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***91** BEYOND SPEECH CODES: HARMONIZING RIGHTS OF FREE SPEECH AND FREEDOM FROM DISCRIMINATION ON UNIVERSITY CAMPUSES

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INTRODUCTION

A word ... is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Justice Oliver Wendell Holmes, in Towne v. Eisner. [FN1]

A university department chair is confronted with a claim of racial harassment stemming from a professor's selection and instruction of Mark Twain's Huckleberry Finn in an elective class on race relations. A black student complains about the repeated use of the racial term "nigger" [FN2] in the book--over 200 times--and the fact that class members ***92** have been asked to read objectionable portions of the novel aloud. The student is offended by the language and by the often heated discussions about race relations stemming from the discussion of the novel. How should the university respond? [FN3]

The black student soon thereafter receives racist and threatening electronic mail messages from white students in the class. In addition, based on the controversy generated by the curriculum in the course, flyers and computer bulletin board messages containing racist symbols, statements, and epithets-- including the term "nigger"--are posted throughout the campus. A Ku Klux Klan symbol is drawn on the black student's dormitory room door. The student complains to the president's office about the impact of these developments on his learning environment. How should the university respond?

These examples are illustrative of the types of dilemmas frequently confronted by university counsel. Indeed, the university community finds itself at the center of the debate in which the right to free speech is frequently pitted against that of freedom from discrimination. [FN4] These issues often arise from incidents of alleged "harassment" by faculty, staff, or other students. Although the definition of the term "harassment" is itself a source of controversy, once defined, the debate then frequently centers on a deceptively simple question: Does the right to free speech under the First Amendment ever "trump" the right to be free from such harassment? [FN5]

***93** The legal parameters of this controversy are framed, on the one hand, by principles of free expression. Under the First Amendment to the United States Constitution, a public university's ability to regulate expression [FN6] of students, among others, is limited to those situations in which the expression materially disrupts classwork or other university activities, or otherwise constitutes conduct that unduly interferes with the rights of others. [FN7] In more general terms, a university has the ***94** constitutional authority to "impose

reasonable regulations compatible with its educational mission." [FN8]

Also shaping the legal dimensions of this controversy are federal and state laws that prohibit unlawful discrimination with regard to the provision of educational opportunities or benefits, on the basis of characteristics such as sex or race. [FN9] Under federal law, for instance, discrimination may occur when an individual is unable to participate in school activities because of a school environment that is reasonably perceived to be hostile, based on his or her sex or race. [FN10]

When addressing situations in which racist or sexist expression may constitute or contribute to unlawful discrimination in the form of racial or sexual harassment on a campus, universities must assess the steps they may take to respond to that expression, in light of both free speech and anti- discrimination principles. Several court decisions in recent years have been read as settling the question of whether universities may regulate racist or sexist expression, at least in general terms. These decisions struck down anti- harassment or so-called "speech codes"-- regulations adopted by universities in an effort to ensure that students are not subjected to objectionable (e.g., racist or sexist) expression that ***95** would interfere with their learning environment. In every reported case on the subject relating to the attempted regulation of student expression, the universities' codes have been found to be unconstitutional, based on their vagueness and overbreadth, [FN11] or on their discrimination among topics permitted to be discussed or views that may be expressed. [FN12]

These cases, along with the debate that has accompanied the propagation of these codes, have no doubt contributed to the perception that the interests in free speech are inevitably in tension with those that underlie the protections against discrimination. [FN13] The Supreme Court did little to diminish perceptions about this tension in its landmark decision regarding hate speech in R.A.V. v. City of St. Paul, Minnesota. [FN14] In R.A.V., the Court invalidated a hate crime ordinance that prohibited expression that would reasonably arouse "anger, alarm or resentment in others" based on characteristics such as race and gender. [FN15] The foundation of the majority's conclusion in that opinion ***96** was, in fact, that this proscription impermissibly distinguished among different categories of speech-- forbidding, for instance, "messages 'based on virulent notions of racial supremacy,"' while allowing expression condemning those who preach racial supremacy. [FN16] The Court ruled that the First Amendment did not permit government actors to make such content-based distinctions. [FN17]

Against this backdrop, not surprisingly, many commentators have concluded that tensions between the notions of free speech and equality require that universities either compromise and balance these supposedly "competing" rights, or favor one as being more important to the learning environment than the other. [FN18]

In this article, we will show that to the extent that universities have been abstractly defining the behavior that they want to prohibit and broadly distinguishing between protected speech and regulable conduct, they have framed their policies in ways that are doomed to invite successful legal challenges. This does not mean, however, that the existing cases on speech codes and related regulations preclude efforts to address meaningfully the problems of racial and sexual harassment, even when allegations of those forms of discrimination includecomplaints of racist or sexist expression.

We will demonstrate, through a comprehensive examination of First Amendment and anti-discrimination principles in the university setting, that colleges and universities can (and sometimes must) take steps to proscribe discrimination in the form of racial and sexual harassment, without sacrificing free speech principles in the process. [FN19]

Specifically, we will show that a resolution of the question of how a university may regulate speech that constitutes in whole or in part a racially or sexually hostile environment depends less on some abstract "balancing" of anti-discrimination and free speech rights than on a more focused inquiry in the university setting. As the mission of the university comprises dual and compatible aims of the anti-

discrimination and free speech principles, we will illustrate how harassment cases can be addressed in ways that fully respect both anti-discrimination and free speech principles. Stated differently, we will show that the ***97** benefits protected by these two legal guarantees in higher education--(1) an educational environment that is free from discrimination and therefore conducive to learning; and (2) an educational environment in which the free and robust exchange of ideas maximizes learning potential--are mutually supportive.

As part of this analysis, we will address the central importance of the manner in which the university regulates the expression at issue. In this context, we will show that because violations of federal anti-discrimination laws may encompass expressive elements, as well as other types of non- expressive activity, the operative question is not whether the activity that may be the target of a discrimination claim is "speech" or "conduct." [FN20] Rather, the inquiry in any case involving a claim of racial or sexual harassment should include consideration of whether the regulation under which the university takes action is directed at a legitimate harm that the university may prohibit--regardless of the expression that may, incidentally, be a part of the activity creating the harm. [FN21]

To demonstrate that colleges and universities can harmonize the rights of free speech and freedom from discrimination by focusing on the educational objectives and opportunities at stake, [FN22] we will first examine principles under federal law that apply when issues of free speech are present (Part I), [FN23] and when harassment claims must be evaluated under anti- discrimination laws (Part II). [FN24] Based on the principles discussed in these two sections, we will then show in Part III [FN25] how these rights are mutually supportive in the higher education setting through an analysis of the two factual situations previewed at the ***98** beginning of the article (and set forth in greater detail in the beginning of that section). [FN26]

We will then briefly consider how these principles might apply in related scenarios in which it may become more difficult to draw the necessary legal lines. Finally, in Part IV, we will provide specific recommendations, with supporting rationales, to help guide colleges and universities as they address the problems of discrimination while seeking to preserve communities in which the "robust exchange" of many, differing ideas and perspectives remains a reality for all.

I. BASIC PRINCIPLES OF FREE SPEECH IN HIGHER EDUCATION

Free speech rights stemming from the First Amendment apply to both students and faculty members on public college and university campuses. [FN27] As will be explained below, however, those rights are not absolute. [FN28] The objectives that underscore the First Amendment also reflect and reinforce the educational mission of colleges and universities. These objectives include advancement of a representative democracy and self-government; [FN29] the pursuit of truth in the marketplace of ***99** ideas; [FN30] and the promotion of individual self-expression and development. [FN31] Constitutional protection is afforded to the open and robust expression and communication of ideas, opinions, and information to further each of these objectives. [FN32] This protection parallels a central mission of higher education: to nurture and preserve a learning environment that is characterized by competing ideas, openly discussed and debated. [FN33]

The paramount importance of the "robust exchange of ideas" in the postsecondary context has been recognized by the Supreme Court:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom .... The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,' [rather] than through any kind of authoritative selection. [FN34]

***100** Both students and faculty contribute to that robust exchange of ideas. [FN35]

The determination of the extent to which ideas and opinions expressed on a college campus merit constitutional protection is guided by an examination of both the general mission of the university, and by the specific context in which the expression occurs--such as the audience, the location, and the reasons for the expression. [FN36] When the Court first addressed the scope of First Amendment protections for free expression, Justice Holmes recognized that "the character of every act depends upon the circumstances in which it is done." [FN37] Thus, both the ***101** mission of the academic community and the specific context in which the communication occurs bear directly on the way in which expressive activity may be regulated. [FN38]

Within any particular context (such as education or employment), the Supreme Court has limited the restriction or punishment of speech by the state to instances in which there was a social harm that the government could legitimately regulate. [FN39] Using a case-specific analysis, the Court has balanced the "free speech" interests of individuals against the interests of the community regulating the speech. [FN40] Shaped by the context in which activity occurs, the focus of the Court's inquiry has been on the putative harm to society resulting from the expression the government seeks to regulate. The ostensible harm may be viewed as a limitation or denial of an opportunity or benefit that is recognized and protected under the law.

Some types of harm that may be subject to regulation are tied directly to interference with the central mission of a college or university. [FN41] In some instances, therefore, a university will have the authority to regulate expressive behavior within its confines because of the educational nature of its mission. For example, colleges may restrict expression on campus in the limited situations in which the challenged expression "materially disrupts the classwork or involves substantial disorder or invasion of the rights of others." [FN42] Stated differently, when expressive activity infringes on reasonable campus rules, interrupts classes, or substantially interferes with the opportunity of students to obtain an education, then reasonable, non- discriminatory limits on the expression can be established. [FN43]

***102** This standard is based on protection of the educational mission itself and is not tied to the content or viewpoint of expression. [FN44] Under this standard, the offensiveness of racist or sexist expression, by itself, is not a sufficient legal reason to justify regulation of the expression. [FN45] Of course, the fact that expressive conduct is offensive should not and does not shield it from regulation, either. [FN46] For example, offensive expression may be regulated when it is so intrusive that individuals who are entitled to participate in a particular activity are placed in circumstances in which they constitute a "captive audience"--i.e., they cannot avoid the objectionable expression if they want to participate in the activity. [FN47] Thus, if "substantial privacy interests of the listener are being invaded in an essentially intolerable manner," [FN48] and if he has little to no choice in the decision about whether to "turn off" the expression, [FN49] the offensiveness of the expression may justify restrictions on that expression that would not be permitted absent the "captive" surroundings. [FN50]

***103** Other types of regulation have historically been directed at the actual content of certain narrowly defined categories of expression that were long deemed to be so inherently and directly harmful that they were thought to be outside the scope of First Amendment protections. For example, so-called "fighting words"--by definition, words likely to incite an immediate breach of the peace--were believed to be without First Amendment protection because such words were "of such slight social value ... that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." [FN51]

Out of concern with hate speech and the harm it was perceived to cause on campuses, many college anti-harassment and speech codes were based largely on these categories, particularly fighting words. Colleges and universities enacted prohibitions on expression within the so-called "unprotected" categories of speech

that targeted racial, sexual, and other animus. [FN52] But in 1992, the Supreme Court ruled on a city ***104** hate speech ordinance in R.A.V. v. City of St. Paul, Minnesota, [FN53] and in doing so altered the relevant legal landscape.

Although the Supreme Court's decision in R.A.V. essentially confirmed the university speech and anti-harassment code decisions of the federal courts in Doe and UWM Post, the decision did something ultimately more significant. For the first time in the Court's history, a majority of the Supreme Court held that there were, in fact, no categories of unprotected speech--including those like fighting words, defamation and obscenity--that had been previously construed to be outside of the protection of the First Amendment. [FN54] Also, the Court strongly reaffirmed the idea that government institutions could not proscribe speech with which they disagreed because of their disagreement with that speech. [FN55] The reasoning used in the majority opinion to support these conclusions has profound implications for the ways in which universities may regulate racial and sexual harassment.

