

Journal of College and University Law
Summer, 1994

***1 FREEDOM FOR THE THOUGHT THAT WE HATE: A POLICY ANALYSIS OF STUDENT SPEECH
REGULATION AT AMERICA'S TWENTY LARGEST PUBLIC UNIVERSITIES**

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INTRODUCTION

The presence of hostile and harassing speech on college and university campuses in the United States is well documented. [\[FN1\]](#) The decades ***2** from the 1960s through the 1990s have seen a dramatic increase in the ratio of minority to majority students, bringing with it not only greater cultural diversity, but also an increase in racial and ethnic unrest.

The resurgence of students' use of hateful speech in the decade of the 1980s, along with an increased emphasis on civil rights and minority student retention, understandably gives rise to new attempts by some institutions to regulate the use of hostile, intimidating, and harassing speech on campus. [\[FN2\]](#) This attempted regulation has resulted in a collision of students' constitutional rights to free speech [\[FN3\]](#) on the one hand, and their constitutional rights to equal protection under the law [\[FN4\]](#) on the other.

***3** Two factors add an emotional component to this issue. First is the encroachment upon students' civil rights, i.e., the rights of minorities to fair and equal educational environment and opportunity. Second is the possible curtailment of civil liberties, i.e., the rights of citizens of the United States to exercise freedom of speech, even when that speech is demeaning to others. To understand the complexity of this issue and help liberate it from emotionally-charged discussion, one must analyze relevant provisions of the United States Constitution, United States Supreme Court cases, other federal court decisions, and pertinent federal and state statutes.

The first issue to consider is that campus speech regulations must not abridge the constitutionally-protected individual right to the free exercise of speech. The First Amendment to the Constitution says that "Congress shall make no law . . . abridging the freedom of speech." [\[FN5\]](#) Furthermore, the Fourteenth Amendment extends this protection to citizens as they are governed by state statutes and state actions: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." [\[FN6\]](#) This becomes important as state-financed and state-governed institutions, such as public universities, begin to adopt rules and regulations governing speech.

The second issue to consider is whether to provide students with equal protection

under the law from harassment, intimidation, or hostile speech based on a person's race, ethnicity, religion, gender, national origin, or other protected status. Establishing this basic concept, the Fourteenth Amendment states that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." [\[FN7\]](#) Therefore, some commentators propose that one basic premise governing higher education in America is that students in an educational environment should be protected from the actions of others that encroach on fair and equal access to an education. [\[FN8\]](#)

While there is some speech-related behavior that is obviously subject to existing civil and criminal remedies, [\[FN9\]](#) other speech-related behavior is not. The four important questions to be answered are: (1) What type of speech can be legally regulated on public college and university *4 campuses? (2) What type of speech must remain protected? (3) Do university speech codes regulate speech within the constitutional limits established by legislative and judicial precedent? and (4) What are large public universities (education policy leaders) in the country currently doing to regulate hateful or harassing speech on their campuses?

The purpose of this article is fourfold: (1) to clarify the current status of University "hate speech" regulations by: (a) analyzing Supreme Court and other federal cases relevant to state regulation of speech on public college and university campuses and (b) extracting the "salient constitutional principles" that apply to college and university regulation of "hate speech"; (2) to document the types of speech codes that are currently being employed to regulate student speech by the larger campuses in the United States; (3) to compare those university speech codes to the aforementioned "salient constitutional principles" to determine whether the codes could pass current judicial muster; and (4) to provide a coherent set of guidelines and recommendations for universities to consider as they analyze new or existing policies and procedures that regulate "hate speech" on campus.

The authors surveyed the twenty public universities in the United States that have the largest total student enrollment, [\[FN10\]](#) as identified by the Chronicle of Higher Education. [\[FN11\]](#) These institutions were questioned regarding their current policies and procedures governing students' harassing, discriminatory or hateful speech. The survey information collected from each of the universities was compiled and is presented in the aggregate to offer a composite view of the current approach to speech regulation in America's largest institutions.

Ten of the universities, according to each school's legal counsel, have policies that specifically address "hateful or harassing speech or conduct." The code of conduct from each of these ten universities is *5 critically analyzed against the "salient constitutional principles" identified in the holdings of the major court cases reviewed. Several sample policy statements that violate one or more of the "salient constitutional principles" are cited as examples of the type of wording to avoid. Likewise, several model statements are cited.

The final objective of this article is to draw some conclusions and make recommendations for university policy-makers who are considering adopting or changing a "hate speech" code. "Policy analysis deals with the question of what the institution or system should do--goals, directions, and the institutional processes for achieving those goals." [\[FN12\]](#)

One of the most difficult tasks involved in any study of a complex social or judicial issue is defining the focus of the study: which issues to include and which to leave out. [\[FN13\]](#) This article focuses only on "hate speech" codes at public universities as they relate to students. It does not discuss professors' classroom speech and the censorship of outside speakers, since these have unusual implications relating to academic freedom and prior restraint. [\[FN14\]](#) Private universities, although viewed differently by the courts, may be under obligations similar to those discussed in Part I.

Part I of this article reviews the historical context within which the "hate speech" controversy finds itself, including both foundational court cases and other major cases that affect "hate speech" regulation at the university level. Part II

distills this basic jurisprudence into thirty "salient constitutional principles" that should be considered when evaluating the constitutionality of a campus "hate speech" code. Part III uses the thirty "salient constitutional principles" to analyze sections of student codes of conduct that may infringe on student speech on campus. Part IV summarizes the most important findings of a survey of the legal counsel at the twenty largest universities in the United States on "hate speech" regulation, conducted in May 1993. Part V discusses the factors that university policy-makers should consider when reviewing the constitutionality of a current or potential "hate speech" code. Finally, Part VI supplies a list of resources that provide alternative "hate speech" codes.

I. "HATE SPEECH" AND THE COURTS

The issue of hateful and harassing speech has been a divisive one, not only for the campus community, but for ostensibly single-minded *6 and steadfast organizations such as the American Civil Liberties Union (ACLU). Even the ACLU has found its members so severely divided on this issue that, as ACLU President Nadine Strossen says, it may "end up splitting us apart." [FN15]

On one side of the issue are the traditional civil libertarians who interpret, in an absolutist fashion, the First Amendment phrase that says, "Congress shall make no law . . . abridging the freedom of speech." [FN16] This interpretation has been one of the driving forces for the ACLU since the organization's inception in 1920. [FN17] Over the past several years, however, more and more members of the ACLU have come to believe that civil rights--the rights of minority members of society to fair and equal treatment-- ought to supersede civil liberties. [FN18]

The objective of Part I is to document the details of both sides of the "hate speech" argument. First, the civil rights or equal protection perspective is reviewed. Second, the courts' perception of the university as part of the public forum and the marketplace of ideas is detailed. Third, the major theories of free speech are discussed. Fourth, the foundational and major court cases that impact speech policies at the university are reviewed. Fifth, the concept of content-based regulations is surveyed and a "new jurisprudence," which allows a greater reach to university censorship of speech, is proposed. Lastly, the obligations of private educational institutions are addressed.

A. Civil Rights and Equal Protection Issues

One major perspective involved in the "hate speech" issue on campus concerns providing students with equal protection under the law from harassment, intimidation or hostile speech based on a person's race, ethnicity, religion, gender, national origin or other protected status. *7 One statement from *Brown v. Board of Education*, [FN19] the landmark case in which the United States Supreme Court overruled its prior "separate but equal" stance, seems to paraphrase this perspective on public education. "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." [FN20]

Some commentators see the campus concern for equal protection as just another passing fad; one of a number of "politically correct" statements released to the press by campus administrators in order to appease complaining factions of the campus community. [FN21] Others see the issue solely as one of protecting students from the actions of others (which are not protected by First Amendment rights to free speech), rather than the expressions of others (which are protected by the First Amendment). [FN22] Still others see the campus responsibility for equal protection as a great opportunity for teaching the virtues of tolerance and understanding. [FN23]

Those on the other side of the debate see these approaches as deferential and condescending substitutes for "real" equal protection. These measures do not satisfy

many who believe that minorities have suffered decades of discrimination and repression and deserve to be protected from the direct, immediate, and substantial injury that results from invidious discrimination. [FN24]

Establishing this basic concept, the Fourteenth Amendment states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws." [FN25]

The Fourteenth Amendment provides the foundation of most theories that propose regulation of hateful and hostile speech on campus. [FN26] These theories hold that incessant racial categorization and the treatment of minority individuals as second-class citizens impair an individual's*8 ability to obtain an equal education. Hateful remarks silence rather than further discussion, impair rather than empower, distort the truth rather than attempt to discover it, and degrade rather than uplift. [FN27] This results in an unequal burden upon one group for the benefit of the First Amendment, and an unequal education for minority students who are subjected to this type of "speech." [FN28]

Richard Delgado [FN29] likens this type of constant hateful repression to the effects of water dropping upon sandstone. "[I]t is a pervasive harm which only the most hardy can resist." [FN30] Some would dismiss one drop--one incident--as isolated, but taken together, these compounded "drops" wear down and can harm the students who are victims of discriminatory and hostile speech.

These terse epithets come down to our generation weighted with hatreds accumulated through centuries of bloodshed They are not in that class of epithets whose literal sting will be drawn if the speaker smiles when he uses them. They are always, and in every context, insults which do not spring from reason and can be answered by none. Their historical associations with violence are well understood, both by those who hurl and those who are struck by these missiles. [FN31]

Regarding the collision of First and Fourteenth Amendment issues, Delgado aptly observes that "we are in uncharted terrain: we lack a pole star." [FN32] No university speech code that has adopted Fourteenth Amendment protections has passed judicial muster. [FN33] Furthermore, much of the discussion about restricting First Amendment freedoms in this context "tends to be somewhat theoretical and philosophical" [FN34] rather than based on sound jurisprudence.

Some commentators on this issue would extend content-based regulation of speech into the classroom and scientific research, saying that research about controversial issues related to racial differences is injurious to self-esteem. [FN35] Such proponents of speech regulation buttress *9 their argument for more regulation by saying that a "marketplace of ideas" can't provide a remedy for the harms that are inflicted upon minorities. [FN36]

If aggressive rules intended to limit invidious discrimination have not yet been successfully litigated, and most of the explanations for limiting hateful speech are theoretical, how do policy-makers at universities know just what the courts will allow in the way of speech regulation on campus? Answers to this question can be approached after a better understanding of public forum, "marketplace," and free speech theories, and the applicable court decisions regarding the limitation of free speech.

B. The University as a Public Forum [FN37]

The doctrine of the public forum began with an effort by Justice Holmes, when on the Massachusetts Supreme Judicial Court, "to solve a difficult First Amendment problem by simplistic resort to a commonlaw concept." [FN38] In *Davis v. Massachusetts*, [FN39] a preacher was convicted under an ordinance prohibiting any public address upon publicly-owned property without a permit from the mayor. In upholding the permit ordinance, Holmes indicated that "for the legislature absolutely or conditionally to forbid public speaking in a highway or park is no

more an infringement of rights of a member of the public than for the owner of a private house to forbid it in the house." [FN40] On appeal, the United States Supreme Court upheld the decision and unanimously adopted the Holmes rationale, saying, "the right to absolutely exclude all right to use [public property] necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser." [FN41]

*10 This rationale survived until 1939 when the Supreme Court rejected the Davis dictum and uttered its now famous "counter dictum," which has "played a central role in the evolution of the public forum theory." [FN42] In *Hague v. Committee for Industrial Organization*, [FN43] the Court stated:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. [This privilege of a citizen] is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied. [FN44]

Only eight months later, the Court invalidated several ordinances prohibiting leafletting on the public streets or in other public places and added some impressive content to *Hague*. In *Schneider v. New Jersey*, [FN45] the Court reaffirmed municipalities' obligation to

keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. [FN46]

The Court elaborated that citizens do not have the freedom to throw "literature broadcast in the streets," since "such conduct . . . bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion." [FN47] Current public forum theory now concludes that governments must allow access to streets, parks, and other public property for use by its owners, the citizens of the United States.

Although government may regulate behavior that would be disruptive to the intended primary use of the property, [FN48] it cannot regulate speech on the basis of content. [FN49] Government may impose only reasonable, *11 content-neutral restrictions on the time, place, and manner in which the public forum is used.

[FN50] This test, known as the O'Brien test, deems restrictions "reasonable" when:

- a) they are within the constitutional power of the government;
- b) they further an important or substantial governmental interest;
- c) the governmental interest is unrelated to the suppression of free expression;

and

d) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. [FN51]

In addition, any restrictions must:

- e) be justified without reference to the content of the regulated speech; and
- f) leave open ample alternative channels for communication of the information.

[FN52]

Three types of fora that are inherent to any public university are identified in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.* [FN53] They are the traditional public forum, the non-traditional public forum created by government designation, and the non-public forum.

The traditional public forum includes streets, sidewalks, open mall areas, and other generally public areas on campus. Since the traditional purpose of a public forum is the "free exchange of ideas, speakers can be excluded from a public forum

only when the exclusion is necessary to serve a compelling state interest and [when] the exclusion is narrowly drawn to achieve that interest." [FN54]

The non-traditional public forum consists of "a place or channel of communication for use by the public at large for assembly and speech *12 for use by certain speakers or for the discussion of certain subjects." [FN55] These areas do not simply develop on their own, according to the *Cornelius* Court, but must be created by the university for that purpose. The university is not required to retain the open character of the facility once the use of that forum for a particular purpose has been concluded.

The limits of the public forum were also delineated in *Cornelius*, as the Court discussed the appropriate use of public property. The federal government sought to limit the number and types of charitable groups allowed to solicit through the Combined Federal Campaign (CFC), [FN56] a charitable fund raising drive carried on in federal offices by government employees on government time. [FN57] The Court concluded that although the CFC took place in public offices, the government's intended use of the offices was to raise funds for a charitable purpose while minimizing the disruption of the federal workplace. [FN58] In finding that there was no intent on the part of the government to open the federal workplace to all speech, the Court held that, even though the CFC offices were government property, they were not considered a public forum. [FN59] Thus, the Court examined the primary purpose of the governmental institution, permitting regulation of only that speech that was fundamentally incompatible with that mission. [FN60]

In addition to being viewed by the courts as a public forum, the streets, sidewalks, and open malls of a university are also seen as having special characteristics and missions inherent to an institution of higher education. These special characteristics become readily apparent when looking at the university, as judges have done, as a "marketplace of ideas."

In *Sweezy v. New Hampshire*, [FN61] the Supreme Court addressed this question and included a paragraph-long encomium on the virtues of the university. The language used in the decision indicates that the Court sees a university not only as a public forum, but also as crucially involved in the marketplace of ideas. This special role carries with it a heightened responsibility to maintain an open interchange of ideas, even offensive ideas. [FN62] The marketplace concept further imposes upon the university the responsibility to maintain "the widest latitude for free expression and debate consonant with the maintenance of order." [FN63]

*13 Chief Justice Warren supported this theory in the Court's decision in *Sweezy*:

To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, . . . otherwise our civilization will stagnate and die. [FN64]

The courts identify most places outside the university classroom and offices as public fora, and therefore not amenable to governmental regulation of freedom of speech. Consequently, streets and sidewalks, as well as designated areas of the state-owned university, are seen by the courts as necessary to the hearty interchange of opinions inherent in the "marketplace of ideas."

C. Theories of Free Speech

The freestyle freedom of speech inherent in the "marketplace of ideas" is justified in the minds of many people by the utilitarian vision that it achieves some greater social good. [FN65] Kent Greenawalt [FN66] outlines three relevant justifications for free speech (and freedom of the press): the argument from truth, the argument from democratic self-governance, and the argument from tolerance. These three justifications are termed "consequentialist" arguments. He contrasts these

three "consequentialist" ideals with the "nonconsequentialist arguments" that maintain that speech is good per se. Suppressing speech under the "non-consequentialist" theory is "wrong," merely because it violates rights or is unjust. Since this argument is taken at face value, only the "consequentialist" arguments are elaborated further.

"The most familiar argument for freedom of speech," according to Greenawalt, "is that speech promotes the discovery of truth." [FN67] He quotes this argument as having been at the basis of Milton's *Areopagitica*, *14 as well as eloquent opinions by Holmes and Brandeis, and John Stuart Mill's defense of free speech in *On Liberty*. [FN68] The foundation of this argument for free speech is that if the government can suppress any ideas at all, it may suppress ideas that are true. Therefore, the best way to discover the truth is to have robust discussion regarding a particular topic. In the end, the truth is more likely to emerge in an open forum than if the government suppresses what it deems false.

The second consequentialist ideal, argument from democratic self-governance, states that it is important to know and understand what the masses desire in order to structure the government to meet the needs of the people. [FN69] Social stability is a consequence of freedom of speech, and therefore justifies freedom's existence.

The third consequentialist ideal, argument for free speech, is that of tolerance. In his book, *The Tolerant Society*, [FN70] Lee Bollinger states that if people are forced to acknowledge a minority group's right to express an opinion, they are taught the lesson that members of society should be tolerant of others whose opinions differ from their own. Interestingly, the tolerance justification in favor of freedom of speech directly opposes the opinions of some who vociferously support a ban on speech that is intolerant of other people because of their race, religion, color, sexual orientation or group. [FN71]

Of the three arguments, Greenawalt feels that the first, the argument from truth, is the most persuasive and most readily applied. It appears that this is also the argument upon which the courts most rely to continue their hard stance in defending freedom of speech on campus. The truth justification is basic to the concept of an open forum and the free marketplace of ideas discussed earlier.

