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***573** PROHIBITING DISCRIMINATORY HARASSMENT BY REGULATING STUDENT SPEECH: A BALANCING OF FIRST-AMENDMENT AND UNIVERSITY INTERESTS [FNa]

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INTRODUCTION

Like many other colleges and universities, the University of Wisconsin System recently has witnessed a disturbing increase in racist and discriminatory conduct on campus. Incidents range from the clumsily offensive "humor"' of a mock slave auction to the anonymous call of "nigger"' from a crowd; from racist caricatures on posters to epithets scrawled on the mirrors and walls of private living quarters. The reports of the victims attest to the pain caused by such episodes. The damage to the University is perhaps less palpable, but no less real. Recurring instances of discriminatory behavior undermine institutional efforts to provide equal access to education and to improve the educational environment for all students. They also erode the tolerance that is fundamental to the existence of a university community. Because of the harm done to both individuals and the university, the University of Wisconsin System--like other colleges and universities--has responded to discriminatory, harassing behavior with efforts to regulate the conduct of staff and students in this area. [FN1]

This type of regulatory effort, however, implicates academic freedom and free-speech rights protected under the first amendment to the United States Constitution. Much discriminatory, harassing conduct takes the ***574** form of verbal or otherwise "expressive"' behavior, thus raising questions as to whether it merits constitutional protection. Attempts to prevent or to prohibit discriminatory harassment through university regulations must, therefore, be tempered by sensitivity to individual rights of free speech. Successful and legally-sustainable regulation ultimately requires balancing values associated with equality of educational opportunity and those related to freedom of expression in an academic setting.

The Wisconsin effort to regulate discriminatory harassment by students illustrates the legal and policy difficulties inherent in any attempt to proscribe conduct in this area. This Article discusses, in the context of the Wisconsin experience, the legal and policy reasons for regulating discriminatory harassment by students, and suggests a constitutionally sound framework for regulation.

I. HISTORY OF THE WISCONSIN REGULATION

The University of Wisconsin System initiated its formal effort to regulate discriminatory harassment in late 1987, following several highly publicized incidents of racist and racially-harassing behavior on Wisconsin campuses. In one episode, a fraternity held a party featuring a "Harlem room,"' in which it served fried chicken and watermelon punch, and students wore black-face. In another, a

fraternity placed a large cardboard caricature of a black man on its lawn to announce a "Figi Island"' party. [FN2] And in still another, racist name-calling led to an altercation involving students at a fraternity house. [FN3] As public attention focused on these incidents, minority students reported a number of other instances in which abusive language and racial epithets were applied to them. [FN4] The apparent increase in such episodes emphasized the problem of campus racism in general, and the need for the University to consider appropriate responses to the particular kinds of racially-motivated expressive behavior occurring.

Existing University rules and policies governing student conduct did not address harassing verbal conduct and offensive expressive behavior by students. Absent a threat of physical danger or harm to property, Wisconsin's student-conduct rules provided no mechanism for the redress of harassing verbal or expressive behavior. [FN5] This deficiency in the student-conduct rules, and the frustration resulting from the University's inability to respond effectively to specific incidents of racist conduct, led to the formation of a committee at the University of Wisconsin-Madison campus charged with developing a policy on discriminatory conduct by students. [FN6]

***575** During early 1988, as this campus committee began its work, the Board of Regents of the University of Wisconsin System reexamined systemwide efforts to improve educational opportunities for minorities and the economically disadvantaged. The quality of the campus environment emerged, in the course of the Regents' study, as a critical factor in attracting and retaining minority students. The study also identified responding effectively to episodes of discriminatory harassment as an important element in assuring a hospitable environment. Design for Diversity, [FN7] a comprehensive plan resulting from the Regents' study, addressed these issues by requiring that each University of Wisconsin campus prepare nondiscriminatory-conduct policies to address discriminatory harassment by faculty, staff and students. [FN8]

The approval of Design for Diversity in May, 1988 coincided with the completion of the Madison campus committee's work on a proposal to amend the student-conduct rules to prohibit verbal or expressive-discriminatory harassment. The Madison proposal was one possible response to the Design for Diversity requirement that each campus adopt policies on student-discriminatory harassment. Because only the Regents have the authority to amend the student- conduct code, [FN9] however, the Board circulated the Madison proposal to all other University of Wisconsin campuses for comment. The Board then appointed a systemwide working group to review the comments received, to determine whether a change in the conduct rules was needed and desirable, and to recommend to the Board necessary amendments. Concluding that the student- conduct code should be amended to prohibit discriminatory harassment, the working group drafted revisions during December, 1988 and January, 1989. After debate and public commentary at Regent meetings and before the state legislature, the Board adopted these revisions, with minor modifications, as administrative rules. The rules took effect September 1, 1989.