The municipal ordinance at issue in R.A.V. prohibited as disorderly conduct the placement on public or private property of objects or messages that one would reasonably know to arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." [FN56] The defendant was convicted under the ordinance because of his complicity with others in burning a cross in the yard of a black family in St. Paul. [FN57] He challenged his conviction on the basis that the ordinance was overbroad and vague on its face, and because it discriminated based on the viewpoint of the speech at issue. [FN58]

***105** All members of the Court agreed that the conviction should be overturned, but disagreed strongly about the reasons that would support this result. Justice Scalia, on behalf of five members of the Court, concluded that the ordinance was facially unconstitutional because "it prohibitled] otherwise permitted speech solely on the basis of the subjects the speech addresse[d]." [FN59] Even given the limiting construction of the ordinance--that its reach was only to fighting words in the categories described--the majority found that the operation of the ordinance was impermissibly content- and viewpoint-based, concluding that the ordinance "prohibit ed otherwise permitted speech solely on the basis of the subjects the speech addresses." [FN60] In particular, the Court focused on the city's targeting of "fighting words ... that communicate messages of racial, gender, or religious intolerance." [FN61] It stated that " s electivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas." [FN62] The Court recognized that the record and concessions of the city "elevate the possibility to a certainty." [FN63] When explaining its construction and analysis of the ordinance, the Court was careful to note that in practical operation the ordinance discriminated on the basis of viewpoint, as well. The Court concluded that the ordinance in many instances would "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules"--authority the city lacked under the First Amendment. [FN64]

Although not directly at issue in the case, the majority was careful to distinguish federal harassment law from the municipal regulation at issue, suggesting that a state could constitutionally prohibit expression ***106** that was part of legally proscribed discrimination under federal law because "conduct rather than speech" was the target of anti-discrimination statutes. [FN65] Justice Scalia reasoned that since words could in some circumstances violate laws directed against conduct rather than speech, a "particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech." [FN66] "Thus, ... sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." [FN67]

Taking issue with the majority opinion, Justice White, in his concurrence on behalf of four members of the Court, specifically discussed the hostile environment theory in the employment context and the ramifications implicit in the R.A.V. majority opinion on this subject. [FN68] He observed that the prohibitions of Title VII were "similar to" the St. Paul ordinance that banned the placement of certain

objects on private property because both imposed "special prohibitions on those speakers who express ed views on disfavored subjects." [FN69] He concluded, therefore, that under the majority's reasoning, hostile environment claims should "fail First Amendment review, because a general ban on harassment, ... would cover the problem of sexual harassment, and any attempt to proscribe the subcategory of sexually harassing expression would violate the First Amendment." [FN70]

The point of division between the opinions can be explained only with reference to the analysis of the "secondary effects" doctrine, which addresses the regulation of expression not for its inherent content but because of other conditions that result from such expression. [FN71] Both the ***107** majority and concurring opinions recognized that rules such as those prohibiting students from engaging in conduct that creates a racially hostile environment would, to the extent that they regulate expression, constitute content- or viewpoint-based restrictions on expression--as long as they were not justified by "secondary effects" of the expression being regulated. [FN72] The question of whether such rules were, in fact, justified by "secondary effects" was one on which the Justices sharply differed. The majority concluded that the "secondary effects" standard would permit anti- discrimination laws that prohibited racially or sexually hostile environments. [FN73] Justice White disagreed, maintaining that because the hostile environment standards were "keyed" to the "emotive impact of the speech" on the victim, they would no more fall within a secondary effects exception than did the ordinance at issue. [FN74]

Justice Scalia did not specifically respond to Justice White's argument as he might have. Although Justice White correctly noted that hostile environment standards are "keyed" to the impact on the victim of the hostile environment, what he failed to acknowledge was the fact that that impact, under federal standards, is defined by more than "the emotive impact" on the victim. [FN75] In the education context, in particular, ***108** there must be a limitation of an educational opportunity, in addition to the adverse emotive impact of the conduct, in order to establish a racially or sexually hostile environment. [FN76]

Justice Scalia's observation that "[w]hen the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy," [FN77] recognizes that conduct containing expressive elements may nevertheless constitute a violation of federal law--including the anti- discrimination statutes. The standards governing racial and sexual harassment in the education context stemmingfrom these statutes are the other aspect of the law with which universities must be concerned in cases involving alleged harassment and expression. Accordingly, these standards will be described briefly in the next section.

II. BASIC PRINCIPLES OF HARASSMENT IN HIGHER EDUCATION

Harassment that limits or interferes with an individual's educational opportunities on the basis of characteristics such as race or sex is a recognized form of discrimination under federal law. [FN78] The right to be free from discrimination on the basis of race or sex is protected by the Equal Protection Clause, [FN79] as well as federal statutes designed to ensure equal educational opportunity for all students. [FN80] These laws prohibit public institutions or recipients of federal funds from discriminating among students on these bases, absent appropriate justifications. [FN81]

The term "harassment" does not appear in the race and sex discrimination statutes that apply to colleges and universities. [FN82] Definitions of harassment that have been developed subsequent to the passage of discrimination statutes are actually summaries of legal standards of ***109** liability for certain types of discrimination. [FN83] The legal standards defining discriminatory harassment, as articulated in the context of higher education, cover both the misuse of authority by the agents or employees of educational institutions and the establishment of a hostile environment for which such institutions are ultimately responsible. [FN84]

Harassment involving the abuse of authority by an institution's agent(s) or

employee(s), acting within the scope of his or her duties, to limit educational benefits on the basis of race or sex, leads to direct liability of the institution. For example, an institution is liable for so-called "quid pro quo sexual harassment" when a representative of the institution conditions someone's educational opportunities on the performance of sexual favors. [FN85] An institution is similarly liable when its representatives limit educational opportunities on the basis of race. [FN86] In such cases, the legal standards are premised upon the discriminatory limitation of educational benefits rather than on a general definition of harassment. [FN87]

Federal agencies and courts have also recognized the concept of a discriminatory hostile environment, which can result from an institution's failure to provide a nondiscriminatory environment that is conducive to working or learning. [FN88] This legal standard reflects the overall mission of an institution (e.g., as an employer or educator), and recognizes that the opportunities for individuals that stem from that mission can be unlawfully limited when the institution fails to address harassment of those individuals within its programs and activities. Like the theories of direct liability, this legal standard is ultimately based on the institution's need for and ability to exercise control over the setting in which it offers its opportunities and benefits.

In the education context, a violation of Title VI or Title IX occurs if a recipient of federal funds has created or is otherwise responsible for a racially or sexually hostile environment. [FN89] In general, this determination ***110** is based on an inquiry about whether conduct is sufficiently severe, pervasive or persistent so that the victim of the hostile environment cannot fully participate in or take advantage of the opportunities provided by a college or university. [FN90] This assessment of the environment involves analysis of the "totality of the circumstances," [FN91] and turns on whether the allegedly harassing conduct would interfere with or limit the educational benefits of a similarly situated individual based in part on an objective standard of "reasonableness." [FN92]

Thus, legally cognizable harm to individuals that can constitute discrimination must consist of more than subjective offense taken at a race- or sex-related statement. The educational benefits protected by the anti- discrimination statutes cannot be reasonably read to go so far as to guarantee complete comfort or agreement with the opinions and perspectives expressed within the educational environment. [FN93]

***111** As with other legal standards of discrimination in the education context, the question of whether there is a limitation of educational benefits or of participation in educational programs or activities is the linchpin of the hostile environment analysis. [FN94] In other words, the illegality of the hostile environment stems from the harm or injury that it causes to the education of the student(s) affected. [FN95]

The concept of harm to an educational benefit is difficult to define in broad or general terms because the educational benefits themselves vary greatly depending on the particular circumstances. Any assessment of such harm must start with the recognition that a university environment that is conducive to learning will not always be comfortable or non-confrontational, because much learning results from the clash of disputed theories, opinions and perspectives. [FN96] The educational mission of colleges and universities, unlike that of employers in most circumstances, therefore necessitates an environment that permits and even encourages a broad range of conflicting viewpoints and ideas. [FN97]

***112** As described above, the legal standards describing discriminatory conduct are very general, and like the principles governing freedom of expression discussed in Part I, depend on specific factual contexts for their meaning. The "totality of the circumstances" analysis, as well as the "reasonable person" standard (the meaning of which depends upon the race, sex and age of the victim of the harassment) highlight the importance of context. The next section illustrates ways in which the principles discussed above can be applied and harmonized in the college and university setting with a discussion of specific examples in which these principles can be applied.

This discussion of specific examples will in turn establish a foundation for more general conclusions in Part IV about how to harmonize these principles in higher education, and for recommendations for colleges and universities that deal with these inherently fact- and context-driven issues.

III. A CASE-SPECIFIC ANALYSIS

A case-specific analysis will illustrate how the principles of free expression and freedom from discrimination, discussed above, can apply to institutions of higher education in a way that allows the full protection of rights protected by both the First Amendment and the anti-discrimination laws. The two stages of the case described below are intended to serve as clear, common examples of how these principles should be applied. After demonstrating how these principles apply in relatively clear situations, we will then identify some of the variables that will affect their application in more difficult cases.

(1) In an elective class on the history of race relations in America, the professor assigns The Adventures of Huckleberry Finn as required reading. The professor instructs students to read portions of the book aloud in class for dramatic effect. The word "nigger" appears in the book over 200 times, and many of the passages read aloud include that word. Class discussions about the relationships of blacks and whites at the time in which the novel is set become quite heated. The class contains twenty-seven white students and three black students.

A black student complains to the department chair, alleging that a racially hostile environment has been created in this class. The department chair is aware of the professor's curriculum and teaching methods and comes to you (the university counsel) for advice. What do you tell the department chair?

In order to determine whether any legally-cognizable race discrimination has occurred, it is first necessary to determine the nature of the ***113** educational opportunities and benefits at stake in this case. Once identified, a determination of whether activity constitutes protected expression or illegal discrimination can be made by analyzing whether the matters in question limit or interfere with educational opportunities or benefits on the basis of race. The context-specific inquiry about whether educational opportunities or benefits are limited by the professor's classroom instruction provides more specificity than the more general question of whether these events constitute "speech" protected by the First Amendment or "conduct" regulable by the university. The facts of this case demonstrate the futility of abstractly differentiating speech and conduct in this way: the behavior at issue involves aspects of expression, even though the student complains that the behavior has created a racially hostile environment for him.

The immediate context is an elective class on the history of race relations in America. In the broadest sense, the educational benefits at stake in this context consist primarily of the right of the professor to teach about this subject matter and the right of the students to learn about it. Key components of the context that may affect those benefits include the professor's choice of curriculum and teaching methods, as well as the nature of the classroom discussion.

A. Choice of Curriculum

The novel itself is set in a time and place in American history in which slavery of African-Americans was widespread and legally sanctioned. The novel's theme of race relations is frequently cited by teachers at various levels, although not all literary scholars agree that the novel is worth studying as assigned reading in a class. [FN98] In fact, the ongoing debate about this famous American novel in scholarly circles is itself the type of discussion that must be protected in order to advance our understanding of such topics. This debate among subject matter experts about the merits, meaning and impact of a literary work is precisely the type of controversy in which federal judges or agencies are ill-equipped to intervene. Indeed, the regulations under Title IX of the Education Amendments explicitly forbid such a role for the Office for Civil Rights. [FN99]

***114** Regardless of one's perspective on the ultimate merits of Huckleberry Finn, it is an influential work that has stood the test of time, is widely read and quoted, and raises issues relevant to the course topic. The professional judgment of the faculty member with regard to this class reading material is itself part of the foundational educational benefit of academic freedom. [FN100] In similar situations, OCR has recognized that a teacher's choice of text that is relevant to a particular course is generally within the professor's professional discretion. [FN101]

B. Teaching Techniques

Similarly, a professor in an elective course on a subject such as race relations would ordinarily be expected to have substantial latitude with regard to the pedagogical techniques selected to convey the material. [FN102] If the professor is trying to focus on the theme of race relations in the novel, he may deliberately choose to emphasize passages that illustrate race-related attitudes and tensions of the time and place in which the novel is set. If the professor is trying to stimulate discussion and debate to bring out different points of view, he may choose a teaching technique designed to pique students' interest and arouse strong feelings. Such techniques may be useful in a variety of college courses, and their use may depend on factors such as the level of interest of the students in the subject matter, [FN103] the number of students in the class, and the nature of the subject matter. [FN104]

In fact, some teaching methods are designed to promote debate because the nature and form of the debate are themselves integral to an understanding of the subject matter. [FN105] In a first-year law school ***115** class, for example, in which students are expected to learn the skills of legal reasoning and argument, a professor must have the latitude to illustrate those concepts in his or her classroom presentation. It is precisely in order to get students' attention and to train them to think critically about concepts that a professor might choose to use emotionally charged examples to illustrate more general principles--precisely as was done by a law professor at the George Mason University School of Law. [FN106] In a class on torts, the professor chose to discuss verbal torts and First Amendment principles through a discussion of a hypothetical in which the Ku Klux Klan marched through a black community and used the term "nigger." [FN107] This illustration prompted a student to file a complaint with OCR, complaining that she had been subject to a racially hostile environment as a result of that class discussion. [FN108] OCR concluded that the use of an illustrative example was a relevant and legitimate teaching technique. [FN109]

Although such techniques do not necessarily make students comfortable and may even offend them at times, a certain amount of discomfort or even offensiveness may help them to learn more by pressing them to acknowledge their own assumptions and feelings. Obviously, such techniques can be handled with more or less sensitivity, depending on the instructor. However, the federal civil rights statutes do not protect students from all discomfort or offense, and application of those statutes does not depend on the degree of sensitivity of a professor whose teaching technique or style is at issue. [FN110] For example, an instructor may fail to explain adequately his or her decision to ask students to substitute the word "black" or "African-American" for the term "nigger" when reading a novel aloud in class, but such a failure to explain the technique does not, without more, contribute to a legal violation under anti- discrimination principles. [FN111]

The question under the discrimination statutes that remains is whether any circumstances exist in which a professor might employ a teaching technique which is so outrageous or extreme that it ceases to comport with the educational mission of the university and provide educational benefits to students and, instead, interferes with their ability to learn. ***116** What if this professor decided to call on white students only to read the parts of white characters, and black students only to read the parts of black characters? Moreover, what if the professor called only on white students to discuss the perspective of white characters, and black students to

discuss the perspective of black characters? Going one step further, what if the professor decided to illustrate the concept of racism in such a class by refusing to call on black students at all?

