighth section in each period, and the survey is administered in those class sections during class time, so the same students can't answer the survey more than once.

Senator Tom Litwack said it is important that not only Mr. Shard Pierre was given information he clearly did not have, but that Ms. Thomas also be given that information. The Senate agreed that in addition to communications between President Kaplowitz and Ms. **Thomas**, the Senate minutes would be a way of providing such information. President Kaplowitz said that when Ms. April Moore, the manager of John Jay's B&N called her a week ago to say that 80 percent of the course book orders are not yet in and asked for advice, the advice she gave was to ask Provost Wilson to put a global phonemail message to the faculty and to also ask Professor Harold Sullivan to put a phonemail message to the Council of Chairs asking them to remind their faculty: she said she told Ms. Moore to feel free to name her as the person who suggested that Ms. Moore make these requests. Two days ago she saw Ms. Moore who said she had not yet made the request of either Provost Wilson or of Professor Sullivan but she again expressed thanks for the advice.

Senator Litwack suggested that the Senate issue a memo to the faculty about the importance of timely submission of book orders, but Senator Betsy Gitter said there is no agreed upon definition of timeliness and that the due date, on the occasions when it is announced, is unreasonably early. Senator Litwack agreed that such a memo should be sent only once these issues are resolved.

Both Senator Gitter and Vice President Amy Green said that, furthermore, it is not the Senate's role to send such a memo, saying that it is the administration's job to do this. President Kaplowitz said that she does not ~~think~~ a memo should be sent by the Senate unless the Senate can feel confident that the bookstore and the College administration will be properly responsive to faculty about bookstore issues **as** they arise, adding that she still has not been able to arrange a meeting of the Senate's Executive Committee with the Auxiliary Services Corporation (ASC), despite repeated requests in writing. The ASC is chaired by President Lynch and includes among its members Provost Wilson and Vice President Witherspoon. She noted that the contract between the College and B&N states that book order due dates are to be determined by the bookstore in consultation with the Auxiliary Services Corporation. Vice President Amy Green said that if we write any letter it should be to Ms. Timyiaka Thomas, saying we would welcome an invitation to the ASC, on which five students, including Ms. Thomas serve.

7. Computer monitoring and the development of a privacy policy

President Kaplowitz reported that subsequent to Vice President Pignatello's meeting with the Faculty Senate on November 20 about the issue of potential monitoring of computer use, she checked with the CUNY Central Administration and was told that the University does not monitor computer use. Furthermore, the document Vice President Pignatello and we have been referring to as the "CUNY Policy on Computer Users Responsibility" is not a CUNY policy but rather a "statement"; indeed, the 1995 document, which is on the CUNY homepage, is called "The City University of New York Computer User Responsibilities." Immediately below this heading is the following statement: "NOTE: The City University of New York Computer User Responsibilities is a statement originally prepared by the University's Computer Policy Committee. It underwent review by the University Faculty Senate and the CUNY Office of the Vice Chancellor for Legal Affairs."

Also subsequent to the Senate's meeting with VP Pignatello on November 20, the Council of Chairs met with Provost Wilson, who characterized the monitoring of computer use as "*benign*." The chairs strongly disagreed. Professor Martin Wallenstein, who chairs John Jay's Institutional Review Board (IRB), which must ensure that proposed projects are designed to protect human subjects, as required by Federal law, noted that the IRB can not approve any project unless the privacy of the subjects can be guaranteed and that the monitoring of computers would vitiate that guarantee of privacy. The Provost said he had not considered that and called it a very compelling point.

As a result of the Senate's meeting with VP Pignatello, which was extremely informative, and the Chairs' meeting with the Provost, a meeting was held on December 4 that included members of the Faculty Senate Committee on Technology (Lou Guinta and Anthony Carpi) and of the Curriculum Committee's Subcommittee on Educational Technology (Douglas Salane and Anthony Carpi), as well as Professor Harold Sullivan and herself and several administrators (VP Pignatello, Provost Wilson, Associate Provost Kobilinsky, and DoIT Director Banowicz) to discuss ways to improve consultation about technology issues, including the issue of computer use privacy.

This ad hoc group agreed that the two faculty committees, the Senate Technology Committee and the Curriculum Committee Subcommittee on Educational Technology, would jointly develop a computer user privacy policy which would be presented to this ad hoc group and then to the Faculty Senate, the Council of Chairs, the Curriculum Committee, and eventually to the College Council. A possible model policy, the University of Pennsylvania's "Policy on Privacy in an Electronic Environment," adopted in April 2000, is being reviewed by the two committees. The University of Penn's policy is at the following URL: <http://www.upenn.edu/almanac/v47/n04/OR-eprivacy.html>. Additional policies that other universities have adopted will also be reviewed. Also VP Pignatello and Director Bob Banowicz have agreed to meet at least once a semester with the combined faculty committees to discuss plans and projects and to consult with the combined faculty committees.

But at the same time some faculty, including members of the two faculty committees, think that a much broader College privacy policy is needed, one that addresses issues beyond computer privacy. Senator James Cauthen made a motion that the Senate endorses the formation of this joint faculty group and its work in drafting a policy on computer privacy and awaits the work and the advice of the two committees before further pursuing the question **as** to whether a broader privacy policy is needed. The motion was adopted by **unanimous** vote.