D. Foundational and Major Court Cases

Now that the basic premise of the harms against the individual victim of hate and intolerance has been established, and the courts' view of the mission and objective of the university has been outlined, this article next considers what happens when these two value systems appear to collide in court.

1. The Foundations

Several cases provide a jurisprudential foundation to free speech cases that directly involve the university as the regulator of speech. *15 This section reviews each of the foundational cases as a prelude to a review of other major cases that more specifically relate to regulation of speech at the university.

In 1919, the Supreme Court made a memorable statement regarding regulation of speech in *Schenck v. United States*. [FN72] In this espionage case, the Court stated that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." [FN73] This case is often used as justification for the fundamental concept that the First Amendment does not protect all speech, and, therefore, acceptable exceptions to an absolutist First Amendment doctrine can be found.

Chaplinsky v. New Hampshire [FN74] is a seminal case in the history of "hate speech" regulation. The Supreme Court upheld a statute that prohibited any person from saying "any offensive, derisive or annoying word to any other person who is

lawfully in any street or other public place, nor call him by any offensive or derisive name" [FN75] It then offered the frequently- quoted phrase describing the words that fall outside the traditional protections of the First Amendment. "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." [FN76]

The Court further indicated that "fighting words" are those that have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed. . . . The word "offensive" is not to be defined in terms of what a particular addressee thinks The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. [FN77]

The two-part Chaplinsky definition for "fighting words" stood solid until the first portion was weakened in *Collin v. Smith*. [FN78] The Court appears to have eliminated the portion of the definition referring to words that "inflict injury," and left intact the portion of the definition allowing regulation of speech that tends "to incite an immediate breach of the peace."

*16 In *Beauharnais v. Illinois*, [FN79] the defendant was convicted under a state statute prohibiting dissemination of materials that promote racial or religious hatred. Justice Frankfurter expanded the "fighting words doctrine" of *Chaplinsky*, ruling that libelous statements aimed at groups, like those aimed at individuals, fall outside First Amendment protection.

The Court espoused the doctrine that hostile stereotyping in a poster might be group defamation, but this rationale was overturned in *Collin* because it did not "tend to incite an immediate breach of the peace." [FN80] But, in *R.A.V. v. City of St. Paul*, [FN81] the general proposition of "defamation" was held to be within the "traditional limitations" on freedom of speech. It is unclear whether group libel may give rise to a legal remedy, but it appears that, in light of more recent decisions that disallow content-based regulation, group libel would be a tenuous tightrope on which to balance a university speech policy. The Court reiterated its stand in *Grayned v. City of Rockford*, [FN82] when it said that words that tend to "trouble" or "disturb" do not rise to the level of fighting words.

In 1968, the Supreme Court decided a landmark case in education law regarding the wearing of "symbolic speech" on clothing by students in a public high school. In *Tinker v. Des Moines Independent School District*, [FN83] the Court penned these memorable lines: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." [FN84] This case affirmed and expanded the First Amendment constitutional rights of public school students. Subsequent cases in the higher education arena have continued to do so, with certain limitations. [FN85]

For example, in *Esteban v. Central Missouri State College*, [FN86] the court said:

We do hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has the power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct; that, as to these, flexibility and elbow room are to be preferred over specificity [FN87]

*17 However, as with *Esteban* and *Tinker*, *Healy v. James* [FN88] indicates that any rules and regulations must be reasonable with respect to time, place, and manner, and must not infringe on the content of the message, consistent with the *O'Brien* test and other limitations addressed earlier.

2. Other Major Cases

In addition to these foundational cases, four major cases help outline the recent history and current state of the law concerning a state's use of "hate speech" rules. [FN89]

a. Doe v. University of Michigan

The University of Michigan became the first institution to see a direct court challenge of a campus "hate speech" code in Doe v. University of Michigan. [FN90] In the winter of 1987, there had been an alarming sequence of events that prompted the Michigan House of Representatives and the United Coalition Against Racism to push for a set of rules that would govern the use of hostile speech on campus. First, fliers were distributed on campus that declared "'open season' on blacks," and used offensive language in referring to African-Americans. A week later, racist jokes were heard on the campus radio station in an apparently unrelated incident. [FN91] Later, at a rally in which these incidents were being protested, a Ku Klux Klan uniform was displayed from a dormitory window. The University administration quickly took action in the form of a statement from the president expressing outrage at the events and reaffirming the University's dedication to maintaining a racially, ethnically, and culturally diverse campus. [FN92]

By the following winter, the University had designed a policy that provided for disciplinary action against any student found guilty of racial harassment. [FN93] The proposed policy went through twelve drafts and was scrutinized by the students, faculty, administration, and Board of Regents before it went into effect on May 31, 1988. [FN94] The policy's framers certainly knew of the "serious civil liberties questions" [FN95] involved in the adoption of such a policy, yet they were determined to make a strong statement to the campus community that racism would not be tolerated in any form. [FN96] The rule that originally went into effect *18 specifically applied to areas of study, [FN97] and proscribed as punishable the following:

1. Any behavior, verbal or physical, that stigmatizes or victimizes any individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status and that

A. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

B. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extracurricular activities or personal safety; or

C. Creates an intimidating, hostile, or demeaning environment for education pursuits, employment or participation in University sponsored extra-curricular activities. [FN98]

In August 1989, shortly after the rule went into effect, Section 1(C) was withdrawn on the grounds that "a need exists for further explanation and clarification of [that section] of the policy." [FN99] Later, in the winter of 1989, after the case was filed, the University withdrew its interpretive guide entitled What Students Should Know about Discrimination and Discriminatory Harassment by Students in the University Environment because "the information in it was not accurate." [FN100]

Doe, a psychology graduate student with a specialty in the field of biopsychology, felt the new regulations would hamper his discussion of the biological roots of individual differences in personality traits and mental abilities. He felt that some of his theories could be perceived as sexist or racist by some students because the theories espoused genetic and biological factors as major contributors to individual differences. Doe brought suit against the University of Michigan seeking a preliminary injunction on the ground that the new regulations would unduly chill constitutionally-protected discussion. [FN101]

*19 The court found the policy unconstitutionally overbroad and vague, because the terms "stigmatize" and "victimize" are "not self defining," and "because these words can only be understood with reference to some exogenous value system." [FN102] The court also took issue with the University because it sought to prohibit "certain speech because it disagreed with ideas or messages sought to be conveyed. . . .

[T]he University [could not] proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people." [\[FN103\]](#)

Earlier, *Papish v. Board of Curators* [\[FN104\]](#) had explained that a university could not ban the dissemination of ideas, no matter how offensive, based strictly on content. [\[FN105\]](#) A university does, however, have the right to impose reasonable time, place, and manner restrictions on the dissemination of ideas on campus. [\[FN106\]](#) *Tinker* further clarified this issue by indicating that actions that involve a "substantial interference with school work or discipline" are not covered by constitutional guarantees of free speech. [\[FN107\]](#)

b. *UWM Post, Inc. v. Board of Regents*

UWM Post, Inc. v. Board of Regents, [\[FN108\]](#) which involved the University of Wisconsin, was the second major court challenge to a campus speech code. The University adopted a hostile speech rule as a result of several highly-publicized racial incidents involving fraternities. The rule provided for discipline of any student involved in

[nonacademic] 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 or 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. [\[FN109\]](#)

*20 The district court concluded that this rule was overbroad as a content-based rule that reached a substantial amount of protected speech. [\[FN110\]](#) In addition, it failed to meet both the "fighting words" test [\[FN111\]](#) and the proposed balancing test [\[FN112\]](#) from *Chaplinsky*.

The *UWM Post* rule also prohibited some speech that was spoken against the indicated groups, but not other types of hostile speech directed at non-protected groups. The court indicated that this created an unconstitutional content-based form of speech regulation. [\[FN113\]](#)

The university interest in protecting students from the negative psychological effects and injuries caused by hostile speech, while commendable (according to the court), did not constitute a "compelling state interest," [\[FN114\]](#) nor was it protected speech under the modified interpretation of the *Chaplinsky* test. [\[FN115\]](#) Furthermore, the equal protection issue did not apply because the students, rather than employees of the university, perpetrated the discriminatory speech, and students are not state actors. [\[FN116\]](#)

c. *R.A.V. v. City of St. Paul*

The third case to question "hate speech" rules, *R.A.V. v. City of St. Paul*, [\[FN117\]](#) decided in June of 1992, challenged a new St. Paul city ordinance prohibiting bias-motivated disorderly conduct. It prohibited the display of a symbol that one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." [\[FN118\]](#)

R.A.V., a minor, was charged under this ordinance after allegedly burning a cross on a black family's lawn. While the city could have chosen to charge *R.A.V.* with one of several other statutory offenses *21 (arson, criminal damage to property, etc.), it chose to use his case to test the new ordinance. [\[FN119\]](#)

According to Christopher Shea in the *Chronicle of Higher Education*, [\[FN120\]](#) *R.A.V.* "offers little guidance to colleges that wish to protect minority groups from harassment." [\[FN121\]](#) He observed that the University of Michigan, which lost a

similar court battle in 1989, suspended enforcement of the new section of its code dealing with "hate speech." [FN122] The University of Michigan's legal counsel, Elsa Kircher Cole, said it would run afoul of the new ruling by prohibiting "speech which consists of racial, sexual, or ethnic epithets." [FN123]

However, this ruling is clearly consistent with the decisions articulated in *Doe v. University of Michigan and UWM Post*, saying that no differentiation can be made selectively on the basis of content (race, creed, color, gender, etc.), but that "fighting words" must be prohibited entirely. [FN124] Although the Court may not have provided much guidance for institutions wishing to protect minority groups from harassment, the Court did state very clearly that it would not tolerate restrictions of speech based on content. [FN125] Justice Scalia, however, wrote that words can in some circumstances violate laws directed not against speech but against conduct, [FN126] and singled out defamation and obscenity as examples of unprotected speech. [FN127]

d. *Wisconsin v. Mitchell*

The most recent case to address "hate crime" regulation, *Wisconsin v. Mitchell*, [FN128] was decided by the Wisconsin Supreme Court on June *22 23, 1992, just one day after the United States Supreme Court decided *R.A.V.* [FN129] *Mitchell* was convicted in the Circuit Court of Kenosha County of aggravated battery and theft, and was given an enhanced sentence on the grounds that the defendant intentionally selected his victim by race. [FN130]

Chief Justice Heffernan of the Wisconsin Supreme Court held that the "hate crimes" statute, which provided an enhanced penalty for criminal conduct against a victim because of the victim's "race, religion, color, disability, sexual orientation, national origin or ancestry," violated the First Amendment. [FN131] Referring to the Supreme Court decision in *R.A.V.*, the court rejected the "hate crimes" statute as "facially invalid" under the First Amendment on the grounds that it punished offensive thought. [FN132]

The United States Supreme Court unanimously reversed the decision of the Wisconsin Supreme Court, pointing out a significant difference between the rationale of *R.A.V.* and this case. The Court held that "Mitchell's First Amendment rights were not violated by the application of the Wisconsin penalty- enhancement provision in sentencing him," [FN133] because the statute in question was "aimed at conduct unprotected by the First Amendment." [FN134] The statute in *R.A.V.*, on the other hand, had been "explicitly directed at speech." [FN135]

The Wisconsin statute specifically enhances the penalty for a defendant who "intentionally selects the person against whom the crime . . . is committed," [FN136] while the St. Paul ordinance provides:

Whoever places on public or private property, a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross, or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor. [FN137]

The Court noted a clear distinction between the lower court's consideration of the racial animus underlying protected speech as opposed *23 to that underlying criminal conduct. The St. Paul ordinance was directed at punishing symbolic speech, while the Wisconsin statute was directed specifically at punishing criminal conduct more heavily when such conduct is racially motivated.

Referring to *Dawson v. Delaware*, [FN138] the Court said:

[W]hile it is equally true that a sentencing judge may not take into consideration a defendant's abstract beliefs, however obnoxious to most people, the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing [for a criminal offense] simply because they are protected by the First Amendment. [FN139]

Addressing the defendant's argument that the statute may have a chilling effect on protected speech, Chief Justice Rehnquist found such possibility highly unlikely. "We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial" [FN140]

3. Other Cases Involving the Conduct/Speech Dichotomy

In *In re Joshua H.*, [FN141] a decision rendered just two weeks before the Supreme Court decision in *Mitchell*, the California Court of Appeal exhibited an understanding of the crucial differences between conduct and speech. The court upheld a California statute that enhanced the sentence for hate crimes, but cited two other decisions in which courts had invalidated sentence enhancement statutes. [FN142]

[W]e disagree that the hate crime statutes punish bigotry. . . . In our view, the Wisconsin and Ohio courts misinterpreted *R.A.V.*

* * *

[H]ate crime statutes . . . do not regulate speech; they regulate acts of violence intended to interfere with the victim's protected rights To be protected as "expressive conduct," the activity must be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." . . . The "basis" for punishing violent crimes directed at members of a racial, religious, or other specified group more severely than *24 randomly inflicted violent crimes is that such crimes inflict greater injury upon the victim and society at large and existing criminal statutes and penalties have been inadequate to stop them. [FN143]

Similarly, in *Oregon v. Plowman*, [FN144] the Oregon Supreme Court revealed an understanding of the speech/conduct issue spelled out in *Mitchell* when it upheld a statute that made it a crime for two or more persons to injure another "because of their perception of that person's race, color, religion, national origin or sexual orientation." [FN145]

The fine line in the speech/conduct dichotomy was recently addressed by the United States Court of Appeals in *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*. [FN146] The Fourth Circuit found a university fraternity to be within its constitutionally-guaranteed right to free speech when the fraternity sponsored a "slave auction" that included sexual and racial stereotypes that others found offensive. Sigma Chi's portrayal of these issues was "expressive entertainment," according to the court, and therefore not regulable by the University, even though the messages were adverse to the University's mission of providing a diverse environment free of racism and sexism. The fraternity's "slave auction" apparently did not include any criminal behavior, and therefore was considered unregulable speech.

4. Application to Universities

University rules may enhance penalties for criminal conduct [FN147] committed because of a person's race, religion, color, disability, sexual orientation, national origin or ancestry. However, the university will still be barred from regulating speech and symbolic conduct that fall short of "fighting words." Although obnoxious viewpoints or "hate speech" must be tolerated, regulating "hate conduct" may prove to be one valuable tool in the university arsenal against hate crimes on campus. [FN148]

*25 Gary Pavela, director of judicial programs at the University of Maryland, for example, said that he feels confident that the University of Maryland's policy would survive a court challenge. [FN149] That policy states that students may be dismissed

from the university for any violation of the code that is "motivated by considerations of sex, race, ethnic origin, religion, or sexual orientation." [FN150]

E. Content-Based Regulation and the Courts [FN151]

Looking strictly at speech rather than conduct, there are several concepts in these major cases that discuss content-based regulation. Most current university speech codes that aim directly at the "hate speech" issue are content-based. Therefore, this concept is reviewed more thoroughly.

The Supreme Court made it clear in *UWM Post* and *R.A.V.* that it would not tolerate content-based regulation of speech without a "compelling government interest." Although the Court in *Mitchell* felt that there were compelling government interests in regulating bias-inspired conduct, [FN152] two cases helped clarify how "compelling" these interests may have to be in order to be "compelling enough" to limit speech.

The first case, *Boos v. Berry*, [FN153] involved a District of Columbia ordinance that prohibited the display of any sign within 500 feet of a foreign embassy if the sign tended to bring the foreign government into public odium or disrepute. The District adopted the ordinance in order to comply with an international law obligation of shielding diplomats from offensive speech. However, the Supreme Court characterized the ban as content-based because the justification for the statute was the direct impact that the speech has on its listeners. [FN154] Thus, it appears that content-based restrictions will be unacceptable to the Court, even in the face of international pressure.

In the more recent case of *Burson v. Freeman*, [FN155] however, the Supreme Court supported a content-based restriction on speech. The Court upheld a Tennessee election-day prohibition of political speech within 100 feet of a polling location, to prevent voter intimidation and voter fraud. The ordinance did not take into account what the person might have to say, only that the very presence of political speech so *26 close to the polling places would perhaps intimidate some voters into not voting at all or into casting a coerced ballot. "No right is more precious . . . than that of having a choice in the election of those who make the laws under which . . . they must live. Other rights, even the most basic, are illusory if the right to vote is undermined." [FN156] *Burson* can be distinguished from *Boos*, since it limits all political speech, not just that which has a particular impact on the listener, and does so by narrowly restricting the time and place of the public forum.

There are some who would prefer to see a new First Amendment jurisprudence develop in the United States that recognizes the need for limited content-based restrictions on speech. While some believe that its development has already begun, others see that change as unlikely. The current views of an emerging First Amendment jurisprudence, however, are important to the understanding of the "hate speech" issue and are reviewed next.