At some point, such distinctions could essentially recreate a form of segregation being studied in the class and constitute different treatment of students on the basis of race with regard to the provision of an educational benefit. One such benefit would be the ability to participate fully in class. That benefit becomes more identifiable and concrete to the extent that such class participation might affect, for example, a student's grades or letters of recommendation. Of course, a professor might also be able to use such a technique sensitively on an isolated basis to make a point in dramatic fashion. This is why context is critical--it is impossible to make general rules that will apply to all such situations. [FN112]

Similarly, it is possible to envision a college classroom in which a professor uses sexually or racially charged language and examples on a consistent basis to illustrate points about a topic bearing little or no relationship to sex or race (e.g., in a physics or mathematics class). [FN113] The educational aims in such a class would ordinarily bear little if any demonstrable relationship to sex or race; hence, their constant inclusion could distract from the subject matter rather than enhance it. If such conduct by the professor causes students to drop the course, the reasons for their withdrawal might need to be examined. [FN114] The concept of academic freedom must not be construed so far as to shield faculty in all circumstances from harassment allegations merely because the alleged incidents occur in classrooms. [FN115]

***117** The so-called "captive audience" theory may come into play under these circumstances. [FN116] The college classroom may present a factual context somewhere in between the extremes of (1) a required elementary or secondary class in a compulsory program; and (2) the public square in which people are free to come and go as they please, turning their heads to avoid expression that may be offensive. [FN117] The principles that may support application of this theory to the college classroom would have less merit in cases in which particular courses were elective, rather than mandatory or required (e.g., as prerequisites for other courses); alternative sections of the same course were offered; or the course content and teaching techniques were known to students when they signed up for the course.

As a general rule, courts and federal agencies must tread very lightly in making judgments about provocative teaching techniques. This point was reinforced in the Ninth Circuit's recent opinion in Cohen v. San Bernardino Valley College. [FN118] In Cohen, the Ninth Circuit struck down disciplinary measures against an English professor under a sexual harassment policy, holding that the policy was unconstitutionally vague as applied to this professor. [FN119] Professor Cohen had long used a "devil's advocate" approach in a remedial English class, focusing on topics of a sexual nature and using profanity and vulgarities. [FN120] According to the Ninth Circuit, the sudden application of this policy without warning to Professor Cohen's "longstanding teaching style" was the problem--"a style which, until the College imposed punishment upon Cohen under the Policy, had apparently been considered pedagogically sound and within the bounds of teaching methodology permitted at the College." [FN121] The court explicitly stopped short of stating that Professor Cohen's speech was completely shielded by the First Amendment, however:

> We do not decide whether the College could punish speech of this nature if the Policy were more precisely construed by authoritative interpretive guidelines or if the College were to adopt a clearer and more precise policy. Instead, officials of the College, on an entirely ad hoc basis, applied the Policy's nebulous outer ***118** reaches to punish teaching methods that Cohen had used for many years. Regardless of what the intentions of the College may have been, the consequences of their actions can best be described as a legalistic ambush. [FN122]

Variety and creativity with regard to teaching styles and methods in higher education is one of the great strengths of the American post-secondary education system. In the situation described above, in which students are assigned to read only those parts of characters of their own race, for example, how would the law

apply if it was a drama or theater class? Clearly, the specific context of the classroom and the instructor's purposes are important and relevant, because both help to determine the nature of the educational benefits which the students in the class would reasonably expect and to which they are entitled.

C. Classroom Discussion

The question remains whether student discussion and interaction in the classroom can constitute or contribute to a racially hostile environment. Under the hostile environment theory of discrimination, an educational institution can be liable for its failure to address a racially or sexually hostile environment of which it has notice. [FN123] Harassment by fellow students can cause or contribute to such an environment. [FN124]

In a college class on the topic of race relations, a student can reasonably expect some discussion of racially sensitive or even controversial issues. Many of the issues raised in such a class will undoubtedly raise serious and upsetting thoughts and concerns in the minds of students of any race, especially if they have struggled with issues of race and discrimination in their own lives.

As upsetting as the history and the issues might be, discussions of these issues are relevant to the subject matter that is supposed to be taught in the course, meeting an important criterion of the boundaries of academic freedom. [FN125] In fact, such discussions are vital to an understanding of the course content. As in the George Mason School of Law case, it may be important to convey an understanding of the nature of a verbal tort and relevant free speech principles with clear, concrete examples that employ the very kind of threatening or hurtful language that the principles describe. [FN126]

Furthermore, college students are at an age and maturity level at which they are expected to be able to think for themselves and address ***119** controversial issues constructively. [FN127] Indeed, the "reasonable" college student in a hostile environment analysis would be expected to have some understanding of the right of free speech and of its importance in the higher education environment. [FN128] Special rules that might apply to elementary and secondary school students based on their age and maturity level are therefore likely to carry little weight in most post- secondary settings. [FN129]

As with the professor's choice of curriculum and teaching methods, discussions that are clearly related to the educational mission in the particular class are part of the educational benefits protected by the First Amendment and the anti-discrimination statutes. [FN130] On matters such as relations between the races, it is reasonable to expect that college students from different backgrounds will have different opinions with regard to questions about race relations in American history. The expression and examination of these different points of view are an important part of the pedagogical process in a college class devoted to such a subject. So long as the students' comments are related to the topic at hand, it is reasonable for the professor to let them speak their minds and express their opinions.

Therefore, the mere expression of different points of view within the classroom about the topics under discussion cannot constitute discrimination, even if that expression at times offends or even angers some students. The right to be free from discrimination does not entail a right to have everyone else in class agree with one's own opinion. [FN131] In fact, the nature of the educational benefits in this setting is such that there is a right to be exposed to differing points of view, because that exposure is a crucial part of the education provided by the course even if it makes students uncomfortable at times. The students will learn both by expressing their own points of view and by listening to the perspectives of others. In other words, opportunities to express and hear differing points of view in such a context are protected by the discrimination statutes, not prohibited by them.

But when does disagreement about issues become something more threatening to

individuals? Is it possible for such expression to take a ***120** form that is so personally demeaning or threatening that it interferes with the educational mission in the classroom? Again, the key question in determining whether a racially hostile environment has been created in a particular context such as the one described above is whether an educational benefit can be identified that has been limited on the basis of race or sex.

If, for example, students drop out of a physics or calculus course due to a pattern of racially or sexually charged discussion, it may be possible to conclude that the particular class at issue is not providing the educational benefits for all students for whom those benefits are intended. If the university's mission is to educate its students, and if it cannot provide courses in particular subject matter areas for whole segments of its student body due to the nature of the class discussions in those subject areas, then a university may reasonably conclude that its mission has been disrupted in a manner that should be addressed. [FN132] If, on the other hand, a student chooses simply not to participate in sometimes heated discussion, the university would not have the obligation under discrimination statutes to intervene.

In sum, the necessary elements of an educational environment that is conducive to learning for students in the classroom must include, among other things, the opportunity to hear and participate in class discussions, and to have access to necessary materials. For both students and professors, the concept of academic freedom incorporates a set of benefits that includes broad discretion of professors with regard to curricular materials and teaching techniques, as well as the ability to express a broad range of opinions and ideas (even if controversial). [FN133]

(2) After speaking with you, the department chair decides not to take any action and explains to the black student complainant that the professor's actions are protected by academic freedom. Later that week, the black student receives racist and threatening e-mail messages from white students in his class, and a Ku Klux Klan symbol is drawn on the door of his dormitory room along with a picture of a noose and the word "nigger." The student complains ***121** to the president's office, and the president again turns to you, the university counsel. How should you respond now?

At the outset, it is important to remember that the discrimination statutes apply to all types of programs and activities of an educational institution. [FN134] Therefore, if the dormitory is operated by the educational institution, the institution has the responsibility to ensure that the benefits within that program are offered to students regardless of their race or sex. [FN135]

What, then, are the educational benefits at stake for the students in this second stage of the example? As to extracurricular activities, equal opportunity to participate is the fundamental educational benefit or opportunity. [FN136] In public forums, this benefit would include equal access to individuals and groups with different perspectives, opinions, and agendas. Of course, equal results are not guaranteed under federal law any more than they are in the classroom.

On campuses which provide housing for students, special considerations come into play. Even if publicly owned and operated, college dormitories are essentially the temporary private residences of individuals within the microcosm of a society that is a higher education institution. Thus, the educational benefits in this context must by necessity include the benefits typically associated with living in one's own home, including privacy, personal security and safety. Conduct within this realm of interaction must be regulated to the extent necessary to protect these interests.

Among other things, the hostile environment analysis calls for a determination of the severity of the conduct. [FN137] In order to make this determination, many factors may be taken into account, such as the location of the incidents, the identity of and relationships among the individuals involved, and the occurrence of other incidents. [FN138]

If the black student is being targeted for harassment on the basis of his race, and he becomes aware of that targeted threat, it is reasonable for him to feel more personally threatened than in other circumstances ***122** in which perceived racial

slurs or threats do not appear to be directed at any particular individual(s). The delivery of e-mail messages to his individual address, and the appearance of racist symbols and slurs linked to his race on his own door, make it unmistakably clear that he has been singled out by others as a target.

The individualized nature of the perceived threat in this case (particularly the possibly violent connotations of the noose symbol and its use at the individual's place of residence) helps to establish severity. The captive audience argument for regulating such activity would likely be stronger than in the classroom setting, because the student is being subjected to threatening behavior in his own home, where privacy interests to be protected are at their zenith. [FN139]

Furthermore, the combination of the delivery of e-mail messages and the posting of materials on the student's door provide some degree of pervasiveness, especially given their close proximity in time. Under such circumstances, it is easier to link the individual incidents with each other and to establish a pattern of harassing conduct than if the incidents were isolated or spread out over an extended period of time. [FN140]

Given the severity and pervasiveness of the conduct in question in this second stage of the example, a strong case can be made that harassing conduct has occurred with regard to this individual to a sufficient extent so as to require some sort of responsive action by the university. [FN141]

As with the first stage of the example, however, a few changes in the fact pattern could make a significant difference in this judgment. For instance, what if the e-mail messages were posted among other students only, and this student found out about them only through a third party? What if the Ku Klux Klan symbol, noose and word "nigger" appeared somewhere on the campus, but not necessarily on the door of this particular black student or at a location with which he has a particular tie? What if these symbols were used in a student newspaper article about race relations on campus--perhaps even an article by another black student, criticizing the campus climate? Obviously, the mere use of particular words or symbols is not enough to establish a violation of the law in every instance.

The two stages of this example illustrate the danger of attempting to draw bright-line rules about expressive behavior when addressing problems of harassment. The use of the same racial language and symbolism ***123** used in Huckleberry Finn that is protected in the classroom setting may contribute to a hostile environment (and may, therefore, be sanctioned) when directed at a particular individual outside of the classroom. Based upon the demonstrable importance of context illustrated in the two stages of this example, the final section of this article will provide specific recommendations to colleges and universities that are seeking meaningfully and legally to address the problems stemming from racist and sexist expression on campus.

IV. GUIDING PRINCIPLES AND RECOMMENDATIONS

In light of the rulings striking down speech and anti-harassment codes that have targeted particular kinds of expression, higher education institutions must think more broadly and creatively about ways to address the problems associated with racist and sexist expression. They must, in the words of one court, be able to articulate a "principled way to distinguish sanctionable from protected speech." [FN142] The often overlooked ramification of these cases is that (at least in the context of anti-discrimination laws) institutions may, in fact, legally do just that. Despite the uninterrupted line of court decisions striking down university speech or anti-harassment codes, [FN143] colleges and universities retain viable options and strategies for addressing harassment based on race or sex, even when racist or sexist expression is part of the harassment. [FN144] Based upon the need and ability to harmonize the rights of free speech and freedom from discrimination as described above, several recommendations are set forth below.

1. Promulgate Policies That Track Anti-Discrimination Laws and Explicitly Recognize the Different Types of Opportunities and Benefits At Stake In Different

Educational Contexts.

Fundamentally, college discrimination and harassment policies should not focus on abstract definitions of harassment or on prohibitions of certain types or viewpoints of expression, but should instead track the applicable discrimination statutes and standards as closely as possible. [FN145] These statutes and the legal standards recognized under them ***124** are designed to ensure that all individuals, regardless of race or sex, enjoy the opportunities and benefits necessary for full participation in the specific contexts of higher education--such as classrooms, employment, extracurricular activities and dormitories. Any other starting point for an anti-discrimination or harassment policy, no matter how well-intentioned or carefully crafted, is likely to fail from the perspective of both the discrimination statutes and the First Amendment.