Senator Liza Yukins noted approvingly that the University of Pennsylvania's policy (which was included in the Senate's agenda packed) contains and is built upon a strong statement of not only

one's right to privacy but of one's right to an expectation of privacy. She read from the "Preliminary Observations" on the first page of the document: "The University affirms that the mutual trust and freedom of thought and expression essential to the academic mission of a university rest on an expectation of privacy, and that the privacy of those who work, study, teach, and conduct research in a university setting will be respected." She noted that the document then makes the important statement that this expectation of privacy extends to electronic privacy .

8. Profanity in the classroom: protected versus unprotected speech [Attachment A, B, C]

President Kaplowitz said that one issue raised at our last meeting by the president of the Student Council, Timyiaka **Thomas**, merits the Senate's discussion: Ms. Thomas had asked the Senate to urge faculty to refrain from cursing and from using profanity in the classroom. Several documents, which were included in the Senate's agenda for preparation of this discussion, were reviewed: the first is **an** article from *The Chronicle of Higher Education* from November 2, 2001 (a month ago), which reports the decision of the U.S. Supreme Court to reject an appeal of a tenured professor, a member of the faculty of his college since **1967**, who was suspended for using crude language in the classroom [Attachment A]; **an** earlier article about that same case from the March 16, 2001, issue of *The Chronicle of Higher Education* which reported that a federal appeals court had ruled that a college has the right to suspend a faculty member for using crude language in the classroom on the **grounds** that such language creates a "hostile learning environment" [Attachment B]; and an excerpt from the federal district court's 36-page decision [Attachment C].

Senator Betsy Gitter called these documents extremely interesting but suggested that instead of taking up this issue, the Senate should communicate to the Student Council president the recourse that students have if they are offended by something their teachers are doing in the classroom. She called this a student government issue. She said if there are people in the College who use offensive language in the classroom, then the students should complain about it. Students do have avenues of recourse, she noted.

President Kaplowitz said a Senate discussion of this issue is a way for us to **inform** faculty that their speech in the classroom may not be **as** protected as they may think: she said some faculty believe that academic freedom and tenure are absolute protections. She noted that tenure only ensures due process before punitive action, such **as** suspension or termination, may take place. And academic freedom is not necessarily a protection of profane speech if such speech is unconnected to the subject matter of the course, according to the court's recent ruling and according to case law.

President Kaplowitz said it is probable that most faculty do not know what the courts have been ruling on this matter. She said that although her immediate response to Ms. Thomas's comments about this at our last Senate meeting was that she was personally unaware of faculty use of profane language in the classroom, she subsequently recalled a situation a few years ago in which a faculty member's use of profanity in the classroom became the subject of **an inquiry** by the administration when a classroom incident drew this person's behavior to the attention of the administration. She recalled that when she and Professor Haig Bohigian, John Jay's PSC Chapter Chair, together met with this faculty member, a tenured full-professor, this professor kept insisting that he has freedom of speech and academic freedom and, therefore, has the right to use whatever language, including profanity, he wishes to use in his classroom and as frequently **as** he wishes.

She and Professor Bohigian explained that their understanding of freedom of speech and of academic freedom is that they do not protect pervasive use of profane language in the classroom if such language is not related to the subject of the course. And they explained that charges could be brought against a tenured or untenured faculty member: the CUNY Bylaws state that “a member of the instructional staff may be suspended or removed for one or more of the following [4] reasons.” The fourth reason is “Conduct unbecoming a member of the staff. This provision shall not be so interpreted as to constitute interference with academic freedom” – Article 7.1 of the *CUNY* Bylaws.

This faculty member did not know this, was shocked to learn this, was grateful to Haig and her for personally informing him, and stopped using profanity in the classroom. Because of a variety of circumstances, charges were not brought but could have been, although a written report was placed in his file and remains there should charges be filed about subsequent allegations.

Since the last Senate meeting, President Kaplowitz said, she has talked to faculty and has discovered that many faculty do not know about the difference between protected and unprotected classroom speech, although they themselves may not use profanity, but now that this issue has been raised at the Senate, we arguably have an obligation to the faculty to **inform** them.

Senator Gitter suggested that such information, then, should be in the faculty handbook. President Kaplowitz explained that the **only** version of the Faculty Handbook was published ten years ago (for the Middle States re-accreditation review) and has not been revised since. Furthermore, the Faculty Handbook is not something that is within the control of the Senate, whereas our meetings and our minutes that report our discussions are.

President Kaplowitz added that if the Student Council president is raising this issue with the Senate, it means the issue is on the radar screen of the Student Council and she does not want faculty to say that the Senate knew that this was the case and chose to not alert faculty about this fact.

Vice President Amy Green noted that it is interesting that the court’s reasoning in upholding a college’s suspension of the faculty member is that the use of profanity unrelated to the course material creates a hostile learning environment, which is the same phrase that is used about sexual harassment, which is also on today’s Senate agenda.

Senator Liza Yukins said that this is the one compelling issue that the Student Council president raised that does need to be responded to. She said she is concerned about some students’ incapacity to differentiate between obscene language and thematically relevant language. She said she can give two examples that she and a colleague experienced just this week in their literature courses. The first involved an analysis of a contemporary novel in which a major thematic event occurs around an act of masturbation. Her colleague used the word masturbation while teaching this novel and the students were in an uproar, complaining to the instructor that masturbation is an inappropriate word to use in class; when the instructor asked one of the students after class what word could be more formal and, indeed, scientific than masturbation, the student said that she should have used the term “self pleasure.” So, Senator Yukins said, what students consider to be profane language is not necessarily clear.