II. POLICY AND LEGAL AUTHORITY FOR THE WISCONSIN REGULATION

The working group and the Board of Regents considered various legal and policy principles in preparing the revised student conduct code. The drafters recognized that the University has not only the authority, but also the responsibility, to discourage discriminatory harassment. [FN10] ***576** Legal and policy principles establish the University's duty to provide equal access to education, to prevent interference with educational opportunities, and to regulate student conduct. The drafters also recognized, however, that any administrative rule limiting harassing speech or other expressive behavior must balance these policy commitments and legal duties against students' first-amendment rights and principles of academic freedom. As a result, the drafters examined first-amendment case law in defining the appropriate scope of university regulation of verbal and expressive discriminatory harassment. The Wisconsin rule-makers attempted to shape a rule narrow enough to withstand first-amendment scrutiny, but broad enough to serve the University's objective of discouraging discriminatory harassment. [FN11]

A. The University's Authority and Duty to Regulate Discriminatory Harassment

1. Equal Access to Education: Individual Rights and Institutional Obligations

Familiar legal principles establish the University's general duty to provide equal educational opportunities. As a state university, Wisconsin must act in accordance with the fourteenth amendment's [FN12] guarantee of equal protection in providing educational opportunities. As the United States Supreme Court stated in Brown v. Board of Education, "The opportunity of an education, where the state has undertaken to provide it, is a right which must be made available to all on all equal terms."' [FN13] In addition, federal laws such as Title VI of the Civil Rights Act of 1964, [FN14] Title IX of the Education Amendments of 1972, [FN15] and Section ***577** 504 of the Rehabilitation Act of 1973 [FN16] mandate equal access to, and participation in, educational benefits for specific protected groups, Wisconsin state statutes establish similar requirements. [FN17] Moreover, the policies of the Board of Regents affirm the University's commitment to assuring equal access, and to complying with laws requiring equal access. [FN18] As consistently stated in its policy documents, the Board's goal is to achieve equality of educational opportunity for all students. [FN19]

Reasoning from employment-law principles and case law under Title IX concerning the sexual harassment of students, the Wisconsin working group concluded that verbal or expressive harassment of individuals based on their race or other protected characteristics is discriminatory, violating legal and policy guarantees of equal opportunity in education. In employment-law cases, courts have construed the equal employment opportunity guaranteed by Title VII of the Civil Rights Act of 1964 [FN20] to afford employees the right to work in an environment free from discriminatory intimidation, ridicule and insult. [FN21] Cases arising under Title VII have recognized racial, ethnic-origin, and religious harassment as prohibited discrimination in the workplace. [FN22] Likewise, courts have held that sexual harassment--defined as discriminatory conduct in the guidelines of the Equal Employment Opportunity Commission [FN23]--violates Title VII. [FN24] Under these and similar state-employment rules, [FN25] courts may hold employers liable for discriminatory harassment in the workplace, and employers have a duty to take corrective action when harassment occurs.

Discriminatory harassment creates a work environment that is inherently unfair to its victims. It renders the terms and conditions of their ***578** employment unequal, undermining their ability to function effectively. An employer's tolerance of harassment is, therefore, a form of discrimination, which violates Title VII's assurance of equal employment opportunity.

Harassment of students in the educational setting shares the characteristics of harassment in the workplace. It causes the same type of harm, tainting the environment, adversely affecting the ability of students to perform, and causing disparate treatment. [FN26] The ultimate result is inequality of educational opportunity for those who are the victims. By analogy to the employment setting, the University's general obligation to provide equality of educational opportunity includes the authority--and duty--to take policy action against discrimination in the form of harassment between and among students.

Sexual harassment cases arising under Title IX also support this conclusion. In Alexander v. Yale University, [FN27] a Connecticut District Court recognized for the first time that sexual harassment is a form of discrimination, actionable by students under Title IX. More recent cases also support such claims, on the theory that harassment discriminates by creating an environment hostile to education. [FN28] Recognition of sexual harassment as a kind of discrimination that violates Title IX suggests that harassment based on other protected characteristics likewise might be found to be impermissible discrimination under such statutes as Title VI, Section 504, or similar state provisions. [FN29] The sexual-harassment case law under Title IX thus provided further support for the University's authority and

responsibility to prohibit discriminatory harassment. [FN30]

***579** 2. Preventing Interference with Education, Protecting Students, and Regulating Student Conduct

Additionally, more general institutional duties to prevent interference with education, to protect students, and to maintain order on campus demonstrated the need to regulate discriminatory harassment. The kind of personal harm caused by discriminatory harassment, as well as its capacity to disrupt educational activities, indicated that regulation, consistent with these general principles, would be appropriate.