A university policy that attempts broadly to proscribe particular expression, regardless of the context, is likely to fail because of the tendency to rely on vague or overbroad language. [FN146] As illustrated above, the same words, phrases or symbols could be used in one setting in a manner appropriate for the learning process and be used elsewhere in a manner that limits the opportunities of individuals to participate in that process. It is for this reason that it is impossible to develop a list of categories of expression, or words and phrases, that may always or automatically be proscribed at an institution of higher education. Words that are "insulting" to individuals based on their race, [FN147] or, more particularly, derogatory racial terms such as the word "nigger" are a good example of words that cannot be proscribed categorically. As illustrated in Part III, for example, the study of their use in historical literature such as Huckleberry Finn may enlighten students as to the forms and harms of racism, particularly when handled with sensitivity and care. [FN148]

Alternatively, from the discrimination standpoint, an abstract, context-less code would fail to adhere to federal harassment standards by attempting to define certain behavior as harassment without considering the effect of that behavior on particular educational opportunities, in a particular context, under the "totality of the circumstances" analysis. [FN149] Moreover, such a code might fail to address other forms of behavior that would not usually be identified as expression, but that could constitute discriminatory harassment. [FN150]

In practical terms, the need to track anti-discrimination laws and standards (rather than create a list of objectionable categories or kinds of expression devoid of context) requires that institutions of higher ***125** learning not fall into the trap of asking simply, in the abstract, whether offensive expressive behavior is "speech" or "conduct." [FN151] Consider, for instance, in the second part of the example above, the case when a university punishes a student--for the dissemination of racist flyers and e-mail messages, and for the damages to a dormitory room resulting from the drawing of a noose and the term "nigger" on the door--pursuant to a code that prohibits "expression" intended to insult or stigmatize an individual based on race or national origin. [FN152] In that case, the prohibition of the expression-- rather than the separate harm to the educational environment caused by the expression--would probably run afoul of the First Amendment. [FN153] The university could punish the very same activity with a code that prohibits harassment in education programs or activities, as defined under Title VI of the Civil Rights Act of 1964. For example, language adopted by the University of Oklahoma provides in part:

> In the educational context, racial/ethnic harassment is race discrimination which interferes with students' opportunities to enjoy the educational program offered by the University, prohibited by law under Title VI of the Civil Rights Act of 1964....
>
> Principles of academic freedom and freedom of expression require tolerance of the expression of ideas and opinions which may be offensive to some and the University respects and upholds these principles. The University also adheres to the laws prohibiting discrimination in ... education. The University also recognizes ***126** that conduct which constitutes racial/ethnic harassment in ... educational programs and activities shall be prohibited.... This policy is premised on the University's obligation to provide a nondiscriminatory environment which is

conducive to ... education. [FN154]

Critics might counter that the anti-harassment policies struck down by federal courts are based largely on the general standards for harassment under federal law, particularly as developed by the Equal Employment Opportunity Commission in the employment context. [FN155] Furthermore, as pointed out by the Ninth Circuit in its recent Cohen decision, a policy that prohibits different treatment or a racially or sexually hostile environment in educational programs and activities may fail to provide much-needed specificity to individuals as to the types of behavior protected or prohibited under the policy. [FN156]

It is for this reason that the best possible policy will refer explicitly to legally recognized standards for discrimination within particular contexts, based on the specific law(s) that apply to those contexts. For example, the majority in R.A.V. expressly recognized that hostile environment claims in employment under Title VII would survive a First Amendment challenge under the standards set forth in that case. [FN157]

One of the problems with many college anti-discrimination and harassment codes is that they have attempted to adapt the general standards developed under Title VII case law in the employment context to other contexts in higher education (such as the classroom) without adequate recognition of the differences between those contexts. [FN158] It is not the standards themselves (such as "hostile environment") that need to change; they are merely descriptions of various forms of discrimination in any context. Instead, it is the different nature and extent of benefits protected in each context that should be explicitly recognized in a thorough policy. By identifying these benefits, at least in general terms, a college can make a positive statement about the type of environment it is trying to foster to carry out its mission in various activities, and also give individuals notice as to the types of behavior that will interfere with those discrete activities.

What, then, are the different types of contexts that have special characteristics, or raise special concerns and therefore merit particular mention in an anti-harassment policy? Although an exhaustive list may ***127** not be possible, several broad categories are suggested by the existing discrimination laws and regulations that apply to colleges--i.e., employment, the classroom, extracurricular activities, and housing.

Within each of these contexts, certain key factors can be identified that define what is unique about that setting--e.g., (1) the central purpose or mission of the activity; (2) the location; and (3) the power relationships among the parties involved in the activity and their reasonable expectations of each other within that context. Not surprisingly, analysis of the relevance of allegedly "harassing" behavior with regard to each of these key factors is at the heart of the "totality of the circumstances" test applied in evaluating all hostile environment cases. [FN159] For example, the use of certain offensive racial slurs to convey an historical idea in a class dealing with such ideas, or in a newspaper article making a satirical point about the campus environment, is ordinarily far less threatening to any one individual than are the same words when directed at a particular minority student in a much more private setting (such as his or her own dormitory). These same key factors are also important from a First Amendment perspective, because they determine the nature and scope of the communication needed in order for each of these types of "marketplace(s)" of ideas to function effectively.

In the employment context, for example, Title VII and its implementing regulations protect the "terms and conditions of employment"--i.e., wages, hours, and other generally recognized contours governing the contractual relationship between an employer and employee. [FN160] In the classroom context, as discussed in the first stage of the example, the policy could recognize the need for a broad range of texts, pedagogical techniques, and discussion. [FN161] In extracurricular activities and with regard to the provision of other educational benefits, the focus of the regulatory language and precedents under Title VI or Title IX is on the opportunity to participate (e.g., in an extracurricular activity for which a student was qualified and interested) or to have access (e.g., to a service such as financial

aid or counseling). [FN162] Finally, in housing (as discussed in the second stage of the example above), the Fair Housing Act [FN163] and other similar statutes would suggest that housing should be available on a nondiscriminatory basis.

Specific examples of the positive benefits protected within each of these different contexts (providing a better sense of the type of environment that is sought, as discussed further in the next recommendation) ***128** could help to give an anti-harassment policy some clarity and specificity. For example, the use of different teaching techniques and curricular materials could be explicitly noted as within the realm of professors' discretion in the classroom, as judged by peer review within the field of expertise for competence and relevance to the subject matter. [FN164] Had such examples been given in the policy applied to Professor Cohen at San Bernardino Valley College, it is less likely that he would have been disciplined, because the behavior for which he was criticized (i.e., provocative, longstanding "devil's advocate" teaching techniques) would have been recognized as a type of benefit protected by discrimination statutes as applied to the classroom. [FN165] The standards articulated in the San Bernardino policy appear to have been based on existing discrimination standards (quid pro quo and hostile environment sexual harassment in particular). [FN166] The policy was modified, however, to relate to students and to their academic standing or success. [FN167] The Ninth Circuit did not find the standards themselves to be vague or overbroad, but instead held that their application to Professor Cohen was unconstitutionally vague because the policy failed to put him on notice that behavior that had previously been at least tacitly accepted as within the realm of his professional judgment was no longer acceptable. [FN168] In the court's view, the mere reference to the educational environment was clearly not enough to alert individuals as to how the policy would be applied--but an explicit recognition of the benefits protected in that context might have passed muster and prevented the "legalistic ambush" decried by the court.

In sum, if a discrimination policy provides an indication of the nature and extent of the benefits it is meant to protect in the different contexts in which it applies, then it stands a better chance of passing legal muster--while also conveying a positive signal of the institution's attitude toward fostering and maintaining an open, participatory educational environment.

2. Articulate Values of Tolerance and Civility, and Respond With "More Speech" When Racist or Sexist Expression Takes Place.

When developing anti-discrimination or harassment policies, institutions are not restricted from articulating the type of environment that they believe to be conducive to learning. Legal concerns with vagueness, overbreadth or other free speech principles should not and need not stand in the way of a statement of principles or values. For example, a statement of vision or goals embracing the concepts of diversity, ***129** tolerance and civility can be made in the introduction or preamble of such a policy. [FN169] So long as it is clear that an abstract or general statement is not by itself intended to be a pronouncement of legally enforceable obligations or sanctions, it can help to set the tone for an environment that fosters and values both free expression and nondiscrimination. [FN170]

Indeed, an institution and its representatives can exercise their own free speech rights to disagree with or denounce racist or sexist attitudes or comments, whether made by faculty, students, or others--at the same time that they may be constrained by First Amendment principles from limiting or regulating that objectionable speech. [FN171] Additional speech can serve an educational purpose by exposing and prompting critical examination of underlying attitudes and prejudices. Additional speech can also send a strong message to the university community and empower individuals who may feel that their participation is not fully welcomed or understood within that community. When tensions arise as a result of racist or sexist expression on campus, steps can always be taken to ensure that competing voices are heard within the institution's programs and activities. [FN172] After all, the most fundamental question asked by the university when allegations of racism or sexism emerge should not be merely whether it has a legal obligation to respond to discrimination, but whether it has an educational obligation to address ignorance, incivility and intolerance within its midst.

3. Use Other Content-Neutral Regulations to Limit Disruptive Behavior and Expression.

Much of the conduct frequently associated with racist or sexist expression can be regulated in other, content-neutral ways. For example, universities may use content-neutral time, place and manner regulations when they are narrowly tailored to serve a significant governmental interest unrelated to the suppression of speech, [FN173] and " l eave open alternative channels for communication of the information." [FN174] In addition, ***130** strong and consistent enforcement of rules against disorderly conduct, [FN175] disruption of educational activities, disturbing the peace, alcohol and drug abuse, vandalism of property, arson, trespassing, etc. can have a significant impact on behavior that manifests itself in the form of racist or sexist expression. [FN176]

CONCLUSION

Once applied and examined within a particular factual setting at a college or university, the rights of free speech and freedom from discrimination do not create the conflict that has generally been suggested. Indeed, once the educational benefits of that particular context are identified (e.g., the study and furtherance of knowledge of race relations or physics), then these rights can be seen as complementary because they both reinforce the conditions that are prerequisites for an environment conducive to learning for all students. These conditions are in essence the foundational educational benefits that are meant to be protected within the context of higher education, reflecting the central purpose and mission of colleges and universities. [FN177]

The expression and interaction of ideas and perspectives on such issues is central to the mission of higher education in a variety of contexts both in and outside the classroom. [FN178] Exposure to and participation in this interaction is one of the core benefits in higher education and is protected by both the First Amendment and by the anti-discrimination statutes. At the same time, in order for this educational context to provide for the full range of expression, it must allow for the full participation of voices from all perspectives and backgrounds. If the participation of certain individuals becomes limited due to their race or gender, then the learning environment itself has been limited to the detriment of all participants. Indeed, the maintenance of this diversity within a student body has been recognized as part of a college or university's academic freedom protected under the First Amendment precisely because of its contribution to the "robust exchange of ideas" for the benefit of all faculty and students on campus. [FN179]

***131** When an institution of higher learning tries to determine the extent to which it may regulate behavior that may include expressive elements, therefore, the institution should always look first to its educational mission and to the conditions needed to fulfill that mission. In doing so, it is important to distinguish between momentary discomfort or anxiety and long-term limitations on full participation. A student may be offended in class when he or she first encounters a racially derogatory term in a historical novel such as Huckleberry Finn, but in the long run he or she may actually benefit from exposure to the attitudes reflected in such terms by learning how to recognize and discuss their impact. This recognition and discussion can also enlighten other students and faculty and raise their awareness of their own attitudes and behavior.

This does not mean, of course, that an institution must wait for the development of a full-fledged hostile environment for which it has legal liability in order to act to combat racial or sexual hostility on campus. Nor does this mean that individuals must passively sit back and accept racist or sexist remarks or behavior. Frequently, the appropriate response to individual instances of racist or sexist expression that may eventually contribute to a hostile environment is more speech, as discussed above.

As our nation becomes more and more diverse, our institutions of higher education will continue to reflect that diversity and may serve as a flashpoint for related

tensions. These institutions are often an intense microcosm of the world around them. Indeed, as free expression has been allowed to flourish in many emerging democracies in the late Twentieth Century, tensions related to racial and ethnic differences have emerged and have threatened to tear whole societies apart. Such tensions pose one of the great challenges in many different societies as the world enters the next millennium.

One tempting response to racial and gender-based tensions is to suppress expression related to such issues, but such restraints merely submerge the tensions temporarily and fail to address the underlying attitudes and prejudices from which they arise. [FN180] That is why college ***132** speech codes were doomed to fail even before legal challenges were brought against them. Instead, recognition of the true common interests served by both free expression and freedom from discrimination can help to address such issues constructively. [FN181] As articulated by Mr. Justice Stevens, "Let us hope that whenever we decide to tolerate intolerant speech, the speaker as well as the audience will understand that we do so to express our deep commitment to the value of tolerance--a value protected by every clause in the single sentence called the First Amendment." [FN182]

Nowhere are the interests of free expression and freedom from discrimination more mutually supportive than in higher education. Animosities and prejudices that are learned behaviors can best be overcome with more education. Higher education offers a unique variety of contexts in which individuals can interact with and learn from people different than themselves. That interaction presents the greatest possibilities when both free expression and freedom from discrimination are recognized and valued.

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In addition to relevant federal and state court decisions, citations in this article will include decisions by the U.S. Department of Education, Office for Civil Rights (OCR), the federal agency charged with enforcement of several civil rights laws among educational institutions that receive federal funds (including most colleges and universities). See infra note 9 (describing these civil rights statutes). These decisions are not published routinely in a reporting service, but may be obtained upon written request from OCR.

[FN1]. 245 U.S. 418, 425, 38 S.Ct. 158, 159 (1918).

[FN2]. The authors recognize that this term is offensive. It is used for illustrative purposes precisely because it serves as an example of the type of language that elicits strong reactions, and is, therefore, particularly relevant to the topic addressed in this article. See generally 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) (citing numerous examples in which the use of the term "nigger" is at issue).

[FN3]. Cf. Portland School District 1J, OCR Case No. 10-94-1117 (Dec. 7, 1994). In this case, a teacher's instruction that her class substitute the term "black" or "African-American" for "nigger" when reading TO KILL A MOCKINGBIRD aloud was alleged to be discriminatory because it "plant[ed] in the minds of impressionable young students that African-Americans are 'niggers."' OCR recognized in that case that "teachers have significant discretion in making educationally based decisions regarding their class sessions" and found that this teaching method did not constitute a form of legally cognizable race discrimination under Title VI.

[FN4]. See, e.g., J. Peter Byrne, Racial Insults and Free Speech Within the University, 79 GEO L.J. 399 (1991); Charles R. Lawrence, III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431 (1990). Dozens of articles in recent years have examined these rights, and some have focused on the college and university setting. See, e.g., SPEAKING OF RACE, SPEAKING OF SEX (Henry L. Gates, Jr. et al. eds., 1994) (collecting a series of essays exploring First Amendment principles that relate to racist and sexist expression). However, they have not focused on standards under the federal civil rights statutes by which claims of racial and sexual harassment are assessed. See infra note 9 (describing those civil rights statutes). Along with the relevant free speech considerations, these civil rights law standards will be the focus of this article, which we hope will contribute to the more general discussion surrounding the contentious issues of when and how colleges and universities should address problems stemming from hate speech.