Senator **Yukins** said the second example involves a very prestigious novel she is teaching: when she read aloud from a crucially important passage about neocolonialism in which the word “shit” occurs, the students erupted in **an** uproar upon hearing that word. Some students’ incapacity to engage in an intellectual conversation that includes a text’s “crude language” is very troubling and

may be the cause of student complaints, she said, adding she would like this discussion to not only inform faculty but she would like us to find a way of educating students about the difference between intellectual interrogation and profane speech and, thereby, throw a wet blanket so **as** to extinguish these smoldering fires.

Senator Yukins added that what she found to be of most interest in the three documents is the difference between *The Chronicle's* stories, which report that the professor was teaching a short story and which seemed to show a connection between his language and what he was teaching, and the court's decision in which the professor's language was not only quoted much more extensively but much of his language was extremely demeaning and was also not course-related. Senator Yukins said it is not enough to say that students have avenues of recourse, that students may bring charges against faculty, but rather we must make some declaration about the distinction between language of intellectual merit as opposed to language that is merely obscene.

Vice President Amy Green said she teaches many plays that employ vulgar language **as** well as plays that are about sexual activity and she has to deal with both the tittering and the hysteria. She said it seems **from** the court's ruling and from the case law the court cites that what she teaches is protected and that if charges were brought against her for requiring students to read plays that contain vulgar language those charges would have no merit. On the other hand, if she were to use vulgar language when talking about non-course related matters, if she were to use such language gratuitously, frequently, and especially if it were directed at students, that is not protected speech. She said she agrees that the faculty need to be informed and she also agrees that students need to be taught the distinction between forms of language. Vice President Green said she does not want to tell the student government president that students should file charges against faculty because faculty may be uninformed about the consequences of the language choices they make.

Senator Gitter explained that her comments about this agenda item were really a negative and impatient reaction against those members of the faculty who do use profanity for profanity's sake in the classroom. She said that those faculty do so because they think it is "cool" to use obscene language in class and also because they think that students will like them if they use obscenities in class when, in fact, students do not like it. She said these faculty, who are few in number from what she knows, are faculty about whom students regularly complain to their other teachers.

Some senators spoke about conversations with counselors who tell them that they hear complaints from students (whom they do not identify) about some faculty who use obscene language in class, language that is **unconnected** with the course subject matter, and according to these counselors the students are very upset by such language, are very offended by it, and do feel that their ability to learn in those classes is impeded **as** a result. Students tell their counselors that they feel too intimidated to raise the issue with their instructors and that, furthermore, most students do not, in fact, know that they have recourse, much less what that recourse is. Furthermore, senators reported that counselors have told them that even when counselors **inform** students about **the** avenues of recourse open to them, students choose to not take action because they will be receiving a grade from that professor and because they may need to take classes with that professor in the future. Some students report to the counselors, according to what some senators reported, that some faculty direct their profanity at the students themselves when *criticizing* or reprimanding students. Vice President Green said that such faculty need to know that such behavior is not only extremely and unacceptably unprofessional but is actionable and is not protected.

Senator Kirk Dombrowski said that he is concerned about the concept of **a** hostile learning

environment because he teaches a course on deviant sexuality and the very best ethnography available is a book he uses about transgendered prostitutes. This is an intensely explicit book; the author translates the talk of these men quite literally because the book is about ordinary speech and the construction of body images. The talk of these men is not that of reserved, professional sex workers. It is a graphic book. It is absolutely the best book on the topic. But, he said, he is concerned that it is possible that some students will consider the very use of such a book **as** creating a hostile learning environment. President Kaplowitz said that he is protected because the **very** topic of the course requires that such material be taught and because **as** a member of the Anthropology Department he has an obligation to teach the best texts to his students. Senator Dombrowski said he understands that but his question is about process at the College: there has been talk about process for students but there is no process for faculty for defining and standing up for notions of academic freedom. There seems to be nothing outside of purely legal channels. He said he does not find this satisfactory. He said that knowing he has legal recourse is not enough, that he would much rather feel he has community recourse.

President Kaplowitz said that she thinks the Senate is the community recourse. She noted that the Senate adopted a policy statement recently informing faculty that if they believe their academic freedom is being threatened, they can bring the matter to the Senate formally or in a confidential way, in which case a small panel of faculty would be convened to review the situation and make a recommendation. She said she is not aware of anyone having any trouble at the College about anything they assigned or taught that was connected to the course subject.

Senator Lorraine Moller said that she has the same concerns **as** Senator Dombrowski, explaining that in her theater course she teaches the depiction of incarceration **as** portrayed **in** the cable show *Oz*, which is a graphic show. She also teaches sociodrama which involves role playing based on scenarios and the language can not be separated from the content. She said her concern is that some students may feel they are in a hostile learning environment because the language, which is sometimes profane, by virtue of the scenario and the roles the students are playing, is language generated by other students. She, too, therefore, would be interested in knowing what the policies are, if any, about such situations.

Senator P. J. Gibson said she agrees with President Kaplowitz that it is important for the faculty to know about this issue. She said that even if such information were to be included in the Faculty Handbook, people don't necessarily read and remember all that is included **in** such a volume which they tend to look at when they're hired and not again and those who are already tenured probably don't look at it at all. She recommended holding a Better Teaching Seminar on this topic.