Mari Matsuda, one proponent of a new jurisprudence in the United States, maintains that the injuries caused by hateful speech are so devastating to the victims that the government ought to adopt contentbased regulations similar to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. [FN157] Among other things, this regulation would "declare as an offense punishable by law all dissemination of ideas based on racial superiority or hatred." [FN158] Banning the "dissemination of ideas" would indeed be a radical change in jurisprudence from the current stand of the Supreme Court; one that would be facially unconstitutional. However, others have taken a more moderate approach by proposing a modification of international precedent or current United States statutes to make them fit the educational environment. [FN159]

For example, Canada passed a law that affirms the rights of all citizens to be free from harassment and intimidation. The Canadian Criminal Code establishes

criminal penalties for "[e]very one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable [racial, religious, or ethnic] group" [FN160] However, there is still a fundamental difference between *27 the Canadian Charter of Rights and Freedoms and the United States Constitution that allows for this distinction, and that has created a markedly different jurisprudence in Canada.

The Charter, while allowing for "freedom of thought, belief, opinion, and expression," also allows those freedoms to be infringed upon if the "impugned state action has an objective of pressing and substantial concern in a free and democratic society." [FN161] The pressing and substantial concern in this instance was the desire of the statute and the Canadian Court to protect another section of the Charter from infringement. That section allows for the Charter guarantees to "be interpreted in a manner consistent with the reservation and enhancement of the multicultural heritage of Canadians." [FN162] This basic recognition in the Charter that Canadians are of many cultures, and the Court's rejection of the American notion of individualism and freedom of speech at any cost, allows for this exception. Canadian law evidently reflects Epstein's belief that "if there are no taboos in society, there will be few in the psyche." [FN163]

There have been some attempts to apply a rationale similar to Canada's to invidious discrimination in the United States. An employment discrimination case under Title VII of the Civil Rights Act of 1964, *Davis v. Monsanto*, [FN164] indicates that, even though employers are not required to fire all "Archie Bunkers," they are required to take prompt action to prevent bigots from expressing their views in an offensive way. In order to demonstrate racial harassment under Title VII, all the victims needed to show was that the alleged conduct constituted an unreasonable, abusive or offensive work-related environment. [FN165]

The court in *UWM Post* outlines three difficulties with the application of Title VII theory to a university setting. "First, Title VII addresses employment, not educational, settings. Second, even if Title VII governed educational settings, the [*Meritor Savings Bank v. Vinson* [FN166]] holding would not apply to this case . . . " because "agency theory would generally not hold a school liable for its students' actions since students normally are not agents of the school." [FN167] Finally, "even if the legal duties set forth in *Meritor* applied to this case, they would not make the *UWM Post* rule constitutional. Because Title VII is only *28 a statute, it cannot supersede the requirements of the First Amendment." [FN168]

The Mitchell Court compared the Wisconsin statute to Title VII. The Court said that the statute allowed the motive or reason for acting to be considered in the penalty enhancement, assuming the same role "as it does under federal and state antidiscrimination laws, which have been upheld against constitutional challenge." [FN169] However, the Court clarified the use of the Title VII rationale "as an example of a permissible content-neutral regulation of conduct" [FN170] (as opposed to regulation of speech).

Even though the Court emphasized that the issues of bigotry and discrimination are compelling issues, content-based regulation of speech is not a probable result of a new jurisprudence. "Freedom of speech is almost absolute in our land and the only restriction the fighting words doctrine can abide is that based on the fear of violent reaction." [FN171]

Matsuda suggests establishing an "outsider's jurisprudence," and, in fact, feels that it is already beginning to develop in American law schools alongside mainstream jurisprudence. [FN172] One manifestation of this is the feminist jurisprudence evident in the United States, which is analogous to a jurisprudence belonging to people of color. It is grounded in social reality and experience, conscious of both historical and revisionist attempts to understand the experience of disenfranchised peoples of all colors and nationalities. Matsuda's approach promotes the use of analogous law, such as Title VII discussed above or Title IX of the Educational Amendments of 1972, in the development of new laws. Such new laws would apply to all harassment in higher education rather than just sexual and workplace harassment.

One other analogous law is 42 U.S.C. § 1985(c). This statute already affords a civil remedy for conspiracy to deprive persons of "equal protection of the laws, or of equal privileges and immunities under the laws," [FN173] but has been applied mainly to employment law. It has yet to be used by one student against another for discrimination in education because of the difficulty of proving discrimination under this definition. "A cause of action under this section requires (1) a conspiracy; (2) an 'animus to deprive [[a person] . . . of the equal enjoyment of legal rights'; (3) action which furthers the conspiracy; and (4) resulting personal injury." [FN174]

Arguing that the United States, as a nation, has failed to provide adequate protection against derisive speech, Delgado maintains that a ***29** new independent tort action for racial insults is both permissible and necessary. [FN175] He justifies his theory on the basis that the harms caused by racial discrimination are extremely pervasive and insidious.

Delgado acknowledges that applying this rationale, however, will be an uphill battle because of the Court of Appeals' holding in Collin that the threat of criminal penalties for participating in a demonstration against Jews impermissibly abridged the plaintiff's First Amendment rights. While recognizing that Jewish residents in the town of Skokie, Illinois, would find a Nazi parade "extremely mentally and emotionally disturbing" and "noxious and reprehensible," the Seventh Circuit limited the scope of "fighting words" to "those which provoke an immediate breach of the peace." The Court of Appeals no longer regards the "infliction of injury" part of Chaplinsky as a valid reason for regulating speech. [FN176]

It appears that until a new jurisprudence becomes more pervasive in the courts, rather than only in law schools (as indicated by Matsuda), none of these laws can be applied readily to general harassment on campus. [FN177] However, this change is not likely to occur without significant changes in the United States Constitution or the Supreme Court's interpretation of the Constitution. [FN178] Until the law so changes, university administrators must work within established judicial guidelines to control harassment, taking into consideration the principles identified by the courts before adopting a policy that may infringe on speech.

F. Constitutional Obligations for Private Institutions

Private institutions may be bound by constitutional principles if they have made a contractual or de facto commitment to assume the duty ***30** to control harassment. [FN179] This de facto commitment may be as simple as allowing anyone from the general public onto the campus to purchase event tickets or items from a bookstore.

In *Commonwealth v. Tate*, [FN180] the Supreme Court of Pennsylvania found that the grounds of a private campus were "open to the public" within the meaning of a state statute, because there was no notice of trespass given anywhere on the grounds and because there were establishments on campus that were open to the public. These included a Post Office, a public cafeteria, a federal book depository library, and a booth for the sale of tickets to public events. However, the court indicated that even when the owner of private property is constitutionally obligated to honor speech and assembly rights of others, the institution may still impose reasonable restrictions on the mode, opportunity, and site for individual expression and assembly to take place. This rationale is consistent with the case law regarding speech regulation at public institutions because it does not base speech restrictions on the content of the expression.

In *Mullins v. Pine Manor College* [FN181] a student filed suit against a private college seeking damages for injuries suffered when she was raped on campus. The Supreme Judicial Court of Massachusetts ruled that, when the college voluntarily undertook a duty to protect students from the criminal acts of third parties, the college also assumed a duty to perform that function with due care.

It appears that when private institutions invite or allow the public on campus, they also assume a duty to provide reasonable access to the campus for

constitutionally-protected speech. This speech is subject to reasonable restrictions in terms of time, place, and manner, but not in terms of the content of the speech. Therefore, private institutions that allow the general public open access to the campus may be under the same constitutional obligations outlined in this article for public institutions. Additionally, constitutional guarantees at private institutions will be mandated where a finding of state action or interdependent relationship exists between the state and the private institution. [FN182]

II. "SALIENT CONSTITUTIONAL PRINCIPLES" GOVERNING THE REGULATION OF "HATE SPEECH"

The cases discussed above clarified the several "salient constitutional principles" relating to state regulation of harassing speech and conduct. *31 Since the Supreme Court decision in Mitchell, it seems clear that the university has the ability to regulate and punish bias-motivated criminal conduct. However, the principles governing the regulation of speech are more elusive.

The "salient constitutional principles" listed below relate to the regulation of speech by a state entity, and are grouped into two sections: A) speech that can be regulated by the state; and B) speech that cannot be regulated by the state. Each section is divided into three subcategories: content-based regulation, content-neutral regulation, and important procedural and policy issues identified by legislatures and the courts.

A. Elements of Speech That Can Be Regulated

1. Content-Based Restrictions:

a. Several categories of speech are not entitled to First Amendment protection and therefore may be regulated. [FN183] These include "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words'--those that by their very utterance tend to incite an immediate breach of the peace," or "imminent lawless action." [FN184] However, government must regulate all fighting words, not just those fighting words with which it disagrees. [FN185]

b. "Fighting words" are words "directed to the person of the hearer" [FN186] that "naturally tend to provoke violent resentment" or "imminent lawless action." [FN187] Anything short of words that would be regarded as an "invitation to exchange fisticuffs" are not considered "fighting words." [FN188]

*32 2. Content-Neutral Regulations:

a. Access to a public forum may be restricted by government "as long as the regulation on speech is reasonable and [is] not an effort to suppress expression merely because public officials oppose the speaker's view." [FN189]

b. The university has the right to place reasonable time, place, and manner restrictions on the dissemination of ideas on campus but may not regulate the content of the ideas. [FN190]

c. Time, place, and manner restrictions are reasonable when:

i) they are within the constitutional power of the government;

ii) they further an important or substantial governmental interest;

iii) the governmental interest is unrelated to the suppression of free expression; and

iv) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. [FN191]

In addition, restrictions must be

v) justified without reference to the content of the regulated speech; and

vi) leave open ample alternative channels for communication of the information. [FN192]

d. Actions that "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" are not protected by

constitutional guarantees of free speech. [FN193] However, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." [FN194]

*33 e. The Supreme Court has held that "a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has the power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct." [FN195] These rules may include laws that are enforceable under current criminal statutes such as those regarding disturbing the peace, intimidation, harassment, defamation, vandalism, destruction of property, etc. [FN196]

f. The phrase, "discriminatory comments, epithets or other expressive behavior," is not unconstitutionally vague and may be used in regulations if "the meanings of the terms appear clear and definite in the context of the phrase and the rule," [FN197] and if they apply only to words that "naturally tend to provoke violent resentment." [FN198]

g. "Government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue." [FN199] This concept also applies to "captive audiences" that "cannot practically avoid exposure" to the speech. [FN200] Loud or offensive speech may be regulated if it confronts the citizen "in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." [FN201]

*34 h. Intimidation through threats of physical violence is not protected speech under the First Amendment and can be regulated. [FN202] Typically, however, state criminal statutes already govern this type of behavior.

3. Procedural and Policy Issues:

a. "A statute must give adequate warning of the conduct which is to be prohibited." [FN203]

b. "A statute . . . must set out explicit standards for those who apply it." [FN204]

c. In order to regulate student speech, the statute must provide students due process in any accusations made against them. [FN205]

d. The university has the right, the "responsibility, even the obligation, . . . to confront such notions in whatever form they appear." [FN206] Speech can be used by the university to oppose speech that runs counter to the mission of the institution. Federal and state governments may even spend money to publish positions they take on controversial subjects. [FN207] However, the government must stop short of silencing objectionable speech. [FN208]

B. Elements of Speech That Cannot Be Regulated

1. Content-Based Restrictions:

a. Under R.A.V., the St. Paul ordinance imposed "special prohibitions on those speakers who express[ed] views on disfavored subjects . . . [such as] race, color, creed, religion or gender" [FN209] while at the same time it permitted displays containing "abusive invective . . . unless they are addressed to one of the specified disfavored topics." [FN210] This type of content-based ordinance is "facially unconstitutional." [FN211]

*35 b. Symbolic speech, such as military uniforms, arm bands, or words worn on clothing, may not be regulated unless it falls under the categories of being "lewd and obscene," "profane," "libelous," and "insulting or 'fighting words'" [FN212] or speech that materially and substantially interferes with the requirements of appropriate discipline in the operation of the school, etc. [FN213]

c. Expression of a speaker's feelings and emotions (including hate) is considered constitutionally protected speech and may not be regulated. [FN214]

d. Speech cannot be proscribed "simply because it [is] found to be offensive, even gravely so, by large numbers of people." [FN215]

e. A narrowly tailored, content-based speech ordinance that "helps to ensure the basic human rights of members of groups that have historically been subjected to

discrimination, including the right of such group members to live in peace where they wish," does not serve a sufficiently compelling state interest to justify the "danger of censorship." Instead, "an ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect." [FN216]

*36 f. Student speech cannot be abridged on the basis of Fourteenth Amendment equal protection issues in an attempt to create an equal educational environment. This argument is inapplicable in the university setting when students, rather than employees of the university, are the perpetrators of the discriminatory speech since students are not state actors. [FN217]

2. Content-Neutral Restrictions:

a. Speech that "stigmatizes" or "victimizes" others is not regulable, because these words are "not self-defining," [FN218] and because these words "can only be understood with reference to some exogenous value system." [FN219] They are therefore unconstitutionally vague and overbroad and should not be used in a university speech code.

b. The phrase "intimidating, hostile or demeaning environment" is overbroad because the words do "not necessarily tend to incite violent reaction" as would "fighting words." [FN220] Even "extremely mentally and emotionally disturbing" words are not "fighting words" and cannot be regulated. The Supreme Court no longer regards the "infliction of injury" part of Chaplinsky as a valid reason for regulating speech. [FN221]

c. A phrase that "tends to disturb" does not rise to the level of "fighting words" and should be avoided in the construction of campus speech codes. [FN222]

d. Demonstrations, parades, and picketing may not be banned in public areas. (However, reasonable time, place, and manner restrictions may be imposed on demonstrations and parades.) [FN223] The state may "impose financial burdens on the exercise of First Amendment rights, such as permit fees, only when the amount involved is reasonable and directly related to the accomplishment of legitimate governmental purposes." [FN224]

*37 e. Leafletting on public streets and in other public places may not be proscribed. [FN225]

3. Procedural Issues:

a. The regulation of off-campus speech is questionable. It may pose some difficulty to the university to demonstrate that the student intended to create a hostile environment for university-authorized activities. [FN226]

b. Any infringement of First Amendment freedoms in a traditional public forum or in a public forum by government designation is subject to heightened scrutiny. [FN227]

c. A state constitution may provide an even greater scope of speech protection than does the First Amendment to the United States Constitution, [FN228] forcing a university to be even more cautious in limiting speech. The applicable state constitution must be considered in the drafting of any policy that regulates speech.

d. Speech may not be regulated or controlled by a vague statute. A statute is vague when "men of common intelligence must necessarily guess at its meaning and differ as to its application." [FN229] Rules that sanction words that "intend to" or "tend to" demean another person, for example, have been ruled vague because "it is ambiguous as to whether the regulated speech must actually demean the listener and create an intimidating, hostile or demeaning environment for education or whether the speaker must merely intend to demean the listener and create such an environment." [FN230]

e. An overbroad regulation may not be used to regulate speech. A regulation is overbroad if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate. [FN231]

*38 III. ANALYSIS OF UNIVERSITY POLICIES GOVERNING SPEECH

Several statements in the ten university codes of conduct reviewed in this study

offended one or more of the "salient constitutional principles" discussed in Part II above. Some of these statements, along with their supporting rationale, will be critiqued in Part III. Other statements that did not offend the "principles" are presented as possible options for universities currently conducting a policy review.

The following discussion of "salient constitutional principles" will hereinafter be referred to using the Section numbers denoted in Part II above. Sections designated as II.A. address those items indicating the types of speech that can be regulated by the university. Sections designated II.B. address those items indicating types of speech that cannot be regulated. Due to space considerations, the content of each Section referenced is not always quoted in its entirety. The reader is directed to Part II for the complete text.

To avoid confusing the paragraph designations in the individual codes of conduct with the "salient constitutional principles," the sections of codes of conduct are referred to as "paragraphs" rather than sections, and are designated by the ¶ symbol (e.g., ¶ E-8).

Each of the ten institutions adequately warned students what their regulations were (Section II.A.3.a.) through publication of the university rules and regulations in pamphlet form or in the student catalog or handbook. [FN232] The standards governing student speech were explicitly spelled out (Section II.A.3.b.), and each of the university codes also provided adequately for due process (Section II.A.3.c.).

Section II.B.3.b. indicates that any infringement on the First Amendment in a traditional public forum or in a forum made public by government designation is subject to heightened scrutiny. Many of the paragraphs critiqued here could abridge First Amendment rights and put the university in the defensive position imposed by "heightened scrutiny," thereby forcing the university to carry the burden of proof that First Amendment rights are not impinged.

A. Hazing

Several "hate speech" prohibitions take the form of bans on "hazing." The Student Code of Conduct adopted by the Arizona State Board of Regents for both Arizona State University and the University of Arizona defines hazing as

any activity undertaken or situation created, whether on or off campus, by any individual, group of individuals or organization, in which individuals are voluntarily or involuntarily subjected to activities which have the potential to harass, intimidate, impart pain, humiliate, invite ridicule of, cause undue mental or physical fatigue or distress, or to cause mutilation, laceration, or bodily injury. Such activities include, but are not limited to, paddling in *39 any form, physical or psychological shocks, late work sessions which interfere with scholastic activities, advocating or promoting alcohol or substance abuse, tests of endurance, submission of members or prospective members to potentially dangerous or hazardous circumstances or activities which have a foreseeable potential for resulting in personal injury, or any activity which by its nature may have a potential to cause mental distress, panic, human degradation, or embarrassment. [FN233]

There are several words in this statement that may not rise to the level of "fighting words" (Section II.A.1.a. and II.A.1.b.) and therefore the rule may be vague and overbroad as described in Sections II.B.3.d. and II.B.3.e. For example, Section II.A.2.h. indicates that "intimidation through threats of physical violence is not protected speech." However, this definition of hazing does not remain within the limitation of physical violence. Of particular concern in this rule is the "potential" to "humiliate, invite ridicule of, cause undue mental . . . distress," or "human degradation or embarrassment," since the portion of Chaplinsky dealing with infliction of emotional distress is no longer recognized as a valid reason to regulate speech (Section II.B.2.b.).

