Catholic University Law Review

Volume 44
Issue 1 *Fall 1994*

Article 8

1994

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A COMMUNITARIAN COMPROMISE ON SPEECH CODES: RESTRAINING THE HOSTILE ENVIRONMENT CONCEPT

*Linda E. Fisher**

I. INTRODUCTION

The zenith of campus speech codes and antiharassment policies has peaked and the backlash has arrived. Recently, some schools even have abandoned their codes, with much attendant publicity.[1] Criticism of the codes has come from many quarters. Opposition to multiculturalism or enforced nondiscrimination has provided the basis for the more shrill and

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1. For example, the University of Michigan and Wesleyan University have repealed their policies. Lawrence White, *Hate-Speech Codes That Will Pass Constitutional Muster*, CHRON. HIGHER EDUC., May 25, 1994, at A48. The University of Pennsylvania recently limited its policy condemning hate speech, but explained that "the content of student speech or expression is not by itself a basis for disciplinary action." University of Pennsylvania, Code of Student Conduct, July 12, 1994. Threats of violence and disorderly conduct, however, are precluded by the policy. *Id.* Other schools, such as the University of Texas, are reexamining or modifying their policies in reaction to the Supreme Court decision in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), which placed limitations on content-based restrictions of speech by the state. Telephone Interview with Gage Paine, Associate Dean of Students, University of Texas at Austin (June 30, 1994).

For a survey of codes at public institutions, see ARATI W. KORWAR, WAR OF WORDS: SPEECH CODES AT PUBLIC COLLEGES AND UNIVERSITIES (1994); Michael A. Olivas, *The Political Economy of Immigration, Intellectual Property, and Racial Harassment: Case Studies of the Implementation of Legal Change on Campus*, 63 J. HIGHER EDUC. 570, 581-84 (1992).

ideological attacks.[2] These critics tend to brand the initials "P.C." on code supporters.[3]

More reasoned and moderate criticisms emphasize that many codes are poorly drafted, vague, or overbroad.[4] When vagueness is combined with enforcement by poorly trained or overzealous administrators, it leads to prosecutions that are disproportionate to the underlying complained-of behavior and chills campus speech.[5] Other critics oppose all speech codes

2. *See* James Boyle, *The PC Harangue*, 45 STAN. L. REV. 1457, 1462 (1993) (reviewing DEBATING PC: THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES (Paul Berman ed., 1992)). As with bilingual education and affirmative action programs, conservatives oppose speech codes, which are based on a belief that an "American state should stand for no particular religion or pattern of culture, or [which are based on] a commitment to . . . 'diversity.' " *Id.*

3. "P.C.," or politically correct, is often used as an epithet. Ironically, those leveling these charges, presumably in the interest of promoting free speech, often stifle debate. *See* Boyle, *supra* note 2, at 1465. One commentator noted that

> in some of the cases described by the critics of political correctness, there seems to be a complete failure to recognize that free speech cuts both ways. If I tell a black student that even when she honestly believes her classmate's position to be racist she is not allowed to say so, I am hardly supporting the cause of *free speech*. The same goes for the students who find it objectionable when a professor always casts women in the role of secretaries, men in the role of lawyers. What are we supposed to do in the name of the First Amendment, tell the students to shut up?

Id.

4. *See* White, *supra* note 1, at A48.

5. For example, the University of New Hampshire and Professor Donald Silva recently reached a settlement after Silva brought suit against the university, claiming the school violated his right to freedom of speech under the First Amendment. *See* Silva v. University of New Hampshire, No. Civ. 93-533-SD, 1994 WL 504417, *17 (D.N.H. Sept. 15, 1994). The university suspended Silva without pay for sexual harassment when he used sexual allusions in class. *Id.* On one occasion, Silva, a technical writing professor, explained the concept of "focus" in writing: " 'Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one.' " *Id.* at *3. On another occasion he gave the following example of a simile to his class: " 'Belly dancing is like jello on a plate with a vibrator under the plate.' " *Id.*

In addition to the classroom comments, several students complained that Silva used *double entendres* or made other offensive remarks in their presence. *Id.* at *15-17. One student said that, in response to her remark that she was "going to jump on the computer," Silva replied, " 'I'd like to see that.' " *Id.* at *16. Another stated that he told a student who was on her hands and knees searching through a card catalog that she looked like she'd " 'had a lot of experience' " on her knees. *Id.* at *16. A couple of other students claimed Silva implied that they had a lesbian relationship by asking, " 'How long have you two been together?' " *Id.* Another claimed he made too many sexual references when speaking to her. *Id.* at *15-16.

The United States District Court for the District of New Hampshire granted Silva a preliminary injunction holding that Silva would likely succeed on his First Amendment claim. *Id.* at *21. The court ordered the university to reinstate Silva, finding that the school disciplined Silva merely because a few students found his choice of words "outrageous": " '[T]he fact that society may find speech offensive is not sufficient reason for suppressing it. . . .' " *Id.* at *21 (quoting FCC v. Pacifica Found. 438 U.S. 726, 745 (1978)). In

and attempt to regulate verbal harassment on various grounds, including the need to uphold the marketplace of ideas and the claimed inherent ineffectiveness of codes.[6] Lately, some commentators decry many codes' emphasis on victimization.[7] Arguing that a focus on victim status deprives one of agency, these critics instead endorse self-reliance.[8] They believe that targets of harassment should assume the responsibility to respond individually to harassers.[9] Their opponents in turn reply that harassment policies can fortify victims' empowerment, giving them the necessary support to fight harassment.[10]

Like many others, I approach the entire subject not only with a great deal of ambivalence, but also with some trepidation. When interests as potent as free speech and equality clash, the fallout can easily obscure the issues, generating more heat than light, as evidenced by recent media attention.[11] In this atmosphere, supporters of even limited regulation

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reaching its decision, the *Silva* court only considered the evidence that "clearly demonstrate[d] that but for Silva's classroom statements he would not have been subject to UNH discipline." *Id.* at *23.

The University of New Hampshire planned to appeal the court's decision, but the recent settlement ended the litigation. Professor Silva will receive $60,000 in back pay and compensation and $170,000 in lawyer's fees. In addition, the school reinstated Silva without prejudice and the charges against him were removed from his personnel file. *In Brief: Settlement in University of New Hampshire Sexual Harassment Case*, ACADEME, Jan.-Feb. 1995, at 5. For additional discussion of the Silva case, see Richard Bernstein, *Guilty if Charged*, N.Y. REV. BOOKS, Jan. 13, 1994, at 11; *Academic Freedom and Tenure: University of New Hampshire*, ACADEME, Nov.-Dec. 1994, 70, 80 (concluding that the sanctions imposed by the University of New Hampshire departed from established standards of academic due process).

6. Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 530, 562-69 (arguing current regulations chill protected speech). Alternatively, Strossen suggests, "the strategy of increasing speech—rather than decreasing it—not only would be consistent with first amendment principles, but also would be more effective in advancing equality goals." *Id.* at 562.

7. Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1421-23 (1993) (stating that women students and students of color feel silenced by the codes in the classroom); *see* Kathryn Abrams, *Songs of Innocence and Experience: Dominance Feminism in the University*, 103 YALE L.J. 1533, 1535-39 (1994) (referring to one critic's assessment that the codes teach women to be " 'hothouse flowers,' " unable to handle the demands of the sexual world).

8. *See* Abrams, *supra* note 7, at 1538.

9. *See, e.g.*, KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS 88-93 (1993) (indicating that the response to sexual harassment should be decollectivized action rather than imposition of codes of etiquette).

10. *See* Abrams, *supra* note 7, at 1552-57.

11. Sheldon Hackney, former president of the University of Pennsylvania, recently gave his perspective on the turmoil over speech codes: " 'In this kind of argument, one is either right or wrong, for them or against them, a winner or a loser. Real answers are the casualties of such drive-by debate. This may be good entertainment, but it is a disservice to the American people. It only reinforces lines of division and does not build toward agreement.' " Paul McMasters, *Free Speech Versus Civil Discourse: Where Do We Go From*

become "censors," while opponents are not only "insensitive" but "reactionary."

More fundamentally, even after one manages to pick through the debris, a basic tension remains. Each side's arguments have not only a modicum of appeal, but some merit.[12] Encouraging the free expression of ideas and constant debate enhances creativity and diminishes misdirected suppression of dissidents.[13] On the other hand, giving free rein to bigots and bullies ultimately undermines the very academic atmosphere necessary to sustain creative debate.[14] Restraining group-based harassment also can foster multiculturalism. Permitting the suppression of disapproved speech, however, creates almost insurmountable problems of line-drawing and enforcement.[15] Further, imposing sanctions on certain speech can make martyrs of bigots.[16] As a result, the debate rages on, circling endlessly around itself. Its terms are by now well-rehearsed and even somewhat "shopworn," as one commentator recently observed.[17]

Here?, ACADEME, Jan.-Feb. 1994, at 8, 11-12 (quoting Sheldon Hackney); *see also Buffaloed: Risking Political Incorrectness, Penn Rescinds its Speech Code*, TIME, Nov. 29, 1993, at 67, 67 (explaining that the University of Pennsylvania replaced its speech code with a policy based on community standards); *Colleges Questioning Anti-Bias Guidelines*, PHIL. INQR., May 2, 1994, at A13 (noting that college officials are concerned that federal civil rights guidelines will cause schools to violate the First Amendment); *Racism Taints Universities' Hallowed Halls*, USA TODAY, Nov. 9, 1992, at 6A (indicating that the University of Massachusetts' efforts to deal with campus racism include the recruitment of minority faculty and students and diversity training for staff); *Stanford Anti-Harassment Policy Violates Rights of Free Speech, California Judge Rules*, CHRON. HIGHER EDUC., Mar. 10, 1995, at A32 [hereinafter *Stanford Anti-Harassment Policy Violates Rights*] (discussing that the Stanford antiharassment policy was struck down under a California statute applying constitutional standards to private schools); *War of Words over Stanford's Speech Rule: Student's Lawsuit Claims University's Code is Unconstitutional Gag on Free Expression*, S.F. CHRON., May 4, 1994, at A14 (indicating that students are challenging the speech code by seeking its repeal or reduction).

12. *See* Ronald J. Rychlak, *Civil Rights, Confederate Flags, and Political Correctness: Free Speech and Race Relations on Campus*, 66 TUL. L. REV. 1411, 1432 (1992) (recognizing that, while the intent of speech codes to protect the "well-being" of students is "legitimate," such codes ultimately stifle the "free and robust exchange of ideas" crucial to preserving academic freedom); Strossen, *supra* note 6, at 530 (arguing that "silencing certain expressions may be tantamount to silencing certain ideas").

13. *See* Rychlak, *supra* note 12, at 1429 (arguing that education "is dependent upon the free flow of ideas so that open and honest debate can lead to the correct answer").

14. *See* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452-53 (arguing that racial insults "disserve" the purpose of the First Amendment to encourage "the greatest amount of speech").

15. *See* McMasters, *supra* note 11, at 11 (discussing the failure of speech codes to define acceptable and unacceptable speech).

16. Henry L. Gates, Jr., *Truth or Consequences: Putting Limits on Limits*, ACADEME, Jan.-Feb. 1994, at 14, 15.

17. *Id.* at 14. Several legal commentators also have considered these topics. *See* Michael A. Olivas, *Racial Harassment/Hate Speech Bibliography*, 63 J. HIGHER EDUC. 599,

Notwithstanding the problematic nature of codes, however, I submit that a narrowly drafted, rationally enforced code prohibiting physical and certain verbal acts of racial, religious, and sexual harassment still can play an important role on campuses.[18] While personal insults and unwanted sexual advances constitute the majority of this harassment, in some instances codes also might address subtle, veiled attacks that apparently are not directed toward a particular individual.[19] Such limited codes, when enforced intelligently, can promote rather than stifle academic freedom for everyone in the community consonant with First Amendment principles.[20]

I analyze sexual, racial, and religious harassment similarly because they are conceptually more alike than distinct. Such harassment may be mutually reinforcing in cases involving women of color, for example, who experience both racial and sexual harassment, with no clear boundary distinguishing the two.[21] Although sexual harassment often takes the

599 (1992) (listing citations of several legal articles dealing with harassment and hate speech).

18. Campus codes might also prohibit group-based discrimination and harassment based on sexual orientation or disability, or even prohibit all forms of personal harassment.

19. For a definition of this narrow exception to the individually directed requirement, see *infra* text accompanying notes 83-94.

20. *See* Lawrence, *supra* note 14, at 450-51 (describing Stanford University's speech code prohibiting "face-to-face insults" as an example of a valid speech regulation that meets First Amendment requirements). My argument is directed primarily toward private institutions that need not comport with the Supreme Court's decision in R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2548 (1992) (striking down as unconstitutional a St. Paul, Minnesota ordinance that contained "selective limitations upon speech").

In Canada, the Ontario Ministry of Education and Training recently directed universities to devise plans to achieve zero tolerance of harassment and discrimination. Wendy Warburton, *Ontario's Campus Crackdown: Is a "Code of Conduct" the Best Way to Curb Offensive Behavior?*, OTTAWA CITIZEN, Feb. 8, 1994, at B3. The Ministry's framework includes broad prohibitions on "speech and conduct that harasses or discriminates against a designated group or creates a negative environment on campus." *Id.* Critics charge that such prohibitions "threaten[ ] free speech and academic independence." *Id.* Such concerns led the faculty and students of a particular university to circulate petitions opposing speech and conduct codes. *Id.* Notably, the scope of the Ministry's framework for prohibiting harassment exceeds similar attempts in the United States that failed to pass muster under the First Amendment. *Id.*

21. *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 149; *see also* Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 117-19 (1992) (discussing courts' treatment of racial and sexual harassment as two distinctive types of discrimination). Chamallas attributes the courts' differential treatment of racial and sexual harassment to the "difference in the traditional understandings of the nature and effects of the two types of discrimination." *Id.* at 117. The failure of certain institutions to address other forms of harassment reinforces such disparate treatment. The 1980 Equal Employment Opportunity Commission (EEOC)

form of unwanted advances,[22] frequently it consists of the same type of repellent group-based attacks as those associated with racial, ethnic, and religious harassment. Moreover, harassing sexual advances generally are the product of a desire for power rather than a desire for sex.[23]

Further, although policies and codes are problematic,[24] the lack of a policy is even more troublesome because it appears to counter harassing incidents with passivity.[25] Silence and inaction in the face of intimidating

guidelines, for example, targeted only sexual harassment. *Id.* In challenging this distinction, critical race theorists in the late 1980s "laid a foundation for thinking about race and sex discrimination in ways that intersected or converged" *Id.* at 119.

22. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 106 (1987) (noting that "[b]etween a quarter and a third of women in the federal workforce report having been sexually harassed, many physically").

23. *Id.* at 107 (describing the power men derive from the hierarchical nature of gender). Nonetheless, many schools treat racial and sexual harassment differently, according greater protection to racist speech and behavior than to sexual harassment. Most sexual harassment policies are based on EEOC guidelines covering workplace harassment. The Supreme Court discussed the guidelines in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), upholding the EEOC's determination that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Id.* at 66.

In part because schools have extended the EEOC workplace protections to the entire academic context, and some private schools have promulgated racial and religious harassment policies in light of the Supreme Court's decision in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), schools often treat analogous conduct distinctly. For example, under Pennsylvania State University's policies, verbal or physical abuse of a sexual nature constitutes sexual harassment if it "has the purpose or effect of interfering unreasonably with the individual's work or academic performance or creates an offensive, hostile, or intimidating working or learning environment." Pennsylvania State University, Policies & Rules: A Guide for Students (1993-94). Thus, such verbal abuse is an offense in itself. The same policies provide, however, that similar abuse of a racial nature is only an aggravating factor of another, independent violation of the policy. *Id.*

The end result is anomalous, because racial and religious harassment are as inimical to the academic mission as sexual harassment. Moreover, overbroad sexual harassment policies threaten academic freedom as much as similar policies concerning other group characteristics. *Cf.* Karen Czapanskiy, *Anti-Harassment: Building Law School Policies*, 4 MD. J. CONTEMP. LEGAL ISSUES 163, 164 (1993) (stating that nearly all of the 70% of law schools responding to a request for copies of their antiharassment policies sent sexual harassment policies only; very few sent materials relating to other group-based harassment, leading the authors to conclude "that few law schools have policies addressing harassment based on multiple identities").

24. *See* Strossen, *supra* note 6, at 530 (arguing that the "chilling effect" of codes may promote even "broader forms of censorship").

25. Abandoning policies does not vitiate the underlying problems. Instead, abandonment cedes victory to those who would deny basic human rights to others. Although critics of speech codes often promote the use of education to remedy discrimination or harassment, such mandatory sensitivity training is often more intrusive than a mere policy or rule. *See* Strossen, *supra* note 6, at 563 (suggesting that universities might implement educational programs "designed to promote intergroup understanding"). Moreover, a code's mere existence expresses a university's commitment to equality and may deter harassment and discrimination as well. *See* Paul Reidinger, *Who's the Boss?*, A.B.A. J., Mar. 1994, at

behavior may imply condonation of misconduct.[26] Theoretically, one can counter harassing speech with more speech, but that is not a realistic avenue of redress for many victims who are figuratively beaten into submission and who withdraw or freeze in panic.[27]

Accordingly, the balance between a code's potential to chill speech and the unwelcome environment enhanced by lack of prohibitions should be struck in favor of limited regulation. While academic freedom requires that individuals be permitted to speak their consciences, it does not shield harassment of and threats against specific individuals,[28] even when the offensive conduct takes subtle forms. Thus, academic freedom is not unbounded and absolute, but rather limited by notions of responsibility to other members of the community.

In this Article, I focus initially on the concept of academic freedom and its relationship to harassment policies. Specifically, I provide a general justification of narrowly drafted policies that primarily restrict harassment directed to individuals. The justification is premised upon a communitarian model of a university that simultaneously protects both academic freedom and relatively powerless individuals.

This Article presents an argument that is both practical and theoretical. Its structure is primarily dialectical. I proceed by exposition of arguments and counterarguments and attempt to achieve a synthesis that is not an ultimate or universal solution, but rather a pragmatic and provisional one.[29] The tension between the two extremes of absolute liberty and ab-

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103, 103 (reviewing KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION (1993)). Reidinger quotes Karst as stating that " '[m]uch of the promise of the law . . . lies in its perceived potential for governing the expression of public values—not just the power of law to regulate expression, but the expressive power of law itself.' " *Id.*

26. *See* Gates, *supra* note 16, at 15 (explaining that, according to code proponents, adoption of codes "expresses" a university's "opposition to hate speech and bigotry").

27. *See infra* text accompanying notes 69-76 (discussing injuries caused by harassment); *see also* Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 385 (1991). Delgado explained:

> Not only does racist speech, by placing all the credibility with the dominant group, strengthen the dominant story, it also works to disempower minority groups by crippling the effectiveness of *their* speech in rebuttal. This situation makes free speech a powerful asset to the dominant group, but a much less helpful one to subordinate groups . . . .

Id. (footnote omitted).

28. For an analogous balancing approach regarding workplace sexual harassment, see Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 43-49 (1990) (suggesting sexist speech can be regulated consistent with the First Amendment, "so long as the speech is made with discriminatory intent . . . or [ ] the offended listener constitutes a captive audience").

29. One commentator explained that the optimal method for analyzing an issue such as this one is as follows:

solute equality creates the impetus for an intermediate resolution of the conflict. The potential feasibility of my proposals is their chief justification.

I flesh out in detail an appropriate method to address targeted harassment, but I do not specify additional policy requirements. I suggest, however, alternative formulations of various issues. My choice not to endorse a particular model policy is intentional, as institutional needs, capacities, and standards of appropriateness differ.

Next, I examine the term "hostile environment," a lightning rod in some of the current debates. Most schools' sexual harassment policies include this term. Originally Equal Employment Opportunity Commission (EEOC) guidelines employed this phrase; subsequently Title VII workplace sexual and racial harassment case law also embraced the term.[30] Hostile environment generally refers to the consequences of racist or sexist acts on the complainant that produce a pervasive sense that the working (or educational) atmosphere is alien and that undermine the

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> [O]ne thing that intellectuals *cannot* do without is the full intellectual process itself. Into it goes historically informed research as well as the presentation of a coherent and carefully argued line that has taken account of alternatives. In addition, there must be, it seems to me, a theoretical presumption that in matters having to do with human history and society any rigid theoretical ideal, any simple additive or mechanical notion of what is or is not factual, must yield to the central factor of human work, the actual participation of peoples in the making of human life. [T]his kind of human work, which is intellectual work, is worldly, . . . it is situated in the world, and about that world. It is not about things that are so rigidly constricted and so forbiddingly arcane as to exclude all but an audience of likeminded, already fully convinced persons.

Edward W. Said, *The Politics of Knowledge*, *in* DEBATING P.C.: THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES 172, 176-77 (Paul Berman ed., 1992) [hereinafter DEBATING P.C.]; *see also* Boyle, *supra* note 2, at 1481 (stating that "[w]ithout roots in practical activity and lived experience, campus politics becomes a ritualistic invocation of formal rules").

30. *See, e.g.*, Bundy v. Jackson, 641 F.2d 934, 944-45 (D.C. Cir. 1981) (applying the hostile environment language of *Rogers* to sexual harassment); Rogers v. EEOC, 454 F.2d 234, 237-38 (5th Cir. 1971) (recognizing a hostile racial environment claim under Title VII for the first time), *cert. denied*, 406 U.S. 957 (1972). For other racial harassment cases, see White v. Federal Express Corp., 939 F.2d 157 (4th Cir. 1991); Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503 (11th Cir. 1989). For other sexual harassment cases, see Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Hicks v. Gates Rubber Co., 928 F.2d 966 (10th Cir. 1991) (focusing on racial as well as sexual harassment); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

The concept of hostile environment is making inroads into Title IX sexual harassment jurisprudence as well. *E.g.*, Lipsett v. University of Puerto Rico, 864 F.2d 881, 896-97 (1st Cir. 1988) (applying Title VII standards to Title IX claims); Moire v. Temple Univ. Sch. of Medicine, 613 F. Supp. 1360, 1366 (E.D. Pa. 1985) (using the "abusive environment" type of sexual harassment standard under Title IX), *aff'd*, 800 F.2d 1136 (3d Cir. 1986).

well-being of the victim.[31] The concept frequently has been imported from sexual harassment policies into overall antiharassment policies, applying broadly not only to sexual harassment, but also to racial, religious, national origin, disability, sexual orientation, and occasionally all other forms of harassment.[32]

The specific issue addressed in this section of the Article is whether the hostile environment concept properly belongs in an antiharassment code or whether it defies precise definition and application. Embedded in this inquiry is an important issue concerning the extent to which nontargeted harassment is actionable. Some of the more problematic and disturbing prosecutions have amplified hostile environment far beyond the constraints created by Title VII case law to encompass allegedly offensive conduct that is ambiguous at best.[33]

Finally, I examine the American Association of University Professors (AAUP) model sexual harassment policy, which relies on the hostile environment concept, and revisions to it recently proposed by the AAUP

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31. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993); *Vinson*, 477 U.S. at 67.

32. For example, Duke University's Harassment Policy Statement defines harassment as "[t]he creation of a hostile or intimidating environment, in which verbal or physical conduct, because of its severity and/or persistence, is likely to interfere significantly with an individual's work or education, or affect adversely an individual's living conditions." The policy applies the hostile environment concept broadly to all forms of harassment; it also specifically defines sexual coercion as a form of harassment. Duke University, Harassment Policy Statement para. II.A (effective Jan. 1, 1994), *reprinted in* DIALOGUE, Dec. 10, 1993, at 7.

At the University of Connecticut, the President's Policy on Harassment provides that "[h]arassment consists of abusive behavior directed toward an individual or group because of race, ethnicity, ancestry, national origin, religion, gender, sexual orientation, age, physical or mental disabilities .... The University ... (b) forbids harassment that has the effect of interfering with an individual's performance or creating an intimidating, hostile, or offensive environment." University of Connecticut, President's Policy on Harassment 1 (Mar. 29, 1994).

Stanford University's Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment is intended to regulate harassment. It states that

> Each student has the right to equal access to a Stanford education, without discrimination on the basis of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin. Harassment of students on the basis of any of these characteristics contributes to a hostile environment that makes access to education for those subjected to it less than equal.

Stanford University, Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment (1990), *reprinted in* Lawrence, *supra* note 14, at 450-51 [hereinafter Stanford University Policy]. The Stanford policy recently was struck down under a California statute that applies constitutional standards to private institutions. *Stanford Anti-Harassment Policy Violates Rights*, *supra* note 11, at A32. The court relied heavily on *R.A.V.* to hold that because the policy protects only certain groups, it is unconstitutionally viewpoint discriminatory. *Id.*

33. *See supra* note 5; *infra* notes 203-06 and accompanying text.

Committee A on Academic Freedom and Tenure. The AAUP has a long history of expert experience with academic freedom issues, and many academic institutions rely on or adopt its model policies and procedures when drafting their own.[34]

II. Scope and Definition of Academic Freedom

A. Sources

The term "academic freedom" has been assigned various interpretations or emphases by writers. Some employ it to justify an autonomous view of the role of faculty within the academy,[35] while others stress the institution's need for independence from outside control.[36] Disagreement often arises concerning the nature of permissible limitations upon this freedom and its distribution among various groups in the academic community.[37]

Notwithstanding the variety of definitions and differences in emphasis, most writers share a fundamental belief that academic freedom requires that faculty possess the freedom to pursue and convey their own ideas of truth,[38] at least within an area of professional expertise and often extending to extramural utterances as well. Correlatively, students must be free to learn a full range of ideas without imposition of others' orthodoxy,

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34. I am a member of the AAUP's Committee W on the Status of Women and serve as a consultant to its Committee A on Academic Freedom and Tenure. Committee A is proposing that the AAUP revise its model sexual harassment policy to better accommodate academic freedom concerns.

35. *See* Matthew W. Finkin, *"A Higher Order of Liberty in the Workplace": Academic Freedom and Tenure in the Vortex of Employment Practices and Law*, Law & Contemp. Probs., Summer 1990, at 357, 366-67, 373-74 (articulating the view that academic freedom allows faculty to research, teach, and publish on many issues without institutional infringement upon their rights of expression); *see also* Parducci v. Rutland, 316 F. Supp. 352, 357 (M.D. Ala. 1970) (holding that teachers, not school boards, are constitutionally empowered under academic freedom to select course material and assignments relating to approved topics).

36. *See* Mark G. Yudof, *Three Faces of Academic Freedom*, 32 Loy. L. Rev. 831, 848, 851-53 (1987).

37. Academic freedom has an "equivocal" meaning. Piarowski v. Illinois Community College, 759 F.2d 625, 629 (7th Cir.) (Posner, J.) (holding that academic freedom arguments apply to both the institution's freedom to pursue its goals without undue government interference and to individuals' freedom to pursue personal goals without undue interference from the academic institution), *cert. denied*, 474 U.S. 1007 (1985); *see* Fisher v. Fairbanks North Star Borough Sch. Dist., 704 P.2d 213, 217 (Alaska 1985) (stating that although a public school board's authority to review classroom materials is broad, it may not design a curriculum that favors a particular religion or political stance).

38. Today, one generally does not seek Truth, but truths, or for the postmodernist, multiple perspectives that give insight into the socially-constructed and contingent nature of knowledge.

and academic institutions must support these efforts without undue outside interference.[39]

The United States Supreme Court has addressed the concept of academic freedom on a number of occasions. The Court, however, has failed to define its exact nature and scope and failed to develop a real constitutional theory of academic freedom.[40] Generally, the concept, as applied to public universities,[41] is rooted in the First Amendment's concern with free inquiry and promotion of heterodox views that critically examine conventional wisdom.[42] As with related areas of First Amendment jurisprudence, truth is said to be discovered in the marketplace of ideas, culled from a cacophony of diverse views.[43] Indeed, the Court has referred interchangeably to academic freedom and the right to political expression.[44]

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39. One Commentator highlighted Judge Posner's conception of academic freedom:

> "[Academic freedom] is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher (or in some versions—indeed in most cases—the student) to pursue his ends without interference from the academy; and these two freedoms are in conflict . . . ."

David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, LAW & CONTEMP. PROBS., Summer 1990, at 227, 282 (alteration in original) (quoting *Piarowski*, 759 F.2d at 629).

40. *See* Yudof, *supra* note 36, at 854-57 (discussing the mixed and confused state of defining academic freedom).

41. Many private institutions voluntarily choose to comply with First Amendment standards. *E.g.*, Olivas, *supra* note 1, at 582 ("Because it is a private college, Stanford is not required to abide by First Amendment jurisprudence, although in . . . matters of free speech, they have chosen to adhere to the higher standard.").