Senator Peter Mameli said that our discussion seems to be directed mainly to the full-time faculty, and part-time faculty may also be uninformed and, may, perhaps have less of a network of people **from** whom they can seek advice **as** to what is permitted and not permitted in class. President Kaplowitz agreed and explained that whereas for many years the Senate minutes were sent to all faculty, full-time and adjunct, when our previous fiscal crisis hit in 1995, the Provost asked that the Senate send the minutes to only the full-time faculty because the adjunct faculty had increased to more than 400, which was double the number of full-time faculty' and ever since the minutes have been sent to the full-time faculty and to the four adjunct members on the Senate. President Kaplowitz said that if the Senate's duplicating budget is sufficient, the Senate could send all adjunct faculty those pages of the minutes of today's meeting that discuss this issue. This was agreed to if it proves possible. Senator Margaret Wallace suggested that the Chairs be asked to share this information with their adjunct faculty.

Vice President Green supported Senator Gibson's suggestion of a Better Teaching Seminar on academic freedom and tenure and on what is protected speech and what is not. She said that she is finding it very helpful to listen to colleagues from other disciplines talk about this subject today because she teaches plays that create very difficult moments in her class. She tries to establish an environment in her classroom in which she makes everyone comfortable and she tells her students that they may disagree vehemently with the material and that she wants to hear their disagreement but they must do so in a respectful way but, she added, it is very, very difficult. She said she would love to share such experiences with other faculty in other disciplines. She feels that to not bring such texts into her classroom would be a disservice, a violation of academic integrity.

President Kaplowitz said that when we teach texts that are appropriate to the subject matter of the course and those texts contain vulgar language, the issue is how we **as** faculty handle the situations that arise in class, not whether we have the right to assign such texts. If, for example, a course on abnormal psychology involves the study of compulsive use of obscene language and a case study is assigned, that is integral to the subject matter of the course. But, she said, in talking to students since the last meeting, what is at issue is not only the egregious behavior of cursing at a student but the gratuitous use of profane adjectives, of vulgar expletives, language that one doesn't want to hear from anyone, students or faculty, in the hallways or outside our buildings, and certainly not in the classroom which for students, as the court ruling states, constitutes a captive setting where students are unable to ignore or physically avoid hearing such language. She said that since the last meeting she has talked with a number of people and has discovered, interestingly, that faculty who are reported to use such language gratuitously rarely or never use it when they are with other faculty; rather, they reserve it for the classroom. Senator Gitter said that is her understanding as well.

Senator Evan Mandery said **as** a lawyer he would like to note that we are talking about two issues: what faculty need to know and what students should know. He said that isolated incidents of a faculty member using a crude or offensive **term** in class do not even remotely approach the behavior that is being discussed in the Bonnell case [Attachment C]. He said that if one looks at the facts of this case and of other similar cases in which a person's speech is held to be not protected, it is necessary to demonstrate that a hostile work environment was created and that requires that there has been a pervasive pattern of such conduct. That standard is not met if a faculty member uses a vulgar term once in a while. It may be unprofessional to do use such a term once in a while but it would not meet the standard necessary to determine that the person created a hostile work environment. But if a faculty member used such terms in every class, or if a faculty member in class referred to a woman in a derogatory way, or if a faculty member spoke in an explicitly racially derogatory way, that is a very different situation. Isolated incidents do not give rise to liability. He said it is true that such speech is not protected but at the same **time** faculty should not be fearful if they occasionally use such terms.

Senator Mandery also noted that the language cited in the Bonnell case and in a case involving a basketball coach, which the court refers to, is of such an offensive and pervasive nature that he can not imagine any one in this room ever engaging in such behavior. Furthermore, he said, he would be reluctant to tell students they should bring charges if a faculty member occasionally uses a crude term. He said he would be reluctant were we to create a litigious atmosphere. He said he **has** spoken with Karen about a situation in which a former student has come to him for advice about sexual harassment she is being subjected to and it is **in** response to that discussion that the sexual harassment issue is on today's agenda. He explained he always feels it is very important to separate out something a teacher does that is really, really terrible, such **as** sexual harassment of someone or the pervasive use of profanity in class every day, from the very occasional use of a vulgar term.

Senator James Cauthen said that the big distinction that the court makes is whether the language is related to the course content: that is the standard. One case that is referred to in the ruling involved a professor who consistently and constantly verbally attacked his students for not performing on a level that he wanted and that behavior was problematic because it was totally unrelated to the course content. Senator Cauthen added that the second area, as Senator Mandery noted, is the question of whether there is a pervasive discriminatory environment in the class through the use of language unrelated to the course content. That is the big distinction: the unrelated nature of the behavior and language to the course content.

The senators who reported conversations with members of the counseling faculty said that they were told that students have complained that some faculty use profane language not only in every class but over and over during each class.

Several senators expressed concern that students will feel they can bring charges against faculty at will. President Kaplowitz said that both the Board of Trustees Bylaws and the PSC contract provide for a very rigorous due process and that a case without merit can not be pursued without violating both the Bylaws and the contract. She said faculty do have academic freedom but academic freedom is not absolute and the College has an obligation to provide both students and faculty with a college environment that is free of undue interference in the learning and teaching process and environment.

Senator Gitter said that far from being too litigious, she thinks that most of our students are too passive and that while they may complain to their counselors, they suffer silently because they never take action that will result in a change in the situation that is making them suffer. And many students never speak to a counselor and suffer not only silently but without the professional help a counselor can provide. Senator Gitter said that she also thinks that Senator Yukins' comments about some students' inappropriate responses to language in texts is very, very important. Senator Gitter also said that if students complain to us about the language that another of their teachers uses, we should urge them to speak to the teacher or else to speak to a counselor. She said that if faculty realize that students don't like to hear such language they will stop using it.