The Indiana University Code of Ethics defines "hazing" as:

any conduct which subjects another person, whether physically, mentally,

emotionally, or psychologically, to anything that may endanger, abuse, degrade, or intimidate the person as a condition of association with a group or organization, regardless of the person's consent or lack of consent. [FN234]

Additionally, Indiana's statute regarding "criminal recklessness," [FN235] the State's version of a "hazing" policy, addresses only bodily injury and not the mental and emotional degradation covered in the University rule.

The University of Florida addresses hazing in its student code, as mandated by Florida statute. The statute requires all state universities to adopt a rule banning hazing, which "includes but is not limited to, any brutality of a physical nature, . . . or other forced physical activity . . . which would subject the individual to extreme emotional stress" [FN236]

There are some significant differences between the Florida statute and the definition of hazing in the University rule. The student code defines hazing, among other things, as:

***40** a broad term encompassing any action or activity which does not contribute to the positive development of a person; or which inflicts or intends to cause mental or physical harm or anxieties; or which may demean, degrade or disgrace any person regardless of location, intent or consent of participants. [FN237]

The statement that hazing can be considered a "broad term" that consists of anything that "does not contribute to the positive development of a person" is vague because "men of common intelligence must necessarily guess at its meaning and differ as to its application" (Section II.B.3.d.). Further, it is severely overbroad because it would sweep within its ambit a great deal of speech that is protected (Section II.B.3.e.).

In addition, the words "demean, degrade or disgrace" neither mirror existing state law, nor rise to the level of fighting words (Section II.B.2.b.), nor do they carry the threats of physical violence required by intimidation (Section II.A.2.h.). Therefore, this phrase is also overbroad (Section II.B.3.e.).

The University of Michigan's policy on hazing demonstrates a similar weakness in construction. Hazing is defined, among other things, as "degradation, humiliation, or compromising of moral or religious values." [FN238] Both "degradation" and "humiliation" fail to rise to the level of fighting words even though they may be "extremely mentally and emotionally disturbing" (Section II.B.2.b.). This rule also may be vague (Section II.B.3.d.) and overbroad (Section II.B.3.e.).

B. Harassment

Four of the ten institutions whose codes of conduct were reviewed have policies addressing harassment. The Arizona Student Code of Conduct indicates that students are subject to disciplinary action for harassment if they are

[e]ngaging in harassment or unlawful discriminatory activities on the basis of age, ethnicity, gender, handicapping condition, national origin, race, religion, sexual orientation or veteran status, or violating university rules governing harassment or discrimination. [FN239]

Since harassment is codified in Arizona, this paragraph clearly prohibits only criminal harassment and other "unlawful discriminatory ***41** activities." This paragraph may therefore be analogous to the sentence enhancement statute for criminal behavior upheld by the Supreme Court in Mitchell that enhances the penalty for an offense if the defendant "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person," [FN240] and therefore does not offend any of the "salient constitutional principles." However, as will be discussed later, Arizona would be wise to avoid the listing of specific protected categories without some sort of statement that the language of the paragraph does not limit harassment to only those protected subgroups.

Indiana University's Racial Harassment rule says:

A student has the right to be free from unlawful racial harassment.

(1) A student has the right to be free from unlawful racial harassment in any building or at any location on any university property.

(2) A student has the right to be free from unlawful racial harassment that occurs in a building or on property that is not university property if the racial harassment occurs during the course of university activities that are being conducted off the university campus or relates to the security of the university community or the integrity of the university's educational process

Racial harassment includes any behavior, physical or verbal, that victimizes or stigmatizes an individual on the basis of race, ethnicity, ancestry, or national origin, and involves any of the following:

(1) The unlawful use of physical force or violence to restrict the freedom of action or movement of another person or to endanger the health or safety of another person;

(2) Physical or verbal behavior that involves an express or implied threat to interfere unlawfully with an individual's personal safety, academic efforts, employment, or participation in university-sponsored, extracurricular activities and causes the person to have a reasonable apprehension that such harm is about to occur;

***42** (3) Physical behavior that has the purpose or reasonably foreseeable effect of interfering unlawfully with an individual's personal safety, academic efforts, employment, or participation in university-sponsored, extracurricular activities and causes the person to have a reasonable apprehension that such harm is about to occur; or

(4) "Fighting words" that are spoken face-to-face as a personal insult to the listener or listeners in personally abusive language inherently likely to provoke a violent reaction by the listener or listeners towards the speaker. [FN241]

Even though this rule uses the words "victimizes" and "stigmatizes," which have been ruled vague by the Supreme Court (Section II.B.2.a.), the rule prohibits only "unlawful" activity. Therefore it does not offend any of the "salient constitutional principles." However, it is interesting to note that there is only one statute in Indiana that makes racial harassment unlawful. [FN242] This statute regulates only racial harassment committed by officers or employees of the state and does not apply to students at any of Indiana's state universities. Further, there are no statutes that specifically regulate harassment based on sex or sexual orientation. Therefore, in terms of general student "hate speech," the reference in this rule to "unlawful" racial harassment has no binding effect on the students at Indiana University because there is no law that criminalizes racial harassment perpetrated by them.

Texas A&M University's (Texas A&M) rule on "Racial and Ethnic Harassment" attempts to combine the "hostile work environment" of sexual harassment and civil rights legislation with the unproven "hostile educational environment" jurisprudence.

In providing an educational and work climate that is positive and discrimination-free, faculty, staff and students should be aware that racial and ethnic harassment in the workplace or the educational environment is unacceptable conduct and will not be condoned. Texas A&M University will protect the freedom of speech guaranteed by the First Amendment to the U.S. Constitution, while at the same time will determine conduct that goes beyond the legally defined boundaries of free speech. [FN243]

Combining three types of jurisprudence that may be incompatible with each other (Section II.B.2.b.) may make any references to student ***43** speech outside the work environment overbroad because non-employee speech in an educational setting enjoys a wider degree of protection (other than professor's speech in the classroom, which is protected by academic freedom). Further, this definition does not rise to the level of "fighting words," (Sections II.A.1.a. and II.A.1.b.) and, therefore, any other interpretation of what "goes beyond the legally defined boundaries of free speech" may be overbroad (Section II.B.3.e.). These inconsistencies may therefore result in this section being deemed vague (Section II.B.3.d.).

The University of Florida's statement on "Racial Harassment" and "Sexual Orientation Harassment" [FN244] may attempt to operate under color of state statutes

regarding general "harassment," "intimidation," or "sexual abuse." [FN245] However, these policies are used to single out and prohibit only those types of harassment that deal with disfavored subjects with which the university disagrees (Section II.B.1.a.). These rules may therefore be considered to be unconstitutional content discrimination. In an analogous decision, the court in R.A.V. said that if the state prohibits any fighting words, then all fighting words should be prohibited, not just those classes of words with which the state disagrees.

C. Assembly

Some codes of conduct effectively regulate certain types of assembly and distribution of literature. For example, the Code of Student Ethics at Indiana University states that: "[s]tudents are free to engage in peaceful and orderly protests, demonstrations and picketing which do not disrupt functions of the university, subject to appropriate regulations concerning time, place, and manner." [FN246] This statement is carefully worded to regulate these freedoms only in terms of time, place and manner, rather than content (Sections II.A.2.b. and II.A.2.c.).

One section of the University of Florida's student code regulates "demonstrations," [FN247] but also within the time, place, and manner limits *44 established in Sections II.A.2.a., II.A.2.b., and II.B.2.d., and without infringing on the content of the speech involved. In terms of assembly issues, most of these universities seem to understand that restrictions can only be based on time, place, and manner and not on content.

D. Statements of Principles

There were several "statements of principles" that affirmed a university's stand against "hate speech" and other forms of human degradation, but that did so only as a matter of principle rather than imposing sanctions or the rule of law upon the students. Three are offered as examples:

(1) Texas A&M is committed to providing an educational and work climate that is conducive to the personal and professional development of each individual. To fulfill its multiple missions as an institution of higher learning, Texas A&M encourages a climate that values and nurtures collegiality, diversity, pluralism and the uniqueness of the individual within our state, nation and world. The University also strives to protect the rights and privileges and to enhance the self-esteem of all its members. Faculty, staff and students should be aware that any form of harassment and any form of illegal discrimination against any individual is inconsistent with the values and ideals of the University community. Individuals who believe they have experienced harassment or illegal discrimination are encouraged to contact the appropriate offices within their respective units. [FN248]

(2) While freedom of thought and expression is the lifeblood of our academic community, the maintenance of civility is a precondition *45 to the vigorous exchange of ideas, and it is the policy of the University to promote civility in all forms of expression and conduct. The University thus believes that any expression or act of intolerance or discrimination--whether based on race, gender, religion, color, age, national origin, disability, status as a Vietnamera veteran, or on any other basis--is repugnant and inimical to our most basic values. [FN249]

(3) The University has a concern about behavior repugnant to or inconsistent with an educational climate. [FN250]

Since these statements are statements of principle rather than prescribing regulations with attached sanctions, they do not run contrary to any constitutional principles (Section II.A.3.d.). It is noteworthy that the second example includes a list of several favored subgroup classifications. This could be problematic if intolerance were not also seen as "repugnant" "on any other basis." It is important to include such a broadening statement with any list of favored subgroup classifications or disfavored topics in order to avoid the perception of violating Section II.B.1.a. regarding the imposition of "special prohibitions on those speakers who express[ed] views on disfavored subjects."

E. Protected Categories and Subgroup Classifications

One common error in code construction is the use of protected subgroups of people or specific categories of disfavored subjects. A code cannot protect only some subgroups, but, rather, must provide the same level of protection to all people, regardless of their subgroup classification, for the same types of speech, conduct or criminal activity. Specific categories are often mentioned, but must be accompanied by some sort of broadening statement that extends the same protection to everyone.

One example of this type of broadening statement is Texas A&M's policy, which simply says: "[e]ach student shall have the right to participate in all areas and activities of the University, free from any form of harassment and any form of illegal discrimination and without regard to any subgroup classification or stereotype." [FN251] Consistent with Section II.B.1.a., this statement appropriately prohibits "illegal discrimination*46 . . . without regard to any subgroup classification or stereotype." [FN252]

Conversely, the prohibition of subgroup classification and stereotyping based on disfavored subjects was deemed unconstitutional by the court in Sigma Chi. In that case, the university imposed sanctions against the fraternity for some verbal and symbolic language in a skit that racially and sexually stereotyped minorities and women. The court, however, defined the skit as having some "entertainment value." [FN253] Therefore a code that prohibits "stereotyping" based on subgroup classification may be overbroad (Section II.B.3.e.). Even stereotyping speech that is "obnoxious," "extremely offensive," or "demeans" others is not proscribable (Sections II.B.1.d. and II.B.2.b.). If the prohibitions in this rule were defined in terms of "fighting words" as described in Sections II.A.1.a. and II.A.1.b. or in terms of criminal behavior as outlined in Mitchell, and were not limited to specific protected categories, they might pass judicial muster. However, these prohibitions are not and may therefore be vague and overbroad (Sections II.B.3.d. and II.B.3.e.).

The University of California at Los Angeles' (UCLA) policy governing a "Theme Based Social Activity" indicates:

An officially recognized organization's actions and activities which are sponsored by the University must not be presented in a manner which tends to promote degrading or demeaning social stereotypes based on race, ethnicity, national origin, gender, sexual orientation, religion, or disability. In determining whether an action or activity is degrading or demeaning within the meaning of this provision, the theme and all surrounding circumstances of the action or activity shall be considered in light of the following:

a. Does it reinforce group stereotypes which the officially recognized organization should reasonably know have historically prevented disadvantaged persons in our society from reaching their full potential?

b. Are the circumstances associated with the action or activity, (e.g., advertisements, decorations, the garb of the participants), of the type which should reasonably be recognized as likely to exacerbate the negative connotations of the theme itself?

* * *

e. Does the information available suggest that the theme, advertisements, decorations and garb were chosen to mock or degrade the groups associated with the theme?

*47 f. Does the information available suggest that the theme, advertisements, decorations and garb of the activity were chosen with the intent to incite breaches of the peace or disorder in the campus community, or under circumstances where the officially recognized organization should reasonably know that breaches of the peace or disorder in the campus community were likely to result? [FN254]

This section, when understood in light of Sigma Chi, is clearly overbroad because it sweeps within its ambit a great deal of speech that is protected by the First Amendment (Section II.B.3.e.). In addition, it is vague because people must naturally guess at its meaning (Section II.B.3.e.).

The phrases "mock or degrade" and "promote degrading or demeaning social stereotypes" do not rise to the "fighting words" standard (Sections II.A.1.a., II.A.1.b., and II.B.2.b.). This amounts to contentbased censorship of certain viewpoints ("race, ethnicity, national origin, gender, sexual orientation, religion, or disability"), even though they may be offensive viewpoints (Sections II.B.1.d. and II.B.2.b.), because they are disfavored by the university (Section II.B.1.a.).

Symbolic speech such as "advertisements, decorations, and garb" cannot be censored unless it rises to the fighting words standard (Section II.B.1.b.). This is clearly pointed out in Sigma Chi. [FN255]

The policy applicable to "Theme Based Social Activities" may be unconstitutional under the California state constitution as well because the policy allows discrimination "on the basis of" protected categories. Granting a class of citizens special privileges or immunities is not allowed under California's constitution.

Texas A&M's policy entitled "Malicious treatment, harassment and/ or hazing," states:

Previously relied upon "traditions," whether Corps, fraternity/ sorority or other group-related terms, will not suffice as a justifiable reason for participation in any act or threat, physical or mental, perpetrated for the purpose of submitting a student or other person to physical pain or discomfort, indignity or humiliation (including personally abusive epithets such as derogatory references to subgroup classification or stereotype) regardless of the intent of such an act and regardless of the consent or cooperation of the recipient. [FN256]

This paragraph is patterned after a Texas law prohibiting hazing that reads, in part:

***48** Hazing means any intentional, knowing or reckless act, occurring on or off the campus of an educational institution, by one person alone or acting with others, directed against a student, that endangers the mental or physical health or safety of a student for the purpose of pledging, being initiated into, affiliating with, holding office in, or maintaining membership in any organization whose members are or include students at an educational institution. The term includes but is not limited to:

* * *

(D) any activity that intimidates or threatens the student with ostracism, that subjects the student to extreme mental stress, shame or humiliation, or that adversely affects the mental health or dignity of the student or discourages the student from entering or remaining registered in an educational institution, or that may reasonably be expected to cause a student to leave the organization or the institution rather than submit to acts described in this subsection . . . [FN257]

The paragraph from Texas A&M's policy, like the statute, refers to "abusive epithets such as . . . subgroup classification or stereotype" that do not rise to the "fighting words" standard (Sections II.A.1.a. and II.A.1.b.) and may be overbroad (Section II.B.3.e.). Of particular concern are the references to "hazing" as the perpetration of "mental . . . indignity or humiliation," and the statute's definition of hazing as "mental stress, shame, or humiliation" (Section II.B.2.b.).

The prohibition of "any form of 'quadding'" under another paragraph of Texas A&M's policy [FN258] is also vague as interpreted under Section II.B.3.d., because not everyone may understand this colloquialism without an explicit definition.

F. Conduct Versus Speech and "Fighting Words"

Despite the age of some of the universities' policies and guidelines, many of their drafters had a good sense of the division between conduct and speech as articulated in the recent Mitchell decision. For example, UCLA's policy prohibits "physical abuse, threats of violence, or conduct that threatens the health or safety of any person on University property" [FN259] Speech is then discussed in succinct First Amendment language and is limited only in terms of time, place, and manner and to protect individuals who could become "involuntary audiences," as articulated in Section II.A.2.g.

***49** UCLA's harassment policy also mirrors the "fighting words" standard (Sections II.A.1.a. and II.A.1.b.). Sanctions can be imposed for misconduct, which includes:

[t]he use of "fighting words" by students to harass any person(s) on University property, on other property to which these policies apply as defined in campus implementing regulations, or in connection with official University functions or University-sponsored programs.

"Fighting words" are those personally abusive epithets which, when directly addressed to any ordinary person are, in the context used and as a matter of common knowledge, inherently likely to provoke a violent reaction whether or not they actually do so. Such words include, but are not limited to, those terms widely recognized to be derogatory references to race, ethnicity, religion, sex, sexual orientation, disability, and other personal characteristics. "Fighting words" constitute "harassment" when the circumstances of their utterance create a hostile and intimidating environment which the student uttering them should reasonably know will interfere with the victim's ability to pursue effectively his or her education or otherwise to participate fully in University programs and activities. [FN260]

This policy defines fighting words within the appropriate parameters (Sections II.A.1.a. and II.A.1.b.), enumerates examples of derogatory references to "race, ethnicity, religion, sex, sexual orientation, [and] disability," but does not limit fighting words to those protected categories and therefore prohibits all fighting words as pointed out in Section II.A.1.a. (albeit with emphasis on protected categories).