[FN5]. As discussed in this article, the term "harassment" refers to a form of discriminatory different treatment consisting of (1) certain incidents in which students are treated differently by an institution's agent(s) or employee(s) on the basis of race or sex; or (2) conduct that creates a racially or sexually hostile environment that is legally proscribable under federal law. See infra notes 84-95 and accompanying text. This term should be distinguished from a more generic, layperson's concept of harassment. As explained in Section III of this article, the relevant legal question is not whether conduct satisfies some dictionary-style definition of harassment, but whether it satisfies the anti-discrimination standards set forth in federal policy and case law. In Section V, we explain that it is inadvisable for universities to attempt to derive their own definitions of harassment without considering the extant standards embodied in the applicable law, including court and agency rulings.

With this foundation, it is also important to understand at the outset that, as used in this article, the term "harassment" is not in all cases coextensive with racist or sexist expression (often described as "hate speech"). Although the use of racist or sexist expression may in fact constitute an element of a hostile environment in particular cases, the use of hate speech does not in all cases rise to the level of sexual or racial harassment in violation of federal law, as we will explain below.

[FN6]. The Constitution provides rights to individuals in relation to government entities, including public colleges and universities. See Healy v. James, 408 U.S. 169, 180, 92 S.Ct. 2338, 2345 (1972) ("state colleges and universities are not enclaves immune from the sweep of the First Amendment"); Widmar v. Vincent, 454 U.S. 263, 268-69, 102 S.Ct. 269, 274 (1981) ("First Amendment rights of speech and association extend to the campuses of state universities."). Even though the Constitution does not directly apply to private colleges and universities, see Rendell-Baker v. Kohn, 457 U.S. 830, 102 S.Ct. 2764 (1982) (receipt by private school of public funds does not render school a state actor subject to the Constitution), the principles of academic freedom are also generally recognized at private postsecondary institutions. See Statement of Principles on Academic Freedom and Tenure, drafted by the American Association of University Professors (AAUP) and the Association of American Colleges, AAUP Policy Documents and Reports 3-7 (1995

ed.) [hereinafter AAUP Policy Documents and Reports] (recognizing concept of academic freedom for faculty in higher education generally). Moreover, some state constitutional and statutory provisions explicitly extend the protection of free speech principles to private colleges and universities. See, e.g., Cal. Educ. Code § 94367 (the so-called "Leonard Law") (extending First Amendment protections to students at private postsecondary educational institutions). See Corry v. Leland Stanford Junior Univ., No. 740309, slip op. (Cal. Super. Ct. Feb. 27, 1995) (discussed infra notes 12, 52; Michael A. Olivas, Reflections on Professional Academic Freedom: Second Thought on the Third "Essential Freedom," 45 Stan. L. Rev. 1835, 1837 (1993). For a general discussion of the relationship between academic freedom and First Amendment protections, see, e.g., Matthew W. Finkin, Intramural Speech, Academic Freedom, and the First Amendment, 66 Tex.L.Rev. 1323 (1988); William W. Van Alstyne, Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review, 53 Law & Contemp. Probs. 79 (1990).

[FN7]. See Widmar, 454 U.S. at 276-77, 102 S.Ct. at 277; Healy, 408 U.S. at 188-89, 92 S.Ct. at 2350 (actions which "materially and substantially disrupt the work and discipline of the school" can be regulated) (citations omitted); see also Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 508-09, 895 S.Ct. 733, 737-38 (1969). When faculty expression or teaching techniques are at issue, the public university must have a reasonable belief about the likelihood of a disruption of university activities in order to regulate expression. See Jeffries v. Harleston, 52 F.3d 9 (2d Cir.), cert. denied, 116 S.Ct. 173 (1995); see also Stephen A. Newman, At Work in the Marketplace of Ideas: Academic Freedom, The First Amendment, and Jeffries v. Harleston, 22 J.C. & U.L. 281 (1995). Although we will address the context of the classroom as a forum for assessing liability under federal discrimination and First Amendment standards, a comprehensive examination of the parameters of a professor's academic freedom rights is beyond the scope of this article.

[FN8]. Widmar, 454 U.S. at 267, 102 S.Ct. at 273, n.5.

[FN9]. See, e.g., Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1996) [hereinafter Title VI]; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681-88 (1990) [hereinafter Title IX]. The implementing regulations for these statutes are found in 34 C.F.R. pts. 100, 106 (1996), respectively. These two statutes serve as the foundation for harassment claims based on race or sex, which will be the focus of this article. See also Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75, 112 S.Ct. 1028, 1037 (1992) (sexual harassment may constitute discrimination under the Equal Protection Clause of the Fourteenth Amendment and under Title IX); U.S. Department of Education Office for Civil Rights Sexual Harassment Guidance: Harassment of Students by School Employees (including Appendix Two, entitled Sexual Harassment Guidance: Peer Harassment) (draft) 61 Fed. Reg. 52172 (1996) [hereinafter Sexual Harassment Guidance] (recognizing sexual harassment as a form of sex discrimination under Title IX); Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448 (1944) [hereinafter Investigative Guidance] (recognizing racial harassment as a form of race discrimination under Title VI).

Other forms of hostile expression on campus (based on religion, sexual orientation, or disability, for instance) which may violate federal or state laws are beyond the scope of this article.

[FN10]. See Ellison v. Brady, 924 F.2d 872, 878-80 (9th Cir.1991) (discussing the need to examine harassment from the perspective of the reasonable victim of the harassment in question with the same characteristics upon which the alleged harassment was based); Harris v. International Paper Co., 765 F.Supp. 1509, 1515-16 (D.Me. 1991) (recognizing that the appropriate standard to apply in a "hostile environment racial harassment case [where the alleged victim is black] is that of a 'reasonable black person"'); Investigative Guidance, 59 Fed. Reg. at 11452.

[FN11]. See, e.g., UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys., 774 F.Supp. 1163 (E.D. Wis. 1991); Doe v. University of Mich., 721 F.Supp. 852, 856 (E.D. Mich. 1989); see also Dambrot v. Central Mich. Univ., 55 F.3d 1177 (6th Cir.1995) (holding speech code applicable to faculty and students facially invalid, but upholding university regulation of coach's speech because it was not protected under First Amendment standard for public employees); Silva v. University of N.H., 888 F.Supp. 293 (D.N.H. 1994) (striking down university sexual harassment policy for employing an impermissibly subjective standard that failed to protect academic freedom); Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir.1996) (striking down discipline of professor under anti-harassment policy that was found unconstitutionally vague as applied).

[FN12]. See Corry v. Leland Stanford Junior Univ., No. 740309, slip op. (Cal. Super. Ct. Feb. 27, 1995) (striking down a private university's code based on state law regarding free expression); see also Dambrot, 55 F.3d 1177 (6th Cir.1995) (holding hate speech code facially invalid, but not the restriction applied to university coach).

[FN13]. For example, the court in Doe, 721 F.Supp. at 853, observed:

> It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict....[necessitating the] mediat [ion] [of] the appropriate balance between these two competing values.

See also UWM Post, 774 F.Supp. at 1181.

[FN14]. 505 U.S. 377, 112 S.Ct. 2538 (1992).

[FN15]. Id. at 391, 112 S.Ct. at 2547. Although the opinion in R.A.V. did not specifically discuss a university's attempt to address hate speech or harassment, it comprehensively addressed issues surrounding the regulation of hate speech. R.A.V., therefore, constitutes a baseline from which any legal assessment of regulations that may restrict racist or sexist expression must develop. In addition, the concurring opinion of Justice White raised significant questions about implications for the continuing constitutionality of certain federal anti-discrimination laws and standards. See id. at 409- 10, 112 S.Ct. at 2557-58 (White, J., concurring in the judgment).

Notably, the Court was very much aware of the trends involving college speech codes at the time that it decided R.A.V. See Brief of Minnesota Civil Liberties Union (discussing the growth of college speech codes). In his concurring opinion, Justice Blackmun appeared to acknowledge the efforts of Justice Scalia's opinion to address these trends, stating, "I fear that the Court has been distracted from its proper mission by the temptation to decide the issue over 'politically correct speech' and 'cultural diversity,' neither of which is presented here." 505 U.S. at 415, 112 S.Ct. at 2561 (Blackmun, J., concurring).

[FN16]. 505 U.S. at 392, 112 S.Ct. at 2548.

[FN17]. Id.

[FN18]. See, e.g., Richard Delgado, Campus Anti-Racism Rules: Constitutional Narratives in Collision, 85 NW. U. L. REV. 343, 345-48 (1991); Richard Delgado and Jean Stefancic, Overcoming Legal Barriers to Regulating Hate Speech on Campuses, CHRON. OF HIGHER EDUC., Aug. 11, 1993, at B1; Robert M. O'Neil, Colleges Should Seek Educational Alternatives to Rules that Override the Historic Guarantees of Free Speech, CHRON. OF HIGHER EDUC., Oct. 18, 1989, at B1; see also UWM Post, 774 F.Supp.

at 1177, 1181 (predicating opinion in part on conclusion that Title VII cannot supersede the requirements of the First Amendment); Doe v. University of Mich., 721 F.Supp. 852, 853 (E.D. Mich. 1989).

[FN19]. See infra Section IV.

[FN20]. See infra note 152 and accompanying text.

[FN21]. As we will demonstrate, when determining whether activity is protected by the First Amendment, an abstract distinction between activity that is "speech" and activity that is "conduct" is tenable, at best. An altogether different and appropriate question for First Amendment purposes centers upon the object of any rule that may have an impact on expression. Also frequently referenced in terms of a speech-conduct dichotomy, the question posed in this examination is whether the content of speech is the target of the rule at issue, or whether other activity that causes some social harm (conduct) is the target. See infra note 152 and accompanying text.

[FN22]. Although we will focus primarily on educational opportunities and benefits for students in this article, Title VI and Title IX and their implementing regulations may also protect educational opportunities and benefits for faculty members under certain circumstances. See supra note 9. The precise parameters of employment coverage under Title VI and Title IX have long been debated and are currently in question. See, e.g., Lakoski v. University of Tex. Medical Branch at Galveston, 66 F.3d 751 (5th Cir.1995) (involving whether the availability of remedies under Title VII of the Civil Rights Act precludes a private suit seeking damages for employment discrimination under Title IX), petition for cert. filed, 64 U.S.L.W. 3625 (U.S. Mar. 8, 1996) (No. 95-1439).

[FN23]. See infra notes 27-77 and accompanying text.

[FN24]. See infra notes 78-97 and accompanying text.

[FN25]. See infra notes 98-141 and accompanying text.

[FN26]. We have selected these examples because they provide contrasting paradigms through which many of the legal principles related to a university's regulation of expressive behavior that may constitute harassment can be illustrated, and because these examples are representative of frequently recurring instances in which claims of harassment linked to objectionable expression arise. For examples analogous to the classroom discussion described in the first stage of the illustration, see UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys., 774 F.Supp. 1163 (E.D. Wis. 1991); Portland Sch. Dist. 1J, OCR Case No. 10-94-1117 (Dec. 7, 1994); George Mason Univ. Sch. of Law, OCR Case No. 03-94-2086 (Dec. 12, 1994). For examples analogous to the campus activity described in the second stage of the illustration, see University of Ill. at Urbana-Champaign, OCR Case No. 05-94-2104 (Nov. 30, 1995); Trenton Junior College, OCR Case No. 07-87-6006 (Dec. 30, 1987).

There are, no doubt, more analytically difficult cases that could be discussed, and we do not mean to suggest in this article that the analytical framework outlined will provide easy answers in all cases. Rather, our goal is to establish a baseline of inquiry from which any case involving claims of harassment under federal law may be analyzed consistent with First Amendment principles, and to do so in a way that frames the analysis so that the values inherent in each can be fully acknowledged.

[FN27]. See Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506, 89 S.Ct. 733, 736 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."). As discussed in supra note 7, these same principles of free expression are also generally recognized at private colleges and universities.

[FN28]. From the earliest cases involving First Amendment protections of free speech, the Supreme Court has consistently inquired about the interests that may justify government regulation and interference with the expression at issue. See, e.g., Debs v. United States, 249 U.S. 211, 39 S.Ct. 252 (1919); Gitlow v. New York, 268 U.S. 652, 455 S.Ct. 625 (1925); Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857 (1951).

[FN29]. See Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308 (1957) (noting that the promulgation, exchange, discussion and debate of ideas contribute to an informed electorate that can in turn bring about the "political and social changes desired by the people").

[FN30]. See, e.g., Abrams v. United States, 250 U.S. 616, 630, 40 S.Ct. 17, 22 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas"); American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir.1985), aff'd, 475 U.S. 1001, 106 S.Ct. 1172 (1986) (observing that "as a general matter" the truth of the marketplace of ideas is a core principle in First Amendment decisions, but also that truth need not be dominant in order for the government to protect speech in a particular context).

[FN31]. See, e.g., Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866, 102 S.Ct. 2799, 2807 (1982) (plurality opinion) (discussing First Amendment precedent that focuses on the "role of the First Amendment in fostering individual self expression" (citations omitted)); New York Times Co. v. Sullivan, 376 U.S. 254, 269, 84 S.Ct. 710, 720 (1964) ("It is a prized American privilege to speak one's mind, although not always in perfect good taste, on all public institutions." (citations omitted)).