The authority of universities to regulate student conduct and activities, thereby preserving order and preventing interference with education, is well- established. Universities have a legitimate interest in regulating student activities that "interfere with the opportunity of other students to obtain an education."' [FN31] The University may prohibit activities that materially and substantially disrupt its work and discipline. [FN32]

Harassment impedes the educational process, and interferes with the educational pursuits of its victims. It damages individuals, impairing their ability to function in the academic environment. It is, moreover, a kind of assaultive behavior, which is inherently disruptive and very likely to precipitate further disorder. [FN33] In some instances, it may even constitute criminal activity. [FN34] Given these characteristics of harassment, university regulation is authorized not only to assure equal access to education, but to prevent interference with the educational process, and to preserve an orderly, safe campus environment.

B. First-Amendment Analysis

Convinced of the University's general authority and responsibility to prevent discriminatory harassment, the Wisconsin rule-drafters used first-amendment law principles in describing the expressive conduct subject to regulation, and in defining the permissible limits of regulation. The constitutional implications of regulating discriminatory harassment were particularly significant at Wisconsin both because it is a state institution, [FN35] and because it is dedicated to encouraging academic freedom, debate and "that fearless sifting and winnowing by which alone ***580** the truth can be found."' [FN36] Concerned about the first-amendment impact of regulating harassing speech, Wisconsin adopted a cautious approach to rule-drafting, choosing to regulate only where governmental regulations on speech clearly were allowed.

First-amendment case law indicates that--despite its paramount position in the hierarchy of constitutional values--the right of free speech is not absolute. In appropriate circumstances, the government may limit or restrict speech; in addition, some types of speech and expressive behavior are beyond the scope of first-amendment protection altogether. Cases allowing incidental governmental restrictions on expressive activities suggested the University could limit harassing speech to serve its compelling, countervailing interests in preventing discrimination and interference with equal education opportunities. [FN37] Cases identifying types of speech not entitled to constitutional protection helped to define the scope and characteristics of the discriminatory harassing speech and expressive behavior the University could regulate. [FN38]

1. Constitutional Limits on Speech Activities and Expressive Behavior

Numerous first-amendment cases recognize the government's ability to limit speech and other expressive behavior, if the limitation is tailored narrowly to serve a substantial governmental interest. [FN39] In general, these cases recognize that one person's exercise of first-amendment rights may conflict with compelling

governmental interests, or may interfere with another person's exercise of different--but equally important--protected rights, thus justifying governmental limitations on the first-amendment activities.

General time, place and manner restrictions are familiar examples of such constitutionally-acceptable limitations on speech activities. [FN40] Restrictions on first-amendment activities designed to protect unwilling listeners from becoming the recipients of unwanted speech are closely related, and also appropriate. In a variety of situations, ranging from door-to-door solicitations [FN41] and religious proselytizing, [FN42] to the use of ***581** the mails to send obscene material [FN43] and placement of political advertisements on city buses, [FN44] courts have recognized that--despite the rights of a particular individual or group to speak--other citizens have a right not to listen. The government may intervene to protect this right not to receive speech, particularly when the speech occurs in a place in which the potential listener has some expectation of being free from intrusion or interference, or from which the listener cannot readily depart.

Incidental limitations on speech also are permitted in public-employment situations, [FN45] and in circumstances in which there is potential harm to certain groups of listeners, such as the very young, [FN46] or in which speech and non-speech elements are combined in such a way that the regulation of the non-speech elements has an incidental effect on "pure"' speech. [FN47]

Further restrictions on speech in an educational setting may be sustained when necessary to serve important governmental and individual interests in preventing interference with educational opportunities. These interests have been described as proper bases for limiting the exercise of first-amendment rights in schools and universities. [FN48] As the Supreme Court stated in Tinker v. Des Moines Independent Community School District: " C onduct by students , in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of free speech."' [FN49] Similarly, in Widmar v. Vincent, the Court affirmed the university's right to "exclude first-amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education."' [FN50]

***582** These first-amendment principles provided support for the University's authority to impose incidental restrictions on racist and discriminatory speech to serve critical governmental and individual interests in achieving equal educational opportunity, and in preventing discrimination and interference with the educational process. As the cases also made clear, however, the regulation must be narrowly drawn, identifying the abusive speech activities sought to be restricted, and demonstrating the harmful impact of such speech on other substantial individual and university interests.