42. *See id.* at 581-82.

43. Justice Douglas explained that

> academic freedom . . . 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."

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (emphasis added) (alteration in original) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)); *see also* Widmar v. Vincent, 454 U.S. 263, 279 n.2 (1981) (" 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation' " (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957))); Healy v. James, 408 U.S. 169, 180 (1972) (noting that freedom of speech must be accorded to the ideas we hate or First Amendment protection will eventually be denied to ideas we cherish); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("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.").

44. *See* Rabban, *supra* note 39, at 244.

The Court indirectly has imposed certain limitations upon academic freedom, because employees of academic institutions are treated almost identically to all other public employees.[45] Although the Court has not limited directly academic freedom through the public employee doctrine, it has constricted the rights of faculty at public institutions. According to case law, speech on matters of public concern is constitutionally protected, while speech on internal institutional matters is entitled to considerably less protection.[46] A university's need to maintain orderly operations and to regulate its own affairs essentially outweighs the employee's speech interest.[47] Furthermore, the Court has stated expressly that academic freedom protects neither intimidating acts and actual threats nor disruptive acts interfering with an educational program.[48]

Another source of academic freedom is the AAUP's 1940 Statement on Academic Freedom and Tenure (1940 Statement).[49] This Statement establishes guidelines for a faculty member's academic freedom, but it applies only to those public and private institutions that have adopted it.[50] The authoritative status of the Statement is not clear. Although it

45. *See* Pickering v. Board of Educ., 391 U.S. 563, 574 (1968) (holding that public employees may exercise their right to speak on issues of community importance without fear of termination unless the statements are intentionally false or reckless).

46. *Id.* at 572-74; *see* Connick v. Myers, 461 U.S. 138, 146-47 (1983) (holding that the Court will intervene to protect speech on matters of public concern but will not challenge personnel decisions reprimanding employees who speak out on matters of personal interest). For a discussion of *Pickering*, see William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, LAW & CONTEMP. PROBS., Summer 1990, at 79, 94 n.44, 102-05 nn.68-75.

47. *See* Rankin v. McPherson, 483 U.S. 378, 388-89 (1987) (recognizing that an individual's First Amendment rights may be outweighed by a strong state interest in maintaining efficient performance or enterprise); *see also* Waters v. Churchill, 114 S. Ct. 1878, 1914 (1994) (making it easier for employers to terminate employees whose speech is disruptive to the work environment).

48. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission . . . .' " (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986))); Healy v. James, 408 U.S. 169, 189 (1972) (stating that the First Amendment does not protect speech disturbing the discipline of the school); Tinker v. Des Moines Independent Community Sch. Dist., 393 U.S. 503, 513 (1969) (holding that speech that disrupts classwork or involves substantial disorder or invasion upon the rights of others will not be protected); Van Alstyne, *supra* note 46, at 123.

49. *1940 Statement of Principles on Academic Freedom and Tenure*, *in* AAUP POLICY DOCUMENTS AND REPORTS 3, 3 (1990) (stating that the Statement aims "to promote public understanding and support of academic freedom and tenure") [hereinafter AAUP POLICY DOCUMENTS].

50. *Id.* at 3-4.

does not necessarily constitute a code of professional conduct, it does recommend an approach to academic freedom issues.[51]

The Statement declares that the search for truth justifies academic freedom and demands liberty to teach and publish one's own ideas.[52] Again, however, academic freedom does not exist without limitations. For example, a teacher "should be careful not to introduce into [his or her] teaching controversial matter which has no relation to [his or her] subject."[53] Additionally, when "speak[ing] or writ[ing] as [a] citizen[ ], . . . [the teacher has] special obligations. . . . [He or she] should at all times be accurate, should exercise appropriate restraint, [and] should show respect for the opinions of others . . . ."[54] Thus, according to the AAUP's standards, a faculty member has freedom to speak, teach, and research when acting with fairness and courtesy.[55]

The AAUP's 1940 Statement is not the only source from which the parameters of academic freedom have been shaped. The predecessor of the 1940 Statement is the AAUP's 1915 General Report of the Committee on Academic Freedom and Tenure, which espouses a view that is similarly limited.[56] The 1987 Statement on Professional Ethics also is

51. *See id.* The preface to the Statement indicates that representatives of the AAUP and the Association of American Colleges agreed upon a restatement of principles set forth in a 1925 Statement following a series of conferences begun in 1934. *Id.* at 3.

52. *Id.* (stating that "[t]he common good depends upon the free search for truth and its free exposition").

53. *Id.*

54. *Id.* at 4.

55. *See id.* at 3-4.

56. *General Report of the Committee of Academic Freedom and Academic Tenure* (1915), *reprinted in* LAW & CONTEMP. PROBS., Summer 1990, at 393, app. A 401. For example, it states

> Since there are no rights without corresponding duties, the considerations heretofore set down with respect to the freedom of the academic teacher entail certain correlative obligations. The claim to freedom of teaching is made in the interest of the integrity and of the progress of scientific inquiry; it, is, therefore, only those who carry on their work in the temper of the scientific inquirer who may justly assert this claim. The liberty of the scholar within the university to set forth his conclusions, be they what they may, is conditioned by their being conclusions gained by a scholar's method and held in a scholar's spirit; that is to say, they must be the fruits of competent and patient and sincere inquiry, and they should be set forth with dignity, courtesy, and temperateness of language. The university teacher, in giving instruction upon controversial matters, while he is under no obligation to hide his own opinion under a mountain of equivocal verbiage, should, if he is fit for his position, be a person of a fair and judicial mind; he should, in dealing with such subjects, set forth justly, without suppression or innuendo, the divergent opinions of other investigators; he should cause his students to become familiar with the best published expressions of the great historic types of doctrine upon the questions at issue; and he should, above all, remember that his business is not to provide his students with ready-made conclusions, but to

pertinent. It forbids "any exploitation, harassment, or discriminatory treatment of students," and requires professors to "protect [students'] academic freedom."[57]

None of these sources of academic freedom justify or create an absolute right to pursue any notion or to express any views without regard for their veracity and their effect on others within the community.[58] To the contrary, these sources require faithfulness to the search for some version of truth based upon available evidence and create a professional standard of care.[59]

B. Dilemma Created by Competing Underlying Values

These sources of the right of academic freedom counsel against official suppression of even highly offensive ideas, but simultaneously uphold academic norms of civility and respect for others.[60] An obvious tension between the two values arises in many situations, such as when a professor expresses racist ideas that threaten the precarious position of persons of color on college campuses,[61] or when a fraternity holds an " 'ugly wo-

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train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently.

Id. at 401.

57. *Statement of Professional Ethics* (1987), *in* AAUP POLICY DOCUMENTS, *supra* note 49, at 75, 76. In 1992, the AAUP's Committee on Academic Freedom and Tenure (Committee A) adopted a statement, On Freedom of Expression and Campus Speech Codes. *On Freedom of Expression and Campus Speech Codes*, ACADEME, July-Aug. 1992, at 30, 30. It concludes that no campus speech should be sanctioned: "No viewpoint or message may be deemed so hateful or disturbing that it may not be expressed." *Id.* My conclusion is somewhat at odds with that of Committee A, as I endorse very limited sanctions imposed on racist or other harassing speech as outlined in this Article.

58. *See supra* notes 41, 52-57 and accompanying text.

59. Letter from Matthew Finkin, Professor of Law, University of Illinois, to the author (June 28, 1994). Professor Finkin explained that "because teaching, research, and publication are professional prerogatives to which the freedom attaches, the academic is held to a professional standard of care. The expressing of a professional view without regard to its veracity would be a breach of academic responsibility." *Id.* at 2.

60. *See supra* notes 53-59 and accompanying text.

61. *E.g.*, Levin v. Harleston, 770 F. Supp. 895, 899-903 (S.D.N.Y. 1991) (setting forth racially controversial publications of plaintiff professor), *aff'd in part and vacated in part*, 966 F.2d 85, 86 (2d Cir. 1992); *cf.* Jeffries v. Harleston, 21 F.3d 1238, 1241 (2d Cir.) (holding that City College violated the professor's First Amendment rights by refusing to reappoint him to his position as chair of the black studies department after a series of racist classroom comments), *rev'd*, 115 S. Ct. 502 (1994); Jeffries v. Harleston, 828 F. Supp. 1066, 1097 (S.D.N.Y. 1993) (stating that a pattern of racist remarks by a professor in class "tends to silence rather than promote the free exchange of ideas, and to destroy rather than enhance academic diversity"), *aff'd in part and vacated in part*, 21 F.3d 1238 (2d Cir.), *rev'd*, 115 S. Ct. 502 (1994). The Supreme Court recently overturned the Second Circuit opinion, remanding the case and instructing the lower court to reconsider its decision. Harleston v. Jeffries, 115 S. Ct. 502, 502 (1994).

man contest' " that includes an insulting blackface depiction of an overweight African-American woman.[62] No easy resolution of the tension exists.[63] To shelter one value is to expose and leave the other value relatively unprotected.

The danger of censorship exacerbates the dilemma. Although history is replete with examples of overzealous, politically-motivated enforcement, First Amendment jurisprudence wisely eschews content-based suppression of speech in most instances.[64] Evidence exists that codes are invoked often against the very groups they were enacted to assist.[65] Given that those in power also hold disproportionate power to utilize codes, this finding is not surprising. Advocates of regulation must confront this paradox and draft a policy that is clear and narrow.[66]

Moreover, academic communities can thrive only in an atmosphere that promotes free speech.[67] Without tight constraints, attempts to regulate expressions of general or political opinion threaten to intrude upon the expression and testing of ideas,[68] the values at the heart of academic freedom. This threat is particularly true with regard to unorthodox theories or radical views, as dominant paradigms cannot be overturned if new ideas are not nurtured. Experience thus counsels caution in regulating speech, lest legitimate academic exploration of controversial issues be swept into a broadly-fashioned net.

Experience also teaches, however, that absolute freedom to debase others, particularly members of historically oppressed groups, undermines their fragile position on campus and thus defeats diversity.[69] Counterspeech often is not an effective remedy for those in a relatively powerless status, since the ability to engage in debate presupposes equal-

62. Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 387-88 (4th Cir. 1993).

63. One possible resolution of this tension is to tolerate expression of general ideas or opinions, but to sanction expressions of racial or other group-based hostility against individuals. *See* Stanford University Policy, *supra* note 32, at 450-51. An alternative and narrower restriction would sanction only " 'fighting' words." *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding that fighting words are not protected speech).

64. *See generally* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (analyzing the history of First Amendment jurisprudence).

65. Strossen, *supra* note 6, at 557-58; William A. Henry III, *The Politics of Separation*, TIME, Dec. 1993, at 73 (stating that over half of all university charges were brought against minorities).

66. *See* Olivas, *supra* note 1, at 583.

67. *1940 Statement of Principles on Academic Freedom and Tenure*, *supra* note 49, at 3.

68. *See* Rabban, *supra* note 39, at 229.

69. *See* Jeffries v. Harleston, 828 F. Supp. 1066, 1097 (S.D.N.Y. 1993), *aff'd in part and vacated in part*, 21 F.3d 1238 (2d Cir.), *rev'd*, 115 S. Ct. 502 (1994).

ity.[70] Meanwhile, the very powerlessness of vulnerable groups often renders them voiceless.[71] Only the most intrepid women and people of color would dare to speak out against harassment in situations in which they are vastly outnumbered and overpowered.[72]

Harassment undermines and threatens victims' ability to learn and function effectively.[73] Individually directed verbal harassment can be as harmful as physical threats.[74] In essence, at least some harassing speech directed toward individuals does not express an idea.[75] Instead, it conveys a visceral threat, a raw assertion and affirmation of power that is a challenge to the victim's very being.[76]

Thus, the conflict between freedom and equality is presented.[77] The underlying question is not which value is more important, but rather,

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70. *See* Balkin, *supra* note 64, at 396.

71. *See* MACKINNON, *supra* note 22, at 113.

72. *See* Lawrence, *supra* note 14, at 453-54.

73. *Id.* at 457-66; Richard Delgado, *Words that Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 136-37 (1982) (indicating that racist insults can produce devastating consequences for victims, including humiliation, isolation, and self-hatred); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2336 (1989) (relating that the physical and emotional effects of racist remarks can range from nightmares and post-traumatic stress disorder to psychosis and suicide).

Empirical studies have determined that sexual harassment severely affects victims both in the workplace and in academic situations. Victims commonly report symptoms of severe stress, loss of motivation and self-confidence, interference with ability to work, adverse effects on their physical health, or changes in their career plans. Peggy Crull, *The Stress Effects of Sexual Harassment on the Job*, *reprinted in* MICHELE A. PALUDI & RICHARD B. BARICKMAN, ACADEMIC AND WORKPLACE SEXUAL HARASSMENT 133 app. 4, at 137-40 (1991) [hereinafter SEXUAL HARASSMENT]; Michele A. Paludi & Richard Barickman, *Sexual Harassment of Students: Victims of the College Experience*, *reprinted in* SEXUAL HARASSMENT, *supra*, at 149 app. 5, at 154 ("The consequences of being harassed to undergraduate and graduate women have been devastating to their physical well-being, emotional health, and vocational development, including depression, insomnia, headaches, helplessness, decreased motivation."). *See generally* JUDITH L. HERMAN, TRAUMA AND RECOVERY (1992) (analyzing the long term effects of harassment on trauma survivors).

74. *See* Crull, *supra* note 73, at 140.

75. *See* Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 797 (1993) ("Courts should uphold very narrow, content-based restrictions on hate speech if the speech in question is not reasonably taken to be part of the exchange of ideas.").

76. Lawrence, *supra* note 14, at 453-55; CATHARINE A. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 47-55 (1979).

77. Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 63 J. HIGHER EDUC. 485, 485-86 (1992). Professor Grey illustrates the conflict:

> Like the pornography issue, the harassment problem illustrates the element of paradox in the conflict of civil-liberties and civil-rights perspectives or mentalities. This problem does not simply trigger familiar disagreements between liberals of a classical or libertarian orientation as against those of a welfare state or social democratic one—though it does sometimes do that. In my experience, the issue

what works to diminish harassment without unduly constraining academic freedom. There is no ultimate philosophical resolution of the tension between these two values. Freedom and equality are not only polar opposites in their application to many situations, but are irreconcilable in a Cartesian system.[78]

Nonetheless, academic institutions must achieve a pragmatic settlement of the conflict between values when harassment occurs.[79] Although no final principles decide the conflict, more limited principles provide guidance.[80] For instance, decision makers should examine carefully the lessons of history, as well as the positions and rights of the members of the community.[81] In addition, decision makers should be sensitive to both the context in which the conflict occurs and the perspectives of the actors, while respecting their differences.[82] I also believe that experience mandates an individually targeted limitation and that some type of reasonableness standard should be employed to determine what constitutes harassment.[83] Beyond that, particular aspects of a policy will vary from institution to institution, depending on the existing circumstances.