[FN32]. See Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769 (1942) (the First Amendment protects "communication of information or opinion"); Hudnut, 771 F.2d at 327 ("Under the First Amendment the government must leave to the people the evaluation of ideas."). See also Rodney Smolla, Rethinking First Amendment Assumptions About Racist and Sexist Speech, 47 WASH. & LEE L. REV. 171, 209-210 (1990) (distinguishing between "racist opinion" and "racist speech that is devoid of opinion"). It is the message inherent in the communication--ideas, opinions and information--rather than the form of the communication, that predominantly shapes the constitutional inquiry under the First Amendment. See, e.g., Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533 (1989) (upholding flag burning as a form of protected expression, observing that expressive conduct protected by the First Amendment is that activity which reflects an intent to convey a particularized message and a great likelihood that the message will be understood by those who receive it).

[FN33]. See Rosenberger v. Rectors of the Univ. of Va., 115 S.Ct. 2510, 2520 (1995) (universities are "vital centers for the nation's intellectual life").

[FN34]. Keyishian v. Board of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603, 87 S.Ct. 675, 683 (1967). In that case, the Court also cited its own earlier decision in Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S.Ct. 1203, 1211-12 (1957) (plurality opinion), in which Chief Justice Warren noted the importance of

exchange in the classroom to society as a whole:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. 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, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

[FN35]. See supra note 27 and accompanying text. In fact, even the institution itself--or at least its administration--can exercise protected free expression rights when acting as a speaker in the society at large rather than as a regulator of the conduct of individuals within the institution. See, e.g., Rosenberger, 115 S.Ct. at 2510 (discussing rights of a university as a speaker).

[FN36]. It is important to recognize that many university programs and activities do not maintain all of the attributes of the traditional public forum, such as streets and parks, that historically have been open venues for a virtually unlimited exchange of ideas and discussions. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267, 108 S.Ct. 562, 567 (1988). The range and extent of dialogue and discussion that a university must allow under the First Amendment is, therefore, directly related to its policies and practices that limit (or do not limit) access to its facilities. The Supreme Court has recognized that a university, like a private property owner, may "legally preserve the property under its control for the use to which it is dedicated." Rosenberger, 115 S.Ct. at 2516 (quoting Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 390, 113 S.Ct. 2141, 2146 (1993)). Once it has opened a limited forum, however, a university "must respect the lawful boundaries it has itself set." Rosenberger, 115 S.Ct. at 2517. Speech may only be excluded from that forum where such exclusion is "reasonable in light of the purpose served by the forum." Id. (citations omitted). See also Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 684 (1990). For a general discussion of this forum analysis in a university setting, see Erik Forde Ugland, Hawkers, Thieves and Lonely Pamphleteers: Distributing Publications in the University Marketplace, 22 J.C. & U.L. 935 (1996).

[FN37]. Schenck v. United States, 249 U.S. 47, 51, 39 S.Ct. 247, 248 (1919); see aLso FCC v. Pacifica Found., 438 U.S. 726, 747, 98 S.Ct. 3026, 3039 (1978) (observing that "constitutional protection accorded to [offensive language] need not be the same in every context. ... [inasmuch as] its capacity to offend and its 'social value' vary with the circumstances," and that "one occasion's lyric is another's vulgarity"); Roth v. United States 354 U.S. 476, 494-96, 77 S.Ct. 1304, 1314-15 (1995) (Warren, C.J., concurring) (recognizing the central role of context in First Amendment analysis).

[FN38]. See, e.g., Rosenberger, 115 S.Ct. 2510 (1995); Tinker, 393 U.S. at 506, 89 S.Ct. at 736. Cf. Delgado, supra note 18, at 379 ("Classroom discussion of racial matters and even the speech of a bigot aimed at proving the superiority of the white race might move us closer to the truth. But one- on-one insults do not.").

[FN39]. Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249 (1919); Collin v. Smith, 447 F.Supp. 676, 688 (N.D. Ill.), ("the central issue in First Amendment cases is the constant tension between the policy of permitting unrestricted exchange and discussion of ideas and the government's legitimate interest in preventing the harms that may be caused by speech."), aff'd, 578 F.2d 1197 (7th Cir.), cert.

denied, 439 U.S. 916, 99 S.Ct. 291 (1978).

[FN40]. See R.A.V., 605 U.S. at 382-83, 112 S.Ct. at 2542-43.

[FN41]. Of course, that mission is not identical to the mission of compulsory education at lower levels. "The mission of education at all levels is disseminating knowledge, but the mission of higher education includes also discovering and improving knowledge." NEIL HAMILTON, ZEALOTRY AND ACADEMIC FREEDOM 201 (1995).

[FN42]. See Tinker, 393 U,S. at 513, 89 S.Ct. at 740; see also Grayned v. Rockford, 408 U.S. 104, 117-18, 92 S.Ct. 2294, 2304 (1972) (no absolute right to use all parts of school for unlimited expressive purposes).

[FN43]. See Healy v. James, 408 U.S. 169, 180, 194, 92 S.Ct. 2338, 2346, 2353 (1972) (stating that universities may impose viewpoint-neutral, "reasonable campus rules and regulations" consistent with their obligation to "vigilant[ly] protect[]" First Amendment freedoms on campus) (citation omitted).

[FN44]. See infra note 89.

[FN45]. See United States v. Eichman, 496 U.S. 310, 110 S.Ct. 2404 (1990) (government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable). See also Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533 (1989); Cohen v. California, 403 U.S, 15, 915 S.Ct. 1780 (1971) (holding that state lacked compelling justification for its prosecution of an individual for wearing clothing in public bearing the message, "Fuck the Draft"). In fact, the offensiveness of expression, without more, does not rise to the level that would establish a racially or sexually hostile environment under federal law. See, e.g., University of Ill. at Urbana- Champaign, OCR Case No. 0594-2104 (Nov. 30, 1995) ("'Offensiveness,' in and of itself, is not dispositive in assessing a racially hostile environment claim under Title VI, particularly in light of the First Amendment to the United States Constitution.").

[FN46]. See R.A.V., 505 U.S. at 390, 112 S.Ct. at 2546-47 ("Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.").

[FN47]. Frisby v. Schultz, 487 U.S. 474, 108 S.Ct. 2495 (1988); see also Carey v. Brown, 447 U.S. 455,471,100 S.Ct. 2286, 2296 (1980) (the right to communicate is not limitless; "[t]he State's interest in protecting the well- being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."); Rowan v. Post Office Dept., 397 U.S. 728, 737, 90 S.Ct. 1484, 1491 (1970) ("That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere"). Cf. Collin v. Smith, 578 F.2d 1197 (7th Cir.) (recognizing that city residents were not a captive audience because they could avoid an offensive parade if they chose), cert. denied, 439 U.S. 916, 99 S.Ct. 291 (1978).

[FN48]. See Cohen v. California, 403 U.S. 15, 21, 91 S.Ct. 1780, 1786 (1971).

[FN49]. See, e.g., Sable Communications, Inc, v. FCC, 492 U.S. 115, 127, 109 S.Ct.

2829, 2837 (1989) (upholding prohibition against obscene interstate commercial telephone communication but striking down similar prohibitions of indecent messages and stating: "Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message."). See generally, Cohen, 403 U.S. at 21, 108 S.Ct. at 1786 ("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").

[FN50]. See Frisby, 487 U.S. at 48, 108 S.Ct. at 2503 (upholding ordinance that completely banned picketing "before or about" any residence, noting that the reach of the ordinance was to "only focused picketing taking place solely in front of a particular residence," and that "the type of picketers banned by the ... ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident and to do so in an especially offensive way.").

[FN51]. Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769 (1942). The Supreme Court first set forth the "fighting words" doctrine in Chaplinsky, ruling that the First Amendment did not protect those words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id. at 570, 62 S.Ct. at 769. That doctrine has been substantially narrowed, with the Supreme Court now requiring that for a regulation of such expression to be constitutional, the proscription on speech must be tied to an "imminent" danger of violence. See Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829 (1969) (the state may forbid or proscribe advocacy of the use of force or a violation of the law in the limited circumstance where such advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); see also Terminiello v. Chicago, 373 U.S. 1, 83 S.Ct. 1068 (1949); Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303 (1951); Gooding v. Wilson, 405 U.S. 518, 528, 92 S.Ct. 1103, 1109 (1972) (invalidating an ordinance primarily because it had been applied to utterances "where there was no likelihood that the person addressed would make an immediate violent response"); Lewis v. New Orleans, 415 U.S. 130, 132, 94 S.Ct. 970, 971 (1974) (remanding conviction under statute because punishment of "opprobrious language" could include words that did not "by their very utterance inflict injury or tend to invite an immediate breach of the peace") (citation omitted).

[FN52]. The speech code adopted by Stanford University expresslyprohibited expression that "[made] use of insulting or 'fighting' words or non-verbal symbols." Corry v. Leland Stanford Junior Univ., No. 740309, slip op. at 2 (Cal. Super. Ct. Feb. 27, 1995). The Stanford code defined "harassment by personal vilification" to include expression intended to insult or stigmatize an individual on the basis of the individual's "sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin." Id. Similarly, the board of regents at the University of Wisconsin argued that its rule regulated only "fighting words." UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys., 774 F.Supp. 1163, 1169 (E.D. Wis. 1991). The University of Wisconsin rule included as an element of regulated expression "discriminatory" expression that intentionally "demean[ed] the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age" of the individual addressed. Id. at 1165. The University of Michigan policy also included as an element of regulable conduct expression that stigmatized or victimized individuals on the basis of "race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnamera status...." Doe v. University of Mich., 721 F.Supp. 852, 856 (E.D. Mich. 1989).

The narrowness of the fighting words doctrine is the basis upon which, at least in part, these codes were invalidated. See Cory, slip op. at 9 (striking down Stanford University speech code because, among other things, it prohibited words which would "not only cause people to react violently, but also cause them to feel insulted or stigmatized"); UWM Post, 774 F.Supp. at 1172 (striking down University of Wisconsin rule because the rule did not regulate only "speech [which] by its very utterance

tend[ed] to incite violent reaction").

[FN53]. 505 U.S. 377, 112 S.Ct. 2538 (1992).

[FN54]. R.A.V., 505 U.S. at 383-86, 112 S.Ct. at 2543-45.

[FN55]. Although the public university, for example, maintains the constitutional authority to regulate disruptive expression, it may not, as a general rule, impose special regulations on speakers who express views on disfavored subjects, or who express views that contradict or challenge those favored by the university. This prohibition is based upon the existence of "an 'equality of status in the field of ideas,"' and the recognition that under the First Amendment government "must afford all points of view an equal opportunity to be heard." Carey v. Brown, 447 U.S. 455, 463, 100 S.Ct. 2286, 2291 (1980) (citations and footnote omitted). If universities restrict speech in a way tending to favor one side of a debate over another, or tending to limit expression on particular issues, their actions will be subject to a heightened scrutiny under the First Amendment. Such restrictions are referred to as viewpoint- and content-based restrictions, respectively.

[FN56]. R.A.V., 505 U.S. at 380, 112 S.Ct. at 2541.

[FN57]. See id.

[FN58]. See id.

[FN59]. Id. at 381,112 S.Ct. at 2542. The similarity on this point between this ordinance and the college codes that courts have invalidated is striking. See supra note 12.

[FN60]. Id. at 381, 112 S.Ct. at 2542.

[FN61]. Id. at 393-94, 112 S.Ct. at 2549.

[FN62]. Id. at 394, 112 S.Ct. at 2549.

[FN63]. Id.

[FN64]. Id. at 391,112 S.Ct. at 2547. Justices White, Blackmun and Stevens filed separate opinions on behalf of themselves and other members of the Court, concurring in the judgment only. In an opinion that read more like a dissent, Justice White attacked the majority for "cast[ing] aside a long- established First Amendment doctrine [regarding certain narrowly defined categories of speech] ... and adopt[ing] an untried theory." Id. at 398, 112 S.Ct. at 2551 (White, J., concurring in the result). His most fundamental challenge to the majority's opinion rested on his belief that the majority abandoned a long-standing recognition that some categories of speech were of such low value that they were "not within the areas of constitutionally protected speech." Id. at 400, 112 S.Ct. at 2552 (citations omitted). See also New York v. Ferber, 458 U.S. 747, 764, 102 S.Ct. 3348, 3353 (1982) (White, J.) (in an opinion on behalf of the Court, observing that the Court had "squarely held" that obscenity was not constitutionally protected speech).

Justice Blackmun agreed with Justice White's reasoning. R.A.V., 505 U.S. at 413-15, 112 S.Ct. at 2560-61 (Blackmun, J., concurring in the judgment). Justice Stevens, agreeing with much of Justice White's opinion, wrote to explain what he believed to be a "skewed" analysis by both the majority and concurring opinions, based on the absolutism inherent in each. Id. at 417, 112 S.Ct. at 2561 (Stevens, J., concurring in the judgment).

[FN65]. R.A.V., 505 U.S. at 389, 112 S.Ct. at 2546.

[FN66]. Id.

[FN67]. Id. See also Wisconsin v. Mitchell, 508 U.S. 476, 486, 113 S.Ct. 2149, 2200 (1993) (recognizing that R.A.V. cited Title VII as "an example of a permissible contentneutral regulation of conduct"); Hishon v. King & Spaulding, 467 U.S. 69, 104 S.Ct. 2229 (1984). Many of the concepts and principles applicable to hostile environment analysis under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1994), which relates to employment, are similar to the concepts and principles of Title VI and Title IX, which relate to education. See supra note 9. See generally Franklin v. Gwinnett, 503 U.S. 60, 112 S.Ct. 1028 (1992); Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946 (1979). Of course, as noted in Investigative Guidance, the differences between the contexts of employment and education must be considered. See supra note 9.

[FN68]. 505 U.S. at 409-10, 112 S.Ct. at 2557-58.

[FN69]. Id. at 409, 112 S.Ct. at 2557 (citation omitted).

[FN70]. Id.