President Kaplowitz agreed and recalled that what the Student Council president said at the last Senate meeting was that she knows that faculty hear students use profanity in the hallways and in the elevators and she knows that faculty are offended by it but that at the same time when students are subjected to hearing faculty use profanity in the classroom, the students absolutely hate it.

Senator Will asked whether the College has an ombudsman. President Kaplowitz recalled that about ten years ago, at the time of student strikes at John Jay, a group of faculty developed a proposal for the creation of the position of ombudsperson but the student council president at the time successfully campaigned against the idea, saying it is he who is the students' ombudsperson. (He was the one who led the student shut downs of both buildings.) Perhaps, she said, we may wish to revisit this idea: Hunter, City, and Baruch have an ombudsperson, to whom students, faculty, and staff can go, and other CUNY colleges may as well.

Senator Dagoberto Orrantia said that during the many years he has taught at John Jay he has seen and heard students create a hostile environment not by the way they speak in the hallways but by the way students speak in the classrooms. He said many faculty ignore the use of crude language by students in the classroom, which he thinks contributes as much to a hostile learning environment as does faculty use of crude language. He said if we are going to do anything about curbing the

extreme cases among the faculty we should also say to the students that it is just **as** unpleasant for the faculty to be subjected to crude language from students. We should all make an effort to ensure a proper learning environment and that means, he said, faculty not permitting students to use profanity in the classroom.

President Kaplowitz agreed and said that students do not, in fact, have the right to use profanity in the classroom. Faculty have not only the power of moral suasion and the power of the grade but can bring disciplinary charges against students for such behavior. Senators expressed their surprise at this information. President Kaplowitz said the faculty member is responsible for creating and maintaining a classroom environment that is conducive to learning and to teaching and if the faculty member determines that profane language by students interferes with or renders impossible such **an** environment, it is the faculty member's right to say that such language may not be used. **This** has nothing to do with free speech which is the automatic rejoinder of many students when faced with an instructor who takes this position, that students have a right to say whatever they want because they are guaranteed freedom of speech: the freedom of speech clause refers to only action by the government but even if faculty at public universities are, in fact, agents of the government, the Supreme Court **has** ruled that free expression may be limited.

Senator Cauthen said students have **free** speech rights in the classroom but it is limited free speech: students are not permitted to disturb the learning environment. Senator Mandery agreed.

When a senator asked if a faculty member has **an** obligation to not permit such profanity by students if she herself is not offended by it, President Kaplowitz suggested that faculty have an obligation to not permit such language if such language may impede the ability of other students in the class to learn. Senator Tom Litwack noted that even if language is protected speech, that does not mean that it is prudent to use that language in the classroom. Vice President Green called this discussion very interesting, informative, and important.

9. Sexual harassment: CUNY & John Jay policies and procedures

Senator Evan Mandery said he does not think the statement in the John Jay Faculty Handbook about sexual harassment is adequate and he would like the rights and responsibilities of faculty and students to be more fully spelled out. He said he does read the Faculty Handbook and he thinks students read the Student Handbook.

Senator Mandery explained that he requested that this issue be on the agenda because he has been asked by some former and current students what recourse they have for dealing with the sexual harassment they are being subjected to by some of their professors. Senator Mandery said that when he could find no information on the John Jay homepage, he asked Karen Kaplowitz, who referred him to the *CUNY* home page, which has *CUNY*'s Policy on Sexual Harassment at <http://www.cuny.edu/topframe-abtcuny.html>, and she provided him with John Jay's leaflets, which are not widely available, at least not in T Building, where he teaches and where his office is located.

Senator Mandery suggested that the John Jay home page have a link to the **CUNY** home page's Sexual Harassment Policy of *CUNY*. The Senate endorsed this suggestion by unanimous vote, which President Kaplowitz said she would communicate to John Jay's webmaster. Senator Mandery said that he would like the Senate to consider ways that the faculty can be educated in a

systematic manner about issues of sexual harassment. Although he knows there is insufficient time today, given the imminent arrival of CUNY Budget Director Ernesto Malave, he said that having this issue on today's agenda is important and he urged the Senate president to request that the Affirmative Action Officer, who is responsible for sexual harassment issues on campus, send all faculty the materials provided by John Jay about sexual harassment. Although these materials are available in the Department of Counseling and Student Life on the third floor of North Hall, he said faculty should receive a copy of the CUNY policy and of the John Jay brochure that both lists the members of John Jay's Sexual Harassment Panel and explains the process an aggrieved party can follow. This material is needed both because faculty should be informed for their own sake and because faculty need to be informed for the sake of their students, who may ask them for guidance and advice, as his students have. This request was supported.

Senator Mandery was thanked for submitting this as an agenda item. President Kaplowitz was noted that there have been quite a number of Senate-sponsored Better Teaching Seminars on sexual harassment but that those who attend tend to be either faculty who are having problems with this issue or those whose consciousness is already acutely raised. She said a less ad hoc approach may be warranted. She noted that the section of the **CUNY** home page on sexual harassment includes not only the *CUNY* Policy on Sexual Harassment but an excellent question and answer interactive test, with a certificate that one can print out upon successfully completing the test. She reported that a few years ago the CUNY Board of Trustees adopted a policy requiring all *CUNY* employees, full-time and part-time, to be trained about sexual harassment, adding that the software on the CUNY home page was purchased by the University in order to implement that policy.