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also has the power to appear to a single person in different shapes and suggest different solutions as it oscillates between being framed in civil-liberties and civil-rights terms. At the same time, however, it remains recognizably the same problem.

Id.; *see* Delgado, *supra* note 27, at 345-48 (discussing the conflict between freedom and equality).

78. *See* Susan H. Williams, *Feminist Legal Epistemology*, 8 BERKELEY WOMEN'S L.J. 63, 103 n.174 (1993); *see also* Grey, *supra* note 77, at 486.

79. *See 1940 Statement of Principles on Academic Freedom and Tenure*, *supra* note 49.

80. *See id.*

81. *See infra* text accompanying note 222 (distinguishing rights as defined under AAUP Model Policy from those available under the EEOC standard of harassment).

82. *See* Williams, *supra* note 78, at 103. Speaking of the epistemological theories of Martha Nussbaum and other feminist scholars, which elaborate on these principles, Williams explains: "They seek to define a middle ground denied by Cartesianism. The principles they suggest are not transcendent because they are tied to human experience, subject to constant revision in light of that experience, and susceptible to real cultural variation." *Id.* (footnote omitted).

83. Many formulations of a reasonableness standard are available. The most common is the reasonable person standard endorsed by the Supreme Court in Harris v. Forklift System, Inc., 114 S. Ct. 367, 371 (1993). Many courts and commentators have endorsed a reasonable woman standard, in the case of sexual harassment, or a reasonable victim standard for other forms. *E.g.*, Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1990) (stating that "men and women will learn what conduct offends reasonable members of the opposite sex"); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987) (suggesting a reasonable woman standard for sexual harassment cases). Numerous scholarly articles explore the concept. *E.g.*, Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 152 (1994) (arguing for an individualized standard focusing on the conduct of the harasser and its effect on the actual plaintiff's work environment).

Therefore, sanctions should not be permissible in the example presented at the beginning of this section concerning a professor who expressed racist opinions in class, as long as the opinions did not target individuals.[84] If the obvious targets are not individuals, one should employ a contextual analysis to determine whether the expressions are the functional equivalent of targeted insults. Ostensibly nondirected remarks that really are veiled attacks on individual members of disfavored groups who are present would constitute such expressions.[85]

Beginning with a presumption that nontargeted remarks are not actionable,[86] one factor that may rebut this presumption is whether the stated opinions pertained to the subject addressed in that class and were within the professional expertise of that faculty member.[87] If they were gratuitous and irrelevant to the class material, the decision maker could inquire further whether the intent and effects were essentially those of individually directed harassment.[88]

Alternatively, the decision maker could proceed directly to an analysis of intent and effects, bypassing the professional expertise inquiry. Argua-

84. *See supra* note 61 and accompanying text; *cf.* Smith v. Atkins, 622 So. 2d 795, 797 (La. Ct. App. 1993) (deciding defamation action in favor of a plaintiff law student against a professor who called her a " 'slut' " in class).

85. *See* Delgado, *supra* note 73, at 180 (explaining that a directed statement might be actionable if a reasonable person would consider it an insult in the particular context).

86. Individually targeted harassment thus becomes the paradigm into which any exceptions must fit. *See* Strossen, *supra* note 6, at 493 (stating that hate speech regulation would not apply unless the speech was directly targeted at a specific individual). The subcommittee to the AAUP Committee A on Academic Freedom and Tenure that drafted a proposed revised sexual harassment model policy, and to which I served as a consultant, considered employing such a presumption, but then rejected it. *See infra* text accompanying notes 220-21.

87. Michael A. Olivas, *Reflections on Professional Academic Freedom: Second Thoughts on the Third "Essential Freedom,"* 45 STAN. L. REV. 1835, 1843-46 (1993) (explaining that academic freedom should protect only professionally-related speech).

88. The sexual harassment policy subcommittee to the AAUP Committee A on Academic Freedom and Tenure included an intent and effects standard in its definition of veiled targeted conduct. *See infra* text accompanying notes 220-21; *supra* note 82; *see also* Robin M. Hulshizer, Comment, *Securing Freedom from Harassment Without Reducing Freedom of Speech:* Doe v. University of Michigan, 76 IOWA L. REV. 383, 387 n.30 (1991) (stating that severity of sanctions is dependent upon the intent of the accused and the effect of the conduct).

It reportedly has been common for anatomy professors to use nude magazine centerfolds of women to study female anatomy. Although such a use of the pictures is both gratuitous and highly offensive, it is not clear that it would meet the standard suggested here, as it does not necessarily indicate a target. By contrast, a colleague of mine related to me that a former professor of his in college would lead the mostly male class in a chorus of boos when a woman student entered the room, because he felt that it inhibited his freedom to make off-color remarks. That is the sort of targeted harassment that my suggested policy primarily covers.

bly, that issue is subsumed within an analysis of intent.[89] For example, one could infer an intent to harass if the statements had nothing to do with the subject matter of the class, but did concern the presence of women in the class.[90] Less justification exists if the statements were gratuitous.[91] The presence of such factors could convert an oblique, apparently nondirected remark into a directed attack.[92] This is more likely to occur

89. *See* William A. Kaplin, *"Hate Speech" on the College Campus: Freedom of Speech and Equality at the Crossroads*, 27 LAND & WATER L. REV. 243, 256 n.23 (1992) (explaining that to establish harassment, it must be shown that the speaker intended to harass the victim).

90. *See* Doe v. University of Mich., 721 F. Supp. 852, 858 (E.D. Mich. 1989) (stating, as an example of sanctionable conduct, that a man who makes remarks in class such as " '[w]omen just aren't as good in this field as men' " creates a hostile learning atmosphere for females in the class).

91. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 85 (1991) (commenting that the use of gratuitous and voyeuristic language is highly inappropriate).

92. *See* Alison G. Myhra, *The Hate Speech Conundrum and the Public Schools*, 68 N.D. L. REV. 71, 82 (1992) (suggesting that a speaker's racial or sexual comments also impact nontargeted individuals). Robert O'Neil constructed for the AAUP Committee A subcommittee revising sexual harassment policy a set of hypotheticals that conceivably could fall within the category of prohibited, nondirected expression by a faculty member:

> A. A male faculty member tells sexist jokes (relevant to the course subject matter) to a class that is overwhelmingly male.
>
> B. A male faculty member makes sexually offensive or demeaning remarks outside class to a group of students (or colleagues or staff) that includes some women.
>
> C. A male faculty member teaching a course on modern military history intersperses nude female pinups in his slides of war machinery and battle scenes to great guffaws of laughter from male students, and much offense to female students.
>
> D. The same male professor of modern military history illustrates a lecture on "Front Line Morale During World War II" with replicas of actual pinup posters and calendars of scantily clad female models preserved among servicemen's memorabilia, remarking to the class that "items like these kept our troops going after D Day."
>
> E. A male professor of creative writing occasionally uses in class sexually suggestive and offensive, but subject-relevant, analogies such as "focus in writing is a lot like the sex act" and (gesturing with his hands on this one) "a lively story can arouse you just like the gyrations of a belly dancer."
>
> F. A male professor of criminal law illustrates the prosecutor's dilemma by noting a very high incidence of sexual assault complainants who, after filing charges, declined to proceed and thus embarrassed the prosecutor.
>
> G. A male faculty member in a professional school publicly attacks a proposed affirmative action plan for the recruitment of women by arguing that "the admission of women on a preferential basis will lower the quality of education we offer and will debase the value of the degree we confer."
>
> H. The same male professor, after calling in class upon a female student who was unprepared, turns away from the class and makes the same statement, to no one in particular, but in an audible "stage whisper."

in a class containing a small number of students of color, women students, or other members of disfavored groups.[93]

For instance, assume that a female law student is unprepared for a torts class and is unable to answer the male professor's question. He then turns from her to the class and remarks, in an elaborate stage whisper, that the law school's affirmative action plan to recruit women is clearly misguided. This ostensibly nondirected remark actually demeans this particular woman student and, as such, should be actionable.[94] The remark is unrelated to torts and circumstances indicate a likely intent to harass, as well as a likely deleterious effect on the student.

The standard also could be met in a large class, containing few women, in a male-dominated field such as engineering. For example, the professor may repeatedly state that women are irrational and generally unfit for the profession and may refuse to recognize or call upon the women students.[95] If he does acknowledge and engage in dialogue with the male students, the refusal to acknowledge the women creates a nexus between those individual women and the disparaging remarks. The circumstances indicate a demeaning intent, and the women would feel vulnerable and highly offended.[96]

Robert O'Neil, Memorandum to the AAUP Committee A subcommittee revising the model sexual harassment policy (on file with the author). Although a detailed contextual analysis is necessary, I would respond that my proposed policy would not cover hypothetical A in most circumstances; B may be covered if circumstances indicate the likelihood of an individual target. Hypothetical C involves gratuitous use of pornography, having a negative effect on the women students, and therefore a further inquiry into the professor's intent is required. Most likely academic freedom protects D. Hypotheticals E (apparently based on the Silva case), F, and G are acceptable and not actionable. Hypothetical H, however, is prohibited, as it is essentially a targeted remark.

93. Libel law contains precedent for this interpretation. Allegedly defamatory remarks may be "of and concerning the plaintiff" even if they pertained to a small group of persons, of which the individual plaintiff was a member. Bornmann v. Star Co., 66 N.E. 723, 725 (N.Y. 1903) (Haight, J., dissenting); *see also* Fawcett Publications, Inc. v. Morris, 377 P.2d 42, 52 (Okla. 1962) (holding that an article libeled every member of a football team, including the plaintiff, even though he was not specifically named), *cert. denied*, 376 U.S. 513 (1964); Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 690 (1988) (stating that group libel affects individuals because it shows a lack of respect for the individuality of the group members).

94. By contrast, if the remark did not follow a dialogue with this particular individual, it should be protected. *See* O'Neil, *supra* note 92, at 1-2. This example was originally created by Matt Finkin.

95. *See* Doe v. University of Mich., 721 F. Supp. 852, 858 (E.D. Mich. 1989) (holding University Policy on Discrimination and Discriminatory Harassment of Students in the University Environment unconstitutional because the policy swept in protected First Amendment speech issues to its forbidden activities).

96. *See* Mark Cammack & Susan Davies, *Should Hate Speech Be Prohibited in Law Schools?*, 20 SW. U. L. REV. 145, 164 (1991) (concluding that differential treatment of male

In the absence of such a nexus between the individual female students and the remarks, a decision maker would have more difficulty finding an intent to harass these women. It is unlikely, however, that any professor inclined to utter such sexist remarks would confine his sexist behavior to making general statements in class. His behavior is likely to extend to his treatment of individual women in the class as well.

The example posed at the beginning of this section concerning the fraternity party is more problematic, because the " 'ugly woman contest' " was not an exchange of ideas occurring in a professional environment.[97] The African-American women on campus would be extremely offended and harmed,[98] assuming they were aware of it. Nonetheless, because it involved expressive activity[99] and no captive audience was present,[100] the university probably should not prohibit the contest as long as it did not target specific individuals.[101]

If there were only a handful of overweight black women on campus, however, they easily could feel singled out and perhaps could argue that the depiction was directed at each of them individually.[102] Again, one could inquire further whether both the intent and effects of the depiction were focused enough to suggest the ugly woman contest constituted a veiled personal attack. Because the requisite intent most likely could not be shown, however, the university could not discipline the actors.

The risks attending the drafting of a highly subjective, and thus overbroad, policy justify leaving most such incidents unredressed.[103] For the

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and female students in the classroom creates a hostile learning environment that causes women to stay silent in class).

97. Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 387 (4th Cir. 1993) (commenting that the " 'ugly woman contest' " was part of the " 'Derby Days' " event, which was planned both as entertainment and as a source of funds for charitable donations).

98. *Id.* at 388 (describing one character in the skit as offensively depicting a black woman and emulating African-American slang in a satirical manner).

99. *See* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 769 (1988) (stating that courts must look "to whether the activity in question is commonly associated with expression").

100. *Iota Xi Chapter*, 993 F.2d at 389 (noting that the Fraternity staged the contest in the cafeteria of the Student Union); *see infra* text accompanying notes 153-54 (discussing the captive audience problem).

101. *See* Jack M. Battaglia, *Regulation of Hate Speech by Educational Institutions: A Proposed Policy*, 31 SANTA CLARA L. REV. 345, 376 (1991) (stating that speech that takes place in a dormitory or classroom, where there is a captive audience, can be differentiated from speech that occurs at scheduled rallies and public addresses); *cf.* White, *supra* note 1, at A48 (arguing that a policy can ban hate speech in dormitories that it cannot ban in classrooms under existing time, place, and manner analysis).

102. *See supra* note 60.

103. *See supra* note 93 and accompanying text.

purposes of this Article, "subjective" is defined as lacking a common, widely ascertainable standard. Our culture has no accepted or agreed-upon criteria to judge what types of nondirected, impersonal attacks are impermissible. Indeed, a brief conversation with friends and colleagues will demonstrate the wide, sometimes astonishing, variety of opinions on the subject, even within academia.

The inherent ambiguity of subjects such as sexuality or the social meaning of race presents a paradigmatic problem for the drafter of a speech policy. No authoritative exposition of the nature of human sexuality, for instance, can ever capture its full meaning; its significance and relation to other aspects of personhood will vary with the individual and her circumstances. Perhaps only literature can represent faithfully human struggles with sexual issues. To clamp down on the struggle for understanding in this arena by delineating a zone of acceptable expression inevitably will chill honest exploration of the issue and the search for insight. Attempts to impose a particular sensibility in this area will fail as surely as forced conversions.[104]

Humorous remarks, which depend highly on context and mood ("You had to have been there"), pose a similar problem. An innocuous remark in one setting can be tasteless and offensive in another. Irony presents even more complex issues, because the listener must apprehend the statement's double meaning to appreciate its humor. Taken literally or seriously, ironic statements can convey a bias completely opposite of the intended meaning.[105]

Nonetheless, threats against or intimidation of individuals may be prohibited.[106] General consideration of an issue should not be affected by

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104. *See* Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 MINN. L. REV. 933, 944 (1991).