[FN71]. When the adverse "secondary effects" of the speech at issue provide the basis for a regulation that distinguishes among categories of speech, the regulation is not characterized as content-based for First Amendment purposes. The supporting rationale for this is clear. Government may enact rules that regulate expression in cases where the rule targets the "secondary" harm resulting from that expression rather than the message communicated. Thus, the state may draw otherwise impermissible lines in the regulation of a particular kind or segment of speech when it can justify its restriction "without reference to the content of the regulated speech." Boos v. Barry, 485 U.S. 312, 320, 108 S.Ct. 1157, 1163 (1988); see also Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925 (1986).

[FN72]. The secondary effects "exception" (in the words of Justice White) was one of three exceptions that the majority "engrafted" onto its "newly announced First Amendment rule." R.A.V., 505 U.S. 377, 408, 112 S.Ct. 2538, 2556 (White, J., concurring). The others were: (1) permitting content based distinctions that are made for "the very reason the entire class of speech at issue is proscribable," and (2) permitting content-based distinctions when "there is no realistic possibility that official suppression of ideas is afoot." Id. at 390, 112 S.Ct. at 2558. See also Corry v. Leland Stanford Junior Univ., No. 740309 slip op. at 18 (Cal. Super. Ct. Feb. 27, 1995) (applying the R.A.V. framework).

[FN73]. One term after R.A.V., the Supreme Court in Wisconsin v. Mitchell, 508 U.S. 476, 477, 113 S.Ct. 2194, 2196 (1993), unanimously upheld a penalty enhancement statute singling out bias-inspired conduct because it inflicted "greater individual

and social harm," such as retaliatory crimes and community unrest, and based on the conclusion that the state's desire to redress those harms "provid[ed] an adequate explanation ... over and above mere disagreement with the offender's beliefs and biases." Cf. R.A.V., 505 U.S. at 425, 112 S.Ct. at 2557 (Stevens, J., concurring) (the critical examination in the "selective" regulation of expression designed to protect certain individuals or groups depends on a "legitimate determination that the harm created by the regulated expression differs from that created by the unregulated expression"). See generally Roberts v. U.S. Jaycees, 468 U.S. 609, 628, 104 S.Ct. 3244, 3255 (1984) ("Violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact ... are entitled to no constitutional protection.").

[FN74]. Justice Scalia expressly acknowledged this legal maxim, albeit in a different portion of his opinion: "The emotive impact of speech on its audience is not a 'secondary effect."' R.A.V., 505 U.S. at 394, 112 S.Ct. at 2549 (citations omitted).

[FN75]. Cf., e.g., Aguilar v. Avis Rent-A-Car Sys., 70 Fair Empl. Prac. Cas. 1477 (Cal. Ct. App. 1996) (in the employment context, the secondary- effects exception encompasses speech that creates an abusive work environment in violation of Title VII).

[FN76]. See infra notes 91, 92, 94 and accompanying text.

[FN77]. R.A.V., 505 U.S. at 390, 112 S.Ct. at 2546.

[FN78]. See supra note 9 (describing the applicable federal civil rights laws).

[FN79]. U.S. CONST., amend. XIV, § 1.

[FN80]. See supra note 9. Although only public institutions are subject to the Constitution, most colleges and universities (both public and private) receive federal funds and are therefore subject to Title VI and Title IX.

[FN81]. Under certain circumstances, current federal law permits (and sometimes requires) affirmative action to further improve educational opportunities for certain groups of students. See, e.g., 34 C.F.R. § 100.3(b)(6)(i) and (ii) (1995) (Title VI regulations that require affirmative action to remedy discrimination and permit voluntary affirmative action to overcome the effects of conditions that have resulted in limited participation in educational programs by members of a particular race, color or national origin). See also Joint Statement on Rights and Freedoms of Students, AAUP Policy Documents and Reports (1995 ed.) at 228, n.3 ("In all aspects of education, students have a right to be free from discrimination on the basis of individual attributes not demonstrably related to academic success in the institution's programs, including but not limited to race, color, gender, age, disability, national origin, and sexual orientation.").

[FN82]. See supra note 9 (referencing Title VI and Title IX).

[FN83]. See, e.g., 29 C.F.R. § 1604.11 (1991) (definition of sexual harassment in employment based on legal standards for employer liability). See also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399 (1986) (discussing the evolution of the

case law and recognizing a sexually hostile environment as a form of sex discrimination in employment).

[FN84]. See Investigative Guidance, 59 Fed. Reg. at 11448; Sexual Harassment Guidance, supra note 9.

[FN85]. See Alexander v. Yale Univ., 459 F.Supp. 1, 4 (D.Conn. 1977), aff'd, 631 F.2d 178 (2d Cir.1980) (a claim that academic advancement was conditioned upon submission to sexual demands constitutes a claim of sex discrimination in education); Kadiki v. Virginia Commonwealth Univ., 892 F.Supp. 746 (E.D. Va. 1995); see also Moire v. Temple Univ. Sch. of Medicine, 613 F.Supp. 1360, 1366 (E.D. Pa. 1985), aff'd mem., 800 F.2d 1136 (3d Cir.1986).

[FN86]. See Investigative Guidance, 59 Fed. Reg. at 11448-49 & 11451 (citations omitted).

[FN87]. See id.

[FN88]. See id. at 11449-51 (discussing hostile environment standard as used to analyze racial harassment allegations in the education context); Meritor, 477 U.S. 57, 106 S.Ct. 2399 (recognizing hostile environment standard as a form of sexual harassment under Title VII); Sexual Harassment Guidance, supra note 9, at 52175.

[FN89]. The benefits protected by the discrimination laws differ based on the mission and purpose of institutions as educators or employers. Accordingly, the context and the role of the institution (as educator or employer) must be considered in applying these legal standards. See Investigative Guidance, 59 Fed. Reg. at 11451, n.3 ("OCR will consider the differences between the contexts of employment and education" in applying these standards). This article focuses on the educational context and on the role of colleges and universities as educational institutions, rather than on employment issues that arise in the university setting.

[FN90]. For example, "compare Trenton Junior College, OCR Case No. 07-87- 6006 ([T]itle VI violated where college failed to provide adequate security for black basketball players who were subjected to a break-in, cross-burning and placement of raccoon skins at their campus residences) with University of Cal., Santa Cruz, OCR Case No. 09-91-6002 (no finding of racial harassment where OCR found only isolated individual incidents over three-year period)." Id. at 11452-53 and cases cited therein.

[FN91]. The question is whether all the facts and circumstances, taken together, are enough to indicate the existence of an environment that is not conducive to--or that interferes with--learning. See Investigative Guidance, 59 Fed. Reg. at 11452; Sexual Harassment Guidance, supra note 9, at 52176. By its very nature, this standard necessitates a case-by-case analysis. See also, e.g., University of Ill. at Urbana-Champaign, OCR Case No. 05-94- 2104 (Nov. 30, 1995) (no violation of Title VI found where most alleged incidents of harassment were isolated, not recent, or not corroborated).

[FN92]. See, e.g., Investigative Guidance, 59 Fed. Reg. at 11449:

> As with other forms of harassment, ... the relevant particularized characteristics and circumstances of the victim--especially the victim's race and age--[are considered] when evaluating the severity of racial incidents at an

educational institution.... The perspective of a person of the same race as the victim is necessary because race is the immutable characteristic upon which the harassment is based.
Cf. AAUP, Policy Documents and Reports, 1995 ed. p.171 (defining sexual harassment as speech or conduct that is "reasonably regarded as offensive and substantially impairs the academic ... opportunity of students.... If it takes place in the teaching context, it must also be persistent, pervasive, and not germane to the subject matter").
Differences in age are somewhat less important for this analysis in higher education (where students are generally adults or close to adulthood) than in elementary and secondary education, where developmental differences due to the age of students may be more pronounced. See Sexual Harassment Guidance, supra note 9, at 52177 and cases cited therein.

[FN93]. See supra notes 44-45 and accompanying text.

[FN94]. See, e.g., 34 C.F.R. § 106.31 (1995) (defining sexual discrimination as premised upon a denial of student benefits, services and opportunities); Quincy High Sch., OCR Case No. 01-92-1003 (July 12, 1995) ("A racially hostile environment exists when harassing conduct of a racial nature is sufficiently severe, pervasive, or persistent as to interfere with or limit the ability of an individual to participate in or benefit from the services, benefits, activities, or privileges provided by a recipient [of federal funds]." (emphasis added). The federal civil rights statutes that apply to institutions of higher education cover conduct within the full range of programs and activities offered by those institutions, both in and outside the classroom. See, e.g., 34 C.F.R. § 100.3 (1995) (describing the variety of contexts in which race discrimination is prohibited under Title VI, including "any academic, extracurricular, research, occupational training, or other education program or activity").

[FN95]. See Sexual Harassment Guidance, supra note 9.

[FN96]. See HAMILTON, supra note 41, at 3:
Practically speaking, in a liberal intellectual system, the university is the one community whose mission is specifically the seeking, making, and disseminating of knowledge through the use of evidence, reason, and unrestricted professional criticism.... These skills are the heart of the checking process that produces knowledge.

[FN97]. In employment law, for example, Title VII of the Civil Rights Act of 1964 protects against discrimination in the "terms and conditions of employment." 42 U.S.C. § 2000e (1994). See also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64, 106 S.Ct. 2399, 2404 (1986); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 371 (1993). By contrast, some of the benefits relating to and resulting from the robust exchange of ideas in the context of higher education are not ordinarily recognized as legally protected benefits in other contexts--such as employment in other industries. The American Association of University Professors' Policy Statement on Academic Freedom and Sexual Harassment (1994) notes:
At its best, the academic working environment--and a fortiori, the academic learning environment--itself consists in robust exchange of ideas. Ideas whose expression may be felt to be intimidating, hostile, or offensive cannot be prohibited on the sheer ground that they are felt to be so. The learning environment must be open to all ideas, however distasteful or distressing they may be felt to be, for there cannot be responsible assessment of ideas-- or acquisition by students of the ability to make responsible assessments of ideas for themselves--in an environment in which some ideas are suppressed at the outset because they do or may offend.
See Academic Freedom and Sexual Harassment, ACADEME, Sept.-Oct. 1994, at 64.

[FN98]. See, e.g., Jane Smiley, Say It Ain't So, Huck: Second Thoughts on Mark Twain's Masterpiece, HARPER'S MAG., Jan. 1996, at 61 (questioning the relative literary value of HUCKLEBERRY FINN in light of its treatment of racial issues and suggesting that other works may better illustrate such issues in a serious way in a classroom setting).

[FN99]. "Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials." 34 C.F.R. § 106.424 (1995). As stated in the preamble to this section, "The Department has construed Title IX as not reaching textbooks and curricular materials on the ground that to follow another interpretation might place the Department in a position of limiting expression in violation of the First Amendment." 40 Fed. Reg. at 24135 (1979). Title VI and its implementing regulation have been similarly construed. See, e.g., infra note 101.

[FN100]. See, e.g., Westbrook v. Teton County Sch. Dist. No. 1, 918 F.Supp. 1475, 1484 (D.Wyo. 1996) ("Teachers ... should have an important voice in the debate over educational matters ranging from curriculum to discipline.") (citations omitted). "[F]ree discourse among academic professionals within the ethical and competency constraints of a discipline" is the key requirement for the improvement of knowledge. HAMILTON, supra note 41, at 201. For this reason, AAUP and others advocate the concept of peer review of faculty by colleagues in their discipline. See id.

[FN101]. See, e.g., Mount Vernon Hosp. Sch. of Nursing, OCR Case No. 02-94-2099 (June 12, 1995) (pediatrics instructor's use of books on nursing and anatomy, making reference regarding melanin in dark-skinned individuals, was relevant to the subject matter of the general course and therefore did not constitute discrimination); Portland Sch. Dist. 1J, OCR Case No. 10-94- 1117 (Dec. 7, 1994) (use of historical novel, TO KILL A MOCKINGBIRD, in a reading class was within the teacher's discretion).

[FN102]. See Westbrook, 918 F.Supp. at 1492 and cases cited therein.

[FN103]. See, e.g., Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir.1996); Silva v. University of N.H., 888 F.Supp. 293 (D.N.H. 1988). In both cases, professors argued that they used deliberately provocative teaching techniques to illustrate points in class and to sustain their students' interest in the subject matter of the course.

[FN104]. "In a nutshell, expression of controversial ideas and criticism of the status quo must be protected, even at the risk of discomfort for the teacher or class, when a professor is teaching within her field." Olivas, supra note 6, at 1845.

[FN105]. See id. at 1849 (certain adversarial teaching methods, for example, may have a place in classes on litigation tactics).

[FN106]. See George Mason Univ. Sch. of Law, OCR Case No. 03-94-2086 (Dec. 12, 1994).

[FN107]. Id.

[FN108]. Id.

[FN109]. Id.

[FN110]. See Sexual Harassment Guidance, supra note 9, at 52180: "OCR recognizes that the offensiveness of particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX." (citation omitted).

[FN111]. See Portland Sch. Dist. 1J, OCR Case No. 10-94-1117 (Dec. 7, 1994) (Student objected to use of this technique and filed a complaint of racial harassment. OCR concluded that the teacher had made an educational decision to use a particular technique, and that "[c]onduct which is offensive but which does not constitute a form of legally cognizable race discrimination is not covered by Title VI.").

[FN112]. In asking these questions, it should be clear that the professor generally has no legal obligation to explain a choice of text or teaching method. Of course, in the context of litigation in which a colorable claim of discrimination has been alleged (e.g., in which the allegations address more than a text or teaching method), such an explanation may be called for. See George Mason Univ. Sch. of Law, OCR Case No. 03-94-2086 (Dec. 12, 1994).