10. Invited guest: CUNY Budget Director Ernesto Malave [See Minutes #222: Part III]

Respectfully submitted,

Edward Davenport
Recording Secretary

&

James Cauthen
Associate Recording Secretary

&

Amy Green
Vice President

Please see Part II of Minutes #222 for the report of the Senate's meeting with

CUNY Budget Director Ernesto Malave

This article from The Chronicle of Higher Education (<http://chronicle.com>)

From the issue dated November 2, 2001

Supreme Court Rejects Appeal of Professor Suspended for Crude Language

By ROBIN WILSON

The U.S. Supreme Court has let stand a federal appeals-court decision that allowed Macomb Community College to suspend an English professor who used crude language in the classroom. The professor, John C. Bonnell, called the court's action a defeat for free speech, but the Michigan college said it was a triumph for efforts to maintain an environment conducive to learning.

Mr. Bonnell was suspended for three days in February 1999 after a student complained that his frequent use of graphic language was "dehumanizing, degrading, and sexually explicit." Mr. Bonnell was criticized for using words and phrases like "damn" and "blowjob" in class, and for using the expression "as useless as tits on a nun" during an analysis of a short story that deals with a nun's conflicted sense of her sexuality.

When the college suspended Mr. Bonnell, it said the obscenities were not germane to classroom readings. Immediately after issuing the three-day suspension, the college placed Mr. Bonnell on indefinite leave with pay while it conducted an investigation. It was concerned about an "apology" Mr. Bonnell had subsequently written and distributed to colleagues and to reporters, making fun of both the student who had complained and the college's reaction. Mr. Bonnell says that the apology he wrote was "a lampooning of the inquisitorial kangaroo-court sessions I was subjected to by college personnel."

In July 1999, the college decided to punish Mr. Bonnell for writing the mock apology by suspending him for four months, without pay. Hunter L. Wendt, the college's lawyer, said that in the document, Mr. Bonnell had "retaliated" against the student who complained, ridiculing her. Although Mr. Bonnell did not name the student, Mr. Wendt said the professor had made it easy for others to identify her. In doing so, said Mr. Wendt, the professor had violated the student's right to privacy.

Mr. Bonnell's lawyer sought an injunction to stop the college from suspending him, and in August 1999, a U.S. district-court judge, Paul D. Borman, ordered the college to reinstate him, saying that Mr. Bonnell's speech -- both in the classroom and in the satirical apology -- was protected by the First Amendment.

But in March, the U.S. Court of Appeals for the Sixth Circuit overruled the judge. "While a professor's rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student's right to learn in a hostile-free environment," the decision said.

The Supreme Court's refusal to hear Mr. Bonnell's case upheld the appeals court's ruling. Meanwhile, Mr. Bonnell started serving the semester-long suspension in August, and he is to return to the classroom in **January**. His original suit against the college, in which he claimed that it had violated his First Amendment rights by suspending him for his classroom remarks, is still pending. The college plans to ask the district court to throw that suit out.

Mr. Bonnell said he never used obscene language in the classroom "to demean, insult, embarrass, or single out" students. He used it because it was appropriate, given the literature the students were reading, and given that the students themselves use such language and relate to it, Mr. Bonnell said. "The thing I've learned from this is that the First Amendment is virtually dead in this country for community-college teachers of my sort," he said.

But Mr. Wendt had a different view. "We have an obligation to provide a hostile-free learning environment and to protect the privacy interests of our students," he said. "When someone decides to violate those **rights**, they aren't going to be able to hide behind the First Amendment in doing so."

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From the issue dated March 16, 2001

Judge Lets College Suspend Professor for Creating 'Hostile Learning Environment'

By RON SOUTHWICK

A federal appeals court has ruled that Macomb Community College has the right to suspend a faculty member for creating a "hostile learning environment," even at the risk of curbing the professor's free-speech rights. The ruling came in a dispute over an English professor who used salty language during classroom discussions of literature.

If it stands, this month's decision of the U.S. Court of Appeals for the Sixth Circuit will allow the college to issue a semester-long suspension to John C. Bonnell, an English professor.

The appeals court said freedom of expression is not an institution's first obligation. "While a professor's rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student's right to learn in a hostile-free environment," the decision said.

The student, who has not been identified, complained about the professor's foul language in November 1998, saying she felt degraded and sexually harassed. In February 1999, the college suspended Mr. Bonnell for his classroom language but rejected the sexual-harassment allegations.

College officials said Mr. Bonnell used words like "damn" and "ass," as well as more-graphic language. He was admonished for using the term "blow job" when referring to President Bill Clinton's affair with Monica Lewinsky. He also was criticized for saying "as useless as tits on a nun" in the course of analyzing a story that depicted a nun's conflicted sense of her sexuality.

After Mr. Bonnell issued a satirical apology in 1999, the student who filed the complaint said she could be identified from it. The college indefinitely suspended Mr. Bonnell with pay in February 1999, citing his classroom language and his breach of a confidentiality provision in his contract.

A month later, Mr. Bonnell filed a federal lawsuit to be reinstated; Macomb stopped paying him that month.

In August 1999, U.S. District Court Judge Paul D. Borman ordered him reinstated, ruling that the professor's speech was protected by the First Amendment. The appeals court ruling reverses that decision and allows the Michigan college to suspend him.

"This case was very important to the college because the lower-court ruling undermined our ability to provide and protect a nonhostile academic setting in which free expression and the exchange of ideas thrives for both students and faculty," said the provost, Rose B. Bellanca, in a statement.

Mr. Bonnell and his lawyer, James C. Howarth, have argued that none of the professor's language in the classroom was directed at the student who filed the complaint.

"This is a major infringement upon the civil rights and the free-speech rights of college professors," Mr. Bonnell says.

He adds that he's deciding whether to appeal the decision to the U.S. Supreme Court.