105. *Cf.* Dambrot v. Central Mich. Univ., 839 F. Supp. 477, 479 (E.D. Mich. 1993) (upholding discipline against a white basketball coach for directing a racial epithet toward his African-American players, despite his claim that he meant it in a "positive and reinforcing" manner).

106. Stanford University has a policy that draws this particular distinction. *See supra* note 32; *see also* John T. Shapiro, Note, *The Call for Campus Conduct Policies: Censorship or Constitutionally Permissible Limitations on Speech*, 75 MINN. L. REV. 201, 230-31 (1990) (suggesting a similar policy).

Prior to R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), courts struck down public university policies that were considerably broader, on grounds of both vagueness and overbreadth. *See, e.g.*, U.W.M. Post v. Board of Regents, 774 F. Supp. 1163, 1180 (E.D. Wis. 1991) (finding that a university's rule prohibiting the direction of discriminatory epithets at individuals with the intent to demean and to create a hostile educational environment was overly broad and unduly vague in part because it did not meet the requirements of the fighting words doctrine); Doe v. University of Mich., 721 F. Supp. 852, 864-67 (E.D. Mich. 1989) (finding that a policy prohibiting individuals from "stigmatizing or victimizing" individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed,

prohibitions on individualized harassment of a specific person that can include oblique attacks and elliptical references. The line between acceptable and unacceptable behavior is ascertainable, and the search for understanding cannot justify personal attacks or threatening sexual advances.

Although it is possible that frivolous charges may be brought under the suggested standard, defining harassment as individually targeted behavior or its strictly defined equivalent should eliminate most nonmeritorious charges. Furthermore, an objective requirement that harassment can exist only when a reasonable person in the victim's circumstances would perceive it as such would provide additional protection.[107]

In addition, neither our collective cultural experience nor First Amendment case law completely forbids content-based restrictions in limited arenas.[108] Obscenity, fighting words, and child pornography do not enjoy constitutional protection;[109] nor does speech likely to incite or produce imminent lawless action.[110] The First Amendment also does not shelter

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national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status and containing no fighting words limitation was overly broad and vague, encompassing a significant amount of protected conduct within its scope).

107. Frivolous charges also have been brought under Title VII and section 1983, but Congress evidently has decided that the benefit of these claims outweighs the cost of the frivolous cases brought.

108. Although the United States Constitution allows only a few content-based restrictions, Canadian law has followed a different course. Canada's Criminal Code, section 319(2) prohibits an individual from "communicating statements, other than in private conversation, [which] wilfully promote[s] hatred against any identifiable group." Criminal Code, R.S.C. ch. C-46, sec. 319(2) (1985) (Can.). The law was challenged as a contravention of section 2(b) of the Canadian Charter of Rights, which guarantees "freedom of thought, belief, opinion and expression, including freedom of the press," CAN. CONST. pt. I, § 2(b), and appeals courts came down on both sides of the issue.

The Supreme Court of Canada, in Regina v. Andrews, 77 D.L.R.4th 128 (Can. 1990), noted that section 319(2) undermined freedom of expression by including expressions of sincerely held, albeit erroneous, opinions within its ambit. *Id.* at 139. Unlike the United States Constitution, section 1 of the Canadian Charter expressly subjects all granted rights and freedoms "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." CAN. CONST. pt.1, § 1. The court declared that the aim of section 319(2) constituted a pressing and substantial objective under section 1. *Andrews*, 77 D.L.R.4th at 136-37. It found that the means chosen were proportional to the valid objective because use of the word "hatred" prevented an unduly wide limitation on freedom of expression. *Id.* at 137. Furthermore, use of the word " 'wilfully' " added a stringent *mens rea* requirement. *Id.* at 138. In contrast, a United States court would almost surely consider legislation banning the promotion of hatred vague and overbroad. *See R.A.V.*, 112 S. Ct. at 2547.

109. New York v. Ferber, 458 U.S. 747, 757-58 (1982) (child pornography); Miller v. California, 413 U.S. 15, 36-37 (1973) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (fighting words).

110. Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969).

fraud and perjury,[111] or treason implemented by speech acts.[112] Likewise, defamatory utterances are actionable,[113] and content-based regulations aimed at the secondary effects of the speech are permissible.[114] Verbal expressions of crime victim selection based on race can provide evidence to enhance a criminal sentence.[115] Finally and most importantly, the First Amendment does not shelter "sexually derogatory 'fighting words' " in the workplace.[116]

In other words, both the Supreme Court and our culture tend to rank speech as having either high or low value, with political speech at the apex[117] and speech implementing or effectuating unlawful acts at the nadir.[118] Narrow and precise regulation of speech does not inevitably tumble down the slippery slope into the abyss of censorship.[119] Rather, careful regulation can coexist and even further free speech for both insider and outsider voices.

The support of an institution as a whole, expressed in a rationally-enforced policy, can assure that outsiders and minorities flourish in an often

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111. Balkin, *supra* note 64, at 396.

112. *R.A.V.*, 112 S. Ct. at 2546.

113. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

114. Burson v. Freeman, 112 S. Ct. 1846, 1856 (1992) (upholding prohibition of electioneering within 100 feet of a polling place); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (upholding a zoning ordinance that prohibited adult theaters within 1000 feet of any residential zone, church, park, or school).

115. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201-02 (1993).

116. *R.A.V.*, 112 S. Ct. at 2546.

117. Speech on public issues represents " 'the highest rung of the hierarchy of First Amendment values.' " NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)); *see also* Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 135 (1992) ("Not all speech is created equal. The constitutional law of free expression is rife with categories of speech, each receiving a different quantum of constitutional protection from suppression. . . ."). Some members of the Court, however, oppose ranking speech, finding the process inherently subjective. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 87 (1976) (Stewart, J., dissenting) ("The fact that the 'offensive' speech here may not address 'important' topics . . . does not mean that it is less worthy of constitutional protection."); *see also* Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 730 (1980) (observing that Supreme Court cases allowing regulations based on content "seem puzzling and unintelligible only because one is distracted from the real issues by the alluring mirage of content neutrality"); T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 550 (1979) (noting that "it is difficult to construct a principled argument for restriction [of offensive expression] that is consistent with our policy towards other forms of expression").

118. Cass R. Sunstein, *Free Speech Now*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 255, 301-04 (Geoffrey R. Stone et al. eds., 1992).

119. *Id.* at 309. If falling down the slippery slope were inevitable, any regulation would lead to censorship and thus none would be imposed. Sunstein points out, however, that limitations on speech do not invariably produce censorship. *Id.*

hostile environment. That support may require sanctioning certain personal insults based on characteristics such as race or gender.[120] Effective institutional support would curb not only particular acts of harassment, but also would help create a climate that encourages diversity. That climate may help attract a critical mass of women and people of color on campus and thereby have the further salutary effect of reducing the incidence of harassment.[121]

Once again, I distinguish intimidating personal insults and the unusual case of ostensibly nondirected but provable operatively equivalent statements from general expressions of opinion concerning a group. The latter cannot be prohibited because they more directly implicate the academic freedom of the speaker. That is not to say that nondirected expressions of racist or sexist opinion cannot cause severe harm. Because racism and sexism address core characteristics of social identity, these opinions easily can invade and shake one's conscious sense of being and belonging. The threat is heightened, however, when the insult is directed at an individual, either subtly or overtly, and thus becomes a personal attack.[122]

Concededly, drawing the line between specific and general remarks means that some harmful, extremely offensive speech will be unpunished by a university. The regulation of general expression, however, is so in-

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120. One also may add a requirement that the insults rise to the level of fighting words, to pass First Amendment scrutiny. The Supreme Court, however, appears to have narrowed the definition of fighting words to only those words that tend to provoke an immediate breach of the peace. Gooding v. Wilson, 405 U.S. 518, 527 (1972). The problem with such a limitation is that it is inapplicable to the behavior of many harassment victims, who typically respond by withdrawing or freezing in panic, rather than lashing out. *See* MACKINNON, *supra* note 22, at 113; Jean A. Hamilton, *Emotional Consequences of Victimization and Discrimination in "Special Populations" of Women*, 12 PSYCHIATRIC CLINIC N. AM. 35, 36-37 (1989) (indicating that a woman may be overwhelmed by an abusive experience and respond by dissociating herself from the intolerable effects); Lawrence, *supra* note 14, at 453-55; Matsuda, *supra* note 73, at 2336, 2370-71.

Moreover, *R.A.V.* struck down an ordinance whose reach was limited to "fighting words" because it was content-based, applying only to race, gender, and religion. *R.A.V.*, 112 S. Ct. at 2547. Sanctioning all harassment, rather than selective group-based harassment, avoids the problems of viewpoint discrimination raised in *R.A.V.*

121. *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1502-03 (M.D. Fla. 1991) (testimony of Dr. Susan Fiske, professor of psychology at the University of Massachusetts and plaintiff's expert witness). Dr. Fiske testified that until members of a particular group, such as women, constitute 15 or 20% of a workforce, they are viewed as rarities or solos and subjected to harsher scrutiny than members of the majority group. *Id.* at 1503.

122. *See* Lawrence, *supra* note 14, at 452-57. Some take issue with this formulation, contending that broad-based attacks are more dangerous and difficult to counter. When discriminatory comments are addressed dispassionately toward an entire group, the strength of the speaker's conviction of those prejudiced beliefs is arguably greater than when the derogatory remarks result from a heated dispute between two individuals.

herently subjective that it is essentially impossible to create a standard that also will not chill legitimate exploration of ideas. In these cases, the risks and dangers of unrestrained prosecutions outweigh even the grievous harm that words can cause.[123]

III. Balancing Individual Rights with a Communitarian Conception

Despite the need for limited social intervention to safeguard each community member's physical and psychological well-being, Americans historically have preferred a libertarian, marketplace of ideas approach to resolving differences, in part because it resonates with our individualistic cultural values. The academic counterpart to a verbal duel seems more effective, and less dangerous, than university-imposed limitations on the right to untrammeled free expression.[124] Moreover, to many Americans, the harms occasioned by verbal attacks on members of groups based on immutable characteristics pale in comparison to the looming specter of censorship.[125] This is particularly true in academia, where limitations on expression could stifle the learning process.[126] Bias against restraint of expression, however, distorts appreciation of the countervailing harm that exclusion causes victims.[127] Thus, sanctioning a narrow range of speech that effectuates or accompanies personal intimidation based on

123. Policies should be further tailored to emphasize conduct instead of speech. White, *supra* note 1, at A48. When the speech component of behavior is ancillary to action the threat to speech is minimized.

124. Indeed, it is not just American, but post-Enlightenment modernism in general, that exalts the individual over the collectivity, and presumes that each "individual is supremely responsible for causing the unequal situation he or she occupies," which effectively legitimizes inequality within the social structure. R.C. Lewontin, *Women Versus the Biologists*, N.Y. Rev. Books, Apr. 7, 1994, at 31.

125. *See* Rorie Sherman, *Crime's Toll on the U.S.: Fear, Despair and Guns*, Nat'l L.J., Apr. 18, 1994, at A1, A19-A20 (discussing Americans' intense commitment to civil liberties even in the face of violent crime). For instance, in a recent poll taken by *The National Law Journal*, only 12% of Americans surveyed supported legislation that would restrict television violence: "The public says free expression is to be jealously guarded despite its overwhelming belief that television, pornography, rap music and video games tend to encourage crime and violence." *Id.* at A19. Thus, although most Americans believe that some media of communication and avenues of expression feed criminal impulses, they nonetheless overwhelmingly hesitate to advocate limitations on free speech. *Id.*

126. *See* Rabban, *supra* note 39, at 239-40 (discussing the Supreme Court's decision in Keyishian v. Board of Regents, 385 U.S. 589 (1967), in which the Court reiterated that academia functions as a marketplace of ideas to encourage active verbal exchanges).

127. *See* Jeffries v. Harleston, 828 F. Supp. 1066, 1097 (S.D.N.Y. 1993) (discussing the harm to the active exchange of ideas that racist remarks cause when the remarks go unchecked in the classroom), *aff'd in part and vacated in part*, 21 F.3d 1238 (2d Cir.), *rev'd*, 115 S. Ct. 502 (1994).

group membership need not be perceived as a threat to academic freedom. In fact, such restrictions might enhance it.

In resolving the conflict between academic freedom and speech codes, the application of a communitarian model to the university setting may provide a principled framework to curb the excesses of American individualism without imposing a regime of censorship.[128] This communitarian model seeks to achieve a practical balance of interests,[129] one that abhors censorship but recognizes and justifies the need for limited regulation of expression. Accordingly, an academic community must determine when it is appropriate to rely upon either individualism or multiculturalism[130] and resolve competing values through an examination of a dispute's context.[131] In this way, academic conflicts can be addressed within a structure that provides a means to effectuate both the need to encourage the marketplace of ideas and the need to safeguard individual dignity.

Under this view, the academic community as a whole, not just the faculty as individuals, or as a group opposed to students or the institution,

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128. *See generally* MARY ANN GLENDON, RIGHTS TALK (1991) (exploring a reformulation of the current social discourse that overemphasizes individual civil rights into a discourse that emphasizes communitarian responsibility). One commentator explained:

> When community begins to erode, communitarian movements sometimes arise to offer solutions. Recognizing the fragility of society, communitarians are centrally concerned with the "social glue" that binds people together. Communitarians understand that personal fulfillment and social order depend on the secure attachments and moral frameworks which only communities can offer. In periods of great social dislocation, a communitarian politics may be the only viable alternative to such dangerous phenomena as nativism and fascism which spring up proffering the illusion of relief from economic or spiritual pain. Communitarianism, in contrast, is a politics of meaning, which speaks to our need for belonging and purpose. At its best, it produces new values and institutions that can bring us together with greater civility and humanity.

Charles Derber, *Coming Glued: Communitarianism to the Rescue*, TIKKUN, July-Aug. 1993, at 27, 27 (1993). With this focus, the individual would conceptualize himself or herself within the larger society, thereby minimizing the harmful consequences of individualism. *Id.*

129. Michael Walzer, *Multiculturalism and Individualism*, DISSENT, Spring 1994, at 185, 191 (balancing the larger cultural values associated with multiculturalism and the more self-oriented values associated with individualism to retain the benefits of each).

130. *Id.* (contending that this shifting balance, a form of social democracy, provides the necessary structure for the resolution of conflict through a flexible understanding of when to focus on either the individual or the group).