[FN113]. Nevertheless, such examples might be used legitimately to get students' attention. See, e.g., Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir.1996) (college anti-harassment code was unconstitutionally vague as applied to place limits on professor's longstanding "devil's advocate" teaching style, using sexual topics and language in remedial English class).

[FN114]. Students may drop a course for a variety of reasons. A student's choice to withdraw must be analyzed much like an employee's quitting of a job under the constructive discharge theory. See, e.g., University of Ill. at Urbana-Champaign, OCR Case No. 05-94-2104 (Nov. 30, 1995) (although there was evidence that students had withdrawn from university programs and activities, there was insufficient evidence that those actions were linked to a denial of educational benefits on the basis of race).

[FN115]. Note that in Cohen v. San Bernadino Valley College, 92 F.3d 968 (9th Cir.1996), the Ninth Circuit declined to hold that the college could never punish behavior of this nature--it said only that the college anti-harassment policy was unconstitutionally vague as applied in that case.

[FN116]. See supra notes 47-50 and accompanying text.

[FN117]. See, e.g., Piarowski v. Illinois Community College, 759 F.2d 625 (7th Cir.1985) (where college art gallery in heavily trafficked space is not open to expression by the general public, college can exercise some control over exhibit of professor's allegedly sexually explicit and racially offensive works).

[FN118]. 92 F.3d 968 (9th Cir.1996).

[FN119]. Id.

[FN120]. Id.

[FN121]. Id.

[FN122]. Id.

[FN123]. See supra notes 89-92 and infra note 141.

[FN124]. See supra notes 5-19.

[FN125]. See supra notes 7-34.

[FN126]. See supra note 26.

[FN127]. See e.g., Silva v. University of N.H., 888 F.Supp. 293 (D.N.H. 1994) (presuming that college students have the sophistication of adults). See generally NAT HENTOFF, FREE SPEECH FOR ME--BUT NOT FOR THEE 167(1992).

[FN128]. See, e.g., Florida Agric. & Mechanical Univ., OCR Case No. 04-92-2054 (Nov. 13, 1992) (where college newspaper article offended some students, but they had option of responding with their own opinion, no violation of Title VI was found).

[FN129]. Compare, e.g, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272, 108 S.Ct. 362, 570 (1988) (with regard to the regulation of speech on sensitive topics, schools can "take into account the emotional maturity of the intended audience"), with Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269 (1981) (at the postsecondary level, restrictions based on the content, offensiveness, or political viewpoint of speech generally are not permitted).

[FN130]. See generally HAMILTON, supra note 41, at 204-06.

[FN131]. See Sexual Harassment Guidance, supra note 9, at 52180.

[FN132]. Note that AAUP and other faculty experts have long held the view that, in the first instance, the judgment as to what constitutes appropriate pedagogy and curriculum in any given field is best made by faculty colleagues within the discipline. See generally HAMILTON, supra note 41, at 166-67.

[FN133]. See supra notes 3, 7, 34. George Mason Sch. of Law, OCR Case No. 03-94-2086 (Dec. 12, 1994); Silva v. University of N.H., 888 F.Supp. 293 (D.N.H. 1994); Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir.1996); Mount Vernon Hosp. Sch. of Nursing, OCR Case No. 02-94-2099 (June 12, 1995); see also HAMILTON, supra note 41, at 351:

> As an aspirational matter, the principle of free inquiry and speech is critical

to the university's mission of seeking, making and disseminating knowledge. Without free discourse, teaching, scholarship, and the university itself are without legitimacy in a liberal intellectual system.

[FN134]. See supra note 94.

[FN135]. See id. This does not necessarily mean that a college cannot offer single-sex housing or other housing programs that are identified with particular student groups on a voluntary basis. Those issues raise other questions under discrimination statutes and are beyond the scope of this article. Although the weight of federal authority confirms that the protections of Title IX extend to peer-on-peer student sexual harassment, see Sexual Harassment Guidance, supra note 9 at 52175; Bosley v. Kearney R-1 Sch. Dist., 904 F.Supp. 1006 (W.D. Mo. 1995), the question is not yet settled. See Rowinsky v. Bryan Ind. Sch. Dist., 80 F.3d 1006 (5th Cir.1996), cert. denied, 65 U.S.L.W. 3261 (U.S. 1996).

[FN136]. See, e.g., Florida Agric. and Mechanical Univ., OCR Case No. 04-92-2054 (Nov. 13, 1992) (upholding right of students to express opinions about racial issues in student newspaper where all students had access to that opportunity).

[FN137]. See Investigative Guidance, 59 Fed. Reg. at 11452; supra note 9.

[FN138]. See id. at 11452-53.

[FN139]. See supra notes 47-50 and accompanying text.

[FN140]. SeeUniversity of Ill. at Urbana-Champaign, OCR Case No. 05- 94-2104 (Nov. 30, 1995) (alleged incidents of harassment that could be corroborated were isolated and spread out over a period of several years).

[FN141]. See Investigative Guidance, 59 Fed. Reg. at 11452. Even if such conduct was sufficiently severe, pervasive or persistent to establish a racially hostile environment within the legal definition of Title VI, the law would not be violated unless and until the university failed to respond adequately upon notice of the harassment.

[FN142]. Doe v. University of Mich., 721 F.Supp. 852, 867 (E.D. Mich. 1989).

[FN143]. See supra notes 11-12 (describing cases in which codes have been ruled invalid).

[FN144]. As discussed earlier, see, e.g., supra note 6, private institutions are not subject to the First Amendment and therefore may have more flexibility in regulating expression. Nevertheless, such institutions generally share an interest in academic freedom and open discourse, and may be subject to other legal obligations based on state law or their own promises or principles (contractual or otherwise).

[FN145]. Compare University of Oklahoma Racial and Ethnic Harassment Policy (1995) (defining prohibited harassment in terms of federal standards under Title VI), with Stanford Speech Code (prohibiting, among other things, speech directed at and

"intended to insult"--through the use of "insulting or 'fighting"' expression--individuals on the basis of race, color, etc.) (invalidated under state law extending First Amendment protections to private colleges and universities in Corry v. Leland Stanford Junior Univ., No. 740 309, slip op., (Cal. Super. Ct. Feb. 27, 1995), where the court construed the code and record to suggest that the code's "aim" was certain categories of expression).

[FN146]. See supra note 52 (discussion of Michigan and Wisconsin policies); see also Westbrook v. Teton County Sch. Dist. No. 1, 918 F.Supp. 1475, (D.Wyo. 1996) (school policy limiting criticism among and between employees found vague and overbroad). See generally Rust v. Sullivan, 500 U.S. 173, 200, 111 S.Ct. 1759, 1776 (1991) (citation omitted).

[FN147]. See Corry v. Leland Stanford Junior Univ., No. 740309, slip op. (Cal. Super. Ct. Feb. 27, 1995) (reciting terms of university's speech code).

[FN148]. See supra notes 98-133 and accompanying text.

[FN149]. Id.

[FN150]. See, e.g., University of Pittsburgh, OCR Case No. 03-89-2035 (Oct. 27, 1989) (campus police treated black students more severely than white students); Roosevelt Warm Springs Institute for Rehabilitation, OCR Case No. 04-89-3003 (Mar. 2, 1989) (same).

[FN151]. This inquiry ignores the indisputable fact that many forms of expression involve "conduct" or "action" just as they involve "speech." Therefore, to premise any analysis on abstract bright lines between speech and conduct will result in a question-begging and ultimately futile exercise. See, e.g., Texas v. Johnson, 491 U.S. 397, 416, 109 S.Ct. 2533, 2546 (1989) (recognizing that the distinction between "written or spoken words and nonverbal conduct is of no moment where the nonverbal conduct is expressive ... and where the regulation of that conduct is related to expression"); see also LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-7 at 827 (2d ed. 1988) ("[A]ny particular course of conduct may be hung almost randomly on the 'speech' peg or the 'conduct' peg as one sees fit."); John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 HARV.L.REV. 1482, 1495-96 (1975) (all communicative behavior is "100% action and 100% expression"). Sign language highlights the problems of the speech-conduct distinction in this regard. It consists of "various kinds of physical conduct--whether the making of specific sounds or specific hand movements--[that constitutes] language when they have reached a level of sophistication in grammatical structure and vocabulary to allow them to convey complex ideas with a sufficient degree of accuracy." Yniguez v. Arizonans for Official English, 69 F.3d 920, 935, n.18 (9th Cir.1995) (en banc), cert. granted, 64 U.S.L.W. 3635, 3639 (Mar. 25, 1996) (No. 95-974).

[FN152]. See Stanford Speech Code discussed supra note 52 and accompanying text.

[FN153]. See supra note 21 and accompanying text. But see Dambrot v. Central Mich. Univ., 55 F.3d 1177 (6th Cir.1995) (upholding the termination of a coach for his use of the term "nigger" during a locker room session, despite finding that the university harassment policy pursuant to which he was terminated was unconstitutional).

[FN154]. See supra note 145 and accompanying text.

[FN155]. Compare, e.g., sections of the San Bernardino Valley College sexual harassment policy found in Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir.1996), with the U.S. Equal Employment Opportunity Commission definition of sexual harassment cited in R.A.V., 505 U.S. 377, 389, 112 S.Ct. 2538, 2546 (1992).

[FN156]. See Cohen, 92 F.3d at 972.

[FN157]. See R.A.V., 505 U.S. at 389-90, 112 S.Ct. at 2546-47.

[FN158]. See generally Sexual Harassment: Suggested Policy and Procedures for Handling Complaints, AAUP Policy Documents and Reports, at 172.

[FN159]. See supra note 97.

[FN160]. See supra note 97 (describing Title VII).

[FN161]. See Sexual Harassment: Suggested Policy and Procedures for Handling Complaints, supra note 158; see also, e.g., George Mason Univ. Sch. of Law, OCR Case No. 03-94-2086 (Dec. 12, 1994).

[FN162]. See, e.g., University of Ill. at Urbana-Champaign, OCR Case No. 05-94-2104 (Nov. 30, 1995); Florida Agric. & Mechanical Univ., OCR Case No. 04-92-2054 (Nov. 13, 1992).

[FN163]. 42 U.S.C. § § 3601-31 (1994).

[FN164]. See supra note 104 and accompanying text.

[FN165]. See Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir.1996).

[FN166]. Id.

[FN167]. Id.

[FN168]. Id.

[FN169]. In the policy adopted by the University of Oklahoma, for instance, the introduction discusses the importance of diversity and the importance of respecting cultural differences in the higher education context. See supra notes 145, 154 and accompanying text.

[FN170]. There is a fundamental distinction between a representative of a university

acting as a speaker in expressing particular views and the university acting, based on particular views, to regulate the expression of students on campus. In the former case, the action is generally constitutional; in the latter, it is not. See Rosenberger v. Rectors of the Univ. of Va., 115 S.Ct. 2510 (1995); see also Post, supra note 36, at 665.

[FN171]. See On Freedom of Expression and Campus Speech Codes, AAUP Policy Documents and Reports, at 38; Sexual Harassment Guidance, supra note 9, at 52180.

[FN172]. See Sexual Harassment Guidance, supra note 9, 52180.

[FN173]. See, e.g., Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S.Ct. 3065 (1984).

[FN174]. Metromedia, Inc. v. San Diego, 453 U.S. 490, 516, 101 S.Ct. 2882, 2879 (1991) (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771, 996 S.Ct. 1817, 1830 (1976)) (citation omitted).

[FN175]. See Sexual Harassment Guidance, supra note 9, at 52180.

[FN176]. See R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 389-90, 112 S.Ct. 2538, 2546-47 (1992); see also Wisconsin v. Mitchell, 508 U.S. 476, 113 S.Ct. 2194 (1993) (enhancement of penalties for various infractions, if shown to have been based on race or sex, may be appropriate). See On Freedom of Expression and Campus Speech Codes, AAUP Policy Documents and Reports, supra note 171, at 38.

[FN177]. Cf. Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 395 (4th Cir.1993) (Murnaghan, concurring in the judgment) ("Certainly, the most fundamental concern of a university is to provide the optimum conditions for learning."); Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 MICH.L.REV. 2320, 2370-71 (1989) ("Students are particularly dependent on the university for community, for intellectual development, and for self definition.").

[FN178]. See On Freedom of Expression and Campus Speech Codes, supra note 171, at 38.

[FN179]. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-13, 98 S.Ct. 2733, 2759-60 (1978) (quoting Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675 (1967)). Although this concept of diversity in higher education has recently come under attack in the context of affirmative action, see, e.g., Hopwood v. Texas, 78 F.3d 932 (5th Cir.) (rejecting diversity as a compelling interest for justifying race-based affirmative action in admissions at a public law school), cert. denied, 116 S.Ct. 2581 (1996), many leading educators continue to reaffirm the principles of Bakke, stating the belief that diversity remains a central goal and benefit in higher education. See, e.g., Neil L. Rudenstine, The Uses of Diversity, HARV. MAG., Mar.-Apr. 1996, at 48.

[FN180]. See On Freedom of Expression and Campus Speech Codes, supra note 171, at 37:

> An institution of higher learning fails to fulfill its mission if it asserts the power to proscribe ideas--and racial or ethnic slurs, sexist epithets, or homophobic

insults almost always express ideas, however repugnant. Indeed, by proscribing any ideas, a university sets an example that profoundly disserves its academic mission.

[FN181]. See HENTOFF, supra note 127, at 146-92.

[FN182]. EDWARD J. CLEARY, BEYOND THE BURNING CROSS 198 (1995) (quoting a speech of Mr. Justice Stevens).

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