The reactions of other members of the college's faculty have been mixed, he says. Some of them don't believe that instructors have the right to free speech, and they may well be in the majority at Macomb, Mr. Bonnell says. Others have been supportive and are worried about the ramifications of the case, he says.

More than 100 students and former students, in person or in writing, have expressed their support for him, adds Mr. Bonnell, who has taught at Macomb since 1967.

Asked whether he had changed his teaching style as a result of the litigation, he replies: "Not yet. I'm still the same teacher I've always been."

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ELECTRONIC CITATION: 2001 FED App. 0057P (6th Cir.)

File Name: 01a0057p.06

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

John C. Bonnell and Nancy L. Bonnell,

Plaintiffs-Appellees,

v.

Albert Lorenzo, William MacQueen, and Gus J. Demas,

Defendants-Appellants,

Mark Cousens,

Defendant.

No. 99-2047

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

No. 99-71155--Paul D. Borman, District Judge.

Argued: February 4, 2000

Decided and Filed: March 1, 2001

Before: NELSON, COLE, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Hunter L. Wendt, Mt. Clemens, Michigan, for Appellants. James C. Howarth, Detroit, Michigan, for Appellees. **ON BRIEF:** Hunter L. Wendt, Mt. Clemens, Michigan, **Thomas P. Brady**, Jeffrey A. Steele, BRADY & HATHAWAY, Detroit, Michigan, **Timothy S. Ferrand**, CUMMINGS, McCLOREY, DAVIS & ACHO, Roseville, Michigan, for Appellants. James C. Howarth, Juan A. Mateo, Detroit, Michigan, for Appellees. Donald J. Mooney, Jr., BENESCH, FRIEDLANDER, COPLAN & ARONOFF, Cincinnati, Ohio, Gerald K. Evelyn, Detroit, Michigan, for Amici Curiae.

CLAY, J., delivered the opinion of the court, in which COLE, J., **joined**. NELSON, J. (pp. 49-51), delivered a separate concurring opinion.

OPINION

ii. Balancing of the Interests

The balancing of interests between a faculty member's right to free speech and a college's or university's right in preserving its interests has recently been described as follows:

Free speech rights stemming from the First Amendment apply to both students and faculty members on public colleges and university campuses. . . . [H]owever, those rights are not absolute. The objectives that underscore the First Amendment also reflect and reinforce the educational mission of colleges and universities. These objectives include advancement of a representative democracy and self-government; the pursuit of truth in the marketplace of ideas; and the promotion of individual self-expression and development. Constitutional protection is afforded to the open and robust expression and communication of ideas, opinions, and information to further each of these objectives. This protection parallels a central mission of higher education: to nurture and preserve a learning environment that is characterized by competing ideas, openly discussed and debated.

Arthur L. Coleman & Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses*, 23 J.C. & U.L. 91, 98-99 (1996) (footnotes omitted).

In the matter before us, we believe that Defendants' purported interests, including maintaining the confidentiality of student sexual harassment complaints, disciplining teachers who retaliate against students who file sexual harassment claims, and creating an atmosphere free of faculty disruption, outweigh Plaintiff's purported interests. As noted by the several commentaries cited above, colleges and universities are legally required to maintain a hostile-free learning environment and must strive to create policies which serve that purpose. While a professor's rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student's right to learn in a hostile-free environment. To hold otherwise under these circumstances would send a message that the First Amendment may be used as a shield by teachers who choose to use their unique and superior position to sexually harass students secure in the knowledge that whatever they say or do will be protected. Such a result is one that a state college or university is legally obligated to prevent, and such a result would fail to consider the countervailing interests. See 18 Berkeley J. Emp. & Lab. L. at 320 ("The First Amendment and [a]cademic freedom must not be used to shield the abuse of a captive audience by racially or sexually derogatory epithets.").

iii. "Classroom Language"

Finally, we turn to Plaintiff's classroom language which gave rise to the sexual harassment complaint and the disciplinary measures. The content of Plaintiff's language at issue is what the College terms profanity not "germane to course content." (10) See, e.g., March 4, 1998 Memorandum from MacQueen to Plaintiff entitled "Obscene and vulgar speech" (cautioning Plaintiff that "[u]nless germane to discussion of appropriate course materials and thus a constitutionally protected act of academic freedom, your utterance in the classroom of such words as 'fuck,' 'cunt,' and 'pussy' may serve as a reasonable basis for concluding as a matter of law that you are fostering a learning environment hostile to women, a form of sexual harassment"). In other words, it was not the content of Plaintiff's speech itself which led to the disciplinary action; rather, it was the context and form in which Plaintiff used the speech -- i.e., in the course of his teaching where the language was not germane to the course content -- that the College found to be in violation of its sexual harassment policy.

The context in which a message is delivered is often the pivotal factor when determining whether the speech will be protected. As the Supreme Court recently opined

[T]he protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it. Indeed, it may not be the content of the speech, as much as the deliberate verbal or visual assault, that justifies proscription. Even in a public forum, one of the reasons we tolerate a protestor's right to wear a jacket expressing his opposition to government policy in vulgar language is because offended viewers can effectively avoid further bombardment of their sensibilities simply by averting their eyes.

Hill v. Colo., 530 U.S. 703, 120 S. Ct. 2480, 2489 (2000) (citations and internal quotation marks)

omitted). Nearly a century before *Hill* was decided, Justice Holmes likewise opined that "the character of every act depends upon the circumstances in which it was done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that have all the effect of force." See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (citations omitted).