Employment-law concepts--so significant in concluding that harassing speech denies equal educational access--also proved useful in narrowing the Wisconsin regulation for first-amendment purposes. Workplace principles limit expressive behavior that demeans on the basis of protected characteristics and creates a hostile work environment. [FN51] This description of the relationship between harassing speech and its adverse effects on important employment interests suggested an analogy for the educational setting. Borrowing from the structure of the workplace rules, the Wisconsin regulation prohibits discriminatory speech or expressive behavior that demeans race, sex, religion, color, creed, disability, sexual origin, national origin, ancestry or age and interferes with the University's interest in assuring equal educational opportunities by creating a hostile environment for "education, university- related work, or other university-authorized activity."' [FN52]

2. Categories of Speech Not Entitled to First-Amendment Protection: "Fighting Words"

Additional elements of the harassing speech prohibited by Wisconsin's rule were based on constitutional principles excluding some categories of speech from first-amendment protection. As Justice Holmes noted in Schenk v. United States, "The most

stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."' [FN53] Similarly, defamation, obscenity, [FN54] and "fighting words,"' are beyond the scope of constitutional protection. Because of the parallels ***583** between this last category of speech and racist and discriminatory comments, the "fighting-words"' doctrine provided key elements in regulating discriminatory harassment.

"Fighting words"' do not enjoy first-amendment protection because they are inherently inconsistent with first-amendment values and purposes. They do not contribute to any meaningful exchange of ideas; they do not advance the search for truth, and they are harmful to individuals. [FN55] The United States Supreme Court articulated these ideas in the seminal case of Chaplinsky v. New Hampshire: [FN56]

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the . . . insulting or "fighting"' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. [FN57]

The Court also noted that, because such "utterances are no essential part of any exposition of ideas [and are] of . . . slight social value as a step to truth . . .,"' they may be prohibited without violating the first amendment. [FN58]

Similarly, discriminatory insults, name-calling and abusive epithets have no value as a "step to the truth."' They are inherently harmful, constituting a kind of verbal assault on the person to whom they are directed. [FN59] They are, further, unlikely to form any part of a dialogue or exchange of views. They are instead the kinds of words that incite reaction and cause harm without any opportunity for reply. Given these parallels between traditional "fighting words"' and abusive discriminatory comments, Chaplinsky suggests a constitutional basis for prohibiting insulting, abusive, discriminatory speech.

Chaplinsky and later cases discussing the "fighting words"' doctrine also indicate that, to be excluded from first-amendment protection, the prohibited speech must be directed at an individual and must be intentional. Several cases in which defendants invoked the first amendment as a defense for offensive language or behavior emphasize the importance of these additional elements.

In Cohen v. California, [FN60] Cohen appeared in court wearing a jacket that said "Fuck the draft."' He successfully pleaded the first amendment as a defense to his prosecution for disturbing the peace. In Hess v. ***584** Indiana, [FN61] Indiana cited for disorderly conduct a man who used a vulgarity during a Vietnam War demonstration. The man prevailed on his claim that the comment was constitutionally protected. In both cases, the Supreme Court noted that the first amendment does not provide absolute freedom to speak whenever or wherever one chooses. Referring to the "fighting-words"' doctrine, however, the Court noted that in these particular situations " n o individual actually or likely to be present could reasonably have regarded the words . . . as a direct personal insult."' [FN62] Thus, the expressive conduct in these situations was distinguished from "fighting words,"' and was protected by the Constitution. To be outside the scope of first-amendment protection and prohibited by the university, therefore, speech must be "directed at"' someone, rather than be a generalized statement aimed at no one in particular.

Similar analysis suggested the need for a requirement that discriminatory speech be intentional to be prohibited consistent with the first amendment. The significance of an intent requirement is apparent from Brandenburg v. Ohio, [FN63] involving a first amendment-based challenge to a criminal syndicalism statute. In its decision in Brandenburg, the Supreme Court noted that--absent the intent to incite "imminent lawless action"' and the likelihood of such action in fact resulting--even speech advocating crime or violent action is protected by the Constitution. [FN64] Given the importance of intent in this context, it appeared likewise appropriate to incorporate intent as a required element of the discriminatory harassment prohibited by the University. [FN65]

The "fighting-words"' doctrine and related case law thus contributed several key

elements to the regulatory framework for prohibiting discriminatory harassment. The doctrine suggested that insulting, abusive discriminatory speech directed at another person, and intended to produce some sort of harm to that person could be prohibited, consistent with the first amendment. These elements were incorporated into the rule proposed to, and ultimately approved by, the Board of Regents. Accordingly, in addition to the concepts drawn from cases allowing speech limitations to prevent interference with other constitutional rights and governmental interests, the Wisconsin regulation requires that the prohibited speech be discriminatory and demeaning ("discriminatory comments, epithets or other expressive behavior"'); that it be directed at an individual; that it be intended to demean--on the basis of a protected characteristic--the person to whom it is directed; and that it be intended to interfere with education by creating a hostile environment for education and other university-related activities. [FN66]

***585** III. THE RESULTING REGULATION

As the above discussion suggests, the rule that the working group developed and recommended to the Board of Regents was narrow in scope. It provides, in pertinent part:

> UWS 17.06 Offenses defined. The university may discipline a student in nonacademic matters in the following situations:
>
> . . .
>
> (2)(a) For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets, other expressive behavior or physical conduct intentionally:
>
> 1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
>
> 2. Create an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity.
>
> (a) is present shall be determined by consideration of all relevant circumstances. [FN67]
>
> (b) Whether the intent required under par.