A possible problem with UCLA's policy is the reference to a "hostile and intimidating environment," wording adopted from sexual harassment law. However, "hostile and intimidating environment" is used in reference to harassment, which is defined as a subset of "fighting words" in UCLA's document. Therefore, under this definition, this type of speech does not enjoy protected status and the policy would not offend any of the "salient constitutional principles."

In a third instance, the University of Maryland adopted a policy that bans all "acts of destruction or violence which are racially, ethnically, religiously, and/or otherwise motivated against the person or property of others and which infringe on the rights and freedom of others." [FN261] This statement is within the "criminal conduct" parameters established in Mitchell, and provides a statement that broadens the reach of the ***50** policy from acts that are "racially, ethnically, [or] religiously" motivated to anything that is "otherwise motivated."

Another paragraph of the University of Maryland's code prohibits several categories of criminal conduct and acts of violence, and also prohibits any violation of the code of student conduct. [FN262] Most elements of the code of student conduct are also illegal acts, readily regulable by the university (Section II.A.2.e.). However, another section of the code prohibits "racial insults or any other 'fighting words.'" [FN263] This rule combines "racial insults" with "fighting words" in an attempt to make the two synonymous. According to Section II.A.2.f., racial insults can be prohibited when they rise to the level of "fighting words," but not all racial insults rise to that level. For example, the University of Wisconsin adopted a policy that prohibited:

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 or other expressive behavior or physical conduct intentionally: 1) Demean the race, sex, religion, color, creed, disability,

sexual orientation, national origin, ancestry, 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. [FN264]

The court held this rule overbroad as a content-based rule that reached a substantial amount of protected speech. [FN265] In addition, the rule failed to meet both the "fighting words" test [FN266] and the proposed balancing test [FN267] from *Chaplinsky*. Unless "racial insults" rise to the level of fighting words and are defined strictly in terms of fighting words, they cannot be banned (Sections II.A.1.a. and II.A.1.b.). Otherwise, this type of regulation amounts to an unconstitutional limitation on the rights of speakers who express views on disfavored subjects (Section II.B.1.a.), even if those views are gravely offensive and obnoxious to many (Section II.B.1.d.). Therefore, this portion of the rule may be vague (Section II.B.3.d.) and overbroad (Section II.B.3.e.).

G. Off-Campus Offenses

Texas A&M's policy provides a good example of the type of offcampus offense that can be regulated by a university (Section II.B.3.a.). The policy says, in part:

*51 [t]he University will take disciplinary action against a student for such an off-campus offense only when the nature of the offense is such that in the judgment of the vice president for student services, the continued presence of the student on campus is likely to interfere with the educational process and the orderly operation of the University. [FN268]

If the Vice President for Student Services requires that a violation of this policy must constitute a "material and substantial disruption" of the campus (Section II.A.2.d.), then this type of conduct or speech would be sanctionable within the purview of the university (Section II.B.3.a.). However, the "material and substantial disruption" standard must be the benchmark.

The University of Florida's policy regulating off-campus conduct prescribes sanctions

only when it is required by law to do so or when the nature of the offense is such that in the judgement of the Director of Student Judicial Affairs, the continued presence of the student on campus is likely to interfere with the educational process or the orderly operation of the University; or the continued presence of the student on campus is likely to endanger the health, safety, or welfare of the University community. [FN269]

This type of regulation of off-campus student conduct may also be within regulable territory as defined by Section II.B.3.a., but should be defined more succinctly in terms of the "material and substantial disruption" standard.

IV. THE SURVEY'S SIGNIFICANT FINDINGS

There are several important findings resulting from the telephone survey of the nation's twenty largest public universities. The data provide an interesting composite view of the current approaches to the regulation of student speech on major university campuses. Although it would be inappropriate to assume this analytic view is representative of all university campuses in the nation, it does provide an indication of the current state of affairs on twenty highly-visible campuses that tend to be in the forefront of policy development. [FN270]

Further, several campuses in the report are part of state educational systems that handle speech with system-wide policies. Therefore, the policies examined at these universities would be similar, if not identical, to those at related institutions. Still others have been involved in court challenges of their policies in an attempt to manage the increasing intolerance on today's campuses.

The respondents to the survey were legal counsel to the major universities. The majority--thirteen--operated out of the Office of the *52 General Counsel at their respective universities; three worked at the Offices of the General Counsel for the state system to which the university belonged; two others were Attorneys General in the respective states and handled university legal affairs; and the remaining two worked for private legal firms that represented the university.

Several interesting trends unfolded during the examination of the survey's results. First, all but one of the ten policies that governed "hateful harassing speech or conduct" were adopted between 1987 and 1990. No new policies have been adopted since then, and two have been abandoned. Perhaps the fact that the court struck down the speech code in *Doe v. University of Michigan* [FN271] in September 1989 chilled other universities' inclinations to regulate speech on campus as a means of dealing with intolerance.

The second trend was the rarity with which campus "hate speech" policies were actually used. Most of the legal counsel responding to the survey indicated that they were reluctant to use the policies because of the risk of inviting litigation. Four of the ten institutions with policies never use them; four others use them, on the average, fewer than six times per year; only two institutions used their policies more than five times per year, and one of those has had its more "traditional" policy in effect since 1978. "Traditional" conduct policies and the use of state criminal statutes governing intimidation, disorderly conduct, harassment, and other crimes seem to be the preferred modes of handling speech related incivility.

Two institutions that have policies stated that their codes are "statements of principle" and carry with them no sanctions. This tactic may help reduce the possibility of legal entanglements and still allow the university to "make a statement" that deplores intolerance. However, one attorney responding to the survey took issue with that approach, calling it "university political correctness." He felt that the "counseling approach to 'hate speech' adopted by some universities may have some chilling effect" on students, which could result in the policy being declared overbroad by the courts.

Another interesting observation is that two universities adopted policies without consulting anyone. One respondent said "we knew what we wanted and we knew we couldn't please everyone so we just did it without consulting anyone." Obviously, if a university is prepared to consult with students, faculty, and other interested parties, it should be prepared to respond to their concerns and input about its policies. However, if university officials know what kinds of demands may be made by these groups and the university is not prepared to implement such a policy for legal, philosophical or other reasons, perhaps the approach of these two universities would be an option.

One other note of interest is the statement by one of the respondents that "student affairs people don't have the legal background to interpret *53 the fine line between what's regulable and what's not in a narrowly constructed code." This statement clearly emphasizes the fact that the university needs to supply more training, policies that are easier to interpret, or both.

V. POLICY CONSIDERATIONS REGARDING "HATE SPEECH" REGULATION AT THE UNIVERSITY

The purpose of Part V is: (1) to outline the implications of the compiled research on American higher education; (2) to make some recommendations regarding how American higher education can confront the "hate speech" problem on campus; (3) to outline what further research should be conducted on the topic; and (4) to draw some conclusions regarding higher education's involvement in the regulation of "hate speech."

A. Implications of the Research

There are four implications that arise as a result of the data presented in this article. First, only half of the universities surveyed have policies that regulate "hostile or harassing speech or conduct." Five of the ten legal counsel from those universities that do have regulations responded with a statement that, "yes, we have a regulation, however" They comment that they feel somewhat uncomfortable about the constitutionality, practicability, and enforceability of those regulations. This is demonstrated by the fact that, despite increasing "hate speech" incidents, the policies go relatively unused.

The second implication is that the institutions that do have regulations have good reason to be concerned about the constitutionality of their rules. Eight of the ten university codes analyzed in this study were found to violate some portion of the thirty "salient constitutional principles."

The third implication, outlined in an article by David McGowan and Ragesh Tangri, [\[FN272\]](#) is that "only regulations designed to prevent violence are both permissible under the Constitution and good policy for universities to pursue." [\[FN273\]](#) This assertion held true in the ten university codes analyzed in this article. Only two codes escaped constitutional problems when analyzed under the thirty "salient constitutional principles." Both codes applied the violence standard when sanctioning speech-related offenses.

The fourth implication arises from the general sense of confidence expressed by those who do not have regulations. Without exception, they are adamant that "hate speech" rules run too great a risk of violating the First Amendment.

***54** If one subscribes to the notion that many opinions are better than one, this should send a clear signal that it does not make good sense from a risk-management perspective to tackle the "hate speech" issue head-on with a ban on speech that could prove to be unconstitutional. However, some suggestions that arise from the research may provide some help in combatting disruptive speech on campus.

B. Policy Guidelines and Recommendations

Eight recommendations arise from the research and provide university policy-makers with some guidelines for tackling a very difficult issue.

First, the university should adopt speech regulation guidelines that are within the current parameters established by the courts, as outlined in the thirty "salient constitutional principles" and the criminal behavior standard adopted by the Mitchell court. However, the administration should understand that, although there may be a change in behavior, inner feelings that motivate "hate speech" cannot be legislated out of existence and should also be addressed. [\[FN274\]](#)

Second, the university should take appropriate legal action against students that commit crimes under the guise of freedom of speech. This prosecution must be done without regard to content, but should consider behavior that is currently regarded as illegal in any context. [\[FN275\]](#)

Third, if the administration of an institution feels that it is necessary to "make a statement" by mentioning specific protected categories, an additional statement should be added that does not limit protection only to "politically correct" categories. The statement should read, for example, "based on race, gender, religion, color, age, national origin, disability, status as a Vietnam- era veteran, or any other basis." The key phrase could also precede the list and read: "including, but not limited to."

Fourth, the administration should make assertive use of speech to decry the abusive or intolerant acts of students that may fall under the protection of the First Amendment.

Fifth, legislatures should be encouraged to adopt statutes that appropriately regulate the abusive use of speech against another individual or group, no matter who the object of that abuse or what the topic of speech may be.

***55** Sixth, the university should take particular care to avoid the typical pitfalls found in several of the codes examined. Specifically, to solve a majority of the problems observed in the codes analyzed here, the university should avoid using inappropriate definitions of "fighting words," limitations on speech that do not rise to the "fighting words" standards, bans on categories of speech that are disfavored by the university, and the use of overbroad or vague rules.

Seventh, the university should establish formal mechanisms to help resolve most "hate speech" incidents on an informal basis. [FN276] Thomas Simon asserts that "[m]ost incidents of hate speech complaints occur in conjunction with other violations [of existing laws]. . . . This indicates that serious incidents of racism are already actionable and that hate speech is best handled through informal mechanisms." [FN277]

Eighth, the university should establish comprehensive, campus-wide, multifaceted educational programs to encourage a climate of tolerance and understanding. These programs should have both the philosophical and financial support of the administration, and may range from special orientation sessions to multi-ethnic task groups assigned by a professor to research an academic topic together for a class assignment.

For example, one study by Robert Slavin and Nancy Madden [FN278] found strong positive effects on racial attitudes for both black and white students when they were assigned to work together in groups with students of different races. [FN279] "Results were interpreted to indicate that programs involving cooperative interaction between students of different races are most likely to improve race relations in desegregated schools." [FN280]

In her studies on the elimination of prejudice in school settings, Edith King [FN281] found that, although one program can have some effect, the cumulative effect of many programs, policies, and individual factors has a more profound effect than any one factor by itself. "The implication is that individual actions or measures may combine to create a particular ethos, or set of values, attitudes, and behaviors which will become characteristic of the school as a whole." [FN282]

Several of the institutions surveyed for this study also conduct a myriad of programs geared to educate students about social tolerance, ***56** diversity, peaceful conflict resolution, and other related topics. A compilation of a few outstanding programs as well as a list of related literature is contained in Part VI.

C. Future Research

In addition to the success of implementation of these campus programs, research should be conducted in the following areas.

First, since the state of the law is continually in flux as the courts decide new and different cases, continuing legal research should be conducted on the "hate speech" issue to help campus decision-makers better understand the fine line between what is and is not regulable.

Second, this study should be reproduced in one or two years to determine whether the recent Mitchell decision has had an impact on the types of codes used to regulate "hate speech" on campus. The new distinction between speech and conduct may initiate the adoption of "hate speech" codes aimed at conduct and fighting words rather than the wide-sweeping speech codes of the past.

Third, a longitudinal study of "hate speech" incidents should be conducted to provide higher education with a more accurate gauge for understanding the dynamics of "hate speech" use over time. A longitudinal study would also help ascertain

whether certain policies or programs at specific institutions actually help reduce the incidence of "hate speech" on campus.

Fourth, individual campuses should begin conducting longitudinal studies that provide a benchmark year for documenting "hate speech" incidents. This approach could also help document how specific policies affect the use of "hate speech" on campus.

Fifth, the survey participants indicated an interest in information regarding the "social costs of hate speech." This could include research, but may also include a panel discussion by "hate speech" experts regarding how to reconcile these costs with the demands of the First Amendment, and the impact of speech codes on First Amendment protections and academic freedom.

D. Conclusions

Logic dictates that appropriate measures to regulate speech within the confines of existing legislative mandates and judicial interpretation must be an integral part of a more comprehensive program to create an ethos of compassion, cooperation, tolerance, and trust on campus. This must begin not only at the grass-roots level, but with the president of the institution and others who hold the power of the purse and are in a position to set policy. These key individuals provide the example for campus-wide acceptance of people from diverse backgrounds. They also establish the basic attitude toward campus-wide programs that foster diversity, cooperation, and conflict resolution.

***57** This study has demonstrated the magnitude of the problem and the ineffectiveness of some regulatory practices that offend the Constitution. Now is the time to institute tough, constitutionally-valid legal measures and establish educational programs that have the philosophical and financial support of the university administration. Only through timely and consistent implementation of a balanced approach to "hate speech" regulation can university administrators begin to moderate this cancerous blight on America's campuses.

VI. RESOURCES FOR DIVERSITY PROGRAMMING, MEDIATION AND CONFLICT RESOLUTION

The following list of resources may assist policy-makers in their search for ideas that may be useful in creating a campus community that is more tolerant of diversity. This list contains both printed material such as books and pamphlets, as well as programs and diversity-related organizations listed by institution. This list was compiled as a byproduct of the research for this study and is by no means intended to be exhaustive.

Printed Material:

American Council on Education
Publications Dept. MSB
1 Dupont Circle
Washington, D.C. 20036
(202) 939-9300

Sources: Diversity Initiatives in Higher Education

This 400 page directory lists over 2,000 curriculum projects, faculty development programs, and student recruitment programs along with more than 225 books, reports, and other publications. Cost: \$35 (prepaid).

Anti-Defamation League of B'nai B'rith

(Publishers of several reports on hate-crime, defamation, and anti-Semitism.)
10495 Santa Monica Blvd.
Los Angeles, California 90025-5031

(213) 466-8000

Bodine, Richard et al., *Creating The Peaceable School: Conflict Resolution in Schools* (Research Press, forthcoming 1994).

Crawford, Donna K. et al., *The School for Quality Learning: Managing the School and the Classroom the Deming Way* (Research Press, 1993).

Johnson, David W. & Johnson, Roger T., *Teaching Students to Be Peacemakers* (Interaction Book Co., 1991).

King, Edith W., *Recent Experimental Strategies for Prejudice Reduction in American Schools and Classrooms*, 18 *J. Curriculum Stud.* 331 (1986).

***58** Kreidler, William J., *Creative Conflict Resolution* (Scott, Foresman & Co., 1984).

Kreidler, William J., *Elementary Perspectives 1: Teaching Concepts of Peace and Conflict* (Educators for Social Responsibility, Cambridge, Mass., 1990).

Morrison, Ann, *The New Leaders: Guidelines on Leadership Diversity in America*, The Jossey-Bass Management Series (1992).

Schrumpf, Fred et al., *Peer Mediation: Conflict Resolution in Schools* (Research Press, 1991)

Slavin, Robert & Madden, Nancy, *School Practices That Improve Race Relations*, 16 *Am. Educ. Res. J.* 169 (1979).

Organizations and Institutional Programs:

Arizona State University
Campus Environment Team
Office of the President
(602) 965-5606

Arizona State University has adopted a Campus Environment Team (CET) [FN283] approach to harassing and discriminatory speech. The CET guidelines state that ASU "is committed to maintaining hospitable educational, residential, and working environments that permit students and employees to pursue their goals without substantial interference from harassment. [FN284] However, since these policies are statements of principle and not disciplinary rules that prescribe student sanctions for misconduct, they probably will not come under fire from the courts.

California State University

"Campus Climate: Toward Appreciating Diversity," A report prepared for the University in 1990 by a panel of experts on campus climate.

Academic Publications Program
Office of the Chancellor
The California State University
400 Golden Shore
Long Beach, California 90802-4275

***59** Illinois Institute for Dispute Resolution

301 1/2 West Cook Street
Springfield, Illinois 62704
(217) 523-6080
FAX: (217) 523-8223

This organization offers a newsletter with articles on dispute resolution in the schools, as well as conference sessions on violence prevention, sexual harassment, creation of a peaceable school, peer mediation training, mediation of group racial conflicts among gangs, responsibility education, etc.