The degree of protection afforded to a college professor's speech in the context of the classroom was addressed by the Fifth Circuit in *Martin v. Parrish*, 805 F.2d 583,584-85 (5th Cir. 1995). There, the plaintiff was discharged from his teaching position at a college for his incessant use of profanity in the classroom. *Id.* In finding that the speech was not protected, the Fifth Circuit took into account the unique context in which a college professor speaks such that his students are a "captive audience" who may find themselves intimidated by the person who has the ability to pass upon them a poor grade. Specifically, in *Martin* the plaintiff teacher denigrated his students with profanity such as "bullshit," "hell," "damn," "God damn," and "sucks," allegedly because the students had a poor attitude. The plaintiff brought a §§ 1983 claim against the college for violation of his First Amendment rights; the district court held that the plaintiff did not have a constitutionally protected right to use profanity in the classroom; and the Fifth Circuit agreed. See *id.* at 585. The Court held that the teacher's speech did not touch upon a matter of public concern because the profanity served only to reflect the teacher's attitude toward his students. *Id.* In connection with its holding, the Court recognized that the students were a "captive" audience, and that they "paid to be taught and not vilified in indecent terms . . ." *Id.* at 586. In short, the Court held that the teacher's "language is unprotected . . . because, taken in context, it constituted a deliberate, superfluous attack on a 'captive audience' with no academic purpose or justification." *Id.*

In *Dambrot v. Central Michigan University*, we relied upon the Fifth Circuit's decision in *Martin* when we held that the coach of a state university basketball team did not engage in protected speech when he used the word "nigger" during a locker room session allegedly to motivate his basketball players. See 55 F.3d 1177, 1180 (6th Cir. 1995) ("[Y]ou know we need to have more riggers on our team Coach McDowell is a rigger, . . . Sand[er] Scott who's an academic All-American, a Caucasian, I said Sand[er] Scott is a nigger. He's hard nose, [sic] he's tough, et cetera."). The coach was discharged by the university for this speech and he filed suit alleging that his discharge violated the First Amendment. The district court granted the university's motion for summary judgment and this Court affirmed. Relying upon *Martin*, the Court concluded as follows:

The First Amendment protects the right of any person to espouse the view that a "nigger" is someone who is aggressive in nature, tough, loud, abrasive, hard-nosed and intimidating; someone at home on the [basketball] court but out of place in a classroom setting where discipline, focus, intelligence and interest are required. This same view has been and is held about African Americans by many who view the success of Black athletes as a result of natural athletic ability and the success of Black executives as the result of affirmative action.

What the First Amendment does not do, however, is require the government as employer or the university as educator to accept this view as a valid means of motivating players.

An instructor's choice of teaching methods does not rise to the level of protected expression. . . . The University has a right to disapprove of the use of the word "nigger" as a motivational tool just as the college in *Martin* was not forced to tolerate profanity.

55 F.3d at 1190-91 (citation omitted; emphasis added).

The *Dambrot* Court also rejected the coach's argument that his speech was protected under the realm of "academic freedom." 55 F.3d at 1188. "The analysis of what constitutes a matter of public concern and what raises academic freedom concerns is of essentially the same character." *Id.* (citing *Swank v. Smart*, 898 F.2d 1247, 1250 (7th Cir. 1990)). The Court then noted that the "linchpin of the inquiry is, thus, for both public concern and academic freedom, the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives." To this end, the Court concluded that, unlike the case of *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992), and *Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir. 1994), *vacated and remanded*, 513 U.S. 996 (1994), *rev'd* 52 F.3d 9 (2d Cir. 1995) - where the speech of college professors who made derogatory comments about persons of certain racial or ethnic groups was found to serve the purpose of advancing viewpoints, however repugnant, which had as their purpose influencing or informing public debate - the coach's speech did not have such a purpose. *Id.* at 1189.

Turning to the matter at hand, just as a university coach may have the constitutional right to use the word "nigger," but does not have the constitutional right to use the word in the context of motivating his basketball players, *see* 55 F.3d at 1190; so too, Plaintiff may have a constitutional right to use words such as "pussy," "cunt," and "fuck," but he does not have a constitutional right to use them in a classroom setting where they are not germane to the subject matter, in contravention of the College's sexual harassment policy. *See id.; see also FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (finding speech that is "'vulgar,' 'offensive,' and 'shocking' . . . is not entitled to absolute constitutional protection under all circumstances"). This is particularly so when one considers the unique context in which the speech is conveyed -- a classroom where a college professor is speaking to a captive audience of students, *see Martin*, 805 F.2d at 586, who cannot "effectively avoid further bombardment of their sensibilities simply by averting their [ears]." *Hill*, 120 S. Ct. at 2489. Although we do not wish to chill speech in the classroom setting, especially in the unique milieu of a college or university where debate and the clash of viewpoints are encouraged - if not necessary -- to spur intellectual growth, it has long been held that despite the sanctity of the First Amendment, speech that is vulgar or profane is not entitled to absolute constitutional protection. *See Pacifica*, 438 U.S. at 747.

To summarize, although we find Plaintiff's classroom profanity that was not germane to the subject matter to be unprotected speech, we are also of the belief that Plaintiff's acts of expression in circulating the Complaint and the *Apology* were protected as addressing matters of public concern. Because parts of Plaintiff's speech for which he was disciplined addressed a **matter** of public concern, we are required to conduct a balancing of the parties' respective interests as set forth in *Pickering v. Board of Education*. *See Connick*, 461 U.S. at 149; *Rahn*, 31 F.3d at 411.