***586** By focusing on the "fighting-words"' principles in the context of the University's substantial interest in providing equality of educational opportunities and in preventing interference with education, the rule prohibits a narrow category of expressive conduct. It does not address a wide range of racist or otherwise discriminatory activity or offensive conduct occuring in group settings or in the public forums of the University. Similarly, it does not attempt to regulate the expression of ideas--even if derogatory to protected groups--in the classroom. It does not purport to reach student activities unrelated to the University's functions and work. [FN68] The working group and the Board of Regents tailored the Wisconsin regulation to be consistent with the first amendment, and chose to avoid the risks attendant on regulating more questionable areas. [FN69] The resulting rule prohibits only the most egregious kinds of discriminatory expressive behavior, and only when necessary to serve other compelling university and individual interests.

As of this writing, the constitutionality of the Wisconsin regulation has not been litigated. The only case challenging a discriminatory-harassment policy is John Doe v. University of Michigan, [FN70] holding Michigan's policy unconstitutional and enjoining its enforcement. There are, however, substantial differences between the Michigan policy and Wisconsin's regulation that make the application of the reasoning of the Doe decision to Wisconsin's regulation unlikely. The conduct prohibited by the Michigan policy included "any behavior, verbal or physical, that stigmatizes or victimizes an individual"' and either involves a threat to an individual's academic efforts or personal safety, or has the purpose or effect of interfering with the individual's academic efforts, or creates a hostile environment. [FN71] Michigan applied this language to speech such as a classroom statement that a student believed homosexuality was a disease, and he intended to develop a counseling plan to make gay ***587** clients straight. The language of the Wisconsin rule is narrower, as indicated above, in terms of the conduct prohibited, the proof required to establish a violation, and the rule's application in the

classroom setting. Accordingly, the court's rationale for finding the Michigan policy unconstitutional likely would not apply to the Wisconsin regulation.

CONCLUSION

The University of Wisconsin System chose to regulate verbal and expressive discriminatory harassment in the context of specific problems and on the basis of substantial legal and policy interests. The University initiated its effort in response to particular incidents of harassing behavior that offended the entire University community. The regulation became part of a much broader attempt by the University to improve educational opportunities for minority groups throughout the System. The reasons for regulating harassment included the need to assure the rights of individuals to participate equally in the educational process, the desire to help the University fulfill its own policy commitments and legal obligations to provide equal access to education and to prevent discrimination, and the importance of preventing interference with the educational process and maintaining an orderly, hospitable campus environment for learning.

First-amendment concerns about regulating expressive activities, however, resulted in a narrow rule. Because the rule focuses on harassing speech specifically directed at individuals, with the intent to produce certain specific harmful results, it excludes a wide range of racist or otherwise discriminatory commentary uttered in group settings. The rule does not prohibit classroom expressions of opinions offensive to a protected group. It also does not preclude certain offensive discriminatory displays, or the distribution of racist or discriminatory literature in the public forums of the University. Ironically, the rule would not prohibit some of the racist incidents that led to its creation.

The relatively narrow ambit of the regulation was, however, justified by the need to adopt a rule which would withstand constitutional scrutiny, while expressing the University's commitment to principles of equality, tolerance and diversity in the University community, and its willingness to support those principles. Educational institutions, particularly colleges and universities, occupy a special place in our society. They function as incubators of learning and transmit social values. Regulating discriminatory harassment affirms the University's interest in the values of equality of opportunity and equal treatment of individuals in the University community, and establishes the University's leadership role in responding to a particularly difficult and troubling aspect of the discrimination confronting society.

 As this Article was going to press, an action was filed challenging the constitutionality of the Wisconsin rule. The lawsuit, UWM Post, et al. v. Board of Regents of the University of Wisconsin System, Case No. 90-C-0328 (Eastern District of Wisconsin), alleges that the rule, on its face, violates the first and fourteenth amendments to the United States Constitution and Article I, sections 1 and 3, of the Wisconsin Constitution. The plaintiffs contend that the rule is overly broad and vague, and inhibits their exercise of constitutional rights. They seek declaratory and injunctive relief against the Board of Regents. At this writing, the Board has not filed its answer to the complaint.

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[FN1]. The University of Michigan, Stanford University, the University of Massachusetts at Amherst, the University of North Carolina, and the University of California at Berkeley, among others, have considered or adopted discriminatory-harassment policies.

[FN2]. See, e.g., WIS. STATE J., May 4, 1987.