Los Angeles County Commission on Human Relations

320 West Temple Street, Suite 1184
Los Angeles, California 90012
(213) 974-7611

The Commission publishes a "Resource Guide of Audio, Video and Printed Materials" on hate crime and has also organized a Network Against Hate Crime composed of many area agencies and organizations.

National Association of Mediation in Education

205 Hampshire House, U Mass
Amherst, Massachusetts 01003

(413) 545-2462

FAX: (413) 545-4802

RP8 Violence Prevention Packet (Second Edition) \$11

This organization is a clearinghouse for resources on conflict resolution, conflict management, and peaceful persuasion and offers curriculum materials to colleges of education, including a complete step-by-step trainers manual for college instructors.

National Coalition Building Institute

1835 K Street, N.W., Suite 715

Washington, D.C. 20006

(202) 785-9400

FAX: (202) 785-3385

The Institute conducts training in prejudice reduction and coalition building and has consulted in Canada, Europe, the Middle East, and at over 100 campuses in the U.S.

National Institute for Dispute Resolution

1726 M Street, Suite 500

Washington, D.C. 20036

(202) 466-4764

Rutgers University

Common Purposes Committee

301 Van Nest Hall, CAC

College Avenue Campus

Rutgers University

New Brunswick, New Jersey 08903

*60 (908) 932-7255

Texas A&M University

Department of Multicultural Services

137 Memorial Student Center

College Station, Texas 77843-1121

(409) 845-4551

Towson State University

Campus Violence Prevention Center

Admin. 110

Towson State University

Towson, Maryland 21204

(410) 830-2178

University of Washington

Valuing Diversity Program

Office of the Vice President of Student Affairs

476 Schmitz Hall

1410 NE Campus Parkway

Seattle, Washington 98195

(206) 543-2965

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[FNaa1]. Kay Hartwell Hunnicutt, Ph.D., J.D., is an associate professor in the College of Education, Division of Educational Leadership and Policy Studies at Arizona State University. She teaches courses on School Law, has served as acting coordinator of the Higher Education program, and consults and practices as an attorney in the area of school law.

The authors would like to thank Professors Charles R. Calleros, Nick Appleton, Quentin Bogart, and Christine Wilkinson, and Attorney Ed Johnson for their assistance in reviewing previous drafts of this article.

[FN1]. See, e.g., BILLIE W. DZIECH & LINDA WEINER, THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS (1984); HOWARD J. EHRLICH, CAMPUS ETHNOVIOLENCE AND THE POLICY OPTIONS (1990); J. Peter Byrne, Racial Insults and Free Speech Within the University, 79 GEO. L.J. 399 (1991); Richard Delgado, Campus Antiracism Rules: Constitutional Narratives in Collision, 85 NW. U. L. REV. 343 (1991); Joseph M. Fernandez, Bringing Hate Crime into Focus: The Hate Crime Statistics Act of 1990, Public Law No. 101-275, 26 HARV. C.R.-C.L.L. REV. 261 (1991); Steve France, Hate Goes to College, A.B.A. J., July 1990, at 44; Leonard Gordon, Racism on College Campuses: Reflections on Changing Attitudes, 17 J. INTERGROUP REL. 3 (1990-91); Linda Haviland, Note, Student Discriminatory Harassment, 16 J.C. & U.L. 311 (1989); Sylvia Hurtado, The Campus Racial Climate: Contexts of Conflict, 63 J. HIGHER EDUC. 539 (1992); Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431 [hereinafter Lawrence, If He Hollers Let Him Go]; Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2320 (1989); Chester E. Finn, Jr., The Campus: "An Island of Repression in a Sea of Freedom", COMMENTARY, Sept. 1989, at 17; Courtney Leatherman, More Anti-Semitism is Being Reported on Campuses, but Educators Disagree on How to Respond to It, CHRON. HIGHER EDUC., Feb. 7, 1990, at A1; Jon Wiener, Words That Wound: Free Speech for Campus Bigots, NATION, Feb. 26, 1990, at 272; Letter from Rikki Kanner, Program Director of Hillel Union of Jewish Students adjacent to Arizona State University, to Dr. Leon Shell, Arizona State University Assistant Vice President of Student Affairs (Apr. 2, 1991) (copy on file with the authors); Letter from Leigh Nicole Gross, Arizona State University Student, to Lattie Coor, President of Arizona State University (Feb. 20, 1991) (copy on file with the authors).

[FN2]. See, e.g., Charles R. Calleros, Reconciliation of Civil Rights and Civil Liberties After R.A.V. v. St. Paul: Free Speech, Anti-Harassment Policies, Multicultural Education, and Political Correctness at Arizona State University, 1992 UTAH L. REV. 1205; Mark Cammack & Susan Davies, Should Hate Speech Be Prohibited in Law Schools?, 20 SW. U.L. REV. 145 (1991); Delgado, supra note 1; Lauri A. Ebel, University Anti-Discrimination Codes v. Free Speech, 23 N.M.L. REV. 169 (1993); Robert Ehrlich & Joseph Scimecca, Offensive Speech on Campus: Punitive or Educational Solutions?, 72 EDUC. REC. 26 (1991); Gerald Gunther, Good Speech Bad Speech: Should Universities Restrict Expression That Is Racist or Otherwise Denigrating? No, STAN. LAW., Spring 1990, at 7; Charles R. Lawrence III, Good Speech Bad Speech: Should Universities Restrict Expression That Is Racist or Otherwise Denigrating? Yes, STAN. LAW., Spring 1990, at 6 [hereinafter Lawrence, Good Speech Bad Speech]; Rhonda G. Hartman, Hateful Expression and First Amendment Values: Toward a Theory of Constitutional Constraint on Hate Speech at Colleges and Universities After R.A.V. v. St. Paul, 19 J.C. & U.L. 343 (1993); Patricia B. Hodulik, Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First Amendment and University Interests, 16 J.C. & U.L. 573 (1990); Robin M. Hulshizer, Comment, Securing Freedom from Harassment Without Reducing Freedom of Speech; Doe v. University of Michigan, 76 IOWA L. REV. 383 (1991).

[FN3]. Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal?, 1990 DUKE L.J. 484 (1990). Strossen, general counsel for the American Civil Liberties Union (ACLU), is at the forefront of the Civil Libertarian argument that holds that the constitutional value of free speech as inviolable. See also Murdock v. Pennsylvania, 319 U.S. 105, 115, 63 S. Ct. 870, 876 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position.").

[FN4]. See U.S. Const. amend. XIV, § 1; 20 U.S.C. §§ 1681-88 (1988) (Title IX of the Education Amendments of 1972); 42 U.S.C. § 2000d (1988) (Title VI of the Civil

Rights Act of 1964); 42 U.S.C. § 2000e to 2000e-17 (1988); see also Lawrence III, *If He Hollers Let Him Go*, *supra* note 1, in support of the equal protection argument. Although Charles Lawrence and Nadine Strossen are both devout civil libertarians and ACLU supporters, they disagree on certain civil liberties issues. Earlier versions of Lawrence's and Strossen's articles were presented as papers for a plenary session of the 1989 Biennial Conference of the ACLU. Papers presented at this session served as a basis of discussion by delegates in small working groups who then proposed policy resolutions for adoption by the convention. Following a spirited debate, a resolution supporting narrowly-framed restrictions of racist speech on campuses was defeated by the convention. On October 13, 1990, the ACLU National Board of Directors, without dissent, adopted a statement entitled "ACLU Policy Statement; Free Speech and Bias on College Campuses." This statement "reaffirms [the ACLU's] traditional and unequivocal commitment both to free speech and to equal opportunity." *Id.* at pml. The policy supports college and university "disciplinary codes aimed at restricting acts of harassment, intimidation and invasion of privacy," *Id.* § 3, and advocates the use of orientation, counseling, educational, and extracurricular programs, rather than the curtailment of speech, to address the question of invidious discrimination on campus. *Id.* § 4.

[FN5]. U.S. Const. amend. I.

[FN6]. *Id.*, amend. XIV, § 1.

[FN7]. *Id.*

[FN8]. Lawrence, *If He Hollers Let Him Go*, *supra* note 1; Matsuda, *supra* note 1. See also Calleros, *supra* note 2.

[FN9]. Current Arizona state statutes codify as crimes: threats and intimidation, Ariz. Rev. Stat. Ann § 13-1202 (1993); assault, *id.* § 13-1203 (1993); criminal damage to property, *id.* § 13-1602 (1993); unlawful assembly, *id.* § 13-2902 (1993); riot, *id.* § 13-2903 (1993); disorderly conduct, *id.* § 13-2904 (1993); interference with an educational institution, *id.* § 13-2911 (1993), and the use of the telephone to terrify, intimidate, threaten, harass, annoy, or offend, *id.* § 13-2916 (1993).

[FN10]. Arizona State University, Indiana University--Bloomington, Michigan State University, Ohio State University--Main, Pennsylvania State University--Main, Purdue University, San Diego State University, Texas A&M University, University of Arizona, University of California at Los Angeles, University of Florida, University of Houston--University Park, University of Illinois--Urbana-Champaign, University of Maryland--College Park, University of Michigan--Ann Arbor, University of Minnesota--Twin Cities, University of Texas--Austin, University of Washington, University of Wisconsin--Madison, and Wayne State University. Five additional universities were used in a pilot study for the survey. They were Rutgers University--New Brunswick, Temple University, University of California--Berkeley, University of Cincinnati--Main, and the University of South Florida. The authors express gratitude to the legal counsel at these universities for their cooperation in this study.

[FN11]. 1991 Enrollment by Race at 3,100 Institutions of Higher Education, *CHRON. HIGHER EDUC.*, Mar. 3, 1993, at A31. Not only were total enrollment figures reported, but this article also presented each institution's enrollment by race. Conspicuously absent from this list were University of California at Los Angeles and University of California--Berkeley. A disclaimer accompanying the list indicated that about 300 universities had not answered the survey distributed by the Chronicle, and therefore

were not included. Since it would be an oversight to exclude them, they were added to the list and equivalent data were obtained for them.

[FN12]. Judith I. Gill & Laura Saunders, Editor's Notes, 76 NEW DIRECTIONS FOR INSTITUTIONAL RESEARCH 1, 2 (1992). See also Cameron Fincher, Policy Analysis and Institutional Research, in KEY RESOURCES ON HIGHER EDUCATION GOVERNANCE, MANAGEMENT, AND LEADERSHIP: A GUIDE TO LITERATURE (Marvin W. Peterson & Lisa A. Mets eds., 1987). Fincher maintains that policy analysis "is the most effective means of clarifying policy issues, reshaping or redirecting policy, and establishing a less confused policy-making process." Id. at 283.

[FN13]. EDWARD S. QUADE, ANALYSIS FOR PUBLIC DECISIONS (1975).

[FN14]. A recent debate of the First Amendment and professors' classroom speech can be found in A.B.A. J., Feb. 1994, at 40-41.

[FN15]. Dennis Cauchon, Debate Over Competing Principles: Conflict May "End Up Splitting Us Apart", USA TODAY, Mar. 31, 1993, at A1; see also Bill Blum & Gina Lobaco, Fighting Words at the ACLU, CAL. LAW. REV., Feb. 1990, at 43; Susan Gellman, Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws, 39 UCLA L. REV. 333 (1991).

[FN16]. U.S. Const. amend. I (emphasis added).

[FN17]. Cauchon, supra note 15.

[FN18]. Civil rights are rights given, defined, and circumscribed by positive laws (which grant some right) enacted by civilized communities. See Sowers v. Ohio Civil Rights Comm'n, 252 N.E.2d 463, 474 (Ohio C.P. Trumbull County 1969). This case provides a thorough review of the concepts of civil rights and civil liberties. See also Thomas Grey, Civil Rights v. Civil Liberties: The Case of Discriminatory Verbal Harassment, 63 J. HIGHER EDUC. 485 (1992), for a thorough review of these issues.

Civil rights differ, in theory at least, from civil liberties in that civil rights are positive in nature, and civil liberties are negative in nature; that is civil liberties are immunities from governmental interference or limitations on governmental action (such as those embodied in the First Amendment) which have the effect of reserving rights to individuals.

Steven H. Gifis, BARRON'S LAW DICTIONARY 73 (3d ed. 1991) (emphasis added).

[FN19]. 347 U.S. 483, 74 S. Ct. 686 (1954).

[FN20]. 347 U.S. at 493, 74 S. Ct. at 691.

[FN21]. Craig B. Anderson, Comments, Political Correctness on Campuses: Freedom of Speech v. Doing the Politically Correct Thing, 46 SMU L. REV. 171 (1992).

[FN22]. Thomas I. Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 955-56 (1963).

[FN23]. Alan E. Brownstein, Regulating Hate Speech at Public Universities: Are First Amendment Values Functionally Incompatible with Equal Protection Principles?, 39 BUFF. L. REV. 1, 51 (1991).

[FN24]. Lawrence, *If He Hollers Let Him Go*, supra note 1; see also Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11 (1985); Lawrence, *Good Speech Bad Speech*, supra note 2; Charles R. Lawrence, III, *Speech That Harms: An Exchange: Acknowledging the Victims' Cry*, 76 ACADEME 10 (1990); Mari J. Matsuda et al., *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFF. L. REV. 337 (1989); Matsuda, supra note 1.

[FN25]. U.S. Const. amend. XIV, § 1 (emphasis added).

[FN26]. Delgado, supra note 1.

[FN27]. Chester E. Finn, Jr., *The Campus: "An Island of Repression in a Sea of Freedom"*, COMMENTARY, Sept. 1989, at 17. See also Matsuda, supra note 1, at 2338 ("To be hated, despised, and alone is the ultimate fear of all human beings.").

[FN28]. Matsuda, supra note 1, at 2376.

[FN29]. Delgado, supra note 1, at 348.

[FN30]. *Id.* at 384.

[FN31]. Collin v. Smith, 447 F. Supp. 676, 691 (N.D. Ill. 1978) (quoting Kunz v. New York, 340 U.S. 290, 299, 71 S. Ct. 312, 317 (1951) (Jackson, J., dissenting)).

[FN32]. Delgado, supra note 1, at 348.

[FN33]. *Id.* at 378.

[FN34]. Robert A. Sedler, The Unconstitutionality of Campus Bans on "Racist Speech: The View From Without and Within, 53 U. PITT. L. REV. 631, 632 (1992).

[FN35]. Richard Delgado et al., Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research, 31 UCLA L. REV. 128 (1983). Delgado and his colleagues conclude that "regulation of genuinely scientific Race-IQ research would be constitutional if narrowly aimed at those specific social harms that may arise immediately and demonstrably from the very act of research: stigma, psychological injury, and the risk of violence." Id. at 225.

[FN36]. Sean M. Selegue, Campus Anti-Slur Regulations: Speakers, Victims, and the First Amendment, 79 CAL. L. REV. 919 (1991); see also Lawrence, *If He Hollers Let Him Go*, supra note 1, at 466 (commenting that it is difficult to use the "marketplace of ideas" to solve minority concerns when "most blacks-- unlike many white civil libertarians--do not have faith in free speech as the most important vehicle for liberation.").

[FN37]. For a more comprehensive analysis of the public forum than is permitted in this article, see STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT: CASES, COMMENTS, QUESTIONS (1991); Robert C. Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L. REV. 1713 (1987); Geoffrey R. Stone, Fora Americana: Speech in Public Places, 1974 SUP. CT. REV. 233. For a treatment of this issue as it relates specifically to the university, see Brownstein, *supra* note 23; Harry Kalven, Jr., The Concept of the Public Forum: Cox v. Louisiana, 1965 SUP. CT. REV. 1.

[FN38]. Vince Blasi, Prior Restraints on Demonstrations, 68 MICH. L. REV. 1482, 1484 (1970).

[FN39]. 39 N.E. 113 (Mass. 1895).

[FN40]. Id. at 113.

[FN41]. Davis v. Massachusetts, 167 U.S. 43, 48, 17 S. Ct. 731, 733 (1897).

[FN42]. SHIFFRIN & CHOPER, *supra* note 37, at 369.

[FN43]. 307 U.S. 496, 59 S. Ct. 954 (1939).

[FN44]. 307 U.S. at 515, 59 S. Ct. at 964.

[FN45]. 308 U.S. 147, 60 S. Ct. 146 (1939).

[FN46]. 308 U.S. at 160, 60 S. Ct. at 150.

[FN47]. 308 U.S. at 161, 60 S. Ct. at 150.

[FN48]. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 105 S. Ct. 3439 (1985).

[FN49]. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

[FN50]. Papish v. Board of Curators, 410 U.S. 667, 93 S. Ct. 1197 (1973); Healy v. James, 408 U.S. 169, 92 S. Ct. 2338 (1972).

[FN51]. United States v. O'Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968); see also R.A.V., 112 S. Ct. at 2544. In Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746 (1989), the Court indicates that any restriction on time, place or manner "need not be the least restrictive or least intrusive means of doing so." 491 U.S. at 798, 109 S. Ct. at 2757-58.

[FN52]. Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 648, 101 S. Ct. 2559, 2564 (1981); see also R.A.V., 112 S. Ct. 2538 (1992); Ward, 491 U.S. 781, 109 S. Ct. 2746 (1989); Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495 (1988); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S. Ct. 2882 (1981); Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S. Ct. 1817 (1976); Papish, 410 U.S. 667, 93 S. Ct. 1197 (1973); Cox v. Louisiana, 379 U.S. 536, 85 S. Ct. 453 (1965); Cox v. New Hampshire, 312 U.S. 569, 61 S. Ct. 762 (1941); Shelton v. Trustees of Ind. Univ., 891 F.2d 165 (7th Cir. 1989).