131. *See* Martha Minow & Elizabeth V. Spelman, *In Context*, *in* PRAGMATISM IN LAW AND SOCIETY 247, 266-68 (Michael Brint & William Weaver eds., 1991) (defending a contextual approach to understanding and resolving problems that, on their face, seem to present a straightforward application of law and policy, yet in reality involve unique configurations of factors that must be evaluated within their full context).

retains academic freedom.[132] The community is an aggregation of individuals, each of whom has rights and interests that exist in relation to those of other community members.[133] It comprises individuals of both genders, as well as members of various racial, ethnic, and religious groups. Although interests can diverge, the individuals in the community share the common goal of promoting education.[134] To achieve this goal, each member must exercise the maximum amount of academic freedom necessary to stimulate the learning process without impinging upon the freedoms of another.[135] Thus, justice is attainable when an institution recognizes and balances the rights, interests, and needs of all of the members who comprise its academic community.

Individuals need the protection of the community's academic freedom to flourish in the marketplace of ideas. Conversely, the community relies on the academic freedom that its members exercise to effectuate the freedom that the entire community possesses.[136] We are social beings, but that does not require losing individual identity in that of the collective.[137]

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132. The American tradition of academic freedom does not include a well-developed theory of students' academic freedom. Nevertheless, everyone in the academic community shares in and partakes of academic freedom. *See* Rabban, *supra* note 39, at 236-37.

133. *See generally* Cary v. Board of Educ., 427 F. Supp. 945 (D. Colo. 1977) (holding that a high school teacher's academic freedom is subject to restraints necessary to recognize the interests of the other members of the community), *aff'd*, 589 F.2d 535 (10th Cir. 1979).

134. *See id.* at 949 (discussing the education of students as they prepare for citizenship as another goal of safeguarding academic freedom).

135. Positing academic freedom as belonging to the entire academic community does not require a notion that group rights trump individual rights, although it can be conceptualized in that fashion. The community's academic freedom is largely the sum total of that of each individual member. The community also could retain academic freedom not as a right, but as a means to further the educational mission of the university. That is achieved in part by "juggling prerogatives of student and teacher [, which] might enhance open exchange of views." Letter from Thomas Haskell, Professor of History, Rice University, to the author 7 (June 9, 1994) (on file with the author).

136. *Cf.* Universal Declaration of Human Rights, December 10, 1948, *in* HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 1, 6 art. 29, U.N. Doc. A/810, U.N. Sales No. E.88.XIV.1 (1988) ("Everyone has duties to the community in which alone the free and full development of his personality is possible.").

137. *See* Thomas C. Kohler, *Individualism and Communitarianism at Work*, 1993 B.Y.U. L. REV. 727, 728. Kohler elucidates one reason for the difficulty Americans have in engaging in the individualist-communitarian debate:

> [W]e have only the language of individualism in which to pursue our questions and carry on our discussion. The paucity of meanings that this language carries with it leaves us with an enormous conceptual blind-spot: we can only comprehend individuals. We almost cannot conceive of groups or communities. This fact pushes us to posit a tremendously restricted set of possibilities. We are left to regard groups as representing affiliations among discrete, monadic and otherwise unassociated individuals, or to reify the group as the single, sole individual. Either way, we end up by denying something crucial about ourselves. We implic-

Even an individual's sense of autonomy is conditioned by and arises out of existence of the community.[138] Likewise, interdependence is a *sine qua non* of education, as learning cannot occur in isolation. If the asserted academic freedom (or license) of a professor undermines that of a student,[139] the diminution of the entire community's academic freedom may be the net result.[140] Therefore, as the United States Court of Appeals for the Fifth Circuit observed in *Martin v. Parrish*, "[t]he 'rights' of the speaker are . . . always tempered by a consideration of the rights of the audience and the public purpose served, or disserved, by his [or her] speech."[141]

By providing a standard to differentiate the acceptable from the unacceptable, this model inescapably takes a moral stance. The enforcement and establishment of this moral position in practice impose restraints that prohibit conduct the community views as egregious and unacceptable.[142] Because verbal and nonverbal behavior that threatens and intimidates others can be extremely harmful to the educational process in general and to diversity in particular, prohibitions on such behavior are accepta-

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itly reject our character as social beings, or we submerge our particular and distinct individuality in the mass.

Id.

138. *See id.* at 730 (acknowledging that the community functions to ensure that the individual attains a healthy existence, resulting in the ability to express oneself within a democratic context); *see also* Laurie Zoloth-Dorfman, *First, Make Meaning: An Ethics of Encounter for Health Care Reform*, TIKKUN, July-Aug. 1993, at 23-24. One commentator explains the role of the community:

> Rather than living in a world described and defined by the necessity of autonomous choice, freely made, most people actually live in the relational, obligatory, and interconnected world, a world far messier and heavily freighted, far more passionately loving and passionately hating than that described in philosophic texts. Prior even to the conceptualization of the "self," of the autonomous being with rights and bodily integrity, there is a self-in-relation, a self-in-connection, a child born from the body of a woman into the waiting hands of another. Community is prior to autonomy. We know that is true from the most common details of an ordinary life and it is from these details that the language of justice must be created.

Id. at 24.

139. *See* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (stating that "[t]he classroom is peculiarly the 'marketplace of ideas' . . . . depend[ing] upon . . . wide exposure to that robust exchange of ideas").

140. Or the freedom of a professor or student may be undermined by the conduct of another student.

141. Martin v. Parrish, 805 F.2d 583, 584 (5th Cir. 1986).

142. Elizabeth Fox-Genovese, *The State of Contemporary Politics and Culture*, TIKKUN, Mar.-Apr. 1994, at 50, 51 (stating that "the essence of morality is to establish and enforce boundaries between the permissible and the impermissible").

ble under the model.[143] Both individuals and the community must accept some restraints to create a tolerant academic environment that supports nonmajority perspectives or unconventional approaches.[144]

The model developed in this Article distinguishes the academic community from the community-at-large, where individuals in some cases possess broader speech rights.[145] The mission of the academy is to seek knowledge in common in a rigorous and disciplined atmosphere, where members are in close intellectual and physical proximity to other members. Participation in this community requires that some rights be surrendered and some responsibilities assumed in exchange.[146] Although the "common mission" is difficult to define in a multicultural society, at the very least it must include a commitment to respect the personhood of others, especially those traditionally excluded.[147] The intellectual and cultural diversity of those views enhances the education of every member of the academic community.[148] Forsaking absolute autonomy and prohibiting threatening treatment of those diverse individuals, moreover, does not create taboos on discussion of certain topics.[149] Rather, it fosters thoughtful discussions and discourages mere *ad hominem* debate.[150]

In addition, the model builds upon the idea that the physically close proximity of members of the academic community justifies restrictions on

143. Fox-Genovese further observes that the establishment of moral standards inevitably implicates the relationship between individuals and the collectivity. *Id.* Moral standards can be established only by the group, and an individual's conduct is moral to the extent that it adheres to those standards. *Id.* Thus, individuals cannot be "moral" in isolation. *Id.*

144. This model presupposes that intellectual and cultural diversity are goods that rank as high priorities of an educational institution. *Cf.* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312-13 (1978) (noting that "the quality of higher education . . . is widely believed to be promoted by a diverse student body").

145. For instance, when people are not in close proximity to each other, time, place, and manner constraints become less compelling. *See supra* text accompanying notes 146-48.

146. *See supra* note 144 and accompanying text (regarding the need to sacrifice some individual rights in exchange for participation in and improvements to the academic community). Moreover, this model may apply only to private academic institutions, where the problems of meeting the standards of First Amendment case law and of conferring excessive regulatory power on the government do not exist.

147. *Cf.* Mary Ann Glendon, *Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations*, 1993 B.Y.U. L. REV. 385, 415. Glendon explains that: "Effective protection for individual rights requires citizens who are willing to respect the rights of others even at some cost to themselves. . . . The pluralistic nature of most societies requires, in addition, citizens who are able to respect and appreciate the cultural, ethnic, and religious heritage of others." *Id.*

148. As Judge Learned Hand observed, "[R]ight conclusions are more likely to be gathered out of a multitude of tongues." United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

149. *See supra* notes 138-41 and accompanying text.

150. *See supra* note 144.

time, place, and manner that are not applicable in other venues.[151] In many ways, students are a captive audience, unable to leave an oppressive situation.[152] Undeniably, many types of speech restrictions would be unduly invasive in an open urban environment. There, it is generally possible to avoid more than passing, superficial contact with individuals whose views and behavior stifle one's own.[153] In the academic or other community setting, however, consideration of others mandates partial sublimation of an individual's own expressive behavior.[154]

IV. ENFORCEMENT

Still remaining is the question whether rational, even-handed enforcement of limitations on academic speech is possible. Regulations that are perfectly calibrated on paper may deteriorate rapidly into a blunt instrument when applied.[155] Indeed, the most vexing problem speech restrictions pose is that the bureaucracy may lack the ability to recognize the necessary fine distinctions among different types of behavior that are essential to the delicate balancing of interests. This Article does not propose to answer the question fully.[156] A narrowly tailored and clearly stated policy, as well as the conferral of enforcement power only on indi-

151. The Supreme Court has endorsed broad time, place, and manner restrictions on even protected expressive activity. Thus, for example, nude dancing can be banned despite any potential expressive value. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 563 (1991).

152. *See* Fong v. Purdue Univ., 692 F. Supp. 930, 951 (N.D. Ind. 1988), *aff'd*, 976 F.2d 735 (7th Cir. 1992). When speech is directed towards an audience that could not easily avoid exposure to the speech, the Supreme Court has permitted restrictions on that form of expression. *E.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (plurality opinion) (holding that the FCC may prohibit offensive language in certain contexts); Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (upholding restrictions of political advertising on city-owned buses to reduce "the risk of imposing upon the captive audience").

153. *See, e.g.*, Cohen v. California, 403 U.S. 15, 21 (1971) (noting that people who find the expression on an individual's jacket offensive could protect themselves "simply by averting their eyes").

154. *See supra* note 151.

155. The Canadian experience with censoring pornography is instructive here. In 1992, the Canadian Supreme Court, in Regina v. Butler, 89 D.L.R.4th 449 (1992), upheld section 163(8) of the Criminal Code. *Id.* at 450-51. Section 163(8) defines as obscene "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence." Criminal Code, R.S.C. ch. C-46 § 163(8) (1985) (Can.). Catharine MacKinnon and some feminist groups heralded the decision as beneficial to women. *MacKinnon/Dworkin "Theories" Flunk Reality Test*, CENSORSHIP NEWS (National Coalition Against Censorship) Issue 4, No. 50 (1993), at 1. The first publications censored after the *Butler* decision, however, were gay and lesbian publications. Ruth Rosen, *Not Pornography!*, DISSENT, Summer 1994, at 343, 343. Since then, "[u]ninformed and confused customs officials have also seized books written by Oscar Wilde, Audrey Lorde, Marguerite Duras, and Jean Genet." *Id.* at 343-44.

156. *See supra* notes 136-50 and accompanying text.

viduals sensitive to the importance of academic freedom, however, could reduce heavy-handed enforcement.[157]

While enforcement issues typically arise as due process questions, policies that are neither vague nor draconian can surmount this initial hurdle. These policies provide notice and fair warning regarding the scope of prohibited conduct and contain sanctions proportionate to the underlying behavior.[158] Additional problems arise when procedures are fundamentally unfair. In one recent case, for example, unproved charges of harassment were published, along with an implication of guilt, to the entire university community.[159] The alleged harasser did not receive advance notice of all of the charges against him; an affirmative action officer of the university interviewed a witness without his knowledge; and other procedural irregularities occurred.[160] More satisfactory procedures would alleviate many of the problems universities experience with enforcement without decimating policies.

To analyze these situations, I would suggest correlating adequacy of procedures, sensitivity of personnel, and breadth of a policy. The better the procedures and personnel, the more discretion a policy can allocate. The inverse also would be true: the less precise the procedures and the less sensitive the personnel, the more narrow and tightly constrained the

157. That is why I believe that sanctions on speech may be more workable in academic settings. In general, enforcement personnel tend to be more highly educated and attuned to the need for free expression than government administrators, although a regrettable number of exceptions exist. If personnel at a particular institution are not sensitive to academic freedom concerns, they should receive more training in that tradition.

158. *Debate Over Faculty-Student Relations Intensifies*, ACADEME, July-Aug. 1994, at 6, 6-7 [hereinafter *Debate*]. For instance, sanctions seem disproportionate in a recent case at the University of Maine at Fort Kent. *Id.* The University of Maine dismissed history professor Richard Dinsmore for sexual harassment for inviting a student to lunch three times, assisting her in putting on her coat, sending her a note, touching her in class, and asking her to take another course from him. *Id.* at 6. Dinsmore has filed a civil rights and defamation suit against the school. *Id.* An arbitrator recently ordered Dinsmore reinstated, *id.*, and the university is presently contesting the finding in court. *Questionable Conduct*, A.B.A. J., Nov. 1994, at 71. Unless the contents of the note were obscene or threatening, the conduct does not appear sufficiently severe or pervasive to warrant dismissal. *See Debate*, *supra*, at 6-7. More minor sanctions, however, might be appropriate.

159. Starishevsky v. Hofstra Univ., 612 N.Y.S.2d 794, 797 (N.Y. Sup. Ct. 1994). In this case, a disciplinary committee at Hofstra University found a professor who had kissed a student and two employees not guilty of the sexual harassment charges filed against him. *Id.* at 799-800. The university, however, fired the professor anyway, citing unethical, inappropriate, and unprofessional conduct (not a basis for discipline under the sexual harassment guidelines). *Id.* The New York Supreme Court ordered the university to reinstate Starishevsky, holding the dismissal arbitrary, capricious, in bad faith, and violative of his right to a fair hearing. *Id.* at 802.

160. *Id.* at 798-800.

policy should be, perhaps prohibiting no more than the most egregious directed harassment.

V. When Academic Freedom Meets the Hostile Environment, Does Anyone Emerge the Winner?

As mentioned previously, the potential for undermining academic freedom is great when a university policy prohibits creation of a hostile environment based on race, sex, or other characteristics, particularly when harassment need not be directed to an individual or is defined loosely.[161] Nonetheless, within narrow parameters, hostile environment claims can be important and powerful tools for fighting campus harassment without chilling speech deserving of protection. By discouraging intimidating expressions, they can serve to maximize the mutual exchange of ideas in the academic community at the same time.