[FN3]. See, e.g., WIS. STATE J., Nov. 8, 1987.

[FN4]. See, e.g., WIS. STATE J., Nov. 8, 1987.

[FN5]. WIS. ADMIN. CODE, Ch. UWS 17 (1975).

[FN6]. Although a number of University of Wisconsin system institutions received reports of racist incidents, most attention focused on those occurring at the University of Wisconsin-Madison. As a result, the Madison campus took a leading role in addressing the problem.

[FN7]. Official minutes of the Board of Regents of the University of Wisconsin System, May, 1988; Regent Policy Document 88-4 (University of Wisconsin System).

[FN8]. Design for Diversity, Section III.A.2., provides that each institution of the University of Wisconsin System shall develop written codes of student and employee conduct to ensure a nondiscriminatory environment.

[FN9]. WIS. STAT. § 36.35, L. 1973, c.335, § 7 1985 Act 332, § 251(1), eff. June 12, 1986, requires the Board of Regents to adopt administrative rules governing student conduct. The provisions of the Wisconsin Administrative Procedures Act, Chapter 227, Wisconsin Statutes govern the rule-making process.

[FN10]. While the impetus for amending the student-conduct rules came from episodes of racial harassment, both the Madison committee and the systemwide working group felt it appropriate and consistent with other nondiscrimination policies to extend the anti-harassment rule to cover all groups protected from discrimination by federal or state law or by policy of the Board of Regents. These protected categories include race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.

[FN11]. The Madison committee proposal provided particularly valuable guidance to the systemwide working group and the Board of Regents in this effort. The Madison policy was the product of extensive legal research by faculty and students, and both the policy statement recommended by the committee and supporting materials were made available to the systemwide working group. The regulation recommended to--and with some modifications, ultimately adopted by--the Board of Regents, reflects and incorporates many of the principles contained in this proposal.

[FN12]. U.S. CONST. amend. XIV.

[FN13]. Brown v. Board of Educ., 347 U.S. 483, 493, 74 S.Ct. 686, 691 (1954); Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 98 S.Ct. 2733 (1978).

[FN14]. Title VI, Pub. L. No. 88-352, 42 U.S.C. § 2000d (1964), et. seq. "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial

assistance."

[FN15]. Title IX, Pub. L. No. 92-318, 20 U.S.C. § 1681 (1972), et. seq. prohibits discrimination on the basis of sex in federally-funded education programs.

[FN16]. 87 Stat. 394, 29 U.S.C. § 794 (1973).

[FN17]. See, e.g., WIS. STAT. ANN. § § 36.11, 101.223, 101.225 (West 1966 & Supp. 1989) for state statutes prohibiting discrimination in educational programs.

[FN18]. Regent Policy Documents, 72-7, 72-21, 80-3, 83-4, 83-5, 84-5, and Design for Diversity, supra note 8.

[FN19]. See, e.g., Regent Policy Document 84-5:
The long range objective of the UW System is to achieve the goals of equality of access and of opportunity [for minority and disadvantaged students]. The achievement of these goals might be inferred from the attainment of a condition in which entry rates, academic success rates, graduation rates and distribution of educational and professional choices by minority students would more closely resemble those characteristics of all students of the UW System.

[FN20]. 78 Stat. 253 (1964) (codified as amended, 42 U.S.C. § 2000e, et. seq. (1982 & Supp. V 1987)).

[FN21]. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65, 106 S.Ct. 2399, 2405 (1986).

[FN22]. See, e.g., Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir. 1977), cert. denied sub nom., Banta v. United States, 434 U.S. 819, 98 S.Ct. 60 (1977); Compston v. Borden, Inc., 424 F.Supp. 157 (S.D. Ohio 1976).

[FN23]. EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (1988).

[FN24]. See Meritor Savings Bank, FSB, 477 U.S. 57, 106 S.Ct. 2399 (1986); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Zabkowicz v. West Bend Co., 589 F.Supp. 780 (E.D. Wis. 1984).

[FN25]. See, e.g., WIS. STAT. ANN. § 111.32(13) (West 1966).

[FN26]. See Delgado, Words that Wound, 17 HARV. C.R.-C.L. L. REV. 133 (1982); and Kretzmer, Free Speech and Racism, 8 CARDOZO L. REV. 445 (1987) (discussing the harms of racist speech). Anecdotal evidence to the same effect is abundant. See Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2320 (1989).

[FN27]. 459 F.Supp. 1 (D. Conn. 1977), aff'd, 631 F.2d 178 (2d Cir. 1980).