[FN53]. 473 U.S. 788, 105 S. Ct. 3439 (1985).

[FN54]. 473 U.S. at 800, 105 S. Ct. at 3448.

[FN55]. 473 U.S. at 802, 105 S. Ct. at 3449; see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46, 103 S. Ct. 948, 955 (1983).

[FN56]. 473 U.S. at 792, 105 S. Ct. at 3443.

[FN57]. 473 U.S. at 790, 105 S. Ct. at 3443.

[FN58]. 473 U.S. at 806, 105 S. Ct. at 3451.

[FN59]. Id.

[FN60]. See, e.g., Greer v. Spock, 424 U.S. 828, 96 S. Ct. 1211 (1976) (holding that a military base is not a public forum).

[FN61]. 354 U.S. 234, 77 S. Ct. 1203 (1957).

[FN62]. Papish, 410 U.S. 667, 98 S. Ct. 1197 (1973). See also Abrams v. United States, 250 U.S. 616, 630, 40 S. Ct. 17, 22 (1919).

[FN63]. Healy, 408 U.S. at 171, 92 S. Ct. at 2341. See also Robert W. McGee, Hate Speech, Free Speech and the University, 24 AKRON L. REV. 363, 391 (1990) ("In order to protect valuable speech from attack, it is necessary to protect speech that is valueless as well.").

[FN64]. 354 U.S. at 250, 77 S. Ct. at 1211-12.

[FN65]. Calvin R. Massey, Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression, 40 UCLA L. REV. 103 (1992). Massey provides a comprehensive overview of free speech theories as they relate to hate speech and the First Amendment and also discusses the harms which are a result of the abuse of that freedom.

[FN66]. Kent R. Greenawalt, Free Speech Justifications, 89 COLUM. L. REV. 119 (1989).

[FN67]. Id. at 130.

[FN68]. Id.

[FN69]. Id. at 141-42.

[FN70]. LEE BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

[FN71]. See Cass R. Sunstein, *Ideas, Yes; Assaults, No*, in *FIRST AMENDMENT LAW HANDBOOK* 399 (James L. Swanson ed., 1992-93 ed.); Lawrence, *If He Hollers Let Him Go*, *supra* note 1; Matsuda, *supra* note 1.

[FN72]. 249 U.S. 47, 39 S. Ct. 247 (1919).

[FN73]. 249 U.S. at 52, 39 S. Ct. at 249.

[FN74]. 315 U.S. 568, 62 S. Ct. 766 (1942).

[FN75]. 315 U.S. at 569, 62 S. Ct. at 768.

[FN76]. 315 U.S. at 572, 62 S. Ct. at 769 (quoting ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 149 (1941)).

[FN77]. 315 U.S. at 573, 62 S. Ct. at 770 (quoting *State v. Brown*, 38 A. 731 (N.H. 1895)). See also *State v. McConnell*, 47 A. 267 (N.H. 1900).

[FN78]. 447 F. Supp. 676 (N.D. Ill.), aff'd, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916, 99 S. Ct. 291 (1978).

[FN79]. 343 U.S. 250, 72 S. Ct. 725 (1952).

[FN80]. 578 F.2d at 1203.

[FN81]. 112 S. Ct. 2538 (1992).

[FN82]. 408 U.S. 104, 111, 92 S. Ct. 2294, 2300 (1972).

[FN83]. 393 U.S. 503, 89 S. Ct. 733 (1969).

[FN84]. 393 U.S. at 506, 89 S. Ct. at 736.

[FN85]. See Hazelwood v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562 (1988) (freedom of the press); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 106 S. Ct. 3159 (1986) (oral speech).

[FN86]. 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965, 90 S. Ct. 2169 (1970).

[FN87]. 415 F.2d at 1089.

[FN88]. 408 U.S. 169, 92 S. Ct. 2338 (1972).

[FN89]. Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993); R.A.V., 112 S. Ct. 2538 (1992); UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

[FN90]. 721 F. Supp. 852 (E.D. Mich. 1989).

[FN91]. Id. at 854.

[FN92]. Id.

[FN93]. Id. at 855.

[FN94]. Id. at 856.

[FN95]. Id. at 855.

[FN96]. Kenneth Shaw, president of the University of Wisconsin, declared that his school's policy "send[s] a message to minority students that the board and its administration do care." See Finn, *supra* note 1, at 17.

[FN97]. 721 F. Supp. at 856 ("[e]ducational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers").

[FN98]. Id. The second part of the rule read much the same way except that it addressed conduct involving sexual harassment.

[FN99]. Id. The provision regarding sexual harassment, however, was allowed to remain intact. Perhaps this was because the concept of sexual harassment had a track record of legislative and judicial backing and had already passed constitutional muster. See, e.g., Mary Gray, Academic Freedom and Nondiscrimination: Enemies or Allies?, 66 TEX. L. REV. 1591 (1988).

[FN100]. Doe v. University of Mich., 721 F. Supp. at 858.

[FN101]. Id. at 866-67.

[FN102]. Id. at 859.

[FN103]. Id. at 863 (citations omitted).

[FN104]. 410 U.S. 667, 93 S. Ct. 1197 (1973).

[FN105]. 410 U.S. at 670, 93 S. Ct. at 1199; see also Healy, 408 U.S. 169, 92 S. Ct. 2338 (1972).

[FN106]. See Papish, 410 U.S. at 670, 93 S. Ct. at 1199; Healy, 408 U.S. at 192, 92 S. Ct. at 2352.

[FN107]. 339 U.S. at 511, 89 S. Ct. at 739.

[FN108]. 774 F. Supp. 1163 (E.D. Wis. 1991).

[FN109]. Id. at 1165.

[FN110]. Id. at 1181.

[FN111]. Chaplinsky, 315 U.S. at 572, 62 S. Ct. at 769 ("those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

[FN112]. 315 U.S. at 573, 62 S. Ct. at 770 ("The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight.").

[FN113]. UWM Post, 774 F. Supp. at 1174.

[FN114]. Id. at 1176-77.

[FN115]. The prong of the Chaplinsky test which allowed regulation of speech which "inflicts injury" or affects the "sensibilities" of the hearer did not meet the requirements of fighting words. The infliction of injury prong was also rejected in Collin, 578 F.2d 1197 (7th Cir. 1978).

[FN116]. UWM Post, 774 F. Supp. at 1177. This case specifically discusses Title VII, but the rationale would also be applicable to Title VI, which declared that "[n]o 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." 42 U.S.C. § 2000d (1988) (Title VI of the Civil Rights Act of 1964). These codes specifically govern the actions of state actors or state programs, therefore, the actions of individuals who are not state actors (usually state employees) are not governed by these codes.

[FN117]. 112 S. Ct. 2538 (1992).

[FN118]. Id. at 2540.

[FN119]. The court in *R.A.V.* reaffirmed Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533 (1989), the highly-publicized flag burning case, saying that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses--so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.

. . . The government may not regulate use based on hostility--or favoritism--towards the underlying message expressed.

R.A.V., 112 S. Ct. at 2544-45; see also Akhil R. Amar, Comment, The Case of the Missing Amendments: R.A.V. v. St. Paul, 106 HARV. L. REV. 124 (1992). But see Alex Kozinski & Eugene Volokh, Commentary, A Penumbra Too Far, 106 HARV. L. REV. 1639 (1993).

[FN120]. Christopher Shea, Court's Decision on "Hate Crimes" Sows Confusion, CHRON. HIGHER EDUC., July 29, 1992, at A26.

[FN121]. Id.

[FN122]. Id.

[FN123]. Id.

[FN124]. R.A.V., 112 S. Ct. at 2540.

[FN125]. Id. at 2540, 2545.

[FN126]. Id. at 2541.

[FN127]. Id. at 2543. Justice Scalia specifically addressed the fact that obscenity, defamation, libel, and "fighting words" are areas of speech that "can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content." Id. (emphasis added). However, it appears that these are the only content-based limitations permitted.

[FN128]. 485 N.W.2d 807 (Wis. 1992), rev'd, 113 S. Ct. 2194 (1993).

[FN129]. R.A.V., 112 S. Ct. 2538 (1992). The Mitchell court also quoted *R.A.V.* to justify its decision.

[FN130]. 485 N.W.2d at 809.

[FN131]. Id. at 811.

[FN132]. Id. at 815.

[FN133]. Mitchell, 113 S. Ct. at 2202.

[FN134]. Id. at 2196 (emphasis added).

[FN135]. Id. (emphasis added); see also Jonathan D. Selbin, Note, *Bashers Beware: The Continuing Constitutionality of Hate Crimes Statutes After R.A.V.*, 72 OR. L. REV. 157 (1993). Selbin argues that while "laws prohibiting hate speech . . . are clearly invalid under current First Amendment jurisprudence, . . . hate crimes statutes . . . are . . . constitutionally valid." Id. at 203.

[FN136]. Mitchell, 113 S. Ct. at 2197.

[FN137]. R.A.V., 112 S. Ct. at 2541.

[FN138]. 112 S. Ct. 1093 (1992).

[FN139]. Mitchell, 113 S. Ct. at 2196.

[FN140]. Id. at 2201.

[FN141]. 17 Cal. Rptr. 2d 291 (Cal. Ct. App. 1993).

[FN142]. Ohio v. Wyant, 597 N.E.2d 450 (Ohio 1992), cert. granted and judgment vacated, 113 S. Ct. 2954 (1993) and rev'd, 624 N.E.2d 722 (Ohio 1994); Mitchell, 485 N.W.2d 807 (Wis. 1992), rev'd, 113 S. Ct. 2194 (1993).

[FN143]. In re Joshua H., 17 Cal. Rptr. 2d at 296, 298-99 (citations omitted).

[FN144]. 838 P.2d 558, 560 (Or. 1992), cert. denied, 113 S. Ct. 2967 (1993); see also Dobbins v. Florida, 605 So. 2d 922 (Fla. Dist. Ct. App. 1992). In *Dobbins*, the court upheld Florida's "hate crimes" statute, with much the same rationale. That law punishes any offense, the commission of which "evidences prejudice based on the race, color, ancestry, ethnicity, religion or national origin of the victim." Id. at 923. The law does not target conduct based on its expressive content, but rather the act of discriminating against people, making them victims of a crime. Therefore, the court ruled that the statute does not punish protected speech.

[FN145]. 838 P.2d at 560.

[FN146]. 993 F.2d 386 (4th Cir. 1993).

[FN147]. "[A] physical assault is not by any stretch of the imagination expressive

conduct protected by the First Amendment." Mitchell, 113 S. Ct. at 2199.

[FN148]. Scott Jaschik, High Court's Ruling on Bias Crimes May Permit Hate Speech Penalties, CHRON. HIGHER EDUC., June 23, 1993, at A22. Jaschik also indicates that in addition to adding some teeth to existing criminal codes, "some college officials believe the ruling opened the way for public colleges to use similar policies in their campus codes of conduct." Id.

[FN149]. Id.

[FN150]. Id.

[FN151]. See Massey, supra note 65. This article provides a good overview of contentbased restrictions on speech since R.A.V., but before Mitchell.

[FN152]. 113 S. Ct. at 2196. The Court stated further that "[t]he State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases." Id. at 2201.

[FN153]. 485 U.S. 312, 108 S. Ct. 1157 (1988).

[FN154]. 485 U.S. at 321, 108 S. Ct. at 1163.

[FN155]. 112 S. Ct. 1846 (1992).

[FN156]. Id. at 1851.

[FN157]. Matsuda, supra note 1; see also Peter Monaghan, "Critical Race Theory" Questions Role of Legal Doctrine in Racial Inequity, CHRON. HIGHER EDUC., June 23, 1993, at A7; Michael A.G. Korengold, Note, Lessons in Confronting Racist Speech: Good Intentions, Bad Results, and Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination, 77 MINN. L. REV. 719 (1993).

[FN158]. Matsuda, supra note 1.

[FN159]. Robert F. Drinan, Should Hate Speech on Campus Be Punished?, AMERICA, Sept. 21, 1991, at 167. Drinan points out that "the United States is the only country in the world that has no law restricting speech." Id. at 167. See also Andrew Altman, Liberalism and Campus Hate Speech: A Philosophical Examination, ETHICS, Jan. 1993, at 302. Altman argues that a middle ground could be reached in which "speech acts of subordination" should be regulated. Id. at 317.

[FN160]. R.S.C., ch. C-46, § 319 (1985) (Can.), quoted in Massey, supra note 65, at 187.

[FN161]. Id., quoted in Massey, supra note 65, at 187-88 (emphasis added).

[FN162]. Id., quoted in Massey, *supra* note 65, at 189.

[FN163]. Leslie Epstein, *Civility and Its Discontents*, in *FIRST AMENDMENT LAW HANDBOOK* 381 (James L. Swanson ed., 1992-93 ed.).

[FN164]. 858 F.2d 345 (6th Cir. 1988), cert. denied, 490 U.S. 1110, 109 S. Ct. 3166 (1989).

[FN165]. 858 F.2d at 346.

[FN166]. 477 U.S. 57, 106 S. Ct. 2399 (1986). In this landmark case of Title VII workplace harassment, the Court held, *inter alia*, that an employer can be held liable for sexual harassment of one employee by another and that Title VII allows for a private right of action.

[FN167]. UWM Post, 774 F. Supp. at 1177.

[FN168]. Id.

[FN169]. 113 S. Ct. at 2196.

[FN170]. Id. at 2200 (emphasis added).

[FN171]. UWM Post, 774 F. Supp. at 1181.

[FN172]. Matsuda, *supra* note 1, at 2323.

[FN173]. Id.

[FN174]. Haviland, *supra* note 1, at 317.

[FN175]. Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling, 17 *HARV. C.R.-C.L. L. REV.* 133 (1982).

[FN176]. 578 F.2d at 1203; see also UWM Post, 774 F. Supp. at 1170; Note, The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Interment, 106 *HARV. L. REV.* 1129 (1993).

[FN177]. John T. Shapiro, Note, The Call for Campus Conduct Policies: Censorship or Constitutionally Permissible Limitations on Speech, 75 *MINN. L. REV.* 201, 229 (1990).

[FN178]. See Texas v. Johnson, 491 U.S. at 414, 109 S. Ct. at 2545 ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not

prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Terminiello v. Chicago, 337 U.S. 1, 4, 69 S. Ct. 894, 896 (1948) (A principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642, 63 S. Ct. 1178, 1187 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); UWM Post, 774 F. Supp. at 1181 ("[F]reedom of speech is almost absolute in our land. . . . Contentbased prohibitions such as that in the UWM Rule, however well intended, simply cannot survive the screening which our Constitution demands.").

[FN179]. See Leikvold v. Valley View Community Hosp., 688 P.2d 170 (Ariz. 1984); Mullins v. Pine Manor College, 449 N.E.2d 331 (Mass. 1983); Commonwealth v. Tate, 432 A.2d 1382 (Pa. 1981).

[FN180]. 432 A.2d 1382.

[FN181]. 449 N.E.2d 331 (Mass. 1983).

[FN182]. For a more comprehensive discussion of the state action doctrine or finding of interdependent relationships between the state and private universities, see Robert M. Hendrickson, *The Colleges, Their Constituencies and the Courts*, in NATIONAL ORGANIZATION ON LEGAL PROBLEMS IN EDUCATION, Monograph No. 43 (1991).

[FN183]. Chaplinsky, 315 U.S. at 572, 62 S. Ct. at 769; see also Doe v. University of Mich., 721 F. Supp. at 862.

[FN184]. *Id.*; see also R.A.V., 112 S. Ct. 2538 (1992); Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533 (1989); Miller v. California, 413 U.S. 15, 93 S. Ct. 2607 (1973); Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827 (1969); Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973).

[FN185]. R.A.V., 112 S. Ct. at 2547-50; see also Mitchell, 113 S. Ct. 2194 (1993); Sigma Chi, 993 F.2d 386 (4th Cir. 1993); Philip Weinberg, R.A.V. and Mitchell: Making Hate Crime a Trivial Pursuit, 25 CONN. L. REV. 299, 312 (1993) ("[N]o court, until now, has ruled that the state may ban all fighting words, though not racist fighting words as a group in themselves.").

[FN186]. Cohen v. California, 403 U.S. 15, 20, 91 S. Ct. 1780, 1785 (1971); see also UWM Post, 774 F. Supp. at 1171.

[FN187]. UWM Post, 774 F. Supp. at 1170-71; see also Mitchell, 113 S. Ct. 2194 (1993); Lewis v. City of New Orleans, 415 U.S. 130, 94 S. Ct. 970 (1974); Gooding v. Wilson, 405 U.S. 518, 92 S. Ct. 1103 (1972); Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780 (1971).

[FN188]. Texas v. Johnson, 491 U.S. at 409, 109 S. Ct. at 2542; see also UWM Post, 774 F. Supp. at 1171.

[FN189]. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 103 S. Ct. 948, 955 (1983); see also Sigma Chi, 993 F.2d 386 (4th Cir. 1993).