Conceptualizing harassment as environmental is powerfully descriptive and fitting because its consequences include not just hostility between a harasser and a victim, but an incapacitating, overall sense of vulnerability and alienation in the victim.[162] Self-esteem and confidence plummet, and victims often report symptoms of depression that affect their ability to function not only with the harasser, but within the university in general.[163] The consequences of harassing incidents reverberate within the walls of the university, amplifying their effect in the mind of the victim and creating the proscribed hostile or intimidating environment.[164]

The environment notion also is apt because the context within which harassment takes place is critical to its analysis. If harassment of an individual victim occurs and responsible institutional personnel fail to address this conduct, what began as a problem between two people can mushroom into an intimidating educational atmosphere.[165] If harassment of others is allowed, the effect is much more debilitating. Moreover, whether a victim feels the academic community supports or ignores her plight greatly will affect her ability to overcome the situation.[166] Indeed,

161. *See supra* note 126.

162. *See supra* text accompanying notes 22-23 (recognizing that the term hostile environment has been imported into antiharassment policies).

163. *See supra* text accompanying note 50.

164. *See* Grey, *supra* note 77, at 491.

165. *See* Matsuda, *supra* note 73, at 2371. While granting an alleged harasser adequate due process does not signal support, ignoring harassing conduct or refusing to treat it seriously sends a signal that the institution condones harassment. *Id.*

166. *See id.* at 2370-71. Tolerance by the university "is harmful to targets, who perceive the university as taking sides through inaction, and who are left to their own resources in coping with the damage wrought." *Id.* at 2371.

if the community seems not only indifferent to the victim's plight, but also supportive of the harasser, the victim's condition is likely to worsen.[167]

The communitarian model is useful here. Because individuals function within a community and require some degree of support and cooperation to flourish, inertia and lack of response are not neutral or benign.[168] Instead, they signal that harassment is acceptable in that milieu, thereby rendering victims' suffering more pervasive and invisible.[169] By contrast, if the university prohibits a hostile environment, it recognizes the various forms of harassment and the resulting harm. Consequently, the university demonstrates its commitment to equality, thus dignifying the victim.[170] Effective enforcement then reinforces the commitment.

The hostile environment standard proposed cannot operate merely as fog, a shrouded and lurking presence threatening to devour the unwary (or to devour academic freedom).[171] The targeted speech requirement (or its functional equivalent) constrains it.[172] Interpretation of the hostile environment standard, however, should be further constrained in accordance with courts' construction of Title VII. These limitations place the

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167. *See id.* at 2370-71 & n.250.

168. *See supra* text accompanying notes 163-67.

169. *See generally* RALPH ELLISON, INVISIBLE MAN (1952). Ellison died recently, not having written another novel since *Invisible Man* was published.

170. Title VII cases employ this principle when they ascribe great weight to whether an employer responded promptly and effectively to a plaintiff's complaint of harassment. *See, e.g.*, Nash v. Electrospace Sys., 9 F.3d 401, 404 (5th Cir. 1993) (upholding summary judgment for defendant where employer acted swiftly to remedy the harassment); Anderson v. Kelley, No. 92-6663, 1993 U.S. App. LEXIS 32963, at *21-22 (6th Cir. Dec. 15, 1993) (holding that the plaintiff failed to prove a claim of hostile environment where employer relocated the plaintiff immediately after she reported harassment); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989) (finding that an employer was liable for harassment where management took no action to remedy the situation). *But see, e.g.*, Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir.) (holding Columbia University liable for harassment regardless of absence of notice or reasonableness of the school's complaint procedures), *cert. denied*, 114 S. Ct. 2693 (1994).

171. *Cf.* Rychlak, *supra* note 12, at 1428 (arguing that regulations at some universities adversely affect the academic community by " 'fostering a decline in tolerance and a rise in intellectual intimidation' ").

172. Another alternative limitation applying to faculty conduct determines whether the behavior allegedly creating a hostile environment is clearly unprofessional, as that term traditionally has been defined with respect to other types of unacceptable faculty conduct. *Academic Freedom and Sexual Harassment*, ACADEME, Sept.-Oct. 1994, at 64, 68-69 cmt. (comment by Barbara F. Reskin). The AAUP Committee W on the Status of Women in the Academic Profession recently proposed a similar standard. *Id.* at 69. To ensure that the term " 'unprofessional' " is defined appropriately, the accused faculty person is entitled to a peer review of the charges. *Id.* at 69 n.1. Others also have endorsed use of a professionalism standard. *E.g.*, Mary W. Gray, It's Power, Stupid! 16 (1994) (unpublished manuscript, on file with the author). I am not yet persuaded, however, that this standard is sufficiently ascertainable to provide an appropriate basis for sanctioning harassing speech.

hostile environment concept within an existing interpretive tradition. While the targeted speech limitation has its origin in constitutional and defamation law,[173] judicial interpretation of the hostile environment term holds promise for application to the academic arena.[174]

For some time, case law decided under Title VII has recognized the applicability of the hostile environment standard to both racial and sexual harassment.[175] As Title VII sexual harassment law developed, the EEOC and the Supreme Court acknowledged the existence of two distinct categories: *quid pro quo* harassment and hostile environment harassment.[176] The former consists of cases in which a job benefit is conditioned upon sexual acquiescence.[177]

By contrast, the hostile environment category includes all other types of claims, operating almost as a catchall.[178] Some analytical confusion has arisen in defining a hostile environment because the courts and the EEOC have used the term so broadly, to include even one-on-one harassment.[179] That use of the term is somewhat counterintuitive, because the "environment" in such cases is that perceived by the victim.[180] Nonethe-

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173. *See* Olivas, *supra* note 87, at 1839-43 (providing examples of cases brought on First Amendment grounds).

174. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65, 67 (1986). A hostile environment has been consistently interpreted by the Supreme Court to mean an environment that is permeated with "discriminatory intimidations, ridicule, and insult" that is " 'sufficiently severe or pervasive . . . [to] create an abusive working environment.' " *Id.* (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982); *see also* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993) (defining hostile environment similarly).

175. *See supra* note 30.

176. *Meritor*, 477 U.S. at 65-67; Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1993); *see* Marlisa Vinciguerra, Note, *The Aftermath of* Meritor*: A Search for Standards in the Law of Sexual Harassment*, 98 YALE L.J. 1717, 1718 (1989) (distinguishing *quid pro quo* harassment, which can be likened to sexual blackmail, from hostile environment sexual harassment, which primarily arises in the workplace environment and negatively affects the psychological well-being of the victim).

177. Vinciguerra, *supra* note 176, at 1718. Courts have construed this category narrowly, upholding claims only where the *quid pro quo* nature of the situation is explicit. *Id.* at 1717.

178. *Id.*; *see Meritor*, 477 U.S. at 67 (condemning all sexual harassment that creates a hostile work environment); Katz v. Dole, 709 F.2d 251, 254-55 (4th Cir. 1983) (stating that employer condonation of co-workers' unwelcome behavior created a hostile work environment); Henson v. City of Dundee, 682 F.2d 897, 901 (11th Cir. 1982) (stating that employers who create or condone a hostile environment violate Title VII); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (holding that the EEOC may investigate factual allegations that could reasonably encompass unfair employment practices when a plaintiff alleges that segregation of Hispanic parties created a hostile environment), *cert. denied*, 406 U.S. 957 (1972).

179. *See* Vinciguerra, *supra* note 176, at 1718-19.

180. *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993); Equal Employment Opportunity Comm., Policy Guidance on Current Issues of Sexual Harassment, 8 Fair Empl. Prac. Man. (BNA) 405:6681 (Mar. 19, 1990) [hereinafter Policy Guidance on Sexual

less, when a supervisor (or professor) harasses a subordinate (or student), she reasonably may perceive her entire work (or school) environment as tainted.

According to the case law, hostile environment sexual harassment occurs when unwelcome sexual conduct unreasonably interferes with an individual's job performance or creates a hostile, intimidating, or offensive work environment.[181] The conduct must be sufficient to alter the conditions of employment[182] and create an abusive working environment, though a plaintiff need not prove psychological injury.[183] A reviewing court will consider the frequency and severity of the discriminatory conduct, whether it was physically threatening or humiliating, and whether the conduct unreasonably interfered with the employee's work performance.[184] The alleged harasser is judged from the standpoint of a reasonable person.[185] Generally, more than a single incident is required to constitute a hostile environment; a pattern of offensive conduct is necessary.[186] These standards illustrate the limitations that both the Supreme Court and the EEOC have built into hostile environment claims.[187]

Harassment]. The EEOC states that the harasser's conduct should be evaluated from the objective standard of the reasonable person, taking into consideration the victim's perspective rather than stereotypical notions of acceptable behavior. *Id.*

181. *Meritor*, 477 U.S. at 67.

182. *Id.*

183. *Harris*, 114 S. Ct. at 370-71. The Supreme Court explained that "[a] discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Id.*

184. *Id.* at 371. In *Harris*, a female manager of Forklift Systems, Inc. sued Forklift under Title VII, claiming the company's president created a hostile working environment. *Id.* at 369. Among other things, he called Harris " 'a dumb ass woman,' " and said on several occasions, " 'You're a woman, what do you know?' " *Id.* On another occasion, the president suggested to Harris that they " 'go to the Holiday Inn to negotiate [her] raise.' " *Id.* The Supreme Court declared that such conduct could support a hostile environment claim under Title VII. *Id.* at 371.

185. *Id.* at 370.

186. *Id.* at 371. The EEOC guidelines read in relevant part: "In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(b) (1993); *see also* Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62-63 (2d Cir. 1992) (holding that incidents of harassment must be repeated and continuous; isolated acts will not merit relief); Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990) (suggesting that the factfinder examine each alleged incident of harassment " 'in the context of several other related incidents.' " (quoting Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989))).

187. *See supra* note 176.

While they do not guarantee frivolous claims will not be brought, they ensure that nonmeritorious claims rarely will prevail.[188]

Several Supreme Court and court of appeals decisions have clarified the standards.[189] Most courts have exercised great restraint in their interpretations of hostile environment doctrine, requiring particularly severe harassment to find a hostile environment existed.[190] For instance, in *Saxton v. American Telephone & Telegraph Co.*,[191] the United States Court of Appeals for the Seventh Circuit held that a hostile environment did not exist[192] when, on one occasion, a male supervisor rubbed his hand along the female plaintiff's upper thigh and kissed her for several seconds.[193] She admonished him, but several weeks later he drove her to a secluded area, attempted to grab her, and later attempted to put his hand on her leg again.[194] Thereafter, the supervisor behaved particularly coldly towards the plaintiff, allegedly rendering her work environment hostile.[195] The Seventh Circuit declared this course of conduct nothing more than unpleasant or offensive.[196] Courts have applied many of the

188. *See* Policy Guidance on Sexual Harassment, *supra* note 180, at 405:6681. The EEOC expressly states that Title VII hostile environment claims are not to be used " 'as a vehicle for vindicating the petty slights suffered by the hypersensitive.' " *Id.* (quoting Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784 (E.D. Wis. 1984)).

189. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-67 (1986). The Supreme Court explained that

> not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."

Id. (alteration in original) (citations omitted) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)); *see also* Saxton v. American Tel. & Tel. Co., 10 F.3d 527, 537 (7th Cir. 1993) (holding that a woman who was treated coldly by her supervisor after she refused his advances was not working in a hostile environment).

190. *See Harris*, 114 S. Ct. at 370; *Meritor*, 477 U.S. at 67; *Saxton*, 10 F.3d at 533; Daniels v. Essex Group, Inc., 937 F.2d 1264, 1270-71 (7th Cir. 1991); King v. Board of Regents, 898 F.2d 533, 537 (7th Cir. 1990).

191. 10 F.3d at 526.

192. *Id.* at 537 (holding that even though the defendant's behavior was inappropriate and unprofessional it was not so "serious or pervasive that it created a hostile work environment within the meaning of Title VII").

193. *Id.* at 528.

194. *Id.*

195. *Id.* at 529.

196. *Id.* at 534. The *Saxton* court relied on Dockter v. Rudolf Wolff Futures, Inc., 913 F.2d 456, 461 (7th Cir. 1990), which noted that multiple incidents of sexual misconduct during plaintiff's first two weeks of work did not support a hostile environment claim where they ceased after plaintiff reprimanded the aggressor. *Saxton*, 10 F.3d at 534. The Saxton court also examined King v. Board of Regents, 898 F.2d 533, 534-35 (7th Cir. 1990), which noted that repeated verbal assaults and physical harassment that continued despite

same standards to Title IX cases, even though these cases generally do not concern workplace situations.[197]

Nearly all of the reported hostile environment cases address individually directed harassment, rather than general, diffuse harassment that is purely environmental.[198] In these cases, the plaintiffs alleged that the defendants' direct harassment created or contributed to a hostile environment.[199] While indirect or general environmental harassment may have increased the plaintiff's sense of degradation and indignity, it was not the main component of each of the claims.[200]

An exception to this line of cases is *Robinson v. Jacksonville Shipyards, Inc.*,[201] currently on appeal in the Eleventh Circuit. Not only did the United States District Court for the Middle District of Florida grant the individual plaintiff relief,[202] it also enjoined the display of "sexually suggestive, sexually demeaning, or pornographic" materials anywhere in the workplace.[203] The scope of the injunction was thus much broader than the scope of the directed harassment of the plaintiff. This case has received much attention and occasioned much controversy.[204] Neverthe-

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plaintiff's [reprimands] were sufficient to support a hostile environment claim. *Saxton*, 10 F.3d at 534.

197. *E.g.*, Lipsett v. University of Puerto Rico, 864 F.2d 881, 897-98 (1st Cir. 1988) (discussing EEOC guidelines under Title IX, which rely on the well-developed case law and legislative history of Title VII); Moire v. Temple Univ. Sch. of Medicine, 613 F. Supp. 1360, 1366-70 (E.D. Pa. 1985) (recognizing a claim for sexual harassment based on a hostile educational environment), *aff'd*, 800 F.2d 1136 (3d Cir. 1986); *see* Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2155-58 (1993) (advocating the application of Title VII hostile environment standard to Title IX sexual harassment cases).

198. *E.g.*, Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990) (finding that plaintiffs were personally harassed, and that "the posting of pornographic pictures in common areas and in the plaintiffs' personal work spaces" may serve as evidence of a hostile environment); *see also* Brown v. Eastern Miss. Elec. Power Ass'n, 989 F.2d 858, 861 (5th Cir. 1993) (admitting evidence of supervisor's nontargeted use of racial epithet, in addition to harassment directed at plaintiff, as direct evidence of motivation); Yudovich v. Stone, 839 F. Supp. 382, 389 (E.D. Va. 1993) (admitting evidence of supervisor's anti-Semitism in finding a discriminatory work environment, even though some remarks were nondirected).