[FN28]. See Moire v. Temple Univ. School of Medicine, 613 F.Supp. 1360 (D.C. Pa. 1985), aff'd, 800 F.2d 1136 (3d Cir. 1986); Lipsett v. University of Puerto Rico, 637 F.Supp. 789 (D. P.R. 1986). In Moire, the Court, relying on Vinson, 477 U.S. 57, 106 S.Ct. 2399, indicated that environmental sexual harassment was precluded under Title IX. But see Bougher v. University of Pittsburgh, 713 F.Supp. 139 (W.D. Pa. 1989) (stating that Title IX does not permit a hostile environment claim of sexual harassment of the kind described for the workplace, but reaches only "quid pro quo"' harassment in which educational benefits are conditioned on the granting of sexual favors). For general commentary concerning the availability of a student cause of action for sexual harassment under Title IX, see Connolly and Marshall, Sexual Harassment of University or College Students by Faculty Members, 15 J.C.U.L. 381 (1989).

[FN29]. See supra notes 14-17.

[FN30]. This idea was, moreover, consistent with past action of the Wisconsin Regents in the area of sexual harassment. Following the adoption of the EEOC Guidelines on Sexual Harassment in 1980, and the Yale litigation, the Wisconsin Board of Regents adopted a policy statement on sexual harassment, prohibiting sexual harassment by faculty, staff and students of the Wisconsin System. Regent Policy Document 81-2 (University of Wisconsin System).

[FN31]. Healy v. James, 408 U.S. 169, 189, 92 S.Ct. 2338, 2350 (1972); Widmar v. Vincent, 454 U.S. 263, 277, 102 S.Ct. 269, 278 (1981); Gay Student Services v. Texas A&M Univ., 737 F.2d 1317 (5th Cir. 1984), cert. denied, 471 U.S. 1001, 105 S.Ct. 1860 (1984).

[FN32]. Tinker v. Des Moines Indep. Community School Dist. 393 U.S. 503, 513, 89 S.Ct. 733, 740 (1969); Gay Student Services, 737 F.2d at 1317, 1327. In the case of the University of Wisconsin System, the Board of Regents also possesses statutory authority to regulate student conduct, under Wisconsin Statutes § 36.35.

[FN33]. See Delgado, supra note 26, discussing harms of racist speech. For commentary concerning the idea that words may become "projectiles"' in a kind of speech assault, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 837 (2d ed. 1988).

[FN34]. See, e.g., WIS. STAT. ANN. § 947.013 (West Supp. 1989). See Note, Student Discriminatory Harassment, 16 J.C.U.L. 311 (1989).

[FN35]. See, e.g., Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940).

[FN36]. Taken from a plaque in Bascom Hall, at the University of Wisconsin- Madison (quoting from the decision of the Board of Regents of the University of Wisconsin in a dispute concerning academic freedom).

[FN37]. E.g., Healy v. James, 408 U.S. 169, 92 S.Ct. 2338 (1972).

[FN38]. E.g., Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508-09, 89 S.Ct. 733, 737 (1969).

[FN39]. E.g., Widmar v. Vincent, 454 U.S. 263, 277, 102 S.Ct. 269, 278 (1981).

[FN40]. City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118 (1984) (placement of campaign advertising on city's sign poles); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S.Ct. 3065 (1984); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925 (1986); Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 101 S.Ct. 2559 (1981); State v. Horn, 126 Wis. 2d 447, 377 N.W.2d 176 (Ct. App. 1985).

[FN41]. Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862 (1943).

[FN42]. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940).

[FN43]. Rowan v. United States Post Office Dep't, 397 U.S. 728, 90 S.Ct. 1484 (1970).

[FN44]. Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714 (1974).

[FN45]. Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1983); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 99 S.Ct. 693 (1979); Pickering v. Board of Educ., 391 U.S. 563, 88 S.Ct. 1731 (1968); Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987).

[FN46]. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159 (1986); FCC v. Pacifica Found., 438 U.S. 726, 98 S.Ct. 3026 (1978); Olesen v. Board of Educ. of Sch. Dist. No. 228, 676 F.Supp. 820 (N.D. Ill. 1987).

[FN47]. United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673 (1968). In Johnson v. Texas, 109 S.Ct. 2533 (1989), the Supreme Court applied the O'Brien analysis in a case involving a prosecution for burning the American flag. The Court held that the flag-burning was a purely symbolic, expressive act, and thus protected by the first amendment. Discriminatory harassment does not share this quality of "pure symbolism."' Most significantly, harassment is not an act directed at an inanimate object representing a set of values, but is a sort of verbal assault, directed at other human beings and the cause of identifiable harm to them. See supra notes 33 and 34. In the context of the O'Brien and Johnson analyses, therefore, discriminatory harassment may be subjected to regulation because it is conduct combining speech (the verbal or expressive act) with non-speech (the attack on another person) elements.

[FN48]. Healy v. James, 408 U.S. 169, 92 S.Ct. 2338 (1972).