[FN190]. R.A.V., 112 S. Ct. 2538 (1992); Papish, 410 U.S. at 670, 93 S. Ct. at 1199; Healy, 408 U.S. at 192, 92 S. Ct. at 2352; see also McLaughlin v. Florida, 379 U.S. 184, 85 S. Ct. 283 (1964); Shelton v. Trustees of Ind. Univ., 891 F.2d 165 (7th Cir. 1989); Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992 (5th Cir. 1975).

[FN191]. United States v. O'Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968). These four elements are known as the O'Brien test. See also R.A.V., 112 S. Ct. at 2544. However, in Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746 (1989), the Court indicates that any restriction on time, place, or manner "need not be the least restrictive or least intrusive means of doing so." 491 U.S. at 798, 109 S. Ct. at 2757-58.

[FN192]. Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 648, 101 S. Ct. 2559, 2564 (1981); see also R.A.V., 112 S. Ct. 2538 (1992); Ward, 491 U.S. 781, 109 S. Ct. 2746 (1989); Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495 (1988); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S. Ct. 2882 (1981); Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S. Ct. 1817 (1976); Papish, 410 U.S. 667, 93 S. Ct. 1197 (1973); Cox v. Louisiana, 379 U.S. 536, 85 S. Ct. 453 (1965); Cox v. New Hampshire, 312 U.S. 569, 61 S. Ct. 762 (1941); Shelton v. Trustees of Ind. Univ., 891 F.2d 165 (7th Cir. 1989).

[FN193]. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 505, 89 S. Ct. 733, 735 (1969); see also Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533 (1989); Healy v. James, 408 U.S. 169, 92 S. Ct. 2338 (1972); Esteban v. Central Mo. State College, 415 F.2d 1077, 1086 (8th Cir. 1969); Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966).

[FN194]. Tinker, 393 U.S. at 508, 89 S. Ct. at 737.

[FN195]. See Healy, 408 U.S. 169, 92 S. Ct. 2338 (1972); see also Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992 (5th Cir. 1975); Sword v. Fox, 446 F.2d 1091 (4th Cir.), cert. denied, 404 U.S. 994, 92 S. Ct. 534 (1971). In Doe v. University of Michigan, the court said "it can be safely said that most extreme and blatant forms of discriminatory conduct are not protected by the First Amendment, and indeed are punishable by a variety of state and federal criminal laws and subject to civil actions." 721 F. Supp. at 861.

[FN196]. See Doe v. University of Mich., 721 F. Supp. at 861-62, for a more complete listing of the possible civil and criminal codes which could be used to sanction students' conduct.

[FN197]. UWM Post, 774 F. Supp. at 1179. However, the rule in the case of UWM Post was "ambiguous since it failed to make clear whether the speaker must actually create a hostile educational environment or if he must merely intend to do so." Id.

[FN198]. Id. at 1170.

[FN199]. Cohen v. California, 403 U.S. 15, 21, 91 S. Ct. 1780, 1786 (1971); see also Rowan v. United States Post Office, 397 U.S. 728, 90 S. Ct. 1484 (1970). On-campus residence halls would probably fall under this protective umbrella, however, quasi-public lounges in the residence halls may not.

[FN200]. Collin, 578 F.2d at 1206.

[FN201]. FCC v. Pacifica Found, 438 U.S. 726, 748, 98 S. Ct. 3026, 3040 (1978); see also Frisby, 487 U.S. 474, 108 S. Ct. 2495 (1988); Grayned, 408 U.S. 104, 92 S. Ct. 2294 (1972); Rowan v. United States Post Office, 397 U.S. 728, 90 S. Ct. 1484 (1970); Kovacs v. Cooper, 336 U.S. 77, 69 S. Ct. 448 (1949).

[FN202]. United States v. Lee, 935 F.2d 952 (8th Cir. 1991).

[FN203]. UWM Post, 774 F. Supp. at 1178; see also Grayned, 408 U.S. at 114, 92 S. Ct. at 2302; Pickering v. Board of Educ., 391 U.S. 563, 88 S. Ct. 1731 (1968); Sword v. Fox, 446 F.2d 1091 (4th Cir.), cert. denied, 404 U.S. 994, 92 S. Ct. 534 (1971); UWM Post, 774 F. Supp. at 1180; Collin, 578 F.2d 1197 (7th Cir. 1978).

[FN204]. UWM Post, 774 F. Supp. at 1178.

[FN205]. See Dixon v. Alabama, 294 F.2d 150 (5th Cir. 1961); see also Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992 (5th Cir. 1975); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

[FN206]. R.A.V., 112 S. Ct. at 2548 (quoting In re Welfare of R.A.V., 464 N.W.2d 507, 508 (Minn. 1991)).

[FN207]. Joyner v. Whiting, 477 F.2d 456, 457 (4th Cir. 1973).

[FN208]. R.A.V., 112 S. Ct. at 2548; see also Sigma Chi, 993 F.2d 386 (4th Cir. 1993); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

[FN209]. R.A.V., 112 S. Ct. at 2547-48.

[FN210]. See R.A.V., 112 S. Ct. at 2547; see also UWM Post, 774 F. Supp. at 1174.

[FN211]. R.A.V., 112 S. Ct. at 2547; see also Mitchell, 113 S. Ct. 2194 (1993); Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269 (1981); Carey v. Brown, 447 U.S. 455, 100 S. Ct. 2286 (1980); Police Dep't v. Mosley, 408 U.S. 92, 92 S. Ct. 2206 (1972); Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780 (1971); McLaughlin v. Florida, 379 U.S. 184, 85 S. Ct. 283 (1964); Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988); UWM Post, 774 F. Supp. 1163 (E.D. Wis. 1991); Sigma Chi, 993 F.2d 386 (4th Cir. 1993).

[FN212]. Chaplinsky, 315 U.S. 568, 62 S. Ct. 766 (1942); see also Miller v. California, 413 U.S. 15, 93 S. Ct. 2607 (1973); Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780 (1971); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

[FN213]. Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); see also Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 99 S. Ct. 291 (1969).

[FN214]. Cohen v. California, 403 U.S. 15, 26, 91 S. Ct. 1780, 1788 (1971); see also UWM Post, 774 F. Supp at 1175.

[FN215]. Doe v. University of Mich., 721 F. Supp. at 863, referring to Texas v. Johnson, 491 U.S. at 414, 109 S. Ct. at 2544; see also Mitchell, 113 S. Ct. 2194 (1993); United States v. Eichman, 496 U.S. 310, 110 S. Ct. 2404 (1990); Papish, 410 U.S. at 670, 93 S. Ct. at 1199; Healy, 408 U.S. 169, 92 S. Ct. 2338 (1972); Street v. New York, 394 U.S. 576, 89 S. Ct. 1354 (1969); Sigma Chi, 993 F.2d 386 (4th Cir. 1993); Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973); Collin, 578 F.2d 1197 (7th Cir. 1978).

[FN216]. R.A.V., 112 S. Ct. at 2549-50. The Court indicates further that "the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids." Id. at 2550 (footnote omitted).

[FN217]. UWM Post, 774 F. Supp. at 1177. This case specifically discusses Title VII, but the rationale would also be applicable to Title VI.

[FN218]. Doe v. University of Mich., 721 F. Supp. at 859.

[FN219]. Id.

[FN220]. UWM Post, 774 F. Supp. at 1172, 1181.

[FN221]. Collin, 578 F.2d at 1203; see also UWM Post, 774 F. Supp. at 1171.

[FN222]. Grayned, 408 U.S. at 111, 92 S. Ct. at 2300; see also City of Houston v. Hill, 482 U.S. 451, 107 S. Ct. 2502 (1987); Lewis v. City of New Orleans, 415 U.S. 130, 94 S. Ct. 970 (1974).

[FN223]. Grayned, 408 U.S. at 116, 92 S. Ct. at 116; Sword v. Fox, 446 F.2d 1091 (4th Cir. 1971); see also Kovacs v. Cooper, 336 U.S. 77, 69 S. Ct. 448 (1949); Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992 (5th Cir. 1975).

[FN224]. Collin, 447 F. Supp. at 685.

[FN225]. Schneider v. New Jersey, 308 U.S. 147, 60 S. Ct. 146 (1939). However, rules may be made against throwing literature broadcast in the streets.

[FN226]. UWM Post, 774 F. Supp. at 1166.

[FN227]. Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 107 S. Ct. 2568 (1987).

[FN228]. Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n, 773 P.2d 455 (Ariz. 1989).

[FN229]. Connally v. General Constr. Co., 296 U.S. 385, 46 S. Ct. 126 (1926); see also Smith v. Goguen, 415 U.S. 566, 94 S. Ct. 1242 (1974).

[FN230]. UWM Post, 774 F. Supp. at 1180; see also Doe v. University of Michigan, in which a policy was found to be vague because "looking at the plain language of the policy, it was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct." 721 F. Supp. at 867.

[FN231]. City of Houston v. Hill, 482 U.S. 451, 107 S. Ct. 2502 (1987); see also NAACP v. Button, 371 U.S. 415, 433, 83 S. Ct. 328, 338 (1963).

[FN232]. Each university publication was referenced in the microform, College Catalog Collection (1992), to assure that the guidelines and regulations were published.

[FN233]. ARIZONA STATE UNIVERSITY, STUDENT CODE OF CONDUCT ¶ E-8 (1990) (emphasis added) [hereinafter ARIZONA STUDENT CODE].

[FN234]. INDIANA UNIVERSITY, CODE OF STUDENT ETHICS ¶ III.B.17 (1990) [[hereinafter INDIANA STUDENT CODE].

[FN235]. Ind. Code Ann. § 35-42-2-2(a) (Burns 1994).

[FN236]. Fla. Stat. Ann. § 240.262 (West 1989) (emphasis added).

[FN237]. UNIVERSITY OF FLORIDA, THE STUDENT GUIDE 1992 - 1993 63 (1992) (emphasis added) [hereinafter FLORIDA STUDENT GUIDE].

[FN238]. UNIVERSITY OF MICHIGAN, THE UNIVERSITY OF MICHIGAN'S STATEMENT OF STUDENT RIGHTS AND RESPONSIBILITIES ¶ IV.A.5 (1993) (emphasis added).

[FN239]. ARIZONA STUDENT CODE, supra note 233, ¶ F-10 (emphasis added).

[FN240]. 113 S. Ct. at 2197.

[FN241]. INDIANA STUDENT CODE, supra note 234, ¶ I.A.4.

[FN242]. Ind. Code Ann. § 4-15-2-40 (Burns 1992).

[FN243]. TEXAS A&M UNIVERSITY, UNIVERSITY REGULATIONS ¶ 57 (1992) [[hereinafter

TEXAS A&M REGULATIONS].

[FN244]. FLORIDA STUDENT GUIDE, supra note at 237, at 64-65.

[FN245]. Fla. Stat. Ann § § 784.048 (West 1992 & Supp. 1994) (harassment); id. § § 914.24, 934.03 (West 1985 & Supp. 1994) (harassment); id. § 876.155 (West Supp. 1994) (intimidation); id. § 876.20 (West 1976) (intimidation); id. § 415.102 (West 1993) (abused persons).

[FN246]. INDIANA STUDENT CODE, supra note 234, ¶ 1.E.4.

[FN247]. Campus Demonstrations.

1. Demonstrations may be held anywhere on the campus, so long as they do not disrupt the normal operation of the University community, except that no demonstrations are permitted inside University buildings. Although no specific areas on the campus are designated for the purpose of demonstrations or impromptu speech, exclusive use of the [plaza] for this purpose may be obtained by prior clearance through the Public Functions Office. Any use of sound amplification equipment on the campus must also have prior clearance through this office.

2. In order that demonstrators not interfere with the operation of the University or the rights of others, they shall not:

- (a) obstruct vehicular, bicycle, pedestrian, or other traffic;
- (b) obstruct entrances or exits to buildings or driveways;
- (c) interfere with educational activities inside or outside the building[;]
- (d) harass passersby or otherwise disrupt normal activities;
- (e) interfere with or preclude a scheduled speaker from being heard;
- (f) interfere with scheduled University ceremonies or events; or
- (g) damage property, including lawns, shrubs, or trees.

3. In the event of disruptive action, University employees and students involved in the demonstration shall identify themselves by presenting appropriate documents such as current fee cards when requested to do so by the President or his/her designated representative, and such representative will identify him/herself when making this request. Demonstrators not officially related to the University of Florida will be directed to leave the campus immediately or be subject to arrest for a violation of the law.

FLORIDA STUDENT GUIDE, supra note 237, at 60-61.

[FN248]. TEXAS A&M REGULATIONS, supra note 243, at 3.

[FN249]. Purdue University Board of Trustees, Meeting Minutes (November 1992) (emphasis added) (copy on file with the authors).

[FN250]. University of Minnesota, A Statement of Standards of Student Conduct Enforceable by University Agencies ¶ II.7 (1991).

[FN251]. TEXAS A&M REGULATIONS; supra note 243, at 4. One concern with this statement is that it indicates students have the right to be free from "harassment." However, this statement does not actually prohibit or define harassment; nor is "harassment" codified in state law. This rule could prove to be vague and ambiguous to students (Section II.B.3.d.).

[FN252]. Id.

[FN253]. 993 F.2d at 391.

[FN254]. UCLA, ACTIVITY GUIDELINES 45 (1986) (emphasis added).

[FN255]. 993 F.2d 386 (4th Cir. 1993); see also Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533 (1989); Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780 (1971).

[FN256]. TEXAS A&M REGULATIONS, supra note 243, ¶ 50(5)(a) (emphasis added).

[FN257]. Texas Educ. Code Ann. § 4.51(6) (West 1991) (emphasis added).

[FN258]. TEXAS A&M REGULATIONS, supra note 243, ¶ 50(5)(a)(6).

[FN259]. UCLA, POLICIES APPLYING TO CAMPUS ACTIVITIES, ORGANIZATIONS, AND STUDENTS ¶ 51.16 (1983).

[FN260]. Id. ¶ 51.00 (as amended by an open letter from the Office of the President, Sept. 21, 1989) (emphasis added) (copy on file with the authors).

[FN261]. University of Maryland, Policy on Acts of Violence and Extremism (1990) (emphasis added).

[FN262]. UNIVERSITY OF MARYLAND, CODE OF STUDENT CONDUCT, at Letter of Introduction from Gary Pavela, Director of Judicial Programs, to students (1991).

[FN263]. Id. ¶ 12.C.

[FN264]. UWM Post, 774 F. Supp. at 1165.

[FN265]. Id. at 1168.

[FN266]. 315 U.S. at 572, 62 S. Ct. at 769 ("those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

[FN267]. 315 U.S. at 573, 62 S. Ct. at 770 ("The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight.").

[FN268]. TEXAS A&M REGULATIONS, supra note 243, ¶ 50(6).

[FN269]. FLORIDA STUDENT GUIDE, supra note 237, ¶ VI.

[FN270]. This was the current state of affairs in May 1993 when the survey was

conducted.

[FN271]. 721 F. Supp. 852 (E.D. Mich. 1989).

[FN272]. See David F. McGowan & Ragesh K. Tangri, A Libertarian Critique of University Restrictions of Offensive Speech, 79 CAL. L. REV. 825 (1991).

[FN273]. Id. at 825.

[FN274]. See Suzanna Sherry, Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech, 75 MINN. L. REV. 933 (1991). Sherry argues that manners may be coerced by "hate speech" rules, but virtue, "an internal state of mind" which contributes to good citizenship, cannot be enforced by government.

[FN275]. For example, under Arizona law this could include: Ariz. Rev. Stat. Ann. § 13-1202 (1993) (threats or intimidation); id. § 13-1203 (1993) (assault); id. § 13-2916 (1993) (use of the telephone to terrify, intimidate, threaten, harass, annoy or offend); id. § 13-1602 (1993) (criminal damage to property); id. § 13-2902 (1993) (unlawful assembly); id. § 13-2903 (1993) (riot); id. § 13-2904 (1993) (disorderly conduct); id. § 13-2911 (1993) (interference with an educational institution); or id. § 13-2921 (1993) (harassment).

[FN276]. See ARIZONA STATE UNIVERSITY, CAMPUS ENVIRONMENT TEAM REFERRAL GUIDEBOOK (1992), for ideas regarding the establishment of such an approach to controlling the number of "hate speech" incidents and successfully mediating those which do occur.

[FN277]. Thomas W. Simon, Comment, Fighting Racism: Hate Speech Detours, 26 IND. L. REV. 411, 423 (1993).

[FN278]. Robert Slavin & Nancy Madden, School Practices That Improve Race Relations, 16 AM. EDUC. RES. J. 169 (1979).

[FN279]. Id. at 169.

[FN280]. Id.

[FN281]. Edith W. King, Recent Experimental Strategies for Prejudice Reduction in American Schools and Classrooms, 18 J. CURRICULUM STUD. 331 (1986).

[FN282]. Id. at 333.

[FN283]. ARIZONA STATE UNIVERSITY, CAMPUS ENVIRONMENT TEAM REFERRAL GUIDEBOOK 1992-1993 (1992).

The purpose of the CET is to (1) work with other persons and organizations on campus to promote a campus environment that values diversity and provides respect for all individuals regardless of their status, and (2) protect free speech and academic freedom. The CET will carry out the objectives set forth below and, in addition, may make recommendations to the President, governance groups, and other campus entities on issues pertaining to the purpose of the CET and the following

objectives. The CET should not duplicate existing University activities or functions.
Id. at 29.

[FN284]. Id. at 27.

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