199. *Brown*, 989 F.2d at 861; *Andrews*, 895 F.2d at 1485; *Yudovich*, 839 F. Supp. at 389.

200. *Brown*, 989 F.2d at 863; *Andrews*, 895 F.2d at 1484-85; *Yudovich*, 839 F. Supp. at 389.

201. 760 F. Supp. 1486 (M.D. Fla. 1991).

202. *Id.* at 1541.

203. *Id.* at 1542 (requiring the defendant to adopt a sexual harassment policy with a provision enjoining the display of such materials).

204. *E.g.*, Chamallas, *supra* note 21, at 109-17; Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?*, 28 WAKE FOREST L. REV. 619, 622-25 (1993); Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1122-23 (1993); Sunstein, *supra* note 75, at 838. The American Civil Liberties Union, as *amicus curiae*, argued that the prohibition of display of pornography is

less, although the district court issued its decision in March of 1991,[205] the Eleventh Circuit has yet to rule.

Very few cases have followed the lead of *Jacksonville Shipyards* in regulating nondirected pornography or other nondirected expression in the workplace.[206] The reported cases on the whole therefore indicate that unless a plaintiff is subjected individually to harassing conduct, it is unlikely that a court will hold that a hostile environment existed.[207]

If academic disciplinary committees or administrators applied the standards courts have developed in this area, it is doubtful that many exaggerated prosecutions would occur. Some recent problems, however, have developed because universities have released the concept from its original moorings. For example, at least one university found that classroom discussion of a concept related to sex may suffice to create a hostile environment.[208] Consequently, a pattern of objectionable behavior towards an individual is no longer required.

One way to reduce this occurrence is to institute a pattern of behavior requirement, inversely correlating frequency and severity, so that more frequent harassment need not be as severe as less frequent.[209] Additionally, a policy should specify that harassment must be directed to an indi-

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unconstitutionally overbroad and violative of the First Amendment. Brief for *Amicus Curiae*, ACLU Foundation of Florida, Inc. and ACLU, Inc. at 19-23 (Mar. 26, 1992) (No. 91-3655).

205. *Jacksonville Shipyards*, 760 F. Supp. at 1486.

206. *See, e.g.*, Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 882-83 (D. Minn. 1994) (holding that nontargeted conduct, such as sexual graffiti and pornographic photos, created a sexualized work environment detrimental to women). The *Jensen* court granted an injunction requiring elimination of the sexualized work environment and ordered the employer to develop a program educating employees on permissible and impermissible conduct. *Id.* at 888-89; *see also* Stair v. Lehigh Valley Carpenter's Union, 62 Empl. Prac. Dec. (CCH) ¶ 42,602, at 77,258 (E.D. Pa. 1993) (finding pornographic calendars posted in work shanties or trailers on job sites created hostile environment for female plaintiff absent any directed harassment).

207. *See supra* note 197.

208. For example, the Chicago Theological Seminary recently placed Professor Grayson Snyder on probation for discussing in class an anecdote from the Talmud. Dirk Johnson, *A Sexual Harassment Case to Test Academic Freedom*, N.Y. TIMES, May 11, 1994, at D23; Edward Walsh, *Sexual Ethics in the Seminary*, WASH. POST, May 13, 1994, at D1. The anecdote concerns a man who falls off a roof onto a woman, accidentally having sexual intercourse with her. Johnson, *supra*, at D23. Although Snyder intended to use the story to illustrate the varying ethical approaches of Judaism and Christianity, the subject of the class discussion, a task force found that the professor created a hostile environment when he employed this example and offended a student. Walsh, *supra*, at D1.

209. *See Jacksonville Shipyards*, 760 F. Supp. at 1524.

vidual.[210] Then, one discussing or referring to sexuality in general would not be chilled from expressing his or her beliefs.[211]

Conversely, hostile environment claims should not be abolished entirely in a misguided effort to avoid overbroad and misdirected charges. Such action would eliminate many viable claims that ought to be redressed.[212] Although the hostile environment notion forms the background rather than the foreground of these claims, it remains useful for their determination.

For example, imagine a male professor who repeatedly makes both direct and indirect sexual advances toward numerous female students. His behavior is primarily verbal.[213] These advances are unwanted. The professor frequents student hangouts and approaches students there, as well as at school.[214] The net, overall effect of his conduct is to sexualize the educational atmosphere both inside and outside his classroom. The university administration appears completely indifferent to this faculty member's conduct because it continues for an entire academic year unabated and apparently unnoticed.

Absent the context of the sexualized academic environment, a student to whom this man made advances or whom he propositioned once probably would not have a hostile environment claim because the conduct is not sufficiently serious in itself. But, in this particular context, the advances become ominous and far more intimidating than they otherwise might have been. A student in this position should be able to seek sanctions against the professor because the oppressive environment would be a significant factor in her personal harm.[215] She could employ the ad-

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210. *See* Johnson, *supra* note 208, at D23.

211. *Id.*

212. Imposing a targeted harassment limitation does not eviscerate the hostile environment notion, as the multitude of Title VII (and increasingly, Title IX) hostile environment cases involving targeted harassment attest.

213. If his behavior is primarily physical, including unwanted touching and standing too close, a sexual harassment complaint would not implicate academic freedom to the same extent. Therefore, it would not be as problematic, even though expressive activity can include physical behaviors.

214. I assume here that extramural behavior in some instances is actionable, such as when the complainant is a member of the community and the behavior affects her situation at school. In this hypothetical, the professor deliberately and repeatedly chooses to be present where female students congregate. He then makes unwanted sexual advances. This choice can evidence an intent to harass, and the behavior should be subject to a sexual harassment policy.

215. Leaving her with the option of filing a Title IX claim would not always solve the problem because of the time and expense involved in litigation. Indeed, the claim would be rendered moot with respect to injunctive relief when the student graduated. *See* Alexander v. Yale Univ., 631 F.2d 178, 184 (2d Cir. 1980) (holding in part that graduation

vances made toward other students as evidence in a hearing to prove the charge of sexual harassment of her.[216]

In contrast, a student to whom the professor made no direct advances would have no standing to bring a complaint, even though she was affected by the sexualized atmosphere at the school.[217] No evidence would exist, even circumstantially, of an intent to harass that would render the situation the operative equivalent of a directed incident. Even if the professor used sexual innuendo in the classroom, his behavior would not be actionable unless she could demonstrate the conduct was tantamount to targeted harassment.

Thus, while the distinction between acceptable and unacceptable behavior may seem arbitrary at the margins, it is justified. The practical problems implicated in drafting a policy forbidding most nondirected harassment are insurmountable. Any such policy necessarily will sweep into its ambit an unacceptable amount of expression that needs protection, not condemnation.

VI. AAUP Suggested Revised Policy

In a 1990 report (Report), the AAUP adopted a model policy for regulating sexual harassment complaints (1990 Model Policy).[218] Contrasting the 1990 Model Policy with recently proposed revisions provides a concrete example of the standards I have proposed. The Report, *Sexual Harassment: Suggested Policies and Procedures for Handling Complaints*, is a revision of a report adopted in 1984. The 1990 Model Policy adapts the EEOC guidelines in large part and reads as follows:

> It is the policy of this institution that no member of the academic community may sexually harass another. Sexual ad-

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mooted former students' sexual harassment claims because they would not suffer from the alleged injury nor benefit from the requested relief).

216. This evidence would involve individually directed harassment, even though the professor did not address all of the harassment to this particular student. To prevent the admission of evidence that is insufficient to sustain a charge of harassment, evidence of nondirected harassment, at times, should be excluded from the hearing. Although the evidence arguably could be relevant to motive or to both the victim's and perpetrator's states of mind, it should be excluded when the prejudice it creates outweighs its probative value. *Cf.* New Jersey v. Mortimer, 641 A.2d 257, 267 (N.J. 1994) (in criminal harassment cases, courts should carefully scrutinize and weigh the prejudicial harm versus probative value of evidence of "a defendant's bigoted thoughts, expressions, and associations"); Fed. R. Evid. 403.

217. *Cf. Alexander*, 631 F.2d at 184 (denying standing to plaintiffs whose sexual harassment claims were too speculative to justify judicial action).

218. *Sexual Harassment: Suggested Policy and Procedures for Handling Complaints*, AAUP Policy Documents, *supra* note 49, at 113.

> vances, requests for sexual favors, and other conduct of a sexual nature constitute sexual harassment when:
> 1. Any such proposals are made under circumstances implying that one's response might affect such academic or personnel decisions as are subject to the influence of the person making such proposals; or
> 2. Such conduct is repeated or is so offensive that it substantially contributes to an unprofessional academic or work environment or interferes with required tasks, career opportunities, or learning; or
> 3. Such conduct is abusive of others and creates or implies a discriminatory hostility toward their personal or professional interests because of their sex.[219]

Paragraph one concerns *quid pro quo* harassment. Paragraph two incorporates the hostile environment concept, denominating it "an unprofessional academic or work environment." Its explicit requirement that the conduct be repeated or that it "substantially" affect the environment constricts the EEOC standard. Paragraph three is not patterned after the EEOC guidelines, but its threshold requirement is "abusive" conduct.

The Report also outlines complaint-resolving procedures that attempt to protect the due process and privacy rights of parties to the dispute.[220] For instance, the procedures urge confidentiality to the extent possible. Additionally, the procedures suggest that if informal measures are insufficient to resolve complaints, complainants "should have access to the grievance procedures at the institution."[221] The faculty review committee, a peer group, which has authority to dismiss nonmeritorious complaints, handles complaints against faculty members.[222] If followed, these procedures greatly would improve the adjudication of complaints at numerous universities.

In 1992, the AAUP's Committee A on Academic Freedom and Tenure (Committee A) issued a report that was critical of campus speech codes.[223] Committee A soon realized that this position was at odds with the broad sexual harassment policy and subsequently reexamined the issue of sexual harassment regulation. The Committee has issued a report (Committee A Report)[224] that proposes a revised sexual harassment policy (Revised Policy). Arguing that ordinary workplace norms do not and

219. *Id.* at 114 pt. II.
220. *Id.*
221. *Id.* at 115 pt. II.
222. *Id.*
223. *See supra* note 57.
224. *Academic Freedom and Sexual Harassment*, ACADEME, Sept.-Oct. 1994, at 64.

cannot adequately protect academic freedom and the discourse that sustains it,[225] Committee A endorses the following Revised Policy:

> It is the policy of this institution that no member of the academic community may sexually harass another. Sexual advances, requests for sexual favors, and other conduct of a sexual nature constitute sexual harassment when:
>
> 1. Such proposals are made under circumstances implying that one's response might affect academic or personnel decisions that are subject to the influence of the person making the proposal; or
> 2. Such speech or conduct is directed against another, and is either abusive or severely humiliating, or persists despite the objection of the person targeted by the speech or conduct.
>
> In some cases the speaker's or actor's intention, taken with the effects of the speech or action, may make clear that there was a target of harassment, though the person or persons were not explicitly identified. In such cases the foregoing policy applies.[226]

In comparison to the AAUP's 1990 Model Policy,[227] the newly Revised Policy retains paragraph one regarding *quid pro quo* harassment, substantially revises paragraph two, and deletes paragraph three of the 1990 Model Policy concerning "discriminatory hostility." Paragraph three of the 1990 Model Policy created a rather vague standard that is difficult to constrain with reference to precedent, and it conceivably covered nontargeted conduct such as classroom discussion of sexuality. Therefore, I have no objection to its deletion. The revisions to paragraph two are the most controversial aspect of the proposed policy because they eliminate the hostile environment concept and add a targeting requirement.

The sentences following paragraph two explain that an obvious target is not always necessary. Essentially paralleling the functional equivalency exception for nontargeted conduct that was discussed previously, Committee A is alluding to incidents such as the example concerning a woman student who is unprepared for class.[228] Indicating dissatisfaction, the male professor turns to the class and comments that the school's affirmative action program for women was a mistake. Circumstances indicate that the woman student is actually the target of the professor's disparaging statement. My proposed formulation and that of Committee A on

225. *See id.* at 64-67.
226. *Id.* at 67 pt. V.
227. *See supra* text accompanying note 219 (setting for the AAUP's 1990 Model Policy).
228. *See supra* note 94 and accompanying text.

this particular issue do not differ in any important respects. I attempt to flesh out in a bit more detail, however, a test to determine when an ostensibly, nondirected attack actually targets an individual.[229]

I mainly disagree with the Revised Policy's excision of the hostile environment concept. For all the reasons set forth in the immediately preceding section,[230] I believe it is a mistake to abandon the notion.[231] It is possible to require targeting while importing the courts' construction of the term into the academic disciplinary context. Such a limitation can provide adequate notice of what conduct is forbidden without trampling on academic freedom. Removal of the hostile environment notion creates a perception of sexual harassment as strictly an individualized, one-on-one phenomenon, deleting consideration of its pervasive aspects. It also removes the rhetorical and symbolic power of the environment notion, rendering a more limited picture of the nature and scope of sexual harassment.

VII. CONCLUSION

In this Article, I have addressed the conflict between academic freedom and prohibition of harassment from a communitarian perspective. The structure and progression of the Article mirror my own process of sifting and sorting through the very difficult and often emotional issues involved. Although my proposed synthesis of the conflict provides no ultimate answers and only provisional guidance to those confronting and grappling with this dilemma, I do not believe that practical justice can attain much more than that in most contexts. Any satisfactory resolution at a particular institution ultimately and inevitably depends on the presence of policy makers, administrators, decision makers, and faculty persons of good will, toleration, and a sincere desire to empathize[232] with the struggles of others in the search for a better approach.

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229. *See supra* notes 84-94 and accompanying text.

230. *See supra* part V.

231. As a consultant to Committee A on this issue, I argued that the concept should be retained, but members of the subcommittee drafting the report and policy, as well as members of the larger committee, were disturbed by some of the recent cases giving the term almost unlimited application and voted to eliminate the hostile environment notion. *See supra* notes 4, 129.

232. *See supra* text accompanying notes 78-83 (discussing related factors that decision makers should consider); *see also* Anne C. Dailey, *Feminism's Return to Liberalism*, 102 YALE L.J. 1265, 1278-79 (1993) (reviewing FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (1991) and endorsing an "empathetic liberalism"); Cynthia V. Ward, *A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature*, 61 U. CHI. L. REV. 929 (1994) (responding to Dailey).