[FN49]. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 513, 89 S.Ct. 733, 740 (1969).

[FN50]. Widmar v. Vincent, 454 U.S. 263, 277, 102 S.Ct. 269, 278 (1981). See also, Bob Jones Univ. v. United States, 461 U.S. 574, 103 S.Ct. 2017 (1983), in which the Supreme Court recognized a compelling governmental interest in eradicating racial discrimination in education, sufficient to justify a limitation on the first-amendment right to the free exercise of religion. In that case, the university faced loss of federal tax exempt status because of its racially discriminatory policies. The Court determined that the government's fundamental interest in eliminating

discrimination in education outweighed the incidental burden on the free exercise of religion resulting from the university's loss of its exempt status.

[FN51]. See supra notes 20-25.

[FN52]. WIS. ADMIN. CODE § UWS 17.06(2) (1989).

[FN53]. 249 U.S. 47, 39 S.Ct. 247 (1919).

[FN54]. See, e.g., New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 719 (1964); Beauharnais v. Illinois, 343 U.S. 250, 72 S.Ct. 725 (1952); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2678 (1973).

[FN55]. See Delgado, supra note 26, and Tribe, supra note 33.

[FN56]. 315 U.S. 568, 62 S.Ct. 766 (1942). Chaplinsky was convicted under a statute prohibiting adressing "offensive, derisive or annoying words"' to others. The actual words he used were "You are a god-damned racketeer; you are a damned fascist."

[FN57]. Id. at 572, 62 S.Ct. at 769-70.

[FN58]. Id.

[FN59]. See Delgado, supra note 26, and Tribe, supra note 33.

[FN60]. 403 U.S. 15, 91 S.Ct. 1780 (1971).

[FN61]. 414 U.S. 105, 94 S.Ct. 326 (1973).

[FN62]. 403 U.S. at 20, 91 S.Ct. at 1785-86 (emphasis added).

[FN63]. 395 U.S. 444, 89 S.Ct. 1827 (1969). See also Hess, 414 U.S. 105, 94 S.Ct. 326 (1973) and compare Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894 (1949).

[FN64]. 395 U.S. 444, 89 S.Ct. 1827 (1969).

[FN65]. See WIS. ADMIN. CODE § UWS 17.06(2) (1989).

[FN66]. Id.

[FN67]. WIS. ADMIN. CODE § UWS 17.06(2). The rule also sets forth specific examples of prohibited conduct, and conduct not prohibited, as follows:

(c) In order to illustrate the types of conduct which this subsection is designed to cover, the following examples are set forth. These examples are not

meant to illustrate the only situations or types of conduct intended to be covered.

1. A student would be in violation if:

a. He or she intentionally made demeaning remarks to an individual based on that person's ethnicity, such as name calling, racial slurs, or "'jokes"'; and

b. His or her purpose in uttering the remarks was to make the educational environment hostile for the person to whom the demeaning remark was addressed.

2. A student would be in violation if:

a. He or she intentionally placed visual or written material demeaning the race or sex of an individual in that person's university living quarters or work area; and

b. His or her purpose was to make the educational environment hostile for the person in whose quarters or work area the material was placed.

3. A student would be in violation if he or she seriously damaged or destroyed private property of any member of the university community or guest because of that person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.

4. A student would not be in violation if, during a class discussion, he or she expressed a derogatory opinion concerning a racial or ethnic group. There is no violation, since the student's remark was addressed to the class as a whole, not to a specific individual. Moreover, on the facts as stated, there seems no evidence that the student's purpose was to create a hostile environment.

[FN68]. Compare, Discrimination and Discriminatory Harassment by Students in the University Environment, policy of the University of Michigan (adopted April 15, 1988).

[FN69]. Despite this cautious approach, the presentation of the working group's recommended rule to the Board of Regents at its March, 1989 meeting stirred considerable public controversy over the legality and propriety of the university's effort to regulate in this area. Because of its own concerns with the first-amendment implications of the recommended rule, the Board invited first amendment scholars from the University of Wisconsin Law School to discuss the pertinent constitutional issues. Following extensive debate and deliberation, the Regents directed further narrowing the working group's original draft to emphasize that, to be prohibited, discriminatory comments would have to be made both with the intent to demean and with the intent to create a hostile environment. With this and other minor changes, the Regents proceeded with the administrative rule-making process. In accordance with Wisconsin's administrative procedures act, the Board conducted a public hearing on the rule on June 8, 1989. The rule was then forwarded for review by the state legislature. Following a joint hearing by standing committees of each house, the legislative review period expired without objection being made to the rule. Because no objection was raised, the new rule was promulgated by the Regents and became effective September 1, 1989.

[FN70]. 721 F.Supp. 852 (E.D. Mich. 1989).

[FN71]. See supra note 68.

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